Neutral Citation Number: [2025] EWHC 1747 (Comm)

**Claim No. CL-2023-000173**

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS**
**OF ENGLAND AND WALES**
**COMMERCIAL COURT (KBD)**

Date: 10th July 2025

**Before**:

**Peter MacDonald Eggers KC**
**(sitting as a Deputy Judge of the High Court)**

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**Between:**

**(1) VISALIA MARKETING CORP**
**(2) MR JOHN KENNEDY**

**Claimants**

**– and –**

**(1) SEADRILL LIMITED**
**(2) SEADRILL MANAGEMENT AME LTD**

**Defendants**

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**Ms Emily Wood KC** and **Ms Catherine Jung** (instructed by **Simpson Thacher & Bartlett LLP**) for the **Claimants**
**Mr Alexander Gunning KC** and **Mr Mehdi Baiou** (instructed by **Skadden, Arps, Slate, Meagher & Flom (UK) LLP**) for the **Defendants**

Hearing dates: 5th, 6th, 10th, 11th, 12th and 18th March 2025

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# APPROVED JUDGMENT

This judgment was handed down remotely at 10am on 10th July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

**Introduction**

1. These proceedings arise in respect of a course of tripartite negotiations in 2018-2019 involving the Claimants, members of the Seadrill group of companies (collectively referred to as "**Seadrill**") and Empresa de Serviços e Sondagens de Angola ("**Sonangol**"), the state oil and gas company of Angola. The purpose of these discussions was the negotiation, securing and performance of drilling contracts primarily offshore in Angola. The Defendants are members of Seadrill.

2. In February 2019, Seadrill Ltd, a company in the Seadrill group ("**Old Seadrill Ltd**"), entered into a Joint Venture with Sonangol, pursuant to which each of Old Seadrill Ltd and Sonangol were to contribute two rigs for the Joint Venture to use to perform the drilling contracts and Old Seadrill Ltd were to operate and manage the rigs for a "*Daily Operating Fee*" of US$185,000 per rig per day while the rigs were operational.

3. In October 2019, the Joint Venture commenced its first drilling contract and has been operational ever since.

4. The Joint Venture was negotiated through the contemporaneous involvement of the Second Claimant, Mr Kennedy, an oil and gas executive with 50 years' experience in the industry. The Claimants' case is that the Joint Venture was concluded through the services of Mr Kennedy; the Defendants describe the Joint Venture having been concluded following an introduction by Mr Kennedy.

5. Between November 2018 and February 2019, the Claimants and Seadrill carried out their own negotiations with a view to concluding a "*Representation Agreement*", whereby the First Claimant ("**Visalia**"), Mr Kennedy's corporate vehicle, in exchange for the defined "*Services*", would receive a fee of 4% of the drilling contract revenue ("*Contract Revenue*") earned by the Joint Venture rigs, plus an additional upfront payment of US$1,500,000 ("**the Fee**"). Visalia's counterparty was intended to be the Second Defendant ("**Seadrill Management**").

6. However, even though the Joint Venture was created and performed as a result of the execution of a shareholders' agreement ("**SHA**") between Sonangol and Old Seadrill Ltd, the Representation Agreement was never signed by the Claimants and Seadrill, because - according to Seadrill - the Claimants failed to satisfy the transparency

requirements in order to mitigate the risk that any payment for the Claimants' services might place Seadrill in breach of anti-corruption legislation, and, specifically, the US Foreign Corrupt Practices Act 1977 ("**the FCPA**").

7. Seadrill has not paid the Claimants in respect of Mr Kennedy's role in the conclusion of the Joint Venture.

8. The Claimants claim damages, in the sum of the Fee, for breach of contract, the Representation Agreement, which although unsigned the Claimants contend was contractually binding on Seadrill on 5th February 2019. Failing the success of a claim in contract, the Claimants claim restitution of the same sum on the grounds of unjust enrichment (failure of basis). The Claimants alternatively claim that the Defendants had an obligation to account as a trustee.

9. Seadrill denies these claims, contending that no liability arises in respect of any of the Claimants' formulations of the claim. Even if there were a liability on the part of Old Seadrill Ltd, as a result of Seadrill group entering into proceedings in the United States, under Chapter 11, Title 11 of the United States Bankruptcy Code ("**Chapter 11**"), between February 2021 and February 2022, a new corporate entity which emerged from Chapter 11 - the First Defendant ("**New Seadrill Ltd**") - is different from the corporate entity which bears any liability, namely Old Seadrill Ltd, and so the First Defendant can bear no liability for the Claimants' claims. The Claimants contend that New Seadrill Ltd cannot evade liability for a number of reasons and, in any event, this does not affect the liability of Seadrill Management, the Second Defendant.

**The Parties**

10. The First Claimant, Mr Kennedy, spent some 50 years in the oil and gas industry in a variety of executive positions in several major oil and gas companies, including as Executive Vice President of Halliburton from 1999 until 2002, in which role he came to have dealings in Angola. For the last 20 years, Mr Kennedy worked on private equity opportunities in the oil and gas sector, served on the boards of numerous energy companies, and acted as an industry advisor and consultant. Mr Kennedy is the sole owner and controller of Visalia.

11. New Seadrill Limited was incorporated on 15th October 2021 as part of a corporate reorganisation under Chapter 11. Old Seadrill Ltd was a predecessor company bearing the same name which entered Chapter 11 on 10th February 2021 and was previously the Seadrill group parent. Old Seadrill Ltd was a foreign private issuer listed on the New York Stock Exchange. Its directors included Mr John Fredriksen (who was director and Chairman of the Board). "Seatankers" was the family office of Mr Fredriksen.

12. Seadrill Management is a Bermudan subsidiary of New Seadrill Limited (and, formerly, of Old Seadrill Limited).

13. The Claimants were represented at the trial by Ms Emily Wood KC and Ms Catherine Jung. The Defendants were represented by Mr Alexander Gunning KC and Mr Mehdi Baiou. The quality of the parties' advocacy was impressive; the submissions were delivered ably and efficiently. I was fortunate also to have the benefit of observing both Ms Jung and Mr Baiou, both junior counsel, cross-examining some of the witnesses and to hear Mr Baiou during closing submissions.

**The witness evidence**

14. During the trial, I was assisted by the oral evidence of:

    (1) Mr Kennedy and Mr Gunnar Eliassen, a former employee of Seatankers, called by the Claimants.

    (2) Mr Grant Creed (who had been Seadrill's Vice President of M&A, Vice President of Corporate Finance and Chief Restructuring Officer, and currently is the CFO of Seadrill), Mr Matthew Lyne (formerly Senior Vice President of Commercial, Seadrill), and Mr Anders Hvashovd (formerly Chief Compliance Officer of Seadrill from January 2020 to December 2023).

15. A witness summons had been served on Mr Harald Thorstein, a director at both Seadrill Limited and Seatankers (Mr Fredriksen's family office), but it was agreed between the parties that he need not give evidence.

16. I also had the benefit of written expert evidence and a joint memorandum on the rules and application of the FCPA from two US attorneys, namely Ms Kara Brockmeyer, a

partner at Debevoise & Plimpton who was previously chief of the SEC's specialised FCPA Unit, and Mr Ephraim Wernick, a partner at Vinson & Elkins who was previously a federal prosecutor of fraud and FCPA violations. The parties agreed that the experts need not give oral evidence.

17. By and large, I considered that the witnesses, whose evidence I heard, answered their questions honestly. In some respects, the evidence of the witnesses was especially frank and candid. For example, Mr Creed candidly acknowledged that there was an occasion where information presented to Mr Kennedy for inclusion in a term sheet with Sonangol was understood to be false. However, that information was not ultimately presented to Sonangol. Equally, Mr Kennedy acknowledged that, as evidenced by correspondence, he was prepared to enlist the assistance of someone else to send a "*fake message*", although he regarded it as a "*white lie*" and a part and parcel of "*the natural fencing of any commercial agreement*".

18. Mr Kennedy's evidence was delivered more argumentatively than the other witnesses. However, where Mr Kennedy could not remember a detail, he acknowledged he could not.

19. Generally, I gained more assistance from the contemporaneous correspondence than I did from the oral evidence of the witnesses. Indeed, much of the evidence was taken up with a review of the contemporaneous correspondence. In this respect, I had regard to the observations made in *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm), para. 16-22 and in *Blue v Ashley* [2017] EWHC 1928 (Comm), para. 67-68.

**Facts**

<u>The initial discussions in 2018 and the MOU</u>

20. Sonangol is the state oil and gas company of Angola. There has been a history of corruption with Sonangol and Angola (as the FCPA experts agreed in their joint memorandum).

21. In 2013, Sonangol commissioned two offshore drilling rigs (later named "***Libongos***" and "***Quenguela***") from a South Korean shipyard ("**DSME**"). The drilling market later

collapsed. By 2017, the rigs were still stranded in the DSME shipyard, with an outstanding indebtedness of US$1.43 billion.

22. In November 2017, Mr Carlos Saturnino, the new CEO of Sonangol, sought Mr Kennedy's advice and assistance with the rehabilitation of the rigs. Mr Kennedy suggested, and Sonangol decided, to attempt to conclude a settlement with DSME to release the rigs, and then create a drilling joint venture with an established foreign drilling contractor to put the rigs to work and establish an income stream into Sonangol.

23. Mr Saturnino appointed Mr Kennedy to spearhead a "task force" to achieve these objectives. Mr Kennedy agreed with Sonangol that he would be remunerated on a "success fee" basis when and if the stranded rigs generated revenue.

24. In 2018, three drilling contractors were identified as potential joint venture partners for Sonangol, of which Seadrill emerged as the most suitable candidate.

25. On 29th October 2018, Mr David Mullen telephoned Mr Harald Thorstein, a director at both Seadrill Limited and Seatankers (Mr Fredriksen's family office) to explore whether Seatankers might be interested in exploring an opportunity in Angola. When Mr Thorstein expressed interest, Mr Mullen provided Mr Kennedy with Mr Thorstein's details.

26. On 2nd November 2018, after making contact with Mr Thorstein, Mr Kennedy met Mr Fredriksen (who was then the Chairman of Seadrill), Mr Thorstein and Mr João Saraiva e Silva (an employee of Seatankers) to discuss the joint venture opportunity. The meeting took place at Seatankers' offices in London.

27. Following that meeting, on 4th November 2018, Mr Kennedy recommended to Mr Saturnino (CEO of Sonangol) and Mr Rosario Isaac (COO of Sonangol) that Sonangol "*execute a legally non-binding MOU with Seadrill*".

28. Mr Kennedy held several further calls with Mr Thorstein and Mr Saraiva e Silva to discuss the details of the potential joint venture. During these calls, according to Mr Kennedy, he reiterated that he expected to receive a 4% fee for his efforts in arranging the joint venture and introducing the parties, and Mr Thorstein and Mr Saraiva e Silva agreed to this.

29. On 15th November 2018, Mr Kennedy and his son, Loughlinn (who was assisting Mr Kennedy), sent Mr Thorstein and Mr Saraiva e Silva drafts of a Memorandum of Understanding ("**MOU**"), a shareholders' agreement ("**SHA**") between Sonangol and Old Seadrill Ltd, and a Representation Agreement between Old Seadrill Ltd and Visalia. The draft Representation Agreement provided that Old Seadrill Ltd "*will pay [Visalia] 4.0% (Four Decimal Zero Percent) of the Contract Day Rate Revenue for the performance of the Services in relation to all Contracts*" (clause 3.1) and, upon execution of the SHA, Old Seadrill Ltd will pay Visalia US$1,500,000 as a Success and Mobilisation Fee (clause 3.2).

30. On 18th November 2018, Mr Fredriksen hosted a lunch for Mr Saturnino and Mr Isaac at his home in London to discuss the proposed joint venture. Mr Kennedy, Mr Thorstein and Mr Saraiva e Silva attended the lunch. According to Mr Kennedy's evidence, his role and proposed fee were discussed. Later that day, Mr Thorstein sent a summary of the proposed deal to Mr Anton Dibowitz, Seadrill's President and CEO, which included as one of the "*main elements*" a requirement for "*Seadrill to enter into a Representation Agreement with Visalia Marketing*".

31. Later, on 18th November 2018, Mr Thorstein reported on events to Mr Dibowitz and Mr Thorstein explained that the parties had discussed the "*potential drilling JV between Seadrill and Sonangol*" and that Sonangol had confirmed following the lunch that it was "*now keen to do this deal with Seadrill*". Mr Thorstein explained that the "*ambition would be to sign an MOU already Thursday next week and then participate in negotiations with DSME the following week*" and said that there was "*obviously still a lot of work and diligence to do before having a final deal here*."

32. Mr Thorstein provided Mr Dibowitz a "*summary of the proposed deal*" dated 16th November 2018 ("**the JV Summary**") which provided a description of the overall structure of the deal that included Seadrill entering into a Representation Agreement with Visalia and of the content of the draft MOU and Representation Agreement. The JV Summary stated:

> "*The envisaged partnership contemplates the following main elements*
>
> - *Sonangol and Seadrill contribute two rigs each into an offshore JV (IJC)*

- *IJC will be owned 50.1% by Seadrill and 49.9% by Sonangol; it will be incorporated in Cayman and have HQ in [Houston/London]; the IJC will own the rigs and will, via a contract with Seadrill, negotiate contracts with customers and ensure rigs are in working order; Seadrill's costs will be charged out to the JV on a "per month, per rig" basis …*

- *Seadrill to enter into a Representation Agreement with Visalia Marketing (100% owned by John Kennedy - to be subject to DD and representations); Visalia will be responsible for furthering the interests of Seadrill in Angola and securing work for Seadrill rigs (including the four JV rigs, as well as additional rigs 100% owned by Seadrill); in exchange for these services, Seadrill will pay Visalia 4% of the revenues arising from any Seadrill rigs operating in Angola (including on the four JV rigs - these costs must be passed through to the JV via Seadrill's monthly charge-out to the JV) …*"

33. The JV Summary also set out a diagram explanation of the various relationships including an arrow pointer from Seadrill towards Visalia with the comment "*Representation Agreement, including payment of 4% fees on the 4 JV rigs plus other Seadrill rigs operating in Angola*".

34. On 19th November 2018, Mr Saraiva e Silva provided Mr Kennedy with some comments on the draft MOU that had been provided by Mr Loughlinn Kennedy.

35. On 20th November 2018, Mr Grant Creed (who since September 2018 had held various positions, namely Vice President of M&A, Vice President of Corporate Finance, Chief Restructuring Officer and CFO of Seadrill) sent an email to Mr Matthew Lyne (Senior Vice President of Commercial, Seadrill). In that email, Mr Creed observed that they had not had an opportunity to discuss the "*John Kennedy (Sonangol agent) notes*", and that the agent's fee should be tied to bottom line profitability rather than top line revenue, Seadrill had an existing agent in Angola with regional exclusivity, which would have to be managed, Seadrill could not agree to a Visalia agency fee on all other Seadrill rigs in Angola (excluding the JV rigs), due to that existing agency agreement, and the proposal that Mr Kennedy be the Chairman of the JV Board and the proposed upfront fee of US$1.5 million were to be discussed.

36. During the evening of 20th November 2018, Mr Dibowitz sent an email to Old Seadrill Ltd's Board and reported that "… *in particular [Mr Fredriksen's] mention of a potential opportunity for Seadrill in Angola, a meeting was held on Sunday between JF, Harald and Sonangol's Carlos Saturnino (Chairman) & Rosario Isaac (Head of*

*E&P). The meeting centred on a prospective joint venture between Sonangol and Seadrill. The basis of the JV would be contribution by Sonangol of two newbuild DSME drillships (original delivery late 2014 but still in yard) and by Seadrill of two existing Seadrill rigs. The rigs would be operated by Seadrill and marketed for work primarily in Angola*". Mr Dibowitz further reported that, at the lunch meeting on 18th November 2018, it was committed to signing an MOU between Old Seadrill Ltd and Sonangol, and, enclosing a copy, said that "*there would be extensive work, including due diligence, to be undertaken prior to concluding any deal*".

37. On 21st November 2018, Mr Lyne of Seadrill sent an email to Mr Loughlinn Kennedy referring to their call earlier that day and stating that:

> "*Our preference remains that Visalia's marketing fee (4%) is accrued and paid by the JV, subject to the JV having distributable cash i.e. after cash reserves for working capital, rig SPS, etc …*
>
> *We are aware that this is a departure from the structure proposed by Visalia however the MOU has a provision for marketing fees (article 4, sub article 15) to be covered under the JV and we suggest that we take this discussion on that basis, together with Sonangol during the SHA negotiation. It seems reasonable that we would be able to find a middle ground with all parties sitting at the same table*."

38. On 22nd November 2018, Mr Dibowitz sent an email to Mr John Kennedy and Mr Loughlinn Kennedy stating that:

> "*I appreciate the forthright and transparent discussion over that last days. It is clear that there is a common desire to find solutions and common ground that we can reach on the key outstanding items with respect to the representation agreement and payment of commercial fees to Visalia. In order to continue to move forward we suggest that we execute the MOU and continue to work together to find solutions to the following items:*
>
> *1. Address the potential situation regarding paying agency fees when the JV is generating breakeven or negative cash flows. We have discussed a number of possible solutions such as agreeing a dayrate floor on contracts sufficient to cover all costs including overheads and your fees, a construct whereby agency fees are reduced/accrued and not paid until the JV is generating sufficient positive cash flow etc. How we address the topic will ultimately be dependent on how the contracting of rigs to oil companies / funding of JV by partners will operate in practice and consequently suggest we defer until those details of the later become more clear.*

a. *As indicated, we believe the current structure with Visalia receiving fees from Seadrill and then onward charging them to the JV will be challenging from a compliance standpoint. We acknowledge your clear expectations on fee levels. In order to move forward we suggest that we engage outside counsel as part of our due diligence process to provide an opinion on the workability of the current struc[t]ure and / or suggest modification that allow us to achieve the desired outcome recognizing our publicly listed status. I don't see us solving this today but the compliance / due diligence process and some practicality of thought on both sides should be able to guide us on a reasonable solution for both parties.*

*Again, I don't believe these items can be resolved overnight but neither are they insurmountable, so in the interest of time, suggest we progress the MoU so that we can work on the SHA and the representation agreement in parallel …*"

39. On 23rd November 2018, Mr Kennedy replied to Mr Dibowitz, without referring to the proposed fees for Visalia expressly, but proposing that the Representation Agreement be executed prior to the MOU over the next few days.

40. On 25th November 2018, Mr Dibowitz sent a further report within Seadrill providing a "*status update re: the Sonangol JV opportunity*" in the following terms:

"*Attached please find a revised MOU agreement between Seadrill and Sonangol. Same is still under negotiation but substantially complete and will likely be executed in next few days. As before the MOU does not contain any binding commitments and the deal remain subject to negotiation of final agreements and relevant board approvals.*

*A few key developments / items of note that you should be aware of going forward:*

1. *The MOU now includes a commitment that was made in the original 18th Nov meeting that Seadrill will provide or otherwise seek to procure from related (i.e. Hemen) or third parties, a loan of circa $100M to enable Sonangol to complete and mobilize their two under construction assets.*

2. *John Kennedy, who brought the deal to us has a clear expectation of an agency agreement, including a 4% fee of all rig contracts awarded going forward. My unwillingness to commit to this has been a major issue with John and may ultimately kill the deal but the magnitude of his compensation for arranging the deal, whether it should be paid upfront or on an ongoing basis, the entity that should be responsible (i.e. the JV versus Seadrill) will all need to bottomed out by due diligence / a comprehensive compliance process and once the commercial terms of the deal with Sonangol are better defined. As per our DOA, any agency agreement will be brought to the board prior to commitments being made …*"

41. In November 2018, Seadrill commenced its due diligence review and to this end instructed Skadden, Arps, Slate, Meagher & Flom LLP ("**Skadden**").

42. On 25th November 2018, Mr Kennedy sent an email to Mr Dibowitz discussing the MOU, the meetings with Sonangol, contact with DSME, and concluding in respect of the "Representation Agreement" as follows:

> "*We currently understand that. Subject to a compliance review, we are in agreement on this matter. Time is of the essence so that all agreements can be signed simultaneously. Accordingly, if your lawyers or outside counsel require any face-to-face we will be available on Monday and Tuesday November 26 & 27. For the record, we can assure Seadrill that we are aware of the FCPA and EU anti- bribery & corruption legislation; are in full agreement, and, in full compliance in all and every matter. We understand your need for due process but courteously state that these matters cannot be used as an explanation or excuse for prevarication or delay. Once we sign with DSME the clock is ticking !*"

43. On 26th November 2018, Mr Dibowitz replied to Mr Kennedy's email adding his comment to the above-quoted statement by Mr Kennedy as to the Representation Agreement:

> "*As discussed on Friday the compliance process has been started. I believe the compliance questionnaire has already or will be sent to you this morning. Outside counsel (Skadden) has been engaged but obviously need completion of questionnaire, full understanding of structure and completed CRG report to provide their opinion. Would you prefer we liaise with Loughlinn, yourself directly or someone else on your team to complete this process*."

44. On 28th November 2018, Mr Dibowitz sent an email to his colleagues at Seatankers and others explaining that the proposed Joint Venture with Sonangol "*certainly adds another level of complexity but may be "price of admission" for preferential access to Angola market. JV's are messy but given unique position it would give us in Angola …*".

45. On 6th December 2018, Mr Dibowitz circulated within Old Seadrill Ltd a confidential memorandum summarising the proposed transaction with Sonangol, and attaching a draft of the MOU. In this memorandum, Mr Dibowitz stated that:

> "*CONFIDENTIAL*
>
> *The transaction was brought to us by an agent who has requested a fee of 4% of JV revenue. We are conducting appropriate due diligence and background checks*

*on the agent. Completion of the transaction will be subject to a positive outcome of the due diligence and agreement on a compliant structure for his remuneration*."

46. The memorandum concluded with a review of the benefits and risks of the proposed transaction.

47. On 12th December 2018, Old Seadrill Limited (by Mr Dibowitz) and Sonangol (by Mr Saturnino) executed the MOU (dated 3rd December 2018) to "*establish the basis for further negotiations … regarding the creation of the JV*".

Discussions relating to the Representation Agreement

48. On 14th December 2018, Mr Lyne sent an email to Mr Kennedy referring to a meeting later that day "*working through the rep agreement*" and to a further meeting with Skadden on the following Monday (17th December 2018). At the meeting on 14th December 2018, a draft of the Representation Agreement was discussed; the copy before the Court contained some proposed amendments. The amendments included removing a parent guarantee, although during his oral evidence Mr Kennedy said that he did not agree to this. The draft included an "*entire agreement*" clause. There were comments on the draft which were in Mr Creed's handwriting, including a query whether the fee of US$1,500,000 could be included in a separate agreement.

49. On 14th December 2018, Mr Creed sent an internal email to his colleagues, Mr Krishna Singhania and Mr Holger Fink, raising various queries and comments to which Mr Singhania and Mr Fink responded on 16th December 2018. Such responses included that the 4% fee should be paid on the basis of the revenue net of withholding tax, rather than on the gross revenue and although a parent company guarantee has not been provided previously, it is something Seadrill could do.

50. On 16th December 2018, Mr Creed reported to his colleagues at Seadrill on his further discussions with Mr Kennedy that day, concluding with the comment that "*Regarding parent company guarantee. Told him we can't do PCG but will ask Slaughter and May to draft a pass through agreement whereby Seadrill entity receiving the $185k operating fee commits to send his $10k agent fee directly to him. He agreed to consider this*".

51. On 17th December 2018, Control Risks prepared a due diligence report on Mr Kennedy and his activities in Angola, on the instructions of Seadrill.

52. That day, Mr Creed sent an updated draft of the Representation Agreement to Mr Kennedy, which continued to include clauses 3.1 and 3.2 in respect of the proposed 4% fee and the US$1,500,000 fee, as well as provision for a guarantee.

53. On 17th December 2018, Mr Kennedy sent an email to Mr Dibowitz recording that the parties were then unable to reach common ground on the proposed Representation Agreement, stating that Mr Lyne had informed him that Skadden had a problem with the timing of the Representation fee, and concluding that unless he heard from Mr Dibowitz that day, he would pursue other options. It appears that there were further discussions at 10.00 pm that night.

54. Early the following day, 18th December 2018, Mr Kennedy sent a further email to Mr Dibowitz stating that:

> "*For the avoidance of doubt, my understanding of the position between us is as follows:-*
>
> *1. Based on the CV of myself J W KENNEDY and the interview, you and your internal and external lawyers are satisfied regarding the FCPA compliance and history of myself.*
>
> *2. Your position is that the remunerative percentage of 4% may raise a "red flag" and give the wrong perception.*
>
> *3. To remedy the issue of #2, you propose to parri-passu lodge the associated fees into an escrow account with a delayed pay-out after 9 months. A delay of 2 years was mentioned but, to be absolutely clear, this is unacceptable and unprecedented …*
>
> *Anton, to be truthful, I'm very disappointed at this situation. I/we have been open, up-front and transparent with you from the very start regarding this matter and received assurances that now seem to be false. We returned your requested questionnaire same day November 26th which is now three weeks ago and offered immediate and unfettered access at any time. Statements regarding delays and reaction times are self- serving and, to be honest, unconvincing.*
>
> *We all, I'm sure, will behave professionally in the resolution of this matter so it is important that we are transparent to you. To protect our position, we have requested another potential partner for exploratory talks with us later this week on (1) a sole risk basis and (2) to send us marked up and executable proposed agreements (SHA, Representation agreement, loan term sheet, Management-operational agreement) by 0800 am GMT, Dec 19th. As agreed, we will work*

*diligently with the Seadrill team to agree and finalise the SHA and Rep Agreement TODAY and assure you that we will expend best efforts to get you "over the line".*"

55. Later, on 18th December 2018, Mr Lyne sent to Mr Kennedy Skadden's proposal for an escrow arrangement, whereby Seadrill would pay the representation fee into an escrow account to be released after 9 months, unless there were "*a breach of the Anti-Corruption representations and warranties of the contract*". Mr Kennedy promptly responded stating that the maximum deferral of payment would be 9 months and that in the event of a breach of the relevant representations and warranties, "*funds in the Escrow amount shall be from frozen pending mutual resolution*".

56. At the same time, during the week commencing 17th December 2018, meetings took place between Seadrill and Sonangol in London to discuss and negotiate the terms of the SHA and a "*Management and Related Activities Agreement*" term sheet ("**Management Term Sheet**").

57. On 24th December 2018, there was a call between Skadden and Mr Creed, which recorded that:

"*Call with JK - 1) Escrow; and 2) transparency. JK ok on 9 months and paid on rolling basis. Paid 9 months in arrears. So good. As for transparency, he is ok including para. In SHA - any and all material contracts associated with the SHA are appended - append rep. agmt. In rep. agreement signed together with the SHA and is a corollary [sic].*

58. During his oral evidence, Mr Kennedy said that he did not know, which I took to mean that he did not recall, the agreement about the 9 month escrow arrangement, but he resisted the notion that he agreed to the appending of the Representation Agreement to the SHA.

