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Case No: 2010 FOLIO 1517

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/12/2013

Before:

LORD JUSTICE CHRISTOPHER CLARKE

- -

Between :

Excalibur Ventures LLC **Claimant**

- and –

(1) Texas Keystone Inc.
(2) Gulf Keystone Petroleum Limited
(3) Gulf Keystone Petroleum International Limited
(4) Gulf Keystone Petroleum (UK) Limited **Defendants**

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- -

Simon Picken QC, Timothy Kenefick, Jessica Sutherland and Keir Howie (instructed by **Clifford Chance**) for the **Claimant**
Michael Crane QC, Tamara Oppenheimer and Richard Power (instructed by **Jones Day**) for the **1st Defendant**
Jonathan Gaisman QC, Harry Matovu QC, Richard Waller QC, Richard Eschwege and Nicola Timmins (instructed by **Memery Crystal**) for the **2nd, 3rd and 4th Defendants**

Hearing dates: **October** 15th – 18th, 22nd, 23rd, 30th and 31st; **November** 1st, 5th – 8th, 12th – 15th, 19th – 21st, 23rd, 26th – 30th; **December** 3rd – 7th, 10th – 13th, 17th – 19th; **2012**; **January** 14th – 17th, 21st – 25th, 28th – 31st; **February** 1st, 4th, 5th, 15th, 25th – 28th; **March** 1st , **September** 10th **2013**.

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LORD JUSTICE CHRISTOPHER CLARKE

Introduction *Index*

1. In 2007 Kurdistan was one of the last largely unexplored inland regions where there were prospects of discovering oil. **Excalibur Ventures LLC** ("Excalibur"), the claimant, contends that it has been unlawfully cut out of a deal under which, in the events which have happened, it became entitled to an interest in four blocks in Kurdistan, one of which – the Shaikan block – has been found to have very large quantities of oil – something like three times the amount of Brent North Sea oil.

2. The foundation of Excalibur's claim is a Collaboration Agreement ("the Collaboration Agreement") of 16 February 2006 under which the parties agreed to collaborate in bidding for petroleum blocks in Iraqi Kurdistan. In Kurdistan the form which concessions take is that the Kurdistan Regional Government of Iraq ("KRG") enters into a Production Sharing Contract ("PSC") with one or more companies.

3. The Collaboration Agreement is expressed to be between Excalibur and **Texas Keystone Inc** ("Texas"), the first defendant. Excalibur claims that **Gulf Keystone Petroleum Ltd** ("Gulf"), the second defendant, was also a party to that agreement

(either because Texas executed it as Gulf's agent or because Texas was the *alter ego* of Gulf) or became one by assignment.

4. In the event, Excalibur accepted not being a party to any PSC to be entered into as a result of a successful bid. On 6 November 2007, after a series of proposals (as opposed to a formal bid), a PSC was entered into between the KRG on the one hand and (i) **Gulf Keystone International Ltd** ("Gulf International"), the third defendant, a Gulf subsidiary; (ii) Texas; and (iii) Kalegran Ltd ("Kalegran") on the other in respect of the Shaikan block. Kalegran is a Cypriot company wholly owned by MOL Hungarian Oil & Gas Public Company Ltd ("MOL"), a public oil and gas company listed on the Budapest Stock Exchange, whose largest shareholder is the Hungarian State.

The dispute in summary *Index*

5. Excalibur contends that, although it is not a party to the Shaikan PSC, the Collaboration Agreement entitles it to an interest in it. Any such interest would necessarily be indirect. The principal remedy which it claims is specific performance of the Collaboration Agreement, so as to give effect, in such manner as the Court may determine, to its indirect interest in Shaikan. It also claims similar relief in respect of three other blocks:

   i) Akri-Bijeel, which was the subject of another PSC of 30 October 2007 between the KRG and Kalegran and of an acreage swap of 31 December 2007 whereby MOL (the bidder) exchanged a 20% interest in Akri-Bijeel for a 20% interest in Shaikan;

   ii) Sheikh Adi; and

   iii) Ber Bahr.

   The PSCs in respect of Sheikh Adi and Ber Bahr were signed in 2009.

6. Alternatively Excalibur claims damages from Texas and Gulf in contract, including various claims in the alternative to its primary contractual claim, and under five non-contractual headings (interference with contract, interference with business relations, breach of fiduciary duty, fraud by misrepresentation and fraud by concealment). It puts its damages at over US[1] $ 1.75 billion in respect of Shaikan alone. All the defendants contend that Excalibur is not entitled to any relief against any of them.

7. Gulf claims, *inter alia*, that it was never a party to the Collaboration Agreement, and that it was entitled to bid for Shaikan (and any other block) without reference to Excalibur. Both Texas and Gulf contend that, by deciding that it did not need to be on the PSC, Excalibur in effect gave up on any rights under the Collaboration Agreement, which does not, they say, confer or recognise any indirect interests. Even if it might have been entitled to an indirect interest, Excalibur could not raise the necessary finance for the bonuses payable under the Shaikan PSC within any commercially acceptable timeframe, so that it was in material breach of its obligations under the Collaboration Agreement, or renounced them. It was, in any event, neither

[1] All $ figures in this judgment are in US dollars unless otherwise stated.

ready nor able to fulfil those obligations within such a timeframe, so that, on both counts, it is disentitled to any such interest.

8. The closing submissions in the present case exceed by about 30,000 words the length of the Old Testament (in the King James version). They have 9,214 footnotes helpfully hyperlinked to the documents and the transcript. I do not intend to deal in this judgment with all the material referred to, facts asserted, or arguments made. If and insofar as I do not do so that does not mean that I have ignored them. I have read the entirety of the submissions more than once and reread a very substantial proportion of the referenced material. This judgment contains such findings of fact as I consider it necessary to make and my conclusions thereon in the light of the submissions made.

9. Many, but by no means all, of the facts are not the subject of serious dispute. In this judgment I have made extensive use of the framework and content of Volume 2 of Gulf's final submissions (which contains a detailed narrative history) and, in particular, its summary or citation of documents and evidence, but with many variations, additions, omissions, qualifications and substitutions of my own. I have done so because I have found it a reliable summary of relevant parts of the enormous quantity of documentary material and the oral evidence of both sides. Wherever I have made use of the text from that source (whether in original or altered form) I have checked the relevant references to satisfy myself that the citation is accurate and not incomplete.

The parties and those behind them

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Excalibur

10. Excalibur, the claimant, is a Delaware corporation. It is the corporate vehicle of Mr Rex Wempen ("Mr Wempen"), who founded it in April 2003, and his brother Eric Wempen. Under an Amended and Restated Operating Agreement of 6 January 2008 ("the Operating Agreement"), which replaced the original agreement of 1 May 2003, he is its sole Manager and in complete control. The company has no shares and consists only of membership interests – 75% in the case of Rex and 25% in the case of Eric Wempen[2].

11. Excalibur has no working capital; and no Board. It never had any formal management or investment team (as opposed to people on whom it might be able to call on to work on different projects). It had no employees in any sense after 2004. The Operating Agreement provides that Excalibur shall not hold annual meetings of members: clause 5.7.2. It is not an oil company and has no track record in respect of oil exploration or production, nor any oil and gas expertise. It is, in essence, a nameplate for the Wempen brothers, who have no relevant management experience.

12. Excalibur has not prepared financial statements or any other financial information since 2005. It is not required to do so. The only set of accounts located (for 2003) shows Total Assets of $ 6,739, and a trading loss of $ 5,935 against revenue of $ 146,799. In 2006 Excalibur had no income. Excalibur did not maintain management

[2] During 2006 and 2007 the minority interest was held by the Wempens' mother and before then Eric Wempen had had less than 25% and the amount had fluctuated.

or similar accounts[3]. The bank accounts for 2003-4 were left in the Baghdad office and have been lost, as have tax records prior to 2009 save for a filing in 2008, which declared that Excalibur had nil assets and a net loss of $ 120,992. Because Mr Wempen has not since 2008/9 conducted business through Excalibur, other than the pursuit of these proceedings, it has had no assets or liabilities on its books.

Texas

13. Texas was incorporated in Texas on 4 October 1988. It was founded by David and Todd Kozel for the purpose of oil and gas exploration and production in the United States. The male members of the Kozel family consist of Frank Kozel[4], and his sons Robert, David and Todd (in that order). Since early 1999 when Robert Kozel exercised an option to buy 10,000 shares it has been beneficially owned by all three Kozel brothers in equal shares. Frank Kozel is entitled to a 25% share of the profits. Texas is primarily involved in the development and production of oil and gas from wells located in the Appalachian basin with operations in Pennsylvania, West Virginia and New York State, where it has interests in over 1,800 producing oil and gas wells.

14. Initially Frank Kozel was President and Todd and David Kozel were Vice-Presidents. David Kozel was in control of field operations. When he joined the company in around 1994 Robert worked on fund raising and became a Vice President.

15. From 1994 until September 2004 Todd Kozel (hereafter "Mr Kozel") was President of Texas. Until a date in 2003 he was also its Chief Executive Officer, although Frank Kozel played a significant management role until around 2001. From 2003 until July 2011 Robert Kozel was Chief Executive Officer and from September 2004 until July 2011 he was President and Mr Kozel was Vice Chairman (but not an officer). Robert Kozel ran the company from its offices in Pittsburgh, Pennsylvania. David Kozel remained in charge of field operations. In 2006 and 2007 the Board consisted of Frank Kozel and the three Kozel brothers. Texas currently has about 50 employees all of whom work in the USA.

16. By 2006 Texas was a well-established oil company, having facilitated the drilling of some 1,200 wells and at that stage overseeing the operation and distribution activities of more than 800 actively producing wells. The Kozel family had extensive experience in oil and natural gas in the USA with more than 375,000 acres of land under management. Texas had considerable technical capabilities. Its gross revenue for 2006 was over $ 40 million.

Gulf - Gulf LLC and Gulf Algeria/Gulf Keystone

17. In late 1999 the Kozel family and other UAE and Kuwaiti investors founded **Gulf Keystone Petroleum LLC** ("Gulf LLC") in Sharjah in the U.A.E. to pursue oil and

[3] This situation appears inconsistent with the provisions of the Operating Agreement, Article 9.1 which requires the Manager i.e. Mr Wempen to "*keep adequate books and records at one or more of its places of business, setting forth a true and accurate account of all business transactions arising out of and in connection with the conduct of the Company*". Further, Article 9.2 provides that "*the Members shall be furnished annually by the Company with an unaudited financial statement for the year then ended.*"

[4] Frank Kozel had built up his own business – Keystone Energy Oil & Gas Inc – from nothing to one worth tens of millions of dollars. Texas' funding was initially secured from those who had backed Frank in his successful ventures.

gas development opportunities outside the US, particularly in North African and Middle Eastern countries, seeking foreign energy companies as partners in the development of oil and gas reserves. The idea was to try to use in these countries the small independent model which had worked for Texas in the United States. Sheikh Faisal Bin Sultan Al-Qassimi ("Sheikh Al-Qassimi") was Chairman and Frank Kozel Vice Chairman.

18. Gulf LLC participated in Algeria's first international bid round for oil and gas licences. As a result on 14 February 2001 it was awarded, together with Sonatrach, Algeria's national oil and gas company, a PSC for Block 126 in the Ferkane area of North East Algeria. The contract was signed on 28 February 2001.

19. On 29 October 2001 Gulf LLC incorporated **Gulf Keystone Petroleum Algeria Ltd** ("Gulf Algeria") in Bermuda as a 100% subsidiary to act as Gulf LLC's operating company in Algeria to include the development of Block 126. With Sonatrach's consent Gulf LLC assigned all its rights and obligations, including its interest in Block 126 to Gulf Algeria (Gulf LLC becoming a guarantor of the obligations).

20. On 20 May 2004, in preparation for the listing referred to below, Gulf Algeria changed its name to Gulf, the second defendant. On 26 May 2004 Roger Parsons and Bill Guest joined the Board as non-executive directors. Mr Parsons, who became non-executive Chairman, had over 35 years of investment banking experience. Mr Guest, who became President, had substantial oil and gas exploration experience through Shell, Monument Oil and Gas Plc and Endeavour International Corporation.

21. Gulf LLC and Gulf were initially financed by capital and loans provided by the Kozel family and unrelated foreign investors. Some of this finance was provided by Texas or Falcon Partners, a Pennsylvanian business trust founded by the Kozel family in 1996.

22. In 2002, 2003 and 2004 Gulf secured about $ 9.5 million, $ 14.95 million and $ 13 million by private placement of Series A preferred shares to individual and institutional investors.

Gulf's float

23. On 8 September 2004 Gulf floated on the Alternative Investment Market ("AIM") of the London Stock Exchange raising $ 60 million gross in an initial public offering ("IPO").

24. For the purpose of the IPO Gulf had to produce a "Competent Persons Report", describing and assessing the company's assets. The Competent Persons Report was carried out by a subsidiary of Exploration Consultants Limited ("ECL"), a company based in Henley-on-Thames, providing consultancy and operations services (seismic and well site geology) to exploration and production ("E & P") companies. ECL's Chairman was Dr Ashti Hawrami ("Dr Hawrami"), an Iraqi Kurd, who was in May 2006 to become the Minister of Natural Resources in the KRG. Gulf continued to use ECL's services after the listing. Mr Kozel first met Dr Hawrami in 2002 or 2003[5].

[5] Until shortly before the first Erbil visit – see para 370 – there was an outstanding dispute over unpaid invoices.

25. After its flotation Gulf focused on the development of exploration activities in Algeria. In April 2005 it acquired, against stiff international competition, a further 8 licences for exploration blocks in Algeria so that its total acreage was 33,216 km². One of the blocks acquired was the Hassi Ba Hamou block ("HBH") gas concession. The only loan made by the Kozel family to Gulf after the IPO was a 12 months loan of $ 2.5 million made to Gulf through Falcon Partners at 7% per annum when Gulf was facing liquidity problems. GIBCA, Gulf LLC's 51% shareholder (see para 31 below), provided a similar loan. The loan agreements were signed on 9 June 2006.

26. In August 2006 Gulf farmed out part of its interest in HBH to the BG Group, raising $ 55 million. The loans referred to in the previous paragraph were fully repaid with interest on 13 January 2007 after the completion of the BG deal.

27. In 2006 Gulf made a profit of $ 46.3 million and had net assets of $ 163.351 million, with cash and cash equivalents of $ 59.328 million. As at 31 December 2007 its net assets were $ 133.99 million with cash and cash equivalents of $ 88.29 million.

28. Over the years the commercial environment in Algeria became increasingly difficult as the Algerian authorities sought to re-negotiate contracts; and in 2009 Gulf decided to exit Algeria. Oil production in Algeria ceased in June 2008 and Gulf surrendered its remaining oil assets to the Algerian Government. In February 2010 it sold its remaining gas interest in HBH to BG for $ 10 million and it ceased operations there in 2011.

29. **Gulf Keystone Petroleum (International) Ltd** ("Gulf International") is a wholly owned subsidiary of Gulf, which was incorporated in Bermuda on 6 August 2007. It was to become a party to the PSCs for the four blocks at issue in these proceedings. Its directors in 2007 were Mr Kozel, Mr Ali Al-Qabandi (see para 31 below) and Mr Jon Cooper, then Gulf's Chief Financial Officer.

30. **Gulf Keystone Petroleum (UK) Ltd** ("Gulf UK") is a wholly owned subsidiary of Gulf, which was incorporated in England on 17 November 2004. It provides geological, geophysical and engineering services and administration to companies in the Gulf group. Although it is the fourth defendant no relief appears to be claimed against it and it can be ignored.

Changes in shareholdings in Gulf LLC and Gulf

Gulf LLC

31. When Gulf LLC was formed its shares were held in the following percentages:

    i) 51% GIBCA, a company founded by members of the Al-Qassimi family[6], who were in banking and construction in Sharjah;

    ii) 10% Mr Ali Al-Qabandi, a Kuwaiti, whom Mr Kozel had met at the end of the first Gulf War in 1991, and who prior to early 2001 worked for the Kuwait Oil Company;

[6] Which includes Sheikh Faisal Bin Sultan Al-Qassimi and Sheikh Khalid Bin Saqr Al-Qassimi.

iii) 10% Mr Ibrahim Al-Khaldi, a Saudi, who prior to early 2001 had been working for Baker Hughes Inc, a major oilfield service company;

When the contract for Block 126 was won in 2001 Mr Al-Qabandi and Al-Khaldi resigned their then posts and moved to Algeria to develop the Block.

iv) 29% Mr Kozel in trust for his father and the three brothers.

100%

32. In 2003 Mr Kozel bought an 11% shareholding from GIBCA.

33. In May 2011 Gulf LLC was wound up and its shares in Gulf were distributed to its shareholders.

Gulf

34. On 27 May 2004 each common share of US $ 1 in Gulf Algeria was sub-divided into 100 common shares of US $ 0.01. Gulf LLC's holding then became 90 million common shares. It transferred 20 million to GIBCA, 20 million to Mr Kozel and 5 million each to Mr Al-Qabandi and Mr Al-Khaldi leaving it with 40 million. Mr Kozel agreed with his father and brothers that he would own his 20 million shares personally.

35. The $ 60 million raised by the September 2004 IPO was in exchange for 125 million new common shares of US $ 0.1 each at an issue price of 48p. In addition to the 90 million common shares in issue prior to the placing, the 37,564,500 Series A preferred shares which had been issued in exchange for earlier financing were converted to 37,564,500 common shares.

The relationship between Gulf and Texas

36. Excalibur contends that the relationship between Gulf and Texas is such that Texas is to be regarded as the *alter ego* of Gulf; that Texas danced to Gulf's tune; and that Robert Kozel was, in relation to Texas' affairs, dominated by his younger brother. I consider these contentions in more detail below. For the moment it is necessary to set out a number of facts.

Shareholdings

Gulf

37. Gulf is a public, AIM listed company, incorporated in Bermuda. It is, thus, subject to the requirements of the company law of Bermuda and the applicable rules of the London Stock Exchange. The AIM Rules call for supervision by a Nominated Adviser ("Nomad") who has to meet the eligibility criteria set out for Nominated Advisers and be approved by the AIM Regulation Team.

38. Texas does not have, and never has had, any shares in Gulf.

39. As at 31 December 2004 Mr Kozel had a direct interest in 20 million shares in Gulf. On 18 July 2005 he purchased 500,000 shares which brought his total direct shareholding to 20,500,000 shares. That was his shareholding as at 31 December 2005. He had 2,650,000 share options that could be exercised for a certain period up until 2014 if the company's share price reached certain levels. The total share capital of the company at this time was 253,732,140 shares. As at 31 December 2007 he still had 20,500,000 shares and the share options had not been exercised. The total share capital at this time was 278, 040, 556 shares[7]. He, therefore, directly owned 7.2% of the issued share capital.

40. In addition Gulf LLC owned (see para 34) 40 million shares in Gulf i.e. just under 16%. Mr Kozel had an 11% shareholding in Gulf LLC and a 25% beneficial interest in a further 29% of Gulf LLC i.e. 7.25%, making 18.25% of Gulf LLC and, thus, a further indirect interest in Gulf of 2.92% (16% of 18.25%).

41. On 24 February 2009 Mr Kozel established the Gokana Trust, a trust of which Mr Kozel was the settlor but not a beneficiary. On 15 April 2009 he transferred 20,000,000 shares in Gulf, then equivalent to 5.4% of Gulf's issued capital, by way of gift to Emeralp (sic) Trust Ltd, the trustee of the trust. In early August 2009 the trust subscribed for 10,750,000 new shares in Gulf with the benefit of a loan from Mr Kozel, which was later repaid.

42. The arrangements in respect of the trust are unclear. Mr Marcus Hugelshofer, Mr Kozel's lawyer, was described by Mr Kozel as a trustee. There is in the papers what appears to be the trust deed, which provides for a number of charitable beneficiaries and excludes Mr Kozel and the Trustee or any director or employee of the Trustee as beneficiaries. Mr Kozel said in evidence that, at the discretion of trustees, the trust was capable of having beneficiaries which were not charities provided that they did not include him or anyone related to him. But he also said that he issued a letter of wishes at the end of August or the beginning of September 2009[8] asking for his ex-wife and children to be added as beneficiaries although that was, he said, cancelled later, apparently because they were not capable of being beneficiaries at all.

