Transocean Offshore International Ventures Limited *v* Burgundy Global Exploration Corporation
[2013] SGHC 117

Case Number	: Suit No 87 of 2009 (Registrar's Appeal No 158 of 2012)
Decision Date	: 21 June 2013
Tribunal/Court	: High Court
Coram	: Tay Yong Kwang J
Counsel Name(s)	: Toh Kian Sing S.C., Ian Teo and Ting Yong Hong (Rajah & Tann LLP) for the plaintiff/respondent; Rakesh Vasu and Winnifred Gomez (Gomez & Vasu LLC) for the defendant/appellant.
Parties	: Transocean Offshore International Ventures Limited — Burgundy Global Exploration Corporation

Contract – Contractual Terms – Exclusion Clauses

Contract – Remedies – Remoteness of Damage

[LawNet Editorial Note: The appeals to this decision in Civil Appeals Nos 48 and 55 of 2013 were allowed by the Court of Appeal on 14 May 2014. See [2014] SGCA 24.]

21 June 2013

Tay Yong Kwang J:

1 This was an appeal against the assessment of damages by an Assistant Registrar ("the AR") awarding the plaintiff, Transocean Offshore International Ventures Limited ("Transocean"), damages in the sum of US$105,536,922 plus interest for breach of contract by the defendant, Burgundy Global Exploration Corporation ("Burgundy"), in a transaction involving the hire of a semi-submersible drilling rig. I upheld the AR's quantification of damages on the basis of net loss of profits flowing from a related contract but varied the award on one particular element – the "cold-stacking" expenses for maintaining the drilling rig after Burgundy's repudiatory breach of contract.

2 Burgundy has appealed in Civil Appeal No 48 of 2013 ("CA 48/2013") against my decision. I now set out the reasons for my decision.

Background facts

3 Transocean is a company listed on the New York Stock Exchange and is the world's largest offshore drilling contractor. It supplies mobile offshore drilling units and provides drilling services for oil and natural gas reserves. Burgundy is a company incorporated in the Republic of the Philippines ("the Philippines") and is engaged in the business of exploration and development of oil and gas resources in the Philippines.

The Drilling Contract and the Escrow Agreement

4 On 29 September 2008, Burgundy entered into a contract with one Triton Industries Inc ("Triton") for the provision of a semi-submersible drilling unit and related drilling services. Transocean,

Burgundy and Triton subsequently entered into an agreement dated 30 October 2008 whereby Triton assigned all its rights and obligations under the contract to Transocean, substituting Transocean for Triton and substituting the drilling unit to be supplied to C KIRK RHEIN, JR ("the Drilling Rig"). Transocean and Burgundy further agreed to extend the term of the contract to a minimum-maximum period of 238-305 days and for the contract Operating Rate (*ie*, the hire rate) to be US$550,000 per day for the first 140 calendar days and US$525,000 per day thereafter. This amended contract is hereafter referred to as the "Drilling Contract". Article 11 of the Drilling Contract provided that:

> ...[i]t shall be condition precedent that prior to Commencement Date under this Contract, [Burgundy] and [Transocean] shall enter into an Escrow Agreement in the manner approved by [Transocean].

5 Transocean and Burgundy entered into an escrow agreement on 31 October 2008 ("the Escrow Agreement"). The material terms of the Escrow Agreement were as follows:

> **2. Acknowledgement**
>
> Subject to Burgundy depositing the Escrow Amount into the Escrow Account in accordance with clause 3.2, Transocean acknowledges that the requirements of Article XI of the Drilling Contract are satisfied by the execution of this Agreement by Burgundy and Transocean.
>
> Notwithstanding any other provision of this Agreement or the Drilling Contract, in the event that Burgundy fails to deposit the Escrow Amount into the Escrow Account in accordance with clause 3.2, Transocean shall have the right to suspend the work while simultaneously accruing the Standby rate under the Drilling Contract and/or terminate the Drilling Contract.
>
> ...
>
> **3.2 Escrow Amount**
>
> Burgundy will cause to be deposited into the Escrow Account the following amounts:
>
> (a) 30 days prior to the planned Commencement Date or by December 15, 2008 whichever is earlier, Burgundy shall deposit the sum of US$16,500,000 (calculated as the Operating Rate multiplied by thirty (30) days) into the Escrow Account; and on the Commencement Date, Burgundy shall again deposit the same amount into the Escrow Account; and
>
> (b) thereafter, on each day which is a multiple of thirty (30) days from the date of the second deposit in accordance with clause 3.2 (a) above or from the Commencement Date, until the total amount deposited by Burgundy in accordance with this clause 3.2 is equal to the amount that is the Operating Rate multiplied by the entire anticipated maximum duration of the relevant Term, Burgundy shall further deposit into the Escrow Account the amount that is the Operating Rate multiplied by lesser of:
>
> (i) thirty (30) days (of the Term); or
>
> (ii) the number of days remaining in the Term if such number is less than 30 days,
>
> **(Escrow Amount)** and provide documentary evidence of such deposit to Transocean.
>
> ....

6 Burgundy failed to make the initial deposit of US$16,500,000 ("the Escrow Amount") into an escrow account by 15 December 2008. By a letter dated 22 December 2008, Transocean informed Burgundy that:

(a) it was exercising its right under cl 2 of the Escrow Agreement to terminate the Drilling Contract with immediate effect; and,

(b) the failure to deposit the Escrow Amount constituted a repudiatory breach of the Escrow Agreement and that it accepted the repudiation as terminating the Escrow Agreement with immediate effect.

Burgundy replied by way of letter on 23 December 2008, expressing that it respected Transocean's decision but that it believed it would be in the interests of the parties to "cooperate and find a suitably workable solution". The parties did not reach any agreement.

Procedural history

7 On 29 January 2009, Transocean issued a writ of summons in this action claiming for damages as a result of Burgundy's breach or repudiation of the Escrow Agreement. The Statement of Claim (Amendment No 2) claimed for loss of net profits in the sum of US$105,937,952.00, or, in the alternative, wasted costs and expenses amounting to US$55,001.46.

