



[2021] UKFTT 145 (TC)

TC08114

CORPORATION TAX – restriction on deductions for “relevant assets” – whether vessel was excluded on basis that reasonable to suppose that its use to provide accommodation for offshore workers was unlikely to be more than incidental to other uses to which the vessel was likely to be put – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

**Appeal number: TC/2018/04148
TC/2019/09437**

BETWEEN

DOLPHIN DRILLING LIMITED

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY’S REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE JEANETTE ZAMAN
DUNCAN MCBRIDE**

The hearing took place on 21 to 23 September 2020. With the consent of the parties, the form of the hearing was a remote video hearing on the Tribunal video platform. A face to face hearing was not held because of the ongoing restrictions arising from the COVID pandemic. The Tribunal was provided with an e-bundle, the contents of which are outlined in the Decision Notice, as well as an additional table compiled by Mr McNall from the information in that bundle.

The hearing was in public, and was attended by those instructing counsel, observers from Ernst & Young and transcribers.

Nicola Shaw QC, counsel, instructed by Ernst & Young, for the Appellant

Christopher McNall, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. Dolphin Drilling Ltd (“DDL”) provided vessels by way of bareboat charter to operators in the oil and gas industry. DDL had chartered the Borgsten Dolphin (“the Borgsten”) – which was initially a drilling rig but was converted into a tender support vessel (“TSV”) as described further below – from Borgsten Dolphin Pte Ltd (“BDPL”) to fulfil a contract with an operator in connection with drilling activities at the Dunbar oil platform (“the Dunbar”). The operator in question is Total E&P (UK) Limited (“Total”), and the contract which was negotiated between DDL and Total is the Total Contract (described further below).

2. HMRC concluded that the amount of the deduction claimed by DDL for the years ended 31 December 2014 and 31 December 2015 in respect of amounts paid for the hire of the Borgsten should be restricted on the basis that the Borgsten was a “relevant asset” within the meaning of Part 8ZA of the Corporation Tax Act 2010 (“CTA 2010”), this being legislation which applied with effect from 1 April 2014.

3. HMRC issued closure notices:

(1) on 15 January 2018 - HMRC amended DDL’s tax return for the year ended 31 December 2014 so as to increase its taxable profits by \$21,909,895 giving rise to an additional liability to corporation tax of £3,034,129. The quantum of the amendment was subsequently increased to £4,039,309.26; and

(2) on 21 October 2019 - HMRC amended DDL’s tax return for the year ended 31 December 2015 so as to increase its taxable profits by \$20,340,976 giving rise to an additional liability to corporation tax of £2,691,385.73.

4. DDL appealed against those closure notices and the amendments made to its corporation tax computations on the basis that the Borgsten was not a relevant asset (although the quantum of the amendments made is not in issue).

PRELIMINARY ISSUE

5. The appeal was listed to be heard by Judge Zaman and Mr McBride. DDL was represented by Ernst & Young LLP, who had instructed Ms Shaw.

6. At the beginning of the hearing Judge Zaman drew the parties’ attention to the fact that Mr McBride had been a partner at Ernst & Young LLP until 2004. He had not had any prior involvement with DDL or the Dolphin Drilling ASA group. The overlap was between Mr McBride’s former career and DDL’s adviser. Judge Zaman invited Mr McNall and Ms Shaw to make representations as to any concerns their clients might have about appearances of conflict or bias. Both counsel confirmed that their clients had no objection to Mr McBride hearing this appeal.

7. Judge Zaman was satisfied that there was no conflict or bias in Mr McBride being part of the panel to hear this appeal and the hearing proceeded to be heard by Judge Zaman and Mr McBride.

RELEVANT LEGISLATION

8. Part 8ZA of the CTA 2010 was inserted by Finance Act 2014 with effect from 1 April 2014. It establishes the corporation tax treatment of “oil contractor activities” and the legislation operates by ring-fencing the profits from “oil contractor activities” and restricting, inter alia, the deduction of rental payments on “relevant assets”.

9. “Oil contractor activities” consist of the provision of a “relevant offshore service” (s356L(2)). A “relevant offshore activity” is defined as the provision, operation or use of a

“relevant asset” in connection with the exploration or exploitation of the seabed and subsoil and their natural resources in the territorial sea of the UK (s356L(3)-(5)).

10. Section 356LA defines the term “relevant asset”. It provides as follows:

“(1) In this Part “relevant asset” means an asset within subsection (2) in respect of which conditions A and B are met.

(2) An asset is within this subsection if it is a structure that—

(a) can be moved from place to place (whether or not under its own power) without major dismantling or modification, and

(b) can be used to—

(i) drill for the purposes of searching for, or extracting, oil, or

(ii) provide accommodation for individuals who work on or from another structure used in a relevant offshore area for, or in connection with, exploration or exploitation activities (“offshore workers”).

(3) But an asset is not within subsection (2)(b)(ii) if it is reasonable to suppose that its use to provide accommodation for offshore workers is unlikely to be more than incidental to another use, or other uses, to which the asset is likely to be put.

(4) In subsection (2)—

...

“structure” includes a ship or other vessel.

(5) Condition A is that the asset, or any part of the asset, is leased (whether by the contractor or not) from an associated person other than the contractor.

(6) Condition B is that the asset is of the requisite value.

(7) The asset is of the “requisite value” if its market value is £2,000,000 or more.”

EVIDENCE

11. The hearing bundle which had been prepared comprised 16 pdf files (albeit that one of these consisted solely of a master index of the papers before us).

12. We heard oral evidence from the following witnesses for DDL, each of whom were cross-examined and answered questions from the Tribunal. For each we have set out their roles within the group during the relevant time:

(1) Ivar Brandvold – CEO of Dolphin Drilling ASA, director and the chairman of DDL from October 2009 until summer 2019 and director of BDPL. Mr Brandvold had sworn witness statements dated 29 May 2019 and 9 June 2020;

(2) Iain Mitchell — director of DDL and Senior Vice President of Marketing of that company. His role had involved marketing vessels and negotiating their terms of use by third party operators – he was part of the team which had conducted negotiations for the use of the Borgsten by Total. Mr Mitchell had sworn witness statements dated 31 May 2019 and 9 June 2020; and

(3) Andrew Thain – he was an employee of DDL and the rig manager of the Borgsten, working primarily onshore albeit that his role required regular offshore visits to the vessel (from 2013). His main duties as rig manager were responsibility for the overall safety of the vessel, ensuring compliance with legislative and marine standards, crewing and staffing, ensuring all plant and machinery were functional, maintenance of all areas and

equipment on the vessel, managing the vessel and project budgets, liaison and communication with the operator and ensuring the efficient supply of all goods and consumables required on board. He had sworn witness statements dated 30 May 2019 and 22 June 2020.

13. Mr McNall criticised the evidence of Mr Brandvold and Mr Mitchell on the basis that they had not been able to answer some of his questions in relation to the use of the accommodation on the Borgsten – they had both stated on several occasions that (in the case of Mr Brandvold) such questions should be addressed to Mr Mitchell and/or Mr Thain and (in the case of Mr Mitchell) they should be addressed to Mr Thain.

14. The Tribunal considered the scope of the matters addressed by the witness statements of the three witnesses and noted:

(1) Mr Brandvold's witness statement explained the organisation of the Dolphin Drilling ASA group, leasing activities within the group, the offshore vessels market and the role of TSVs, the status of the Borgsten and the commercial decision to convert it from a drilling rig to a TSV; and

(2) Mr Mitchell's witness statement explained the Total Contract, tendering process and requirements for accommodation vessels such as the Borgholm, change orders which were agreed in relation to the Total Contract, and the early termination of the Total Contract and scrapping of the Borgsten.

15. Thus neither Mr Brandvold nor Mr Mitchell had addressed matters relating to the day-to-day operations of the Borgsten during the Total Contract or the use of the accommodation on board the Borgsten whilst it was alongside the Dunbar. By way of contrast, Mr Thain's witness statements addressed his role as rig manager of the Borgsten, description of the TSV and tender assisted drilling services, importance of stability for a TSV, the mud system, the cement system, the compressed air system, the pipe rack and deck storage, welding and machine shops, storage, water system, wharf function, office and conference room facilities, blow out protection, heliport, leisure facilities and accommodation, and the operational delays which occurred. His second witness statement addressed the activities onboard the Borgsten prior to the drilling commencing on the Dunbar, activities after drilling commenced, information about personnel onboard the Borgsten and the hire fees paid from 1 October 2015.

16. Given the matters addressed by each of the witness statements, we do not criticise Mr Brandvold or Mr Mitchell or draw any adverse inferences from their referral of certain questions to other witnesses, in particular to Mr Thain.

17. We found all three witnesses to be credible. Subject to two caveats, we accept their evidence. The caveats are:

(1) all three witnesses stated that the provision of accommodation onboard the Borgsten to offshore workers was incidental to the Borgsten's primary purpose (or main or ultimate purpose). That is the question for the Tribunal to determine, although we have had regard to the matters which they said supported or illustrated this conclusion; and

(2) during cross-examination and re-examination Mr Thain was asked various questions around the numbers of personnel onboard the Borgsten and the Dunbar. He was clear that some of his answers were estimates of what he would expect to be the position based on information available to him and his experience – he did not purport to know the actual numbers. We accept that these answers were given honestly and assess them further in the Discussion.

18. In reaching our decision we have considered all of the submissions and evidence to which we were referred. We have not, however, considered it necessarily to refer to all of these submissions or the evidence in this decision notice; this does not mean that we have not taken it into account.

FINDINGS OF FACT

19. We make the following findings of fact based on the documentary evidence before us and the evidence from DDL's three witnesses of fact. Further findings of fact are contained in the Discussion.

20. DDL is a UK registered company and was a majority-owned indirect subsidiary of Dolphin Drilling ASA (which is a company registered in Norway whose shares are listed on the Oslo stock exchange).

21. DDL is a bareboat charterer and contractor of offshore drilling rigs and other vessels used for various types of support to operators in the oil and gas industry (i.e. operating oil companies) ("Operators"). The Dolphin Drilling ASA group owns a floating rig fleet comprising a number of different types of offshore vessels used in exploration and production activities within the oil and gas industry, including the Borgsten. The life cycle of a field from grant of licence through to exploration, exploitation and decommissioning requires a variety of specialised and capital-intensive assets. These are generally owned and operated by service providers as it is uneconomical for Operators to invest in and own these assets itself – they lease them from service providers such as DDL at the point in the field cycle when they are required.

22. BDPL is a Singapore registered company and was a wholly-owned subsidiary of Dolphin International AS which was, in turn, a wholly-owned subsidiary of Dolphin Drilling ASA. BDPL is an associated person of DDL for the purposes of s356LA. BDPL owned the Borgsten. The Borgsten had been a drilling rig, but was converted into a TSV in order to fulfil the Total Contract.

TSVs and TAD services

23. A TSV is designed to provide essential operational support services known as tender assisted drilling ("TAD") services to a minimum facility drilling platform, without which the platform's drilling operations could not be performed. Minimum facility drilling platforms only have parts of the drilling capability on board so they need the additional support of TAD services. They have the drilling derrick/drill floor with all required operational functionality but they lack significant facilities which are essential for active drilling operations.

24. A TSV cannot drill in its own right and can only support drilling activities by another vessel or platform – the TSV is moored alongside such a platform and connected via a gangway and an assortment of hoses. When connected, a TSV and the platform would effectively be an integrated unit during the drilling campaign.

25. There are only 26 TSVs in operation globally (of which there are two types, one type being semi-submersible TSVs like the Borgsten became) and there are only two minimum facility drilling platforms in the UK continental shelf designed to require TAD services to be provided by semi-submersible TSVs, one of which is the Dunbar (the platform operated by Total).