59. On 27th December 2018, Mr Creed sent a revised draft of the Representation Agreement to Mr Kennedy, with the 4% fee included (as clause 3.2) and the US$1,500,000 fee included (as clause 3.1), noting the following "*key commercial points*":

"*1) This draft includes updated language to address the flow of cash into the Escrow and out to you in nine months …*

*4) Formula to calculate your 4% fee against the gross revenue vs. revenue net of withholding tax remains outstanding. We believe you should receive 4% of revenue after any withholding tax has been deducted. If, as you say, there is no withholding tax in Angola there will not be any difference to the amount you receive (i.e., gross and net are equal). All of our similar agency agreements are calculated off the net revenue, not gross*."

60. On 29th December 2018, Mr Kennedy sent a response to this email, although his comments did not seem to engage with the points quoted above.

61. On 3rd January 2019, Mr Creed sent to Mr Kennedy an updated draft Representation Agreement, which was said to address comments made by Mr Kennedy the previous week. This draft made provision for the payment of the US$1,500,000 fee (clause 3.1), the 4% fee (clause 3.2) and the holding of the 4% fee in escrow for release in 9 months' time, unless there were a relevant breach, in which case the matter would be referred to a dispute resolution process (clause 3.3).

62. On 5th January 2019, Mr Kennedy responded to additional questions prepared by Skadden. On 9th January 2019, Mr Kennedy attended a "*follow-up interview*" with Skadden.

63. On 10th January 2019, Mr Creed sent Mr Kennedy a further draft of the Representation Agreement, stating that "*We are nearly there on the rep agreement. Next step is I need to submit the execution version to the Board for approval. Can you revert asap with confirmation that the attached document is in agreed form, or flag any o/s issues*".

64. On 12th January 2019, Skadden prepared a memorandum in relation to the Representation Agreement and FCPA risks. There was no evidence that Mr Kennedy had been involved in any improper conduct under the FCPA. Skadden concluded that:

"*Given the history of corruption in Angola, Kennedy's past involvement with companies that have been investigated for corruption and the magnitude of the commission Kennedy will receive, the Representation Agreement presents corruption risks. Seadrill clearly appreciates those risks and has performed extensive due diligence, obtained contractual representations and warranties, audit rights and required indemnification for non-compliance with the terms of the Representation Agreement, including an anti-corruption specific indemnification guaranteed by Kennedy's assets. The escrow arrangement provides Seadrill with additional opportunities to conduct compliance diligence during the term of the Representation Agreement and imposes further economic risk on Kennedy in the event of a suspected breach. Accordingly, the economic*

*risks to Kennedy in the event he were to breach the Representation Agreement are significant, and it appears unlikely that he would agree to such obligations if he intended to breach the agreement.*

*In addition to diligence, contractual guarantees and shifting of economic risk, Seadrill has insisted on transparency regarding the Representation Agreement. The Representation Agreement and its terms will be disclosed to Sonangol (and hence the relevant government officials in Angola), and also in Seadrill's periodic financial filings. Other than to alter the compensation terms to a lesser amount, we do not believe that there are other risk mitigation actions available to Seadrill. Even lowering the commission percentage would not abate the risk entirely.*

*The residual risk remains that if Visalia or Kennedy were to make an improper payment in relation to the JVC's business, U.K. and U.S. regulators could argue in hindsight that Seadrill was reckless in entering into the transaction. In essence, regulators could take the position that there were no terms on which it was reasonable to complete the transaction. An investigation by U.K. or U.S. regulators could also implicate Seadrill's agency agreements in other jurisdictions. If an investigation were litigated, Seadrill would argue that its officers, executives, and directors had no actual knowledge of a corrupt payment and mitigated risks as much as possible such that there was no reckless disregard of a high probability of a corrupt payment. Although such an investigation would have economic and reputational costs for Seadrill, Seadrill's mitigation steps provide credible arguments and a thorough and transparent record from which to argue that there should be no criminal liability for individuals or the Company*."

65. On 14th January 2019, Mr Loughlinn Kennedy returned to Mr Creed a revised draft of the Representation Agreement.

66. On 15th January 2019, Mr Dibowitz prepared a memorandum of the proposed Sonangol Joint Venture to Seadrill stating that:

"***Executive Summary:***

*…*

*In essence, the deal is structured as a pooling of interests on the operations of drilling rigs rather than a traditional JV i.e. there will not be any asset transfers. At a high level, each party will supply two rigs into the pool, with profits split 50/50. Seadrill will provide management services while rigs are operating at $185k per day per vessel. This number covers direct opex, indirect overhead and approximately $25k profit margin.*

*The attraction of the JV for Seadrill is:*

- *Relationship with Sonangol and its ability to provide a competitive advantage for tenders and contracts in Angola for: i) the four JV rigs;*

*and ii) other wholly owned Seadrill rigs if or when demand in Angola exceeds the four rigs supplied by the JV.*

- *Profit margin of $25k per day per vessel on the management fee - approximately $30m per annum on all four vessels according to the base case operating schedule and financial model. Absorption of indirect overhead on the two Sonangol units will be mostly incremental profit to Seadrill - approximately $15m per annum.*

*A key risk to the transaction is the requirement to enter into a revenue fee based representation agreement with John Kennedy (a very experienced and credible oil & gas executive), and any potential reputational, legal and regulatory consequences if improper payments are subsequently made by Kennedy.*

*John Kennedy, who arranged the deal, will earn a 4% fee based on drilling contract revenue earned by the JV rigs. The risk inherent in this fee, in a high risk country such as Angola, has been mitigated by: i) thorough due diligence performed by Control Risk/Skadden; ii) strong protections afforded to us under the terms of the representation agreement, including the fees being placed in an escrow account for a rolling 9 months period prior to being released to Kennedy; iii) Kennedy personally indemnifying Seadrill for any losses caused by him breaching the representation agreement i.e. paying a bribe; and iv) disclosure and transparency as to the relationship and variable compensation fees both in the shareholder agreement (i.e. within Sonangol / Angola) and Seadrill's 20-F filing ...*

***Representation Agreement:***

*John Kennedy, who arranged the deal, will receive a 4% fee based on drilling contract revenue earned by the JV rigs, which is significant in its own right and comparatively higher than the 3.5% we pay our existing agent in Angola. The Representation Agreement is between Seadrill and Visalia Marketing, a company wholly-owned by John Kennedy. Seadrill will pay the representation fee in an escrow account which will then be released to Visalia Marketing nine months in arrears. The representation fee is included in the operating fee of $185k per day which Seadrill will receive from the JV.*

*This fee in a high risk country such as Angola, as well as certain other features (such as the use by Kennedy of an offshore vehicle) are considered red flags. We are very conscious of this and consequently great care has been taken by us in engaging Skadden/Control Risk extensively in the due diligence and negotiation of the representation agreement processes. The result is that these risks have been significantly and effectively mitigated ...*

*We believe that point iii) is particularly significant given Kennedy's financial position i.e. he is prepared to risk his significant personal wealth if he were to get caught committing any FCPA/Bribery Act violations - all in an environment where we have provided for transparency. See Skadden's diligence report attached herewith as Exhibit 2. Gary Di Bianco, the Skadden partner who has advised Seadrill on ABC matters for many years, will also attend the Board Meeting.*

*The scope of the representation agreement is in relation to the four JV rigs. However, we do also have a right of refusal to engage Kennedy's services for any other opportunities he may identify for wholly owned Seadrill rigs in Angola.*

*We should also mention that the agreement with Seadrill's existing agent in Angola, Simples, provides for exclusivity until expiration of that agreement on July 9, 2019 …*"

67. On 15th January 2019, the minutes of a meeting of the board of Old Seadrill Ltd, attended by Mr Dibowitz and Mr Gary DiBianco of Skadden, recorded that:

"*Mr. Dibowitz brought the Board's attention to the requirement to enter into a revenue fee based representation agreement (Representation Agreement) with John Kennedy via his company Visalia Marketing Corp, the level of the fee, and the potential risks that this presented.*

*The Board discussed the proposed Representation Agreement. Mr di Bianco advised the Board of the potential reputational, legal and regulatory consequences of any improper payments made by Mr. Kennedy and noted that significant due diligence had been undertaken on Mr. Kennedy. The Board reviewed the steps that had been taken to mitigate these risks, including paying the fee due under the Representation Agreement into an escrow account to be released nine months in arrears and receiving an indemnity from Mr Kennedy, enforceable against his personal assets, for any losses caused by his breaching the Representation Agreement. In particular, the escrow arrangement was designed to provide flexibility to act on any concerns. The Board requested that the management fee payable be made transparent to all parties to the Shareholder Agreement.*

*The Board agreed that it was not appropriate, given the Group's financing arrangements and liquidity position, to provide a loan to Sonangol. It agreed to appoint Visalia Marketing Corp as agent in the context of the Sonangol JV and further agreed that entering into the Sonangol JV was in the best interests of the Company*."

68. These minutes then went on to record the resolutions made by the board of Old Seadrill Ltd at this meeting as follows:

"*i. the Sonangol JV be and is hereby approved;*

*ii. the Shareholder Agreement be and is hereby approved;*

*iii. Visalia Marketing Corp be and hereby is appointed as the agent to the Sonangol JV;*

*iv. the Representation Agreement be and is hereby approved; and*

*v. that any one Director or Officer of the Company hereby is authorised on behalf of the Company to negotiate, sign, execute (under hand or common*

*seal, whether or not expressed to be a deed, as may be necessary or appropriate) and deliver the Shareholder Agreement and Representation Agreement and any and all documents or deeds required in connection therewith or otherwise in connection with the Sonangol JV and any amendments or supplements thereto which such Director or Officer may in his/her absolute and unfettered discretion deem appropriate, necessary or desirable, such deeming to be conclusively evidenced by such person's execution thereof*."

Discussions concerning transparency relating to the Representation Agreement

69. On 15th January 2019, Mr Creed sent Mr Kennedy language to be included in the SHA that "*Sonangol has consulted with John Kennedy and his company Visalia Marketing Ltd. in connection with financial and operational strategy regarding the subjects of this Agreement. Mr. Kennedy facilitated discussions between the Seadrill Parties and Sonangol in relation to the MOU and this Agreement. Seadrill Ltd has entered into a Representation Agreement with Visalia Marketing Ltd., appended hereto*".

70. On 16th January 2019, Mr Kennedy countered with his own proposed language: "*Sonangol and Seadrill have consulted with John Kennedy and his company Visalia Marketing Ltd. in connection with financial and operational strategy regarding the subjects of this Agreement. Mr. Kennedy facilitated discussions between the Seadrill Parties and Sonangol in relation to the MOU and this Agreement and Mr Kennedy will be remunerated appropriately and it is intended that he will be appointed independent non-voting chairman of the JVC*".

71. This gave rise to further discussion as to whether the Representation Agreement should be disclosed only to Mr Saturnino of Sonangol alone (as Mr Kennedy then argued) or whether it should be disclosed to additional members of the Sonangol board. There were a number of proposed wordings exchanged involving Skadden and Sonangol.

72. On 17th January 2019, Mr Creed sent an email to Mr Edwards and Mr DiBianco stating that "*See attached suggested disclosure to go in the SHA and Sonangol Letter which Anton has agreed with Kennedy. Please review and reply with confirmation or provide any comments asap*". Attached to the email was a wording for inclusion in the SHA and the wording for the disclosure letter, which read as follows:

"*We acknowledge that Seadrill has entered into a representation agreement (attached herewith) with Visalia Marketing, a company wholly owned by John*

*Kennedy, in connection with the establishment of a joint venture between Seadrill Limited and Empresa de Servicos e Sondagens de Angola (Sonangol)*

*Mr. Kennedy facilitated discussions between Seadrill and Sonangol in relation to the MOU and the Shareholder Agreement and will be remunerated as per the representation agreement. This remuneration is included in the daily Management and Related Services Fee paid by the Joint Companies to Seadrill and will be paid by Seadrill to Mr Kennedy / Visalia Marketing*."

73. During cross-examination, when Mr Kennedy was asked whether he agreed to the text of the disclosure letter, he said "*That is categorically not true. What is true is that the wording to go in the SHA was shared with me, but certainly never any letter or letter draft. That is categorically untrue*" (day 2, page 151).

74. On 17th January 2019, Mr Dibowitz sent a memorandum to his colleagues at Seadrill stating that:

"*A long couple of days here but we seem to be closing in on the end game. I am cautious about sending a "running commentary" but Sonangol seem intent (based on internal deadline) on closing and signing SHA today so wanted to give you an update of our (hopefully final) positions:*

*…*

*2. Rep agreement transparency. Using "lockbox" structure as described previously. SHA clearly describes John Kennedy's role in the transaction, the existence of the Rep Agreement and the fact that the remuneration due to Kennedy is included in the $185K daily fee. Saturnino (CEO) and Sonangol board will separately certify they have reviewed the Rep Agreement as part of the approval process of the JV and acknowledge Kennedy's remuneration will be paid by Seadrill and that those costs are included as part of our daily fee to the JV. Skadden is fully comfortable and has reviewed the relevant language.*

*It is my understanding that neither of these outcomes is a material deviation from what was discussed and agreed at the board but I am happy to take any questions*."

75. On 18th January 2019, the language referring to the Representation Agreement which was ultimately incorporated into the SHA as clause 14.18 was circulated by Mr Creed to his colleagues in Seadrill, Sonangol and Mr Kennedy:

"*Sonangol and Seadrill have consulted with John Kennedy and his company Visalia Marketing Ltd. ("Visalia") in connection with financial and operational strategy regarding the subjects of this Agreement. Mr. Kennedy facilitated discussions between the Seadrill Parties and Sonangol in relation to the MOU and this Agreement and will be remunerated as per the representation agreement*

*dated on or about the date of this Agreement. Seadrill will be compensated a daily operating fee by the Joint Companies in accordance with the Management and Related Activities Agreement, which covers operations and administration of the rigs management of the Joint Company and any remuneration due to Visalia*."

76. On 18th January 2019, Seadrill Management signed a resolution that:

> *(a) the Representation Agreement be and is hereby accepted as in the best interests of the Company;*
>
> *(b) any one Director of the Company, or any one of the following individuals, Anton Dibowitz, Matt Lyne, Grant Creed or Nicola Stephen be authorised to sign the Representation Agreement, including any ancillary documents in order to effect the same, for and on behalf of the Company*."

77. On 18th January 2019, Mr Lyne exchanged WhatsApp messages with Mr Eliassen stating that "*it will all come down to the rep agreement*".

78. On 19th January 2019, Mr Kennedy sent a message to Mr Saturnino of Sonangol stating that "*I think we've reached reasonable agreements on outstanding issues Plan is to have a five day extension to MOU till Friday when we can exchange execution between you and Seadrill CEO and focus on rigs*". During his cross-examination, Mr Kennedy explained this message by saying that "*We clearly had to finesse some issues, otherwise we wouldn't have had an extension*".

79. On 24th January 2019, Mr Creed sent a revised draft of the Representation Agreement to Mr Kennedy. This draft included the provisions for the payment of a success and mobilisation fee of US$1,500,000 upon execution of the SHA and 4% of the Contract Revenue to be paid into escrow to be paid upon a nine-month "*Release Date*" (as defined), unless there were a "*Notification of Breach*" (as defined). The draft however appears to have omitted the contract clause numbering.

80. On 24th-25th January 2019, Mr Creed sent an email to Mr Dibowitz with a draft of an update to the board of Old Seadrill Ltd, stating amongst other things that:

> "*We had planned to append Kennedy's representation agreement to the shareholder agreement in order to achieve transparency. However, in order to address a concern that a large number of low to mid level employees at Sonangol may have unnecessary access to the agreement, we agreed instead to have the Sonangol Board sign a separate disclosure letter acknowledging the representation agreement. Such letter to be signed by at least three members of*

*the Sonangol Board. We have discussed this approach with Gary Di Bianco from Skadden who was ok with the approach*."

81. In reply, Mr Dibowitz stated that "*do we actually mention 185k in the SHA? I thought this was removed, if so, I would tone down the message to avoid being miss leading and remove the 185 number*". During his cross-examination, Mr Kennedy denied that any agreement referred to in Mr Creed's email was an agreement to which he was a party. Of course, this was not an email which had been sent to Mr Kennedy.

82. On 28th January 2019, Mr Loughlinn Kennedy sent two emails to Mr Kennedy raising his concerns about the draft of the Representation Agreement received from Mr Creed on 24th January 2019. The second of those emails concentrated on the deletion of a provision in relation to future opportunities unrelated to the Joint Venture rigs. This point appears not to have been pursued thereafter.

83. On 28th January 2019, Mr Creed sent an email to Mr Gentil Pimenta, a lawyer working at Sonangol, stating that the breakdown of the service fee for the rigs was discussed during meetings in Luanda. Mr Pimenta enquired whether there was any reason not to include the breakdown in the Management Term Sheet. Mr Creed sent an email to Mr Kennedy suggesting providing a breakdown of the operating fee of US$185,000 per day (namely, personnel - US$60,000, repairs and maintenance - US$30,000, other direct costs - US$25,000, indirect overhead - US$45,000 and capital expenditure - US$25,000) and "*pushing back*" on including this breakdown in the Management Term Sheet. Mr Creed then sent a message to Mr Kennedy stating that:

"*I spoke to Anton and he does not want to send any cost breakdowns to Sonangol. We can offer them more clarity what's included in the fees if that helps. The point is there is a profit margin and we should be ok with that. But difficult to say precisely how much that is. It also includes management systems and other qualitative costs that are difficult to quantify*."

84. During his cross-examination, Mr Creed had stated that it was forecast that Seadrill would earn a profit of US$25,000 per day and that as the proposed breakdown did not include the profit margin, the breakdown provided to Mr Kennedy gave a false impression.

85. On 28th January 2019, Mr Dibowitz sent what he hoped was a "*penultimate update*" to his colleagues at Seadrill stating that:

"• *Closing likely pushed to tomorrow at this point. We have received the SHA initialled by their GC, executed and reverted. Sonangol CEO (Saturnino) will at this point sign in the morning.*

• *We have shared the draft PR with Sonangol and made clear that absent comments (which we will take into consideration) we will release tomorrow.*

• *We will likely not sign the rep agreement tomorrow because they have not secured sign-offs on the Board Acknowledgement Letter. This will likely follow in next week(s). I have been very clear with John Kennedy that we will not sign the Rep Agreement unless / until those signature are secured …*"

86. On 28th January 2019, Mr Kennedy sent an email to Mr Dibowitz, Mr Lyne and others stating that:

"*I had a call from Carlos Saturnino yesterday regarding execution of the SHA which, in his eyes, is the initiation of the JVC.*

*He will execute this morning and DHL to you (presumably in london). I told him that the Rep Agreement was largely agreed (1/2 tweets [tweaks?] to accommodate the recent buy-out clauses) and that I had Seadrill commitment to same.*

*I will leave it to Grant [Creed] to close the loop with Tiago [Neto] …*"

87. On 29th January 2019, Mr Dibowitz replied to Mr Kennedy stating that:

"*Looks like we are very close to finish line. I have executed SHA and initial the management term sheet.*

*Not sure what changes are needed to the Rep Agreement to accommodate the buy-out clauses but let's get them drafted an agreed forthwith. After that we will just need to get the Sonangol Board acknowledgment letter executed so that we can execute that agreement*."

88. During his cross-examination, Mr Kennedy appeared to accept that the Representation Agreement was largely agreed at that time and that the only thing holding matters up was the "*disclosure letter*". Mr Kennedy also said that "*I had everybody in contact and open discussion. Here's Seadrill openly talking to Tiago Neto, who was head of the Sonangol delegation. So it was complete transparency on what everybody was doing*".

89. On 30th January 2019, Mr Creed sent a message to Mr Lyne stating that Mr Saturnino of Sonangol would sign the "*side letter*" (the disclosure letter).

90. On 31st January 2019, Mr Dibowitz updated Mr Kennedy by email stating that he expected that Mr Saturnino of Sonangol would be signing the SHA that day and then stated that:

> *"Grant [Creed] has passed on the update that we expect Carlos [Saturnino] to sign today and send the executed document to London via DHL. Good to hear we are finally there on signing. We need to get moving quickly on getting the Sonangol rigs ready ... every day we don't have a signed document is pushing back that process. Further, Total are pestering me regarding the offer letter for work in Angola which expires today. I only want to have that conversation with Total after the SHA is executed and announced publicly. So it is imperative to get a scanned copy of the executed documents ahead of the couriered originals. Can you help arrange that?*
>
> *Regarding your Rep Agreement. The document is agreed and signed off by our Board. As discussed in Luanda you have my commitment (as I trust is also your intention) that we will fully abide by the terms of that agreement and do not intend to re-open the document. I further trust that we have sufficient documentation and correspondence to demonstrate that the current draft is the clear intent of both parties. As we have previously discussed, a key factor that our Board considered when approving the transaction and our Rep Agreement was transparency to the nature of the relationships between yourself, us and Sonangol. As you will recall, we initially agreed to achieve the appropriate level of transparency by appending the agreement to the SHA. When that was an issue for you, we worked with you to change the plan to simply disclosing the existence of the Rep Agreement in the SHA, and entering into a separate side letter where the Sonangol board acknowledged your and the Rep Agreements role and terms as part of the JV transaction and structure. As discussed previously both while I was in Dubai and later with you in Luanda, in order to achieve the necessary transparency in this alternate structure, we need to have that side letter signed by multiple Sonangol Board members. The preference was the entire board but we can live with Carlos plus three other Board members. We will work with you to get there, and I do believe we will get there, but this is one issue which we cannot be flexible on.*
>
> *We're almost there, we just need the final push to get the documents over the line so that we can get onto getting the JV up and running*."

91. At this point, Mr Kennedy during his oral evidence said that "*I'm afraid this email was the one, I am ashamed to say, where I totally lost my temper with them …*" (referring to Seadrill).

92. Mr Kennedy replied to Mr Dibowitz stating that:

> *"I've explained to you and your people several times that what Sonangol signs and how it execute documents is solely a matter for them and them alone. I cannot nor do I have the power or influence to dictate to Sonangol. I have clearly stated to your people that, similar to the shareholder agreement which will be solely*

*signed by Mr Saturnino, that his reply is and was that Sonangol documents are signed by him. There is NO precedent of anything else*."

93. On 1st February 2019, Mr Dibowitz sent a message to Mr Kennedy stating that "*In good conscience I don't think I can get the board to agree to just one person, regardless of whom it is, acknowledging the Rep Agreement terms*". Mr Kennedy replied to Mr Dibowitz that "*As we are constructively trying to work together I need to unequivocally understand if you are telling me to inform sonangol that there is no deal*".

94. On 2nd February 2019, Mr Dibowitz wrote to Mr DiBianco of Skadden summarising the position as regards the Representation Agreement:

> "*… The intention was that this side letter would be signed by at least 3 board members. The issue is that Saturnino (Sonangol CEO and Chairman of the Board) is willing to sign the side letter on behalf of the board, but is not willing to have other individual board members certify. His position is that this is without precedent in Sonangol and he views it as usurping his authority. Unfortunately is has become quite an emotive issue and is now the sole issue holding up signature. I don't believe we are going to get much if any movement on the above and appears to be a walk-away issue for them.*
>
> *I know there are no bright lines here but fully recognize we need to have a level of disclosure that makes us as management and the board comfortable. My bottom line question is whether (1) the above (single written certification from Saturnino) could be considered sufficient or otherwise (2) if we could supplement the above with other disclosure to get us to a reasonable place. Thoughts on (2) are:*
>
> *1) In person meeting with board (witnessed by yourself or Chris) where we could certify that the board is aware. Not sure if this is practical given the emotiveness of the issue with Saturnino.*
>
> *2) Right now we will disclose in our 20-F the relationships and the fact that there is variable compensation to Visalia …*"

95. The reference to "*20-F*" was to Seadrill's Form 20-F annual report to be filed with the US Securities and Exchange Commission (SEC).

96. Later that day, Mr DiBianco sent an email to Mr Chris Edwards of Seadrill stating that he had caught up with Mr Dibowitz and "*I conveyed that it is important that there be evidence of other members of the board being aware of the Rep Agreement and quantum of payment. Alternatives to them signing would be an person separate from Sonangol such as Anton or Matt meeting with the board members. I do not think it needs*

*to be you or me doing that; as long as Anton or Matt would document the meeting. And the Seadrill disclosure remains important*".

97. On 3rd February 2019, Mr Dibowitz sent an email to Mr DiBianco summarising his understanding of the regulatory position:

> "*Just wanted to follow up make sure we are on the same page before I returned with a potential path forward with JK / our board. It is of course extremely disappointing that JK believed he could secure a level of disclosure within Sonangol that it appears now can't be delivered. Upon reflection I do understand why Saturnino may be unwilling to have it advertised internally that he has to rely on, and pay significant sums to, outside consultants to get things done that a competent organization should be able to accomplish on their own. Given the command and control nature of the organization, I am also not sure that disclosure to even a number of Sonangol executives / board members would truly give us the comfort that it would encourage "whistleblower" behaviour even if they did believe there was something untoward going on.*
>
> *At this point I think the only realistic path forward will be:*
>
> *1. Certification from Saturnino (as Chairman) obo the board that the Rep Agreement is acknowledged and acceptable to Sonangol, supplemented by*
>
> *2. A fulsome disclosure in our 20-F regarding the quantum of Visalia / JK's fees*
>
> *It will most likely take another call including yourself with our board to get them comfortable. Before go down this road and offer that I wanted to make sure we (you, Chris, me) had time to reflect and could support*."

98. There was a telephone conversation, or a series of conversations, soon afterwards between Mr Dibowitz and Mr Kennedy. In his first witness statement, at para. 45-47, Mr Kennedy referred to a telephone conversation on 5th February 2019 with Mr Dibowitz, while Mr Kennedy was in Abu Dhabi. Mr Kennedy said it was a memorable conversation and went on to say that:

> "*45. … Mr Dibowitz was apoplectic and was pleading with me to get the SHA across the line. I understood there was huge pressure in the company to get the deal done, and also especially because there was a contract with Total on the table for the joint venture and the SHA needed to be signed to progress that opportunity.*
>
> *46. I was really frustrated by this stage and I expressed my frustrations to Mr Dibowitz. I told him that unless we could find a way through, the joint venture would not proceed and the SHA would not be signed; I would not allow that to*

*happen. I said I would get Mr Saturnino on the phone right away (i.e., to join in on our call) and tell him that Sonangol should walk away. Seadrill was not the only company that Sonangol could potentially do the deal with, as there remained other interested parties who continued to push for consideration (including Transocean and Ensco Energy. Mr Dibowitz asked me not to stop the deal and told me that if I could get a letter signed by the Sonangol Chairperson, Mr Saturnino, then Mr Dibowitz on behalf of Seadrill would be satisfied, and everything could proceed. He also said that they would publish the full details of my representation inclusive of fee in the disclosure form to the SEC and investors and ensure transparency about the fee that way. I fully agreed and accepted this as a means of achieving the same goal and allowing the transaction to close.*

*47. I asked for his word, and Mr Dibowitz gave me his absolute assurance that if I could get the one-signature letter, which he said was just a matter of process, then we were all done, and the deal could go ahead and I would be paid my fee accordingly. I even offered to attempt to organise a joint call with Mr Saturnino but Mr Dibowitz said that would not be necessary. I felt it was important to record this settlement in an email exchange with Mr Dibowitz. After this conversation, the SHA was promptly signed …*"

99. When Mr Kennedy was questioned about the accuracy of his memory of this conversation, he said that (day 2, page 185):

"*I told Anton, as I have told you, that I could not procure a letter that he wanted with four signatories from Sonangol. There was absolutely no mention or no discussion about content or form. He was −− I mean, one doesn't want to demean anybody, he but he was begging me that −− to let this go through and allow the SHA to be signed and I said, "Anton" −− you're asking me the content and I'm paraphrasing of course, but I said, "Anton, clearly, you know, I can't procure the letter, will not procure the letter, will not ask for that letter". So that's it*."

