

Case No: 2009 FOLIO 1677

Neutral Citation Number: [2010] EWHC 204 (Comm)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/02/2010

Before :

MR JUSTICE GROSS

Between :

VENTURE NORTH SEA GAS LIMITED

Claimant

– and –

NUON EXPLORATION & PRODUCTION UK LIMITED

Defendant

Andrew Lenon Q.C. and Daniel Hubbard (instructed by **Herbert Smith**) for the **Claimant**

Helen Davies Q.C. and Michael Bools (instructed by **McGrigors LLP**) for the **Defendant**

Hearing dates: 25th, 26th 27th and 28th January 2010

Judgment

Mr Justice Gross :

INTRODUCTION

1. By a Sale and Purchase Agreement dated 18th June, 2009 ("the SPA"), the Claimant/Seller ("Venture") agreed to sell a bundle of interests in certain UK Petroleum Production Licences ("the Licences"), to the Defendant/Buyer ("Nuon"), on the terms and conditions therein set out.
2. In this expedited trial, Venture has sought specific performance of Nuon's obligations under the SPA, together with related declaratory and other relief. For its part, Nuon has denied that it is obliged to complete the transaction, on the ground that Venture had not fulfilled all the Conditions Precedent (set out in the SPA) by the Back Stop Date (15th December, 2009).
3. The trial took place over the period Monday 25th January - Thursday 28th January. Given the urgency of the matter and the fact that it would be of assistance to the parties to know the result, I indicated on Monday 1st February that the claim failed. I now set out my reasons for coming to that conclusion. By reason of time constraints, the Judgment, while seeking to do justice to the high calibre arguments addressed to me by Mr. Lenon QC (representing Venture) and Ms Davies QC (representing Nuon), will be distinctly more summary than might otherwise have been the case.
4. *The factual history:* The transaction encompassed by the SPA related to two producing gas fields and a number of exploration blocks.
5. The dispute was confined to two Licences, P1669, relating to exploration Block 43/28 and P1670, relating to exploration Block 43/29 ("Blocks 43/28 and 43/29 Interests" or, as appropriate, the "Block 43/28 and Block 43/29 Licences"). Whereas most of the Interests forming the subject of the intended sale were 100% owned by Venture, the distinguishing feature of Blocks 43/28 and 43/29 was the presence of third party interests. The Block 43/28 and 43/29 Licences were jointly owned by Venture, having a 60% interest, Ithaca Energy (UK) Limited ("Ithaca"), having a 30% interest and Volantis North Sea Gas Limited ("Volantis"), having a 10% interest.
6. Venture, Ithaca and Volantis owned and operated their interests in the Block 43/28 and Block 43/29 Licences, pursuant to a Bidding Agreement dated 13th May, 2008 ("the Bidding Agreement"). The Bidding Agreement contemplated that the parties would enter into a Joint Operating Agreement ("the JOA"). To this end, cl. 12 of the Bidding Agreement provided for them to negotiate in good faith and in a timely manner a JOA "substantially in the form of the United Kingdom Offshore Operators" recommended JOA.

7. The SPA provided for Nuon to purchase half of Venture's 60% interest (i.e., a 30% interest) in the Block 43/28 and Block 43/29 Licences. Inevitably the question arose as to the means of bringing Nuon into a relationship with Ithaca and Volantis. In a nutshell, the choice lay between (1) novating the Bidding Agreement or (2) making Nuon a party to the (contemplated) Block 43/28 and Block 43/29 JOA. In the event, Venture elected to proceed by way of the latter route - making Nuon a party to the JOA. Although there was some debate at the trial as to the choice involved, it does not seem to me that the reasons for deciding against the novation route matter - and I say no more of that.
8. In accordance with the decision to make Nuon a party to the Block 43/28 and Block 43/29 JOA - the agreement which would define the rights and duties of the parties in connection with the Block 43/28 and Block 43/29 Licences - Venture and Nuon agreed a form of JOA, which was appended to the SPA as Part 3 of Schedule 7 thereof ("the draft JOA"). There is no dispute that the draft JOA followed the standard industry form recommended by the United Kingdom Offshore Operators' Association ("UKOOA").
9. Ithaca and Volantis were of course not parties to the SPA and indeed had been unaware of the negotiations culminating in the SPA - the transaction had been kept confidential for reasons of price sensitivity. Necessarily, however, Ithaca and Volantis had to sign up to any JOA in respect of Block 43/28 and Block 43/29. It was therefore made a Condition Precedent of the SPA that prior to Completion, Ithaca and Volantis should have signed up to a JOA in respect of the Block 43/28 and Block 43/29 Licences, "*in substantially the form*" of the draft JOA.
10. As already noted, the Back Stop Date was the 15th December, 2009. On the 14th December, 2009, Venture, Ithaca and Volantis executed two JOAs in relation to the Block 43/28 and Block 43/29 Licences ("the executed JOAs"). Venture's case was that by doing so, it had fulfilled the last of the Conditions Precedent to Completion – and that Completion should therefore take place on the 21st December, 2009 (i.e., the 5th Business Day following the Business Day on which the last of the Conditions Precedent had been satisfied, or waived, in accordance with cl. 7.1 of the SPA). Nuon disagreed and has refused to complete. The trial has been concerned with whether that refusal was justified.
11. *The Principal Issues:* Two principal Issues arose, which may be summarised as follows:
 - i) Whether, on the true construction of the SPA, the agreement of Nuon was necessary for the executed JOAs to constitute Completion Documents? ("Issue (I)")
 - ii) Whether the executed JOAs were in substantially the form of the draft JOA? ("Issue (II)")

12. Issue (I) involved a short point of construction. As it was common ground that Nuon had not agreed the executed JOA, it necessarily followed that if the answer to Issue (I) was "yes", then the claim must fail. If, however, the answer to Issue (I) was "no", then the focus of the argument shifted to the inquiry as to whether the executed JOAs were in "substantially the form" of the draft JOA ("Issue (II)"). If the answer to Issue (II) was "yes", then a subsidiary question arose as to interest, as to which (in the event) I need say no more. If the answer to Issue (II) was "no", then it was common ground that a Condition Precedent had not been satisfied, so that again the claim must fail.
13. *The SPA*: It is next convenient to outline certain of the central features of the SPA. The price of the Interests was €101,500,000. As was common ground, there was no severance clause; the SPA stood or fell as a "package".
14. Cl. 3 dealt with Conditions Precedent and Termination and, insofar as material, provided as follows:

" 3.1 The sale and purchase x. is subject to the satisfaction (or waiver) of the following conditions prior to Completion ('the Conditions Precedent'):

3.1.3 the execution by the parties thereto (excluding the Parties and the Secretary) of the Completion Documents;

3.1.5 if required by Venture, the transaction contemplated herein being approved by the shareholders of Venture in general meeting.

