



Neutral Citation Number: [2024] EWHC 3183 (Comm)

Claim No: CL-2023-000779

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING’S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2024

Before :

MR JUSTICE FOXTON

Between :

(1) WALTER OIL & GAS UK LLP
(2) EAGLE H C LIMITED
- and -
WALDORF CNS (II) LIMITED

Claimants

Defendant

Eleanor Campbell (instructed by **BoothLaw Limited**) for the **Claimants**
David Davies KC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Defendant**

Hearing date: 25 November 2024
Draft judgment to the Parties: 04 December 2024

Approved Judgment

This judgment was handed down remotely at 2pm on 12 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Foxton:

1. This hearing involves cross-applications for summary judgment under CPR 24.3 in relation to disputes concerning a Deed of Grant of Overriding Royalty Interest of 19 September 2005 (“**the Deed**”).
2. By the Deed, the Defendant (“**Waldorf**”), as one of two Grantors granted the First Claimant (“**Walter**”) a right to 3% of all petroleum produced from certain blocks in the North Sea (“**the Royalty Interest**”), the Deed forming part of the consideration for the sale of licenses for the production of oil and gas from those blocks. In the event, only one block (“**the Block**”) went into production. Walter has since assigned part of its entitlement under the Deed to the Second Claimant, and references to Walter in this judgment embrace the Second Claimant’s derivative entitlement under the Deed.
3. The amount payable under the Deed was a percentage of “the Net Proceeds”, defined as the “Gross Proceeds” less certain permissible deductions or “Deductible Costs”. The parties disagree as to the proper construction of the term “Deductible Costs”.
4. Both parties accept I can finally decide the disputed issues of construction on this application.

The Background

5. Walter served evidence as to the factual background to the Deed in the form of evidence from Mr Brooke, which Waldorf does not demur from. Waldorf has served evidence as to the invoicing procedures from Mr Pringle which has not been challenged.
6. The Deed was entered into as part of a transaction by which Walter’s parent, an entity named Walter Oil & Gas UK Limited (“**Walter Oil and Gas**”), sold its interest in the production licences relating to the blocks to an entity named Palace Exploration Company (United Kingdom) Limited (“**Palace UK**”). The interest in the licences was held by Waldorf, which was then owned by Walter Oil and Gas. Pursuant to a share purchase agreement also entered into in September 2005 (the “**SPA**”), Walter Oil & Gas agreed to sell, and Palace UK agreed to purchase, the shares in Waldorf.
7. Pursuant to the SPA the consideration for the shares comprised two elements:
 - i) a cash payment as provided for in Clause 2(a) and Clause 3 of the SPA (which in the event totalled c.\$2 million); and
 - ii) a promise by Palace UK that it would procure the grant to Walter Oil & Gas (or an affiliate of Walter Oil & Gas) “of an overriding royalty interest of three per cent (3%) of the total quantities of Petroleum won and saved from the area(s) governed by the Walter E&P Licences from time to time” (Clause 3(b) of the SPA).
8. I will refer to the petroleum which is the subject of Walter’s 3% interest as “**Royalty Interest Petroleum**”.
9. Palace UK entered into a separate agreement with an entity named Challenger Minerals (North Sea) Limited (“**CMNS**”) “relating to the transfer of certain legal and beneficial interests in the Blocks”. In the event, rather than Walter alone granting a 3% interest in

production from the blocks pursuant to the Deed, as contemplated by Clause 2(b) of the SPA, CMNS was the second “Grantor” pursuant to the Deed.

10. The successor in title to CMNS pursuant to the Deed is an entity named EnQuest Heather Limited (“**EnQuest**”) which is the operator of the Block. There is no dispute between Waldorf and EnQuest, and it is not a party to these proceedings. At all relevant times Waldorf and EnQuest have each had a 50% interest in all Petroleum produced from the Block, apart from the Royalty Interest Petroleum.
11. Pursuant to a Deed of Amendment, Release, Discharge and Novation dated 3 September 2015 (the “**Deed of Amendment**”), the Deed was amended so that it applied solely to Licence P.1107 in respect of the Block, the other licences which were the subject of the Deed in its original form having been relinquished.
12. Petroleum from the Block is produced and transported to the UK mainland where it is sold, in five stages:
 - i) Petroleum extracted from the Block is transported for processing along a pipeline which is jointly owned by Waldorf and EnQuest. No issue arises as to this pipeline.
 - ii) It is processed on a platform (the “**Kittiwake Platform**”) which is jointly owned by EnQuest and a third party named Dana Petroleum E&P Limited (“**Dana**”). Processing is undertaken pursuant to a Transportation, Processing and Operating Services Agreement between EnQuest, Dana, and Waldorf and dated 25 September 2015 (the “**TPOSA**”). The Kittiwake Platform is operated by EnQuest as the “Host Operator” pursuant to the TPOSA.
 - iii) The first stage of the journey from the Kittiwake Platform to shore is through a pipeline named the Kittiwake-Unity Pipeline (the “**KUP**”) which has at all relevant times been owned by an Affiliate of EnQuest within the meaning of the Deed, or (as is the current position) by EnQuest itself.
 - iv) The petroleum is transported through the KUP pursuant to an Agreement for Transportation of Scolty Crathes Liquid between EnQuest and Waldorf and dated 11 October 2016 (the “**SC KUPTA**”). The KUP is operated by EnQuest as the “Pipeline Operator” pursuant to the SC KUPTA.
 - v) The second stage by which the petroleum is transported to shore, is via the Forties Pipeline System (the “**FPS**”). The FPS is currently owned by Ineos FPS Limited (“**Ineos**”) and has at all relevant times been owned by parties unrelated to Waldorf or EnQuest. The petroleum is transported pursuant to a Scolty & Crathes Transportation Tariff Agreement dated 2 August 2016, between EnQuest, Waldorf and Ineos (the “**FPS TPA**”).
13. The Operating Agreement referred to in the Deed (the “**JOA**”) was entered into on 2 November 2005, not long after the execution of the Deed. The parties to the JOA were CMNS and Waldorf, which was then named Palace Exploration Company (E&P) Limited. The JOA sets out the mechanism by which EnQuest, as Operator pursuant to clause 4 of the JOA, is to be reimbursed by EnQuest and Waldorf as the “Parties” to the JOA, for the costs of “Joint Operations” in respect of “Joint Petroleum” (each as defined in the JOA).