8 Burgundy filed Summons No 3009 of 2009 seeking a stay of the proceedings in favour of arbitration pursuant to Art 25.1 of the Drilling Contract, which provided:

25.1 Arbitration

The following Dispute Resolution provision shall apply to this Contract.

(a) Any dispute, controversy or claim arising out of or in relation to or in connection with this Contract, including without limitation any dispute as to the construction, validity, interpretation, enforceability, performance, expiry, termination or breach of this Contract whether based on contract, tort or equity, shall be exclusively and finally settled by arbitration in accordance with this Article XXV...

The stay application was granted at first instance but the appeal against the order was allowed by Andrew Ang J (see *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] 2 SLR 821 ("*Transocean (Arbitration)*"), who held that Art 25.1 of the Drilling Contract did not apply to claims arising from Burgundy's failure to pay the Escrow Amount into the escrow account in accordance with the terms of the Escrow Agreement. Ang J's decision was affirmed by the Court of Appeal.

9 After Burgundy filed its Defence, Transocean filed Summons No 3511 of 2010 seeking summary judgment pursuant to O 14 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC"). Assistant Registrar Teo Guan Siew ("AR Teo") granted summary judgment with damages to be assessed on the basis that Burgundy had failed to raise any triable issue and rejected Burgundy's argument that it had a defence on the basis of an indemnity clause in Art 19.1 of the Drilling Contract. Quentin Loh J dismissed the appeal against AR Teo's decision.

10 The parties then went before the AR for the assessment of damages. Burgundy applied for a vacation of the hearing dates (*vide* Summons No 1850 of 2012). The application was dismissed by the

AR following Burgundy's failure to furnish security for costs in the sum of $324,000 by 3.00pm on 24 April 2012. Burgundy's solicitors for the abovementioned application, Mr Rakesh Vasu ("Mr Vasu") and Ms Winnifred Gomez ("Ms Gomez") then applied to discharge themselves. This application was granted by the AR. The evidence that Transocean adduced during the substantive hearing was thus uncontroverted as Burgundy was not represented by solicitors. Only a representative of Burgundy, Mr Richer S. Andaya, was present as an observer during the hearing. I note that Mr Vasu and Ms Gomez subsequently represented Burgundy at this appeal before me and are also on record as Burgundy's solicitors for CA 48/2013.

The AR's decision

11 The AR held that the loss of profits under the Drilling Contract was within the reasonable contemplation of the parties as the Escrow Agreement was a condition precedent for the performance of the Drilling Contract and entered into for the purpose of facilitating the financial arrangements to be put in place for Transocean to perform its obligations under the Drilling Contract. The AR also considered that due to market conditions in the industry at that time, there was no viable alternative transaction that Transocean could have entered into.

12 The AR accepted Transocean's evidence that:

(a) the total revenue that it would have earned under the Drilling Contract was US$126,292,500;

(b) it would have incurred expenses of US$24,494,185.53 to perform the Drilling Contract; and

(c) it had incurred actual costs of US$3,738,607 for reasonable mitigation of its losses.

Transocean's loss of profits was therefore quantified at US$105,536,922, *ie*, (a) – (b) + (c).

The parties' submissions on appeal

13 Burgundy submitted that the damages that the AR had awarded for loss of profits were "losses under the Drilling Contract and not the Escrow Agreement". [note: 1] As these heads of claim fell squarely under the Drilling Contract, these were disputes that were subject to arbitration pursuant to Art 25.1 of the Drilling Contract. Burgundy also relied on Art 19.1 of the Drilling Contract, which provided that Transocean would "save, indemnify, release, defend and hold harmless [Burgundy] from [Transocean's] own Consequential Loss" and submitted that the loss of profits under the Drilling Contract constituted "Consequential Loss" that Transocean was precluded from claiming under Art 19.1.

14 Transocean submitted that the loss of profits suffered by Transocean under the Drilling Contract as a result of Burgundy's breach of the Escrow Agreement was clearly within the reasonable contemplation of the parties at the time the Escrow Agreement was concluded and was direct loss within the meaning of the first rule in *Hadley v Baxendale* (1854) 9 Exch. 341 ("*Hadley v Baxendale*"). Transocean argued that the AR had correctly quantified the loss of profits on the basis of the net sum that Transocean would have earned under the Drilling Contract as there was no available market for alternative employment of the Drilling Rig during the minimum period of hire under the Drilling Contract.

15 In response to Burgundy's argument that the claim for loss of profits was a claim under the Drilling Contract and should have been referred to arbitration under the dispute resolution clause in

the Drilling Contract, Transocean submitted that the issue of whether Transocean's claim was a dispute within the scope of the arbitration clause in Art 25.1 of the Drilling Contract was *res judicata* and Burgundy was barred from re-litigating this issue at the assessment of damages stage. Transocean also denied that Art 19.1 of the Drilling Contract excluded the loss of profits that was incurred by Transocean *vis-à-vis* Burgundy under the Drilling Contract and argued that the exclusion clause in the Drilling Contract was not relevant to a claim premised on a breach of the separate Escrow Agreement. Arguments on Art 19.1 were raised and rejected at the liability stage when summary judgment was granted and the issue was now *res judicata* at the quantum of damages stage.

My decision

Whether the assessment of damages should have been referred to arbitration

16 I agreed with Transocean's submission that the specific issue of whether Transocean's claim for breach of the Escrow Agreement was a dispute falling within the scope of the arbitration clause in Art 25.1 of the Drilling Contract was the subject of a final and conclusive determination by Ang J which was affirmed by the Court of Appeal. Burgundy was thus not entitled to repeat the same arguments in relation to the assessment of the quantum of damages after the application for a stay in favour of arbitration had been rejected at the preliminary jurisdiction stage.

17 Burgundy's submissions on this point conflated the distinction between a *claim* premised upon the parties' contractual rights and obligations under the Drilling Contract and the *factual quantification* of losses flowing from the termination of the Drilling Contract resulting from a breach of the separate Escrow Agreement. As Ang J observed in *Transocean (Arbitration)*, Transocean's claim was for a straightforward breach of contract based on Burgundy's failure to comply with cl 3.2 of the Escrow Agreement (at [15] of *Transocean (Arbitration)*) and Art 25.1 did not govern "a dispute squarely under the Escrow Agreement and having at best a tenuous connection with the Drilling Contract" (at [22] of *Transocean (Arbitration)*).

