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Case No: 2012 Folio 564

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 September 2014

**Before** :

**MR JUSTICE EDER**

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**Between :**

**UNAOIL LTD**

**Claimant**

**- and -**

**LEIGHTON OFFSHORE PTE LTD**

**Defendant**

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**Huw Davies QC** (instructed by **Jones Day**) for the **Claimant**
**Ian Gatt QC and Graeme Robertson** (Solicitor Advocate) (instructed by **Herbert Smith Freehills LLP**) for the **Defendant**

Hearing dates: 25, 26, 30 June & 2 July 2014

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# 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.

.....

MR JUSTICE EDER

## Mr Justice Eder:

*Introduction*

1. The claimant ("Unaoil") is a company incorporated in the British Virgin Islands and is part of the Unaoil Group of companies ("Unaoil Group"), the holding company of which is UNAEnergy (Holdings) Pte Ltd. Its head offices are in Monte Carlo. The Unaoil Group was founded in 1991. It provides oil and gas services in the Middle East, Central Asia and Africa and now has approximately 200 employees (excluding temporary and project based employees and contractors). Unaoil provides a wide range of services across the oil and gas sector, principally in challenging locations such as Iraq. Those services include engineering and construction, provision of specialist technical workforces, camp solutions, equipment and aftermarket services and business advisory services.

2. The defendant ("Leighton Offshore") is a company incorporated in Singapore and is a leading engineering, procurement, construction, commissioning and life of field services constructor.

3. The disputes between Unaoil and Leighton Offshore arise against the background of a substantial oil infrastructure project, known as the Iraq Crude Oil Expansion Project (also known as the "Phase I Project" or "ICOEEP"). The Phase I Project was part of a series of projects undertaken as part of the Government of Iraq's efforts to rebuild Iraq's oil export infrastructure.

4. The present proceedings concern various claims made by Unaoil against Leighton Offshore under a Memorandum of Agreement between the parties dated 10 December 2010 ("JICA MOA") as amended pursuant to which Unaoil says that Leighton Offshore appointed Unaoil as its sub-contractor for the onshore works component of the installation of an oil pipeline in the Al-Basra South region of Iraq and the northern Arabian/Persian Gulf referred to variously as the "JICA Project", "Phase III" and the "Sealine Project". Unaoil advances three main claims viz:

    i) A debt claim in the aggregate sum of US$12,577,500 pursuant to Exhibit 3 of the JICA MOA.

    ii) A claim for liquidated damages in the sum of US$40 million pursuant to Article 8 of the JICA MOA.

    iii) A claim for damages for Leighton Offshore's repudiatory breach of the JICA MOA quantified in the sum of US$29,847,167 alternatively US$26,720,297.

*The Evidence*

5. On behalf of Unaoil, the following individuals provided signed written statements and gave oral evidence:

    i) Mr Ata Ahsani. He is the Chairman of the Board of the Unaoil Group His involvement in operational matters is limited. Rather, his main role is to provide guidance and generally assist the Board with achieving its vision for the Unaoil Group.

ii) Mr Cyrus Ahsani. He is the CEO of the Board of the Unaoil. His role includes general oversight and strategic involvement in all of the Unaoil Group's larger projects but generally not day to day operational matters.

iii) Mr Peter Willimont. He joined the Unaoil Group in 1991 and is the Executive Vice President of the Advisory Division of the Unaoil Group. At all material times, he was responsible for the Unaoil Group's largest accounts and the development of its major projects.

iv) Mr Richard Lyndon. He joined the Unaoil Group in April 2010 and became Executive Vice President, Contracts for the Unaoil Group with responsibility for negotiating and drafting many of the Unaoil Group's contracts for major projects. In addition, he was also responsible for commercial management of the P&L of the JICA Project (amongst other projects) and additionally provided counsel and mentoring to the operational and project teams on both the contract administration and operational delivery management.

v) Mr Martin Worrall. He was originally employed by Leighton Offshore from October 2010 to work from Dubai for the Middle East division of its international offshore project office. He acted as Project Director for the first phase of the ICOEEP and continued in this role until he left Leighton Offshore at the end of November 2011. He then joined Unaoil in January 2012 until he left in September 2013.

6. On behalf of Leighton Offshore, the following individuals provided signed witness statements and gave oral evidence:

i) Mr Roy Timms. He was the Manager of DPS Leighton Offshore Engineering in Kuala Lumpur for a short period from September 2011 until January 2012 when he was appointed as Leighton Offshore's first Project Director of the JICA Project. His replacement in this role was Timothy Douglass who was appointed in July 2012 although he stayed on for an additional 6 months sharing the role of Project Director but concentrating on managing Leighton Offshore's relationship with the funders and ultimate developers of the JICA Project.

ii) Mr Timothy Douglass. As stated above, he became Project Director for Leighton Offshore in July 2012.

7. As appears below, there were three other individuals who appear to have played important roles on behalf of Leighton Offshore in relation to the JICA Project viz. Mr Russell Waugh, the original CEO of Leighton Offshore, Mr Peter Cox who took over the role of CEO of Leighton Offshore from Mr Waugh in about the end of 2010 and Mr Michael Pearce who was Leighton Offshore's General Manager, Projects. However, these individuals subsequently left Leighton Offshore. They did not provide statements and did not give evidence.

*Summary of Main Events*

8. Before turning to consider the three main claims advanced by Unaoil, it is convenient to summarise an outline of the main events – although it is worth mentioning at the outset that certain aspects of the story are, to say the least, somewhat obscure.

9. In about April 2010 Mr Willimont, on behalf of Unaoil, approached Mr Waugh, on behalf of Leighton Offshore, to suggest that the two companies work together to pitch for the original Phase 1 Project. As with the later JICA Project which is the subject of these proceedings, the ultimate client for the Phase I Project was the Iraqi state-owned oil company South Oil Company ("SOC"). Unaoil proposed to Leighton Offshore that Unaoil carry out all of the onshore works with regard to the Phase I Project and that Leighton Offshore carry out the offshore works. To Leighton Offshore, the attraction was that Unaoil had experience operating in Iraq and the expertise, local knowledge and personnel to carry out the onshore element of the Phase I Project.

10. Mr Willimont's approach to Leighton Offshore led to detailed negotiations between the parties following which the parties entered into a Memorandum of Understanding dated 31 May 2010 ("Phase I MOU"). At this date, Leighton Offshore had not yet been appointed as contractor by SOC. However, the Phase I MOU anticipated such appointment and recorded that in the event that Leighton Offshore was successful in securing the Phase I Project from SOC, Unaoil would be appointed as Leighton Offshore's sub-contractor for the execution of the onshore construction works in relation to that project.

11. The Phase I MOU was superseded by a Memorandum of Agreement dated 26 June 2010 (although signed on 30 June 2010) ("Phase I MOA"). Pursuant to the Phase I MOA, Leighton Offshore appointed Unaoil as its sub-contractor for the execution of the onshore construction activities in connection with the Phase I Project for an all inclusive price of US$77.5 million.

12. In October 2010, SOC awarded Leighton Offshore the main contract for the Phase I Project. Thereafter, and as envisaged by the Phase I MOA, Leighton Offshore and Unaoil entered into a back-to-back formal sub-contract dated 13 December 2010 with regard to the onshore works. This superseded the Phase I MOA.

13. Meanwhile, in about November 2010, Mr Willimont and Mr Waugh discussed the potential for Leighton Offshore and Unaoil to collaborate on a separate project involving the construction of a further parallel oil pipeline. This project benefited from funding from the Japan International Cooperation Agency ("JICA") and hence became known as the JICA Project. The project management company ("PMC") for the JICA Project was Japan Engineering Co. Ltd ("JOE").

14. In the event, the JICA MOA, dated 10 December 2010, was signed by Mr Saman Ahsani on behalf of Unaoil and by Mr Waugh on behalf of Leighton Offshore. It consisted of 9 type-written pages and provided in material part as follows:

> "*MEMORANDUM OF AGREEMENT*
>
> …
>
> *WHEREAS*

*LEIGHTON OFFSHORE and UNAOIL respectively wish to record their irrevocable and binding agreement relating to their collaboration and co-operation in connection with the "IRAQ CRUDE OIL EXPORT FACILITY RECONSTRUCTION PROJECT reference EFP 0910100 (hereinafter referred to as the "PROJECT" and or "JICA") for SOUTH OIL COMPANY (hereinafter referred to as the "CLIENT") in Iraq.*

*NOW THEREFORE, it is on the basis of the foregoing premise being an integral part this MOA that the Parties hereto agree as follows:*

*ARTICLE 1 – PURPOSE OF THE MOA*

*In consideration of the mutual undertakings each Party gives to the other under this MOA, the Parties agree as follows:*

*1.1 To freely enter into this MOA, in collaboration and co-operation, whereby the Parties agree that such collaboration and cooperation is by way of a sole and exclusive contractor and sub-contractor relationship in respect of the above PROJECT for the UNAOIL Scope of Work (later herein defined).*

*1.2 That UNAOIL shall immediately following signature irrevocably commit to the further engagement of subcontract resources and the continued incurrence of costs in respect of the above PROJECT for the UNAOIL Scope of Work (later herein defined).*

…

*1.5 Save in so far as the Party's respective subcontract arrangements that may be necessary in order to support the purpose and intent of this MOA, or as otherwise expressly provided in this MOA, neither Party shall individually enter into any relationship which is substantially equivalent to that defined by this MOA, in connection with the PROJECT and the UNAOIL Scope of Work with any person or firm other than the other Party to this MOA. For the avoidance of doubt, neither Party shall, whether directly or indirectly, make any other tender to or agreement with the CLIENT or any other party with respect to a work scope that is substantially equivalent to the UNAOIL Scope of Work (later herein defined) on this PROJECT which would thus attempt to circumvent the purpose and intent of this MOA.*

…

*1.7 Nothing in this MOA shall create any entitlement whatsoever between the Parties, including any right to damages, costs or expenses in the event LEIGHTON OFFSHORE (or any one of it's* [sic] *existing or future group companies) is not awarded the contract for the PROJECT by the CLIENT.*

…

*ARTICLE 2 – IMPLEMENTATION OF THE MOA*

*The Parties agree to proceed as follows:*

*2.1 UNAOIL confirms that it together with any partners with which it works in connection with the PROJECT shall have, the requisite skill, experience, ability and available resources and that it meets, and all such partners shall meet, all requirements at law including holding of all relevant licences to execute the UNAOIL Scope of Work as is hereby subcontracted by LEIGHTON OFFSHORE to UNAOIL in accordance with this MOA.*

*2.2 Without further payment obligation unless and until LEIGHTON OFFSHORE (or any one of its existing or future group companies) is successful in securing the PROJECT from the CLIENT, LEIGHTON OFFSHORE hereby appoints UNAOIL (or by way of later assignment one of its existing or future group companies, subject to LEIGHTON OFFSHORE approval, which will not be unreasonably withheld or delayed) to be its sub-contractor for the execution of the onshore construction activities (as further defined in Exhibit 1 and 2) in connection with the PROJECT ("UNAOIL Scope of Work").*

*2.3 Other than those agreements set forth in this MOA, UNAOIL and LEIGHTON OFFSHORE will negotiate in good faith to agree the further terms and conditions of the subcontract for the UNAOIL Scope of Work with such terms and conditions to be on a back to back basis with the terms and conditions contained in the contract between LEIGHTON OFFSHORE and the CLIENT, to the fullest extent such terms and conditions may reasonably and proportionately be deemed applicable in the context of the subcontract and the UNAOIL Scope of Works…*