3.4 Subject to Clause 3.5, if any of the Conditions Precedent have not been fulfilled or waived by the Back Stop Date this Agreement shall cease to be of any force or effect and the Parties shall be freed and discharged from all liability under this Agreementx.."
15. Pausing there and by way of elaboration:
 - i) "Completion Documents" (cl. 3.1.3) was defined in cl. 1 of the SPA to mean "the Principal Completion Documents together with any other documents which the Parties (acting reasonably) agree are necessary or desirable to effect the transfer of the Interests to the Buyer". In turn, "Principal Completion Documents" was defined in cl. 1 to mean "in respect of an Interest, those Completion Documents listed in Schedule 1". I shall come to Schedule 1 presently.
 - ii) "Parties" (as distinct from "parties") was dealt with in cl. 1 of the SPA as follows:

" 'Party' means a party hereto and 'Parties' shall be construed accordingly"

"Parties" therefore means Venture and Nuon. I return to the question of "Parties" and "parties" when dealing with Issue (I).

- iii) Cl. 3.5 of the SPA (to which cl. 3.4 was subject) dealt with waiver of a Condition Precedent; no question of waiver arose, so nothing further need be said as to cl. 3.5.
- 16. Schedule 1 to the SPA dealt with each of the Interests the subject of the sale in a separate Section; Part 2 of each Section listed the Completion Documents for the Interest in question. The Block 43/28 and Block 43/29 Interests were dealt with in Section 8. Part 2 of Section 8 included the following provisions:
 - " 2.4 If agreed by all parties thereto by the Completion Date, the Block 43/28 & Block 43/29 Operating Agreement;
 - 2.5 Except where the Block 43/28 & Block 43/29 Joint Operating Agreement is agreed by all parties thereto by the Completion Date, Novation of the x..[Bidding Agreement]x."
- 17. The "Block 43/28 & Block 43/29 Joint Operating Agreement" was itself defined in cl.1 of the SPA to mean:
 - " xthe Joint Operating Agreement relating to Licence P.1669 Block 43/28 and Licence P. 1670 Block 43/29 in substantially the form attached in Schedule 7 Part 3, to be entered into at Completion."
- 18. Pausing again and, as already foreshadowed, there was no dispute as to the scheme of the SPA, so far as concerns Issue (II). The question was whether the executed JOAs were in "substantially the form" as the draft JOA. It was common ground that if the answer to this question was "no", then the Completion Documents in respect of the Block 43/28 and Block 43/29 Interests would not have been executed, so that Condition Precedent 3.1.3 would not have been satisfied by the Back Stop Date. That being the case, cl. 3.4 applied, so that the SPA ceased to be of any force or effect.
- 19. With regard to undertaking the comparison between the executed and the draft JOAs, the executed JOAs were (*mutatis mutandis*) identical for Blocks 43/28 and 43/29. For the purpose of addressing Issue (II), the parties most helpfully prepared a "comparite version", tracking the changes between the "draft" and "executed" JOAs, to which easy reference can be made. When dealing with Issue (II), I shall set out the clauses in the draft and executed JOAs which were at the centre of the debate.

20. Before leaving the SPA, I should note cl. 7.4, to which reference was made in the argument concerning Issue (I). Cl. 7.4 provided as follows:

"In the event that all parties to the Block 43/28 & Block 43/29 Joint Operating Agreement have not agreed the final terms thereof so as to enable signature of that Operating Agreement by all parties thereto at Completion, the Seller and the Buyer shall, subject to the remaining terms of this Agreement, nevertheless proceed to Completion and shall thereafter use all reasonable endeavours to procure such agreement and signature of that Operating Agreement in substantially the form set out in this Agreement. "

21. *Completing the chronology:* To complete this introduction, mention should be made here of a number of features of the factual landscape.
22. First, that there would be some differences between the executed and draft JOAs was only to be expected. Putting the Issue (I) arguments to one side, the Parties (i.e., Venture and Nuon) must have contemplated a negotiation between Venture, on the one hand and Ithaca and Volantis on the other. That much is apparent from the requirement that Venture should procure (used neutrally) Block 43/28 and Block 43/29 JOAs agreed by Ithaca and Volantis and that the executed JOAs should be "in substantially the form" of the draft JOA. In a negotiation of that nature, it would have been remarkable if there were no changes to the draft. Moreover, the requirement was not identity between the executed and draft JOAs but an executed JOA "in substantially the form" of the draft JOA (see below).
23. Secondly, on the face of it, with the SPA concluded in June 2009 and a Back Stop Date of the 15th December, 2009, there was ample time to ensure fulfilment of the Conditions Precedent. In the event, as has already been noted, the date of the executed JOAs was the 14th December, 2009 - and, as was apparent from the materials before me, much took place in the final weeks of the June - December period. As it seems to me, at least a reason for the not inconsiderable delay over that period was the uncertainty resulting from the takeover of Venture's ultimate parent company by Centrica; see too, cl. 3.1.5 of the SPA. By itself, any shortage of time is plainly neither here nor there as to the Issues which I must decide. However, in the events which happened, it is noteworthy that Venture came to require agreement from Ithaca and Volantis to the executed JOAs at a time when the SPA deadline was looming large. That consideration is perhaps not altogether irrelevant when considering the manner in which the executed JOA came to differ from the draft JOA.
24. Thirdly, on the evidence, the market had moved between conclusion of the SPA in June 2009 and December 2009, so that the deal was no longer attractive to Nuon. Against this background, Nuon's resistance to Completion necessarily required (and received) close scrutiny. But such considerations can only go so far; either Nuon does or does not have a good defence to the claim; if it does not, it is bound to Complete; if it does, it is not bound to Complete - and it is nothing to the point that walking away from the deal is now commercially appealing to Nuon. Put the other

way, Venture is not the first and will not be the last party to have failed to fulfil conditions precedent to completion in market conditions where it would undoubtedly be to its commercial advantage to have done so. Such things happen. In all this, I have not overlooked the evidence that Venture negotiated with Ithaca and Volantis mindful of the danger of agreeing amendments to the draft JOA which would jeopardise Completion; but, at the same time, Venture also needed to accommodate Ithaca's and Volantis's requirements, as underlined by the matter to which I next turn.

