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Case No: HQ 10X00116

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 April 2011

Before :

His Honour Judge Havelock-Allan Q.C.

- -

Between :

TIMOTHY SNOWDON LE BRETON	**Claimant**
- and -	
PETRPODEL RESOURCES LIMITED	**Defendant**

- -
- -

Rupert Higgins (instructed by Ronaldsons LLP) for the Claimant
Charles Dougherty (instructed by Hill Dickinson) for the Defendant

Hearing dates:

- -

Approved Judgment

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

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HH Judge Havelock-Allan Q.C. :

Introduction

1. The claimant, Timothy Le Breton, is a geologist by training, who has considerable experience of working in the oil industry and in particular as an oil trader. From the autumn of 2004 until July 2008 he worked for the defendant company, Petrodel Resources Limited ("Petrodel"). Petrodel is controlled by Michael J. Prest. Mr Prest ("MJP") is not an appointed director of Petrodel, but there is no dispute that he acts as a shadow director of that company and its associated companies, and is in overall strategic command of them.

2. Petrodel is incorporated in the Isle of Man. It is principally an oil trading company, but it has oil exploration and production interests as well. The main trading offices of Petrodel are in Nigeria and in Monaco. The company is administered from Nevis and the Isle of Man. The downstream side of the business involves the buying and selling of cargoes of crude oil and refined petroleum products, mainly sourced from Nigeria. The upstream side of the business consists mainly of exploration and production ("E & P") licences in Tanzania.

3. The claimant ("TLB") was appointed Group Manager of Petrodel in the autumn of 2004. He had been working for Petrodel in another capacity since 2001. His role as Group Manager was very similar to that of a Managing Director. According to the service agreement which he signed in February 2005, TLB's specific responsibilities included the management of the staff, budget, bank accounts and cash expenditure of the company. More importantly he was in charge of operations and logistics for all physical and paper trades and one of his express tasks was "*Supporting Michael J. Prest in strategic planning and corporate development*".

4. TLB left Petrodel around the end of July 2008. The precise dates on which he resigned from the posts he held in various companies within the Petrodel Group does not matter. The important point is that he had ceased working for Petrodel and its associates by 31 July. The principal cause of TLB's departure was disagreement with MJP over sums of money which TLB said he was owed by Petrodel. There were attempts to resolve the disagreement in discussions between TLB and MJP in the summer of 2008, which culminated in a meeting between the two of them in Petrodel's Monaco office on 3 July. Whether any agreement emerged from those discussions is itself a matter of dispute. No payment was made on TLB's claims, hence the present action.

5. TLB is pursuing 3 claims against Petrodel: (1) a claim for bonus in respect of 2006, (2) a claim for "resource allocation" payments allegedly earned in the same year, and (3) a claim for increase in salary between 1 January 2007 and July 2008. Only two witnesses have been called at the trial, namely, TLB and MJP. They were the two major players in Petrodel at the material time - MJP was the founder and controller of the Group, and TLB was, or seems to have been, his right hand man. Since their dealings were not all recorded clearly in writing, resolution of the claims (in particular the salary claim) depends in some measure on whose version of events is to be believed. Having had the advantage of observing the two protagonists in the witness box, I should record at the outset the impression they made.

6. It is clear that TLB is a focussed and highly capable operator in the oil business. His particular expertise lies in arranging the shipment of physical oil cargoes but he is a trader in the wider sense and has executive skills enabling him to handle relationships with suppliers, run an office and manage a team. TLB also has a well-developed sense of what his services are worth. He did not shrink from demanding a higher bonus for 2006 than MJP offered him, and the two other claims in this action have been pursued out of a conviction that he was not paid his just desserts.

7. Given the direct and often categoric manner in which TLB responded to questions in cross-examination, it is unfortunate that his pleaded case did not reflect the way in which the claims were eventually put at trial. Nevertheless I do not think he can be accused of basing his claims on afterthought. In my estimation, he was an honest witness, telling the truth about events as he recollected them. The problem is that TLB had thought it politic not to press MJP on some matters, whilst pressing him on others. So there were topics on which things were not said, or were not spelled out, which would have confirmed the extent of their mutual understanding.

8. MJP came across as an equally astute businessman. He is the moving force behind the Petrodel Group and is responsible for having established Petrodel's trading relationship with Nigerian National Petroleum Corporation ("NNPC") and its supplier-subsidiary Pipelines and Products Marketing Company Limited ("PPMC"). Initially he impressed me by his demeanour as a witness. The replies he gave in cross-examination were measured and thoughtful. But on too many occasions he failed to give a direct response to the point being put to him, and some of his answers, especially on the subject of the bonus, were unrealistic. MJP is plainly very intelligent. There is no question that he was missing the point. He was simply not prepared to view the issues raised by the claims in the action other than through his own spectacles. This undermined the value of his

evidence and left me with the view that on the contentious issues not addressed in the contemporaneous documents, he was a less reliable witness than TLB.

9. I will deal with the 3 claims in the order in which they were addressed in closing submissions.

The bonus claim

10. TLB says that he is entitled to payment of a bonus of US$200,000 for 2006. The Particulars of Claim allege that the bonus was agreed by MJP on or about 27 June 2008: but this is not correct. There was no agreement over the figure, and, as I shall shortly explain, that is the foundation of Petrodel's defence.

11. TLB had no automatic entitlement to a bonus. The right to be paid one derived from clause 5 of his service agreement which stated:

> *"... The company may pay a bonus to the employee based on the nett profitability of the company and the employee's contribution and performance in any given Financial year. Payment of bonus is discretionary and shall be determined by Michael J. Prest. ..."*

The issue, therefore, is whether a bonus was ever determined and, if so, in what amount.