*2.5 LEIGHTON OFFSHORE and UNAOIL agree that UNAOIL Scope of Work shall be as set out in Exhibit 1 …*

*2.6 LEIGHTON OFFSHORE and UNAOIL agree to the commercial points of principle as set forth in Exhibit 3 hereto and, in so far as is necessary and without prejudice to the same, further agree that they will negotiate together in good faith to incorporate the said agreed principles into any further detailed terms and conditions of the subcontract.*

*2.7 LEIGHTON OFFSHORE and UNAOIL agree an all inclusive price of USD 75,000,000 (seventy five million dollars).*

…

*ARTICLE 5 – EFFECTIVE DATE*

*This MOA is effective and binding between the Parties as of the date of its execution under hand.*

*ARTICLE 6 – LAW AND DISPUTES*

*This MOA and any non-contractual obligations arising in connection with it shall be governed by and construed in accordance with the laws of England and Wales.*

…

*ARTICLE 7 – TERMINATION*

*Other than as set out hereunder in this Article 7, neither party shall have any further obligation to the other under this MOA after its termination. Article 3 CONFIDENTIALITY, Article 6 LAW AND DISPUTES and Article 7 TERMINATION shall accordingly remain in full force and effect after its termination. This MOU* [sic] *will terminate on the earliest of any of the following events occurring:*

…

*4. The award of the PROJECT to LEIGHTON OFFSHORE and entry by the Parties into (by mutual consent and formal execution thereof) of a subcontract agreement for the UNAOIL Scope of Work that includes a condition that expressly supersedes this MOA.*

…

*ARTICLE 8 –LIQUIDATED DAMAGES*

*8.1 If LEIGHTON OFFSHORE is awarded the contract for the PROJECT by the Client, and LEIGHTON OFFSHORE does not subsequently adhere to the terms of*

*this MOA and is accordingly in breach hereof, LEIGHTON OFFSHORE shall pay to UNAOIL liquidated damages in the total amount of USD 40,000,000 (Forty million US dollars). After careful consideration by the Parties, the Parties agree such amount is proportionate in all respects and is a genuine pre-estimate of the loss that UNAOIL would incur as a result of LEIGHTON OFFSHORE's failure to honour the terms of the MOA.*

*8.2 Any liquidated damages payable under Article 8.1 shall be paid by LEIGHTON OFFSHORE to a bank account nominated by UNAOIL in instalments, with one initial instalment of USD 10,000,000 (Ten million US dollars) being made within 30 days of a written demand by UNAOIL, and the balance sum being paid in 14 equal instalments on a monthly basis, commencing in the month following the initial payment, or as may be otherwise agreed in writing between UNAOIL and LEIGHTON OFFSHORE.*

*ARTICLE 9 – CONTINUED SERVICE PROVISION*

*9.1 If LEIGHTON OFFSHORE does not subsequently adhere to the terms of this MOA and is accordingly in breach hereof, then notwithstanding and without prejudice to LEIGHTON OFFSHORE's obligation to pay liquidated damages to UNAOIL in accordance with Article 8 but subject always to the strict conformity and adherence of the agreed payment structure set forth therein, UNAOIL will continue to assist LEIGHTON OFFSHORE with the successful execution and completion of the PROJECT for the CLIENT and shall:*

- *Provide local knowledge and advice on the preferences of the CLIENT, its partners, the government and governmental agencies.*

- *Assist in arranging meetings and maintaining relations with the CLIENT, its partners, the government, governmental agencies and any other business representatives that are deemed desirable for the satisfactory completion of LEIGHTON OFFSHORE's contract.*

- *Ensure LEIGHTON OFFSHORE is kept appraised of all requirements the CLIENT may have in relation to the execution of the contract.*

- *Provide feedback and monitoring of performance of the CLIENT, its partners and others during execution to ensure a successful contract execution.*

- *Provide assistance on possible change orders and guidance relating to invoicing procedures and billing issues if needed.*

*EXHIBIT 3*

*AGREED COMMERCIAL POINTS OF PRINCIPLE*

*…*

*2. Payment terms*

*The agreed payment terms are set forth below:*

*a. Non-refundable Advance Payment of 15.0% of the Fixed Lump Sum Price contained in Article 2.7, which shall be set against each of the Lump Sum Prices contained in Exhibit 2 UNAOIL's Unit Rates / Price Breakdown …*

*b. Within 30 days of (a) a Non Refundable Pipe Laying Equipment Asset Write Down and Mobilisation Payment of 7.5% of the Fixed Lump Sum Price contained in Article 2.7, which shall be set against each of the Lump Sum Prices contained in Exhibit 2 UNAOIL's Unit Rates / Price Breakdown.*

*c. Thereafter, monthly progress payments against actual progress of the Work Breakdown Structure activities on the balance of 72.5% of each of the Lump Sum Prices contained in Exhibit 2 UNAOIL's Unit Rates / Price Breakdown …*

*d. …*

*e. With the exception of (a) and (b) above (which are payable on demand following the opening of the main contract LOC and the receipt of first funds by LEIGHTON OFFSHORE as set forth in (a) and (b)), the period of payment shall be no greater than 45 calendar days …*

*5. UNAOIL's approval as a subcontract*

*In the event of a written objection by the CLIENT to UNAOIL's engagement as a sub-contractor to LEIGHTON OFFSHORE, UNAOIL shall in a timely manner seek and obtain approvals for its continued engagement to perform the works as set forth in this MOA. For the avoidance of doubt, should thereafter UNAOIL's continued engagement remain unacceptable to the CLIENT, then notwithstanding the same both Parties hereby agree that UNAOIL shall always continue to be obliged to provide the services*

> *set forth in Article 9.1 and LEIGHTON OFFSHORE shall always be obliged, upon the continued provision of those services, to pay UNAOIL in strict accordance with the instalments set forth in Article 8.2. If at such time UNAOIL have already issued the Performance Bond set forth above and in Article 2.10, then LEIGHTON OFFSHORE hereby agree to return the same with a letter of unconditional release from obligation there under to UNAOIL's guarantor bank.*"

(The paragraph numbers in Exhibit 3 have been added for ease of reference.)

15. Leighton Offshore's original pleaded case was that the JICA MOA was so vague and uncertain that it could not be given contractual force. However, in the course of the trial, that position was abandoned and a more limited case, as considered below, was advanced. At this stage, I would merely observe that the JICA MOA is very badly drafted and that the disputes which are now the subject of the present proceedings are probably due, in large part, to such bad drafting.

16. As set out in Article 2.7, the JICA MOA provided for an all inclusive price of US$75 million. The evidence of Mr Ata Ahsani (which I accept) is that this figure was his decision; that in this type of project the price of the onshore works is generally about 7-12% of the total price of the project; that he thought that Leighton Offshore would put in a bid for the total JICA Project of between "*maybe 700 million, maybe 650 …*"; that the figure of US$75 million was thus pitched as a percentage of that total bid price; that in arriving at the figure of US$75 million, he also considered the estimate for the cost of the engineering and construction ("E&C") works to be provided by Unaoil under the JICA MOA which was in the range of US$22 million to US$35 million; that he thought US$35 million was quite a reasonable estimate of the cost of such works including a reasonable amount of profit (i.e. between something like 5-12%) and contingency; and that the difference between the figure of US$75 million and US$35 million (i.e. US$40 million) was to cover the cost to Unaoil of providing whatever support services were needed to get the job done (as referred to in Article 9.1 of the JICA MOA) and (to the extent that such support services were not required by Leighton Offshore or ultimately proved unnecessary) an additional "premium profit" for Unaoil.

17. It is perhaps somewhat surprising that there are no contemporaneous documents to support these figures as at the date of the original JICA MOA. In particular, there are no contemporaneous documents as at that date to support the estimate of US$22-35 million for the cost of the E&C works as stated by Mr Ata Ahsani. However, it appears that estimates were produced internally by Unaoil shortly after the JICA MOA was signed including, for example, a single sheet Job Estimate Form ("JEF") seemingly dated 25 March 2011 showing what is described on the face of the document as an "Estimated Amount" of US$26,436,392 consisting of a base total cost for the E&C works of US$19,825,000 plus contingency (7.5%) of US$1,486,875, E&C and Group "overhead" (7.5%) of US$1,486,875, Gross Profit (10%) of US$1,983,642 and Iraq Taxes (3.3%) of US$1,650,000 apparently based on a figure of US$50 million.

18. In the course of the evidence and the parties' submissions, there was much debate as to the nature and cost of support services that Unaoil might have to provide over and above the E&C costs and what, if any, "profit" might remain out of the figure of US$40 million referred to above. This is crucially important to Unaoil's claim in these proceedings under the third head i.e. for loss of profits. Somewhat surprisingly, there is nothing in any of the witness statements served on behalf of the claimant dealing in any detail with this topic – although it is noteworthy that this figure of US$40 million is, of course, identical to the figure of US$40 million in Article 8 of the JICA MOA relating to liquidated damages. It is also perhaps somewhat surprising that there were no documents to indicate how this figure of US$40 million had been calculated or the nature or cost of the additional support services that might be required. In summary, Mr Ata Ashani's evidence in cross-examination was that that exercise was not carried out because it would be "useless" and there was no basis for it; that "… *in Iraq estimates are not estimates. Things change. So I don't spend a lot of time doing these things, I just take a view and we go forward ….*"; that the figure of US$75 million was, in effect, a "punt"; that Unaoil go into areas where there is a perceived risk; that although Unaoil took the view that the south of Iraq (as opposed to the north) was a "normal place" which was not politically unstable, there was still a "risk"; and that they might have to evacuate. As to the nature of the risk, Mr Ata Ahsani stated:

> "*… you can never foresee things. You understand you can have explosions happening in your camp, you understand we could have Leighton Offshore men getting drunk and getting arrested … it is a sort of insurance for high profit in an area where other people see a perceived high risk …*".

As to what Leighton Offshore was getting for this US$40 million, Mr Ata Ahsani's evidence was:

> "*They were getting the comfort that the onshore project is going to be done on time, their visas are going to be supplied, they would be met at the airport where – all of these things in a country where there was a risk of war and so on, and they were getting the comfort that they are with us and we have been there for ten years. That is what.*"

Further, it was Mr Ata Ahsani's evidence that Unaoil had two "profit centres" i.e. the "advisory" and the "projects"; and that, unlike E&C costs, costs incurred in respect of "support services" would be attributed by country, not by project. I revert to this topic when dealing with the parties' submissions in relation to Unaoil's damages claim.

19. Given that Leighton Offshore had already been awarded the Phase I Project and was responsible for constructing the two initial oil pipelines, with Unaoil carrying out all of the related onshore works and services, Leighton Offshore and Unaoil both hoped that they might be able to persuade SOC that the JICA Project did not need to be sent out to tender. However, in the event, they were disappointed; and SOC decided that the JICA Project should be sent out to competitive tender.