43. There have been later developments in relation to Mr Kozel's shareholding in Gulf the details of which are immaterial. He has never substantially controlled it and has always had a small minority stake.

Texas

44. Texas is a private, family owned company with its management based in Pittsburgh. The Kozel brothers own all the shares in Texas in equal proportions. None of them is, therefore, a controlling shareholder.

45. Gulf does not have, and never has had, any shares in Texas.

Management

[7] As at April 2011 there were over 754 million issued shares in Gulf which had a market capitalisation of £ 902,800,000 at the then price of £ 1.22 per share. There were 2,262 shareholders including institutional shareholders such as M & G Investments.

[8] This was a departure from evidence he gave in Florida divorce proceedings to the effect that a letter was in existence at the time of the placement of shares in early August 2009.

Texas

46. Texas is a family run business. The Kozel brothers, who are the only shareholders, and their father (who, in addition to them, is a director) communicate with each other and make decisions in an informal way, often in person or by telephone. Their offices and that of their father were next to each other in Pittsburgh. They were not much given to minutes or memoranda. But board level decisions, however informally taken, were made by the board. Mr Kozel did not have power to take such decisions unilaterally. After Mr Kozel resigned as President and CEO in 2003 Robert Kozel was in charge at Pittsburgh. Mr Kozel's day to day involvement with Texas ceased and his overall involvement with Texas decreased (being confined to receiving drilling and other reports and being consulted as a director) save that the operation of the Collaboration Agreement was very much his responsibility. His brothers expected him, subject to any direction or decision of the Board, to take charge of it. They did not expect to be, and were not, copied in on every, or even every significant, email.

Gulf

47. Frank Kozel was Chairman from its incorporation in 2001 until he stepped down on 26 May 2004 in preparation for the AIM flotation. Roger Parsons then became Chairman which he remained until July 2007, when Mr Kozel became Chairman. Mr Kozel was the Chief Executive Officer at all material times. Mr Guest was President from 26 May 2004 until July 2007.

48. Mr Al-Khaldi (referred to as "Abe") was a director and chief operating officer between 2001 and 2004. He resigned as a director in May 2004 (together with Frank Kozel, Mr Al-Qabandi and Sheikh Al-Qassimi) but continued as COO until 1 October 2008, when Mr Gerstenlauer joined, after which he served as Vice President (MENA Region). He resigned from Gulf on 3 September 2009.

49. Mr Al Khaldi's position at Texas is convoluted. Robert Kozel said that he was appointed VP of International Business Development at Texas in June 2005. He was in fact engaged because he could be of assistance in a dispute that the Kozel family had in relation to shares in Texas with "the original GKP company" i.e. Gulf LLC in the UAE. But he was not paid by Texas until 2010. It appears that, until at least 2009, his real employment was at Gulf (including at an early stage acting as the interface with the Texas personnel who were performing services for Gulf under certain Management Services Agreements – see para 51) and his employment was dressed up as employment with Texas in order that he could obtain a US visa[9]**.** A petition to extend his visa drafted by an attorney in 2007 describes him as having been employed by Gulf until June 2005 (sic) and as responsible for directing all the company's business planning and implementation activities throughout North Africa and the Middle East. Texas had no such activities and Mr Al Khaldi never carried out the VP's duties for Texas specified in the draft. Mr Kozel said that Mr Al Khaldi had agreed to act as Texas' representative if something did transpire in Kurdistan; but, even if that is so, as will become apparent, so far as Texas was concerned it bowed out of Kurdistan. The draft also wrongly described Gulf as Texas' parent.

[9] The disclosed documents do not reveal what documents were finally submitted to the US visa authorities and by whom they were signed. They must, however, have included representations that Mr Al-Khaldi was employed by Texas at the relevant time.

50. None of the other directors or officers of Gulf, or Gulf International or Gulf UK was ever a director or officer of Texas and none of the other directors or officers of Texas was a director or officer of Gulf at any material time.

51. In the early years Texas provided Gulf LLC and Gulf with professional and administrative services pursuant to two Management Services Agreements dated May and October 2001. These included engineering, geological and geophysical services (charged out at the same hourly rates as Texas charged third parties), and administrative functions including financial systems, controls and reporting, employee training, benefits management and payroll services and risk management and insurance coverage assessments (charged out at cost + 10%). Gulf LLC and Gulf also leased unused office space from Texas in Pittsburgh.

52. After Gulf's flotation it established an office in Berkeley Street in London, and began to hire staff. By the end of 2005 the London office had about 20 members of staff as Gulf took over many of the services previously provided by Texas. After 2005 professional and administrative services were no longer provided by Texas, although Gulf continued to lease office space from Texas during 2007. In 2006 and 2007, the years with which this action is primarily concerned, Mr Kozel as Chief Executive Officer of Gulf was based in Berkeley Street in London, and he often dealt with matters affecting Texas from there.

53. As appears from the foregoing Mr Kozel has never had more than a relatively small (albeit now very valuable) minority stake in Gulf and a one third stake in Texas. He controlled neither company. Gulf and Texas were not part of the same group. They were not under common control or ownership and were run and controlled by their respective Boards. Gulf did not have the power to compel Texas to act nor vice versa. It was suggested that in reality Robert Kozel acted in respect of the Collaboration Agreement as Mr Kozel directed and that he was under his control. Todd Kozel reacted to the idea that he dominated his elder brother (or that Gulf dominated Texas) with some bemusement[10], and, having heard from both Robert and Mr Kozel I am satisfied that this suggestion is incorrect. The fact that the Kozels left it to Mr Kozel to get on with matters relating to the Collaboration Agreement did not mean that the Texas Board were ciphers or puppets or that they exercised no independent judgment.

Personalities

54. The factual evidence given orally came from (i) Rex Wempen; (ii) Eric Wempen; (iii) Robert Kozel; (iv) Todd Kozel; and (v) John Gerstenlauer. Written evidence came from Adnan Samarrai, who was due to give oral evidence but was not well enough to testify.

The Wempens

Rex Wempen

55. Rex Wempen ("Mr Wempen") comes from a family with a military background and strong Republican Party links. He went to Cornell University on a 4 year US Army Reserve Officer Training Corps scholarship and received a B.A. in Political Science.

[10] "*In 45 years I have never been able to tell my brother what to do*".

He then studied for and obtained a Masters in National Security Studies under the Georgetown National Security Studies program during which time he served as an assistant to two US Congressmen and in the Maryland Army National Guard Special Forces. He was called to active duty during the first Gulf War. He served full-time during the 1990s in the US Army, joining in 1994 the 1st Battalion, 1st Special Forces Group (such groups being known as Green Berets). He rose to the rank of Captain with top secret security clearance, leading deployments in five countries commanding very small units and training or liaising with local forces. From 1999 to 2001 he did an MBA course at Marshall Business School, University of Southern California ("USC"), continuing as an Army Reservist with the Defence Intelligence Agency ("DIA").

56. He then joined an entertainment technology company in California but returned to active duty with the DIA after 9/11. From November 2002 to February 2003, he worked as a "*business consultant*" to a company called Pivotal Ventures Inc. He describes his role as "*advising them on counter-terrorism applications for their technology and supporting their federal government marketing efforts by briefing high level Pentagon officers such as Vice-Admiral Poindexter and members of Congress*". He established Excalibur two months after the end of his role with Pivotal. He acts as a consultant in Washington doing some sort of work with the US Government for which he maintains a top security clearance.

57. Excalibur was founded in order to develop further business opportunities in Iraq. But, although it was involved in initiatives in relation to various projects – e.g. petroleum development, power projects, building materials, commodities – practically none of them came to fruition. In 2004 it was involved in the National Economic Survey of Iraq, for which it engaged (but did not employ) a large number of data gatherers.

58. Mr Wempen is an impetuous go-getter; who, on many occasions, took positive salesmanship (as he termed it) beyond the point of accuracy. As will become apparent he repeatedly misrepresented Excalibur's funding position and made misleading statements to a range of people, including Mr Kinnear, his close business associate. He was not a satisfactory witness.

59. At the beginning of his cross examination he told me that he had resigned voluntarily from the army and "*entirely voluntarily*" from the Reserves. He said he had never been convicted by a court of criminal jurisdiction. In fact, he had been convicted of disturbing the peace ("*wrestling around on a lawn with an army buddy at 2 am*") and received 2 years unsupervised probation. This would have been of very little consequence but for the fact that he implausibly claimed to have forgotten it.

60. In 1999 when he left the Army he was the subject of an unfavourable officer evaluation report ("OER") and was the subject of what are called Article 15 proceedings (apparently for being in an area of nightclubs where he was not supposed to be). He joined the Reserves. In September 2002 he was discharged from the Reserves following allegations that he had forged the signatures of officers on an OER, which, whether true or false, "*resulted in the termination of [his] reserve career*": see the official statement of Mr Wempen and his brother of 26 September 2003. Again this might have been of limited consequence but for the fact that his evidence in relation to these topics was cagey and his denial that the allegations led to the end of his reserve career was, on the basis of his own statement, false. He sought

to have his record "sealed", which would have made it unavailable for public inspection, and his unfavourable OER erased.

61. His evidence displayed a considerable degree of evasiveness and, at times, a marked inability or unwillingness to answer the question or stay on the point. He tended to engage in advocacy of his cause beyond that to be expected from someone to whom the case meant so much, reiterating points he wished to make whether they were an answer to the question or not. As a result his evidence took far longer than should have been necessary. Some of his oral evidence displayed remarkable changes from his written evidence; some appeared to be contrived to fit with the case being put (e.g. his evidence that the Prime offer of finance was a good offer when at the time it was regarded as a very poor one).

Eric Wempen

62. Eric Wempen is a tax lawyer. He, too, is a former US Army Reservist. He was at one stage with KPMG LLC. In 2005 he was with Baker & McKenzie LLP. He later became an executive director and in-house counsel with UBS bank in Stamford, Connecticut, specialising in finance, tax and cross-border Mergers & Acquisitions. He left them in May 2012 in order to devote himself full time to this litigation. He will receive 25% of any net recoveries.

63. Eric Wempen's connection with the events the subject of this claim was intermittent. It consisted largely of the provision of legal or tactical advice in respect of Excalibur's dealings with Texas and Gulf given to his brother on various occasions, without, on some occasions, much sustained thought. I did not regard him as a wholly reliable witness.

64. He described himself in one email as his brother's "*consigliare* (sic)". His activities in this respect included devising litigation strategies, one of which contemplated the use of unacceptable tactics such as the idea of blackmailing Mr Kozel (see paras 934-940 below), and a suggestion to his brother that they "*pull a fast one*" by deleting wording in the jurisdiction clause of a draft confidentiality agreement but not drawing it to Gulf's attention in the hope that they would "*never miss it in pdf form*" in order to "*keep any future litigation on this out of the UK courts.*" In late 2007 he purported to represent UBS vis à vis Gulf in a manner which was not justified. His account of how he came to ask for certain information from Mr Patrick of Gulf was not truthful: see para 791 below.

65. Prior to their involvement with Excalibur neither brother had any experience of the oil industry, or of raising money for oil exploration. Nor did they have resources of their own with which to contribute any meaningful capital to an oil exploration venture. If their claim is valid they will each become immensely rich. This case has taken over their lives and the need to support the legal theories put forward has, in my view, coloured their evidence.

The Kozels

66. Robert Kozel is the eldest Kozel brother, who has spent his life in the oil industry. I found him a straightforward and reliable witness.

67. Mr Kozel is the youngest Kozel brother. He, too, has spent his life in the oil industry. He is something of an adventurer, having branched out into Gulf LLC and Gulf and developed a highly successful and profitable venture in Kurdistan. He is plainly a focused and motivated operator who works all the time. He is not keen on documentary communication, nor is he someone who scrutinizes his emails, a medium he does not like much, with any intensity. He is not likely to correct mistakes in the emails of other people. I regarded him as a credible witness.

Mr Gerstenlauer

68. Mr Gerstenlauer became Chief Operating Officer of Gulf on 1 October 2008. He is an oil man through and through. He was a plainly honest, impressive and engaging witness. He accepted that he had, in his statement, catalogued the risks in 2007 and 2008 (rather than the potential pluses) because, as he put it "*prior to discovery... there is no upside*". At one point in his evidence he described how the oil business is very much like a gold rush culture and that Kurdistan was the latest fad. I do not take this expression to signify a view that in late 2007 it was easy to obtain finance for exploration there. Mr Jull, one of the defendants' expert witnesses, did not share Mr Gerstenlauer's opinion. Kurdistan was, in his view, interesting, as were other areas, but some, e.g. Brazil, were "*hotter*".

Mr Samarrai

69. Mr Samarrai is a qualified geologist with over 45 years experience with extensive experience in Iraq. He had worked for the Iraq Petroleum Company from 1964 until it was nationalised in 1972, then for the North Oil Company until 1984, and from 1985 for Oil Exploration Company, a subsidiary of the Iraqi National Oil Company. He had been the Chief Geologist at Kirkuk.

Expert evidence

New York law

70. Both sides called expert evidence on the law of New York. Excalibur called Judge Joseph Bellacosa, a distinguished former judge of the New York State Court of Appeals. The defendants called Judge George Pratt, a former member of the US Court of Appeals for the Second Circuit, which hears appeals from the District Courts in, inter alia, New York. I was greatly assisted by both witnesses. As was to be expected there was, in the end, limited difference between them, when cross examination had elucidated their evidence and, in the case of Judge Bellacosa produced, in a limited number of instances, amendments to reports which had, in the first instance, been drafted by Clifford Chance and then worked on and amended by him. On a spectrum between a nuanced and a black letter approach Judge Bellacosa was closer to the former.

Other expert evidence

Mr Park

71. Excalibur called Mr J Jay Park QC as their expert in three fields: (a) oil industry practice; (b) oil industry financing and (c) Kurdish law (not explored at trial). Mr Park

is a well-established lawyer of good repute in private practice in Canada (he was a partner with Norton Rose Canada) who has specialised in oil and gas law since 1980. He is a director of some oil and gas companies. He is not, however, a professional in the financing sphere nor a securities lawyer. He has attended 12 or so meetings between clients and investment bankers.

72. I have considerable doubts about Mr Park's suitability as an expert for the purposes of this case and as to his independence.

73. As to the former, his expertise in the relevant fields is markedly inferior to that of the experts called by the defendants. His evidence in relation to the non-legal aspects of oil finance is, as he accepted, at the periphery of his expertise. He is not an expert as to the approach of investment banks seeking to raise equity or on private equity investment in oil and gas projects. His basic thesis – that Excalibur's lack of a management team with any financial or technical competence would not have been an insurmountable obstacle to the raising of finance given the appetite for investment in Kurdistan and that can-do investment banks would assist in securing the necessary changes – was inherently unconvincing.

74. As to the latter, there are a number of matters, relied on by the defendants, in my view justifiably, which are of concern. In his first report he expressed the view that Excalibur was no different from many companies which signed PSCs. At this stage all he knew about Excalibur was what he had read in the pleadings. He did not refer to the fact, of which he was ignorant, that Excalibur was, in essence, a nameplate. He was unaware when giving evidence that Excalibur had no board of directors or shareholders. In his third report he considered in some detail the example of a company called Vast, which he described as a very small player which did not appear to have any international expertise or credentials, as comparable to Excalibur. He did not mention that Vast was a company in the Forbes & Manhattan Group, although he knew of the connection between the two.

75. Some of his evidence as to fund raising activity on the Canadian financial markets in 2007 and 2008 in relation to Kurdistan was inaccurate. He referred in cross examination to the fact that Western Zagros (one of his clients) had no positive seismic at the relevant time, when in fact it had. It also had cash assets of about $ 82.5 million and an experienced management team. He initially suggested (wrongly) that it was common ground between him and Mr Wilkinson, the defendants' expert, that the capital and appetite available for listed and unlisted private placements were the same; and said that, insofar as there was a difference, there was no reason to suppose that Excalibur could not achieve listing relatively quickly. This was (a) inconsistent with what he had said in a joint memorandum; and (b) wrong. He wrongly suggested that UBS did not get involved in Kurdistan projects.

76. He also showed a tendency to act as advocate for Excalibur. This was particularly so in his third and fourth reports. In his first report he was not prepared to opine on the likelihood of Excalibur being able to raise finance because he did not know enough about the company to express a view. In the joint report with Mr Wilkinson he said that it was speculative as to what Excalibur would have been able to do by way of fundraising and in what time frame. By the time of the third report he was clear that "*subject to the title defect*" it was far more likely than not that it would have raised the necessary finance. The content of his first and third reports had to be revised in the

course of his cross examination in a significant way. He sought to advance the proposition that the Collaboration Agreement gave rise to an indirect interest without being able to identify with any precision how that might be so.

Bryan Emslie

77. Mr Emslie, Excalibur's oil industry expert, had not expressed an opinion on the value of Excalibur's interest as at the date of the breach i.e. at the time when its interest was not recognised in 2007. In the course of the trial I directed that any question as to the present value of an interest in Shaikan should be determined, if relevant, after the delivery of this judgement. He did not, therefore, give oral evidence.

The defendants' experts

78. The defendants' oil industry expert was Mr David Codd**.** He started as a lawyer but has over the past 32 odd years been involved in the management of oil exploration companies including companies with interests in Kurdistan. I found him an entirely reliable witness.

79. The defendants called Mr Philip Jull to give evidence as to the ability of Excalibur to obtain finance on the Canadian capital markets in 2007. He was asked to do so shortly before trial when it became apparent that Mr Park was placing considerable reliance on the availability of finance in those markets. I regarded his reports as carefully written, his evidence as the product of an independent mind, and his views as cogent and given with authority.

80. Mr Joseph Wilkinson gave evidence for the defendants on the approach of private equity investors to the financing of oil exploration projects in 2007. From 1991 to 1997 he managed an energy private equity investment fund which completed 8 financings 4 of which involved oil exploration in addition to some oil development. He also reviewed investment proposals weekly. From 1997 to 2007 he worked at Deloitte Financial Advisory Services in Houston as leader of the oil and gas group. Half of his time was litigation related; half in providing management advisory and corporate finance consultancy services. I am satisfied that he was qualified to give evidence as to the availability of private equity finance; and that his evidence, although occasionally dogmatic, was reliable.

81. The only expert evidence of the value of the relevant blocks in 2007 and 2009 came from Mr Stephen Rogers. I regarded him as a reliable witness, undoubtedly expert and experienced in this field. Oil companies, banks, and investors might have taken a more rough and ready approach to valuation. That is in no sense a criticism. Valuation of an exploration opportunity is not an exact science (although there are well recognised methods). The basis on which someone considering investment may value an asset is a function of the method, assumptions and approach that he is minded to take. When, however, the court seeks to assess a value it should, in the first place, look, if it can, to a valuation provided by someone of the competence and thoroughness of Mr Rogers.

The Oil and Gas Industry in Kurdistan *Index*

82. Oil exploration is a risky business wherever it takes place. On occasion it produces high rewards. But enormous costs are involved in finding out whether hydrocarbons are present at any location in commercially exploitable quantities. The results of exploration are, as it is said, binary: either the oil is there or it is not. If it is not, the expense of looking for it is wasted with serious or even catastrophic economic consequences, particularly for a small oil company, such as Gulf, without a diverse portfolio. Even if there has been a "successful" exploration well, further exploration may reveal that the necessary volume of commercially exploitable oil or gas is not there. Investing in the oil and gas business in Kurdistan involved several different types of risk: exploration, technical, and political.

Exploration risk

83. In 2005 – 2007 (and beyond) the exploration risk in Kurdistan was very high. Kurdistan was known to contain oil. It was, as Mr Gerstenlauer put it, "*a large unexplored area in a good fairway*" – a fairly rare opportunity – where oil companies could, to the extent they were allowed, choose their blocks. Kurdistan lies at the northern end of the Zagros fold belt, within which are some of the largest of Iraq's oil fields[11]. The Kirkuk field which is very large is at the edge of Kurdistan. Taq Taq and Tawke had world class flow rates. There was, therefore, a substantial amount of interest in Kurdistan where some 14 PSCs were awarded between August and December 2007 (two of which were re-signings). The bonuses payable in respect of these were about $ 420 million.