12. A bonus for 2006 was first discussed between TLB and MJP in 2007. The provisional accounts for 2006 were showing a profit in excess of $4 million. TLB considered that a bonus of 10% of that figure i.e. $400,000, would be a fair reward for his efforts. MJP let it be known that he had in mind a sum which was half that figure. The discussion progressed no further at that point. TLB raised the topic again in the summer of 2008. Unfortunately, by this time, his relationship with MJP was becoming strained and the atmosphere was less conducive to compromise.

13. On 9 June 2008 there was a series of e-mail exchanges between TLB and MJP about the money which TLB claimed was due to him from Petrodel. The exchange began by TLB demanding payment of a sum of $97,830.89 in respect of resource allocation payments. Like the parties I will refer to the resource allocation scheme by the abbreviation "RA". MJP replied a few minutes later saying: "*What is this amount for? Petrodel owes you USD 200k less an advance of your bonus ...*". TLB responded immediately by saying that the $97,000 was the amount "*... formerly known as resource allocation*". He continued: "*Bonus*

is a range of $200-400k for 2006". This drew a swift reply from MJP in the following terms:

> "*So you and are CRYSTAL clear the only sums you are due under any name are:*
>
> *1) USD 200k less bonus advance. I will check later today what that advance was.*
> *2) Any balance due in lieu of the abandoned RA for efforts in 2007, which you tell me is $97,830.89 and I will check later today.*"

14. TLB responded later the same afternoon:

> "*We were CRYSTAL clear the last time we discussed this in Monaco. The RA is as stated $97,830.89 for 2006 & 7 – that is how old these outstandings are – never tell me I am not patient. This amount is due prompt, please pay accordingly.*
>
> *Re bonus for 2006; I have not agreed to your proposal of $200k, which in a year when we made $4m is derisory, particularly after the exchange rate deterioration in the intervening 18 months. We agreed to discuss within the range of $200-400k. My contribution through that period was worth far more than you propose."*

15. The exchanges on 9 June ended with a message from MJP saying:

> *"The advance was an advance. The terms of its remittance were quite clear. As you know or should know 2007 and 2006 PRL [Petrodel] lost money. The payment of $90k is a gesture nothing more. It is a panacea with no obligation. I am not aware you have been patient".*

16. The advance being referred to was the payment by Petrodel of sums totalling $81,884.78 in discharge of certain of TLB's credit card liabilities. It is common ground that these payments were made on account of whatever bonus was eventually declared for 2006. Petrodel seeks to set-off this sum against any sums awarded in this action. In other words, Petrodel seeks credit for these payments against any judgment in TLB's favour: but there is no Part 20 claim to recover the money in the event that the bonus claim and the other claims fail.

17. Nothing further of relevance was said about the bonus until, on 25 June, TLB wrote a letter to the directors of Petrodel saying, amongst other things:

"Petrodel has repeatedly failed to make timely contractual payments to me, be they salary, expenses, resource allocation or bonus and currently owes me the following:
With regard to 2006 activity:

- *$97,830.89 Resource Allocation fees …*
- *$400,000 bonus for 2006"*

18. The response was a letter dated 27 June from John Murphy, one of the directors, which began by saying:

> *"Reference is to be made to the E-Mail from the Company Chief Executive to you. All amounts detailed in that E-Mail are being honoured and for the sake of good order they are as follows:*
>
> *i) For 2006, USD 200k less the bonus advance taken by you and for which you make no mention in your letter*
>
> *ii) Any balance due in lieu of the abandoned Resource Allocation for Efforts in 2007. This is now confirmed at $97,830.89. …"*

19. It is not entirely clear what e-mail from the chief executive Mr Murphy had in mind; but it was probably the last of the messages from MJP which I have quoted in paragraph 8.

20. There followed a meeting between TLB and MJP at Petrodel's office in Monaco on 3 July. MJP's recollection was that it was a short meeting which was abruptly brought to an end by TLB when his mobile phone rang and he said he had to leave. When the meeting broke up it was planned that they would meet again the following week: but the second meeting never took place. TLB summarised the discussion on 3 July with an e-mail which, so far as concerns the RA payment and bonus, was as follows:

> *"For the record we agreed:*
>
> 1. *you would pay the 97,830 next week or the following week*
> 2. *you would make all efforts to pay the 200k by end of July being the 2006 bonus after deduction of the loan i.e. 280k gross, 200k net …"*

21. MJP replied the following day:

"To keep it for "Good orders' sake" please note that we agreed (that is we both agreed) that PRL would pay the $97k odd promptly. That PRL would try to settle you $200k by end July. It was not captioned whether that was gross or net of anything …"

22. What emerges from this final exchange is that, by the end of the Monaco meeting, TLB had abandoned his demand for a bonus of $400,000 but had not entirely given up hope of securing more than $200,000. However, the suggestion in his e-mail of 3 July that $200,000 was to be a net figure has all the hallmarks of a "try on". It meant that the bonus for 2006 would be $281,884.78. I agree with MJP that the gross/net distinction was not discussed at the meeting. I find that the only bonus figure which was in play when the meeting ended was the sum of $200,000 being suggested by MJP. Since it is common ground that the $81,000 was paid "on account of" whatever bonus was to be paid for 2006, credit must be given for that amount against the sum of $200,000 if that is the bonus payable for that year.

23. At first the reason Petrodel gave for saying that no bonus was due was that the company had actually made a loss in 2006, and payment of a bonus presupposed that the year had been profitable. I am satisfied that this argument is, and always was, entirely specious. It emerged in circumstances which do no credit to either side: least of all to Petrodel. In the autumn of 2009, TLB tried to enforce payment of his bonus claim and other claims by serving a statutory demand. The statutory demand was for a total of $504,000. Within this figure TLB asserted that the unpaid amount of the bonus was $200,000 and failed to give credit for the $81k. Moreover, he claimed interest at the surprisingly high rate of 13% per annum, which seems difficult to justify since there was no agreed contractual rate. When the demand was not paid, TLB applied for the winding-up of Petrodel in the Isle of Man. MJP then filed a witness statement in the IOM proceedings raising the argument that no bonus was due because no profit had been made in the year in question. The explanation given for the vanishing profit was that there had been a need to adjust the accounts for 2006 retrospectively, and the adjustment had produced a loss.