20. Meanwhile in about November or December 2010, Mr Waugh was succeeded by Mr Cox as Leighton Offshore's CEO. There was a period of handover but by the end of

December 2010 or January 2011, Mr Cox seems to have assumed overall control within Leighton Offshore of both the Phase I Project and the JICA Project. The advent of Mr Cox led to significant problems for Unaoil on both the Phase I Project and the JICA Project. This was dealt with at some length by Mr Lyndon and Mr Worrall in their witness statements. For present purposes, the detail does not matter. However, in general terms, I accept that by the summer of 2011, Mr Cox had found a willing ally at Leighton Offshore by the name of Michael Pearce, who was appointed Leighton Offshore's General Manager, Projects around the same time; that both Mr Cox and Mr Pearce were forthright and aggressive characters who both made it clear (in particular to Mr Worrall) on several occasions that Leighton Offshore did not need Unaoil for either the Phase I Project or the JICA Project; and, as confirmed by certain of Leighton Offshore's contemporaneous internal documents, that so long as Messrs Cox and Pearce were involved in the JICA Project, Leighton Offshore was intent on reneging on the JICA MOA. The precise reasons for this were unclear and the subject of certain conjecture in the course of the trial. In any event and whatever such reasons might have been, Leighton Offshore's contemporaneous documents show that Mr Cox and Mr Pearce did not intend to honour the terms of the JICA MOA or at least not unless and until Unaoil agreed to reduce the lump sum price of US$75 million; although it would seem that Leighton Offshore continued to string Unaoil along with Unaoil devoting a great deal of time and expense to compiling the detailed technical information and price estimate required for the onshore element of the JICA work scope which would form part of Leighton Offshore's bid to SOC.

21. Following the decision of SOC to put the JICA Project out to competitive tender, there were further discussions between Unaoil and Leighton Offshore; and the JICA MOA was amended by agreement on the terms of Supplementary Agreement No. 1 dated 23 March 2011 which provided in material part for additional wording to be inserted at the end of Article 1.5 of the original JICA MOA in effect permitting Unaoil to make any other tender to or agreement direct with SOC or any other party with respect to a work scope substantially equivalent to the Unaoil scope of work under the JICA MOA without disclosure to Leighton Offshore.

22. Shortly thereafter, agreement was also reached between Leighton Offshore and Unaoil that in order to increase the chances of securing the work, it would be necessary for both Leighton Offshore and Unaoil to reduce their respective fixed lump sum prices. To this end, the JICA MOA was further amended by Supplementary Agreement No. 2 dated 15 April 2011 ("Supplementary Agreement No. 2") which amended Article 2.7 of the JICA MOA as follows:

> "…
>
> *Replace all of 2.7 with the following words:*
>
> *Leighton Offshore and Unaoil agree a minimum price to be paid to Unaoil for construction and marketing of US$ 55,000,000 (fifty five million US dollars).*
>
> *Furthermore the parties agree that Unaoil shall be paid an additional marketing fee of 5% on any amount that Leighton Offshore receive on the Project above US$ 500,000,000 (five hundred million US dollars).*

> *Notwithstanding the above and for the avoidance of doubt the marketing fee paid to Unaoil shall not be less than US$ 25,000,000 (Twenty five Million US Dollars).*"

23. On its face, the wording of this document (which went through various draft iterations) is somewhat confusing. However, it seems relatively clear that the effect of this Supplementary Agreement No 2 was to vary the JICA MOA such that the all inclusive lump sum price of US$75 million in the original JICA MOA was reduced to a minimum price of US$55 million plus an additional "marketing fee" of 5% on any amount that Leighton Offshore received on the JICA Project above US$500 million. However, it is important to note that although the price under the JICA MOA was thereby reduced, the liquidated damages provision at Article 8.1 of the JICA MOA was not amended and, on its face, continued to provide for liquidated damages of US$40 million.

24. Further, it is important to note that the reduced figure of US$55 million included an amount of US$25 million as a "marketing fee". Although not expressly stated, the balance (i.e. US$55 million – US$25 million = US$30 million) was presumably the figure notionally attributed by the parties to the price of the E&C works. There was much debate in the course of the evidence and the parties' submissions with regard to this "split". The notional figure of US$30 million for the price of the E&C works was relatively uncontroversial: it falls within the original cost estimate given by Mr Ata Ahsani and is marginally in excess of the figure in the JEF referred to above.

25. However, the stated "marketing fee" of not less than US$25 million and the additional marketing fee of 5% above US$500 million were much more controversial. What was this supposed "marketing fee"? In summary, Mr Lyndon's evidence was that he was not involved in the negotiation of what became Supplementary Agreement No. 2. The evidence of Mr Cyrus Ahsani was that the reference to "marketing" was a "mis-use" of words as they (i.e. Unaoil) never agreed to provide "marketing" to Leighton Offshore; that Leighton Offshore explicitly said that they did not want such services from Unaoil; and that a better word would have been "support services". However, Mr Cyrus Ahsani frankly accepted that he was not involved in the negotiation of Supplementary Agreement No. 2 and that his understanding of how the term "marketing" came to be used was only "second-hand" and was derived from what his father had told him. The evidence of Mr Ata Ahsani was, in summary, that although he was involved in the events leading up to the signing of Supplementary Agreement No. 2, he was not a lawyer and it had been signed by his son, Mr Saman Ahsani (who did not give evidence); that he could not remember reading it; that he could not explain the choice of language nor the change of the original draft wording of "market consulting fee" to "marketing fee"; that he did not remember discussing the inclusion of the "split" in Supplementary Agreement No. 2 although he "presumed" that it was included at his request for what he described as "… *internal Unaoil profit allocation purposes…*"; that the use of the word "marketing" was misleading; that substitution of that word for "support services" (i.e. the support services referred to in Article 9.1 of the JICA MOA) would have been clearer; and that, in effect, this figure of US$25 million represented a reduction of US$15 million from the original figure of US$40 million in respect of the potential support services included in the original price of US$75 million as referred to above.

26. It seems to me that some of this evidence is probably inadmissible as an aid to construction; and even if not strictly inadmissible, I remain perplexed by the reference to a "marketing fee". I should mention that in the course of cross-examination, Mr Gatt specifically asked Mr Ata Ahsani whether any part of the "marketing fee" was to be paid to a Leighton Offshore employee or an Iraqi official. Such suggestion was expressly and emphatically denied by Mr Ata Ahsani. In his final written submissions, Mr Gatt submitted in the context of addressing Unaoil's claim for loss of profits, that the Court had to be satisfied that no part of the "marketing fee" was to be disbursed to a third party or otherwise "paid away" and in that context he referred me to the "evidence" of possible corrupt payments. However, such evidence was at best tenuous; and I say no more about this point.

27. Following the signing of Supplementary Agreement No. 2, it appears that Leighton Offshore submitted its bid to SOC to act as the main contractor for the JICA Project and that an important meeting then took place in Amman, Jordan over a number of days between 1-4 August 2011 attended by representatives of SOC, JOE, the Ministry of Oil ("MOO") and Leighton Offshore to discuss Leighton Offshore's bid. It is one of the many curiosities of this case that there was no direct evidence from any individual who attended that meeting. However, Mr Gatt relied heavily upon the written minutes of that meeting (the "Minutes"). They show that the meeting was attended by Mr Yaser Ammar Dhahir (Project Manager) and some 7 other representatives on behalf of SOC/MOO; Mr Hiroshi Takada (Project Leader) and some 7 other representatives on behalf of JOE; and Mr Mike Pearce (Project Director) and some 4 other representatives on behalf of Leighton Offshore. The Minutes are headed "*Crude Oil Export Facility Reconstruction Project (Contract No EFP-10-10200), CONTRACT CLARIFICATION MEETING – MINUTES OF MEETING*"; they state that they were prepared by PMC Amman Office and are dated 4 August 2011. The Minutes also appear to bear the signatures of Mr Dhahir and the 7 other representatives of SOC/MOO as well as Mr Takada on behalf of JOE and Mr Pearce and Mr Tambe on behalf of Leighton Offshore.

28. Paragraph 2.3 of the Minutes is headed: "*Proposed Sub-contractors/ Manufacturers by the Bidder*" and provided in subparagraph (2) as follows:

> "*The Employer reviewed sub-contractors/Manufacturers proposed by the Bidder … and the Employer presented the List of Approved Sub-contractors/Manufacturers (Attachment-4). In the List, the Employer:*
>
> *- rejected sub-contractors/manufacturers which were judged as not qualified or less experienced and*
>
> *- Instructed the Bidder to contract with sub-contractors/ manufacturers directly, not through agents …*"

Attachment-4 is a two-page document headed "*Proposed Sub-contractor and Manufacturer*" which consists of a table referring to different "packages" of work, contractors and remarks and provides in material part as follows:

| Package Description | LEIGHTON OFFSHORE | | |
|---|---|---|---|
| | Sub-contractor name | Country | Remarks |
| ONSHORE WORKS | ~~Unaoil~~ | ~~Iraq~~ | Not approved |
| | ~~Basra East~~ | ~~UAE~~ | Not approved |

29. It is another of the many curiosities of this case that Leighton Offshore never provided a copy or even extract of these Minutes to Unaoil until (as appears below) some months later i.e. 16 January 2012. As submitted by Mr Davies, it may be that this is explicable on the basis that Leighton Offshore were at all material times intent on reneging on the terms of the JICA MOA and squeezing Unaoil out of the JICA Project; that Leighton Offshore never made any serious attempt to obtain SOC's approval for Unaoil to act as the sub-contractor in respect of the onshore element of the JICA Project; that Leighton Offshore failed to submit any documents to SOC in order to secure the approval of Unaoil as a sub-contractor; and that this was a deliberate decision on Leighton Offshore's part. Be all this as it may, it is perhaps important to emphasise that Mr Davies expressly made plain that Unaoil's case did not depend in any way on establishing any failure by Leighton Offshore to co-operate in seeking to obtain SOC's approval of Unaoil as a sub-contractor still less any suggestion of a deliberate ploy on Leighton Offshore's part to engineer a situation that SOC should withhold such approval. Further, although there was, as I have said, no direct evidence from any individual with regard to this meeting, Mr Davies did not dispute that the Minutes as disclosed were authentic and were evidence of the truth of what is stated in the Minutes. I deal below with Mr Davies' submissions with regard to these Minutes but, at this stage, it is sufficient to say that, at the very least, they are evidence of a decision to which SOC was a party that Unaoil was, at least at this stage in early August 2011, "not approved" for the JICA Project.

30. Mr Gatt submitted that the reason for this "non-approval" was dissatisfaction (whether or not justifiable) with regard to Unaoil's performance on the Phase I project and certain concern as to Unaoil's behaviour; and I accept that there is some evidence in the contemporaneous documents in support of such submission including Unaoil's own internal documentation. However, he made plain that his case did not depend on showing the reason for such non-approval; and I do not consider that such evidence as exists would permit me to reach a positive conclusion one way or another as to such reasons.

31. In passing, I should mention that there was much debate in the course of the parties' submissions as to whether or not such "non-approval" constituted a "written objection" – in particular for the purpose of Exhibit 3 Clause 5; and that I address this point later in this Judgment.

32. In any event, on about 12 September 2011, a meeting took place at Leighton Offshore's offices in Dubai between (amongst others) Mr Lyndon and Mr Pearce. For his part, Mr Lyndon saw this meeting as an opportunity to get some "face to face" dialogue going between them to try to repair the rift that had developed between Unaoil and Mr Cox. The evidence of Mr Lyndon (which I accept) is that Mr Pearce said that, so far as Leighton Offshore was concerned, Unaoil was not involved in the JICA Project and that any arrangements about cooperation had been with Mr Waugh

not Mr Cox and did not stand. Mr Pearce also said that in a recent JICA Project meeting attended by a man called "Yasir" (i.e. SOC's Project Manager) and a man called "Takada" (a representative of JOE), Unaoil had not been approved as a sub-contractor and had been crossed off the list. Mr Lyndon said that he was not aware of this but that there was a procedure to follow if that was indeed the case. Mr Lyndon also relayed to Mr Pearce what he had been told by Unaoil's local team and which he (Mr Lyndon) believed to be true i.e. that Unaoil's local team had contacted "Yasir" and that he (i.e. Yasir) had said that he had categorically not rejected Unaoil and not crossed Unaoil through at SOC's instigation at all but that instead Leighton Offshore had said that they would be doing the onshore work themselves and this was the actual background to the matter.