14. It is common ground that both EnQuest and Waldorf sell the 3% Royalty Interest attributable to their respective 50% shares as agent for Walter, that being the effect of clause 2.1 of the Deed.

The Deed

15. Clause 2.1 of the Deed provides:

- i) The Grantors grant the Grantee an entitlement to receive 3% of all Petroleum produced from the Block;
- ii) The Grantee appoints such of the Grantors, as shall be agreed, as its “Agent”(s) to sell the Royalty Interest Petroleum; and
- iii) The Agent(s) is/are required to sell the Royalty Interest Petroleum with its/their own entitlement to Petroleum produced from the Block, and at no less favourable a price “and to account to the Grantee for the Gross Proceeds thereof less Deductible Costs (“Net Proceeds”)”.

16. Clause 4.1 of the Deed provides that, without prejudice to the right of the Grantors to deduct the Deductible Costs from the Gross Proceeds, the Grantee shall not be liable or responsible in any way:

“... for payment of all or any part of the costs and expenses charged against any interest or interests held in and under the Licences or any of them, or for any liabilities incurred in or in connection with the developing, exploring, drilling, equipping, testing, operating, producing, maintaining, or plugging and abandoning of any well in the Blocks or the storing, handling, transporting, treating or marketing of production from the Blocks.”

17. Clause 4.1 further provides that the Grantee is entitled to be indemnified by the Grantors for legal costs incurred as a consequence of the Grantors’ breaches of the Grantors’ obligations under the Deed.

18. Deductible Costs are defined in Clause 1 as:

- “(a) all Tax which may be levied now or in the future in respect of the production of all Royalty Interest petroleum produced from the Blocks, the transportation of that Petroleum and the processing and initial storage of that Petroleum at any terminal, in each such case as such tax so levied arises prior to its delivery to any purchaser thereof; and
- (b) the actual amounts, if any, as may be reasonably required to be paid by the Grantors, the Agent (acting in its capacity as such) and/or the Operator for the processing, transportation, dehydration, compression, recycling or any other similar cost or expenses incurred in making [Royalty Crude Oil, as defined in Clause 1] or [Royalty Gas, as defined in Clause 1] as the case may be ready or available for market or transporting same to the point of sale and which are charged to the Grantors, the Agent (acting in its capacity as such) or the Operator by third parties who are not Affiliates of such party for such services; and if such amounts have not been incurred in respect of [Royalty Crude Oil] or [Royalty Gas] specifically, such proportion as the quantity of

[Royalty Crude Oil] or [Royalty Gas] bears to the total quantity in respect of which such amounts have been incurred.”

19. “Affiliate” is defined as

“... in relation to a Party, a subsidiary or holding company of that Party and includes the ultimate holding company of that Party and any subsidiary of that holding company and for the purposes of this definition “holding company” and “subsidiary” shall have the meanings respectively given to them by section 736 of the Companies Act 1985, as amended by section 144 of the Companies Act 1989.”

20. “Operator” is defined as

“... the party recognised as operator of the [Block] by the Secretary and identified as Operator in the relevant Operating Agreement.”

21. “Operating Agreement” is defined as:

“any such agreement or agreements as are or may be from time to time in place setting out the relationship between the parties thereto for the exploitation and the management of the [Block].”

22. “Tax” is defined as:

“... without limitation tax, levy, royalty, rate, duty, fee or other charge imposes directly or indirectly in respect of the Royalty Interest and/or the Royalty Interest Petroleum and/or the Net Proceeds thereof, or the assets, income, dividends or profits of the Grantee (without regard to the manner of collection or assessment and whether by withholding or otherwise) by any governmental, semi-governmental or other body authorised by law to impose such Tax.”

The Other Agreements

The JOA

23. The JOA for the Block was entered into on 2 December 2005 shortly after execution of Deed on 19 September 2005, The parties to it were Palace UK and CMNS (now Waldorf and EnQuest). The JOA extended to identified blocks (of which the Block is the only relevant and surviving field). CMNS was appointed the operator the Block (a position now held by EnQuest). The JOA contains a number of provisions addressing the exploitation of the Block, including a mechanism for the Operator to prepare budgets and call for contributions to the other parties to the JOA (effectively itself and Palace UK).

24. The responsibilities covered by the JOA do not extend to the operation of the Kittiwake Platform or the FPS. So far as the former is concerned, it is accepted that EnQuest owes no duties under the JOA or the Deed to retain its interest in the Kittiwake Platform.

The TPOSA

25. The Kittiwake Platform is North Sea infrastructure. It is apparent from a field schematic in the evidence that there are various North Sea blocks whose output goes through and is processed by the Kittiwake Platform, and not just the Block.