26. TAD services consist of the provision of a stable base from which to deliver a range of drilling support services, including:

- (1) the uninterrupted supply of what is referred to as "mud", water, compressed air and cement to the platform. "Mud" is a man-made compound used in drilling activities. It

is a mixture of oils and chemicals which come in both liquid and solid form and it is used to carry rock cuttings to the surface and to lubricate and cool the drill bit;

(2) the provision of facilities, such as warehousing, storage (eg for oils and chemicals, mixed mud, water and cement), workshops providing welding and machine facilities, deck storage for tubing and pipes, stores for spare parts such as cables, hoses, tools and other items, wharf functions, lab space, office and conferencing facilities for the TSV crew as well as personnel of the Operator working on board the TSV and blow out protection to seal the platform well in the case of a catastrophic event; and

(3) functions such as a heliport to enable personnel to arrive from and depart to the mainland and other offshore installations and living space including leisure, hospital, galley, mess and sleeping accommodation.

Total's request for TSV support for the Dunbar

27. In August 2010 Total released a request for engineering support in relation to the Dunbar field development. That document stated in its introduction:

“Total operates the Dunbar platform in the UK sector of the North Sea. The drilling package has not drilled for a number of years with the major drilling equipment being partially removed, preserved and stored onshore. The client has indicated that they have a three year drilling campaign commencing in 2012 and require the Matthew Hall tender documents for the Telescopic Gangway to be updated to current standards and regulation for inclusion in their ITT.”

28. In May 2011 Mr Mitchell was contacted by KCA Deutag (“KCAD”), who were the incumbent drilling contractor for Total on the Dunbar platform to tell him about a tender process which Total were about to initiate to reinstate drilling at that platform. It was anticipated that the tender would consist of two parts – TSV drilling services and drilling package reinstatement services. DDL was approached by KCAD (as, Mr Mitchell understood, were other rig providers) with a view to providing the TSV drilling services. KCAD would be tendering for the drilling package reinstatement services.

29. In June 2011, DDL received an invitation to tender (“ITT”) from Total for what was described as the Dunbar Drilling Package Reinstatement Services (“DDP Reinstatement Services”) and TSV Drilling Services with a view to it recommencing drilling activities at the Dunbar in 2012. The ITT states that the Dunbar was designed originally as tender assist, therefore Total required the use of a TSV to become fully operational for drilling, stating “the tender [vessel] supplies mud storage and pumping, cement storage and pumping, utilities and accommodation”. The Introduction to the ITT states that to perform the required services two contracts will be awarded to one single contractor. The ITT included specimen contracts – Contract A for TSV Drilling Services and contract B for the DDP Reinstatement Services.

30. At the time of receiving the ITT, the Dolphin Drilling ASA group did not have a suitable vessel to deliver the requirements described in the ITT. However, the group identified that the Borgsten, which had originally been built as a semi-submersible drilling rig in 1975 and was at the end of its useful life as a drilling rig, could be converted into a TSV with the specifications required. After carrying out a commercial appraisal of the costs of converting the Borgsten into a TSV, DDL tendered for the TSV Drilling Services.

31. DDL's tender quoted a base rate of \$210,000 per day for the provision of the Borgsten and TAD services. The expected contract period was 1215 days of which 1095 were expected to be fully operational (i.e. when the Dunbar's drilling operations would be underway) and a pre-drilling phase of 120 days.

32. After submission of the tender there were several months of negotiations between the parties. They were focused on issues such as the daily rate, the five-year class renewal survey and various contractual issues including parent company guarantees and limitation of liability caps.

33. On 10 November 2011 DDL was awarded the contract to supply TAD services to the Dunbar (the “Letter of Award”). The base rate was set at \$202,000 per day, assuming a start date in 2012. There was scope for a price increase after 1 August 2012 based on an industry formula. As the hire did not start until 1 February 2013, the base rate at commencement of the Total Contract had increased according to that formula to \$203,433.

34. Between the dates of the Letter of Award and signing of the Total Contract, DDL agreed to undertake the five-year class renewal survey for the vessel, at a cost of around \$30 million (although the Total Contract provided that Total would make a payment of \$25 million towards this cost). This would be undertaken in parallel to the conversion project. All vessels have to go through periodic surveys to confirm they comply with relevant regulations and industry standards. The Borgsten’s renewal survey was not required to be undertaken for a further three years, but Total were keen to have the survey advanced because it would ensure that the Borgsten could be on station throughout the planned drilling programme.

35. The final contract for the provision of TSV Drilling Services between DDL and Total was signed on 1 February 2012, with an effective date of 10 November 2011 – and this is what we refer to as the Total Contract. (KCAD was awarded the contract for the supply of DDP Reinstatement Services, but we did not have any further information in respect of that contract, save for the specimen version which had been included with the ITT.) The Total Contract stated that the commencement date for the provision of the services would be between 1 October 2012 and 31 December 2012.

36. After the contract had been signed, various change orders were entered into by the parties.

The Borgsten

37. DDL leased the Borgsten from BDPL on a bareboat charter basis. DDL paid a charter fee of \$107,033 per day to BDPL until 1 October 2015 when, following the oil price crash, the fee was reduced to \$82,189 per day.

38. The Borgsten is 108.2m long and 67.36m wide. It has two decks, each the approximate size of the football pitch at Wembley. The significant majority of the space on board the Borgsten was used for the provision of TAD services. At the time of the ITT it had capacity to accommodate 102 personnel on board. DDL did not plan to change this number of berths.

39. Substantial works were required in order to convert the Borgsten into a TSV – including removal of derrick drilling equipment, removal of subsea equipment, installation of a gangway (for personnel transfer and mud lines, water lines and compressed air), upgrade of the mud system, upgrade of seawater and freshwater capacity, relocation of the lifeboats, and upgrade of the fire-fighting system. The original accommodation was to be retained.

40. The Borgsten’s crew (ie DDL’s employees and sub-contractors who would be working on the Borgsten – we refer to these as DDL Personnel) would be around 55 personnel. There were thus expected to be around 47 surplus berths on board.

The Borgsten and the Dunbar in operation

41. During a drilling campaign there will be personnel working on the platform and the TSV. Some may work on both, some only on one. Everyone requires accommodation – this may be on either the platform or the TSV.

42. Whilst the crew of the Borgsten, the DDL Personnel, were expected to be accommodated on the Borgsten, the Operator would be expected to decide where to accommodate other personnel – both the Operator’s personnel working on the Borgsten and those working on the platform. The Dunbar could accommodate 60 personnel.

43. This flexibility only existed during drilling operations, as this was the only period during which the TSV was alongside and connected to the platform. Once drilling ceased and the platform only carried out production activities (which the Dunbar was capable of doing without support from another vessel) then all those working on the platform needed to be accommodated on the Dunbar.

44. The commencement date under the Total Contract was 1 February 2013 and the Borgsten moved into position alongside the Dunbar in February 2013. Although originally expected to last 120 days, the pre-drilling phase was extended until 3 April 2015 as the upgrade works on the Dunbar took longer than anticipated to complete.

45. The Borgsten was operational and fully crewed throughout the pre-drilling phase. Once the Borgsten was in position, it was connected to the Dunbar and kept in a constant state of readiness. Its functions included:

- (1) running the mud systems on a closed loop,
- (2) supplying water and compressed air, and
- (3) providing warehousing, heliport, welding and machine shop, deck storage, cranes, wharf, office and accommodation facilities.

46. There was little difference between the day-to-day activities on board the Borgsten during the pre-drilling phase and the fully operational phase. The main differences were:

- (1) the Borgsten crew who would have seen the most change in their daily duties were the drilling team (responsible for the mudding system) and the roughneck team (responsible for general labour);
- (2) the mud system – this was running water on a closed loop during the pre-drilling phase and then, once drilling operations commenced, started producing mud and flowing it to and from the Dunbar; and
- (3) the type of personnel engaged by Total and its third party contractors and their roles.

Market changes and early termination

47. In 2015 poor market conditions and low oil and gas prices resulted in Total requesting a reduction in the base rate from \$203,433 to \$164,000 per day, with effect from 1 October 2015.

48. Continued difficulties in the oil market meant that Total triggered their early termination rights and the Total Contract came to an end in October 2016.

49. Following the termination of the Total Contract, and in the absence of any alternative need for a TSV in the UK continental shelf or elsewhere, the Borgsten was scrapped in 2017.

DISCUSSION

50. It was common ground that:

- (1) unless the Borgsten was within the exception in s356LA(3) it would be a relevant asset as defined on the basis that it can be used to provide accommodation for offshore workers (within s356LA(2)(b)(ii)); and

(2) during the relevant accounting periods the Borgsten could not be used to drill for the purpose of searching for or extracting oil (within s356LA(2)(b)(i)).

51. The question for determination in respect of each accounting period under appeal is thus whether the Borgsten is excluded from falling within s356LA(2)(b)(ii) because “it is reasonable to suppose that its use to provide accommodation for offshore workers is unlikely to be more than incidental to another use, or other uses, to which [it] is likely to be put” (s356LA(3)).

52. We remind ourselves that it is for DDL to establish, on the balance of probabilities, that the Borgsten is within this exception. If we are not so satisfied then HMRC’s assessments stand good.

53. The use which we need to assess is the use of the Borgsten to provide accommodation for “offshore workers”, as that term is defined for this purpose. Section 356LA(2)(b)(ii) provides that offshore workers are individuals who work on or from another structure – in this case, the Dunbar. We have already referred to the fact that the Borgsten has its own crew, who are either DDL employees or sub-contractors (including, for this purpose, employees of the sub-contractors). We refer to these personnel as “DDL Personnel” – none of these were offshore workers as they were sleeping and working on the Borgsten. There were also personnel provided by Total, whether they were Total’s employees or its sub-contractors (or employees of the sub-contractors). We refer to these personnel as “Total Personnel”. This terminology refers to the employer/contractor of the individuals concerned. It does not describe where they were working. Individuals within the category of Total Personnel could work solely on the Borgsten, solely on the Dunbar, or on both. Only those Total Personnel who work on or from the Dunbar could be offshore workers.

54. For DDL, Ms Shaw emphasised:

(1) The exception does not enquire as to actual use, it asks what it is reasonable to suppose the use is likely to be (whereas, she submits, HMRC focus – wrongly - on the actual use).

(2) It is necessary to consider whether the Borgsten is likely to be used to provide accommodation for offshore workers, not accommodation generally. It is thus irrelevant whether the Borgsten is likely to provide accommodation to its own crew or to Total Personnel who are working on the Borgsten. HMRC had failed to recognise this distinction, and proceeded on the false premise that any accommodation is enough to take the vessel outside of the exception.

(3) The term “incidental” means minor or subordinate, and the correct approach is to assess whether the use of the Borgsten to provide accommodation to offshore workers is minor to other uses (to provide TAD services, accommodation for the Borgsten crew or accommodation for Total Personnel who were working on the Borgsten).

(4) A qualitative approach should be taken, looking at the substance of the services to be provided.

55. For HMRC, Mr McNall emphasised that, it being agreed that the burden is on DDL to establish that it is within the exception and advance the evidence which gets them there, these are facts within the knowledge of DDL. He submitted that the evidence which was relevant was who was sleeping on the Borgsten and where these individuals were working. He submitted that:

(1) The application of the exception is not an abstract question. The evidence was that a large majority of the Total Personnel sleeping on the Borgsten were working on the Dunbar.

(2) The legislation does not impose a main purpose test - HMRC accept that the Borgsten has a composite purpose - or ask whether the provision of accommodation to offshore workers was expected to be profitable.

(3) There is a pattern to the evidence, demonstrating that when the Total Contract was being agreed DDL was aware that the accommodation was important to Total – this can be seen from the references to the “accommodation rate” or “flotel mode”, DDL’s emphasis of its experience with the Borgholm (an accommodation vessel) in the pitch, and the communications around the stock exchange announcement.

56. Mr McNall submitted that the use of the Borgsten to provide accommodation cannot be incidental – the accommodation involved a physically significant part of the vessel, the additional accommodation requested by Total cost millions and involved management time for DDL, the use of the accommodation cost Total around \$150,000 per month and there were Total Personnel sleeping overnight on the Borgsten who would then cross the gangway to work on the Dunbar. This pattern of sleeping and working continued throughout the time in which the Borgsten was alongside the Dunbar.