84. The Shaikan block is some 85 kilometres northwest of Erbil and covers an area of 283 square kilometres. The block is dominated by a single large anticlinal structure with the geological strata dipping away from the centre of the block in all directions, suggesting the possibility of a structural trap for hydrocarbons in the subsurface.

85. But the Shaikan and Akri-Bijeel exploration blocks, although broadly on trend with the belt, were "wildcat" blocks i.e. there had been no exploration wells and the blocks were not in the vicinity of any known oil or gas fields. The only offset well[12] (the Jebel Kand well) for Shaikan was 26 km away and, although it went down 5,000 metres, was a dry hole. Geologists and geophysicists can form an educated view on the likelihood of finding oil, relying on structures or experience in similar areas[13]. But the view may well turn out to be no more than a bad guess. Even the seepage of oil or gas from the surface, which was apparent in Shaikan, may mislead. It indicates that there was a reservoir structure at some stage with a significant amount of hydrocarbons. But it may also signify that oil has leaked away from the underground trap because the cap rock is ineffective or has been ruptured. Talisman and Niko Resources declined to farm in to Shaikan in 2008 out of concern about the effectiveness of the reservoir trap. One geologist at the University of Mosul had written a thesis with a very negative conclusion about Shaikan's prospectivity.

86. By 2007 Iraqi Kurdistan had been largely unexplored. No wells had been drilled between 1982 (at the time of Saddam Hussein) and 2006. There was little reliable data

[11] 5% of discoveries in Iraq have been of super-giant fields of more than 5 billion barrels**.**

[12] An offset well is a well used to obtain information over and above that obtained from seismic before you drill an exploration or appraisal well.

[13] Notwithstanding Mr Gerstenlauer's view that all geologists are lunatics or, as Mr Jull put it, "*more ethereal*" because they try to explain what was on earth millions of years ago which gave rise to a structure with oil in it.

from analogous fields. Shaikan was, as Mr Kozel put it, "real frontier" exploration. Mr Rogers, Gulf's expert, summarised *the exploration risk* as:

> "*…driven by five main areas of uncertainty in relation to an exploration block: (a) whether suitable reservoir rocks exist, in which accumulations of oil and/or gas may have collected and from which they can be extracted; (b) whether any reservoir rock unit is adequately sealed (or capped) by an overlying impermeable rock to prevent any oil or gas from leaking out of the reservoir; (c) whether a suitable geological structure or trap exists which is sufficiently large to contain a commercially viable volume of oil or gas; (d) whether a suitably mature oil and/or gas source rock exists which will have produced extractable oil and/or gas; and (e) whether the source rock has been able to expel the oil and/or gas generated along a migration path which enables it to reach the targeted reservoir sequence and structure or trap location at a time where it could accumulate in the trap and not be dispersed.*"

87. Even if oil is discovered in substantial quantities, there will be uncertainty about (i) the quantity of oil-in-place; (ii) the amount of oil that can be recovered; (iii) its quality; (iv) the ease of recovering it (and, thus, the rate of extraction) and the cost thereof; and (v) the prices that it might achieve.

88. Kurdistan could thus be looked at as "highly prospective" because there was a fair chance that oil would be discovered somewhere, and, if so, it might be in large quantities; but also high risk because any place chosen might turn out to be a dry hole[14]. In September 2005 Mr Wempen emailed Azzat of Dabin (see para 116) to say that "*everybody is scared of Iraq*" and that, after talking to numerous oil companies "*nobody is sure that there is any oil there*". Those companies included Ryder Scott (who were convinced there was no oil there), Statoil (who were not sure there was any there) and Delta. Gulf, on the other hand, at a presentation made to the KRG in July 2007 estimated the recoverable reserves at 244 million barrels.

Technical difficulties

89. Exploration in Shaikan has involved considerable technical difficulties. The rock was exceptionally difficult to drill and cost about three times as much as typical drilling costs. The oil in Shaikan, Akri-Bijeel and Sheikh Adi is heavy oil which requires higher pressure to drive it up the borehole and larger pipelines. The presence of toxic hydrogen sulphide has been a major factor. Access to drilling locations has been difficult as a result of which Gulf International has had to carry out more difficult directional drilling. The absence of available service contractors and equipment has increased prices and required the commissioning of a new rig in Houston. The absence of feeder pipelines means that, for oil fields other than Tawke, in order to access the Kirkuk-Ceyhan[15] pipeline, the only one currently available for oil exports, oil has had to be trucked to Faysh Khabur, close to the Turkish border. Bad weather has caused enforced shutdowns and the presence of minefields and unexploded ordnance has caused problems.

[14] The Zagros fold belt "*was viewed as a target rich environment perhaps, but that does not obviate the need for good marksmanship*": per Mr Gerstenlauer.
[15] Ceyhan is a Mediterranean port at the extreme south east of Turkey.

90. Whilst these difficulties are not unimportant they are likely to be capable of solution, albeit at a price.

Political risk

91. Investing in oil exploration in Kurdistan involved significant political risks. Saddam Hussein was overthrown in April 2003. In May 2003 the Coalition Provisional Authority ("CPA") was established and lasted until the end of June 2004. On 8 March 2004 the CPA "*Law of Administration for the State of Iraq for the Transitional Period*" came into force. The Law recognised the provinces of Dohuk, Erbil and Suleimaniyah as an autonomous region. On 15 October 2005 a new Constitution for Iraq was approved by referendum. It entered into force in 2006 on the formation of a government pursuant to it. Under it Iraqi Kurdistan was recognised as an autonomous region with the three provinces forming governorates, and the KRG became its regional government. By 2007 the Constitution was, therefore, only two years old and its durability uncertain.

92. The KRG claims that the Constitution gives it the right to control and make deals for oil produced by the region subject to sharing profits with the rest of Iraq. The Iraqi Federal Government, dominated by non-Kurds, disputes this. It takes the position that the PSCs awarded by the KRG are invalid. On **26 November 2007** Hussain al-Shahristani, the Federal Oil Minister, wrote to MOL, which had just signed the Shaikan and Akri-Bijeel PSCs, declaring the annulment of all the contracts recently signed with the KRG's Ministry of Oil and Natural Resources.

93. The risk that the PSCs will be annulled has receded over the years; and is now unlikely, but still possible. In 2007 it was markedly more pronounced. The Federal Government threatened to blacklist any companies entering into PSCs with the KRG. This probably accounts for the absence of the larger international oil companies ("IOCs") from participation in the Kurdistan region upstream sector in 2007. The US Government supported the Federal Government, taking the position that US companies should deal with the Federal Government and not the KRG in respect of petroleum matters. In July 2011 the Deputy Prime Minister of Iraq indicated that Hess would be excluded from licence activities in southern Iraq after it signed PSCs with the KRG. A number of companies, including Exxon Mobil, declined to participate in Kurdistan as a result of pressure from the Federal Government.

94. The dispute between the KRG and the Federal Government remains unresolved. As a result no Federal Petroleum Legislation has been agreed or enacted by the Iraq Council of Ministers or the Council of Representatives. When agreement is reached and a Federal Energy Law is passed, as will probably occur sometime, existing contracts may be challenged or reviewed, as in 2007 the Iraqi Oil Minister warned would happen, and such contracts might have to be renegotiated (as the price of the Federal Government approving the PSC), or they might be compulsorily altered. In my judgment, reached in 2013 in the light of the views of Mr Codd and Mr Park, the likelihood now (after hundreds of millions of dollars have been invested in oil in Kurdistan) is that any amendment required would be limited to a fairly modest reduction in the value of the contractors' terms (e.g. royalty rates, profit oil percentages) – perhaps in the order of single figure percentages. But it is impossible to be certain; and the position in 2007 was less clear. Whilst annulment or major amendment was unlikely it was still a risk.

95. The Federal Government owns and controls (though its agency North Oil Company) the only currently available oil export pipeline, the Kirkuk-Ceyhan pipeline, whose use is governed by a treaty between Turkey and Iraq, and which passes through Kurdistan for a few kilometres at Faysh Khabur. As a result it has a monopoly over oil exports. Companies which entered into PSCs ran (and run) the risk that they would not have access to the pipeline and thus to the international oil market and might be limited to selling, at much lower prices, to the local market. By the time that Mr Gerstenlauer gave evidence in December 2012 Gulf, which had made minimal use of the pipeline, had done the preliminary design work, and was getting towards final construction design, for a 122 km pipeline with a capacity of about 400,000 barrels a day feeding from Shaikan into the existing Kirkuk-Ceyhan pipeline, was waiting for the go ahead; and expected construction to start in 2013. In May 2012 the KRG had also recently announced that it was planning a new 1 million barrel a day pipeline from Kurdistan to the Turkish border to reach the border by August 2012 with a second pipeline connecting to the Kirkuk-Ceyhan pipeline intended for 2014. Up until at least the time of Mr Gerstenlauer's first statement Gulf had trucked the small amount of oil which it exported from limited production at the Shaikan-1 and Shaikan-3 wells to Faysh Khabur.

96. The Federal Government also has a monopoly on the marketing of official oil exports, which is carried out by the State Oil Marketing Organisation ("SOMO"). SOMO decides at what price it will sell oil that has passed down the pipeline and it collects all oil revenues. SOMO should then pay to the KRG the sale price less transportation costs. The KRG should then distribute the share due to the companies under the terms of their PSCs (some of it being a royalty to the KRG, some being cost oil, and some, to the extent that there are no costs to be paid, profit oil for the KRG and the other parties). In fact pending resolution of the Federal Oil and Revenue sharing laws SOMO has decided that the KRG shall be reimbursed a proportion of the revenues which it treats as cost oil, which is to go to the contractors to defray their costs. The value of Iraq's total production of oil and gas is, under the Constitution, supposed to be shared between the different regions in proportion to their populations. Kurdistan's proportion is 17% and, as I understood from Mr Codd, the KRG is waiting to receive it, although it has been paid more than cost oil from time to time. But most of the contractors have not yet received any profit oil. Receipt of this awaits resolution of the dispute with Baghdad or a new pipeline from Kurdistan to Turkey.

97. The oil companies are, thus, at risk that a dispute between the KRG and the Federal Government/SOMO cuts off or reduces oil revenues in which they are entitled to share. This risk is not theoretical. Oil exports began in May 2009 but were suspended by the KRG in September/October 2009 until February 2011 as a result of a dispute between the Federal Government and the KRG over the division of oil revenues. Exports were again suspended in April 2012 because the KRG did not receive its share of the revenues from SOMO for 10 months. Production had to be diverted to the local market. When payment was eventually made to the KRG it was said by the Federal Government to be for reimbursement of contractor costs. What the oil companies then received was just a lump sum. Exports were resumed from 1 August 2012, but on the basis, as Dr Hawrami made clear in a letter to the then current major exporters of oil, that this was only temporary pending payment of the substantial sums owed to the KRG from previous export periods.

98. The Kurdish people form part of a regional diaspora. There are significant Kurdish populations in Iraq, Turkey, Syria and Iran and significantly more Kurds outside Iraq than within it. Kurds in all these countries have, historically and to varying extents, argued for independence. Kurdistan[16] is bordered by Turkey and Iran which have sizeable Kurdish minorities and separatist movements; with an accompanying risk of instability in the region. A report by Control Risks prepared for Gulf dated 23 November 2007 outlined salient threats to Gulf's operations in Erbil and Dohuk which included ongoing Turkish and Iranian military operations and external and internal Islamic extremist threats.

Security risk

99. Kurdistan is, in general, safer than the rest of Iraq. In 2005 and 2006 Western visitors felt the need for armed protection and body armour, although in retrospect that may have been unduly cautious. On 7 April 2006 Mr Kozel sent Mr Wempen an article from the Times commenting on the insurgent attacks in and around Kirkuk. From 2007 onwards the position eased although personal security is still a concern. Gulf personnel stopped wearing bullet proof vests for visits after the first Erbil visit in June 2006. Others were more cautious. In 2008 the KRG Minister of State for the Interior reported in a KRG publication that there had not been a single attack on foreign business and civilian assets.

100. More recently the Kurdistan Region has been affected by intermittent security incidents, including explosions, the result of terrorist activity by the PKK, the Kurdish separatist group, which have ruptured the pipeline (most recently on two occasions in August 2012) and armed clashes between Turkish forces and PKK guerrillas along the border with Turkey, which has led to incursions by Turkish troops into Kurdistan.

101. There are, of course, other regions where the risks are similar in degree or worse. As Mr Gerstenlauer put it, Gulf had not "*run into anything in Kurdistan that hasn't been encountered in one or two other places in the world*".

The history – Part 1: Prior to the Collaboration Agreement *Index*

How it all began

102. In **early 2003** war in Iraq was imminent. Mr Wempen saw the war, which he expected to be brief, as an investment opportunity because the private sector would play a leading role in post war economic recovery. He wanted to get in first. Kurdistan was of particular interest because of its untapped natural resources and pro-American population (protected for a decade by the US–led No-Fly Zone). He had friends in Washington who were involved in helping the Kurds and who had maintained close ties with them, and he knew members of the US military and intelligence community with connections in Kurdistan. He made plans with Jas Dhillon, managing director of Pivotal Ventures, a USC alumnus and venture capitalist for whom he had worked in

[16] There is an area of Iraq which represents Kurdistan's official border; a further area beyond this under Kurdish control; and a further area still with a large Kurdish population which is sought to be controlled by Kurdistan. The referendum in the disputed areas mandated by the 2007 Constitution to determine which areas should form part of Kurdistan has not yet taken place. Whether Kirkuk should be part of Kurdistan is a major issue in which Turkey, which has claimed Kirkuk in the past, has an interest.

2002 and 2003 and who had been his mentor, and David Halpert, managing partner of the New York hedge fund Prince Street Capital Management, who was interested in working on a fund to rebuild Iraq. Mr Wempen's idea was that he would travel to Iraq, be one of the first to meet the leaders of the new government when formed, and identify and develop opportunities; and that those two should produce or procure the necessary capital.

103. In **March 2003** Excalibur made an application for financing to the Overseas Private Investment Corporation ("OPIC"), an agency of the US Government, in respect of a fund to be called "Excalibur 1" on the footing that Pivotal Ventures with Prince Street Capital would raise $ 100 million to be guaranteed by OPIC to launch the fund for investment in infrastructure and telecommunications projects in Iraq. As is apparent, Mr Wempen was aiming high. This fund did not get off the ground.

104. In May 2003 Mr Halpert suggested in an email to Eric Wempen that what Mr Wempen needed to do was to make some money on one deal, say $ 250 – 500,000, and use the proceeds as seed capital to start his business for the next few years. In an email to Mr Wempen himself he warned him not to take on too many different projects but to get one project done well. This was not a course which commended itself to Mr Wempen, who sought to pursue multiple projects.

105. On **13 March 2003** Mr Wempen flew to Ankara and met various Kurdish leaders from the Kurdistan Democratic Party ("KDP") and the Patriotic Union of Kurdistan ("PUK"), the two political parties between whom the US had brokered a peace agreement in September 1998 and which were later, in 2004, to form the Democratic Patriotic Alliance of Kurdistan ("DPAK")[17]. They were there to meet Zalmay Khailizad, President Bush's advisor on Iraq. Mr Wempen was invited by Mr Hoshyar Zabari, then the Speaker of the KDP and soon to be Foreign Minister of post war Iraq, to whom he had expressed a desire to be one of the first US businessmen to invest in Kurdistan, to attend a further meeting with him and senior representatives of the KDP in Erbil the following week.

106. On **20 March 2003** Operation Iraqi Freedom commenced. The Turkish border with Iraq was closed. Mr Wempen got into Kurdistan after a four day and night trek through the Alborz mountains with Kurdish smugglers and eventually reached Erbil, where Mr Zabari told him they would have to defer their discussion until Saddam Hussein had been got rid of, and that he should feel free to travel around. Mr Wempen set off with a contingent of Pesh Merga (Kurdish guerrillas) deputed to "look after" him and roamed relatively freely. On **9 April 2003** Baghdad fell. Mr Wempen travelled with the Pesh Merga to Kirkuk and Mosul and decided to stay in Baghdad where the PUK provided him with four Kurdish bodyguards. Excalibur was formed in the same month to develop investment opportunities in Iraq.

107. In Baghdad Mr Wempen established headquarters in the Ishtar Sheraton Hotel; met representatives of major companies seeking to do business in Iraq; and had discussions regarding investment opportunities. He assisted in establishing an Iraq branch of a US firm called Diligence to provide intelligence and security, and was

[17] The two parties had attempted to work together from 1992 in the 1st Kurdish Regional Government following the creation of a Kurdish Autonomous Region after the invasion of Iraq in February 1991; but distrust between the two parties culminated in a civil war between 1994 and 1998.

acting Country Operations Officer, which involved visiting every corner of Iraq. In the Spring of 2004 he was hired by Occidental as a consultant and won for Excalibur, with an Iraqi partner, a CPA contract to conduct the National Economic Survey of Iraq. He also provided representation and marketing services for Qualcomm Corporation. He acted as a consultant for, or had links with, other companies.

The Iraq Recovery Fund

108. Mr Wempen floated the idea of an **Iraq Recovery Fund ("IRF")**, which would form US majority owned project companies to invest in energy and infrastructure projects in Iraq. An early Executive Summary of the fund describes a large team of Iraqis and international investment professionals with members in Iraq and New York. The team included Mr Halpert and others at Prince Street Capital Management, the name of which appears on the first page. Most of those names were personal friends or business contacts. Different names appear in later versions. They had jobs of their own. None of them ever entered into any contractual commitments with the Fund or were paid, although they were prepared to come on board if Excalibur was successful. The target size of the Fund was $ 250 million and it was said to be interested in an extremely wide range of projects. Excalibur itself had no expertise in any of the areas concerned.

109. The IRF registered to apply to OPIC for political risk insurance. On **23 June 2004** it entered into a framework agreement with OPIC whereby OPIC set out the terms on which "*it may*" provide a letter of commitment for one or more contracts of insurance subject to approval by the OPIC investment committee. The agreement required numerous conditions to be satisfied. On **1 July 2004** the IRF made a further application to OPIC for political risk insurance, envisaging an initial investment of $ 50 million, with $ 25 million to follow, in respect of the construction of a ready mix cement plant. On **27 July 2004** OPIC agreed to reserve $ 50 million capacity to issue contracts of insurance until 30 September 2004 (extendable at OPIC's discretion and subject to renegotiation of the terms) subject to numerous conditions precedent. Nothing ever came of this. No application was ever made in respect of oil exploration.

110. Mr Wempen used to pray the OPIC commitment in aid in his search for funding for projects. In reality there was no binding commitment at all. Nor would political risk insurance provide any cover in respect of the most significant risk for an oil exploration project – the loss or absence of reserves.

111. The idea of raising money through a fund surfaced and resurfaced from time to time as Mr Wempen sought to raise finance for Excalibur's participation in the Kurdistan oil exploration venture. In the event the IRF never raised any money for any specific project nor was any money ever invested in it. Nor did anything come of another fund intended to focus on oil and gas ventures, called Thames Chesapeake LLP, which was to be a Cayman Islands limited partnership, whose investment manager (the "Manager") was to be a Cayman company, which was to be owned by Excalibur and Fuel Handling Systems, a company owned by Mr Iain Kinnear (see para 129). The Manager was to own the General Partner, another Cayman company.

112. In **April/May 2004** Mr Wempen established the Iraq branch of the US Chamber of Commerce, recruiting the founding members. He maintained contacts with various businessmen, US diplomats and representatives of the CPA. He made proposals for

independent private power plants to the Ministry of Electricity with the idea that it should form an anchor project for the IRF with Excalibur as fund manager.

113. Between 2003 and 2005, Excalibur entered into numerous agreements with clients and consultants on projects including petroleum development initiatives, power projects, building material projects, logistical and transportation projects and communications initiatives. Excalibur was also involved in initiatives to supply commodities to Iraq such as oil, grain and sugar.