24. This justification for not paying the bonus was enough, with other objections to the statutory demand, to bring about a compromise of the winding-up proceedings. It was not pressed at the trial as a pretext for not paying because MJP conceded in the course of cross-examination that, once a bonus was awarded, Petrodel would always pay it, even if it subsequently transpired that the company had made a loss in the year in question. The concession rendered the adjustment of the accounts a matter of no relevance to the bonus claim. The

adjustment was approved after TLB had left Petrodel. By that time, either the bonus had been awarded or it had not.

25. Yet I cannot leave the point about the adjustment without making three observations. The first is that, if MJP was being truthful about Petrodel's policy of honouring bonus payments regardless of losses subsequently uncovered, he must have known that the subsequent adjustment of the accounts was no answer to the statutory demand for the bonus. He should never have relied on it in the IOM proceedings or have allowed Petrodel's solicitors to think it was a valid argument. The fact that the point was taken at all reinforces the view I have formed of MJP that he is a man who will put forward any argument which appears at that moment to suit his purposes.

26. The second observation is that MJP's policy of always honouring a bonus accords with what appears to be the law, namely, that a bonus, once declared, is irrevocable (see the judgment of the EAT on 26/10/04 in *Farrell Matthews v Hansen* UKEAT/0078/04/MAA at paras. 38 to 40).

27. The third observation is that, having looked briefly at the available evidence, the case for saying that Petrodel made a loss in 2006 is at best obscure. One suggestion is that Petrodel felt obliged to accept responsibility for 50% of a claim which had been made by NNPC against a company called Aurora Energy Ltd, because Petrodel was owner of 50% of the shares in Aurora. The claim was for US$19,138,780. Half of that figure amounted to US$9,569,390 of which the directors decided to write off $6,117,879 in the 2007 accounts and $3,451,511 in the accounts for 2009. There are a number of difficulties with this explanation. The decision to accept responsibility for, and to write off, 50% of the claim against Aurora in this way was not taken until late in 2009. Aurora ceased trading in Nigeria in 2004; so NNPC's claim was by then 5 years old. It is not obvious why the claim should have been booked to the 2007 and 2009 years or why that decision affected the net profit for 2006. Moreover the item appears in the audited accounts of Petrodel to 31 December 2007 as a "Contingent Liability" rather than an accrued loss. The other suggestion is that the Nigerian auditors found it necessary, when preparing the financial statements at 31 December 2007 in the course of 2009, to "*reconcile single line entry errors in the opening balances of 2007*" totalling US$6,632,419. A note to this effect appears in the financial statements at 31 December 2007 to explain a "Prior year adjustment" of this amount. But nowhere is it stated what the "single line entry errors" were. It is far from clear that they had anything to do with the NNPC claim against Aurora. Nor am I convinced that it is necessarily correct to say that the prior year adjustment in the accounts for 2007 meant that the result for 2006 was a loss, rather than that the profit made in 2007 became a loss. The difference is one of accounting but it

matters because TLB was offered a bonus for 2006 but was not offered a bonus for 2007.

28. The reason why Petrodel now says that no bonus is payable is that none was agreed between MJP and TLB. MJP gave evidence that he always sought consensus with an employee over the amount of his bonus. On the face of it, it was laudable to seek to negotiate a compromise figure. But it was not laudable if consensus was made the "sine qua non" of any bonus being paid. Such a system would be highly disadvantageous to the employee, who would risk losing his bonus if he did not agree to the figure proffered by the management. Worse, there is no evidence that MJP ever formally announced to staff that agreement over the bonus figure was an essential prerequisite to payment. TLB did not know that was the case. So in holding out for more than the £200,000, he was unwittingly doing himself out of any bonus at all.

29. The injustice of such a system is demonstrated by the defence in the present case. MJP says that he might have been prepared to go higher than $200,000 if TLB had been willing to negotiate (perhaps meet him "*half way*" as MJP put it in his oral evidence). But TLB's stance did not amount to a negotiation. When TLB eventually came down to a net figure of $200,000 (i.e. £281,000 gross), it was apparently too late. In the view of MJP no agreement had been reached and so nothing was payable (save the concession that TLB can keep the $81,000 if his other claims fail).

30. I cannot accept this argument. I can see no reason why agreement over the bonus figure should be regarded as a precondition to payment. It does not appear as a requirement in clause 5 of the employment contract. It was not announced as company policy, and it is invidious to the employee for the reasons already given. The bonus figure may be discussed, and it may be agreed, but whether or not it is discussed or agreed, ultimately it is for Petrodel to exercise its discretion by determining what it will pay and to inform the employee, who can take it or leave it as he chooses. On behalf of TLB, Mr Higgins submits that that is precisely what Petrodel did when Mr Murphy wrote his letter of 27 June 2008. The letter declared the bonus payable for 2006. Mr Dougherty, for Petrodel, counters that by saying that the Murphy letter must be read in the context of the whole sequence of exchanges between MJP and TLB. He points out that the dispute about the amount of the bonus continued after the letter was sent. Viewed against that background, his submission is that the letter was not a declaration of the bonus: that stage was never reached. I think Mr Higgins is right. The Murphy letter informed TLB that he would be paid $200,000 as a bonus for 2006. At that point the bonus was declared at $200,000. It follows that TLB is entitled to the balance of that sum, after giving credit for the advance of $81,000.