57. We note at this stage that Mr McNall submitted that we cannot make any findings of fact about the personnel on the Dunbar, as there was no evidence from either Total or KCAD. We disagree with such a proposition expressed in those absolute terms. We are a fact-finding Tribunal and make findings of fact based on the evidence before us, including documentary evidence and evidence from witnesses. We are able to draw inferences from that evidence where we are satisfied of a matter to the relevant standard, namely the balance of probabilities.

58. We keep these submissions in mind and the evidence before us in relation to our assessment of:

- (1) the different types of offshore vessels, the capacity of the Borgsten to provide accommodation and practical arrangements which were made in relation thereto;
- (2) the arrangements with Total, namely the requirements of the ITT, the Total Contract (including evidence surrounding relevant negotiations) and the change orders;
- (3) the actual use of the accommodation on the Borgsten by Total Personnel, including evidence relating to whether these individuals were offshore workers;
- (4) the approach to be taken to interpretation of the statutory provisions in light of HMRC’s technical notes and the record of the parliamentary debates at the time the provisions were introduced; and
- (5) the terms of the exception, and our assessment of its application to the facts as we find them.

Accommodation on different types of offshore vessels and the Borgsten

59. We had before us a presentation on offshore vessels dated March 2019. This document, which was appended to Mr Brandvold’s witness statement, had been prepared after the accounting periods in issue (and after the Borgsten had been scrapped). It showed different categories of offshore vessels, including (with a view to contrasting them) TSVs and accommodation vessels.

60. It was common ground that the Borgsten was converted from a drilling rig into a TSV. It had mud processing equipment and cementing equipment as well as living quarters whereas an accommodation vessel would only have accommodation units (as well as a heliport and crane). The sole purpose or function of the latter type of vessel is to be used as a mobile offshore hotel – hence the nickname “flotel”.

61. The March 2019 presentation set out information in relation to the accommodation capacity of the Borgsten and other TSVs as well as accommodation vessels (including not only those which had been available in 2012 but also those which have come into service since). The information contained therein was based on that publicly available, and Mr McNall drew attention to the difficulties (and resultant inaccuracies) in setting out accurate averages given that data was not available for all vessels.

62. DDL sought to distinguish between TSVs and accommodation vessels on various grounds:

(1) Where the provision of accommodation to offshore workers is the primary function or purpose of the contract, an accommodation vessel is engaged because it has greater accommodation capacity and/or offers a more cost-effective option for an Operator in need of additional accommodation. (The Dolphin Drilling ASA group has a flotel called the Dolphin Borgholm (the “Borgholm”).) We accept that where an Operator does not need TAD services it is likely to charter an accommodation vessel. We did note that some of the accommodation vessels listed had more than 600 beds, whereas a couple of older vessels had 150 or 159 beds, so there is clearly a wide range in capacities.

(2) Where accommodation is the main or one of the main intended uses for a vessel, this is reflected in the tender process and contractual terms. Mr Mitchell’s evidence set out an explanation of the differences between a contract for the provision of TSV services and a contract for the provision of accommodation, appending a contract for the hire of the Borgholm by way of illustration. His evidence was that in a contract for accommodation, where the contract is solely or primarily concerned with the provision of accommodation:

(a) the contract is clearly marked as such;

(b) technical requirements for the accommodation are provided in detail and captured in the contract, generally in the scope of work. Cabin standards are specified. This includes details of services which are directly related to the provision of accommodation, including catering, cleaning, recreation, storage, medical and communication systems;

(c) there is limited reference to the vessel’s specifications;

(d) the charge per berth will usually be higher, eg on the Borgholm which has 274 berths, the charter rate at the time was \$242,000 per day, which equates to \$883 per berth per day; and

(e) there is a more extensive description of the accommodation and catering.

We accept this explanation of the differences, and agree that the Total Contract does not fit this description of a contract for the provision of accommodation by the hire of an accommodation vessel.

(3) The crew requirements for an accommodation vessel are very different from those of a TSV because such a vessel does not need drilling support personnel. An accommodation vessel will generally have a handyman and gangway controllers. In contrast to an accommodation vessel, the Borgsten did not engage an “Accommodation Technician” – Mr Thain’s evidence was that on the Borgsten, the catering and housekeeping functions were sub-contracted because the Borgsten was not in the business of providing those services; it was in the business of providing TAD services.

We accept this description of the different crew requirements and find that the Borgsten's crew did include those required for providing TAD services. Whilst DDL did sub-contract the provision of services relating to the accommodation to Sodexo (as described below) we do not draw any inferences from this. It was apparent that there was a significant use of sub-contractors in various roles on both the Dunbar and the Borgsten (this could be seen from the POB Logs to which we were referred), many of which roles were fundamental to the reinstatement of drilling on the platform or the drilling itself. The decision to sub-contract does not necessarily imply a lack of importance.

(4) The technical specifications are substantially different, as accommodation vessels do not include any of the equipment used for TAD services. We had the technical specifications of the Borgholm, for the purpose of comparison against those of the Borgsten. We acknowledge that the technical specifications of the Borgsten are twice as long as those of the Borgholm (reflecting the complex technical functions of a TSV compared to an accommodation vessel).

63. The evidence from Mr Brandvold, Mr Mitchell and Mr Thain was that each type of offshore vessel will have berths for the crew that live and work aboard these vessels. Almost all support vessels can be expected to have berths in excess of these requirements, ie surplus berths, and where offshore vessels are then used to support other vessels and/or platforms, it is not unusual for the surplus berths also to be used by crew working on those other vessels or platforms. A TSV can therefore also be used to provide accommodation for offshore workers. We accept this evidence.

64. Sodexo was the service provider for the Borgsten, responsible for catering, laundry, housekeeping, cleaning and the shop. In relation to these arrangements:

(1) We had a copy of the contract between DDL and Supplier Remote Sites Scotland Ltd ("Sodexo") for the provision of catering and housekeeping services on/offshore DDL offices and UK rigs which had been entered into with effect from 1 November 2015. The scope of services was defined briefly, but included preparation of meals seven days a week at fixed times, four meals per day (food served to be healthy, wholesome and nutritious), provide laundry services, maintenance and cleaning of DDL's galley equipment, cleaning of cabins and washrooms, cleaning of common areas. Sodexo had been providing these services to DDL for a number of years.

(2) Sodexo charged according to an agreed scale by reference to the number of persons or personnel on board ("POB"); the rates showed the manning levels for the POB. The 2015 rate sheet we were taken to was cut-off at 80-84 POB. At that level, the charge was £35.36 (and by way of illustration had been £39.95 at 50-54 POB).

(3) Sodexo prepared a welcome leaflet, which was available in each of the cabins, setting out basic information about the lounges, meal times, phones and postal arrangements. This was provided to all personnel on board the Borgsten.

65. There were also "house rules" set out on DDL letterhead, including as to keeping cabins tidy and where food could be taken. From the evidence before us, we infer that these were applicable to all personnel on board the Borgsten.

66. We did not find this exercise of comparing accommodation vessels and TSVs to be particularly helpful for the purpose of considering the application of the exception. It was common ground between the parties that the Borgsten was a TSV which provided TAD services and had accommodation in excess of that which was required for its own crew, whereas vessels also existed which did not provide TAD services but only provided accommodation. The reason why an Operator would hire an accommodation vessel is to

provide accommodation for workers on its drilling rig or other offshore vessel (ie offshore workers). The only other use of such a vessel would be to provide accommodation to its own crew, and it was (correctly in our view) not argued by DDL that the provision of accommodation to offshore workers could be incidental to this other use in such a situation.

Arrangements with Total

67. In considering the arrangements between DDL and Total we refer below to specific parts of the documentary evidence as well as the evidence from DDL's witnesses. We also set out some of the submissions made and our conclusions thereon.

Invitation to Tender

68. It is evident from the face of the ITT that accommodation is one aspect of the services which the successful tenderer is expected to be provided. The introductory section, describing the need for a TSV, states "Briefly, the tender supplies mud storage and pumping, cement storage and pumping, utilities and accommodation."

69. Ms Shaw submitted that in the context of the ITT as a whole this was a minor element and, in any event, there is no reference to this being accommodation for offshore workers. A TSV must provide accommodation for its own crew, and for Total Personnel working on the TSV - so accommodation is always a necessity for a TSV.

Specimen contract A for TSV Drilling Services

70. This was a pro forma contract, prepared by or on behalf of Total, which accompanied the ITT. As is to be expected, it is fairly lengthy, at around 188 pages. Article 1 states that the Contractor, ie DDL, agrees to perform the Services as defined in Appendix 4 Part 1 using the TSV. The Company is Total. The definitions also include the following:

"SERVICES means all activities to be performed by CONTRACTOR under the CONTRACT including those required in Appendix 4 Parts 1 and 3, which include the provision by CONTRACTOR of CONTRACTOR's PERSONNEL and of the TSV specified in Appendices 8 and 9 together with all necessary and/or incidental supplies, base facilities and works as may be inferred therefrom."

71. Article 2 is headed "Performance of the Services" and sets out the obligations of the Contractor, including as to mobilisation of the TSV and the Contractor's personnel, ensuring continuous operation of the site, details regarding drill string standards, drilling fluids, coring and then concludes with:

2.28 Additional services and supplies

For the performance of the SERVICES, CONTRACTOR shall, provide at COMPANY's request additional CONTRACTOR's PERSONNEL, equipment, materials and/or services as may be required...

2.29 Food and accommodation

CONTRACTOR shall provide food and accommodation for all personnel on the TSV under the conditions of Appendix 5."

72. The services are then defined as follows:

APPENDIX 4 - Part 1 - The Services CONTRACTOR shall perform the SERVICES as set out in the CONTRACT.

The performance of the SERVICES includes:

a) Mobilisation/demobilisation of the TSV to/from a LOCATION specified by COMPANY,

- b) Positioning and station keeping or anchoring/de-anchoring the TSV on LOCATION,
- c) Drilling of (a) well(s) as specified by COMPANY including deviation and horizontal drilling, and deepening, multi-branching or side tracking of well(s) which shall be considered as part of the original well,
- d) Re-entries of (a) well(s) for deepening or multi drains drilling as specified by COMPANY,
- e) Testing (DST) and clean up of wells as specified by COMPANY,
- f) Completion of wells as specified by COMPANY, including installation of COMPANY's subsea equipment (this information to be forwarded to CONTRACTOR by COMPANY)
- g) Workover of wells as specified by COMPANY,
- h) Suspension or plug and abandonment of wells as specified by COMPANY,
- i) Other operations required by COMPANY that may be performed by the TSV and DDP within the technical specifications given in Appendix 9 and with the CONTRACTOR's PERSONNEL listed in Appendix 8,
- j) Provide assistance and make the TSV and DDP facilities available to COMPANY's other contractors in performing their services on the TSV and DDP,
- k) Daily reporting of the stocks of COMPANY's items on the WORKSITE, including stocks of liquid mud(s), mud chemicals, cement and additives, bulk material, fuel, lubricants, industrial and potable water.
- l) CONTRACTOR shall have the exclusive control and direction of the management of the TSV and of CONTRACTOR's PERSONNEL subject to COMPANY's right to give instructions, inspections and supervision for the performance of the SERVICES.
- m) CONTRACTOR shall be solely responsible and shall direct, supervise and control
 - The mobilisation and demobilisation of the TSV in time target as specified or required by COMPANY,
 - The anchoring/de-anchoring or Positioning and station keeping of the TSV on LOCATION
 - To keep the TSV level and centred over the well at all times,
 - To preserve at all times the watertight integrity of the TSV and precautionary measures to safeguard the personnel, the well, the TSV and DDP and the environment,
 - To maintain at all times a safe working environment for all personnel on the TSV and DDP,
 - The TSV loading, sea fastening and TSV stability
 - All associated operations related to maintain TSV classification and/or certifications,
 - For the removal and where appropriate the marking or lighting of any wreck and debris of/from RIG and/or equipment, being or not its property.
- n) CONTRACTOR shall co-ordinate all transportation means of moving the TSV between LOCATION.