18 Ang J and the Court of Appeal (by implication) had thus held that the claim for breach of the Escrow Agreement was not subject to the arbitration clause in Art 25.1 where the question of liability (*ie*, the substantive dispute) was concerned. In my view, the subsequent assessment of damages flowing from this liability could not then be subject to Art 25.1. After the basis of liability was identified, the only issue at the assessment of damages stage was the identification of the heads of loss and quantification of the magnitude of losses flowing from breach of the Escrow Agreement, albeit in the form of net profits that Transocean would have earned under the Drilling Contract. This was not in the nature of a dispute, controversy or claim arising under or in connection with the Drilling Contract; the Drilling Contract was not itself the source of the parties' rights and obligations giving rise to the dispute or claim and was only a reference for ascertaining the financial consequences of the breach. Burgundy's jurisdictional objection to this court hearing the assessment of damages was therefore without merit.

Whether Art 19.1 of the Drilling Contract excluded damages arising from loss of profits

19 I deal first with Transocean's preliminary point that Burgundy was not entitled to raise Art 19.1 before me as the scope and interpretation of Art 19.1 was an issue that went to liability instead of quantum. Transocean relied on the decision of Andrew Phang J, as he then was, in *Emjay Enterprises Pte Ltd v Skylift Consolidator (Pte) Ltd* [2006] 2 SLR(R) 268 ("*Emjay*") for the proposition that an contractual exclusion clause should be dealt with at the liability stage. It submitted that Burgundy had previously sought unsuccessfully to raise Article 19.1 as a defence before AR Teo, who granted

summary judgment under O 14 of the ROC, and Loh J, who affirmed AR Teo's decision. Burgundy therefore should not be given a third bite of the cherry.

20 In *Emjay*, Phang J observed at [19]:

> I pause here to note that possible conceptual confusion arises only because *every decision as to liability will, literally speaking, have a bearing on the quantum of damages payable*. *However*, we must bear in mind the fact that this is not the crux of the issue at hand. *The nub, or crux, is the primary nature and purpose of an exception clause, regardless of whether it is a total exclusion of liability clause or a limitation of liability clause*. And this, as I have already pointed out, is to govern the *obligations* of the respective parties to the contract - an issue that necessarily relates to *liability* rather than the quantum of damages, although the latter is inextricably linked to the former as a matter of *literal* fact as well as causation. [emphasis in original]

Based on Phang J's approach, an exclusion clause conceptually affects liability rather than the quantum of damages.

21 However, even if the interpretation of Art 19.1 should ordinarily have been dealt with at the liability and not the assessment of damages stage, I was of the opinion that the construction of Art 19.1 by AR Teo was not *res judicata* on the basis of issue estoppel due to the particular context in which the arguments on Art 19.1 were advanced by the parties and the manner in which Transocean had framed its claim under the Escrow Agreement. AR Teo's notes of arguments state as follows:

> My view is that the Defendant has failed to raise a triable issue. In particular, *I do not think that the defence* based on inter alia implied terms and the *indemnity clause warrants consideration at trial. I agree with Mr. Toh's construction of clause 19, i.e. the indemnity clause is not intended to cover liability as between the two parties.* Based on the evidence before me, it is clear that there was a *wrongful repudiation by the Defendant of the escrow agreement*. [emphasis added]

22 In *Lee Tat Development Pte Ltd v MSCT Plan No 301* [2005] 3 SLR(R) 157, the Court of Appeal held (at [14]–[15]) that for issue estoppel to arise, there had to be "a final and conclusive judgment on the merits" and "identity of subject matter in the two proceedings". While Transocean was correct in pointing out that Burgundy had attempted to raise Art 19.1 repeatedly at the liability (both jurisdiction and merits) stage, I do not think it emerged clearly from AR Teo's notes of arguments that the scope of Art 19.1 was considered within the subject matter parameters of what categories of losses arising from a termination of the Drilling Contract were excluded by Art 19.1 or that a final determination of the merits of this particular issue was made.

23 Before AR Teo, both parties' submissions were focused on the issue of whether there had been a repudiatory breach of the Escrow Agreement by Burgundy. The parties' obligations under the Drilling Contract and the scope of Art 19.1 in relation to this did not arise squarely for determination. There was no indication that AR Teo's construction of Art 19.1 was made with the issue of liability under the Drilling Contract in mind as that could only have arisen tangentially at the summary judgment stage.

24 Even if Art 19.1 of the Drilling Contract was not a valid defence to liability for breach of the Escrow Agreement, it did not logically follow that Art 19.1 could not affect the exact quantum of damages at the assessment based on a factual analysis of the specific pleaded heads of loss. Transocean brought its claim as a straightforward breach of cl 3.2 of the Escrow Agreement giving rise to a contractual right to terminate the Drilling Contract, with losses quantified by reference to the net loss of profits that flowed from the termination of the Drilling Contract. Assuming for the purposes of argument that Transocean would not in any event have been entitled to claim such loss

of profits after the termination of the Drilling Contract due to the exclusion in Art 19.1, Transocean could not then quantify such loss of profits as damages that were causally related to the breach of the Escrow Agreement. This, in my view, is conceptually distinct from the argument – rejected by AR Teo and implicitly by Loh J – that Art 19.1 of the Drilling Contract excluded any potential liability that Burgundy may owe under the Escrow Agreement.

25 I therefore proceeded on the basis that Burgundy was not precluded from raising arguments on Art 19.1 as part of the logically prior question of whether the purported net loss of profits under the Drilling Contract was in fact suffered by Transocean. It thus remained open to me to determine the scope of the exclusion clause and whether it covered Transocean's net loss of profits under the Drilling Contract.

