



Neutral Citation Number: [2019] EWHC 1220 (Comm)

Case No: CL-2017-000086

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF
ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice
Business and Property Courts
7 Rolls Buildings,
Fetter Lane, London,
EC4A 1NL

Date: 14/05/2019

Before :

MR JUSTICE BUTCHER

Between :

TEESSIDE GAS TRANSPORTATION LIMITED

Claimant

- and -

- (1) CATS NORTH SEA LIMITED
(2) ANTIN CATS LIMITED
(3) CONOCOPHILLIPS PETROLEUM
COMPANY U.K. LIMITED
(4) ENI UK LIMITED

Defendants

Simon Rainey QC and Henry Ellis (instructed by Boies Schiller Flexner (UK) LLP) for the
Claimant

Tim Lord QC and Richard Eschwege (instructed by Pinsent Masons LLP) for the
Defendants

Hearing dates: 31 January, 4-7, 11-12, 20-21 February 2019

Approved Judgment

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MR JUSTICE BUTCHER

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INTRODUCTION

1. Some 230km east of Aberdeen, in the central North Sea, lies an offshore riser platform (the “Central Area Transmission System (CATS) Riser Platform”), owned and operated by the Defendants (the “CATS Parties”). The CATS Riser Platform is linked, by a bridge, to a production platform, not owned by the Defendants, namely the North Everest platform. A 404km high-pressure gas pipeline (the “CATS Pipeline”) runs from the CATS Riser Platform to an onshore redelivery terminal and gas processing plant (collectively, the “CATS Terminal”) at Seal Sands, Teesside. Several production fields in the North Sea are linked to the CATS Pipeline, delivering gas to it either directly or through a series of connexions at the CATS Riser Platform. Since becoming operational in 1993, the CATS Pipeline has been one of six principal pipelines delivering North Sea gas to the UK mainland.
2. On 10 September 1990, the Claimant (“TGTL”) and the predecessors of the Defendants entered into a ‘Capacity Reservation and Transportation Agreement’ (“CRTA”). Under the CRTA, TGTL was entitled to a pre-determined capacity of pipeline gas, through the exclusive use of specified points of entry (for gas entering the system) and exit (the redelivery of the gas from the transportation facilities into the processing facilities). The effect of this, as all parties were agreed, was to grant TGTL ‘a pipeline within a pipeline’.
3. The central issue in this case is the amount payable by TGTL to the CATS Parties under the CRTA. The CRTA provided for two different payment regimes. From April 1993 (when the CATS System became operational) until 1 October 2013, TGTL paid a fixed ‘Transportation Fee’. That fee was the subject of litigation in 1997-8 (to which I shall refer below), but is not in issue in these proceedings. From 1 October 2013 to 1 October 2018 (being the end-date of the CRTA), TGTL was to pay a non-fixed ‘Capacity Fee’. That fee was to be calculated pursuant to a contractual formula, which is at the heart of this dispute.
4. Of the amounts invoiced by the CATS Parties in respect of the five-year Capacity Fee period, TGTL has withheld some £37.7 million. TGTL seeks various declarations as to its entitlement to withhold all or some of that amount; the CATS Parties counterclaim in debt for the full unpaid sum, with contractual interest.

THE PARTIES

5. TGTL is a company incorporated in the late 1980s by ICI, which sold a 50% share to Enron Europe Ltd (“Enron Europe”) shortly thereafter. For that reason, TGTL is referred to in most of the contractual documentation as ‘the ICI/Enron Party’. Enron Europe bought ICI’s remaining share in 1996. Following the collapse of Enron Europe’s parent company in 2001, TGTL entered a scheme of arrangement, and was subsequently acquired by Deutsche Bank AG (“Deutsche”) in February 2008, Deutsche becoming TGTL’s ‘Admitted Scheme Creditor’. Later that year, Deutsche sold some of its interest in TGTL to an investment entity managed by CarVal Investors GB LLP.
6. At all material times, TGTL’s sole business activity was to acquire capacity within (what is now known as) the CATS Pipeline, and to sell on that capacity to a consortium

operating a collection of fields downstream of the CATS Riser Platform, close to the CATS Terminal, known as the J-Block fields. The J-Block gas enters the system at TGTL's 'Entry Point', which is the most downstream subsea point of entry on the CATS Pipeline. TGTL was unique amongst shippers of gas through the CATS System, in that it was directly in competition with the CATS Parties for the sale of capacity through its 'pipeline within a pipeline'. Since the expiry of the CRTA in 2018, TGTL has had no business activity or source of income.

7. The CATS Parties collectively own and manage the CATS System. The First and Second Defendants are wholly owned by CATS Management Limited (now known as Kellas Midstream Limited), itself a wholly owned subsidiary of Antin Infrastructure Partners. The First Defendant (or "CNSL") holds a roughly 36.2% interest in the CATS System, which it purchased from Amoco (U.K.) Exploration Company, LLC ("Amoco") on 1 October 2015. The Second Defendant holds a roughly 62.8% share in the CATS System, the vast majority of which it purchased from BG International Limited on 19 February 2013. Consequently, via CATS Management Limited, Antin owns a 99% stake in the CATS System. The remaining 1% share in the CATS System is held by the Third Defendant (as to roughly 2/3), and the Fourth Defendant (as to roughly 1/3). The relationship between the CATS Parties is governed by a Joint Operating Agreement dated 17 November 1992. Under that agreement, the CATS Parties are to nominate one company as 'CATS Operator', with various responsibilities for managing the CATS System. The original CATS Operator was Amoco; CNSL became CATS Operator on 1 October 2015.

FACTUAL BACKGROUND TO THE CRTA AND TAA

The CRTA

8. The CRTA, the mechanism by which TGTL acquired its 'pipeline within a pipeline' was concluded in September 1990, some three years before the CATS System was fully constructed and operational. The CRTA was concluded in parallel with arrangements whereby another entity in which Enron had a substantial interest, Teesside Power Limited, agreed to purchase gas from the Everest and Lomond gas fields, which was to be used (after processing) to generate power and steam at the Teesside Power Station (then partly owned by Enron).
9. From April 1993 (when the system became operational) until 1 October 2013, TGTL paid for its share of the pipeline capacity through a fixed tariff (which was made up of a high initial tariff from 1993 to 2008, and a considerably reduced tariff from 2008 to 2013). There was in fact a dispute between the (then) parties to the CRTA concerning the tariff – in particular whether, and if so when, the 'Commencement Date' (from which the tariff was payable) occurred. That dispute led to proceedings, which were decided in favour of the CATS Parties by Langley J on 3 June 1997. In a further judgment dated 21 January 1998, Langley J rejected the CATS Parties' claim that TGTL's withholding of invoiced sums pursuant to the earlier dispute had been in bad faith (which, as set out below, is relevant to the question of contractual interest).
10. From October 2013, the Capacity Fee, which forms the basis of the present dispute, was payable. The provisions of the CRTA relevant to the Capacity Fee are set out in some detail below. Clause 4 ('Capacity Reservation') provided (in clause 4.1) for TGTL's right to use and sell on the Capacity Reservation. TGTL's Capacity Reservation Rate

was defined in clause 1.1 as some 8.3m Cubic Metres per Day. Pursuant to clause 21, that was reduced to some 6.5m Cubic Metres per Day, effective as of the Contract Year 2017-18.

11. Under clause 4.5, the CATS Parties were free to use or sell all capacity other than TGTL's Capacity Reservation. If they contracted for the sale of capacity to third parties (by way of a 'Non-Capacity Gas' contract), the CATS Parties were required by clause 4.6 to provide TGTL with certain information about that contract, including its estimated period of life, the proposed points at which gas would enter and leave the CATS System, and a bona fide estimate of the aggregate quantity and composition of the Non-Capacity Gas in the system. Clause 4.6 is central to the present dispute, and is considered in detail below. Very few original clause 4.6 notices (many of which would now be 20-25 years old) were found and put in evidence for the purposes of this trial. However, it was common ground that notices were provided in respect of each Non-Capacity Gas contract.

Conclusion of the TAA in 1998

12. On 20 November 1998, the CATS Parties, TGTL, and a number of third-party shippers entered into a multilateral Transportation Allocation Agreement (the "TAA"). The purpose of this agreement, in broad terms, was to make provision for the allocation of gas to shippers because, though the gas entered the pipeline with varying quality and composition, it was necessarily mingled within the pipeline.
13. The TAA and the CRTA were intended to co-exist, and TGTL and the CATS Parties entered into 'Agreement No.2' amending the CRTA for this purpose. By clause 17.3 of Agreement No.2, all provisions of the CRTA were to remain in full force and effect other than those expressly set out in that Agreement. Those amendments were considerable, and very detailed; they included, amongst other amendments, the deletion of several sections of the CRTA and their replacement by provisions of the TAA. By way of (relevant) example, the Allocation provisions formerly found in Schedule XIII of the CRTA were replaced by the TAA. Clause 1.11 of the TAA provided a priority mechanism. In the event of conflict or inconsistency between the TAA and the CRTA (as amended), the TAA was to prevail in any matter relating to 'nomination, allocation, attribution, measurement or substitution' (these not being defined terms); in all other matters, the CRTA was to prevail.
14. Amongst other information set out in the Schedules to the TAA, Schedule VII contained 'Capacities for Shippers and Stock Accounts'. By clause 10.8 of the TAA, the CATS Operator was required continually to update this information.

THE CAPACITY FEE PROVISIONS

15. At the heart of this dispute is the contractual formula for calculating TGTL's Capacity Fee. That formula, contained in clause 7.10 of the CRTA, is as follows:
 - i. **CF = (CRR/CC) (OE + EOE + CE) (1.15).**
 - ii. The abbreviations used in that formula are further defined by clause 7.10:
 - iii. **CF** is defined as: 'Capacity Fee payable for the Contract Year in question.' (Under clause 1.1, a 'Contract Year' is 'a period during the term of this

Agreement commencing at 6 o'clock a.m. on 1st October of any calendar year and ending at the same hour on 1st October of the following calendar year.’)

- iv. **CRR** is the amount of gas reserved by TGTL. It is defined as: ‘an amount equal to the sum of the Capacity Reservation Rates (expressed in Cubic Metres per Day) applicable on each Day of the Contract Year in question, adjusted in accordance with Clause 7.5 as though references in such Clause 7.5 to factor “C” were references to factor “CRR”.’ (The reference to clause 7.5, which concerns force majeure and ‘failure to deliver’, is not relevant to the present dispute). The CRR was defined under clause 1.1 as 8,334,900 Cubic Metres per Day. That sum was later adjusted in respect of the 2017-18 Contract Year, in accordance with the procedure set out in clause 21, to 6,515,000 Cubic Metres per Day.
- v. **CC** is defined as: ‘an amount equal to the sum of the CATS Capacities (expressed in Cubic Metres per Day) applicable on each Day of the Contract Year in question.’ The meaning and effect of this definition is one of the principal issues in this dispute; it is considered in detail below.
- vi. **OE** is defined as: ‘reasonable Operating Expenditures (expressed in Pounds) incurred by the CATS Parties in connection with the CATS Transportation Facilities in the Contract Year in question.’ Operating Expenditure is defined under clause 1.1 as ‘all direct costs borne or paid by the CATS Parties to maintain and operate the CATS Transportation Facilities’.
- vii. **EOE** is defined as: ‘reasonable Extraordinary Operating Expenditures (expressed in Pounds) incurred by the CATS Parties in connection with the CATS Transportation Facilities in the Contract Year in question.’ ‘Extraordinary Operating Expenditures’ are defined in clause 1.1 as ‘expenditures of a non-capital non-recurring nature with respect to the operation of the CATS Transportation Facilities’, not including (so far as is relevant) ‘any costs or expenditures that may arise in respect of matters occurring prior to the date when the Capacity Fee [...] becomes effective.’
- viii. **CE** is defined as ‘Capital Expenditures (expressed in Pounds) amortised over their useful life reasonably and necessarily incurred by the CATS Parties after 6 o'clock a.m. on 1st October 2013 to operate the CATS Transportation Facilities.’ ‘Capital Expenditures’ are defined in clause 1.1. as ‘all costs and expenditures of a capital nature for the design, purchase, construction, installation, repair or replacement of property, materials, plant and equipment, provided that Capital Expenditures shall not include any Abandonment [“decommissioning, demolition or removal”] Costs attributable to such property, materials, plant and equipment.’ Within that definition, the phrase ‘of a capital nature’ is not capitalised, and is not a defined term.

16. As to the definitions of **OE**, **EOE**, and **CE**:

- i. Each of these definitions contains a provision that no expenditure shall fall within more than one of those three categories.
- ii. The definitions of **OE** and **EOE** require that the relevant costs be ‘reasonable’; the definition of **CE** contains the more stringent requirement that the costs be ‘reasonably and necessarily incurred’.

- iii. Only expenses classified as **CE** required amortisation (being of a ‘capital nature’). The classification of certain expenses – and therefore whether or not they were to be amortised – is a matter in dispute between the parties.
 - iv. Each of the definitions of **OE**, **EOE**, and **CE** also confines the relevant expenses to those incurred ‘in connection with the CATS Transportation Facilities’.
 - v. The term “CATS Transportation Facilities” (which I will abbreviate as “CTF”) is defined in clause 1.1 as: ‘the facilities to be constructed, owned and operated by the CATS Parties, as described in Schedule I.’
 - vi. That Schedule contains a relatively detailed list of onshore and offshore facilities, along with a general definition of the physical extent of such facilities falling within the definition of the CTF. The precise scope of these facilities is one of the issues in dispute between the parties, and is addressed below.
17. Returning to the Capacity Fee formula, **CF = (CRR/CC) (OE + EOE + CE) (1.15)**:
- i. It follows from the definitions set out above that the first element of the Capacity Fee formula, **CRR/CC**, is a quotient with TGTL’s reserved gas (initially 8,334,900 Cubic Metres per Day) as the numerator, and (broadly speaking), the total amount of pipeline gas as the denominator. This quotient therefore represents (again, broadly speaking), the proportion of the total pipeline gas reserved for TGTL.
 - ii. The second part of the formula, **(OE + EOE + CE)**, is the sum of the expenses incurred on the CTF (which, in the case of **CE**, must be amortised).
 - iii. The first and second parts, when multiplied together (**(CRR/CC) (OE + EOE + CE)**) therefore represent a share of the expenses incurred on the CTF which is proportional to the amount of pipeline gas capacity reserved for TGTL.
 - iv. The third part of the formula gives the CATS Parties a 15% uplift on that sum.
18. Under clauses 7.10(b) and 7.12 of the CRTA, the CATS Operator was to notify TGTL with an estimated Capacity Fee on 1 July of each relevant year, three months prior to the commencement of each Contract Year on 1 October. That estimated fee was then invoiced monthly to TGTL in arrears. Under clause 7.10(c), by 1 December two months after the end of the Contract Year the CATS Operator was to calculate the actual Capacity Fee owed, according to the formula set out above. The difference was to be paid by the CATS Parties to TGTL if the estimated fee was too high, and vice versa.
19. Under clause 7.17(a), TGTL had ‘the right to dispute, in good faith, any amount specified in an invoice’. By clause 7.18, ‘When any amount is in dispute under this Agreement, the undisputed portion shall promptly be paid and, after settlement of the dispute, any amount agreed or adjudged to be due shall promptly on demand be paid.’ Clause 7.17(b) provided that ‘should any Party fail or refuse to make any payments properly due under this Agreement, the amount due shall bear interest (before and after judgment) at the Interest Rate (plus, in the case only of sums which are not the subject of a bona fide dispute, 2 percent per annum) calculated from the date when such payment is properly due to the date of payment (both inclusive).’

20. In the event of a dispute, clause 7.19 provides that: ‘Each Party shall have the right at reasonable hours upon giving any other Party reasonable notice and at its own expense to examine the books, records and charts of the other Party relative to this Agreement to the extent necessary to verify the accuracy of any accounting statement, charge, computation or claim made pursuant to any of the provisions of this Agreement’.
21. The CRTA also includes general provisions of potential relevance:
 - i. Clause 28.1 provides that ‘None of the provisions of this Agreement shall be considered as waived by a Party unless such waiver is made in writing, and then only by the duly authorised representatives of such Party. No waiver by a Party of any default or defaults by another Party in the performance of any of the provisions of this Agreement shall operate or be construed as a waiver of any other or further default or defaults.’
 - ii. Clause 31.1 provides that: ‘the Agreement, the Measurement Provisions, the Allocation Provisions and any agreements made pursuant hereto contains the entire agreement between the Parties with respect to the subject matter hereof and supersede any previous understandings, commitments, agreements or representations whatsoever relating thereto, whether oral or written. This agreement shall not be varied except by an instrument in writing, of even date herewith or subsequent hereto executed by the duly authorised representatives of the Parties.’ The ‘Allocation Provisions’ for the purposes of that clause must, from 1998, mean the relevant provisions of the TAA.