100. On 5th February 2019, Mr Dibowitz wrote to Mr Kennedy as follows:

"*In follow up to our conversations of the last days, most recently this morning.*

*As discussed at length, there has never been any question as to Mr. Saturnino's authority to enter into any and all agreements on behalf of Sonangol. The only requirement is to gain sufficient disclosure of the transaction and the Visalia Representation agreement. That being said I believe we have an agreed path forward which is:*

*❑. Mr Saturnino will execute the previously agreed Representation Agreement Disclosure Letter on behalf of the Sonangol Board.*

*❑. Seadrill will include suitable disclosure of the Representation Agreement within its annual 20-F.*

*We can do this without specifically enumerating the 4% fee*."

101. Mr Kennedy acknowledged this email and said he would revert. Later, on 5th February 2019, Mr Kennedy replied that:

> "*We acknowledge this email and, subject to your verbal assurances in our telecon this morning and the following points, Visalia and John Kennedy will support and progress the execution of the SHA.*
>
> *1. What and how, Mr Saturnino signs in terms of disclosure is solely a matter for them to decide. We will not influence or attempt to influence but, for the avoidance, our role in terms of advocacy and representation for and on behalf of Seadrill is well understood within Sonangol.*
>
> *2. The appointment of independent professional (audit, legal including FCPA overview etc) to the new JVC, Sonadrill.*
>
> *3. The payment of services to Visalia parri passu but subject to oversight from newly appointed advisors …*"

102. On 5th February 2019, Mr Dibowitz provided an update to the board of Old Seadrill Ltd stating that:

> "*As you are all aware, we have still not yet announced the Sonangol JV.*
>
> *Documentation on Shareholders Agreement etc was all agreed last week but right before signing we had a 180 from John Kennedy /Sonangol regarding the manner in which the Representation Agreement would be disclosed. As you will recall the last iteration of this was to accomplish transparency via an Acknowledgement Letter signed by multiple Sonangol board members. Despite previous assurances from Kennedy to the contrary, Saturnino (Sonangol CEO and Chairman) was apparently unwilling to seek signatures on the Acknowledgement Letter from other board members as he views this as usurping his authority.*
>
> *We have consulted with Skadden over the past week and weekend and the path forward is to:*
>
> *1. Have Saturnino execute the Acknowledgement Letter in his capacity as CEO and Chairman of the Board*
>
> *2. Include a more fulsome disclosure than was previously planned within our 20-F. This will include language disclosing JK / Visalias role and Visalia will earn a fee that is material in relation to the revenues earned under the contracts.*
>
> *From a disclosure / transparency standpoint, this is actually a better position with respect to transparency and disclosure than what we had settled on before when the materiality of Kennedy's fees was only going to be formally acknowledged within Sonangol (and by a limited number of persons on the Sonangol board) with lighter disclosure publicly (in our 20-F).*

*You will recall that the Shareholders Agreement also includes language disclosing the role of Kennedy and that his compensation, while paid by Seadrill, is borne by the JV via the daily management fee charged.*

*This having been agreed, Sonangol have promised that they will execute the SHA today*."

103. Mr Dibowitz sent a message to Mr Thorstein stating that "*Nothing important. SHA signed per JK. Told him we were not reopening the Rep Agmt but not sure he was truly listening. Want to get the SHA in hand (Reid our new SVP will pick up tonight) and then deal with the rest*". As to this, Mr Kennedy said during his cross-examination that "*I can't be 100% correct, but he [Mr Dibowitz] called me and said that he wanted to have the physical shareholders' agreement signed and in his hand or in his company's hand and would I mind if he signed …*".

The Joint Venture (the SHA)

104. On 6th February 2019, the SHA and the Management Term Sheet were executed by Mr Saturnino on behalf of Sonangol and by Mr Dibowitz on behalf of Old Seadrill Ltd.

105. Each of Sonangol and Seadrill were to contribute two rigs to the Joint Venture. Sonangol contributed the *Libongos* and *Quenguela* rigs. The SHA did not identify the rigs to be contributed by Seadrill. To date, Seadrill has contributed only one rig to the Joint Venture ("***West Gemini***").

106. The rigs were to be bareboat chartered to the Joint Venture at a nominal rate. The Joint Venture was then to use those rigs to secure and perform drilling contracts with oil companies. Profits generated by the Joint Venture were to be shared equally between Sonadrill and Seadrill, on the basis that each of Seadrill and Sonangol were contributing two rigs to the Joint Venture.

107. Seadrill and Sonangol were each entitled to appoint two directors to the Sonadrill board. Mr Kennedy was appointed as non-voting Chairman (as recorded in clause 4.3 of the SHA).

108. Clause 14.18 of the SHA contained an express acknowledgment that Seadrill was to enter into a Representation Agreement with the Claimants to compensate Mr Kennedy

for his services in facilitating the conclusion of the Joint Venture; and that fee was to be paid out of the Daily Operating Fee. Clause 14.18 provided that:

> "*Sonangol and Seadrill have consulted with John Kennedy and his company Visalia Marketing Ltd. ("Visalia") in connection with financial and operational strategy regarding the subjects of this Agreement. Mr. Kennedy facilitated discussions between the Seadrill Parties and Sonangol in relation to the MOU and this Agreement and will be remunerated as per the representation agreement dated on or about the date of this Agreement. Seadrill will be compensated a daily operating fee by the Joint Companies in accordance with the Management and Related Activities Agreements, which covers operations and administration of the rigs, management of the Joint Company and any remuneration due to Visalia*."

109. Later, on 6th February 2019, Mr Dibowitz informed the board of Old Seadrill Ltd that the SHA had been signed and added that "*FYI only: have not yet signed the Kennedy Rep Agreement as we have not yet received the Acknowledgement Letter from Saturnino. Expect this will follow in due course*".

110. On 7th February 2019, Mr Loughlinn Kennedy sent an email to Mr Kennedy identifying "*issues*" in the Representation Agreement.

111. On 8th February 2019, Mr Dibowitz sent an email to Mr Saraiva e Silva stating that Mr Loughlinn Kennedy had been "*negotiating*" with Mr Creed and said that "*Apparently JK is of the opinion that we are willing to trade waiving the 9mos escrow of his payments in return for getting Saturnino to sign some kind (with no commitments as to form of course) of Rep Agreement acknowledgement letter*". During his oral evidence, Mr Kennedy said that he was not a party to that email and could not comment.

112. On 9th February 2019, Mr Creed sent to Mr Loughlinn Kennedy a revised draft of the Representation Agreement and added that Mr Dibowitz "*will be ready to sign this Rep Agreement Monday once Carlos has signed the side letter on behalf of Sonangol*".

113. On 11th February 2019, Mr Creed sent to Mr Kennedy, Mr Lyne and Sonangol a 90 day plan, a drilling schedule and a draft mobilisation schedule. The 90 day plan for the Joint Venture recorded that the priorities included: "*Agree terms for first drilling contract with Total. Delivery and mobilisation of the Libongos and Quenguela*".

114. On the same day, 11th February 2019, there was an exchange of messages between Mr Kennedy and Mr Dibowitz as to whether there had been an agreement beforehand that

the 9 month payment deferral provision had been agreed to be removed from the Representation Agreement, Mr Kennedy maintaining that this was a condition precedent for the signature of the SHA and Mr Dibowitz maintaining that this had been agreed and was not up for discussion.

115. On 12th February 2019, Mr Dibowitz sent a message to Mr Kennedy asking "*where are you on getting acknowledgement letter signed by Mr Saturnino?*".

116. On 14th February 2019, Mr Creed sent an email to his colleagues at Seadrill, Mr Lyne, Mr Edwards and Ms Alex Murata, referring to Mr Kennedy's email dated 5th February 2019 in which Mr Kennedy set out his conditions for his and Visalia's support in favour of the execution of the SHA, namely:

(1) "*What and how, Mr Saturnino signs in terms of disclosure is solely a matter for them to decide*": Mr Creed understood this to refer to the disclosure letter and noted that "… *we are being pushed into a narrower and narrower disclosure in Sonangol and this is Skadden's suggested potential fix*".

(2) "*The appointment of independent professional (audit, legal including FCPA overview etc) to the new JVC, Sonadrill*": Mr Creed was not certain what was being referred to, but said that "*We cannot accept anything until we know who he is recommending and why*".

(3) "*The payment of services to Visalia parri passu but subject to oversight from newly appointed advisors*": Mr Creed understood this to refer to the escrow issue: "*The first point to make is that the escrow arrangement has been recommended to Seadrill by its ABC external counsel and is seen by Management/Board as a key plank of our DD/mitigation measures. It is also a genuine requirement that has helped us get comfortable with what is, in any objective view, a high risk transaction. Whatever third party legal comment he has received is really irrelevant (actually we think it is fabricated anyway) and this is what our Board has signed off on*".

117. Later that day, Mr Edwards raised the possibility in an email to Mr Creed that "*we may need to consider would be if (and I recognise this is unlikely) we ended up going ahead without the Rep Agreement, it would presumably open up an argument from Sonangol*

*that our management fee is too high (as the fee payable to Visalia is presumably no longer relevant)"*.

118. On 15th February 2019, Mr Dibowitz sent an email to Mr Kennedy stating that:

> "*While I appreciate your efforts to find middle ground, we have conferred with counsel and unfortunately cannot agree to the below proposal sent by Loughlinn this afternoon. We obtained board approval in January on the basis that the deferral/escrow was part of the structure and we cannot agree to waive that based on the outcome of a third party opinion. I do appreciate your confirmation that Carlos has agreed to sign the acknowledgement letter and in the spirit of collaboration and compromise suggest the following in order to try and resolve your request to eliminate the deferral arrangement in the Representation Agreement.*
>
> *As suggested by you on our call this morning, Seadrill will appoint a second law firm to review the totality of the arrangement and to opine whether or not they believe the nine month escrow account itself and/or the nine months' period are appropriate or as you believe, overly conservative, considering the facts and circumstances. This will be undertaken at Seadrill's cost and as quickly as reasonably practical. Skadden will necessarily be involved in explaining the background process, due diligence and suggested mitigations. You and Mark Stein will also be afforded the opportunity to present your opinion should you wish (and may be required in any case in order to gain a full understanding of the arrangement). We will share the final opinion with you. If the final opinion suggests modification or elimination of the escrow arrangement, we undertake that we will update the draft Representation Agreement accordingly and will support the revised agreement in seeking Board approval.*"

119. On 16th February 2019, Mr Kennedy replied stating that "*the Seadrill proposal is a step in the right direction*", but made a counter-proposal concerning the appointment of the reviewing law firm. This led to Mr Dibowitz and Mr Kennedy agreeing to Seadrill retaining Covington & Burling LLP ("**Covington**").

120. In February 2019, Mr Dibowitz prepared a summary of Seadrill's operations for a board meeting stating that "… *Our newly formed JV with Sonangol, Sonadrill, is a significant win, opening up opportunities for the designated rigs, plus potentially incremental units, in an attractive benign floater market. The JV will generate incremental cash flow through the management of the two Sonangol drillships as well as opportunity for future fleet expansion …*".

The disclosure letter signed by Mr Saturnino

121. On 3rd April 2019, a UK company, Sonadrill Holding Ltd ("**Sonadrill**"), was established to act as the Joint Venture holding vehicle, in which Sonangol and Seadrill were 50/50 shareholders.

122. On 11th April 2019, Skadden and Covington discussed the Representation Agreement.

123. On 12th April 2019, a letter dated 11th April 2019 signed by Mr Saturnino was delivered to Mr John Fredriksen ("*Fridricksen*") of "*Seadrill Drilling Co*". The letter used language which Mr Kennedy proposed to Mr Saturnino on 22nd February 2019:

> "*By copy hereto, we inform you that Sonangol and it's board are aware and have worked with Mr. John Kennedy and his company, "Visalia Marketing" and are fully aware of his representation agreement and activity for and on behalf of Seadrill Drilling Co.*
>
> *Mr Kennedy enjoys the full confidence of Sonangol for many years and we encourage his relationship with Seadrill and wish both companies success in their joint activities*"

124. Following the receipt of this letter, there followed an exchange of emails between Seadrill and Skadden as to what Seadrill required in respect of the disclosure letter. In an email dated 17th April 2019 addressed to Mr Creed and Mr Lyne, Mr Dibowitz referred to his own email to Mr Kennedy dated 5th February 2019 sent immediately before the signature of the SHA where he referred to the "*path forward*" being to "*Have Saturnino execute the Acknowledgement Letter in his capacity as CEO and Chairman of the Board*" and then concluded by stating that "*This having been agreed, Sonangol have promised that they will execute the SHA today*".

Further discussions between the parties during May to December 2019

125. On 8th May 2019, Mr Saturnino was dismissed from the Sonangol board for political reasons and replaced by Mr Sebastiao Gaspar Martins as CEO.

126. On 21st May 2019, a memorandum prepared by Mr Lyne for Seadrill in respect of the proposed contract for *West Gemini* stated that:

"*It is intended that this contract will be novated to Sonadrill upon completion of the set-up of the JV and appropriate novation language will be included in the Contract.*

*We will seek approval to novate the contract from Seadrill to Sonadrill at the appropriate time, when we have more clarity around the JV and all its workings*."

127. On 28th May 2019, Mr Kennedy sent an email to Mr Dibowitz stating that:

"*The point at issue and that which has always been in contention is "whether or not a delay in payment of nine months into an escrow account" mitigated or stopped FCPA non-compliance.*

*Visalia maintained that the provision was and is irrelevant and ineffective.*

*Seadrill maintained the opposite.*

*We tentatively explored and agreed the following compromise.,*

*1. In order to get the Visalia agreement executed and allow the overall process to be finalized and concluded*

*(A) Visalia will agree to the 9 month delay pro temp.*

*(B) The nine month delay excludes the one/ off initial payment of $1.5 m.*

*(C). Any and all funds will be automatically released to Visalia after the agreed delay unless there is a non-compliant event in accordance with clause 3 of agreement. A*

*(B). However the parties, in good faith, will investigate a way to reduce the 9 month delay in payments*

*2. Visalia and Seadrill agree that upon payment of day rate income/ revenue from operator to Sonadrill (or Seadrill on behalf of Sonadrill) that the Visalia commission will be paid parri passu into a holding account controlled by a recognized UK law firm or similarly recognized professional firm or bank and be released after nine months and/ or upon the mutual agreement of Visalia and Seadrill and/or upon any corporate default by Seadrill …*"

128. Later that day, Mr Dibowitz wrote to Mr Lyne stating that "*I think we can work with it. 1 (B) refers to our discussion (as agreed with Skadden[)], that we could reconsider the 9months if the payments and agreement were fully visible to the JV*".

129. On 30th May 2019, Mr Creed sent to Mr Loughlinn Kennedy a disclosure letter to be signed by Mr Martins and other Sonangol board members. The content of the suggested letter was drafted as follows:

> "*The Undersigned acknowledge that Seadrill has entered into a Representation Agreement (attached herewith) with Visalia Marketing Ltd. ("Visalia"), a company wholly owned by John Kennedy, in connection with the establishment of a joint venture between Seadrill Limited ("Seadrill") and Empresa de Servicos e Sondagens de Angola ("Sonangol")*
>
> *The Undersigned confirm that the Board of Sonangol has reviewed the terms of the Representation Agreement as part of its approval process for the transaction and acknowledge that Mr. Kennedy provided services to Seadrill and Sonangol in relation to the MOU and the Shareholder Agreement and will be remunerated as per the Representation Agreement. This remuneration is included in the daily Management and Related Services Fee of $185,000 (per Unit), which is referenced in the Management and Related Activities Term Agreement and is paid by the Joint Companies to Seadrill and will be paid by Seadrill to Visalia*."

130. In reply, Mr Loughlinn Kennedy wrote to Mr Creed stating that "*Thanks for circulating the draft which will serve as a good starting point/basis of discussion to finalise an agreed text*".

131. On 1st June 2019, Mr Creed sent an email to himself stating that:

> *Rep letter CP's shall include:*
>
> *1. A letter from Sonangol which includes the following key points:*
>
> - *The rep agreement is attached to the letter signed by Sonangol directors*
> - *The letter is signed by four Sonangol directors [Internal Question: is the requirement really four directors? I know at one stage we were at four, but then I understand that was reduced to just the CEO when we agreed to incremental public disclosure in Seadrill's public filings]*
> - *Visalia's fee is included in the management fee which Seadrill will receive from the JV.*
>
> *2. Executed Escrow Fund agreement*"

132. During cross-examination, Mr Creed confirmed by reference to the internal question in this email that it was his "*understanding that although Seadrill had at one stage been*

*asking for four signatures, this had then been reduced to just the CEO plus the increased 20-F disclosure*".

133. On 1st June 2019, there was a telephone call between Mr Kennedy and Mr Dibowitz. In his first witness statement (at para. 51), Mr Kennedy stated that during this call "*Mr Dibowitz claimed that he was being pressurised again by his board for a four signature letter. In absolute frustration, I said I would assist and facilitate to the best of my ability but I steadfastly refused to take responsibility. I was agreeing only to get Mr Dibowitz a meeting with Mr Martins and whichever other directors came with him to present Seadrill's case about what they wanted. I was adamant and categorical that I could not guarantee one, or four, or any number of, signatures to any letter of prescribed form for the simple reason is that it was outside my control*".

134. On 2nd June 2019, Mr DiBianco sent an email to Seadrill stating that:

> "*As to the escrow itself, JK proposed a process (third law firm view from Covington) and appears not to be following through on it. From my perspective that means we are staying with the escrow as originally contemplated, no negotiation or dilution.*
>
> *As to the transparency, there is similarly no negotiating. We believe that the change in Sonangol leadership introduces elements of risk that require the original transparency that was agreed: validation of the Rep Agreement by the Chairman and three directors*."

135. On 3rd June 2019, Mr Loughlinn Kennedy sent an email to Mr Lyne stating that "*I understand that there have been conversations between Joao, yourself and my father in which Visalia's position has either been misquoted or misrepresented*", and then referring to the escrow and disclosure letter.

136. On 4th June 2019, Mr Loughlinn Kennedy sent an email to Mr Dibowitz and Mr Thorstein stating that:

> "*I think we finally arrived at a mutually satisfactory position last night and, post meeting, Visalia are convinced of Seadrill's good faith and intent to progress forward. … There were THREE outstanding matters to be resolved:*
>
> *1. 9 month payment delay*
>
> *2. Escrow account*
>
> *3. Comfort letter from Sonangol*

*Per the email below of May 28th I think we all agree that Points 1&2 are now agreed. In relation, to Point 3 — Visalia's position has always been consistent and can be summarized as follows …*

*E. J K and Visalia at NO point agreed to furnishing or being able to furnish a prescripted letter from Sonangol. Since the matter was raised, Visalia has consistently responded that such a request is unrealistic and inconsistent with NOC practice. Sonangol GC and legal team SOLELY decide and advise on these. As such, a scripted letter as a CP is doomed to failure*

*F. What we can, and agree to do, is request a letter from Sonangol recognizing the role, representation and advocacy of Visalia on behalf of Seadrill and use best endeavours to do obtain.*"

137. On 5th June 2019, the Seadrill board met with Mr Dibowitz and Mr Edwards in attendance. The minutes of the meeting recorded that:

"*The Meeting had a full and comprehensive discussion on progress with the Sonangol joint venture. There had been a series of high-level personnel changes at Sonangol, and it was now unclear whether the agency agreement would be signed under the same terms as had originally been agreed, such terms were intended to provide full transparency. In addition, the proposed agent had sought to renegotiate his own deal, which materially increased the risk to the Company.*

*Having discussed the matter in detail, the board concluded that it was important to develop a good working relationship with the new Sonangol team and, in a spirit of co-operation, work to get the deal closed. It was agreed that the CEO should have a face to face meeting with the new Sonangol team to understand the value of the agent in the new context.*

*Any proposed deviations from the original requirements of the board to satisfy transparency with the agency agreement would be brought back to the board for consideration*."

138. The "*agency agreement*" is a reference to the Representation Agreement. The Seadrill board therefore decided not to sign the Representation Agreement with the disclosure letter and escrow agreement as conditions precedent and directed Mr Dibowitz to have a face-to-face meeting with the new Sonangol team.

139. On 6th June 2019, Mr Kennedy sent an email to Mr Loughlinn Kennedy stating that:

"*At the end of day, the basic objective must be to get Rep Agreement signed which they will not do without letter. My view is that we beat them up for a while to see how malleable they are. Maybe have Felisberto give them a fake message. We ultimately need to get to a NON HOSTILE take it or leave it but with enough flexibility for Visalia to agree - kiss and make-up*."

140. Mr Kennedy was cross-examined about this email and his willingness to have others (in particular, Mr Felisberto Vieira, the joint venture drilling manager) send "*fake messages*" for him. Mr Kennedy explained this as part of "*commercial fencing*" and as a response to what Mr Kennedy described as Seadrill's "*outlandish*" and "*egregious*" behaviour in their changing demands and in their attempt to "*welch on my fee*".

141. During the course of June 2019, there were further exchanges, often involving Mr Kennedy demanding the execution of the Representation Agreement.

142. On 4th July 2019, there was a meeting held at Seatankers' offices in London between Mr Martins and Mr Baltazar Miguel of Sonangol, Mr Dibowitz and Mr Lyne of Seadrill, Mr Thorstein of Seatankers, and Mr John Kennedy and Mr Loughlinn Kennedy of Visalia. The minutes of the meeting, prepared on 7th July 2019, recorded that:

> "*JK highlighted his role in bringing the parties together and the manner of his compensation, noting for all present that:*
>
> - *Visalia Marketing (Visalia), a company 100% owned by John Kennedy, have not and will not receive any compensation from Sonangol for his role in putting together the joint venture.*
> - *He serves as a non-voting independent Chairman of the SJV board.*
> - *Visalia has a Representation Agreement with Seadrill.*
> - *Visalia will be paid by Seadrill under the terms of the Representation Agreement and this compensation is included in the daily management fee paid by SJV to Seadrill for operating the rigs on behalf of the JV.*
> - *Visalia's compensation, but not the quantum, was raised by John Kennedy on two occasions*
> - *Carolos Saturnino (then CEO of Sonangol when the SJV was negotiated and formed), Gaspar and Baltazar were / are all aware of the relationship that JK /Visalia, has with Seadrill, the SJV and the manner of his compensation*."

143. The amount of the fee to be paid under the Representation Agreement was not referred to in the minutes.

144. On 15th July 2019, the Sonadrill board decided, amongst other things, that "*Board approve Gemini/TOTAL contractual terms … and for Seadrill novation to Sonadrill novation is approved*".

145. On 16th July 2019, Seadrill Gemini Ltd and Seadrill Angola Lda entered into a drilling contract in respect of the *West Gemini* rig, which entered into effect on 28th June 2019.

146. On 25th July 2019, Mr Kennedy was appointed as the non-voting Chairman of Sonadrill.

147. On 14th August 2019, Seadrill sent execution copies of the Representation Agreement to Mr Loughlinn Kennedy. On 15th August 2019, Mr Loughlinn Kennedy returned the "*initialled*" Representation Agreement to Seadrill.

148. On 19th August 2019, as contemplated by the Management Term Sheet, a Management Services and Related Activities Agreement ("**Management Agreement**") was concluded between various Seadrill and Sonadrill entities (including Seadrill Management). Pursuant to the Management Agreement, Seadrill Management (as International Manager) and Seadrill Angola Lda (as Angola Manager) were to perform management services for the Joint Venture, for which they were to be paid the Daily Operating Fee of US$185,000 per rig per day (with lower sums for when the rig was not on contract or transitioning). Importantly, that fee was, in Seadrill's words, "*sized to cover the Agency Fee*".

149. On 3rd September 2019, Sonadrill entered into a drilling contract in respect of the *Libongos* rig.

150. On 4th September 2019, Ms Murata prepared a memorandum seeking Seadrill Management's approval to enter into the Representation Agreement and an escrow agreement and stating that:

> *John Kennedy introduced the opportunity to form a joint venture with Sonangol to Seadrill based on his relationship with current Sonangol E.P. management, who consulted with him for strategic assistance in their efforts to refinance certain rigs and to identify a partner with rig operating expertise. Kennedy has proposed entering into the Representation Agreement through a British Virgin Islands ("BVI") company, Visalia, that was established specifically for the Representation Agreement.*
>
> *The following commercial terms have been negotiated with respect to Visalia:*
>
> *1) SMAL [Seadrill Management] enters into the Representation Agreement of the same duration as the SHA;*

*2) Pursuant to the Representation Agreement, SMAL would pay Visalia an initial payment of US $1.5 million as compensation for the success and mobilization of the Joint venture and 4% of the actual revenue received by the joint venture for ongoing agency services provided by Visalia (the "Agency Fee"); and*

*3) The payments from SMAL to Visalia under the Representation Agreement will come from the operating fees SMAL receives for operating and managing the joint venture rigs under the Management and Related Services Agreement entered into by SMAL on 19 August 2019. Such operating fees are sized to cover the Agency Fee …*

*Based on the interviews and review of publicly available documents related to the Cobalt investigation, Seadrill has not identified any information or evidence that Kennedy was involved in any improper arrangements to provide value to Angolan government officials to benefit Cobalt or any other person or entity. Based on the available public information, the DOJ and SEC expended significant time and resources on the Cobalt investigation. The fact that they did not pursue further information from Kennedy or press charges against him supports his representations that he did not engage in any improper conduct in relation to Cobalt*."