- o) CONTRACTOR shall provide the services and supplies as indicated and listed in Appendix 4, Part 3.
- p) CONTRACTOR shall provide all equipment and procedures that will allow safe and efficient operations. Equipments like internal riser tools etc
- q)
- r) Handling of drill cuttings on board the TSV and DDP. Accommodation services on board the TSV (Flotel Mode)
- s) All others related services.”

73. Part 2 of Appendix 4 sets out the Scope of Services, describing the Dunbar infill development project. The scope of work makes no mention of accommodation. There is significant detail in relation to the wells proposed to be drilled and the drilling facilities on the Dunbar.

74. Part 3 of Appendix 4 then sets out the specifications for the TSV. The introductory section to Part 3 states that the TSV “shall be moored alongside the south side of the Dunbar Platform for operation in the Tender Assisted Drilling (TAD) mode or as a flotel”. That section goes on to describe the drilling systems that will be located on the Dunbar and the drilling and utility systems that are to be located on the TSV. Utility systems to be located on the TSV include “office and living accommodation”.

75. Matters covered are listed as including environmental design data, station keeping, stability and variable deck load capacity, mud system, cement system, utility systems (including compressed air-rig, sea water and potable water), bulk tanks, power generation, radio and telecommunications, deck cranes and accommodation appears at paragraph 2.14. At 2.14 (Accommodation) it is provided that the TSV shall provide living accommodation and associated safety equipment for 100-120 persons, including changing rooms, hospital, recreation rooms, mess rooms, etc. It then specifies that Total requires accommodation, offices and conference facilities:

- “o Accommodation for 40 COMPANY personnel total.
- o Hereof accommodation in two berth cabins for 8 COMPANY personnel minimum.
- o Two (2) offices minimum for COMPANY personnel, one being equipped with drilling control instrumentation and TV monitor with 4 channels (rig floor, cellar deck, stabbing board and monkey board).
- o One mud engineer laboratory (4m X 3m minimum) equipped with bench, sink, 'mesh water and electricity (1 I0/220v) supplies.
- o Unrestricted access to a conference room for ten (10) people, with table, chairs, blackboard and overhead projector.”

76. Article 4 Part 3 Section A then lists the services and supplies to be provided either by the Company or by the Contractor. This takes the form of a list (of just under ten pages) with columns to mark who provides the relevant service and at whose expense. The services are grouped under sub-headings, and group G deals with the TSV itself. This has 47 items (some of which are themselves split into two or three sub-parts) and the first item is “TSV (incl. living quarters)”, item 31 is two office-cabins for Company’s personnel, item 32 is one warehouse container for Total’s use and item 34 is “living quarters with air conditioning”.

77. Appendix 5 deals with Remuneration. There were various categories of rates and fees. The “Daily Rate” was to be specified in paragraph 1 thereof as follows:

“1.1. DRILLING SERVICES daily RATE (the BASE Rate T...) (... ..)

78. Paragraph 9 then deals with food and accommodation, requiring that DDL shall provide food and lodging, and that any food and lodging provided by DDL for Total’s and its contractors’ personnel shall be invoiced to the Company. Tenderers were required to specify a unit price for bed and breakfast, then lunch, dinner, and a full day’s food and accommodation.

79. Mr McNall drew attention to the fact that the specimen contract required that the Contractor provided accommodation as part of the services, and that there was more than one reference to there being an accommodation rate or flotel mode.

80. Ms Shaw submitted that:

(1) References to accommodation are general, sometimes referring to that which will be needed for DDL Personnel working on the Borgsten, and even where it does refer to Total Personnel the contract does not focus on those working on the Dunbar, ie offshore workers, eg:

(a) the obligation in Article 2.29 (that the Contractor shall provide food and accommodation for all personnel on the TSV) is that DDL is required to provide for its own crew and those personnel who are working onboard the TSV;

(b) the inclusion of accommodation in the list of services in Part 1 of Appendix 4 is a general reference to accommodation being available;

(c) addressing paragraph 2.14 of Part 3 of Appendix 4, the “100-120” is a general reference to the TSV’s overall accommodation. Total’s requirement was for up to 40 berths. This does not specify whether the relevant personnel would be working on board the Borgsten or the Dunbar. They also wanted various office facilities – this was necessary because some Total Personnel would be working on board the Borgsten. There is nothing here that says that Total required accommodation for offshore workers; and

(d) the unit price in paragraph 9 of Appendix 5 for berths per night identifies the amount payable for Total Personnel; there is no distinction between those working on the Borgsten and those on the Dunbar. There is no indication that what is required would relate to offshore workers.

(2) In the context of the services as set out in Part 1 of Appendix 4, accommodation is tacked on as an apparent afterthought to paragraph (r), having referred first to the apparently unrelated matter of the handling of drill cuttings.

(3) The use of the label “flotel mode” (in Appendices 4 and 5) is a Total label, and it is wholly inapt to describe the pre-drilling phase of the Total Contract – the Borgsten was fully operational, there was no point at which it was a flotel, even during the pre-drilling phase, and there was little difference in the operations on the Borgsten between the pre-drilling and drilling phases.

(4) The requirement to tender a separate price for food and accommodation (in paragraph 9 of Appendix 5) demonstrates that there was no flotel mode, otherwise Total would be paying for accommodation twice. Furthermore, Total would only be paying for the accommodation it used. There was no implied amount of usage, no obligation, and certainly no obligation to use any accommodation available for offshore workers.

81. It was clear that Total expected and required that the TSV providing the TSV Drilling Services would have surplus accommodation that could be used for Total Personnel.

82. We accept Ms Shaw's submissions that there is very little detail in this specimen contract in relation to such accommodation – it is “tacked on” – and that all labels and descriptions in this version are those of Total. There was no evidence before us from Total as to why the terms “flotel mode” or “accommodation rate” had been used. We revert to the significance or otherwise of these terms in the context of DDL's submission of its tender.

Tender submitted by DDL

83. The tender was submitted by DDL on 1 August 2011. The letter is on the combined letterhead of KCAD and Dolphin Drilling, signed by Martin Ellins on behalf of KCAD and Mr Mitchell on behalf of DDL, and is sent as a joint response to the ITT. That letter refers to KCAD and DDL providing a high level of teamwork, with the principle being that Total experiences a seamless drilling service provided by the two companies. Nevertheless, they were tendering to contract separately for the two different services required – KCAD for the DDP Reinstatement and DDL for the TSV Drilling Services.

84. The cover letter highlights some aspects of their experience and includes:

- “• Dolphin Drilling is the only drilling contractor that also has a platform support semi currently active in the UK. The Borgholm Dolphin is currently contracted to BP providing long term accommodation support to the Andrew platform and has previously been on almost continuous hire with BG and Shell in the UK sector since 2005
- The Borgsten Dolphin (sister vessel to the Borgholm Dolphin) is of a proven design suited for TSV support work and is available to suit the Dunbar project timing”

85. The tender included a completed version of Appendix 5 (Remuneration), setting out DDL's proposal. For the TSV daily rate (drilling mode) at paragraph 1.1 the rate is pitched at \$210,000 per day, this being the “Base Rate T”, and for the TSV accommodation rate (flotel mode) the rate is stated as 100% of Base Rate T. The price pitched for both periods was thus the same. At paragraph 9 (food and accommodation), the pitch is a unit price per person of \$80 for full board and accommodation. The evidence from DDL was that this unit price was intended to reflect the marginal additional cost of accommodating additional personnel on board.

86. Tenderers were requested to provide a “Method Statement” covering how they proposed to coordinate the services, manage all internal and external interfaces and effectively execute both aspects of the project. The statement prepared by DDL sets out what are described as the main items in the planned conversion of the Borgsten into a TSV. This includes fabrication and installation of a new gangway, relocation of the aft lifeboat, increased mud tank capacity, addition of a fourth mud pump, upgrades to the seawater, fresh water and fire water pumping capacities, upgrade to the compressed air system, installation of piping to the Dunbar and addition of conference room and heli-admin area.

87. The documents included a Technical Proposal, identifying the main areas of work required to convert the Borgsten into a TSV. This is several hundred pages long. The anticipated yard stay duration for the completion of these works was estimated to be 90 to 120 days. For planning purposes, the paper states that the offer is based on the provision of an all new gangway. DDL had been advised that this would have a manufacturing lead time of “close to 12 months” and this was likely to be the critical path item in planning the project.

88. At this time the Borgsten had 102 berths on board, and it was not proposed to increase or decrease this number of berths.

89. The ITT had stated that tenderers must list in a prescribed form all the potential commercial/contractual qualifications they sought in respect of the specimen contract and explain the reason for such qualifications. The tender submitted by DDL included the required list of contractual qualifications (the “Contractual Qualifications Table”). There were 138 in total. None of these modifications sought to amend the provisions relating to accommodation.

90. Ms Shaw submitted that the proposed daily rate, which was to be the same for both the pre-drilling and the drilling phases, was based on the premise that there was to be no material difference in the services to be provided by the Borgsten during the hire period. The focus was on the operation of the Borgsten as a TSV, providing TAD services.

91. Mr McNall’s challenge (both by way of submissions and put to witnesses in cross-examination) was that Total’s request for accommodation was important, or vital. He submitted that:

(1) if DDL had not been able to make accommodation available as required by the ITT then their tender would not have been successful;

(2) the approach taken by DDL in the cover letter, namely the references to DDL’s experience with the Borgholm, was seeking to sell the Borgsten’s capabilities as an accommodation vessel;

(3) DDL entered into a contract with Total which referred to the Borgsten as having a “flotel mode” – they must have considered this was an appropriate description. DDL had not, in its list of 138 modifications sought to the terms of the specimen contract, even proposed to remove any references to there being an accommodation rate or flotel mode; and

(4) the response was accompanied by a list of the Borgsten crew expected to be used, showing the total personnel required and the number of persons who would be on board the Borgsten (as well as their pay rates). This showed that DDL was expecting 37 people to be on board, plus the catering team as required. So who were to be the other 78 personnel sleeping overnight on the Borgsten?

92. The evidence from DDL’s witnesses was that:

(1) Total’s request for accommodation was not considered by DDL to be of any significance. The Borgsten only required a team of around 55 crew in order to function as a TSV and provide the TAD services. As such, Total’s request for up to 40 berths was within the Borgsten’s original capacity of 102 berths – making the remaining berths available to Total was immaterial to DDL. Indeed, the average number of berths on a TSV vessel is 150 so any TSV vessel would have had sufficient accommodation to meet Total’s accommodation requirements. Mr Brandvold’s evidence was that DDL had tendered on the specifications that they had, and the Borgsten had accommodation. He had never seen a vessel in the market that did not contain accommodation. What was important was the tender support capacity.

(2) Moreover, DDL had to accommodate those working on board the Borgsten (whether employed by DDL, Total or its third party contractors) in any event. Providing accommodation to offshore workers was immaterial to the contract and to the day-to-day operations of the Borgsten, in the sense that any accommodation-related issues would have arisen in any event, the same welcome pack was provided to all personnel living on

board the Borgsten and it was irrelevant whether a particular berth was occupied by a person working on board the Borgsten or an offshore worker.

(3) The primary focus of the contract negotiations with Total was on the provision of TAD services, not with the provision of accommodation to Total Personnel. Mr Mitchell put it that the accommodation was a minor part and was given almost no attention. It was in the natural capacity of the rig as it existed, so no additional works were required, and no strings or penalties were attached to it. He contrasted this with, eg, the gangway where there were detailed specifications as it needed to be designed and manufactured. The accommodation was just there.

(4) The value of the contract to DDL attached predominantly to the TAD services.

(5) DDL didn't consider the language used – ie flotel mode - as important. They set the same rate throughout the entire period. From Mr Mitchell's perspective, they were populating blanks in the remuneration sheet. This phrase was not defined, they didn't know how it applied, and for DDL there was no time where the Borgsten would only be providing accommodation. They did not want a different rate to apply for any part of the hire period, so rather than debate Total's language, they set out that they would be paid the full day rate throughout. They side-stepped around the lack of clarity in the contract.

