Neutral Citation Number: [2020] EWHC 1891 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Claim No CL-2019-000658

Royal Courts of Justice. Rolls Building
Fetter Lane, London, EC4A 1NL
Friday 17 July 2020

BEFORE:

MR RICHARD SALTER QC
Sitting as a Deputy Judge of the High Court

BETWEEN:

ALTERA VOYAGEUR PRODUCTION LIMITED

Claimant

- and -

PREMIER OIL E&P UK LTD

Defendant

- -

Mr Sean O'Sullivan QC
(instructed by *Stephenson Harwood LLP*)
appeared for the Claimant

Mr Simon Colton QC
(instructed by *CMS Cameron McKenna Nabarro Olswang LLP*)
appeared for the Defendant

Hearing date: 8 July 2020

- -

……

Approved Judgment

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

……..

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10:30am on 17th July 2020.

MR SALTER QC:

Introduction

1. In this action, the claimant ("**Altera**")[1] claims the sum of USD 12,108,072.50 plus contractual interest by way of adjusted hire for the floating production, storage and offloading vessel *Voyageur Spirit* ("the Vessel"). That sum is said to be due under the terms of a Sub-Bareboat Charter Party dated 9 November 2010 ("**the Charterparty**"). The defendant ("**Premier**") disputes that claim and counterclaims for the sum of USD 3,837,580.91 by way of hire that it says that it has overpaid.

2. The dispute between the parties has resolved itself into a pure question of construction. The parties have agreed that there is no need for any disclosure or witness evidence and have agreed the financial consequences of their rival interpretations of the relevant terms. The sole question for the court to decide at this, the trial of the action, is the correct interpretation of the Hire Adjustment Formula in Section 5 of Appendix M.

3. That formula consists of a narrative and two worked examples. Those worked examples contain two steps which are not set out expressly in the preceding narrative. In summary, Altera contends that the formula should be applied precisely in the way set out in the worked examples. Premier says that Altera's interpretation produces a result which is inconsistent, not only with the preceding narrative, but also with the other terms of the Charterparty and with commercial common sense. Premier says that the narrative ought therefore to be preferred to the worked examples, as giving effect to what a reasonable person would say was the intention of the parties as conveyed by the words which they have used in the Charterparty, taken as a whole.

Background

4. The following summary of the factual background is taken from the Skeleton Arguments submitted by the parties.

5. Premier is an oil exploration company, which at the material time was engaged in developing and producing the Huntington Field oil reserves in the North Sea. For that purpose, Premier bareboat chartered the Vessel from Altera. Altera was the operator of the Vessel, under a charter from the Vessel's owner, Altera's parent company.

[1] Both parties changed their names from time to time during the relevant period, and the name of the Vessel also changed. Since nothing turns on these changes, I shall refer to the parties and the Vessel throughout this judgment by their current names.

6. The parties entered into the Charterparty on 9 November 2010. On the same date, they entered into a separate "Service Agreement", under which Altera agreed to operate the Vessel, but on the basis that it "will subcontract a significant part of the Services to a third-party manager". Among other things, the Service Agreement required Altera to agree planned maintenance schedules with Premier and to obtain approval for the operating budget. The compensation for this was fixed but included an incentivisation bonus, the details of which I shall describe later in this judgment.

7. The parties also entered into an "Over-Arching Agreement" for the Charterparty and the Service Agreement. The Over-Arching Agreement recited that Altera was going to perform upgrade work (as specified by Premier) to the Vessel. It also identified the scope of the work, both for the upgrade and during operation. There was also a detailed functional specification and Altera's "Execution Plan". Otherwise, the Over-Arching Agreement was mainly concerned with the conditions precedent to the validity of the various agreements, and the warranties and undertakings to be given to each party by the other.

8. Importantly for present purposes, the Over-Arching Agreement had 11 Appendices. In Article 1.2.1 of the Charterparty, these Appendices were stated to "have effect for the purposes of" the Charterparty. These included "Appendix B – Compensation" and "Appendix M – Availability and Hire Adjustments". Appendix D and Appendix H were stated in the Over-Arching Agreement to be "not used". Article 1.2.2 of the Charterparty stated:

> **1.2.2 Unless otherwise expressly provided, in the event of any conflict between:**
>
> **(a) the Charter Documents, the order of precedence shall be the Over-arching Agreement, this [Charterparty], the Service Agreement;**
>
> **(b) an Appendix and the main body of the Charter Documents, the latter shall prevail;**
>
> **and**
>
> **(c) the Appendices, the order of precedence shall be B, M, A, I, C, L, F, G, J, K.**

9. The Charterparty envisaged that, following completion of the upgrade work, the Vessel would be accepted by Premier and the "**Secondary Charter Period**" (defined in Article 3.2) would begin. The Secondary Charter Period commenced on 13 April 2013. After an initial dispute, the Daily Base Hire (without adjustment) was paid from 22 February 2014. The Charterparty came to an end (and was replaced with a different agreement) on 13 April 2018.

The provisions of the Charterparty relating to hire

10. Article 27 of the Charterparty is headed "Compensation" [2]. Article 27.1.1 (under the heading "Daily Base Hire") provides that:

> **During the Secondary Charter Period [Premier] shall pay [Altera], as compensation for the charter of the [Vessel] in accordance with the terms and conditions of this [Charterparty], the Daily Base Hire in accordance with Appendix B. The Daily Base Hire shall be subject to adjustment during the Secondary Charter Period as provided for in this [Charterparty].**

In Article 1.1 ("Definitions"), the "Daily Base Hire" is defined as:

> **.. the daily amount payable by [Premier] to [Altera] to charter the [Vessel] from [Altera] during the Secondary Charter Period as further described in Appendix B and as may be adjusted from time to time in accordance with Appendix M.**

11. Section 3 of Appendix B states that:

> **For each day of the Secondary Charter Period [Premier] shall pay to [Altera] the applicable Daily Base Hire set out in Table 1 below.**
>
> **Table 1: Daily Base Hire**
>
> | **Charter Year** | **Daily Base hire (US$)** |
> |---|---|
> | **1** | **215,000** |
> | **2** | **210,000** |
> | **3** | **205,000** |
> | **4** | **200,000** |
> | **5** | **195,000** |
>
> **The rate of Daily Base Hire for any Charter Year following the Initial Term shall be US$195,000.**
>
> **Notes to Table 1:**
>
> **The Daily Base Hire shall be paid in reimbursement of all costs related to the supply of the [Vessel] including design, engineering, procurement, construction, installation, commissioning and testing. The Daily Base Hire shall be payable from the commencement of the Secondary Charter Period**

[2] Article 1.2.9 of the Charterparty specifies that "The headings are for convenience only and shall not affect the interpretation of any provision of this [Charterparty]".

