Neutral Citation Number: [2021] EWHC 1283 (Comm)

Case No: CL-2020-000618

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/05/2021

Before :

Charles Hollander QC, Sitting as a High Court Judge

- -

Between :

APACHE UK INVESTMENT LIMITED	**Claimant**
- and -	
ESSO EXPLORATION AND PRODUCTION UK LIMITED	**Defendant**

- -

- -

David Allen QC and Luke Pearce (instructed by **Clyde & Co**) for the **Claimant**
Nigel Tozzi QC (instructed by **Norton Rose Fulbright**) for the **Defendant**

Hearing dates: 10 May 2021

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JUDGMENT

Charles Hollander QC:

A. Introduction

1. This matter concerns disputes as to the amount of security to be provided in respect of decommissioning obligations related to certain hydrocarbon producing fields in the North Sea. The matter came before me as a short trial, although no oral witness evidence was led. It was well argued on both sides.

2. By an LLC Sale and Purchase Agreement dated 21 September 2011 ("the SPA"), Apache UK Investment Limited ("Apache") acquired from Esso Exploration and Production UK Limited ("EEPUK") the sole legal and beneficial ownership in Apache Beryl I Limited ("ABIL"), then known as Mobil North Sea LLC ("MNSL"). ABIL holds licences in the Beryl, Buckland, Ness, Nevis, Skene and Maclure hydrocarbon producing fields in the North Sea (the "Fields").

3. Apache and EEPUK entered into six Bilateral Decommissioning Security Agreements dated 31 December 2011 (the "BDSAs") in respect of the Fields. The BDSAs provide for security in respect of Apache's obligation under the SPA to indemnify EEPUK for all decommissioning related expenditures which EEPUK was or might become liable to incur whether such expenditures arose before, at or after the Effective Date of the SPA. The obligation to indemnify was further supported by a parent company guarantee provided by Apache Corporation, the ultimate parent company of Apache.

4. On 26 March 2020, Apache Corporation ceased to be a "Qualifying Surety" under the BDSAs. Consequently, pursuant to the terms of the BDSAs, Apache was required to provide further security in the form of Letters of Credit. The BDSAs provide a contractual process to determine the amount of the further security to be provided. The security is substantial. Not surprisingly, Apache wish to provide as little security as is possible in accordance with their obligations, and EEPUK are by contrast concerned that they might end up under secured.

5. The operation of that process of determining the amount of security has given rise to a dispute between the parties focusing on two discrete matters. The first is a matter of construction of the BDSAs. The second involves an analysis of the effect of the Petroleum Act 1998 in the events which have occurred.

B. **Security under the BDSAs.**

6. The first issue involves a complex question of construction of the BDSA. The issue is whether the required security is to be assessed in accordance with a Proposed Plan which Apache have put forward for 2021 or whether it should be assessed in accordance with a Proposed Plan they have put forward for 2020.

7. Clause 4.2 of the BDSAs required Apache to provide EEPUK with a Letter of Credit by way of security in the amount set out in BDSA Clause 5 within 10 days of Apache Corporation ceasing to be a Qualifying Security, namely by 5 April 2020. The relevant provisions of the BDSAs are as follows.

> ""Provision Amount" means in respect of any Licensee for any Relevant Year, the amount calculated pursuant to Clause 5.1.

"Relevant Year" has the meaning given to it in Clause 3.1.2.

"Year" means a calendar year…

2.1: The object of this Agreement is to provide security for Apache's indemnity in favour of EEPUK (and others) in the SPA in relation to MNSL's Licence Interest Share of the costs of Decommissioning of the Field. ….

3. Determination of Decommissioning Plan

3.1 The estimated Net Cost of Decommissioning is set out in Appendix 2. If, after the date of this Agreement, Apache Corporation ceases to be a Qualifying Surety (and provided that Apache Corporation continues to not be a Qualifying Surety), then Apache shall within three (3) months of Apache Corporation ceasing to be a Qualifying Surety submit to EEPUK a proposed Decommissioning schedule and budget (the "Proposed Plan") which shall substantially follow and be based on the assumptions set out in Appendix 1 and the Oil & Gas UK 'Guidelines on Decommissioning Cost Estimation' with additional detail to specify the base assumptions used to qualify the constituent elements and sub-elements including durations of activities, resource requirements and associated rates, and covering:

3.1.1 an estimate of the dates on which Decommissioning will commence and be completed;

3.1.2 an estimate of the highest Net Cost during the immediately following Year (such immediately following Year being the "Relevant Year"); and

3.1.3 all other matters relevant to the proper preparation for and management of Decommissioning, including but not limited to decommissioning options, alternative uses for Field Property and an assessment of eligibility for derogation from removal obligations.

3.2 If EEPUK does not object to the Proposed Plan within sixty (60) days of the submission, the Proposed Plan shall become the Decommissioning Plan for the Relevant Year.

3.3 For so long as Apache Corporation is not a Qualifying Surety, Apache shall:

3.3.1 on or by 30th June in each third Year since the last Proposed Plan was issued, issue a new Proposed Plan; and

3.3.2 on or by 30th June in every year in which a new Proposed Plan is not issued pursuant to Clause 3.3.1 above, update the most recent Proposed Plan to reflect changes in inflation, discount rates, Decommissioning already conducted, and applicable currency exchange rates (a "Proposed Plan Update").