Scope of Art 19.1

26 Article 19 of the Drilling Contract provides as follows:

> **ARTICLE XIX – CONSEQUENTIAL LOSS**
>
> **19.1 Consequential loss or damage**
>
> Notwithstanding any provisions to the contrary elsewhere in the Contract, *[Burgundy] shall save, indemnify, release, defend and hold harmless [Transocean] from [Burgundy's] own Consequential Loss and [Transocean] shall save, indemnify, release, defend and hold harmless [Burgundy] from [Transocean's] own Consequential Loss.*
>
> For the purposes of this sub-clause 19.1 [sic], the expression "Consequential Loss" shall mean *any indirect or consequential loss howsoever caused or arising* whether under contract, by virtue of any fiduciary duty, in tort or delict (including negligence), as a consequence of breach of any duty (statutory or otherwise) or under any other legal doctrine or principle whatsoever whether or not recoverable at common law or in equity. *Consequential Loss shall be deemed to include, without prejudice to the foregoing generality, the following to the extent to which they might not otherwise constitute indirect or consequential loss*:
>
> (a) loss or damage arising out of any delay, postponement, interruption or loss of production, any inability to produce, deliver or process petroleum or any loss of or anticipated loss of use, profit or revenue;
>
> (b) loss or damage incurred or liquidated or pre-estimated damages of any kind whatsoever borne or payable, under any contract for the sale, exchange, transportation, processing, storage or other disposal of petroleum;
>
> (c) losses associated with business interruption including the cost of overheads incurred during business interruption;
>
> (d) *loss of bargain, contract, expectation or opportunity*;
>
> (e) any other loss or anticipated loss or damage whatsoever in the nature of or consequential upon the foregoing.
>
> [emphasis added]

27 Burgundy submitted that Art 19.1 excluded liability for loss of profits under the Drilling Contract

and that the definition of "Consequential Loss" covered both direct and indirect losses. Burgundy relied on Art 19.1(a) and Art 19.1(d) as unconditionally covering loss of profits. Transocean contended that Burgundy's interpretation of Art 19.1 defied commercial common sense as it would effectively render nugatory each party's liability for expectation losses for failure to perform its obligations under the Drilling Contract. Transocean submitted that on a proper construction of Art 19.1, Burgundy's liability for loss of profits under the Drilling Contract was not excluded.

28 The principles of interpretation of exclusion clauses may be found in the following passage in the Court of Appeal decision of *Singapore Telecommunications Ltd v Starhub Cable Vision Ltd* [2006] 2 SLR(R) 195 ("*Singapore Telecommunications*") at [52]:

> ... The focus on the purpose of the contract and the circumstances in which it was made is particularly apt where exemption clauses are concerned. The general rule should be applied that if a party otherwise liable is to exclude or limit his liability or to rely on an exemption, he must do so in clear words; any ambiguity or lack of clarity must be resolved against that party: per *Lord Hobhouse in Homburg Houtimport BV v Agrosin Private Ltd* [2004] 1 AC 715 at [144]. The principle that exemption clauses must be construed strictly entails, as this court held in *Hong Realty Pte Ltd v Chua Keng Mong* [1994] 2 SLR(R) 90 ("Hong Realty") at [19], that the application of such clauses must be restricted to the *particular circumstances* the parties had in mind at the time they entered into the contract.

29 Turning to consider the interpretation of Art 19.1, I found that this clause was not intended to apply to the contracting parties *inter se* where the loss of profits suffered were the net profits that one party would otherwise have earned under the Drilling Contract had both parties performed their respective obligations. Art 19.1 therefore did not exclude any claim by Transocean for loss of net profits of this nature. Transocean cited the following passage in *Oil and Gas Infrastructure and Midstream Agreements* (Langham Legal Publishing, 1st Ed, 2009) ("*Oil and Gas Infrastructure*") on the purpose of "consequential loss" clauses in oil and gas contracts (at p 209-210), which I adopted as a helpful starting point in construing the intentions of the parties with respect to the scope of Art 19.1:

> Whether as part of the liabilities and indemnities clause, or, due to its importance, as a separate clause, there will almost always be a provision to the effect that neither party is to have any liability to the other for consequential losses. This is usually non-controversial because of the magnitude of the potential losses if, for instance, the operator were to lose significant production because of the contractor's default, or the contractor were to lose future business because of an ill-timed suspension. ...
>
> Even if there were no such clause, the court might well hold that some losses of the kind specified as consequential losses are not properly claimable; however the court will be seeking to determine whether the losses are too remote to be permissible as contract claims, and this is probably not the test the parties are aiming to apply, or the result they want to achieve. Therefore, the clause will no doubt exclude claims for some categories of loss that might well otherwise be awarded, and that is its importance: limitation and certainty.
>
> To achieve this certainty the parties need to give careful consideration to the types of loss the phrase 'consequential losses' is to cover, and how they are to be defined in the contract. The definition will usually include loss of product or production, loss of revenue, and loss of profit. It is useful to add loss of or under contract, since this will preclude a claim by the operator for damages payable under a dependent oil or gas sale or transportation agreement which may arise due to late completion, or a claim by the contractor for losses arising from cancellation of a

subsequent contract or a subcontract due to the operator's default. The greater the detail, the greater the clarity.

The structure of Art 19.1 is inclusionary: the general limb defines the term "Consequential Loss" in terms of the general law on indirect and consequential losses and there is a further enumeration of a list of categories of losses that are covered by the term "Consequential Loss", without prejudice to the scope of the general limb.

30 The general limb of Art 19.1, which requires Transocean to "save, indemnify, release, defend and hold harmless" Burgundy from Transocean's own "Consequential Loss" (and vice versa), applies only to losses which would be regarded as "indirect or consequential loss" under the general law of damages. In the context of contractual exclusion of liability, the English Court of Appeal has construed the phrase "consequential loss" as confined to loss or damage falling within the second rule in *Hadley v Baxendale*: see *McGregor on Damages* (Sweet & Maxwell, 18th Ed, 2009) ("McGregor") at para 1-037 and the cases cited therein. The English approach was followed by the Court of Appeal in *Singapore Telecommunications* at [59]-[62] and the High Court in *Kay Lim Construction & Trading Pte Ltd v Soon Douglas (Pte) Ltd and another* [2013] 1 SLR 1 at [70]. Based on this line of authorities, I gave the same narrow construction to the phrase "any indirect or consequential loss howsoever caused or arising" in Art 19.1. The general limb of Art 19.1 thus only applied if Transocean's loss of net profits under the Drilling Contract fell within the second rule in *Hadley v Baxendale* where Burgundy's liability following a termination of the Drilling Contract was concerned.

