**IN THE MATTER OF THE ARBITRATION**

BETWEEN:

**A&V OIL AND GAS LIMITED**

Claimant

and

**PETROLEUM COMPANY OF TRINIDAD AND TOBAGO LIMITED**

Respondent/Counterclaimant

**Before Arbitration Tribunal:**

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| Sir Dennis Byron | Chair |
| Lord David Hope | Arbitrator |
| Justice Humphrey Stollmeyer | Arbitrator |

**Appearances:**

Ramesh Lawrence Maharaj, SC; Peter Knox, QC, Robert Strang, John Almeida; Ronnie Bissessar; Varin Gopaul-Gosine Counsels for the Claimant

Deborah Peake, SC; Ravi Heffes-Doon; Tamara Toolsie; Marcelle Ferdinand Counsels for the Respondent

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2020: November 23; 24; 25; 26; 27; 30;
December 1; 2; 3; 4; 5; 16; 17; 18;

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**AWARD**

[1] This is an arbitration conducted under the UNCITRAL Arbitration Rules at Port of Spain, Trinidad and Tobago.

[2] By a Contract dated 18th November, 2009 called an Incremental Production Service Contract ("IPSC") A & V Oil and Gas Limited ("the Claimant") and the Petroleum Company of Trinidad and Tobago Limited ("the Respondent") agreed that the Claimant would take possession of and explore and extract oil from an area commonly referred to as the Catshill Field and deliver oil to the Respondent. Clause 36.6 of the IPSC provided that, if Mediation failed to settle a matter in dispute, the matter in dispute was to be referred to a panel of three

Arbitrators, one to be appointed by each of the Parties and the third to be appointed by agreement in writing by the Parties. It also provided that the decision of the majority shall be binding upon the Parties and determine the matter in dispute. Article 36.7 provided that the Arbitrators were to deliver their decision (including the grounds for the award) within three months after entering upon the reference.

[3] A dispute having arisen between the Parties which was not settled by Mediation, steps were taken for it to be referred to Arbitration under Article 36.6 of the IPSC. On 9th April, 2019 in accordance with the Terms of Appointment for the Tribunal, the Parties confirmed their agreement that Justice Humphrey Stollmeyer, 4 St. Andrews Village, Moka, Maraval, Trinidad and Lord David Hope, Brick Court Chambers, 7-8 Essex Street, London WC2R 3LD, had been validly appointed by the Parties in accordance with the provisions of the IPSC and that Sir Dennis Byron, Chock Villa, Sunny Acres, St Lucia had been validly appointed to act as Chairman. By Clause 15 of the Terms of Appointment the Parties agreed to waive Article 36.7 of the IPSC in so far as it required the Arbitrators to deliver their decision within three months. By Clause 19 the Parties confirmed that the judicial seat of the Arbitration is Trinidad, and that the law governing the conduct of the arbitration is the law of Trinidad and Tobago.

[4] The Attorney representing the Claimant in these proceedings is Varin Gopaul-Gosine, Lawgivers, 11A Gordon Street, San Fernando. The Attorney representing the Respondent is Marcelle Ferdinand, J D Sellier & Co, 129-131 Abercromby Street, Port of Spain.

**The Procedure**

[5] By Clause 16 of the Terms of Appointment it was provided that within seven days of their execution, the Arbitrators were to deliver procedural directions as to the dates for the delivery of the pleadings and related documents for the Arbitration. On 10th April, 2019 the Chairman sent his provisional Procedural Direction No.1 to the Parties, asking for their response within three days. The Parties asked for the deadline for their response to be extended as they could not comply with it. In the meantime, draft Terms of Reference, which included a provision that the hearing would take place between 18th and 22nd November 2019, were sent to the Parties for their approval.

[6] On 26th April, 2019 the Chairman issued Procedural Direction No.1 setting out a schedule for the delivery of the pleadings and for discovery in terms to which the Parties had agreed. All the times set out in that schedule were extended by Procedural Direction No.2 on 15th May, 2019 and the time for delivery of the Reply and Defence to the Counterclaim was further extended by Procedural Direction No.3 on 28th June, 2019. By Procedural Direction No.4 on 22nd July, 2019 the date for exchange of documents was extended, a directions hearing was fixed for 6th September, 2019 and it was confirmed that the hearing would take place in Trinidad between 13th and 24th January, 2020.

[7] By emails to the Chairman on 2nd July, 2019 the Parties confirmed that, subject to the change to the hearing date made by Procedural Direction No.4, the Terms of Reference had been agreed. In Clause 6 of the Terms of Reference the Parties confirmed that they had no grounds to object to the Arbitration by way of jurisdiction or otherwise. Part IV contained a broad summary of the Parties' claims and defences and the reliefs sought, designed to enable the Tribunal to appreciate the issues in the Arbitration. Various matters of procedure were set out in Part V.

[8] The Claimant's summary was set out in Clause 9 of the Terms of Reference, as follows:

(i) whether the Respondent was entitled in law and/or fact to terminate the IPSC in relation to the Claimant by its Notice dated 19 December 2017 pursuant to Article 29.1 of the IPSC on the basis that the Respondent had reasonable grounds for suspecting that the Claimant had misconducted itself or otherwise had been involved in wrongful or fraudulent activity and had participated in inappropriate practices in the alleged overstatement of the volume of oil it produced and sold to the Respondent for the period April 2016 to July 2017;

(ii) whether the Respondent was entitled in law and/or fact to retain the sum of TT$84,699,879.47 or any sum referable to the Claimant's unpaid invoices for crude oil supplied to the Respondent during the period 1 June 2017 to 31 December 2017 and which said sum is being held by the Respondent in escrow in the Trinidad and Tobago Unit Trust Corporation's TT$ Income Fund Account No.3299252-2 pending the determination of the arbitration;

(iii) whether the Claimant is entitled in law or/fact to the sum of TT$17,322,320.17 from the Respondent referable to crude oil supplied to and received by the Respondent during the period 1 January 2018 to 18 January 2018 as well as for crude oil supplied to and received by the Respondent during the period 19th January 2018 to 28th February 2018 when A&V vacated the Catshill Field;

(iv) whether the Respondent wrongfully and in breach of Contract terminated the IPSC in relation to A&V by the Termination Letter dated 19 December 2017, by virtue of which the Claimant is entitled to loss and damage; and

(v) whether the Claimant is entitled to specific performance of the IPSC *post* 17 November 2019 on the basis that A&V acted to its detriment in reliance upon Petrotrin's assurances that the IPSC would be renewed and/or extended for a term of 10 years from 18 November 2019 until 17 November 2029.

[9] The Respondent's summary was set out in Clause 10 of the Terms of Reference, as follows:

(i) the Respondent was entitled to terminate the IPSC by way of its letter dated 19 December 2017 giving Notice of Termination pursuant to Article 29.1 of the IPSC or at all on the basis that the Respondent had reasonable grounds for suspecting that the Claimant had misconducted itself or had otherwise been involved in wrongful or fraudulent activity, and had participated in inappropriate practices in the process of the delivery of crude oil to the Respondent;

(ii) as a result of the overstatement by the Claimant of the volume of oil supplied by the Claimant to the Respondent, the Claimant had been overpaid by the Respondent for oil supplied by it and/or the invoices issued by the Claimant to the Respondent did not state a true and accurate volume of oil allegedly supplied;

(iii) consequently, the Respondent was entitled not to pay the Claimant the sum of TT$84,699,879.47 in respect of oil purportedly supplied by it to the Respondent and which said sum is being held by the Respondent in escrow in the Trinidad and Tobago Unit Trust Corporation's TT$ Income Fund Account No. 3299252-2 pending the determination of the arbitration;

(iv) subsequent to the lawful termination of the IPSC by the Respondent, the Claimant submitted invoices to the Respondent claiming the sum

of US$1,305,251.91 in respect of oil delivered in the period 1 January 2018 to 31 January 2018 and the sum of US$979,146.49 in respect of oil delivered in the period 1 February 2018 to 28 February 2018. The Claimant has no entitlement under the IPSC to payment by the Respondent for oil supplied after the date of the termination of the IPSC, which became effective on 18 January 2018;

(v) further, or alternatively pursuant to Article 13.8 and paragraph 3.6 of the IPSC, the Respondent has the right to offset any liabilities to the Claimant against any amounts due and owing to the Respondent by the Claimant. The Claimant is liable to pay the Respondent in respect of Abandonment Contribution for New Wells drilled by the Claimant under Article 20.3 (b) (ii); Abandonment Contribution for infrastructure constructed and installed by the Claimant under Article 20.3(b); (iii) the eventual abandonment of existing wells and decommissioning and removal of existing infrastructure and facilities under Article 20.5(d); costs necessitated by the termination (including mobilization costs) under Article 30.1; and amounts owed by the Claimant in respect of its License Obligations, Oil Impost, Charges for Additional Sales and other expenses under Article 13.

[10] By Procedural Direction No.5 on 10th August, 2019 amended directions were given for the exchange of documents, and the Parties were given an extension of time to notify the Tribunal of an agreed directions Order. By Procedural Direction No.6 on 6th September, 2019 the directions hearing for that date was dispensed with, the Claimant was given liberty to file applications for an Order for specific disclosure and for an Order to amend its pleadings, and directions were made about the filing and exchange of lists of witnesses and documents and a calendar for the delivery of evidence at the evidentiary hearing in January 2020. By Procedural Direction No.8 on 8th October, 2019 permission was given for further amendments to be made to the pleadings. By Procedural Direction No.9 on 28th October, 2019 directions were given as to the Claimant's application for specific disclosure to which the Respondent had served submissions in opposition. A note of reasons for the decision was attached. By Procedural Direction No.10 on 30th October, 2019 the Parties were given permission to further amend the pleadings. By Procedural Direction No.11 on 12th November, 2019 the Respondent was given further time to comply with the Orders and directions for specific disclosure in Procedural Direction No 9.

[11] On 19th November, 2019 the Claimant requested the Tribunal to make an Order for its legal team to conduct a site visit on 21st November, 2019 for the purpose of inspecting the field in preparation for the hearing in January 2020. By Procedural Direction No.12 on 20th November, 2019 the Tribunal declined to order a site visit on that date, to which the Respondent had objected. It directed the Parties to negotiate an alternative date when the site visit could be conducted. On 21st November, 2019 in view of serious doubts as to the ability of all Parties including the Tribunal Members to be ready for a hearing on 13th January, 2020 the Chairman wrote to the Parties proposing that procedural hearings should be substituted for the evidentiary hearing which was to start on that date. It was suggested that this would allow for consideration of the most efficient and least time-consuming method of conducting a full hearing at a later date. It was also suggested that the hearing on liability should be separated from any hearing that might be required for the assessment of damages.

[12] By Procedural Direction No.13 on 29th November, 2019 permission was given to the Respondent to further amend its pleadings and to the Claimant to make consequential amendments, the hearing date of 13th to 24th January 2020 was vacated and a procedural hearing was substituted to be held on 14th January 2020 and if necessary, the two following days. The Parties were requested to assist the Tribunal in the management of the agenda for that hearing. By Procedural Direction No.14 on 6th December, 2019 the Claimant was granted an extension of time to file amendments consequential on the Respondent's amendments.

[13] On 20th December, 2019 the Claimant raised again the issue of a site visit. It sought an Order that the visit be convened on various dates in January 2020. By Procedural Direction No.15 on 24th December, 2019 the Parties were instructed to agree a date for a site visit to take place no later than 13th January, 2020 failing which the Tribunal would make an Order when the site visit was to take place. The decision to hold a procedural hearing on 14th and 15th January, 2020 was confirmed, and the Parties were given a proposed agenda for that meeting. The date for the site visit having been agreed by the Parties, it took place on 13th January, 2020. It was attended by representatives of the Parties, including their legal representatives, and by the Tribunal. The

Procedural Hearing which had been fixed for 14th and 15th January, 2020 then took place.

[14] On 15th January, 2020 the Tribunal issued its decision on the following matters that had been discussed at the Procedural Hearing on 14th January, 2020:

(i) It was noted that the Respondent had departed from the argument referred to in para 1 of the Amended Defence that these proceedings are an abuse of process.

(ii) Bearing in mind that the Respondent had conceded that the Tribunal was not bound by the decisions on the facts before the Courts referred to in that paragraph, the Tribunal reserved its decision as to what weight, if any, to attach to those decisions until after it had heard the evidence.

(iii) Bearing in mind that the Respondent had conceded that the suspicion referred to in Article 29.1 of the IPSC had to be objectively reasonable and that the judgment had to be based on the totality of the material collected, the Tribunal reserved its decision on the other propositions in para 118 of the Re-Re-Amended Statement of Claim as to the proper interpretation of Article 29.1 until after it had heard the evidence.

(iv) The Claimant's application to strike out passages in the particulars of para 43A(a) of the Re-Re-Amended Defence identified in Schedule A to its Re-Re-Amended Reply was refused, as these particulars were provided by the Respondent in response to a call by the Claimant to identify the passage in a report that was already before the Tribunal on which is proposed to rely; but it was to be understood, as this had been expressly conceded by the Respondent, that the Tribunal would not permit any evidence to be led or argument to be developed by the Respondent on issues that had not been clearly and unequivocally identified in the pleadings before the Tribunal.

(v) As it had been already settled that the substantive hearing on liability would precede any hearing on the award of damages that might be required after deciding the question of liability, the Tribunal reserved its position as to what rulings it should make at the liability hearing as to the principles on which damages would be awarded until after it had heard the evidence.

[15] By Procedural Direction No.16 on 15th January, 2020 the Tribunal gave directions on matters of procedure that had been discussed on 14th and 15th

January, 2020. The Parties were to be at liberty to make further amendments to the pleadings, which were to be deemed closed on 17th February, 2020 and dates were set for the filing and exchange of lists of witnesses and documents, for a calendar for the delivery of evidence and for the filing of trial bundles and summaries of the Respondent's cases, all with a view to the hearing taking place in Post of Spain from 8th to 19th June, 2020. Dates were also set for the filing and exchange of the parties' closing submissions and their submissions in reply. By Procedural Direction No.17 on 7th February, 2020 the Claimant was given an extension of time to submit an amendment to its Re-Re-Amended Reply. By Procedural Direction No.18 on 18th April, 2020 the Claimant was given permission to file an amended lists of witnesses.

[16] On 26th March, 2020 as part of the national protocols to address the effects of the Covid-19 pandemic which by now had become apparent, the Prime Minister of the Republic of Trinidad and Tobago announced that from 30th March to 15th April, 2020 all non-essential service providers were required to remain at home to reduce community spread. On 27th March, 2020 the Parties applied by a jointly issued email for an extension of time for the filing of witness statements. By letter dated 28th March, 2020 the Chairman informed the Parties that this request was granted by the Tribunal. He also said that a decision as to the June hearings was being deferred, but that it was increasingly unlikely that the Tribunal could convene at that time.

[17] On 14th April, 2020 the Chairman wrote to the Parties informing them that the Tribunal had reluctantly concluded that the effects of Covid-19 had made it unworkable to proceed with the scheduled hearing in June, and that it should be rescheduled for November/December. By Procedural Direction No.19 on 28th April, 2020 corrected and re-issued on 30th April, 2020 the Parties were directed by the dates stated therein to prepare an agreed chronology, an agreed statement of issues, an agreed statement of issues which could not be agreed and witness statements and expert reports. Dates were given for the exchange of witness statements and expert reports, for liberty to object to any witness testifying as an expert, for the exchange of lists of witnesses for cross-examination, for the submission of a calendar for the delivery of evidence, for the service of trial bundles and for the filing by the Parties of their respective case summaries. It was directed that the evidentiary hearing was to take place from 23rd November to 4th December, 2020 and dates were given for the filing and exchange of closing submissions and submissions in reply, which were to

include all submissions relating to costs, with liberty to the Tribunal to request oral submissions to supplement or clarify the written submissions.

[18] By Procedural Direction No.20 on 22nd May, 2020 the Parties were granted an extension of time to prepare an agreed chronology. By Procedural Direction No.21 on 8th June, 2020 the Parties were granted an extension of time to file and serve the agreed statement of issues and the unagreed statement of issues. By Procedural Direction No.22 on 25th June, 2020 the Respondent was given permission to file an amended list of witnesses. By Procedural Direction No.23 on 29th June, 2020 the Claimant in its turn was given permission to file a further amended list of witnesses. By Procedural Direction No.24 on 29th July, 2020 it was directed that service records of Southern Sales and Service Company would be admitted into evidence without the attendance of a witness.

[19] On 25th August, 2020 the Chairman wrote to the parties requesting them, in view of the Covid-19 spike in Trinidad, to consult with each other as to the way forward. He said that the Tribunal would be comfortable with a virtual hearing. By letter dated 10th September, 2020 the Claimant informed the Chairman that the Parties had agreed in principle that the evidentiary hearing should be convened virtually on the terms set out in that letter. The Tribunal Members and the Parties' legal teams were to participate remotely from their various locations, and the witnesses were to be subjected to virtual cross-examination. It was proposed that a tutorial should be convened on 20th November, 2020 to familiarise the Tribunal and the Parties with the technology. It was contemplated that the Tribunal could issue procedural directions for that hearing, and the Tribunal was requested to give guidelines in a virtual hearing protocol. The Tribunal had been advised that the Parties were not yet in agreement as to whether the hearing was to be virtual or in person, but it was subsequently accepted by both Parties that the continuing effects of Covid-19 made a virtual hearing inevitable.

[20] On 11th September, 2020 the Parties exchanged witness statements and reports. On 18th September, 2020 the Claimant submitted a notice of objection to the Respondent's witnesses Arlene Chow and Newton Wildman giving evidence as experts in certain specified particulars. By a letter of the same date the Respondent gave notice of its objection to the expert report of the Claimant's witness David Aron on the ground that he had not demonstrated his expertise to opine on matters that were identified by paragraph number in that letter.

Notwithstanding that objection, the Respondent said that it did not object to the admissibility of those paragraphs, and that the Tribunal could properly consider the materiality and weight to be given to them following the receipt of his evidence. By Procedural Direction No.25 on 22nd September, 2020 the Tribunal, having noted that the Respondent had made it clear by letter dated 21st September, 2020 that Arlene Chow and Newton Wildman were not being presented as expert witnesses, said that it would determine the materiality and weight to be given to their evidence at the evidentiary hearing.

[21] On 23rd September, 2020 the Chairman wrote to the parties raising the question whether 10 days would be sufficient for the evidentiary hearing, asking them for their views on the time required for cross examination and proposing that there should be a pre-trial case management hearing on 20th October, 2020. On 25th September, 2020 the Parties gave notice of the opposing Party' witnesses whom they wished to cross examine. On 5th October, 2020 the Chairman sent to the Parties, for their comments, a draft protocol for the conduct of the evidentiary hearing by electronic means. On 16th October, 2020 the Claimant sought permission to adduce rebuttal statements by several of their witnesses and rebuttal expert reports. On 19th October, 2020 the Parties submitted their calendars for the delivery of evidence.