3.4 If EEPUK objects to a Proposed Plan or a Proposed Plan Update, EEPUK shall provide notice to Apache of EEPUK's objections to the Proposed Plan or the Proposed Plan Update (such notice must include a written statement of EEPUK's objections explaining such objections in reasonable detail), within sixty (60) days of submission of the Proposed Plan or the Proposed Plan Update to EEPUK. If EEPUK fails to provide such notice to Apache within such sixty (60) day period, EEPUK shall be deemed to have approved the Proposed Plan or the Proposed Plan Update. If EEPUK provides Apache with a valid objection notice pursuant to this Clause 3.4, then all Parties shall meet promptly to discuss those objections and shall attempt to reach an amicable resolution. If no amicable resolution has been reached within ninety (90) days of submission of the Proposed Plan or the Proposed Plan Update by Apache, then EEPUK shall be entitled to refer the matter for Expert determination pursuant to Clause 10… The Proposed Plan or the Proposed Plan Update, as adjusted if applicable, shall then be deemed to be approved by the Parties and shall become the Decommissioning Plan for the Relevant Year. …

4. Provision of Security

4.1 Apache undertakes contemporaneously with the signature of this Agreement to provide to EEPUK an Affiliate Guarantee in respect of MNSL's Licence Interest Share of the costs of Decommissioning of the Field Property. …

4.2 Apache shall promptly notify EEPUK if the provider of the Affiliate Guarantee ceases to be a Qualifying Surety. Within ten (10) days of the provider of the Affiliate Guarantee ceasing to be a Qualifying Surety, Apache shall in addition to its obligation under Clause 4.1 but subject to Clause 4.4, be obliged to provide EEPUK with a Letter of Credit in the amount equal to the Provision Amount stated in or calculated for the Relevant Year under Clause 5 (as the case may be). Such Letter of Credit shall expire and be renewed in accordance with Clause 5. …

5. Licence Interest Share of Costs of Decommissioning

5.1 The Provision Amount for the 2011 Relevant Year and 2012 Relevant Year is set out in Appendix 2 (the "Initial Amount"). Commencing with respect to the 2013 Relevant Year, the

Provision Amount in respect of each Relevant Year shall be calculated in accordance with the following formula:

Provision Amount = (X x Y) – F

Where

X = MNSL's Licence Interest Share of the estimated Net Cost of Decommissioning as set out in the Decommissioning Plan for the Relevant Year;

Y = a risk factor which shall be one decimal point two (1.2); and

F = the aggregate amount of any Additional Security.

5.2 By no later than 1st October in the Year preceding each Relevant Year for which Apache is required to provide EEPUK with a Letter of Credit, Apache shall advise EEPUK of the Provision Amount resulting from the computations set out in Clause 5.1 for the Relevant Year.

5.3 If by 1st October of the Year preceding a Relevant Year, the Decommissioning Plan for the Relevant Year has yet to be approved or deemed approved under Clause 3, or Apache has not provided the calculation of the Provision Amount in accordance with Clause 5.2, the Provision Amount for the Relevant Year shall be deemed to be the same as the Provision Amount for the preceding Relevant Year, or if there is no Provision Amount for the preceding Relevant Year or at all, then the Provision Amount shall be equal to the Initial Amount (as the case may be "Interim Amount"). In the event that the Provision Amount for the Relevant Year for which the Interim Amount applies is subsequently approved, deemed approved or determined by the Expert pursuant to clause 10 at a time in which Apache Corporation is not a Qualifying Surety, then Apache shall (subject to Clause 4.4) be obliged to provide a substitute Letter of Credit in the amount of the Provision Amount so approved, deemed approved or determined and EEPUK shall be obliged to return to Apache for cancellation the Letter of Credit in the amount of the Interim Amount promptly upon EEPUK's receipt of the new substituted Letter of Credit. …

5.4 A Letter of Credit provided pursuant to Clause 4.2 shall (subject to Clause 4.4) be renewed for each Relevant Year by no later than 1 December preceding such Relevant Year provided that the renewed Letter of Credit may be stated to take effect from the expiry date of the expiring Letter of Credit. On provision of a renewed Letter of Credit which takes immediate effect,"

C. The Proposed Plans: factual summary

8. As explained above, on 26 March 2020, Apache Corporation ceased to be a "Qualifying Surety" under the BDSAs. The following day, on 27 March 2020, Apache notified EEPUK of this, and indicated that it was currently arranging for the required letters of credit to be issued to EEPUK by 3 April 2020.

9. As at that date, and in circumstances where Apache Corporation had at all material times previously been a Qualifying Surety, Apache had never been required to submit a Proposed Plan under Clause 3.1 of the BDSAs, there was no Decommissioning Plan for the year 2020, and nor was there a Provision Amount for the year 2019. It followed that, pursuant to Clause 5.3 of the BDSAs, the relevant Provision Amount was the Initial Amount as defined in Clause 5.1 (which was £549,672,792). Accordingly, between 2 and 6 April 2020, eleven letters of credit were duly issued to EEPUK in the aggregate amount of £549,672,792 (the "Letters of Credit").