31 As stated in the passage in *Oil and Gas Infrastructure* cited above (at [29]), parties in the oil and gas industry may also delineate how "consequential loss" is to be defined. They may include specific categories of loss that might otherwise be classified as direct loss under the first rule in *Hadley v Baxendale* and would hence not be excluded under the general definition of consequential and indirect loss. The express inclusion of particular categories of loss provides for greater limitation and certainty. Under the Drilling Contract, the term "Consequential Loss" in Art 19.1 is likewise given an expansive and detailed definition that is not limited to the confined meaning of the term as ordinarily understood under general principles of interpretation of exclusion clauses. Sub-clause (a) of Art 19 deems that "Consequential Loss" additionally includes, *inter alia*, "any loss of or anticipated loss of use, profit or revenue", and sub-clause (d) includes "loss of bargain, contract, expectation or opportunity" within the exclusion. I now consider the interpretation of each sub-clause.

32 First, Burgundy submitted that the phrase "any loss of or anticipated loss of...profit" in sub-clause (a) covered any form of loss of profits incurred by Transocean. Burgundy argued that this phrase was preceded by the word "or", which was disjunctive and not conjunctive and the phrase should thus be read as an independent category of loss. On a purposive interpretation of sub-clause (a) based on the context in which the phrase "any loss of or anticipated loss of...profit" appeared, I considered that this phrase could not be given the literal interpretation contended for by Burgundy. Sub-clause (a) states in full as follows:

> ... loss or damage arising out of any delay, postponement, interruption or loss of production, any inability to produce, deliver or process petroleum or any loss of or anticipated loss of use, profit or revenue

33 Read *ejusdem generis*, the phrase "any loss of or anticipated loss of...profit" should be construed in the light of the overall genus of losses contemplated in sub-clause (a), *ie*, losses flowing from disruptions or delay to production or processing of petroleum. I agreed with Transocean that the ostensibly broad scope of the phrase "any loss of or anticipated loss of...profit" should be limited by the context and could not be read in literal terms as a blanket exclusion for any loss that may be

labelled as either party's "loss of profit". I found that sub-clause (a) was only intended to cover loss of profit attributable to causative events related to production issues, *eg*, loss of profits from an inability to perform third party contracts of sale or delays in production due to breakdown of the rig. The quantum of losses flowing from production issues and the consequential effects on third party contracts are often of an open-ended magnitude that cannot be fully anticipated by the parties at the time of entering into the initial contract of hire and it is common in the industry for parties to seek to expressly limit liability for this particular category of losses.

34 This is, in my view, consonant with the approach of the Court of Appeal in *Singapore Telecommunications* and gives due regard to the purposes of the contract and the circumstances the parties had in contemplation when the Drilling Contract was made. If the parties had intended to exclude any losses of profits howsoever caused, it was open for the parties to unequivocally exclude this as a separate, free-standing category; but on a *contra proferentum* construction, in the absence of such an unmistakable indication of the parties' intentions, I find that the most commercially sensible interpretation that does not depart from the meaning of the words used in clause (a) is that the exclusion was limited to loss of profits arising from *production issues* related to the Drilling Rig.

35 Second, I found that on a proper construction of the scope of sub-clause (d), liability for loss of profits that one party expected to have made from the Drilling Contract if the contract had been duly performed was not excluded. I was not persuaded by Burgundy's vague submission that sub-clause (d) referred "unconditionally to loss of profits". Sub-clause (d) does not make express reference to "profits". Instead, it excludes liability for "losses of bargain, contract, expectation or opportunity". I did not think that the plain meaning of the four words was apt to describe the loss of profits that one party expected to make under the Drilling Contract:

(a) the words "bargain" and "contract" appeared on a plain reading to refer to contractual arrangements that either party could have entered into with a *third party*; and,

(b) the words "expectation" and "opportunity" were more appropriately construed as referring to additional or alternative commercial and business opportunities or transactions (apart from the Drilling Contract) that either party could have obtained or exploited.

Burgundy's assertion that sub-clause (d) unequivocally covered loss of profits from the Drilling Contract was not borne out by the specific words used in sub-clause (d). None of the words naturally described or encompassed a "loss of profit" and Burgundy did not point to any specific words as supporting its construction.

36 Further, as a more general point, I was of the view that if Burgundy's interpretation of Art 19.1 was correct and sub-clause (a) and (d) were construed to cover any loss of profits that either party would have or anticipated to have made from the Drilling Contract, the exclusion would effectively undermine the commercial purpose of the Drilling Contract by giving the parties virtually no effective recourse against the other for a breach of the Drilling Contract apart from the recovery of (at most) reliance losses. As Transocean correctly pointed out, this would be tantamount to negating the contractual bargain by excluding all expectation losses under the Drilling Contract. It was highly unlikely that the parties would have intended this result, particularly as the Drilling Contract was of a capital intensive nature and was a contract of substantial value. I therefore preferred the overall interpretation that was more consistent with what sensible commercial men would have intended – that references to "any loss of or anticipated loss of...profit" in sub-clause (a) or "loss of bargain, contract, expectation or opportunity" in sub-clause (d) only included losses arising out of production issues or losses that one party incurred in relation to third party contracts or business opportunities

that were often not readily quantifiable or even anticipated (at least in terms of magnitude or scope).

