Neutral Citation Number: [2022] EWHC 162 (Comm)

CL 2021 000118

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMMERCIAL COURT (QBD)

Royal Courts of Justice, Rolls Building

Fetter Lane, London, EC4A, 1NL

Date of Judgment: 28 January 2022

BEFORE:

MR. ADRIAN BELTRAMI QC

Sitting as a Judge of the High Court

BETWEEN:

ALBION RESOURCES LIMITED

Claimant

and

(1) HERITAGE OIL LIMITED
(2) ENERGY INVESTMENTS GLOBAL LIMITED

Defendants

Michal Hain, instructed by Charles Fussell & Co LLP, on behalf of the Claimant.

Celia Rooney, instructed by Macfarlanes LLP, on behalf of the Defendants.

Hearing dates: 17-20 January 2022.

JUDGMENT

I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR ADRIAN BELTRAMI QC:

1. This is a claim by the Claimant (**Albion**) for the balance said to be due under a loan facility agreement dated 13 August 2015, as amended on 4 July 2016 (**Loan Agreement**) and a related Share Purchase Agreement dated 31 January 2018 (**SPA**). The Borrower under the Loan Agreement was the First Defendant (**Heritage Oil**). The Second Defendant (**EIGL**), the sole shareholder of Heritage Oil, agreed under the SPA to procure the repayment of the outstanding loan amount and it is agreed that the Defendants are jointly and severally liable for any balance that is in fact due. It is common ground that Albion advanced US$9,241,642.00 under the Loan Agreement and that there was a repayment on 24 December 2020 in the sum of US$7,772,216.81. At the date of the Particulars of Claim, the remaining balance, including interest, was said to be US$6,495,927.65.

2. The Defence, in short, is that no further sum is due because the Defendants are entitled to deduct from any outstanding balance the total of what are said to be repayable expenses incurred by the ultimate beneficial owner of Albion, Mr Anthony Buckingham (**Mr Buckingham**). It is accepted in the Particulars of Claim that some of Mr Buckingham's expenses should be deducted, and Albion has during the course of the trial conceded the deduction of further expenses. That has left two controversial categories of expenses in issue, and the question for the court is whether (and if so in what amount) any further deductions should be made.

3. Mr Michal Hain appeared on behalf of the Claimant. Miss Celia Rooney appeared on behalf of the Defendants. I am grateful to both Counsel, and their instructing solicitors, for the assistance they have provided.

Background

4. Mr Buckingham was the founder of Heritage Oil. The company, through its group, has been engaged in the exploration, development, production and acquisition of oil and gas assets internationally. Heritage Oil (then a plc) was until 2014 listed on the London Stock Exchange as a FTSE 250 company. Mr Buckingham, personally and through his company Albion Energy Ltd (**Albion Energy**), was a major shareholder, and he was also the Chief Executive Officer.

5. Heritage Oil was taken private in 2014, pursuant to a scheme of arrangement under Article 125 of the Jersey Companies Law, under which EIGL purchased 80% of the issued share capital. EIGL is a special purpose vehicle registered in the British Virgin islands, a wholly owned subsidiary of Al Mirqab SPC, and beneficially owned by his Excellency Sheikh Hamad Bin Jassim Bin Jabor Al Thani (**HBJ**). HBJ was, or at least was understood by Mr Buckingham to be, the business partner of His Excellency Sheikh Hamad bin Khalifa Al Thani, the former Emir of Qatar. The remaining 20% of the issued share capital was retained by Albion Energy and there was a Shareholders Agreement dated 29 April 2014 between the two shareholders (**Shareholders' Agreement**). The cash price for the ordinary shares of Heritage Oil was 320 pence and this valued the company at approximately £924 million.

6. Mr Buckingham thereupon stepped down as Chief Executive Officer and became a Consultant, with a view to developing new business and assisting with the management of existing assets. This was achieved by an Advisory Agreement dated 30 June 2014, as amended and restated on 30 July 2014 (**Advisory Agreement**). The parties to the Advisory Agreement were: (1) Heritage Oil; (2) Sundance Investments Ltd (**Sundance**), a company beneficially owned by Mr Buckingham, as Advisor; and (3) Mr Buckingham, as Consultant.

7. Pursuant to the terms of the Advisory Agreement, Sundance agreed to make available to Mr Buckingham and Mr Buckingham undertook to perform the "*Services*". These were defined as:

   "*… providing strategic advice and assistance to the Board of the Company in pursuing the Company's objectives of continuing and expanding the business of upstream oil and gas exploration, development and production activities with and resulting from the exploitation of oil and gas interests in any and all areas and regions of the world including the acquisition of such assets and companies…"*

8. The following further terms of the Advisory Agreement are of relevance:

   a. Clause 5.1: "*With effect from the Commencement Date [30 June 2014], the Advisor will procure that the Consultant shall (and the Consultant undertakes that he shall) provide the Services to the Company at such times, at such locations and on such occasions as the Company may reasonably require and for such periods as may be reasonably necessary, provided that the Consultant shall dedicate sufficient time and attention to satisfy his obligations under this Deed*."

   b. Clause 5.7: "*The Consultant will be required by the Company to travel extensively overseas on business and to meet with and continue to develop his contacts and connections for the benefit of the Group. Accordingly, the Company shall make available the Company's G550 jet or its equivalent to the Consultant for the purposes of providing the Services*."

   c. Clause 7.1: "*The Company shall pay a fee to the Advisor at a rate of one hundred and sixty six thousand six hundred and sixty seven British pounds (£166,667.00) per calendar month (plus applicable taxes, if any) upon production of an invoice in accordance with clause 7.2 below (the* ***Fee****)*."

   d. Clause 7.5: "*The Company shall be entitled to deduct from the fees (and any other sums) due to the Advisor any amounts that are owed by the*

Advisor or the Consultant to the Company (or any Group Company) at any time."

e. Clause 8.1: "*The Company shall reimburse the Advisor (on production of such evidence as the Company may reasonably require) any reasonable travelling and accommodation expenses (including hotel and subsistence) and reasonable entertaining expenses which are reasonably and properly incurred by or on behalf of the Advisor and/or Consultant in the course of providing the Services*."

f. Clause 8.2: "*The amount of any expenses shall be submitted separately by invoice by the Advisor on or about the end of each month and the Company shall reimburse the Advisor within fifteen (15) days of receipt of the invoice*."

g. Clause 8.3: "*The Company shall provide the Consultant with a corporate credit card which the Consultant shall use wherever convenient to pay for expenses incurred in connection with the Services*."