[22] On 20th October, 2020 a pre-trial hearing was convened by electronic means. The Tribunal heard submissions from Peter Knox, QC for the Claimant and Deborah Peake, SC for the Respondent. The protocol for the conduct of the evidentiary hearing, which had been revised in the light of the Parties' comments, was agreed. On 22nd October, 2020 having considered the Parties' submissions, the Tribunal issued Procedural Direction No.26, by which the following Orders and directions were made:

(i) The Claimant's application to adduce rebuttal statements was allowed and it was allowed to adduce and rely on a supplemental report by David Aron, if lodged by a given date; the Respondent was to be at liberty to file rebuttal witness statements and expert reports by 16th November, 2020.

(ii) The Claimant was directed to file and serve a paginated, book marked and hyperlinked electronic trial bundle by 2nd November, 2020 and an agreed Core Bundle of documents by 9th November, 2020.

(iii) A test run was to be convened on 12th November, 2020 to familiarise the Tribunal and the Parties with the electronic bundles and the exhibits.

(iv) The Parties were to be at liberty to file and serve their case summaries on or before 13th November, 2020.

(v) The evidentiary hearing was to take place from Monday, 23rd November to Friday, 4th December, 2020 and, if required, from Tuesday, 15th December to Friday, 18th December, 2020.

(vi) Each Party was to file and exchange its closing submissions in writing with a maximum of 100 pages by 15th January, 2021 and its reply submissions with a maximum of 25 pages by 5th February, 2021. Those dates were to be moved to a later date if the hearing did not finish by 4th December, 2020.

(vii) The closing submissions of each Party were to include all submissions relating to costs.

[23] On 4th November, 2020 it was confirmed by Procedural Direction No.27 that the Claimant could adduce and rely on the supplemental report by David Aron, it was confirmed by Procedural Direction No.28 that the electronic trial bundle had been filed with the leave of the Tribunal on 4th November, 2020 and permission was given by Procedural Direction No.29 for the list of authentic documents to be amended to include documents whose authenticity had been agreed on 3rd November, 2020. The test run, for which a draft agenda was circulated on 11th November, 2020 took place on 12th November, 2020 and was completed to the satisfaction of all Parties, including the Tribunal.

[24] The evidentiary hearing took place virtually in accordance with the agreed protocol over 14 days between Monday, 23rd November and Friday, 18th December, 2020. The Claimant was represented by Ramesh Lawrence Maharaj SC, Peter Knox QC, Robert Strang, John Almeida, Ronnie Bissessar, Varin Gopaul-Gosine and its IT Consultant, Andre Soodeen. The Respondent was represented by Deborah Peake SC, Ravi Heffes-Doon, Tamara Toolsie and Marcelle Ferdinand. We are extremely grateful to all of them for their assistance. The following witnesses were called for the Claimant and having spoken to their statements or reports and taken the oath, were cross-examined for the Respondent: Hanif Baksh, Shiraz Rajab, Nazir Ali, Mervyn Mayers, Isaac Soogrim, Arjoon Samdath, Sanathan Maharaj, Vedish Ramlogan, Nikita Kuarsingh, Kierron Darren Yip Ngow, David Aron, Frederic Buse and David Hilliard Williams. The following witnesses were called by the Respondent and having spoken to their statements or reports and taken the oath, were cross examined for the Claimant: Arlene Chow, Donnie Esahack, Newton

Wildman, Jessel Ali, Carlos Alverez, Dianne Lochan, Peter McFarlane and John Wylie.

[25] On 18th December, 2020 the Tribunal gave directions that the Parties should file their closing submissions on or before 19th February, 2021 and their reply submissions on or before 12th March, 2021. By Procedural Direction No.30 on 16th February, 2021 the time for filing and exchanging closing submissions was extended to 26th February, 2021 and for the filing and exchange of reply submissions to 19th March, 2021. By Procedural Direction No.31 on 25th February, 2021 those dates were extended to 3rd March and 24th March, 2021. The Parties filed and exchanged their closing submissions on 4th March, 2021. By Procedural Direction No.32 on 23rd March, 2021 the date for the filing and exchange of reply submissions was extended to 31st March, 2021. The Parties filed and exchanged their reply submissions on that date.

**The Submissions**

[26] In the prayer for relief appended to its Re-Re-Amended Statement of Claim the Claimant invited the Tribunal to make the following Orders:

(i) for payment of TT$84,699,879.47 for the Claimant's unpaid invoices for crude oil supplied to and received by the Respondent during the period 1 June 2017 to 31 December 2017 together with accrued interest pursuant to the IPSC;

(ii) for payment of US$2,284,398.40 (or the appropriate TT$ equivalent) for the Claimant's unpaid invoices for crude oil supplied to and received by the Respondent during the period from 1 January 2018 to 28 February 2018 together with accrued interest pursuant to the IPSC;

(iii) (in the alternative to (ii) above), for payment of TT$17,322,320.17 pursuant to the IPSC for oil supplied from 1 January 2018 to 18 January 2018, together with a further sum referable to crude oil supplied to and received by the Respondent during the period 19 January 2018 to 28 February 2018 by way of quantum meruit or unjust enrichment;

(iv) for payment of US$65,300.00 as damages referable to the Claimant's wasted demobilisation expenditure during February 2018;

(v) for payment of US$415,300,00 as damages referable to the Claimant's reasonable costs of remobilisation in the Catshill Field in the event that the Claimant was permitted to resume its operations in the Catshill Field;

(vi) for payment of US$54,829,765.00 as damages referable to the Claimant's lost and/or reduced earnings from the sale of crude oil to the Respondent during the period 1 August 2017 to 18 November 2019;

(vii) (assuming that the Claimant was not permitted to return to the Catshill Field under a renewed IPSC) for the discounted sum of US$84,388.983.55 referable to the Claimant's lost earnings during the period 19 November 2019 to 18 November 2029;

(viii) an order directing the Respondent to transfer the sum held in escrow in Trinidad and Tobago Unit Trust Corporation's TT Dollar Income Fund No 3299252-2 to the Claimant on account of monies due to the Claimant quantified in (i) to (vii) above;

(ix) an order directing the Respondent to pay to the Claimant, within seven days of the transfer of the monies held in escrow, the balance due and owing by the Respondent to the Claimant;

(x) (alternatively to the order sought at (vii)), a declaration that the IPSC was renewed for the period 19 November 2019 to 18 November 2029, and an order that the Claimant be permitted to return to and remain in the Catshill Field and to continue its operations in accordance with the IPSC (as renewed) during the period 19 November 2019 (or such other date as ordered) to 18 November 2029 and directing the Respondent specifically to perform the IPSC to give effect to the declarations above;

(xi) damages for breach of Contract;

(xii) interest as aforesaid;

(xiii) the costs of these proceedings.

[27] In its Closing Submissions the Claimant renewed its debt claim, referred to in (i) to (iii) of its prayer for relief, in the total sum of US$14,645,174.74 or its equivalent in TT$ for oil delivered to the Respondent for the period from 1st June, 2017 to 28th February, 2018. It also renewed its damages claim for the Respondent's wrongful purported termination of the IPSC on 19th December, 2017 resulting in its wrongful ejection from the Catshill Field on 28th February, claiming in the alternative that the Respondent had waived its right to terminate because it affirmed the continued existence of the Contract by continuing to require the Claimant to perform its obligations under the IPSC and to continue to deliver oil. While reserving the quantification of damages for a further hearing, it invited the Tribunal to determine at this stage whether its future loss should be calculated on the basis that the IPSC, whose term was to end in November 2019, would have been extended for a further period in

the light of (1) the Parties' agreements in July 2016 and (2) assurances given by the Respondent at round that time. It submitted that, in the event that it succeeded on both claims, it would be entitled to an award of costs pursuant to Article 42(1) of the UNCITRAL rules, and it invited the Tribunal to exercise its power under Article 40(1) to fix a separate hearing for the quantification of costs.

[28] In its Closing Submissions the Respondent invited the Tribunal to make the following findings:

(i) that the Respondent lawfully terminated the IPSC under Article 29.1, and that the Claimant's claims at paras (1) to (13) of its prayer for relief should be dismissed;

(ii) that the Respondent did not agree to extend the IPSC for 10 years or at all;

(iii) that the Claimant is liable to the Respondent under Articles 13.2, 13.3, 20.3. 20.3(b)(iii), 20.5(d) and 30.1 of the IPSC upon its termination for (a) an abandonment contribution for new wells drilled by the Claimant, (b) an abandonment contribution for infrastructure constructed and installed by the Claimant, (c) eventual abandonment of existing wells, (d) decommissioning and removal of existing infrastructure, (e) costs necessitated by the termination of the IPSC and (f) other amounts in respect of license fee obligation, oil impost, charges for additional sales;

(iv) that the Claimant is liable to the Respondent in the sum of US$143,892,387.12 under Article 14.15 of the IPSC as the Respondent lawfully discovered that the Claimant was engaging in inappropriate practices in the process of delivery of petroleum, lawfully found that the period in which is a reasonable estimation the inappropriate practices took place was May 2016 to June 2017 and that the Respondent may treat the delivery of petroleum during this period as not having been delivered by the Claimant for the purpose of calculating the service fee of any monies due to the Claimant for oil delivered after July 2017;

(v) that the Claimant is liable for the costs of these proceedings.

**Conclusions**

[29] Having considered the submissions of the Parties and all the evidence, both oral and documentary, that was placed before it, the Tribunal now makes these findings for the reasons set out in the Appendix hereto:

(i) The Respondent has failed to establish that the Claimant was engaged in seal tampering or any other inappropriate practice in the process of the delivery of crude oil to the Respondent during the period from April 2016 to July 2017.

(ii) The Respondent is not entitled to treat any of the crude oil delivered to it by the Claimant during that period as not having been delivered by it in pursuance of Article 14.15 of the IPSC.

(iii) The Respondent did not have reasonable grounds for suspecting that the Claimant had misconducted itself or otherwise been involved in wrongful or fraudulent activity entitling it to terminate the Agreement under Article 29.1 of the IPSC.

(iv) The Claimant is entitled to damages for the wrongful termination of the Agreement, but its claim for future loss of earnings cannot be extended beyond 18th November, 2024.

[30] In consequence of the above, the Tribunal makes the following orders:

(i) The Claimant is entitled to payment of the sum of TT$84,699,879.47 referrable to the sums due on its unpaid invoices during the period from 1st June, 2017 to 31st December, 2017 together with interest at the rate of 3 per cent per annum from the due date of each invoice until the date when the principal sum due was paid into escrow.

(ii) The Claimant is also entitled to payment of the sum of US$2,284,398.40 in respect of the amounts invoiced by it for crude oil supplied to the Respondent during the period from 1st January, 2018 to 28th February, 2018, together with interest at the rate of 3 per cent per annum from the date when each payment fell due until the date of this Award.

(iii) The amounts referred to in (i) and (ii) above are to be drawn down by the Respondent from the sum held in escrow in Trinidad and Tobago Unit Trust Corporation's TT Dollar Income Fund No.3299252-2.

(iv) The Order referred to in (iii) above is subject to the condition that the sum held in escrow in Fund No.3299252-2 must continue to be held in escrow, pending a decision as to whether the Respondent is entitled to payment of the amounts claimed in Heads 2 to 6 of the Counterclaim.

(v) Head 1 of the Respondent's Counterclaim for the sum of US$143,892,397.12 pursuant to Article 14.15 of the IPSC is dismissed.

[31] Our decisions as to the following matters are reserved for further consideration:

(i) The quantum of the damages to which the Claimant is entitled for the wrongful termination of the Agreement.

(ii) Whether the Respondent is entitled to payment of the sums claimed in Heads 2 to 6 of the Counterclaim.

(iii) The costs of the proceedings.

[32] The procedure to be followed for the consideration of the matters referred to in paragraph 31 will be subject of Procedural Directions to be issued by the Chairman.

**Sir Dennis Byron**
Chair

**Lord David Hope**
Arbitrator

**Justice Humphrey Stollmeyer**
Arbitrator

As at Port of Spain,
Trinidad.
June, 2021

## APPENDIX

### Reasons for Award

[1] The dispute in this case arises out of a decision by the Respondent to terminate a Contract under which the Claimant was engaged to take possession of and explore and extract petroleum from lands in Trinidad known as the Catshill Block (referred to in these proceedings as "the Catshill Field") and deliver it to the Respondent. The Contract, which was called the Incremental Petroleum Services Contract ("IPSC") [5291], was dated 16th November, 2009. The term of the Contract was 10 years from that date. The Claimant took possession of and explored the Catshill Field and began to deliver to the Respondent the oil that it had extracted from it. By a letter dated 19th December, 2017 [2595] the Respondent gave notice to the Claimant that it had decided to terminate the Contract pursuant to Article 29.1 of the IPSC. The termination was to become effective upon the expiry of 30 days from the receipt of that notice. The reason that was given for taking this decision was that there were reasonable grounds for suspecting that the Claimant had misconducted itself or otherwise been involved in wrongful or fraudulent activity in the overstatement of the volume of oil it produced and sold to the Respondent for the period from April 2016 to July 2017. The Respondent gave notice that it had also decided to exercise the remedies provided for by Articles 14.15 and 30.1 of the IPSC. The dispute arose because the Claimant denied that there were grounds for terminating the Contract or exercising these remedies. It applied to the High Court for interim relief pending resolution of the dispute, and it was granted stays of execution pending the determination of appeals. It remained in possession of the field after the expiry of the period of notice and it continued to deliver oil to the Respondent. But when its final appeal was dismissed, it was ordered by the Respondent to demobilise and vacate the field. It did so on 28th February, 2018.

### Outline of Events

[2] The Claimant was required by the IPSC to invest in improving oil production from the Catshill Field by, among other things, conducting a comprehensive survey of the field, working over existing wells using its production rigs, drilling new wells using its drilling rigs and improving the infrastructure to

facilitate increased production. Its production levels were low at the outset, and only began to increase from mid-2015 when new wells and work over existing wells started to produce returns from the investment. It then turned its mind to increasing its investment with a view to carrying out a drilling programme of new wells to increase production. On 18th April, 2016 [2449] it wrote to the Respondent seeking its commitment to renew the IPSC for a further 10 years to 2029. It explained that it expected to complete its work obligations by the end of that month with the drilling of its last commitment well. It had already offered to drill an additional 12 wells commencing in May 2016. At the end of that drilling programme it would offer to drill up to 22 additional wells, making up a total of up to 40 wells drilled in the field. It said that an extension of the Contract was required to make that programme economic. By letter dated 13th June, 2016 [2451], in reply to the Claimant's letter of 18th April, 2016 the Respondent said that its Board of Directors had approved a series of revisions to the IPSC which altered the over-riding royalty rate, the base production rate and the first tranche crude oil rate provide for by Schedule C of the IPSC. Although it did not commit itself to renewing the IPSC for a further 10 years as had been requested, the period of years set out for the revised base production rate and the first tranche crude oil rate extended for five years beyond the term of the Contract to the end of 2024.

[3] At a quarterly meeting on 16th June, 2016 [4436] the Claimant informed the Respondent of its plan to embark on an aggressive drilling programme. It reminded the Respondent of its request for a renewal of the term of the Contract for another 10 years and asked for an urgent response to that request. By Supplementary Agreement No.6 dated 18th July, 2016 [2771] the series of revisions to the IPSC referred to in the Respondent's letter of 13th June, 2016 were agreed. Article 3 of the IPSC as to the term of the Contract was deleted and replaced by a new Article which stated that, if the Claimant had given written notice of its desire to renew the Contract for a further term of five years prior to the expiry of its term, the Parties would use their best endeavours to negotiate in good faith the terms on an agreement for the renewed term. The Claimant says that in reliance on that agreement it charged the Respondent on the basis of the changed royalty rates in its invoices, and it invested a substantial sum in drilling new wells to increase its production. In October 2016, following the giving of approval on 4th October, 2016 by the Ministry of Energy and Energy Industries [2482-5], Sales Tank No.7 at Gathering Station

No.2 was converted from a wash tank to a sales tank under the supervision of the Respondent and the Ministry.

[4] In January 2017 the Head of the Respondent's Custody Transfer Exploration and Production Department ("E&P") informed Internal Audit that the Refining and Marketing Custody Transfer section at Pointe-a-Pierre had been reporting increasing monthly shortages in the crude oil it had been receiving from it since August 2016 and asked for the matter to be investigated. On 17th January, 2017 Vidya Deokiesingh took up duty as the Respondent's Crude Procurement Specialist and Custody Transfer Representative at Catshill Field. A second sales pump, the GASO pump, was installed to supplement the pumping capacity, which until then had been provided by the existing Worthington pump. The Claimant says that it was in operation from 10th March onwards, but this date is disputed by the Respondent. By letter of 3rd April, 2017 [2506] the Claimant asked the Respondent to increase the sales days for crude oil produced at Catshill, as two sales days were insufficient for its production and it was making considerable investment in the field, having drilled 29 wells to date and planned to continue its drilling programme for the remainder of the year. On 5th July, 2017 [2508] the Respondent instructed the Claimant, in view of recent events including the unauthorised drilling of wells CO-160X and CO-168X, to suspend all drilling activities at Cashill with immediate effect.

[5] On 11th July, 2017 the Respondent's Internal Audit team visited Catshill. On 12th July, 2017 Jessel Ali assumed duty as the Respondent's Custody Transfer Representative at Catshill in place of Vidya Deokiesingh. On 4th August, 2017 [2514] the Respondent wrote to the Claimant saying that, following a meeting on 3rd August, 2017 it was agreeable to allowing the Claimant to resume drilling activities, subject to strict compliance with its contractual obligations, regulations and the law in the conduct of operations under the IPSC. In a letter to the Claimant dated 14th August, 2017 [2516] the Respondent said that it had discovered certain inappropriate practices in the process of the delivery of oil under the IPSC for the period January to June 2107, which it was currently investigating. In view of the impact that might have on the volumes of oil delivered to and paid for during that period, the Respondent would be withholding payment under the Claimant's latest invoice in accordance with Article 14.15 of the IPSC until such time as the volumes delivered from Catshill during that period had been verified and any adjustments made. In its reply

dated 15th August, 2017 [2520] the Claimant said that it would comply fully with that investigation. On 17th August, 2017 the Internal Audit Department produced a report ("the Audit Report") [5465] in which it said that its evidence suggested that there had been fraudulent activity in the Catshill Field in that the Claimant, in collusion with Vidya Deokiesingh, had been overstating Catshill's production for at least six months. On 21st August, 2017 the Internal Audit Department produced a Supplementary Report [2778] which identified deficiencies in the controls governing the transmission of crude oil from the fields to the refinery at Pointe-a-Pierre.