Application of Art 19.1

37 As discussed above at [30], the general limb of Art 19.1 defining "Consequential Loss" in terms of "indirect or consequential loss" under the general law extends only to losses falling within the second rule in *Hadley v Baxendale*. I found that Transocean's loss of profits under the Drilling Contract were direct losses under the first rule in *Hadley v Baxendale* and accordingly did not fall within the scope of the general limb in Art 19.1. The first rule in *Hadley v Baxendale* covers loss which flows naturally from the breach in the usual course of things and which is presumed to have been within the reasonable contemplation of the parties: *Robertson Quay Investment Pte Ltd v Steen Consultants Pte Ltd and another* [2008] 2 SLR(R) 623 at [59]; *Out of the Box Pte Ltd v Wanin Industries Pte Ltd* [2013] 2 SLR 363 ("*Out of the Box*") at [15]. The loss of profits that Transocean would otherwise have earned under the Drilling Contract is the classic example of direct loss within the first rule – this was the precise result that the parties had contracted for. The expectation losses arising from breach, quantified by the market value of the benefit that Transocean was deprived of in the form of net profits, falls squarely within the category of loss that arises as a natural consequence of breach and/or termination of the Drilling Contract.

38 I was also of the view that neither sub-clause (a) nor (d) applied to Transocean's claim for net loss of profits under the Drilling Contract *vis-à-vis* Burgundy. Both sub-clauses only excluded losses of profits flowing from disruptions or delays in production or third party contracts and alternative commercial opportunities.

39 Article 19.1 therefore did not exclude any claim that Transocean could potentially have for the net loss of profits it would have made had the Drilling Contract been performed.

Quantification of loss of profits under the Drilling Contract

40 Transocean's evidence on the absence of alternative employment opportunities for the Drilling Rig was essentially uncontroverted by Burgundy. I quantified Transocean's loss of profits on the basis that there had been no available market and Transocean could not enter into a substitute contract of hire despite having made due endeavours to do so. The Drilling Contract was for the intended hire period commencing from March 2009 for a minimum period of 238 days within the Southeast Asian region and this represented the reference period and geographical region within which the availability of a substitute contract would be considered and quantified.

41 I accepted Transocean's evidence that there was generally a long lead time for contracts of hire of drilling rigs and invitations to tender were usually sent 12 to 18 months prior to the commencement of the hire period due to the extensive preparation works required. When the Drilling Contract was terminated on 22 December 2008, it was therefore difficult for Transocean to enter into a substitute contract for the Drilling Rig to be provided from March 2009 within the short period of four months. [note: 2] Burgundy did not dispute that Transocean had continued discussions with Burgundy during January 2009 and had simultaneously continued to consider other potential opportunities for the Drilling Rig to be employed for other projects. [note: 3] In the event, Transocean claimed that it was unable to secure any commercially viable avenues of employment for the Drilling Rig in the Southeast Asian, Pacific and Indian regions. [note: 4]

42 I also did not see any reason to doubt the expert report of Mr Gavin Strachan that the market for semi-submersible drilling units had deteriorated rapidly in 2009 although it had been particularly

strong in 2008 (*ie*, when the Drilling Contract was entered into) [note: 5] and that the Asian market was relatively small. [note: 6] Mr Gavin Strachan also concluded, based on available data of actual employment of other rigs in the region, that there were no opportunities for the Drilling Rig that made economic sense between 22 December 2008 and 15 November 2009. [note: 7]

43 In the light of the evidence before me that Burgundy did not seek to challenge on appeal, I affirmed the AR's finding that there was no available substitute contract that Transocean could have entered into to mitigate its losses from the termination of the Drilling Contract. The *prima facie* measure of loss of profits for a contract of hire would, in the ordinary course of events, be the difference between the rate of hire under the contract and the market rate of hire under a substitute contract. However, as I was satisfied that the market rate of hire was nil in the present case as there was no available market during the relevant period, Transocean's loss of profits was correctly quantified by the AR on the basis of the hire payable for the minimum period of hire less the expenses that Transocean would have incurred in providing the Drilling Rig.

Whether damages on the basis of loss of profits arising under the Drilling Contract were too remote

44 The test of remoteness of damage for breach of contract is set out in Alderson B's judgment in *Hadley v Baxendale* at 354:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. ...

The *Hadley v Baxendale* test was affirmed by the Court of Appeal in *MFM Restaurants Pte Ltd and another v Fish & Co Restaurants Pte Ltd and another appeal* [2011] 1 SLR 150 and most recently in *Out of the Box*. The Court of Appeal in *Out of the Box* set out the following analytical framework for remoteness at [47]:

> A straightforward analytical framework for questions of remoteness of damage would help ascertain in most cases the extent to which the defendant can fairly be held liable for losses that are causally connected to his breach. Such a framework would engender the following inquiries:
>
> (a) First, what are the specific damages that have been claimed?
>
> (b) Second, what are the facts that would have had a bearing on whether these damages would have been within the reasonable contemplation of the parties had they considered this at the time of the contract?
>
> (c) Third, what are the facts that have been pleaded and proved either to have in fact been known or to be taken to have been known by the defendant at the time of the contract?
>
> (d) Fourth, what are the circumstances in which those facts were brought home to the

defendant?

(e) Finally, in the light of the defendant's knowledge and the circumstances in which that knowledge arose, would the damages in question have been considered by a reasonable person in the situation of the defendant at the time of the contract to be foreseeable as a not unlikely consequence that he should be liable for?

45 Transocean submitted that as a matter of principle, losses flowing from the breach or repudiation of contract A could be based on losses incurred under contract B, subject to the requirements of causation and remoteness. Transocean cited a number of cases where the courts had awarded damages for an innocent party's loss of profits under a separate contract with a third party as a result of the breach of the primary contract which rendered the innocent party unable to perform the third party contract.

46 This was not a controversial proposition but the circumstances before me presented a different factual pattern, where the loss of profits arose under a separate contract that was also between the contract breaker and the innocent party and the separate contract was terminated by the innocent party. As Transocean pointed out, its claim was not for a loss of profits arising from another contract with a third party but was a claim for the hire that Burgundy had agreed to pay under the Drilling Contract and would have paid had the Drilling Contract been performed. [note: 8] Nonetheless, I agreed with Transocean that there should not be a blanket preclusion against a claim for damages representing Transocean's loss of net profits from the Drilling Contract; the assessment of damages in a particular case is always a fact sensitive inquiry and the question of remoteness cannot be resolved by semantically categorising heads of loss into broad categories of loss that are either foreseeable or unforeseeable by classification (see *Out of the Box* at [44]).