10. On 23 June 2020, Apache wrote to EEPUK enclosing a Proposed Plan in respect of each of the BDSAs for the years 2020 and 2021 (the "2020 Proposed Plan" and the "2021 Proposed Plan"). On the basis of the Proposed Plan for the year 2020, the relevant Provision Amount for that year was £412,045,083. Since this sum was lower than the amounts of the Letters of Credit, Apache indicated that it would require EEPUK to return the Letters of Credit to Apache upon receipt of substitute letters of credit in the lower amount.

11. On 20 August 2020, EEPUK responded to Apache's letter of 23 June 2020. EEPUK stated that Apache had no obligation or right to submit the 2020 Proposed Plan under the terms of the BDSAs, and that it had therefore disregarded that document. EEPUK treated the 2021 Proposed Plan as being in accordance with BDSAs Clause 3, and raised various objections to the detail of the 2021 Proposed Plan. One of these objections was that Apache had failed to include in the plan up to 10 additional subsea wells, which it suggested could add approximately £100 million to the gross cost estimate. Following further correspondence between the parties, EEPUK has refined this objection to only four additional wells, namely EM1, EM2, EM3 and EM5, located in the Nevis and Buckland Fields (the "Additional Wells"). This gives rise to the second substantive issue between the parties. Apache claims there is no basis for them be required to provide security for the Additional Wells, EEPUK demurs.

D. The Proposed Plans: submissions

12. I consider first whether Clause 3 required, in the events that have occurred, that Apache is required to present a Proposed Plan for 2020 or 2021.

13. On behalf of Apache it was submitted:

    a. The starting point is Clause 4.2 and the obligation on Apache to provide EEPUK with a Letter of Credit "in the amount equal to the Provision Amount stated in or calculated for the Relevant Year under Clause 5 (as the case may be)." For that purpose, in the events which have occurred, the Relevant Year must mean 2020.

b. It is highly unlikely that the parties used the expression Relevant Year to mean different things in different places in the BDSAs. So, it is to be assumed that the Relevant Year for other purposes is also 2020.

c. The effect of EEPUK's submissions is that "Relevant Year" means different things in different clauses in the BDSAs, which is highly unlikely.

d. "Year" is defined as calendar year and Clause 3.1.2 defines "Relevant Year" as "the immediately following year". That latter expression is ambiguous. It could mean "the following calendar year" although the word "immediately" would then be redundant. Alternatively, it could mean "the year immediately following the day in question", so on 1 June 2020 the immediately following year is 2020. This latter construction should be preferred because it gives Relevant Year the same meaning as in Clause 4.2.

e. Clause 5 assumes there will be a Decommissioning Plan for every relevant calendar year; however, on EEPUK's case there will be no Plan at all for 2020.

f. Moreover, for the purpose of Clause 5.3, on EEPUK's case the "Interim Amount" is not interim at all but a final amount.

g. EEPUK's construction is inconsistent with Clauses 5.1, 5.2 and 5.3.

h. The commercial purpose of these provisions is to ensure that EEPUK is properly secured and that security is adjusted so EEPUK neither receives too much or too little security. But on EEPUK's case even though there is an obligation to provide security in March 2020, that security is based on out of date figures and there is no possibility of amending that for the rest of that calendar year, which is not in accordance with commercial common sense

14. Apache submitted Proposed Plans both for 2020 and 2021. EEPUK responded to the 2021 Plan and certain elements of that remain in contention. However, it stated that it would "without comment disregard" the 2020 Plan because (on the basis of EEPUK's construction) no requirement for a 2020 Plan arose. If therefore Apache is correct in its construction, in accordance with Clause 3.3, it submitted that because EEPUK has not objected to the 2020 Plan, it is treated as having approved it and it follows that Apache's obligation for 2021, 2022 and 2023 is limited to updating the 2020 Plan.

15. EEPUK submitted:

a. The correct starting point is the definition of "Relevant Year" as the immediately following calendar year. That means the next calendar year. It would be extraordinary if, as Apache submit, the immediately following year on 1 June 2020 was 2020. It is obviously 2021.

b. Once Apache's submission on that point is rejected, then it is apparent that the obligation to present a Plan is an obligation in relation to 2021, not 2020.

c. That conclusion makes sense of Clauses 5.1, 5.2 and 5.3 which cannot be explained consistently on Apache's case.

d. It is true that on this submission the wording of Clause 4.2 presents a difficulty, because in "in the amount equal to the Provision Amount stated in or calculated for the Relevant Year under Clause 5 (as the case may be)" the wording has gone adrift but that is no reason to reject this construction.

e. Apache's submission in any event misunderstands Clause 5.3, which is concerned both with the Interim Amount as well as the Initial Amount.

16. It was and is EEPUK's position that the 2020 Plan sent by Apache was of no effect, but in responding to the 2020 and 2021 Plans, EEPUK set out its objections to the 2021 Plan in detail. EEPUK submitted that as the same points arise on the 2020 Plan, it is in any event incorrect to say that EEPUK did not object to the 2020 Plan.