[6] On 10th September, 2017 the Leader of the Opposition, reading from a document which she said was the Audit Report, made a public statement alleging fraud by the Claimant. In a letter dated 14th September, 2017 [2526], referring to statements made by the Respondent to the media which she said implicitly supported that allegation, the Claimant's Attorney, Ms. Vijaya Maharaj, said that this was the first time the Claimant had been informed of it as it had not received the Audit Report or been asked to respond to any of its allegations. She said that she had been advised, for reasons set out in detail in that letter, that the Audit Report's findings were baseless and without foundation and called upon the Respondent immediately to correct the record. On 30th September, 2017 the Respondent announced in the press that it had retained Kroll Consulting Canada Co ("Kroll") to probe what was referred to as the fake oil scandal. On 17th November, 2017 the Respondent issued a media release [2562] saying that its findings had been confirmed by Kroll and that an additional report by Gaffney Cline had also found that the reservoir was not capable of producing the volumes in question. By letter dated 21st November, 2017 [2563] the Claimant asked the Respondent for payment of the monies retained by it under Article 14.15 for the period 1st June, 2017 to 31st October, 2017 as an appropriate interim measure until it had completed its investigations. By letter dated 27th November, 2017 [2565] the Respondent said that it was still in the process of considering the reports prepared by Gaffney Cline and Kroll and that they were confidential and privileged. By letter dated 29th November, 2017 [2566] the Claimant's Attorney gave notice that a dispute had arisen between the Parties in relation to the IPSC for the purposes of Article 36, details of which were set out in that letter. She proposed that the Parties attempt to resolve it by negotiation or, failing that, by mediation in accordance with Articles 36.2 and 36.3 of the IPSC. By letter dated 1st December, 2017 [2571] she proposed a conference on 4th December,

2017 and identified three independent third parties who had appropriate experience to act as mediator for the purposes of Article 36.3.

[7] On 1st December, 2017 [2573] the Respondent wrote to the Claimant saying that, after a careful review of the Kroll and Gaffney Cline reports, which it again said were privileged and confidential, it had formed the view that there were reasonable grounds for suspecting that the Claimant had misconducted itself or had otherwise been involved in wrongful or fraudulent activity and had participated in inappropriate practices in the delivery of oil to the Respondent over the period from April 2016 to July 2017. It set out thirteen reasons for taking this view and invited the Claimant to respond within 7 days. It did not say that it was proposing to terminate the IPSC. By a further letter dated 1st December, 2017 [2577] the Respondent's Attorney disagreed that a dispute had arisen, saying that the proposal for negotiations was premature. The Claimant responded by letter dated 8th December, 2017 [2584], denying that it had been involved in any wrongful or fraudulent activity. It answered each of the reasons in turn and invited the Respondent to attempt to negotiate resolution of the dispute in good faith in accordance with Article 36.2, and to agree to an independent mediator if the negotiations were unsuccessful.

[8] By a letter dated 19th December, 2017 [2595] the Respondent informed the Claimant that it had decided to terminate the IPSC pursuant to Article 29.1. The termination was to become effective upon the expiry of thirty days from the receipt of the notice. On 22nd December, 2017 [2598] the Claimant's Attorney wrote to the Respondent disputing the validity of the notice of termination, saying that she did not accept that the Kroll and Gaffney Cline reports were privileged and confidential and formally activating the negotiation phase of the dispute resolution provisions in Article 36 of the IPSC. She said that, for the reasons set out in her letter, the Respondent was in breach of the requirement of Article 36.2 that the Parties should attempt to resolve disputes in good faith. She identified the issues in dispute and the Claimant's grounds for putting them in issue as set out in the letter of 8th December, 2017. She asked for an urgent conference and gave the names of three proposed nominees as Mediator. She also asked that the Claimant should be allowed to continue to operate the Catshill Field pending the determination of the determination of the negotiation and mediation process. By letter dated 28th December, 2017 [2606] the Respondent maintained the validity of the notice of

termination. But it said that it was ready and willing to participate in amicable negotiations and it agreed to a meeting.

[9] A meeting for negotiations took place on 4th January, 2018. It was followed by another meeting on 9th January, 2018. That meeting was preceded by a letter from the Claimant's Attorney of the same date [2652] in which she again requested the Respondent to agree, without prejudice, to stay the operation of the notice of termination pending the resolution of the dispute. She asked the Respondent to permit the Claimant to continue to perform the IPSC, without prejudice to the Respondent's rights, and to pay for the supply of crude oil from 1st January, 2018. She proposed that the monies referrable to that supply should be paid by the Respondent into an escrow account pending resolution of the dispute. Following that meeting and again by a pre-action protocol letter dated 11 January 2018 [2655] the Claimant' Attorney informed the Respondent that, unless it agreed to its proposed interim measures to maintain the status quo, the Claimant intended to commence proceedings in the High Court to seek interim relief for a stay to suspend the operation of the notice of termination. On 12th January, 2018 [2666] the Respondent refused to stay the operation of the notice of termination.

[10] On 15th January, 2018 the Claimant initiated its proceedings for relief in the High Court, seeking an interim injunction restraining the Respondent from ejecting it from the Catshill Field [5023]. On 17th January, 2018 Quinlan-Williams J refused the Claimant's application [5252]. The Claimant appealed to the Court of Appeal and was given a stay of execution pending the determination of the appeal. On 8th February, 2018 the Court of Appeal dismissed the appeal [2529], and the Claimant was given a further stay of execution pending an appeal to the Judicial Committee of the Privy Council. On 26th February, 2018 the Claimant's application for permission to appeal was dismissed by the Privy Council. It was then ordered by the Respondent to demobilise and vacate the field, which it did on 28th February, 2018.

**The Issues**

[11] The following summary is taken from a Statement of Agreed Issues that was delivered to the Tribunal by the Claimant on 12th June, 2020 in accordance with Procedural Direction No.21, read together with the Claimant's list of the issues for determination in its Closing Submissions, paras 1-6.

(i) *The Claimant's debt claim and the Respondent's set-off and counterclaim*

1. Is the Claimant entitled to payment of the sum of TT$84,699,879.47 paid into the escrow account in respect of amounts invoiced by the Claimant for the period 1st June, 2017 to 31st December, 2017?
2. Is the Claimant entitled to payment of the sum of US$1,305,259.19 (or the TT$ equivalent thereof) being the amount invoiced by the Claimant to the Respondent for the period 1st January, 2018 to 31st January, 2018 and US$979,146.49 (or the TT$ equivalent) being the amount invoiced by the Claimant to the Respondent for the period 1st February, 2018 to 28th February, 2018?

(ii) *The Claimant's damages claim*

1. Did the Respondent have reasonable grounds for suspecting that the Claimant had misconducted itself or had otherwise been involved in wrongful or fraudulent activity entitling the Respondent to terminate the IPSC under Article 29.21 thereof?
2. If the Respondent did have reasonable grounds for suspecting that the Claimant had misconducted itself or had otherwise been involved in wrongful or fraudulent activity entitling it to terminate, did it waive or lose that right by election, by positive acts consistent only with an intention to treat the IPSC as continuing, or by failing to make a decision to terminate within a reasonable time after it knew of its right to do so?
3. Was the Respondent required to exhaust the dispute resolution procedure under Article 36 of the IPSC before terminating the same pursuant to Article 29.1 thereof?
4. If the Respondent was not entitled to terminate the IPSC under Article 29.1, is the Claimant entitled to damages for its wrongful termination?
5. Did the Respondent agree with the Claimant that the term of the IPSC would be renewed or extended from November 2019 for a further 10 years (or alternatively 5 years) or is it estopped from denying that it should be so extended?
6. Is the Claimant entitled to specific performance of the IPSC post 17th November, 2019 on the basis of the alleged agreement to renew or extend the IPSC or proprietary (or other) estoppel?

(iii) *The Respondent's contractual claims*

Is the Claimant liable to pay the Respondent and/or is the Respondent entitled to offset its liabilities to the Claimant (if any) against the following:

(a) Abandonment Contribution for new wells drilled by the Claimant pursuant to Articles 20.1 and 20(3)(b) of the IPSC of US$7,703.228.81, for infrastructure constructed and installed by the Claimant pursuant to Article 20.3(b) (iii) of US$4,235,353.55, eventual abandonment of existing wells of US$5,822,927.46 and decommissioning and removal of existing infrastructure of US$241,984.40 pursuant to Article 20.5(d);

(b) Costs necessitated by the termination of the IPSC (including mobilization costs) that would otherwise not have been incurred under Article 30.1 in the sum of US$10,000.00;

(c) The following sums pursuant to Article 13.2 and 13.3 of the IPSC in respect of:

(i) License fee obligation: US$2,528,662.41;

(ii) Oil impost: US$569,074.95;

(iii) Charges for additional sales: US$93,375.00

(iv) Other (map): US$2,923.00; and

(v) Interest on all sums due to the Respondent.

**The IPSC**

[12] The preamble to the IPSC [5291], in which the Respondent is referred to as "the Client" and the Claimant is referred to as "the Contractor", states that in consideration of the Client paying the Service Fee and the Contractor undertaking to observe the terms and conditions thereof the Client thereby engages the Contractor with effect from 18th November, 2009 (the "Effective Date") to perform the Work for the purpose of the production, transportation and delivery of petroleum from the well head in relation to each of the existing wells and the new wells, as the case may be, to the place where its physical delivery passes to the Client ("the Delivery Point"). The definition of the expression "the Work" includes the construction and installation of infrastructure, including a delivery and measurement system for petroleum and its maintenance, the operation and management of the wells and any activities and operations necessarily ancillary to those tasks, to facilitate the production, transportation and delivery of petroleum from the well head to

the Delivery Point. The terms and conditions which the IPSC sets out are detailed and comprehensive to a high degree, as one would expect given the need for accuracy in the measurement of the valuable commodity that was to be extracted and delivered to the Respondent. For present purposes it is necessary to quote only those provisions that lie at the heart of this dispute.

[13] Article 14, which is headed "Delivery and Measurement of Petroleum", includes the following:

> "14.15 Without prejudice to any other remedy it may have available, including termination of this Agreement, if the Client should discover seal tampering or any other inappropriate practice in the delivery of Petroleum to the Client, then during the period it considers in its reasonable estimation that seal tampering or any other inappropriate practice has been taking place having regard to the relevant circumstances, the Client may, at its discretion, treat the delivery of Petroleum during such period as not having been delivered by the Contractor and the value thereof for the purpose of calculating the Service Fee shall be deducted from any monies due to the Contractor from the Client."

[14] Article 29 [5335], which is headed "Termination", includes the following:

> "29.1. In addition to the right to terminate this Agreement contained in Articles 27, 41 and 46, the Client may terminate this Agreement by thirty (30) days Notice to the Contractor if the Client has reasonable grounds for suspecting that any member of the Contractor's Group has misconducted itself or otherwise been involved in wrongful or fraudulent activity and the Client shall be entitled to exercise its right to continue the Work in similar manner and on similar terms and conditions as contained in Article 27.4. Termination of this Agreement shall become effective upon the expiry of the said thirty (30) days from the date of receipt of the Notice by the Contractor."

[15] Article 30, which is headed "Consequences of Termination", includes the following:

> "30.1 If the Client terminates this Agreement for any breach or default on the Contractor's part, the Client shall have the right to perform the Work with or without the assistance of Third Parties, without incurring liability to the Contractor. The Contractor shall pay the Client for actual

direct costs reasonably necessitated by the termination that would otherwise not have been incurred, including, without limitation, as applicable, any additional mobilizing and demobilizing costs incurred by other contractors, and excess costs incurred in obtaining performance of Work during the remaining period of the Term by other contractors and their subcontractors or by the Client, plus any damages resulting from delay incurred as a result of the termination."

[16] Article 36, which is headed "Governing Law, Dispute Resolution and Independent Expert", includes the following:

> "36.2 The Parties will attempt in good faith to resolve any dispute or difference arising out of or relating to this Agreement36.3 If the Parties are unable to resolve the matter through negotiations then either of the Parties shall be entitled to refer the matter in dispute within thirty (30) days of the dispute to an independent Third Party selected by mutual agreement who shall mediate and have the matter in dispute settled within a maximum period of twenty-one (21) days after the appointment of the mediator. The Third Party shall act as an amicable compositor only and not as an arbitrator."

[17] Article 36.4 provides for the appointment of a Mediator if the Parties cannot agree on the appointment of a Mediator under Article 36.3. Article 36.5 provides that, if mediation fails to settle the matter in dispute, it shall be referred by either Party to Arbitration.

[18] There are a number of issues as to the proper interpretation of Article 29.1 that require to be considered at this stage.

[19] First, there is the meaning to be given to the phrase "reasonable grounds for suspecting". We note that the contractual test is based on suspicion, not belief. There is a difference between the evidential threshold implied by these two words. The phrase used here sets a standard that is less exacting. On the other hand, the qualification introduced by the words "reasonable grounds" provides the other party to the Contract with an important safeguard against an arbitrary use of the power. We consider that full weight must be given to those words, bearing in mind the consequences of termination for that other Party referred to in Article 30.1. That is the point that the Claimant seeks to make when it submits that the suspicion to which Article 29.1 refers had to be

held in good faith and be objectively reasonable: Re-Re-Amended Statement of Claim, paragraph 118(2) [92]. The suspicion must be based on facts or inferences based on facts, not on suppositions or assumptions.

[20] The Respondent's position, as stated in the second paragraph of para 43 of its Re-Amended Defence, was that the Tribunal should not substitute itself for the contractually agreed decision maker and conduct a merits based determination of whether there were reasonable grounds under Article 29.1 [254]. It renewed its submission that this was the proper approach for the Tribunal to take to the assessment of what it referred to as its "contractual discretion" in submissions made in response to the Claimant's application for specific disclosure and further information which were sent to the Tribunal by its Attorney on 11th October, 2019. Its argument was set out in paragraph 12 of that submission in these terms:

> "We submit that the proper approach of the Tribunal to the assessment of Petrotrin's contractual discretion should be in accordance with the guidance given in *Braganza BP Shipping Ltd* [2015] 1 WLR 1661 cited by A &V in para 118(5) of its Amended Statement of Claim, that is to say, by way of analogy with public law principles applicable in determining whether a public authority acted rationally. The issue to be determined is whether a reasonable person in the position of Petrotrin could have decided that there were reasonable grounds to suspect misconduct by A&V. In our respectful view the Tribunal should not substitute its judgment for the contractually agreed decision maker and conduct a merits based determination of whether there were or were not in fact such reasonable grounds."

[21] In our opinion, this position was hard to justify, having regard to the language used in Article 29.1. Unlike Article 14.15 which uses the phrases "in its reasonable estimation" and "at its discretion" with regard to the decisions to be made under that Article, there is an absence of words to show that for the purposes of Article 29.1, the Respondent was the agreed decision maker. Furthermore, the relevant words of the contract that was before the UK Supreme Court in *Braganza* were "if in the opinion of the Company or its insurers" the death resulted from the officer's fault or misconduct. The words "in the opinion of" are absent from Article 29.1. So, we would not have been able to uphold that submission that it was not open to us to conduct a merits based decision as to whether there were reasonable grounds for the suspicion.

On 30th October, 2019 the Respondent, having been permitted to make amendments to its defence by Procedural Direction No.10, deleted the second paragraph of para 43 from its defence. Its position now, as set out in para 97 of its reply submission, is that the question for the Tribunal is whether a reasonable person acting in the position of the Respondent could have decided that there were reasonable grounds to suspect misconduct by A &V.

[22] As we understand it, the Respondent no longer submits that it is not open to us to examine the grounds for ourselves to determine whether it had reasonable grounds for its decision to terminate. Of course, we must recognise that the decision was not ours to take. But the contractual context in which those words appear, without the qualifications that are set out in Article 14.15, indicates that our task must be to consider whether the decision to terminate was made in good faith and whether, all necessary enquiries having been made, the grounds for the suspicion on which the decision was based were objectively reasonable.

[23] Then there is the question, how in the events that have happened, we should approach this task? The Claimant refers in paragraph 325 of its Closing Submissions [89] to a passage in the judgment of Teare J in *Pacific Basin IHX v Bulkhandling Handymax* [2012] 1 CLC 1, para 55, in support of the proposition that the Respondent had to show that it made all reasonable and necessary enquiries of fact which a reasonable person would have made. In that passage the Judge said that, where a contract conferred a discretion or a power, the judgment reached must be objectively reasonable and that a person who wishes to ensure that his judgment is objectively reasonable will make all necessary enquiries. In this case Article 29.1 conferred on the Respondent with what he described as a power, not a discretion. But, as the Judge made clear, that is a distinction without a difference. They must both be exercised in the same way.

[24] In its Reply Submissions, the Respondent makes these submissions with regard to Teare J's judgment in *Pacific Basin* [25]:

> "99. That decision says that if a party makes those enquiries which it considers sufficient, but fails to make all necessary enquiries before reaching its judgment, its judgment will not be judged unreasonable 'if in fact it was an objectively reasonable judgment and would have been shown to be so had all reasonable enquiries been made'.

> 100. Thus a finding that Petrotrin did not make all necessary inquiries before issuing the notice of termination on 19 December 2017 will not invalidate the decision to terminate. The question is 'had all necessary inquiries been made' would Petrotrin's decision have been objectively reasonable. The Tribunal now has before it all the material which those enquiries would have yielded (and more) and is able to determine whether Petrotrin's decision to terminate would have been shown to be objectively reasonable."

[25] We agree with what the Respondent says in those paragraphs, although we note that in paragraph 101 it submits that it did in fact make reasonable enquiries and did act fairly before it made its decision to terminate the IPSC. We conclude from what it says there that the first issue for us is whether the Respondent did make all necessary inquiries and whether it acted fairly before it made that decision. The onus is on the Claimant to show that it did not. If that onus is satisfied, it then shifts to the Respondent to show that its decision would have been objectively reasonable if it had had all the material that is now before the Tribunal when it made that decision.

**The Decision to Terminate**

[26] The following narrative of the events leading up to the service of the Notice of Termination on 19th December, 2017 is taken from documents in the trial bundle whose authenticity is agreed, read together with relevant passages in the Re-Re-Amended Statement of Claim and the Re-Amended Defence.