(6) The reference to the Borgholm in the joint response was not intended to suggest that the Borgsten was an accommodation vessel. Mr Brandvold said the sister vessel was a reference to the Archer H3 design, not a suggestion that the Borgsten was also an accommodation vessel. Mr Mitchell had been the author of the DDL parts of the cover letter, and stated that the reference to the Borgholm showed that DDL understood the operation of a support vessel gangway and the issues associated with mooring in close proximity to a fixed platform.

93. We accept this evidence and reach the following conclusions in relation to the tender submitted by DDL:

(1) DDL was keen to ensure that Total was aware of its expertise in providing support vessels in the North Sea, including providing accommodation. However, this was against the backdrop that at the time of submission of the tender the Borgsten was not a support vessel but was a drilling rig in its own right. There was clearly a message that needed to be "sold" to an Operator about experience in providing support to a platform.

(2) The proposed pricing (with the daily rate proposed to be the same throughout the contract period) supports the proposition that DDL did not draw a distinction between different phases of the period, particularly in the context that the timing of the move from one phase to another was not within its control. It proposed a daily price for the provision of the services.

(3) The difference between the proposed daily rate of \$210,000 and the unit price for food and accommodation of \$80 is striking, particularly given that when being asked to make available 40 berths per day the maximum charge was going to be limited (\$96,000 per month if all were fully occupied throughout).

(4) DDL did not seek to make any changes to the terminology used by Total for the different phases of the contract. In tendering for a high value commercial contract such as that in issue, we recognise that there is often a commercial incentive to avoid requiring what might be seen as unnecessary, or "nice to have", changes, and instead to focus only on matters which have commercial value. That is not a complete answer to the reason for not changing the labels used by Total – looking at the 138 changes which were proposed in the Contractual Qualifications Table, some of the changes requested were

“for clarity”, including a proposed deletion of what was presumably considered to be some unnecessary blurb in the preamble itself to the contract, and a request that “undertakes and warrants” be changed to “agrees”. DDL was therefore prepared to propose changes which did not go to value or liability. We accept the evidence of both Mr Brandvold and Mr Mitchell that they just had not focused on the language at the time, it was not important to them, and the main focus was to propose that the same rate would apply throughout the hire period. The label used just did not matter.

Class renewal survey

94. DDL agreed that the class renewal survey for the Borgsten would be conducted during the conversion project, even though it would not otherwise be due for another three years. An email from Mr Mitchell to Mr Brandvold dated 31 October 2011 (ie several months after submission of the tender and shortly before DDL were awarded the contract) states that, based on discussions with Total, excluding the renewal survey “will mean that we are very likely out of the race with Total”. Total had therefore informally tabled a proposal where they would fund the \$25 million the following year, in return for a discounted rate during the term of the contract. Mr Mitchell then sets out some suggested revised numbers looking at daily rates and contract values.

95. Mr Mitchell’s evidence was that if DDL hadn’t agreed to advance the renewal survey then the Borgsten would have been required to break off mid-contract for the survey to be carried out inshore. We accept this.

96. Mr McNall submitted that this showed the importance to Total of having the Borgsten on site throughout in order that the accommodation could be available throughout. Mr Brandvold rejected this – he gave evidence that this had nothing to do with accommodation. If the Borgsten had had to interrupt services, there would have been a hiatus on all drilling operations on the platform. The drilling would therefore finish later, and this could affect production.

97. On the basis of the time periods being referred to we infer that the class renewal survey would otherwise have been due by the end of 2014. At the time of the final negotiations leading up to the Letter of Award it was still expected that the Borgsten would be in position next to the Dunbar for around 120 days before drilling operations commenced. The commencement date was (at that stage) scheduled to be at some point between October 2012 and December 2012 – it would therefore have been expected that drilling on the Dunbar would commence in the first half of 2013. Conducting the renewal survey in 2014 would have interrupted drilling operations, as it was common ground (and we find as fact) that the Dunbar was a minimum facility platform and could not drill without a TSV.

98. We consider that the acceleration of the survey was important to Total as it wanted continuity of drilling operations. Mr McNall submitted that accommodation was part of this. But we have no evidence that supports the lack of the Borgsten’s accommodation as being a problem for the Dunbar if drilling was suspended and the Borgsten was not in the field. The Dunbar could accommodate 60 personnel on board, and this was sufficient for the periods when it was only performing production activities. If drilling was suspended, then there would be no need for any personnel whose roles related to the drilling activities to be onboard the platform. We were not given any evidence as to how many personnel might have been needed to remain on the platform during this period of suspension, but see no reason why this would have been more than were required when production activities were underway.

99. For this reason, we conclude that the accommodation on the Borgsten would not have been necessary at all for any Total Personnel working on the Dunbar during a period when drilling was suspended by reason of the Borgsten having needed to return to the yard.

Letter of Award

100. On 10 November 2011 Total sent the Letter of Award to DDL notifying DDL that they were offering to award to DDL a contract for the provision of TSV Drilling Services using the Borgsten. That offer was subject to various terms and conditions, one of which was resolution of outstanding qualifications in the Contractual Qualifications Table, and execution of a mutually acceptable contract. The effective date of the contract was to be 10 November 2011.

101. The commencement date of the contract was to be any date within the period 15 October 2012 and 15 December 2012, and the initial operational period was to be 1215 days from the actual commencement date, subject to the following:

- (1) the initial operational period shall always be extended to complete the operations to be carried out on the well in progress at the end of the period; and
- (2) Total had the right to extend the initial operational period for two periods of six months each.

102. Prior to satisfaction of the conditions in the Letter of Award, DDL was authorised to carry out certain works, including the ordering of long lead items (the gangway, fourth mud pump, water maker, compressors, electrical items and inspections), and Total authorised DDL to incur or commit to costs in connection with these works up to \$20,470,000, which amount represented Total's maximum liability to DDL arising out of the Letter of Award.

Announcement to stock exchange

103. The award of the contract to DDL prompted an announcement by Dolphin Drilling ASA to the Norwegian Stock Exchange.

104. The first draft of the announcement was prepared by Mr Mitchell and sent to Mr Brandvold, copied to Hjalmar Krogseth Moe, the chief financial officer of DDL. In that draft Mr Mitchell described the contract as being for the provision of tender support services at the Dunbar, and set out an estimated contract value of \$267 million. The notes accompanying this include that the contract value is made up of the lump sum payments plus the daily rate multiplied by expected contract period (which was set out as 1095 days plus 61 days, unlabelled). It records that mobilisation was from 15 November 2012 (or earlier if possible) with the TSV to provide hook up and commissioning support for the platform drilling set refurbishment prior to the start of drilling. Mr Moe made some changes to this, but the key features remain the same.

105. There was then a delay in the Letter of Award being agreed, and a few days later Mr Mitchell updated the draft statement. His cover email circulating this to Mr Brandvold and Mr Moe reads:

“The Total LOA states 1215 days i.e. 1095 days TSV support preceded by 120 days accommodation/commissioning support. I have revised the draft statement accordingly.”

106. Ms Shaw noted that the announcement referred to the provision of tender support services (not accommodation) and the contract value was based on the daily rate and other lump sum payments. The \$80 per berth charge did not feature in these calculations.

107. Mr McNall emphasised the language which had been used by Mr Mitchell – “120 days accommodation/commissioning support” - submitting that this was important as it shows how DDL regarded the contract (at a time at which it was not known there would be a change in law and that therefore there might be any significance in the use of the word accommodation).

108. Mr Mitchell's explanation was that this was just a quick email, and he was flagging the increase in the contract period from what was initially to be three years by the additional 120

days. He did not know who the accommodation would be used by – this email was sent one year before commencement of the contract.

109. Mr Brandvold’s evidence was that there are only two things of any importance regarding a stock exchange announcement such as this - the value of the contract and its duration.

110. We agree with Mr McNall’s submission that correspondence from this time, when no-one at DDL could have known that there would later be any significance to whether a vessel had accommodation, or a surplus, or how it might be used by an Operator, is an indicator of how DDL regarded the contract. It is, however, just one indicator – furthermore, the reference is to “accommodation/commissioning support”, ie includes the TAD services in some form.

Total Contract

111. The contract for the provision of TSV Drilling Services was entered into between Total and DDL on 1 February 2012. This contract – the Total Contract - was largely based on Specimen Contract A which had been attached to the ITT.

112. Whilst amendments had been made thereto during negotiations, they did not materially change any of the provisions already referred to above, save that the daily rate had been reduced – the Total Contract provides that the TSV daily rate (drilling mode) shall be \$202,000 per day, and the TSV accommodation rate (flotel mode) shall be 100% of this rate. In addition, paragraph 2.4 of Appendix 5 provided for a lump sum of \$25 million to be paid for the five yearly class renewal survey to be carried out prior to the commencement date.

Change Orders

113. There were various change order instructions from Total to DDL. Such instructions were essentially a request from Total to DDL to submit a price for specified additional works, together with any amendments to the Total Contract which DDL believed were necessary to take account of the proposed change. If the price and changes were then agreed, a Change Order would be signed by the parties. DDL was not obliged to accept these requests – they were a matter of negotiation between the parties.

114. On 21 December 2011 Total requested that DDL prepare a study to detail the cost and schedule impacts of increasing the accommodation on the Borgsten from 102 to 120 persons, with a report to be prepared by 20 January 2012. Total wanted to increase the number of berths available to it from 40 to 65.

115. Mr Mitchell explained that this was to maximise Total’s opportunities to increase the capacity of the crew in the hope that upgrades to the Dunbar would take less time. He understood that Total’s intention at the time was to increase the number of personnel working on the upgrades to the Dunbar so that drilling operations could commence more quickly. In order to accommodate this request, an additional 18 berths were required on board the Borgsten. It was made very clear by Total’s project manager to DDL that it was important that this additional request for accommodation should not delay the Borgsten being deployed.

116. On 7 March 2012 DDL wrote to Total in connection with the proposal to increase the capacity of the living quarters on board the TSV from 102 to 120 berths, or POB. The letter refers to the increase having been discussed between the parties. DDL proposed that the works be undertaken during the scheduled yard visit in 2012 in parallel with other TSV modifications and the price was to be \$6,700,800, ie £4,188,000. That letter describes the main elements of the scope of work as:

- (1) new 20 bed accommodation block on two levels,
- (2) extend mess room and upgrade galley for higher POB,

- (3) create improved alternative non-smoking lounge facilities,
- (4) install new 2x60 man lifeboats and associated upgraded davits,
- (5) provide life rafts, and
- (6) obtain DNV approvals.

117. That letter states:

“In addition to the basic accommodation increase to 120 POB, we consider that the alterations and enhancements to the living quarters, mess, galley and recreational areas incorporated within our proposal will increase the utility of the TSV and considerably benefit the execution of Total’s drilling campaign generally.”

118. The relevant Change Order is dated 1 May 2012, stating that the value of the Change Order was £4,188,000 and Total agreed to pay DDL for the cost.

119. There were other change order instructions from Total to DDL, eg on 12 January 2012 in relation to the safety integrity levels for the control systems on the gangway.

120. Mr McNall submitted that the works involved in providing the additional accommodation were significant:

- (1) The cost was in excess of \$6 million - the breakdown shows that the accommodation module cost £1,250,000, and installation a further £175,000. This was around 20% of the cost originally budgeted for the conversion works.
- (2) The works also involved further changes, as described above.
- (3) Significant management time was required from DDL to manage these works – there were fortnightly meetings involving various individuals within the Dolphin Drilling ASA group, including Mr Brandvold.

121. Ms Shaw submitted that this request was agreed by DDL on the basis that it did not delay commencement of the operations and the cost was borne by Total. The additional accommodation was not specific to offshore workers.