26. The TPOSA provides for the provision of transportation and processing services by the Kittiwake Platform and associated infrastructure to owners and operators of North Sea licenses in blocks in the Scolty Crathes field. The Kittiwake Platform is referred to in the TPOSA as the “Host Platform” and the “Host Facilities” are shown in a diagram at Schedule A Figure 2.
27. The TPOSA distinguishes between the “Host Owners” who provide the relevant services and the “Shippers” who use and pay for the services. The “Host Owners” are EnQuest and Dana, described in the Recitals as “the legal and beneficial owners of the Host Field and the Host Facilities”. EnQuest is the “Host Operator”, i.e., it operates the Host Field and the Host Facilities for the benefit of both itself and Dana. Pursuant to Clause 17.3.2 of the TPOSA, the Host Owners represent and warrant that the Host Operator acts as their agent.
28. Waldorf is party to the TPOSA only in its capacity as a “Shipper”, purchasing the transportation, processing and operating services to be supplied by the Host Owners under the TPOSA.
29. As well as being a Host Owner and the Host Operator, EnQuest is a party to the TPOSA in its capacity as a “Shipper” and it also acts as the “Shippers Operator” which is defined as meaning “the operator of the Shippers Field appointed from time to time by the Shippers, being at the date hereof EnQuest”. The Shippers Operator acts as agent for the Shippers (Clause 17.3.1).
30. Clause 3.1.1 of the TPOSA provides that “The Host Owners shall perform the Production Services, and Non-Tariff Services agreed in accordance with Clause 3.3, with effect from the Acceptance Date or earlier in accordance with Clause 3.1.4, as appropriate, in accordance with and subject to the terms and conditions of this Agreement.”
31. The “Production Services” are detailed in Schedule F. The Liability of the Host Owners under the TPOSA is joint and several (Clause 17.2.1). As noted above, the duties and obligations owed by the Host Owners are to be performed by the Host Operator (EnQuest) as their agent.
32. Clause 6.1 provides for payment to be made on either a “Crude Oil Tariff” or “Costs Share” basis. These are alternatives and the evidence shows that the TPOSA was initially operated on the Crude Oil Tariff basis and later moved to a Costs Share basis. The Costs Share basis of payment, governed by Clause 8 of the TPOSA, requires the Shippers to pay to the Host Owners “in respect of each Month of such Contract Year an amount equal to the Host Operator’s then bona fide current estimate of the annual amount of the Costs Share Costs payable by the Shippers....” (Clause 8.4(a)).
33. Invoicing and payment are governed by Clause 13 of the TPOSA. Clause 13.1 provides for a monthly invoice to be issued by the Host Operator to the Shippers Operator in respect of amounts “payable by the Shippers” and requires the Shippers to cause the relevant payment to be made by the Shippers Operator to the Host Operator.
34. Since EnQuest is both the Host Operator and the Shippers Operator, this necessarily involves EnQuest invoicing itself. But EnQuest issues the invoice as Host Operator, on behalf of itself and Dana, and to itself as Shippers Operator, on behalf of itself and Waldorf as the Shippers.

35. There is also an annual reconciliation process (Clause 13.2) which is to take place direct between the Host Owners and the Shippers directly (i.e. without the intermediation of the Host and Shippers Operators). Thus, Clause 13.2 provides: “After the end of each Contract Year, the Host Owners shall send to the Shippers a statement (the “Annual Reconciliation Statement”) in respect of the relevant Contract Year...” Similarly, the Shippers have an audit right under Clause 13.4.
36. Clause 17.2 provides that the liability of the Host Owners and the Shippers is “joint and several”. There is no equivalent provision addressing the liability of the Host Operator and Shippers Operator, reflecting their essentially intermediary roles.
37. The relationship between Dana and EnQuest as Host Owners is regulated by a separate joint operating agreement.
38. The evidence from Mr Pringle for Waldorf is that EnQuest and Waldorf account for Waldorf’s liabilities under the TPOSA by using the accounting procedure under the JOA for the Block and two additional blocks which are subject to a different production licence: Schedule 1 to the JOA sets out the accounting procedure by which the Operator recovers the other parties’ share of the costs of the Joint Operations. This involves a monthly cash call requiring advance payment of the estimated expenses for that month (para. 2.2) followed by the production of a final Billing Statement after the end of the month (para. 4.1). EnQuest includes Waldorf’s share of the TPOSA charges in its monthly bills to Waldorf under the JOA.
39. What happens, therefore, is:
 - i) EnQuest, as the Host Operator under the TPOSA bills itself, as Shippers Operator, for the totality of the charges that have to be paid by the Shippers (i.e., itself and Waldorf) under the TPOSA.
 - ii) EnQuest separates out the 50% of the TPOSA charges for which Waldorf is liable in respect of the Scolty production and then invoices Waldorf for that part by including Waldorf’s 50% share of the relevant TPOSA charges in the monthly statements issued under the JOA.
 - iii) Waldorf then pays that amount to EnQuest along with other JOA expenses in respect of the relevant month.
40. I accept that there is no contractual term of the JOA which requires the accounting relating to the use of the Kittiwake Platform to be effected pursuant to its invoicing provisions. As I have stated, the JOA does not purport to regulate the use of the Kittiwake Platform, and it would have been open to Dana and EnQuest to sell their interest in the Kittiwake Platform and cease to be parties to the TPOSA without breaching the JOA. Had EnQuest and Waldorf not been willing to use the accounting and invoicing provisions of the JOA to address the costs of processing and transporting product from the Block on and through the Kittiwake Platform, they would have had to find some other mechanism for doing so.

The SC KUPTA

41. The SC KUPTA relates to the transportation of liquids through the KUP, which transfers liquids on from the Kittiwake Platform to the Forties Unity Riser. The KUP is now owned by EnQuest (having formerly been owned by one of EnQuest’s affiliates).