THE DISPUTE OVER THE CAPACITY FEE

The 2013 Estimated Capacity Fee

22. On 2 October 2012, the CATS Operator (then Amoco, a subsidiary of BP) held a meeting setting out considerations for the calculation of the Capacity Fee. That was followed by workshops for the CATS Parties in November 2012 and May 2013. The second of those workshops included a presentation by Mr McDonald of proposed allocation methodologies, with which all the CATS Parties agreed. Also around May 2013, TGTL engaged the energy consultant GL Noble Denton to produce an estimate of the Capacity Fee, and to advise TGTL more generally.
23. On 31 May 2013, the CATS Operator sent TGTL a framework spreadsheet setting out the information which would be provided to accompany the estimated Capacity Fee. Mr Harper, on behalf of TGTL, complained about three aspects of this spreadsheet. First, he complained that the spreadsheet used the Daily Reserved Capacity Rates (or “DRCRs”) for the purposes of the calculation of the Capacity Fee, and specifically for the purposes of the calculation of the ‘CC’ portion of the quotient. Secondly, he said that the information provided was insufficient for determining whether the OE, EOE, and CE costs (including all those in respect of the CATS Riser Platform) were properly included. Thirdly, he disagreed with the proposed method for allocating expenditure to transportation or processing.
24. The CATS Parties sent TGTL an estimated Capacity Fee for the Contract Year 2013-14 on 28 June 2013, substantially adopting the spreadsheet which had previously been circulated. The estimated fee was around £11m. TGTL sent its initial objections to this estimated fee some ten days later.

25. In August 2013, GL Noble Denton provided their report to TGTL (which had been prepared without having sight of the estimated Capacity Fee spreadsheet sent to TGTL by the CATS Parties). That report estimated the typical Capacity Fee in the region of £3.65m. There followed substantial correspondence and disagreement between the parties. On 25 October 2013, TGTL sent the CATS Parties a formal notice of its disagreement with the estimated Capacity Fee; the CATS Parties responded to that notice on 18 November 2013. Pursuant to these disagreements, TGTL withheld, and has continued to withhold, a substantial part of the Capacity Fee claimed by the CATS Parties. During the course of the 2013-14 Contract Year, TGTL paid the CATS Parties some £3.1m.

The November 2014 Adjusted Capacity Fee

26. The CATS Parties sent TGTL the adjusted Capacity Fee for the Contract Year 2013-14 on 28 November 2014, in the sum of £7.8m. Much of the significant reduction was attributed to the cancellation of a planned flotel (floating hotel) campaign. By letter dated 18 December 2014, TGTL disputed this adjusted fee on the same bases as it had previously advanced. It put forward an adjusted fee of £4.1m, and paid the CATS Parties £1m, being the difference between the sum it had already paid and the adjusted fee which it was proposing. TGTL also said that it wished to proceed with an ‘audit process as envisaged under Schedule III of the CRTA’.

The Audit

27. Following TGTL’s request for an audit, Mr McDonald replied, on behalf of the CATS Parties, on 9 February 2015, stating that ‘The CATS Parties anticipate that such audit would be carried out in respect of the Capacity Fee in its entirety and shall not be limited to such portion of the Capacity Fee that TGTL disputes.’
28. TGTL re-employed GL Noble Denton (by this time known as DNV GL), and Deloitte LLP (“Deloitte”), to assist with the audit. On 5 March 2015, TGTL sent a ‘First Audit Memo’ containing a proposed agenda for the parties’ first meeting, comments on the purpose of the audit, and a list of questions and requests for documents. Following the CATS Parties’ response, TGTL sent a further ‘Second Audit Memo’ on 21 March 2015 including further details. This was followed by a phone call between Mr Harper and Mr McDonald on 23 March 2015, from which it was apparent that the parties were not in agreement as to the scope of the proposed audit.
29. On 15 June 2015, employees of TGTL spent three days in the Aberdeen offices of BP, and were given access to financial records for the purposes of the audit. TGTL thereafter sent the CATS Operator an ‘audit workbook’, and Deloitte provided analysis of the Capacity Fee calculation. Following further meetings on 3 November and 24 November, on 30 November 2015 Deloitte circulated a ‘CRTA Bridge’ document, which set out TGTL’s view of the remaining points of dispute.
30. On 1 October 2015, Amoco transferred the CATS Operatorship to CNSL. On 17 December 2015, CNSL was sold to CATS Management Limited (the parent company of the First and Second Defendants). This transfer has sometimes been referred to as “the Transition”.

The October 2016 CATS Report

31. On 18 February 2016 Mr Harper wrote to Aileen Foulkes, who was now the point of contact at the CATS Operator, proposing a meeting to conclude the audit. Her response, sent after something of a delay, indicated that the CATS Parties had someone assisting them with the audit analysis. On 29 June 2016, CNSL informed TGTL that it had expanded the scope of its own audit/review of the Capacity Fee, and in particular that it had been reviewing the allocation methodologies. This included a minor reduction in the proportion of offshore facilities which it considered attributable to transportation (and therefore appropriate for inclusion in the Capacity Fee). It also included an increase in the proportion of the costs relating to onshore facilities included in the Capacity Fee.
32. These matters, and others, were set out in detail in a 195-page report provided by the CATS Operator on 12 October 2016. The report was accompanied by a letter from the CATS Parties' solicitors, seeking various undertakings and the establishment of a 'security account' for withheld sums. The CATS Parties describe this report as 'the natural and logical outcome of the audit process that TGTL had initiated'.
33. The net effect of the various amendments made in this report was substantially to increase the Capacity Fee said to be payable for the Contract Years 2013-14 (by nearly £3m) and 2014-15 (by some £2.2m). These were, in the CATS Parties' phrase, 'corrected and re-invoiced to TGTL' accordingly. TGTL considers these purported invoices to be a 'restatement' of the Capacity Fee, and disputes the CATS Parties' entitlement to provide such a restatement under the terms of the CRTA (even if, as TGTL denies, the restated fee is correct in principle).
34. The parties' dispute concerning the Capacity Fee continued thereafter, including at meetings on 8 November 2016 and 9 February 2017. During the latter meeting, on 9 February 2017, TGTL issued these proceedings.

THE ISSUES TO BE RESOLVED AND APPROACH TO CONSTRUCTION

35. The issues to be resolved fall into seven broad categories, as follows:
 - (1) The scope of the CTF.
 - (2) Issues as to the COSA and Everest Use Agreement.
 - (3) Allocation methodologies.
 - (4) Categorisation of expenditure.
 - (5) CATS Capacities.
 - (6) The right of the CATS Parties to 'restate' the Capacity Fee.
 - (7) TGTL's good faith, or lack of it, in contesting the Capacity Fee.
36. I will consider each of those issues or groups of issues in turn. At the outset, it should be noted that most involve, and some entirely depend on, issues of construction of the CRTA and related agreements. In approaching that exercise of construction, I have borne in mind the following points.

37. First, that the CRTA is a long and complex commercial document, made even more so by the 1998 amendments and the subsequent need to refer, at least on some issues, to the TAA. While recognising that considerable care will have been expended on its drafting, including by expert advisers, it would also be imprudent to begin the process of construction by assuming that every phrase in such a document is as elegantly crafted or as logically integrated with every other as it might be desired. It is equally unrealistic to consider that the drafters will have envisaged every possible factual scenario which might arise under the contract over the course of the following three decades.
38. Secondly, the CRTA was drafted in 1990 and amended in 1998, but designed to govern the parties' relationship until 2018. In relation to such long term contracts it is often appropriate for the court to adopt a relatively 'flexible approach' to construction in order to give effect to the reasonable expectations of the parties, which may go so far as to require a certain (and fact-sensitive) degree of co-operation between the parties: see *Globe Motors TRW Lucas Varity Electric Steering* [2016] EWCA Civ 396, at [64] – [68]. During the course of the trial, it was suggested, somewhat hesitantly, that the present contract might give rise to a more generalised duty of good faith on both parties, along the lines suggested by Leggatt J (as he then was) in *Yam Seng Pte v International Trade Corp* [2013] EWHC 111 (QB). However, even if it were otherwise appropriate to treat the CRTA as a relational contract of the kind that Leggatt J had in mind, as Beatson LJ said at para 68 in the *Globe Motors* case, 'an implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it.' In the present case, certain clauses of the CRTA explicitly provide for a good faith requirement in respect of particular discrete aspects of performance (for example, the right to dispute an invoice in good faith under clause 7.17(a), which is addressed below). The contract thereby defined, in my judgment exhaustively, the extent of any good faith obligations arising under it. It would be inconsistent with those terms to imply any wider duty of good faith.
39. Thirdly I have had in mind the ordinary principles of construction. The court is engaged in a 'unitary' exercise of construction, in which the court will carefully consider the words used and the clarity or lack of clarity of the drafting and if rival meanings of particular words are plausibly asserted will test and re-test those rival interpretations against the other provisions of the contract, the evident commercial purpose of the agreement, and the relevant background. The principles were summarised by Lord Hodge in *Wood v Capita* [2017] UKSC 24, citing many of the other leading judicial statements. At paragraphs [10] – [14], Lord Hodge said:

'10 The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. In *Prenn v Simmonds* [1971] 1 WLR 1381, 1383H—1385D and in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, 997, Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations. When in his celebrated

judgment in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912—913 Lord Hoffmann reformulated the principles of contractual interpretation, some saw his second principle, which allowed consideration of the whole relevant factual background available to the parties at the time of the contract, as signalling a break with the past. But Lord Bingham of Cornhill in an extra-judicial writing, "A New Thing Under the Sun? The Interpretation of Contracts and the ICS decision" (2008) 12 Edin LR 374, persuasively demonstrated that the idea of the court putting itself in the shoes of the contracting parties had a long pedigree.

11 Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the *Rainy Sky case* [2011] 1 WLR 2900, para 21f. In the *Arnold case* [2015] AC 1619 all of the judgments confirmed the approach in the *Rainy Sky case*: Lord Neuberger of Abbotsbury PSC, paras 13—14; Lord Hodge JSC, para 76 and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky case* (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the *Rainy Sky case*, para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299, paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the *Arnold case*, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

12 This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the *Arnold case*, para 7, citing *Re Sigma Finance Corp*n [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13 Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the

conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally-drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn* [2010] 1 All ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions.’

40. In the process of construction involved in determining the issues in this case I have sought to apply an approach to construction consistent with Lord Hodge’s judgment and the leading authorities referred to in it.

THE TRIAL AND THE WITNESSES

41. At the trial, TGTL called Mr Richard Harper who is, and has since April 1997 been a director of TGTL. The CATS Parties called Mr Andrew McDonald who is a Business Manager at BP, and was, between 2013 and 2015 CATS Commercial Operations Advisor and CATS Business Manager, at the time when Amoco was CATS Operator. They also called Mr James Biscomb, who was CATS Area Engineering Support Team Leader from 2012 until April 2017 when, now employed by the John Wood Group (which is contracted by the CATS Parties to run the CATS Terminal), he became CATS Manager; Mr Phillip Conner who from 2012 to 2015 was North Sea Midstream Discipline Engineering Manager with BP, and who after the Transition became Technical Director of CATS Management Ltd, which is the post he still holds; and Mr Guy Appleton, who is Finance Director of CATS Management Limited.
42. I also heard expert accountancy evidence from Mr Gervase MacGregor, who is a partner of BDO LLP; and Mr Paul Rathbone, who is a partner of Osterwald Rathbone and Partners.
43. I considered all the witnesses to have been seeking to assist the court with truthful and careful evidence, although of course I found some parts more persuasive and more in keeping with the documentation than others. I found of limited assistance most of the forensic indignation expressed by the parties about the other side’s witnesses.
44. With that introduction I can turn to the first of the groups of issues which falls to be determined.

THE SCOPE OF THE CTF

45. The first issue which arises is as to the proper scope and extent of the CTF. It is only OE, EOE and CE which is incurred in connexion with the CTF which may form part of the Capacity Fee. Accordingly it is necessary to know what does and what does not form part of the CTF to see what items of expenditure can form part of the Capacity Fee.
46. The points of dispute as to what forms part of the CTF have narrowed considerably from the position on the pleadings. In particular, as a result of concessions made by TGTL, including in its opening skeleton argument and subsequently, it is no longer in

issue that caissons C1 and C2, the onshore control room, the onshore flare stack and onshore Redelivery Point Ex 3 fall within the CTF. This leaves only 4 categories of facilities/equipment which are in issue. I will take each in turn.

Facilities upstream of gas manifold block on CATS Riser Platform

47. The first is whether certain facilities or equipment between the inlet gas valves for the Armada field and the Lomond/Erskine field, which are immediately upstream of the gas manifold block on the topside of the CATS Riser Platform, and the subsea points of entry for those fields, constitute part of the CTF. In particular the sub-issues which remained at the conclusion of the trial were whether the following items are included in the CTF: (i) the Armada and Lomond/Erskine subsea points of entry; (ii) the Armada and Lomond/Erskine risers; (iii) the Subsea Isolation Valves (SSIVs) and other related equipment connected to the risers; and (iv) the Armada and Lomond/Erskine pig receiver traps.
48. These disputed items relate to facilities and equipment by which gas from the Armada and Lomond/Erskine fields is brought into the CATS Riser Platform and the CATS Pipeline. The gas from these two fields enters the CATS system, in stages, as follows:
 - i) The gas first enters the system at two subsea points, one each for Armada and Lomond/Erskine. These are the Armada and Lomond/Erskine pipeline tie-ins at the base of two separate risers at the CATS Riser Platform, one for Armada and one for Lomond/Erskine. The Lomond/Erskine tie-in has a SSIV fitted; the Armada tie-in does not.
 - ii) The gas is then carried via the risers up the topsides and the upper deck of the CATS Riser Platform.
 - iii) The risers themselves end on the lower deck of the topsides of the CATS Riser Platform at the riser emergency shutdown valves or RESDVs. The gas for each field is then separately piped from each of the two RESDVs on the lower deck to the 24" common gas manifold situated on the middle deck of the CATS Riser Platform. There is an inlet gate valve at the junction of each of the Armada and Lomond/Erskine gas supply piping with the common manifold.
 - iv) Similarly, Everest gas, which is piped across the bridge between the North Everest production platform and the CATS Riser Platform, has a manifold connexion at the 24" common gas manifold, with an inlet gate valve at the junction with the common manifold.
 - v) The 24" common gas manifold combines the gas from the Armada, Lomond/Erskine and Everest fields into the common gas supply which is transported onwards from the manifold connexions for export to the CATS Pipeline. Accordingly the 24" common gas manifold connects to the 36" export riser which takes the combined gas to the subsea pipeline.
 - vi) As part of the piping and associated facilities lying between the RESDV and the inlet gas valve for each of the Armada and Lomond/Erskine fields' gas at the 24" common gas manifold, there is other pipework for each field, including a separate gas pig receiver, for pigs sent up to clear/check the Armada pipeline

and the Lomond/Erskine pipeline from the respective field to the CATS Riser Platform.

49. The issue of whether any of the contested facilities/equipment upstream of the common gas manifold form part of the CTF depends on the proper construction of the CRTA. Schedule I to the CRTA defines what the CTF consists of. At this point it is important to note the following provisions of that Schedule:

‘The [CTF] means the facilities listed below and such modifications thereto and/or replacements thereof (made in accordance with the standard of a Reasonable and Prudent Operator) from time to time:

1. The offshore riser platform jacket, decks and structural steel located in UKCS Block 22/9 adjacent to the North Everest production platform;

2. The topsides of the offshore riser platform described in paragraph 1 to the extent consisting of valving, metering and associated production equipment for the transportation of CATS Gas from the manifolds to the export riser, together with the safety and life support equipment, including hydrocarbon flare, located on such riser platform (the facilities described in paragraphs 1 and 2 hereinafter identified collectively as the “CATS Riser Platform”);

...

5. The CATS 36” export riser, the 36” pipeline running from the CATS Riser Platform to the CATS Terminal together with the ancillary equipment installed for the purpose of transporting CATS Gas and CATS NGL from any points of entry to the CATS Terminal (including but not limited to equipment comprising or relating to all points of entry into the [CTF]);

...