25. Fourthly, on the 14th December, 2009, Venture entered into "side agreements" with Ithaca and Volantis ("the side agreements" and the "Ithaca" or "Volantis" side agreement, as appropriate). In the light of the discussion to come under Issue (II), the relevance of the Ithaca side agreement cannot be dismissed out of hand. On Venture's own evidence, this side agreement was plainly intended to give Ithaca comfort, against a background where Ithaca had its own financial concerns but Venture could not agree substantial changes to the JOA without putting Completion at risk. I shall return to the Ithaca Side Agreement in due course and for the moment do no more than note the provisions of cl. 3 thereof:

" Undertakings by Venture in the period prior to 31st March 2010

Notwithstanding the terms of the JOAs or any other agreement between Venture and Ithaca, Venture hereby undertakes to Ithaca:

3.1 to use all reasonable endeavours to put in place all reasonable amendments to the JOA(s) that Ithaca may suggest in writing to Venture prior to March 31st 2010; and

3.2 prior to 31st March 2010 to not take any action under the JOAs (or either of them) that shall cause Ithaca to incur liabilities or costs under the JOAs (or either of them) be such costs and/or liabilities financial, contractual, environmental or otherwise in nature, without Ithaca's prior written consent (save for expenditure under Clause 6.10.2 of the JOAs); and

3.3 at the written request of Ithaca made prior to 31st March 2010, to use best endeavours to support and execute Ithaca's withdrawal from either or both Licencesx.."

26. I turn to the Principal Issues. Given the view I take of the matter, it is convenient to deal with Issue (II) first.

ISSUE (II): WHETHER THE EXECUTED JOA WAS IN SUBSTANTIALLY THE FORM OF THE DRAFT JOA?

27. (1) *The test:* My starting point is the applicable test for determining whether the executed JOA was in substantially the form of the draft JOA.

28. As it seems to me:

- i) The question is one of substance, not form, to be determined objectively: *Yewbelle Limited v London Green Developments Limited* [2006] EWHC 3166 (Ch), at [107] and [110]. The comparison lies between the draft and executed JOAs, considered as a whole and with regard to the relevant factual matrix. Although the differences between the draft and executed JOAs are first to be considered individually, it is appropriate to take their cumulative effect into account – with this caution: aggregating a number of trivial differences (if such they are) may well be unlikely to produce a significant cumulative effect.
- ii) "Substantially" has its ordinary meaning, upon which it is perhaps best not to elaborate. But to the extent that elaboration or paraphrasing is warranted, the meaning in the present context is best captured by the *Shorter Oxford Dictionary* (5th ed.) meanings, "essentially, intrinsically" or "actually, really". On any view, if, in context, the differences amount to "material" changes having regard to the JOA as a whole, then the executed JOA will not be in substantially the form of the draft JOA.
- iii) There is great force in Ms Davies' submission that the relevant comparison:

" xis and must be between the contractual rights and obligations, the bundle of rights and obligations created by the two agreements. The reason for that is that it is the contract which defines what the parties are going to be obliged to do and what the other parties are therefore entitled to call on by way of performance x. "

On one view, there is much to be said for stopping there. If the contractual difference is material, the second agreement is not in substantially the form of the first. On this approach, the fact (if it be the fact) that, commercially, the parties may seek to overcome the resultant difficulties, is neither here nor there. Such commercial efforts do not mean that the executed JOA is in substantially the form of the draft; they go instead to mitigating the consequences of the second agreement not being in substantially the form of the first.
- iv) However, it may also be right not to be unduly rigid in this area. The matter can be tested in this way. Let it be assumed that in some circumstances it is overwhelmingly likely that commercial parties will act in a particular way to address the consequences of an apparently significant contractual alteration. If that be so, then it can be cogently contended that the contractual difference should not be viewed as preventing the second agreement from being in substantially the form of the first. To do otherwise, might involve the danger of failing to give effect to the practical or commercial realities. Accordingly, *de bene esse* , I am prepared to proceed on the assumption, most favourable to Venture, that I should not, without more, stop with a strict comparison of

contractual rights and duties; instead, I should go on to consider the commercial effects and realities of that difference. When I do so, Mr. Lenon is right to contend that the parties should not be assumed to wish to sabotage the venture. That said, obvious caution is needed before assuming that the conduct of any party will be other than in accordance with its rights and obligations.

29. (2) *The evidence:* Each party adduced factual and expert evidence, without objection. The evidence was irrelevant to Issue (I). Its scope was confined to the Issue (II) topic of assessing the practical effects of such differences as there were between the executed and the draft JOAs.
30. As witnesses of fact, Venture called Mr. Sheach and Mr. Fleming; Nuon called Mr. Van Der Zanden and Mr. Anderson. Nuon also put in evidence the witness statements of Ms Bell and Mr. Rijcken (who were available for cross-examination but were not required). As to expert evidence, I heard from Mr. Black, called by Venture and Mr. Rossiter, called by Nuon.
31. I am satisfied that all the witnesses honestly sought to assist the Court, even if, amongst the factual witnesses, there was an element of partisanship. I am further satisfied that both experts approached their task dispassionately. I unreservedly acquit Mr. Black of the charge of lack of independence. As to Mr. Rossiter, although it was necessary to make allowance for the stridency of certain of his opinions, the core of his evidence remained of great assistance. The conclusions of the experts in their Joint Memorandum ("the Joint Memorandum") were noteworthy, serving to belie any suggestion of partiality; as will be seen, I placed great store on these conclusions.
32. (3) *The Nuon complaints:* At the outset of the trial, Nuon highlighted a number of differences between the executed and draft JOAs which it categorised as material ("the differences"). These were helpfully set out in a Schedule attached to the Nuon Outline Argument and in similar form in the Joint Memorandum; it is unnecessary to lengthen this Judgment by repeating the full details here. In summary, those differences - and the clauses of the comparative version of the JOA to which they relate - were as follows:
 - i) Cl. 1.1: Relevant Majority.
 - ii) Cl. 1.1: Senior Managerial Personnel.
 - iii) Cl. 6.6.1: Authority of the Operator to represent the Participants.
 - iv) Cl. 9.8.3 (n) and/or 10.2.2 and/or 12.2.2: Unanimity requirement for issue and/or approval of Authorisation for Expenditure ("AFE") in certain circumstances.

- v) Cl. 9.8.3(o) and/or 10.1.3 and/or 12.1.3: Unanimity requirement for early commitment to expenditure prior to approval of the relevant budget.
 - vi) Cl. 9.9.2 (a), (b) and (c): Time periods relating to the "Drill or Drop" date, together with availability of information.
 - vii) Cl. 10.2.1 and 11.2: Deletion of the word "capital" in relation to certain commitments for expenditure.
 - viii) Cl. 15.4.6: Sole Risk Seismic "buy-back in".
 - ix) Cl. 23.2: The right of "first look".
 - x) Cl. 24.3(f): Withdrawal rights and implications for decommissioning.
33. For reasons which will become apparent, my primary focus is on differences iii) and iv) - and I will treat difference v) essentially as an adjunct to difference iv).
34. Ms. Davies realistically abandoned reliance on difference x) at the start of the final day of the hearing and I say no more of it.
35. Ms. Davies, also realistically, indicated during the course of the hearing that Nuon would not rely on any of differences i), vii) and ix) of themselves, though she submitted that they remained relevant to the cumulative picture. I shall deal very briefly with these differences, together with differences ii), vi) and viii).
36. (4) *Cl. 6.6.1 - Authority of the Operator to represent the Participants:* In the draft JOA, cl. 6.6.1 provided that:
- "Unless otherwise directed by the Joint Operating Committee, the Operator shall represent the Participants regarding any matters or dealings with the Secretary and other governmental authorities or third parties in so far as they relate to the Joint Operations, provided that there is reserved to each Participant the unfettered right to deal with the Secretary or any other governmental authorities in respect of matters relating to its own Percentage interest."