114. An example of Mr Wempen's "positive" approach was his proposal to supply 200MW of power to the Iraqi Ministry of Electricity. On **1 September 2004** Excalibur entered into a non-binding memorandum of understanding with Kellogg, Brown and Root ("KBR") to work on a "*possible strategic partnership*" and develop commercial ventures in Iraq, which were to be the subject of separate agreements once an opportunity had been identified. On **31 October 2004** he wrote a letter on IRF paper on behalf of Excalibur and the IRF to the Ministry with the proposal. In his letter he said that the IRF, which was described as a "*financing vehicle designed to provide US Government backing and insurance*", "*will finance this project*" and would insure the project against political risks; that Excalibur was managing "*this unique US Government insured financing vehicle*"; and that KBR was the "*lead EPC contractor*". In fact the IRF had no funding or commitment to funding and there was no firm commitment from OPIC to the IRF to insure. There was also no contract between Excalibur and KBR, only an expressly non contractual memorandum of understanding providing for evaluation of opportunities for a possible strategic partnership and development of ventures in Iraq where KBR would "*potentially conduct lead contractor functions*".

115. Mr Wempen's attitude in respect of this and other instances of misleading information was to dispute, or not to concede, that what he wrote was misleading, and to observe that it was necessary to get the deal first ("*you need a deal to raise a dollar*"), after which financing and insurance would follow. The letter was saying what was going to happen. He claimed that the Minister knew that Excalibur had nothing in the bank. I doubt it.

The agreements with Dabin

116. Towards the end of 2004 Mr Wempen began to focus on Kurdistan and realized that it was necessary to have a local partner with strong local ties. On **16 December 2004** Excalibur entered into a Memorandum of Understanding ("MOU") with the Dabin Group ("Dabin"). Dabin was a Kurdish investment development company based in Erbil focused on working with foreign enterprises to develop investment projects in Kurdistan. Khaled (Azzat) Othman (Spindari) (hereafter "Azzat") was its VP for business development. Izeddin Berwari was its President. He was a retired member of the KRG and a continuing senior member of the KDP. At the time Dabin's focus was on construction and real estate development but it was interested in expanding into infrastructure and petroleum projects. Dabin viewed the IRF as something that would enable them to achieve this and Mr Wempen viewed Dabin as a partner who would negotiate approval of the IRF's projects.

117. Under the MOU Excalibur and Dabin agreed to use their best efforts to raise financing for co-managed funds with pre-planned or pre-approved projects, several of which

Excalibur was said to have identified, the intent being that the projects would be financed through the OPIC-insured IRF.

118. On **4 January 2005**, Excalibur (described as in the business of fund management) signed a services agreement with Dabin ("**the Dabin Agreement**") under the terms of which Dabin agreed to provide general consulting and fundraising services including: "*identifying, providing introductions to, and negotiating with appropriate Kurdish and national Iraqi government and private entities in support of [Excalibur's] business activities*". Dabin was also to be responsible for obtaining all licences required for operations in Kurdistan, providing labour and project management services as appropriate on a project by project basis under separate contract. Excalibur was to pay Dabin 10% of the profits from commercial activities it was involved in, including "*10% of the carried interest or equity [Excalibur] owns or is entitled to on a project by project basis*".

119. On **13 March 2005** Mr Wempen received a letter from Nichervan Barzani, the Prime Minister of the KDP-controlled region of Kurdistan (and in 2006 of the unified KRG), with whom Dabin appear to have had connections, inviting him (on behalf of Excalibur) to Erbil to discuss investment opportunities. The KRG was interested in attracting foreign, particularly American, capital.

120. In **May 2005** Mr Wempen travelled to Erbil where on **17 May 2005** he met Prime Minister Barzani, who received his ideas and the Iraq Recovery Fund presentation positively. Mr Barzani referred Mr Wempen to Dr George Yacu ("Dr Yacu"), his senior oil and gas advisor. Dr Yacu was Vice President of the Oil & Gas Establishment, set up by Law No 38 of the Kurdish National Assembly. Mr Wempen had several meetings with Dr Yacu, who suggested that the best way for Excalibur to proceed would be to bring an independent oil company to Kurdistan to operate a petroleum block on its behalf with whom it could co-invest during exploration and development. He made it clear that whatever oil company was brought in would need to be a US company because the KRG wished to be seen to be awarding concessions to US companies. The KRG wanted a US led consortium (a) because it was friendly towards the US and grateful for its assistance; and (b) because the presence of US interests in Kurdistan would be likely to provide some form of protection against hostile incursions, including from Baghdad itself[18].

121. Mr Wempen's other investment proposals were also positively received and the Prime Minister arranged for his Ministers of Electricity, Energy & Industry and Communications to meet with Mr Wempen also. Mr Wempen discussed with them proposals to build an Excalibur/Dabin turnkey cement plant; to build, own and operate a 200MW power plant and a refinery; and to build a regional data network for dual use by security forces and the general public in the 450MHz and 1900 MHz range in Kurdistan.

122. An Excalibur Corporate Profile dated June 2005 states that Excalibur was the petroleum representative of the Shaw Group and a development partner of Halliburton Corporation and that it could "*readily access world class exploration and production teams through its proprietary network of petroleum professionals and private equity*

[18] Mr Wempen recalled the view of President Barzani as having been that "*five American companies in Kurdistan are equivalent to two divisions of US troops, we want as many Americans there as we can*".

sources in the US and worldwide". In fact Excalibur had no such network. At best Excalibur had some expectation of support from Halliburton, which seems to have been derived from Mr Jim Kitterman, the deputy country manager for Iraq of KBR and a founder of Peregrine International, a project management and consultancy firm in Kuwait, and hoped to be able to access Halliburton's team of professionals. According to Mr Wempen "*its proprietary network*" was (implausibly) referring to Halliburton's network.

123. The Profile described Excalibur as "*managed by highly qualified professionals who bring in rich and diverse experience in managing investments…*". In fact Excalibur was managed by Mr Wempen. The professionals referred to were those he hoped to bring in and who were listed as members of the team. One of them was Mr Farrell (see para 125 below) who on some date between 11 and 15 June gave Mr Wempen some forthright advice that he needed "*one whole hell of a lot more help*", that if Excalibur was interested in pursuing an oil company and a cement project it needed to be prepared to commit $ 500-700,000 over the next 6 months and that "*Excalibur has enjoyed 5 free months looking up my dress, it is now time to get serious – or not*". He invited Mr Wempen to come to Ankara with his cheque book. Mr Farrell then faded from the picture.

124. In the Profile Mr Wempen was said to have 15 years of international experience in private equity, business consulting and government. He did not. It is likely either that a previous version of this document was shown to Dr Yacu in May or that the pitch to him was in similar terms.

125. On **11 June 2005** Mr Wempen wrote to Dr Yacu on behalf of Excalibur to request an oil concession or distinct geological formation in Kurdistan for immediate exploration, preferably in an area which already had some preliminary technical data recorded "*by your office*". The letter is another example of Mr Wempen's misleading salesmanship. It said that "*we are prepared to explore for oil in Kurdistan*" when Excalibur had no present ability to do so and had not secured a US partner as Dr Yacu had said was required. Mr Wempen referred to Excalibur's board of directors and said that Excalibur had over 30 years in the oil business, and included the former President of Dorchester Gas company and Vice President of Atlantic Richfield Company (i.e. Mr Farrell). In fact Excalibur (a) had no board of directors (there is no reason to believe that Dr Yacu knew that); (b) was founded in April 2003; and (c) had never been in the oil business. Mr Farrell was not part of Excalibur. Mr Wempen referred to "*our team*" having exploration experience on all continents and in 30 countries. Whatever might have been the position of the individuals whom Mr Wempen wanted to lend their names to the IRF or Excalibur, these statements were not true for Excalibur itself.

126. On **11 July 2005** Mr Wempen received four letters from a KRG Minister of State, expressing interest in each of the proposals made during the May 2005 visit and inviting Excalibur to return to Kurdistan in order that the KRG might learn and understand in depth Excalibur's approach. The letter in respect of petroleum exploration asked for relevant data and information indicating "*the financial capabilities, technical expertise, and petroleum experience of your investment firms, affiliate companies and organizations*". None of these letters received a reply.

127. Mr Wempen decided that the best way forward was to concentrate in the first instance on the oil and gas proposal as the anchor investment for the IRF. An IRF term sheet dated **15 July 2005** envisaged a $ 250 million placement with an annual return of 25-35%. The term sheet stated that Excalibur (the Fund's "*Local Adviser*") had been "*assigned a contract to provide finance and insurance for a BOO electricity plant from a development partner that was awarded such a contract*" by the Iraqi Ministry of Electricity. This was not true.

The search for a partner

128. Mr Wempen returned to Washington, where he set up an office, and began to seek a partner. Occidental Petroleum told him that the time was not right and they preferred to concentrate in the south of Iraq. Various oil companies and sources of finance in Geneva and London were not interested. Mr Duane Gaither, a Texan, was CEO of two oil companies. These were Atlas Petroleum Exploration Worldwide Ltd, an international petroleum company with an offshore exploration block in Tunisia, and Gaither Petroleum Corporation, which was focused on domestic onshore US exploration and development in Texas and Louisiana. Mr Wempen thought they would be a good package to help him. Mr Gaither showed some interest but a trip arranged for him to meet Dr Yacu in Erbil was cancelled by him because of his other commitments.

129. In 2003 Mr Wempen had met Mr Iain Kinnear ("Mr Kinnear") in Kuwait. Mr Kinnear (who has since died) owned a fuel distribution business named Fuel Handling Systems and had contacts in the oil industry. He did not have oil exploration or production experience. They had kept in touch, communicating opportunities which might be of interest. On **3 November 2005** Mr Wempen told Mr Kinnear that he wanted him as an oilfield services partner in Iraq and, when Mr Kinnear expressed interest, told him that Excalibur intended to assist with "*mature field extraction and pipeline and oilfield infrastructure construction/upgrades*" which Mr Kinnear understood to cover purchasing and specifying equipment for oil extraction and pipelines.

130. On **2 December 2005**, OPIC registered Excalibur for a $2 billion oil refinery project, for political risk insurance. The letter made clear that "*This registration does not constitute a commitment by OPIC to provide insurance for this project.*"[19]. Excalibur could apply for insurance so long as the registration remained in effect. It was initially valid over a period of 2 years. The letter also said that OPIC only offered insurance after investors had investigated the possibility of private political risk insurance with at least two insurers and insurance was not available on terms sufficient to make the investment viable. Excalibur never investigated such possibility other than to contact AIG and discover that they did not have much appetite for it.

131. On **6 December 2005**, OPIC acknowledged the IRF's interest (in relation to its application in July 2004) in obtaining OPIC political risk insurance for any investment in the IRF.

Mr Wempen meets Mr Kozel

[19] The assertion in Mr Eric Wempen's witness statement that OPIC "*agreed to cover both equity and debt investments in the IRF's portfolio investments*" was misleading.

132. Mr Kinnear approached Mr Al-Qabandi, a founding shareholder of Gulf LLC and Gulf's Vice President for business development, with whom he had a personal but not a business relationship. On **15 December 2005** Mr Kinnear emailed Mr Wempen to tell him that he had found a "*US/Kuwaiti/Algerian company with private money sources …, street credibility and a proven track record*" which he believed would meet Mr Wempen's criteria. On **16 December 2005** Mr Wempen replied, after checking the Gulf website, to point out that they were not a US company adding "*[Well] let's see what we can do*". He spoke with Mr Al-Qabandi on the same day. In his first witness statement of 13 April 2012 he said that Mr Al-Qabandi had told him that Mr Kozel had his own family owned oil company, Texas, and that Excalibur could work with Texas in partnership with Gulf. When he came to give evidence Mr Wempen had no independent recollection of this call.

133. It is unlikely that Mr Al-Qabandi gave anything approaching a commitment as opposed to suggesting a possibility. Mr Wempen had not yet met Mr Kozel, who would be the immediate person to make a decision about the prospect of either Texas or Gulf joining up with Excalibur. Mr Al-Qabandi was Gulf's business development director and his role was to pass things on, not to make decisions about what Gulf, let alone Texas, would participate in. The likelihood is – as Mr Kozel later understood from Mr Al-Qabandi – that Mr Kinnear had thought that Gulf was US owned and had approached Mr Al-Qabandi on that footing. When it became apparent that Mr Wempen needed a US company, Mr Al-Qabandi told him of Mr Kozel's involvement with Texas and may well have discussed the possibility of involving both Texas and Gulf.

134. Mr Al-Qabandi asked Mr Kozel to meet Mr Wempen and Mr Kozel invited him to a meeting in Tampa, Florida.

The meeting in Tampa

135. The meeting took place on **22 December 2005** at a restaurant over a 1½ hour lunch. Mr Wempen gave Mr Kozel an account of his exploits in Kurdistan and the several projects for which he said he was bidding which were said to be complementary.

136. According to Mr Kozel, Mr Wempen told him that there was an opportunity to acquire a licence in respect of the Taq Taq field, where oil had already been discovered (i.e. a proven field). He said that Excalibur needed an American flag oil company to operate the licence because that is what the Kurdish authorities required and was the only way in which OPIC insurance could be obtained. Mr Wempen said that Excalibur already had an institutional backer in place in the form of UBS. He wanted Texas to enter into a joint venture with Excalibur and for Excalibur to have at least 50% of the contract. He originally asked for 80% or something like it on the footing that Excalibur had UBS as a backer. Mr Kozel said he would only be interested if Texas was the operator and had at least 51% of the equity, pointing out that, however big the size of their backer, Excalibur was inviting Texas to invest millions of dollars without itself having the necessary experience or expertise. Mr Wempen understood the difference between Texas and Gulf, which Mr Kozel explained to him. Mr Kozel said that, since it was only Texas that was a US company, which is what the KRG required and Mr Wempen was looking for, Mr Kozel was, for

the purpose of any deal, representing Texas. The possibility of Gulf having the chance to participate at a later stage was discussed[20].

137. According to Mr Wempen, he said that the KRG wanted a US company to lead the consortium and that that would help them to obtain OPIC insurance. He raised the possibility of using Texas to lead as the consortium's named operator but with Gulf doing all the work. He did not say he had UBS backing (but that Excalibur was "*perfectly capable of acquiring financial backing*"). Nor did he offer the prospect of an interest in Taq Taq because it was already allocated. Mr Kozel himself may have mentioned Taq Taq. (In support of this he refers to the fact that a map sent to Mr Kozel after the meeting features two marked up exploration area which did not include Taq Taq). The upshot of the meeting was that it was agreed that both Texas and Gulf would be part of a consortium to bid for blocks; that the involvement of Texas was to be essentially "*cosmetic*"[21], with Gulf being the "*real partner*" and doing all the work. There would be a 50/50 split as between Excalibur and Texas/Gulf with the precise split as between Texas and Gulf being resolved at a later date. Mr Kozel made it clear he could deliver both companies.

138. In the absence of any note or record it is not easy to determine exactly what was said at a meeting attended only by Mr Wempen and Mr Kozel and in respect of which Mr Kinnear and Mr Al-Qabandi's subsequent understanding was second hand.

139. In my judgment the likelihood is that the discussion was broadly in the form described by Mr Kozel as summarised in para 136 above. I prefer his evidence which is supported by the following considerations.

140. The KRG wanted a US oil company to operate any concession, as Dr Yacu had said; and OPIC would only insure a consortium if it was US majority owned, as Mr Wempen understood. I reject the suggestion made by Mr Wempen in evidence that he had in mind at this meeting obtaining some form of partial OPIC insurance, whereby Texas or Excalibur might be insured for their minority interest. If the deal was one which Mr Kozel had understood then to be available to a non-American company such as Gulf, he would, as he realised, have had to offer it to Gulf.

141. Mr Wempen's evidence was that he would not have considered presenting to the KRG a consortium of Texas and Excalibur alone. In his witness statement he said that Texas did not have the necessary financial capability or technical knowledge for Kurdistan petroleum operations although in his oral evidence he acknowledged the technical expertise of the "*Keystone companies*". I do not think it likely that at this stage Excalibur would have been reluctant to introduce Texas, a US oil company, to the KRG, which was looking for one, or that he knew enough about Texas to take the view that it lacked the necessary capabilities. In fact it had considerable experience in the conduct of oil and gas operations. The suggestion that Texas' participation was intended to be cosmetic (thus masking the reality from someone) is not easy to square with Mr Wempen's repeated insistence that the KRG and the US authorities knew everything about the Excalibur/Texas/Gulf consortium.

[20] As Mr Kozel says at para 96 of his first witness statement but says happened a month later at para 6 of his second.
[21] Mr Eric Wempen's phrase: para 4.22 of his 1st witness statement.

142. Mr Kozel would not have been content for Texas not to be an operator with at least 51% (a majority share for the operator being standard in the industry). Mr Kozel is likely to have told Mr Wempen as much. He was, also, understandably unsure of Excalibur's ability to shoulder as much as 50% of the obligations and is likely to have said so.

143. As to UBS backing, Excalibur points to the fact that Mr Eric Wempen did not start at UBS until the summer of 2006 and that in 2005 Mr Wempen had had (according to his second witness statement) no dealings with UBS or any connections there. The likelihood, however, is that Mr Wempen either said or implied that he had financial backing from (or including) UBS and referred to that in support of his claim to an 80% share. He is highly likely to have wished to establish his financial credentials and he had a tendency to exaggerate Excalibur's financial backing when talking to third parties[22]. In July 2003 Eric Wempen had wanted Mr Jon Paul Javellana, a Wempen family friend and a Vice President – Investments with UBS Financial Services in California, to start a security business with the Wempens in Iraq. On 7 October 2003 Mr Wempen informed a Mr Haider Hamoudi, from whom he wanted assistance in respect of private placements for Iraqi companies, that "*My firm is working with UBS Warburg and KPMG*". This was untrue. Excalibur had no work at the time with UBS or KPMG[23] (which was where Eric then worked), although Mr Javellana might have been interested in any deals which Excalibur came up with. On 11 October 2003 Mr Wempen asked Mr Javellana whether it would be possible to "*package a private equity deal under the UBS name...*". On 27 October 2003 he complained to his brother about Mr Javellana's failure to get back to him in relation to UBS backing.

144. It is Mr Wempen who is likely to have made reference to Taq Taq. Mr Kozel knew little about Kurdistan and the name Taq Taq meant nothing to him at this stage. Mr Wempen was hazy on the detail too (Mr Kozel recalled that he did not know its acreage). It is possible that there was a misunderstanding on Mr Wempen's part because he had thought that there was a prospect of obtaining a licence in respect of Taq Taq, when there was not. Whether or not that is so, I do not think that Mr Kozel has simply made up the idea that Taq Taq was mentioned by Mr Wempen. Mr Kozel's account is corroborated by his brother Robert who recalls that when he discussed the position with Mr Kozel in January 2006 it was Taq Taq of which Mr Kozel spoke as a field where there was an opportunity to obtain a licence – the unfamiliar name being a reason for his recollecting it.

145. Mr Wempen handed over an Executive Summary of the IRF for which Kurdistan was intended to be the anchor deal. The summary referred to the fund being led by an outstanding team of Iraqis and international investment professionals with members in Iraq, Washington DC and California. The team members were now said to be Mr Wempen, Jaymie Durnan, John Balfe, Jas Dhillon, Imad Jonaby, Ronald Parks, and Eric Wempen. The Summary was calculated to suggest that Excalibur had this team of financial and local experts on board. In fact Excalibur had no contractual links with any of them. Mr Kozel was not to know that: he took Mr Wempen at his word in relation to what he was saying about UBS and the IRF.

[22] E.g. on 7 January 2003 he represented to Mr Jeffrey that Excalibur represented a consortium ready to invest $ 100 million.
[23] In evidence, he admitted that he had been "*a little bit wrapped around the axle here*".

The draft joint venture agreement

146. On **23 December 2005**, Mr Eric Wempen, then working for Baker & McKenzie in California, sent Mr Kozel a draft joint venture agreement dated 26 December 2005. In the accompanying email the draft was described as between "*Excalibur and Gulf Keystone*". Mr Eric Wempen said that Mr Wempen had requested that he forward the draft and described himself as Excalibur's counsel and said "*Please feel free to make any proposed changes or alterations to the agreement*". This was the only direct communication (whether in writing or orally) between him and Mr Kozel.