The Resource Allocation claim

31. The RA scheme ran from 1 January 2005 until 31 December 2006. It was designed to reward members of Petrodel's operations team for shipping physical cargoes from Nigeria. While the scheme lasted, it was a counterpart to the bonuses awarded to personnel in the trading department on the profit earned from cargoes traded. There were only 5 or 6 people in the operations team who benefitted from the RA system. TLB was one of them. His entitlement to RA payments derived from a letter he received, dated 28 February 2005, which was in the following terms:

> "*Following our recent discussions regarding professional contributions to the business, the Board of Directors have asked me to offer you a participation in a "resource pool" that is directly linked to the performance of the company in generating and executing new business.*
>
> *Your share of the resource pool shall be defined as follows:*
>
> - *$US 0.50/mt based on the contractual volume on refined products (refined product export cargoes, import cargoes and coastal allocations) negotiated as from 1st January 2005, including current awards of fuel oil export cargoes*
> - This amount will be payable within 5 days of payment from cargo receiver, on presentation of your invoice ..."

For the second and final year of the RA scheme the rate of reward was raised to $1.00 per ton.

32. The supply of oil from Nigeria is a state monopoly controlled by the NNPC and its subsidiary, PPMC. PPMC maintained a list of companies to whom it was willing to sell cargoes. Petrodel was on that list. Supplies would be allocated in quantities of 25,000 mt, plus or minus 5%. Companies on the trading list would apply to PPMC for allocations, using the contacts or influence available to them. When an allocation was made, it was in the form of an offer by PPMC to sell to the company in question. Almost invariably the offer would be accepted, either expressly or impliedly, by the company requesting laycan dates for the particular cargo.

33. In the course of his oral evidence MJP made the point that PPMC was in the habit of issuing more allocations than it could physically fulfil. Thus, many allocations never resulted in laycan dates being given. TLB accepted that

allocations did not always result in a laycan; but he could think of only one instance in the case of Petrodel when it had not. There is no necessary inconsistency in this evidence. It is common ground that most of the work to secure allocations was done by MJP. It was he who had the contacts within NNPC and PPMC. If Petrodel's allocations almost always resulted in laycan dates and cargoes, that fact is testament to the strength of MJP's relationship with the Nigerians as much as to the diligence of Petrodel's operations team in arranging shipment. What is clear, however, is that an allocation did not guarantee a laycan. It is also the case that PPMC sometimes postponed laycan dates it had earlier given. The operations team at Petrodel had to work hard to get suitable laycan dates and to hold on to them.

34. All of the cargoes were shipped from PPMC's loading facility at Port Harcourt. Once laycan dates were given, the operations team would fix a suitable vessel on subjects and nominate her to PPMC. If the nomination was accepted the fixture would be made firm and the cargo would be sold. The sale contract was also the responsibility of the operations team and Petrodel had a term contract with at least one preferred purchaser. If there was a risk of delay in the cargo becoming available, Petrodel would request PPMC to re-validate the laycan dates for a later spread so as to avoid demurrage under the charter and having to charge PPMC demurrage under the purchase. TLB's particular role in this process was negotiating the terms of the sale of the cargo: but he was also in overall charge of the operations team.

35. The RA claim relates to the second year of the scheme, when the rate of remuneration was $1 per ton. TLB claims that amount in respect of 3 cargoes: (1) a cargo of 53,808.08 mt of fuel oil shipped on the New Century early in November 2006, which had already been sold by Petrodel to Sempra Energy Trading Corporation on 10 July of that year, (2) a cargo of 24,722.67 mt of naphtha shipped on the Nordic Ruth under a bill of lading dated 13 January 2007, which was sold to Vitol on 3 January 2007, and (3) a cargo of 54,456.43 mt of fuel oil shipped on the Mare Pacific in the second half of March 2007, which had been sold to Sempra on or about 29 September 2006. TLB sent invoices to Petrodel for his RA payment on these cargoes in or around March 2007. The invoices amounted in total to the sum of $97,830.89 which features in the e-mails between TLB and MJP quoted earlier. A sum of $35,000 was paid to TLB on account of the New Century shipment on 23 October 2007. The balance of $18,651.79, and $24,722.67 plus $54,456.43 for the other two cargoes remains outstanding.

36. There is no defence to the claim for the balance due for the New Century shipment. The cargo was allocated, shipped and re-sold during the second year of the RA scheme. TLB is entitled to judgment for at least $18,651.79. As to the

rest, Petrodel's answer is that the entitlement to an RA payment was earned on shipment. The two cargoes were shipped after the RA scheme had come to an end on 31 December 2006. Accordingly no payment is due. TLB's case is that the entitlement to RA allocation arose when Petrodel received the allocation of supply from PPMC. Both these cargoes were allocated in 2006 and qualified for an RA payment at the rate of $1.00 per ton.

37. As support for his case that this was how the RA scheme operated, TLB relies on two matters. The first was the RA payment made for a cargo of about 50,000 mt of fuel oil which was allocated to Petrodel in 2005 but only shipped, on a vessel called the Four Moons, in January 2006. TLB's evidence is that he asked for payment at the rate of $1 per ton on the footing that his entitlement had only accrued when shipment took place: but MJP insisted that the entitlement accrued when the allocation was first made, so TLB was only to be remunerated at the rate of £0.50 per ton which applied in the first year of the RA scheme, and that is all he got. The second matter is the fact that, when the RA scheme was introduced, there were already several cargoes which had been allocated to Petrodel by PPMC in 2004 but which had not yet shipped. To avoid argument over whether these cargoes qualified for RA payments, MJP had drafted the letter of 28 February 2005 so as to make clear that the scheme was one "… *including current awards of fuel oil export cargoes*". This rider was necessary, says TLB, because the scheme triggered entitlement to share in the RA pool from the moment an allocation was made and the cargo allocations in 2004 would not otherwise have been covered. If the scheme had been intended to operate so that entitlement accrued at the time of shipment, the rider would have been unnecessary.