122. The cost of the works was not insignificant, either viewed in isolation or in comparison to the costs of the conversion project. However, giving evidence Mr Brandvold explained that whilst he did not know why Total had asked this for this increase from 102 to 120 POB, all that had mattered to him was that DDL could comply with the request and the cost was recovered from Total. This was why he was content to authorise the expenditure of £4,188,000. It was not unusual that a client requested changes to the scope of works – what was important was whether DDL could comply, if the changes have any negative impact on DDL, and how the cost is to be recovered. If the answers to these questions was acceptable to DDL, then “we do it”. We accept this evidence, which was consistent with that of Mr Mitchell and also which we consider makes good commercial sense.

123. The evidence from Mr Mitchell and Mr Thain was that the additional berths involved a relatively simple modification - essentially an additional two-storey block was added to the port side of the mud storage tanks. Whilst we accept this evidence as to how the accommodation capacity was increased, we do also find that additional works were involved as well, as set out in the letter of 7 March 2012. Nevertheless, Mr Brandvold stated that this project in totality was not a large project – it could easily be accommodated in the bigger project, namely the conversion works.

124. We were provided with minutes of the Dolphin Drilling ASA group steering committee meetings in relation to the Borgsten. There were 28 sets of minutes of meetings, which took

place fortnightly on Wednesdays, and Mr McNall correctly pointed out that the first set of minutes implies that there had been a small number of meetings prior to the first minuted meeting (which was in February 2013). There was clearly a significant amount of management time devoted to the works on the Borgsten. However, we regard it as important that the works in relation to the renewal survey, the conversion of the drilling rig into a TSV and the additional accommodation were dealt with together. Given the significance of the works involved in the conversion of the Borgsten from a drilling rig to a TSV, we consider that monitoring the additional works relating to the additional accommodation (and associated works) would not have involved significant additional time for DDL.

125. We recognise that the Change Order was not agreed until after the signing of the Total Contract (although the change had been requested before then)) and therefore Total could not force this change upon DDL. We also accept the evidence from DDL that whilst this was more complex than just making available accommodation they already had, DDL could get these works done whilst the Borgsten was at the shipyard being converted into a TSV, it gave Total what it wanted, did not delay the project and there was no commercial risk to DDL as Total was meeting the additional cost.

126. Whilst we agree that no distinction was drawn in the initial request from Total or in the Change Order between whether the berths would be used by Total Personnel working on the Borgsten or those working on the Dunbar, we regard the fact that the request was made at all as telling, as is the explanation given - the plan was to increase the number of personnel working on the upgrades to the Dunbar so that drilling operations could commence more quickly. This is the first occasion on which the evidence addresses the question of who the accommodation being made available to Total Personnel was to be used by – the additional 25 berths (ie the increase from 40 to 65) were requested so that more Total Personnel working on the Dunbar could be accommodated, ie offshore workers.

Extent of actual use to provide accommodation for offshore workers

127. It was not in dispute (and we find as facts) that:

- (1) All personnel working onboard the Borgsten and the Dunbar needed to be accommodated on one of those vessels throughout the time those vessels were in the field. Personnel and/or supplies were brought to the Borgsten by helicopter most week days (usually twice a day). This was how the crews were changed over after their period on board, typically of around two weeks. Some individuals were occasionally flown in and out on the same day (eg management visits), or stayed on board just one or two nights. There were no routine helicopters on Saturdays or Sundays.
- (2) The DDL Personnel were working on the Borgsten, not the Dunbar.
- (3) The Borgsten had 102 berths when it operated as a drilling rig, and DDL had intended to retain this number upon its conversion to a TSV.
- (4) Total initially required 40 berths to be available on the Borgsten for Total Personnel. This required no additional works on the Borgsten. Total later requested that the number of berths be increased from 102 to 120 and that 65 be made available to Total Personnel. This work was done during the conversion programme, and the cost was borne by Total.
- (5) The Borgsten thus had 120 berths; this was also the maximum number of individuals who could be on board the vessel at any one time (irrespective of sleeping capacity) as this was the lifeboat capacity of the vessel.
- (6) The Dunbar had 60 berths.

128. There was considerable evidence before us as to the extent of the actual use of the surplus accommodation on the Borgsten by Total Personnel, ie the extent to which they used the 65 berths which were made available to them.

129. Ms Shaw submitted that whilst s356LA(2)(b)(ii) is concerned with what an asset can be used for – ie its possible use to provide accommodation to offshore workers – s356LA(3) is concerned with its intended or likely use, specifically whether it is reasonable to suppose that its use to provide accommodation for offshore workers is unlikely to be more than incidental to the other uses to which it is likely to be put. The exception is not concerned with the actual use to which a vessel is put.

130. Mr McNall invited us to consider why the Borgsten was there at all, and submitted that we should look at what was actually happening in terms of its use as well as the contractual matrix between the parties.

131. We consider these submissions further in Consideration and Conclusions. At this stage it is sufficient for us to note that as this Tribunal is the primary fact-finding Tribunal in respect of the matters under appeal it is appropriate for us to consider the evidence of actual use and make findings in respect thereto, irrespective of the fact that DDL’s position is that this is not relevant (or potentially only relevant as a sanity check). We did not take Ms Shaw to be disagreeing with this approach.

132. During cross-examination of the witnesses, Mr McNall asked how many people whose ordinary place of work was the Dunbar were sleeping on the Borgsten. He put this question, in slightly different forms, to each of DDL’s witnesses:

- (1) Mr Brandvold did not know how many people at any point in time were working on the Dunbar during the drilling campaign, or if it was more than 60.
- (2) Mr Mitchell said this question should be put to Mr Thain.
- (3) Mr Thain referred to the average numbers of Total Personnel who were sleeping on the Borgsten (as set out in his witness statements) and his estimates as to how many of those were, in the pre-drilling and drilling phases, working on the Borgsten (with the necessary consequence that the remainder were working on the Dunbar).

133. It was readily apparent that this was information to which DDL had not, during the accounting periods in issue, paid any attention.

134. We had before us (and the witnesses were taken to) various types of records showing the use of the accommodation on the Borgsten. This included information as to the number of Total Personnel sleeping on the Borgsten at various times and for whom DDL charged Total \$80 per person per night. However, we accept that this does not necessarily correlate to how many offshore workers were being accommodated on the Borgsten. We find that some Total Personnel were working on the Borgsten (and are thus not offshore workers for the purpose of the exception) but are no more specific than that at this stage.

135. There were records from 11 February 2013 to December 2015 (although not for every month) showing persons on board the Borgsten for every night in the relevant month (the “POB Log”). The POB Log showed numbers per day of both DDL Personnel and Total Personnel on board. This set of logs was prepared for the purpose of calculating the charge to Total under the Total Contract, and their accuracy was not challenged. We accept the numbers of DDL Personnel and Total Personnel being accommodated onboard the Borgsten each night.

136. We were taken to a selection of months and days by Mr McNall, and whilst we have not set them all out below, we are satisfied that they give a fair reflection of the overall picture:

(1) Taking 1 March 2013 as an example (ie shortly after the Borgsten had connected to the Dunbar, and at the beginning of the pre-drilling phase), this showed 56 DDL Personnel, broken down further as 36 from DDL, 11 from Sodexo, and nine from other listed sub-contractors. In addition to Sodexo there are columns for 18 different categories of sub-contractors, all bar three of which are shown as having personnel on board at some point during the month. For Total, there were 50 Total Personnel on board (and for which Total was to be charged), listed as being one person from Total, nine from KCAD and 40 from other sub-contractors. There are 30 columns for categories of sub-contractors on the Total side of the log.

(2) Looking at March 2013 as a whole, the DDL Personnel on board ranged from 49 to 57, and the Total Personnel on board ranged from 45 to 67. The records set out the “chargeable POB”, ie number of nights’ accommodation for Total Personnel, and for March 2013 this was 1,708, giving a charge to Total of \$136,640 for that month.

(3) On 1 April 2013 there were 49 DDL Personnel staying on the Borgsten and 67 Total Personnel. Of the Total Personnel, one was from Total, whereas most were sub-contractors. There were 12 personnel listed as being from KCAD (the “KCAD Personnel”) that day, and ranged from 7-12 during the month.

(4) On 1 January 2015, there were 46 DDL Personnel on board and 56 Total Personnel. Of the Total Personnel, 1 was from Total, the remainder were various sub-contractors, including 29 KCAD Personnel (and looking at the month as a whole there were between 26 and 33 KCAD Personnel on board). For the month, there were 1,650 chargeable POB, with a charge of \$132,000.

(5) On 1 May 2015 (with drilling on the Dunbar having started in April 2015) there were 55 DDL Personnel on board and 59 Total Personnel. None of the Total Personnel were from Total itself (the Total representative only spent one night on the Borgsten that month). There were 26 KCAD Personnel (which was not atypical of that month, as the range was from 26 to 29).

137. We had a sample of daily operational reports (the “Operational Reports”) from the Borgsten for the period from 1 April 2014 to 30 May 2014. These covered a wide variety of matters, including safety drills and deck loads, and cross-winds on the gangway. They also tracked personnel arriving by helicopter each day. On 1 April 2014, this showed 116 personnel on board the Borgsten at the beginning of the day, 117 at the end. In the sample of Operational Reports before us, there were always not less than 110 personnel on board the Borgsten.

138. There was a sample monthly invoice for the food and other personnel costs from DDL to Total, dated 2 October 2014 for the month of September 2014. The food and accommodation charge was shown as \$151,680 and was accompanied by the POB Log. No distinction was drawn in the invoice (nor was it in the POB Log) as to whether the Total Personnel were working on the Borgsten or the Dunbar.

139. The documentary evidence described above thus shows how many Total Personnel were being accommodated on the Borgsten at various times, as well as the number of DDL Personnel. It does not tell us whether individuals who make up the group of Total Personnel were working on the Dunbar or the Borgsten. The evidence of Mr Thain (both in the form of his witness statements and his oral evidence) is particularly important in this respect.

140. Mr Thain’s witness statements include the following:

(1) During the pre-drilling phase the number of DDL Personnel working on board the Borgsten was usually around 55 personnel, this number being “fairly constant”.

(2) Once drilling commenced, the daily number of DDL Personnel working on board the Borgsten was in the range of 45 to 59 with an average of 52.

(3) The number of Total Personnel staying on board the Borgsten was on average 57.6 per day during 2014 (the entirety of which was the pre-drilling phase). (We round this up to 58 when considering this average below.)

(4) The number of Total Personnel staying onboard the Borgsten once drilling commenced remained largely the same, at an average of 59 per day. There was a wider range during this period, from 26 to 72.

141. This evidence was not challenged and we therefore find as facts accordingly.

142. Mr Thain also explained that:

(1) There were a number of Total Personnel who worked on board the Borgsten, eg the cement engineers and geoscientists would work on both vessels and primarily on board the Borgsten in many cases. Drilling engineers would also work on board the Borgsten.

(2) At the time it was not relevant whether a Total berth was being occupied by a person working on the Borgsten or a person working on the Dunbar and consequently there are no records detailing that variable.

(3) Whilst the average numbers of Total Personnel on board the Borgsten remained largely the same during the pre-drilling and drilling phases, the roles of the individuals themselves did change. Before the commencement of drilling, the Total Personnel included individuals involved in the refurbishment and repair of the Dunbar platform, eg scaffolders, painters, riggers and welders. Once drilling commenced, they were replaced by those involved in drilling and production, eg engineers, cement engineers, mud engineers and field operators. A number of these roles were carried out on the Borgsten.

(4) He had reviewed the offshore manning reports and estimated that in the pre-drilling phase there would generally have been around four or five Total Personnel who were sleeping on the Borgsten and worked on or from the Borgsten each day. The balance would have either worked solely or partly on the Dunbar.

(5) He estimated that the number of Total Personnel who were accommodated on the Borgsten who were working on the Dunbar fell once drilling started (as the pre-drilling works onboard the Dunbar were more labour-intensive than the drilling activities). In addition, the commencement of drilling meant that Total required more chemists, geologists, mud analysts and waste processors – these individuals performed their functions on the Borgsten. He estimated that nine or ten of the Total Personnel sleeping on the Borgsten in this phase would have been working on the Borgsten.