[27] The first indication to the Claimant that the Respondent was in possession of reasons for suspecting that there were grounds for terminating the IPSC was in the Respondent's letter dated 14th August, 2017 [2516]. The Respondent said in that letter that it had discovered certain inappropriate practices in the process of the delivery of oil for the period January to June 2017, that it was currently completing its investigation and that it would not be paying the Claimant under its invoice of July 2017 until the volumes delivered from Catshill during that period had been verified. In its reply of 15th August, 2017 [2520] the Claimant assured the Respondent of its fullest co-operation into this issue. It also gave some details about its activities during this period, and pointed out that the Respondent's own staff had spent considerable time at

Catshill reviewing its facilities. On 17th August, 2017 the Audit Report [5465] was delivered to the Respondent by its Internal Audit team. The purpose of the investigation had been to determine why the crude oil volumes received at Pointe-a-Pierre were significantly less than the volumes claimed to have been produced and pumped from the fields for the period from August 2016 to June 2017.

[28] The Audit Report referred to the team's visit to Catshill on 11th July, 2017. It said that the Eastern District was the most likely source of the problem at Pointe-a-Pierre, and that all of the fields there except for Catshill had relatively constant production during the relevant period. It noted that there had been three employees from the Respondent's custody transfer team who had been responsible for the witnessing of the fiscalisation process at Catshill from July 2016: Suresh Maharaj to December 2016, Vidya Deokiesingh from January to 11th July, 2017 during which period, it was said, the shortage in the crude oil sent to Pointe-a-Pierre had been become more significant, and Jessel Ali from July 2017. Its analysis had revealed that there was a positive correlation between the increase in the shortage of crude oil received at Pointe-a-Pierre and the increase in Catshill's production, and that the custody transfer process at Catshill was compromised during the period January to June 2017. It noted, among other details, (i) that numerous wells were not producing on 11th July 2017, (ii) that wells that had been producing high volumes in previous weeks "suddenly stopped producing when the auditors turned up at the Catshill field", (iii) that, as the Joint Venture Department was relying solely on the operator's production information, it was easy for the Claimant, in collusion with Mr. Doekiesingh, to manipulate the fiscalisation process, (iv) that, following Mr Deokiesingh's removal on 11th July, 2017 the Claimant's reported daily production and fiscalised volumes decreased significantly and (v) that a test performed on the sales pump, translating to a rate of 85 bbls/hr, was significantly lower than the rate of 350 bbls/hr provided by the Joint Venture department. Details were also given of instances where Mr. Deokiesingh was present only for a short time during fiscalisation, and where he was present in the Claimant's head office when he had no reason to be there.

[29] In its summary of findings and conclusions the Audit Report stated that the team had concluded that the custody transfer process at Catshill had been compromised resulting in the fraudulent overstatement of production, and that this was the main contributing factor to the shortage at Pointe-a-Pierre. It

said that its visit on 11th July, 2017 and the removal of Mr. Deokiesingh seemed to have a debilitating and paralyzing effect on production. It again stated that Catshill's high producing wells suddenly waxed up or sanded up on the day of the visit, while other wells simply stopped producing. Since 11th July, 2017 there had been increased oversight, and the reported and fiscalised production at Catshill had decreased significantly. The evidence suggested that there had been fraudulent activity in the Catshill field for at least six months, that the Claimant had been taking advantage of control weaknesses in the Respondent's processes to perpetuate a fraud on the Respondent and that there was wilful misconduct by Mr. Deokiesingh during the period from January to June 2017. By a letter dated 25th August, 2017 [2522] the Respondent's President, Mr. Fitzroy Harewood, told the Claimant that, following the Audit Department's investigation, the Respondent was evaluating the situation and seeking independent confirmation of its findings, following which it would inform it of its findings and give it an opportunity to respond. He said that it would be withholding payment on the Claimant's July invoice until its findings had been independently confirmed, but at that stage it was making no election to affirm or terminate the IPSC.

[30] On 10th September, 2017 during a public political meeting the Leader of the Opposition read from a document which she said was the Audit Report. On 11th September, 2017 the Claimant obtained a copy of the Audit Report which had been placed, without the Respondent's consent, by third parties in public domain and circulated on social media. On 14th September, 2017 [2526] the Claimant's Attorney wrote to the Respondent's newly appointed Chairman, Mr. Wilfred Espinet, complaining about the Respondent's media statements on 12th September, 2017 which were said to have implicitly supported the Leader of the Opposition's allegations that the Claimant had fraudulently received US$11.5M from the Respondent by overstating its production of crude oil which was sold to the Respondent. She said that the Claimant had not been consulted by the auditors or invited to make any representations in its favour prior to or upon the Report's publication, and that it had been delivered to the Opposition notwithstanding that it was an interim report for internal use only. The first notice it had received of the specific allegations was in media reports of the statements made by the Leader of the Opposition on 10th September, 2017. She also said that her preliminary instructions were that the Report was, for various reasons set out in her letter, baseless and without foundation. She called upon the Respondent's Chairman and its

President to issue a public statement affirming that the Report's findings were preliminary and to withdraw any statements or inferences that suggested that the Claimant was guilty of fraudulent conduct. On 27th September, 2017 [2545] the Respondent's President, replying to the letter of 14th September, 2017 declined to issue the public statement that had been requested. He said that the public disclosure of the Audit Report had not been authorised by the Respondent and that it was not responsible for, and did not endorse, the opinions expressed by other persons in the public domain in reference to the contents of the Audit Report. As regards payment of the July and August invoices, he said that the findings in that Report clearly indicated that certain inappropriate practices had been discovered in the process of delivering crude oil to the Respondent. However, it was willing to permit the Claimant to continue operations until a final decision had been made based on the conclusion of the investigation in which it anticipated the Claimant would be involved.

[31] By letter to the Respondent dated 28th September, 2017 [2551] the Claimant's Attorney said that the Claimant wished to make it clear that, notwithstanding its differences with the Respondent, it was not interested in activating the dispute resolution provisions in the IPSC unless that was absolutely necessary. But it was interested in cooperating with the Respondent to have the matter resolved. She suggested that a meeting be convened by the Respondent with the Claimant to attempt to resolve the matter before the dispute resolution provisions were resorted to. She accepted the statements in the Respondent's letter of 27th September, 2017 that neither the Respondent nor its Chairman were responsible for the publication of the Audit Report and that they did not support or corroborate the allegations made by the Leader of the Opposition. But she again stated that the Claimant was at no time part of the Internal Audit investigation, and that it was never informed of the allegations against it or given an opportunity to make representations in its favour in relation to it. She went on to identify the various stages in the procedures for the sale and supply of oil to the Respondent that involved the active participation of the Respondent's custody transfer official to show that the volumes and quantities of oil which were the subject of the Claimant's unpaid invoices had been accepted by the Respondent, She also said that the high volume of sales that were achieved during the period 1st January, 2017 to 30th June, 2017 were because of its heavy and continuous drilling programme, that an audit conducted by another of the Respondent's departments in July and August

2017 did not support the irregularities identified in the Audit Report and that the Audit Report had failed to take into account the reasons for the decrease in production in July 2017. She asked for a meeting to be convened on a mutually convenient date during the week commencing 2nd October, 2017.

[32] On 25th October, 2017 [2558] the Claimant's Attorney wrote to the Respondent stating that the Claimant had observed a media report in which the Respondent stated that it had retained Kroll Consulting Canada to conduct a forensic examination into the Audit Report's findings. She said that the Claimant remained committed to cooperation with the Respondent to resolve their differences, and that it had retained its own foreign investigator with similar expertise to Kroll. She asked that the Claimant be given reasonable notice of the anticipated meeting and particulars of the matters that the Respondent wished to discuss or required the Claimant's response. In its reply dated 31st October, 2017 [2560] the Respondent said, with respect to the proposed meeting, that it might be more appropriate for the Claimant to advise it of the issues it wished to discuss and that its preference was for its investigations to be completed prior to meeting with the Claimant. It reiterated that at that stage it made no election to affirm or terminate the IPSC. The Respondent then received a report from Gaffney Cline which was dated 6th November, 2017 [2204] on the feasibility of the Catshill field to produce the quantities of oil reported by the Claimant for its reservoirs. Its conclusion was that there was no technical basis to support the production reported during the period from April 2016 to July 2017. This was followed by a Report dated 13th November, 2017 from Kroll [5690], which expressed agreement with the findings set out in the Audit Report that the discrepancies and shortages in the volumes of crude oil as supplied to Pointe-a-Pierre originated from Catshill, that the fiscalisation process there had been compromised by the improper conduct of Mr. Deokiesingh between 16th January, 2017 and 19th January, 2017 and that, as indicated in the Gaffney Cline report, fiscalised crude oil volumes appeared to commence deviating from their estimate of actual production in April 2016. Kroll noted that it had not had the opportunity to interview Mr. Deokiesingh, who had not responded to communications from the Respondent and whose current location was unknown.

[33] On 17th November, 2017 the Respondent published a media release [2562] in which it stated that its initial findings had been confirmed by Kroll and

Gaffney Cline, and that its Charman had confirmed that the company would be taking decisive action following these reports. By letter dated 21st November, 2017 [2563] the Claimant's Attorney reminded the Respondent of its repeated undertakings that, on receipt of confirmation of its findings, it would inform the Claimant and give it an opportunity to respond. She requested the Respondent, on or before 4:00 pm on 27th November, 2017 to particularize to the Claimant any alleged breaches of the IPSC, to identify the sum that the Claimant was liable for arising from any such breach, to supply to the Claimant copies of the Kroll and Gaffney Cline reports and cause to be paid to the claimant the sum which it had withheld. By letter dated 27th November, 2017 [2565] the Respondent told the Claimant that it was still in the process of considering the contents of and taking advice on the Kroll and Gaffney Cline reports, both of which it said were confidential and privileged, and that once it had done so it intended, in compliance with the IPSC, to communicate with the Claimant in good faith in an attempt to resolve any disputes or differences. Once again, the Respondent stated that, for the avoidance of doubt, it made no election to affirm or terminate the IPSC.

[34] By letter dated 29th November, 2017 [2566] the Claimant's Attorney gave notice to the Respondent of the following matters:

> "1.1 A dispute has arisen between the parties in relation to the IPSC.
>
> 1.2 The dispute arose, for the purposes of article 36 of the IPSC, on 28 November 2017.
>
> 1.3 Our client proposes that the parties attempt to resolve the dispute by negotiation, or failing that by mediation, in accordance with Articles 36.2 and 36.3 of the IPSC."

She identified the Dispute by reference to the correspondence between the parties, starting with the Respondent's letter of 14th August, 2017 and said that the Claimant considered that with effect from 28th November, 2017 a dispute had arisen between the parties as a result of the Respondent's refusal to do what she had requested by her letter of 21st November, 2017. She asked the Respondent to convene an urgent conference of the Parties to resolve the dispute through negotiations in accordance with the dispute resolution provisions and proposed that it should be convened on 4th December, 2017 or alternatively on a date and at a time mutually convenient to the parties. She added that, if the Parties were unable to resolve the dispute by negotiation, it would be prudent for the Parties to agree the identity of a Mediator. She asked it to propose the names of three persons to act as Mediator for the purposes of

Article 36.3 and said the Claimants would shortly advise it of its nominees. By letter dated 1st December, 2017 [2571] the Claimant's Attorney provided the Respondent with the names of its three nominees.

[35] By letter dated 1st December, 2017 [2573] addressed to the Claimant's Chief Executive Officer, Mr. Hanif Baksh, the Respondent referred to its letter of 14th August, 2017 and said that, after a careful review of the Kroll and Gaffney Cline reports, which it said were privileged and confidential, it had formed the view that there were reasonable grounds for suspecting that the Claimant had misconducted itself or otherwise been involved in wrongful or fraudulent activity over the period from April 2016 to July 2017. It set out thirteen reasons for arriving at that view and invited the Claimant to provide it with its comments, if any, on those reasons within seven days of that letter. It again added, for the avoidance of doubt, that it had made no election to affirm or terminate the IPSC. By a letter of the same date [2578] addressed to the Claimant's attorney the Respondent said that it had written that day to the Claimant informing it of its reasons for its view as stated in that letter and asking for its comments within seven days while it considered what steps it should take. It asked that it be noted that it had not invoked any provision of the IPSC and said that it disagreed that a dispute had arisen between the parties for the purposes of Article 36. So, the invocation of its clauses and the request for the convening of an urgent conference and the identification of a Mediator were premature. Once again it stated that, for the avoidance of doubt, it made no election to affirm or terminate the IPSC.

[36] On 4th December, 2017 [2580] the Claimant's Attorney acknowledged receipt of the Respondent's letters of 1st December, 2017. On 8th December, 2017 [2584] she replied more fully to these letters, referring to the letter to the Claimant as "the Allegations Letter" and the letter to its Attorney as "the Dispute Letter". She said that, although she disagreed with the reasoning in the Dispute Letter, she was content to adopt the Respondent's position that no dispute arose on 28th November, 2017. But she asked that her letter be taken as notice that a dispute had now arisen for the reasons that she then set out. She said that the Claimant strongly denied the Respondent's accusation that it had overstated the oil delivered to the Respondent over the period from April 2016 to July 2017, that it had not provided proper particulars and data to support its allegations of misconduct and that its refusal to provide copies of the Kroll and Gaffney Cline Reports on which it had expressly relied as confirmation of

its grounds for the continued retention of monies owed to the Claimant was in breach of the requirements of Article 36.2 of the IPSC that the Parties attempt to resolve disputes in good faith. She said that she considered that a dispute had arisen under Article 36 upon the delivery of her letter to the Respondent, and that her letter constituted a notice for the purposes of Articles 36 and 40.1 of the IPSC. She then responded to each of thirteen allegations in the Allegations Letter. She ended her letter by inviting the Respondent to negotiate in good faith and to agree the identity of an independent third-party Mediator, saying that for those purposes she relied on the nominees identified in her letter of 1st December, 2017.

[37] There was no further communication between the Parties until the Respondent served its Notice of Termination pursuant to Article 29.1 of the IPSC on 19th December, 2019 [2595]. Its reasons for doing so, as set out in that letter, were that the Claimant at all material times had full particulars of the reasonable grounds for suspecting that it had misconducted itself and had ample opportunity to respond to them. It said that what was inescapable was that the wells in the Catshill Field were incapable of producing the volumes of oil that the Claimant had represented that it produced and sold to the Respondent, and that the fact that the production volumes had not returned to anything close to the levels reported prior to the site visit conducted by the Audit Department supported this. The Notice was to become effective upon the expiry of thirty days on its receipt. Details were also given of the amount said to have been overpaid for the period from April 2016 to May 2017 and notice was given of the Respondent's claims under Article 30.1. It also contained the following response to the invitation to negotiate in good faith and to agree the identity of a Mediator in the Claimant's Attorney's letter of 8th December, 2017:

> "That invitation was premature as Petrotrin had not at that time invoked or taken any decision pursuant to the provisions of the IPSC as was made clear in our 1st December, 2017 letter. A dispute could not therefore have arisen upon the delivery of our 1st December, 2017 letter or the 8th December, 2017 letter."

Further, neither Clause 29.1 nor any other provision of the IPSC requires that the Parties initiate or complete negotiation, mediation or arbitration proceedings pursuant to Clause 36 before deciding whether or not to terminate the same or as a precondition to taking such action, a fortiori where,

as here, there are reasonable grounds for suspecting misconduct and wrongful or fraudulent activity.

However, in the event that A&V wishes to initiate the dispute resolution processes under the IPSC in relation to this notice of termination or monies due to Petrotrin under the IPSC pursuant to Clause 36.1 Petrotrin is ready and willing to participate in same.

**Was the Decision to Terminate as at 19 December wrongful?**

[38] We have paused our examination of the facts as this point. This is because it is necessary to consider at this stage whether the Respondent acted fairly in deciding to terminate the IPSC, in the way that it did, on 19th December, 2017. The history of events which we have outlined in the previous paragraphs suggests that, while the Respondent had material before it in the form of the Audit Report and the Kroll and Gaffney Cline Reports which was sufficient, at first sight, to give it grounds for suspecting that the Claimant had misconducted itself in the way to which Article 29.1 refers, it was not willing at any stage to engage with the Claimant in a meaningful discussion about its response to these grounds so that it could determine fairly what weight to attach to the response before it made is decision to terminate. So, as we noted in paragraph 25, above, the first issue for us is whether the Respondent did make all necessary inquiries and whether it acted fairly before it made that decision. The onus is on the Claimant to show that it did not. If that onus is satisfied, it then shifts to the Respondent to show that its decision would have been objectively reasonable if it had had all the material that is now before the Tribunal when it made that decision.

[39] The Claimant submits that, in order to be able to rely upon Article 29.1 to terminate the Contract, the Respondent had to be able to show that its judgment was made in good faith and was objectively reasonable, and that it cannot show that it had reasonable grounds to terminate the Contract for two main reasons: first, because the allegations of fact were wrong and unreasonable and, second, because the Respondent did not give the Claimant a proper opportunity to provide full answers to the matters said to give rise to suspicions. It says that it was evident that the Respondent in fact prejudged matters against the Claimant and acted wholly unfairly in purporting to exercise its right to terminate: Claimant's Closing Submissions, paragraphs

324-332 [89]. It accepts that the duty to negotiate in Article 36.2 was not a condition precedent to the right to terminate under Article 29.1. But it says that this reinforces the argument that Article 29.1 requires that a fair opportunity be given to answer before accusations are acted upon to see if reasonable grounds exist: Claimant's Reply Submissions, paragraph 81[25]. The Respondent, on the other hand, submits that the complaint that it did not make proper inquiries by giving the Claimant a proper opportunity to respond to its allegations is otiose, given that the Tribunal is not confining itself to a review of the matters considered on 19th December, 2017 and now has before it all the material that all necessary inquiries would have yielded and is able to determine whether the decision to terminate would have been shown to be objectively reasonable. In any event, the Claimant had been put on notice of the discovery of inappropriate practices from as early as 14th August, 2017 had been given the fullest opportunity to dispel the Respondent's suspicions and had been unable to answer them or come up with a credible response. So, the Respondent did act fairly before it made the decision to terminate the IPSC: Respondent's Closing Submissions, paragraphs 152-159 [50-53], and its Reply Submissions, paragraphs 100-101 [25].