42. The SC KUPTA distinguishes between the owners and users of the relevant infrastructure. EnQuest is the “Pipeline Owner” and the “Pipeline Operator”. The users of the transportation services are the “Scolty Crathes Group” comprising EnQuest and Waldorf (under its previous name of MOLGROWEST (II) Limited). EnQuest is identified as the “Scolty Crathes Operator”.
43. Waldorf and EnQuest are liable to pay EnQuest for the transportation services provided under the SC KUPTA. The tariff is on a per barrel basis and is governed by the formula in Clause 7. The invoice is to be submitted to the Scolty Crathes Operator, EnQuest (Clause 8.1(a)) with the result that there is the same process of EnQuest invoicing itself in the first instance.
44. Clause 15.6.2 of the SC KUPTA provides that the rights and obligations of the “Scolty Crathes Group” (i.e. the users of the KUP) is joint and several, and that “the liabilities of the Scolty Crathes Group intersea shall be governed by the Scolty JOA and Crathes JOA”, which include the JOA.
45. Mr Pringle’s evidence as to the invoicing process is the same as that given in relation to the TPOSA. At the first stage, EnQuest invoices itself for the total amount of the tariff payable by both itself and Waldorf. At the second stage EnQuest then invoices Waldorf for its share of the tariff (using the JOA accounting procedure). The only difference between the TPOSA and the SC KUPTA is that there is no additional payee like Dana and all of the tariffs are received by EnQuest.
46. Once again, that there is no contractual term of the JOA which requires the accounting relating to the use of the KUP to be effected pursuant to its invoicing provisions. As I have stated, the JOA does not purport to regulate the use of the KUP, and it would have been open to EnQuest to sell its interest in the KUP and cease to be a party to the SC KUPTA without breaching the JOA. I accept, however, that the SC KUPTA does contemplate that the liabilities of Waldorf and EnQuest inter se would be governed, inter alia, by the JOA.

The KUP Settlement

47. By a Letter Agreement dated 9 June 2018 (the “**KUP Settlement**”), EnQuest and Waldorf (then named MOLGROWEST (II) Limited) entered into an agreement with the parties to the SC KUPTA to settle a dispute relating to the use of the KUP. EnQuest and Waldorf are described in the KUP Settlement as the “Scolty Crathes Group”.
48. Under the KUP Settlement, EnQuest and Waldorf agreed to meet:
 - i) The costs of installing and commissioning a new pig launcher on the Kittiwake Platform (the “**KUP Settlement Installation Costs**”).
 - ii) The costs of operating that pig launcher (the “**KUP Settlement Operating Costs**”).

The FPS TPA

49. The FPS TPA regulates the use by EnQuest and Waldorf (as the Shippers Group) of the FPS, pipeline infrastructure currently owned by Ineos. The FPS provides for the payment of tariffs for Shippers Production tendered by the Shippers Group, and of certain other charges.

The Disputed Costs

50. The Disputed Costs comprise certain sums charged to the Grantors pursuant to the TPOSA, the SC KUPTA, the KUP Settlement and the FPS TPA.
51. First there are tariffs paid pursuant to invoices rendered by EnQuest:
 - i) for production services invoiced by EnQuest in its capacity as “Host Operator” of the Kittiwake Platform to EnQuest in its capacity as “Shippers Operator” within the meaning of and pursuant to the TPOSA. Such tariffs comprise a “Crude Oil Tariff” charged pursuant to Clause 6.2 of the TPOSA in the period up to December 2020, and “Costs Share Costs” charged pursuant to Clause 8 of the TPOSA since January 2021 (the “**TPOSA Tariffs**”); and
 - ii) for transportation services charged pursuant to Clause 7 by EnQuest in its capacity as “Pipeline Operator”, to EnQuest in its capacity as “Scolty Crathes Operator” within the meaning of the SC KUPTA (the “**SC KUPTA Tariffs**”).
52. Second, there are the disputed Costs incurred pursuant to the FPS TPA which are the send or pay charges referred to as the “Tariff Shortfall Payments”, charged by Ineos to EnQuest and Waldorf as the “Shippers Group”, in respect of the difference between the minimum quantity (referred to as the “Tariff Minimum Quantity”) required to be delivered through the FPS in any Contract Year (as defined in the FPS TPA), and the quantity actually delivered during such Contract Year (the “**Send or Pay Charges**”).
53. Third, there are amounts which have been, and which are being paid by EnQuest and Waldorf (as the “Scolty Crathes Group”) to EnQuest in its capacity as Pipeline Operator of the KUP, pursuant to the KUP Settlement.
54. Finally, there are Emissions Trading Scheme tariffs (and their UK equivalent post-Brexit) invoiced pursuant to Clause 6.6 of the TPOSA (the “**ETS Tariffs**”).
55. The disputes give rise to four issues of construction:
 - i) The first arises in relation to all the Disputed Costs charged pursuant to the TPOSA (excluding the ETS Tariffs), the SC KUPTA and the KUP Settlement. The issue is whether those costs are charged to Waldorf by “third parties which are not Affiliates of such party for such services” within the meaning of the Deed, such that they are Deductible Costs (the “**Third Party Issue**”).
 - ii) The second issue of construction is whether the Send or Pay Charges are costs of “the processing, transportation, dehydration, compression, recycling or any other similar cost or expenses incurred in making RCO or RO as the case may be ready or available for market or transporting same to the point of sale” within the meaning of the Deed and therefore, Deductible Costs (the “**Send or Pay Issue**”).
 - iii) The third issue of construction is whether the KUP Settlement Installation Costs are costs of “the processing, transportation, dehydration, compression, recycling or any other similar cost or expenses incurred in making RCO or RO as the case may be ready or available for market or transporting same to the point of sale” and therefore, Deductible Costs, or whether they are a capital cost of infrastructure for

the production and transportation of petroleum from the Block and therefore not a Deductible Cost (the “**KUP Settlement Issue**”).

- iv) The final issue of construction is whether ETS Tariffs are within the definition of “Tax” in the Deed and if so, whether they are the kind of Tax which is a Deductible Cost (the “**ETS Issue**”).