Without limitation to the foregoing, the [CTF] will physically extend from the Entry Points to any Redelivery Points and the NGL Redelivery Point.’

50. The ‘Entry Point’ (with capitals) on the CATS Riser Platform was described in Schedule IV of the CRTA (as amended) as being located ‘at the inlet gate valve immediately upstream of the gas manifold block on the [CATS Riser Platform] and shall be connected upstream to a gas riser of 20” nominal external diameter, such connection to be made through such associated piping, valving and measuring equipment as may be required...’.
51. The facilities / equipment at issue here must be regarded as upstream of the ‘Entry Point’ on the CATS Riser Platform. This was not significantly in issue. The CATS Parties contended, however, that the relevant facilities / equipment nevertheless

constituted part of the CTF because they fell either within paragraph 5 of Schedule I, as being ‘ancillary equipment installed for the purpose of transporting CATS Gas and CATS NGL from any points of entry to the CATS Terminal’, or within paragraph 2 of Schedule I, as being ‘associated production equipment for the transportation of CATS Gas from the manifolds to the export riser’. The final sentence of Schedule I, providing that the CTF ‘will physically extend from the Entry Points...’, is no obstacle to the CATS Parties’ case, they contend, because it is explicitly ‘without limitation’ to the foregoing provisions of Schedule I. TGTL disputes both ways in which the CATS Parties seek to suggest that the relevant facilities / equipment fall within Schedule I and the definition of CTF.

52. On this point I consider that TGTL is correct. Schedule I is a structured and logical definition of the CTF, setting out a description of the CTF in segments or stages running from the CATS Riser Platform to the CATS Terminal, starting with the parts of the CATS Riser Platform which are included. Paragraph 5 is dealing with matters relating to the export of CATS Gas from the CATS Riser Platform to the CATS Terminal. In this context the reference to ‘points of entry’ is to subsea points of entry on the pipeline itself. Furthermore, while it is correct to say that the last sentence of Schedule I is ‘without limitation’ to the foregoing provisions, it nevertheless informs the construction of paragraphs 1 – 8 of Schedule I, and militates against a construction whereby equipment upstream of the Entry Point on the CATS Riser Platform constitutes part of the CTF.
53. While the CATS Parties referred to the fact that the TAA determined the Input Points for CATS Gas into the CTF as being at the Armada and Lomond/Erskine subsea points of entry, at the bases of the respective risers, it did not appear to me that this was a persuasive point. Neither the TAA nor Agreement No 2 indicates that the term ‘points of entry’ as used in the specific context of paragraph 5 of Schedule I to the CRTA was intended to be synonymous with the ‘Input Points’ as defined in the TAA.
54. Nor do I consider the CATS Parties’ case in relation to paragraph 2 to be correct. In my judgment, the only item of equipment on the CATS Riser Platform which fell within the description of ‘manifolds’ was the 24” common gas manifold. I do not consider that the fact that paragraph 2 refers to ‘manifolds’ in the plural assists the CATS Parties. The CRTA was concluded when the facilities had not been constructed. In fact, as constructed, the 24” common gas manifold was the only equipment which would, as a matter of ordinary language, qualify as a ‘manifold’.¹ It is notable that there are no references in any P&ID, line inventory or in the Maximo maintenance systems to ‘Armada’ or ‘Lomond/Erskine’ manifolds, nor were they described as such in the Authorisations for Expenditure (“AFEs”) for the work carried out on this equipment. I did not find Mr Conner’s evidence to the effect that piping from the common gas manifold to the Armada and Lomond/Erskine import risers were ‘manifolds’, which was marked by certain reversals of view, persuasive.
55. I consider that TGTL’s case in this area is supported by the following consideration. Were the CATS Parties correct, it would mean that the pig receivers for pigs on the Armada and Lomond/Erskine pipelines would constitute part of the CTF. This

¹ The OED (Concise) 9th ed. definition of “manifold” is “a pipe or chamber branching into several openings”, and that in the OED (Shorter) 3rd ed. is “a pipe or chamber with several outlets or valves forming connections with other pipes”.

appeared to me unlikely to have been the intention of the parties, given that these pigs were for the purpose of calibrating and cleaning the lengthy pipelines which ran upstream from the CATS Riser Platform to the Armada and Lomond/Erskine platforms, which pipelines, on any view, were not part of the CTF. I would have expected the parties to have considered the pig receivers of those lines to be treated in the same way, for the purposes of classification as CTF or not, as the lines which their pigs cleaned/calibrated.

56. While the history of this argument does not assist in the process of construction, I was fortified in my view as to the correct interpretation of the extent of the CTF in this area by a consideration of the following. Before the Transition, while BP did include 100% of CATS Riser Platform costs in the Capacity Fee, this was not based on a careful analysis of the CTF, but instead on a broad-brush approach. It is, however, apparent that BP's staff did not consider these facilities to be part of the CTF. Specifically, when asked by Mr McDonald in October 2015 for his technical perspective, Mr Biscomb's view was that it was 'more challenging' to see how the Armada and Lomond/Erskine pig receivers were within the CTF, and expressed the view that under the Pipeline Safety Regulations 1996 the Armada and Lomond/Erskine pipelines would end after the downstream isolation valve of the pig receivers.² Mr Mitchinson, the CATS Area Manager, agreed that 'non-[CATS Riser Platform] pipelines and pig launchers/receivers (Everest, Armada and Lomond)' probably did not fall within the CTF.³ The case which was subsequently made, post Transition, that all equipment upstream of the common gas manifold, reaching as far as the Armada and Lomond/Erskine subsea points of entry, was one which does not appear to have occurred to those considering the matter at BP.

Mercury Removal Facilities

57. The second category relates to the mercury removal facilities onshore. In relation to these, TGTL's case is that, while the relevant mercury removal facilities are within the physical extent of the CTF, they do not fall within the relevant definition of CTF processing plant or equipment in paragraph 6 of Schedule I to the CRTA. This is so, on TGTL's case, because paragraph 6 refers to 'processing facilities utilised to effect redelivery of the CATS Gas at the Redelivery Specification and CATS NGL at the NGL Specification, but excluding any other processing facilities', and the Redelivery Specification in the CRTA did not include a specification as to mercury, as Langley J held in his judgment of 3 June 1997. Accordingly, TGTL argues, any onshore processing equipment used for the removal of mercury is not equipment utilised to effect redelivery of gas at the Redelivery Specification within the meaning of paragraph 6.
58. The relevant facilities consist of two treatment vessels or removal beds where the catalyst removes mercury from the CATS Gas which flows through them. These facilities were installed in 1996. As Langley J's judgment records, it was TGTL/Enron which had raised the need to remove mercury and saw it as their responsibility to deal with the mercury in the gas. TGTL had requested that the mercury removal beds be installed. As Mr Lord QC submitted, on more than one occasion, these facts made

² G/747/1: 16 October 2015. Mr Biscomb did not at that point have the Riser P&IDs to hand, but it does not appear that he subsequently modified this view.

³ G/749.

TGTL's current position that these facilities did not constitute part of the CTF an unattractive one.

59. In my judgment, these facilities do form part of the CTF. The evidence of Mr Conner established that some 10-15% of the gas was directed through these facilities, and bypassed H₂S removal, in order to allow the H₂S Specification to be met by the subsequently commingled gas, without costly over-treatment by unnecessary H₂S removal. In those circumstances, I consider that these mercury removal facilities, which can also be termed H₂S bypass facilities, qualify as 'processing facilities utilised to effect redelivery of CATS Gas at the Redelivery Specification'.
60. Furthermore, the evidence of Mr McDonald was to the effect that, unless mercury was removed by these facilities, the gas would have mercury levels which were not safe and which could not be redelivered. I consider that, if the gas could not safely be redelivered without the treatment effected in these facilities, then for this additional reason, these are facilities 'utilised to effect redelivery of CATS Gas at the Redelivery Specification'. Even though there was no mercury specification, without mercury treatment there would have been no redelivery at the Redelivery Specification (or otherwise). In the circumstances, the facilities are utilised for the purpose stated.

H₂S Removal Facilities

61. The third issue is as to costs of the H₂S Removal Facilities at the CATS Terminal. It is not in issue that the H₂S Removal Facilities form part of the CTF. TGTL contends, nevertheless, that the CATS Parties are estopped from recovering the costs of the H₂S Removal Facilities or that there is a collateral contract to the effect that they will not recover any such costs.
62. The basis for this contention is an email sent by Ms Foulkes on behalf of the CATS Parties during the course of negotiations for an Amended Supplementary Agreement between the CATS Parties, the J-Block Parties and TGTL. The background to these negotiations was that there had been a Supplementary Agreement to the CRTA dated 30 January 2009 between the same parties whereby the J-Block Parties had agreed to pay an 'Additional Fee' to the CATS Parties in return for the CATS Parties agreeing a new, higher, H₂S specification for their gas. At the same time, under clause 8(c) of that Supplementary Agreement, the CATS Parties' H₂S removal facilities were stated to form part of the CTF. That Supplementary Agreement was due to come to an end at the commencement of the Capacity Fee Period on 1 October 2013. In advance of that date the parties sought to negotiate terms on which it could be continued, and also to deal with a new J-Block field, the Jasmine field, coming on stream.
63. In the course of those negotiations, Mr Harper on behalf of TGTL, on 20 August 2013, provided TGTL's comments on the draft agreement in mark-up to BP's head of legal, stating in the covering email: 'However, we note clause 8(c) specifically adds the H₂S Removal Facilities in the CATS Transportation Facilities, we assume that the costs of such facilities will not be passed through to TGTL in the Capacity Fee given the CATS Parties' principal (sic) of "polluter" pays as not do so would lead to a double recovery.' On 22 August 2013 Mr Harper asked for 'a response from the CATS Owners on how they propose to address the issue of over-recovery of their costs by the inclusion of the H₂S Removal Facilities within the [CTF] during the Capacity Fee period post 1st October 2013.' The response from Ms Foulkes, on which this argument principally

turns, was sent later on the same day, and stated, in part: ‘There will be no over recovery of costs associated with the H2S Removal Facilities as the costs used in the calculation of the estimated Capacity Fee have been prepared on a basis which ensures that this will not occur.’ The following week, on 27 August 2013, Mr Harper included in a list of queries about the CATS Parties’ Estimated Capacity Fee to Mr McDonald, a request to ‘Please confirm that the mercury and hydrogen sulphide removal facilities and costs are excluded from the allocations given their exclusion from the CATS Transportation Facilities.’ The Amended Supplementary Agreement was concluded on 9 September 2013. It confirmed that the H2S Removal Facilities were part of the CTF. It further provided by Clause 19 that, except as expressly provided in the Amended Supplementary Agreement, the CRTA ‘shall remain in full force and effect’. After the Amended Supplementary Agreement had been concluded, on 7 October 2013, Mr McDonald of BP replied to Mr Harper’s request of 27 August 2013, as follows: ‘We have ensured that there is no double dipping on costs recovered under the H2S Supplemental Agreement.’

64. Given the nature of the argument and the communications which give rise to it, it is of some importance to see exactly what TGTL’s pleaded case is on this point. It is to the following effect (in the RARDC, paragraph 9):

‘(2) Ms Foulkes statement [in her email of 22 August 2013], in its context, constituted a clear and unequivocal promise that the CATS Parties would not include costs associated with the H2S Removal Facilities in their calculation of the Capacity Fee. TGTL entered into the Amended Supplementary Agreement in reliance on this assurance. The CATS Parties are now estopped from claiming an entitlement to payment of those parts of the Capacity Fee that reflect the costs of operating and maintaining the H2S Removal Facilities.

(3) Alternatively, in the email exchange between Mr Harper and Ms Foulkes, TGTL and the CATS Parties entered into a collateral agreement that the CATS Parties would not include costs of the H2S Removal Facilities in calculation of the Capacity Fee, or in any other way recover such costs from TGTL, notwithstanding that they formed part of the [CTF]. In consideration for that promise, TGTL entered into the Amended Supplementary Agreement.’

65. Mr Lord QC submitted, on behalf of the CATS Parties, that these pleas are to the effect that no costs reflecting the costs of operating and maintaining the H2S Removal Facilities would be included in the Capacity Fee, and are not, for example, that only such costs as were not recovered from the J-Block Parties would be included in the Capacity Fee. As he said, the CATS Parties had been entitled to deal with the pleaded case, and there had not been an investigation as to the extent to which there was in fact any double recovery. Furthermore, he submitted, the pleaded case must fail, in that there was no unequivocal representation that no costs of operating and maintaining the H2S Removal Facilities would be included in the Capacity Fee. In addition he submitted that there was no reliance by TGTL on any representation made on behalf of the CATS Parties.

66. I consider that the CATS Parties are correct on this issue. In the first place, I do not consider that there was any representation, and certainly not an unequivocal representation, that no costs of operating and maintaining the H2S Removal Facilities would be included in the Capacity Fee. Ms Foulkes' email of 22 August 2013 did not say that there would be no such costs included. What it indicated was that, to the extent that there were such costs included, they would not lead to a double recovery by the CATS Parties. In the circumstances, I consider that TGTL's pleaded case is not made out.
67. Furthermore, I considered that TGTL had not made out its pleaded case of reliance on the alleged representation. Mr Harper's witness statement did not give any evidence that he (or through him, TGTL) had relied upon the representation in entering into the Amended Supplementary Agreement. Mr Lord QC did not cross-examine Mr Harper on the point. TGTL complained about this (as well as about the fact that the CATS Parties decided, at a late stage, to withdraw Ms Foulkes as a witness). I considered that the CATS Parties were entitled to take the course which they did. The result was that there was no witness evidence of reliance. Furthermore, I did not consider that I could infer simply from the fact that TGTL entered into the Amended Supplementary Agreement without seeking an amendment to ensure non-recovery of H2S Removal Facilities costs as part of the Capacity Fee that this was in reliance on the statement in Ms Foulkes' email. I consider that, at most, that email had left the position equivocal, and that there was no certainty appears to me to be confirmed by the fact that Mr Harper sent an email to Mr McDonald on 27 August 2013 which asked for a further confirmation in relation to such costs. He had received no response to that email by the time that the Amended Supplementary Agreement was entered into. This sequence of events is consistent with TGTL knowing that there was an open question here, but deciding not to press for any change to the proposed Amended Supplementary Agreement to deal with it. It does not compel the inference that the Amended Supplementary Agreement was entered into on the basis of what Ms Foulkes had written.
68. Nor do I consider that TGTL's case on a collateral contract succeeds. I do not consider that, viewed objectively, there was any agreement between the parties to the effect pleaded by TGTL, namely 'that the CATS Parties would not include costs of the H2S Removal Facilities in calculation of the Capacity Fee, or in any other way recover such costs from TGTL'. In my judgment there was nothing which can be regarded as a contractual promise to that effect.

Flotel Costs

69. The fourth item which needs brief mention is the costs of various flotel campaigns incurred in relation to operations and maintenance work on the CATS Riser Platform. The Everest Operator, ie the operator of the North Everest production platform, which also operated the CATS Riser Platform in circumstances I will describe shortly, decided on the use of a flotel for each flotel campaign, and charged the CATS Parties pursuant to the COSA, which again I will describe shortly in somewhat more detail.
70. TGTL raised an objection to the inclusion in the Capacity Fee of flotel costs in relation to works on: (i) liquid-handling facilities on the CATS Riser Platform; (ii) the risers; (iii) the caissons; and (iv) any other point 'upstream of the manifolds located on the topsides'.

71. In relation to (ii), (iii) and (iv), these flotel costs will be recoverable or irrecoverable depending on whether the relevant matters worked on did or did not constitute part of the CTF. As I have already set out, TGTL has accepted that (iii), the caissons, did fall within the definition of the CTF, and thus flotel costs associated with work on the caissons are capable of falling within the Capacity Fee. As I understand it, on the basis of my finding as to where the CTF commenced and that it did not commence at the subsea points of entry, it is common ground that flotel costs associated with work on items (ii) and (iv) cannot form part of the Capacity Fee. The position in relation to item (i) is rather more complicated. There is no dispute that the liquid-handling facilities on the CATS Riser Platform are not themselves part of the CTF. Whether they should be treated as if they were for certain purposes – including the present purpose of deciding on the legitimacy of including flotel costs associated with them – depends on the issues relating to the COSA and Everest Use Agreement, and the ‘swap’ arrangements, to which I now turn.