E. The Proposed Plan: Discussion

17. When Apache Corporation ceased to be a Qualifying Security on 26 March 2020, Clause 4.2 required Apache to provide a Letter of Credit within 10 days. At this stage no assessment had been made of the quantification of security necessary and therefore the amount of security provided interim protection to EEPUK. It is common ground that the appropriate sum was the Initial Amount calculated in accordance with Appendix 2. As provided in Clause 5.1, that reflected the Provision Amount for the 2011 and 2012 Relevant Year because none of the relevant subsequent events referred to in Clauses 5.1-5.3 were applicable. Clause 4.2 was thus complied with.

18. The next obligation of Apache arose under Clause 3.1, which provided that it should provide a Proposed Plan within 3 months for consideration by EEPUK. The Proposed Plan would provide a more accurate estimate of the security required because it updates the essentially historic figure initially provided in accordance with Clause 5. There is then a mechanism under Clause 3.2-3.4 whereby EEPUK may object to the Proposed Plan within 60 days, and after a dispute resolution process, the matter may be referred to expert determination. It should be noted it is contemplated that the process may take many months to complete.

19. Clause 3.1.2 requires the estimate of the cost to be for the "immediately following Year (such immediately following Year being the Relevant Year)". At any given date in 2020, the immediately following calendar year is 2021. Any other construction would be very surprising.

20. On this basis, the obligation to submit a Proposed Plan must relate to the 2021 Year, as EEPUK submit, not 2020. However, it is necessary to consider whether other provisions militate in favour of a contrary interpretation.

21. The most significant difficulty with EEPUK's construction is the wording of Clause 4.2. There is no difficulty in determining what Clause 4.2 means in the present case: the Initial Amount is accepted to be the Provision Amount because none of the events referred to in Clause 5 which would give rise to a different result have yet occurred. However, Clause 4.2 provides that the obligation to provide EEPUK with a Letter of Credit is "in the amount equal to the Provision Amount stated in or calculated for the Relevant Year under Clause 5." It is difficult to make sense of the addition of the words "for the Relevant Year" which are otiose at best and arguably misleading. It is fair to say that the draftsman has not always used the expression Relevant Year in a way

entirely consistent with his definition: for example in Clause 5.1 there is reference to the "2011 Relevant Year and 2012 Relevant Year" which does not square particularly well with the definition "immediately following Year".

22. So, whilst the problem with Clause 4.2 does not on any view affect the amount of security to be provided in the present case on an initial or interim basis, the question arises whether this drafting difficulty should lead to a different construction of other provisions, as Apache contend. I have already pointed out that Apache's case requires construing Clause 3.1.2 in a way which would be most surprising. But there are numerous other problems with Apache's construction.

23. Assume Apache Corporation had ceased to be a Qualifying Security in the latter part of 2020, perhaps in December 2020. On Apache's case, the process of submitting a Proposed Plan would focus not on the security required for the coming year 2021 but the past year 2020, and the Proposed Plan would not be submitted until early 2021 and probably agreed in mid-2021. Given Apache's submission that commercial common sense required these provisions to be construed so that accurate and up to date security could be provided, this seems unlikely and indeed commercial common sense seems very much on the side of EEPUK's construction. It is hard to provide any commercial justification for such a result. Further, it has led in the present case to Apache submitting two plans for consecutive calendar years at the same time. Nothing in the BDSAs suggests that was contemplated.

24. Apache's submissions also make it difficult to make sense of Clause 5. Clause 5.2 provides that Apache must advise EEPUK of the Provision Amount by no later than 1st October in the Year preceding each Relevant Year for which Apache is required to provide EEPUK with a Letter of Credit. On Apache's case, that would be by 1 October 2019, and could never happen. It seems obvious that Clause 5.2 refers (in the events which have happened) to 1 October 2020, which supports EEPUK's case. Exactly the same point can be made as to Clause 5.3. These provisions provide strong support for the contention that Relevant Year has what seems to me to be its natural meaning, namely the next calendar year after the year in which the event occurs.

25. Apache submitted that Clause 5.3 supported its case because on EEPUK's case the Interim Amount was not in fact initial, but in fact a final amount. However, the scheme under Clause 5.3, which is not particularly happily drafted, is that the Interim Amount is either the Provision Amount for the preceding Relevant Year, or if there is no such amount, the Initial Amount, but that is itself only an interim arrangement subject to alteration when an expert determination or agreement occurs. This does not seem to assist Apache's case.

26. Notwithstanding the difficulty in the wording in Clause 4.2, I conclude that EEPUK's submission is correct and the obligation to prepare a Plan relates to 2021, not 2020.

27. It follows from this that EEPUK is not deemed to have approved the 2021 Plan, in respect of which there remains a dispute.

28. Once the 2021 Plan has been agreed or determined, Apache's obligation in the following years is merely a limited obligation under Clause 3.3.2 to provide changes in the Plan to update for inflation, discount rates, Decommissioning already conducted,

and applicable currency exchange rates. The obligation under Clause 3.3.1 to provide a new Plan only arises every third year.

29. My conclusion on the appropriate year for the Proposed Plan makes it unnecessary to consider Apache's submission that EEPUK did not object to its 2020 Proposed Plan and is therefore deemed to have accepted it. EEPUK contended that, if necessary, it should be treated as having objected to it, albeit by a somewhat indirect route. On the basis of my conclusion above, the Proposed Plan for 2020 was not effective and there was no obligation on EEPUK to respond to it.