The Third Party Issue

56. The dispute which arises here is as follows:

- i) Waldorf contends that the TPOSA Tariffs and the TPOSA Send or Pay Charges, together with sums incurred pursuant to the SC KUPTA and the KUP Settlement, are Deductible Costs because they are charged to it by EnQuest, and EnQuest is a third party which is not an Affiliate of Waldorf within the meaning of the Deed.
- ii) Walter disputes that these are Deductible Costs because they are charged by EnQuest in its capacity as operator of the Kittiwake Platform and the KUP, to itself as Operator of the Block and/or on behalf of EnQuest and Waldorf as the Grantors, who are jointly and severally liable for them. Walter contends that since EnQuest is one of the Grantors, these costs are not charged to the Grantors, the Agent or the Operator “by third parties who are not Affiliates of such party for such services”, and they are therefore not Deductible Costs.

57. I should state at the outset that the answer to this question is to be ascertained by interpreting the language of the Deed according to well-established principles. It is not helpful to try and reach some broad characterisation of the nature of Walter’s relationship with the Grantors – e.g. as a “profit share” – and then seek to interpret the Deed in the manner which best reflects that overarching characterisation. It is clear that the definition of “Deductible Costs” involved a rather blunt and imperfect means of arriving at the “Net Proceeds” of sale for Walter’s 3% interest. For example, the mere fact that services are provided by an affiliate who is paid for them does not mean that they have no objective market value, or that the amount paid was not fair. And yet the entirety of the amount paid is to be excluded. And the fact that internal costs, management time or overtime might be incurred by the Agent in selling Walter’s 3% interest does not matter, it only being amounts “charged ... by third parties” which can be deducted.

58. I am satisfied that Waldorf’s construction is to be preferred:

- i) The definition contemplates that the same legal persons may pay amounts which fall to be deducted in different capacities: the Grantors, “Agent (acting in its capacity as such)” who will be one of the Grantors under clause 2.1, and the Operator, who may well once again be one of the Grantors (and in the JOA which was entered into not long after the Deed, was confirmed to be CMNS (now EnQuest)).
- ii) It is necessary to look at the amounts paid by that relevant person in the relevant capacity, and ask what amount has been paid to third parties “who are not Affiliates of such party” – i.e. the paying party – for “such services” (i.e. those to which the payment relates). That party-by-party approach is reinforced by the definition of

Affiliate, which similarly contemplates a party-by-party analysis (“‘Affiliate’ means in relation to a party, a subsidiary or holding company of that Party”).

- iii) Here the relevant payment has been made by Waldorf to EnQuest, who it accepted is not an affiliate of Waldorf.
 - iv) Ms Campbell’s reliance on the boilerplate in clause 1.6 – “unless the context otherwise requires, references to the singular shall include the plural and vice versa” – does not assist. It is the compendious expression “such party” which is key here, “such” being a well-known interpretative prompt when placed in front of a noun to indicate that it is a particular person, time, place or thing in the qualified term which is being referred to, as indicated elsewhere in the clause.
 - v) The fact that the Shippers are jointly and severally liable to the Host Owners (and thus EnQuest and Waldorf for the other’s share *qua Shipper* of transportation and processing charges) does not change the outcome. The focus of the definition of “Deductible Costs” is on “actual amounts” “paid” and “charged” and which are “incurred in respect of RCO and/or RG”.
 - vi) It is said that Walter might have no visibility as to any ownership interests in the Kittiwake Platform. However, there are inevitably aspects of “Deductible Costs” which may require some form of enquiry – for example the allocation of “amounts ... not incurred in respect of RCO and/or RG specifically”. If these is a dispute, clause 6.4 provides for an expert determination process with an express obligation to provide information. Clause 3 of the Deed also contains an audit right.
59. The conclusion which I have reached as a matter of the language of the Deed is supported by considerations of commercial purpose and consequence:
- i) Mr Davies KC’s construction distinguishes between amounts not paid on an arms-length basis, and of which the relevant Grantor or the group of which it forms part is a beneficiary, and payments made on an arms-length basis by one Grantor to the other for a service provided. That is a distinction which is readily understandable from a commercial perspective.
 - ii) By contrast, Ms Campbell’s construction places far too much weight on the identity of the Host Operator from time-to-time. Ms Campbell did not shrink from the conclusion that if EnQuest was the Host Operator with only a 1% stake as Host Owner (or indeed none – there seems to be no requirement in the TPOSA that the Host Operator is a Host Owner), none of the costs charged to Waldorf could be deducted, but if Dana was the Host Operator, all the costs could be passed on even if EnQuest owned 99% or 100% of the Kittiwake Platform.
 - iii) This is so even though the obligations arising on the “Host” side under the TPOSA are placed on the Host Owners and the Shippers, not the Host Operator and the Shippers’ Operator (Clauses 3.1, 6.1, 13.1, 13.2 and clauses 17.2 and 17.3), with the two Operators acting on behalf of the respective groups.
 - iv) The definition of “Deductible Costs” and the operation of the Deed provide other protections for Walter, such that it is not necessary to give this part of the definition a wider reach to address that concern – costs deducted must be “as may be

reasonably required to be paid” and the Agent will be paying the same charges for their own 48.5% interest as for the Royalty Interest Petroleum.