147. The draft is expressed to be between (i) Excalibur and (ii) "*Texas Keystone/Gulf Keystone LTD, a limited liability company organised and existing under the laws of the state of ---------- of the United States of America and of Bermuda, respectively (Keystone)*". It thus appears to treat Texas and Gulf as alternatives since, in addition to the use of "/", it refers to a single company (albeit one apparently incorporated in two different jurisdictions). But this may have been intended to signify that the counterparty could be either Texas or Gulf or both (albeit "and/or" would have been clearer for the latter). The signature block provided for execution by Mr Wempen for Excalibur and for execution on behalf of Keystone Investment Company (which does not exist and was presumably intended to be some special purpose vehicle). The first two recitals recorded that the Parties (Excalibur and Keystone) wished to collaborate to pursue and ultimately prepare bids to develop petroleum blocks in Iraqi Kurdistan and, in the event that Consortium Bids were successful, wished to develop and sell petroleum resulting therefrom through a joint venture to be established between the Parties. These are described as the "*Transactions*". The third recital recorded that the Parties wished to memorialise in the Agreement "*their preliminary understanding of the principal terms of the Transactions*".

148. Clause 2 provided for the parties to act in consortium to submit Consortium Bids to the National Owner but that before a Consortium Bid was submitted the Parties should enter into a "*Comprehensive Agreement*" setting out in greater detail their rights and obligations in conjunction with the preparation and submission of the bid. Clause 3 provided that, after the Parties had submitted the Consortium Bid, they should as between themselves be jointly bound to the National Owner by its provisions. Clause 4 recorded the Parties' agreement that the Comprehensive Agreement was to be performed through a US joint venture company to be established between the Parties if and when it became apparent that the Consortium Bid would be successful, with a 50/50 split of profit interests or share capital as between Excalibur and Keystone.

149. The draft is, thus, something of a muddle so far as the parties are concerned, and the agreement contained in it is inchoate. It contemplates the making of a further Comprehensive Agreement before the making of a bid. If the bid was successful the Parties were as between themselves to be jointly bound to the National Owner (which would involve them being parties to the contract with the National Owner resulting from the successful bid). The agreement was only a joint venture agreement in the sense that it contemplated the establishment of a jointly owned company which, once the bid was successful, would carry out the development and sale of petroleum resulting therefrom.

150. The agreement was despatched by Eric Wempen within a matter of hours of Mr Wempen's lunch with Mr Kozel after a short telephone conversation between the two brothers. It was based on a standard joint venture agreement which Eric Wempen had developed for Excalibur. Eric Wempen said that he filled it in with a description of the counterparty provided by Mr Wempen but what exactly that description was (it may have been simply "Texas/GulfKeystone") is, and may at the time have been, unclear. Mr Kozel ignored the draft, which he had not been expecting, because the question of structure had not been discussed and he had neither the time nor (on the day before Christmas Eve) the inclination to address or correct it. He would respond in his own time.

151. Mr Wempen was and remained in a great hurry to have something signed because he feared that, without it, he might miss out on the opportunity. He was now, as on other occasions, extremely impatient. He thought that Mr Kozel had got cold feet when in reality he was simply busy with his family in Florida over Christmas. He was also awaiting the birth of his second daughter, who was born on 16 January 2006. Mr Wempen may have been, or felt himself to have been, under pressure from Kurdistan via Dabin to come up with a proposal, especially as the scheduled visit of Mr Gaither had been cancelled. He reckoned that he would need to pay another visit to Erbil.

2006

152. On **5 January 2006** Mr Kinnear emailed Mr Wempen to tell him that his corporate business partners were not going to run with northern Iraq (they were said to be "*too busy looking at risk*") but that he would run alone without them. In the same email chain Mr Kinnear said that he was "*Waiting on an answer from Dubai on what will happen but its on track. Todd has to ask others*". What exactly that refers to is unclear (Gulf had no business in Dubai and Sultan Al Qassimi came from Sharjah and Ras Al-Khaimah): but it may be a reference to Mr Kozel having to clear matters with Gulf before proceeding further on behalf of Texas (see para 157 below).

153. On **6 January** Mr Kinnear sent an email to Mr Kozel asking for an update on the "*Kurdistan project*". He understood that there would be a meeting with the Kurdish minister the following week and he wanted to know whether Mr Kozel would be attending or whether it was just Mr Wempen and his "*team*" alone. If it was the latter, Excalibur would, he noted, struggle as it had "*no track record in this Industry*". On the same day Mr Wempen told Mr Kinnear that if Mr Kozel did not come through the next day the two of them would have to go to Erbil without him "*and present our financing letters at least*". Excalibur had no such letters. Mr Wempen was making out to Mr Kinnear, as he continued to do thereafter, that he had (or would have) available sources of finance.

154. On **8 January 2006** Mr Kinnear emailed Mr Al-Qabandi expressing concern that the project would fall through and asking if it was of real interest to Gulf. He referred to the need for a "*white face*" (by which he meant a non-Arab) to present the case to the Kurdish Government. Mr Al-Qabandi replied:

> "*I fully understand the need for a white face, and that for an American company with operations and assets in the States to bid for this opportunity, and this is why the combination of Gulf Keystone Pet and Texas Keystone Inc. is feasible*".

155. Thereafter Mr Wempen sent several emails desperately chasing for a signed contract.

The Texas Board considers the opportunity

156. In **early January** Mr Kozel telephoned each of his father and brothers, being the other members of the Texas board, to inform them of the opportunity being presented by Excalibur for Excalibur and Texas to collaborate to bid for oil projects in Kurdistan. He had several discussions with Robert Kozel. Robert Kozel recalled Mr Kozel saying in the initial conversation that he had met Mr Wempen, through the introduction of Mr Al-Qabandi. Mr Wempen, he was told, claimed to have political and business contacts in Kurdistan and said that there were opportunities for American companies to be involved. Mr Kozel wanted to know whether the other Kozels were interested. Robert Kozel did not recall Mr Kozel mentioning Gulf in the first conversation but there were subsequent discussions about including Gulf and reference to that possibility was added to the Collaboration Agreement. He did recall mention of Taq Taq. Mr Kozel's father and brothers thought, as did he, that the opportunity was worth looking into and were content for him to conduct further discussions with Mr Wempen on Texas' behalf. They wanted to know the initial cost which Mr Kozel estimated at a few hundred thousand dollars.

157. Insofar as Kurdistan was an opportunity available to Gulf (Mr Kozel's probably correct understanding was that since an American flag company was needed, it was not one then open to Gulf), there was a potential conflict of interest between Texas and Gulf. Mr Kozel who was on the board of both was conscious of this conflict, which was later to become marked. In the New Year he had informal conversations with Mr Roger Parsons, the non-executive Chairman, and Mr Bill Guest, the President, of Gulf to whom on Tuesday **10 January 2006**[24] he sent a copy of the draft joint venture agreement, about the Kurdish opportunity. He described it as a Texas deal. At this stage Mr Parsons and Mr Guest were not keen for Gulf to become involved in Kurdistan on top of its involvement in Algeria. This would add another exploration project in a politically unstable area when Gulf was looking towards expanding in less risky areas and away from exploration risks. But Mr Guest wanted Gulf to have the opportunity to participate at a later date.

158. Mr Kozel did not want a joint venture agreement, from which Texas might not be able to withdraw or which might commit it to a bid. The rest of the Texas board had similar concerns. Instead he preferred a joint bidding agreement which would give Texas the freedom to bid or not as it wished.

159. At this stage Mr Kozel was still in Florida, awaiting the birth of his daughter. Mr Guest in London offered to help him out in relation to Kurdistan and, to that end, approached Ms Sandy Shaw of McGrigors, Gulf's lawyers, for a draft agreement. That firm had the relevant experience and expertise for dealing with a joint bid agreement. Texas did not have experience with a joint bidding agreement. McGrigors did the drafting and Texas paid the bill. The invoice ultimately issued was directed to Texas (at Gulf's London address). The itemised description of the items of work charged for referred to the drafting as having been "*Work on Gulfkeystone Excalibur project*". That does not mean that Gulf was intending to be bound, as opposed to

[24] Mr Guest had first been brought into discussions on the deal on Monday 9 January 2006.

potentially interested, in the Collaboration Agreement. Some of the items for which Texas paid were Gulf Algeria matters, which Texas paid in error.

11 January 2006

160. On **11 January 2006**, Bill Guest emailed Mr Kozel in response to Mr Kozel's request for him to contact Sandy Shaw and get a draft of a "*joa or kc*[25]". He wanted to discuss the equity levels and operating principles that "*you and Texas (sic) ... are after*". Mr Kozel explained to him in a telephone conversation the need for an American flag company for the Taq Taq opportunity and told him that Gulf could have the opportunity to be part of the deal if that arose, but that that was not possible at this stage.

161. On the same day Mr Kozel emailed Mr Wempen to say that he had attempted, unsuccessfully, to send a "*Doc Package*" on the afternoon of Monday, 9 January; and that he was going to send something that afternoon and wanted approval of a cover letter. He also said that he had brought Mr Guest in on the whole deal on Monday that he was now up to speed and would be contributing. This was a reference to his assistance in getting a draft agreement out. What exactly Mr Kozel had tried to send on 9 January is unclear. Mr Kozel recalled that Mr Wempen had wanted to see the type of information that needed to be submitted by a bidder to the KRG because he did not know what was needed and he speculated that it might be a package of such information.

162. Also on the same day Mr Kozel's assistant at Texas in Pittsburgh, Mr Steve Goda, sent a package of documents to Mr Wempen. It included a draft introductory cover letter from Texas (which Mr Kozel had previously sent to Mr Goda) for presentation to the KRG. Mr Kozel had told Mr Wempen in the email referred to in the previous paragraph that Mr Wempen's approval of it was required and in a later email "*Letter needs your input. No poetic license*".

163. The draft was based on one of Gulf's submissions for an Algerian licence. Texas was described as the company exploring the opportunity of participating in oil and gas exploration. The letter said that it included a profile for Gulf, and explained how Mr Kozel had co-founded Gulf and about its activities in Algeria. The purpose of this was in order to bolster the KRG's confidence in Texas because of Mr Kozel's experience. A similar exercise but with Texas and Gulf reversed was used when Gulf introduced itself to the Algerian authorities. The letter also said that it submitted qualification documents for the "*Texas Keystone group of associated companies*". When the letter was eventually signed on 17 February 2006 these were: (i) a document describing Texas' corporate structure, (ii) a Texas interim presentation and (iii) Gulf's Annual Report. The package also included a number of documents relating both to Texas and Gulf.

164. On **12 January 2006** Mr Wempen pressed Mr Kozel to sign the draft joint venture agreement. It was never signed by either Texas or Gulf despite further urgings on 12, 13, 17, 19 and 20 January from Mr Wempen to Mr Goda, Ms Margaret Berry, who was Mr Kozel's assistant, and Mr Kozel.

[25] "*Joa*" = joint operating agreement. "*kc*" was probably meant to be "jv" i.e. joint venture, being the letters next to "kc" on a qwerty keyboard.

165. On **24 January 2006**, Mr Guest of Gulf emailed Mr Kozel, in an email whose subject was "*joint bidding agreement*", to suggest that, on the assumption that the opportunity "*gets past first base*", the two companies should sit down and "*conceptualise the commercial/structural H[eads] O[f] A[greement] that [Gulf] may need to put in place with [Texas]*". This email recognises that Gulf was not then part of the deal.

The making of the Collaboration Agreement

166. On **25 January 2006**, Mr Goda of Texas sent Mr Wempen a copy of a (fourth) draft joint bidding agreement between Excalibur and Texas under cover of a letter to Mr Wempen on Texas notepaper. The signatory of the letter was expressed to be Mr Kozel. It was signed by Mr Goda in Mr Kozel's name. It described the enclosed agreement as a "*Joint Bidding Agreement*" and read:

> "*I've spoken to the Shareholders and Directors of the company, due to the political and economical risks, size and scope of the project and the position we are in as the operator, they feel compelled to propose an 80% - 20% sharing arrangement*
>
> *Please review the agreement and revert to us at your earliest convenience.*"

167. Even if the previous proposals had been for an agreement between Excalibur and both Texas and Gulf this letter was a counter offer from Texas alone. It was obviously referring to the shareholders and directors of Texas. Mr Wempen suggested in his oral evidence that the reference to shareholders was to Gulf shareholders. It cannot have been. Gulf was publicly quoted and had thousands of shareholders, to whom Mr Kozel could not possibly have spoken. The attached agreement, whose parties were expressed to be Excalibur and Texas, proposed a consortium in which the interests were split 80% Texas and 20% Excalibur. It made no mention of Gulf.

168. Eric Wempen's evidence was that Mr Wempen forwarded the letter and agreement to him and he and his brother discussed it. No documentary evidence of the forwarding or of the discussion has been produced. Mr Wempen said that if they had found an objectionable term they would have let their concerns be known and that he probably noticed that Gulf was not mentioned – he could scarcely have failed to do so – and that he discussed this issue with his brother. Mr Wempen did not consider the absence of Gulf to be a problem; nor (he said) did his brother, who did not suggest that Gulf needed to be a signatory. Eric Wempen's evidence was that he reviewed the documents (for an hour or an hour and a half) and concentrated his review on the transfer provisions. At this stage these gave Texas the right to assign part but not all of its consortium interest to an Associate, which meant any third party.

169. Mr Wempen telephoned Mr Kozel to ask about the change from a 50/50 to an 80/20 split. Mr Wempen's evidence was, initially, that Mr Kozel referred to a Gulf Board meeting in Geneva, which Mr Wempen later corrected to Zurich. The Gulf Board never met in Geneva and had not met anywhere since 10 December. The likelihood is that, if Mr Kozel said that there had been a board meeting, he meant Texas. The Texas board had discussed the proposal.

170. On **27 January 2006**, Mr Wempen replied to Mr Kozel that "*the terms of the agreement you sent through your Texas Keystone affiliate*"[26] were acceptable, but that Excalibur wanted to negotiate the percentages allocated to the parties. The email stated that "*our financial backers*" had been offering their support based on the previous 50/50 split. (Mr Wempen said this was a reference to Mr Halpert of Prince Street Capital and Mr Talal Al Ghalib of Gulf Finance House who "*might in time*" finance Excalibur's project: even if this is true they were not then backers, let alone persons who had agreed to back it on the basis of a particular split). The email made a counter-offer of 60%/40% "*after consultation with our financing team*". This was one of many messages which conveyed the misleading impression of the existence of actual financial backers and a retained or operating team of financiers or financial advisers. Mr Wempen suggested in this and other instances that Mr Kozel understood the true position. He did not; and, if he had done so, Mr Wempen would not have spoken in those terms. In fact Mr Kozel reported to his brother on a number of occasions that Mr Wempen had backers.

171. On **30 January 2006** Mr Wempen emailed Mr Kozel to ask for confirmation of the 60/40 counteroffer saying that he assumed "*your board members in the Gulf have examined it*". The assumption was misplaced and probably arose because Mr Wempen misinterpreted the board which Mr Kozel had referred to.

172. On **2 February 2006**, Steve Goda of Texas sent a message to Mr Wempen from Mr Kozel. It read: "*The Shareholders and Directors have reviewed the counter-offer and come back to you with a proposal of 70% Texas Keystone – 30% Excalibur Ventures…Best regards Todd.F.Kozel President.*" This was plainly a reference to the shareholders and directors of Texas. Mr Wempen said it did not cross his mind that this was a counter offer from Texas alone, but it plainly was. Unless Mr Wempen gave it no proper thought (which is possible) he must have realised that it was[27].

173. On **Friday 3 February 2006**, this proposal was accepted by Mr Wempen ("*We accept*") for Excalibur. On **6 February 2006**, he emailed Mr Goda, with a copy to Mr Guest, referring to the 2 February 2006 email and saying "*Per our preliminary response on … 3 February.. we accept the terms*". He referred to the latter email as containing a proposal of a 70/30 "*Gulf/Excalibur*" split. This was a mis-description. The 2 February 2006 email, accepted on 3 February 2006, had had no mention of Gulf.

174. On **13 February 2006**, Mr Wempen sent Mr Kozel a signed copy of the agreement dated 10 February 2006 which set out what the accompanying letter described as the "*agreed 70% Texas Keystone/ 30% Excalibur Ventures economic split*". Mr Wempen thereby corrected the erroneous reference to a 70/30 Gulf/Excalibur split. The letter was addressed to Mr Kozel as CEO of Gulf at its London office and referred to the Joint Bid Agreement forwarded through "*your affiliate, Texas Keystone*".

175. On **15 February 2006** Mr Kinnear met Mr Al-Qabandi and Mr Kozel in London.

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[26] Gulf was not, in fact, a Texas affiliate as the Collaboration Agreement was to make clear. Excalibur relies on the phraseology used in support of its contention that Gulf was a party: but the terms which were said to be acceptable made plain that it was not.

[27] Mr Robert Kozel's evidence was that he was not aware of the 60/40 offer but was aware of the 50/50, 80/20 and 70/30 proposals.

176. On **16 February 2006** Mr Kinnear emailed the two of them to say how Mr Wempen was well backed by some senior Republicans and that he had just phoned "*about MOU as his backers are all waiting in both countries to sell the deal between themselves in Kurdistan/US*". That is what Mr Wempen must have told him. There were no such backers. According to Mr Wempen in evidence, the reference embraced friends and supporters and the fact, so he claimed, that there were "*people capable of financing projects that were interested in what we were doing*".

177. In his email of **16 February 2006** Mr Kinnear explained to Mr Wempen that the delays in signing the agreement which Excalibur had encountered were due to its lack of experience in the oil industry and said that he had had "*to stand surety for you to enable the board to agree this deal*". He spoke of the huge sums involved, and that "*you must have backers and some political cover and you should line up those to meet with them as it will build confidence for the next phase*". He said that they (i.e. the backers) should travel to Iraq sooner rather than later. Mr Kinnear assumed that Mr Wempen had such backers (as did Mr Kozel because that is what Mr Wempen had told him, as he had reported to Robert Kozel). In his email in reply Mr Wempen said that he hoped for something tomorrow and that "*We will have to go with somebody next week, unfortunately, even if it is a smaller company I can't keep Kurdistan on ice forever*." There was no such company.

178. On the same day Ms Berry sent a revised version of the agreement to Mr Wempen, with the corrections set out on a separate document. Among the changes were the following:

    a) Recital D now recited that Texas wished to reserve the right to introduce Gulf as a Party and/or as participant in any Consortium Bid; previously the right reserved was to introduce one or more third parties ("Associates");

    b) "*Gulf*" was a defined word and the definition stipulated that "*for the avoidance of doubt at the date of this Agreement [Gulf] is not an Affiliate*"

    c) Clause 3.3 now gave Texas a specific option to assign a part of its Consortium interest to Gulf, as opposed to an Associate.

179. In a sense this was the Gulf price for letting Mr Kozel go ahead with the Kurdistan deal on behalf of Texas. Mr Kozel had discussed with Robert Kozel his wish, from his perspective as the CEO of Gulf, to preserve the potential for Gulf to participate if an opportunity presented itself and terms could be agreed.

180. Mr Wempen faxed a signed copy of the agreement to Mr Kozel whose company was described in the Fax Cover Sheet as Texas Keystone. The fax was sent to Mr Kozel's Texas number for the attention of Mr Goda, who was asked to copy it to Mr Kozel. Mr Goda sent the fax by email to Mr Kozel in London. Mr Kozel duly executed the agreement on behalf of Texas (mistakenly signing as CEO when it should have been Vice Chairman) and Ms Berry emailed Mr Wempen a copy of the executed agreement. Mr Kozel thought that there would have been a discussion with his family, the Texas board members, before he actually signed, authorising him to do so. There is no record of this and I cannot tell whether it happened or not. In any event it is plain

that the Kozel family were leaving the agreement for Mr Kozel to deal with and that the 70/30 split was acceptable.

181. On **17 February 2006**, Mr Kinnear emailed Mr Al-Qabandi again. He said that events were running away the previous evening when "*the main backers requested we move forward if necessary to another company, as the new petroleum laws were nearing completion in Baghdad...The backers were taking this out of Rex's hands, and I also would have withdrawn...*" Mr Kinnear was probably relaying what Mr Wempen told him – see paras 176-7. But there were no backers.