33. Thereafter, further meetings took place between Mr Lyndon and Mr Pearce on 25 and 29 September 2011 when discussions took place with regard to the JICA Project as described in Mr Lyndon's statement. However, in the event, it would seem that nothing much turns on such discussions although it is perhaps noteworthy that, according to Mr Lyndon, Leighton Offshore was apparently happy for Unaoil to carry out the works but not at the price that had previously been agreed.

34. It is not clear to me when SOC decided to award the JICA Project to Leighton Offshore but there is no doubt that that did indeed happen and that on 13 October 2011 Leighton Offshore entered into the main contract ("Main Contract") with SOC with a price of US$518,157,348. A copy of the Minutes was incorporated in the Main Contract. A letter of credit was opened on or about 14 October 2011; and shortly thereafter Leighton Offshore drew down its first receipt of funds from SOC.

35. The subsequent events in the latter part of 2011 remain somewhat obscure. The evidence of Mr Lyndon was that the fact that Leighton Offshore was asserting that Unaoil had been removed from Leighton Offshore's draft list of approved sub-contractors was not something which caused him or others at Unaoil a great deal of concern at that time. Mr Lyndon's explanation was that given the stated feedback that had been received from Unaoil's personnel in Iraq who had spoken to "Yasir", Unaoil's non-approval did not seem a significant problem or a bar to Unaoil working as a sub-contractor. I am bound to say that I find this extremely surprising. In the ordinary course, I would (at the very least) have expected Mr Lyndon to have taken urgent and immediate steps to clarify the position perhaps with SOC direct in particular having regard to the fact that, as confirmed by Mr Willimont, Unaoil had a history of working in Iraq for SOC since Unaoil's entry into Iraq in 2003 and were known to and trusted by SOC. However, perhaps that is not how things are done in Iraq; and, in any event, that does not appear to have happened until, as appears below, some months later in early 2012.

36. In the meantime, it appears that during the the autumn and latter part of 2011, there were internal discussions within Unaoil which focussed on the possibility of Unaoil reducing their contract price further downwards from US$55 million; and such possibility was also explored with Leighton Offshore. However, no agreement was reached.

37. On 12 January 2012, Mr Lyndon sent a letter to Leighton Offshore attaching two invoices in respect of what were said to be the first two advance payments due pursuant to Exhibit 3 of the JICA MOA viz US$8,385,000 and US$4,192,500 being

15% and 7% respectively of the sum of US$55,900,000 stating that such sums were payable on demand with immediate effect; and reminding Leighton Offshore of their obligation under Exhibit 3 to provide Unaoil with immediate effect an irrevocable and unconditional parent guarantee in the agreed form. These are the debt claims advanced by Unaoil in these proceedings.

38. On 16 January 2012, Leighton Offshore responded to the invoices with an email by Mr Pearce in which he stated in material part as follows:

> "*2. As you are aware we have an instruction from the Client that Unaoil are NOT approved for work on JICA..…*
>
> *3. Our Agreement dated 10th December 2010, Exhibit 3, Commercial Points of Principle deals with Non Approval of your status as a Sub-Contractor.*
>
> *4. Your invoices clearly state they are for 'Advance' and 'Mobilization' Payments. We have never indicated that we want you to Mobilize or take any part in execution of the Sealine Contract. In fact the contrary is true. If we required you to execute this Contract then the MOA would be converted to a Sub Contract. Clearly it has not been.*
>
> *In summary we advise you that we will not be proceeding with any payment of Invoices which are for services which have not been requested nor performed. The Invoices are therefore not valid. Due to our Clients position in respect of their rejection of you as a sub-contractor our agreement is null and void*".

Mr Pearce also attached a copy of an extract from the Main Contract and the Minutes.

39. On 19 January 2012, as a result of being sent the extract of the Minutes, Unaoil sent a letter to SOC under the heading, "*Proposed Sub-contractors and Manufactues* [sic] *for JICA Pipeline Project*", stating as follows:

> "*With reference to the above:*
>
> *1 Please confirm that our status remains that we are on the above approved Contractor listing to South Oil Company"*.
>
> *2 That South Oil Company has no objection to us being a Sub-contractor to the appointed main Contractor for the onshore pipeline works within the JICA Project*".

The letter was signed by Basil Al Jarah, Iraqi Partner. The copy of the letter in the trial bundle bears additional manuscript writing in arabic apparently signed by Mr Hajam, the Director General of SOC which reads (in translation):

> "*Prepare reply to Unaoil that their company is still within the approved Contractors list. That we have no objections against the company to participate in any of our projects.*"

This appears to be an internal instruction of some kind; and it is not clear how such document came to be in the possession of Unaoil. Be that as it may, SOC responded by letter dated 23 January 2012 signed by Mr Hajam under the heading "*Approved Unaoil Limited Contractor for SOC*" referring to the letter from Unaoil dated 19 January 2012 and stating that Unaoil "*… is still qualified in our vendors list. Consequently, there is no objection against your company to participate in any projects released by SOC*".

40. On 23 January 2012, Mr Lyndon forwarded a copy of this correspondence with SOC to Leighton Offshore. Following certain internal communications between Mr Cox and Mr Pearce, Mr Pearce responded to Mr Lyndon on 26 January stating in relevant part:

> "*The PMC (JOE) appointed to manage and administer the Sealine Project in accordance with the JICA procedures and protocol rejected Unaoil as a proposed sub-contractor during the tender clarification and negotiation process. JOE required that Leighton Offshore remove Unaoil (along with other proposed sub-contractors for a variety of different work scopes) from the list of approved sub-contractors. We have never questioned Unaoil's qualification with SOC as a general sub-contractor and your response does not have any bearing on your exclusion from the list of qualified sub-contractors for the Sealine Project in the executed contract.*"

41. At about this time, the contemporaneous documents show that active consideration was again being given internally by Unaoil to the possibility of reducing further its price under the JICA MOA. In particular, the contemporaneous documents show that Mr John Lindfield, Unaoil's Director of Operations, prepared a revised draft JEF for the E&C works. This was circulated internally to certain individuals within Unaoil under cover of an email dated 23 January 2012 with the comment: "*The net result is that there is no fat in the original estimate and therefore no savings to be made …*". Later that day, Mr Lyndon and Mr Willimont met to "brainstorm" the figures. That exercise was reduced to paper by Mr Lyndon in a manuscript document dated 23 January 2012. This was headed "JICA BRAINSTORMING IN NUMBERS" and contains various "balloons", scribblings and back-of-the-envelope calculations. What appears to be a summary towards the bottom right of the page shows the following figures:

| PROPOSED JOB | | DISCOUNT | |
|---|---|---|---|
| JOB | $22 | $4M | (15% DISCOUNT) |
| FEE | $16M | $10M | (38% DISCOUNT) |
| TAX | $3M | $1M | (25% DISCOUNT) |
| | $41M | $15M | (27% DISCOUNT) |

Some time was spent by Mr Gatt cross-examining Mr Lyndon with regard to this manuscript "brainstorming" document. I accept that there are certain parts of it which are not easy to understand. However, in the event, I accept Mr Lyndon's evidence that there was nothing sinister in the exercise which appears in this document; and that it

was simply part of the "challenge" to seek to reduce the price under the JICA MOA and thereby move forward with Unaoil being an integral part of the JICA Project.

42. Early on 24 January 2012, Mr Lyndon sent this brainstorming document to Mr Willimont under cover of an email stating:

> "*Peter, Our thoughts on paper. But we have an additional challenge. Spoke to JL this am. He reckons there is not US$4m in this job. I am trying to get to the bottom of it. Either we got the original estimate wrong or we are not challenging ourselves enough here and thinking about it logically.*"

43. Later that same day i.e. 24 January 2012, Mr Lyndon circulated that brainstorming document internally under cover of an email by Mr Lyndon to various other individuals within Unaoil including Mr Ata Ahsani and Mr Cyrus Ahsani. The email stated (amongst other things):

> "*Attached brainstorming notes that Peter and I put together on how we could potentially unlock this. The challenge is therefore to get the job down to $22 million ….*"

As part of this exercise, it appears from the face of that email that Mr Lyndon also reviewed the JEF and made suggested amendments to achieve the stated "target" for the E&C works of US$22 million. This revised draft JEF was also attached to the email dated 24 January 2012. It showed a reduced base total cost figure of US$18,302,500 and a reduced total "estimated amount" (including a reduced gross profit figure) of US$22,054,513. The email stated in summary form the main areas in which he (Mr Lyndon) had sought to make reductions and ended as follows:

> "*Your thoughts? This does not seem too much a stretch does it? If we can get comfortable with this then it makes the potential for settlement much more "do able" in line with brain storming notes attached …*"

44. Meanwhile, Unaoil made further enquiries with JOE who confirmed by email on 31 January 2012 that Leighton Offshore had not put forward Unaoil's name to JOE for approval. Mr Lyndon's evidence was that Unaoil decided not to pursue this any further with JOE.

45. Absent any payment by Leighton Offshore of the invoices and a satisfactory response from Leighton Offshore, Unaoil sent a formal letter to Leighton Offshore on 13 February 2012 requesting dates for a "kick-off" meeting relating to the construction phase of the onshore scope of works. The construction phase follows the engineering and design phase and would not begin for some time. Mr Pearce's internal response to Unaoil's letter of 13 February 2012 noted that Leighton Offshore's response should confirm that Unaoil "*will have no involvement in Sealine*". Thereafter, by letter dated 19 February 2012, Leighton Offshore provided its formal response to Unaoil which stated in relevant part:

> "*Unaoil must immediately cease from making any representation to having any involvement with the JICA project*

> *or having any contractual relationship with Leighton Offshore in this regard. Such actions also imply that Leighton Offshore have received approval from JICA to utilize Unaoil on the S432 Project, which we have not, and further Leighton Offshore have made it clear to Unaoil on numerous occasions that Leighton Offshore have no intention to seek to reverse the rejection of Unaoil by JICA*".

46. On 1 March 2012, Mr Lyndon wrote to Leighton Offshore stating that his understanding of the letter of 19 February 2012 was that Leighton Offshore's position was that it no longer had any contractual relationship with Unaoil in relation to the JICA MOA on the basis that Unaoil had been rejected by SOC as a sub-contractor and that it would not be performing its obligations under the JICA MOA in the future, and asking Leighton Offshore to confirm whether this understanding was correct. Mr Lyndon also enclosed tax invoices reflecting the aggregate debt of US$12,577,500 that Unaoil alleged was due. Leighton Offshore did not reply to this letter.

47. On 4 March 2012, it appears that Leighton Offshore received a letter from SOC stating that SOC "*will withhold issuing a letter of 'No Objection' to any of* [Leighton Offshore's] *nominated sub-contractor which was contracted by Leighton Offshore under EPC-1* [the Phase I Project] *until the Government receives the official report of the investigation.*" It was Mr Gatt's submission that this so-called "moratorium" has not been lifted – although it does not apply to sub-sub-contractors. There was some dispute as to what "investigation" was being referred to in this letter. According to Mr Gatt, the background to this was that Leighton Offshore had reported itself to the Australian Federal Police following discovery in late 2011 of an internal handwritten file note dated 23 November 2010 in relation to the Phase I Project and the JICA Project and that this led to an ongoing Australian Federal Police investigation into Leighton Offshore and its sub-contractors regarding allegations of corruption relating to Phases I and III of the Phase I and the JICA Project, which was made public in February 2012. However, it may be that this is a reference to some kind of internal investigation being carried out by the authorities in Iraq. Be that as it may, Unaoil only learned of the existence of this letter a few months later in July 2012.