F. The Additional Wells

30. The second dispute between the parties, also concerned with the amount of security to be provided by Apache, is concerned with the extent of the potential decommissioning obligations of EEPUK under the Petroleum Act 1998 ("the Act").

31. On 23 June 2020 Apache sent its Proposed Plan for 2021 to EEPUK. EEPUK sent its formal objections to the Proposed Plan to Apache on 20 August 2020. Amongst its objections, EEPUK identified that up to 10 subsea wells relevant to the BDSAs had not been included in Apache's cost estimates. After further analysis and communication with Apache, this number was narrowed down to four wells.

32. EEPUK served a witness statement from Mr Simon Whatling on this issue. Mr Whatling, who is an accountant employed by Esso, and was not required by Apache to attend for cross-examination, explains that three of these wells are designated as Nevis Field wells on the UK National Data Repository website. The other well is designated as a Buckland Field well. Mr Whatling refers to these wells as EM1, EM2, EM3 (the Nevis wells) and EM5 (the Buckland well) (together the "Additional Wells"). EM1 (S67) is in Block 9/13a and is part of the Nevis Field; EM2 (S70) is in Block 9/13a and is part of the Nevis Field; EM3 (N15) is in Block 9/13a and is part of the Nevis Field; EM5 (B7) is in Block 9/18a and is part of the Buckland Field.

33. EEPUK's concern is that it is possible that the Secretary of State will contend that, on a proper construction of the Act, the existing notices served under s29 of the Act are wide enough to require decommissioning of the Additional Wells, and unless provision is made for security under the 2021 Plan, there is a risk that EEPUK will be significantly unsecured.

34. The Act provides as follows:

> "**29 Preparation of programmes**.
>
> (1) The Secretary of State may by written notice require—
>
> (a) the person to whom the notice is given; or
>
> (b) where notices are given to more than one person, those persons jointly,
>
> to submit to the Secretary of State a programme setting out the measures proposed to be taken in connection with the

abandonment of an offshore installation … (an "abandonment programme").

30 Persons who may be required to submit programmes.

(1) A notice under section 29(1) shall not be given to a person in relation to the abandonment of an offshore installation unless at the time when the notice is given he is within any of the following paragraphs—

(a) the person having the management of the installation or of its main structure;

(b) a person to whom subsection (5) applies in relation to the installation;

(ba) a person to whom subsection (5)(a) and (b) applied in relation to the installation, but who—

(i) transferred the right mentioned in that subsection to another person, and

(ii) has not obtained a consent required under the licence in relation to the transfer;

(c) a person outside paragraphs (a) and (b) who is a party to a joint operating agreement or similar agreement relating to rights by virtue of which a person is within paragraph (b);

(d) a person outside paragraphs (a) to (c) who owns any interest in the installation otherwise than as security for a loan;

(e) a body corporate which is outside paragraphs (a) to (d) but is associated with a body corporate within any of those paragraphs.

…

(5) This subsection applies to a person in relation to an offshore installation if—

(a) the person has the right—

(i) to exploit or explore mineral resources in any area,

…, and

(b) either—

(i) any activity mentioned in subsection (6) is carried on from, by means of or on the installation, or

(ii) the person intends to carry on an activity mentioned in that subsection from, by means of or on the installation, or if he had such a right when any such activity was last so carried on.

(6) The activities referred to in subsection (5) are—

(a) the exploitation or exploration of mineral resources in the exercise of the right mentioned in subsection (5)(a);

31 Section 29 notices: supplementary provisions.

…

(1) Subject to subsection (3), the Secretary of State shall not give a notice under section 29(1) in relation to an offshore installation to a person within paragraph (e) of section 30(1) if the Secretary of State has been and continues to be satisfied that adequate arrangements (including financial arrangements) have been made by a person or persons within paragraph (a), (b) or (c) to ensure that a satisfactory abandonment programme will be carried out.

…

(3) Subsections (1) and (2) shall not apply if there has been a failure to comply with a notice under section 29(1) or if the Secretary of State has rejected a programme submitted in compliance with such a notice.

34 Revision of programmes.

(1) Where the Secretary of State has approved a programme submitted to him under section 29—

(a) …

(b) either he or any of those persons [who submitted it] may propose that any person who by virtue of section 36 has a duty to secure that the programme is carried out shall cease to have that duty, or that a person who does not already have that duty shall have it (either in addition to or in substitution for another person).

(2) In the case of a proposal of the kind mentioned in subsection (1)(b), any person who would if the proposed change were made have a duty to secure that the programme is carried out must be a person who—

(a) if the programme relates to an offshore installation, is within paragraph (a), (b), (ba), (c), (d) or (e) of section 30(1) when the proposal is made, or has been within one of those

paragraphs at some time since the giving of the first notice under section 29(1) in relation to the installation; …

44 Meaning of "offshore installation".

(1) In this Part of this Act, "offshore installation" means any installation which is or has been maintained, or is intended to be established, for the carrying on of any activity to which subsection (2) applies.