THE COSA AND EVEREST USE AGREEMENT

72. The issues here are, when isolated, short. But they arise in a somewhat complicated way and require a detailed introduction.
73. As I have already set out, the CATS Parties own and operate the CATS Riser Platform. They and the Everest Owners were parties to an Agreement for the Provision of CATS Riser Platform Operating Services by the Everest Owners (the “COSA”) dated 30 July 2010. Under the COSA the Everest Operator was appointed as the operator and ‘duty holder’ for the CATS Riser Platform. As such it was responsible for the overall operation and safety of the CATS Riser Platform. The Everest Operator invoiced the CATS Parties for the maintenance and operation of the CATS Riser Platform. The CATS Parties paid the Everest Owners for such Operating Services. The payments made in respect of such services consisted of: (i) a Management Fee; (ii) costs of non-routine work as set out in AFEs; and (iii) a 10% administration charge.
74. The Everest Owners provide certain utilities to the CATS Parties under the COSA. These utilities fall within the Management Services under Part I of Schedule II of the COSA. Part I(ii) of the COSA provides that ‘no charge’ shall be made in respect of these utilities.
75. The CATS Parties contend, however, that it was in return for those utilities that they agreed to make certain liquid-handling and gas-flaring services on the CATS Riser Platform available to the Everest Owners pursuant to the Everest Use Agreement. The CATS Parties refer to this arrangement as the ‘swap arrangement’. The CATS Parties do not charge the Everest Owners under the Everest Use Agreement.
76. In deciding the amount of the Management Fee which the Everest Owners will charge the CATS Parties use is made of a ‘tag count’ allocation. I will revert to this concept in the context of Allocation Methodologies, below. In brief, however, what is involved is a division of costs based upon the number of ‘tags’ which relate to equipment used in the relevant activity or operation. Under the maintenance management system used by the Everest Operator, which is known as ‘Everest Maximo’, and which is a configured version of a proprietary computerised asset management software developed by IBM, each component or item of equipment which may require maintenance or repair is assigned a separate ‘tag’. In assessing the amount of the

Management Fee which is to be charged to the CATS Parties, the Everest Operator assesses the number of tags on both platforms, and divides the number of tags on the CATS Riser Platform by the number on both it and the North Everest platform, to determine the proportion which CATS Riser Platform tags bear to total tags. The answer is roughly 9%. The Everest Operator then passes on roughly 9% of the costs of running both platforms. In that calculation, the tags on the liquid-handling and gas-flaring facilities on the CATS Riser Platform are included in the CATS Riser Platform proportion. In this way the CATS Parties bear a proportion of the Management Fee by reference to those liquid-handling and gas-flaring facilities.

77. The CATS Parties have then included a proportion of the Management Fee charged by the Everest Operator in the Capacity Fee under the CRTA. In making that calculation, they have taken the number of tags on the CTF equipment and facilities on the CATS Riser Platform,⁴ and added the number of tags relating to the liquid-handling and gas-flaring equipment of which use is made by the Everest Owners pursuant to the Everest Use Agreement. This combined number of tags is then divided by the total number of tags on the CATS Riser Platform to determine the proportion of the Management Fee which should form part of the Capacity Fee.
78. In addition, the cost of any AFEs which relate to the operation and maintenance of those liquid-handling and gas-flaring facilities are also charged by the Everest Operator to the CATS Parties, and those costs are included in the Capacity Fee.
79. With that introduction, it is possible to consider TGTL's case in this area. It has not disputed during the trial that it is liable to pay something in respect of COSA costs. It has admitted that it is obliged to pay that proportion of the Management Fee 'that relates to the CTF (properly defined), and ... non-routine costs charged by the Everest Operator under AFEs insofar as they relate to the CTF (properly defined)'. It has denied, however, that it is obliged to pay any costs associated with the liquid-handling and gas-flaring facilities.
80. TGTL's case has three aspects. In the first place, TGTL does not accept that any costs incurred by the CATS Parties by reference to the liquid-handling and gas-flaring facilities on the CATS Riser Platform were the consideration for, or price of, the utilities provided to the CATS Riser Platform by the Everest Operator. It contends that the consideration for the utilities provided by the Everest Operator can be determined only by reference to the contracts entered into between the CATS Parties and the Everest Owners. On the express terms of those agreements, TGTL contends, and while the COSA remains in being, (a) the consideration for the Everest Owners' provision of utilities and services to the CATS Riser Platform consists solely of the CATS Parties' specified obligations under the COSA, including the CATS Parties' obligations to pay the relevant fees provided for therein; and (b) the CATS Parties made liquid-handling and associated gas-flaring services available to the Everest Owners in consideration only of the mutual covenants specified in the Everest Use Agreement, not in the COSA, and specifically in return for a contingent promise (in clause 6 of the Everest Use Agreement) that the Everest Owners would make utilities and services available to the CATS Parties on the termination of the COSA.

⁴ As they have considered them to be. This will need to be revised, in the light of my judgment, in determining the final quantum of the Capacity Fee.

81. In my judgment this argument is artificial and ill-founded. I consider that the nature of the ‘swap’ arrangement is apparent from an analysis of the COSA and the Everest Use Agreement. They were entered into at the same time, on 30 July 2010, and form part of the same transaction and should accordingly be construed in light of each other. Furthermore, the background to both agreements indicates that the Everest Use Agreement services were intended to be the consideration for the utilities provided free of charge under the COSA. In particular, the COSA and the Everest Use Agreement are successor agreements to a CATS Facilities Agreement dated 22 June 1993, pursuant to which the Everest Owners provided facilities and utilities in consideration of the liquid-handling and gas-flaring facilities. COSA and the Everest Use Agreements were intended to replace the CATS Facilities Agreement, but without any intention to change the substance of the existing arrangement. This is supported by the fact that Recital C of the COSA and Recital C of the Everest Use Agreement each refers to the arrangement under the CATS Facilities Agreement; by the fact that Recital F of the COSA refers to the CATS Parties wishing to make provision for the Everest Owners to perform certain operations and maintenance services ‘in addition’ to the utility services performed under the CATS Facilities Agreement; and by the fact that Recital F of the Everest Use Agreement notes that the COSA and the Everest Use Agreement are to replace the CATS Facilities Agreement.
82. Furthermore, TGTL’s argument here would suggest that the CATS Parties provided the liquid-handling and gas-flaring services to the Everest Owners essentially free. That is commercially unrealistic, and this fact encourages recognition of the arrangements as amounting to a ‘swap’, and the provision of the liquid-handling and gas-flaring services as having been the price of the utilities provided to the CATS Riser Platform.
83. The second aspect of TGTL’s case is a contention that, even if it is appropriate to regard the provision of the liquid-handling and gas-flaring services as having been the price of the utilities, this was not a ‘direct cost’ and so these costs did not constitute OE within the meaning of that term set out in clause 1.1 of the CRTA, and accordingly such costs could not form part of the Capacity Fee.
84. I do not consider that this is a valid argument. The relevant costs were directly borne by the CATS Parties, and were, on the basis of my finding as to the reality of the ‘swap’ arrangement, the cost of the utilities provided by the Everest Operator to the CATS Riser Platform. There is no case made that the quantum of such costs was an unreasonable price for the utilities which the Everest Operator provided. In those circumstances there appears to me to be no difficulty in recognising that these costs were ‘direct costs borne or paid by the CATS Parties to maintain and operate the [CTF]’. The CATS Riser Platform, whose functioning was vital to the CTF, could not have operated without utilities. These costs were, accordingly, borne in order to maintain and operate the CTF.
85. The third aspect of TGTL’s case, as I understood it, was that costs should not form part of the Capacity Fee when they were charged by reference to parts of the CATS Riser Platform which were not within the definition of the CTF. I understood TGTL to contend that insofar as, in ascertaining what proportion of the Management Fee which the CATS Parties paid in respect of the operations of the CATS Riser Platform should be included in the Capacity Fee, the allocation took account of the number of tags related to the liquid-handling and gas-flaring facilities on the CATS Riser Platform, this was objectionable. And further, that there should not be the inclusion within the

Capacity Fee of costs of AFEs which related to such liquid-handling and gas-flaring facilities.

86. I did not consider that either of these points was persuasive. As to the first, adding the tags of the liquid-handling and gas-flaring facilities to the other CTF tags on the CATS Riser Platform in order to determine the proportion of the Management Fee which should be included in the Capacity Fee calculation appeared to me to be a reasonable method of allocating the cost of the provision of utilities – through the ‘swap’ arrangement – to the CTF, and thus to the amounts which could form part of the Capacity Fee. As to the second, the fact that costs might be expended by way of AFEs on parts of the CATS Riser Platform which were not within the definition of the CTF did not of itself mean that such costs did not fall within the Capacity Fee. Insofar as such AFEs related to expenditure to operate and maintain the liquid-handling and gas-flaring facilities, they would still constitute costs paid ‘to maintain and operate the [CTF]’, because, even though they related to items of equipment which were not within the CTF, without the ‘swap’ arrangement the CTF could not have been operated.

ALLOCATION METHODOLOGIES

87. The CATS System has always been operated as a single system, though it includes elements which relate to transportation and others which relate to processing. When, under the CRTA, there was a change from a tariff to the costs division entailed by the Capacity Fee formula, it became necessary to determine which costs of the CATS System related to the CTF. In a number of cases, the equipment and/or activity could be said to be entirely devoted to either transportation, and thus related to the CTF, or to processing, and thus not. In other cases the equipment and/or activity related to both.
88. The CATS Parties adopted a number of allocation methodologies for different types of shared cost.
89. TGTL’s case was originally that the CATS Parties were not entitled to include an allocated part of shared costs under the CRTA. By its RAPOC, however, TGTL accepted that the CATS Parties were entitled to use allocation methodologies, although TGTL pleaded that any such methodologies had to be consistent with and give effect to the requirements of the CRTA and be fair, equitable and in conformity with industry standards.
90. TGTL continued to challenge a number of the allocation methodologies which the CATS Parties had employed in calculating the Capacity Fee. During the trial, the number of such challenges reduced. I will proceed to consider all the issues which remained live in relation to allocation methodologies.
91. Before doing so, however, I will address the contractual basis on which there can be allocation and what contractual standard applies to determine the appropriateness or otherwise of any allocation methodology.
92. The CRTA makes no express provision for allocation. I consider that the ability of the CATS Parties to include an allocated proportion of the costs of shared equipment/operations derives from an implied term of the CRTA. The industry experts instructed by each party were in agreement that cost sharing and cost allocation in the offshore industry needs to be on a ‘fair, equitable and reasonable basis’. I consider that

the implied term of the CRTA can be expressed as being that the CATS Parties can include in the CRTA a proportion of the costs of shared equipment/operations provided that the allocation or apportionment methodology used is fair, equitable and reasonable.

93. The CATS Parties have argued that the choice of allocation methodologies is a matter to which the discretion which they are afforded by clause 3.2(b) of the CRTA, namely ‘the right to decide the method and manner in which they shall conduct all operations with respect to the CATS System’, applies. From that starting point they have argued that, provided they have not acted in an arbitrary or capricious manner or one which can be regarded as wholly irrational in selecting an allocation methodology, then that choice is not open to challenge. I do not accept that argument. I consider that clause 3.2(b) is concerned with the physical operation of the CATS System, and not with an accounting exercise between the parties to the CRTA such as that involved in the process of cost allocation with which I am dealing now.
94. Against that background, I turn to consider the allocation methodologies which the CATS Parties adopted, and the extent to which there remain disputes as to them.
95. There were five aspects of allocation methodology where issues arose. The position in relation to them, by the end of the trial, was as follows:

(1) The ‘*CTF Offshore Tag Factor*’, which used the tagging of equipment on the CATS Riser Platform to determine what proportion of the costs of the CATS Riser Platform were to form part of the Capacity Fee, was not disputed by TGTL as a methodology. The only issue which remained was as to what was properly included within the tags taken as relating to the CTF. That is determined by TGTL’s concessions and my findings as to the extent of the CTF on the CATS Riser Platform, and by my findings in relation to the COSA and Everest Use Agreement issues.

(2) The ‘*onshore tag factor*’. The use, in general terms, of a tag count methodology for the CATS Terminal was not disputed by TGTL. As I understood it, only one issue remained, which was as to whether the methodology which should have been employed was the ‘Complexity Factor’ devised by BP and Mr Biscomb, which gave a 17% cost allocation to transportation and which was applied by BP from 2013 to 2015, or the ‘CTF Onshore Tag Factor’ devised by Antin/CATS and Mr Conner, which gave a 25.5% cost allocation to transportation, and was set out in the CATS Report of October 2016.

(3) The *timewriting allocation* in respect of staff and employee costs. Subject to one exception, TGTL accepted that this will be determined by my decision as to which of the two onshore tag factors described in (2) above is to be applied, as under each the respective tag factor percentage is employed for shared or common use employees. The one exception is that TGTL contends that six employees described as ‘Gas Administrators’ should not be regarded as having a 100% transportation role.

(4) The '*footprint factor*' in relation to onshore rent and business rates was not disputed by TGTL as a methodology. The only issues which remained were as follows. Firstly, whether the H2S plant and mercury removal plant were to count as transportation facilities for the purpose of working out what surface area of land was occupied by transportation as opposed to production facilities. That is answered by my determination that these facilities did fall within the CTF. Secondly how the portions of land which TGTL contended related to the future expansion of processing trains 3 and 4 were to be treated in the application of the '*footprint factor*'.

(5) The '*fiscal factor*' in relation to fiscal measurement and metering costs at onshore redelivery points, giving a 53.85% cost allocation to the CTF, is accepted by TGTL.

96. I accordingly turn to the issue which remains live in relation to the '*onshore tag factor*'. This is whether the appropriate methodology is the so-called '*Complexity Factor*' or the '*CTF Onshore Tag Factor*'. These need some explanation.
97. The so-called '*Complexity Factor*' involves an allocation of the costs of each shared or common use process system into one of two '*buckets*', transportation or processing, by a consideration of whether the shared system predominantly served transportation or processing. Mr Biscomb made a judgment as to whether the system was predominantly one which served transportation or predominantly served processing, and depending on the answer, the costs of that system were 100% allocated either to transportation or processing. The '*CTF Onshore Tag Factor*' allocation method, by contrast, involves an allocation of tags to (a) 100% transportation, (b) 100% processing and (c) common systems. The tag factor is the ratio of (transportation tags) / (transportation tags + processing tags) and this figure is applied to the costs in relation to the common systems.
98. TGTL's case at trial, albeit not in its pleadings (paragraph 55 of the RARDC), was that the '*Complexity Factor*' was a fair and appropriate allocation. By contrast, it contended that the '*CTF Onshore Tag Factor*' method of allocation was not.
99. The CATS Parties contended that, in the light of the evidence given by Mr Harper at trial, it was not open to TGTL to dispute the appropriateness of the CTF Onshore Tag Factor. I do not accept that submission. The passage of Mr Harper's evidence on which the CATS Parties relied (at Day 3/144-146) in my judgment did not amount to the acceptance of the reasonableness of the '*CTF Onshore Tag Factor*' as opposed to a method of allocation which utilised Maximo tags. Certainly, I do not regard that passage as having been a clear acceptance of the appropriateness of the use of the CTF Onshore Tag Factor methodology in the allocation of costs for the purposes of the Capacity Fee.
100. Turning to the merits of the issue, I considered that there were arguments in favour of each of the '*Complexity Factor*' approach and the '*CTF Onshore Tag Factor*' approach. The '*Complexity Factor*' approach utilised the detailed knowledge of Mr Biscomb as to the way in which the common systems and facilities worked. On the other hand, it

had a considerable element of subjectivity to it. Furthermore, I accept that, given that under it far more shared systems will be deemed 100% processing than 100% transportation, it can be regarded as giving an underweight share to transportation. It is true to say that the allocation of the costs of the shared systems by reference to the proportion of the tags of the non-shared systems is bound to be only a proxy for the proportional maintenance split of the shared systems, but it appears to me to be a reasonable one.