The "default position" was accordingly that the Operator was authorised to represent the Participants in accordance with the terms of the clause. In order to prevent the Operator from doing so, the draft JOA required a 65% majority to vote in favour of the restriction on the Operator's authority: cl. 9.8.2. Given the percentage Interests of

the co-venturers in Block 43/28 and Block 43/29, three parties would have needed to agree on the restriction in order to assemble a 65% vote.

37. In the executed JOA, the default position has been reversed. The opening words of cl. 6.6.1, "*Unless otherwise directed* " have been deleted and replaced with the words "*When and as directed*" . At least by the conclusion of the trial, it was not in dispute that the new wording was restrictive. The Operator could only represent the Participants in respect of the matters covered by the clause, "when and as" authorised to do so. In short, unless so directed, the Operator did not have authority to represent the Participants. It follows from cl. 9.8.2 of the JOA (which was unchanged so far as here material), that to obtain such authority a 65% affirmative vote was required. Thus 3 of the 4 parties were now required to vote in favour of granting the Operator authority.
38. The experts' agreed observation in the Joint Memorandum is of note:
- " Agreed the consequences are significant depending upon
xhow restrictive the words are. "

Given the consensus that the wording was restrictive, the experts therefore agree as to the significance of the consequences.

39. On the material before me, that observation is both unsurprising and striking. First, it was plain on the evidence that whereas the clause in the draft JOA conformed to the standard recommended UKOOA form, the amended version in the executed JOA did not. In his oral evidence, Mr. Black said that he had not seen a clause in this (amended) form "which certainly introduces the potential for conflict on this issue". Secondly, on all the evidence there can be no sensible dispute as to the extensive nature of the Operator's dealings with the Secretary, i.e., the Secretary of State for the Environment and Climate Change ("DECC") and with a very wide range of "third parties" - contractors, other oil companies and so on. A vast number of third parties (perhaps hundreds) could be involved in joint operations. In his written report, Mr. Rossiter said simply that the provision as found in the executed JOA was "unworkable". I agree.
40. The thrust of Mr. Lenon's response was as follows. He accepted the force of the concerns as to the executed JOA, if the wording required the Operator to come back to the Joint Operating Committee ("the JOC") to ask for separate permission each time it wished to communicate with DECC or a third party. But he went on to submit that the JOC could approve a "blanket approval resolution for representations". Assuming the JOC did so, then he contended that the change in the wording had no significant effect. The only difference in outcomes would arise in a situation of stalemate - where the parties divided two all on whether authority should be conferred on the Operator. Mr. Lenon categorised that situation as "theoretical" and, were it to arise, "the lack of authority on the part of the Operator would be only one symptom of the paralysis engendered by the deadlock, not its cause".

41. I am, with respect, wholly unable to accept Mr. Lenon's submissions in this regard.

- i) On the evidence of Mr. Sheach, this amendment to cl. 6.6.1 was introduced at the behest of Ithaca because Ithaca wished to make representations on its own behalf and wished to restrict the Operator's authority for doing so in accordance with the wording of the executed JOA. There is something unreal in the notion that Venture, Ithaca and Volantis having gone to the trouble of amending the JOA in this respect, would thereafter agree to grant a "blanket" approval to the Operator. The obvious and unanswered question is why they would do so, a step which would effectively restore the position found in the draft JOA. On any view, it must be, at best, only speculative that they would do so. In passing, a formal amendment to the JOA to restore the *status quo ante* would require unanimity: cl. 32.2 of the JOA.
- ii) It is correct that a 65% majority (i.e., any 3 of the 4 parties) could take a decision under both the draft and the executed JOA to reverse the default position, as a matter of withholding or granting authority to the Operator. It is also correct that under either form of JOA, if the parties were split two all, there would be stalemate. But it does not follow from this, as Mr. Lenon submitted - almost as a matter of "*realpolitik*" - that the amendment makes no practical difference. To my mind, that is again, at best, a matter of speculative assumption. The balance of power has shifted in favour of restricted authority. The bargaining position of the parties has been altered; the dynamics may well be different depending not only on the parties' relations under this contract but on their position generally. A second party may all the more readily be induced to accept the new *status quo* of restricted authority rather than having to canvass support for a 65% majority to introduce such a restriction. A restriction on the Operator's authority is of course capable of serving as a brake on activity - a matter not without significance when it is borne in mind that both Ithaca and Volantis were (on the evidence) appreciably smaller entities than Venture or Nuon and that Ithaca's cash flow concerns are plain from the Ithaca side agreement.

42. In my judgment, if I compare the position with respect to cl. 6.6.1 under the draft JOA and under the executed JOA, then so far as concerns contractual rights and obligations there has, almost self evidently, been a material change. If it is right to go on, then, having regard to commercial realities I am equally convinced of the significance of the change. The experts' agreement points that way and nothing in Mr. Lenon's suggested answers has persuaded me otherwise. Ms. Davies said this in her oral final submissions:

" x. this is a clause governing the ability of the operator to engage in the pursuit of joint operations in a whole range of communications and dealings that go to the very heart of the conduct of joint operationsx.

x.that [i.e., this amendment] is an absolutely fundamental shift in the authority of the operatorx. "