48. Throughout this period and at all material times, it is important to note that Unaoil remained ready, willing and able to perform its obligations under the JICA MOA as amended. Further, I accept that, as stated by Mr Lyndon in paragraphs 87-89 of his statement that Unaoil took certain steps as sub-contractor for the JICA Project.

49. Meanwhile, Unaoil issued the present proceedings in April 2012.

50. On 1 August 2012, Unaoil wrote again to the Director General of SOC referring to his letter of 23 January 2012 and asking for "*an update of this approval confirming Unaoil is still acceptable to work on SOC projects.*" His reply dated 9 August 2012 stated: "*We would like to conforming our letter ….. dated 23/1/2012 that content your company is still qualified in our vendors list.*"

51. Meanwhile, in the summer of 2012, Mr Cox left Leighton Offshore. According to Mr Lyndon, he was sacked. In late 2012, it appears that Leighton Offshore also sacked Mr Pearce – although the reasons for these sackings remain obscure. In any event, it seems that this opened the way for a period of apparent reconciliation between the

parties. In particular, in the latter part of 2012, the new management at Leighton Offshore re-engaged with Unaoil with regard to the possibility of Unaoil becoming involved again in the JICA Project. In that connection, Leighton Offshore requested Unaoil to requote for the onshore works element of the JICA Project which Unaoil submitted (without prejudice to its rights and claims under the original JICA MOA) on or about 16 December 2012 with an indicated price of approximately US$28.5 million with a possible reduction to approximately US$24 million. However, in the event, this came to naught; and on 1 July 2013, Leighton Offshore entered into a sub-contract with a third party, Technical Resources General Contracting Company ("TRG") to act as a sub-contractor to Leighton Offshore on the JICA Project. However, the TRG Contract did not cover the whole of the onshore works for the JICA Project. In particular, it did not include the above ground piping.

52. Thereafter, there were further communications between Unaoil and SOC. In particular, the Director General of SOC wrote a letter dated 10 April 2014 stating: "… *we confirm the following:- 1 –Unaoil remains on our approved vendors list and qualified to work on SOC projects. 2 – Unaoil has never been suspended or banned for* [sic] *working on any SOC project within the company's capability.*"

53. Against that summary of the main facts, I turn to consider the three main claims advanced by Unaoil.

*Unaoil's debt claim in the total sum of US$12,577,500 pursuant to Exhibit 3 of the JICA MOA.*

54. Mr Davies submitted that these are straightforward debt claims pursuant to Clauses 2(a) and (b) of Exhibit 3 of the JICA MOA which I have already quoted above. In particular, he submitted that there can be no doubt that SOC opened the letter of credit under the Main Contract; that Leighton Offshore received the first funds thereunder on about 14 October 2011; that such matters are indeed admitted by Leighton Offshore; that (as I have found) Unaoil remained ready, willing and able to perform its obligations under the JICA MOA as amended; and that accordingly, these sums are due and payable.

55. In response, Mr Gatt relied upon a number of points by way of defence which I consider in turn.

56. First, I should mention that one of the points originally advanced by Leighton Offshore was that these debt claims failed because the JICA MOA had, in effect, been terminated on one or other of a number of dates viz 14 September 2011, 13 October 2011, 16 January 2012, 19 February 2012, 1 March 2012. As submitted by Mr Davies, this line of defence would only be relevant (i) if the JICA MOA was terminated before the obligation to pay arose or (ii) if the JICA MOA was terminated by mutual agreement of the parties and Unaoil agreed to waive its right to the accrued debt claims as part of that agreement. For present purposes, it is sufficient to say that the facts do not support any such relevant termination or waiver; and I say no more about this point.

57. Second, Mr Gatt submitted that the obligations to make the advance payments as set out in Exhibit 3 Clauses 2(a) and (b) of the original JICA MOA had, in effect, fallen away because such payments were fixed by reference to a percentage of the "… *Fixed*

*Lump Sump Sum Price contained in Article 2.7 …*" and, by virtue of Supplementary Agreement No. 2, Article 2.7 had been "replaced" with the effect that there was no longer any "fixed lump sum price" but only a "variable sum". This is a short point of construction. It is, of course, right that the effect of Supplementary Agreement No. 2 was to "replace" the whole of Article 2.7 of the original JICA MOA. It is also right to say that as at the date of Supplementary Agreement No. 2, the contract price under the JICA MOA was unascertained – although subject to a minimum of US$55 million; and that it was, in this sense, "variable" i.e. it might increase depending on the amount that Leighton Offshore received on the JICA Project under the Main Contract between Leighton Offshore and SOC. However, in my view, once that figure became ascertained, the "minimum price" plus the additional marketing fee (if any) as stipulated in Supplementary Agreement No. 2 in effect became the new fixed sum lump price by reference to which the advance payments were to be calculated. Although the wording is not perfect, it seems to me that this best reflects the objective intention of the parties reading the original JICA MOA and Supplementary Agreement No. 2 together as a whole. In contrast, Mr Gatt's suggested construction would mean that the effect of Supplementary Agreement No. 2 was to destroy Leighton Offshore's obligation to make advance payments as stipulated in Exhibit 3 Clauses 2(a) and (b) of the original JICA MOA. Absent express wording to such effect, it seems to me that that is a result which would be inconsistent with the objective intention of the parties. For these reasons, I do not accept Mr Gatt's submission on this point.

58. Third, Mr Gatt submitted that although Unaoil was appointed as sub-contractor by Article 2 of the JICA MOA, it cannot have been contemplated by the parties that Unaoil could perform as sub-contractor if it was not in fact approved by SOC and that it must, in effect, follow, that it was a condition precedent to its right to perform the E&C works (and to be paid in respect thereof) that it was approved by SOC as sub-contractor. This is what Mr Gatt referred to rather grandly as the "*General Approval Condition*" and was, he submitted, an express, alternatively, implied term of the JICA MOA. In particular, Mr Gatt submitted that this was the effect of various provisions in the JICA MOA which he summarised as follows:

i) Exhibit 3, paragraph 5, which clearly contemplates Unaoil's approval "as a subcontract" (sic).

ii) The Recital ("an integral part of this MOA") which records the parties' agreement to collaborate and co-operate in the JICA Project. Implicit in this is the parties' acceptance of the terms of the JICA Project. It was a fundamental aspect of the JICA Project, as set out in the express terms of the Main Contract, that SOC's approval of sub-contractors was required. In agreeing to collaborate in connection with the JICA Project, the parties agreed to accept the conditions of that Project.

iii) The payment terms in Exhibit 3 Clauses 2(a) and (e) which provide for the two non-refundable payments to be payable following "the opening of the main contract LOC …" This must be a reference to a Main Contract in which Unaoil is an approved sub-contractor. It could have no entitlement to be paid monies in relation to a Main Contract under which it was not approved. Nor could it commence the Unaoil Scope of Works (under paragraph 2(a)) if it was not approved as sub-contractor. The advance payments are payments in respect of

construction works to be undertaken. Evidently, if Unaoil was not approved to undertake those works it would not be entitled to the payments in respect of them.

iv) To the extent that the condition is implied, it is to be implied to reflect the true intentions of the parties as reflected in the express terms.

59. The consequence of the non-satisfaction of this *General Approval Condition* is, submitted Mr Gatt, that, unless and until Unaoil was approved by SOC as Leighton Offshore's sub-contractor, it was unable to perform the E&C works and/or receive any payments in respect thereof under the JICA MOA; and, in particular, that unless and until Unaoil was approved it had no entitlement to any advance payments referable to performance of the E&C Works. In further support of this argument, Mr Gatt submitted as follows:

i) Unaoil's debt claims were intended to provide Unaoil with up-front cash to cover its expenses for the Unaoil Scope of Work. If Unaoil was not entitled to perform that work it was not entitled to payment in respect thereof.

ii) The Letter of Credit and the first funds (which Unaoil contends gave rise to the payment obligation on demand) were not opened/received until 14 October 2011. At this time, the condition remained unsatisfied. Unaoil was not approved. Unaoil has never subsequently been approved. Consequently, the payment obligation has never arisen.

60. Alternatively, Mr Gatt submitted that Unaoil's continued engagement as sub-contractor for the E&C works was subject to a condition subsequent (contained in Exhibit 3 paragraph 5) i.e. Unaoil's engagement as sub-contractor for the E&C works terminated in the event that (i) there was a written objection by the client to Unaoil's engagement as sub-contractor to Leighton Offshore; and (ii) following such an objection Unaoil did not within a timely manner seek (and obtain) approval for its continued engagement to perform the E&C works; and if this condition subsequent occurred then (i) Unaoil's continued engagement as sub-contractor for the E&C works terminated; (ii) the Performance Bond (if issued) was to be returned with a letter of release; and (iii) Unaoil was obliged to provide the Article 9.1 services (and, if they were provided, Leighton Offshore was obliged to pay for them "in strict accordance with the instalments set forth in Article 8.2").

61. Here, Mr Gatt submitted that (a) the condition precedent was not satisfied because Unaoil was never approved by SOC to act as Leighton Offshore's sub-contractor for the JICA Project; and/or (b) the condition subsequent occurred because (i) there was a written objection by SOC to Unaoil's engagement as a sub-contractor to Leighton Offshore and (ii) Unaoil did not in a timely manner seek and obtain approvals for its continued engagement to perform the E&C work. Indeed, Mr Gatt submitted that Unaoil never obtained such approval.

62. In this context, it is necessary to consider the debate between the parties (which I have already referred to) as to whether the non-approval of Unaoil as reflected in the Minutes which were subsequently incorporated into the Main Contract constituted a "written objection" to Unaoil's engagement as Leighton Offshore's sub-contractor. Mr Gatt submitted that this was indeed the case. Mr Davies submitted to the contrary;

that there was never any "written objection" as such to Unaoil as Leighton Offshore's sub-contractor; and that this was confirmed or at least reflected in the reports which Unaoil received and the subsequent correspondence with SOC in early 2012 as referred to above. In response, Mr Gatt submitted that the Minutes, being authoritative documents, are to be preferred; and that if, as appears may be the case, different people at SOC may have been prepared to say different things to different people at different times, the official record for these purposes, i.e. the Minutes signed by SOC's authorised representative, are to be preferred.

63. As to this dispute, my conclusions are as follows. First, I accept that Unaoil was not approved as a sub-contractor by SOC as at early August 2011 or as at the date of the Main Contract. That seems to me necessarily to follow from the Minutes which Mr Davies accepted as authentic and which were subsequently incorporated into the Main Contract. Second, notwithstanding the subsequent correspondence heavily relied upon by Mr Davies (in particular, the manuscript notation on the letter from Unaoil dated 19 January 2012, the SOC's response dated 23 January 2012 and the letter dated 9 August 2012), it seems to me that these documents are not sufficiently specific and do not provide a sufficient basis to make a positive finding that Unaoil was in fact ever formally approved as a sub-contractor by SOC for the JICA Project. To that extent, I accept Mr Gatt's submissions. However, there is, in my view, a distinction between a "non-approval" and a "written objection"; and although such distinction might be somewhat fine, I am not persuaded on the limited evidence available, that the fact that the Minutes show that Unaoil were not approved at the meeting in early August and that such Minutes were incorporated into the Main Contract constitutes a "written objection" to Unaoil as sub-contractor. In my view, this is consistent not only with the reports received by Unaoil and the correspondence referred to above in 2012 but also by the fact that Leighton Offshore requested Unaoil to submit a revised quote much later in 2012.