101. Ultimately the question I have to answer is whether it has been shown that the CTF Onshore Tag Factor methodology is not fair, equitable and reasonable. I do not consider that that has been shown. On the contrary, I consider that that methodology can properly be said to be fair, equitable and reasonable. There may be other methodologies which could also be said to be fair, equitable and reasonable, but that does not imply that this one is not.
102. In relation to *timewriting*, the only issue which remained for me to decide was as to the allocation of the roles of the six Gas Administrators, which have been allocated by the CATS Parties entirely to transportation. This is a very short point. Given the evidence of Mr Biscomb (at Day 5 pp. 125-131) I considered it to be established that these Administrators were not dealing solely with transportation. Accordingly they should have been treated as shared employees to whom the relevant onshore tag factor should have been applied.
103. In relation to the *footprint factor*, as I have set out above, the only remaining issue was as to whether an area of the CATS Terminal to the side of the onshore reception flare should have been regarded as 100% processing or should have been regarded as unused land which would be subject to the application of the footprint factor.⁵ Mr Biscomb's evidence was to the effect that, though at some point in the past, apparently in the 2000s, it had been contemplated that this land would be used for processing trains 3 and 4, subsequently, between about 2013 and 2015, it had been contemplated that it might be used for CO₂ removal which would have been for the purposes of transportation. Accordingly, there had been no fixed decision that this land would be used only for processing, and it was therefore appropriate to regard it as unused land. In light of this evidence, I considered that TGTL's objection to the treatment of this area of land was unfounded.
104. A discrete subsidiary issue arose under the wider issue of Allocation Methodologies, and this related to TGTL's case that certain specific items were not direct costs or were 100% transportation. This was pleaded, in somewhat unspecific terms (in that the language used was of examples 'without limitation') in TGTL's RARDC and was only very briefly mentioned in TGTL's Opening submissions, where the references were to the intended expert evidence of Mr Tan, who in the event was not called and whose evidence (save to the extent embodied in the agreed memorandum with Mr Rowe) was not relied on. In its Closing Submissions (paragraph 170.3) TGTL had confined its case in this area to (a) IT costs; (b) BP wide project costs; (c) costs related to new entrants; and (d) costs of the Rich Gas Project.
105. As to (a) to (c) I did not consider that TGTL had put before me material which allowed me to conclude that it had made out its case that those categories of costs were not

⁵ The area is the left-hand square marked "Future Process Unit" on G/136/1.

direct. Furthermore, in relation to IT costs, and in light of the evidence of Mr Biscomb in paragraphs 14-16 of his Second Witness Statement, I came to the positive view that there was no difficulty in regarding these as direct costs. As to (d), Mr Biscomb in his evidence on Day 5 stated that the aspects of the Rich Gas project which were 100% devoted to processing had been so allocated, and did not accept that there had been a misallocation of these costs. I accept that evidence.

CATEGORISATION OF EXPENDITURE

106. The issue in this regard relates to whether certain items of expenditure on what may be loosely described as repair and maintenance have been correctly categorised by the CATS Parties as OE or EOE rather than as CE. The point matters because CE, unlike OE or EOE, must be amortised before it is included in the Capacity Fee. Thus, by way of example, a capital cost of £5 million incurred by the CATS Parties in one Contract Year would not be added to the Capacity Fee as £5 million (multiplied by the CRR/CC quotient) but instead, if its amortisation period was 20 years, only £250,000 (multiplied by the CRR/CC quotient) would be included for the year that the expenditure was incurred, and for each subsequent year of the Capacity Fee period.
107. I have already set out the three key definitions of OE, EOE and CE. The issue turns on what is meant by the words ‘of a capital nature’ in the definition of CE.
108. TGTL’s pleaded position in relation to the correct approach to the meaning and application of the phrase ‘of a capital nature’ changed in the RARDC. Previously, TGTL had pleaded that whether or not a specific item of expenditure constituted a cost ‘of a capital nature’ was a matter to be objectively determined by reference to the ordinary meaning of the words, but had also pleaded that the CATS Operator was ‘required’, in accordance with accounting standards ‘such as FRS 15’ to classify as CE any expenditure which (a) enhanced the economic benefit of a tangible fixed asset; and/or (b) was incurred in the replacement or restoration of a fixed asset; and/or (c) was incurred in a major inspection or overhaul. In the RARDC TGTL pleaded that ‘... the applicable standards (and those which were to be applied by the CATS Operator in categorising costs as capital) were and are those current at the time at which the accounting exercise in question is to be carried out’; that prior to 1 January 2014, the applicable accounting standard used by the CATS Operator was FRS 15; but that from 1 January 2014 the applicable accounting standard was IAS 16, and that under that standard the costs relating to an item of property, plant or equipment were to be recognised as an asset and capitalised if (a) it was probable that future economic benefits associated with the item would flow to its owner, and (b) the cost of the item could be measured reliably.
109. What did not change was TGTL’s plea that there were no accounting standards or accounting practice which treated costs as not being of a capital nature because they were ‘not material’.
110. Expert accountancy evidence was served by both parties. In the joint statement prepared by the experts, there appeared the following:

[22] “Capital” is generally accepted as being an expense for the purchase of an item that is expected to lead to long term benefits

for a business and would thus [be] expected to be of use to a business for more than one year.

...

[24] “Capital nature” is not defined in the CRTA. ... In the absence of the above, from an accounting experts’ point of view, it is appropriate to look for guidance at accounting standards current from time to time.’

111. The experts further set out a history of the relevant accounting standards current from time to time. This may be summarised as follows:

(1) In 1990 there was no specific UK GAAP standard dealing with capitalisation. There was an international accounting standard IAS 16, which had been in force from 1982. It is convenient to refer to this as “IAS 16 (1982)”. IAS 16 (1982) provided, in part, in relation to expenditure on an asset subsequent to its initial acquisition that ‘Only expenditure that increases the future benefits from the existing asset beyond its previously assessed standard of performance is included in the gross carrying amount.’

(2) FRS 15 was issued in 1999. It specifically dealt with capitalisation, and its approach was similar to the IAS 16 (1982) standard. FRS 15 was valid for accounting periods up until the end of 31 December 2014.

(3) FRS 15 set out three tests for capitalisation of subsequent expenditure on an asset. These were as follows:

‘36. Subsequent expenditure should be capitalised in three circumstances:

(a) where the subsequent expenditure provides an enhancement of the economic benefits of the tangible fixed asset in excess of the previously assessed standard of performance.

(b) where a component of the tangible fixed asset that has been treated separately for depreciation purposes and depreciated over its individual useful economic life, is replaced or restored.

(c) where the subsequent expenditure relates to a major inspection or overhaul of a tangible asset that restores the economic benefits of the asset that have been consumed by the entity and have already been reflected in depreciation.’

(3) IAS 16 was revised on a number of occasions. The 1993 revision provided that the cost of an item of property, plant or

equipment 'should be recognised as an asset when (a) it is probable that future economic benefits associated with the item will flow to the enterprise; and (b) the cost of the asset to the enterprise can be measured reliably.' There were further revisions of IAS 16, most recently in 2003. It is helpful to refer to this as "IAS 16 (2003)". IAS 16 (2003) had criteria for recognition as an asset very similar to the 1993 version. Under IAS 16 (2003) if an item of repair or replacement is capitalised, then the original item which is being repaired or replaced must be derecognised.

(4) In 2013/14 the UK accounting framework changed and companies could adopt either IFRS (ie IAS 16 (2003)), or New UK GAAP. New UK GAAP had two standards: FRS 101, which incorporated IAS 16 (2003); and FRS 102. In relation to replacement items, FRS 102 provided that an entity was to add to the carrying value of an item of property, plant or equipment the cost of replacing such an item if the replacement part 'is expected to provide incremental future benefits to the entity.'

(5) From 1 January 2015 FRS 15 was withdrawn.

(6) From 31 December 2015, a non-listed UK entity was obliged to report under new UK GAAP, ie either under FRS 101 or FRS 102.

112. The evidence was that, as CATS Operator, BP/Amoco adopted FRS 15 for the year ending 31 December 2013, and thereafter FRS 101 for its external reporting. CNSL used FRS 101 for its external reporting.
113. At the outset of the trial, the issue was framed as being, in essence, as to which of two different accounting standards one should have regard in considering what was meant by 'of a capital nature', with the CATS Parties contending for FRS 15, with its 'enhancement' criterion, and TGTL contending for IAS 16 (2003), with its approach of asking whether future economic benefits will flow to the enterprise and are capable of reliable measurement.
114. In its opening Skeleton Argument, TGTL made the point (at paragraph 233.2) that at the time of the conclusion of the CRTA, the parties knew that the formula in clause 7.10(a) as to the Capacity Fee, which involved categorisation of costs, would not apply until 2013, some 23 years after the CRTA was signed. The argument made was that: (a) 'it is common ground that regard must be had to accounting standards to interpret the term "capital nature"'; (b) this was a very long term arrangement, and the issue of what was of a 'capital nature' would only become relevant at the end of the arrangement; (c) that 'on a proper construction of the CRTA, the meaning of the term "capital nature" falls to be determined by reference to the applicable (UK) accounting standards that (i) were and are current at the time at which the accounting exercise was carried out, and in particular (ii) were and are utilised by the CATS Operator (as a reasonable and prudent operator) for external (statutory) reporting at the relevant time'

(paragraph 238); and (c) that ‘any other construction of the CRTA would not give effect to its terms, interpreted in context, and would lead to unworkability’ (paragraph 239).

115. The CATS Parties, by contrast, argued that in construing what was meant by costs of a ‘capital nature’, it was relevant that both at the time when the parties entered the CRTA and at the time when they entered the Capacity Fee period (on 1 October 2013) the relevant standards, which they contended were IAS 16 (1982) in relation to the former and FRS 15 in relation to the latter, had a similar approach to subsequent expenditure, namely one which required enhancement of the asset. The CATS Parties contended that this approach to construction was supported by a consideration of a number of authorities. The argument was that, although the ordinary position that a contract must be interpreted as at the date when it is made may be displaced when the contract is intended to endure for a long time, when there can be a ‘mobile’ interpretation of this sort, such a mobile interpretation should not change the scope of the underlying contract. Reference was made in particular to *Lloyds TSB Foundation for Scotland v Lloyds Group plc* [2013] 1 WLR 366, where the Supreme Court held that, when the parties entered into a deed in 1997, an accounting for negative goodwill such as was introduced by an accounting practice change in 2005 was outside their contemplation, and would not have been accepted had it been foreseen; and that the language of the deed had to be construed in the light of the parties’ original intentions and purposes.
116. The accountancy experts each gave evidence and were cross-examined. Mr MacGregor, who was called by TGTL, described the test for capitalisation of subsequent expenditure as being ‘materially different’ under IAS 16 (2003) from that under FRS 15. As he put it, ‘you looked at things in a very different way’.
117. In closing the case, both in its very lengthy written document, and in Mr Rainey QC’s closing oral submissions, TGTL put at the forefront of its argument in this area, not the need for the Court to determine the meaning of the term ‘capital nature’ by reference to the accounting standards referred to in paragraph 238 of TGTL’s Opening Skeleton, but rather certain other arguments of construction in relation to the definitions of CE, OE and EOE in the CRTA. Specifically, Mr Rainey QC emphasised: (i) that the definition of OE was limited to ‘direct costs’; (ii) that there was significance in the distinction between the phrase ‘maintain and operate’ in the definition of OE, and the reference to ‘repair and replacement’ of items in the definition of CE; and (iii) that the term ‘of a capital nature’ takes colour from the reference, inter alia, to ‘repair and replacement’ which must be understood to mean repair and replacement which is not routine maintenance. The essence of the argument in (ii) and (iii) was that ‘maintenance and operation’ mean ‘everyday regular and routine maintenance and operation of the system’ and that the definition of CE includes all (or almost all) repair and replacement of equipment beyond that. The argument then proceeded that ‘to the extent that it is relevant to have regard to external accounting standards’, those which should be chosen should be those most in accordance with the distinction between ‘maintenance and operation’ and ‘repair and replacement’ drawn by the CRTA, which TGTL contended were IAS 16 (2003); which were also those ‘temporally the most relevant to the accounting exercise to be carried out over the five year period of the Capacity Fee.’
118. Mr Lord QC objected, strongly, to TGTL’s reliance on these arguments of construction. He submitted that they were not open to TGTL and that, given the way that the case had been pleaded and put in TGTL’s opening, and given the evidence which had been called, the Court was faced with a ‘binary choice’: the contract had to be interpreted as

either meaning that ‘capital nature’ should be construed in accordance with the adoption of the approach in FRS 15 or that in IAS 16 (2003), and ‘not neither or a hybrid’.

119. I am not able to accept that part of Mr Lord QC’s submissions which suggested that the Court had no option but to accept one or other of the two constructions put forward by the parties in opening. The Court is being asked to construe the CRTA. In that process of construction it cannot be limited to the positions taken by the parties: it is open to the Court to say that the proper construction of the document is not one for which either party has contended. Furthermore, I consider it problematic to say that the Court charged with a process of construction can only consider some points which go to the proper interpretation of the relevant provisions of the contract and not others. Nor was I convinced that the CATS Parties were prejudiced by the way in which these arguments were advanced by TGTL, late though it undoubtedly was. I have therefore had regard to those arguments in my consideration of this area of the case.
120. I have reached the conclusion that the CATS Parties are essentially correct in relation to their construction of the CRTA as to the meaning to be accorded to ‘of a capital nature’. I consider that it should be construed as importing a requirement that subsequent expenditure should be regarded as of a capital nature only if it enhances the economic benefits of the asset. My reasons for this are as follows:
- (1) In using the phrase ‘of a capital nature’, the parties have adopted a generic term, and must be taken to have contemplated reference to more detailed accounting standards or guidance to inform the categorisation of specific items of expenditure.
 - (2) The guidance which they can be taken, at the time of conclusion of the CRTA, to have had in mind as providing more detailed content to the concept of ‘capital nature’ was that contained in IAS 16 (1982), with an enhancement criterion in relation to subsequent expenditure.
 - (3) Though the question of whether costs were of ‘a capital nature’ would only become relevant in the Capacity Fee period, the parties should be taken to have intended that reference could be made to accounting standards applicable at the outset of that period unless materially different from those which were known to them, and which they must be taken to have had in contemplation, at the time of the entry into of the CRTA (ie IAS 16 (1982)). This permits reference to the recognition criteria in FRS 15.
 - (4) The parties should not be taken to have intended that the test for what items were ‘of a capital nature’ would vary markedly over time, depending on the accounting standards in force at a particular time.
 - (5) The recognition criteria in IAS 16 (2003) are materially different from those in IAS 16 (1982), and thus are materially different from those which the parties must be taken to have had in contemplation at the time of conclusion of the CRTA.

- (6) An approach to categorisation of expenditure as ‘of a capital nature’ similar to or based on that in IAS 16 (2003) does not fit easily into the Capacity Fee calculation because under it, if a replacement or repair cost satisfies the recognition principle then the carrying amount of the replaced/repared part is derecognised. It is unclear how derecognition costs would be classified: as CE, OE or EOE.
121. The additional construction points raised by TGTL in its closing arguments, to which I have referred above, did not lead me to any different conclusion. The phrase ‘maintain and operate’ in the definition of OE is a very wide one, and can readily embrace many instances of repair and replacement. The fact that the definition of CE refers, inter alia, to ‘repair or replacement’ says little as to what repairs or replacements will be CE, because these words are qualified by the requirement that to count as CE the relevant costs and expenditures must be ‘of a capital nature’. That simply raises the question of what is meant by that phrase. The fact that at least some repair and replacement expenditure might be ‘of a capital nature’ is unsurprising and tells one nothing significant as to what is meant by the phrase.
122. Nor, insofar as it was relied upon, does the fact that OE are specified as being ‘direct costs’ assist in deciding whether expenditures on particular items of repair or replacement are ‘of a capital nature’.
123. Accordingly, I accept the CATS Parties’ submissions that the CRTA provides for subsequent expenditures on repair and replacement to be treated as CE only if they enhance the economic benefits of the asset. I do not, however, accept that the CRTA should be construed as importing all aspects of FRS 15. While the phrase ‘of a capital nature’ should be taken to be a reference to the principle of categorisation I have mentioned, I do not consider that it was, or needed to be, a reference to all the details of a particular accounting standard.
124. Nor do I accept the CATS Parties’ case that there is any ‘materiality’ threshold for the inclusion of items as CE. The CATS Parties argued that a materiality threshold was utilised by both BP/Amoco and CNSL when categorising costs, and that this reflected their accounting policies. (Those thresholds were significantly different: £1 million in the case of BP/Amoco and £100,000 in the case of CNSL.) The CATS Parties contended that, given this, and given that it is industry practice to have a materiality threshold, there should be one for the purposes of inclusion of expenditures as CE under the CRTA. The difficulty with this, however, is that the definition of CE is in terms of ‘**all** costs and expenditures of a capital nature’, and this leaves no room for the implication of a materiality threshold.
125. The CATS Parties sought to rely on what it characterised as an acceptance by TGTL that costs which were *de minimis* could not be included in CE, and argued that this constituted a recognition of a materiality threshold. I consider that the only amounts which might be regarded as *de minimis* would be very minor sums which it could make no difference to either party whether they were classified as CE or OE or EOE (cf *Veba Oil v Petrotrade* [2002] 1 Lloyd’s Rep 295). In any event, any expenditures which were ‘of a capital nature’ would be unlikely to be *de minimis*.