> **and is fixed except for agreed Change Orders [under Article 25] and other adjustments pursuant to the terms of the [Charterparty] and Appendix M.**

The provisions of the Charterparty relating to adjustments of hire

12. Article 17 of the Charterparty is headed "Availability Adjustments and Off-Hire". Article 17.1 (headed "Target Availability; Adjustments to Hire") provides for the reduction or upward adjustment of the Daily Base Hire in the event that Altera or those for whom Altera is responsible cause a reduction or increase in the "Availability" of the Vessel. That Article states that:

> **If, during the Service Period, there is a loss of time or reduction in production/processing operations of the [Vessel] attributable to [Altera or its group] as provided in Appendix M, that reduces or impairs the ability of the [Vessel] or any of its Systems to receive and process Well Product, provide water injection services and/or store or discharge Export Product such that the [Vessel] or any of its Systems falls below the Target Availability, then Daily Base Hire may be reduced as provided for in Appendix M.**
>
> **If there is an increase in the production/processing operations of the [Vessel] attributable to [Altera or its group] as provided in Appendix M, that increases the ability of the [Vessel] or any of its Systems to receive and process Well Product, provide water injection services and/or store or discharge Export Product such that the [Vessel] or any of its Systems increases the Target Availability, then Daily Base Hire may be adjusted as provided for in Appendix M.**

13. "Target Availability" is defined in Article 1.1 of the Charterparty by reference to Appendix M. Section 1 of Appendix M defines "Target Availability" as meaning:

> **An availability factor (expressed as a percentage) for the [Vessel] and its Systems of ninety-five percent (95%). This percentage is calculated on the basis that [Altera] is entitled to full payment of Daily Base Hire provided the [Vessel] does not exceed 438 hours (equivalent to eighteen point two five (18.25) Days) of permissible shutdown time per year for planned and unplanned maintenance, as follows:**
>
> $$\frac{\text{365 Days - 18.25 Days}}{\text{365 Days}} \times 100 = 95\%$$

14. Article 17.2 (headed "Continuous Deficiency") provides for the consequences of Altera failing continuously or regularly to achieve "Target Availability". It states:

> **17.2.1 Subject to Article 17.3:**

> **(a) if the [Vessel] or any of its Systems continuously or regularly operates below the Target Availability; or**
>
> **(b) [Altera] fails to achieve any of the performance requirements and/or requirements set out in the Statement of Requirements of this Bareboat Charier (whether or not Article 17.2.1 (a) is applicable),**
>
> **then upon the written request of [Premier], [Altera] shall submit a rectification plan with a technical solution and definitive time schedule to correct the deficiency. The rectification plan shall state whether or not [Altera] requires a total production shut down to correct the deficiency and when this shut down would be required.**
>
> **17.2.2 If [Altera] fails to remedy the deficiency or otherwise fails to submit a rectification plan to [Premier]'s reasonable satisfaction within twenty-one (21) Days of [Premier]'s written request (or within such other period agreed by [Premier]), then upon written notice from [Premier] the Daily Base Hire attributable to that System shall cease to accrue until the deficiency is remedied to [Premier]'s reasonable satisfaction. Such reduction in Daily Base Hire shall apply not withstanding that the [Vessel] may be operating.**
>
> **17.2.3 If [Altera] fails to remedy such deficiency or otherwise fails to submit a rectification plan to [Premier]'s reasonable satisfaction within a further period of fourteen (14) Days (or within such other period agreed by [Premier]) from the suspension of the Daily Base Hire in respect of a System of the [Vessel], then without prejudice to its rights under Article 30 and Article 31, and article 9 (Cure and Supervisory Rights and Novation Options) of the Over-arching Agreement, [Premier] may suspend payment of the full amount of Daily Base Hire until the deficiency is remedied to [Premier]'s satisfaction.**
>
> **17.2.4 [Altera] shall continue to operate the [Vessel] during any period of reduced or suspended Daily Base Hire and such reduction or suspension in Daily Base Hire shall apply notwithstanding that the [Vessel] may be operating.**

15. Appendix M overall is headed "Availability and Hire Adjustments". It begins with a narrative section headed "Overview", stating:

> **In accordance with article 27.1 of the [Charterparty], the Daily Base Hire shall be subject to adjustments ("Hire Adjustments") based on the performance of the [Vessel] as determined in this Appendix.**

> **This Appendix describes a mechanism whereby a 'time-based' allowance for maintenance, shut-down or down-time is converted into an 'allowance' or 'tolerance' of allowable under-production measured in barrels.**

16. Section 1 of Appendix M contains a number of definitions. Importantly, it divides the work of the Vessel into two "Systems". "System A" is defined as meaning the oil and gas process systems on the Vessel. "System B" is defined as meaning the water injection system on the Vessel. These Systems are then ascribed weighting factors (or "**WF**") for the purposes of the calculations which follow:

> **.. 0.90 for System A and 0.10 for System B, as may be amended from time to time in accordance with section 2 of this Appendix M ..**

17. Section 3 of Appendix M provides for the recording and categorisation of any underproduction. Section 3.1 states that:

> **Production Targets for Systems A and B shall be expressed in barrels per Day**

Section 3.5, which is headed "Contractor Underproduction and Company Underproduction" then states as follows:

> **[Altera] and [Premier] shall on each Day record the Actual Production of crude oil processed through System A and delivered into storage and quantities of water injected through System B.**
>
> **If, on a Day, Actual Production does not achieve the Production Target for a System then after consultation between [Premier] and [Altera], the quantity of such System underproduction shall be categorised as either Contractor [ie Altera] Underproduction or Company [ie Premier] Underproduction and recorded in barrels (by reference to the relevant Production Target). Notwithstanding anything to the contrary in the [Charterparty], it is agreed that Actual Production shall be deemed to be equal to ninety five (95%) percent of the Production Target for any period of Force Majeure affecting [Altera].**
>
> **"Contractor Underproduction" means any under-production caused by an act or an omission of [Altera] or attributable to a breakdown or failure of the Vessel (or a System) ..**
>
> **"Company Underproduction" means any underproduction which is not Contractor Underproduction ..**