(2) This subsection applies to any activity mentioned in subsection (3) which is carried on from, by means of or on an installation which is maintained in the water, or on the foreshore or other land intermittently covered with water, and is not connected with dry land by a permanent structure providing access at all times and for all purposes.

(3) The activities referred to in subsection (2) are—

(a) the exploitation, or the exploration with a view to exploitation, of mineral resources in or under the shore or bed of relevant waters;

…

(5) For the purposes of this section—

…

"installation" includes—

(a) any floating structure or device maintained on a station by whatever means; and

(b) in such cases and subject to such exceptions as may be prescribed by Order in Council, any apparatus or works which are by virtue of section 26 to be treated as associated with a pipe or system of pipes for the purposes of Part III of this Act, but, subject to paragraph (b), does not include any part of a pipeline within the meaning of that section;"

35. The Secretary of State has served a number of s.29 notices in respect of the Nevis and Buckland Fields. The potentially relevant s.29 Notices in respect of the Nevis Field in so far as they concern EEPUK are:

a. The notice served on MNSL (as it then was) dated 29 May 2000 which required MNSL to submit to the Secretary of State an abandonment programme setting out the measures proposed to be taken in connection with the abandonment of the offshore installations specified. The Field Installations identified were as follows:

Field	Block	Facility	Field First Production Date
Nevis	9/12a 9/13a 9/13b	Subsea Installation comprising wells, with protective structures and associated manifolds tied back to Beryl A via a Subsea Distribution Unit	9/96

b. The notice served on MNSL dated 18 January 2005 which required MNSL to submit to the Secretary of State an abandonment programme setting out the measures proposed to be taken in connection with the abandonment of the offshore installations specified. The Field Installations identified were as follows:

Field	Block	Facility	Date First Production
Nevis	9/12a 9/13a 9/13b	Nevis South Phase 1 & 2: All subsea equipment including wells, protection structures and manifolds associated with the Nevis field	September 1996

36. For present purposes, the relevant s.29 notices in respect of the Buckland Field are the notices served on MNSL on 18 March 2004 and 25 November 2005. These required MNSL to submit to the Secretary of State an abandonment programme setting out the measures proposed to be taken in connection with the abandonment of the offshore installations specified. The Field Installations identified were as follows:

Field	Block	Facility	Field First Production Date
Buckland	9/18	All subsea equipment including the Buckland North Drill Centre Subsea Template/Manifold and Buckland South Drill Centre Subsea Manifold	8/99

37. The Indemnity Obligation contained in clause 9.1 of the SPA is as follows:

> "…Notwithstanding any provision to the contrary in this Agreement, and except as provided in Clause 7.1.2(b), on and from Closing, the Buyer [Apache] shall procure that the Company [ABIL] complies with all applicable laws, and all applicable provisions of the Licence Interest Documents, relating to decommissioning of each of the Field Facilities and the Buyer shall indemnify, defend and hold the Seller [EEPUK], the Seller Affiliates and the Seller Associated Parties harmless from and against all Decommissioning Obligations relating to ownership or operation of the Remaining Assets, whether arising

> before, at or after the Effective Date and from and against any breach of the foregoing obligation regardless of: (i) how the Decommissioning Obligations arose or arise; (ii) whether the Decommissioning Obligations are or were foreseeable or unforeseeable; and (iii) whether the Decommissioning Obligations result from any acts or omissions, negligence or breach of duty, whether statutory or otherwise, conduct or statements of any or all of: the Seller, the Seller Affiliates, the Company or the Seller Associated Parties or the condition of the Field Facilities and / or the Interests, including:
>
> 9.1.1 the proper plugging, replugging, and abandoning of all Wells associated with the Interests, whether drilled or plugged before at or after the Effective Date;
>
> 9.1.2 removing and disposing of all the Field Facilities; and
>
> 9.1.3 compliance with the provisions of the Licences, the other Licence Interest Documents and all applicable laws and government rules, regulations, orders and requirements associated with the abandonment of all the Field Facilities and the Licence Areas, provided that the Buyer shall not be required by the provisions of this clause 9.1 (but without prejudice to any other provisions of this Agreement) to reimburse the Seller, any Seller Affiliate or any Seller Associated Party for amounts actually expended by the Seller, the Company, any Seller Affiliate or any Seller Associated Party prior to the Effective Date in respect of any Decommissioning Obligations."

38. Clause 2.1 of the BDSAs provides that:

> "The object of this Agreement is to provide security for Apache's indemnity in favour of EEPUK (and others) in the SPA in relation to MNSL's Licence Interest Share of the costs of Decommissioning of the Field. Apache hereby agrees to provide security as aforesaid in accordance with the terms of this Agreement."

39. Pursuant to Clauses 4.1 and 4.2 of the BDSA, Apache agreed to provide security 'in respect of MNSL's License Interest Share of the costs of Decommissioning of the Field'. That security is to 'satisfy in full the obligation on Apache to provide to EEPUK an Ultimate Parent Guarantee under the SPA but only as it relates to Clause 9.1 of the SPA.'