43. I entirely agree. As amended, cl. 6.6.1 furnishes a recipe for discord, delay and indecision, going to the heart of the JOA and in a manner which plainly diverges from the industry standard form of agreement. Given the importance of the clause and the materiality of the amendment, I am inclined to the view, on the basis of this difference alone, that the executed JOA was not "substantially in the form" of the draft JOA. However, I defer a final decision until later.
44. For completeness, I must now deal with the other amendments to cl. 6.6.1. The wording of the clause in the draft JOA was as set out above. In the executed JOA, the wording "in respect of matters relating to its own Percentage Interest" has now become a sub-clause, 6.6.1(a). A new sub-clause, 6.6.1 (b), has also been added, in the following terms:
- " to the extent that a Participant does not support the representations of the Operator, in respect of matters pertaining to the Licence, to Work Obligations, to any Development Plan or to Decommissioning provided always that such Participant shall:
- (i) afford the Operator prior access to the Secretary (or other governmental authority);
- (ii) promptly report details of, and keep the Joint Operating Committee fully informed of, all technical representations and Licence related representations as it may make to the Secretary (or other governmental authority),
- provided that no Participant shall give any undertaking or make any representations to the Secretary in respect of any additional or contingent work obligations which would prejudice any interest of any of the other Participants under the Licence. "
45. The difficulty with sub-clause 6.6.1(b) is that it furnishes an explicit right to Participants to make their own representations to DECC regarding matters not confined to the Participant's own Interest. Mr. Rossiter (so far as it was a matter for him) suggested that cl. 6.6.1 (b) gave rise to a conflict with cl. 9.8.4, which provides that all Participants are bound by decisions of the JOC. I am not persuaded that there is a conflict as such; the right to make dissentient representations under cl. 6.6.1 (b) is not inconsistent with the obligation to be bound by JOC decisions. But that said, I do think that cl. 6.6.1 (b) does increase the scope for voicing dissent and emphasises the shift in the executed JOA towards confining the Operator's freedom of action. By itself I do not think that the insertion of cl. 6.6.1(b) amounts to a significant difference as between the draft and executed JOAs. However, when read as part of the amendments to cl. 6.6.1 as a whole, it serves to emphasise the material nature of the difference between the draft and executed JOAs.
46. (5) *Cll. 9.8.3 (n) and/or 10.2.2 and/or 12.2.2: Unanimity requirement for issue and/or approval of AFE in certain circumstances:* I turn next to another topic which loomed large at the trial.

47. Cl. 9.8.3 (n) first made its appearance in the executed JOA; it was not contained in the draft JOA. It introduced an additional unanimity requirement in the following terms:

"9.8.3 The following matters and decisions require the affirmative vote of all Participants entitled to vote or the consent or approval of all Participants:

(n) approval of any AFE in respect of expenditure under an approved Programme and Budget which is greater than one million Pounds (£1,000,000) within the four (4) months following the date of submission of the draft Programme and Budget to the Participants pursuant to clause 10.1.1 and/or clause 12.1.2 other than expenditure incurred by the Operator under clause 6.10.2"

48. As to the contractual scheme, cl. 10.1.1 of the JOA (both the draft and executed versions) obliged the Operator in each calendar year to submit to each of the Participants "not later than 1st November a draft of the proposed exploration and/or appraisal Programme and Budget referred to in clause 10.1.2" for the next year. Cl. 10.1.2 of the JOA required the Operator, in each year, to submit to each of the Participants "not later than 8th December a proposed exploration and/or appraisal Programme and Budget" for the next year. Cl. 10.1.3 provided for the JOC to approve an exploration and/or appraisal Programme and Budget not later than the 31st December. Budgetary approval required the "ordinary" 65% majority.
49. As will be apparent, cl. 10 of the JOA dealt with exploration and appraisal Programmes and Budgets. So far as concerns the production stage, cl. 12 of the JOA dealt with production programmes and budgets. Cll. 12.1.1, 12.1.2 and 12.1.3 were in, *mutatis mutandis*, like terms as the timetabling provisions in cl. 10 (just referred to). Approval of the production programmes and budgets likewise required the "ordinary" 65% majority.
50. However, giving effect to cl. 9.8.3 (n), new clauses were introduced into the executed JOA (not found in the draft JOA), covering the exploration/appraisal and production stages respectively and containing a requirement of unanimity. These were clauses 10.2.2 and 12.2.2, again *mutatis mutandis* in like terms. Taking cl. 12.2.2 for illustration, it provided, so far as material, as follows:

" Other than any expenditure incurred under clause 6.10.2×..the issue by the Operator of an AFE in respect of any expenditure under an approved production Programme and Budget which is greater than one million Pounds (£1,000,000) within the four (4) months following the date of submission of the draft production Programme and Budget to the Participants pursuant to clause 12.1.1 shall require the prior approval of all Participants. "

51. Cl. 6.10.2 provides for emergencies in the following terms:

" The Operator is also authorised to make any expenditures or incur commitments for expenditures or take actions it deems necessary in the case of emergency for the safeguarding of lives or property or the prevention of pollution×."

52. Other than in the case of emergencies, it is, however, clear that budgetary approval by a 65% majority does not permit the Operator to enter into commitments or incur expenditure in disregard of the requirements of cll. 10.2.2 and 12.2.2. So, cl. 6.10.1 provides that:

" The Operator is authorised to make such expenditures, incur such commitments for expenditures and take such actions as may be authorised by the Joint Operating Committee in accordance with clauses 10 to 14×.."

Furthermore, Schedule A to the JOA, "Accounting Procedure" (made part of the JOA by cl. 16.1 thereof) contains in Section IV a "Budgeting, Forecasting and Reporting Procedure". Cl. 4 of Section IV of Schedule A, as amended in the executed JOA, could hardly be more explicit:

" Budget Approval and AFE Approval

Approval of Budgets for exploration and/or appraisal,×.production×.provides the Operator with general approval of the proposals but does not permit the Operator to enter into commitments or incur any expenditures in excess of the limits provided under Clauses 10.2×.12.2×.until an AFE is approved by the Joint Operating Committee as provided in Clauses 10.2×12.2×. "

53. In terms, these amendments to the executed JOA gave any individual participant a right to veto entry by the Operator into JOA commitments or expenditure for the period specified. Although Nuon categorised it as a "4 month time lag", I think it better to view the period in question as one of 2 months. First, although a draft budget was required by latest the 1st November each year, approval of the next year's budget was not required until latest 31st December of the current year. If the specified period for unanimity commences running on the 1st November of the current year, then it expires at the end of February of the following year; but as a matter of contractual right and duty, it cannot be assumed that the budget would have been approved prior to the 31st December of the current year - hence the 2 month period I prefer. Secondly, expenditure requirements for November and December of the current year could be dealt with, if need be, by way of amendment to the current year budget, a process which was not subject to the unanimity requirement: see cll. 10.3.2 and 12.3.1. Nonetheless, a 2 month time lag remains.

54. In his witness statement, Mr. Sheach explained the reason for these amendments:

" This change~~x~~.was introduced at the suggestion of Ithaca in order to ensure that they had sufficient time to ensure the funds were in place to meet any expenditure in excess of £1,000,000 anticipated in a draft budget - in other words to ease any potential cash flow difficulties (Ithaca and Volantis are relatively small companies in the industry)~~x~~"

Mr. Fleming's evidence was to similar effect. These cash flow concerns were of course highlighted by the terms of the Ithaca side agreement (see above).

55. For my part, it is beyond serious dispute that the terms of this difference between the draft and the executed JOAs impact upon the financial relationship between the parties and in a manner which must tend to favour delay. It must equally be beyond serious dispute that the financial relationship between the parties is (as Ms Davies submitted) a "key area" of the JOA. It is noteworthy that the UKOOA standard form agreement does not contain any such unanimity requirement, carrying with it a moratorium on commitments and expenditure. It was common ground that in the production stage, operations were conducted on a "24/7 365 days a year" basis. The expert evidence in the Joint Memorandum as to these amendments in the production context was telling:

" With the Budget cycle, if there is a non-consenting Participant, this will impact Production Operations and thereby is an unacceptable position for the other Participants to be in."