9. This arrangement continued between 2014 and 2018. During this time, Mr Buckingham carried out work as Consultant to Heritage Oil and this involved, amongst other things, extensive international travel. For this purpose, in accordance with clause 5.7 of the Advisory Agreement, he made frequent use of the company's corporate jet (the **jet**). The jet was also used by Mr Buckingham for personal trips which were not connected with the Services. In addition, Mr Buckingham incurred expenditure (to use a neutral term for the moment) which was ultimately discharged by Heritage Oil or a subsidiary company, in accordance with clause 8 of the Advisory Agreement. He also incurred expenditure of a personal nature unconnected with the Services.

10. Mr Buckingham's expenditure was subject to a reconciliation process conducted by Mr Paul Atherton (**Mr Atherton**). Mr Atherton had been the Chief Financial Officer of Heritage Oil until he replaced Mr Buckingham as Chief Executive Officer. I will explore the detail of the process below, but, in summary, Mr Atherton allocated expenditure

between Heritage Oil and Mr Buckingham, and any amounts categorised as personal were recharged to Mr Buckingham and set off against amounts otherwise due to Mr Buckingham or to companies related to him. Such arrangements were the same as or similar to those which had obtained before the acquisition by EIGL, in respect of expenditure incurred by Mr Buckingham when Chief Executive Officer.

11. On 13 August 2015, as I have mentioned, Albion entered into the Loan Agreement with Heritage Oil, advancing a total sum of US$9,241,642.00 in six unequal instalments. Relevant defined terms are:

    a. Repayment Date: "*the fifth (5th) Business Day immediately following the date of receipt of a written demand for repayment from the Lender of all or part of the Advances*."

    b. Interest: "*The Advances shall be subject to interest at the rate of nine percent (9%) per annum… to the day on which the Advances are repaid… In the event that an amount is due and payable but not paid, including interest… it shall be capitalised on the last day of each interest period and shall bear interest at a rate of 10% per annum on any sum from the due date up to the date of actual payment*."

    c. Repayment: "*Without prejudice to the other terms of this Facility Letter, the principal balance of the Advances and outstanding interest is repayable on the Repayment Date as notified to the Borrower*."

12. Sometime in 2017, the relationship between Mr Buckingham and HBJ became strained and, on 31 January 2018, EIGL acquired the remaining 20% percent of Heritage Oil pursuant to the SPA. The parties to the SPA were: (1) Albion Energy; (2) EIGL; (3) Heritage Oil; (4) Albion; (5) Sundance; and (6) Mr Buckingham. EIGL agreed to purchase the remaining shares for a consideration of US$100 million, to be paid in three instalments. The Shareholders Agreement was terminated, as was the Advisory Agreement.

13. The Loan Agreement also was addressed in the SPA, with provisions for repayment contained in clause 6:

    a. Clause 6.1: "*Subject to Completion taking place and clause 6.2 below, the Buyer [EIGL] irrevocably undertakes to procure the repayment by the Company, on or before the third anniversary of the Completion Date, of the Loan Facility Amount less the amount of any expenses disbursed from the Company to the Consultant, (which have not been repaid by the Consultant as at the date of repayment of the Loan Facility Amount)…"*

    b. Clause 6.2: "*Albion Resources irrevocably acknowledges and agrees that:*

        6.2.1 There will be no prepayment penalties in the event that any of Loan Facility Amount is repaid before the third anniversary of the Completion date; and

        6.2.2 Upon repayment of the Loan Facility Amount in accordance with clause 6.1, the Company's [Heritage Oil's] obligations under the Loan Facility shall be deemed to be fully settled and discharged."

14. The SPA further included broadly drafted release clauses. Mr Buckingham's evidence, with which the Defendants agreed, was that these provisions were designed to draw a line under the relationship between the parties and to settle disputes between them. By clause 8.1, the Buckingham parties (Albion Energy, Albion, Sundance and Mr Buckingham) released the EIGL parties (EIGL and Heritage Oil) in respect of the "*Seller Released Claims*" and by Clause 8.2, the EIGL parties released the Buckingham parties in respect of the "*Buyer Released Claims*". Both sets of claims were defined in expansive terms, save that the Buyer Released Claims contained a proviso carving out "*any Claim which relates to any matter reported by Alvarez and Marsal Disputes and Investigations LLP in relation to their audit of the business and affairs of the Company currently in progress on behalf of the Seller…"*.

15. The trial bundles contained certain documents or draft documents which appear to have been the product of the audit referred to in this proviso. In their written opening, the Defendants sought to place reliance on the content of these documents as applicable factual matrix for the purpose of the interpretation exercise which both parties agree must be undertaken. However, one of the documents post-dated the SPA and it was not established that the other had been made available to all of the parties, and specifically the Buckingham parties, in advance of the SPA. By the time of closing, Miss Rooney fairly accepted that the content of the documents could not assist.

16. Albion made demand for repayment by way of a letter from its solicitors, Charles Fussell & Co LLP, dated 21 October 2020. The outstanding loan balance was said to stand at US$14,390,408.20, with interest accruing at the then daily rate of US$3,578.81. The Repayment Date was specified as 30 October 2020. Heritage Oil made its partial payment on 24 December 2020, said at the time to discharge the balance due after deduction of expenses, pursuant to clause 6.1 of the SPA. By letter dated 15 December 2020, Heritage Oil had quantified those expenses at US$6,761,536.46, made up as follows (I explain the categories below):

    a. Credit card expenses: US$866,258.

    b. Plaza 107 payments: US$1,200,986.

    c. Gulfstream Jet costs: US$4,694,292.46.