38. Mr Higgins submits that MJP's conduct regarding the Four Moons cargo demonstrates that Petrodel's defence to the RA claim is opportunistic. He says that MJP has changed tack so as now to argue that the right to payment only accrued on shipment because it suits Petrodel's case. MJP's only explanation for the difference in stance is that he made a mistake in 2006. He was therefore forced to concede at the trial that TLB is owed a further sum of $25,916.67 on the Four Moons cargo: but that is still a good deal less than the $79,179.10 which is owing on the two cargoes shipped early in 2007 if TLB's interpretation is correct. Mr Higgins obtained permission at the trial to amend TLB's case to claim $25,916.67 in the alternative: but his client's primary case remains that the RA scheme was intended to operate so that payment was due for the cargoes on the Nordic Ruth and the Mare Pacific.

39. The issue is one of interpretation of the letter of 28 February, which is the only source of TLB's entitlement to participate in the resource pool. I must interpret that letter in the light of the relevant background circumstances i.e.

what was known and understood by both sides about how Petrodel was used to going about the process of generating new cargoes from Nigeria. MJP's stance in relation to the Four Moons cargo is subsequent conduct. It not admissible as an aid to construing what was agreed about TLB's entitlement at the outset, absent an allegation of estoppel by convention or an allegation that the letter was a sham (neither of which is advanced in this case) – see *Lewison on the Interpretation of Contracts*, 4th edition, chapter 3, section 15. At one point Mr Higgins came close to suggesting that where, as a defence to a contractual claim, the defendant advances an argument of construction which is not bona fide, his inconsistent conduct in implementing the agreement becomes a legitimate aid to construction. I know of no such principle, and when I put that to Mr Higgins he was quick to clarify that the point he was making is that the defence now run by Petrodel is so disingenuous as to cast doubt on the credibility of MJP.

40. There may be substance to that criticism of MJP. However, MJP's evidence as to how he believed the RA scheme was to operate is no more admissible than that of TLB. The parties' subjective intention or understanding, especially when expressed against the background of an accrued dispute, is not material. The determining factor is what the parties may be supposed to have intended from an objective appraisal of the wording which was used, read in the context of the relevant surrounding circumstances. The RA scheme was described in the first paragraph of the letter of 28 February as being "… *directly linked to the performance of the company in generating and executing new business*". The letter went on to say that TLB was to be entitled to share in the resource pool in respect of cargoes *"… negotiated as from 1st January 2005"*. It was known at the time that it was MJP who procured the cargo allocations from PPMC, rather anyone within the operations team. So the reward given by a share in the resource pool must have been intended to be a reward for the work done thereafter by the operations team in processing cargo allocations into physical cargoes and selling them.

41. Logic would suggest that in order to incentivise this work, the entitlement to share in the pool should arise only upon shipment and not before. It is also stated to be a share on volume. Mr Dougherty submits that that also indicates that the point of shipment is critical because the volume is not known until that point. However, the reward is for effort in bringing about the shipment and sale of a cargo. By far the greater part of that effort will lie in securing acceptance of the nomination of a vessel for specified laycan dates and concluding the onward sale. The exact date of shipment is incidental and may bear no relation to when most of the work was done. The fact that the volume on which the RA payment is calculated will not be known until the bill of lading is issued does not mean that entitlement to payment on that cargo cannot arise earlier. The entitlement

could accrue on allocation, on shipment or at some point in between, but the sum not become payable until after the bill of lading quantity is known. The fact that the letter of 28 February specified that the amount would become payable 5 days after the bill of lading date but said nothing in terms about when the payment was to be earned leaves this possibility open.

42. The RA claim arises because there was no express agreement to cater for what should happen to cargoes "in the pipeline" as at 31 December 2006. The inclusion of cargoes "in the pipeline" when the scheme began might suggest that, had MJP thought about it, cargoes in the pipeline when the scheme ended were likewise to be included. But neither party advanced this argument. In my judgment there is a strong case for holding that entitlement to an RA payment depended on when the work to secure the cargo was done. However, neither party argued for this alternative, and there is insufficient evidence for me to be able to make any reliable finding as to what was done when to secure the disputed shipments. It might be legitimate to infer that most of the work for the shipment on the Nordic Ruth was done before 1 January 2007, but the same cannot be said of the cargo on the Mare Pacific.

43. I am left with having to choose between the date of allocation and the date of shipment. Of the two I consider that the date of shipment is the correct answer. It accords more closely with the commercial intention of the RA scheme, which was to provide a reward for negotiating cargoes out of allocations which had been procured by MJP. In my judgment the phrase "*including current awards of FO export cargoes*" in the letter of 28 February is equivocal. Whilst it could mean that allocation was the point at which members of the operations team earned the right to share in the resource pool, it could just as well be read as providing clarity as to what was to happen about cargoes for which some of the work had been done before 1 January 2005 but there remained important work still to do.

44. It follows that the RA claim succeeds to the extent of $18,651.79 in respect of the New Century shipment, but not otherwise. However the secondary claim of $25,916.67 in respect of the cargo on the Four Moons must also succeed. I reach this conclusion as a matter of construction of the agreement evidenced by the letter of 28 February 2005. I do so with little satisfaction. In his letter to TLB of 27 June 2008 Mr Murphy stated plainly that Petrodel would pay the entire sum of $97,830.89 in respect of the RA claim, and, in his e-mail following the meeting in Monaco on 3 July, MJP said the same (see paragraph 19 above). It strikes me that both these statements were arguably an acknowledgment of the debt: but no claim was advanced on that basis.

The salary claim

45. It is best to begin by recording what is not in dispute about the background to the salary claim. The following is not in dispute:

(1) In December 2006 MJP and TLB had a discussion about the development of the E&P or "upstream" side of Petrodel's business. The E&P business consisted of Petrodel's interest in the exploration licences in Tanzania. There were two licences in which Petrodel had an interest, one in the Tanga area of the country and one in the Kimbiji and Latham areas.

(2) Petrodel's involvement arose under Product Sharing Agreements ("PSAs") which it had entered into with the Tanzanian Government and the Tanzanian Petroleum Development Corporation ("TPDC") in respect of each licence area. TLB had been active with MJP in securing the issue of the licences earlier in 2006 and in the signing of the PSAs. The PSAs required Petrodel to spend certain sums on research (e.g. seismic and geological surveys) and development (e.g. the establishment of an office in Tanzania). They also provided for certain costs and overheads to be shared with TDPC. A royalty was to be paid to the Tanzanian Government on the net profit from the sale of oil or gas extracted from the licensed areas, after costs and overheads had been deducted.