64. However, in my view, none of the foregoing provides any defence to the debt claims advanced by Unaoil broadly for the reasons advanced by Mr Davies. In particular, whilst recognising fully that the JICA MOA is badly drafted, I do not read it as being conditional upon Unaoil being approved or confirmed by SOC as a sub-contractor. In this respect, as submitted by Mr Davies, Articles 1.5 and 2.2 of the JICA MOA are quite clear, as is the objective intent of the JICA MOA read as a whole: Unaoil was appointed as Leighton Offshore's sub-contractor by the JICA MOA and Leighton Offshore was precluded from appointing any other third party in its place. In my view, there is nothing in the JICA MOA which could properly be regarded as an express term to the effect contended by Mr Gatt. Nor, in my judgment, is there anything which could justify the implication of a term to such effect. I readily accept that it may be inferred from the terms of the JICA MOA that there was at least a hope or even an expectation that Unaoil would indeed be accepted by SOC as a sub-contractor. However, it is plain from the terms of the JICA MOA itself, in particular Exhibit 3 Clause 5, that the parties recognised that SOC might object to Unaoil's engagement as a sub-contractor and that, in such circumstances, the parties expressly agreed what would happen in such a case.

65. Further and, as it seems to me, crucially, the parties also expressly agreed that the advance payments stipulated in Exhibit 3 Clauses 2(a) and (b) were both "non-refundable". This is in sharp contrast to Exhibit 3 Clause 2(c), which makes express

reference to the fact that the monthly progress payments are only to be made against "*actual progress*". In such circumstances, it seems to me that Mr Davies is right in saying that the payments in question are in the nature of forfeitable deposits and that there is no scope for an argument of total failure of consideration. In that context, he referred me to a number of cases viz. *Hyundai Heavy Industries v. Papadopoulos* [1980] 1 WLR 1129 at pp.1132G-1136G (per Viscount Dilhorne), 1141B-G (per L.Edmund Davies), 1147C-1150D (per Lord Fraser); *Stocznia Gdanska SA v. Latvian Shipping Co* [1998] 1 WLR 574 at pp.584F-590A (per Lord Goff); *Ermis Maritme Corp. v. Goymer* 13 December 2001 (unreported) at paras 74 and 83 (per Langley J); *Firodi Shipping Ltd v. Griffon Shipping LLC* [2013] EWCA Civ 1567 at [12]-[14] (per Tomlison LJ); and, my own judgment in *Cadogan Petroleum Holdings Ltd v. Global Process Systems LLC* [2013] 2 Lloyds Rep 26 at [14]-[27]. I agree that these authorities provide general assistance to Mr Davies as to the underlying principles although ultimately, as Mr Davies accepted, the issue is essentially a matter of construction of the JICA MOA itself.

66. I am prepared to accept the existence of a possible argument that on the assumption that Exhibit 3 Clause 5 had (contrary to my view) been triggered because there had been a "written objection" to Unaoil's engagement, an obligation would arise on Unaoil which required Unaoil in a timely manner to seek and obtain the necessary "approvals" for its continued engagement (the "seek and obtain approvals obligation"); that any breach of that obligation would possibly give rise to a claim in damages; and that, in such circumstances, such damages claim would include the amount of the advance payments claim and might be relied upon by way defence or set-off to the claim for advance payments. However, although I am prepared to accept what appears from the face of the Minutes as incorporated in the Main Contract that Unaoil was not, at least at that stage and at the date of the Main Contract, an "approved" contractor, as already stated, I am not persuaded that there was ever any "written objection" as such to Unaoil's engagement falling within Exhibit 3 Clause 5. Further, even if that is wrong, I am not persuaded that Unaoil was in breach of the seek and obtain approvals obligation. It seems to me that in order for such obligation to be triggered, Unaoil would, at the very least, need to see the "written objection"; and that even if the Minutes are (contrary to my view) to be regarded as constituting the necessary "written objection" sufficient to trigger the opening part of Exhibit 3 Clause 5, such Minutes were not provided to Unaoil until 16 Janaury 2012. In that context, I accept Mr Lyndon's evidence that prior to that time, the position was unclear; and thereafter, it seems to me that Unaoil took appropriate steps to clarify the position. Further, even if all that is wrong, I am not satisfied on a balance of probability that if Unaoil had taken any earlier or different action, the outcome would necessarily have been different at least without the active support of Leighton Offshore which would appear to have been most unlikely. Finally, given the fact that the advance payments are stated to be "non-refundable", I am far from convinced that any such damages claim could be relied upon by way of defence or set-off. For these reasons, I do not consider that this possible argument avails Leighton Offshore in the circumstances of the present case.

67. For these reasons, I uphold Unaoil's debt claims in the amount claimed.

*Unaoil's claim for liquidated damages in the sum of US$40 million pursuant to Article 8 of the JICA MOA*

68. Mr Gatt raised various points in relation to this claim which are unnecessary to address in detail because, in my view, there is a short answer to it. For present purposes, I am content to assume in favour of Unaoil that Leighton Offshore is to be regarded as having failed to adhere to the terms of the JICA MOA and that Leighton Offshore became (or would in due course become) *prima facie* liable to pay US$40 million by way of "liquidated damages" in accordance with the first sentence of Article 8 of the JICA MOA. However, Mr Gatt submitted that this was a "penalty" and unenforceable in accordance with well-established principles as summarised in Chitty on Contracts, (31st Ed.), Vol. 1 para 26-171 and following. This was disputed by Mr Davies.

69. In support of his submission that this payment was not a penalty, Mr Davies relied, in particular, on the recent decision of the Court of Appeal in *Talal El Makdessi v. Cavendish Square Holdings BV* [2013] EWCA Civ 1539. In particular, he submitted as follows (references in square brackets are to the judgment of Christopher Clarke LJ in that case unless otherwise stated):

i) The law of penalties is a blatant interference with freedom of contract: [44].

ii) The burden of proving that a clause is penal is on the party making the assertion (i.e. Leighton Offshore in this case): [75(i)]; *Chitty* (supra) at para 26-174.

iii) Whether a clause is penal is a question of construction to be assessed at the time of the contract, and requires the whole of the contract to be examined in the circumstances and context in which it was made: [75(ii)]; *Cadogan* (supra) at [34].

iv) The Court is generally reluctant to find that a clause is penal and will not be astute to find a clause in a commercial contract is unenforceable because it is penal, especially if the parties are of equal bargaining power and have the benefit of a high level of legal advice: [75(iii)]; *Chitty* (supra) at para 26-172.

v) The Court will adopt a robust approach to the assessment of the potential loss. This is particularly the case where it might be difficult to assess the potential loss at the time of the contract: [75(iv)].

vi) The words used by the parties, whilst not determinative, are relevant to the Court's determination: *Lewison, Interpretation of Contracts*, at para 17.05.

vii) Recent authorities demonstrate that the question of whether a clause is penal should not be answered by assuming a complete dichotomy between what is and what is not a genuine pre-estimate of damage, and treating as a penalty anything which does not fall within the former category: [54] and [84] to [91].

viii) The modern test requires the party asserting that the clause is penal to demonstrate: (1) that the clause in question is "*extravagant and unconscionable with a predominant function of deterrence*" and (2) even if that is demonstrated, that there was no other commercial justification for the clause: [93], [104], [105], [117] and [124].

70. Whilst Mr Davies submitted that the burden lies on Leighton Offshore to prove the contrary, he relied on the following factors in support of the contention that Article 8.1 is not a penalty clause:

i) Article 8.1 is not a simple liquidated damages clause. It has to be read in tandem with Article 9.1.

ii) The combination of Article 8.1 and Article 9.1 makes it apparent that:

a) Article 8.1 is only intended to apply in the situation in which Leighton Offshore refuses to adhere to the terms of the JICA MOA, in the sense that it refuses to retain Unaoil as its sub-contractor for the onshore works.

b) Even if Unaoil is not retained by Leighton Offshore as its sub-contractor to do the onshore works (in breach of the MOA), Unaoil would still provide the support services set out in Article 9.1. But those support services are only to be provided on condition that Leighton Offshore pays the sums due under Article 8. Hence, the US$40 million is not just to recompense Unaoil for its prospective loss of profits, but also to compensate Unaoil for the continued provision of the support services set out in Article 9.1. In that regard, there is a clear commercial justification for the provision, quite apart from the fact that it is stated by the parties to amount to a genuine pre-estimate of Unaoil's loss.

iii) When the JICA MOA was originally entered into (10 December 2010), Unaoil estimated the cost of carrying out the sub-contract works to be between US$22 million and US$25 million – see paras 96-100 of Mr Lyndon's witness statement. Subtracting those figures from the original all inclusive contract price of US$75 million gives a range of profit of US$50 million to US$53 million.

iv) In light of the above, at the time the JICA MOA was entered into it is impossible to say that the US$40 million figure in Article 8.1 was extravagant and unconscionable, and was included with the predominant function of deterring Leighton Offshore's breach. Nor can it be said that there was no other commercial justification for it, particularly in light of Article 9.1.

v) Although the all inclusive contract price was reduced by Supplementary Agreement No 2 to US$55 million, the principle remains the same in the light of Article 9.1. In any event, there is no evidence to suggest that Unaoil's intention with regard to Article 8.1 suddenly changed when it entered into Supplementary Agreement No 2.

vi) The Court should also bear in mind that the parties were at least of equal bargaining power and it can be assumed that both parties had access to high level legal advice.

71. As to the applicable legal principles, there was no significant dispute; and I am content to assume in favour of Unaoil that the figure of US$40 million as stipulated in

Article 8 was or at least may have been a genuine pre-estimate of the loss likely to be suffered by Unaoil in the event of Leighton Offshore's repudiation of the original JICA MOA i.e. when the original contract price was US$75 million and therefore not originally a penalty – although I fully recognise that even that assumption is not necessarily correct. I also fully accept what is trite law i.e. that the question whether the clause is a penalty or not must be viewed as at the date of the contract. However, where, as here, the contract is amended in a relevant respect, the relevant date is, in my judgment, the date of such amended contract. So far as I am aware, there is no authority to such effect but it seems to me that this is consistent with general principle. Here, once the original contract price was reduced by Supplementary Agreement No. 2, the figure of US$40 million was, even on Unaoil's own evidence, manifestly one which could no longer be a genuine pre-estimate of likely loss by a very significant margin indeed whether one takes the figures identified by Mr Lyndon (relied upon by Mr Davies as referred to in the previous paragraph) or by Mr Ata Ahsani (as referred to earlier in this Judgment). The reason why the figure of US$40 milion was not reduced at the same time as when the contract price was reduced was not explained. Perhaps it was a mistake or an oversight. I do not know. In any event, once the original contract price was reduced, it was, on any objective view, "*extravagant and unconscionable with a predominant function of deterrence*" without any other commercial justification for the clause.

72. For these reasons, it is my conclusion that Article 8.1 is a penalty and unenforceable. It follows that Unaoil's claim under Article 8.1 fails.