The Wempens consider the draft Collaboration Agreement

182. Mr Wempen said that he read the agreement carefully. Eric Wempen said that he reviewed the final version of the agreement and discussed it with his brother. He noticed the assignment provisions. He accepted that there was a significant question mark as to whether Gulf was a party and that Recital D indicated that it was not. His response to the suggestion that he should have spotted this at the time was as follows:

> "*A. Yes, and in one sense I did, which was I notice[d] that there was this deed of adherence requirement and the question I posed to myself was how could this thing come unravelled …… and my conclusion was, although not optimal and although I would probably change some of the language, I was* ***confident that were Gulf to take the benefits of the contract it would not be able to do so without somehow tripping up either the contract or some other tort or legal theory.***
>
> *Q. So you -- A. I just didn't think it could get away cleanly based on my overall reading.*
>
> *Q. So you spotted the point but … Excalibur took the risk on the language of being wrong? I think that is the effect of your evidence?*
>
> *A. That's one way to characterise it. I believe we were in a take it or leave it situation. Time appeared to be an issue and the question wasn't whether it was optimal, the question was whether we could live with it and I think the answer was we thought we could live with it.*
>
> *Q. Exactly. So what you are saying is that effectively you identified the point but thought that you had no bargaining power?*
>
> *A. That's correct.*
>
> *Q. But one thing you could have done, or you could have advised Rex to do, if he hadn't have been in such a tearing hurry, is to go back to Mr Kozel or anybody else on behalf of either of the Keystone companies and say, "Look, we originally had a certain understanding and it is now not clear to us on the language of this final draft that we are still on the same page here. Can we please be quite clear that -- is this a two-way consortium prior to any assignment or a three-way consortium?" What was to stop you asking or advising Rex to ask?*

> *A. I have asked myself on numerous occasions and just hoped that I would have done just such that. I think at the time I viewed it the way I have explained it. Clearly doing so would have saved a lot of grief.*"

183. Mr Wempen signed the agreement on behalf of Excalibur and faxed an executed copy to Mr Goda for Mr Kozel's attention. Mr Kozel executed the agreement on behalf of Texas.

184. Whether or not Gulf was a party to the Collaboration Agreement *ab initio* is an objective question. Evidence as to the subjective view of either Wempen or Mr Kozel, if relevant at all, is relevant primarily to any question of apparent authority although it may have some tangential relevance as to whether the dealings between the parties were on the basis that Gulf was a party – since what the parties thought may have affected how they conducted themselves.

185. Mr Wempen's evidence was that the Wempens regarded the agreement originally proposed by Texas as being an agreement to which Gulf would be a party (with Gulf as the majority partner and Texas as the face of the consortium – as Mr Wempen says he explained the deal to his brother) and that they said nothing about the fact that Gulf was not mentioned in the Collaboration Agreement because they did not see it as a problem. This is surprising. Any ordinary businessman, let alone one with a degree in Business Administration (Mr Wempen), or who was a practising lawyer (Eric Wempen), would realise that signing a contract to which Gulf was supposed to be a party, but which made no mention of it, could give rise to problems.

186. Eric Wempen's evidence is that when it came to the amended draft he, at any rate, saw that there was a problem: see para 182. The analysis of which he speaks is of the most general character and does not even appear to assume that Gulf would necessarily be treated as a party *ab initio*. I have some doubts as to how far he thought through these matters at the time that the contract was made, but I am prepared to assume that his thinking was of the nature described.

187. On any view Mr Wempen was in a great hurry to sign a contract. The likelihood is that, insofar as he addressed his mind to the question of parties, he was content for the agreement to be with Texas, a US oil company, on the basis that it contained terms which contemplated that Gulf might join in the bid or the Collaboration Agreement at some stage. In Mr Eric Wempen's somewhat incoherent, or at any rate inchoate, thinking, if Gulf came in on the bid, things would probably work out all right in the end, in the sense that Gulf could not bid without becoming under some liability to Excalibur. For both of them the key thing was to sign up.

188. Neither of the Wempens raised any concern with Mr Kozel on the issue of Gulf being a party. At this stage, they were content to contract with Texas and wished to sign up as soon as they could in order to get back to Kurdistan with the news that they had done so. What Mr Wempen was concerned with was the interest split. Eric Wempen was prepared to take the risk involved in Gulf not being expressed as a party. So far as Mr Kozel was concerned he regarded Texas as a party and not Gulf.

The Collaboration Agreement of 16 February 2006

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189. The Collaboration Agreement is the foundation of Excalibur's claim to relief. The parties to it are Excalibur and Texas.

190. The Recitals to the Collaboration Agreement record that:

> "*A. The Parties wish to collaborate to pursue and ultimately prepare bids to acquire by way of Consortium Bids … and develop petroleum blocks in Iraqi Kurdistan ('Acreage')…*
>
> *B. In the event that Consortium Bids are successful, the Parties wish to develop the petroleum blocks in order to produce and sell and/or export petroleum resulting there from.*
>
> *(The activities pursuant to A. and B. above are collectively referred to herein as the 'Transactions'.)*
>
> *C [Texas] wishes to be appointed and the Parties wish to accept [Texas] as operator in relation to the Transactions*
>
> *D [Texas] wishes to reserve the right to introduce Gulf … as a Party to this Agreement and/or participant in any Consortium bid pursuant to the terms of this Agreement.*
>
> *E. The Parties wish to set forth in this Agreement their interests, rights, duties, obligations and liabilities in respect of the Transactions and their agreement to and understanding of the principal terms of the Transactions*."

191. Clause 1 of the Collaboration Agreement contains a number of defined terms, including the following:

> "*1.1 In this Agreement the following defined terms bear the meanings ascribed to them:*
>
> *'Acreage' has the meaning set forth in Recital A.*
>
> *'Affiliate' means a company:*
>
> *a in which a Party hereto owns directly or indirectly share capital, conferring fifty per cent (50%) or more of the votes at shareholders' meetings of such company; or*
>
> *b which is the owner directly or indirectly of share capital conferring fifty per cent (50%) or more of the votes at shareholders' meetings of a Party; or*
>
> *c whose share capital conferring fifty per cent (50%) or more of the votes at shareholders' meetings of such company and the share capital conferring fifty per cent (50%) or more of the votes at*

shareholders' meetings of a Party are owned directly or indirectly by the same company.

[…]

"Closing Date" means the closing date for receipt of Consortium Bids in respect of each and every parcel of Acreage for which the Parties are considering the submission of a Consortium Bid in accordance with this Agreement.

'Concession' means the licence, production sharing agreement or buy back or any other similar concession awarded to the Parties in respect of the Acreage (or any part thereof) as a result of a successful Consortium Bid.

'Consortium Bid' means an application and/or bid or tender by the Parties (or any of them) to the National Owner for a license, production sharing agreement or buy back or any other similar concession for or in respect of the Acreage pursuant to this Agreement.

'Consortium Interest' means, in relation to a Party, such Party's participating interest share in the interests, rights, duties, obligations and liabilities arising under this Agreement from time to time expressed as a percentage.

[…]

"Deadline" means thirty (30) days before the Closing Date or such other date as may be agreed by the Parties in accordance with Clause 7.5.

[…]

'Government' means the government of Iraq and/or the State of Iraqi Kurdistan as the case may be…

"Gulf" means Gulf Keystone Limited […] which for the avoidance of doubt at the date of this Agreement is not an Affiliate of [Texas],

'Joint Operating Agreement' means an agreement between the Parties relating to the rights and obligations of the Parties in respect of any Acreage granted pursuant to a Consortium Bid made by the Parties as provided for in this Agreement, which such Joint Operating Agreement shall be based on the UKOOA 20th Round Proforma Joint Operating Agreement, incorporating all the principles set forth in Schedule 3.

[…]

'National Owner' means Iraq and/or the State of Iraqi Kurdistan, as the case may be, or any nationalised company created by the Government to own the Acreage and/or any rights and licence therein.

[…]

'Operator' means TKI, being the Party appointed as such under this Agreement, acting in that capacity and not as owner of a Participating Interest.

'Participating Interest' means, in relation to a Party, such Party's participating interest share in the interests, rights, duties, obligations and liabilities arising from and in respect of a parcel of Acreage acquired pursuant to this Agreement as a result of a successful Consortium Bid.

[…]

'Transactions' has the meaning set forth in the recitals hereto.

In this Agreement:

The Recitals and Schedules shall constitute an integral part of this Agreement…"

192. Clause 2, headed "*SCOPE OF AGREEMENT*", provides as follows:

"*2.1 The Parties shall act in consortium to:*

a. acquire, share and review data and opportunities for the acquisition of Acreage by way of Consortium Bid;

b. submit Consortium Bids to the National Owner when agreed by the Parties Agreement;

c. negotiate contracts resulting from successful Consortium Bids; and

d. upon completion of successful negotiations, complete all necessary documentation to effect the award of the Concession, provided that nothing in this Agreement shall be construed so as to require that any Party acquire data or submit Consortium Bids in which it does not wish to participate.

2.2 During the term of this Agreement, otherwise than in accordance with and subject to this Agreement: -

a. The Parties shall work exclusively together in the pursuit of the Transactions described in the Recitals and no Party shall at any time pursue all or part of the Transactions independently or with or through any Affiliate or with or by any third party unless otherwise agreed in writing between the Parties. Provided that nothing in this provision shall prevent any Party using third party services in or for the fulfilment of such obligations…

b. Each Party shall not and shall procure that its Affiliates shall not become involved in any transaction, project, opportunity, or other dealing which has been introduced to its attention by the other Party in respect of the Transactions and which competes with the Transactions contemplated hereunder with the National Owner without the prior written consent of the Introducing Party. Except as provided in Clause 11.4.3, the obligations set forth in this Clause…shall survive the termination of this Agreement for a period of two (2) years."

193. Under Clause 3 headed "*PARTICIPATING INTERESTS*", it was agreed as follows:

"*3.1 <u>Consortium Interests and Participating Interests</u>*

3.1.1 Subject to Clause 3.3, the Consortium Interests of the Parties are:

EXCALIBUR 30%

[Texas Keystone] 70%

3.1.2 Except as otherwise agreed between the Parties, a Party's Consortium Interest shall be that Party's Participating Interest in any Consortium Bid. Where the Parties agree, the Participating Interests of any or all of the Parties in relation to any Consortium Bid may be different than the Consortium Interests of the Parties.

In such case, the Parties agree to bear all costs and expenses pursuant to Clauses 4.3(d) and 5.2 which relate exclusively to such Consortium Bid in its Participating Interests applicable to such Consortium Bid.

3.1.3 A Party may participate in any Consortium Bid under this Agreement through a financially capable Affiliate without assigning a Consortium Interest to such Affiliate, providing that the said Party shall remain liable for the due performance of this Agreement by the said Affiliate…"

3.2. Assignment

3.2.1. A Party may freely assign, sell or otherwise dispose of (hereafter referred to as "transfer") all or part of its Consortium Interest or Participating Interest to any of its financially capable Affiliates.

3.2.2. Save as provided in Clauses 3.1.3., 3.2.1 and 3.3. and subject to clause. 3.2.3.no Party may transfer its Consortium Interest or Participating Interest or any part thereof without obtaining the prior written consent of the other Parties which consent shall not be unreasonably withheld or delayed.

3.2.3 No transfer of all or part of a Consortium Interest shall in any circumstances be effective unless and until the transferee undertakes in writing to the Parties to be bound by and adhere to the terms of this Agreement and all duties, obligations and liabilities attaching thereto as if it were a Party to this Agreement.

3.3.1. [Texas] shall have the option to:-

(a) assign a part (but not all) of its Consortium Interests to Gulf Keystone; and

(b) take a reassignment of all or any of such part of its Consortium Interests from Gulf Keystone

at any time and from time to time upon written notice to Excalibur to that effect. Such assignment shall become effective upon the execution by Gulf Keystone of the Deed of Adherence...

3.3.2 Subject to the execution by Gulf of the Deed of Adherence in favor of Excalibur and TKI [Texas], Excalibur and TKI [Texas] agree with each other and in favor of Gulf that Gulf shall have corresponding rights and entitlements pursuant to this Agreement as if it were a Party hereto on and from the date of execution of the Deed of Adherence provided that such assignment and adherence shall not impose any liability or obligation on Gulf for any period prior to the date of execution of the Deed of Adherence.

3.3.3 Nothing in this Clause 3.3 shall enable TKI to assign to Gulf its position as Operator or the position of operator of any Acreage as anticipated pursuant to any Consortium Bid without the consent of the Parties.

> *3.3.4. In the event that TKI exercises its option pursuant to this Clause 3.3, TKI undertakes to Excalibur that TKI and Gulf shall act in concert in the exercise of its and their voting rights under this Agreement.*"

194. Clause 5 dealt with "*EXPENDITURE*" and provided:

> "*5.1. Subject to Clauses 4.3 and 5.2 hereof, all costs incurred or accrued in the course of and during the term of this Agreement shall, unless expressly agreed otherwise, be the responsibility and to the account of the Party Incurring the costs.*
>
> *5.2. The Parties shall agree a program and budget pursuant to the provisions of Clause 7 to cover the costs of any Data acquisition, joint studies and the preparation of any Consortium Bid and, if appropriate, negotiations with the Government for the Acreage or any part thereof. All costs incurred pursuant to a program and budget shall be joint account costs calculated and borne pursuant to the terms of the Accounting Procedure attached hereto as Schedule 1.*"

195. By Clause 6 the parties agreed that Texas would be the Operator and would be responsible for the preparation of any Consortium Bid; for the preparation of all work programs and budgets and for their submission to the Operating Committee for approval; and, subject to any necessary approval of the Government, would be the operator of the Acreage if awarded to the parties pursuant to a Consortium Bid.

196. Clause 7 provided for an Operating Committee for the purpose of undertaking the Transactions. Schedule 2 provided for Texas' representative on the Committee to be Mr Kozel and Excalibur's to be Mr Wempen. Under clause 7.2. the duties of the Committee were (a) to consider and determine all matters relating to any Consortium Bids to be made; (b) to consider and amend or approve all proposed programs and budgets submitted pursuant to the Agreement; and (c) to consider and, if approved by all Parties, to acquire Data.

197. Clause 8 addressed certain aspects of the process of bidding for petroleum blocks. It provided in material part as follows:

"*8.1 Upon completion of the evaluation of any parcel of Acreage which shall in relation to each such parcel of Acreage take place by the Deadline, the Operating Committee representatives shall meet to decide on whether they wish to apply jointly for such Acreage and the commitments financial or otherwise which they are willing to accept in relation thereto and no later than ten (10) days after the Deadline each of the Parties shall thereupon give notice to the other Parties of its commitment to participate in or to withdraw from each Consortium Bid agreed as aforesaid. Should a Party fail to give notice as required prior to the expiry of the time period set forth in this Clause 8.1, it shall be deemed to have elected to withdraw from such Consortium Bid*[28].

8.2 If agreed upon by the Operating Committee pursuant to Clause 8.1, the parcel of Acreage shall be the subject of a Consortium Bid submitted by the Operator to the Minister, the National Owner or such other person appointed by them, as the case may be, on the terms agreed by the Parties and such Parties shall use their best endeavours to acquire such Acreage in proportion to their respective Participating Interests.

[…]

8.4 In the event that any of the Parties desires to make a Consortium Bid in respect of a parcel of Acreage and … the Parties have not agreed to include such parcel of Acreage in a Consortium Bid to be made hereunder, such Party (the 'Notifying Party') shall … give written notice to the other Party of its intention to make an application for such Acreage…

a the recipient Party serves a written notice to the Notifying Party stating that it wishes to join in the said application for such Acreage (or any of it which it shall so specify in such a rely) the said Acreage shall be included in a Consortium Bid to be submitted under Clause 8.2. above

b in the absence of service of a reply from the other Party, or in respect of any Acreage which is not specified in any such reply the Notifying Party shall be at liberty to make an application on its own…

8.5. Should a Party withdraw or be deemed to withdraw from a Consortium Bid pursuant to Clause 8.1 or elect or be deemed to elect not to participate in any application pursuant to Clause 8.4, it shall nevertheless remain bound by the terms of this Agreement

[28] Clause 8, and this provision in particular, is analogous to clauses 6 A and B of the version of the Association of International Petroleum Negotiators (AIPN) Model Form Bidding agreement extant when the Collaboration Agreement was entered into. The AIPN pro forma was the only JBA model form in general circulation at the time and the one with the most international currency. The current pro forma (issued in June 2006) is materially the same.

and neither it on its own behalf or through its Affiliates or agents, nor any of its Affiliates shall apply for such Acreage.

8.6 In respect of any Application made hereunder:

8.6.1 Subject to the terms of this Clause 8, after the Parties prepare, approve and submit the Consortium Bid to the National Owner, the Parties shall as between themselves be jointly bound to the National Owner by its provisions and neither Party may vary or seek to vary the same without the previous written consent of the other Party.

8.6.2[29] *In the event that the National Owner requires any material changes in the terms of any Consortium Bid such terms, each participating Party shall notify the other participating Party within seven (7) days of receipt of notice of the proposed change whether or not it wishes to continue to participate. Any party failing to give such notice shall be deemed conclusively to have disapproved such change and to have withdrawn from the Consortium Bid..*

8.7 In the event that as a result of a Consortium Bid the Parties are awarded a Concession in respect of any Acreage, the Parties shall: -

a be bound to accept such Concession and to use their best endeavours to complete all necessary documentation to effect the award of the Concession; and

b enter into a Joint Operating Agreement in respect of such Acreage and the operations anticipated here under in relation to such Acreage."

198. Clause 9.1, headed "*RELATIONSHIP OF THE PARTIES*", provided that "Each of the Parties shall carry out its responsibilities and duties under this Agreement in good faith, responsibly, with due care, competence and diligence…". Clause 9.2. provided that:

> "*The interests, rights, duties, obligations and liabilities of the Parties as between themselves shall be several and not joint or collective. Nothing herein contained shall be construed as creating a partnership of any kind, an association or a trust.* "

199. Clause 11 provided for the contract to become effective on the date of its execution, and to terminate on the Termination Date i.e. two years thereafter.

200. Clause 20 headed "*Entire Agreement*" provided:

> "*This Agreement represent the entire Agreement between the Parties as relates to the Transactions hereto at the date hereof, and may not be changed,*

[29] In the Collaboration Agreement as drafted there are two paragraphs numbered '8.6.2'; this is a reference to the second of those paragraphs.

altered or amended in any respect except in an instrument signed in writing by the Parties. For avoidance of doubt, nothing in this Clause shall be construed as limiting the Parties rights and obligations upon the entering into of formal contractual and/or licensing documentation in respect of a successful Consortium Bid."

201. By clause 14.3.1 the Agreement was to be governed by and construed in accordance with the laws of the State of New York.

The Schedules

202. Schedule 1 set down an accounting procedure as contemplated by clause 5.2. although the parties did not, in fact, follow it. The Schedule provided that:

> "*2.1 The Operator shall be entitled to require the Parties to make advance cash payments…*
>
> *[…]*
>
> *2.3 The due date of an advance shall be the date on which the Operator estimates that it will be making a substantial amount of cash payments…*
>
> *[…]*
>
> *2.5 If any party fails to pay in full its share of any advance by the due date, interest, calculated at 2% above LIBOR shall be payable by such Party on the unpaid amounts. "LIBOR" means the London Interbank Offered Sterling Rate for one month as quoted in the London Financial Times…*
>
> *[…]*
>
> *6. CHARGEABLE EXPENDITURE*
>
> *The Operator shall charge the joint account with all costs and expenditures subject to an approved work programmed [sic] and budget properly incurred under the Agreement.*
>
> ……"

203. Schedule 3 provided that the Joint Operating Agreement should adopt the UKOOA Proforma and should incorporate a number of provisions including:

> "*1 The parties shall have rights and liabilities in accordance with their participating interest share. All liabilities shall be several and the parties shall indemnify each other in the usual manner where liability may otherwise be deemed to be joint or joint and several.*"

204. Schedule 4 contained the terms of the Deed of Adherence of Gulf as Assignee in favour of Excalibur and Texas as Assignor. Recital A recorded that Excalibur and Texas were the present parties to the Collaboration Agreement and Recital B recorded

that pursuant to it Texas was entitled to assign part (but not all) of its Consortium Interests to Gulf on notice to Excalibur and subject to the execution by Gulf of a Deed of Adherence. The Deed provided, in clause 2, that the Assignee gave notice to Excalibur of an assignment of part of Texas' Consortium Interest to the Assignee and clause 3 contained an undertaking to Excalibur and the Assignor to be bound by the terms of the Agreement "*in every way as if the Assignee had been at all times a Party thereto*". The draft provided for execution by Gulf as a deed and signature by Texas and Excalibur by way of acknowledgment of delivery.