18. Sections 3.6 and 3.7 provide for a Monthly Review and an Annual Review. As part of the Annual Review:

> **.. At the end of each calendar year during the Secondary Charter Period, the Actual Production, Production Targets, Contractor Underproduction and Company Underproduction for each System shall be totalled and the Actual Availability (%) of the [Vessel] shall be determined in accordance with Section 4 of this Appendix ..**

19. Section 4 (headed "Determining Actual Availability (%)") provides as follows:

> **Actual Availability (%) for each System and the [Vessel] shall be determined as follows:**
>
> **Target Availability: 95% of Production Target**
>
> **[Vessel] Availability: Actual Production + Company Underproduction**
>
> **Actual Availability (%): [Vessel] Availability / Production Target x 100**
>
> **(Actual Availability shall not exceed 100%.)**

There then follows a worked example in two parts: "Example 1 for System A – Shortfall Availability Case: Part A"; and "Example 1 for System A – Shortfall Availability Case: Part B: Shortfall of 'X' barrels converted into an Actual Availability percentage". At the bottom of the second part, the result is stated to be that "(Actual Availability (%) of System A is 90.832%). This exercise is repeated for each System".

20. The two words used in the defined term "Actual Availability" in Appendix M are each potentially misleading. The word "availability" is potentially misleading, because what is really being talked about here (as explained in the "Overview"[3]) is production, measured in barrels. The word "actual" also has the potential to mislead, since the figure for "Actual Availability" is a notional, calculated one, produced by adding to the factual amount of actual production any shortfall in production that was not Altera's responsibility ("Company Underproduction"[4]) and then expressing that total as a percentage of the Production Target.

21. So, in Example 1 for System A, actual production is assumed to be 524,090 barrels, and Company Underproduction is assumed to be 20,900 barrels, making a total of 544,990 barrels. Taking 544,990 as a percentage of the Production Target assumed for the example of 600,000 barrels produces the figure of 90.832% as the "Actual Availability" for System A.

22. The Hire Adjustment Formula itself is then contained in Section 5 of Appendix M:

---

[3] See paragraph 15 above.
[4] See the definition in Section 3.5, quoted in paragraph 17 above.

Actual Availability of the two Systems shall be calculated at the end of each calendar year (or part thereof) using the mechanism in this section 5.

The following formula shall be applied, using the agreed WF per System, to determine the required Hire Adjustment to the Daily Base Hire.

In the event that Actual Availability is > 95% then the following formula applies to both systems

(100% + (Actual Availability % - 95%) x2) x WF

In the event that Actual Availability is < 95% then the following formula applies

(100% + (Actual Availability % - 95%) x1) x WF

In the event that the Annual Review of the Actual Availability calculation yields an answer of <50%, then the figure of 50% shall be used in the Annual Review Adjustment.

Assuming the annual Actual Availability figures is 92% for System A and 97.5% for System B:

Fig. 1 Worked Example (based on Example 1 of this Appendix M):

System	***Actual Availability (AA) %*** ***Max 100%***	***Hire Adjustment (HA)***	***Weight Factor (WF)***	***HA x WF***
A: Oil/Gas Process	*92.00%*	*100 + (92-95) = 97*	*0.9*	*87.3%*
B: Water Injection	*97.5%*	*100 + (97.5-95) x2 = 105*	*0.1*	*10.5%*
Annual Hire Adjustment Factor			*Total*	*97.8%* *= 1.029474**
[Altera] Entitled to receive: 1.029474 x Daily Base Hire x 365 Days				

For ease of calculation assumed Actual Availability of System B at 97.5%.

- **Annual Hire Adjustment Factor is > 95%**

- **Expressed as a percentage this entitles [Altera] to:**
- **(97.8/95.0) = 1.029474**
- **i.e. a 2.9474% bonus payment**

Example 2

Reduced availability

Assume System A = 88%

Assume System B = 85%

Fig. 2 Worked Example (based on Example 2 of this Appendix M):

System	***Actual Availability (AA) %*** ***Max 100%***	***Hire Adjustment (HA)***	***Weight Factor (WF)***	***HA x WF***
A: Oil/Gas Process	*88.00%*	*100 + (88-95) = 93*	*0.9*	*83.7%*
B: Water Injection	*85.00%*	*100 + (55-95) x2 = 90*	*0.1*	*9.0%*
Annual Hire Adjustment Factor			*Total*	*92.7%* *= 0.975789**
[Altera] Entitled to receive: 0.975789 x Daily Base Hire x 365 Days				

- **Annual Hire Adjustment Factor is < 95%**
- **Expressed as a percentage this entitles [Altera] to:**
- **(92.7/95.0) = 0.975789**
- **i.e. a 2.42105% reduced annual payment.**

23. It is common ground that the "Actual Availability" figures used in Fig 1 and Fig 2 in Section 5 are simply assumptions made for the purposes of the examples. Although Fig 1 in Section 5 states that it is "based on Example 1 of this Appendix M", it does not in fact use the System A "Actual Availability" figure of 90.832% from Example 1 in Section 4: and there is no "Actual Availability" figure for System B in Example

1. Similarly, although Fig 2 states that it is "based on Example 2 of this Appendix M", there is no "Example 2" in Appendix M.

24. As I have already indicated, it is also common ground that the "worked examples" in Fig 1 and Fig 2 in Section 5 contain two steps that are not expressly provided for in the narrative part of Section 5 which precedes them.

25. In the narrative section of Section 5:

25.1 The formulae begin with the percentage figure for "Actual Availability" calculated in accordance with Section 4, and then proceed through four steps.

25.2 In Step 1, the "Target Availability" figure of 95% from Section 1 is subtracted from the "Actual Availability" percentage.