The Proceedings

17. The Claim Form was issued on 3 March 2021, with Albion seeking what it alleged was the remaining balance owed under the Loan Agreement. It was accepted that there was a proper deduction for expenses of US$446,185.14 but it was claimed that the balance, standing at US$6,495,927.65 as at the date of issue, was outstanding.

18. The Defence was served on 16 April 2021. The Defendants' calculation of deductible expenses had changed, increasing to a total of US$8,521,846.42, made up as follows:

    a. Debit card expenses: US$1,261,817.43. These represent expenditure incurred by Mr Buckingham on the corporate debit card, which was linked to a bank account in the name of a subsidiary of Heritage Oil. The Defendants say that the total is comprised of (a) expenditure for Mr Buckingham's personal purposes which should have been recharged to him (this is the figure, of US$446,185.14, which Albion accepted in its Particulars of Claim); and (b) expenditure which Mr Buckingham has not demonstrated to be for a business purpose.

    b. Invoice expenses: US$108,297.28. Heritage paid certain third parties in settlement of invoices or direct debits on Mr Buckingham's behalf and it is not in dispute that this was personal expenditure.

    c. Gulfstream jet costs: US$7,033,285.35. This is the Defendants' calculated value of the outstanding cost to Heritage Oil for Mr Buckingham's use of the jet (a) for personal flights; and (b) for flights which Mr Buckingham has not demonstrated were for a business purpose.

    d. Plaza 107 payments: US$118,446.36. Plaza 107 Ltd is a private company, which provided administrative services for and on behalf of Mr Buckingham. Sums were invoiced to Plaza 107 or paid on credit card by that company, but ultimately discharged by Heritage Oil. It is agreed that this was personal expenditure.

19. The pleaded figures, accordingly, bear a relation to those specified 4 months earlier on 15 December 2020, but were materially different. Further, one consequence of the Defendants' pleaded case is that Heritage Oil must have overpaid Albion, because it deducted only a portion of the total which was available to be deducted. At any rate, there is no counterclaim for the balance.

20. By the time of closings, the parties' respective positions had moved somewhat. Albion had conceded the deductions in respect of invoice expenses and Plaza 107 payments. This meant that the only categories of expenditure which remained in issue were (a) debit card expenditure which (the Defendants said) Mr Buckingham had not demonstrated to be for a business purpose; and (b) Gulfstream jet costs. The Defendants, for their part, accepted that their calculation of jet costs for the period between August 2016 and January 2018 was inapposite and suggested that I give directions for further evidence to be adduced by way of revised calculations, should this prove relevant.

21. Reverting to the pleadings, the Defendants also took issue with the validity of the letter of demand. Their pleaded case is that there was an implied term of the Loan Agreement that the obligation to repay arose only on a written demand "*which specified, with specificity and precision, a sum that was in fact due and owing*" to Albion (original emphasis) and that the letter of 21 October 2020 did not satisfy this requirement both because the figure was itself subsequently slightly recalculated and (more substantively) because it did not take into account the deductions the Defendants now say ought to have been made.

22. This is a point of little significance on the facts. Although the Defendants plead that no obligation to repay the loan balance has ever as a consequence been "*triggered*", this point was not pursued. Hence, the obligation to repay would have arisen in any event on 31 January 2021, pursuant to clause 6.1 of the SPA. This means that the point would at best make only a (small) difference to the interest calculation, in particular, the difference for a short period of time between the normal interest rate of 9% and the default interest rate of 10%. In any event, I have no hesitation in rejecting the Defendants' case on this point. The Loan Agreement has an entirely conventional provision for the service of a written demand for repayment "*of all or part of the Advances*". The general rule under English law is that it is not a condition precedent to the validity of a demand that it be shown to be accurate for all purposes, and indeed there is not necessarily even a requirement to provide any calculation at all: see *Bank of Baroda v Panessar* [1987] Ch 335. I see no

reason to justify the proposed implied term in this case and, what is more, the basis of the alleged breaches, namely a minor recalculation by the creditor and the impact of a disputed expenses claim (the quantum of which changed on the Defendants' own case within a space of months) demonstrates why such a term should not be implied. Otherwise, a creditor could have no certainty as to the effectiveness of its demand, and there would be an enhanced premium in any numerical challenge by the debtor.

The evidence

23. I received evidence orally from two witnesses. Mr Buckingham testified on behalf of Albion and Ms Elizabeth Holloway testified on behalf of the Defendants. Ms Holloway is the Group financial controller of Heritage Oil.

24. In her written closing, Miss Rooney suggested that Albion's case was "*heavily reliant*" on the evidence of Mr Buckingham. She then proceeded to identify a number of ways in which that evidence was less than ideal. It is right to say that Mr Buckingham was rather argumentative and prone to making speeches. I also agree that there was a lot that he could not remember, although this is largely unsurprising given the passage of time. More pertinently, I do have difficulty with some of the things Mr Buckingham did say orally (and which had not been included in his witness statement and which were not otherwise borne out by documents). By way of example, Mr Buckingham claimed that he did provide credit card receipts to Mr Atherton but he had not said this in his witness statement. Also, whereas, in his witness statement, Mr Buckingham spoke of monthly reconciliation meetings with Mr Atherton, unless they were unable to meet because of travel commitments, in which event Mr Atherton would use his "*best judgment*" in allocating expenses, his oral evidence certainly gave the impression that they were able to speak and did so on a much more frequent, even if informal, basis. Overall, I approach Mr Buckingham's unsupported oral evidence with a measure of caution, not because I think he actively sought to be misleading, but because I am not convinced of his fastidiousness with respect to detail.