47 Transocean initially submitted that the net loss of profits would satisfy either the first or second limb of the *Hadley v Baxendale* test [note: 9] but after I directed counsel to file further submissions on the effect of Art 19.1 of the Drilling Contract, Transocean appeared to take the narrower position in its further submissions that the loss of profits under the Drilling Contract were direct losses under the first limb, *ie*, they were damages arising naturally according to the usual course of things from the breach of the Escrow Agreement as may reasonably be supposed to have been in the contemplation of both parties at the time the Escrow Agreement was entered into. [note: 10] Transocean contended that it was in effect claiming for the agreed hire rate under the Drilling Contract for the minimum hire period and that this fell within the category of direct loss arising from Burgundy's breach of the Escrow Agreement.

48 I did not think that Transocean's claim was for "direct losses" merely because this head of damage was in reality a claim for the hire that Transocean was entitled to under the Drilling Contract less the costs of performing the contract. This was not borne out by the manner in which Transocean had chosen to bring its claim – as a simple breach of the Escrow Agreement. Although Transocean sought to draw an analogy between the hire that Burgundy was obliged to pay under the Drilling Contract and the hire rate that constitutes recoverable direct losses where a charterer repudiates a charterparty, the logic of this argument (which is in effect the position I have taken above at [37] in relation to liability under the Drilling Contract) holds only if Transocean's claim was directly premised on a breach or termination of the Drilling Contract. Transocean's claim therefore cannot be characterised as a claim for "direct loss" on this basis.

49 Notwithstanding my rejection of Transocean's argument that the loss of profits was a "direct loss" in the sense considered above, I was of the view that the losses of net profits as a result of the

termination of the Drilling Contract were damages that were not too remote under the first rule in *Hadley v Baxendale* but for a different reason. Burgundy had actual knowledge – based on the express terms of the Escrow Agreement – that Transocean had the option of terminating the Drilling Contract if Burgundy were to breach the Escrow Agreement and the loss of profits that Transocean would otherwise have earned under the Drilling Contract must therefore have been within the parties' reasonable contemplation as a natural consequence of Burgundy's breach of its obligation under the Escrow Agreement to make payments into the escrow account at fixed intervals. I note here that Burgundy did not make any objections to Transocean's claim on the basis that it was too remote.

50 The conclusion of an Escrow Agreement prior to the commencement date of hire was a condition precedent of the Drilling Contract (see Art 11 of the Drilling Contract) and although the Escrow Agreement and Drilling Contract were two separate contracts, the existence of the parties' rights and obligations under the Drilling Contract formed the integral backdrop against which the parties concluded the Escrow Agreement. The Escrow Agreement made specific mention of the Drilling Contract in the recital and a number of the terms in the Escrow Agreement were defined by reference to terms in the Drilling Contract. It was therefore contemplated that the Escrow Agreement was entered into only in conjunction with the Drilling Contract and had no independent commercial purpose beyond facilitating the primary contractual relationship under the Drilling Contract.

51 I was not convinced by Burgundy's characterisation of the Escrow Agreement as "merely a financial instrument to regularise payments to [Transocean] for the performance of obligations under the Drilling Contract". [note: 11] The Escrow Agreement was not put in place to enable payments to be made in regular instalments. It was clearly intended to ensure that Burgundy had the means to commit to a long term capital intensive contract and to manage Burgundy's credit risk. Transocean's Managing Director for the Far East and Australian Division, Mr Kaustubh Vijay Kumar, gave evidence that the purpose of the Escrow Agreement was to provide Transocean with security to ensure that Burgundy would have the necessary funds in place to make payments due under the Drilling Contract. [note: 12] He averred that Transocean did not have prior contractual relations with Burgundy and that it was customary for Transocean to request security from new or smaller clients. [note: 13]

52 The terms of the Escrow Agreement supported Transocean's account of the purpose of the agreement. Cl 3.2 of the Escrow Agreement imposed an obligation on Burgundy to make two initial deposits of a fixed sum of $16,500,000 (quantified by reference to the monthly hire rate) 30 days prior to the commencement date of the hire as well as on the commencement date itself and also imposed an ongoing obligation to make continuing payments at regular 30-day intervals until the total amount deposited in the Escrow Account was equivalent to the Operating Rate multiplied by the maximum days of hire under the Drilling Contract. The Escrow Agreement was hence clearly intended to provide Transocean with continuing security for the entire minimum duration of the Drilling Contract.

53 Burgundy had entered into negotiations with Transocean over the provision of either a letter of credit or an escrow facility as a "guarantee for the whole project" [note: 14]. I found that Burgundy had actual knowledge that the continued performance of Transocean's obligations under the Drilling Contract was therefore dependent on or at least related to Burgundy's performance of its obligations under the Escrow Agreement. This was implicit in cl 2 of the Escrow Agreement which gave Transocean the right to either terminate the Drilling Contract or suspend the performance of its obligations while accruing the standby hire rate if Burgundy failed to make the requisite deposits under the Escrow Agreement. Article 11, which made the conclusion of the Escrow Agreement a condition precedent for the Drilling Contract, was also inserted in the Drilling Contract for the express purpose of formalising the understanding that the Escrow Agreement was a necessary and crucial part of the

parties' overall contractual relationship. [note: 15]

54 The specific head of damage that Transocean was claiming for breach of the Escrow Agreement was the loss of profits that it would otherwise have made under the Drilling Contract. In my view, at the time of the conclusion of the Escrow Agreement, Burgundy was apprised of the critical facts that had a bearing on the possible consequences of a breach of the Escrow Agreement, *ie*, that Transocean's performance of the Drilling Contract was conditional upon Burgundy providing satisfactory security by complying with its obligations under the Escrow Agreement. As discussed above, the mode of provision of security and the relationship between the Escrow Agreement and the Drilling Contract were the subject of specific negotiations between the parties. It may therefore be presumed that it was entirely within the parties' contemplation that a probable result of Burgundy's breach of the Escrow Agreement was that Transocean could choose to terminate the Drilling Contract and thus incur losses under the Drilling Contract. The choice to terminate the Drilling Contract, as opposed to the continued accrual of the standby hire rate without the corresponding provision of the Drilling Rig, would in fact be the more commercially sensible and efficient option for both parties as it would enable Transocean to mitigate losses under the Drilling Contract by seeking out alternative employment for the rig.