- v) Clause 2.1 contemplates that only one of the Grantors would be Agent for the sale of the entire 3% of Royalty Interest Petroleum. In that scenario, the Agent would have to carry all of the transportation costs under the TPOSA if the other Grantor was the operator for the Kittiwake Platform (thereby both subsidising the other Grantor’s share of Walter’s interest and making payments to that other Grantor from which it would benefit). It seems unlikely that the parties could have envisaged the agency operating in so unequal a way.
60. Ms Campbell put forward a number of arguments of commercial purpose said to support the opposite view with which I should briefly deal:
- i) It was said that Waldorf’s construction involved inconsistency in the treatment of the Grantors because EnQuest could not deduct the amounts it paid *qua* Shipper. However, to the extent that this is the case, it is because EnQuest had made that payment to itself and derived profit from doing so, and Waldorf has not. The difference in treatment reflects the difference in circumstances.
 - ii) An issue arises as to whether EnQuest’s role as Host Operator should prevent it passing on the TPOSA costs referable to Dana’s 50% interest in the Kittiwake Platform. Neither party showed any great enthusiasm for me deciding that point. It is possible to formulate a case that only the amount received by EnQuest *qua* Host Operator on behalf of EnQuest *qua* Host Owner should be excluded from deduction, not that received by EnQuest *qua* Host Operator on behalf of Dana *qua* Host Owner. But, whatever the answer to this question, it provides no justification for Waldorf being unable to deduct a payment it has made, none of which is payable to itself or an affiliate and from which it derives no profit.
 - iii) It is said that, in effect, Waldorf is trying to pass onto Walter some element of EnQuest’s profit (*qua* Host Owner). However, I do not accept that the definition of “Deductible Costs” is to be interpreted by reference to the issue of whether the cost being passed on is one which involves a profit element for a non-affiliate of the payer. Even if that was the case, that goal would not be served by Ms Campbell’s construction, which would involve Waldorf being unable to deduct the payment even where EnQuest had made no profit because it was the Host Operator but not a Host Owner, yet being able to pass on the entire amount even if EnQuest had received the entire profit element where the invoice was rendered by Dana as Host Operator.
 - iv) Finally Ms Campbell said the clause was intended to address those cases where the Agent could control the costs (in the sense, presumably, that the Agent could try and get a better deal or refuse to pay). However, the extent of any control by Waldorf as Shipper under the TPOSA of the price to be paid for transportation and processing services is limited, and no greater when the invoice is rendered by EnQuest than when it is rendered by Dana.
61. Accordingly, I answer this first issue of construction in Waldorf’s favour, both in relation to the TPOSA Tariffs and the SC KUPTA Tariffs.

The Send or Pay Issue

62. As explained above, the Send or Pay Issue arises in relation to the Send or Pay Charges.
63. The Send or Pay Charges accrue pursuant to the FPS TPA as follows:
- i) Pursuant to Clause 6.1 of the FPS TPA, the Shippers Group is to pay Ineos a Transportation Tariff payable per “Barrel” of “Shippers Production” delivered for transportation through the FPS.
 - ii) Pursuant to Clause 6.4 of the FPS TPA however, the Shippers Group is obliged to pay for a minimum of 85% of the Firm Maximum Quantity or “FMQ” (being the maximum amount the Shippers were permitted to send pursuant to the FPS TPA in each Contract Year), whether or not it is actually sent such an amount through the FPS (the “Tariff Minimum Quantity”).
 - iii) Pursuant to Clause 6.4(c) of the FPS TPA, the difference between the Tariff Minimum Quantity and the quantity actually delivered during any Contract Year is referred to as the “Tariff Shortfall Quantity”.
 - iv) Pursuant to Clause 6.4(d) of the FPS TPA, a “Tariff Shortfall Payment” (referred to in this skeleton as the FPS Send or Pay Charge) is payable on the Tariff Shortfall Quantity, calculated by multiplying the tariff payable pursuant to Clause 6.1(a), by the Tariff Shortfall Quantity.
64. It is Waldorf’s case that send or pay charges are an essential element of the overall commercial arrangements that are required to ensure that production can be transported through the FPS when required, and they are therefore a cost of transporting the Royalty Interest Petroleum.
65. Walter, by contrast, argues that a more direct nexus is necessary between the charges which the Agent seeks to deduct and the Royalty Interest Petroleum.
66. This is a fairly finely balanced issue of construction, which is largely a matter of first impression, as the parties acknowledged in argument. I have ultimately concluded that Walter’s construction is to be preferred:
- i) The concept of “Deductible Costs” involves a blunt and to some extent crude process of identifying what is paid “for” the identified matters. That is suggestive of a direct link between the charge and the service received, rather than embracing all costs incurred in achieving a desired end. To take and update Lord Hoffmann’s hypothetical “domestic example” in *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 391-92, if a husband brings home new trousers, and his wife asks “what did you pay for them?”, the answer would not naturally embrace not simply the price of the trousers but the petrol consumed driving to the shops to purchase them, and the costs of parking.
 - ii) That conclusion derives some support from the contemplation that the costs will be “incurred in respect of RCO and/or RG”, or at least there will be a proportion which can properly be said to be so incurred. The more diffuse the link between the costs and the transportation and processing of Royalty Interest Petroleum, the more

complex the process of identifying which costs (or proportion of costs) are referable to the Royalty Interest Petroleum will be.

- iii) As Ms Campbell submitted, the Send or Pay Charges are not costs of the transportation of Royalty Interest Petroleum within the meaning of the Deed: they are costs incurred only to the extent that petroleum (including Royalty Interest Petroleum) is not transported through the FPS.
 - iv) It is significant in this regard that the Deed contemplates that there may be costs born by the Grantors in relation to “the storing, handling, transporting, treating or marketing of production from the Block” which cannot be recovered from Walter, even in respect of the Royalty Interest Petroleum. Clause 4.1 of the Deed provides that “without prejudice to the right of the Grantors to deduct the Deductible Costs from the Gross Proceeds, Grantee shall not be or become liable or responsible in any way for ... any liabilities incurred in or in connection with the storing, handling, transporting, treating or marketing of production from the Block.”
67. Further, the circumstances in which the liability to make a Send or Pay Payment arises has a rather attenuated link with the process of transporting Royalty Interest Petroleum ashore:
- i) Clause 4.1 provides that the FMQ which the Shippers Group is entitled to tender for shipment is set out in Exhibit IV at the start of the FPS TPA, but with provision for subsequent adjustment.
 - ii) By 30th September in each year, the Shippers’ Group is to specify its bona fide best estimate of the FMQ for each Quarter of the following Contract Years for the expected duration, failing which the Exhibit IV rates apply.
 - iii) The Shippers Group also have an entitlement, but not an obligation, to serve a notice specifying their best estimate of the FMQ for each Quarter over the remaining life of the agreement (save for the Quarter in which the notice is served and the next quarter), such notice to be served on the last working day in each quarter. There is scope for Ineos to object to such FMQ nominations.
 - iv) Against that background, the liability to make “Send or Pay” payments (which arise when less than 85% of the FMQ is shipped) is effectively dependent on the accuracy of the FMQ submissions made by the Shippers Group and/or any revisions of them, having regard to all their requirements for the FPS (not simply those relating to the Block). If a charge which arose in these circumstances was one which could be passed onto Walter, a clearer communication of this intention in the Deed would be expected.