25. All that said, however, I do disagree with Miss Rooney's submission as to the significance of Mr Buckingham's evidence. That evidence was certainly helpful in setting out the background and context. It was also of assistance in describing the allocation process undertaken by Mr Atherton, the material elements of which were in fact common ground. Beyond that, the issues for determination are largely matters of contractual interpretation. In that regard, and for the reasons I explain below, I take the view that the fact of Mr Atherton's allocation process is of much greater significance than the precise manner in which he carried it out. And, more specifically, in my judgment the answer is the same whether or not he required receipts of Mr Buckingham and regardless of the regularity of their discussions. For these reasons, I do not regard any deficiencies in Mr Buckingham's evidence as affecting the outcome.

26. Ms Holloway did not deal directly with Mr Buckingham, though she was able to speak of the overall accounting process within Heritage Oil. She also produced calculations of what the Defendants contended were the variable costs of the jet. As I have mentioned, the Defendants had by the time of closings withdrawn some of these calculations. I consider that Ms Holloway gave truthful evidence, though, as with Mr Buckingham, indeed perhaps more so, it was of a limited scope.

27. I should address, at this stage, two aspects of the evidence, both of which I have already adverted to. The first is Mr Atherton's allocation exercise. The evidence from the witnesses described the two sides of this exercise. As described by Ms Holloway, from the perspective of Heritage Oil, there was a process in place by which information on expenditure was provided to Mr Atherton on a monthly or approximately monthly basis. In respect of debit card payments, he would be given a spreadsheet of the expenditure, alongside template timesheets to complete. He would then allocate individual items of expenditure, first as between Mr Buckingham and himself (he also had a debit card linked to the same account) and then within categories of personal, General and Administration (**G&A**) and specific projects. Items marked personal would be recharged to Mr Buckingham or to Mr Atherton, as appropriate. The updated spreadsheet would then be returned to the finance team who booked the transactions

accordingly. There was a substantially similar exercise in respect of the jet usage, in that Mr Atherton would receive spreadsheets of flight logs, which he would again allocate to personal, G&A or specific projects. Mr Buckingham would be recharged for personal flights at a cost of £4,000 per flight hour, as what Ms Holloway stated to be a broad estimate of the approximate variable costs attributable to each flight.

28. Mr Buckingham described the other side of this exercise, namely the interactions he had with Mr Atherton for the purpose of completing the spreadsheets. As I have said, the evidence of these interactions was not entirely satisfactory. Mr Buckingham's claim in his witness statement that he would discuss expenses with Mr Atherton was not challenged and I find that this did occur. However, it did not, on Mr Buckingham's own evidence, occur every single month and there were occasions (and I am unable to conclude how frequently) when Mr Atherton used his own judgment without prior discussion. Having seen Mr Buckingham give evidence, I think it unlikely that, whatever discussions were had, they were particularly long or detailed, and nor am I satisfied that many (if any) receipts were produced. It seems to me much more probable that conversations about expenses were brief and at a high level, this reflecting both Mr Buckingham's approach to matters of detail such as this and also the fact that Mr Atherton, as Chief Executive Officer, may be expected to have been familiar with much of the work being carried out by Mr Buckingham in any event.

29. Whilst the evidence described two sides of the same process, it is the process itself which is of significance in this case. The Defendants accepted that Mr Atherton was authorised by Heritage Oil to make the allocations which he did, with the result that these were allocations by the company itself. As such, it does not matter whether Mr Atherton engaged in detailed discussions with Mr Buckingham, whether he exercised his own judgment without discussions, or whether his allocations were made without documentary support. Nor does it matter whether, as Miss Rooney submitted, there was little effective oversight of Mr Atherton either within the company or by its shareholders. All such matters might or might not be relevant to the resolution of any issue between Heritage Oil and Mr Atherton (on which, of course, I express no

view at all). But as between Albion and the Defendants in this case, the necessary factual premise is that there was in place a regular monthly process by which Heritage Oil allocated expenditure into the categories I have described and then carried that allocation through into its accounting systems. As a consequence, and again on a regular basis, amounts allocated as personal expenditure by Mr Buckingham were recharged to him and all other amounts (save for debit card expenses allocated to Mr Atherton) were borne by Heritage Oil.

30. The second factual issue is concerned with the use of the jet. The jet was owned by a subsidiary of Heritage Oil, Darwin Air Ltd (**Darwin Air**). It was operated by an external jet management services company, 51 North Ltd (**51 North**). Heritage's finance team would receive and discharge invoices from 51 North to Darwin Air for the operational costs of the jet. The flight logs supplied to Mr Atherton came from 51 North. It is common ground that the way in which the jet was maintained by Heritage Oil changed in August 2016. Until then (referred to as the **pre-mothball period**), the jet was made available on a continuous basis, with a permanent crew on standby for use as and when required. From August 2016, the jet was "*mothballed*", with the effect that it was kept in storage and used only occasionally, with no crew on standby. As a consequence, the composition of the costs for individual flights changed thereafter (referred to as the **post-mothball period**).

31. In their Defence, the Defendants pleaded that, in or around August 2016, Heritage Oil and Mr Buckingham "*varied their arrangements*" for the use of the jet, with the result that Mr Buckingham agreed to be responsible to 51 North for all costs other than the costs associated with mothballing and flight costs related "*directly*" for business purposes. In a response to a Request for Information, dated 26 May 2021, the Defendants indicated that they understood this oral variation was agreed between Mr Buckingham and Mr Atherton and/or Mr Shahzad Shahbaz (**Mr Shahbaz**), an adviser to HBJ who had been appointed to the Board of Heritage Oil. However, neither Mr Atherton nor Mr Shahbaz produced a witness statement and on 20 December 2021, Albion served a Notice to Admit that there was no oral variation.

32. There was no response to the Notice to Admit until, in effect, the Defendants' written opening on 14 January 2022, in which Miss Rooney stated that the Defendants "*remain of view*" that there was an oral variation but that, in the absence of evidence, "*the Defendants are prepared to assume the issue in the Claimant's favour and to proceed on that basis."* Given that what this actually meant was that the Defendants had no evidence to support their pleaded case, this concession was not only late, its terms were equivocal. The absence of evidence ought to have been apparent, at the latest, when witness statements were exchanged on 19 November 2021.