126. In relation to the specific items as to which there has been an issue as to categorisation as CE, I consider that the appropriate course is for the parties to seek to agree, in the light of my decision as to the proper construction of the CRTA, which items are to be treated as CE and which are not. If or to the extent that the parties cannot agree, then I will receive further submissions on the question of which such items the CATS Parties are entitled to include in the Capacity Fee as CE.

CATS CAPACITIES

The Issue

127. This issue is the most financially significant of all. TGTL contends that, though it has not deducted sums in respect of this point from the amounts which it has paid in respect of the Capacity Fee, such sums must be allowed in the calculation of the Capacity Fee and, amounting to some £37 million, offset all the other points where the CATS Parties contend that TGTL has underpaid.
128. The issue relates to the proper construction to be given to the concept of ‘CATS Capacity’, which forms the denominator of the fraction in clause 7.10(a) of the CRTA.
129. It is convenient to start by identifying the most relevant provisions of the CRTA, and identifying to what extent and in what respects they were amended.
130. Under Clause 1.1, ‘CATS Capacity’ was defined as ‘the summation of the Capacity Reservation Rate and the aggregate maximum rates of delivery of Non-Capacity Gas notified by the CATS Operator pursuant to Clause 4.6(a)(vii), subject to any changes notified pursuant to Clause 4.6(b)(i).’ That provision was not amended.
131. Clause 4.6 read, as originally agreed in 1990, as follows:
- ‘(a) In the event that the CATS Parties have contracted the use of the CATS Transportation Facilities for Non-Capacity Gas, the CATS Operator shall promptly, subject to the provisions of Clause 24.4, give the ICI/Enron Party a notice containing the following information:
- (i) the field from which such Non-Capacity Gas shall be produced and the facilities through which such Non-Capacity Gas will be metered and delivered to the CATS Transportation Facilities;
 - (ii) the proposed point of delivery of such Non-Capacity Gas into the CATS Transportation Facilities;
 - (iii) the proposed point at which such Non-Capacity Gas is to be redelivered from the CATS Transportation Facilities;
 - (iv) the date on which the transportation of such Non-Capacity Gas is proposed to commence;
 - (v) the estimated date on which the transportation of such Non-Capacity Gas is proposed to terminate;

(vi) the specification in a format to be agreed of such Non-Capacity Gas at the point referred to in (ii) above together with a bona fide estimate of the composition of such Non-Capacity Gas during the proposed period of transportation of such Non-Capacity Gas;

(vii) the maximum rate of delivery of Non-Capacity Gas at such point during the proposed period of transportation; and

(viii) the bona fide but non-binding estimate of the aggregate quantity and composition of Non-Capacity Gas (including Non-Capacity Gas under the contract the subject of the notice under this Clause 4.6(a)) to be delivered to the CATS Transportation Facilities for each Month of the current and each of the next 5 Contract Years and for each Quarter during the remaining term of this Agreement.

(b) No less frequently than Quarterly, the CATS Operator shall, subject to the provisions of Clause 24.4, give the ICI/Enron Party a notice containing the following information:

(i) any changes in the information previously provided pursuant to Clause 4.6(a); and

(ii) the CATS Capacity for the ensuing Contract Year.

(c) The foregoing information is provided for operational and planning purposes only and, so long as the information has been provided in good faith, the CATS Parties and the CATS Operator shall not be liable for the accuracy of any such information, nor shall any such information vary the respective rights and obligations of the Parties under this Agreement.'

132. Clause 4.6 was amended by Agreement No. 2 in 1998 in one respect, namely in 4.6(b) to delete the words 'No less frequently than Quarterly' and to substitute for them the words 'From time to time upon receipt of a request from the ICI/Enron Party, which requests may be made on no more than one occasion in each Quarter.'

133. To reiterate, Clause 7.10 (a) provided:

'In lieu of the Transportation Fee, a capacity fee (hereinafter referred to as the "Capacity Fee") will be payable by the ICI/Enron Party to the CATS Parties for capacity in the CATS Transportation Facilities for each Contract Year during the period effective from 6 o'clock a.m. on 1st October 2013 until 6

o'clock a.m. on 1st October 2018, which Capacity Fee shall be calculated in the following manner:

$$CF = [CRR/CC] (OE + EOE + CE) 1.15'$$

I have set out the definitions of CF, CRR, OE, EOE and CE earlier in this judgment. No amendment was made to clause 7.10(a) in 1998.

134. It is also pertinent to refer to Schedule XIII of the CRTA as originally entered into. It contained 'Allocation Principles'. One part of those provisions was a definition of 'Booked Capacity' as meaning 'for a Producing Designated Field the Notified Rate for that field and for a Non-Designated Field the maximum rate of delivery of Non-Capacity Gas notified by the CATS Operator pursuant to Clause 4.6(a)(vii) of the Agreement.' 'Booked Capacity' was used to determine each shipper's contribution to the 'Static Volume' in Schedule XIII, section IX.1(a), 2(b), 2(c), 4(b) and 4(c), which was based on a quotient calculated on the sum of the CRR and Booked Capacity of the other fields.
135. In 1998 the provisions of Schedule XIII of the CRTA were deleted and were replaced by the Allocation Provisions of the TAA. Under the TAA, 'Booked Capacity' was defined as follows:
- '... with respect to a CATS Field Meter(s) the number of Cubic Metres per Day for such CATS Field Meter(s) in the line marked 'Booked Capacity' in table 1 of Schedule VII, as shall be updated from time to time in accordance with clause 10.8, being the aggregate of all the Firm Shipper Capacities reserved under the applicable Transportation Agreements by the Shippers at such CATS Field Meter(s)...'
136. The TAA defined 'Firm Shipper Capacity' as (i) the Daily Reserved Capacity Rate (DRCR) for all transportation agreements other than the CRTA, and (ii) the CRR for the CRTA. The concept of 'Firm Shipper Capacities' was used, under the TAA, to determine each shipper's contribution to the calculation of 'Static Volume' under the TAA.
137. The CATS Parties have always contended that CATS Capacity for the Capacity Fee period should be calculated using (in addition to the CRR) the sum of the DRCRs for the relevant Contract Year for the shippers other than TGTL, ie the 'firm' capacity booked for each shipper for that Contract Year, and which the CATS Parties were obliged to make available in that Contract Year. An essential part of their case is that what should be used is the **up to date** booked capacity for each Contract Year relevant. The CATS Parties contend that that information was provided by TAA Update Schedules, of which at least seven were produced and sent to TGTL in the period 2009 to 2017.

138. TGTL's case has changed and developed. Its initial position, reflected in its original POC served in 2017, was that the 'maximum rate' to be notified by the CATS Operator pursuant to Clause 4.6(a)(vii) had to include 'both fixed capacities (ie any capacity which the CATS Parties agree to ship on a take-or-pay or similar basis) and any additional capacities, including those to which the counterparty has a contingent entitlement (such as gas that the CATS Parties agree to transport on a "reasonable endeavours" basis).' This was a plea that the CATS Capacity was to include both the sum of the DRCRs but also additional entitlements, such that it should be based on the 'actual maximum rates at which gas was expected to be delivered under the applicable contract'. This was understood by the CATS Parties, I think reasonably, as a plea that what should have been used was the figure for total throughput of Non-Capacity Gas. TGTL contended that the CATS Operator had failed to notify the relevant maximum rates, and could not rely on its own notification failure for the purpose of calculating CATS Capacities.
139. By its RAPOC, served in November 2018, TGTL put forward a significantly different case. That case was as follows:
- (1) The maximum rate of delivery is that rate notified under clause 4.6(a) notices, and the CATS Operator was not entitled to amend that information other than pursuant to a request issued by TGTL pursuant to clause 4.6(b) (as amended in 1998).
 - (2) That in the (incomplete) set of clause 4.6(a) notices which had been located, in all save one the 'maximum rate of delivery' specified was the initially-agreed firm booked capacity for that shipper. In the one exception (Gaupe) the rate notified corresponded to the maximum permitted booked capacity under the relevant Transportation and Processing Agreement (or "TPA").
 - (3) That even though the CATS Parties in fact shipped gas from these fields in excess of the maximum rate of delivery specified in the corresponding clause 4.6(a) notice, given that TGTL did not issue any clause 4.6(b) notice requesting an update of the clause 4.6(a) notices, the CATS Operator was obliged to use the rates specified in the clause 4.6(a) notices for the purposes of calculating the Capacity Fee.
 - (4) In relation to fields where no clause 4.6(a) notice had been found, it is to be inferred that there would have been a notice and that it would have specified a rate which corresponded to or exceeded the firm booked capacity specified in the corresponding TPA.
 - (5) Given that those TPAs were available, it could be deduced what the clause 4.6(a) notice would have said.
 - (6) A complete list of what TGTL contended would have been notified under clause 4.6(a) was set out as Annex A to the RAPOC.

140. At the outset of the trial, TGTL put the case as a simple one. It contended that, given that clause 4.6(a) notices had been given, the only questions were (i) whether the CATS Parties were entitled unilaterally to update or amend the information given in those notices, without a request from TGTL; and (ii) if so, had they done so. TGTL answered the first, that ‘the CATS Parties were only entitled to update or amend the information in the clause 4.6(a) notice upon receipt of a request from TGTL. As no such request was made by TGTL, the clause 4.6(a) notices remain unamended.’
141. By the end of the trial, TGTL’s case had undergone significant further development. TGTL argued that what was required under clause 4.6(a)(vii) was a notification at the outset of a transportation agreement with a shipper of the maximum rate at which it was expected that the newly contracted shipper would deliver gas into the CTF at any time during the whole life of that transportation agreement. It was a forward-looking maximum, looking at the contract as a whole and the contract period as a whole. There could only be any notification of a change in that information if it had changed (ie if there had been a change in the maximum rate expected at any point during the life of the transportation agreement), which would effectively only be if there had been an amendment of the underlying agreement. In the absence of that, the CATS Operator could not give a valid notice to amend the 4.6(a)(vii) information, even under the unamended clause 4.6(b). TGTL still contended that, without a request from it, the clause 4.6(a) information could not be amended, but now, in contrast with its opening, and in accordance with its new emphasis on the original notification having to have been for the maximum rate for the whole period, this was said to be ‘of very little significance on TGTL’s case’ because the clause 4.6(a)(vii) information, as TGTL now argued it to be, did not change.

The TPAs

142. Before I consider the merits of the respective cases, it is necessary to say something more about the TPAs which the CATS Parties had with the other shippers, and the basis on which – to the extent it is known – there was a notification under clause 4.6(a).
143. The TPAs relate to 16 fields, and range in date from 1991 to 2014, with six from the 1990s. The first was that in respect of Everest / Lomond, heads of agreement having been concluded in January 1991. The CATS System was not completed until 1 April 1993, and Everest / Lomond gas first flowed in May 1993.
144. Under the first Everest / Lomond transportation agreement, clause 9(b) provided, in part:

‘With respect to the period following the Commencement Date, there shall be a Daily Reserved Capacity Rate (“DRCR”). The DRCR shall be the maximum rate (expressed in Cubic Metres) of Everest Lomond Gas per Day as varied from time to time in accordance with these Heads of Agreement ... at which the Everest / Lomond Party wishes to reserve capacity in the CTF.’

145. Thereafter the TPAs in respect of all fields save two contained a materially identical provision, including the reference to the DRCCR being the ‘maximum rate’ at which capacity is to be reserved. The two exceptions, Banff and MonArb, referred to the DRCCR as being the rate at which the shipper had the right to deliver gas to the CTF.
146. As to what was notified in the six clause 4.6(a)(vii) notices which have been found, it appears that the following is the position.
- (1) In relation to Banff, the notice was dated 20 August 1998. It specified the commencement date for transportation as being 1 October 1998 and the earliest date for the termination of the provision of transportation as being 1 October 2010. In respect of the information required for clause 4.6(a)(vii) it stated that the maximum rate to be delivered during the proposed period of transportation was 1,046,000 cu m/d. This corresponded to the ‘Minimum DRCCR’ specified for the period starting on 1 October 1998 in the TPA (clause 3.2), which reduced to 283,000 cu m/d in October 2000 and 57,000 cu m/d in October 2001.⁶
 - (2) In relation to ETAP, the notice was dated 18 February 1998, gave the period of transportation as between 1998 and 2018 and gave the maximum rate for sub-clause (vii) purposes as being 12.72 million cu m/d. That corresponded to the DRCCR specified in the TPA for the first three years.
 - (3) In relation to Rev, the notice was dated 25 March 2009, gave the period of transportation as between 2009 and the end of the life of the field, expected to be in 2013/14; and as to the rate for sub-clause (vii) purposes, stated the ‘approximate maximum rate of delivery’ to be 3.4 million cu m/d. This corresponded to the DRCCR specified in the TPA for the first three years.
 - (4) In relation to Gaupe, the notice was dated 16 November 2010. It specified the period of transportation as between 2011 and the end of life of the field, expected to be in 2017; and as to the rate for sub-clause (vii) purposes, stated the ‘approximate maximum rate of delivery’ to be 1.5 million cu m/d. This did not correspond with the initial DRCCR specified in the TPA (707,000 cu m/d), which continued for two years, with an estimated DRCCR for the third year of 1,274,000 cu m/d. There was a provision for a +/- 12.5% variation from the 1,274,000. Even taking that into account, the figure of 1.5 million cu m/d is not yielded. It is clearly, as it states, an approximation of some sort.
 - (5) In relation to Huntington, the notice was dated 27 September 2011. It specified the period of transportation as between 2012 and a point beyond the end of the CRTA; and as to the rate for sub-clause (vii) purposes, stated the ‘approximate maximum rate of delivery’ to be 600,000 cu m/d. This corresponded to the DRCCR specified in the TPA for the first two years (rounded up from 594,648 cu m/d).

⁶ The rate of 212,000 cu m/d specified at clause 3.2 is for a period before 0600 on 1 October 1998.

- (6) In relation to Kinnoull, the notice was dated 28 May 2015. It specified the period of transportation as between 2014 and a point beyond the end of the CRTA; and as to the rate for sub-clause (vii) purposes, stated the ‘approximate maximum rate of delivery’ to be 700,000 cu m/d. This corresponded to the DRCCR specified in the TPA for the first two years.

Discussion: Up to date or historical?

147. The totalling of the clause 4.6(a) notices which have been found, together with the figures which TGTL contends must have been notified in those which have not been found, and adding the CRR, gives figures of some 62 million cu m/d for the Contract Years 2013/14 - 2016/17, and approximately 61 million cu m/d for 2017/18. These figures exceed the capacity of the pipeline, which was 48 million cu m/d, and comfortably exceed the throughput for those years (which was in the range 14-18 million cu m/d), and the DRCCRs plus CRR for those years (which was in the range of approximately 17-22 million cu m/d).
148. The case for TGTL is to the effect that the parties agreed that the CATS Capacities should be calculated on the basis of the maximum amount which might, during the course of the entire period of the various transportation agreements with other shippers, be delivered into the CTF. Further that is so, notwithstanding that by the time of the Capacity Fee period under the CRTA, the amount being supplied under any particular transportation agreement might be only a very small proportion of the largest amount which was shipped at any point during the period of the agreement, which might have lasted for many years.
149. In considering whether this is what was agreed it is necessary to consider the nature of the Capacity Fee period under the CRTA. For that period, towards the end of the duration of the CRTA, the parties agreed to substitute what may broadly be called a cost share regime for the earlier tariff regime. Under that cost share regime, the current costs (ie those relating to the Contract Years of the Capacity Fee regime) were to be divided up. Under such a cost share regime, it could be expected that those current costs would be divided amongst those actively using the facility during the period in which those costs were incurred and in proportion to their usage of the facility, and not on the basis of what they might have been shipping many years, and in some cases decades, earlier.
150. Of course, however, though one might not have expected to see an arrangement of the sort for which TGTL contends, it is necessary to consider carefully whether the parties did in fact make such an arrangement, or whether they agreed that what should be used were up to date figures, such that the denominator of the fraction in the formula would represent the contemporary usage of the CTF during the Capacity Fee period.
151. An indicator that the latter was intended is gained by considering the other element of the fraction involved in the clause 7.10(a) formula, namely the CRR. The CRR is both the numerator, and is part of the sum which constitutes the CATS Capacities in the denominator. The CRR was defined in the CRTA as a rate of 8,334,900 cu m/d ‘as the same may be adjusted in accordance with this Agreement’. By clause 21.1 of the CRTA TGTL had the right, on not less than two years’ notice, to reduce, but not thereafter to

increase, the CRR, provided that such reduction should not be effective before 1 October 2008. Under this clause, TGTL thus had the right to reduce the CRR, apparently on multiple occasions. It did, as a matter of fact, exercise that right by reducing the CRR to 6,515,000 cu m/d with effect from 1 October 2017 by a letter dated 28 September 2015. The CRR to be used in the formula was the up to date CRR, as amended pursuant to clause 21.1. I consider that the fact that this aspect of the equation was up to date in this sense, lends support to the idea that the parties intended the other aspect of the fraction, and the other aspect of the denominator, also to be up to date.