143. Mr McNall challenged the need to rely on these estimates, and probed the functions being performed by the various sub-contractors (by reference to those named on the POB Logs). We accept this evidence of Mr Thain and note, as put by Mr McNall, that this evidence supports the fact that the large majority of Total Personnel sleeping on the Borgsten were working on the Dunbar – in the pre-drilling phase this was 53-54 of the average 58 Total Personnel and in the drilling phase, this was 49-50 of the average 59 Total Personnel sleeping on the Borgsten were working on the Dunbar.

144. At the hearing Mr Thain also addressed the activities on the Dunbar. Mr McNall submitted that we did not have the evidence on which to make findings of fact in relation to activities on the Dunbar (in the absence of evidence from eg Total or KCAD). However, bearing in mind Mr Thain's experience in the industry and his role in relation to the Borgsten

we consider that he is able to address (albeit with a level of caution and generality) the activities on the Dunbar. We note in particular that whilst DDL's offshore installation manager ("OIM") had offshore responsibility for all aspects of the Borgsten's activities, Mr Thain had twice daily video conference calls with the OIM to discuss any operational issues as and when they arose. Mr Thain visited the Borgsten approximately every other month for three days at a time, and attended weekly meetings with Total - those meetings were attended by Total employees and employees of their third party contractors, such as KCAD. Those meetings would usually last a couple of hours and would cover the important aspects of the drilling project at the Dunbar. We consider that this level of engagement would have given him a good level of familiarity with the general activities and personnel on board the Dunbar.

145. Mr Thain stated that he believed that:

- (1) the maximum number of personnel permitted on the Dunbar at any one time was in the "mid to high" eighties, confirming that by this he meant 85-89. This was the lifeboat capacity on the Dunbar. This number was monitored by the gangway records – all personnel arriving on the platforms had an e-card, which they were required to tap on the sensors when crossing the gangway (and it was a disciplinary matter to cross without tapping). Once this number was reached, then the traffic lights on the gangway between the Borgsten and the Dunbar would turn red and no additional personnel could cross from the Borgsten to the Dunbar until others came the other way. This limit was not reached often, but he could remember the lights having turned red in this way; and
- (2) his estimate was that during the pre-drilling phase there would have been on average around 80 personnel working on the Dunbar. During the drilling campaign this would have reduce to maybe around 70, or 60-70 personnel.

146. Having regard to Mr Thain's level of experience, his detailed knowledge of the Borgsten and the fact that he would have needed to know the details regarding the operation of the gangway (which was part of the Borgsten), we accept this evidence. That only means that we accept these estimates.

147. Given the findings we have made in relation to Total's level of usage of the accommodation on the Borgsten for Total Personnel, we have considered whether Total needed to use this amount - were they also using up all of the 60 berths on the Dunbar?

- (1) Having been taken to the POB Logs for April 2013, Mr Brandvold stated that he didn't know if the Dunbar's 60 berths were being used – Total could organise the personnel across both units. Mr Thain confirmed that the decision as to where Total Personnel should sleep was up to the OIM on the Dunbar – they could choose.
- (2) Mr McNall questioned whether it would be economically rational for Total, with 60 berths available on the Dunbar, to pay DDL to use berths on the Borgsten if it could accommodate those persons on the Dunbar. Mr Brandvold, Mr Mitchell and Mr Thain considered that it would not be irrational - the \$80 charge made by DDL was intended as cost recovery, reflecting the costs of the sub-contractors, Sodexo, and that the cost to Total would probably be the same irrespective of whether personnel were accommodated on the Dunbar or the Borgsten. We note that the charge of \$80 was in excess of the direct Sodexo costs - however, whilst therefore this is not a precise cost-recovery, the differences are small in the context of amounts being spent elsewhere (eg the daily rate and various lump sums payable) such that the consequence of incurring this cost was not a factor in assessing where the Total Personnel should be accommodated.

(3) Mr Thain observed that whilst the accommodation available on Borgsten was basic, it was thought to be more appealing than that on the Dunbar. The Borgsten had WiFi and French TV, neither of which were available on the Dunbar.

(4) Ms Shaw emphasised that the excess of personnel working on the Dunbar over the 60 that could sleep on the Dunbar was not that great during either the pre-drilling phase or the drilling phase. Nevertheless, the evidence before us was that Total was choosing to accommodate more than this number on the Borgsten throughout the time that the vessels were connected and even if the OIM of the Dunbar had accommodated as many as possible on the Dunbar, there would still have been a need for some Total Personnel who were working on the Dunbar to sleep on the Borgsten.

Other use or uses to which the vessel is likely to be put

148. A particular use of a vessel (in this case the provision of accommodation to offshore workers) can only be incidental if we find that there is “another use, or other uses” to which it is likely to be put. Finding that there is or are such other use or uses does not require that we find in DDL’s favour, but it is an essential component for them to establish that such a use existed in order that any use of the Borgsten to provide accommodation for offshore workers is incidental to it. We refer to any other use or uses as a “Permitted Use”.

149. Ms Shaw submitted that Permitted Uses of the Borgsten were the provision of TAD services to the Dunbar and the provision of accommodation to personnel working on the Borgsten (whether such persons were employed or sub-contracted by DDL or Total). The evidence from Mr Brandvold, Mr Mitchell and Mr Thain as to existence of these Permitted Uses was not challenged by Mr McNall. We accept that these Permitted Uses exist, and this is reflected in our Findings of Fact.

150. We have considered further the extent to which a distinction should be drawn between the Permitted Uses of the Borgsten in the pre-drilling and drilling phases. We note in this regard that the evidence demonstrates that at the time of the Letter of Award and Total Contract the Borgsten was expected to be in a pre-drilling phase for 120 days before the commencement of drilling operations. Drilling was initially scheduled to start on 15 November 2012, but was repeatedly pushed back (and even by the time the Total Contract was signed the commencement date of the provision of the TSV Drilling Services, ie the time at which the 120 days would start, was itself to be in the period from October to December 2012).

151. Mr Thain’s evidence, which we accept, was that this period of 120 days (whilst KCAD was implementing upgrades to the Dunbar) was to be used for connecting the Borgsten to the Dunbar and ensuring the TAD services were ready to go. This was complex because there were significant procedures to go through to ensure an efficient interface. Furthermore, there were other services which the Borgsten was providing during this period before drilling commenced:

- (1) The Borgsten was supplying water and compressed air to the Dunbar.
- (2) The Borgsten had a welding and machine shop. These sealed areas were used for works which generated a spark risk, such as welding and cutting of metals. Where the Dunbar needed welding and cutting performed this was done by Borgsten staff in these specific safe areas. There would have been significant amounts of this type of work during the initial phase of preparing the Dunbar for drilling.
- (3) The Borgsten functioned as a floating warehouse for the Dunbar. It stored mud-related materials, spare parts, spare cables, spare hoses, tools.

(4) The Borgsten acted as a floating wharf enabling it to take deliveries both for itself and the Dunbar from ships. In the period from 1 April to 1 October 2014 there were 74 boat deliveries (which both delivered and took away items).

(5) The Borgsten ran all the systems needed to provide TAD services, and as such much of the plant and machinery necessary for providing the TAD services was in constant operation, even during the pre-drilling phase. The mud systems were running throughout as a closed loop, running water at pressure through the system.

152. In consequence of these services being supplied even in the pre-drilling phase, Mr Thain's evidence was that there was little change in the day-to-day operations on the Borgsten once drilling commenced. The DDL Personnel who would have seen the most change in their daily duties once drilling commenced would have been the drilling team (responsible for the mudding system) and the roughneck team (responsible for general labour on the Borgsten).

153. In reality, the Borgsten did not go on hire to Total until 1 February 2013. It was onsite at the Dunbar from February 2013 and fully connected and ready to provide drilling support services by May 2013. At this stage DDL expected Total to commence its drilling programme in June 2013, but they were unable to do so until 3 April 2015. We accept that the length of the pre-drilling phase was completely unexpected (both for DDL and, by implication, Total).

154. The witness statements, and some of the oral evidence, included comments from all three witnesses on the purpose or main purpose of the Borgsten – eg Mr Mitchell stated that the “ultimate purpose” of the TSV was to provide TAD services, Mr Thain referred to the “primary purpose” of the TSV being to provide the TAD services to the platform. Mr McNall challenged their evidence as to the main purpose. We note that the exception does not use the language of primary, main or ultimate purpose. The question is whether the use is incidental to another use, or other uses, and that is the question before the Tribunal. We reach our own conclusions.

Approach to statutory construction

155. We were taken to HMRC's technical note dated 1 April 2014 and its accompanying papers and extracts from Hansard of the debate in Parliament on the proposed new legislation.

156. Mr McNall submitted that s356LA(3) is a “limited exception” to the definition of accommodation vessels, whereas Ms Shaw disagreed, submitting that nothing pointed to it being limited and that instead s356LA(3) was necessary because virtually all support vessels in the North Sea would have surplus accommodation so could in principle be caught by s356LA(2)(b)(ii).

157. As mentioned above, HMRC had published a technical note on 1 April 2014 on offshore bareboat chartering in the UK oil and gas industry, which included draft legislation, explanatory notes and a tax information and impact note (“TIEN”). The TIEN referred to the government's announcement at Autumn Statement 2013 that it would ensure that more of the profits made by offshore contractors in the UK are subject to UK tax, as part of a package of measures addressing “unfair tax outcomes”. The introduction states that the government had consulted informally with affected businesses and others during February 2014 and made a number of changes, one of which was described as “the measure will now only apply to drilling rigs and accommodation vessels”. The draft legislation at that stage did not include what is now s356LA(3). The TIEN says that:

“Legislation will be introduced during the passage of Finance Bill 2014 to cap the amount of lease payment allowed as a tax deduction for companies providing drilling rigs and accommodation vessels under bareboat charter (or similar) arrangement, where this arises as part of a composite service...”

158. On 2 July 2014, on the reading of this and other new clauses in Parliament, David Gauke said:

“The UK is not currently receiving a fair amount of tax from companies that provide drilling rigs and accommodation vessels to the oil and gas industry. Many of those companies own their assets in lower tax jurisdictions overseas. Those assets are then leased to associated entities operating on the UK continental shelf through specialised leasing arrangements..., giving rise to a large deductible leasing expense in the UK... This measure will cap the amount the UK base contractor can claim as a deductible expense for those leasing payments.”

159. The debate in Parliament included MPs expressing concerns about whether HMRC had evidence that the transfer pricing involved was avoidance activity (in the context that the proposed cap would introduce a legislatively fixed benchmark price that overrides the arm’s length principle), and what impact the measures would have on drilling activity in the UK (noting the contribution that industry makes to the public purse – and maximising exploration is crucial to future revenues - and the UK’s energy security).

160. The response from David Gauke referred to the consultation with the industry, and included:

“As a result of the evidence received, the scope of the measure has been limited to drilling rigs and accommodation vessels and we have increased the deduction cap.”

161. We are not persuaded that we are permitted to look behind the legislation and use the statements made in Parliament to aid our interpretation of the exception. Statements in Parliament are only relevant to the interpretation of a statute where the legislation is ambiguous or obscure. Here, the parties disagree about the meaning and application of the exception; that is different from it being ambiguous or obscure.

162. In any event we do not consider that the statements made in Parliament are helpful for the purpose of considering and applying the exception in s356LA(3). That exception was not expressly mentioned in Parliament – instead, all that was referred to was the inclusion of drilling rigs and accommodation vessels (which is apparent from the face of the legislation and common ground between the parties).

163. It is apparent (from the statutory language itself) that Part 8ZA applies to restrict the deductions available for the rental paid for certain vessels, namely drilling rigs and accommodation vessels, and that this restriction applies even where the rental paid reflects an arm’s length price. That this is the case is confirmed (were this to be necessary or relevant, and we do not consider it is) by the Parliamentary debate. The vessels the rent for which is subject to this restriction are defined as “relevant assets”, and the legislation itself defines what is within and outside its ambit. It is common ground that the Borgsten is within s356LA(2)(b)(ii), unless s356LA(3) applies. We must interpret and apply s356LA(3).