33. Be that as it may, when Ms Holloway came to calculate what she said were the appropriate variable flight costs for the use by Mr Buckingham of the jet, she used a different methodology as between the pre-mothball period and the post-mothball period. Such an approach was premised upon there having been an agreed variation but this was accordingly flawed when the case for such a variation was no longer pursued. In opening, Mr Hain did make the point that the evidence, from Ms Holloway, did not match the case on the concession and that there had been no updated calculations. It was only in closing that the Defendants appeared to recognise this, at which point Miss Rooney suggested that there may need to be a further round of evidence to fill the gap.

The issues

34. The issues for determination resolved themselves into three:

    a. Issue 1: what, if any, categories of expenditure are in principle available for deduction under clause 6.1 of the SPA?

    b. Issue 2: what, if any, items of expenditure should be deducted under clause 6.1 of the SPA?

    c. Issue 3: if items of expenditure should be deducted, what is the quantum of deduction?

35. Because of the narrowing of the case by the time of closings, there are only two categories of expenditure which remain in dispute. The first is debit card expenditure which the Defendants contend was incurred by Mr Buckingham, which was allocated by Mr Atherton to G&A or specific projects, but which the Defendants now say has not been demonstrated to be for a business purpose. There was some attempt in cross-examination of Mr Buckingham to elicit an acceptance that some specific items on what is a long list of expenditure must have been or perhaps might have been for personal purposes but I did not see any real value in that endeavour. Mr Buckingham was unable to recollect the detail but, more pertinently, the Defendants are not asking the court to find, and I am in no position to find, that any particular items of expenditure were in fact for personal purposes. The issue is more generic, namely whether the Defendants should be able to deduct the entire list of expenses previously allocated to G&A or specific projects, on the grounds that they cannot now be shown by Mr Buckingham to be for business purposes, in other words whether the Defendants are able in such circumstances to reverse Mr Atherton's allocations (regardless of whether, in truth, any particular expense was for personal or business purposes).

36. The second item of expenditure, the costs of the jet, have an intricate composition. They comprise: (a) the variable costs of flights allocated by Mr Atherton to personal in the pre-mothball period, over and above the £4,000 per flying hour actually recharged at the time; (b) the variable costs of flights allocated by Mr Atherton to G&A (though not specific projects) in the pre-mothball period which cannot now be demonstrated to be for business purposes; (c) (on a presently unevidenced basis) similar costs in respect of flights taken in the post-mothball period.

37. Attached to Mr Buckingham's witness statement is an annotated version of a schedule of Mr Atherton's flight allocations. In many respects, this involves giving some further information on flights allocated by Mr Atherton to G&A. In addition, Mr Buckingham also accepts that a number of flights allocated to G&A were in fact personal. The Defendants seek to take the benefit of the acceptance of personal flights but at the same time to dismiss the relevance of the rest of the information provided.

Issue 1: what, if any, categories of expenditure are in principle available for deduction under clause 6.1 of the SPA?

38. Issue 1 turns on the interpretation of the SPA. I was referred to a selection of well-known recent cases explaining the process of contractual interpretation but there is no need in this Judgment to re-tread that familiar ground.

39. It is helpful instead to begin with the Advisory Agreement. As I have already set out, it is clause 8 (headed "*Expenses*") which imposes an obligation on Heritage Oil to pay for expenditure incurred by Mr Buckingham when performing the Services. Examining the provisions in a little more detail:

    a. The principal provision is at clause 8.1. This sets out the primary obligation to reimburse Mr Buckingham in respect of reasonable expenses in the course of providing the Services. This obligation is qualified by the requirement that Mr Buckingham produce such evidence as Heritage Oil may reasonably require.

    b. Clause 8.2 provides for the mechanics of expenditure reimbursement, envisaging the submission of a monthly invoice and its discharge within 15 days.

    c. Clause 8.3 is, in effect, an alternative mechanism to clause 8.2. The premise of clause 8.2 is that Mr Buckingham will himself have incurred a liability to a third party, which he then reclaims from Heritage Oil. Clause 8.3 allows for the provision to Mr Buckingham of a credit card (in the event it was a debit card though nothing turns on this distinction). On the presentation by Mr Buckingham of the debit card, the third party would be paid directly out of the linked bank account, so there would be no need to go through the reimbursement process under clause 8.2.

40. Each of clauses 8.1, 8.2 and 8.3 can and in my judgement ought to be read as part of a coherent whole. The primary obligation is contained in clause 8.1. Clauses 8.2 and 8.3 allow for alternative mechanisms by which that primary obligation is given effect. The credit/debit card route is more direct and hence more streamlined than the reimbursement process envisaged in clause 8.2 but they are both ultimately mechanisms to achieve the same end.

41. Further, as I discussed in argument, the qualification in clause 8.1, namely that the obligation to re-imburse arises only on the production of such evidence as Heritage Oil may reasonably require, must be read into the mechanisms in clauses 8.2 and 8.3. Accordingly, the obligation to pay within 15 days under clause 8.2 is not absolute but is subject to the principal provision in clause 8.1 and hence the right of Heritage Oil, acting reasonably, to require evidence. Equally, although the debit card procedure under clause 8.3 envisages an immediate deduction from a Heritage Oil linked bank account, the underlying responsibility for that payment, as between Mr Buckingham and Heritage Oil, is again referable to clause 8.1 and its terms.