40. The BDSA contains the following definitions relevant to this part of the dispute:

> "**"Decommissioning"** means the decommissioning and/or dismantling and/or demolition and/or removal and/or disposal of the Field Property or any part thereof including any operations carried out in connection with or in contemplation of the foregoing (including planning, acquiring long-lead items and

> maintenance of the Field Property following cessation of production but pending the commencement of decommissioning operations), together with any necessary site reinstatement all as may be required under:
>
> (a) Legislation (including without limitation any Statutory Decommissioning Programme in respect of Field Property); …
>
> **"Field"** means the field commonly known as the [Buckland / Nevis] Field lying within the area of the Licence and operated (or previously operated) under the JOA.
>
> **"Field Property"** means property owned, leased or otherwise provided by the Licensees jointly pursuant to the JOA or, where there is no longer a JOA in force, property owned, leased or otherwise provided by the remaining Licensee which pertains to the Field, and any new field facilities including wells, platforms, structures, equipment and pipelines, which pertain to the Field and which result from operations after the date of execution of this Agreement, provided that Field Property shall exclude such new field facilities unless EEPUK or its Affiliates can be required to submit or carry out an abandonment programme in relation to such new field facilities under the terms of the Petroleum Act 1998 …"

41. Apache contends that neither EEPUK nor ABIL (formerly MNSL) fall within s.30(1) of the Act in relation to the Additional Wells, which were drilled after EEPUK divested itself of ABIL, by selling it to Apache. On this basis, it is said, the obligation under s.34 of the Act cannot be engaged.

42. EEPUK has sought to engage with OPRED, on the basis that if OPRED was prepared to accept that the s.29 notices issued before EEPUK sold MNSL to Apache did not apply to the Additional Wells, EEPUK would accept that Apache did not need to provide security for their decommissioning. Mr Whatling refers to discussions with OPRED in his statement. He says OPRED indicated to him that it was of the view that EEPUK could be liable under s.34 for the Additional Wells.

43. EEPUK therefore submits that it is entitled to security for the potential costs of Decommissioning the Additional Wells. EEPUK contends that it has a potential liability under s.34(1)(b) in relation to the Additional Wells.

G. The Additional Wells: submissions of the parties

44. EEPUK submits as follows:

a. Prior to the Effective Date of the SPA, MNSL was issued with s.29 notices covering the Nevis and Buckland Fields.
b. The fact that the Additional Wells were drilled after those notices were issued is immaterial as the notices are wide enough to include any and all installations identified in the relevant fields at the time when an abandonment programme is submitted.

c. There is nothing in s.29 itself which limits the ambit of a s.29 notice to those offshore installations and submarine pipelines which are in existence at the time when the notice is served.

d. At the time of the relevant s.29 notices, although EEPUK did not come within s.30(1)(a)-(d) of the Act, it was caught by s.30(1)(e) as it was a body corporate "associated with a body corporate" which comes within s.30(1)(a) to (d).

e. Under s.34(1)(b) the Secretary of State could now propose that EEPUK should carry out any programme which has been submitted to and approved by him in respect of the work identified in those notices, which includes the Additional Wells.

f. Thus, unless Apache can show that the Additional Wells fall outside the powers of the Secretary of State, Apache is obliged to provide security to protect EEPUK from the possibility of being required to incur decommissioning costs in respect thereof.

45. Apache submits that the security should not be required to cover the cost of decommissioning the Additional Wells:

a. EEPUK does not in fact contend that it can be required to carry out an abandonment programme in relation to the Additional Wells under the terms of the Act (and accordingly that the Additional Wells do fall within the definition of Field Property within the BDSAs). On the contrary, its case is a negative: that it does not accept that it is not liable for such works.

b. No one has suggested that the Secretary of State intends to require EEPUK to decommission the Additional Wells and EEPUK has not tried to prove that. Its case is essentially a non-admission which is insufficient as a basis for requiring the provision of security.

c. The central issue is whether the Additional Wells fall within the definition of "Field Property" in Clause 1.1 of the BDSAs. If they do not (as Apache contends), then it is common ground that account did not need to be taken of them.

d. Whether or not the Additional Wells fall within the definition of "Field Property" depends on whether EEPUK or its Affiliates can be required to submit or carry out an abandonment programme in relation to such new field facilities under the terms of the Act.

e. On a proper construction of the relevant provisions of the Act, EEPUK cannot be required to carry out an abandonment programme in relation to the Additional Wells under the terms of the Act.

f. Each of the Additional Wells (which were "offshore installations" for the purposes of the Act) were drilled for the first time after the ownership of ABIL passed to Apache under the SPA. It follows that a s.29 notice cannot logically have been given in relation to the Additional Wells at a time at which EEPUK

fell within s.30(1)(e) of the Act, and EEPUK cannot therefore be required to carry out an abandonment programme under s.34 of the Act. In particular, a s.29 notice can only be given in relation to an offshore installation that actually exists.

g. Thus the s.29 notices did not relate to the Additional Wells, which did not exist at the time. It follows that the Secretary of State cannot impose a duty on EEPUK to carry out an abandonment programme in relation to the additional wells under s.34 of the Act, and that the Additional Wells do not fall under the definition of "Field Property" for the purposes of the BDSAs.

h. The above conclusion is consistent with the obvious purpose of the statutory provisions set out above. That purpose is to ensure that parties who have derived a financial benefit from an offshore installation should also be responsible for its decommissioning.