HMRC’s guidance on the exception in s356LA(3)

164. Mr McNall referred us to HMRC’s Oil Taxation Manual, which gives examples (at OT50010) of what HMRC consider to be the normal meaning of the incidental provision of accommodation:

“Examples of incidental provision of accommodation

Situations where the provision of accommodation is likely to be considered incidental include:

- Where an asset is being used to provide a composite service involving installation, decommissioning or maintenance, and as part of that provision a small number of berths are made available to individuals who normally work on the platform which is subject to the work.
- Where a vessel has a small number of berths that are actually made available for use other than by its crew or people working on the vessel itself (whether directly employed or subcontracted) and the amount charged or included for such accommodation is less than 5 to 10 per cent of the amount charged as part of the overall service provided or project cost for the installation or decommissioning.
- The unexpected provision of accommodation as a result of adverse weather conditions.

However, if a construction vessel was only used to provide accommodation services briefly during a year and at other times was involved, for example, in construction activity outside the definition of a relevant asset then the period of use for accommodation provision would be subject to the hire cap and would fall within the contractors ring fence. HMRC would not accept that such short term use solely or mainly for accommodation was incidental to any subsequent use by reference to the overall use of the vessel in a calendar year.

Similarly, if a vessel was used simultaneously for accommodation and non-accommodation use under separate contracts, the hire cap would apply to the total amount paid under both contracts.”

165. Mr McNall acknowledged that this is only guidance and does not have the force of law, but submitted that these examples are illustrative of what might be considered to be incidental.

166. Given its status as guidance, we did not consider that these examples assisted with our application of the exception to the facts as we have found them.

Consideration and Conclusions

167. Section 356LA(3) provides that a vessel is not within s356LA(2)(b)(ii) if it is reasonable to suppose that its use to provide accommodation for offshore workers is unlikely to be more than incidental to another use, or other uses, to which the vessel is likely to be put.

168. The evidence demonstrates (and DDL accepted) that the Borgsten was used to provide accommodation for offshore workers, ie those Total Personnel who were sleeping on the Borgsten and working on the Dunbar. The exception requires that we assess whether it is “reasonable to suppose” that this use was “unlikely to be more than incidental” to another use or other uses “to which the vessel is likely to be put”.

169. We accept Ms Shaw’s submission that this language does not focus on an assessment of the actual use. Ms Shaw submitted that actual usage could be relevant to give comfort or as a “sanity check” to the conclusions reached. We consider that actual usage can be relevant to assessing the reasonableness of what was supposed to be likely or unlikely.

170. Both parties noted that there is no definition of “incidental” or “more than incidental” for this purpose, and thus this word, or this phrase, must bear their ordinary meaning. Something is incidental to another matter if it is subordinate, or secondary, to it. We bear in mind throughout that the legislation does not specifically require that this other use is the main (or a main) or primary use.

171. Having considered all of the evidence before us, we have reached the view that there is a significant amount of evidence supporting a conclusion that it is reasonable to suppose that the use of the Borgsten to provide accommodation to Total Personnel generally (ie irrespective

of whether they were offshore workers on the Dunbar or working on the Borgsten) was unlikely to be more than incidental to the Permitted Uses:

(1) The ITT and the Total Contract focus on the provision by the Borgsten of TSV Drilling Services or TAD services to the Dunbar and the technical specifications which would be required of the Borgsten. The requirements relating to accommodation needing to be made available for Total Personnel (up to 40 berths at that stage) are brief, with minimal detail in relation thereto.

(2) At the time of submitting the tender, DDL did not give any significant thought to the use of the accommodation on the Borgsten by Total Personnel, as the Borgsten had surplus capacity in excess of the number of berths that Total was requesting. As Mr Mitchell put it, the accommodation was just there. This was typical and to be expected of any TSV.

(3) Having required that 40 berths be available for Total Personnel, there is no mention in the ITT or the Total Contract of how much use Total would make of the accommodation available to it or who Total would seek to have accommodated on the Borgsten. There was no commitment by Total to use any of these berths (and if it had not done so there would have been no charge of the \$80 unit price). Total had access to office space and a conference room on the Borgsten, thus illustrating that some Total Personnel would be working (at least some of the time) on the Borgsten.

(4) In practical terms, making available the surplus accommodation to Total Personnel was immaterial to DDL. Accommodation needed to be available to, and used by, the DDL Personnel. As such, DDL needed to make arrangements to deal with matters such as catering and laundry, and provide a gym and lounges. Ensuring that this covered a larger amount of usage made minimal difference.

(5) The basis on which DDL agreed to increase the accommodation on board the Borgsten from 102 to 120 berths was that Total would bear the cost of the works and this did not delay the conversion (and thus the commencement date under the Total Contract). The additional works involved could be completed as part of the much bigger programme of works to convert the drilling rig into a TSV.

(6) After the conversion into a TSV and the increase in the accommodation, most of the deck space on the Borgsten was related to its use to provide TAD services to the Dunbar. Mr Thain's evidence was that less than 10% was used for accommodation (which we take to refer to the cabins) but we do note that there was, in addition, space taken by related facilities including, eg, lounges, galley, mess and the gym.

(7) By the time Part 8ZA came into effect on 1 April 2014, the Borgsten had been alongside the Dunbar for more than one year, and had been ready to support the commencement of drilling for just under a year. The drilling reinstatement programme was behind schedule. However, the day-to-day activities on board the Borgsten were largely the same in both the pre-drilling and drilling phases.

172. Both parties focused on the "value" of the Total Contract, and the amounts of money spent by Total to accommodate Total Personnel on the Borgsten at \$80 per night.

(1) Ms Shaw submitted that the value of the Total Contract to DDL was in the daily rate, which was \$203,433 by February 2013. This was supported by the evidence of Mr Brandvold and Mr Mitchell, and consistent with the drafting of the announcement to the stock exchange.

(2) However, this daily rate was the rate for all of the Services provided by DDL under the Total Contract, and those services included not only the TAD services but also the provisions in the Total Contract relating to accommodation. There was no breakdown of the daily rate, and whilst it is clear that DDL focused on the ability to provide TAD services from a converted Borgsten, and what technical specifications would be necessary to achieve this, it would be artificial and inaccurate to state that the daily rate was for everything other than the accommodation. Ms Shaw pointed to the unit price of \$80 per berth payable for accommodation used by Total Personnel, submitting that it would be double-counting if accommodation costs also formed part of the daily rate. We disagree – as we have found, making the surplus accommodation available to Total Personnel didn't cost DDL anything (it was there on the rig and no changes were proposed in the conversion programme, at least until the change order was agreed). That is not the same as concluding that DDL were not charging for making available all of the facilities on board the Borgsten, including the 40 berths, even if they were not used.

(3) We do not, however, consider it appropriate in the light of all of the evidence to over-state this. The overwhelming weight of the evidence before us was that the focus was on the TAD services to be provided from the Borgsten (even to the extent that the tender included a breakdown of the crew that would be provided by DDL and their pay rates). Thus whilst the value of the Total Contract was in the daily rate, this rate itself included an amount for the accommodation-related services (albeit that we concluded this was a very small amount).

(4) Looking at the amounts of money involved, DDL were charging Total \$136,640 (for March 2013), \$151,680 for September 2014, per month for accommodating Total Personnel on the Borgsten. The numbers do not draw a distinction between the proportion of this which related to offshore workers. Also, as a result of the agreement to increase the number of berths on the Borgsten, Total met the cost of \$6,700,800. These are clearly large sums of money. However, we do not look at these amounts in isolation. Total paid DDL a daily rate of \$203,433 - on a 30-day month basis, this was \$6,102,990 per month. Similarly, in the Letter of Award Total agreed that it would be responsible for costs of \$20,470,000 (envisaged to relate to the pre-ordering of items such as the gangway) even before a contract for the TSV Drilling Services was agreed, and paid \$25 million towards the costs of the class renewal survey.

(5) There were large sums of money being spent under the Total Contract, and in readiness for it, albeit that even the \$25 million paid towards the class renewal survey was less than 10% of what DDL calculated to be the value of the contract. The monthly costs being borne by Total to accommodate its personnel on the Borgsten, some of whom were working on the Borgsten and were not offshore workers, were very small, even taking account of the fact that some of the daily rate related to the availability of accommodation facilities.

173. Nevertheless, when assessing what it is reasonable to suppose for the purpose of applying s356LA(3), it was clear that Total expected and required that the TSV providing the TSV Drilling Services would have surplus accommodation that could be used for Total Personnel. We note in particular:

(1) All support vessels are expected to have surplus accommodation (ie over and above that which is required for its own crew) which can be used by the Operator. In putting out the ITT and stating in it that Total required the use of 40 berths, Total was wanting to have access to some of that accommodation, as it would typically expect to be able to do.

(2) Having initially not focused on this request for accommodation at the time of submission of the tender (as the Borgsten had surplus in excess of that which was required by Total), there is then a pattern showing that DDL paid more attention to this use of accommodation - this can be seen from the correspondence relating to the drafting of the stock exchange announcement where Mr Mitchell referred to “accommodation/commissioning support”, and then the fact of Total’s request for additional berths (which necessitated the Change Order as the numbers requested exceeded those which already existed as surplus).

(3) Total wanted to have more berths available for Total Personnel and was prepared to pay for them, albeit not at the expense of delaying the completion of the conversion of the Borgsten into a TSV. At this time, it was apparent that some of the accommodation was sought by Total for Total Personnel who would be offshore workers, as Total wanted to increase the number of personnel working on the upgrades to the Dunbar so that drilling operations could commence more quickly.

(4) The delays to the works on board the Dunbar meant that there was an extended period before drilling commenced. However, we note that these delays were unexpected and the evidence from Mr Thain addressed the activities on board the Borgsten during this period.

(5) The POB Logs show the actual use by Total Personnel of the accommodation on the Borgsten. They did use the additional accommodation which had been requested and paid for. A large majority of Total Personnel sleeping on the Borgsten were working on the Dunbar – this was the case in both the pre-drilling and drilling phases.

(6) Total was paying between \$96,080 and \$163,920 every month to DDL for Total Personnel to be accommodated on the Borgsten.

174. There are some matters which we did not consider to be particularly relevant to the analysis – namely the differences between accommodation vessels and TSVs, the significance to Total of the class renewal survey being completed before the commencement date, the absence of an Accommodation Technician employed by DDL, DDL’s decision to sub-contract catering to Sodexo rather than employing its own personnel, and whether the pricing of \$80 per berth was intended to be a profit-centre in its own right rather than broadly covering the marginal additional costs.

175. The assessment of whether the Borgsten is within s356LA(3) for the accounting periods in issue does not require us simply to weigh these lists of factors against each other. We recognise that, taken together, the factors listed at [173] above demonstrate that the use of the Borgsten to provide accommodation to offshore workers could reasonably be supposed to be of some importance. We have therefore had to consider whether this precludes the use from being no more than incidental. We have concluded that it does not – incidental does not need to be confined to uses which are trivial; it can capture uses which, whilst being desirable, sought-after or even important are nevertheless, when viewed in context, secondary to (or less important than) another use or uses.

176. Having considered all of the evidence before us, we are satisfied that, on the balance of probabilities, it is reasonable to suppose that the use of the Borgsten to provide accommodation for Total Personnel working on the Dunbar was unlikely to be more than incidental to the use of the Borgsten to provide TAD services to the Dunbar and/or to accommodate DDL Personnel (who were working on the Borgsten). Accordingly we have concluded that the terms of the exception in s356LA(3) are satisfied such that the Borgsten was not within s356LA(2)(b)(ii) for the accounting periods in issue. DDL’s appeal is allowed.

CONCLUSION

177. On the basis of the findings of fact and for the reasons set out above, the Borgsten was not an accommodation vessel within s356LA(2)(b)(ii) for the accounting periods in issue. DDL's appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

178. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**JEANETTE ZAMAN
TRIBUNAL JUDGE**

RELEASE DATE: 16 NOVEMBER 2020