The KUP Settlement Issue

68. It is apparent from paragraph 2 of the KUP Settlement that it was entered into as the result of a claim raised by EnQuest, as the “Pipeline Operator” of the KUP to Waldorf, in respect of losses caused to EnQuest by the alleged presence of waxy substances in the Petroleum entering the KUP from the Kittiwake Platform.
69. Pursuant to the KUP Settlement EnQuest as Pipeline Operator agreed to install and commission a pig launcher on the Kittiwake Platform (paragraphs 5.a) and b)), and

thereafter to run a pigging programme (paragraph 5.c)). This was a mechanism for cleaning the pipeline by running a “pig” through it under pressure.

70. Pursuant to Clause 6.a of the KUP Settlement, EnQuest and Waldorf as the Scolty Crathes Group, agreed to make a contribution of £1.4m in respect of the costs of installing and commissioning the pig launcher.
71. Paragraph 7 of the KUP Settlement provides:
 - i) EnQuest as Pipeline Operator pursuant to the SC KUPTA was to invoice the Scolty Crathes Group for the KUP Settlement Installation Costs, and the Scolty Crathes Group was then required to make payment to EnQuest;
 - ii) EnQuest as Pipeline Operator pursuant to the SC KUPTA was to invoice the Scolty Crathes Operator for the KUP Settlement Operational Costs, with the Scolty Crathes Group making payment to the Pipeline Operator.
72. The Claimants claim reimbursement of the amount deducted from the Gross Proceeds in respect of the KUP Settlement Installation Costs (there is a separate dispute as to the treatment of the KUP Settlement Operational Costs which I address below).
73. This raises essentially the same debate as that which arose in relation to the Send or Pay Issue: whether the KUP Settlement Installation Costs can be characterised as a sum paid “for” the transportation of Royalty Interest Petroleum through the KUP.
74. Again, the point is balanced and to a significant degree impressionistic. For essentially the same reasons, I have concluded that the KUP Settlement Installation Costs are not an amount paid “for” the processing or transportation of the Royalty Interest Petroleum. There are the following further factors here reinforcing that conclusion:
 - i) First, they are paid in settlement of a claim in respect of losses suffered by the KUP owners and brought against Waldorf. The concept of “Deductible Costs” does not readily lend itself to amounts paid to settle Waldorf’s liabilities arising from the shipment of off-specification product. This appears to fall more naturally in the carve-out in clause 4 of the Deed by which Walter “shall not be or become liable or responsible in any way for ... any liabilities incurred in or in connection with ... the storing, handling, transporting, treating or marketing of production”.
 - ii) Second, the KUP Settlement Installation Costs involve a capital contribution to the KUP. The working life of the equipment installed is not clear, but it has no necessary connection with the period of time over which Royalty Interest Petroleum would be transported through the KUP (and the use of the KUP is not limited to transporting the life of product from the Block, but extends to other blocks which may have different operational lives). Once again, the difficulties in allocating some element of those costs to the Royalty Interest Petroleum, and the fair allocation of those costs over the life of the KUP, weighs against the suggestion that they constitute Deductible Costs.
75. As I have stated, Walter accepts that the KUP Settlement Operational Costs are costs of producing and transporting the Royalty Interest Petroleum. However, Walter raises the Third Party Issue in response to the costs, by reference to EnQuest’s position as the owner of the KUP.

76. The effect of my conclusion on the Third Party Issue is that the argument does not avail Walter with the result that this objection to Waldorf's deductions of the KUP Settlement Operational Costs fails.

The ETS Issue

77. The final issue of construction is whether Waldorf is entitled to deduct ETS Tariffs from the Gross Proceeds of the sale of Royalty Interest Petroleum.
78. Waldorf has explained that Waldorf and EnQuest have paid amounts to EnQuest and Dana as the "Host Owners" of the Kittiwake Platform, in respect of costs incurred by the Host Owners "in connection with EU ETS", pursuant to Clause 6.6 of the TPOSA. It claims that the ETS Tariffs are a Deductible Cost because they are an environmental tax within the meaning of the Deed, which has been incurred by Waldorf (in its capacity as Shipper pursuant to the TPOSA) in respect of the transportation of Petroleum via the Kittiwake Platform.
79. The nature of the EU and UK emissions trading schemes is not in dispute. In summary:
- i) The EU emissions trading scheme (the "**EU ETS**") was established in 2003 pursuant to Directive 2003/87/EC (the "**Directive**"). It operates on a "cap and trade" principle, by which a cap is set on the total amount of greenhouse gasses which can be emitted by persons subject to the scheme. Over time the cap on permissible emissions has been reduced, and the types of infrastructure affected by the EU ETS has expanded.
 - ii) Pursuant to Article 4 of the Directive, operators of any installation affected by the EU ETS are required to hold a greenhouse gas emission permit requiring them to, amongst other things, surrender allowances equal to the total emissions of the installation, on an annual basis.
 - iii) Allowances may be acquired on issue, either free of charge or for payment at auction pursuant to Article 10; or subsequently, by trading pursuant to Article 12.1.
 - iv) Pursuant to Article 12.3 of the Directive, each September the operator of each installation is to surrender allowances equal to the total amount of emissions from that installation during the preceding calendar year. If they fail to do so, a penalty is imposed by the relevant Member State pursuant to Article 16.3, calculated by reference to the amount by which the emissions from the installation exceed the allowances surrendered.
 - v) The EU ETS was effective in the UK until 31 December 2020. From 1 January 2021 the UK emissions trading scheme (the "**UK ETS**") was established by the Greenhouse Gas Emissions Trading Scheme Order 2020 (No. 1256 of 2020). The UK ETS is materially the same as the EU ETS, though allowances between the two schemes cannot be directly transposed or traded.
80. The precise basis of the ETS Tariffs in issue in this case are not clear (and may not be known to Waldorf): whether they are costs incurred by EnQuest/Dana in purchasing allowances pursuant to the EU/UK ETS, or whether they are fines imposed on them as a result of the Kittiwake Platform exceeding those allowances.