(3) The upshot of the discussion between MJP and TLB about how the E&P business was to be developed was that it was agreed that TLB would become the chief executive officer of a newco to be established to operate the E&P business, and that the interest in the exploration licences would in due course be transferred to the newco from another subsidiary of Petrodel. TLB's annual salary in the new role would be increased from $150,000 to $250,000 and he would devote about 70% of his time to E&P and the remainder of his time to the trading side, performing much the same role as before but on a reduced basis.

(4) The plan was for the newco to be incorporated early in 2007 and for it to acquire working capital via the sale of shares to investors which would be arranged through Royal Bank of Canada.

(5) The fund-raising process was planned for the spring of 2007, but it was agreed that TLB's new salary and responsibilities should be treated as if they took effect from 1 January 2007. TLB began to take responsibility for the E&P side of the business from that date.

(6) The newco was not in fact incorporated until February 2007. It was called Petrodel Upstream Limited ("PUL"). TLB was appointed a director, with the title of Manager.

(7) Any hope of an early capitalisation of PUL was confounded at a meeting with Royal Bank of Canada on 8 February 2007, when the bank indicated that it was unable to assist. In consequence, launching of the prospectus for investors stalled and PUL lacked the resources to employ TLB. TLB remained employed by Petrodel, albeit devoting the major part of his time to the E&P business, and this remained the position until his departure.

(8) One of TLB's new responsibilities was to oversee the preparation of quarterly reports on the Tanga and Latham concessions. These reports gave details of Petrodel's expenditure and overheads. The reports had to be submitted to the Tanzanian Government and TPDC for agreement of the figures, because Petrodel was entitled to deduct its share of E&P costs from the gross revenue from oil and gas production once the concessions came on stream. A cost included in each of the quarterly reports (including even the first report, which was for the last quarter of 2006) was an annual salary of $250,000 for the chief executive.

(9) There were further discussions between TLB and MJP in January 2007 about the budget for PUL. In the course of those discussions TLB persuaded MJP to put the salary of the CEO at $260,000 in the draft investor prospectus. This figure was also included in the draft executive service agreement between TLB and PUL which, following the meeting with the bank on 8 February, was never signed.

(10) At all material times, the E&P activities of PUL were funded by Petrodel and booked in Petrodel's accounts as a debt due from PUL to Petrodel. The figure in Petrodel's accounts to 31 December 2006 was over $13 million (albeit that PUL had not yet been incorporated in that financial year). The debt had increased to over $14.4 million in the accounts to 31 December 2007.

46. TLB was paid his basic annual salary of $150,000 by Petrodel until he left the group. This equated to $12,500 each month, which was paid monthly in arrears. TLB was never paid the additional annual salary of $100,000 for taking on responsibility for the upstream business. The salary claim is for the uplift in pay at the rate of $8,333.33 per month from January 2007 to June 2008, both months inclusive. The claim comes to $150,000 in total.

47. TLB's case is that the additional salary accrued as from 1 January 2007 and Petrodel was responsible for making payment until such time as PUL had

sufficient funds to assume responsibility for this overhead. Since PUL was still without funds at the time of his departure, Petrodel is obliged to make the payment. The defence is that it was agreed that the annual salary increase of $100,000 would only take effect and be paid when PUL was capitalised, so there is no entitlement because PUL has never been capitalised. Petrodel's fall-back position is that, even if the increase in salary was to accrue from the beginning of 2007, it was understood not to be payable until PUL had received investor capital. Since PUL has still not received investor capital, and is now unlikely ever to do so, the agreement about the increased salary is unenforceable and of no value.

48. Petrodel's answer to the claim is unattractive for two reasons. The first is that, as a matter of fact, TLB did start to assume responsibility for the E&P business in January 2007. There was work to be done, whether or not PUL was capitalised, because the PSAs for the Tanga and Latham concessions required steps to be taken by the licence holder. These could not be avoided or postponed because the fund-raising for PUL had not proceeded. The second reason is that, in order to ensure that the Tanzanian Government was happy with the progress being made, Petrodel provided the funds necessary to exploit the licences in and after 2007. There is no reason why these funds should not have also included the amount of TLB's salary increase as CEO-designate of PUL. Indeed there are good grounds for supposing that the debt recorded in Petrodel's audited accounts as due from PUL did include at least the salary uplift, if not the whole salary, since the quarterly reports being prepared under each PSA included a salary cost of $250,000 for Petrodel's CEO.

49. Given that state of affairs, TLB was uncharacteristically reticent in demanding the salary due to him. He did not raise the claim in correspondence until April 2009. In the letter of 25 June 2008, he claimed only $6,000 for the month of May, and in the e-mail of 3 July he said that the unpaid salary was "*18k*" – by which he apparently meant $6,000 for May and $12,500 for June. These were sums outstanding from his original salary from Petrodel. They are no part of the higher salary claim now being pursued. In the course of the discussions with MJP in the summer of 2008 about his financial entitlements, TLB made no mention of the extra $8,333 per month to which he says he was entitled as CEO of the upstream side of the business. Nor was it a topic broached at the Monaco meeting or in the exchanges which followed.

50. Mr Dougherty's submission is that the salary claim is an afterthought and lacks credibility. It emerged only at a point when TLB was losing the argument on other fronts and litigation seemed inevitable.

51. The explanation for TLB's silence came out in cross-examination. TLB said that in or around March 2007 (which was shortly after the disappointing meeting with Royal Bank of Canada), he agreed with MJP that payment of the salary uplift of $8,333.33 per month could be deferred until PUL was in a position to pay. He said that he made the concession because it was not a battle he wanted to fight with MJP at that juncture. He described it as a "*hot button issue*", which he preferred to avoid until a more propitious time which, in the event, was never reached.