55 Due to the manner in which the parties chose to structure the Drilling Contract and Escrow Agreement and the surrounding context, I considered that the loss of profits under the Drilling Contract was, to reasonable parties in Transocean's and Burgundy's positions with the relevant general knowledge of the circumstances at the time of contracting, damage that flowed in the usual course of events from the breach and may be presumed to have been within Burgundy's reasonable contemplation. I therefore held that the net loss of profits under the Drilling Contract was a recoverable loss that was not too remote under the first rule in *Hadley v Baxendale*.

The quantification of net loss of profits

56 Transocean adopted the following formula for quantification of Transocean's net loss of profits under the Drilling Contract:

> Loss = Total Estimated Revenue – Total Estimated Expenses of Performance + Actual Costs Incurred (including costs incurred to mitigate damages)

Burgundy did not present an alternative methodology of quantification or suggest that this was incorrect. I accepted that this was a sensible and logical method of assessing Transocean's net loss of profits.

57 I agreed with the AR's finding that the total estimated revenue should be quantified at **US$126,292,500** on the basis of the minimum period of hire of 238 days:

(a) For the mobilisation phrase of 10 days – 10 days x US$500,000 + a lump sum payment of US$539,000 = US$5,890,000

(b) For the period of Day 11 to Day 140 adjusted by an efficiency rate of 97.5% – 130 days x US$550,000 x 97.5% = US$69,712,500

(c) For the period of Day 141 to Day 228 adjusted by an efficiency rate of 97.5% – 88 days x US$525,000 x 97.5% = US$45,045,000

(d) For the demobilisation phase of 10 days – 10 days x US$514,500 + a lump sum payment of

US$500,000 = US$5,645,000

The efficiency rate is expressed as a percentage of the hire rate per day based on the operational status of the Drilling Rig. Transocean adduced expert evidence that the industry standard efficiency rate was 98% but applied an efficiency rate of 97.5% in its calculations as a fair rate when no major maintenance or repair works were required for the rig. Burgundy did not express any objections to this before me.

58 Transocean also gave undisputed evidence that the expected expenses for the performance of the Drilling Contract amounted to the sum of **US$24,494,185.53**:

(a) Expenses incurred by the Drilling Rig to perform the Drilling Contract – 238 days x US$58,435.33 = US$13,907,608.53

(b) Expenses incurred for the operating of a field office in the Philippines to liaise with the Drilling Rig – 238 days x US$2,030.15 = US$483,177

(c) Taxes payable to the Philippines government for the revenue earned under the Drilling Contract – 8% x US$126,292,500 = US$10,103,400

I affirmed the AR's finding that this was an accurate estimate of the expenses that Transocean would have incurred had the Drilling Contract been performed.

59 Transocean additionally claimed **US$3,738,607** as actual expenses incurred in mitigating the loss during the contract period of March to November 2009:

(a) Expenses incurred in preparing to cold-stack the Drilling Rig = US$2,754,690

(b) Expenses incurred in actually cold-stacking the Drilling Rig = US$983,918 for 9 days in March 2009, the entire period from April to October and 15 days in November 2009.

Cold-stacking refers to the mooring of the rig at a secure location when it is anticipated that there will be a longer term period of inactivity and the rig is shut down completely. Hot-stacking, on the other hand, refers to securing a rig such that it will be available on shorter notice, although the day-to-day running costs are higher. Transocean gave evidence that it initially hot-stacked the Drilling Rig from 23 March 2009 to 24 April 2009 (preparations for cold-stacking) and cold-stacked the Drilling Rig subsequently. I allowed Transocean's claim for (a) above but varied (b) such that the expenses for cold-stacking were limited to the period from 23 March 2009 until end August 2009, when the minimum 238-day hire period would have expired. There was no contractual obligation for Burgundy to continue hiring the Drilling Rig after this period and the cold-stacking expenses that Transocean was entitled to claim should therefore cease after end August 2009. I directed the parties to calculate the revised amount of expenses based on the shortened period.

Conclusion

60 For the foregoing reasons, I dismissed the appeal but varied the damages that Transocean could claim for actual expenses for cold-stacking the Drilling Rig such that it was limited to the minimum period of hire of 238 days under the Drilling Contract.

61 The costs of this appeal and the related Registrar's Appeal No 159 of 2012 against the AR's decision not to vacate the hearing for the assessment of damages were fixed at $20,000 plus

reasonable disbursements.

[note: 1] Defendant's Submissions at [25].

[note: 2] Affidavit of Kaustubh Vijay Kumar Dighe dated 7 March 2012 at [35]; Affidavit of Ranajit Chakraverti dated 6 March 2012 at [12]; Affidavit of Deepak Munganahalli dated 6 March 2012.

[note: 3] Affidavit of Kaustubh Vijay Kumar Dighe dated 7 March 2012 at [22]-[24].

[note: 4] Affidavit of Kaustubh Vijay Kumar Dighe dated 7 March 2012 at [22]-[24].

[note: 5] Affidavit of Gavin Strachan dated 6 March 2012, GS-1 at [3.1.1].

[note: 6] Affidavit of Gavin Strachan dated 6 March 2012, GS-1 at [3.1.9].

[note: 7] Affidavit of Gavin Strachan dated 6 March 2012, GS-1 at [3.2.12].

[note: 8] Respondent's Further Reply Submissions at [92].

[note: 9] Respondent's Submissions at [47].

[note: 10] Respondent's Further Reply Submissions at [89].

[note: 11] Appellant's Submissions at [24].

[note: 12] Affidavit of Kaustubh Vijay Kumar Dighe dated 7 March 2012 at [9]

[note: 13] Affidavit of Kaustubh Vijay Kumar Dighe dated 7 March 2012 at [10]-[12]

[note: 14] Affidavit of Kaustubh Vijay Kumar Dighe dated 7 March 2012 at KD-5 p 226-229.

[note: 15] Affidavit of Kaustubh Vijay Kumar Dighe dated 7 March 2012 at KD-5 p 240.