56. *Prima facie* , therefore, these amendments suggest that the executed JOA was not in substantially the form of the draft JOA. Mr. Lenon, however, sought to resist any such conclusion by reliance, in essence, on the following arguments:

- i) The problem centred on January and February of the following year (the 2 month period in question) - given that the current year budget or amendments thereto could address commitments and expenditure in November and December of the current year. Accordingly, if presentation of the draft budget was brought forward to 1st September, the problem could be avoided.
- ii) The problem could be addressed by a "workaround". As the evidence suggested, the industry was familiar with "workarounds" to furnish practical solutions. The starting point was that a 65% majority had already approved a proposal in the budget; if not, then the proposal would not have passed and the unanimity requirement was irrelevant. But if a 65% majority had approved such a proposal, then faced with a single dissident, the majority could drive through the expenditure anyway and cash call the dissident after the conclusion of the moratorium period; relying upon Mr. Fleming's evidence, it was a "certainty" that such recovery would be made. In the interim, it was accepted that the majority would have to "carry" the dissident (i.e., fund the dissident's share of the expenditure). As the submission was developed, it became clear that the "workaround" arrangements contemplated by Mr.

Lenon, would be made outside the JOA. The Accounting Procedure of the JOA (see above) only "bit" provided the Operator was acting *qua* Operator - not if the Operator was acting outside of that capacity. The commitment entered into by the majority would be entered into as a separate group not under the JOA. No question of ratification under the JOA arose. Moreover, even if an AFE was confined to *future* expenditure, an AFE approved after the end of the moratorium would, in such circumstances, be dealing with future expenditure *under the JOA* ; any expenditure already incurred would not have been incurred under the JOA.

- iii) Focussing on the commercial realities, here too the key lay in the 65% majority. If that majority wanted to incur the commitment and the expenditure it would have its way. It need not be delayed by the unanimity requirement. Whatever the language of the executed JOA, it did not result in a material difference as compared with the draft JOA.

57. With respect, I am not persuaded by any of these submissions. I take them in turn. First, *the budget date*. The JOA is a long-term agreement. To my mind, there can be no expectation that the (draft) budget date will, or will routinely, be advanced. Plainly the Operator (Venture to begin with) was under no contractual obligation to do so. It is worthy of note that Venture had resisted a Nuon proposal (when negotiating the SPA) that the draft budget should be available by 1st October (an advance of only one month). In any event, it could not be assumed that Venture would be the Operator throughout the life of the JOA. Further, the practical difficulties of producing budgets earlier could not be discounted, a matter alluded to by Mr. Black. In like vein and as emphasised by Mr. Rossiter, it must be likely that the earlier the budget, the less accurate it is likely to be.

58. Secondly, the question of "*workarounds*". I do not share Venture's confidence as to the efficacy of the proposed "workaround". Further, to my mind, the need for a workaround outside the JOA strongly points to the conclusion that the executed JOA was not in substantially the form of the draft.

- i) The "reality" here includes not only the 65% majority but the dissentient, sufficiently determined to have maintained its position. The steps taken, purportedly outside the JOA, to circumvent the moratorium, seem to me an invitation to a dispute. For my part, I would not assume that recovery of the sums thus spent from the dissentient would be certain - and it is unlikely to be trouble-free. It is not without significance that in his negotiations with Ithaca, Mr. Sheach sought to include a "deemed ratification" provision, which would have covered this very point; Ithaca rejected the proposal and it did not find its way into the executed JOA.
- ii) The proposal necessarily assumes that the majority would "carry" the dissentient's financial burden of the expenditure incurred in the interim. Again, for my part, I would be reluctant to assume that the budget majority would necessarily remain in place when this additional cost materialised.

Instinctively I cannot help feeling that it might in some circumstances and it would not in others. Over the course of a long term agreement it is no more than speculative to predict if and when the majority would or would not be prepared to proceed in this fashion.

- iii) On any view, this seems a most unattractive approach to the governance of the joint venture - a proposal which requires some of the participants to work outside of it in order to overcome the difficulties posed by a moratorium to which they have all agreed. It is also uncharted territory. But be all that as it may, what is indisputable is the premise of this submission: namely, that Mr. Lenon is driven to accept and aver that the "workaround" involves proceeding outside of the JOA. This is revealing. The reality, as it seems to me, is that Venture is envisaging a "workaround" to mitigate the consequences of the executed JOA differing from the draft JOA. No such "workarounds" were required or contemplated in connection with the draft JOA. I find it difficult to see how a solution which hinges on a workaround - of the nature contemplated - outside of the executed JOA can be reconciled with the submission that the executed JOA was in substantially the form of the draft. This is not some one-off minor practical expedient. Moreover, it relates to a key area of the JOA.

- 59. Thirdly, the submission as to *majority rule* - in effect, that the matter begins and ends with the 65% majority which passed the budget and that nothing else matters. I respectfully disagree. This is a submission which turns on the "politics" of and between the participants. I have reservations as to whether the Court should be straying into this area at all and whether Venture's need to do so serves to illuminate the weakness of its case. But if it is right to engage in arguments of this nature, then, with respect, it is simplistic to assume that the budget majority will translate into a majority willing to push through the expenditure (without the delay to which they have previously agreed). It is one thing for a party to agree to the principles of a budget; it is another for that party necessarily to agree to put its hand into its pocket. All the more so, because the bargaining position between the parties has been altered by the introduction of the unanimity requirement. Take - and hardly fancifully - a party relatively unenthusiastic about a budgetary proposal but which does not wish to insist on its position to the point of dissent. At the same time, it does not wish to put at risk its commercial relationship with the dissentient by seeking to drive the expenditure through regardless. The unanimity requirement gives it a plausible justification for abiding by the moratorium and not seeking to circumvent it. On any view, the provisions introduced into the executed JOA have resulted in a shift in the balance of power in favour of the dissentient - and in favour of delay or indecision.
- 60. For the reasons given and with no real hesitation, I view the introduction of cll. 9.8.3 (n), read with cl. 12.2.2 as resulting in the executed JOA not being in substantially the form of the draft JOA. If the comparison is strictly contractual (i.e., between the bundles of rights and obligations) this conclusion is manifest. Insofar as it is appropriate to go further and consider the commercial realities, the answer is the same. The experts' combined answer in the Joint Memorandum points

overwhelmingly to this conclusion. The final word as to practicalities in this regard belongs to Mr. Rossiter:

" ×.you are losing production in January and February which are the most high-demand high value gas in the whole of the year. It goes beyond volume it goes beyond price×..January and February in a gas field is critical. "

61. Thus far I have considered the amendment to cl. 6.6.1 in the executed JOA and the introduction into the executed JOA of cll. 9.8.3 (n) and 12.2.2 separately. In each case I have inclined towards the view that they point to the executed JOA not being in substantially the form of the draft JOA. Suffice to say that when they are viewed cumulatively, the answer is clear - the executed JOA was not in substantially the form of the draft JOA. Both sets of differences go to the heart of the JOA and its operations; when aggregated they steer the executed JOA markedly in the direction of dispute and delay. Cumulatively, for better or worse, they seal the fate of the present claim.
62. I am very conscious in reaching this conclusion of the need to consider the JOA and the SPA as a whole. I keep well in mind the size of the transaction covered by the SPA and the many provisions of the executed JOA which do not give rise to dispute. But so far as the Block 43/28 and Block 43/29 Interests are concerned, I am amply satisfied that the executed JOA was not in substantially the form of the draft JOA. The differences with which I have already dealt are fundamental. It follows that there has been a failure by Venture to fulfil a Condition Precedent to Completion, in respect of the Block 43/28 and Block 43/29 Interests. As there is no severance clause, it follows that the claim as a whole must fail.
63. For completeness:
 - i) In the Joint Memorandum, the experts treated the introduction of cl. 10.2.2 (dealing with the exploration stage) as of "less significance". My conclusion, as already expressed, rests on the introduction of the unanimity requirement at the production stage and it is unnecessary for me to express any concluded view had the exploration stage stood alone.
 - ii) I have been prepared to proceed throughout - on the basis most favourable to Venture - that the unanimity requirement applies (over the relevant period), as provided by cl. 9.8.3 (n), to the "approval" of an AFE. It should, however, be noted that the terms of both cll. 10.2.2 and 12.2.2 go further and apply the unanimity requirement to the "issue" of an AFE. Plainly if the unanimity requirement is to be applied, not only to the "approval" but also to the "issue" of an AFE, then even sensible consideration of expenditure is stopped in its tracks - and the objections to cll. 9.8.3 (n) and 12.2.2 are all the stronger. Mr. Lenon's answer was effectively that the language of cll. 10.2.2 and 12.2.2 could not mean what it said. I am not sure that the matter can be so simply

disposed of but I am content to rest my decision on the basis already indicated - that the unanimity requirement applied to the "approval" of an AFE.

- iii) I have not overlooked Mr. Lenon's contention that the Nuon argument confuses "the method of payment with the nature of the work" - i.e., that although the payment mechanism contemplated by the workaround was outside the JOA, the work would be carried out under an approved budget and would therefore be a "Joint Operation". With respect, I cannot agree. It is enough to say that this submission cannot survive the language of cl. 4 of Section IV of Schedule A (set out above); see, in particular, the reference to "enter into commitments".

64. (6) *Cll. 9.8.3 (o) and/or 10.1.3 and/or 12.1.3: Unanimity requirement for early commitment to expenditure prior to approval of the relevant budget:* Cl. 9.8.3 (o) was another addition to the executed JOA, not found in the draft JOA. This sub-clause required unanimity for:

" approval of any commitments required prior to approval of the Programme and Budget pursuant to clause 10.1.3 and/or clause 12.1.2."

It would appear that the reference to cl. 12.1.2 is a typographical error and that the reference should be to cl. 12.1.3.

65. The debate here essentially followed the same course as that relating to the previous issue. The unanimity requirement "bit" on items or arrangements which need to be ordered or made more than 12 months in advance. Mr. Lenon submitted that this requirement was of even less practical importance than the unanimity requirement contained in cl. 9.8.3 (n) discussed above. However, in their Joint Memorandum, the experts said this as to the unanimity requirement for approval of early commitment:

" ×With the Budget cycle, if there is a non-consenting Participant, this will impact Production Operations and thereby is an unacceptable position for the other Participants to be in. "

In short, they gave the same answer here as they did in respect of the unanimity requirement under the previous issue.

66. My conclusion here follows my conclusion on the previous issue. The impact, at the production stage, of this difference between the draft and executed JOAs serves to reinforce the conclusion to which I have already come.
67. (7) *The remaining differences relied upon:* I can deal almost summarily with the remaining differences between the draft and executed JOAs relied upon by Nuon (listed above).

68. I begin with the three upon which Ms Davies indicated she did not seek to rely individually though she did not abandon them as part of the cumulative picture. The first (difference i)) concerned the reduction in the "*relevant majority*" (a defined term in the JOA, applicable in only a limited number of situations) from 65% to 50%. In a nutshell, the alteration assists to break deadlock in the circumstances to which it is applicable and is consistent with the scheme of the UKOOA standard form. The second (difference vii)) related to the deletion of the word "*capital*" in relation to certain commitments for expenditure - so that during the exploration and development stages an AFE would need to be sought by the Operator for all expenditure in excess of £1 million, not simply capital expenditure. On the evidence, at the stages in question, non-capital expenditure would be unlikely. The third (difference ix)) involved the loss of the right of "*first look*". That was not a right of pre-emption; it had done no more than give a Participant the right to be informed in the event that another Participant wished to dispose of all or a part of its Interest in the Block 43/28 and Block 43/29 Licences. In each instance, the experts agreed that the amendment was not significant. If Ms Davies is right so far, she does not need to rely on these differences; if she had not succeeded thus far, then, even cumulatively, these differences would not have advanced the Nuon case. No more need be said of them.
69. Turning next to the difference introduced in the definition of "*Senior Managerial Personnel*" (difference ii)), Mr. Rossiter, almost alone, sought to emphasise its importance in connection with the difficulty of affixing liability for wilful misconduct to senior managers other than members of the Operator's board of directors. Assuming (without deciding) that Mr. Rossiter is right as to the construction of the amended clause in the executed JOA, I am not persuaded that this difference was material, given the limited likelihood of it having any practical impact.
70. I come to the changes to the "*Drill or Drop*" timetable, together with the availability of information in this regard (difference vi)). A word as to background is unavoidable. As Mr. Sheach explained, the Block 43/28 and Block 43/29 Licences were granted on the 12th and 13th May 2009, effective from February 2009 with an initial term of four years. Under the terms of the Licences, the co-venturers were required to either give a commitment within the first two years to drill a well before the expiry of that initial term of four years, or allow the Licence (in question) to lapse. This requirement was known as "Drill or Drop". If the co-venturers did give DECC the commitment to drill a well before the 12th February, 2011 ("the relevant date"), then they would incur further "Work Obligations" under the Licences.
71. The timetable in the draft JOA provided for the Operator to make a recommendation as to whether the Participants should drill a well or allow the Licence to lapse, 12 months before the relevant date (i.e., by February 2010). The draft JOA further provided that the Participants must indicate their views by latest 9 months before the relevant date (thus giving the Participants a 3 month period, at least, to decide). The amendments to the executed JOA abridged this timetable. The Operator was now obliged to make the recommendation by, latest, 3 months before the relevant date (i.e., by November 2010); the Participants were to indicate their views by latest 2 months before the relevant date (so having one month, at least, to decide).