*Unaoil's claim for damages for Leighton Offshore's repudiatory breach of the JICA MOA quantified in the sum of US$29,847,167 alternatively US$26,720,297.*

73. Given my earlier conclusions, it is, in my view, clear that Leighton Offshore are to be regarded as in repudiatory breach of the JICA MOA for one or more of the reasons set out in paragraph 21A of the Re-Amended Points of Claim which it is unnecessary to set out in detail; and that such repudiation was accepted by Unaoil as referred to in paragraph 22 of the Re-Amended Points of Claim. The main focus under this head was the quantum of damages.

74. As to such damages, Mr Davies accepted that Unaoil would have to give credit for any amount it receives pursuant to its debt claims. In such circumstances and given my earlier conclusions, this part of Unaoil's claim is only relevant (at least from a commercial point of view) if and to the extent that any damages exceed US$12,577,500.

75. I should mention that Unaoil originally pleaded a general claim for damages by reference to the scope of works to be carried out by TRG which was particularised shortly before the trial in the sum of US$42,850,410 alternatively US$41,283,722. These figures were based on certain calculations set out in Mr Lyndon's witness statement by reference to estimates of what Unaoil's costs would have been in performing such scope of works i.e. between US$14.6 million and US$15.8 million. However, in my view, this approach was fundamentally flawed if only because the scope of works under the TRG contract was much reduced when compared to the JICA MOA; and although I believe such alternative claims were never formally abandoned, Mr Davies indicated in his opening skeleton argument that Unaoil would limit its claims to the figures referred to in the heading above.

76. Perhaps surprisingly, there appears to be a dearth of authority as to the measure of damages in circumstances such as the present in the context of a construction contract. However, the applicable legal principles are clear. In broad terms and subject to well-established limitations, the object of any award of damages is, as far as money can do it, to place the claimant i.e. Unaoil in the same position as if the contract had been performed; and in the present context, general principles would put the normal measure at the contract price less the cost to the builder (i.e. Unaoil) of executing or completing the work: see *McGregor on* Damages, 19th Ed., paras 29-022 to 29-04; *Chitty on Contracts* para 26-001. In the present circumstances, the starting point is therefore the contract price as amended by Supplementary Agreement No. 2 i.e. US$55,907,867. In the course of cross-examination, Mr Gatt suggested that this price was excessive. However, in my view, this is irrelevant. In seeking to determine Unaoil's "net loss", the real issue here is the assessment of the costs which Unaoil would have incurred in performing the JICA MOA.

77. Mr Davies frankly accepted that it was not an easy task to assess the precise loss suffered by Unaoil by reason of Leighton Offshore's wrongful repudiation of the JICA MOA. However, he submitted that the fact that the task of assessing damages is difficult does not mean that the Court should not award substantial damages. Rather, he submitted that where it is clear (as in this case) that Unaoil has suffered substantial loss, the Court will assess damages as best it can by reference to the materials available to it; and that the fact that the amount of a claimant's loss cannot be precisely ascertained does not deprive the claimant of a remedy: see *Chitty* at para 26-015. In particular, Mr Davies referred me to the *Parabola Investments Ltd v. Browallia Cal Ltd* [2011] QB 477 at [22-23], where Toulson LJ pointed out that in circumstances such as the present, the Court does not apply the balance of probability test to measure the loss. In particular, Toulson LJ stated at [23]:

> "*The claimant has first to establish an actionable head of loss. This may in some circumstances consist of the loss of a chance, for example, Chaplin v Hicks [1911] 2 KB 786 and Allied Maples Group Limited v Simmons and Simmons [1995] 1 WLR 1602, but we are not concerned with that situation in the present case, because the judge found that, but for Mr Bomford's fraud, on a balance of probability Tangent would have traded profitably at stage 1, and would have traded more profitably with a larger fund at stage 2. The next task is to quantify the loss. Where that involves a hypothetical exercise, the court does not apply the same balance of probability approach as it would to the proof of past facts. Rather, it estimates the loss by making the best attempt it can to evaluate the chances, great or small (unless those chances amount to no more than remote speculation), taking all significant factors into account. (See Davis v Taylor [1974] AC 207, 212 (Lord Reid) and Gregg v Scott [2005] 2 AC 176, para 17 (Lord Nicholls) and paras 67-69 (Lord Hoffmann)).*"

For present purposes, I proceed on such basis.

78. In essence, Mr Davies submitted that the only costs that would have been incurred by Unaoil in performing the JICA MOA were those in respect of the E&C works; that although the JICA MOA imposed obligations on Unaoil to provide other support services as stipulated, in particular, in Article 9.1, the Court should conclude that no – or only very few – such support services would have been required by Leighton Offshore under the JICA MOA; and that any costs apart from E&C costs would therefore be "nil" or "minimal".

*Construction costs*

79. As to E&C costs, Mr Davies submitted that the best evidence of such costs is to be found in Unaoil's own contemporaneous estimate dated 10 December 2012. This shows total costs for the onshore construction works as (i) US$25,014,961 plus a 5% contingency, totalling US$26,265,709; alternatively (ii) US$21,089,997 plus a 5% contingency, totalling US$22,159,496, if certain stipulated savings could be achieved from (i) Phase I Project synergy (ii) non-abortive Phase I works; and (iii) retaining an integrated project team for both Phase I and the JICA Project. Adopting a conservative approach, Mr Davies indicated that Unaoil was content to calculate its loss of profit claim by reference to the former figure i.e. US$25,014,961. In addition, Mr Davies accepted that Iraqi taxes of US$1,045,739 (3.3%) are a cost item that would have been incurred and should therefore be added to this base figure giving a total for Unaoil's costs for the onshore construction works of US$26,060,700. As to group overheads and contingency provisions, Mr Davies recognised that Unaoil's original estimate included provision for these at 7.5% and 5% respectively; but he submitted that they could have been more or less than this, or avoided entirely. If costs of 7.5% for group overheads (US$1,876,122) and 5% for contingency (US$1,250,748) are included as costs Unaoil would have incurred, Unaoil's total costs for the onshore construction works would have been US$29,187,570. Thus, Mr Davies submitted that the costs to be deducted from the contract price in relation to construction would be either US$29,187,570 or US$26,060,700, depending on whether or not group overheads and contingency provisions are treated as costs that Unaoil would actually have incurred in carrying out the onshore construction works. After deducting these figures from the amended contract price of US$55,907,867 and ignoring any other costs, this exercise arrives at the "net loss" figures of US$29,847,167 alternatively US$26,720,297 stated above. Calculated by reference to the JICA MOA's US$30m portion of the contract price attributable to the construction element based on Supplementary Agreement No. 2, this exercise arrives at a calculated "net loss" on the E&C works of US$3,939,300 if no account is taken of group overhead and contingency costs, or US$812,430 if group overhead and contingency costs provision is made.

80. In the event, Mr Gatt did not dispute these figures. The only issue with regard to the costs in relation to the E&C works was whether or not account should be taken of group overheads and a contingency provision. As to such costs, I note in passing that the view expressed in *McGregor on Damages*, 19th Ed., para 29-022 is that in calculating the builder's costs the indirect costs must be included, especially overheads although no authority is cited to support such general proposition and I confess some difficulty in following the text immediately following.

81. As to group overheads, I can well understand that in some cases, group overheads remain "constant" or "static"; that they are unaffected by any particular project; that any attribution or allocation of such costs to a particular project is essentially a matter of internal accounting; and that, in such circumstances, such overheads might be disregarded or ignored. However, here the evidence was, at best, equivocal. Doing the best I can, it seems to me that a certain element of group overheads would have been incurred in relation to this particular project. Further, Unaoil not only included a provision for group overheads in the original JEF but continued to include such provision (indeed the same provision) even when they were carrying out the attempted cost-cutting exercise in early 2012. It seems to me that this reflects the reality of the situation. As to a contingency provision, I accept that such provision, like any "contingency" provision, may or may not ultimately be utilised in fact. However, it seems to me that such a provision recognises that there is, at least, a real likelihood that it will be utilised and that it is appropriate to include this element in the estimate of costs – even if it is impossible to say that it will, on a balance of probability, ultimately be utilised.

82. For these reasons, it is my conclusion that the costs that would have been incurred by Unaoil in performing the E&C element of the JICA MOA should take account of both group overheads (7.5%) and contingency (5%) and therefore be assessed as US$29,187,570. If that is deducted from the figure of US$30 million, the notional loss of profits on that part of the contract is US$812,430 suggesting that Unaoil are entitled at the very least to that sum as a minimum in respect of loss of profits. I recognise that that exercise is potentially flawed because the two parts of the contract (i.e. E&C and support services) are not "watertight" and it is possible that the costs of providing support services might exceed the stipulated "price" for providing such services. However, doing the best I can, it seems to me that that is a possibility that I can properly ignore; and Mr Gatt was, as I understood, content that I should do so.

*Support services*

83. In considering any additional costs that would or might have been incurred, I proceed on the basis that the reference to a "marketing fee" in Supplementary Agreement No 2 is in respect of the support services contemplated by Article 9.1. In this context, the main debate between the parties focussed on (i) what, if any, support services would have been performed by Unaoil under the JICA MOA; and (ii) what would be the cost to Unaoil in providing such services. Mr Gatt described this part of the case as a "black hole"; and I confess that I have found it difficult to grapple with the arguments advanced in this context on both sides.

84. In summary, Mr Davies submitted as follows:

i) The only party that is in a position to assist the Court in determining what assistance, by way of support services, Leighton Offshore required for the JICA Project is Leighton Offshore because it is actually undertaking the JICA Project. Notwithstanding this:

a) Leighton Offshore has tendered two of its JICA Project Managers as witnesses and neither of them has provided any evidence that they have actually required any support services or, indeed, that Leighton

Offshore performed such services themselves or contracted a third party to do the same;

b) Leighton Offshore has disclosed no documents that evidence that it has actually required any support services or, indeed, performed such services itself or contracted a third party to do the same.

ii) The documents and evidence suggest that Leighton Offshore would not have used Unaoil to provide any support services that it did require. In particular, from at latest February 2011, Leighton Offshore's policy was to limit its reliance on Unaoil on the ground in Iraq, in order that Leighton Offshore would become more self-reliant; and the unchallenged evidence of Mr Lyndon was that Mr Cox did not value Unaoil's services anyway and viewed them as a "waste of time".

iii) In the circumstances, the Court should conclude that no such support services would have been required by Leighton Offshore under the JICA MOA; and that the costs that fall to be deducted for this element should be nil.

iv) In any event, based on Mr Gatt's cross-examination of, for example, Mr Willmont, it appears to be Leighton Offshore's own case that the value and associated cost of any support services would be minimal.

v) Further, the evidence of Mr Willimont and Mr Ahsani is that the advisory division of Unaoil did not operate in the same manner as E&C; that there is no tracking of costs within the advisory division; that, instead, those costs are deducted at group level as overheads; that any costs that may be incurred are not allocated to the advisory group or even by project but attributed by country; which, in this case, would be to the operations in Iraq for a multitude of clients and Unaoil group companies.