151. On 4th September 2019, the board of Seadrill Management met and made the following decisions:

"*It was stated that the purpose of the Meeting was to consider and if thought fit to approve the entrance by the Company into a representation agreement (Representation Agreement) with Visalia Marketing Corp. (Visalia) and to consider the appointment of John Kennedy (Kennedy) as an agent under the terms of the Representation Agreement in relation to the Transaction.*

*Ms. Murata advised the Board that entrance into the Representation Agreement would be subject to receipt of a signed acknowledgement from Sonangol board that they have reviewed the Representation Agreement and that they are aware that Kennedy will be remunerated through Visalia, and that Visalia and Kennedy provided services to Seadrill and Sonangol in relation to the Transaction (Disclosure Letter).*

*It was confirmed that a copy of the Representation Agreement annexed hereto had previously been circulated and reviewed by the Board prior to the meeting.*

*After due consideration, it was RESOLVED that subject to the receipt of the duly signed Disclosure Letter:*

*i) the Representation Agreement as circulated to the Board be and is hereby approved as in the best interest of the Company;*

*ii) the appointment of John Kennedy as agent under terms of the Representation Agreement be and is hereby approved …*

*The Chairperson stated that the purpose of the Meeting was to consider and, if thought fit, approve the entrance into an escrow agreement (Escrow Agreement) relating to the Representation Agreement with Visalia Marketing Corp. and to consider the appointment of Law Debenture Trust Corporation p.l.c. as the escrow agent.*

*It was confirmed that a copy of the Representation Agreement annexed hereto had previously been circulated and reviewed by the Board prior to the meeting.*

*Accordingly, it was RESOLVED that:*

*i) the Escrow Agreement as circulated to the Board be and is hereby approved as in the best interest of the Company …*"

152. On 11th October 2019, Mr Dibowitz sent an email to Mr Kennedy stating that:

"*Just in case you hadn't heard, the Libongos is officially on contract with Eni as of today. This is a great milestone for the Sonadrill team. We have a achieved a lot already but of course there is plenty more still to do.*

*In that regard there is one items we really need to get closed out i.e. the Visalia Representation Agreement. I think the best forward is to arrange a meeting with Gaspar and three of his board members in order to conclude on the transparency aspects related to the agreement. As you will see in the attached scan, I requested the Seadrill board to sign a similar letter to demonstrate their knowledge and support for the process. While the meeting with Gaspar and Balthazar in London was helpful, the documentation around transparency remains outstanding and is a formal process that we need to conclude.*

*I am hopeful that when I meet with Gaspar and share the letter signed by Seadrill's board, it will demonstrate reciprocal support and transparency, i.e. we are holding ourselves accountable to the same requirements that we are asking from our JV partner. I am fully aware that this is not a simple process but with your help, I am confident that we will be able to work with Sonangol, get their support and conclude on this once and for all.*

*It is probably most efficient if I travel to Luanda so that we can maximize the number of available directors.*

*I trust I can count on your support and assistance with setting up the meetings with Gaspar.*"

153. On 14th October 2019, Ms Murata sent Mr Loughlinn Kennedy execution copies of the Representation Agreement.

154. On 15th October 2019, Mr Kennedy sent an email to Mr Dibowitz in response to Mr Dibowitz's email dated 11th October 2019, referring to what was said during the meeting on 4th July 2019 at Seatankers' offices in London. In this email, Mr Kennedy

referred to his call with Mr Dibowitz on 1st June 2019 and stated that during the call it was agreed that:

> "…
>
> - *We would attempt to have 3/4 members of the Sonangol Board of Directors acknowledge their awareness of Visalia's role plus John Kennedy being the sole beneficial owner of Visalia.*
> - *Originally, our position was that attestation by the Executive Chairman (Gaspar Martins) would be sufficient which was the primary reason for convening a meeting at Seatankers offices in London (the "Meeting").*
> - *The following people attended the Meeting: Mr Gaspar martins (Sonangol Chairman & CEO) and Baltazar Miguel (Sonangol CFO); Harald Thorstein and Mr Joao Di Silva (both Seatankers), yourself (Anton Dibowitz) and Matt Lyne (Seadrill) and John & Loughlinn Kennedy representing Visalia.*
> - *During the Meeting the role and ownership of Visalia were raised THREE times and, further, questions invited with respect to content. Additionally, Mr John Kennedy stepped out of the Meeting after you and Matt Lyne has been excused to ensure you were satisfied with the discussion and whether you required or had any further questions or information.*
> - *There can be categorically NO question that you responded in the affirmative i.e. Seadrill had no further questions and had satisfied yourselves that the necessary disclosure and transparency had been completed. However, you latterly reminded me that acknowledgement from TWO further directors was necessary.*
>
> *As communicated to Seadrill (specifically discussed with Matt Lyne on more than five occasions), these Sonangol Directors have been waiting and prepared to give this acknowledgement for the entire interim period and failure to effect such has been totally and exclusively the fault of Seadrill. Specifically, YOU who failed to turn upon at the subsequent Sonadrill Board meeting and have also failed to respond to telephonic communications …*"

155. Mr Kennedy concluded the email by referring to "*two key issues that had been agreed but are still outstanding*", namely two addendum letters, including one relating to the exercise of best endeavours to relax the 9 month deferred payment provision.

156. During cross-examination, it was put to Mr Kennedy that his evidence that there was a private meeting after the plenary meeting at Seatankers' offices between Mr Lyne, Mr Dibowitz and Sonangol, without Mr Kennedy being present, was wrong. Mr Kennedy did not agree, and stated that:

> "*I can tell you exactly what happened. As I said, the plenary meeting was in two parts. The first part was about Seadrill. Matt Lyne and Creed left. The second part was about Seatankers' interest in blocks 31 and 32. During that I stepped out and said, "Is there anything in the plenary session that you're unhappy with?". That's my custom, I do it with people all the time. Then, when the full meeting finished, they were sitting outside, they convened to the small conference room, which is beside the big conference room in Seatankers. I was excluded. Thorstein was excluded, e Silva was excluded, and the four people sat together, that is Gaspar Martins, Baltazar, ie chairman, CEO and CFO. Dibowitz, CEO of Seadrill, and Matt Lyne, who may or may not have been the commercial manager at the time. That's precisely what happened*."

157. However, I read Mr Kennedy's email as stating that Mr Kennedy, Mr Dibowitz and Mr Lyne stepped out of the plenary meeting, at which the discussion referred to in Mr Kennedy's email took place.

158. On 6th November 2019, Seadrill began to accrue Visalia's fees, in particular the US$1.5 million fee.

Discussions in 2020

159. On 14th January 2020, Ms Kristy Shires, a member of Seadrill's compliance team, sent an email to Mr Anders Hvashovd, who had been appointed as Head of Compliance at Seadrill from January 2020. In that email, Ms Shires said:

> "*Following on from our conversations today on JVs, I have a few concerns over the lack of a representation agreement (or any agreement) with the proposed agent in Angola, Visalia. John Kennedy has not signed the rep agreement, and appears to be delaying. I am unsure if there is conversation surrounding this at the moment through other functions and the exec. My immediate concern lies with the fact that there is no agreement, but we in many ways acting as if there is an agreement. JK is carrying out certain actions in relation to the JV, and we are putting money aside in preparation for a time when he will need to be paid (whether directly or through an escrow account). Even though no money has or will change hands, I am uncomfortable that we are acting as if the proposed agreement has been executed, and concerned about the potential consequences or perception if this continues for a prolonged period of time (as it may do)*."

160. Ms Shires concluded the email suggesting a meeting with Mr DiBianco of Skadden. Soon afterwards, on 2nd February 2020, Mr Hvashovd and Ms Shires met Skadden to discuss Seadrill's requirements as to the disclosure letter.

161. On 11th February 2020, Mr Dibowitz sent an email to Mr Kennedy stating that:

"*It will be good to catch up with yourself and ensure continued alignment with the Sonangol team. One takeaway of the meeting needs to be completion of the documentation needed to conclude the Visalia Representation Agreement. In order to do this both shareholders need to acknowledge, in writing, their understanding of the role of Visalia in the JV and the terms of the Representation Agreement (including payment of fees thereunder). This acknowledgment is captured in the attached letter, a facsimile of which has already been signed by the members of the Seadrill Ltd board, for the benefit of the Sonangol Board. The attached will need to be completed by Gaspar, Balthazar, Joaquim and one other board director …*"

162. On 23rd April 2020, Seadrill received a subpoena from the SEC concerning its operations in Angola and its joint venture with Sonangol. On 14th May 2020, Skadden held a teleconference with the SEC providing an overview of Seadrill's history in Angola, the joint venture with Sonangol and Seadrill's efforts to mitigate any compliance risks.

163. On 22nd May 2020, Mr Lyne wrote to Mr Kennedy (as chairman of Sonadrill) about the possibility of Seadrill filing for Chapter 11. In his email, Mr Lyne said that:

" *Should Seadrill choose to use a process such as Chapter 11 to facilitate its restructuring efforts, prior experience demonstrates that all rigs and JV operations would continue uninterrupted and business as usual throughout the proceedings. Seadrill signed close to $400m in new contracts during its last restructuring process indicating a strong commitment from customers and an acceptance of the process …*

- *Regardless of Seadrill's restructuring activities, Sonangol and Sonadrill retain their existing rights under the shareholder and / or management agreements related to termination. Seadrill will continue to adhere to the agreements and in the event of a court facilitated restructuring would affirmatively assume the management agreement as part of its normal restructuring motions, thereby confirming to Sonangol and other stakeholders that they will continue in the ordinary course of business*.

164. On 30th June 2020, Seadrill provided the SEC with further information, including in respect of the Representation Agreement, stating that there had been no threats of litigation in respect of it and, in addition,

"*The Representation Agreement with Mr. Kennedy will not be signed until certain conditions required to enter into the agreement have been met. As a result, Seadrill has not made any payments to Mr. Kennedy. The Company will inform the Commission if the Representation Agreement is signed or payments are made to Mr. Kennedy*."

165. In October 2020, Mr Dibowitz stepped down as Old Seadrill Ltd's CEO, being replaced by Mr Stuart Jackson.

166. On 10th November 2020, Mr Lyne provided Mr Kennedy by email with the draft of the disclosure letter required to be signed by Sonangol, which included a space for four signatories.

167. On 13th November 2020, Mr Kennedy sent an email to Mr Martins of Sonangol and stated, amongst other things, that "*Seadrill maintain that in order to be FCCA compliant they require execution of the attached letter. You will remember that we discussed this in london last year in the Seacontainers office …*".

168. On 18th November 2020, Mr Pimenta of Sonangol requested Mr Lyne to provide him with "*a copy of the representation agreement, the acknowledgment letter signed by Seadrill, and the cost table*", which should be presented to the Sonangol board.

169. On 9th December 2020, Mr Lyne sent Mr Pimenta a copy of the disclosure letter to be signed by four signatories on behalf of Sonangol, and a letter in the same terms but signed by Seadrill.

170. On 17th December 2020, Mr Lyne sent to Mr Kennedy by email an execution version of the Representation Agreement, the escrow agreement and the disclosure letter.

Seadrill in Chapter 11

171. On 10th February 2021, Seadrill filed for Chapter 11.

172. On 14th July 2021, Seadrill entered into a drilling contract in respect of the *Quenguela* rig.

173. On 1st October 2021, Mr Stuart Jackson, the CEO of Old Seadrill Limited, sent an email to his colleague, Ms Sandra Redding, stating that:

> "*I am meeting with John Kennedy and I am sure the topic of his contract will come up.*
>
> *My line has always been - we have an obligation to pay (we entered an agreement), he has the ability to release payments (delivery of the Skadden inspired letter). And that we jointly need to find a way through the impasse which does not help anyone …*"

174. On 15th October 2021, New Seadrill Ltd (the First Defendant) was incorporated.

175. On 8th December 2021, Seadrill prepared an internal memorandum concerning the accounting treatment of the fees which might have to be paid under the Representation Agreement. The memorandum concluded that "*Based on the accounting guidance and reading across to IFRS, Seadrill has a constructive obligation to pay the commission fee to Visalia and an accrual should be recognized on the balance sheet as at December 31, 2021*". According to Mr Creed's evidence, the accrual continued until December 2021 (Mr Creed's witness statement, para. 59).

176. On 22nd February 2022, the Seadrill group emerged from Chapter 11.

177. On the same day, 22nd February 2022, Mr Kennedy chased Mr Jackson of Seadrill and Ms Clare Edwards of Seatankers for payment of the fees he claimed. In that email, Mr Kennedy stated that:

> "*… As you know, Visalia conceived and introduced the idea of a joint venture with Sonangol in Angola in several meetings throughout 2018/19 and the subsequent joint venture between Seadrill and Sonangol was progressed and finalised under the auspices of Visalia ie myself.*
>
> *A commercial arrangement was agreed between myself (under the Visalia banner) and Seadrill and finalisation of this agreement and approval for disbursement based broadly on a 4% of dayrate formula per rig, was subject to an FCPA condition that warranted sign-off by 4 members of the Sonangol board …*
>
> *On several occasions, Visalia has requested an update as to the outstanding consultancy fees due to them and to the fact that suitable accruals were being made for these payments. Further, when Seadrill entered C 11, we and Sonangol were assured that the C 11 process did not jeopardise either the Sonangol JVC, its financial viability or Seadrills obligations thereto …*"

178. On 14th March 2022, Mr Hvashovd sent an email to Ms Redding, Mr Lyne and Mr Creed, attaching a draft memorandum for the board of New Seadrill Ltd, which stated amongst other things that:

> "*Seadrill was approached by John Kennedy in November 2018 regarding the opportunity for a joint venture with Sonangol. This led to: first, formation of the Sonadrill Joint Venture, which is described further in a separate memo presented to the Committee; and second, the negotiation of a Representation Agreement with Visalia Marketing, a company incorporated by John Kennedy …*

*To date, no agreement has been reached between Seadrill and Visalia (or any entity affiliated with Kennedy) and hence no monies or remuneration has been paid to Visalia or Kennedy to date …*".

179. Later that day, 14th March 2022, Mr Creed replied stating that:

"*… I wouldn't agree the sequencing was first formation of JV and second rep letter. The very first thing JK raised was high level terms of rep agreement. In particular, 4% of revenue. He made it very clear that rep agreement should be 4% of revenue. If we didn't want to pay that then he would not proceed with us. We agreed to the 4% subject to certain conditions being met. We then proceeded with forming the JV as second step …*

*No agreement has been signed. But there is an agreed draft rep letter that was heavily negotiated and verbal agreement that it would be executed once the transparency letter is signed by Sonangol …*

*Seadrill has earned a lucrative management fee of $185k per day during the Libongos contract …*"

180. During his cross-examination (day 3, pages 150-151), Mr Creed was asked about his email commenting on the draft memorandum as follows:

"*Q. So the basis on which Mr Kennedy proceeded with Seadrill was that Seadrill would pay him 4% of revenue, wasn't it?*

*A. That's correct, yes.*

*Q. It was only because you took that first step of agreeing to pay the 4% that as a second step you could proceed to form the joint venture; that's correct?*

*A. Correct, and of course subject to the conditions −− …*

*A. Subject to provision of the −− you mean the transparency letter?*

*Q. Yes.*

*A. Yes. If we got the transparency letter, the rep agreement was ready to be signed, and then we would owe the 4% …*"

181. On 15th March 2022, Skadden received confirmation from the SEC that its investigation into Seadrill was no longer active. The notice received from the SEC further stated that the notice "*must in no way be construed as indicating that the party has been exonerated or that no action may ultimately result from the staffs investigation*".

The disclosure letter signed by Mr Martins

182. In March 2022, Mr Jackson was replaced by Mr Simon Johnson as the CEO of Seadrill. On 17th March 2022, Ms Redding sent an email to Mr Johnson including a memorandum prepared by Mr Jackson, in which it was stated that:

> "*… As part of the Joint Venture commitment Sonangol and Seadrill are required to both contribute 2 rigs on a nominal fee bareboat charter basis. The Libongas [sic] was contributed by Sonangol in 2019 and the Quenguela in 2022 but Seadrill is still to contribute a rig to the Joint Venture. With Seadrill's emergence from Chapter 11 and the uptick in the market the pressure is now on for Seadrill to start contributing rigs and the extension of the West Gemini contract with Total Energies Angola is the first opportunity to do so. Failure to contribute a rig will put the Joint Venture arrangements at risk.*
>
> *Contributing the West Gemini to the Joint Venture will increase the current exposure Seadrill has in relation to the agent used in Angola, Visalia. This is a Seadrill, not a Sonadrill, agent although we have implemented certain requirements for the agent to deliver Sonangol acknowledgement of the agency arrangement. The board needs to be comfortable with the controls we have around commencing any payments to Visalia and the potential implications of an existing SEC subpoena relating to Angola (which may or may not include an investigation into Visalia) …*"

183. On 4th April 2022, Mr Creed sent to Mr Kennedy a draft disclosure letter to be signed by four representatives of Sonangol, stating "*As discussed this morning, see attached draft disclosure agreement for Angola*".

184. On 6th April 2022, a Sonadrill board meeting was held in Luanda attended by Mr Kennedy, as chair, Mr Creed and Mr Renato Moure of Seadrill and representatives of Sonangol, together with Mr Hvashovd. Mr Hvashovd explained in his evidence that he had a private meeting with Mr Pimenta of Sonangol to discuss the disclosure letter. That day, Mr Kennedy sent Mr Pimenta a copy of the disclosure letter to be signed.

185. On 25th April 2022, Seadrill prepared an internal memorandum dealing with the agency fee claimed by Visalia, stating that:

> "*Seadrill has discontinued accruing for agent commission in Angola and will hold a $6.6 million loss contingency on the balance sheet to cover the potential settlement that may result from Seadrill not entering the previously negotiated agent agreement …*
>
> *In February 2019 Seadrill and Angolan parastatal, Sonangol E.P. ("Sonangol"), formed joint venture ("JV") Sonadrill to operate four drillships …*

*At the same time, Seadrill negotiated terms for an agency agreement with ("Visalia"). Under the negotiated terms of the agreement, Visalia would have been due a $1.5m flat fee at the start of the relationship plus 4% of Sonadrill revenue as an agency commission. The agreement included certain conditions precedent including, but not limited to, written confirmation from several members of the Sonangol Board of their acknowledgement of this arrangement in the context of the joint venture. As of the time of writing, Visalia have not provided the requested confirmation from Sonangol and, as a result, the agency agreement has not been presented to Seadrill's board for execution.*

*The joint venture commenced operations in October 2019, and the requirement has still not been met as of the time of writing. This raises a serious question of whether Visalia would ever be able to comply with this requirement and whether, considering the passage of time, the new Seadrill Board would still enter the arrangement even in the event that Visalia were able to meet it at some point in the future.*

*In the view of Seadrill's Executive Management team, the most likely outcome is now that the agency agreement will not be executed, but that a commercial settlement may take its place*."

186. On 6th May 2022, Mr Hvashovd sent an email to Mr Pimenta referring to their discussion of the disclosure letter in April 2022 and asked whether there had been any development in relation to this on Sonangol's side.

187. On 9th May 2022, Mr Martins of Sonangol signed the disclosure letter in the following terms:

"*The Undersigned acknowledge that Seadrill has entered into a Representation Agreement (attached herewith) with Visalia Marketing Ltd. ("Visalia"), a company wholly owned by John Kennedy, in connection with the establishment of a joint venture between Seadrill Limited ("Seadrill") and Empresa de Services e Sondagens de Angola ("Sonangol").*

*The Undersigned confirm that the Board of Sonangol has acknowledge [sic] the existence of the Representation Agreement and that Mr. Kennedy provided services to Seadrill and Sonangol in relation to the MOU and the Shareholder Agreement and will be remunerated as per the Representation Agreement. This remuneration is included in the daily Management and Related Services Fee which is referenced in the Management and Related Activities Term Agreement and is paid by the Joint Companies to Seadrill and will be paid by Seadrill to Visalia.*

*This letter is forwarded to you in compliance with the Foreign Corrupt Practices Act (FCPA) legislation and Angolan Compliance regulation*."

188. The disclosure letter was not signed by any other representative of Sonangol.

189. On 12th May 2022, Mr Pimenta sent a message to Mr Kennedy stating that the letter had been signed by the chairman of Sonangol. On 22nd June 2022, Mr Pimenta sent a copy of the disclosure letter to Mr Kennedy.

190. On 27th June 2022, Mr Pimenta sent the signed disclosure letter to Mr Creed by an email message which appears to have been drafted by Mr Kennedy:

> "*As requested by you, the board of directors of Sonangol has considered your request to acknowledge the role of Visalia and John Kennedy.*
>
> *The board of Sonangol duly considered this matter in open session and it's conclusion and position is outlined in the attached letter signed by our Chairman, Mr Gaspar Martins, on behalf of the board.*
>
> *With Sonangol and Angolan law there is no precedent for any further signature save the acknowledgement by the board as stated*."

191. On 1st July 2022, the drilling contract in respect of the *West Gemini* rig was novated from Seadrill to Sonadrill.

192. On 26th July 2022, the following was recorded in the minutes of the Sonadrill board meeting:

> "*… JF [Joaquim Fernandes] stated that Sonangol has some concerns with the joint venture. The JV is meant to operate with four drilling units and we currently only have two drilling units from Sonangol with the West Gemini only entering the JV on 1 July 2022. Sonangol only realised a few weeks ago that the West Gemini was not part of the JV when it was meant to be the first drilling unit in the JV …*"

193. On 16th September 2022, Mr Pimenta sent an email to Mr Creed asking if there was "*any update*" in respect of his email dated 27th June 2022.

194. On 7th October 2022, after prior consultation with Sonangol, Mr Johnson of Seadrill wrote to Sonangol noting that Mr Kennedy's appointment as chairman of Sonadrill expired on 25th July 2022 and that Seadrill did not wish to renew that appointment. On 19th October 2022, Mr Martins of Sonangol wrote to Mr Johnson confirming Sonangol's agreement not to renew Mr Kennedy's appointment as chairman of Sonadrill. On 21st October 2022, Mr Hvashovd acting as a director of Sonadrill wrote to Mr Kennedy to inform him of Sonadrill's shareholders' decision.

**The issues to be addressed**

195. Against the background of this factual chronology, the following issues are to be determined:

(1) Are the Claimants entitled to damages for breach of contract in the sum of the Fee?

(2) Alternatively, are the Claimants entitled to restitution on the grounds of unjust enrichment?

(3) Alternatively, are the Defendants under an obligation to account to the Claimants as trustees?

(4) If there is an entitlement in answer to questions (1), (2) or (3), is New Seadrill Ltd - the First Defendant - legally liable? There is no dispute about Seadrill Management - the Second Defendant - being legally liable if the Claimants have an entitlement to relief.

(5) What is the quantum of any sum recoverable by the Claimants?

196. I shall address each of these issues in turn. In doing so, I consider the arguments advanced by the parties which I think were critical to the determination of the above issues.

**Claim in contract**

197. The Claimants claim damages for breach of contract subject to the terms of the Representation Agreement, subject to a condition relating to the FCPA disclosure letter.

198. The question therefore is whether there was a binding contract between the Claimants on the one hand and Old Seadrill Ltd and Seadrill Management on the other hand, bearing in mind that there was no signed Representation Agreement.

<u>The legal principles</u>

199. In *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601, at 619, Lloyd, LJ said:

"*As to the law, the principles to be derived from the authorities, some of which I have already mentioned, can be summarized as follows:*

*(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole …*

*(2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary 'subject to contract' case.*

*(3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed …*

*(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled …*

*(5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.*

*(6) It is sometimes said that the parties must agree on the essential terms and it is only matters of detail which can be left. This may be misleading, since the word 'essential' in that context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by 'essential' one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge, "the masters of their contractual fate". Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called "heads of agreement" …*"

200. In *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co KG* [2010] UKSC 14; [2010] 1 WLR 753, Lord Clarke adopted the principles set out in *Pagnan v Feed Products* as applicable to the formation of contracts whether in writing and/or orally and said at para. 45-48 and 54:

*45. The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.*

*46. The problems that have arisen in this case are not uncommon, and fall under two heads. Both heads arise out of the parties agreeing that the work should proceed before the formal written contract was executed in accordance with the parties' common understanding. The first concerns the effect of the parties' understanding (here reflected in clause 48 of the draft written contract) that the contract would "not become effective until each party has executed a counterpart and exchanged it with the other"—which never occurred. Is that fatal to a conclusion that the work done was covered by a contract? The second frequently arises in such circumstances and is this. Leaving aside the implications of the parties' failure to execute and exchange any agreement in written form, were the parties agreed upon all the terms which they objectively regarded or the law required as essential for the formation of legally binding relations? Here, in particular, this relates to the terms on which the work was being carried out. What, if any, price or remuneration was agreed and what were the rights and obligations of the contractor or supplier?*

*47. We agree with Mr Catchpole's submission that, in a case where a contract is being negotiated subject to contract and work begins before the formal contract is executed, it cannot be said that there will always or even usually be a contract on the terms that were agreed subject to contract. That would be too simplistic and dogmatic an approach. The court should not impose binding contracts on the parties which they have not reached. All will depend upon the circumstances …*

*48. These principles apply to all contracts …*

*54. … Each case depends upon its own facts. We do not understand Steyn LJ to be saying [in G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25] *that it follows from the fact that the work was performed that the parties must have entered into a contract. On the other hand, it is plainly a very relevant factor pointing in that direction. Whether the court will hold that a binding contract was made depends upon all the circumstances of the case, of which that is but one …*"

201. In order to conduct this assessment, the Court should examine the whole course of the parties' exchanges, both before and after the alleged date of contracting (*Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37; [2017] 4 WLR 163, para. 28-31). In *Blue v Ashley* [2017] EWHC 1928 (Comm), Leggatt, J said at para. 64:

"*What is accepted by counsel on both sides is that where, as here, the court is concerned with an oral agreement, the test remains objective but evidence of the subjective understanding of the parties is admissible in so far as it tends to show whether, objectively, an agreement was reached and, if so, what its terms were and whether it was intended to be legally binding. Evidence of subsequent conduct is admissible on the same basis. In the case of an oral agreement, unless a recording was made, the court cannot know the exact words spoken nor the tone in which they were spoken, nor the facial expressions and body language of those involved. In these circumstances, the parties' subjective understanding may be a good guide to how, in their context, the words used would reasonably have been understood. It is for that reason that the House of Lords in Carmichael v National Power Plc [1999] 1 WLR 2042 held that evidence of the subjective understanding of the parties is admissible in deciding what obligations were established by an oral agreement*."

202. These decisions and the principles referred to in them demonstrate that in reviewing the evidence, which to a large extent comprised contemporaneous written communications, the Court should ask and answer the straightforward question whether or not there has been a binding contract agreed between the parties having regard to the following considerations:

(1) In determining whether the parties have agreed to a contract which creates legally binding rights and obligations, it is relevant to consider:

(a) The extent to which the parties have achieved a consensus as to the terms, and the absence of terms, of the proposed transaction and whether there are any terms, or an absence of terms, where the parties are not in agreement. This consensus might be achieved by a simple offer followed by an acceptance, but the exchanges and negotiations between the parties might be more fluid than a simple sequential offer and acceptance analysis might allow, in which case it is a case of determining the measure of agreement between the parties as to the terms of the putative contract at a particular point of time and whether that measure of agreement is sufficient to give rise to a contract.