52. One might be forgiven for being sceptical about this explanation since it did not appear in TLB's witness statement: but I believe it, essentially for two reasons. The first is that the aftermath of the collapse of the fund-raising plan for PUL was a difficult time for MJP. He later referred to the bank's decision to pull-out as "*the wreckage*". The Petrodel group remained committed to expenditure in Tanzania but now had fewer resources with which to meet that commitment. The impression I have of the relationship between MJP and TLB is that it was always potentially volatile and that the two men were calculating and tactical in their dealings with each other. It comes as no surprise that TLB may have felt that the subject of his salary increase was one best left for discussion at a later time. The second reason is that the concession about deferral of the salary increase is reflected in an e-mail exchange between MJP and TLB in August 2007. On 2 August TLB e-mailed MJP about his RA claim and certain overdue expenses. MJP sent a long message back on 3 August in which the following paragraph was included:

> "… *Post Wreckage – Ever since February 8th 2006* [should be "2007"] *I have been fire fighting to somehow hold things together. Salaries have been paid across the entire group (as they have been month in month out for six years). You told me that you were prepared to stick with your [Petrodel] salary despite the fact I know that your PUL salary was much higher. Expenses have been paid, legal fees have been paid, finance on the loan to BNP has been paid ($120k/month), and fees to various consultants have been paid. Somehow against a backdrop of BNP tightening the screw I have managed to get through. The rosy profitable scenario you paint is one that I do not recognise. I have fought like a dog to get dates for the fuel oil lifting's of the MP simply as a means of SURVIVAL. The next is to somehow get dates for the next cargo, again simply as a means of SURVIVAL. Thankfully now I am turning the corner and this year 2007 will play out positively with both trading on a sound footing and E&P where it should be.*"

53. The second sentence could be read as meaning that TLB had agreed to forego his entitlement to the new salary: but in my judgment it is equally

consistent with his having agreed only to postpone payment of it. The first question I have to decide is whether the intention of MJP and TLB, when they discussed and agreed what was to happen about the future management of the E&P business in and after December 2006, was that TLB would only be entitled to the higher salary if PUL raised finance from investors. If the answer to that question is in the negative, the second question is: what was agreed should happen if the fund-raising for PUL failed or did not proceed? The third question is whether the concession made by TLB, "post wreckage", precludes him from bringing the claim in this action.

54. Arriving at answers to these questions is not altogether straightforward. There are no copies of the management accounts of Petrodel or PUL in evidence. The documents in the trial bundles which record a salary of $250,000 for the CEO of the E&P business are either budgets designed to support a business plan or spreadsheets included in the quarterly reports supplied to TPDC. They are not inconsistent with TLB's claimed entitlement to such a salary: but they are not of themselves proof that it was accruing to him. The answer to the first question is also complicated by the fact that, at all times between December 2006 and 8 February 2007, MJP and TLB assumed that the planned fund-raising for PUL through the medium of Royal Bank of Canada would be successful. The joint expectation was that PUL would have the capital to take over the E&P business from sometime in March. In the circumstances, neither of them expressly addressed what was to happen if the funding did not materialise. I find Petrodel's Defence that the "gist of the discussion" was that the higher salary was to be paid only if PUL was capitalised unconvincing, and MJP's witness statement and oral evidence have not dispelled that scepticism. I think that nothing was said about what was to happen about TLB's salary if PUL was not capitalised, until Petrodel was faced with that reality. If it had been suggested to TLB in December 2006 that he should forego any right to the higher salary until PUL obtained funding at some indeterminate future date, he would have refused to agree to such an arrangement.

55. When the talks with the bank collapsed, there was some discussion of what TLB was to be paid and when. I have accepted TLB's evidence that in or about March 2007 he agreed to a deferral of his salary increase. He did so because Petrodel had cashflow difficulties and he thought it judicious not to press for payment. However, in my judgment, it is implicit in the agreement that TLB would "stick with" his basic Petrodel salary, that the increase of $8,333 per month was to accrue to him, as from 1 January 2007 (as it would have done if PUL had been able to pay it) and would be paid when the money was available. Any other interpretation involves accepting that TLB was prepared to take on responsibility for the E&P business just as if PUL had been capitalised, but forego the entitlement to the new salary and instead accept remuneration which

was less than he had been paid in 2006 (after taking account of his participation in the resource pool). I prefer the evidence of TLB that this was no more than a deferral of payment, not a deferral of the salary increase itself.

56. I answer the third and final question in the negative. I reject the argument that the agreement to defer should be interpreted as meaning that none of the salary increase is payable, because PUL cannot afford to pay. The fact is that PUL is unlikely to be able to afford to pay for an indefinite period because MJP has decided to run the E&P business through Petrodel. Conveniently this has the effect, on Petrodel's case, that no sum is payable or will be paid, even if the salary increase has accrued due. TLB may have assumed, when agreeing to defer payment of his salary increase, that PUL would take over full running of the upstream business in the foreseeable future. But Petrodel was running the upstream business for the time being and meeting all the costs. Whether this was being done on behalf of PUL (as Petrodel's audited accounts imply) or on Petrodel's own account (as the quarterly reports submitted to TPDC suggest) is a moot point. The money for running the E&P business had to come from somewhere. TLB did not press Petrodel for payment of his salary increase because money was short in 2007 and to have insisted on his full pay would have been a "*hot button issue*". However I find that it was implicit in the arrangement which MJP and TLB arrived at in or around March 2007 that TLB should manage the E&P business as an employee of Petrodel until PUL was able to take over, and that his increase in salary would be paid by Petrodel for so long as he managed the E&P business through Petrodel, if PUL did not take over the historic costs when the transfer of control from Petrodel to PUL took place. TLB left the group before the transfer happened. It may now never happen. The liability to pay the salary increase between January 2007 and June 2008 therefore rests with Petrodel. Notably, it has been no part of Petrodel's defence that it cannot now afford to pay it.