[40] That the Respondent was under a duty to act fairly before it took its decision is common ground between the parties. There is a dispute, however, as to what that duty involved. In our opinion, it required the Respondent to do two things: first, to approach the Claimant's representations with a genuinely open mind and, second, to take all reasonable steps to try to resolve the issues that they raised before deciding whether or not there were grounds for terminating the contract. The letter which the Claimant's Attorney wrote to the Respondent on 28th September, 2017 should have been sufficient to indicate to an open-minded reader that there were questions that needed to be answered about the weight to be given to the Audit Report. Her point that the high volume of sales that were achieved during the period 1st January, 2017 to 30th June, 2017 were because of its heavy and continuous drilling programme was especially important, as it did not seem that the Audit team had as much information about what was actually happening on the ground as it should have done. This was due to the fact, as she pointed out, the Claimant was not itself involved in that investigation. Her request for a meeting to discuss the issue was entirely reasonable, and in fairness it should have been accepted and acted upon. Like the requests that she made in her letters of 25th October, 2017

and 21st and 29th November, 2017 that did not happen. Then there is the request that she made in her letter of 21st November, 2017 to supply the Claimant with copies of the Kroll and Gaffney Cline Reports. That request was prompted by the Respondent's publication of a media release on 17th November, 2017 in which it stated that its initial findings had been confirmed by Kroll and Gaffney Cline. Fairness required the release of those Reports to the Claimant, so that it could have an opportunity to consider whether there were grounds for disputing their conclusions. The Respondent's repeated assertion that they were confidential and privileged was misconceived. Legal professional privilege does not extend to the reports of experts on matters of fact, such as these were. They ceased to be confidential once their existence, and the Respondent's intention to rely on them in its dispute with the Claimant, was made known.

[41] As for the steps that should have been taken to try to resolve the issues, the Claimant's Attorney said in her letter of 8th December, 2017 that she was content to adopt the Respondent's position that no dispute arose on 28th November, 2017. But it is plain, notwithstanding the Respondent's assertion to the contrary in its Notice of Termination, that a dispute had arisen when she wrote to the Respondent in response to the thirteen reasons for its suspicion which the Respondent had set out in its letter of 1st December, 2017 which she referred to as "the Allegations Letter". This raises two questions: whether the Respondent was obliged as a matter of contractual obligation to resolve the dispute in the manner set out in Article 36.2 of the IPSC and, if not, whether the duty to act fairly required the Respondent to give the Claimant a fair opportunity, having been given the necessary information, in some other way to present its answers to the allegations.

[42] In our view, despite the Claimant's apparent willingness not to insist on this point, the better view is that the notice of dispute that was given on 8th December, 2017 by the Claimant's Attorney did bring Article 36.2 into operation. We note that the Respondent said in its Notice of Termination that neither Clause 29.1 nor any other provision of the IPSC requires that the Parties initiate or complete negotiation, mediation or arbitration proceedings pursuant to Clause 36 before deciding whether or not to terminate, especially where the Client thinks that there are reasonable grounds for suspecting misconduct and wrongful or fraudulent activity. But we do not agree. It is true that Article 29.1 does not contain that qualification, and the Respondent

submits, with reference to Aikenhead J's observations in *Ericsson AB v EADS Defence and Security Systems Ltd* [2009] EWHC 2598 (TCC) at para 42, that it would require very clear language to in effect freeze a party's contractual right to termination in this way. But each contract must be taken according to its own terms and circumstances, the contract has to be read as whole, and effect must be given to its words according to their ordinary meaning: *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900; *Wood v Capita Insurance Services Ltd* [2017] AC 1173. We see no reason why the words "any dispute or difference arising out of or relating to this agreement" should not extend to a dispute or difference as to whether there were grounds for termination under Article 29.1 in view of the profound effect that a termination would have on the contractor's investment in the operations at Catshill, nor do we see any reason why they should not be given effect as soon as that dispute or difference has arisen and been identified even though a decision to terminate had not yet been taken. In our opinion, the Respondent should have followed the procedures set out in Articles 36.2 and 36.3. In any event the duty to act fairly required it to agree to negotiate, with a view to determining whether the Claimant had answers to the allegations that were sufficient to resolve their differences.

[43] When we look at the course of the Respondent's conduct overall during this period, we are left in no doubt that the Respondent was not willing to engage with the Claimant in a fair, even-handed and open-minded discussion as to what the reasons were for the apparent discrepancies which had given rise to the decision of the Internal Audit team to investigate what was happening at Catshill. Its single-minded and uncompromising approach left no room for discussion as where the truth might lie. As the Claimant says, it had plainly prejudged the issue. This may have been because it had formed the mistaken view that the effect of the IPSC was that it was entirely for it alone to determine whether there were grounds for termination under Article 29.1. Whatever the reason, its conduct fell so far short of what the duty to act fairly required that we have to conclude that its decision to terminate was wrongful. The result is that it was not in possession of all the information that it should have had, that all necessary inquiries had not been made and that the decision to terminate cannot be said to have been objectively reasonable.

[44] That is not, however, an end of the matter. The Notice of Termination has taken effect, and we cannot turn the clock back. As we indicated in paragraph

25 above, our task now is to consider whether the Respondent has shown that its decision would have been objectively reasonable if it had had all the material that is now before the Tribunal when it made that decision. But we also have to consider whether, as the Claimant contends in its Closing Submissions, paragraphs 355-371 [95-98], the Respondent waived the right to terminate the contract by acts that were consistent only with an intention to treat it as continuing or by failing to take the decision to terminate it within a reasonable time. We think that it is appropriate that we should deal with this issue now, as it would be unnecessary for us to consider whether the decision to terminate has been shown to be objectively reasonable if we were to uphold the submission that the Respondent had lost the right to terminate the contract.

**Did the Respondent affirm the Contract?**

[45] The Claimant submits that, if the Respondent did have reasonable grounds to suspect that the Claimant had been involved in wrongful or fraudulent activity, it nevertheless was not entitled to terminate the IPSC because after it knew of the grounds, and thereby knew of its right to terminate pursuant to Article 29.1, it waived or lost that right. It is said to have done this either by election, that is to say by positive acts consistent only with an intention to treat the contract as continuing, or by its failure to make a decision to terminate it within a reasonable time.

[46] The evidence that is relied on as to the Respondent's state of knowledge is provided by the Audit Report [5465], which the Respondent received on 17th August, 2017 by its letter of 27th September, 2017 [2545], its media release of 17th November, 2017 [2562], its letter of 1st December, 2017 [2573] and the Notice of Termination of 19th December, 2017 [2595]. In the letter of 27th September, 2017 it described the Audit Department's Report as final and said that, in view of the Report's conclusion that it had overpaid the Claimants US$11.5 million, it would be mitigating that loss by relying on the provisions of the IPSC. In the media release it stated that the Audit Report's initial findings had been confirmed by Kroll and Gaffney Cline, and that its Chairman had confirmed that the company would be taking decisive action following these reports. In the letter of 1st December, 2017, it set out the thirteen reasons for its view that there were reasonable grounds for suspecting that the Claimant had been involved in wrongful or fraudulent activity over

the period from April 2016 to July 2017. The wording of the Notice of Termination shows that those reasons and the decision to terminate the IPSC were based on the information contained in these three Reports.

[47] This evidence shows that the Respondent first became aware that it had grounds for terminating the Contract when it received the Audit Report, but that it took the view that it needed independent advice before acting upon it. Once it had the other two Reports, however, it was in a position to take the decision, as its media release of 17th November, 2017 makes clear. Yet it allowed the IPSC to remain in existence, with the result that the Claimant continued to perform its obligations under the contract by providing services of value, including the delivery of oil, to the Respondent. Throughout the exchange of correspondence during this period, the Respondent repeatedly reserved its right to terminate until it ultimately did so on 19th December, 2017. We are asked to infer that the Respondent's aim in delaying this decision was to take the value of these services without paying for them to make good the shortfall that it said it had suffered. Among other things, the Claimant drilled three successful wells (CO175, CO176 and CO176) between the first half of November 2017 and early December 2017, which the Respondent completed in 2018.

[48] The Claimant says that these facts demonstrate that the Respondent had to make its decision either to terminate or affirm the contract by, at the latest, 17th November, 2017. It relies on two closely related principles, election by failure to exercise a right and waiver by conduct which is inconsistent with an intention to insist upon that right. As Lord Goff of Chieveley said in *Motor Oil Hella (Corinth) Refineries SA v Shipping Corp of India* [1990] 1 Lloyds Rep 391 at 398, a state of affairs may come into existence in which one party to a contract becomes entitled, either under the terms of a contract or by the general law, to exercise a right and he has to decide whether or not do so:

> "In all cases, he has in the end to make his election, not as a matter of obligation, but in the sense that, if he does not do so, the time may come when the law takes the decision out of his hands, either by holding him to have elected not to exercise the right which has become available to him, or sometimes by holding him to have elected to exercise it."

The facts in the *Motor Oil* case upon which Lord Goff's statement of the principle was based are far removed from what we have here. But we are invited to hold that the Respondent must be taken to have elected not to

exercise the right to terminate. Its case is also said to be analogous to the loss by a landlord of its right to forfeit a lease in the case of a breach by acceptance of rent. In *Davenport v The Queen* [1877] 3 App Cas 115, 130 the evidence of waiver was said to be clear and overwhelming where the rent for three successive years was accepted in advance and the whole of the remaining rent was paid up in full, not only in full knowledge of the breach but also because the Government wanted the money and could not afford to insist on forfeiture.

[49] Of course, the facts do not have to be as extreme as those in *Davenport* for the principle to apply. In *W. J Alan & Co v El Nasr Export* [1972] 2 QB 189, for example, acceptance of payment in one currency was taken as waiving the right to insist to being paid in the currency of the contract. Here, the contract was allowed to run on for at least four weeks, after the Respondent had full knowledge of the contents of the three Reports. Having been told repeatedly that the Respondent had made no election to affirm or terminate the IPSC, the Claimant had to assume that it was still bound to perform its obligations and that the Respondent was still willing to accept the services with which it was provided under the Contract. At first sight, there is some substance in the Claimant's argument on election and the Respondent's failure to exercise its right to terminate within a reasonable time.

[50] The Respondent in reply refers in paragraphs 162-164 of its Closing Submissions [54-55] to the fact that throughout the relevant correspondence it was reserving all of its rights and remedies. In paragraph 18 of its letter of 27th September, 2017 it drew attention to its option to suspend operation pending its evaluation of the situation but said that, as this was likely to prove detrimental to both Parties it was prepared, without prejudice to its rights or remedies, to permit the Claimant to continue operations until a final decision was made. That reservation was repeated in its letters of 31st October, 2017, 27th November, 2017 and 1st December, 2017. It refers also to Article 44 of the IPSC [5344], which provides:

> "44.1 No waiver of any breach of this Agreement shall be or deemed to be effective or binding unless the waiver is in writing and signed by an authorised representative of the Party purporting to have waived the breach and, unless otherwise provided in this Agreement, such waiver shall be limited to the specific breach waived.

44.2 No failure of the Parties to exercise any power given to it hereunder or to insist upon strict compliance with any obligation or condition hereof and no custom or practice of the Parties at variance with the terms hereof shall constitute a waiver of any of the Parties' rights hereunder.

44.3 No waiver by the Parties of any particular default shall affect or impair the Parties rights in respect of any subsequent default of any kind, nor shall any delay or omission of the Parties to exercise any rights arising from any default affect or impair the Parties rights in respect of the said default or any other default."

[51] We are persuaded that the Claimant's submission on this point must be rejected. Reservations of the kind that the Respondent made throughout the correspondence have to be read in the light of its actions during that period. There may come a point in regard to the acceptance of rent, for example, where a Court will conclude that despite its words the landlord must be taken to have been affirming the Contract. But we do not think that, given that the Parties were still corresponding with each other and in view of the length of the period involved, that point was reached in this case. This makes it unnecessary for us to decide whether Article 44.1, which plainly does apply to the argument on waiver, applies to an election by a failure to exercise a right which is a situation that it does not mention. The argument based on the Respondent's delay in serving the Notice of Termination, however, is answered by the provision in article 44.3 that any delay is not to affect or impair the Parties' rights in respect of the default. Our decision, therefore, is that the Respondent did not waive or lose the right to terminate the Contract.

**The Grounds for the Decision to Terminate**

[52] As the Respondent made clear in its letter to the Claimant of 1 December 2017 [2573], its decision to terminate the IPSC was based on a review of the Audit Report [5465] read together with the Kroll report [5690] and the first report by Gaffney Cline [5559]. The period to which its reasonable grounds were said to refer was from April 2016 to July 2017. The thirteen reasons for its having arrived at its view can be summarised as follows:

(1) The volume discrepancies between crude oil produced by E&P and the crude oil pumped to R&M, which was the issue that the Audit Team

had decided to investigate, did not originate from the Western Tank Farm or the Western District.

(2) The only significant discrepancy as to the volumes received by the Barrackpore Tank Farm related to the Catshill Field.

(3) Reported production from Catshill according to the Claimant increased to 4,991 bspd during the period from March 2016, when it commenced its drilling programme, to June 2017.

(4) When the Audit Department visited Catshill in July 2017 oil production was at just above 2,200 bspd. The wells drilled by the Claimant were producing from the same sands from which the legacy wells drilled before the execution of the IPSC were producing. They were incapable of producing the volume of oil that the Claimant represented that it had produced and sold to the Respondent.

(5) Catshill's fiscalised monthly production as reported during the six-month period from January 2017 to June 2017 had increased by almost 150%.

(6) When the Audit Team visited Catshill on 11th July, 2017 several areas that had purportedly been producing high rates had stopped producing or had declined steeply, which could not be attributable to natural phenomena.

(7) On 20th and 21st July, 2017 those who had gone to Catshill to conduct well tests were unable to obtain samples from 54 of the 69 Catshill wells, which indicated that they were not producing.

(8) There were many instances when the volume of crude oil specified on the Custody Transfer Tickets could not be pumped in the time periods, given the available pump flow rate.

(9) Several instances were noted of multiple Custody Transfer Tickets with the same net sales volume.

(10) Mr. Deokiesingh had been acting irregularly or suspiciously during the January 2017 to July 2017 period.

(11) The Respondent had found no leaks in its R&M tank farm, within the areas that were the responsibility of E&P or in its pipeline, and all the Eastern Fields other than Catshill showed relatively constant production during the January 2016 to June 2017 period.

(12) Consequently, the Claimant had overstated the volume of oil it produced and sold to the Respondent, and the Custody Transfer Tickets for Catshill for the period from April 2016 to July 2017 could not be relied on.

(13) Having regard to the Respondent's estimate of the actual production during that period, the Claimant had been overpaid the sum of US$60,579,215.70.

[53] The question to which we now turn is whether it has been shown, having regard to all the material that is now before the Tribunal, that the decision to terminate the IPSC on the grounds listed in that letter was objectively reasonable. The Claimant submits in paragraph 5 of its Closing Submissions [2] that the decision did not reach that standard because it was not based on all reasonable inquiries or the totality of the material available, and because the grounds on which the Respondent sought to rely were wrong, partial and ill-informed. There are then, it says, two main issues that need to be considered: (1) could the Catshill Field have produced the amount of oil said to have been sold by the Claimant in the sales tickets and, if so, is it likely that it did so, and (2) if it is likely that it did so, should one nevertheless conclude that the Claimant's sales tickets deliberately misstated the volumes supplied for any of the reasons advanced by the Respondent. Its treatment of these issues is then developed in this way: first, by considering the evidence about Catshill's capacity to produce the oil said to have been sold from April 2016 to July 2017, and the conclusions one should draw about the accuracy of the Claimant's sales tickets; and then by considering the Respondent's attacks on the sales tickets in respect of (1) siphoning, (2) sales pump capacity, (3) insufficient filling times, (4) repeated high gauges and (5) the involvement of Mr Deokiesingh. The Respondent's Closing Submissions approach these issues in a different order, by submitting that the Claimant's sales exceed the capability of the sales pumps and that Catshill was incapable of producing the volumes of crude oil claimed, and then looking at the conduct of Mr. Deokiesingh and siphoning. These submissions were expanded in its Reply Submissions to include comments on Barrackpore as the source of the shortage and on the multiple identical high gauge readings. We have found all of the Parties' written submissions helpful in bringing together in an orderly fashion the quantity of evidence that was placed before us in writing and orally during the evidentiary hearing. It seems to us that it would be more convenient to follow the order of treatment that the Claimant has adopted in its Closing Submissions, and we propose to follow the same course. But we wish to emphasise that we have taken careful account of the way the Respondent has dealt with those issues both in its Closing Submissions and its Reply.

[54] Before we embark on that analysis of the evidence, however, it is important to bear in mind by way of background some of comments made by Gaffney Cline in the Executive Summary to its first report of November 2017 [5566]. It points out that, although the Respondent's written procedures for measurement of crude oil by tank dips for custody transfer conformed to standard practices in use by the oil industry, the measurement system was largely manual relying on tank dips and measurements that are performed at each location and that most calculations were carried out manually. The consequence of a people-intensive process of that kind was a high likelihood of measurement errors. The custody transfer process relied upon a single representative from the Respondent to validate the amount of crude oil that had been transferred. There was no reconciliation of the amount pumped from third party leases and the amount received at the tank farms or between the tank farms and the refinery. There was only the monthly reconciliation between refinery receipts and the volumes received from all sources. The delay in timing and the multiplicity of sources made it difficult to determine where a measurement error occurred. It also made the point that the risk of physically losing oil to theft was low because the Respondent is the country's only crude oil buyer. As all of the crude oil is transported by pipeline after leaving the lease, the sight of trucks at one of the Respondent's tank farms or an operated lease would raise instant alarms, particularly since truck movements can only legally take place during daylight hours. It acknowledged that measurement errors and fraudulent reporting could occur and be quite costly to the Respondent. So, it recommended a number of steps that the Respondent might adopt to minimise measurement errors and discourage fraud, such as the addition of flow meters on the pipelines to the tank farms, adding tank meters to the crude oil receiving tanks to allow the measurement of crude oil inventories without taking tank dips and the installation of wireless communications that would make central viewing and control possible.

[55] These comments indicate that the measurement system that was in use at the relevant time was imperfect, and that variations between the measurement of the amount of crude oil pumped by E&P and the amount received by R&M were to be expected in the ordinary course of events. The Internal Audit Department's report of 21st August, 2017 [2779] which identified deficiencies in the controls governing the transmission of crude oil from the fields to Pointe-a-Pierre provides further support for this view. So, it would only be where the differences were significant, and thus plainly out of the ordinary,

that there would be cause for concern. The point that the risk of losing oil to theft is low is relevant here too. It has not been suggested that the Claimant was stealing any of the crude oil that it claimed to have sold to the Respondent. The only explanation that is offered for the disposal of the oil other than by sending it on to the Respondent is that a siphon effect was present that enabled the flow of oil back into the bulk tanks from Sales Tank 7: Respondent's Reply, paragraphs 73 – 85 [19-22]. But it is unclear, if this was so, how that process could have continued for so long and on such a scale during the period in question without the risk of its being detected, given the Respondent's right to turn up on site at any time to check what the Claimant was doing: see Article 12(c) [5308], or without an overflow into the environment such as happened on 4/5 March 2018.