(b) Whether the parties intended to create legal relations with the result that they are bound by what they have agreed. Such an intention may exist even if the parties have not achieved an absolute consensus of the terms of the proposed contract. Further, the parties may have intended not to

create legal relations at a particular point in time even if they have agreed all of the terms of the proposed contract.

(2) The inquiry as to whether the parties have achieved a consensus as to the terms of the proposed contract and whether they have intended to create legal relations is ultimately an objective one.

(3) In pursuit of this inquiry, the Court will have to consider the evidence available, which may comprise signed agreements or other documents, an exchange of written communications between the parties or others, communications and records internal to one party, and the oral evidence of the parties concerned or third parties (for example what was said during a meeting or during a call). The documentary and oral evidence to be considered may have been created before or after the time of the alleged contract, but the evidence must be considered in light of how they bear, if at all, upon the moment of the alleged contract.

(4) Insofar as it is alleged that the contract was concluded orally and not in writing, the Court should consider the contemporaneous written documentation and exchanges which might evidence that oral agreement. The parties' own subjective intentions or understandings may be considered in order to assist in determining how the parties' statements or conduct might have been reasonably interpreted or understood. The value of such evidence is potentially more significant if one party's subjective intentions or understandings were known or communicated to the counterparty. It is important that the Court consider the objective nature of the inquiry when considering such evidence.

(5) It is relevant to consider the extent to which the terms of the transaction have plainly been agreed and what terms have not been agreed and why such terms have not been agreed at any particular point in time (for example, because the discussions between the parties are ongoing, or because there is a barrier to further agreement from another quarter, or because the parties have decided upon a course of action, agreeing to leave over the agreement of certain terms).

(6) Insofar as any terms have not been agreed between the parties, the Court should examine whether they are terms of significance in the sense that they are, from the parties' perspective, crucial to the existence of a binding agreement and, if

so, whether the lack of any agreement of such terms would have been considered to be an obstacle to the parties reaching an ultimate consensus.

(7) The Court should consider whether the parties intended to be contractually bound by the terms which have been agreed or whether the parties have signified their intention that they should not be bound unless and until further steps are taken, for example the agreement of further terms, the formalisation of the agreement in a written document signed by the parties or the use of terms such as "*subject to contract*".

(8) It is relevant to consider whether works or services under or related to the alleged contract have been commenced, and if so to what extent, including whether it would have been understood that the alleged contract should or should not have been in place prior to the commencement of such work or services. The fact that such works or services have been commenced with the concurrence of the relevant parties is, *prima facie*, an indication that the parties considered themselves bound by contract; that said, there may be circumstances which militate against such a possibility.

203. Although the ultimate aim of the inquiry to be undertaken by the Court is clear - that is to determine whether the parties have agreed terms or sufficient terms of a proposed contract with the intention to create legal relations - the approach to be adopted by the Court must be sufficiently flexible to allow for the facts and the exigencies of the particular case.

<u>The Claimants' submissions</u>

204. The Claimants' case was that there was a contract in the terms of the Representation Agreement concluded on 5th February 2019. The Claimants originally submitted that there was a binding contract concluded in November 2018, but that was not a case which the Claimants pursued at trial.

205. There was a potential dispute between the parties as to whether the Claimants had adequately pleaded their case based on a binding contract concluded on 5th February 2019 and a breach of that contract. However, by reason of an updated Particulars of Claim having been served, this was no longer an issue by the conclusion of the trial.

206. Ms Emily Wood KC, on behalf of the Claimants, submitted that:

(1) Mr Kennedy did not take the risk that, in the event Seadrill entered into the Joint Venture with Sonangol, he would receive no payment for his services, provided a disclosure letter (in no prescribed form) was signed by the Sonangol CEO alone. Instead, it was Seadrill who took the risk that, having entered into the Joint Venture on this basis, they would have to pay Mr Kennedy, even if they subsequently took the view that they wanted some further or other transparency mitigation or decided they no longer wished to pay Mr Kennedy for other reasons.

(2) From their first meeting with Seadrill and Seatankers in November 2018, and afterwards, Mr Kennedy made it "*crystal clear*" that his fee of 4% of drilling revenues was a part of the price to be paid to enter into the Joint Venture. Seadrill's pursuit of the deal was on those agreed terms. This was recognised by Mr Dibowitz in his memorandum to the Seadrill Board on 15th January 2019 when he wrote that "*A key risk to the transaction is the requirement to enter into a revenue fee based representation agreement with John Kennedy (a very experienced and credible oil & gas executive)* …".

(3) As a result of this agreement,

(a) Seadrill ensured that the Daily Operating Fee of US$185,000 was sized to accommodate the Fee.

(b) Clause 14.18 of the SHA expressly provided that Mr Kennedy "*will be remunerated as per the representation agreement dated on or about the date of this Agreement*".

(c) Until the end of January 2019, Seadrill and Mr Kennedy both envisaged that the SHA and Representation Agreement would be signed at the same time. The Seadrill Board approved these documents as a package.

(4) Both parties understood and agreed that it was not open to Seadrill to enter into the Joint Venture without meeting the requirement to enter into the Representation Agreement and paying Mr Kennedy for his services.

(5) That agreed requirement remained in place at the time when Seadrill entered into the Joint Venture by executing the SHA on 6th February 2019. The only reason that Seadrill asked Mr Kennedy on 31st January 2019 for the SHA to be executed in advance of the Representation Agreement was that Seadrill was anxious for the SHA to be executed urgently for the purposes of doing a deal with Total. On 5th February 2019, Mr Kennedy agreed to this, but only on terms, agreed between Mr Kennedy and Mr Dibowitz in their call and emails of that day, that the Representation Agreement would be executed and Mr Kennedy's fees would be payable upon Sonangol's CEO (alone) signing a disclosure letter (in no prescribed form). That term having been agreed, Mr Kennedy said he would "*support and progress the execution of the SHA*".

(6) Accordingly, on the same day, 5th February 2019, Mr Dibowitz informed the Seadrill Board: "*This [i.e. the single signature disclosure letter] having been agreed, Sonangol have promised they will execute the SHA today*". They duly did.

(7) The exchanges between Mr Dibowitz and Mr Kennedy on 5th February 2019 demonstrate that Mr Dibowitz understood that it was a requirement to obtain Mr Kennedy's agreement as to the terms on which the Representation Agreement would be executed and the Claimants paid their Fee in order to obtain the execution of the SHA. Those exchanges were very far from being an informal discussion as to how the Representation Agreement might or might not be progressed after the conclusion of the SHA. To the contrary, both sides understood that agreement on this issue was required in order for Seadrill to enter into the Joint Venture at all.

(8) While both parties understood that, before proceeding with the Joint Venture, Seadrill would wish to investigate and mitigate the FCPA risks associated with the Joint Venture, and that Seadrill might decline to proceed with the transaction if they could not get comfortable with those risks, both Seadrill and Mr Kennedy considered that the SHA would not or could not be executed without agreement first being reached as to the transparency requirements necessary to payment of the Fee.

(9) The fact that, a number of months later, Seadrill unilaterally sought to backtrack on this agreement, and purported to resurrect their previous demand for the disclosure letter to be signed by four representatives of Sonangol does not alter or negate the existence of their prior agreement.

(10) For all these reasons, by 5th February 2019, there was a binding agreement between Mr Kennedy (on his own behalf and on behalf of his vehicle Visalia), Old Seadrill Limited and Seadrill Management as follows: if the SHA was executed, the Claimants would receive payment of the Fee, subject only to the provision of a disclosure letter signed by the CEO of Sonangol (alone) with no commitment as to the form of that letter ("**the Fee Condition**").

(11) This is consistent with the manner in which the Defendants explained their position at para. 140(a) of their trial skeleton argument, save for the words in parentheses as to the text of the disclosure letter, in stating that "*In the event, it was agreed with Mr Kennedy that, given his concerns about disclosing his remuneration widely within Angola, adequate transparency could instead be achieved through the provision of an approved Disclosure Letter (the text of which had been agreed with Mr Kennedy), initially on the basis that this would be signed by Mr Saturnino and three other board members, but eventually on the basis that a single signature from Mr Saturnino would (in the context of the Sonangol Board as then constituted) do, along with a more fulsome disclosure in Seadrill's F-20 [sic]*".

(12) There was no agreement that the disclosure letter to be signed on behalf of Sonangol had to be in a particular form.

(13) The question for the Court is not whether the Defendants did or did not successfully mitigate any FCPA risk, but whether there was a contract. In any case, the Defendants' submission that Seadrill's obligations and exposure under the FCPA was a central feature of their not having concluded an agreement with the Claimants is wrong, because the experts agreed that there was at least a risk of a violation by Seadrill of the FCPA if there were a relevant concern in respect of Mr Kennedy (joint memorandum), and because, as Ms Brockmeyer stated (at para. 55 of her expert's report) although transparency is an important risk

mitigation feature, there was no prescribed method which reduced that risk to zero; and because, as Mr Dibowitz put it in his message dated 2nd February 2019 to Skadden, there were "*no bright lines*".

(14) The Defendants' submission that the transparency requirements of the FCPA would be left at large is wrong because (a) it is contrary to Mr Dibowitz's assertion on 5th February 2019 that Mr Kennedy had resiled from the "*manner*" of disclosure which had been agreed and which Mr Dibowitz then resolved by informing the Seadrill board of an agreement to have the disclosure letter signed by Mr Saturnino and the appropriate 20-F filing, (b) the accord reached on 5th February 2019 was intended to break the impasse on the manner of disclosure, and (c) it would be commercially absurd to leave this open while Seadrill concluded the SHA and proceeded with the operation of the Joint Venture.

(15) Although, after 5th February 2019, Seadrill and Mr Kennedy continued to debate other features of the Representation Agreement, and in particular whether or not to include the escrow provisions in the Representation Agreement, that does not undermine the parties' intention to be contractually bound by the Fee Condition by 5th February 2019.

(16) There can be no question that the parties had agreed upon the essential terms of their contract (and, indeed, there is no suggestion from the Defendants that the terms of the Fee Condition are too uncertain to be enforceable). The core bargain that Mr Kennedy or his vehicle would be paid 4% of drilling revenues if the Joint Venture came to fruition was settled from his first approach to Seadrill.

(17) As regards the parties to the contract:

(a) Mr Kennedy contracted on his own behalf (as the provider of the services) and on behalf of Visalia (as the intended counterparty to the Representation Agreement and recipient of payment).

(b) One or both of Old Seadrill Limited and Seadrill Management were the counterparties:

(i) Old Seadrill Limited is a natural counterparty to any agreement with the Claimants: Mr Kennedy conducted his discussions in relation to the Joint Venture and the Fee with Old Seadrill Limited office-holders (most obviously Mr Dibowitz, as company CEO), and it was always intended (and came to pass) that Old Seadrill Limited would be Sonangol's Joint Venture partner and a signatory to the SHA. In January 2019, the Seadrill Board had appointed Visalia "*as the agent to the Sonangol JV*", and given Mr Dibowitz a wide-ranging mandate to negotiate and conclude agreements related to the Joint Venture.

(ii) Seadrill Management was the Seadrill subsidiary selected to be party to the Representation Agreement and payor of the Fee and thus, again, a natural counterparty to the Fee Condition. It was the officers of Old Seadrill Limited who acted on its behalf in negotiations as to the conclusion of the Representation Agreement and payment of the Fee.

(18) The conditions to payment agreed by the parties, namely that (i) the SHA would be executed, and (ii) Seadrill would obtain a disclosure letter signed by the Sonangol CEO (alone), were both satisfied, the latter by Seadrill's receipt of the disclosure letter signed by Mr Saturnino on 11th April 2019 and/or the disclosure letter signed by Mr Martins dated 9th May 2022.

(19) Old Seadrill Limited and Seadrill Management have obviously breached the contract: the Claimants have not received payment of any part of the Fee, and the Representation Agreement has not been executed.

The Defendants' submissions

207. Mr Alexander Gunning KC, on behalf of the Defendants, submitted that:

(1) Mr Dibowitz was not authorised to conclude the Representation Agreement with Mr Kennedy. On the contrary, the approval of the board of Old Seadrill on 15th January 2019 was limited to entering into the then draft of the Representation

Agreement including an escrow arrangement and Mr Kennedy's fee being made transparent to all parties to the SHA.

(2) Mr Dibowitz did not have any relevant apparent authority to make the alleged agreement to pay the Fee, because Mr Kennedy was (or ought to have been) aware of the basis on which the Seadrill Board had approved the proposed transaction with him, because Mr Dibowitz had communicated that to him on 31st January 2019.

(3) There was no binding agreement between Seadrill and Mr Kennedy that Mr Kennedy would be paid the Fee, because:

(a) The language of the emails on 5th February 2019 do not refer to an agreement of the nature alleged. Mr Kennedy's email dated 5th February 2019 refers to unidentified "*verbal assurances*", to what Mr Saturnino will do and a promise that Mr Kennedy will not "*attempt to influence that*", and to the appointment of an independent professional and *parri passu* payments that are so imprecise as to be incapable of application.

(b) Mr Kennedy's email does not contain any discernible performance obligation on the part of Seadrill.

(c) Mr Dibowitz did not accept Mr Kennedy's terms.

(d) Mr Dibowitz consistently maintained that Seadrill required transparency to Sonangol as to the arrangements with Mr Kennedy and the reference to such transparency in Mr Dibowitz's email of 5th February 2019.

(e) Had such a binding agreement been made, the Representation Agreement ought to have been capable of being signed there and then. A highly developed draft of that agreement had been circulated, including escrow agreement provisions, to which Mr Kennedy appeared previously to have agreed. However, the Representation Agreement was not in fact signed.

(f) Mr Kennedy's case is that there was no requirement as to the form of the relevant disclosure letter, yet Mr Dibowitz's email required the letter to

be in the form that had been previously agreed. Such a wording had been previously agreed in the form drafted by Skadden and shared with Mr Kennedy (in the Defendants' closing submissions, at para. 115(e), reference was made to the draft sent by Mr Creed to Mr Edwards and Mr DiBianco on 17th January 2019). Even if that were not the case, the words "*previously agreed*" would have to be given some meaning and would naturally be taken to mean in a form previously agreed with Seadrill.

(g) There was no resistance from Mr Kennedy or Mr Loughlinn Kennedy to Mr Creed stating that the Representation Agreement would be signed once the Disclosure Letter had been signed.

(h) Mr Kennedy sought to treat one of the elements of the Representation Agreement, namely the payment deferral provision (that was regarded as an important mitigation by the Seadrill Board), as ripe for renegotiation. Mr Kennedy's response explicitly rejected a fundamental protection that was required by Skadden and signed off by the Seadrill board, namely that payments to Mr Kennedy would be held in escrow for 9 months.

(i) Indeed, Mr Kennedy clearly did not agree to execute the Representation Agreement on the terms as they stood on 5th February 2019 and rejected any proposal in this respect in his email of the same day by demanding that Seadrill drop its requirement for monies to be held in escrow.

(j) The emails exchanged between Mr Kennedy and Seadrill in February 2019 do not express the acceptance of any offer, but rather disagreement on significant elements of the representation agreement. This is not a case in which it can be argued that the parties had on 5th February 2019 reached a core agreement on the central nature of their relationship with agreement to resolve other matters of economic significance in due course. It is a case in which there was no meeting of minds as to the two matters that were of significance, namely (a) the nature of the proposed

letter required and (b) the other central protection required by Seadrill, namely the withholding of payments to Mr Kennedy.

(4) Even if there was an assurance given by Seadrill that Mr Kennedy would be paid the Fee, it is not likely that would have been intended to be binding, because for Mr Dibowitz to have given such a binding assurance of the kind alleged, before any Representation Agreement was signed and before any disclosure letter was received, would fly in the face of (a) all the communications between Mr Dibowitz and Mr Kennedy up to that point, in which it was repeatedly made clear to Mr Kennedy that Seadrill would only pay him under a signed Representation Agreement after the required transparency and FCPA mitigations had been put in place; (b) the detailed negotiations with Mr Kennedy up to that point regarding the terms of the representation agreement; (c) the extensive and laborious internal discussions within Seadrill, and between Seadrill and Skadden, regarding the need for transparency to be achieved before any commitment to pay Mr Kennedy was entered into; and (d) the fact that the Seadrill Board, in accordance with Mr Dibowitz's own memorandum and the advice set out in the Skadden Memorandum, had only approved a transaction that involved a signed representation agreement and Mr Kennedy's fee be made transparent to the parties to the SHA.

(5) It is inconceivable that on 5th February 2019, Mr Dibowitz agreed with Mr Kennedy that Seadrill would pay him 4% of the Contract Revenue on receipt of a single-signature disclosure letter.

(6) By 10th January 2019, the parties had identified the Second Defendant, Seadrill Management, as the proposed counterparty to the draft Representation Agreement. That being so, it would be the correct defendant to a claim for breach of contract. The Claimants' principal case under the alleged February 2019 Contract seems to be made against Seadrill Limited (the First Defendant). There is no basis for thinking that the First Defendant was or became a party to that contract, because it did not exist in February 2019 and nobody envisaged that Old Seadrill as being the counterparty to an agreement with Visalia at that time.

(7) Even if there were a binding contract, there has been no breach, because the Fee Condition as alleged by the Claimants had not been satisfied:

(a) The disclosure letter dated 11th April 2019 signed by Mr Saturnino did not follow the wording that had been proposed to Mr Kennedy in relation to the disclosure letter and was anomalous in a number of respects, in that it was addressed to the non-existent "*Seadrill Drilling Co*" and "*John Fridricksen*". Although it expressed full awareness of a supposed "*representation agreement*" with that entity, it neither attached the agreement nor referred to any review of its terms. Both FCPA experts appear to take the view that the document was inadequate, agreeing in the experts' joint memorandum that "*the letter signed by Mr Saturnino would not itself have achieved the desired transparency that Seadrill would have wanted through its diligence process*".

(b) Shortly afterwards Mr Saturnino was dismissed from Sonangol and a new Board was appointed. Skadden accordingly advised Seadrill that a fresh due diligence exercise was required on the new Sonangol Board, and advised the reinstatement of the requirement for the disclosure letter to be signed by four Sonangol Board members.

(c) On 23rd April 2020, Seadrill received a subpoena from the SEC in relation to the Sonadrill Joint Venture. In his presentation to the SEC, Mr DiBianco of Skadden made express reference to the need for the disclosure letter to be signed by no less than four members of Sonangol's Board and, following a request from the SEC at this meeting, Seadrill confirmed in subsequent dealings with the SEC that it would advise them if the Representation Agreement was executed or payment was made to Mr Kennedy. On 15th March 2022, the SEC informed Skadden that, based on the information received, they did not intend to recommend enforcement action, but that this should not be construed as exoneration or that no action might ultimately result.

(d) The disclosure letter dated 27th June 2022 signed by Mr Martins was sent to Mr Creed more than a month after it was signed, it referred to an

"*attached*" representation agreement that was not attached, it did not refer to Sonangol having reviewed the Representation Agreement and was not signed by any other directors. Seadrill and Skadden did not consider that this complied with Seadrill's requirements.

(8) It should be inferred that Mr Kennedy was involved in the production of a document provided to Sonangol that falsely understated the fee so that Sonangol was never aware of the true quantum, having regard to the following considerations:

(a) On 17th December 2020, Mr Kennedy sent a copy of the Representation Agreement to Ms Francesca Turrell of Gemcorp, who returned an "*execution version*" of the Representation Agreement with the message "*Visalia Contract for transmission to Mr Gentil of Sonangol*". That version had been edited to reduce the initial fee to US$15,000 (a reduction by a factor of 100) and the monthly percentage fee at clause 3 to 0.4% of actual Contract Revenue (a reduction by a factor of 10).

(b) Mr Kennedy could not provide a credible or honest explanation for this change. He attempted to suggest, having first appeared not to recall the episode, that Ms Turrell had requested the document as a template for Gemcorp to use for its own purposes. In addition to there being no support for it in the documents, Mr Kennedy's explanation made no sense. Had that indeed been the background to this exchange, Ms Turrell would not have kept the parties' names unchanged, while only revising the quantum of the fees downwards. Nor would she have been referring to it as for transmission to Mr Pimenta in that form.

(c) The only plausible explanation for what happened on 17th December 2020 is that Mr Kennedy had taken charge of responding to Mr Pimenta's request for a copy of the Representation Agreement and, to avoid revealing the quantum of Visalia's fees to Sonangol, a dishonestly edited version of it was prepared. That was the opposite of providing transparency.

(d) There is no evidence of any other version of the Representation Agreement having been provided by Mr Kennedy to Sonangol, nor of Mr Kennedy having identified the quantum of his fee to Sonangol.

Analysis

208. Having considered the evidence and the parties' submissions, I have come to the conclusion that there was a binding contract in place as at 5th February 2019, immediately before Old Seadrill Ltd executed the SHA with Sonangol.

209. The parties to the contract were (and are) Visalia, not Mr Kennedy, and Seadrill Management, not Old Seadrill Ltd. That is because at all material times the parties contemplated that Visalia and Seadrill Management would be the contracting parties. Of course, I understand Ms Wood KC's submission that the Representation Agreement was negotiated with Mr Dibowitz of Old Seadrill Ltd and that Old Seadrill Ltd was the party to the Joint Venture arrangements and would benefit from the payment of the Daily Operating Fee for the rigs, but the fact remains that the parties' consistent focus was on Seadrill Management being the relevant contracting party and that was at no point altered up until 5th February 2019.

210. The contract was such that Seadrill Management was obliged to pay and account to Visalia in respect of the promised remuneration provided for under the Representation Agreement, namely US$1,500,000 upon execution of the SHA and 4% of the Contract Revenue to be paid in accordance with the escrow arrangements set out in the draft Representation Agreement which had been circulated beforehand, although this escrow arrangement was subsequently discussed and resolved. However, the obligation to pay the remuneration to Visalia was conditional on Sonangol signing the disclosure letter by the CEO of Sonangol (and not by three or four signatories on behalf of Sonangol). As referred to below, the said letter was specifically agreed to be signed by Mr Saturnino on behalf of Sonangol. However, after he ceased to be CEO of Sonangol, it seems to me that the parties must have understood and agreed that a letter signed by a successor to Mr Saturnino as CEO on behalf of Sonangol would satisfy this condition.

211. Upon the satisfaction of the condition, the obligation on Seadrill Management was to execute the Representation Agreement and comply with its terms, which would include the payment of the remuneration to Visalia provided for under the Representation

Agreement. If that is wrong, the contract required the payment of the remuneration provided for under the Representation Agreement without execution of the Representation Agreement.

212. I return to the question whether the condition was satisfied below.

213. My reasons for coming to the conclusion that there was a binding agreement are as follows.

214. First, drafts of the Representation Agreement were exchanged between the parties during the course of January 2019. By the end of January 2019, the terms of the draft Representation Agreement were agreed. I note that the draft Representation Agreement sent by Mr Creed to Mr Kennedy on 24th January 2019 raised some concerns for Mr Loughlinn Kennedy, which he shared with Mr Kennedy, but these were not pursued by Mr Kennedy with Seadrill.

215. At this point, the end of January 2019, it was only the disclosure letter to be signed by Sonangol which held up the execution of the Representation Agreement. On 28th January 2019, Mr Dibowitz informed his colleagues at Seadrill that the matter of the disclosure letter was all that was preventing the immediate signature of the Representation Agreement: "*We will likely not sign the rep agreement tomorrow because they have not secured sign-offs on the Board Acknowledgement Letter*". On 29th January 2019, Mr Dibowitz wrote to Mr Kennedy that it "*Looks like we are very close to finish line …*". On 31st January 2019, Mr Dibowitz informed Mr Kennedy about the importance of the issue of transparency and stated that "*The document is agreed and signed off by our Board … We're almost there, we just need the final push to get the documents over the line so that we can get onto getting the JV up and running*". On 9th February 2019, Mr Creed informed Mr Loughlinn Kennedy that Mr Dibowitz would be ready to sign the Representation Agreement once Mr Saturnino signed the disclosure letter on behalf of Sonangol. On 4th September 2019, the minutes of a meeting of the board of Seadrill Management recorded that "… *Ms. Murata advised the Board that entrance into the Representation Agreement would be subject to receipt of a signed acknowledgement from Sonangol board that they have reviewed the Representation Agreement and that they are aware that Kennedy will be remunerated through Visalia, and that Visalia and Kennedy provided services to Seadrill and*

*Sonangol in relation to the Transaction (Disclosure Letter)* …". On 11th October 2019, when Mr Dibowitz informed Mr Kennedy of the need to close out the Representation Agreement, he referred to the disclosure letter as the matter to be accomplished to this end. This also represented the oral evidence of Mr Creed.

216. Second, it had been understood at all times up until the end of January 2019 between Seadrill and Mr Kennedy that the Representation Agreement and the SHA were to be agreed as necessary parts of the whole transaction. They were inextricably linked. The minutes of a board meeting of Old Seadrill Ltd on 15th January 2019 recorded that "*Mr. Dibowitz brought the Board's attention to the requirement to enter into a revenue fee based representation agreement (Representation Agreement) with John Kennedy via his company Visalia Marketing Corp, the level of the fee, and the potential risks that this presented*". Mr Dibowitz had prepared a memorandum for the board prior to the meeting stating that "*A key risk to the transaction is the requirement to enter into a revenue fee based representation agreement with John Kennedy (a very experienced and credible oil & gas executive), and any potential reputational, legal and regulatory consequences if improper payments are subsequently made by Kennedy*."

217. This is the result of the fact that Mr Kennedy had facilitated the creation of the Joint Venture between Seadrill and Sonangol. Indeed, the Daily Operating Fee to be paid for the rigs was specifically and knowingly "*sized*" to include the fee payable to Visalia. Moreover, clause 14.18 of the SHA recorded that a Representation Agreement was "*dated on or about the date of this Agreement*". Thus, if the SHA were signed, the Representation Agreement was also to be signed, and if it were not, as in fact happened, it must have been because the parties bound themselves to the Representation Agreement being signed in the future.

218. Third, on 5th February 2019, Mr Kennedy and Mr Dibowitz exchanged emails, which reflected a general agreement on the terms of the Representation Agreement, and that Mr Kennedy would agree to the signature of the SHA by Seadrill and Sonangol on the understanding that the Representation Agreement was also to be signed once the disclosure letter was provided.

219. This is evident from the fact that, on 5th February 2019, Mr Dibowitz sent an update to the board of Old Seadrill Ltd stating that "*the path forward*" was to have Mr Saturnio

execute the disclosure letter "*in his capacity as CEO and Chairman of the Board*" and that as this had been agreed ("*This having been agreed*"), Sonangol agreed to execute the SHA.