57. Accordingly I find that it was agreed between MJP and TLB that TLB would be entitled to be paid an increase in salary of $8,333.33 per month as from 1 January 2007 for managing the E&P business, and that payment would be made by PUL if and when capitalised or if not by Petrodel for so long as Petrodel operated and funded the upstream business. It follows that the salary claim succeeds in the sum of $150,000.

58. I have deliberately said nothing until this juncture about a letter which was written to TLB on 6 March 2009 by Dr David Mestres-Ridge. Dr Mestres-Ridge was a director of Petrodel at the time and his letter was in these terms:

> "*I tried reaching you unsuccessfully to ask for your comments on the following:*

I understand that, in 2006, you received $150,000 from Petrodel Resources as a salary or salary equivalent. I understand further that this was increased to $250,000 per annum in 2007 and that this was the level of consideration that applied when you left in June 2008. It appears from our records that only $150,000 was paid in 2007 and a further $75,000 was paid in the first half of 2008.

I have not seen any formal agreement between you and any company within the Petrodel group, or any correspondence that might support the view that the salary was increased to $250,000 in 2007. I would be grateful if you could let me have copies of any such agreement that you consider relevant, as this will provide justification to our auditors.

Notwithstanding this, it appears that Petrodel Resources owes you the unpaid portion of the salary for that period (being $100,000 for 2007 and a further $50,000 for 2008). I propose that this should be accrued in our books and that you therefore are listed as a creditor to the company until the point at which it is able to fulfil its obligations.

Please confirm that you are in agreement with the above."

59. MJP made a number of criticisms of the letter. For example, Dr Mestres-Ridge signed himself as "Managing Director" of Petrodel whereas MJP said he was never more than manager of the E&P side of the business. MJP also said that the style of the address at the foot of the letter was not in Petrodel's standard form. Whether this was meant to imply that the authenticity of the letter was suspicious is not clear: but it was not submitted on Petrodel's behalf that the letter was a forgery or that Dr Mestres-Ridge had no authority to send it.

60. TLB replied by letter on 4 April with confirmation of the details about the increase and the non-payment, but declining to accept any further deferral of what he said was due. Petrodel's case is that TLB only staked his claim because he was prompted to do so by Dr Mestres-Ridge's letter. There would otherwise have been no claim. I do not draw that inference. I think the salary claim would have come to the surface in any event.

61. Some late disclosure shed light on how Dr Mestres-Ridge came to write to TLB in the terms that he did. His letter followed a number of internal e-mails at Petrodel concerning how to deal with salary liabilities relating to the E&P side of the business. The subject had arisen for several reasons. Petrodel's accounts for 2007 to 2008 were being audited. TPDC had also raised queries about some of the costs and overheads in the quarterly reports for 2006 and 2007, so they

were being revisited. There is no evidence that the Tanzanians objected to the $250,000 for the CEO's salary but all the figures were being looked at afresh. Dr Mestres-Ridge only joined Petrodel in August 2008 and was unaware of what had been agreed between MJP and TLB about the CEO's salary before his arrival. He was concerned to establish whether the cost should be booked to Petrodel or to PUL in Petrodel's accounts, and whether the salary increase had accrued to TLB or when payment was due.

62. In the course of his inquiries Dr Mestres-Ridge asked MJP to confirm or provide an answer to the following points (see his e-mail to MJP of 11 February 2009):-

> "*1. what was Tim's annual salary for the period 01.01.06 to the date of his departure in June 2008? We do have a swarm of different numbers.*
> *2. what was the exact date of his departure?*
> *3. if he was paid $250,000 for being a director (your note yesterday), what consideration if any was he entitled to for the period between leaving and being removed as a director in January 2009?*
> *4. why was he paid at $150,000 in 2006 and 2008 but $250,000 in 2007?*
> *5. do we have any contractual agreement between PRL and Tim that can provide an audit trail?*"

MJP could not find the note referred to in question 3 and could not recall the answers he gave: but, insofar as it is relevant, I find that he must have given Dr Mestres-Ridge to understand that TLB's annual salary in 2007 and 2008 was $250,000 and that it was payable by Petrodel. The letter of 6 March is in explicable on any other basis.

63. No claim is advanced in this action that the letter of 6 March 2009 acknowledged the debt. As the letter amounts to no more than evidence of what Petrodel believed its obligation to be in March 2009, it does not assist in interpreting what was in fact agreed between MJP and TLB in December 2006 or March 2007. I refer to the letter because it attracted a good deal of attention at the trial and so as to note that the conclusion I have reached is consistent with it. The only reason Dr Mestres-Ridge could give for not making immediate payment was that Petrodel was not yet able to fulfil its obligations. As I have already said, that was not a defence put forward on Petrodel's behalf at the trial.

Conclusion

64. There will be judgment for the claimant on the bonus claim for $118,115.22, on the R.A. claim for $44,568.46, and on the salary claim for $150,000.

65. It is agreed that the sums awarded should carry interest at U.S. Prime Rate. In the case of the bonus claim interest should run from 27 June 2008. For the RA claim, interest runs from 27 March 2006 on the $25,916.67 outstanding in respect of the Four Moons cargo, and from 11 November 2006 on the balance of $18,651.79 from the cargo shipped on the New Century. As for the salary claim, the final point made by Mr Higgins in his closing submissions was that the deferral of payment ended when TLB left Petrodel. TLB must therefore accept that interest cannot run earlier than a date in July 2008. Mr Dougherty's submission is that interest should only run from the date of TLB's letter of 4 April 2009 to Dr Mestres-Ridge, which was the first demand for payment of the salary increase. I think that the earlier of the two dates is the correct one. The increase had accrued and should have been settled at the time of TLB's departure. It did not depend on a demand for it to become payable at that point. Interest on the salary claim shall run from 31 July 2008.