205. The signature block provided that Mr Kozel was executing the agreement for and on behalf of Texas.

Issues *Index*

206. The following issues arise in respect of this agreement:

i) If Party A does not bid for a Concession but consents to Party B, or Parties B & C (if at any stage there are more than two parties), bidding on the basis that Party A would not be a party to any resulting Concession, is Party A entitled to any interest in the Concession obtained as a result of the successful bid of Party B or Parties B and C?

ii) Was Gulf a Party to the agreement from the beginning and by what law is that question to be decided?

207. The first question arises because by paragraph 8 of Excalibur's Reply:

> "*it is admitted that Excalibur consented to the submission of a bid for the Shaikan PSC on the basis that Excalibur would not be party to that PSC. Mr Wempen was only willing to allow the bid to be submitted without Excalibur because he understood that it was not necessary for it to be a party to the PSC and/or JOA in order to be entitled under the Collaboration Agreement to an interest in the Shaikan Block.*"

208. Excalibur contends that, despite this consent, when the bid for Shaikan was successful Excalibur became entitled, by virtue of clause 3.1.2 of the Collaboration Agreement, to an indirect 30% interest in the rights acquired by Texas and Gulf in the PSC (between the KRG, Texas, Gulf and Kalegran) which resulted from the success of the bid. Excalibur does not claim any rights against Kalegran. But it does claim that Gulf was a party to the Collaboration Agreement – hence the second issue – such that it is entitled to a 30% indirect interest in the 80% interest in Shaikan acquired by Texas and Gulf between them i.e. 24% of the whole. The defendants have denied such entitlement and are, in consequence, in breach of contract.

Principles of contractual interpretation under New York law

209. There is little difference between New York and English law. The applicable principles may be summarised as follows. The Court's aim is to discern the intentions of the parties from the words they used in the context and circumstances in which they did so. It is not for the court to "*improve or purify*" (Judge Bellacosa's words) the agreement which the parties reached. The contract, which is the primary and often

the only place to look, must be read as a whole. The Court should avoid ascribing to a contract a purely technical or unduly literal meaning or a strained or unnatural interpretation. It should not strive to find an ambiguity. If there is a genuine ambiguity, apparent to someone familiar with the customs and practices of the relevant trade or business, the Court will examine extrinsic evidence including the conduct of the parties after the contract has been made (but not the uncommunicated subjective intentions of the parties). In this latter respect New York law differs from that of England & Wales.

Issue (i): Indirect interests under the PSC

Index

The construction of the Collaboration Agreement

210. As the experts (Mr Park and Mr Codd) agree, the Collaboration Agreement has the following features all of which are typical of an upstream joint bidding agreement ("JBA"):

a) a statement of the parties' interest shares (in the agreement their "*Consortium Interests*") which, in the absence of agreement to the contrary will represent their shares in any bid ("*Participating Interests*") in which they choose to join;

b) a provision reserving to each party an unfettered choice of whether or not to participate in any particular bid;

c) a procedure for determining whether to submit a bid for a particular block and if so on what terms;

d) a requirement for the parties to notify each other of their commitment to the bidding terms thus agreed;

e) a provision to the effect that in the absence of a statement of commitment to go forward on the agreed terms (or those which the agreement stipulates) a party is deemed not to participate;

f) a term which prevents a party not participating in a bid from bidding in any other capacity;

g) a term by which the parties opting to participate in a bid undertake to each other to be jointly bound to the host government in the terms of the bid once the bid had been submitted i.e. they agree to assume joint liabilities;

h) in the event that a bid is successful, a requirement for the parties to execute a contract giving effect to the host government concession or licence and to enter into a joint operating agreement which will often be defined as a JOA based on a particular model form.

211. A bidding agreement regulates the position between the parties at the very beginning of the oil exploration process when the risks are likely to be at their highest. It is for

that reason that bidding agreements typically contain the provisions referred to in sub-paras (b) – (d).

The meaning of the Collaboration Agreement

212. Against that background the meaning of the Collaboration Agreement is, in my judgment, clear. The Recitals and Clause 8 show that the scope of the Collaboration Agreement extends to (i) the process in respect of Consortium Bids; (ii) the consequences of participating in or staying out of a Bid; and (iii) the obligations of the parties upon a Bid succeeding. As appears from the definition of "*Concession*" the agreement is drafted for use with several different forms of contract with a host government. In the present case the Concession bid for was a production sharing agreement (i.e. a PSC). Thus a Consortium Bid meant an application, bid or tender by the Parties or any of them for a production sharing agreement "*pursuant to [the] Agreement*". An application for a production sharing agreement connotes that the applicant is seeking to become a party to the agreement. Clause 8.2 required the bid to be submitted by the Operator. An application "*pursuant to [the] Agreement*" is an application made in accordance with the regime laid down by clause 8 to regulate the bidding process and the consequences of opting to participate in a bid or opting not to.

213. If there is no other agreement, a Party's "*Consortium Interest*" is to be that Party's "*Participating Interest*" in any Consortium Bid: clause 3.1.2. The definition of "*Participating Interest*":

> " *... such Party's participating interest share in the interests, rights, duties, obligations and liabilities arising from and in respect of a parcel of Acreage acquired pursuant to this Agreement as a result of a Consortium Bid*"

contemplates that the interest is that of someone who is a party to the PSC. That in which a party is to share is the bundle of rights and obligations acquired pursuant to the Agreement as a result of a Consortium Bid. Those rights and obligations are primarily the rights and obligations of those who are parties to the PSC with the host government which is that for which the Bid is being made. A Party who has opted not to be a party to the PSC will avoid having the obligations inherent in a Participating Interest; and, conversely, will not acquire any of the rights arising therefrom. The rights and obligations in which a party with a Participating Interest is to share are those to be acquired "*pursuant to the Agreement*" i.e. in accordance with the process laid down by the Agreement, which requires the parties (i) to commit to the Bid, (ii) to use their best endeavours to acquire the relevant Acreage in proportion to their respective Participating Interests, (iii) to agree to become jointly bound to the National Owner, (iv) to use their best endeavours to complete the necessary documentation to effect the award of the Concession and (v) to enter into a Joint Operating Agreement, being an agreement relating to the rights and obligations of the Parties in respect of Acreage granted pursuant to a Consortium Bid made by the Parties as provided for in the Agreement. The concept of "*Participating Interest*" does not extend to an indirect interest in the rights and obligations arising under a PSC to which a party to the Collaboration Agreement is not, itself, a party.

214. If a party could claim some form of indirect interest it would mean that a party to a JBA such as the Collaboration Agreement could claim to be entitled to some indirect interest without incurring any direct liability to the host government or, it would

appear, any liability to the parties to the PSC who were not parties to the JBA. The parties to the PSC would in the first instance bear the costs of the venture. Anyone who was a party to the PSC but not the Collaboration Agreement would have no rights against the holder of the indirect interest. This the parties to the Collaboration Agreement cannot have intended.

215. Mr Simon Picken QC for Excalibur submitted that the definition of Participating Interest was wide enough to cover an indirect interest and that, in the event of a successful bid, the parties participating in the bid would each be entitled to a share in whatever interest, rights and obligations were awarded to any of them as a result of the bid in the proportions set out in clause 3.1.1 whether directly or indirectly. He contrasted the words "*arising from and in respect of a parcel of Acreage acquired pursuant to this Agreement as a result of a Consortium Bid*" with the words "*arising under this Agreement*" in the definition of Consortium Bid.

216. I disagree. The words describing the share itself are identical ("*such Party's participating interest share in*"). The description of that which is being shared in is different, being "*the interests, rights, duties, obligations, and liabilities*" either:

a) "*arising under this Agreement from time to time*"; or

b) "*arising from and in respect of a parcel of Acreage acquired pursuant to this Agreement as a result of a successful Consortium Bid*".

217. There is good reason for the difference. Consortium Interests can only be shares in the Collaboration Agreement. But a party to a Concession may find that the Concession, which may take several different forms, grants him interests (e.g. in or in respect of property) or subjects him to obligations (e.g. by statute) in respect of the relevant parcel of Acreage which are not confined to rights or obligations expressed in the PSC to which he is party as a result of a successful Consortium Bid. In addition the share is to be a share of, in effect, the rights and obligations in relation to the Acreage which are contained in the PSC. To share in those rights and obligations it is necessary to be a party, with others, to the PSC i.e. the contract pursuant to which they arise.

218. If the draftswoman[30] had intended to provide for indirect interests she could scarcely have done it in a more recondite or unhelpful fashion. Such an intention is left to be discerned from the definition of Participating Interest, which does not, in my view, bear the meaning attributed to it. The construction argued for requires treating a Party as participating in a Consortium Bid, even though it has no intention of becoming a party to the PSC, with the result that those who are parties to the PSC must in the first instance shoulder the liability to the KRG themselves. Moreover the agreement provides no indication as to how effect is to be given to any such indirect interest in a PSC and no mechanism relating to it – not even an agreement to agree. Mr Park suggested in his oral evidence that the default position would be for the indirect interest to be given effect to by a trust; but clause 9.2 precludes such an approach. Finally, Mr Wempen accepts that Excalibur's payment obligations were the same whether their interest was direct or indirect. But the Collaboration Agreement contains no mechanism in respect of such indirect obligations.

[30] Who was plainly alive to the need or desirability for express reference to indirect interests: see the definition of "*Affiliate*".

219. These considerations militate against construing the agreement as having provided for indirect interests, especially when no one has come up with an example of any other case where a joint bidding agreement created an indirect interest (a somewhat elusive concept) and when Mr Codd's evidence was that in his 32 years in the industry he had never come across one.

220. The true construction of the Collaboration Agreement is not hard to discern. The parties have specified Consortium Interests: 70% for Texas and 30% for Excalibur. Unless they agree otherwise those will be their Participating Interest in any Consortium Bid: clause 3.1.2. That assumes that they have agreed to participate in the Bid. It cannot apply to a party who has decided not to participate in the Bid. The proviso to clause 2.1 makes clear that no Party is required to submit a Consortium Bid in which it does not wish to participate.

221. The agreement contemplates that the parties will, to the extent that they can, disclose data relating to the Acreage and to any opportunities for Consortium Bids. Clause 5 provides that the basic rule is that all costs incurred or accrued in the course of the agreement are to be the responsibility, and for the account, of the Party incurring them. Clause 5.2, by way of exception, provides for the Parties to agree a program and budget pursuant to the provisions of clause 7 to cover the costs of Data acquisition, joint studies and the preparation of any Consortium Bid and, if appropriate, negotiations with the Government. All costs incurred pursuant to a program and a budget are to be joint account costs calculated and borne pursuant to the terms of the Accounting Procedure in Schedule 1. Clause 7 established an Operating Committee to consider and determine all matters relating to any Consortium Bids and to approve all proposed programs and budgets and to consider and, if approved by all Parties, to acquire Data. In fact the parties did not convene an Operating Committee as such but acted more informally, as is not uncommon.

222. Clause 8 dealt with Applications for Acreage. After evaluation of any parcel of Acreage the Operating Committee representatives were to meet to decide whether they wished to apply jointly for acreage and the commitments they were willing to accept. No later than 10 days after the Deadline each of the Parties was to give notice to the other Parties of its commitment to participate in or withdraw from each Consortium Bid and if a party failed to give notice it was deemed to have elected to withdraw from the Bid.

223. In short the Parties had a free option whether to participate or withdraw but had to give notice if they sought to participate: clause 8.1. The Deadline was defined as 30 days before the Closing Date being the closing date for the submission of Bids in respect of each parcel for which the Parties were considering the submission of a Bid.

224. In the event there was no date specified by the KRG as the date by which a bid had to come in. Further, insofar as Bids were submitted they were constituted by the submission of draft PSCs. Excalibur failed to give notice to participate at any time prior to what must be taken as the closing date for the submission of Bids, namely the moment before the Bid was accepted. The fundamental effect of clause 8.1 is clear: in the absence of notice to participate a Party is deemed to withdraw. Further Excalibur "*consented to the submission of a bid for the Shaikan PSC on the basis that Excalibur would not be a party to that PSC*". Excalibur thereby withdrew from the Bid made.

225. Mr Picken submitted that Excalibur could be regarded as applying jointly with Texas, (or Texas and Gulf), if Texas or Texas/Gulf was applying to be on the PSC and Excalibur was content not to be on the PSC and only seeking an indirect interest. I cannot accept that this is what the Collaboration Agreement contemplates. Applying for a concession in the form of a PSC is one thing; claiming an indirect interest in something for which someone else has successfully applied is quite different. The former is what the Collaboration Agreement contemplates; the latter is not. A deemed and, *a fortiori*, an actual withdrawal from a bid is *prima facie* inconsistent with the retention of any interest in the fruits of the bid. Further, the notion that a party who withdraws is in some sense a joint applicant is impossible to reconcile with clause 8.5 which specifies the consequences of withdrawal in the following terms:

> "*Should a Party withdraw or be deemed to withdraw from a Consortium Bid pursuant to clause 8.1 ... it shall nevertheless remain bound by the terms of this Agreement and neither it on its own behalf or through its affiliates or agents, nor any of its Affiliates shall* ***apply*** *for such Acreage.*"

226. Under clause 8.2 the parcel of Acreage agreed upon was to be the subject of a Consortium Bid submitted by Texas as operator on the terms agreed by the Parties who had elected to participate (being Texas and, if Gulf was a party, Gulf). It was such Parties who were to use their best endeavours to acquire Acreage in proportion to their respective interests. The clause does not apply to those who have withdrawn from the bid who cannot use any endeavours to acquire Acreage for which, *ex hypothesi*, they have not applied. In the present case the Bid was submitted by Gulf or Gulf and Texas and was not submitted on behalf of Excalibur which declined to be a party to the PSC. If Excalibur had been applying jointly with Texas, it would have become a party to the PSC: but that was the one thing which was not intended.

227. Under clause 8.6.1 the Parties who prepare, approve and submit the Consortium Bid to the National Owner are as between themselves jointly bound to the National Owner by its provisions. This clause, typically to be found in JBAs, shows that the parties to a Consortium Bid are those who are to become bound to the National Owner (by becoming party to the PSC) – a category which in the present case would not include Excalibur. Once the Bid is submitted the Parties are not at liberty to vary it without the consent of the other Party.

228. Under clause 8.7 the Parties who are awarded a Concession are bound to accept it, to use their best endeavours to complete the documentation to effect the award (i.e. the PSC) and to enter into a JOA as defined. This is the mechanism by which a Participating Interest is to be acquired. Acceptance of a Concession in the form of a PSC involves being prepared to accept the rights and obligations contained in it. It does not cover someone who has declined to be part of it.

229. "*Joint Operating Agreement*" is defined as an agreement "*based on the UKOOA 20th Round Proforma Joint Operating Agreement, incorporating all the principles set out in Schedule 3*". The UKOOA 20th Round Proforma JOA, often used in relation to the North Sea where the Concession usually takes the form of a licence, is drawn in terms which make clear that the parties to a JOA in this form will be the contractors to the related host government contract. The same applies in relation to the AIPN Model Form Operating Agreement. Further the evidence is that the parties to upstream oil and gas industry JOAs are invariably the parties to the related host government

contract: see the Park-Codd Joint Memo para 4.6 (m). Mr Rogers, Mr Park and Mr Codd had never come across a situation where a party to the JOA was not the holder of a direct interest in the related host government contract. All this makes complete commercial sense. By the JOA the contractor parties to the PSC agree among themselves their respective rights and obligations in respect of the performance due under the PSC.

230. It is, of course, open to parties to vary a proforma but the proforma that they specified is a good guide to what they were aiming at. In the present case Schedule 3 to the Agreement made certain further provision as to what the JOA should incorporate including the following:

> "*4. Terms regarding withdrawal from the Concession shall be included so that a party may withdraw from the Concession only after mandatory working obligations have been completed. The withdrawing party assigns its participating interests without any compensation, free and clear of all liens and encumbrances and subject to all other industry terms in relation to withdrawal.*"

In other words a party can only withdraw once it has performed the minimum exploration obligations under the PSC to which it will have been party.

231. Thus clause 8.7 requires the parties to give effect to their interests in a Concession by becoming parties to a PSC and entering into a JOA so as to allocate, as between themselves, their respective rights and obligations in respect of the performance of that contract. The inference must be that the interests with which the Collaboration Agreement is concerned are the interests of those who have participated in a successful bid and have become parties to a PSC in consequence. The PSC is the source of their entitlement, although the Collaboration Agreement or the mechanism provided by it (i.e. the provision that, by agreement, a participating interest may differ from a consortium interest) will in the first place determine the respective interests of the bidders amongst themselves. Clause 8.7 does not cater for indirect interests.

232. The construction of the Collaboration Agreement is not a matter for evidence. It is however of interest to consider what features of it could be said to give rise to an obligation to recognize an indirect interest. Mr Park, Excalibur's expert, was unable to do so and his argument (for such it was) boiled down to there being a distinction between (i) a party opting not to participate (even indirectly) in the Bid; and (ii) a party opting not to participate in the PSC whilst continuing to participate (indirectly) in the Bid. A party would have an indirect interest in case (ii) but not in case (i). I do not regard this as a distinction which the Collaboration Agreement contemplates.[31]

233. In particular the contention advanced misunderstands the nature of a "bid" in the present context. As to that, I agree with the observation of Mr Park in evidence that "*when we speak of a bid, we speak of the document that is tendered by a party that is showing that they are – that they wish to be party to the host government contract.*

[31] I summarised one effect of this as follows: "*Q: So you have to be very careful. If you say "I withdraw", and that means withdraw from the agreement, you don't get anything; but provided you say "I withdraw from the bid but not from the agreement", you are entitled under this agreement to an indirect interest in the successful bid. A Because this is going to be a bid reflecting consortium interests... the parties are doing this together*."

That's one of the structures that industry uses to create a joint venture relationship." Thus the bid, if accepted, will result in a contract with the host government. If it is accepted, there is no distinction between being a party to a bid and being party to the host government contract.

234. Thus, in my judgment, on the proper construction of the Collaboration Agreement:

i) a Party who opts or consents not to be party to a PSC cannot be regarded as participating in a Consortium Bid for the PSC in question;

and

ii) a Party who has been successful in a Consortium Bid and become a party to the PSC is not obliged to recognise or give effect to any indirect interest in favour of another Party who has, or is deemed to have, withdrawn from the Consortium Bid, by not giving notice to participate and thereby, or otherwise, indicating that it does not wish to be or consents not to be a party to the PSC.

235. I have not forgotten that in the event of ambiguity the post contractual conduct of the parties may be a guide to construction. It does not, however, appear to me that the Agreement is ambiguous so as to justify recourse to subsequent conduct. In any event, the subsequent conduct of the parties does not cause me to infer that they must be taken to have agreed that the Collaboration Agreement provides for an entitlement to an indirect interest: a raft of communications and internal documentation shows the opposite. The parties were considering whether Excalibur would be on the PSC. The idea of an indirect interest did not surface until 13 November 2007, after the Shaikan PSC was entered into.

Akri-Bijeel

236. Excalibur claims to be entitled to a 30% interest in Gulf's interests in Akri-Bijeel. The Gulf defendants' interest in Akri-Bijeel was, it says, in effect the consideration for MOL being allowed to acquire an interest in Shaikan and the defendants' interests in both Shaikan and Akri-Bijeel were in reality acquired as a single Consortium Bid. I do not accept this. There was no Consortium Bid for Akri-Bijeel. The only person who bid for Akri-Bijeel was Kalegran.