220. I note that in one of those emails on 5th February 2019, Mr Kennedy referred to Mr Dibowitz's "*verbal assurances*" that day that (a) what and how Mr Saturnino signs by way of disclosure is a matter for Sonangol, (b) an "*independent professional*" be appointed to the Joint Venture, and (c) any payment of services to Visalia "*parri passu*" would be subject to oversight from such advisors. The latter two points appear to relate a desire by Mr Kennedy to have the escrow arrangement reviewed by an independent advisor, although this was not expressed as a precise proposal. The escrow arrangement appears to have been a point for further discussion between the parties. Indeed, this became a debated issue after 5th February 2019, and was subsequently explored and resolved by the end of May 2019. Had there been no such resolution, I would have considered that the parties remained bound by the payment terms of the Representation Agreement. In any event, I do not consider that this issue represented a point which prevented a binding contract from emerging, especially given the fact (as explained below) that, in my judgment, the parties intended to be bound, as at 5th February 2019, by a contract upon the provision of the Sonangol disclosure letter which enabled Seadrill to complete the execution of the SHA immediately afterwards.

221. Therefore, as at 5th February 2019, the parties had agreed to the proposed terms of the Representation Agreement. The fact that Mr Kennedy or Mr Loughlinn Kennedy sought to "*negotiate*" the terms of the Representation Agreement thereafter does not affect the conclusion that there was a binding contract as at 5th February 2019, especially, as I have already said, as the signing of the SHA on 6th February 2019 was itself the direct result of that contract.

222. Fourth, in my judgment, as to who signed the disclosure letter on behalf of Sonangol was no longer a matter of disagreement on 5th February 2019, because an agreement had been reached between Mr Dibowitz on behalf of Seadrill and Mr Kennedy, namely that the disclosure letter would be signed only by Mr Saturnino as CEO and Chairman of Sonangol and that there would be a more fulsome disclosure by Seadrill in its 20-F filing. It is worth recalling the terms of Mr Dibowitz's update to the board of Old Seadrill Ltd:

"*Documentation on Shareholders Agreement etc was all agreed last week but right before signing we had a 180 from John Kennedy /Sonangol regarding the manner in which the Representation Agreement would be disclosed. As you will recall the last iteration of this was to accomplish transparency via an Acknowledgement Letter signed by multiple Sonangol board members. Despite previous assurances from Kennedy to the contrary, Saturnino (Sonangol CEO and Chairman) was apparently unwilling to seek signatures on the Acknowledgement Letter from other board members as he views this as usurping his authority.*

*We have consulted with Skadden over the past week and weekend and the path forward is to:*

1. *Have Saturnino execute the Acknowledgement Letter in his capacity as CEO and Chairman of the Board*

2. *Include a more fulsome disclosure than was previously planned within our 20-F. This will include language disclosing JK / Visalias role and Visalia will earn a fee that is material in relation to the revenues earned under the contracts.*

*…*

*You will recall that the Shareholders Agreement also includes language disclosing the role of Kennedy and that his compensation, while paid by Seadrill, is borne by the JV via the daily management fee charged.*

*This having been agreed, Sonangol have promised that they will execute the SHA today.*"

223. In an internal email to himself, on 1st June 2019, Mr Creed recorded his understanding that only one signatory of the disclosure letter was required, as he confirmed during cross-examination.

224. In this context, I note that Mr Kennedy's own email to Seadrill dated 22nd February 2022 (three years after the making of the contract) stated that "*A commercial arrangement was agreed between myself (under the Visalia banner) and Seadrill and finalisation of this agreement and approval for disbursement based broadly on a 4% of dayrate formula per rig, was subject to an FCPA condition that warranted sign-off by 4 members of the Sonangol board …*". Although this statement is at odds with the Claimants' case at trial, I do not consider that it alters my assessment of the evidence which existed on 5th February 2019. Mr Kennedy maintained as much during his oral evidence (day 2, pages 186-188).

225. Fifth, as to the contents of the Sonangol disclosure letter, although, on 17th January 2019 (and again on 30th May 2019), Seadrill had provided Mr Kennedy with a draft of the letter in terms which Seadrill had signed for itself, there had been no agreement between the parties as to the contents of the disclosure letter, provided that the disclosure letter demonstrated Sonangol's awareness that the Representation Agreement had been concluded or was to be concluded between Visalia and Seadrill. I note Mr Dibowitz's reference to a "*previously agreed*" disclosure letter in an email to Mr Kennedy on 5th February 2019, but this was followed by Mr Kennedy's assertion that he could not require Mr Saturnino to sign the disclosure letter in any particular form: "*What and how, Mr Saturnino signs in terms of disclosure is solely a matter for them to decide*". This was confirmed by Mr Kennedy in his oral evidence. For example, Mr Kennedy said that "*They said, "John, you'll get a letter from Sonangol", and I said to them, right from the get−go, I did not have the authority to commit Sonangol to any letter, I did not have the authority as to what the consent, format or the signatories to that letter was. What they did sign was totally their business*" (day 3, page 51). Mr Creed's oral evidence was consistent with this: "*Mr Kennedy, to his credit, did say, you know, what you are pointing out here, is that he could not guarantee that Sonangol or Mr Saturnino would sign in the form we're putting in front of him*" (day 3, page 160). After this assertion by Mr Kennedy, the SHA was then signed by Old Seadrill Ltd, which to my mind indicated an acceptance by Seadrill of Mr Kennedy's position.

226. If that is wrong, and if the disclosure letter signed by Sonangol required a certain level of content above confirmation that Sonangol was aware of the Representation Agreement, any satisfactory disclosure letter, in my judgment, had to contain only the following information:

(1) That Mr Kennedy had been involved in facilitating the creation of the Joint Venture between Sonangol and Seadrill.

(2) That Visalia had entered into a Representation Agreement whereby it was to be remunerated for Mr Kennedy's services.

(3) That the remuneration for those services was included in the Daily Operating Fee to be paid by the Joint Venture to Seadrill in respect of the rigs pursuant to the Joint Venture arrangements.

227. This is the essence of the information which was set out in the draft letter proposed by Seadrill and the contents of clause 14.18 of the SHA which acknowledged the Representation Agreement. In fact, I did wonder what the purpose of the disclosure letter was in circumstances where the SHA contained the equivalent information in clause 14.18.

228. I do not consider, on any view, that any disclosure letter required the amount of the remuneration to be included in the Sonangol disclosure letter. Indeed, the omission of this information was specifically agreed between the parties on 5th February 2019, as evidenced by Mr Dibowitz's email to Mr Kennedy stating that "*We can do this without specifically enumerating the 4% fee*".

229. I pause to deal with the Defendants' submission that Mr Kennedy deliberately understated to Sonangol (Mr Pimenta) the fee to be paid under the Representation Agreement having regard to the draft of the Representation Agreement sent on 17th December 2020 (which referred to the fee being US$15,000 and 0.4% of the Contract Revenue). Although I consider that Mr Gunning KC fairly put this allegation to Mr Kennedy, I do not consider that that submission is relevant or can be sustained. I do not think it is relevant, because it does not bear on the requirements of the contract I have found to exist. I do not consider that the allegation can be sustained, because: (a) the allegation is based on a draft sent to Mr Pimenta in December 2020, more than 18 months after the SHA was signed; (b) Mr Kennedy rejected the allegation when it was put to him, stating that Mr Pimenta was aware of the amount of the fee (day 3, page 122); (c) there is no evidence of which I am aware whereby Sonangol ever stated that the amount of the fee was misstated by Mr Kennedy; (d) as Ms Wood KC stated during her closing submissions, it is not obvious that the amount of the fee was out of kilter with other similar fees charged, such as by Simples, Seadrill's previous Angolan agent; and (e) I am satisfied that the amount of the fee was discussed at the meeting between Sonangol and Seadrill in November 2018 (Mr Kennedy's first witness statement, para. 27). This is consistent with the JV Summary prepared by Mr Thorstein reporting to Mr Dibowitz on the meeting between Seadrill, Sonangol and Mr Kennedy on 18th November 2018.

230. Sixth, I did not consider that Seadrill's concerns, both before and after their agreement, as to a single-signature disclosure letter meeting the higher requirements recommended

by Skadden was a reason against finding that there was a contract. The procurement of such a letter was designed to mitigate a risk faced by Seadrill. According to the expert evidence, this was not a risk which could be wholly circumvented, even if the disclosure letter had been in the form desired by Seadrill and had been signed by four representatives on behalf of Sonangol. The position adopted by Mr Dibowitz on 5th February 2019 - requiring only a single signature letter and a more fulsome 20-F filing - reflected a commercial decision by Seadrill to manage the FCPA risk. It was not alleged by Seadrill that the alleged contract was at any stage illegal and therefore unenforceable. The steps taken by Seadrill to mitigate this risk had been summarised in Mr Dibowitz's memorandum to the board of Old Seadrill Ltd on 15th January 2019, stating that:

> "*John Kennedy, who arranged the deal, will earn a 4% fee based on drilling contract revenue earned by the JV rigs. The risk inherent in this fee, in a high risk country such as Angola, has been mitigated by: i) thorough due diligence performed by Control Risk/Skadden; ii) strong protections afforded to us under the terms of the representation agreement, including the fees being placed in an escrow account for a rolling 9 months period prior to being released to Kennedy; iii) Kennedy personally indemnifying Seadrill for any losses caused by him breaching the representation agreement i.e. paying a bribe; and iv) disclosure and transparency as to the relationship and variable compensation fees both in the shareholder agreement (i.e. within Sonangol / Angola) and Seadrill's 20-F filing …*"

231. Seventh, it is evident that the parties intended to bind themselves so as to create legal relations between them under the terms of the Representation Agreement, subject only to the issue of the disclosure letter to be signed by Sonangol. On 31st January 2019, Mr Dibowitz informed Mr Kennedy (with emphasis added) that if the SHA were to be executed without the Representation Agreement being executed at the same time, the Representation Agreement would be executed thereafter once the disclosure letter was signed and issued by Sonangol:

> "*… The document is agreed and signed off by our Board. As discussed in Luanda* ***you have my commitment (as I trust is also your intention) that we will fully abide by the terms of that agreement and do not intend to re-open the document****. I further trust that we have sufficient documentation and correspondence to demonstrate that the current draft is the clear intent of both parties. As we have previously discussed, a key factor that our Board considered when approving the transaction and our Rep Agreement was transparency to the nature of the relationships between yourself, us and Sonangol. As you will recall, we initially agreed to achieve the appropriate level of transparency by appending the*

*agreement to the SHA. When that was an issue for you, we worked with you to change the plan to simply disclosing the existence of the Rep Agreement in the SHA, and entering into a separate side letter where the Sonangol board acknowledged your and the Rep Agreements role and terms as part of the JV transaction and structure. As discussed previously both while I was in Dubai and later with you in Luanda, in order to achieve the necessary transparency in this alternate structure, we need to have that side letter signed by multiple Sonangol Board members. The preference was the entire board but we can live with Carlos plus three other Board members. We will work with you to get there, and I do believe we will get there, but this is one issue which we cannot be flexible on.*

*We're almost there, we just need the final push to get the documents over the line so that we can get onto getting the JV up and running …*"

232. Eighth, Mr Dibowitz was prepared to give this "*commitment*" because he was specifically asking for Mr Kennedy's approval to allow the SHA to be signed without the Representation Agreement also being signed at the same time in order to meet Seadrill's own commercial requirements (in order to conclude a transaction with Total). In those circumstances, Mr Kennedy was being asked to give a valuable concession for Seadrill's benefit and it must have been understood and agreed by the parties that the terms of the Representation Agreement would be signed (and performed) upon the transparency issue being satisfactorily dealt with. Indeed, on that basis, Mr Kennedy confirmed on 5th February 2019 that "*Visalia and John Kennedy will support and progress the execution of the SHA*".

233. Ninth, in my view, the most substantial factor against finding a contract to have been concluded in this case was the fact that the parties had intended that the Representation Agreement should be in writing and signed or executed. However, that consideration does not prevent a contract having been agreed on 5th February 2019, because that intention had been overtaken by Seadrill's desire to proceed with the execution of the SHA without the execution of the Representation Agreement, subject to the obtaining of the disclosure letter.

234. Tenth, even after 5th February 2019, Seadrill understood that the Representation Agreement would be concluded. Indeed, Seadrill had acted as if the Representation Agreement had been concluded including accruing the fee in favour of Visalia. On 1st October 2021, Mr Jackson - the new CEO of Seadrill - stated in internal correspondence that "*My line has always been - we have an obligation to pay (we entered an agreement)* …". On 8th December 2021, an internal Seadrill memorandum prepared by Quynh

Nguyen and Alastair Caley recorded that "*Based on the accounting guidance and reading across to IFRS, Seadrill has a constructive obligation to pay the commission fee to Visalia and an accrual should be recognized on the balance sheet as at December 31, 2021*" (although I accept that no great weight should be placed on this memorandum alone, given that it was created by those who were not close to the transaction). On 14th March 2022, Mr Creed stated in a message internal to Seadrill that "*No agreement has been signed. But there is an agreed draft rep letter that was heavily negotiated and verbal agreement that it would be executed once the transparency letter is signed by Sonangol ...*".

235. Eleventh, Seadrill had authorised Mr Dibowitz to agree the terms of the Representation Agreement. This is evident from the authority granted to him on 15th January 2019 and 18th January 2019, his regular updates to Seadrill and the fact that Mr Dibowitz signed the SHA on behalf of Seadrill. Further, Seadrill Management had authorised the signing of the Representation Agreement on 4th September 2019.

236. If my conclusion is correct and a contract was concluded as above, then the question arises whether the condition requiring the issue of a disclosure letter by Sonangol was satisfied. Provided that my conclusion that the so-called "*Fee Condition*" (to use Ms Wood KC's term) required no more than a letter signed by the CEO of Sonangol confirming its awareness of the Representation Agreement is correct, then Mr Saturnino's letter dated 11th April 2019 satisfied that condition. If that is wrong, and the Sonangol disclosure letter also required a reference to the fact that Visalia would be remunerated from the Daily Operating Fee payable to Seadrill under the Joint Venture arrangements, Mr Martins' letter dated 9th May 2022, but not Mr Saturnino's letter, satisfied that condition. In either case, the Fee Condition was satisfied.

237. The Defendants objected to a number of features of Mr Saturnino's letter as rendering the disclosure non-compliant with the Fee Condition, including the fact that Mr Fredriksen's name was misspelt and that the relevant Seadrill company was misdescribed. I do not consider that those errors affect the disclosure letter's compliance with the Fee Condition. It is clear to whom the disclosure letter was addressed and its purpose and meaning were likewise clear.

238. In these circumstances, in my judgment, Visalia's claim against Seadrill Management succeeds. Once the Fee Condition was satisfied, Seadrill Management became obliged to account to Visalia for the US$1,500,000 fee and the fee based on 4% of the Contract Revenue. As Seadrill Management has not accounted to Visalia accordingly, there has been a breach of contract by Seadrill Management. However, Visalia's claim against Old Seadrill Ltd for breach of contract does not succeed and Mr Kennedy's independent claim for breach of contract against either Defendant does not succeed.

**Claim for restitution**

239. If the Claimants' claim for damages for breach of contract does not succeed, their alternative claim is that they are entitled to be paid the Fee as restitution on the grounds of unjust enrichment, in particular that there has been a failure of basis.

The legal principles

240. The key elements of a claim in unjust enrichment were summarised by Lord Clarke in *Benedetti v Sawaris* [2013] UKSC 50; [2014] AC 938, para. 10, and repeated by Lady Rose in *Barton v Morris* [2023] UKSC 3; [2023] AC 684, para. 77, as follows:

> "*It is now well established that a court must first ask itself four questions when faced with a claim for unjust enrichment as follows. (1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant?*"

*Enrichment*

241. When assessing whether the defendant has been enriched, and the value of any such enrichment, "*the starting point … is the objective market value, or market price, of the services performed*", which entails consideration of "*the price which a reasonable person in the defendant's position would have had to pay for the services*" (*Benedetti v Sawaris* [2013] UKSC 50; [2014] AC 938, para. 15, 17).

242. Any agreement between the parties as to the price payable for the claimant's services is relevant to the assessment of market value (*Benedetti v Sawaris* [2013] UKSC 50; [2014] AC 938, para. 168). Although there is a role for subjective devaluation, whereby it is permissible to reduce the objective market value in order to reflect the subjective value of the services to the defendant, the burden of proof falls upon the defendant to

prove that they did not subjectively value the benefit at all, or that they valued it at less than the market price; the Court will be very unlikely to accept such an assertion unless there has been some objective manifestation of the defendant's subjective views; in principle, this can occur before or after a transaction, although conduct after the transaction is likely to carry little weight; in any event, subjective devaluation can be defeated by a claimant proving that: (i) the defendant received an incontrovertible benefit, or (ii) the defendant requested or freely accepted the benefit (*Benedetti v Sawaris* [2013] UKSC 50; [2014] AC 938, para. 18-25).

*At the claimant's expense*

243. The requirement of an enrichment of the defendant being at the claimant's expense may be satisfied by the claimant having sustained a loss (not necessarily in the sense understood by compensatory damages) through the provision of something for the benefit of some other person with no intention of making a gift, that the defendant should have received some form of enrichment, and that the enrichment has come about because of the loss. Such a loss may arise by reason of "*the gratuitous provision of services which could otherwise have been provided for reward, where there was no intention of donation. In such a situation, the claimant has given up something of economic value through the provision of the benefit, and has in that sense incurred a loss*" (*Investment Trust Companies v Revenues and Customs Commissioners* [2017] UKSC 29; [2018] AC 275, para. 44-45).

*The unjust element: failure of basis*

244. The unjust element of an unjust enrichment has numerous manifestations. For the purposes of this case, the relevant unjust element is "*failure of basis*".

245. In *Dargamo Holdings Ltd v Avonwick Holdings Ltd* [2021] EWCA Civ 1149; [2022] 1 All ER (Comm) 1244, Carr, LJ said at para. 77-80:

> "*77. The unjust factor claimed here by the Taruta Parties, and the focus of the present appeal, is 'failure of consideration'. Whilst long-established, it is generally accepted that the terminology of 'failure of consideration' is apt to lead to confusion. In particular, as set out below, the term 'consideration', when used in the phrase 'failure of consideration' as a basis for a restitutionary claim, does not carry the same meaning as it does when considering whether there is*

*sufficient consideration to support the formation of a contract (see Barnes at [104]).*

*78. I prefer to adopt the terminology of 'failure of basis' suggested by Goff & Jones at 12-10 to 12-15. However, whichever terminology is used, the legal content is the same (see Haugesund Kommune v Depfa ACS Bank [2010] EWCA Civ 579; [2010] 1 CLC 770 at [62] per Aikens LJ: the debate about whether to use the language of failure or absence of consideration is 'a question of which is the more apt terminology; it does not have any legal significance'; and Barnes at [105]).*

*79. The core concept of 'failure of basis' is that a benefit has been conferred on a joint understanding that the recipient's right to retain it is conditional. If the condition is not fulfilled, the recipient must return the benefit (see Goff & Jones at 12-01). Whilst failure of basis ranks alongside the unjust factors of mistake, duress and undue influence as a factor negativing consent, it differs in that it is concerned with qualification of consent, as opposed to impaired or vitiated consent (see Burrows, The Law of Restitution, 3rd edn, 2011).*

*80. It is common ground that the meaning of failure of basis extends beyond failure of promissory consideration payable under a contract or a failure of contractual counter-performance (see Fibrosa Spolka Akcyjna v Fairburn Lawson Combe Barbour Ltd [1943] AC 32 at 48). To the extent that [812] or [823] of the Judgment suggest otherwise, they are wrong. The extended meaning is supported in An Introduction to the Law of Restitution (at p 223) (cited with approval by the Court of Appeal in Sharma v Simposh Ltd [2011] EWCA Civ 1383; [2013] Ch 23 at [24]) where it is stated that:*

> *'Failure of consideration for a payment …means that the state of affairs contemplated as the basis or reason for the payment has failed to materialise or, if it did exist, has failed to sustain itself.' …*"

246. The basis which must fail to justify an order for restitution must be ascertained objectively, and the parties' uncommunicated subjective thoughts are irrelevant (*Guardian Ocean Cargoes Ltd v Banco do Brasil SA (Nos 1 and 3)* [1994] 2 Lloyd's Rep 152 at 158-159). Hence, if only one of the parties has a particular basis in mind, and that basis fails, no claim arises in unjust enrichment.

247. The editors of *Goff & Jones on Unjust Enrichment*, (10th ed., 2022) explain the failure of basis as an unjust factor at para. 16-01 - 16-02:

> "*16-01 Where benefits are transferred in anticipation of a contractual agreement which is intended to provide for payment for those benefits, and the contractual agreement does not materialise, the general principles of failure of basis apply. The same principles that govern liability where the contract is void or unenforceable would seem to be equally applicable where the contract does not come about …*

*16-02 It is now acknowledged that the potential for the law of unjust enrichment to provide appropriate remedies where anticipated contracts do not materialise has reduced the pressure to find a solution to such problems within the law of contract. However, as several of the decisions examined in this chapter demonstrate, the courts have not consistently analysed situations of this kind by applying the principles of failure of basis. Claims to recover in respect of services have proved more problematic than claims in respect of payments of money. Doubtless part of the reason for the inconsistency of treatment is that, where the benefit conferred consisted in the performance of a service, it was not clearly appreciated that an analysis in terms of failure of basis was appropriate. As a result, some of the cases—even those decided recently—fail to identify the unjust factor on which liability is based and draw on vaguer, more general justifications such as unconscionability to explain their decisions. It has also been said that a court is more likely to award a remedy in respect of "incontrovertible benefits", and this "may well be a significant difference" as compared with its approach to less clear benefits. In consequence, "The law remains in a state of uncertainty, lacking a clear general principle." However, much of the uncertainty can be eliminated by bringing benefits conferred in anticipation of a contractual agreement which does not materialise under the general principles of unjust enrichment. That is the approach adopted in this chapter. Once the unjust factor of failure of basis is correctly identified and applied to the facts, there is no need, nor is it appropriate, to have recourse to broad discretionary ideas of "unconscionability". Nor should the nature of the benefit received by the defendant influence the entirely separate question of whether that benefit was conferred in a way that satisfies the requirements for failure of basis …*"

248. In determining whether there has been a failure of basis, the Court should approach this question on the basis of the following principles:

(1) The task of the Court is to identify whether a benefit (or enrichment) has been conferred on the recipient on a joint understanding that the recipient's right to retain the benefit is conditional. In other words, where an enrichment has been transferred under a transaction that is or becomes ineffective, the party providing the benefit for which payment was due may recover the value of the enrichment from the recipient, provided that the basis for the transfer has totally failed (*Chitty on Contracts*, (35th ed., 2022), para. 33-063).

(2) The understanding must be common or shared between the parties.

(3) The existence of the understanding and the conditional nature of the basis of the conferral of the benefit - the parties' understanding - is to be determined objectively (*Goff & Jones on Unjust Enrichment*, (10th ed., 2022), para. 13-01 - 13-02).

(4) The condition may be the conclusion of a binding contract between the parties.

(5) The conditional nature of the parties' joint understanding may be determined by reference to the inherent value of the services provided by one party to the other party before the contract is concluded. If there is no reason why a valuable benefit should be conferred without a binding contract, that would indicate that the transfer of the benefit would be in exchange for valuable remuneration (*Goff & Jones on Unjust Enrichment*, (10th ed., 2022), para. 16-04, 16-07).

(6) If, however, it was understood or agreed that a party, in conferring a benefit, took the commercial risk of no remuneration, then that would militate against a relevant joint understanding of the conditional nature of the benefit (*Fenchurch Advisory Partners LLP v AA Limited* [2023] EWHC 108 (Comm), para. 319).

(7) If there is a relevant joint understanding, objectively determined, and if the condition is not fulfilled, the recipient must provide restitution.

The Claimants' submissions

249. Ms Wood KC on behalf of the Claimants submitted that the Claimants are entitled to restitution because:

(1) Mr Kennedy provided substantial services in bringing the potential Joint Venture to Seadrill, and in ensuring that the Joint Venture came to fruition. Both Old Seadrill Limited and Seadrill Management received the benefit of those services (as did Seadrill Limited). They were therefore enriched.

(2) Specifically, Mr Kennedy's efforts ensured that Old Seadrill Limited became a party to the SHA and Sonangol's joint venture partner and also received the benefit of the Daily Operating Fee via the Seadrill "*cash pool*", whereby revenue received by Seadrill Management is transferred instantaneously into an account held by Seadrill Treasury UK Limited, where it becomes part of the fungible cash used by the Seadrill group (Mr Creed's second witness statement, para. 46).

(3) Seadrill Management was enriched because it became the direct recipient of the Daily Operating Fee, which included the portion representing the Fee, as the Defendants admit.

(4) It is common ground that, if Mr Kennedy's services had any market value (which the Defendants dispute), then that market value is the amount of the Fee.

(5) The Defendants do not deny that they received the benefit of Mr Kennedy's services, but they deny that the services provided by Mr Kennedy had any market value in the absence of a disclosure letter signed by four signatories on behalf of Sonangol. That argument should be rejected, both as a matter of legal principle and on the facts, because Mr Kennedy's services plainly did have a value, as the Defendants accepted the 4% rate of commission he proposed, and assessed it to be "*within market practice*", and considered the opportunity secured by Mr Kennedy's services - to become Sonangol's joint venture partner - to be of immense value (as indeed it was).

(6) However, it is not legally permissible, in valuing an enrichment, to take account of the alleged risk that might have arisen in the counterfactual scenario where Seadrill paid for Mr Kennedy's services. It is common ground between the experts that (i) the disclosure letter with four signatures was no "*magic bullet*" for eliminating the risk of prosecution and would not have eliminated the risk of prosecution or substantial fines under the FCPA if the US enforcement authorities believed there was bribery occurring in connection with the Sonadrill Joint Venture; (ii) the US government offers no prescribed formula for mitigating "*red flags*", and, in particular, does not mandate the obtaining of an acknowledgment letter in any particular form; and (iii) if there was an FCPA concern in relation to Mr Kennedy, there was "*at least a risk that it would have been contrary to (that is, a violation of) the FCPA for Seadrill to enter into the Joint Venture procured by Mr Kennedy*".