25.3 In Step 2:

25.3.1 If the Actual Availability figure is greater than 95%, the result of the subtraction in Step 1 (which will necessarily be a positive number) is then multiplied by 2 (which doubles it);

25.3.2 If the Actual Availability figure is less than 95%, the result of the subtraction in Step 1 (which will necessarily be a negative number) is then multiplied by 1 (which has no effect on the number).

25.4 In Step 3, the result of the subtraction in Step 1 and (if the Actual Availability figure is over 95%) the multiplication at Step 2 is then added to 100; and

25.5 In Step 4, the resulting total is then multiplied by the "WF" for the relevant System: 0.9 for System A and 0.1 for System B.

25.6 This produces percentage figures for each System.

26. In the two "Worked Examples" which follow, there are then two further steps:

26.1 In Step 5, the percentage figures for each System are added together to produce an overall total percentage; and

26.2 In Step 6, that overall total percentage is then divided by 95, so as to calculate the percentage of the "Target Availability" figure of 95% represented by the overall total percentage calculated in accordance with the preceding steps.

27. In the "Worked Examples, therefore, the "Target Availability" figure of 95% comes in at two stages of the calculation: first, in the comparison with the figure for "Actual Availability" at Step 1 (described in paragraph 25.2 above); and secondly, in the comparison with the overall total percentage figure in Step 6 (described in paragraph 26.2 above).

28. It was common ground that the parties must be taken to have intended Step 5 – the adding together of the figures for the two systems. However, it was also common ground that the effect of Step 6 was to change the "pivot point" above which there would be an upwards adjustment in Daily Base Hire and to move it downwards. The very different weightings given to the two Systems by the "WF" employed at Step 4 complicate the effect of Step 6 in any particular case: but, in very simple terms:

    28.1 Without Step 6, the formula in Section 5 would require an upward adjustment in Daily Base Hire if the "Actual Availability" figure for both Systems was above the "Target Availability" figure of 95%; whereas

    28.2 With Step 6, an upward adjustment in Daily Base Hire would be required if the "Actual Availability" figure for both Systems was above the lower figure of 90%.

    The parties therefore disagreed about whether Step 6 was something that the parties intended: and that (in very broad terms) is the issue which I have to decide.

Other provisions of the agreements

29. Because the parties have relied on them as relevant context in their arguments concerning the correct interpretation of Appendix M, I should also refer to the provisions of the agreements dealing with force majeure, and with the incentivisation bonus payable under the Service Agreement.

Force Majeure

30. I begin with the provisions relating to force majeure. Section 3.5 of Appendix M deems "Actual Production" for any period of force majeure affecting Altera to be shall be deemed to be "equal to ninety five (95%) percent of the Production Target".

31. The Charterparty deals more generally with force majeure in Article 35, which defines "Force Majeure" as:

> **.. any cause beyond the reasonable control of such Party, and which such Party by the exercise of reasonable diligence is unable to prevent, avoid or remove, provided that a lack of funds shall not constitute Force Majeure ...**

32. Article 35.2 then provides that:

> **If either [Premier] or [Altera] is unable because of Force Majeure to carry out its obligations under this [Charterparty], then as soon as possible after the occurrence of the event of Force Majeure the Party so affected (the "Affected Party") shall give notice to the other Party giving full particulars of the circumstances constituting the Force Majeure and of the obligation the performance of which is thereby affected. The Affected Party shall then, subject to Article 35.4.2, be excused from the performance of such obligation for so long as the circumstances of Force Majeure may continue provided that the Affected Party shall take all reasonable steps to avoid, minimise or overcome the effects of Force Majeure.**

33. Article 35.4 makes specific provision for "Force Majeure" during the Secondary Charter Period:

> **35.4.1 Where an event of Force Majeure causing zero production occurs during the Secondary Charter Period, the Daily Base Hire will reduce to zero percent (0%) for the first fourteen (14) Days following notification of the Force Majeure event thereafter it will be seventy-five percent (75%) of the Daily Base Hire payable at that time.**
>
> **35.4.2 If Force Majeure continues for a continuous period exceeding sixty (60) Days, [Premier] may by written notice to [Altera] at any time thereafter:**
>
> **(a) terminate this [Charterparty] in accordance with Article 35.4.3 and such termination shall take effect at the end of the Termination Period; or**
>
> **(b) continue this [Charterparty], provided that the Daily Operating Services Compensation shall continue to be payable by [Premier] to [Altera] during the Service Period in accordance with the Service Agreement but the Daily Base Hire shall be reduced by fifty percent (50%) for a maximum of one hundred and twenty (120) Days before the Daily Base Hire shall be increased to the Standby Rate and shall be paid by [Premier] to [Altera] for the duration of the Force Majeure or until such time**

> **as [Premier] elects to terminate this [Charterparty] or exercise its rights under the Purchase Option.**

Incentivisation

34. Clause 22.4 of the Service Agreement provides for Premier to pay Altera:

> **.. during the Secondary Charter Period .. an Incentivisation Bonus in the circumstances contemplated in, and as calculated in accordance with, Appendix B ..**

35. The provisions of Appendix B dealing with the calculation of the Incentivisation Bonus are set out in Section 15 and Schedule 5. If anything, they are even more complicated than the provisions of the Charterparty dealing with adjustments of hire, since the bonus is to be calculated by reference to an "Overall Performance Level" defined by reference to "key performance indicators of production, water injection, integrity and budget".

36. Under Section 15.5:

> **If in any month the Overall Performance Level on each Day during such Month is greater than ninety percent (90%) of the Target Availability (as defined in Appendix M), then [Premier] shall pay to [Altera] an Incentivisation Bonus.**

37. This is to be calculated in accordance with the formulae set out in Schedule 5 clause 1.2, which states:

> **The Incentivisation Bonus shall be calculated in accordance with the weightings given for the Overall Performance Level.**
>
> **(a) Production incentivisation shall be calculated in accordance with the following formula:**
>
> **Production Incentivisation Bonus = Pro-rata monthly budget x Relevant Percentage x applicable Overall Performance Level**
>
> **Where:**
>
> **X = (Actual Production for System A + Company Underproduction) x 100**
> **Target Availability**
>
> **Y = Relevant Percentage**
>
> **Where:**
>
> **If X < 90%, then Y = 0%**

If 90% <= X < 100%, then Y = O,5*X% - 41%

If 100% <= X <= 105%, then Y =X% - 91%

If X > 105%, then Y =14%

(b) Water injection incentivisation shall be calculated in accordance with the following formula:

Water injection incentivisation bonus = Pro-rata monthly budget x Relevant Percentage x applicable Overall Performance Level

Where:

X = (Actual Production for System B+ Company Underproduction) x 100
Target Availability

Y = Relevant Percentage

Where:

If X < 85%. then Y = 0%

If 85% <= X < 95%, then Y =0,5*X% - 38,5%

If 95% <= X <= 100%. then Y = X% - 86%

If X> 100%, then Y=14%

38. No similar formula is provided for the "Integrity" element of the calculation, which is stated as something "to be agreed by [Premier] and [Altera] no later than three (3) months prior to Sailaway". A formula is however given for the "Budget" element of the bonus.