85. I recognise that there is some force in some of these points. In particular, I recognise that the extent of the "support services" that Unaoil would have had to provide in performing its obligations under the JICA MOA as amended would have depended at least in part on what "support services" were required by Leighton Offshore. Further, I recognise that certain of the documents show that Mr Cox, in particular, did not value Unaoil's services and that, at a certain stage, Leighton Offshore's policy was to exclude Unaoil from participation in the JICA Project or at least to limit reliance on Unaoil. In the abstract, I also recognise that it is quite impossible to say with any degree of certainty what support services might have been required and what they might have cost. At the risk of repetition, it seems that Mr Ata Ahsani himself recognised this difficulty when (as I have already quoted) he referred in evidence in the context of the original figure of US$40 million to the possibility of explosions happening in the camp and Leighton Offshore men getting drunk and getting arrested; and when he described this element of the contract pricing as being "*a sort of insurance for high profit in an area where other people see a perceived high risk …*". Against that background, Mr Davies' primary submission was that the cost of any support services should be regarded as nil or minimal and that the entirety of the "marketing fee" should therefore be treated as pure profit which had been lost and as such was recoverable from Leighton Offshore in full. However, in my view, that approach is over simplistic and one which I would reject for the following reasons.

86. First, although the essential issue in the present case concerns the quantification of loss and, in that context, I accept that the balance of probability test is not the appropriate standard of proof, the burden of proof remains on Unaoil. This is not a case where damages might be assessed on the basis of "loss of a chance". Neither Mr Davies nor Mr Gatt contended otherwise; and, in my view, it would be quite wrong for the Court to pluck a figure out of the air without at least some proper evidential basis.

87. Second, in the somewhat unusual circumstances of the present case, it seems to me that the Court should be cautious in assessing damages in a case of this kind. The need for caution is, in my view reinforced by the fact that the exercise which has to be performed in assessing Unaoil's claim for loss of profits is not merely historic but also one which involves looking forward in time. This is because, if the JICA MOA had gone ahead with Unaoil's involvement, the actual E&C works would probably not have started until 2012; and, given that the E&C works would probably have taken some four years, would not have been completed before (say) 2016.

88. Third, the actual evidence with regard to this part of Unaoil's claim is, at best, sketchy. The only witness who dealt in any detail in a written statement with the quantum of the loss of profits claim was Mr Lyndon. However, the analysis in his statement was apparently carried out not by himself but by his "team" and, in any event, was, in my view, flawed for the reasons already stated. Moreover, although he dealt with the E&C costs, he did not deal in any detail with the nature and cost of any additional support services. The only other witness who dealt with this aspect in any detail was Mr Ata Ahsani in the course of his cross-examination. I have already summarised what seems to me the main thrust of his evidence. It is fair to say that certain parts of Mr Ata Ahsani's evidence in cross-examination sought to downplay the likely risk of problems which might give rise to any substantial support services and additional costs. However, as he himself emphasised, things change in Iraq and there were risks of the kind which he identified. Further, although Mr Ata Ahsani regarded the south of Iraq as "normal", there was at least some evidence of shelling and attacks in the Basra area. However difficult it may be to evaluate such risks, it seems to me impossible to say that the cost of additional support services would be nil or minimal.

89. Fourth, there was a complete dearth of any contemporaneous documents as to what support services might be required and, if required, their cost. Of course, the exercise I am performing is essentially hypothetical i.e. what would the costs have been had the contract been performed; and, at the risk of repetition, I recognise that what, if any, additional support services might have been required and their cost depended, in part at least, on what Leighton Offshore would have required and is speculative. But, in the ordinary course, one might have expected at least some documents to have been produced which might have been of assistance – perhaps in the form of an "estimate" or from a previous contract. To be clear, I am not saying that Unaoil has necessarily failed in its disclosure obligations. I am prepared to accept that no relevant documents exist although I note that, in support of the present claim for loss of profits, Mr Cyrus Ahsani made reference in cross-examination to Unaoil's experience in a previous contract with BP where work was done in Kirkuk and Unaoil ended up spending more than expected. In any event, the absence of any relevant documents is a particular

feature of this case which renders the assessment of this part of Unaoil's claim particularly difficult.

90. Fifth, Mr Davies' reliance on Leighton Offshore's stated "policy" and the attitude of Mr Cox have to be viewed in their proper context. I have to assess damages on the hypothetical basis that the JICA MOA had gone forward. In such circumstances and particularly once Mr Cox had gone and the new management was in place, it seems to me that it is probable that Leighton Offshore would have been keen to utilise Unaoil to provide whatever support services might have been necessary in particular given (i) that the provision of such services was included in the contract price and (ii) on Unaoil's own case, a very large part of that element of the contract price (some US$25 million) had been allocated – at least potentially – to the provision of such support services. In that context, I note that the wording of Article 9.1 is very wide indeed. In particular, it seems to me that the obligation on Unaoil was not merely to provide the specific support services identified in the enumerated sub-paragraphs but quite generally to "….. *continue to assist LEIGHTON OFFSHORE with the successful execution and completion of the PROJECT for the CLIENT…"*. Adopting Mr Ata Ahsani's own words, the contractual commitment on the part of Unaoil was to provide whatever services Leighton Offshore needed to get the job done.

91. Sixth, the contemporaneous documents do not suggest to me that Unaoil regarded the sum of approximately US$25 million – or anything like that sum – as pure profit if the JICA MOA went ahead. On the contrary, the exercise carried out in early 2012 as referred to above strongly suggests otherwise – in particular, the email from Mr Lindfield stating that the net result is that there is "no fat" in the original estimate and therefore no savings to be made; and the email from Mr Lyndon stating that Mr Lindfield reckoned that "there is not US$4 million in this job". I accept that that these comments seem to have been made with reference to the pricing element of the E&C works (i.e. the figure of US$30 million) and not the overall contract price of approximately US$55 million. However, if Unaoil were indeed sitting on a likely profit of approximately US$25 million and were keen, as stated by Mr Lyndon, to "unlock" the impasse that existed in early 2012, it is difficult, if not impossible, to understand why no serious consideration appears to have been given by Unaoil to give up at least some of this profit. It is true that, as noted above, Mr Lyndon's brainstorming document dated 23 January 2012 suggested such course of action i.e. reducing the contract price by (amongst other things) discounting the figure of US$26 million by US$10 million to US$16 million. However, it seems that that suggestion was never taken up seriously or otherwise pursued – even internally. To my mind, all of this points against this part of the case now advanced by Mr Davies.

92. Seventh, it is at least of some interest that the claim for loss of profits as now formulated is very recent. The original Particulars of Claim advanced an unparticularised claim for loss of profits and asserted that Unaoil was not in a position to quantify the amount of its loss of profit until Leighton Offshore disclosed the sub-contract with TRG. I recognise that this is something of a forensic point. However, if Unaoil had indeed been sitting on a likely profit of approximately US$25 million, it is perhaps somewhat surprising that it did not say so at the outset or at least at a much earlier stage.

93. Eighth, I see no real force in the last point raised by Mr Davies as summarised above concerning the "tracking" of costs. The point bears some similarity to the issue

concerning "overheads" as considered previously in the context of construction costs. In this context, it seems to me that the manner in which Unaoil treated costs in relation to support services is of little, if any, assistance.

94. For all these reasons, I reject Mr Davies' primary submission that the costs of Unaoil providing additional support services would have been nil or minimal and that such potential costs can effectively be ignored in assessing damages.

95. Notwithstanding, it remains necessary to consider whether it is possible to make any assessment of damages at all over and above the sum of US$812,430 referred to above. Even bearing in mind the approach as stated by Toulson LJ in *Parabola*, it seems to me that any such assessment is immensely difficult in the present case; and most, if not all, of the points considered above apply equally in this context.

96. Given all these difficulties, I fully accept that there is much force in Mr Gatt's submission to the effect that Unaoil should not be entitled to any damages for loss of profits in relation to the "marketing fee" element. However, in the event, I accept Mr Davies' submission that whatever difficulties exist, this is a case where the Court must – or at least should – simply do the best it can. I also agree that the starting point should be the amount of the stipulated marketing fee. However, it seems to me that a fair assessment requires that figure to be discounted to take account of the likelihood that Leighton Offshore would require additional support services and other contingencies. Such approach is consistent with numerous authorities over the last century stretching back, for example, to *The Racine* [1906] P 273. Here, the difficulty is not so much the identification of the relevant principle but the application of such principle to the facts of the present case and, in particular, the appropriate level of discount. To my mind, the most important consideration in this context is the evidence of Mr Ata Ahsani himself which I have already summarised above and, in particular, that part of his evidence when he explained – with reference to the original figure of US$40 million – that this was specifically to cover whatever support services were necessary to get the job done. Of course, to the extent that such services were not required, Unaoil's profit would increase. However, in my judgment, such evidence suggests that there was at least a real possibility that such expenditure would have been incurred in providing additional support services. On this basis, a fair assessment of damages would, in my judgment, require the stipulated marketing fee to be reduced by a very heavy discount to arrive at an appropriate measure of damages for the loss of profit.

97. As to the amount of such discount, it is, in my view, of some assistance to have regard to what might be considered to be a "benchmark" reasonable profit. As already noted, Mr Ata Ahsani's evidence was that a reasonable profit at least for the E&C element of the contract fell within the range of 5-12%. Taking a mid-point, say 8.5%, and applying this figure to the balance of the contract price (i.e. approximately US$25 million), this produces a figure of about US$2.2 million. Bearing in mind Mr Ata Ahsani's evidence that this element of the contract was different from the E&C element and involved what he at least hoped would provide a premium profit, it seems to me that that figure is probably too low as a measurement of the loss of profits in respect of the "marketing fee" element. Doing the best I can and having regard to all the circumstances, it is my conclusion that a fair assessment of the loss of profits in respect of the "marketing fee" element is US$5 million. This represents a premium profit on this element of the contract of approximately 20% which, even on Mr Ata

Ahsani's evidence, is substantially higher than his range of 5-12% on E&C works. Looked at another way, it represents a discount of approximately 80% of the "marketing fee" which is consistent with my earlier conclusion that the marketing fee should be reduced by a heavy discount.

98. I recognise that this figure of US$5 million is open to criticism. In particular, there are arguments that it is too low because, for example, it might be said that there is no proper basis for transporting the reasonable profit range of 5-12% for the E&C works as stated by Mr Ata Ahsani to the remainder of the contract; and because it arguably assumes wrongly that Unaoil would have incurred substantial costs in providing additional support services if Unaoil had performed the JICA MOA. On the other hand, there are arguments that even that figure is too high because there is no real "evidence" to support this figure and it is, to a large extent, a "guestimate". These arguments on both sides have much force. However, in the particular circumstances of the present case and doing the best I can, that seems to be a fair assessment of Unaoil's claim for loss of profits.

99. If the figure of US$812,430 in respect of loss of profit on the E&C element is added to this figure of US$5 million, the overall loss of profit is US$5,812,430. Recognising that these figures are all approximate, it seems to me that some rounding is appropriate. Thus, it is my conclusion that Unaoil's claim for loss of profits succeeds in the sum of US$5.8 million.

100. Even if this figure is wrong (whether too low or too high) even by a relatively large amount, I derive some comfort from the fact that this would not seem to be of any particular commercial significance given (i) Unaoil's concession that it will give credit for any amount that it receives pursuant to its debt claims and (ii) the fact that as I have upheld Unaoil's debt claims in the total sum of US$12,577,500 which exceeds by a substantial margin what I have held Unaoil are entitled to recover as loss of profits.

*Conclusion*

101. For these reasons, I uphold Unaoil's debt claims in the total sum of US$12,577,500 and also its claim for damages for loss of profits which I assess in the sum of US$5.8 million. However, as to the latter sum, in the light of Unaoil's concession, Unaoil must give credit for any amount that it receives pursuant to the debt claims. I reject Unaoil's claim for liquidated damages. Accordingly, Counsel are requested to prepare a draft order for my approval and to seek to agree consequential matters (including interest and costs). Failing agreement, I will deal with any outstanding issues.