(7) Indeed, as the Claimants' expert, Ms Brockmeyer, put it in her expert's report at para. 60, "*The specific option Seadrill has chosen - to proceed with the transaction without finalizing the representation agreement - appears to be an attempt by Seadrill to obtain the business benefits of the transaction without*

*paying for it. Refusing to pay the third party that facilitated a transaction while still entering into that transaction (and thus obtaining the benefit of the supposed illegal conduct) does not absolve a company of liability under the FCPA. Rather, U.S. enforcement authorities could view Seadrill's insistence on a specific type of disclosure letter before paying the Claimants, while still entering into and enjoying the benefits of the joint venture with Sonangol, as an attempt to benefit from Claimants' services while avoiding its costs*". Accordingly, the reasonable company who had received Mr Kennedy's services - and who had chosen to become party to the Joint Venture despite alleged corruption concerns - would not insist upon Mr Kennedy procuring a disclosure letter with four signatures as a precondition to paying for those services, nor would it consider such a letter obtained by Mr Kennedy to be capable of eliminating or even significantly reducing any risk of prosecution that existed by reason of its prior entry into the Joint Venture. Nor can the Defendants legitimately argue that they personally considered Mr Kennedy's services valueless in the absence of such a disclosure letter. The Defendants are precluded from any such "*subjective devaluation*" in circumstances where (i) Mr Kennedy's services conferred an incontrovertible benefit upon them, and (ii) they freely accepted and, indeed, positively requested his services in the knowledge that he expected to be paid for them.

(8) The Defendants argue that the mere effecting of an introduction cannot be treated as a relevant transferral of a benefit (*Barton v Morris* [2023] UKSC 3; [2023] AC 684, para. 97). The short answer to this argument is that the enrichment received by the Defendants in the present case is not simply "*the effecting of an introduction*": the services provided by Mr Kennedy to the Defendants extended far beyond that of a "*finder*" or "*introducer*". Indeed, the Defendants themselves refer in their skeleton argument to Mr Kennedy's agreement "*to endorse the execution of the SHA*". Furthermore, Seadrill's own version of the disclosure letter, signed by four members of its board, expressly "*acknowledge[d] that Mr. Kennedy provided services to Seadrill and Sonangol in relation to the MOU and the Shareholder Agreement*". Because of Mr Kennedy's role in facilitating the conclusion of the Joint Venture, the Defendants have received and retained as a windfall the portion of the

"*lucrative*" Daily Operating Fee "*sized to cover the Agency Fee*". In any event, the discussion in *Barton v Morris* is not concerned with establishing enrichment, but rather with the question that was in issue in that case, which concerned the extent to which a claim in unjust enrichment could arise in circumstances where a subsisting contract existed between the parties.

(9) It should not be controversial that any enrichment received by the Defendants was at Mr Kennedy's expense, since he provided the services to the Defendants.

(10) Mr Kennedy performed services for the benefit of the Defendants on the mutual understanding that the Claimants would be remunerated for those services, pursuant to an executed Representation Agreement, in the event that the Defendants entered into the Joint Venture. Although the Defendants entered into the Joint Venture, by concluding the SHA on 6th February 2019, no payment has ever been made by Seadrill, and the Representation Agreement has not been signed. The basis for the Defendants' enrichment has, accordingly, totally failed.

(11) The Defendants contend, in response, that the basis has not failed, because Mr Kennedy took the risk that the Representation Agreement would not be executed and, in particular, took the risk that Seadrill's demands for what it considered to be sufficient transparency would not be satisfied. Mr Kennedy did not assume any such risk. There can be no doubt that Mr Kennedy and the Defendants understood that Mr Kennedy expected to be paid for his services (and, indeed, expected to be paid at a rate of 4% of drilling revenues) should the Joint Venture be concluded.

(12) It is clear that the parties proceeded on the basis that the Representation Agreement - and thus payment for Mr Kennedy's services - was part and parcel of the Joint Venture, such that the conclusion of the latter necessitated the conclusion of the former.

(13) It was understood by both Mr Kennedy and Seadrill that arriving at mutually acceptable transparency measures was critical to the conclusion of the SHA. Mr Dibowitz made his understanding clear to both Skadden and the Seadrill Board.

(14) Mr Kennedy agreed to "*support and progress the execution of the SHA*" ahead of the execution of the Representation Agreement (and the SHA was, following that agreement, promptly executed) only because Mr Dibowitz had made it clear that Seadrill would not insist upon the disclosure letter signed by four signatories on behalf of Sonangol as a precondition to payment, but would rather consider their transparency requirements satisfied by a combination of (i) a disclosure letter signed by Mr Saturnino alone and in no particular form, and (ii) disclosure by Seadrill in their 20-F filing. That former requirement was satisfied by Seadrill's receipt of the disclosure letters signed by Mr Saturnino and/or Mr Martins.

(15) That this was the basis upon which Mr Kennedy provided, and Seadrill accepted, Mr Kennedy's services, is similarly reflected in Mr Dibowitz's update to the board on 5th February 2019, the day that Sonangol executed the SHA.

(16) The fact that, after the SHA was concluded, Seadrill subsequently purported to revert back to demanding a disclosure letter with four signatures as a precondition to execution of the Representation Agreement and payment for Mr Kennedy's services does not and cannot change the basis upon which he conferred those services at the time, and the risks which he assumed (or which he did not assume) at that time.

The Defendants' submissions

250. Mr Gunning KC on behalf of the Defendants submitted that:

(1) The enrichment alleged by the Claimants is his "*arrangement of the Joint Venture*". It has been doubted by Lady Rose JSC in *Barton v Morris* [2023] UKSC 3; [2023] AC 684, at para. 97, that the mere effecting of an introduction can be treated as a relevant transferral of a benefit, on the footing that, had the defendant chosen not to proceed with a third party pursuant to that introduction, no fee would have been earned by the claimant.

(2) If the introduction did constitute an enrichment, then it is accepted the Court will likely conclude that was done at one or other of the Claimants' expense. The Claimants suggest that the transfer was at Mr Kennedy's expense, but it is

unclear whether that is correct, given that by 5th February 2019, it was envisaged that the Representation Agreement would be made with Visalia.

(3) In order to establish that any enrichment was unjust, the Claimants have to prove that the circumstances in which a relevant transfer was made come within one of the categories that the law recognises as sufficient to make retention by the recipient unjust, in this case a failure of basis. The Claimants' pleaded case is that the basis on which Mr Kennedy provided his services, those services being the facilitation of the SHA between Old Seadrill Ltd and Sonangol, was that he would be paid for them by Seadrill and/or that the parties would enter into a contract under which he would be paid for them.

(4) The Claimants' case faces the immediate difficulty that the contemporaneous evidence does not support there being an unequivocal undertaking to pay Mr Kennedy. Indeed, such an undertaking would have exposed Seadrill Management to the very risk that it was seeking to avoid by requiring the provision by Mr Kennedy of a disclosure letter and escrow terms. The evidence illustrates that there was no meeting of minds between Mr Dibowitz and Mr Kennedy as to the basis upon which the SHA was to be released. Such a "*basis*" would run directly contrary to the proposal that Mr Dibowitz made to Mr Kennedy (which imposed a requirement as to form on the proposed disclosure).

(5) It is clear from what occurred following the making of the SHA that Mr Kennedy did not regard signature of the SHA as depriving him of leverage in his dealings with Seadrill. On the contrary, he continued thereafter to seek to exert leverage by threatening the termination of the SHA and thereby impeding the commencement of the joint venture.

(6) It is evident that the only basis upon which Seadrill was prepared to deal with Mr Kennedy was one in which the anti-corruption and bribery mitigations recommended by Skadden, and required by the Seadrill Board, had been put in place.

(7) If there was a discernible underlying basis to any transfer of benefit by the Claimants to the Defendants, the documentary record shows that it was transferred on the basis that any such benefit would be retained unless the anti-

corruption and bribery mitigations recommended by Skadden, and required by the Old Seadrill Board, had been put in place.

(8) It is apparent that on 5th February 2019 that the Board would have been satisfied as to transparency with a letter signed by Mr Saturnino in the form that Skadden had drafted (together with 20-F disclosure), but only if the other terms of the Representation Agreement (including the escrow provision) had been implemented.

(9) It is also apparent that following the unsatisfactory letter signed by Mr Saturnino letter, personnel changes at Sonangol and Mr Kennedy's attempts to renegotiate what had been thought to be a settled deal, the Board (advised by Skadden) was not satisfied with a single-signature letter as the method for achieving the necessary transparency.

(10) As Mr Kennedy knew when he agreed to endorse the execution of the SHA, the Board of Old Seadrill Ltd had only approved the execution of the Representation Agreement on the basis that there was sufficient transparency within Sonangol as to Mr Kennedy's involvement and the terms of that agreement. This was in turn on the basis of Skadden's advice as to the FCPA risks posed by Mr Kennedy's proposed remuneration and the minimum steps required to mitigate those risks. In the event, it was agreed with Mr Kennedy that, given his concerns about disclosing his remuneration widely within Angola, adequate transparency could instead be achieved through the provision of an approved disclosure letter (the text of which had been agreed with Mr Kennedy), initially on the basis that this would be signed by Mr Saturnino and three other board members, but eventually on the basis that a single signature from Mr Saturnino would be sufficient (in the context of the Sonangol Board as then constituted), along with a more fulsome disclosure in Seadrill's 20-F.

(11) Mr Dibowitz had endorsed a path forward (which was devised with Skadden in order to achieve "*a level of disclosure that [would make] management and the board comfortable*") which still involved a single signature disclosure letter. To the extent that Mr Kennedy, for the purposes of his unjust enrichment case,

relies on alleged verbal assurances to the contrary given by Mr Dibowitz on 5th February 2019, such a contention is implausible.

(12) That basis has not failed to sustain itself. The mitigations recommended by Skadden, and required by the Board of Old Seadrill Ltd, have not been put in place.

(13) In the circumstances, it is not unjust for Old Seadrill Ltd, and New Seadrill Ltd (once it assumed the SHA in 2022), to be entitled to refuse to pay Mr Kennedy's fee.

(14) In effect, the Claimants are seeking to use the prism of unjust enrichment to impose on the Defendants an obligation to pay in circumstances in which the Defendants would never have been prepared to contract with the Claimants. That approach would interfere with what has been described (in the context of the evaluation of a benefit) as "*the fundamental need to protect a defendant's autonomy*" (*Benedetti v Sawaris* [2013] UKSC 50; [2014] AC 938, para. 18).

(15) The nature of the enrichment that is alleged to have occurred in this case, namely the facilitation of the SHA. There are two conceptual difficulties with treating facilitation of that kind as enrichment. The first is that the SHA was not the Claimants' contract to make. It was a contract between Old Seadrill Limited and Sonangol for the formation of a Joint Venture. The second is that the principal aspect of the benefit of that joint venture upon which the Claimants rely is the receipt of the Operating Fee element of the Services Fee payable under the Management Agreement which was executed on 19th August 2019.

(16) The Defendants do not contend that Mr Kennedy's services had a different market value to the alleged Fee. Nor do the Defendants seek to advance a case on "*subjective devaluation*".

Analysis

251. In my judgment, if there had been no contract concluded between Visalia and Seadrill Management, Visalia would have been entitled to restitution of the Fee on the grounds of unjust enrichment by reason of the fact that there had been a failure of basis

underlying the enrichment of Seadrill. In my judgment, Visalia's entitlement to restitution for unjust enrichment would have been enforceable against both Seadrill Management (as the proposed counterparty under the Representation Agreement) and Old Seadrill Ltd, because the latter clearly benefited from the failure of basis.

252. I have reached this conclusion for the following reasons.

253. First, Seadrill Management and Old Seadrill Ltd were both enriched.

(1) Seadrill perceived that there were benefits to Seadrill in entering into the Joint Venture. These were summarised by Mr Dibowitz in his memorandum dated 15th January 2019, including a US$25,000 profit margin for each rig each day. Further, in a summary prepared for Seadrill in February 2019, Mr Dibowitz stated that "*Our newly formed JV with Sonangol, Sonadrill, is a significant win, opening up opportunities for the designated rigs, plus potentially incremental units, in an attractive benign floater market. The JV will generate incremental cash flow through the management of the two Sonangol drillships as well as opportunity for future fleet expansion …*".

(2) Mr Kennedy's role in facilitating the creation of the Joint Venture went beyond that of a mere introducer. This is evident from the Services to be provided to the Joint Venture referred to in the draft Representation Agreement, that is soliciting contracts for the Joint Venture, advising on local laws and customs, providing market intelligence, and providing such other services as Seadrill Management or the Joint Venture may reasonably require. In Mr Dibowitz's memorandum of 15th January 2019, it was said that Mr Kennedy "*arranged the deal*". Furthermore, clause 14.18 of the SHA recorded that Mr Kennedy "*facilitated discussions between Seadrill and Sonangol in relation to the MOU and the Shareholder Agreement*". Even if his role had been no more than an introducer, I do not consider that that would stand in the way of a claim for restitution. Lady Rose's comments in *Barton v Morris* [2023] UKSC 3; [2023] AC 684, at para. 97, do not support any contrary submission.

(3) It was understood at all times from November 2018 by all concerned that the Fee would be included in the Daily Operating Fee to be paid to Seadrill in accordance with the Joint Venture arrangements. Mr Kennedy's efforts resulted

in Old Seadrill Limited becoming a party to the SHA and Sonangol's joint venture partner and receiving the benefit of the Daily Operating Fee via the Seadrill "*cash pool*", whereby revenue received by Seadrill Management was transferred instantaneously into an account held by Seadrill Treasury UK Limited, where it became part of the fungible cash used by the Seadrill group.

254. The enrichment is to be valued by reference to the Fee set out in the Representation Agreement. There was no role for any subjective devaluation, as in my judgment there is no evidence that Seadrill viewed the value of the services provided by Mr Kennedy as being less than the Fee referred to in the Representation Agreement. In any event, it is clear to me that Seadrill received an incontrovertible benefit and requested or freely accepted the benefit (*Benedetti v Sawaris* [2013] UKSC 50; [2014] AC 938, para. 18-25).

255. Second, the enrichment of Seadrill was at the expense of Visalia, given that Visalia was to receive the remuneration but for the failure of basis. I understand that the Defendants accepted that such a finding would follow on there being a relevant enrichment. Insofar as it is relevant, in one sense any enrichment was at Mr Kennedy's expense, even though it was his corporate vehicle which was to receive the remuneration, because he was personally providing the services which benefited Seadrill Management and Old Seadrill Ltd. However, as the basis of the enrichment of Seadrill was the making of the Representation Agreement with Visalia and the remuneration of Visalia, for the purposes of the claim in restitution, any enrichment of Seadrill was at Visalia's expense, not Mr Kennedy's expense.

256. Third, there was plainly a failure of basis. There was, in my judgment, a clear joint understanding between Seadrill on the one hand and Visalia and Mr Kennedy on the other hand that the provision of the benefit to Seadrill was conditional on the Representation Agreement being concluded between Visalia and Seadrill Management and Visalia being remunerated accordingly. If no such contract was concluded, and if there was no such remuneration, there has been a failure of basis. The direct result of the lack of such contract was that Seadrill was receiving a Daily Operating Fee for each rig of U$185,000 which was calculated to include the 4% fee to be paid to Visalia. Without restitution, Seadrill would benefit from that 4% fee.

257. I do not accept that the basis of the enrichment of Seadrill Management and Old Seadrill Ltd was the adoption of the corruption and bribery mitigations recommended by Skadden and required by the board of Old Seadrill Ltd. As explained above, Seadrill had made a decision that any risks associated with FCPA were to be mitigated by the obtaining of the disclosure letter signed by the CEO of Sonangol and by the 20-F filing. Nor do I accept that the Claimants took the risk of Seadrill not being comfortable with any mitigations which were adopted.

258. Of course, as I have found that a contract did exist, there can have been no failure of basis and so the claim for restitution on the grounds of unjust enrichment cannot succeed. If my conclusion that a contract was made is not correct, then I would have concluded that Seadrill Management and Old Seadrill Ltd were liable to Visalia in restitution.

**Liability to account as a trustee**

259. Ms Wood KC on behalf of the Claimants submitted that:

(1) Seadrill Management, alternatively New Seadrill Ltd, holds 4% of the drilling contract revenue on trust for Visalia. The Claimants seek an account in respect of these sums.

(a) The Joint Venture was structured, as the SHA expressly provided in clause 14.18, so that Visalia's fee was to be paid by Seadrill out of the Daily Operating Fee.

(b) Reflecting that structure, Seadrill negotiated a Daily Operating Fee that was "*sized to cover the Agency Fee*". Mr Kennedy's evidence explained how the proposed Daily Operating Fee was increased from US$160,000 to US$185,000 per day (when the rigs were operational) in order to accommodate payment of Visalia's 4% without affecting Seadrill's margin.

(c) Seadrill selected Seadrill Management to be the counterparty to both the Representation Agreement and the Management Agreement.

(d) Mr Creed explained that revenue received by Seadrill Management is "*swept*" into an account held by Seadrill Treasury for the benefit of the group, which account Seadrill Management then draws up to make disbursements (Mr Creed's second witness statement, para. 46).

(2) An intention to create a trust on the part of Seadrill Management (and New Seadrill Ltd, to the extent it received proceeds of the Daily Operating Fee *via* the Seadrill Treasury account) can be inferred from such circumstances (*Snell's Equity*, (35th ed.), para. 22-013 - 22-015), such intention arising from (at the very least) the time when Seadrill Management first started to receive the Daily Operating Fee in 2019. It is clear from the structure described above that Seadrill Management did not intend to retain that portion of the Daily Operating Fee representing 4% of drilling contract revenue for its own use and benefit.

260. Mr Gunning KC on behalf of the Defendants submitted that:

(1) The Claimants' statement of case contains very little detail as to the nature of the alleged trust or when/how it was supposed to have operated. To the extent that it can be understood, Visalia's case appears to be that when the SHA was executed an express trust was created over some part of the Daily Operating Fee that would in due course be paid by Sonadrill to Seadrill Management. This is misconceived, essentially because the alleged trust would lack two of the three certainties required for any express trust to be established, namely certainty of intention and certainty of subject matter (*Snell's Equity*, (35th ed.), para. 22-012). That is particularly so given that, the alleged trust only falls for consideration when the Court has determined (a) that there was no agreement between the Claimants and Defendants; and (b) the Defendants have not been unjustly enriched.

(2) As to certainty of intention, neither clause 14.18 of the SHA nor the facts of this case support the contention that a trust was intended to be put in place in respect of Visalia's fees. In particular, the relevant intention for these purposes is that of the settlor of the purported trust, which in this case would be Sonadrill as the payer of the Daily Operating Fee. However, Sonadrill is not a party to the SHA.

(3) To the extent that the SHA could be relevant, the language of clause 14.18, properly construed, does not express or imply any intention to declare a trust. There is nothing in this language suggesting an expectation that "*Seadrill*" (defined in the SHA as Old Seadrill) would owe the duties of a trustee to Visalia, as opposed to the ordinary duties of a debtor under common law. On the contrary, clause 14.18 expressly contemplates such fees being the subject of ordinary contractual rights and obligations, of the kind that one would typically expect to govern commercial dealings.

(4) It is also noteworthy that Visalia does not, in support of its trust claim, rely on anything in the Management Agreement, to which Sonadrill was a party and under which it would actually be paying the Daily Operating Fee. Indeed, other than one clause of the SHA, Visalia does not rely on any document, discussion between the parties, or fact as evidencing an intention or expectation that fiduciary duties were to be imposed on a Seadrill entity.

(5) Ultimately, the alleged trust would be inconsistent with the facts of this case, for several reasons. First, there is no evidence of any restriction having been put in place by Sonadrill on Seadrill's ability to dispose of the Daily Operating Fee after it was received, as it saw fit. Second, there was no requirement from Sonadrill that the relevant Seadrill entity receive, or to put aside any part of, the Daily Operating Fee in a separate bank account. Third, one of the concerns expressed by Mr Kennedy regarding the deferred payment provisions related to Seadrill's creditworthiness. Had Mr Kennedy expected Seadrill to be a trustee over his future fees, no such concerns would have arisen. Fourth, and relatedly, the mechanism of the escrow, under which Seadrill Management was to pay Visalia's fees into a third-party holding account, and under which the appointed escrow agent was itself to hold such deposited sums as a bare trustee, appears inconsistent with the notion that Seadrill Management was expected to act as a trustee in respect of the same sums.

(6) Even if there had been an intention to declare a trust over some part of the Daily Operating Fee (which is denied), that declaration would be a nullity due to a lack of certainty of subject matter. To be valid, any trust must define with sufficient certainty the assets which are to be held on trust and the kind of

interest that the beneficiary is to take in them. Neither clause 14.18 of the SHA, nor any part of the Management Agreement, identifies with sufficient certainty the amount of the Daily Operating Fee that would be attributable to Mr Kennedy's fees at any given time, and which would therefore need to be held separately under a trust by Seadrill. For all of the reasons above, the trust claim should be dismissed.

261. I am not satisfied that a liability to account as a trustee can be established for the reasons given by Mr Gunning KC. In particular, in my judgment, there was no evidence of an intention to create an express trust as alleged by the Claimants.

**The effect of the US Chapter 11 proceedings**

262. Insofar as Old Seadrill Ltd bears any liability to the Claimants, the question arises whether that liability has been assumed by New Seadrill Ltd. This is an important question because New Seadrill Ltd did not exist when any liability on the part of Seadrill Ltd emerged in 2019.

263. Of course, on my findings above, Seadrill Management - not Old Seadrill Ltd - is liable for breach of contract to Visalia. Accordingly, this issue does not arise. However, it would arise if Old Seadrill Ltd had been liable for restitution on the grounds of unjust enrichment to Visalia.

264. Ms Wood KC submitted on behalf of the Claimants that New Seadrill Ltd is liable or assumed the liability of Old Seadrill Ltd for breach of contract or restitution, by means of a novation, an estoppel or an independent claim for restitution, because:

(1) It was understood at all material times that Mr Kennedy was concerned to ensure that the Claimants' entitlement to the Fee was unaffected by the Chapter 11 proceedings, and repeatedly sought express reassurance to this effect.

(2) Despite knowing of Mr Kennedy's concerns, Seadrill never suggested, either before or after New Seadrill Limited's incorporation and its assumption of the role as group parent, that the Claimants' entitlement to the Fee had been affected by the Chapter 11 proceedings.

(3) To the contrary, after the Chapter 11 proceedings had concluded representatives of New Seadrill Limited continued to discuss the payment of the Fee, both with Mr Kennedy and with Sonangol, without any suggestion that any such entitlement resided with the now defunct Old Seadrill Limited.

(4) In such circumstances, New Seadrill Limited's consent to the novation of the Fee Condition is to be inferred, as being necessary to explain why Seadrill Limited continued to engage with both Mr Kennedy and Sonangol as to payment of the Fee after the Chapter 11 proceedings concluded (*Evans v SMG Television Ltd* [2003] EWHC 1423 (Ch), para. 181; *Musst Holdings Ltd v Astra Asset Management UK Ltd* [2023] EWCA Civ 128, para. 57).

(a) In May 2020, Mr Lyne raised with Mr Kennedy the possibility of Seadrill once again filing for Chapter 11 and emphasised to Mr Kennedy that "*cash related to the joint venture is not at risk of seizure*", "*all rigs and JV operations would continue uninterrupted and business as usual*" and that "*Seadrill does not intend, nor is there any reason for Seadrill to elect to reject the management agreements*".

(b) Mr Kennedy and Mr Lyne agree that they discussed the status of the Fee during their conversations concerning Chapter 11; as Mr Lyne puts it, "*when speaking to Mr Kennedy, he would ask questions both about [the] JV and about the representation agreement*" (Mr Lyne's witness statement, para. 50). Mr Kennedy specifically recalled that, in February and July 2021 Mr Lyne called him in order to seek his assistance in "*keep[ing] Sonangol comfortable … I said to him 'woah, woah, woah, hold your horses – where does Visalia stand here?' and he told me that Visalia was not affected by the Chapter 11 and my fee was protected and ring-fenced from the Chapter 11*" (Mr Kennedy's first witness statement, para. 66). Mr Lyne accepts that he "*recall[s] stating to Mr Kennedy generally that the Chapter 11 process would not impact the JV, or Mr Kennedy if the representation agreement was signed*" (Mr Lyne's witness statement, para. 51). No suggestion was ever made to the Claimants, either by Mr Lyne in these conversations or at any other time,

that the Claimants were required to prove in the Chapter 11 proceedings in order to protect their entitlement to the Fee.

(c) Mr Kennedy repeatedly chased Seadrill, and in particular New Seadrill Limited's then-CEOs (Mr Jackson and Mr Johnson), for updates on payment of the Fee. At no point did anyone from Seadrill suggest that Chapter 11 had in any way affected Mr Kennedy's entitlement to be paid.

(d) New Seadrill Ltd carried on seamlessly from where Old Seadrill Ltd had left off with respect to its obligations to Mr Kennedy. On 4th April 2022, Mr Creed sent Mr Kennedy "*[a]s discussed this morning*" a draft of the four signatures disclosure letter, which Mr Kennedy forwarded to Mr Pimenta. On 6th April 2022, Mr Hvashovd met with Mr Kennedy in Luanda, prior to the Sonadrill board meeting, during which they discussed the disclosure letter and Mr Kennedy suggested that Mr Hvashovd speak with Mr Pimenta about it. Mr Hvashovd did discuss the disclosure letter with Mr Pimenta and relayed the contents of that discussion to Mr Creed and Mr Kennedy afterwards.

(5) There was a relevant estoppel, because New Seadrill Limited adopted the express representations made by Mr Lyne, consistently conducting itself on the basis that the Chapter 11 process did not affect the Claimants' entitlement to payment, and in reliance upon this representation, the Claimants did not take steps to protect their right to payment in the Chapter 11 process, and Mr Kennedy continued to work for the benefit of the Joint Venture (Mr Kennedy's first witness statement, para. 70-73).

265. Mr Gunning KC on behalf of the Defendants submitted that:

(1) There was no transfer of any liability on the part of Old Seadrill Ltd to New Seadrill Ltd as part of the Chapter 11 proceedings. The Claimants no longer pursue a positive case to that effect.

(2) As explained by the Court of Appeal in *Musst Holdings Ltd v Astra Asset Management UK Ltd* [2023] EWCA Civ 128, at para. 55-59, there can be a

novation inferred from conduct if it is necessary to provide a lawful explanation or basis for the parties' conduct. The only conduct relied on by the Claimants is the provision of Mr Martins' letter dated 9th May 2022, but this can be explained in the context of New Seadrill Ltd possibly entering into a fresh contractual arrangement with Visalia. So, there can have been no novation.

(3) There can have been no estoppel because an estoppel can be established only where (a) there was a pre-existing legal relationship giving rise to rights and duties between the parties; (b) a promise or a representation was given or made by one party that they will not enforce against the other their strict legal rights arising out of that relationship; (c) there was an intention on the part of the former party that the latter will rely on the representation; and (d) there was such reliance by the latter party (*Chitty on Contracts*, (35th ed., 2022), para. 7-037). In this case:

(a) There was no existing relationship between New Seadrill Ltd and Mr Kennedy/Visalia when the relevant assurances are said to have been made. New Seadrill Ltd was not even incorporated until October 2021. Before then, the relevant contractual relationship with Mr Kennedy was with Old Seadrill Ltd.

(b) Any assurances given by Mr Lyne cannot have been given on behalf of New Seadrill Ltd, because it did not exist at the relevant time.