39. These formulae are then followed by pictorial representations of the "Production Incentivisation Curve" and the "Budget Incentivisation Graph" (both stated to be "included for illustrative purposes only") and (in clause 13.) a detailed and lengthy "Example calculation".

The Law

40. Both parties referred me to the familiar decisions of the Supreme Court dealing with the principles of contractual interpretation, culminating (at least for the time being) in

Wood v Capita Insurance Services Ltd[5]. In *Trillium (Prime) Property GP Limited v Elmfield Road Limited*[6] Lewison LJ said of these authorities that he would:

> **.. not attempt to distil or paraphrase that learning. As Lord Hodge said at [9], the legal profession has sufficient judicial statements of that nature ..**

I propose respectfully to adopt the same approach.

41. There are, however, some particular aspects of those principles that I must mention, in deference to the parties' arguments based upon them.

42. First, Mr Simon Colton QC, who appeared for Premier, drew attention to the "danger of focussing too narrowly on a critical phrase" in a lengthy contract such as this, and of the need to set the words of any particular provision (such as the "Worked Examples") in their commercial context and "in the landscape of the instrument as a whole"[7].

43. Secondly, Mr Colton drew my attention in particular to the second of the seven factors identified by Lord Neuberger of Abbotsbury PSC in *Arnold v Britton*[8], that:

> **.. when it comes to considering the centrally relevant words to be interpreted, .. the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it ..**

As Lord Hodge JSC later said in *Wood*[9]:

> **.. 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 ..**

44. Thirdly, Mr Colton also drew my attention to the principle that, where it is:

> **.. clear that something has gone wrong with the language and .. clear what a reasonable person would have understood the parties to have meant ..**

---

5 [2017] UKSC 24, [2017] AC 1173.

6 [2018] EWCA Civ 1556 at [9]

7 *Charter Reinsurance Co Ltd (in liq.) v Fagan* [1997] AC 313 at 384G-H, per Lord Mustill; quoted and applied in *Re Sigma Finance Corp* [2009] UKSC 2, [2010] 1 All ER 571 at [9] per Lord Mance JSC. See also to similar effect per Lord Collins JSC at [37], cited with approval in *BNY Mellon Corporate Trustee Services Ltd v LBG Capital No 1 plc* [2016] UKSC 29, [2016] 2 All ER (Comm) 851 at [31] per Lord Neuberger of Abbotsbury PSC.

8 [2015] UKSC 36, [2015] AC 1619 at [18]

9 See fn 5 above, at [11].

mistakes in drafting may be corrected as a matter of interpretation. Where each of those two conditions is satisfied:

> **.. there is not, so to speak, a limit to the amount of red ink or verbal rearrangement or correction which the court is allowed ..**[10]

45. In response, however, Mr Sean O'Sullivan QC, who appeared for Altera, referred to the limits to this principle summarised in the *Trillium* case[11]. The judgment of Lewison LJ (with which Leggatt LJ agreed) makes it clear that the kind of mistake which can be corrected by interpretation is a mistake in the language used. This principle cannot assist where the problem:

> **.. is a failure to think through the consequences of what the parties agreed, rather than any deficiencies in drafting ..**
>
> **.. The fact that a contract term was an imprudent one for a party to have agreed or that it has worked out badly or even disastrously is no warrant for departing from the clear language of the contract ..**[12]

46. Mr O'Sullivan also relied on *Honda Motor Europe v Powell*[13]. In that case, Lewison LJ drew attention to the fact that it requires a strong case to persuade the court that something must have gone wrong with the language of a formal contract, and pointed out that, in *Chartbrook*, Lord Hoffmann had taken the view that:

> **.. to interpret the formula under consideration in that case "in accordance with ordinary rules of syntax makes no commercial sense" (see [16]) and that that interpretation was "arbitrary and irrational" (see [20]) ..**

According to Lewison LJ:

> **.. The typical case in which the principle applies is where the clause in question is 'an obvious nonsense' ..**

47. Fourthly, both parties drew my attention to the principles which the court should apply in cases where, as here[14], the contract contains an "inconsistency clause" providing for what should happen in the event of any conflict between different parts of the contractual documents. It was common ground that those principles are conveniently summarised in the judgment of Hamblen LJ in *Alexander v West Bromwich Mortgage Co*[15]:

---

10 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 at [25], per Lord Hoffmann.
11 See fn 6 above.
12 Ibid at [15] and [17].
13 [2014] EWCA Civ 437 at [35] to [37].
14 See paragraph 8 above.
15 [2016] EWCA (Civ) 496 at [32] to [38], quoting and applying the judgments of Bingham and Dillon LJJ in *Pagnan SpA v Tradax Ocean Transportation SA* [1987] 3 All ER 565.

> **.. Where there is an inconsistency clause, one should .. approach the question of inconsistency without any pre-conceived assumptions. One should not strive to avoid or to find inconsistency. Rather one should 'approach the documents in a cool and objective spirit to see whether there is inconsistency or not' ..**
>
> **.. As to what amounts to inconsistency .. it is not enough if one term qualifies or modifies the effect of another; to be inconsistent a term must contradict another term or be in conflict with it, such that effect cannot fairly be given to both clauses .. inconsistency only arises where the provisions cannot sensibly be read together ..**

48. Finally, both parties drew my attention to the judgment of Blair J in *Starbev GP Ltd v Interbrew Central European Holdings BV*[16]. That case, in which Mr Colton appeared as junior counsel for the claimant, involved a number of disputes about the correct interpretation of the terms of a "Contingent Value Right" ("**CVR**") agreement which was ancillary to a Sale and Purchase Agreement under which the defendant sold the shares in various companies to the claimant. One aspect of the dispute concerned the definition of "Excess Equity Return" in clause 1.1 of the CVR, which contained an "illustration" which did not fully replicate the preceding text.