42. In addition to these provisions, clause 5.7 touches on a similar subject. This is the clause which obliges Heritage Oil to make the jet available to Mr Buckingham for the purpose of providing the Services. Because the jet was made available directly to Mr Buckingham, his use of it cannot easily be described as "*expenses*" of the sort envisaged in clause 8, but there is a measure of equivalence in subject matter. When Mr Buckingham used the jet he incurred various costs (namely variable costs over and above the fixed costs of its acquisition and maintenance). Those costs were invoiced, in the main at least, by 51 North and discharged by Heritage Oil. I see no difficulty in implying into clause 5.7 a similar qualification to that in clause 8.1, namely that the obligation to make the jet available to Mr Buckingham for the purpose of providing the Services (including to discharge the attendant costs of doing so) was itself subject to the production of such evidence as the company may reasonably require. Accordingly, if Mr Buckingham did use the jet, it was open to Heritage Oil to require him to satisfy it that this was for a business purpose.

43. Further, clause 5.7 and clause 8 share at least this characteristic, that they are by their express terms concerned only with obligations of Heritage Oil and corresponding entitlements of Mr Buckingham when performing the Services. Nothing in these clauses addresses the parties' respective rights and obligations when Mr Buckingham is not performing the Services. Clause 5.7 contains no obligation of Heritage Oil to make the jet available in such circumstances and no procedure for the consequences of its doing so. Equally, clause, 8 says nothing about expenditure incurred of an entirely personal nature. Nevertheless, Mr Buckingham did use the jet for personal purposes and did incur personal expenditure, including on the debit card.

44. It is therefore necessary to consider the legal incidents of the parties' relationship in such circumstances. There are here two aspects which need to be considered. The first is, at one level, straightforward. All the parties agree that, because Mr Buckingham had no entitlement to use the jet or to incur expenses for personal purposes, and as Heritage Oil had no obligation to pay for the same, then all such expenditure should be down to Mr Buckingham. And that was, of course, the way in which the parties to the Advisory Agreement did proceed, through the allocation process. There was a discussion about the legal route to that broad conclusion, whether it be by way of implied term (as advanced by the Defendants and not disputed, to this extent, by Albion), collateral contract or a free standing liability in unjust enrichment. I do not consider that anything turns on the resolution of that abstract question.

45. The second aspect is more complex. On the assumption that there are both certain items of expenditure (and indeed corporate jet use) which are for the purpose of the Services and so liable to be borne by Heritage Oil and certain items which are personal and so liable to be borne by Mr Buckingham, how are the respective liabilities to be determined? One way to approach this is to determine the conditions under which Heritage Oil would become liable for this expenditure, as against Mr Buckingham, on the basis that anything else would be Mr Buckingham's own responsibility.

46. So far as the debit card expenses are concerned, the Defendants' pleaded case, so far as material, is that there should be implied into clause 8 of the Advisory Agreement a term that Heritage Oil should be liable only for expenses that are "*properly evidenced*". I am not satisfied that such a term should be implied, because: (a) there is already a term dealing with the provision of evidence; and (b) a supposed term that expenses be properly evidenced itself begs rather more questions than it answers (not least, how and when). Miss Rooney, in her oral closing, turned instead to the words actually used in clause 8.1 (namely the qualification "*on production of such evidence as the Company may reasonably require*"). I agree that that is the right area of focus, but it is then necessary to give meaning to those words.

47. It is clear, as a starting point, that the qualification in clause 8.1 grants to Heritage Oil a power (subject to a condition of reasonableness) to require evidence of the business purpose of any particular expense. Miss Rooney's case was that the condition of reasonableness had both a qualitative and a temporal aspect, with the result that the power was exercisable by Heritage Oil for any period, however long, that was deemed reasonable. Thus it could in theory, and on the Defendants' case can in fact, be exercisable many years later through the course of these proceedings. Ultimately, because, on their case, the Defendants can now reasonably require the production of evidence, if Mr Buckingham is unable to provide what is required, he must bear responsibility for the expenses in question notwithstanding the fact that they had all previously been allocated by Heritage Oil to its own account.

48. I reject this submission, for the following reasons:

    a. In the context of an expenses claim, I see the time limits for the requirement to produce evidence as relatively short. By their nature, expenses claims ought to be capable of resolution swiftly. A clue as to the sort of timeframes envisaged is at clause 8.2, which imposes an obligation to repay within 15 days. At least under that clause, any request for evidence must be made within the same time period, else it would make little commercial sense. Because of the different mechanics under clause 8.3 there is no similar express

deadline but I see no reason why a different (and on the Defendants' case radically different) approach should be taken.

b. The word "*reasonably*" must also be read in the context of clause 8.1. The clause imposes a positive obligation on Heritage Oil ("*the Company shall reimburse*…"), subject only the production of evidence reasonably required. As it seems to me, the right of the company to require evidence extends at the latest to the point at which it does in fact assume the obligation to re-imburse. Once it has resolved to do so, having exercised whatever rights it thought appropriate, the process is complete and the liability has arisen. In this case, that point would occur when Mr Atherton made his allocations, or when those allocations were inputted into the accounting systems or, at the latest, when either any payment was made to Mr Buckingham or set-off effected.

c. I find the contrary case, advanced by the Defendants sufficiently uncommercial to be inconceivable. On that case, an expense could be incurred on day 1, accepted as such by the company at the time and paid, yet re-opened years, and potentially many years, after the event (I did push Miss Rooney for an end date but she maintained that it was all just subject to reasonableness) when new management required the production of evidence which was not sought at the time. As well as creating commercial uncertainty, such an interpretation would produce obvious unfairnesses, whatever the facts.

d. The point has in any event further difficulties in the present case. The overarching criterion of reasonableness, a focus for Miss Rooney's oral closing, is not part of the Defendants' pleaded case. As I have mentioned, the pleading asserts an implied term merely that expenses be "*properly evidenced*". A case, instead, that it was reasonable on the facts of this case for the Defendants to require the production of evidence many years later opens up wider considerations which were not explored in the evidence (including why the allocations were made at the time, why it took them so long to reconsider those allocations, why they ended up making the

decision to challenge all of the allocations and whether, in all the circumstances, this was fair and reasonable). There has been no proper enquiry into whether the Defendants have acted reasonably. Even if the contract permitted it, and even if the Defendants' case were now able to be put on that basis, I could not safely make such a finding. Put another way, nothing in Ms Holloway's evidence could satisfy me that it was reasonable for the Defendants to re-open these questions when they did. That is not a criticism of Ms Holloway; she had almost no relevant evidence to give on the issues which would have arisen.