(c) Even if the alleged representations could be attributed to New Seadrill Ltd, they would not amount to a promise not to enforce a then existing legal right or defence against Mr Kennedy.

(d) Promissory estoppel is a defensive doctrine that prevents the enforcement of existing rights it does not "*create new causes of action where none existed before*" (*Combe v Combe* [1951] 2 KB 215, 219). Seadrill Ltd is not now seeking to enforce an existing right, it is maintaining that no such right exists or has existed. Mr Kennedy is the party seeking to establish a contractual right against Seadrill Ltd using the doctrine of equitable forbearance.

(e) The Claimants have not explained how, in the absence of Mr Lyne's alleged assurances, he would have taken steps to ensure that New Seadrill Ltd would now be contractually bound to pay him his alleged Fee.

(f) Sixth, as was explored during his evidence at (Day 3, pages 124-127), and consistently with what Mr Lyne says he had been communicating to him during the process, Mr Kennedy's own email to Mr Jackson on the day of the conclusion of the Chapter 11 process reflects an understanding on his part that any obligation that might be owed to him, whether by Old Seadrill or New Seadrill Ltd, would be "*subject to an FCPA condition that warranted sign-off by 4 members of the Sonangol board*."

266. I will deal only briefly with the issues arising from the effect of the Chapter 11 proceedings and whether, by reason of the above submissions, New Seadrill Ltd assumed responsibility for the obligations of Old Seadrill Ltd.

267. The starting point is that New Seadrill Ltd did not exist until October 2021. As I understand it, there is no express transfer of liability on the part of Old Seadrill Ltd to New Seadrill Ltd by reason of any orders made in the Chapter 11 proceedings. Accordingly, any responsibility assumed by New Seadrill Ltd must have been assumed by means of novation or estoppel. The Claimants have an additional argument that New Seadrill Ltd is independently liable for restitution on the grounds of unjust enrichment.

268. As regards a novation, this submission applies only if there had been an earlier contract, particularly with Old Seadrill Ltd. As the contract I have found to have existed was with Seadrill Management, not Old Seadrill Ltd, I do not see that novation is of any assistance.

269. In case however I am wrong about Old Seadrill Ltd being a party to the contract, I will deal with the submission based on novation. The law was concisely explained by the Court of Appeal in *Musst Holdings Ltd v Astra Asset Management UK Ltd* [2023] EWCA Civ 128, at para. 55-60 as follows:

"*55. As explained in Chitty on Contracts, 34th ed. ("Chitty") at 22-089ff., a novation takes place where a new contract is substituted for an existing contract. This typically occurs where an existing contract between A and B is replaced by a contract between A and C, with C assuming B's rights and obligations. Consideration is provided by discharge of the old contract, specifically by A agreeing to release B, B providing C in its stead, and C agreeing to be bound.*

*56. The consent of all parties is required for a novation. Consent can either be provided expressly or can be inferred from conduct. Whether consent has been provided is a question of fact. For example, in Re Head [1894] 2 Ch 236 a transfer of funds from a current to a deposit account following the death of a partner in a banking partnership was held to amount to a novation of liability to the surviving partner.*

*57. However, a novation will only be inferred from conduct if that inference is required to give business efficacy to what happened. As Lightman J explained in Evans v SMG Television Ltd [2003] EWHC 1423 (Ch) at [181]:*

> *"The proper approach to deciding whether a novation should be inferred is to decide whether that inference is necessary to give business efficacy to what actually happened (compare Miles v Clarke [1953] 1 WLR 537 at 540). The inference is necessary for this purpose if the implication is required to provide a lawful explanation or basis for the parties' conduct."*

*58. Mr Boardman, for Astra, relied on the Court of Appeal decision in MSC Mediterranean Shipping Co SA v Polish Ocean Lines (The "Tychy" (No. 2)) [2001] 2 Lloyd's Rep 403. At [22] the court referred to the acceptance by the trial judge, David Steel J, of a submission that the terms of faxes between the parties were not clear enough to establish a novation, and instead the consent of all parties "must be clearly established on the evidence as being only consistent with the intent of achieving a novation". In fact, rather than accepting that statement quite in those terms, the Court of Appeal referred to it as indicating not that the judge was applying something other than the civil standard of proof, but that where there is an established contract in existence "clear evidence of an intention to produce a novation is likely to be needed if that standard of proof is to be discharged".*

*59. As Chitty explains, a novation differs from an assignment in a number of respects, including the requirement for consent by all parties, the feature that rights and obligations are extinguished and replaced, and the fact that not only rights but obligations are taken over by the new party.*

*60. Chitty also explains at 22-096 and 22-097 that a novation need not be of an entire contract, and that C might be substituted for B only in some respects. Some obligations may be novated and others remain …*"

270. Based on the evidence I have considered, there was no consent expressly given to the novation of the Representation Agreement essentially introducing New Seadrill Ltd in place of Old Seadrill Ltd.

271. As to inferred consent to a novation, Mr Lyne's communications in May 2020 and conversations with Mr Kennedy in February and July 2021 might well have contributed to a novation, but they pre-dated the existence of New Seadrill Ltd and I do not see how New Seadrill Ltd's consent can be inferred from statements made when it did not exist. Of course, when it was incorporated, it might be said that New Seadrill Ltd voluntarily assumed or adopted those past statements, but I find that difficult to uphold where there was no reference by New Seadrill Ltd to those past statements. The discussions in April 2022 to which the Claimants refer are consistent with a novation, especially when considered together with the internal correspondence within Seadrill in March and April 2022 which refer to the arrangements previously made with Mr Kennedy. However, I am unable to conclude that there is any clear evidence of a novation, given that these actions were equally consistent with no relevant contract being in place. Indeed, the email sent by Mr Creed to Mr Kennedy on 4th April 2022 enclosing a disclosure letter to be signed by four representatives of Sonangol did not reflect the terms of the contract I have found to have been made.

272. Further, I am unable to accede to the Claimants' submissions that there was an estoppel, for the reasons largely given by Mr Gunning KC, in particular that there was no pre-existing legal relationship between Visalia and New Seadrill Ltd, there was no sufficiently unequivocal representation or promise by New Seadrill Ltd, and the estoppel would be used to create a cause of action which otherwise did not exist.

273. The final question is whether New Seadrill Ltd has an independent liability for restitution. I would agree that there was an enrichment of New Seadrill Ltd in that it is receiving a Daily Operating Fee for the rigs which included an element for Visalia's remuneration. It is further possible that the recipient of the benefit, New Seadrill Ltd, was a party to the joint understanding that "*the recipient's right to retain it is conditional*", because when New Seadrill Ltd received the relevant fees under the Joint Venture arrangements, it must have known that the benefit was conditional on a contract having been concluded between Old Seadrill Ltd (if there were such a contract) and Visalia. New Seadrill Ltd's knowledge is evident from the internal correspondence in March-April 2022. However, as I have found that there is a relevant contract, and there was accordingly no failure of basis, I do not consider that any such right to restitution arises.

**Quantum of any recoverable claim**

274. I have decided that Visalia is entitled to damages in the sum of the Fee, being the fees due under the contract with Seadrill Management as provided for under the Representation Agreement. Had there been a liability for unjust enrichment, the claim for restitution would be quantified in the same amount.

275. The Fee is calculated in accordance with clause 3 of the Representation Agreement:

(1) US$1,500,000 upon execution of the SHA and associated operating agreements (clause 3.1.1); and

(2) 4% of the "*Contract Revenue*" for each "*Contract Month*" (clauses 3.1.2 and 3.1.3). Clause 1.1 defines "*Contract Revenue*" as follows:

> "*… the following revenue as actually earned and received by the JVC or its Affiliates pursuant to a Relevant Contract for Work performed: (i) dayrate revenue between commencement date and completion date of said Relevant Contract (for clarity, this includes dayrate increases under the contract due to escalation or market index linked dayrate adjustment; and includes other dayrate adjustments agreed with the client such as due to rig upgrades); (ii) demobilization revenue whether said is compensated on a lumpsum or dayrate basis; and (iii) early termination fee revenue whether said is compensated on a lumpsum or dayrate basis.*
>
> *Contract Revenue does not include (i) revenue in respect of mobilization whether said is compensated on a lumpsum or dayrate basis, (ii) revenue in respect of drilling unit upgrades requested and paid for by a client, and (iii) ancillary revenue in addition to the dayrate revenue that is pass through revenue to compensate the JVC for catering, additional personnel (which is billed in addition and separate to the dayrate) or ancillary services.*
>
> *For clarity, "received" means received net of Angolan withholding tax, training levy and other withholdings that may be imposed in the future …*"

276. The parties have provided calculations of their respective cases on quantification, for the period up to and including 7th October 2024 (the date on which the contract would have expired). The Claimants quantified their claim for that period at US$38,272,079.68, including the disputed items. The Defendants' estimate for the same period, excluding the disputed items, is US$31,539,800.01.

277. The parties have agreed that issues of quantification for the period after 7th October 2024 are to be addressed as consequential matters, if necessary. I also accept the Defendants' submission that interest should be calculated as a consequential matter.

278. There are two issues of principle for the Court to determine in relation to quantification of damages:

(1) Whether revenues earned under the *West Gemini* contract prior to its novation to Sonadrill would be included within the Fee. It is common ground that revenues earned under the *Libongos* and *Quenguela* contracts, and revenues earned under the *West Gemini* contract subsequent to its novation to Sonadrill, are included within the Fee.

(2) What categories of revenue earned by the Joint Venture are subject to the Fee, applying the definition of "*Contract Revenue*" in the Representation Agreement.

*West Gemini* prior to novation

279. In July 2019, Seadrill entered into the *West Gemini* contract with Total, which was novated to the Joint Venture in July 2022. When the Sonadrill board approved the *West Gemini* contract on 15th July 2019, its future novation was also approved.

280. Sonadrill's connection with *West Gemini* is evident from the following matters:

(1) Mr Creed during his oral evidence accepted that, when in December 2018 and January 2019, the *West Gemini* contract was being negotiated by Seadrill, "*it would have gone through Sonadrill and both Sonangol and Seadrill input*" (day 4, page 85).

(2) Seadrill Gemini Ltd, the owner of *West Gemini*, became a shareholder of Sonadrill shortly after the *West Gemini* contract was concluded.

(3) The Sonadrill 90 day plan in February 2019 provided for setting priorities for the Joint Venture to include "*Agree terms for first drilling contract with Total. Delivery and mobilisation of the Libongos and Quenguela*". Indeed, Mr Creed during his oral evidence considered that *West Gemini* and *Libongos* to be

interchangeable (day 4, page 88) and that Total should deal with the Joint Venture (day 4, page 89).

(4) In May 2019, Seadrill noted that it was intended that the *West Gemini* contract would be novated to the Joint Venture.

(5) In August 2019, Seadrill Gemini Ltd was one of the contracting parties to the Management Agreement.

(6) The rig status updates circulated to the Sonadrill board referred to *West Gemini*, as well as *Libongos* and *Quenguela*.

(7) When the novation took place on 1st July 2022, Sonadrill noted that *West Gemini* was intended to be the first rig operating within the Joint Venture and that Sonadrill had only recently discovered that *West Gemini* was not part of the Joint Venture.

281. The Claimants accept that, on the express terms of the Representation Agreement, drilling revenue earned by Seadrill under the *West Gemini* contract prior to its novation is not a "*Relevant Contract*" on which "*Contract Revenue*" is payable (because the "*Relevant Contracts*" are those that are entered into "*by the JVC or one of its Affiliates*"). The Claimants contend that a term should be implied into the parties' bargain, for reasons of business efficacy and/or obviousness, that drilling revenues earned by Seadrill pursuant to the *West Gemini* contract should be included within the Fee, being a contract always intended by Seadrill, Sonangol and Mr Kennedy to be novated to the Joint Venture.

282. In support of this submission, Ms Wood KC contended that:

(1) It was at all times a key part of the Joint Venture that each partner would contribute two rigs, and that commission would be payable to the Claimants on all four of those rigs in recognition of Mr Kennedy's role in introducing and concluding the Joint Venture. It was envisaged from at least January 2019 that a drilling contract with Total for use of the *West Gemini* would form part of the Joint Venture; indeed, on 31st January 2019, Mr Dibowitz told Mr Kennedy that he did not wish to negotiate with Total until "*after the SHA is executed and*

*announced publicly*", and this was the reason why Seadrill were pressing for the execution of the SHA.

(2) It is contrary to the notions of efficacy and obviousness that revenues earned from a contract executed "outside" of the Joint Venture simply to avoid losing that opportunity, where that contract was concluded with the knowledge and support of Sonangol and Mr Kennedy, and where it was intended by Seadrill, Sonangol and Mr Kennedy that novation take place as soon as possible, and prior to the commencement of drilling operations, should fall outside the purview of the Fee.

(3) The parties cannot have intended Visalia to be deprived of the Fee on pre-novation *West Gemini* revenues simply because the contract was not, due to a combination of vicissitudes, novated to the Joint Venture for three years thereafter, including Total's delays in conducting due diligence, the suspension of the *West Gemini* contract for over a year during the pandemic, and Seadrill's entry into the Chapter 11 proceedings.

(4) It was an implied term of the parties' agreement, by way of business efficacy and/or obviousness, that the Fee was payable on revenue earned under the *West Gemini* contract even prior to its novation to Sonadrill.

283. Mr Baiou submitted on behalf of the Defendants that there should be no such implied term, because:

(1) Although it is accepted that it was intended at the outset of the Joint Venture that the *West Gemini* would be contracted on behalf of the Joint Venture, the Joint Venture agreed that Seadrill, rather than Sonadrill, would execute the contract then on the table with Total, with a view to novating it to Sonadrill in due course. The Sonadrill board stated that a novation would need to be brought back to it for approval.

(2) The fact that the purpose of the JV was for Sonadrill and Seadrill each to supply two rigs does not address why any rig which was not so supplied should be treated, for the purposes of the representation agreement, as if it had been.

(3) The Claimants' argument pre-supposes what they are required to establish, namely that the initial 2019 *West Gemini* contract was expected to form part of the Joint Venture from the outset.

(4) Seadrill does not accept that the basis upon which the parties dealt with each other at all times was that the *West Gemini* contract was the Joint Venture's opportunity.

(5) The relevant test for the implication of terms was summarised by Lord Hughes in *Ali v Petroleum Company of Trinidad and Tobago* [2017] UKPC 2; [2017] ICR 531, at para. 7:

> "*A term is to be implied only if it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, ex hypothesi, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, Oh, of course) and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient precondition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement*."

(6) The Claimants' alleged implied term fails this test for two main reasons.

(a) The issue of whether Seadrill revenue and/or revenue pursuant to Seadrill contracts in Angola would fall within the scope of "*Contract Revenue*" was heavily negotiated between Seadrill and Mr Kennedy and the parties settled on express language that would exclude such revenue. That alone is fatal to the Claimants' alleged implied term.

(b) It is unclear why an implied term specifically directed at the revenue from Seadrill's *West Gemini* contract would be necessary to make the agreement with Mr Kennedy/Visalia work, whether because it was obvious or for reasons of business efficacy.

(7) For so long as the *West Gemini* was not included in the Joint Venture, Seadrill Management would not be receiving the benefit of a management fee from

Sonadrill in respect of that rig, which is the fee which was intended to include an amount in respect of Visalia's fees. It is not at all obvious why the parties would still have intended, in those circumstances, for Seadrill to pay Visalia 4% of the drilling revenue received in respect of that rig.

(8) In support of the alleged obviousness of their implied term, the Claimants rely on statements which simply express the view that the *West Gemini* had been intended to be included in the Joint Venture. None of them expresses the position that revenue earned from the *West Gemini* while that rig was outside of the joint venture would be the subject of fees payable to Visalia. In practice, Seadrill understood and proceeded on the basis that Visalia's potential fee would not include a share of revenue from its *West Gemini* contract, as the Claimants accept, Seadrill did not accrue sums payable to Visalia in respect of its *West Gemini* contract prior to the novation to Sonadrill.

284. In my judgment, I am not satisfied that a term contended for by the Claimants should be implied in the contract I have found to have been concluded. It is undoubtedly the case that Sonadrill and Seadrill expected that the *West Gemini* contract to be novated to the Joint Venture. However, that is not in my view sufficient to justify the implication of the proposed term, because:

(1) The parties defined what constituted Contract Revenue.

(2) To imply the term suggested by the Claimants would be to re-write the terms of the contract.

(3) Although I can see that the proposed implied term would be desirable, I do not consider that it was necessary for business efficacy.

(4) Nor do I consider that the implied term was obvious. The parties' expectation that the *West Gemini* contract would be novated to the Joint Venture was in fact an expectation that, once novated, drilling revenue earned by Seadrill under the *West Gemini* contract would constitute Contract Revenue. The parties were therefore aware of the significance of the novation. If the novation did not take place, that was a risk assumed by either or both parties. It was not suggested

that the failure to novate the *West Gemini* contract earlier represented a breach of duty by any relevant party.

Categories of Contract Revenue

285. The terms of the contract - clauses 13 and 15.5 of the Representation Agreement - provided for a 5 year term, from 7th October 2019 to 7th October 2024, and for the payment of the Fee during that term and, in respect of Relevant Contracts which were entered into and in force at the date of the expiry of the term.

286. The Contract Revenue data was held by Seadrill, being a party to the Joint Venture. In his first witness statement, at para. 101, Mr Creed identified the following categories of revenue:

(1) Operating / Drilling Revenue earned under a drilling contract.

(2) Add-on sales revenue relating to the incremental cost of items beyond the scope negotiated under the drilling contracts, such as catering or transportation of particular equipment requested by the customer.

(3) Integrated services revenue relating to certain additional services required either by local law or by the client, provision of which was included in the drilling contracts.

(4) Performance bonus, being the bonus payable under certain drilling contracts where specified performance targets are met. This included any liquidated damages payable for delays in mobilisation of the rigs (Mr Creed's second witness statement, para. 27).

(5) Reimbursable revenue handling fee, being any mark-up paid by the client on reimbursable revenue.

(6) Amortised mobilisation / demobilisation revenue, typically being a lump sum payment to compensate the rig owner for costs associated with transporting the rig to or from the drilling location and any preparation of the rig for the contract execution. This lump sum could be amortised over the life of a drilling contract.

(7) Business tax gross revenue not creditable relating to an Angolan levy of 0.5% of total revenue deducted by the client from payments under the drilling contract.

(8) Reimbursable revenue, being revenue received by way of reimbursement for *ad hoc* client requested equipment or services.

287. The parties are agreed that Operating / Drilling Revenue is included within "*Contract Revenue*" for the purposes of calculating the Fee. It is also common ground that a US$11,000,000 fee paid to Seadrill under the *West Gemini* Contract in substitution of the day rate during the Covid-19 pandemic falls within the definition of Contract Revenue.

288. The Claimants however contend that the Incentive Services revenue, the incentive payments element of the Performance Bonus, and the revenue from the three drilling rigs, whose drilling contracts continued beyond October 2024, should be included in the Contract Revenue for the calculation of the Fee.

289. The Defendants submitted that the following elements do not constitute Contract Revenue:

(1) Integrated services, being revenue relating to services that were separate and ancillary to the core drilling services under the Joint Venture's contracts, are not Contract Revenue (being neither dayrate, demobilisation or termination fee revenue, and being more accurately described as "*pass through revenue to compensate the JVC for catering, additional personnel ... or ancillary services*").

(2) The Performance Bonus entries are not Contract Revenue, being neither dayrate revenue nor dayrate adjustments.

(3) Amortised mobilisation / demobilisation revenue are payments for mobilisation services only (Mr Creed's second witness statement, para. 31), and are expressly excluded from Contract Revenue.

(4) The Reimbursable revenue corresponds to sums received by way of reimbursement for *ad hoc* client-requested equipment or services and includes

the "*reimbursable revenue handling fee*" revenue separately accounted for in the Management Reporting Data which includes Sonadrill's overhead or management costs in procuring the requested service (Mr Creed's first witness statement, para. 101). This is excluded from Contract Revenue as ancillary revenue that was "*pass through revenue to compensate the JVC for catering, additional personnel … or ancillary services.*"

290. The parties therefore dispute the proper treatment of Integrated Services revenue and Performance Bonus revenue. The Claimants have stated that Reimbursable revenues, for the period up to 7th October 2024 and Amortised mobilization/demobilization revenue can be excluded from the claim.

291. As regards the Integrated Services revenue,

(1) Ms Wood KC on behalf of the Claimants submitted that this category appears to relate to revenue for what is described in the Drilling Contracts as "*Additional Services*", which variously comprise solids and wastewater management, data transmission and additional bandwith (Mr Creed's second witness statement, para. 24). As is apparent from the terms of the rigs' drilling contracts, the fees for these services were generally (i) charged at a daily rate; and (ii) contained in the same clause as the base drilling rate.

(2) Mr Baiou submitted on behalf of the Defendants that the "*dayrate*" for the purposes of the definition of Contract Revenue refers to the headline "*drilling services*" dayrate revenue and would therefore not include any Integrated Services revenue, which relates to services that were separate and ancillary to the core drilling services under the Joint Venture's contracts and were generally performed by subcontractors, such revenue being more accurately described and excluded from "*dayrate revenue*" as *"pass through revenue to compensate the JVC for catering, additional personnel … or ancillary services*". Some fees for Integrated Services were calculated by reference to a daily rate, but others were not.

292. In my judgment, the Integrated Services revenue is included within the Contract Revenue but only insofar it was charged as a dayrate, because:

(1) The definition of Contract Revenue embraced "*dayrate revenue*", demobilisation revenue whether compensated on a lumpsum or dayrate basis, and early termination fees whether compensated on a lumpsum or dayrate basis.

(2) I do not read the words "*dayrate revenue*" as being limited to "*headline drilling services*". Contract Revenue, however, does not include lumpsum revenue unless it relates to demobilisation revenue or early termination fees.

(3) The exclusion within the definition of "*Contract Revenue*" relating to "*ancillary revenue in addition to the dayrate revenue that is pass through revenue to compensate the JVC for catering, additional personnel (which is billed in addition and separate to the dayrate) or ancillary services*" presupposes that it is billed separately from the dayrate and therefore the dayrate portion of the Integrated Services revenue is not within the exclusion.

293. As regards Performance Bonus revenue,

(1) Ms Wood KC on behalf of the Claimants submitted that the incentive element of the Performance Bonus revenue is included within the Contract Revenue, because such payments constitute a "*dayrate adjustment*". As evident from the drilling contracts, Performance Bonuses were awarded to compensate the contractor for efficient performance of the ordinary drilling activities for which the base dayrate was payable, so that the bonuses were (i) predominantly calculated by a reference to a daily bonus rate for the *Quenguela* and *West Gemini* rigs and (ii) assessed by Seadrill for the *West Gemini* rig as a daily uplift (as Mr Creed told the Sonadrill board on 6th April 2022: "*we can expect $13k/d bonus if the rig continues to drill 5% below client target*"). Deductions for liquidated damages should not be taken into account, because (i) the definition of Contract Revenue does not provide for such sums to be netted off, and (ii) liquidated damages were payable under the Drilling Contracts for "*delays in mobilisation*", and mobilisation revenues are expressly excluded from the scope of Contract Revenue.

(2) Mr Baiou on behalf of the Defendants submitted that Performance Bonus revenue is not Contract Revenue, because they are neither dayrate revenue nor dayrate adjustments. The *Libongos* contract incentive scheme is a

"*discretionary award scheme*" applied at the company's sole discretion on a "*single well basis*". The *Quenguela* Contract applies on a per-day performance basis and the Sonadrill *West Gemini* contract applies on a per-well performance basis. The Claimants' argument that Mr Kennedy's fee should include a share of any Performance Bonus, without any deduction for liquidated damages is unsustainable, because liquidated damages are netted off against revenue, reducing the amount of revenue actually received by Sonadrill.

294. In my judgment, the incentive element of the Performance Bonus revenue is included within the Contract Revenue in respect of *Quenguela* and *West Gemini* rigs, as they were earned on a dayrate basis. Having reviewed the *West Gemini* contract, I considered that it charged the Performance Bonus on the same basis as the *Quenguela* contract, and not on a per-well basis. By contrast, the Performance Bonus revenue for the *Libongos* does not fall within the Contract Revenue, because it is applied on a single well basis. However, the liquidated damages portion of any Performance Bonus does not fall within the Contract Revenue. Insofar as the liquidated damages portion affects the incentive element of the Performance Bonus revenue, I would like to receive additional submissions on the said effect and how this affects the quantification of the fee, if at all.

**Conclusion**

295. For the reasons explained above, I have concluded that:

(1) There was a binding contract between Visalia and Seadrill Management in place as at 5th February 2019, immediately before Old Seadrill Ltd executed the SHA with Sonangol. The contract obliged Seadrill Management to pay and account to Visalia in respect of the promised remuneration provided for under the Representation Agreement, namely US$1,500,000 and 4% of the Contract Revenue, provided that the Fee Condition of the disclosure letter being signed by the CEO of Sonangol was satisfied.

(2) The Fee Condition in the said contract was satisfied by the provision of Mr Saturnino's letter dated 11th April 2019 and, if that is wrong, by the provision of Mr Martins' letter dated 9th May 2022.

(3) Once the Fee Condition was satisfied, Seadrill Management became obliged to account to Visalia for the US$1,500,000 fee and the fee based on 4% of the Contract Revenue, subject to the payment provisions in the Representation Agreement. As Seadrill Management has not accounted to Visalia accordingly, there has been a breach of contract by Seadrill Management.

(4) In these circumstances, Visalia's claim against Seadrill Management succeeds. However, Visalia's claim for breach of contract against Old Seadrill Ltd does not succeed and Mr Kennedy's independent claim for breach of contract against either Defendant does not succeed.

(5) If there had been no contract between Visalia and Seadrill Management, Visalia (but not Mr Kennedy) would have been entitled to restitution from both Seadrill Management and Old Seadrill Ltd of the Fee on the grounds of unjust enrichment by reason of the fact that there had been a failure of basis underlying the enrichment of Seadrill. However, Seadrill would not have been liable to account to Visalia as a trustee.

(6) New Seadrill Ltd bears no liability to Visalia, by reason of novation or estoppel or independently by way of restitution for unjust enrichment.

(7) The quantification of the damages owing to Visalia includes (a) the dayrate portion of the Integrated Services revenue and (b) the incentive element of the Performance Bonus revenue relating to *Quenguela* and *West Gemini* (subject to the impact, if any, of the liquidated damages portion of the Performance Bonus revenue), but excludes (i) the *West Gemini* pre-novation revenue and (ii) the Performance Bonus revenue relating to *Libongos*. I ask the parties to calculate the quantum of the damages and, if that cannot be agreed, I shall deal with it as a consequential issue, together with the quantification of damages, if any, after 7th October 2024.

296. I am very grateful for the parties' extremely well-prepared cases and the excellence of the oral and written submissions. A complex trial was conducted by the parties' legal representatives with admirable efficiency.