> **.. 'Excess Equity Return' means any Equity Return (other than an Equity Return with respect to which an Excess Return Payment has already been made) (i) accruing, as of the relevant date of determination, on or after the date on which the Trigger Event has occurred and (ii) that is in excess of the Equity Return required for the Equity Return of the Investor to exceed both the IRR Threshold and the Investment Threshold. By way of illustration, if, on the date that both the IRR Threshold and the Investment Threshold are exceeded for the first time, the Internal Rate of Return upon a Determination Event is 30% and the Investment Threshold has been exceeded by €500 million, the Excess Equity Return would represent the lower of (a) the Equity Return corresponding to the 5% excess of the Internal Rate of Return over the IRR Threshold and (b) €500 million, and any Equity Return accruing after such date would also constitute an Excess Equity Return to the extent that the Equity Return continues to exceed the IRR Threshold ..**[17]

49. Blair J had to consider the effect of the illustration, and to adjudicate on competing submissions, on one side that the illustration should be read literally and given effect accordingly, and on the other that it should be read subject to the preceding text.

> **[278] The argument focuses on the passage "by way of illustration" The illustration says that if on the date that both the IRR Threshold and the**

[16] [2014] EWHC 1311 (Comm).
[17] Emphasis added

> **Investment Threshold are exceeded for the first time, the Internal Rate of Return upon a Determination Event is 30% and the Investment Threshold has been exceeded by €500 million, the Excess Equity Return would represent the lower of (a) the Equity Return corresponding to the 5% excess of the Internal Rate of Return over the IRR Threshold and (b) €500 million. The 5% comes into the illustration because the IRR Threshold under the CVR was 25% of the Investment Amount (and this did not change). This part of the illustration is not in dispute.**
>
> **[279] However, the illustration goes on to say that any Equity Return accruing after such date would also constitute an Excess Equity Return to the extent that the Equity Return continues to exceed the IRR Threshold. There is no reference to it also exceeding the Investment Threshold (which of course did change with the step-ups which I have described). In substance, Starbev says that a reference to the Investment Threshold is nevertheless to be read into the illustration, whereas ABI says it should be read literally and take effect accordingly.**

50. Blair J's judgment in *Starbev* contains the only judicial discussion that either party has been able to find of the correct approach to interpreting an "illustration" within a contract, where that "illustration" does not exactly correspond to the text which it is supposed to be illustrating:

> **[283] There was some discussion between the parties as to the fact that the provision relied on by ICEH appears within an "illustration". ICEH's case essentially is that the illustration provides expressly for the situation in point and should be given effect to according to its terms ..**
>
> **[284] Parties do sometimes include illustrations or examples within their contracts. The parties were not able to find any authority directly in point ..**
>
> **There is in my view no reason why illustrations or examples should be construed differently than any other term in a contract. It could be said in the context of lengthy contracts in financial transactions with much boiler plate that illustrations or examples deserve particular attention as something to which the parties particularly turned their minds.**
>
> **[285] Ultimately, it depends on the terms of the illustration read in context ..**

The arguments of the parties

51. Against that factual and legal background, I now turn to consider the arguments of the parties. On behalf of Altera, Mr O'Sullivan submitted that there is no need to go behind or to cut across what has been expressly agreed. In the "Worked Examples", the parties have spelled-out, not once but twice, exactly how the "Actual

Availability" inputs for each System are to be used to calculate the required adjustment to the Daily Base Hire. It is agreed that, if the formula as set out in the "Worked Examples" is applied to the actual inputs during the relevant period, it results in Altera being entitled to the adjusted hire of USD 12,108,072.50 claimed. Premier may wish that it had agreed to pay Altera less by way of bonus. But, unless it can show that the Charterparty falls to be rectified (and there is no claim for rectification) Premier cannot go behind what the parties have expressly agreed.

52. By contrast Mr Colton submitted on behalf of Premier that Altera's approach produces a result which the parties plainly cannot have intended. He submitted that, as stated in Article 17.1 of the Charterparty, the objective of the formulae in Appendix M is to assess adjustments to Daily Base Hire if (but only if) there is either a reduction in productivity attributable to Altera such that Systems fall below "Target Availability", or if there is an increase in productivity attributable to Altera so that Systems exceed "Target Availability". Correctly applied, therefore, these provisions must have the effect that, where there is no deviation from "Target Availability", there is no adjustment to Daily Base Hire. In other words, where "Actual Availability" equals "Target Availability", there should be no adjustment.

53. It would be illogical, in Mr Colton's submission, for there to be an upward adjustment to Daily Base Hire even when "Actual Availability" was at the 95% level deemed by Section 3.5 of Appendix M to exist during a period of Force Majeure[18]. It would also, in Mr Colton's submission, be illogical for Article 17.2 to provide for serious consequences in the event of Altera failing continuously or regularly to achieve "Target Availability"[19], if the other provisions of the Charterparty provided even in that event for an upward adjustment in Daily Base Hire. That would involve simultaneously rewarding and penalising failure to achieve "Target Availability".

54. In Mr Colton's submission, the definition of "Target Availability" in Section 1 of Appendix M[20] demonstrates that the "pivot point" above which there is an adjustment upwards, and below which there is an adjustment downwards, is an "Actual Availability" level of 95%. That, Mr Colton submits, is how the operative part of Section 5 works. It sets out two, mandatory formulae which "shall be applied", using the agreed WF per System "to determine the required Hire Adjustment to the Daily Base Hire". These formulae determine the required Hire Adjustment in a way which is entirely consistent with the contractual intention demonstrated by Article 17.1 of the Charterparty and the definition of "Target Availability".