152. Strong support for the contention that the concept of CATS Capacities is intended to be based on up to date usage is afforded by other provisions within the CRTA which make use of the concept. Thus in clause 12.1(b)(ii) of the unamended agreement, to which regard can be had for the intended meaning of the phrase in the original 1990 version of the agreement, it was provided that if there was at any time some restriction on throughput, leading to a reduction in capacity, the Capacity Users (which included TGTL), were entitled to a portion of the remaining available capacity in the proportion which the CRR bore to CATS Capacity. That would need to be on the basis of the up to date usage, and it is obvious that TGTL would have had cause to complain if such an allocation had been done on the basis of CATS Capacity figures calculated using high historic rates of delivery of other shippers, which would have had the effect of decreasing the available capacity allocated to it. I consider that clause 16.1(b)(ii) is also drafted on the assumption that the CATS Capacity is the current contracted usage. And so is clause 22, which remained unamended in 1998, which provides that, in the event of abandonment of the system by the CATS Parties, ownership shall be allocated among the Relevant Parties (namely those having a capacity reservation or a firm contractual right to transportation during the period after an abandonment notice) ‘pro rata to their proportionate shares of the CATS Capacity on the date of expiry of the [abandonment] notice.’ It would make no sense, and potentially be inconsistent with the definition of Relevant Parties, for the calculation of CATS Capacity here to be other than on the basis of up to date figures for usage.
153. The intended topicality of the rates involved in both the CRR and the CC is apparent from the use of the phrase ‘applicable on each Day of the Contract Year in question’, in the definitions of the terms of the formula in clause 7.10. While it can be said that it was necessary to have a phrase to ensure that the number of ‘Capacity Reservation Rates’ was that for a full year, and likewise for the number of ‘CATS Capacities’, the words actually employed emphasise the fact that the rates used will be up to date rates, and ones which may vary during the course of the year.
154. The above analysis of the CRTA is further supported by the way in which the relevant concepts were expressed through the process of amendment. The phrase ‘maximum rates of delivery of Non-Capacity Gas notified by the CATS Operator pursuant to clause 4.6(a)(vii)’ was, in the unamended CRTA, adopted as the definition of ‘Booked Capacities’. The contractual purpose of the phrase ‘Booked Capacities’ was in determining matters of allocation, under Schedule XIII. Upon amendment in 1998, Schedule XIII was deleted, the allocation provisions being thereafter found in the TAA, and the term ‘Booked Capacity’ was defined in the TAA as ‘the aggregate of all the Firm Shipper Capacities’. The ‘Firm Shipper Capacities’ are the DRCRs for each shipper, as set out in Schedule VII to the TAA, as updated from time to time in accordance with clause 10.8 (which included a provision for the amendment of

Schedule VII no more frequently than quarterly). Of course, the definitions in Schedule XIII and in the TAA never co-existed, and cannot properly be used to cross-define terms. Nevertheless, it is a reasonable inference, having regard to the whole contractual scheme, that what was being referred to as 'Booked Capacity' was never intended to change, and that that phrase, like 'CATS Capacity' was a varying, updated, figure.

Discussion: TGTL's primary submission

155. These considerations indicate to me that it was not intended, and is not the proper construction of the CRTA, that the figure for CATS Capacities should include historical rates of delivery for Non-Capacity Gas.
156. As I have said, TGTL's principal argument here, however, was, that the terms of the relevant definition and of clause 4.6(a)(vii) of the CRTA did not permit a construction of the agreement in line with that which I have indicated above. I have considered TGTL's case on this by an iterative process by which I have tested the interpretation I have indicated above against the textual analysis of the terms on which TGTL relies, and vice versa.
157. TGTL's argument depends on that part of the definition of 'CATS Capacity' which provides that it is to include the aggregate maximum rates of delivery of Non-Capacity Gas 'notified by the CATS Operator pursuant to Clause 4.6(a)(vii)'; and on the fact that the information under clause 4.6(a)(vii) was to be 'the maximum rate of delivery of Non-Capacity Gas ... during the proposed period of transportation', which must be the period between the dates notified under clause 4.6(a)(iv) and (v).
158. In my judgment the argument is unconvincing. In providing that what should be notified was the 'maximum rate of delivery' during the proposed period of transportation under a newly-entered into TPA, the parties were not seeking to identify a figure which would be the highest at any point during that period, which would then be the figure set in stone for the purposes of the CATS Capacity, absent a variation of the TPA. Instead, I consider that what was being sought was the relevant DRCR figure. In this regard, it is significant that in the TPAs, the DRCR was regularly referred to as the 'maximum rate' of reserved capacity. While I was not shown any transportation agreement pre-dating the conclusion of the CRTA in 1990, and thus was not shown any definition of a DRCR in terms of a 'maximum rate' which formed part of the background matrix to the contract as initially concluded, this usage was contained in almost all the TPAs, including the very first which dates from January 1991. I considered that it was very probable that in entering into the CRTA the parties had had such a way of referring to a DRCR in mind. In any event this type of definition of DRCRs was used in a number of other TPAs dating from the period between 1991 and 1998, and these can, I consider, be taken into account as part of the background known or taken to be known to the parties, when construing the CRTA as amended in 1998.
159. Accordingly, I consider that what clause 4.6(a)(vii) was requiring should be notified was the DRCR figure specified in the TPA. I do not consider that it was deliberately requiring notification of the largest DRCR figure which there might be at any time. Indeed, it seems likely that there was no consideration of a situation in which a DRCR figure might be specified in the TPA which was larger than the initial DRCR figure because the normal position is that the initial DRCR figure would be the largest because gas fields deplete.

160. Furthermore, and consistently with the above, I consider that it is plain that the parties intended that the figure notified under 4.6(a)(vii) should be kept up to date, and that this was the purpose of the reference to ‘subject to any changes notified pursuant to clause 4.6(b)(i)’. Under the unamended CRTA, the information notified under clause 4.6(a) was to be updated no less frequently than quarterly. That would have allowed the updating of the figures for the maximum rate of delivery of Non-Capacity Gas. In this way the up to date DRCCR figure would be available for the calculation of CATS Capacity, consistently with the overall intention of the CRTA for this to be an up to date figure, as discussed in the previous section of this judgment.
161. Mr Rainey QC relied in support of the argument here under consideration on his cross-examination of Mr McDonald, in particular certain answers in which Mr McDonald was prepared to accept Mr Rainey’s construction of the meaning of ‘maximum rate of delivery during the proposed period of transportation’. I did not find this cross-examination, or these answers, particularly helpful. In essence they were asking Mr McDonald questions of construction of the contract. Given that Mr McDonald was not called as an expert as to industry practice, or terminology, and that he was only expressing his own views, this was not evidence which was of assistance. Furthermore, Mr McDonald stated that he had not before had any reason to focus on what notification should be given in relation to a contract where the DRCCR might increase after the initial DRCCR. He said it was a matter on which he would have sought legal advice. Furthermore, in many answers, Mr McDonald said that what he considered that clause 4.6(a)(vii) was directed to was the initial DRCCR.
162. Accordingly, attractively though it was put, I was not persuaded that TGTL’s primary argument was correct.

Discussion: TGTL’s secondary argument - no request for an amendment of clause 4.6(a) information and no amendment in fact

163. TGTL contended that, even if it was right that the information which was required under clause 4.6(a)(vii) was the DRCCR, any such information could be amended only if there was a request for such an amendment from TGTL. This, it was submitted, was the effect of the amendment to clause 4.6(b) in 1998 to provide that notices under that clause were to be provided ‘from time to time, upon receipt of a request from the ICI/Enron Party’. That created a condition precedent, namely a request from TGTL. It was further submitted that, in any event, the CATS Parties had not in fact updated the clause 4.6(a) information pursuant to clause 4.6(b). In this regard it was pointed out that there was an almost complete absence of notices specifically given under clause 4.6(b). The TAA update schedules relied upon by the CATS Parties as updating the relevant information did not qualify as amendments for the purpose of clause 4.6(b)(i). As I have said, this argument assumed much less significance in TGTL’s closing than in its opening, but it remained part of TGTL’s case.
164. The difficulty with this argument, in my judgment, is that it reads into clause 4.6(b) two requirements which it does not properly contain: (i) a formality requirement, and (ii) a unilateral power, held by TGTL, to permit or to refuse to permit the updating of any information given under clause 4.6(a). I shall take these points in turn.
165. First, the provision says nothing about the form which notices under clause 4.6(b) are to take. It does not, for example, state that a notice under clause 4.6(b) must identify

that it is a notice under that clause. Nor does it provide that any such notice must mirror the form of the original clause 4.6(a) notice, or refer to it. Accordingly the relevant question is, in my judgment, whether what was actually provided by the CATS Parties can be said to have been a notice which contained clause 4.6(b)(i) information.

166. As to this, the correct approach to the interpretation of contractual notices was summarised by Ramsey J in *Vivergo Fuels v Redhall Engineering Solutions* [2013] EWHC 4030 (TCC), at [420]:

‘I consider that the following principles can be derived from [*Mannai Investment v Eagle Star Life Assurance* [1997] AC 749, 767E (per Lord Steyn)] and *Architectural Installation Services v James Gibbons Windows* (1989) 16 ConLR 68 (per HHJ Bowsher QC)].

First, that unilateral notices are to be construed in the same way as contractual documents and therefore it is necessary to construe them objectively against the background or “the relevant objective contextual scene” known to both parties.

Secondly, the relevant meaning of the unilateral notices is the meaning that a reasonable recipient would have understood by the notices. The reasonable recipient “would have had in the forefront of his mind the terms” of the relevant underlying contract.

Thirdly, that the purpose of the notice is relevant to its construction and validity. Prima facie, if a notice unambiguously conveys the purpose, a court will ignore immaterial errors which would not have misled a reasonable recipient.

Fourthly, the notice must be sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when the notice is intended to operate.’

167. Secondly, I do not agree that clause 4.6(b)(i) makes it a condition precedent to any notification updating clause 4.6(a) information that TGTL request such update. In support of such a condition precedent, Mr Rainey QC invoked what he called ‘the modern approach to observing and enforcing the parties’ careful choice of prescribed contractual procedures’.

168. I was referred to *Astor Management AG v Atalaya Mining Plc* [2018] EWCA Civ 2407. In that case, at [33] – [35] it was said by Simon LJ and Dame Elizabeth Gloster (when discussing the question of whether a contractual condition precedent could be disapplied because ‘futile’):

‘[33] ... The expression “futility principle” is perhaps misleading. In the present context it reflects an approach to construction which recognises that in certain circumstances (depending on the terms of the contract) a condition precedent may, as a matter of construction and in the light of subsequent events, no longer apply or may cease to have effect.

[34] At para 49, the judge considered that the real argument was one of construction:

“Whether a contractual obligation has arisen in any given case in principle depends on what the particular contract says, interpreted in accordance with the ordinary rules of contract interpretation. There is, in my opinion, no principle of law or even interpretive presumption which enables a contractual precondition to the accrual of a right or obligation to be disapplied just because complying with it is considered by the court to serve no useful purpose.”

[35] Subject to the qualification expressed in para 33 above, we agree.’

169. There is also a valuable discussion of this issue in *Tullow Uganda Ltd v Heritage Oil and Gas* [2014] EWCA Civ 1048, at [33] – [35] per Beatson LJ:

‘[33] The starting-point of my analysis of this issue is the general appreciation by courts for over half a century that, while classifying a term as a condition precedent or as a condition may provide certainty, it can also have the effect of depriving a party to a contract of a right because of a trivial breach which has little or no prejudicial effect on the other and causes that other little or no loss. It was for that reason that, in the context of international sale and carriage contracts, the courts became more reluctant to classify terms as conditions precedent and conditions. [...] The reluctance of the courts is particularly illustrated by what may be the high-water mark of this approach in *Schuler (L) AG v Wickman Machine Tool Sales Ltd* [1974] AC 235, in which even the use of the term ‘condition’ in a contract did not suffice.

[34] In the context of insurance contracts, this appreciation is reflected by some reluctance to classify notification of loss provisions as conditions precedent: see, for example, Colman J in *Alfred McAlpine plc v BAI (Run Off) Ltd* [1998] CLC 1145 at 1151–3. In such contracts it has been stated that what has to be found is a ‘conditional link’ between the assured’s obligation to give notice and the underwriters’ obligation to pay the claim: see *Friends Provident Life and Pensions Ltd v Sirius International Insurance Corp* [2005] EWCA Civ 601, reported at [2005] 1 CLC 794 at [31] per Mance LJ (as he then was).

[35] The words ‘condition precedent’ are often expressly used in notification of claims clauses. But it is clear that other words can have the same effect, so long as the clause is apt to make that effect the ‘clear intention of the parties’: see *George Hunt Cranes v Scottish Border and General Insurance* [2001] EWCA Civ 1964, reported at [2003] 1 CLC 1 at [11] per Potter LJ and *Eagle Star Insurance v Cresswell* [2004] EWCA Civ 602, reported at [2004] 1 CLC 926 at [20] per Longmore LJ. The general approach was usefully summarised in the context of a

claims notification clause in a sale and purchase agreement by Teare J in *Aspen Insurance UK Ltd v Pectel Ltd* [2008] EWHC 2804 (Comm) at [62], reported at [2009] 2 All ER (Comm) 873 at 888.’

170. Following that passage, Beatson LJ went on to consider the clause at issue in that case in considerable detail, and concluded that it did not create a condition precedent for a claim to an indemnity.
171. It follows from these authorities that the question of whether a contractual mechanism creates a condition precedent (in this case, to notification of amendments to an earlier notice), is a question of construction of the relevant provision in its contractual context, according to the normal principles.
172. Clause 4.6(b), as amended, is clearly intended to impose an obligation on the CATS Operator to provide TGTL with specific information, which it could reasonably be expected to be in TGTL’s interest to know. The nature of the 1998 amendment was to reduce the burden of this obligation; instead of notifying quarterly, the CATS Operator was only obliged to notify upon request, and no more frequently than quarterly. The wording of the provision is ‘from time to time... the CATS Operator shall...’. There is nothing in the wording, in my judgment, to suggest that the CATS Operator may not update TGTL in any other circumstances. That would be an inherently unlikely state of affairs, since the very nature of the arrangement was that only the CATS Parties were possessed of essential information concerning the use of the CATS System. There is very good reason for the CATS Parties, whether in their own interest or in TGTL’s interest, to update TGTL as to the information specified in clause 4.6(a) – including, for example, the aggregate quantity and composition of Non-Capacity Gas, changes to the contracted entry or redelivery points of Non-Capacity Gas, or a simple error. In normal circumstances, TGTL would not be in a position to request a notification, because it could not know that the information originally provided was incorrect, without being provided with precisely the information which the notification would contain. Indeed, TGTL’s evidence was that it never requested such a notice. Express wording would be required to achieve the unlikely and uncommercial result that the CATS Parties could not make such necessary updates.
173. In my judgment, therefore, on a proper interpretation, clause 4.6(b) does not create the condition precedent for which TGTL argues.
174. It is then a question of the interpretation of any given purported notice whether it was effective as such a notice. As I have said, it is the CATS Parties’ case that it notified TGTL of updates to the clause 4.6(a) information through the TAA update schedules. It appears that seven such schedules were served, on 19 March 2009, 23 April 2010, 1 October 2011, 8 October 2012, 1 July 2014, 21 July 2015, and 22 December 2017.
175. Having regard to each of the seven update schedules, I consider that they do constitute update notices in accordance with clause 4.6(b), and that a reasonable observer would interpret them in that way. Each of the Schedules is clearly intended to be a formal provision of information. Each then provides detailed information corresponding in large part with that set out in clause 4.6(a): a simple table, with the first column headed

‘Stock Account’, the second headed ‘Shipper(s) delivering into such Stock Account’, the third headed ‘Firm Stock Account capacity’, the fourth headed ‘Redelivery Point Sets’, and the last column headed ‘Reasonable Endeavours rights at other Redelivery Points Sets’. For each ‘Stock Account’, the reader is encouraged to read across the row to identify the relevant shippers, and their firm reserved capacity (in million cubic metres per Day).