**Did Catshill have the capacity to produce the oil said to have been sold?**

*(1) Background*

[56] This issue is dealt with by the Claimant in its Closing Submissions, paragraphs 34-179 [10-49], by the Respondent in its Closing Submissions, paragraphs 28-121 [25-39], by the Claimant in its Reply Submissions, paragraphs 29-62 [9-20] and by the Respondent in its Reply Submissions, paragraphs 18-58 [6-15]. In its Notice of Termination [2595] the Respondent said that what was inescapable was that the wells in the Catshill Field were incapable of producing the volume of oil that the Claimant represented that it produced and sold to the Respondent. In response, the Claimant says that this assertion is ill-informed and wrong. Its Closing Submissions contain a detailed analysis of the evidence about production, which it says shows that Catshill could and was likely to have produced the volumes claimed. The Respondent in reply says that there is insufficient data in the documents to enable any conclusions to be drawn about the pattern of the Claimant's production or to corroborate its reported production. This, it says, is supported by the evidence of the Claimant's expert, David Aron, where he said [Transcript, pp 625-6] that when he was trying to come up with a field production forecast that bore some similarity to the sales figures that the data from the client's production reports was not of much value, so he attempted to produce something which would represent what he thought would happen. Its production reports were contrived and unreliable. But, as the Claimant has shown in its Closing

Submissions, it is not necessary for it to use the calculations in Mr. Aron's report to provide an answer to the issue about capacity.

[57] The general character of the Catshill Field as described by Mr. Aron in section 3 of his report [733] is not in dispute. The field's geology is complex, it is highly faulted and there are a number of different reservoirs at different depths. Seismic is the typical means of determining potential targets for exploration drilling, and development seismic is widely used for drilling development wells. It was used in the 1950s by Shell prior to the drilling of its first well, but Shell was able very quickly to establish that the field has many faults that would make exploration and appraisal of the field very difficult. In 1976 the Respondent provided the Ministry of Petroleum and Mines with a well drilling programme for its well CO 117. It stated that the structure of the Catshill formation in the vicinity was not definitely known because of the major faulting in the area. The combination of complex faulting and the lack of seismic lines, due to the fact that the surface area of the oilfield is very wooded and access for additional seismic lines would be very difficult, meant that further exploration and development would have to be carried out through drilling. This was the option chosen by the Claimant. It was assisted by the fact that the reservoir is shallow. So, wells can be drilled there in a matter of days.

[58] The Claimant started providing production from Catshill in March 2016. It then carried out a number of recompletions and workovers which resulted in an increase in production. It started drilling wells in February 2016. That was the start of a major drilling campaign. Initially this programme involved drilling wells in areas that had already been partly appraised. This involved re-drilling where previous wells had failed or drilling to a different reservoir in a particular well. These wells produced modest levels of production. But at the end of 2016, following a meeting which the Claimant's director and Chief Executive Officer, Hanif Baksh, described in his witness statement, paragraphs 30-32 [430-431], it started a more ambitious exploration and appraisal programme. In its view, while some of the legacy wells it had inherited from the Respondent were spent and the cost of workovers was disproportionately high in relation to the returns, many were capable of heavy sustained production following extensive workovers. There were many parts of the Field that were un-surveyed and untapped, largely because its complex geology was regarded as high risk. New wells, potentially, would be highly

productive, but the Claimant would have to accept a high percentage of low yields.

[59] When it was put to Mr. Baksh in cross-examination that the Claimant did not undertake basic scientific and technical studies to obtain a proper understanding of the Field before embarking on that investment, he said that they knew that the blocks were faulted but that they worked with that and got better results than they would have had with seismic. His credibility was challenged repeatedly in cross-examination, but the passages that we take from his evidence were not really in question and we are satisfied that we can accept them. He agreed that he had referred repeatedly in documents submitted to the Respondent and the Ministry of Energy that there were high levels of depletion in the area. But he said that it turned out to be different when they drilled [Transcript, pp 74-84]. The Claimant did not lack personnel with experience, as Shiraz Rajab who had been a consultant on technical and business matters with the Claimant since 2010 explained in his witness statement [451]. Nazir Ali, a petroleum engineer with over forty years' experience, started working with the Claimant as its drilling manager in 2013 with responsibility for its drilling programme. His involvement at Catshill began when it started drilling new wells towards the end of 2015. He said that, as a result of drilling new wells in April and June 2017, production was very high and that he could vouch for the high activity during that period [465-6]. Although Mr. Baksh agreed that he took a lot of chances, he said that he relied on the advice of Mr. Rajab and Mr. Ali in deciding where to drill [Transcript, p 83]. We are satisfied that both of them knew what they were doing and that they were well equipped to give that advice by reason of their experience.

[60] The Claimant successfully completed 31 new wells (CO 136 to CO 166) in 2016 and the first half of 2017. Two clusters of wells in particular, those at pad 3 (CO 157 to CO 160X) and pad 4 (CO 161 to 166) which were subject to monitoring and frequent scrutiny by the Respondent, were particularly successful. The Audit Report, p.10 [5477], acknowledged that the marked increase in production over the period January 2016 to June 2017, and especially in March, April and June 2017, was the result of new wells coming on stream. But the Claimant also increased production from older pumping wells by increasing the size of the pump on some wells and installing faster

motors on others. Details of the corroboration provided by the documentary evidence are given in the Claimant's Closing Submissions, paragraph 112 [30].

*(2) The Claimant's analysis*

[61] The Claimant has provided us with a chronological analysis in its Closing Submissions [11-31], to which we now turn. It addresses the issue in three stages, making the point that it is necessary to understand the reasons why wells completed in each of them behaved differently from one another in order to understand the production figures which are under scrutiny. These are (1) the wells completed between March 2016 and late January 2017; (2) the wells completed in late March and early April 2017; and (3) the wells completed between 15 and 23 June 2017. The Respondent asks us in its Reply Submissions to accept that its key points are controverted by the matters to which it refers, and that the Claimant's submission that the Respondent acted unreasonably in concluding that the Field was incapable of producing the volumes claimed is wholly without merit [10]. This is not the view that we have reached after considering the Claimant's analysis.

[62] The first stage comprises the production from wells CO 136-156: Claimant's Closing Submissions, paragraphs 43-58 [12-18]. These wells, which were completed from March 2016 to late January 2017, increased the Claimant's overall production from 745 bspd in March 2016 to 2265 bspd in April 2017. Mr. Alvarez said in his first report that the production performance of wells drilled after January 2017 was abnormal and not consistent with production improvements expected from a mature reservoir with over 50 years of exploitation, and that the drop in production upon and after the audit team's visit on 11th July, 2011 was not consistent with the behaviour of mature reservoirs [2217]. But he accepted in cross-examination that, although they changed performance after July 2017, there was nothing abnormal or unusual about the performance of wells CO 135- CO 156 from March 2016 to April 2017. Wells CO 155 and CO 156, for example, started with a lower initial rate but later went up and continued with a good performance until July [Transcript, pp 1585-1587]. We do not find anything in the Respondent's Reply Submissions that persuades us that we should not accept all the submissions that the Claimant makes about this stage, especially in view of what we take from Mr. Alvarez's evidence. As the Claimant points out in para 58 [17], this has important consequences. These production figures are in line with, and

therefore support, its sales figures for the period from April 2016 to the end of March 2017. And they contradict the argument in the Audit Report that the increase in the shortage figures at Pointe-a-Pierre during this period shown in Table 1 [5469] was due to overstatement by the Claimant of its production at Catshill.

[63] The second stage comprises the production from the wells in pad 3, CO 157-CO 160X: Claimant's Closing Submissions, paragraphs 59-95 [18-26]. This cluster, which was the highest producing overall, was put into production between 1st and 6th April, 2017. According to Mr. Rajab's evidence in his witness statement, which we accept, they were all flowing wells, and they were all managed with beans or chokes [454]. He said that his decision to drill in that area was driven by historical data. Well CO 19, which was being drilled in February 1955, blew out and had to be abandoned. No other company went back to drill there. He thought that there must be something there because of the pressure there that had caused the blow out [Transcript, p 242]. So, he decided to drill well CO 157 near to that abandoned well to test the commercial potential of the area. He was encouraged by what he found, and the other three wells were drilled on the same cluster. This area, then, differed from those where the Claimant had been drilling earlier because of the high pressure and the fact that it had not been exploited since the blow out. The initial entries for these wells in the daily production reports, which are set out in paragraphs 66-68 of the Claimant's Closing Submissions, show figures of 740 bbls for wells CO 157-158 on 1st April, 1531 bbls for wells CO 157-159 on 2nd April and 1820 bbls for wells CO 157-160X on 6th April 2017.

[64] Bulk tests carried out by the Respondent's JV Department on 20th and 21st April, 2017 details of which are given in paragraphs 72-75 of the Claimant's Closing Submissions, confirmed that these wells were doing at least as well the Claimant's production figures for those dates. Wells CO 157-160X were still flowing on 16th and 17th May, 2017 when another two bulk tests, details of which are given in para 79, were carried out. The total volume of oil in the Claimant's production figures was 1176 bspd, as against the test figures of 1232 bspd and 1964 bspd, which again showed that the wells were doing at least as well as indicted by the Claimant's reported amounts. A further bulk test on the pad 3 wells was carried out on 29th June, 2017. It came up with 1224 bspd as against the Claimant's production figure for that day of 1230. The accuracy of the production figures was challenged in the cross-examination of

Mr. Rajab because they were so far in excess of his projection of 50 bspd. But he said that they were accurate [Transcript, p 205], and we can accept the details given in the JV Department's tests as further evidence that confirms their accuracy.

[65] We find further support in the measurements of the pressure in these wells, referred to in the Claimant's Closing Submissions [25-26], which were carried out by Tucker Energy Services on 28th and 30th December, 2017 [2895-2910] when read together with Figure 14 in the second report by Gaffney Cline [2231]. That table was taken from the Smart report of 3rd January, 2018 which based it on information that Tucker had provided [2912]. As noted in paragraph 48 of that report, these pressures, although taken in 2017, were similar to the pressures recorded for a well in 1960. We accept the Claimant's submission in paragraph 95 that this shows that the wells in pad 3 were performing very differently from the rest of the Field. Mr, Alvarez accepted this too in his cross-examination. Although he suggested that the Tucker figures were inaccurate, he could not give any reasons for saying so and we note that they were accepted by the Smart report as accurate. We understood Mr. Alvarez to say that, if this information was right – as we accept was the case, it was probable that that these wells were producing at the rates shown above [Transcript, pp 1600-1603].

[66] The third stage comprises the production from the wells in pad 4, CO 161-CO 166: Claimant's Closing Submissions, paragraphs 96-106 [26-29]. This cluster was put into production between 15th and 23rd June, 2017. Wells CO 161, 164 and 165 are recorded as having come in initially on a bean, but on 21st June, 2017 these three wells were noted as having no bean attached. Wells CO 162, CO 163 and CO 166 then came in on 22nd and 23rd June, 2017 also flowing with no bean attached. The effect of the introduction of these wells was to increase the reported production of 3614 bbls from 60 wells on 14th June, 2017 to 7124 bbls from 66 wells as at 23rd June, 2017. The JV Department carried out a test of these wells on 29th June, 2017 the details of which are given in paragraph 98 of the Claimant's Closing Submissions. It recorded that they were all flowing at a high rate with no choke. But, unlike the wells in pad 3, there was a very swift decline, with the result that by 10th July, 2017 they had all ceased to flow. This information was given by the Claimant to the Respondent in its production reports, with the words "stopped flowing" against the entries for wells CO 161, CO 162 and CO 164 in the report for 3rd July, 2017 for wells CO

165 and CO 166 in the report for 9th July, 2017 and for well CO 162 in the report for 10th July, 2017 [8038-8045]. The result was a drop back in the reported production for 10th July, 2017 to 3,400 bbls.

[67] The Claimant says that the explanation for the way these wells behaved lies in the fact that they were all flowing without a choke, as Mr. Rajab explained in cross-examination. He said that this was the reason for the sharp decline in their production and that he regretted that these wells were not on chokes. Without them the wells were wide open [Transcript, pp 225-6, 245]. The Respondent disputes this explanation in paragraph 32 of its Reply Submissions [9]. But its witness Ms. Chow agreed that if there is no choke there is nothing to control the flow rate on the well as the oil is coming out and that without chokes you would get an awful lot of oil coming out very quickly [Transcript, pp 1143-4]. Mr. Alvarez agreed with her [Transcript, p 1593]. These wells achieved reasonable rates after the Audit visit on 11th July, 2017 when they were put to pump on various dates from 25th to 31st July, 2017 as described in paragraph 106 of the Claimant's Closing Submissions [29]. It would be wrong to conclude from what happened then when they were on pump that the production rates that were reported while these wells were not choked were fraudulent, as the Audit Team seem to have done: see the opening remarks in their Memorandum and paragraph 4.4 of their report [5466, 5481]. But the fact that production continued to be successful, albeit with fewer wells, in the second half of 2017 tends to lend further support to the overall credibility of the Claimant's argument: see the details set out in paragraph 112 of the Claimant's closing submissions [30].

*(3) The Respondent's reply*

[68] The Respondent contends that we should not rely on the evidence which we have just summarised, and that we should conclude that the Catshill Field is incapable of producing the volume of oil that the Claimant said that it produced and sold to the Respondent: see Respondent's Closing Submissions, paragraphs 78-121 [25-39], and its Reply Submissions, paragraphs 18-58 [6-15]. The Claimant has set out its understanding of the Respondent's arguments, and its reply to them, in paragraphs 114 – 179 of its Closing Submissions [31-50]. We note that, although the Respondent had the opportunity to challenge the points made in those paragraphs in its Reply Submissions, it did not do so. We have taken that into account in deciding what weight to give to the fully

argued points that have been made there. The Respondent's arguments go beyond what the Claimant has addressed in that section of its submissions. We have dealt with some of these arguments in the preceding paragraphs. But there a number of points that require further comment: (1) the Claimant's departure from its pleaded case; (2) Mr Aron's comments on the data that was available; (3) the bulk test reports; (4) the evidence about chokes; and (5) that the majority of the Claimant's wells were in depleted reservoirs.

[69] We agree that the way the Claimant has developed its argument in its Closing Submissions is not the same as that in its pleaded case. Instead of following Mr. Aron's report, it has based its presentation on its own production reports and the support which it says they received from other points in the evidence. But we do not accept that this demonstrates the Claimant's lack of credibility, as the Respondent suggests. The evidence on which it relies was led without objection. It is available to be used, and the Claimant is not to be criticised for having taken that course. The explanation lies in the extent to which Mr. Aron cast doubt on the reliability of the data in the production reports and, by implication, on the reliability of his own attempt to match production to sales. The fact that the presentation differs from that proposed by Mr. Aron has no bearing on the overall credibility of the Claimant's case. This argument, and Mr. Aron's observations on the material that was given to him, has to be seen instead in the light of the comments made by Gaffney Cline in the Executive Summary to its first report of November 2017 [5566] to which we referred in paragraph 55 above. The hand-written, form-filling exercise to record the volumes of oil was less than perfect. Mr. Aron said that the entries on these reports were just numbers to fill in a form. But it was not suggested in cross-examination that, despite their defects, they were fabrications.

[70] We consider that it was open to the Claimant to return to the production reports and to build its case on them and, in the case of the wells in pads 3 and 4, to find corroboration in the evidence about the bulk tests. The Respondent's bulk test reports are the key, as Mr. Aron explained [Transcript, p 627]; see also paragraph 140 of his Report [784]. It is true, as the Respondent points out, that there were only three such tests. But we do not agree that this provided insufficient data to corroborate the production reports. Mr. Alvarez agreed that this was so, if the tests were accurate [Transcript, p 1620]. We can see no reason to doubt their accuracy, as Mr. Alvarez did not suggest that there was any reason to do so. He tried to avoid the question, by saying several times

that production was the issue under discussion. We think that we can take it from that response that he had no answer to the question, and that they can be relied on to support the Claimant's argument. An advantage of the approach that the Claimant has adopted is that it uses material that was available to be used by the Respondent before it took its decision to terminate the IPSC. It would have been before the Respondent had all necessary inquiries been made so that it could act fairly, as it was required to do.

[71] The Respondent says that the unreliability of the production reports can be illustrated by the fact that the production reports for wells CO 161, CO 164 and CO 165 show that the production for those wells on 19th June, 2017 when they were recorded as having a bean or choke [4046] was the same as it was on 21st June, 2017 when it was recorded that no bean was attached [4048]. In our opinion it does not follow that these records were inaccurate. These wells were just being brought into production. They first appear in the report for 15th June, 2017 [4038] which include the word "Test". The order of events is set out in paragraph 96 of the Claimant's Closing Submissions [26-27]. They were on choke initially while the tests were being done. It was the decision to remove the chokes, and thus allowing the oil to continue to flow at the initial high rate that Mr Rajab regarded as regrettable [Transcript, p 225].

[72] There is no doubt that many of the Claimant's wells were in areas that were depleted. We note the listing of Catshill as a depleted field by the Society of Petroleum Engineers in its 2012 publication, quoted by the Respondent in paragraph 19 of its Reply Submissions [6]. The general character of the field is complex, however: see paragraph 25 above. So much depends on the connectivity between the depleted areas and others where drilling might turn out to be profitable. For example, Mr. Rajab's decision to drill in the area of pad 3 was driven by the historical data that led him to test the commercial potential of the area [Transcript, p 242]. It turned out that his decision was fully justified, as he found an area where the general characteristic of depletion did not apply. The fact is that generalisations about the character of the field do not tell the whole story. That is why the details about what actually happened matter so much, and why these inquiries were necessary to a decision that could be shown to be objectively.

*(4) Conclusion on this issue*

[73] We are satisfied that the Catshill Field was capable of producing the quantities of oil that the Claimants say they sold to the Respondent. That is because the information that is before us shows that this was so. This information also reveals significant defects in the Audit Report [5465] on which the Respondent relied when deciding to terminate the IPSC, which they would have discovered had all necessary inquiries been made. Their observation that there was a huge increase in production at Catshill between January 2017 and June 2017, and that there was a positive correlation between that increase and the volume discrepancies between the oil produced by E&P and the oil pumped to Pointe-a-Pierre during that period, led them to assume that the likely explanation was that the custody transfer process at Catshill was compromised. What they did not do was to examine the evidence as to what was actually happening on the ground throughout that period. There is no sign that it was appreciated there was nothing abnormal or unusual about the performance of wells CO 135- CO 156 from March 2016 to April 2017, why the decision was taken to drill in the area of pad 3, what the bulk tests that were carried out had shown or that the wells in pad 4 were free flowing without chokes. They overlooked the fact that the wells in pad 4 had all ceased to flow by 10th July, 2017 which was the day before the visit by the Audit Team. These high producing wells did not suddenly wax up, sand up or stop producing on the day of that visit as they seem to have assumed.