---

18 See paragraph 7 above.
19 See paragraph 5 above.
20 See paragraph 5 above.

55. To the extent that the extra step (which I have labelled "Step 6") in the "Worked Examples" which follow these mandatory formulae produces a different result, that step should, in Mr Colton's submission, be disregarded as inconsistent with the parties' obvious commercial intent, as demonstrated by the other provision of the Charterparty to which I have just referred.

56. In that regard, Mr Colton submitted that the provisions of Appendix M have to be read in the landscape of the instrument as a whole[21], and that the various infelicities of drafting (including, for example, the needless repetition of the statement of assumed "Actual Availability" for System B, and the erroneous reference back in Fig 1 to "Example 1" and in Fig 2 to the non-existent "Example 2"[22]) show that this is not an agreement where every word in Appendix M has been carefully considered. That means, Mr Colton submitted, that the court can be the more ready to depart from the natural meaning of the "Worked Examples" to the extent that they fail to reflect the obvious commercial intention apparent from the other provisions of the Charterparty[23].

57. To the extent necessary, Mr Colton submitted that the various illogicalities to which he had drawn attention meant that it was clear that something had gone wrong with the language of the "Worked Examples", and clear (inter alia from Article 17.1) what a reasonable person would have understood the parties to have meant to have achieved in Section 5 of Appendix M. This was therefore a problem of drafting which could properly be corrected by interpretation[24].

58. In the alternative, Mr Colton relied on the "inconsistency clause"[25], and submitted that, to the extent that the Appendix M – and, in particular, the "Worked Examples" in Section 5 – were inconsistent with Section 17.1 of the Charterparty, it is Article 17.1 that must prevail to set the "pivot point" for adjusting Daily Base Hire at the "Target Availability" figure of 95%[26].

59. In response, Mr O'Sullivan pointed out that the wording of Article 17.1 did not precisely track the method provided for in Appendix M of calculating "Actual Availability" in order thereafter to compare that calculated figure with "Target Availability". Nor did it specify what adjustment (if any) was to be made to Daily Base Hire in any particular eventuality. Instead, it expressly stated that Daily Base Hire should be reduced or adjusted "as provided for in Appendix M". In those circumstances, Mr O'Sullivan submitted, there was no inconsistency between Article

---

21 See paragraph 42 above.
22 See paragraph 23 above.
23 See paragraph 43 above.
24 See paragraph 44 above.
25 See paragraph 8 above.
26 See paragraph 46 above.

17.1 and Appendix M. On the contrary, Article 17.1 specifically required the hire adjustment calculation to be carried out in accordance with Appendix M.

60. Mr O'Sullivan also pointed out that there is no inevitability about the figure of 95% as the "pivot point". First of all, the differential weighting (or "WF") of the two Systems means that would be perfectly possible, even on Premier's interpretation of Appendix M, for there to be an upward adjustment in Daily Base Hire even though one or other System was below 95% if the other was significantly above that level. That fact also (in Mr O'Sullivan's submission) provided the answer to Mr Colton's point based on Article 17.2. Article 17.2 is engaged if any individual System continuously or regularly operates below the "Target Availability" level. It follows that, even on Premier's interpretation, Article 17.2 could be engaged because System B (with a "WF" of 0.1) was regularly below 95%, but an upward adjustment in Daily Base Hire could simultaneously be triggered by performance above 95% by System A (with a "WF" of 0.9).

61. Secondly, Mr O'Sullivan pointed out that the incentivisation bonus payable under the Service Agreement appears to "kick in" at >90% of "Target Availability" for System A and at >85% of "Target Availability" for System B[27]. Although not directly relevant to Appendix M, in Mr O' Sullivan's submission these formulas demonstrate that the parties did not regard a "pivot point" of 95% as inevitable. All of these figures are, in Mr O'Sullivan's words, "just a matter for negotiation and agreement": and there is nothing inherently and obviously uncommercial in having a pivot point that is a little below the level set for "Target Availability". All of the elements in the calculation – the level of "Target Availability", the calculation of "Actual Availability", the gearing, the "WF", and all the steps in the calculation (including Step 6) are simply aspects of the way in which the parties have agreed to adjust the hire. The court would be making a new agreement for the parties if it were to re-write or to disregard under the guise of interpretation the clear terms of the "Worked Examples" in Appendix M.

Analysis and conclusions

62. As is well known, interpretation is an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. As Robert Walker LJ explained, in *Morrells of Oxford Ltd v Oxford United FC Ltd*[28]:

> **.. any description of the requisite mental process is likely to be metaphorical and inexact. The judicial mind does not in practice proceed in an orderly series of immutable choices in order to reach a conclusion on**

[27] See paragraphs 36 and 37 above.
[28] [2001] Ch 459 at 468.

> **a question of construction. In practice it scans repeatedly from one point or proposition to another, often forming and rejecting provisional views in the search for the most satisfactory (or least unsatisfactory) resolution ..**

63. I start by considering the quality of drafting of the relevant provisions. It is plain, in my judgment, that this suite of contractual documents has been the product of a negotiation in which elements have been added, other elements have been discarded (such as Appendix D and Appendix H to the Over-Arching Agreement), and changes have been made in the course of drafting, without the consequences always being followed through with rigorous consistency. Concentrating on Appendix M, the needless repetition of the statement of assumed "Actual Availability" for System B, and the erroneous reference back in Fig 1 to "Example 1" and in Fig 2 to the non-existent "Example 2" are good illustrations of this process. This is therefore precisely the sort of contract in relation to which the court, in its attempt to ascertain the objective meaning of the language in which the parties have chosen to express their agreement, must be wary of focussing too narrowly on the dictionary meaning of individual words and phrases but must instead look at the terms of any particular provision in its commercial context and against the landscape of the instrument as a whole.

64. There is also, in my judgment, force in Mr Colton's submissions, both that Article 17.1 of the Charterparty appears to contemplate that the "pivot point" for adjustment up or down of the Daily Base Hire should be the "Target Availability" figure of 95%, and that a "pivot point" at that level would make better commercial sense overall. It would sit more neatly with the Continuous Deficiency provisions of Article 17.2 and would make much more sense in the context of the provisions of Article 35 and Section 3.5 of Appendix M concerning force majeure. Simply as a matter of instinct, it also seems to me to make better commercial sense to reward performance only if it is above the specified target.