H. The Additional Wells: discussion

46. The obligation to provide security under Clause 2.1 of the BDSAs arises in relation to Apache's obligation to indemnify EEPUK. That obligation is contained within Clause 9.1 of the SPA. The indemnity obligation under Clause 9 involves cross-referring to the definition of Field Property in the BDSAs. That definition is wide enough to cover field facilities including wells even if they have been constructed after the SPA, so long as the Secretary of State has power to require their decommissioning by EEPUK under the terms of the Act.

47. The powers of the Secretary of State appear from the Act. It is not suggested that a new notice could now be served for which EEPUK could be liable. EEPUK's concern is that the Secretary of State may contend that one or more of the pre-existing s.29 notices was wide enough to give rise to an obligation in relation to the Additional Wells, and that the Additional Wells will be regarded as falling within the pre-existing s29 notices.

48. S.29 entitles the Secretary of State to serve a notice in connection with the abandonment of an offshore installation.

49. It is accepted that EEPUK was at the relevant time a body corporate within the terms of s30(1)(e) of the Act.

50. Where the Secretary of State has approved a programme under s.29, if the programme relates to an offshore installation, he can impose the duty on a person who was or is within s30(1)(e) in relation to the installation.

51. The question whether the existing s.29 notices could be construed as applicable to the Additional Wells depends on what is meant by "offshore installation". "Offshore installation" is defined by s.44(1) as "any installation which is or has been maintained or is intended to be established for the carrying on of any activity" falling within s.44(2) and (3). Those activities are by s.44(3) the exploitation or the exploration with a view to exploitation, of mineral resources in or under the shore or bed of relevant waters. By s.44(2) that activity must be carried on from, by means of or on an installation which is maintained in the water, or on the foreshore or other land intermittently covered with water, and is not connected with dry land by a permanent structure providing access at

all times and for all purposes. By s.44(5) "installation" includes any floating structure or device maintained on a station by whatever means.

52. EEPUK contended that it was possible to treat an entire field or sub-field such as the Beryl A Field or the Nevis Field, or the Buckland Field, as an "offshore installation". I do not accept this: this seems a much broader interpretation of "offshore installation" than is justified by the definitions. In my view the reference to "offshore installation", particularly given that the definition is said to include floating structure or devices maintained on a station, would naturally refer to equipment or structures within the field or sub-field such as a rig, rather than the entire field. The field is not naturally an expression suitable to be an "offshore installation" and that is supported by the references to floating structures and devices in s44(5) and "an activity carried on from, by means of or on an installation which is maintained in the water" under s44(2).

53. Alternatively, EEPUK contended that the Beryl A platform could be treated as the offshore installation, and it was argued that the s.29 notice of 29 May 2000 was therefore wide enough to bring Additional Wells within its scope. But I do not see how Additional Wells constructed many years later could fall within the Subsea Installation identified in that notice.

54. I was referred to OPRED Guidance issued in 2018:

> "In circumstances where a section 29 notice is not withdrawn from a party that has disposed of its interest (see below) they would not be liable for any new installations or pipelines emplaced in the field. In these cases OPRED will prepare a separate section 29 notice referencing the new installations and the relevant parties. However, the exiting party would be liable for any new equipment added to an installation already covered by their existing notice."

This does not seem to me to take the matter any further.

55. In the light of that conclusion, it is relevant that s44(1) limits the powers in relation to offshore installations to an installation which is or has been maintained or is intended to be established. Thus the Secretary of State would only have power to apply one of the s29 notices to the Additional Wells if at the time of the relevant notice those wells were being maintained or were "intended to be established". However, the s29 notices predated by many years the construction of the Additional Wells.

56. If, however, any of the Additional Wells were "intended to be established" (see s44(1)) at the time of the s29 notices, that is, in contemplation, they could potentially be the subject of one of the s29 notices. There was a debate before me as to where the burden of proof lay here. Apache said it was for EEPUK to prove that the Secretary of State had the relevant power under the Act and that it was for EEPUK to show that the Additional Wells were "intended to be established" at the time of the s29 notices. EEPUK said that Apache had the relevant documents and it was for it to show that the Additional Wells were not "intended to be established." However, this seems something of an arcane dispute. The relevant s29 notices are dated between 2000 and 2005, long before the SPA. No one has ever suggested that there was an intention at the time of the notices to construct any of the Additional Wells, which were only built many years

thereafter. I take the view that there is no possible reason to think that the Additional Wells could fall within the s29 notices on the basis that they fell within "intended to be established."

57. The views expressed by OPRED are not in any sense determinative. However, it is not possible to reach any conclusion as to OPRED's views on the Additional Wells as OPRED would not be committed either way in discussions. But ultimately this is a question of construction of the Act and OPRED's views would not be determinative.

I. Conclusions

58. In summary:

    a. The amount of security required in the events which have occurred is to be determined with reference to the 2021 Proposed Plan in accordance with the scheme in BDSAs Clauses 3-5 and not the (purported) 2020 Plan.

    b. The security is not required to include provision in relation to the Additional Wells.

59. In the light of these conclusions, it is unnecessary to rule on other issues raised before me. I will grant declarations in accordance with these conclusions. It should be possible for counsel to agree them, but if not, I will rule on the precise wording.