176. In my judgment, these schedules clearly provide updates of the information which is properly (on the view I have set out above) to be provided pursuant to clause 4.6(a)(vii) (namely, the DRCRs). I consider that a reasonable observer would understand that the information originally provided under clause 4.6(a) was intended to be amended by these detailed schedules. Further, although this is not relevant to the process of interpretation, I note that this appears to have been TGTL’s subjective understanding of the TAA updates at the time that they were given. In an email dated 22 February 2013, Mr Harper noted that ‘these days’ the ‘equivalent information’ to clause 4.6(a) notices as updated under clause 4.6(b) was provided under the TAA.
177. Mr Lord QC had an additional argument, namely that even if it was a condition precedent to a clause 4.6(b) notice that TGTL requested such notice, that condition was fulfilled by the terms of clause 10.8 of the TAA: ‘Because TGTL entered the TAA, it agreed that the information provided to it under clause 4.6 of the CRTA was to be provided under the TAA, pursuant to the TAA update schedules.’ Had it been necessary, I would have accepted this argument.
178. Clause 10.8 of the TAA provides that: ‘The provisions of Schedules I [Details of Shipper at each CATS Field Meter...], VII [Capacities for Shipper and Stock Accounts] and IX [Input points, Gas Redelivery points, etc.] shall be changed to reflect any relevant changes in the parties to or details of any relevant Transportation Agreement and in accordance with any relevant provisions of or notification given under this Agreement. The provisions of Schedule IV shall be changed to reflect significant modifications, additions or extensions to the CATS Transportation Facilities. None of the Parties shall be entitled to object to any of the changes referred to in this Clause 10.8. The CATS Operator shall notify the other Parties of all amendments to Schedule I, IV, VII and IX but shall not be required to do so any more frequently than on a quarterly basis [...]’ That clause amounts, in my judgment, to a continuing contractual request by TGTL (and all other parties to the TAA) that such information be provided.
179. Further, in respect of the update schedules dated 21 July 2015, and 22 December 2017, I would also have found that these were specifically requested by TGTL in an email from Mr Harper to Mr McDonald dated 12 June 2015 (which asked Mr McDonald to provide “the most recent CRTA clause 4.6(a) notices for each Field/ Shipper and any updates to those notices pursuant to clause 4.6(b) of the CRTA.”). There could have been no “recent” clause 4.6(b) updates other than the TAA schedules. Such requests having been made, it is a matter of interpretation whether any given purported notice was sufficient to constitute a valid clause 4.6(b) notice. I have found that each of the seven TAA Update Schedules was so sufficient.

Conclusion on CATS Capacities

180. For the reasons set out above, I accept the CATS Parties’ case in relation to CATS Capacities and reject TGTL’s.

ENTITLEMENT OF THE CATS PARTIES TO ‘RESTATE’ THE 2013/14 AND 2014/15 CAPACITY FEES

181. Following the 2015-16 audit, and against the background of the parties’ ongoing dispute concerning the Capacity Fee, the CATS Operator sent TGTL the CATS Report on 12 October 2016. As set out above, the net effect of the various amendments made in this report was substantially to increase the Capacity Fee payable for the Contract Years 2013-14 (by nearly £3m) and 2014-15 (by some £2.2m).
182. TGTL contends that the CATS Parties were not entitled to ‘restate’ the Capacity Fee in this way. It submits that the CRTA contained an exhaustive mechanism for the invoicing of the Capacity Fee (through estimated and adjusted fees), and that ‘the time limits for recalculating and invoicing any adjusted Capacity Fee are fixed and immutable. The CATS Operator was not entitled to notify (or invoice for) an amended Capacity Fee after 1 December following the end of any relevant Contract Year.’ It further submits that the ‘restated’ fees could not properly be charged as a consequence of the audit process, because (i) the CATS Parties did not initiate an audit; and (ii) the audit process only concerns errors discovered as a result of one party examining the books of the other. TGTL also initially made a case that the CATS Parties were estopped from adopting different accounting methodologies. That submission has not been pursued.
183. The CATS Parties contend, primarily, that they have ‘a substantive right to payment of the Correct Capacity Fee for each Contract Year’, which is unaffected by ‘the notice provisions and [...] mechanics for payment’ in clause 7.10. In the alternative, they contend that the ‘restated’ amounts were notified in accordance with the contractual audit regime: ‘TGTL itself commenced an audit of the Capacity fee for 2013-14. Having opened up the Capacity Fee, TGTL cannot now resile from the consequences of the audit because it results in an unfavourable result. The restatements were in response to the audit that TGTL wanted.’
184. During the course of the trial, following the cross-examination of Mr Harper, TGTL accepted that the CATS Operator was entitled to restate the figures relating to ‘accruals’ in the CATS Report. That is, insofar as the CATS Report merely corrected a mistake as to the date on which certain expenses accrued, it conceded that the CATS Parties had been entitled to do so. (‘Accruals’ are said by TGTL - no greater detail has been provided by the CATS Parties - to constitute about one third of the disputed ‘restatement’ amount.) That concession was rightly made.
185. As to the remaining point of principle, I accept the CATS Parties’ primary submission. The CATS Parties’ substantive right to payment arises by virtue of the Capacity Fee being due under clause 7.1 and clause 7.10. The mechanism for identifying that sum is not the source of the obligation to pay. In my judgment, on a proper construction of clauses 7.10 and 7.12, they provide for a notification mechanism which is prescriptive, but which does not conclusively determine the CATS Parties’ entitlement. Time is not of the essence in this notification mechanism. This is because (to adopt some of the reasons set out in the CATS Parties’ written opening submissions, at paragraph 299): (i) Clause 7.10 does not expressly stipulate that the time limit for the notification of the adjusted Capacity Fee is fixed and/or final and/or immutable; (ii) there is no ‘deeming

provision' such that if the notice is not served by 1 December, a particular Capacity Fee is 'deemed' to be the adjusted figure and/or the CATS Parties are denied their right to payment of the adjusted Capacity Fee; (iii) clause 7.10(c) does not say that any notice of the adjusted Capacity Fee that is served on 1 December is conclusive and/or binding on the parties; and (iv) the terms of Clause 7.10(c) are to be contrasted with the provisions for certain adjustments to billing statements (not relevant for present purposes) under Schedule III, which provided for such statements to be presumed true and correct after 24 months. In my judgment, there is nothing in the wording of clause 7.10 to suggest that no changes to the invoiced adjusted Capacity Fee can ever be made after 1 December following the end of the relevant Contract Year.

186. I also do not accept the argument that the CATS Parties' construction is commercially absurd because TGTL 'needs to know where it stands financially each Contract Year'. TGTL would at all times have sought to sell on its capacity at the highest available price; there is nothing it would have done differently had the restated amounts been invoiced earlier.
187. Had it been necessary, I would also have accepted the CATS Parties' submission that the 'restatement' was allowable under the audit procedure. As to TGTL's submissions on this point: (i) TGTL commenced an audit in relation to the 2013/14 adjusted Capacity Fee. Having done so, as I have already set out, Mr McDonald sent an email of 9 February 2015, which stated that 'The CATS Parties anticipate that such audit would be carried out in respect of the Capacity Fee in its entirety and shall not be limited to such portion of the Capacity Fee that TGTL disputes.' Furthermore, once the audit process had commenced, TGTL and its representatives raised a variety of questions, and in response to these the CATS Parties sought to confirm that all its calculations were correct. Thus, the audit initiated by TGTL was, as a result of what I consider to have been the CATS Parties' reasonable response, extended to embrace the Capacity Fee in its entirety. This became 'the extent necessary to verify the accuracy of any accounting statement, charge, computation or claim', for the purposes of Clause 7.19. (ii) There is nothing in the wording of clause 7.19 or Schedule III to suggest that if the audit were only initiated by TGTL it would be restricted to a 'downwards only' review, which would be for TGTL's sole benefit. That would be a highly uncommercial result, and one would expect to see clear wording to that effect if that were the parties' intended meaning. (iii) I cannot accept that, on the wording of clause 7.19, a correction might only ever be made if the relevant inaccuracy was discovered after an inspection by one party of the *other party's* books, rather than having been discovered in some other way during the audit process, for example from an examination, during its response to the audit process, by one party of its *own* books. Indeed, I consider that any such contention is fatally undermined by TGTL's concession in relation to 'accruals'. TGTL accepts, in its written closing argument at paragraph 332, that 'insofar as the audit has thrown up accounting errors or inaccuracies, these ought to be corrected'. That is an acceptance that such errors should be corrected whether or not their detection resulted from an inspection by one party of the other party's books: in relation to the mistake as to 'accruals', this was identified by CNSL. Further, there is nothing in the wording of clause 7.19 that limits such corrections to 'accounting errors or inaccuracies', a phrase not found in that provision. The clause instead speaks of 'any inaccuracy in any billing'.
188. I therefore reject TGTL's case on this issue.

TGTL'S GOOD FAITH IN DISPUTING THE INVOICED CAPACITY FEE

189. This issue only arises to the extent that I have found against TGTL on any of the issues above. The relevant duty of good faith is set out in clause 7.17(a), which provides: ‘Any party shall have the right to dispute, in good faith, any amount specified in an invoice referred to in this Agreement.’ As set out above, the consequence of bad faith is specified in clause 7.17(b): the ‘sums which are not the subject of a bona fide dispute’ bear an additional rate of interest, of 2% above the normal contractual rate of interest. As Mr Rainey QC strongly and in my judgment correctly submitted during oral argument, even if a case of bad faith were made out, the relevant enhanced rate of interest could only apply to such sums as were withheld in bad faith, from the moment at which their withholding was in bad faith.
190. It follows that the good faith duty is very limited in scope; it concerns only the reasons for disputing an invoice. Neither party is entitled to dispute an invoice other than in good faith.
191. The meaning and effect of clause 7.17(a) of the CRTA was addressed by Langley J in his 1997-8 judgments. In short, Langley J held that clause 7.17(a) imported a subjective test, which involves enquiring whether the party withholding payment knew that it had no substantial grounds for disputing liability. This requires a consideration of TGTL’s (through its directors’) state of mind during the Capacity Fee dispute, on the basis of ‘what was or what it is reasonable to infer was known to TGTL, or those who acted for the company, including the nature of the enquiries they made, or, if it were the case, chose not to make.’ (see judgment of 21 January 1998 at G/10.1/2). The burden is on the CATS Parties to plead and prove TGTL’s bad faith (and, where relevant, the time at which it arose). As to the evidence required, the issue is likely to depend on inferences to be drawn from all the facts, and in particular the exchanges between the parties at the time.
192. Given what I have found to be the scope of the duty of good faith, it is important to consider that TGTL withheld sums only in respect of the following matters: (a) the CATS Riser Platform (on the basis that it did not fall within the CTF); (b) flotel costs; (c) certain onshore activities (on the basis that they were processing not transportation costs); and (d) the Rich Gas project (on the basis that these were processing not transportation costs). In addition, TGTL re-categorised certain items as CE, and therefore paid reduced amounts in respect of them. Those items were as follows: (aa) the accommodation project; (bb) minor planned modifications; (cc) major maintenance; (dd) CATS Federal Projects; (ee) Panthers System Upgrade; and (ff) Relief Stream Project. TGTL did not withhold sums in respect of the CATS Capacities, or the CATS Operator’s allocations of shared costs.
193. It is also necessary to consider the chronology of the dispute, and of the withholding of sums. Specifically, it is apparent that, when the estimated and adjusted Capacity Fee figures for 2013/14 were presented by BP they did not contain all the information which was reasonably required in order to assess whether the Capacity Fee was accurately stated. A clear example of this was in relation to the costs for the CATS Riser Platform, which were expressed as a single line item on the spreadsheets. It was apparent from Mr McDonald’s evidence, and is unsurprising, that BP took the view that the audit process would be the time to provide additional detailed information. I did not consider, in particular in light of Mr Harper’s evidence (including at Day 2 pp. 39-42) that it is established that TGTL knew prior to the audit that any withholding of amounts claimed was without basis.

194. Clearly, however, information was provided during the course of the audit. By way of example, it is apparent that from June 2015 TGTL was aware that one of the caissons on the CATS Riser Platform was used for fire pumping purposes. Nevertheless, it is fair to say that the audit process was still ongoing at that point, and that even after the final audit meetings which took place at BP's offices in Dyce, Aberdeen on 3 and 24 November 2015, certain further items of information were still being sought. Moreover, the audit process had not been finally concluded when, in the circumstances described in paragraphs 127-133 of Mr Harper's first witness statement, it was in effect put on hold while CNSL, under Antin's ownership, conducted its own review, which led to the production of the CATS Report of 12 October 2016. Once again, I am not satisfied that there was any lack of good faith in TGTL's having continued to withhold sums pending the production of the CATS Report, or for a reasonable period thereafter during which TGTL could consider it. Given the size of the exercise involved in the CATS Report, and the length of time which had been taken to produce it, I consider that a period of three months was reasonable.
195. After that point, there is more of a case that TGTL had no bona fide grounds for continuing to withhold certain amounts. Indeed, TGTL accepts that, in continuing to dispute that part of the invoice or invoices which related to the CATS Riser Platform costs on the basis that caissons C1 and C2 did not form part of the CTF, did not do so in good faith after 24 January 2017, in light of the explanation and drawings in the CATS Report explaining the caissons and their functioning. TGTL does not, however, accept, that the Board was in bad faith in continuing to dispute a proportion of those costs on the alternative basis of the correct categorisation of the caissons expenditure as CE not OE. I accept that it has not been made out that the latter dispute was in bad faith.
196. There remains the question as to whether the withholding of sums invoiced in respect of any other items was in bad faith. One of the problems here is that the CATS Parties' pleadings in this regard were unspecific, and the cross-examination of Mr Harper was often not precise as to the amounts which it was said were being withheld in bad faith, or the date(s) from which it was said that there was bad faith.
197. With that said, I was unable to see a good faith basis on which, after the receipt of the CATS Report and a period of three months thereafter, there had been any withholding of sums invoiced on the basis that the onshore flare stack or the onshore control room did not fall within the CTF. I consider that it must have been recognised that they did, and Mr Harper's evidence at Day 3 pages 103-110 appeared to accept that there had been no continuing basis for disputing these matters.
198. I also considered that, given that there was no good faith basis for contesting that the caissons on the CATS Riser Platform fell within the CTF, then there was no good faith basis for disputing the flotel costs relating to the caissons, at least from the time when a timing point (namely that these were EOE arising in respect of matters occurring before the Capacity Fee period) was no longer pursued, which was at latest by the time that TGTL served its Reply and Defence to Counterclaim on 30 May 2017. Once again, it appeared to me that Mr Harper's evidence at Day 2 pages 109-114 essentially accepted this point.
199. In relation to the issue as to whether Ex 3 fell within the CTF, I accept Mr Harper's evidence that he had forgotten Langley J's conclusion on this point, and had proceeded

on the basis of how the CTF was operated. This may have been an oversight, but it was not bad faith. When Langley J's judgment in this regard was relied upon by the CATS Parties, TGTL admitted that Ex 3 fell within the CTF.

200. Accordingly I consider that in the limited respects and for the periods I have identified, sums were withheld otherwise than in good faith, and the CATS Parties are entitled to recover on the relevant amounts the higher rate of interest. Save in those respects I reject the CATS Parties' claim to enhanced interest by reason of TGTL's bad faith.

CONCLUSION

201. As discussed with the parties during the trial, this judgment sets out my conclusions on the various points of principle which were in dispute, and does not seek to determine the quantum of what is due. It is hoped that that will be capable of agreement, failing which I will have to consider further submissions in relation thereto.
202. I will also consider further submissions as to the terms of the order which should be drawn up.