65. It is therefore tempting to accede to Mr Colton's further submission that I should accordingly disregard "Step 6" (which appears only in the "Worked Examples", and not in the narrative formulae which precede them) and should interpret Section 5 of Appendix M as if it stopped before the "Worked Examples" in Fig 1 and Fig 2.

66. However, tempting though that course may be, I cannot ignore the fact that that is not the agreement that the parties have actually made. Article 1.1 of the Charterparty defines "Daily Base Hire" without reference to Article 17.1, as a sum "as may be adjusted from time to time in accordance with Appendix M". Moreover, as Mr O'Sullivan points out, Article 17.1 does not itself provide for how the adjustment of Daily Base Hire is to be carried out. Instead, it expressly states that that adjustment is to be made "as provided in Appendix M". The "Worked Examples" in Section 5 of Appendix M do not appear, in their context, to be mere optional extras, but rather

to be integral parts of the contract terms which explain how that adjustment is to be calculated. Each of those two "Worked Examples" specifically provides for what I have referred to as "Step 6". To disregard them would, in my judgment, be to re-write the contract that the parties have made.

67. The court can, of course, do just that where it is "clear" that something has gone wrong in the language which the parties have used. However, although I accept that it is undoubtedly *possible* that something has gone wrong here, given the various pointers to which I have already referred, it is not by any means clear to me that it has in fact done so.

68. As Mr O'Sullivan submits, the hire adjustment formula is a complicated one including many factors. The detail of the agreed adjustment is not to be found in Article 17.1 but in Appendix M. As Mr Colton accepted in his oral submissions, Article 17.1 "obviously leaves open for negotiation between the parties, when negotiating Appendix M, the finer details of the application of this clause". It therefore does not logically follow that, because "Step 6" is not specifically provided for in Article 17.1, Appendix M must be interpreted in a way which excludes that step. The "inconsistency clause" accordingly has no part to play in the interpretation of these provisions, because there is no real inconsistency between them.

69. To take one example. As I have already said, Article 17.1, if read in isolation, appears to contemplate a simple "pivot point" for each System at the level of "Target Availability". However, the "WF" element of the calculation (which appears in the narrative section of the formulae as well as in the "Worked Examples") means that the hire adjustment formula does not have that sort of simple "pivot point" for either System. Performance by one System above "Target Availability" can compensate for performance below "Target Availability" by another, particularly if the higher performing System is System A, with its 0.9 "WF". Yet Mr Colton has rightly not suggested that the "WF" aspect of the Appendix M calculation should be disregarded as inconsistent with Article 17.1.

70. In the circumstances, I accept Mr O'Sullivan's argument that all of the elements in the hire adjustment mechanism, including what I have called "Step 6", are simply aspects of the way in which the parties have agreed to adjust the hire.

71. As for the suggested "illogicalities" relied on by Mr Colton, I accept Mr O'Sullivan's argument that the apparent commercial inconsistency between Appendix M and Article 17.2 could operate even on Premier's interpretation of Appendix M. It therefore cannot assist Mr Colton's case.

72. Mr Colton's better argument seems to me to be that based on the fact that "Actual Production" is deemed in Section 3.5 of Appendix M to be 95% during a period of

Force Majeure, thus potentially giving rise (on Altera's interpretation of Appendix M) to an upward adjustment in Daily Base Hire during such a period. Even though Article 35 of the Charterparty contains its own regime for Daily Base Hire and for the remedies available to Premier in those circumstances[29], the interplay between Section 3.5 and Altera's interpretation of Section 5 is difficult to understand on a commercial level. It makes little or no commercial sense for the deemed level of "Actual Availability" during a prolonged period of Force Majeure to result in an automatic upward adjustment to Daily Base Hire.

73. However, even when combined with the other matters to which I have referred, that apparent commercial illogicality is not enough to persuade me that it is "clear" that the inclusion of "Step 6" in the "Worked Examples" means that something has gone wrong with the language of Appendix M. In my judgment, the operation of those "Worked Examples" cannot, even in those circumstances, be characterised as "arbitrary and irrational" or as an "obvious nonsense".

74. On the contrary, it seems to me to be inherently more probable that the parties' true bargain is that to be found in the "Worked Examples". Narrative explanations and formulae may disguise (or, at least, not make clear) their consequences when applied to various factual situations. The whole point of the "Worked Examples" is to demonstrate with clarity the consequences of the formulae in Section 5 of Appendix M when applied to particular levels of "Actual Production". As Blair J said in the *Starbev* case[30]:

> **.. in the context of lengthy contracts .. illustrations or examples [may] deserve particular attention as something to which the parties particularly turned their minds ..**

Blair J was there speaking specifically of financial contracts. However, it seems to me that that principle is equally applicable to the sort of lengthy and detailed commercial contract with which the present case is concerned. It is often only when narratives and formulae are worked through that their true effect can properly be seen.

75. In the present case, there was not just one, but two "Worked Examples" in Section 5 of Appendix M. The inclusion of what I have called "Step 6" in each of them strongly suggests that that was a deliberate choice by the person who drafted those examples. It follows that, in my judgment, it is not possible to say that the two "Worked Examples" including "Step 6" do not represent what a reasonable person with all the relevant knowledge would say that the parties intended should happen.

76. Altera's claim accordingly succeeds. There will therefore be judgment in favour of Altera for the agreed sum of USD 12,108,072.50 plus contractual interest.

---

[29] See paragraphs 30 to 33 above.
[30] See fn 16 above.

77. I invite the parties to attempt to agree the terms of a Minute of Order giving effect to this judgment and dealing with all consequential issues. In the event that agreement cannot be reached by 4pm on Friday 24 July 2020, the parties should so inform the court and should lodge written submissions in relation to the points of disagreement by 4pm on Wednesday 29 July 2020. I will then either give a ruling by email or direct a short further hearing by video conference. Pursuant to CPR PD 52A 4.1(a), I adjourn any application for permission to appeal together with all other consequential applications to be determined in that way and extend time under CPR 52.12(2)(a) until 21 days after that determination.

78. In accordance with the Covid-19 Protocol, this judgment will be handed down remotely by circulation to the parties' representatives by email and release to BAILII. No attendance by the parties is necessary. I am grateful to both counsel and to the teams behind them for their assistance and for the clarity and quality of their submissions.