49. The Defence does not in fact plead a similar implied term under clause 5.7 in respect of the jet costs, namely that they be "*properly evidenced*", though the remainder of the pleading appears to assume something similar as it is alleged that Mr Buckingham has failed to produce sufficient evidence. At all events, it seems to me that exactly the same analysis ought to apply as under clause 8.1. I have already indicated my view that there should be implied into clause 5.7 the same power to require the production of evidence. Its temporal scope should be limited in the same way.

50. In conclusion, accordingly, I find that the power (express under clause 8.1 or implied under clause 5.7) to require the production of evidence was exercisable by Heritage Oil as part of the allocation process and, at the latest, by the time of any payment or set-off by which the parties' respective liabilities were determined. It is not now open to Heritage Oil to seek to re-open the allocations previously made on the ground that Mr Buckingham is not now able to produce evidence which was not sought at the time.

51. Turning now to the SPA, clause 6.1 allows for the deduction of "*any expenses disbursed from the Company to the Consultant (which have not been repaid by the Consultant as at the date of repayment of the Loan Facility Amount)*".

52. The principal argument on behalf of Albion focussed on the jet costs. This was to the effect that the only categories of "*expenses"* which fall under

clause 6.1 of the SPA are those categories of expenditure which are also "*expenses*" under clause 8.1 of the Advisory Agreement. This was a largely textual argument. Mr Hain pointed to the fact that it is the same word ("*expenses*") which is used in both clauses. He also suggested that there was a parallel between the words "*disburse*" in clause 6.1 and "*reimburse*" in clause 8.1, these being words which, he said, shared the same "*linguistic root*". In contrast, he said, clause 5.7 of the Advisory Agreement was not concerned with "*expenses*" nor any "*re-imbursement*". Based on something Mr Buckingham said in evidence, he submitted that the jet costs were not really expenses at all but the costs of a "*depreciating asset*". Finally, he sought to pray in aid the argument that, if the parties to the SPA had intended to include jet costs as expenses, they could have said so expressly.

53. I am not persuaded by Mr Hain's linguistic approach. The case he advanced in closing was a shadow of a more aggressively textual submission which was made in opening (where he had identified 5 "*criteria*" which, he said, had to be satisfied under clause 6.1 of the SPA). By closing, much of that case had been abandoned and the residue was not compelling. The fact that the same word is used in both clauses is certainly true but does not to my mind materially assist in determining what is meant in clause 6.1. These are different agreements between different sets of parties and I see no strong reason to think that they must mean the same thing, or more accurately, that the word "*expenses*" in clause 6.1 must be limited to the categories of expenditure which also fall under clause 8. There is no real value in the point about linguistic roots. The suggestion that the jet costs are merely the costs of a depreciating asset is a red herring because the only claim is in respect of actual variable costs incurred on specific flights and discharged by Heritage Oil. And whilst it is right that the parties could have drafted a contract which anticipated the present dispute and provided an answer with greater clarity, that is a notoriously suspect approach to interpretation.

54. On the meaning of the word "*expenses*", I agree with Miss Rooney that this is an entirely general term which can without damage to either the language of the clause or the overall context be given its natural and ordinary meaning. An expense may simply be regarded as a cost. In the

context of the parties' dealings prior to the SPA, when Mr Buckingham was accustomed to incurring costs for personal and business purposes, and where there was an established process by which those costs would be allocated and either recharged to Mr Buckingham or assumed by Heritage Oil, I agree that the word "*expenses*" in clause 6.1 of the SPA refers to all those categories of expenditure with which the parties regularly dealt between themselves. Specifically, I see no reason to exclude the jet costs, merely because such costs did not fall under clause 8.1 of the Advisory Agreement.

55. This conclusion, however, answers only part of the question. Even assuming that the jet costs (and indeed the debit card expenses) are at least potentially "*expenses*" under clause 6.1 of the SPA, what categories of expenses are available to be deducted against the outstanding loan balance? On the applicable wording, it is only those expenses "*disbursed from the Company to the Consultant (which have not been repaid by the Consultant as at the date of repayment of the Loan Facility Amount)…*"

56. It is clear that the words cannot be read entirely literally or without context. Where reference is made to "*expenses… which have not been repaid*", this is not a reference to all expenses which have not been repaid, because nobody has suggested that it includes expenses which were properly payable by Heritage Oil (whether under clause 5.7 or clause 8 of the Advisory Agreement). It must instead be a reference to expenses which <u>should</u> have been repaid by Mr Buckingham, because they were his legal responsibility rather than that of Heritage Oil.

57. This then leads to the next question which is what those expenses were. There are here two possibilities. The first is that the parties were reserving to the Defendants the power to re-open the entirety of Mr Buckingham's expenses history with a view to deducting from the loan balance any and all expenses which could subsequently be determined to have been incorrectly allocated to Heritage Oil for want of evidence (or indeed for any other reason). The second, of a much more limited nature, is that they were providing for the possibility that there were still expenses which either had been allocated to Mr Buckingham but not yet set off or which remained to be allocated and, if appropriate, set-off, and

that this was therefore a "*run off*" provision to ensure that all and any outstanding matters were catered for as the parties wound down their relationship.