72. As is readily apparent, the original timetable would have been unworkable given a December 2009 SPA Completion Date. Accordingly, the timetable had to be compressed. While there was no magic in the precise dates and periods chosen in the executed JOA, a truncation of some such order was unavoidable. Looked at in isolation, the only possible concern relating to the new timetable was the short, one month, period for the non-operators to consider the Operator's recommendation. On all the evidence, however, I am satisfied that, realistically, the non-Operators would not be "bounced" into a decision and that the information flows would be sufficient for that purpose. I am not dissuaded from this conclusion even though, to my mind, the executed JOA would have been preferable had cl. 9.9.2 (c) (providing specifically for the submission by the Operator of a well proposal and an AFE) not been deleted. Instructively, the experts did not view these amendments as amounting to significant differences. Accordingly, by itself, I do not think that the "Drill or Drop" difference contributes to the executed JOA not being in substantially in the form of the draft JOA or, still less, means that it was not.
73. In one respect, however, the timetable requirements of "Drill or Drop" do reinforce the Nuon case. Even on the truncated timetable, time in 2010 would not be over abundant. Anything - be it the moratorium on expenditure in excess of £1 million or the terms of the Ithaca side letter - which results in a time lag or delay, carries the risk of significantly reducing the time available. On this view, the "Drill or Drop" provision in the Licences serves as a reminder of the potentially significant consequences of delay and indecision.
74. Finally, there is the question of *sole risk seismic "buy-back in"* (difference viii)). In very broad terms, the JOA provides a scheme whereby a Participant may undertake various works on its own account (hence, "sole risk"), including Sole Risk Seismic, if having offered the project to the JOC, agreement is not reached on conducting the work in question as a Joint Operation. If so and if other Participants later wish to join in, then they must pay a premium - a multiple of the sum which would have been due from them had they agreed to participate from the outset. It is unnecessary to take time over this difference. On balance, I am persuaded by Mr. Lenon that (1) the amendment to cl. 15.4.6, prompted apparently by the terms of the Bidding Agreement, does no more than alter the timing of any premium payment; and (2) its provisions are reconcilable with cl. 15.6.1, which deals with the latest time at which Participants are entitled to join a sole risk project. Although there is force in the experts' criticism (in the Joint Memorandum) that the drafting was "sloppy", so giving rise to concerns that there might be a contradiction between cl. 15.4.6 and 15.6.1, I do not think that this difference, properly analysed, does involve a material change between the draft and the executed JOAs.
75. (8) *Overall conclusion on Issue (II)*: For the reasons given earlier, I answer the question raised by Issue (II) "no". That conclusion means that the claim must fail, so that any views I express on Issue (I) are academic. However, in deference to the arguments addressed to me on that topic I now turn to Issue (I) and will briefly state my conclusions.

ISSUE (I): WHETHER, ON THE TRUE CONSTRUCTION OF THE SPA, THE AGREEMENT OF NUON WAS NECESSARY FOR THE EXECUTED JOAs TO CONSTITUTE COMPLETION DOCUMENT?

76. In a nutshell, Ms Davies' submission proceeded as follows. Para. 2.4 of Part 2 of Section 8 of Schedule 1 to the SPA (set out above) meant what it said; "all parties" included Nuon. But Nuon had not agreed the executed JOA by the Completion Date. It was not therefore a Completion Document. As the alternative route of novating the Bidding Agreement had not been pursued (para. 2.5 of Part 2 of Section 8 of Schedule 1 to the SPA), the claim must fail on this ground alone. Cl. 7.4 of the SPA lent support to this construction.
77. Accordingly and with attractive simplicity and brevity, Ms Davies submitted that the answer to Issue (I) should be "yes". Mr. Lenon submitted that it should be "no". I agree with Mr. Lenon, for the following principal reasons:
- i) If Ms Davies was right, then Nuon enjoyed an unfettered right to withhold its agreement to the Block 43/28 and Block 43/29 JOAs. If so, it must follow that Nuon could refuse to agree even if the executed JOA was substantially in the form of the draft JOA. That would be a remarkable construction and one which I would not adopt unless driven to it. It makes a nonsense of the provision that the executed JOA be in substantially the form of the draft - a provision which is only explicable on the basis that Nuon would be obliged to enter into a "conforming" JOA without a fresh opportunity for withholding its consent. Moreover, subject only to the provision as to novation, this construction would amount to a one way bet: if the market moved adversely to Nuon, it could simply withhold its agreement and the transaction could not proceed.
 - ii) The suggested construction gives rise to a difficulty in reconciling cl. 3.1.3 of the SPA with para. 2.4 of Schedule 1. It is clear from cl. 3.1.3 that the Completion Documents are to be executed by the "parties" (i.e., with regard to Block 43/28 and Block 43/29, Ithaca and Volantis), not the "Parties" (i.e., Venture and Nuon). If there is a conflict between any Schedule and the main body of the SPA, then the main body prevails: see cl. 1.2 of the SPA. By contrast, construing "parties", in para. 2.4 of Schedule 1, as restricted to Ithaca and Volantis, permits cl.3.1.3 and para. 2.4 of Schedule to be read consistently together.
 - iii) Cl. 7.4 of the SPA is perhaps best viewed as opaque but if it assists either party then, in my judgment, it assists Venture not Nuon. For the Nuon submission to be well-founded, "all parties" in cl. 7.4 must include Venture and Nuon. But if that be right, then having proceeded (as the clause contemplates) to Completion by way of the novation route, Venture and Nuon "shall thereafter use all reasonable endeavours to procure such agreement" - i.e., to the Block 43/28 and Block 43/29 JOAs. With respect it would be

curious indeed if Nuon was obliged to use all reasonable endeavours to "procure" its own agreement to the JOAs in question.

- iv) If wrong thus far as to the meaning of "all parties", then I would accept Mr. Lenon's fallback submission: namely, that Nuon's agreement under para. 2.4 could not be unreasonably withheld - in particular, if the executed JOA was substantially in the form of the draft JOA. Whether this conclusion is arrived at by means of construction or implication does not seem to me to matter; in my view, either route is amply justified. But if so, then the contest is effectively returned to the true battleground in this case, namely that covered under Issue (II).

- 78. Accordingly, Venture is entitled to succeed on Issue (I) but that success is academic because of my decision in favour of Nuon on Issue (II).
- 79. I will be grateful for the assistance of counsel in drawing up an appropriate order and as to all questions of costs.