81. A Tax for the purposes of a Deed is “without limitation tax, levy, royalty, rate, duty, fee or other charge” which is:
- i) “imposed directly or indirectly in respect of the Royalty Interest and/or the Royalty Interest Petroleum and/or the Net Proceeds thereof, or the assets, income, dividends or profits of the Grantee (without regard to the manner of collection or assessment and whether by withholding or otherwise)”;
 - ii) “by any governmental, semi governmental or other body authorised by law to impose such Tax”; and
 - iii) “levied in respect of the production of all Royalty Interest Petroleum produced from the Blocks, the transportation of that Petroleum and the processing and initial storage of that Petroleum at any terminal”.
82. The first issue, logically, is whether ETS Tariffs are imposed “by any governmental, semi-governmental or other body authorised by law to impose such Tax”:
- i) Walter submits that, to the extent that the ETS Tariffs comprise the costs of purchasing allowances from other operators, these are not “imposed by” any governmental or semi-governmental body: they are paid to private parties.
 - ii) However, the EU / UK ETS requirement of “allowances” is, in my assessment, a “fee or other charge” imposed by a “governmental, semi-governmental or other body authorised by law”. The fact that such allowances can be purchased from other holders in a secondary market as well as acquired from the relevant authority does not, in my view, take them outside the words “imposes directly or indirectly” which are broad in scope.
 - iii) I agree that there would be an unappealing element of happenstance if the question of whether the cost of the allowances constituted a Tax depended on whether they were acquired directly from a governmental body or indirectly through a purchase in the secondary market.
83. The second issue is whether the ETS Tariffs are levied “in respect of” the production, transportation, processing and initial storage of Royalty Interest Petroleum:
- i) Walter submits that they are not, because they are imposed on the operators of infrastructure to which they apply, by reference to the level of emissions from the infrastructure which they operate, not imposed on particular amounts of petroleum produced, or on the proceeds of such petroleum.
 - ii) Waldorf contends that “production from the Block could not take place without paying for the relevant emissions permits”, which has the effect that the “in respect of” test is met.
 - iii) I accept that it can be said that the words “in respect of” allow for a wider nexus than the word “for” in the second limb of the definition of Deductible Costs. However, while the second limb contemplates the allocation of some smaller part of a greater whole to the Royalty Interest Petroleum (“if such amounts have not been incurred in respect of RCO and/or RG specifically, such proportion as the

quantity of RCO or RG bears to the total quantity in respect of which such amounts have been incurred”), there are no such words in the first limb.

- iv) That omission, in my view, means that limb (a) of the Deductible Costs definition requires a tax which, in its operation, is more directly linked to the production or treatment of the Royalty Interest Petroleum than a tax on the operation of third party infrastructure through which it is transported.
 - v) I have concluded, therefore, that the sums paid by Waldorf under clause 6.6 of the TPOSA are not a relevant “Tax” for the purposes of the Deductible Costs provisions in the Deed.
84. In these circumstances, it is necessary to address Mr Davies KC’s fall-back argument that these amounts are recoverable as amounts “paid ... for the ... transportation” of Royalty Interest Petroleum and hence deductible under limb (b) of the Deductible Costs definition.
85. Ms Campbell advanced two responses to that contention.
86. The first was the “Third Party Issue” (because these costs were paid pursuant to invoices rendered by EnQuest as Host Operator), which I have rejected for the reasons set out above.
87. The second was that these were not “amounts paid ... for the processing ...” of Royalty Interest Petroleum. However, these were amounts which were paid by specific reference to the volume of crude oil shipped through the Kittiwake Platform, clause 6.6 of the TPOSA imposing an obligation to pay “the Relevant Proportion” of such costs, which in turn was defined as:

“in respect of a Contract Year, the proportion which the Shippers Crude Oil bears to the total crude oil production on the Host Facilities”.

88. In this case, the ETS Tariffs are, in my assessment, sufficiently directly referable to the Royalty Interest Petroleum, being amounts charged by the Host Owners “for” processing that Royalty Interest Petroleum, to constitute “amounts paid ... for the processing ...” of Royalty Interest Petroleum. They form part of the cost charged by the Host Owners “for” processing Royalty Interest Petroleum, the obligation to pay arising from the processing of the Royalty Interest Petroleum and being expressly and directly linked to the volume of Royalty Interest Petroleum processed. There is, therefore, a “direct link between the charge and service received” (cf. [66(i)]). This conclusion is not, as Ms Campbell submitted, inconsistent with my conclusion in relation to “Tax”. The application of the first limb of the definition of “Deductible Costs” is concerned with the target of the Tax. The second limb is concerned with the amount paid “for” a particular service. The application of the two limbs of the definition involving different enquiries, they are susceptible to different answers.

CONCLUSION

89. The parties are asked to draw up an order reflecting the consequences of the four issues of construction I have determined.