58. On the wording of the clause, both interpretations are possible but in my judgment the latter interpretation is undoubtedly the correct one. This is for the following reasons:

    a. It follows from my interpretation of clause 5.7 and clause 8 of the Advisory Agreement and, specifically, my rejection of the Defendants' case that the allocations remained open to be challenged for want of evidence after they had been made or implemented. In the absence of some sort of claim for breach of duty (which has not been made or even suggested and which would in any event not naturally be described as involving a repayment of expenses), Heritage Oil had no contractual basis to require repayment of sums previously allocated by Mr Atherton on the grounds that they could not now be shown to be in connection with the Services. Clause 6.1 of the SPA must be read in that context. The Defendants could not be reserving to themselves a right to make a challenge which they did not have.

    b. Nor does the SPA provide any context even for any potential challenge. Whilst there is a reference in the definition of Buyer Released Claim to the fact of an audit "*of the business and affairs of the Company*", there is no indication of what that audit involves and, specifically, there is nothing to suggest that the parties had in mind the possibility of re-opening prior expense allocations. The claim which the Defendants now make involves the necessary premise that the Chief Executive Officer of Heritage Oil made multiple errors throughout the entire operation of the allocation exercise, which errors the Defendants are now contractually entitled to correct. Yet such a radical premise is no part of the SPA.

    c. In contrast, there was in existence a known and operating allocation process which for several years had led to a set off against corresponding entitlements when the accounting process

was completed. Moreover, and as explained by Ms Holloway in her witness statement, whilst the set-off had originally been against Mr Buckingham's personal emoluments (whether salary or bonus), from the date of the Loan Agreement, "*the amount due from Mr Buckingham was set off against the value of the loan balance under the Loan Facility Agreement in Heritage's accounts."* In other words, the narrower interpretation reads the provision as preserving the continuation of a process which was already in place and with which the parties were familiar, for the purpose of completing the reconciliation of outstanding expense claims.

59. Clause 6.1 of the SPA can on this analysis be properly analysed as a limited provision which is directed to expenses which have been incurred by Mr Buckingham but which have not yet been set-off or which have not yet been processed through the allocation exercise and will need to be set-off. As would be expected, the Defendants sought to preserve their ability to set-off sums properly allocated to Mr Buckingham, no doubt a sensible precaution in circumstances where he had no continuing link with Heritage Oil. Although the clause has become the focus of this action, I accordingly find that it was of narrow ambit. Specifically, although debit card expenses and jet costs are potentially "*expenses*" for the purpose of the clause, the only categories of expenses which are available to be deducted are those (if any) which were incurred by Mr Buckingham and which had been either allocated to him and not yet set off or not yet allocated or set off. In other words, it enables the Defendants to set-off the outcome of any unfinished allocation or reconciliation process. It does not envisage the re-opening of any processes which have already been completed.

Issue 2: what, if any, items of expenditure should be deducted under clause 6.1 of the SPA?

60. Given my findings on Issue 1, there will be a short answer on Issue 2. My current understanding is that no sums do in fact fall within the relevant category of expenses, as I have defined it. None of the figures in the

schedules provided by the Defendants falls into the "*run-off*" category that I have described. Even in respect of pre-mothball period flights, those allocated as personal were on the evidence recharged to Mr Buckingham (at the £4,000 per flying hour figure) and so do not fall within clause 6.1 of the SPA. None of this undermines the interpretation of clause 6.1, as the clause remains a sensible provision to close off the possibility of outstanding sums, should there be any.

61. Although it is a rather artificial exercise, even if I were wrong about my interpretation of clause 6.1 of the SPA, I would arrive at the same conclusion under Issue 2 because of my interpretation of clauses 5.7 and 8 of the Advisory Agreement. Accordingly even if, somehow, the parties to the SPA had intended to keep open the theoretical possibility of the deduction of a wider category of expenses, this would be of no avail to the Defendants because, as I found, Mr Buckingham has no obligation to repay expenses previously allocated to and assumed by Heritage Oil on the grounds that they cannot now be shown to be for business purposes.

62. Notwithstanding the above, and hence notwithstanding the parties' true legal entitlements, as I have found them, it remains the case that Albion has agreed to certain deductions. Mr Hain made the point that a creditor can agree to waive any part of a loan balance even if it is otherwise due and there is no conceptual difficulty in a concession made whether or not legally necessary. At any rate, the deductions now conceded comprise the total of US$446,185.14 as debit card expenses for personal purposes, US$108,297.28 as invoice expenses for personal purposes and US$118,446.36 as Plaza 107 expenses for personal purposes.

Issue 3: if items of expenditure should be deducted, what is the quantum of deduction?

63. In the light of my findings on Issues 1 and 2, this third Issue does not arise. Had it arisen, there would have been complications in deciding the appropriate figures for jet costs. Dealing with the point briefly, even if I

found in favour of the Defendants on Issues 1 and 2, I would have held that £4,000 per flying hour was the appropriate rate for calculating the cost of flights allocated or (on this hypothesis) re-allocated to Mr Buckingham. This was the cost actually applied throughout the period and is the best measure of the appropriate cost, as assessed by Heritage Oil. Whether as a course of dealing or, as Albion submitted, pursuant to an estoppel, the Defendants are properly bound by that calculation. And, indeed, the difficulties in the evidence presented, including those in respect of the post-mothball period which I have referred to, underline the inappropriateness of seeking to apply unilaterally a revised methodology different from that which was used by Heritage Oil at the time. Ms Holloway agreed in cross-examination that, if anyone at the time had asked as to the cost incurred by Mr Buckingham for private flights, the answer would have been £4,000. Heritage Oil must have known, or at least must have been capable of calculating, what it now says was the true variable cost of Mr Buckingham's flights, but it chose to charge at a consistent rate of £4,000 per flying hour. I do struggle to see any proper basis upon which that number should be now changed.

Disposition

64. I give judgment in favour of Albion for the loan balance claimed, subject to the deductions conceded by Albion and which I have identified. To confirm the import of this judgment, accordingly, the only sums which are in fact deductible are those referred to in paragraph 62 above, namely US$446,185.14 as debit card expenses for personal purposes, US$108,297.28 as invoice expenses for personal purposes and US$118,446.36 as Plaza 107 expenses for personal purposes. As each of these sums is deductible by way of concession, they should be treated as deducted (and hence ongoing interest should to that extent stop) as at the date of the relevant concession, which is 3 March 2021 in respect of the debit card expenses and 19 January 2022 in respect of the other expenses.