[74] There were other grounds for the decision to terminate: see paragraph 52, above. So far as this ground is concerned, however, our conclusion is that the Respondent's decision to rely on it fails to meet the test which we have described in paragraph 25.

*The capacity of the sales pumps*

[75] Among the grounds given by the Respondent in its letter of 1st December, 2017 [2573] for its decision to terminate the IPSC was that there were many instances when the volume of crude oil specified on the Custody Transfer Tickets could not be pumped in the time periods, given the available pump flow rate: paragraph 52, above. We can assume that this allegation was based on statements in paragraph 4.3 and Appendix 2 of the Audit Report that the capacity of the pump used during the period from January to April 2017, the

Worthington, was 160 bbls/hr [5481, 5493] and that the pumping rate of the additional pump which was in use in May, June and July 2017, the GASO, was 350 bbls/hr [5494]. During November 2017 SGS Gulf was commissioned to review the work of the Audit Team. In its Report of December 2017 it said that it had tested the capacity of the GASO in November 2017 and found that it was 260 bbls/hr [2294]. The Worthington pump was not functional at the time of that visit. It was tested when SGS returned to Catshill on 6th December, 2017 and found to have a capacity of 221 bbls/hr [2295]. Both pumps were then tested simultaneously. The longest pumping duration achieved was one and half hours. The combined rate that was achieved was 473 bbls/hr. The Respondent says in paragraph 46 of its Closing Submissions [16] that the evidence of SGS is the only reliable evidence. It is common ground that, on these figures and assuming that the pumps could not be run simultaneously, the Claimant could not have delivered the oil to the Respondents at the rates recorded by it on numerous occasions during the relevant period: see the entries marked in yellow in Ms Chow's table AC35 [15750-15754].

[76] The Claimant challenges the reliability of the figures reported by SGS as a test of what these pumps were able to achieve in practice: paragraphs 287-289 of its Closing Submissions [80]. It points out that the test on the Worthington pump in November 2017 was conducted on sales Tank 7 when it was only about half full with 4476 bbls [2884], whereas all the disputed sales delivered by it were pumped from Tank 7 on very high levels of around 7700 to 9000 bbls. Also, it was carried out after the pipelines leading from the sales pumps to the sales pipeline, and its layout, were changed in August 2017 [Jessel Ali, Transcript, p 1536]. The SGS test on the GASO in December 2017 was carried out on the smaller sales Tank 5, not Tank 7 [2297]. The Respondent points out in paragraph 16 of its Reply Submissions [5] that the Claimant did not commission its own independent test of these pumps, notwithstanding the fact that it had made it clear since the issue of the Audit Report that it was of the view that the pumps could not deliver the volumes claimed. That much is common ground. The Claimant bases its case on the evidence as to what was actually happening on the ground during the relevant period, including that of its production supervisor, Mr. Isaac Soogrim: paragraphs 246-277 of its Closing Submissions [67-78]. The Respondent's response is that nothing in the Claimant's submissions is capable of countermanding its reasonable suspicion on this issue, based on what it says was its reasonable and common-sense

approach. This was the testing of the pumps by a reputable independent third party.

[77] In our view, this response does not measure up to what the test described in paragraph 25 above requires. The question is whether, had all necessary inquiries been made, Petrotrin's decision would have been objectively reasonable: Respondent's Reply Submissions, paragraph 100 [25]. The first step that a person making all necessary inquiries would have taken would have been to check the figures produced by SGS against what was happening on the ground during the relevant period. A study of the sales tickets used by Ms. Chow to compile AC35 would have shown there was a correlation between the increase in the wells drilled by the Claimant during the relevant period and the increase in the amounts of oil said to have been sold during that period. That would have prompted the question whether it was the information in the sales tickets that was wrong or the information from SGS about the pumping capacity. Further inquiries were necessary in order to answer that question. The answer should not have been left to rest on an assumption that the fault lay with the sales tickets. The wider context for that inquiry is the key.

[78] To put this matter into context, therefore, account should have been taken of the whole picture. Account should have been taken of what the necessary inquiries about the capacity of the field would have revealed, as discussed in the previous section. This is that, contrary to what had been indicated by the Audit Report, it was capable of producing the quantities of oil shown on the sales tickets. Two things then follow. First, that checks should have been made to see whether the tests were done in conditions that matched how the pumps were being used when these sales tickets were compiled. That would have shown that the operators were pumping from Tank 7, not Tank 5, and that this was from a tank which was filled to its high level, not when it was about half full. So, it needed to be checked whether this would have made a difference and, if so, why. And second, those who were operating the pumps themselves should have been interviewed. That would have been to discover what, in their experience, the pumps were capable of doing and, if it was different from what they indicated in their Report, why those tests did not match their experience.

[79] Those who were operating the pumps at Catshill during the relevant period were Isaac Soogrim, who had been working as a Production Supervisor there since 2009, and Mervyn Mayers, who was employed there as a Headman. They were both responsible for production at Catshill, both of them provided witness statements, and they were both cross-examined.

[80] Two things emerged during the cross-examination of Mr. Mayers that led to a submission by Counsel for the Respondent that the certificate of truth in his witness statement carried no weight, that he falsely swore an oath that the matters in the statement were true and that his evidence should be disregarded [Transcript, p 389]; Respondent's Closing Submissions, paragraph 149 [49]. When he was taken to paragraph 81 of his witness statement, he found it difficult to read. This was due, he said, to blurred vision. And then, when asked what the word "allegation" in that paragraph meant, he was unable to give a satisfactory answer [Transcript, pp 380-381]. He said that the words in the witness statement were information that he gave to the Lawyers, but he agreed that he had to be able to read and understand every word in the statement to be able to be sure that it was what he had told the Lawyers. He said that he did read and understand the statement, but he agreed that he was not in a position to say that they were all his words or that he understood what they all meant. Counsel then said that she did not wish to cross-examine him any further.

[81] We are not persuaded, as we were asked to do for these reasons, that we should disregard Mr. Mayer's witness statement. He did agree that his eyes were giving him some trouble, but he said that this was because he had been reading every day for the past few weeks [Transcript, p 397]. The facts that he had some problems with his eyesight and was a slow reader do not lead us to the conclusion that he did not read the statement over before he signed it. He insisted in his re-examination that he did so and what he wanted to clarify had been clarified [Transcript, p 399]. The fact that he was unable to give a satisfactory answer to the question what the word "allegation" has to be seen in its context. The passage from his witness statement which was read to him contains more than enough other words to make it clear what it was talking about. These difficulties apart, it was not suggested that he was lying or that there were any passages in the statement that should be disbelieved. We note that when passages from his witness statement were put to Jessel Ali he agreed with them [Transcript, pp 1506-1507]. It seems to us that too much was being

made of the difficulties when he was being cross-examined. We consider that he was a truthful and honest witness, and that we can have regard to his witness statement for the information it contains about how matters were handled at Catshill.

[82] Mr. Soogrim's credibility, on the other hand, was challenged repeatedly when he was cross-examined. This was with regard to four issues in particular. The first related to the question whether the downpipe that was installed in October 2016 before Tank 7 was brought into use as a sales tank was slotted to prevent the siphoning of oil back to the bulk tanks. The second related to his response to the Respondent's case that the two sales pumps were never run simultaneously. The third related to entries in his diary to which reference was made in the support of figures entered on the Custody Transfer Tickets. And the fourth related to the entry in his diary as to the date of the installation of the GASO pump.

[83] It was suggested to Mr Soogrim repeatedly in cross-examination that he was lying and what he said about the slotting of the pipe during the inspection of Tank 7 that followed its installation was a fabrication [Transcript, pp 404, 417, 425]. But, having studied the way he responded to these challenges, and noted the absence of any evidence to the contrary from others who were present when the tank was inspected, we see no reason to question the veracity of his evidence on this issue. His response to the suggestion that he was telling a lie when he said that he saw that the pipe was slotted is worth quoting, as the words used and the manner of their delivery appeared to us to show without any reasonable doubt that he was an honest witness [Transcript, p 414]:

> "Well, Ma'am. I am telling you the truth. That is what I witnessed and that is what I see with my eyes, and that is what I am telling you today."

[84] As for the Respondent's case about the sales pumps, it was that each pump had a separate tie-in valve so that, if both pumps were operated together, the two separate tie-in seals would be recorded on the relevant Custody Transfer Ticket. Ms. Chow's evidence was that there were no such records [1539]. So, its argument went, the two pumps were never operated together. Mr. Soogrim's evidence was to the contrary. He said that there was a single tie-in point after the two lines from the sales pump joined [1472], and that this was where the tie-in seal had been when he was operating the two pumps together and that they could be and were operated together. This evidence was the

subject of a sustained challenge on the ground that it was wholly unworthy of belief [Transcript, pp 1326 -1332]. But Nazir Ali said that the two pumps were used on some occasions in parallel [473], and Jessel Ali, when he was recalled for cross-examination, declined to say that Mr Soogrim was wrong about the location of the tie-in point [Transcript, p 1439]. We accept Mr. Soogrim's evidence on this issue.

[85] Then the Respondent says that it is more likely than not that Mr. Soogrim's diary entries which the Claimant relies on to corroborate the figures entered on the Custody Transfer Tickets for high and low gauges are fabrications: Reply Submissions, paragraphs 59-63 [15-16]. It refers, in support of this argument, to its submission that he was not a witness of truth about the downpipe, a proposition that we have rejected, and to its claim that the sales pumps could not deliver the volumes represented on those tickets which loses much of its force in the light of the evidence that the two pumps were operated together on at least some occasions. Reference is also made to the fact that the diary contains entries with sales figures and other details for dates from October 2017 until the end of the year when on his own evidence he was off work [Transcript, 403]. As this point was not pursued with him in cross-examination, we have no explanation for these entries. The diary as a whole, however, does appear to be genuine, and there is no obvious sign of fabrication. We agree with the Claimant that there is no proper basis for challenging the sales figures that are recorded in the diary on the ground that they were fraudulent: Closing Submissions, paragraphs 182-187 [50-52].

[86] There is a dispute about when the GASO was installed. According to Mr. Soogrim's diary, it was installed on 9th March, 2017 and tested on 13th March, 2017 [568, 11258]. That entry contains the name of the driver who delivered the pump from the Claimant's yard and helped to install it and refers to his boss, Mr. Baksh. Mr. Baksh said that it was installed on 9th March, 2017 was commissioned over the weekend and was first used on 13th March, 2017. He said that he remembered 9th March, 2017 because he had an accident on that date [Transcript, pp 35, 38]. The Claimant's production supervisor, Sahathan Maharaj, said in his statement that it was installed in March [613], and that he is able to recall the month because he did the electrical works. As against that, the Custody Transfer Ticket for 27th April, 2017 which was signed by Mr. Deokiesingh contains the words "Installation of Sales Pump in Progress" in handwriting which appears to have been written by a different pen from the

other entries [9517], and an email from Mr. Ramnarinesingh which says that the Catshill sales pump was changed on 30th April, 2017. We are not told where Mr. Ramnarinesingh, who gives a different date, got his information from. Neither he nor Mr. Deokiesingh gave witness statements or were available for cross-examination. Having considered these points, we prefer the evidence of Mr. Soogrim, supported as it is by that of Mr. Maharaj and Mr. Baksh. Their evidence was also challenged on the ground that it was inconsistent with the Claimant's pleaded case in Schedule 9 to the Statement of Claim, which was later deleted, that the GASO was purchased on 7th April 2017 and was in operation from May 2017. The Claimant's Reply which was filed on 5th July, 2019 stated that the Worthington pump was on its own until 11th April, 2017: paragraph 20(3)(i) and (ii). That date was later amended to 10th March, 2017. We are inclined to attribute the criticism which these pleading points invite to misunderstandings on the part of the Claimant's attorneys rather than to the witnesses who were, of course, not directly responsible for how the pleadings were framed.

[87] Looking at Mr. Soogrim's evidence overall, therefore, we are unable to accept the Respondent's argument that he was a lying and dishonest witness whose evidence on these key points must be disregarded as fabrications and not worthy of belief. We have concluded, on the contrary, that on balance he was a credible witness and that we can rely on what he told us in our assessment of the issues that are before us about which he gave evidence.

[88] The Claimant has invited us to look at this matter chronologically, pump by pump: paragraph 249 of its Closing Submissions [68]. It refers to conversations that Jessel Ali said he had in 2014 when he was the Respondent's Custody Transfer Supervisor at Catshill with the Claimant's operators, probably Isaac Soogrim and Mervyn Mayers, about the capacity of the Worthington pump [Transcript, pp 1430-1432]. He said that it was a casual conversation on sales days when he asked them about its capacity, because it was beneficial for him to know those rates. They told him that it was able to pump over 300 barrels per hour, and that they would have checked that rate themselves as well. Mr. Soogrim said in his witness statement, para 146 [570] that he always thought that it could do between 350 and 400 barrels per hour, and that the GASO could do 400 to 450 barrels on average. It was put to him in cross-examination that the pump rates in his statement were a fabrication because he did not mention them in his affidavit for the proceedings in the

High Court [Transcript, pp 458-459]. But Mr. Ali's evidence suggests the contrary.

[89] Then there are the sales tickets to which the Claimant refers in paragraph 251 of its Closing Submissions relating to dates before Mr. Deokiesingh became the Respondent's Custody Transfer Representative on 16th January, 2017. That position was held during December 2016 and the first two weeks of January 2017 by Suresh Maharaj, who did not give evidence but whose honesty and reliability as to the work he was doing during this period has not been questioned. They show that the Worthington pump was producing rates of at least 233.06 bbls/hr from Tank 7 on 26th December, 2016 of at least 246 bbls/hr from Tank 7 on 30th December, 2016 and at least 225.06 bbls/hr from Tank 7 on 6th January, 2017. We agree with the Claimant that these figures can be relied on to show that this pump could deliver more than the 221 bbls/hr as tested by SGS. This suggests that some other factor was at work here that added to its rate as tested on Tank 5.

[90] There was a change in the method of delivery of the oil from 16th January, 2017 to the end of March when the wells in the first stage referred to in paragraph 62, above, came into production. Unlike the previous period when tanks other than Tank 7 were often used, the sales during this period, with one exception, were all from Tank 7 and the volumes pumped from it were very high. The calculated rates during this period shown on Ms. Chow's table AC35 [15750] range from 222.73 bbls/hr on 20th February, 2017 to 364 bbls/hr on 30th January, 2017 and 412.35 bbls.hr on 23rd February, 2017. The Custody Transfer Tickets for several of the dates in this period were marked as approved by the Respondent's Head of Custody Transfer, Mr. Bachan, who had requested in email of 17th January, 2017 that Internal Audit should carry out an investigation into the escalating shortage of crude oil arriving from the fields at Pointe-a-Pierre [2778]. It seems unlikely that he would have let those figures pass if he noticed that the amounts delivered were exaggerated. Corrections on a Custody Transfer Ticket which he signed on 13th April, 2017 shows that he checked the figures before they were approved [9509]. Furthermore, Mr. Soogrim said in paragraph 136 of his statement that he knew that the Worthington could do 400 bbls/hr as a result of a test carried out by Suresh Marahaj when he was the block supervisor early in 2017 [568]. He said that he was present for the whole test which lasted for two hours, that Mr. Maharaj measured the difference in the tank between the start and stop time, worked

out the amount from the calibration table and told him what the rate was on the same day. There is also a note in Mr. Soogrim's diary for 11th July, 2017 that the pump rate for the Worthington was 400. We do not accept that his evidence was a fabrication as it was put to him for the Respondent when he was cross-examined, especially as we have no evidence to the contrary from Mr. Maharaj.

[91] When SGS tested the pumping capacity of the GASO in November 2017 it found that its capacity was 260 bbls/hr [2294]: paragraph 75 above. Tests carried out by Mr. Soogrim when the GASO was installed and again on 16th May, 2017 produced very different results. He said that he carried out a test for one hour on 13th March, 2017 when the tank they were using, which we can assume was Tank 7, was full. This meant that there was more down pressure from the tank to pump. Two of the Respondent's employees, Ryan Bejaisingh and Visham Ramnarinesingh who did not give evidence, were with him as they wanted to know what the rate was. The pump rate was 460 bbls/hr [569]. He noted this in his diary [11262]. The test which he carried out on 16th May, 2017 in the presence of Mr. Maharaj and Mr. Deokiesingh and lasted for five hours produced a rate of 430 bbls/hr [569]. There is GPS evidence about the movements of his car that shows that Mr. Deokiesingh was present at Catshill for several hours that day [1463], and when he was interviewed about the pump rates by the Audit Team on 26th July, 2017 he told them about this test, which he said was done while Mr. Maharaj was there, lasted for five hours and arrived at a rate of 450 bbls/hr [14995]. We accept Mr. Soogrim's evidence that in practice the pumping capacity of the GASO was far above that recorded by SGS in its test. We also accept that the time of day, the amount of oil in the tank and the possibility of free flow mentioned by Mr. Deokeisingh near the start of his interview, to which we will return, help to explain why this was so.

[92] The fact that there were now two pumps gave rise to the possibility of their being operated together by pumping from two tanks to increase the pumping rate. Mr Soogrim described how this was done in paragraphs 148-151 of his witness statement [571]. He said that the GASO could pump from both tanks at the same time, and that when they were pumping with both pumps together it seemed to take about half the time due to their combined rate. The fact that the two pumps could be run together is not in doubt. This was established when SGS tested both pumps when they were online simultaneously on 8

December 2017 [2298]. The shear pins on both pump discharge pressure limiting valves which were at the 400 psi setting ruptured after about an hour and a half, so the test was stopped prematurely. But it was able to record a combined pump rate of 473 bbls/hr during that period, which is not far short of the sum of the figures it gave for the pumps when operating individually, which was 481 bbls/hr. Mr Soogrim said in paragraph 148 of his witness statement that he had been told by a representative of the Respondent that if the two pumps were run together the pressure might burst the line, but that he did not believe this because the pressure would drop lower down the sales line. Also, as he explained in cross-examination, when the two pumps ran together they were at 160 psi and never went to 300 psi, so the line would not be burst [Transcript, p 456].

[93] The Respondent challenged Mr. Soogrim's evidence on the ground that there were two separate tie in points, one for each pump: see Ms. Chow's witness statement, paragraphs 45-48 [1539]. According to the details entered on Mr. Deokiesingh's Custody Transfer Tickets there was only one tie in seal up to the time of his departure on 11th July, 2017. Ms. Chow said that this meant that only one pump was installed when pumping, not two. Mr. Soogrim insisted in his rebuttal statement that there was only a single tie in point, which was further away after the lines from the two pumps joined [1472]. This point was taken up in cross-examination of the Respondent's witness, Jessel Ali. He accepted, after some hesitation, that Mr. Soogrim was right in his recollection [Transcript, pp 1437-1439]. And he then agreed that the entries on a Custody Transfer Ticket dated 14th August, 2017 [9583] confirmed his recollection [Transcript, 1484-1485]. Here again we accept Mr. Soogrim's evidence. We also accept the conclusion that the Claimant asks us to draw from his evidence in paragraph 275 of its Closing Submissions [77], that it shows that it could deliver oil at the rates set out in Ms. Chow's table AC35 by using both pumps together once the GASO had been installed.

[94] We return now to the point about free flow that we mentioned in paragraph 90, above. The Claimant's expert, Mr. Buse, agreed in the Supplement to his Report dated 9th October, 2020 [1488] with the Respondent's expert, Mr. Wylie of SGS, about the conclusions he drew about the capacity, or flow rate, of the pumps when he tested them on the information available the mechanical capacity. But he pointed out that Mr. Wylie was hired only to determine the flow rate of the pumps. The testing was not designed to take into account the

free flow that might occur during regular sales. That would depend on the existence of back pressure in the line. It would stop when back pressure was developed, but until that point free flow could go into the pipeline. Mr. Wylie agreed that free flow could be made to work on a pipeline system [Transcript, p 1961]. But he said that a pump could only pump the volume of oil that was in the piston chamber. It was impossible for the free flow to take place while the pump was in operation because by the operation of the pump, when one valve was open, the other valve was shut. This must depend, however, as the Claimant submits in its Closing Submissions, paragraphs 283-286 [79-80], on the relative pressures within the system. Account must also be taken of the fact that the evidence shows that, in practice, the pumps were operating beyond SGS's figures as to their capacity. The free flow effect with the valves open was described by Nazir Ali in paragraphs 51-57 of his witness statement [473-474] and by Mr. Ramlogan in paragraph 22 [618]: see also the answer to Question 3 in Mr. Buse's first report dated 30th June, 2020 [1333-1334].

[95] The point about free flow was developed by Mr. Buse one step further. He introduced the theory that gravity flow by siphoning could increase the flow rate within the sales pipeline. This theory did not form any part of the Claimant's pleaded case, as the Respondent points out in paragraph 67 of its Closing Submissions [22] and we agree that we should have no regard to it. In any event, Mr. Buse was unable to demonstrate how his theory would have worked in practice in this case. It depended on precise information about the relative heights of the sales tanks on the one hand and the pipeline throughout its length to Barrackpore on the other, which we do not have. But Mr. Buse drew attention in the Supplement to his Report to the fact that no mention was made in the SGS Report of how much oil was received at Barrackpore tank farm during the test [1489]. We agree with him that this should have been inquired into for the reason he gave, which was that the contention in this case is about the movement of the volume of oil from one point to another in a specified time. The fact that this was not done makes it unnecessary for us to pursue this point. It was for the Respondent to ask for this to be done, as part of the information that it needed to have before it made the decision to terminate. It did not do so.

[96] Our conclusion from the evidence is that the Respondent's assertion in its letter of 1st December, 2017 [2573], that there were many instances when the volume of crude oil specified on the Custody Transfer Tickets could not be

pumped in the time periods given the available pump flow rate, would have been shown to be wrong if all necessary inquires had been made. The Respondent's decision to rely on this point fails to meet the test which we have described in paragraph 25.

*Siphoning, and Mr Deokiesingh*

[97] Our conclusions (i) that the Catshill Field was capable of producing the quantities of oil that the Claimants say they sold to the Respondent and (ii) that the pumps were capable of pumping the amounts of oil recorded on the Custody Transfer Tickets raise the question as to what happened to the oil, given the discrepancies between the crude oil produced by E&P and the crude oil pumped to R&M during the period from April 2016 to July 2017. To justify the decision to terminate the Respondent must show that the decision to terminate was still objectively reasonable because there were nevertheless reasonable grounds for suspecting that the Claimants had been engaged in wrongful or fraudulent activity. There are two remaining issues that we need to examine before we can answer that question. The first is what conclusions we should draw from the Respondent's contention that siphoning took place from Tank 7 back to the bulk tanks. The other is what conclusions we should draw from the evidence about what contribution, if any, the activities of Mr. Deokeisingh made to these discrepancies.

[98] As to the first issue, the Claimant points out that, the shortage problem at Pointe-a-Pierre had already began to increase, and indeed get worse, before Tank 7 was first put into use as a sales tank in October 2016: paragraph 210 of its Closing Submissions [58]. It can also be said that siphoning formed no part of the allegations that the Respondent was making against the Claimant before it made its decision to terminate. It may have been prompted by the overflow of the bulk tanks at the gathering station which occurred during the night of 4/5 March 2018 which took place shortly after the Respondent had taken back possession of Catshill. Oil was observed overflowing from the bulk tanks and the bund wall into the environment. Whatever the reason, however, there is a point here that needs to be considered. This is because, if there was fraudulent activity, the amounts of oil that did not reach the sales pipeline for sending on to Barrackpore must have gone somewhere else. The only possibility that makes any kind of sense is that it was returned from Tank 7 to the bulk talks

so that it could, in effect, be charged for again when it came back to Tank 7. But was this possible?

[99] It seems highly unlikely that such a subterfuge could have gone on undetected, given the volumes of oil involved and the time during which it would have had to be taking place. But the question whether this was possible can be answered by examining the conditions that needed to exist for this to take place. They are set out in paragraph 216 of the Claimant's Closing Submissions [60]. They concentrate on Tank 7 because this, of all the bulk tanks at Catshill, is the only candidate that was mentioned for this in the evidence. First, at least two of the check valves between the sales tanks and Tank 7 would need to have been not working. Second, the downpipe inside Tank 7 would have had to lack perforations, thus enabling the oil that was coming down to go up again out of the tank. And third, the filling valve at the foot of Tank 7 would have to be opened during a sale. The Claimant sets out its detailed reasons for arguing that none of these conditions were met in paragraphs 218-236 of its Closing Submissions [60-65]. The Respondent's answers are in paragraphs 73-85 of its Reply Submissions [19-22]. We need only concentrate on the second reason. This is because the siphoning could not have taken place if there were holes in the upper section of the downpipe.

[100] The Claimant accepts that if there was an overflow on the night of 4/5 March 2018 the downpipe into Tank 7 must have been in a condition then to allow it to happen: paragraph 224 of its Closing Submissions [62]. It also accepts that a video that was taken by Mr. Esahack shows that there were no perforations except for a few in the lowest section of the pipe. The question is whether the pipe shown in the video, which was not taken until 20 April 2020 [Transcript, p 2077], is the same as the downpipe that was installed in October 2016 before it was brought into use as a sales tank. The Respondent says that the only rational inference is that this was so. But in our view the evidence is to the contrary.

[101] The Claimant submitted a drawing of the proposed downpipe to the Respondents in June 2016. It was shown as slotted all the way down [4777]. The Respondent says that this only establishes that the Claimant knew of the need for and significance of the perforations. But there is much more to it than that. Mr. Soogrim, whose evidence we accept, said that he was not present when the pipe was installed. But he said that he saw that it was slotted when

the Ministry, the Respondent and SGS inspected the tank when it had been converted on 20th September, 2016 and that the tank's use as a sales tank was subsequently approved by the Ministry [543, 1474, 3174] [Transcript, pp 412, 416]. As the Claimant says, it is difficult to believe that no one noticed on that occasion that the downpipe was not properly slotted in view of the importance of this feature. Nazir Ali said that the drawings were part of the final inspection and certification by all parties, including the Ministry [479]. The idea that it was installed without slots, despite what was shown on the drawing, as part of a fraudulent enterprise which could so easily have been detected, seems improbable. Also, Mr. Soogrim, when shown the video taken on 20th April, 2020 drew attention to a collar at the bottom of the pipe which indicated to him that this was not the same pipe as that which he said he saw when the tank was inspected on October 2016 [Transcript, p 420-422]. For all these reasons we do not accept that the condition of the downpipe when the Claimant was in occupation of Catshill would have permitted siphoning back to the bulk tanks. The fact that there is no evidence of any overflow into the environment such as that which occurred on the night of 4th/5th March, 2018 lends support to this conclusion. As there was nowhere else for the oil to go once it was in Tank 7, it must have been sent to Barrackpore in the quantities indicated by the Custody Transfer Tickets. Any losses thereafter cannot be attributed to what the Claimants were doing in the gathering station at Catshill.

[102] Turning to the allegations against Mr. Deokiesingh, the suggestion is that he colluded with the Claimant in perpetrating a fraud on the Respondent. So there remains the question whether, even though all the other necessary inquiries to which we have referred indicate that there were no grounds for suspecting that the Claimants were involved in wrongful or fraudulent activity, the Respondent can still say that those grounds exist because of the activities of this man, one of their own employees. As for what those activities were, the evidence depends partly on the GPS records about his movements, and the timing of them, during his time as the Respondent's Custody Transfer Officer at Catshill which the Claimant summarised in paragraph 303 of its Closing Submissions [85], and partly on evidence about his telephone contacts discussed in paragraphs 305-315 [85-87].

[103] At least some of these activities seem to have been inconsistent with a single-minded and unfailingly prompt attention to his duties at the gathering station.

But we do not know how his behaviour compares with his predecessor Suresh Maharaj or his successor Jessel Ali, as we have no such details about their activities. The most significant thing, however, is that there is nothing in this evidence that suggests that these movements or contacts were part of a conspiracy with the Claimants to defraud the Respondents. Such explanations as we have about the telephone calls come from Nazir Ali [480] and Mr. Baksh [446]. They say that they were, at least generally, not in relation to work. Some, it seems, were in relation to politics. There seems to have been nothing more to it than that. Nikita Kuarsingh, the Claimant's office administrator and adviser to Mr. Baksh on office matters, said that she had no knowledge of any calls between Mr. Baksh and Mr. Deokiesingh [Transcript, p 561]. We can find nothing in this evidence to suggest that these movements, conversations or contacts were part of a conspiracy with anybody in the Claimant's organisation to defraud the Respondent.

[104] The Respondent says that innocent explanations do not hinder the formation of a reasonable ground of suspicion: paragraph 96 of its Reply Submissions [24]. That raises a final issue about the construction of Article 29.1 of the IPSC, to which we now turn.

*"Reasonable grounds for suspecting"*

[105] The phrase "reasonable grounds for suspecting" which is used by the IPSC in Article 29.1 [5335] is widely used in legislation for the detection and suppression of crime. *Mandeep Singh Chehil v R* [2013] 3 SCR 220, which is No 3 in the Claimant's bundle of authorities [68], is one example. In that case a dog trained to detect illegal drugs was used without prior judicial authorisation where the facts justified a reasonable suspicion that the person searched was involved in a drug-related offence. Another is *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1996] UKHL 6 where a person was arrested under a section of the Prevention of Terrorism (Temporary Provisions) Act 1984 because the detective constable had a reasonable suspicion that he had been involved in acts of terrorism. As Karakatsanis J explained in *Chehil*, paragraphs 23-28, both the impact on privacy interests and the importance of the law enforcement objective play a role in the level of justification required for the state to intrude upon the privacy interest. He referred to Binnie J's observation in *R v Kang-Brown* [2008] 1 SCR 456, para 75 that 'reasonable suspicion' means something more than a mere suspicion and

something less than a belief based upon reasonable and probable grounds. This, he said, means that in some cases the police will reasonably suspect that innocent people are involved in crime. In *Dryburgh v Gault* 1981 JC 69 at 72, quoted in *O'Hara*, Lord Justice Clerk Wheatley said that the fact that the information on which the police officer formed his suspicion turns out to be ill-founded does not in itself establish that the police officer's suspicion was ill-founded at the time when he formed it.,

[106] The context in which the phrase appears in Article 29.1, however, is quite different. The IPSC has nothing to do with the detection and suppression of crime. There is no balancing here of the private interest against the interest of the state. The balance here is between two parties to a contract which has conferred a power on one party to take a decision in its own interest which may have grave consequences for the other party. As Teare J said in *Pacific Basin IHX v Bulkhandling Handymax* [2012] 1 CLC 1, para 55, the judgment reached to exercise that power must be objectively reasonable and a person who wishes to ensure that his judgment is objectively reasonable will make all necessary enquiries. Furthermore, unlike the case of the justification for a decision to arrest or search by the police, where the possibility that the person may be innocent is outweighed by the public interest and cannot be resolved until the action has been taken, the possibility of an innocent explanation for what the enquiries have revealed must be given full weight in the objective assessment before the decision is taken.

[107] The necessary inquiries must therefore be even handed, not prejudiced in favour of one side or the other. That means that the possibility that there may be an innocent explanation must be inquired into and resolved before the action is taken. If an innocent explanation is found for what was thought at first sight to be suspicious, that factor must be left out of account. For that reason, we have concluded that the Respondent has failed to show that Mr. Deokiesingh's behaviour gave reasonable grounds for suspecting that the Claimant was involved in wrongful or fraudulent activity.

**Conclusion**

*(i) The Claimant's debt claim*

[108] We hold that the Respondent has failed to establish that the Claimant was engaged in seal tampering or any other inappropriate practices in the process of the delivery of crude oil to the Respondent during the period from April 2016 to July 2017. It follows that the Respondent is not entitled to treat any of the crude oil delivered to it by the Claimant during that period as not having been delivered by it in pursuance of Article 14.15 of the IPSC.

[109] The Claimant is entitled to payment of the sum that the Respondent is holding in escrow that is referrable to the sums due on its unpaid invoices during the period from 1st June, 2017 to 31st December, 2017 together with interest at the rate of 3 per cent per annum from the due date of each invoice until the date when the principal sum due was paid into escrow.

[110] The Claimant is also entitled to payment of the sums due on its unpaid invoices for the crude oil supplied by it to the Respondent during the period from 1st January, 2018 to 28th February, 2018 together with interest at the rate of 3 per cent per annum from the date when each payment fell due until the date of this Award.

(ii) *The Claimant's damages claim*

[111] We hold that the Respondent did not have reasonable grounds for suspecting that the Claimant had misconducted itself or otherwise been involved in wrongful or fraudulent activity entitling it to terminate the Agreement under Article 29.1 of the IPSC. It follows that the Claimant is entitled to damages for the wrongful termination of the Agreement. Our decision as to the quantum of any such damages will be reserved for further consideration, as it has been agreed that this should be the subject of a separate hearing. There are, however, issues about the claim for future loss of net earnings on which we must express a view at this stage.

[112] In its pleaded case the Claimant sought to prove that it had been agreed that the IPSC would continue for a further ten years from the end of its original term on 18th November, 2019 to 17th November, 2029: paragraph 41(1) of its

Re-Re-Amended Statement of Claim [69]. It was said that this had been agreed in the course of conversations between Mr. Baksh on the Claimant's behalf and the Respondent's Production Supervisor, Mr. Visham Ramnarinesingh: see paragraphs 39-40. It had already executed Supplemental Agreement No.6 [2771] on 29th June, 2016 by which Article 3 of the IPSC was deleted and replaced by a new Article 3.

[113] The new Article 3 .3 proved for a further term of five years if the Claimant gave notice of its desire to renew the Agreement before it expired and it had and was continuing to observe the terms and conditions of the Agreement. The Supplemental Agreement also set out a new Table for the calculation of royalties until 2024 which was to take effect from 1st July, 2016. The Claimant then proceeded to charge the Respondent on the changed royalty rates in pursuance of that Agreement.

[114] Against that background the claim for future loss was presented in paragraph 153D of the Re-Re-Amended Claim as follows: (i) lost net earnings from 19th November, 2019 to 18th November, 2024 referable to the five year renewal of the IPSC as contemplated in Supplemental Agreement No 6; and (ii) lost net earnings from 19th November, 2024 to 18th November, 2029 referable to the remaining period up to the determination of the IPSC as renewed, it is said, by the agreement between Mr. Baksh and Mr. Ramnarinesingh.

[115] As the Respondent points out in paragraph 170 of its Closing Submissions [56], the evidence about any conversations between Mr. Baksh and Mr. Ramnarinesingh fell well short of showing that there was an agreement to extend the IPSC. Furthermore, Article 45 of the IPSC [5344] provides that no modification or amendment of the Agreement shall be valid or binding unless provided in writing that specifically references the Agreement and that has been duly executed by an authorised representative of the parties. Irrespective of what may have been agreed to in conversations between the parties, no such agreement could take effect until the IPSC was amended in the way provided for by Article 45.

[116] As it is agreed there was no such amendment, we cannot give effect to the Claimant's claim for future loss for the period from 19th November, 2024 to 18th November, 2029.

[117] The Claimant accepts in paragraph 374 of its Closing Submissions [99] that the parties did not agree a five-year extension to the IPSC when they executed Supplemental Agreement No.6. But it says that that agreement was not without effect when calculating future loss, as it provided in the new Article 3.3 that the parties would use reasonable commercial efforts to negotiate in good faith the terms and conditions for the renewed term following the Claimant's notice of its desire to renew the IPSC. The question, it says in paragraph 379, is what could one reasonably expect to have happened had it given such notice? Its case is that it had a reasonable expectation that it would have been renewed for five years from 19th November, 2019.

[118] The Respondent contends in paragraphs 106-107 of its Reply Submissions [26-27] that it is clear on the evidence before the Tribunal that the Claimant had consistently failed to observe and perform the terms and conditions of the IPSC and, accordingly, that the conditions for a renewal could not be met. That argument raises issues of fact to which the Claimant has had no opportunity to reply as it was introduced only in the Submissions in Reply, and which we cannot resolve without hearing further argument. Our decision on this issue must therefore be reserved for further consideration at the further hearing referred to in paragraph 110 above.

*(iii) The Respondent's counterclaim*

[119] As we have held that the Respondent did not have reasonable grounds for suspecting that the Claimant had misconducted itself or otherwise been involved in wrongful or fraudulent activity entitling it to terminate the agreement and that it has failed to establish that the Claimant was engaged in seal tampering or any other inappropriate practice in the process of the delivery of crude oil to the Respondent during the period from April 2016 to July 2017, Head 1 of the counterclaim must be dismissed.

[120] We require further argument as to whether the Respondent is entitled, despite the wrongful termination of the agreement and because it did not raise these matters as being the subject of a dispute between the parties which required to be resolved in accordance with the provisions of Article 36, to the sums claimed as Abandonment Contributions and for decommissioning and the removal of infrastructure under Articles 20.3, to the sum claimed under Article

30.1 and to the amounts claimed under Articles 13.2 and 3 referred to in Heads 2 to 6 of the Counterclaim.

*(iv) Costs*

[121] We reserve our decision as to costs until we have been addressed by the Parties at a separate hearing on that issue, as the Claimant has requested.

**Sir Dennis Byron**
Chair

**Lord David Hope**
Arbitrator

**Justice Humphrey Stollmeyer**
Arbitrator

As at Port of Spain,
Trinidad.
June, 2021