237. Alternatively, Excalibur says that it is entitled to a 30% share in Gulf's interest in Akri-Bijeel because Akri-Bijeel was "*a parcel of Acreage acquired … as a result of a successful Consortium Bid*". A similar argument is put forward in respect of Sheikh Adi and Ber Bahr and it is convenient to address it in that context.

Sheikh Adi and Ber Bahr

238. Excalibur also claims an entitlement to an indirect interest in these fields. As will become apparent, – see para 1296 below – those blocks were acquired by Gulf Keystone/Gulf Keystone International as part of a deal with the KRG and ETAMIC, under which ETAMIC acquired a 50% shareholding in Gulf Keystone International, which in turn acquired an 80% interest in the Sheikh Adi block and a 40% interest in the Ber Bahr block. Gulf Keystone thus initially acquired an indirect 40% interest in Sheikh Adi and a 20% interest in Ber Bahr respectively. That indirect interest

subsequently increased to 80% and 40% when the ETAMIC transaction was unwound, and Gulf Keystone International reverted to being a wholly-owned subsidiary of Gulf Keystone whilst retaining the full direct interest that it had acquired in these two blocks.

239. Excalibur's case under this heading has gone through several mutations about which it is not necessary now to say any more than that the earlier versions have been abandoned. Excalibur now contends that it was only because Gulf had successfully acquired interests in Shaikan and Akri-Bijeel that it was given the opportunity to obtain further interests in these two blocks. In those circumstances Gulf's interests in these fields were acquired "*as a result of a successful Consortium Bid*" within the meaning of the definition of Participating Interest, namely the bid made in 2007. Excalibur is, therefore, entitled to its (indirect) Consortium Interest (30%) in those blocks.

240. I disagree. A Participating Interest is a share in the rights and obligations in respect of a parcel of Acreage "*acquired pursuant to this Agreement as a result of a Consortium Bid*". The only relevant causal connection ("*as a result of*") between the Bid and a block is that the bid was for that block and resulted in an interest being acquired pursuant to the Collaboration Agreement. Sheikh Adi and Ber Bahr were not the subject of a Bid pursuant to that Agreement, which expired on 10 February 2008. Gulf issued shares in Gulf International to ETAMIC which gave it an indirect interest in Shaikan and Akri-Bijeel and Gulf International received interests in the two fields. There was no relevant Participating Interest. Participating Interests are for those who are on the PSC.

241. Excalibur's contention, if valid, would have the odd consequence that any use of the Shaikan and Akri-Bijeel asset to acquire an interest in another block would automatically entitle Excalibur to a 30% interest in that block. It would also appear to oblige Excalibur to accept such an interest, despite the express recognition in the Collaboration Agreement that no Party is bound to participate.

242. The argument is equally inefficacious in relation to Akri – Bijeel.

243. Accordingly, even if my conclusions in para 234 are wrong, Excalibur has no claim in respect of the blocks other than Shaikan on any of the bases so far considered.

Implied Terms

244. Excalibur contends that the Collaboration Agreement expressly or impliedly obliges Texas (and Gulf) to give effect to Excalibur's indirect interest.

245. It puts forward six possible ways in which effect could be given to such an interest. I consider these later in the context of the claim for specific performance. On its case the Parties were bound to enter into one of the suggested (or some other) method of giving effect to the indirect interest.

246. I am quite satisfied that there is no such implied obligation.

247. Under New York law the principles for the implication of a term are not significantly different from those applicable under English law. The Court may imply a term into

an agreement to give effect to the parties' unexpressed but intended purpose and may do so if the promise sought to be implied is one which a reasonable person in the position of the promisee would be justified in understanding was included. The test is, however, as in English law, a strict one:

> "*a party asserting the existence of an implied in-fact covenant bears a heavy burden, for it is not the function of the courts to remake the contract agreed to by the parties, but rather to enforce it as it exists. Thus a party making such a claim must prove not merely that it would have been better or more sensible to include such a covenant, but rather that the particular unexpressed promise sought to be enforced is in fact implicit in the agreement viewed as a whole*." **Rowe v. Great Atlantic & Pacific Tea Co.**, 46 N.Y.2d 62, 69 (N.Y. 1978) – New York Court of Appeals.

248. New York law would not sanction the implication of a term simply in order to make a contract fairer, or better to accord with its own notions of commercial reasonableness. Contractual implication is not a licence to improve, rewrite or purify the parties' own agreement – per Judge Bellacosa. A term may be implied in order to give business efficacy to a contract which would otherwise lack it: see **Wood v. Lucy, Lady Duff-Gordon**, 222 N.Y. 88, 91 (N.Y. 1917) in which Bowen J's dictum in **The Moorcock** 14 P.D. 65, 68 was cited with approval by Cardozo J. But this does not justify the implication of a term to improve a contract that sufficiently covers the matter in hand or which makes commercial sense without it. Where the instrument contains an express covenant in regard to any subject, no covenants are to be implied in respect to the same subject matter. The rule was recently cited in **RJ Capital, S.A. v. Lexington Capital Funding III, Ltd.**, No. 10-25 (PGC), 2011 WL 3251554, 13 (S.D.N.Y. July 28, 2011).

249. The supposed implication fails on many grounds. The Collaboration Agreement makes express provision for the manner in which the parties would acquire and give effect to an interest in a Concession. These provisions make business sense, do not lack business efficacy, and are consistent with arrangements habitually made in the industry. In those circumstances there is no room for the implication of some alternative regime providing (without saying so) for indirect interests. The claim advanced by Excalibur – to participate indirectly in one of the various modes suggested – is inconsistent with the provisions of clauses 8.6.1 and 8.7 which require the Parties who submit a Consortium Bid (in which Excalibur professes to have been indirectly participating) to be jointly bound to the National Owner and to complete the documentation to effect the award of the Concession (i.e. the PSC) and to enter into a JOA which regulates the relationship *inter se* of those who are on the PSC. If the implied term had been suggested to reasonable persons in the position of the Parties, they would neither have agreed that it was impliedly included nor that it should be.

250. The supposed implication would also raise, but not resolve, many questions including: (a) how is effect to be given to the indirect interest; (b) if by one of the six postulated modes (or any other), who is to decide which one; (c) if one of them is chosen (e.g. the establishment of a special purpose vehicle), who is to determine the applicable terms, e.g. its place of incorporation, the terms of its memorandum and articles or equivalent and of any shareholders' agreement; (d) if the Court is, in the end, to decide all these questions, can it decide on a model to which all Parties object; (e)

what criteria is it to apply in reaching any of its decisions; (f) how is effect to be given to Excalibur's obligation to pay its share of the liabilities, expenses and costs?

251. Further, insofar as it is suggested that there should be some form of trust the implication is in conflict with clause 9.2 which provides that "*nothing herein contained shall be construed as creating ... a trust*". A net profit share agreement or a gross overriding royalty would confer on Excalibur a right to income (either gross or net) whilst absolving it from any actual liability for losses, or any duty to pay the costs as they fall due, whereas a Participating Interest includes an interest in "*obligations*".

252. In truth the implied term contended for involves rewriting the contract and imposing on the parties an agreement they have not chosen to make. Insofar as the implication leaves it to the parties to agree the mode of giving effect to the indirect interest and the terms thereof, it amounts to an agreement to agree potentially complex documentation without any template, formula, or criterion. Such an agreement would not be enforceable. As Judge Pratt observed:

> "*[I]t is rightfully well settled in the common law of contracts in [New York] that a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable"* and *"The rule applies all the more, not the less, when...the extraordinary remedy of specific performance is sought.*"

253. A covenant of good faith and fair dealing is generally implicit in contracts governed by New York law. Clause 9.1 of the Collaboration Agreement makes it express. But, as Judge Pratt explained, this covenant cannot be used to create an obligation that is different from and inconsistent with what the parties have expressly agreed. It does not permit the court to add substantive terms to the contract. Additionally, if the contract explicitly provides for a singular method for effectuating a party's interest, the court cannot re-write that provision. Judge Bellacosa effectively accepted this (although not in so many words).

Issue (ii) Was Gulf a party to the Collaboration Agreement? *Index*

Which law determines

254. Gulf is said by Excalibur to have become a party to the Collaboration Agreement *ab initio* because Texas (acting through Mr Kozel) entered into the contract on Gulf's behalf, having actual or apparent authority so to do. There are thus two questions:

a) whether Texas had authority to contract on behalf of Gulf ("the authority issue") and

b) whether it exercised that authority so as to make Gulf a party ("the party issue").

255. On the authority issue it is agreed that the law applicable to whether or not Texas had *apparent* authority is to be determined by the law of New York as the law of the Collaboration Agreement.

256. The question of whether an agent is able to bind his principal in contract vis-à-vis third parties is excluded from the scope of the *Rome Convention* by Article 1(2)(f). On the question of *actual* authority there are two alternative points of view. The first is that, as between third party and supposed principal actual authority is to be determined by the law of the main contract between principal and third party (a view espoused by *Bowstead* 19th Ed 12-017*)* as opposed to the law of the relationship between principal and agent (a view espoused by **Dicey, Morris & Collins** 15th Ed (2012) Volume 2, ¶ 33-433).

257. Excalibur espouses the first alternative and submits that the law of New York applies. Alternatively it says that any agency agreement between Gulf and Texas was governed by the law of New York. The draft joint venture agreement and the Collaboration Agreement always provided for the law of New York so that any contract to be entered into was always intended to be governed by that law. In those circumstances, it is said, Texas and Gulf must have contemplated that the same law would apply to their agency agreement. Further, the law of New York is the law with which the agency contract in issue had its closest connection.

258. Gulf contends that the issue is to be determined by the law of the agency contract and that that law is the law of Bermuda or England being the countries where Gulf had its central administration or place of business.

259. I do not find it necessary to resolve this dispute (although I incline to the view espoused in *Dicey*) because New York and English law are materially identical. Under New York law, as under English, actual authority exists if there is a "*manifestation of consent by one person to another that the other should act on his behalf and subject to his control, and the consent by the other to act*": **Gulf Ins. Co. v. Transatlantic Reinsurance Co.**, 69 AD 3d 71, 96-97 (1st Dept 2009).

260. On the party issue it is agreed that the law of New York applies.

The party issue

261. It is convenient to consider the party issue first since, if Texas did not intend or purport to enter into the Collaboration Agreement on behalf of Gulf, questions of its authority to do so are irrelevant. Gulf is not said to have been an undisclosed principal, whose existence or connection with the transaction was unknown to Excalibur. The critical question is, therefore, whether or not it was the intention of those concerned, and in particular Texas, the putative agent, that Gulf should be a party as well as Texas. That is a question of construction of the contract.

262. The Collaboration Agreement makes it clear that Gulf was *not* intended by Texas or Excalibur to be a party from the outset. That is apparent from the following. Gulf is referred to in the Agreement but is not specified as a party. The Parties are defined as Excalibur and Texas. Recital D records Texas' wish to reserve a right to *introduce* Gulf as a party. Clause 3.1 gives Excalibur a 30% and Texas a 70 % Consortium Interest. Gulf has none. Clause 3 entitles Texas *to assign* part *but not all* of its Consortium Interest to Gulf *if* Gulf executes a Deed of Adherence in the form set out in Schedule 4 in which case it is to have rights *as if it were a party* on and from the date of execution but without any liability for any period prior to the execution of the Deed: clause 3.3.2. The Deed of Adherence set out in Schedule 4 itself records that

Excalibur and Texas are *the present parties* to the Agreement (Recital A) and contains an undertaking by Gulf to be bound by the Agreement *as if* it had been at all times a Party. Clause 20 stipulates that the Collaboration Agreement represents the entire agreement between the parties. The signature block provides that Texas is executing the agreement for and on behalf of Texas. This combination of provisions does not make sense if Gulf was already a party as and from 16 February 2006.

263. Excalibur's case is that Gulf was not named as a party to the Collaboration Agreement because the KRG wanted to be seen to be awarding contracts to US companies. The consortium would be more acceptable to the KRG and have a greater chance of success if Gulf's involvement was kept from the public gaze so that the KRG would be seen to be awarding PSCs to a US led consortium. If Gulf's involvement was publicly known it would have been obvious that the consortium was Gulf led. The understanding was that Gulf would step out from behind the curtain after the PSC was awarded. Texas and Gulf would then allocate the respective percentages between themselves using the assignment mechanism in the contract.

264. There are several difficulties with this. The Collaboration Agreement was a private and confidential document. There was no reason for the KRG (or the public) to see it. The KRG never asked to see it, nor did it occur to Mr Kozel that they would. Moreover, it is Excalibur's case that Parties to the Agreement and to a Consortium Bid do not have to be parties to the PSC, and that a Party to the Collaboration Agreement who is not on the PSC is nevertheless entitled to an indirect interest in it. If that be right, there seems little reason for Gulf not to be a party to the Collaboration Agreement, even if the KRG might see it. Texas and Excalibur could be on the PSC with Gulf having an indirect interest. If the intention was to avoid the possibility of the consortium being Gulf led, the Agreement was inapt for that purpose since Texas could transfer 99.9% of its direct interest to Gulf.

265. Further, in his evidence Mr Wempen accepted that there was no need to conceal Gulf's involvement from the KRG (since both the KRG and the US government were kept fully informed) and that the KRG would have been perfectly content with Texas transferring 99.9% of its interest to Gulf. In Excalibur's final submissions it is said that everyone involved, including the KRG, knew that in reality Gulf was to be the *de facto* operator but that Mr Wempen believed that the consortium would be more attractive if Gulf's involvement was kept from the public gaze. Including Gulf as a party to the Collaboration Agreement would not, however, place it in public view.

266. Further, on Excalibur's case, it seems that the period for which Gulf was to be behind the curtain (diaphanous so far as the KRG was concerned) was temporary. The Collaboration Agreement was a joint bidding agreement and, when the bid came to be made, the identity of the bidders would be patent. If Gulf was to be a bidder, their participation would become apparent once the bid was made. If Gulf was to be an assignee of a portion of Texas' interests under the PSC, once it had been obtained, that would be apparent also, particularly if it was to be *de facto* operator. The advantage to the KRG of creating what it would know to be a temporary illusion of US leadership (since it and the US knew the true position) seems remote.

267. If Excalibur, Texas and Gulf had intended that Gulf should be a party from the outset, there was nothing to prevent that happening. If that was the intention, it is impossible to believe that Gulf's solicitors would have drafted an agreement which did not name

it as a party and left any assignment to Texas' choice, or that the Gulf Board (or Mr Kozel alone) would have been prepared to have the Agreement executed in these terms, without even a side letter setting out the position, whatever might have been discussed at a lunch in Tampa two months before. The reality, as I find, is that Texas and Gulf did not intend that Gulf should be a party and Excalibur, in the person of Mr Wempen, was perfectly prepared to contract with Texas, the only US company in view, which would, so he hoped, take him forward quickly in his quest for a Concession in Kurdistan. It was envisaged that Gulf might play a part in the future.

268. Since the position is not ambiguous it is not open to Excalibur to rely on extrinsic evidence to contradict the terms of the Agreement. As Judge Bellacosa's evidence shows, the parol evidence rule applies to the party issue. If the terms of the Collaboration Agreement are inconsistent with Texas acting as Gulf's agent that would be treated by a New York Court as relevant, albeit not dispositive, evidence that there was no authority and thus no agency relationship. But, as both he and Judge Pratt confirmed, under New York law the terms of the Collaboration Agreement are dispositive of the party issue *if* the terms of the Collaboration Agreement are *unambiguously* inconsistent with Gulf being a party. In such a case, of which this is one, evidence to the contrary breaks the parol evidence rule: **W.W.W. Assocs. v. Giancontieri**, 77 N.Y.2d 157, 162 (N.Y. 1990); **Kashfi v. Phibro-Salomon Inc.**, 628 F. Supp. 727, 731-32 (S.D.N.Y. 1986); **Edgreen v. Learjet Corp.**, 180 A.D.2d 562 (N.Y. App. Div. 1st Dep't 1992).

269. Excalibur relied on three cases, which it suggested were to different effect – (i) **Thomas Gordon Malting Co. v. Bartels Brewing Co.**, 206 N.Y. 528 (N.Y. 1912), (ii) **Guardian Life Ins. Co. of Am. v. Chemical Bank**, 94 N.Y.2d 418 (N.Y. 2000), (iii) **Spagnola v. Chubb Corp.**, 264 F.R.D. 76 (S.D.N.Y. 2010). None of them is, in my judgment, authority for the proposition that parol evidence is admissible to prove that someone is a party to the contract if that proposition is plainly inconsistent with its terms. The position is otherwise if the contract does not make clear that X is not a principal so that the identity of the real principal is left ambiguous.

270. Judge Bellacosa thought that, even if a contract provided that X was not a party, it might be open to the court to decide that he was if, to the knowledge of all concerned, X was described as not being a party in order to hide the fact that he was from others e.g. creditors. No authority to which I have been referred supports this departure from the usual rule and I have doubts as to whether an intention to mislead could properly justify it. In any event, I do not regard the suggested circumstances as comparable since, firstly, all concerned are said to have known the true position and the agreement, far from hiding Gulf's existence, contemplates it becoming a party for anything below 100%.

271. Even if the usual rule is ignored, the evidence does not lead me to conclude that at the time that they entered into the contract the parties intended Gulf to be a party to it or that Texas was or appeared to be acting on behalf of Gulf. I do not accept that the position after the Tampa meeting was that Texas was to be there for cosmetic reasons and Gulf the real partner. But even if the discussion at Tampa went further than envisaging the possibility of Gulf taking a role later, by 16 February 2006 events had moved on. The draft joint venture agreement, contemplating some sort of Texas/Gulf participation, had been rejected; the draft Collaboration Agreement had been put forward and accepted with alacrity; and amendments to add reference to Gulf as a

potential assignee were later added to the draft. There is no evidence of any discussions at this stage qualifying the effect of the documentation or stating or confirming that Gulf was the real partner.

272. Excalibur contends that Texas could not and would never have wanted to bid for and operate concessions in Kurdistan on its own, and was focussed on domestic production and development and taking advantage of US tax breaks. It had, as Mr Kozel put it, dabbled in exploration. It would not, it is said, have wanted to spend the $ 1- 5 million involved in getting to the bid stage. Robert Kozel knew virtually nothing about Kurdistan and had little involvement in it. By contrast Kurdistan was a "perfect fit" for Gulf, consistent with its international aspirations. In those circumstances the Court should readily infer that Texas was contracting for itself and for Gulf.

273. I do not accept this analysis. Whilst Mr Guest and Mr Kozel were interested in Kurdistan (as were Gulf's technical people), the Gulf Board as a whole was not: its focus at that stage was on Algeria with the possibility of expanding elsewhere in North Africa and selected areas in the Middle East[32]. I do not accept that Texas lacked the technical ability to conduct oil and gas explorations. Whilst Texas was focussed on domestic production, Mr Kozel had a more international focus and was signing up to a deal because he thought it had potential and could be taken forward in a number of different ways. Mr Kozel had set up Gulf, with the support of his family. There was no reason in principle why Texas could not establish a "Texas Kurdistan" to take on the project if it remained of interest. Gulf itself had been formed with Texas' investors' capital. The conclusion of the Collaboration Agreement did not commit Texas to much. What the project might involve in terms of (a) technical expertise and (b) cost was unknown. To the extent that Texas lacked either it could access others. Texas was willing to incur some costs and ended up by paying some $ 239,000 of third party costs. It had a free hand whether to bid or not, and if it was a party and Gulf was not, it would be in control. The Collaboration Agreement had benefits from Gulf's point of view in that it preserved the opportunity for Gulf to participate in a venture which had come Texas' way because Texas was a US operator, without committing Gulf in any way at all. In accordance with the Kozel family way of doing things Robert Kozel was content to let Mr Kozel take the lead on the project and for the board to make decisions at the appropriate time.

274. Nor can Excalibur derive any benefit from post – contractual events. None of the three parties – Excalibur, Texas, Gulf – proceeded on the basis that Gulf was a party to the Collaboration Agreement from the outset.

Gulf's post contract conduct

275. No one on the Gulf Board thought that Gulf was a party to the Collaboration Agreement from February 2006. The Gulf Board minutes of **1 March 2006** make no mention of Kurdistan, Excalibur or Texas. On **16 June 2006** Mr Patrick emailed to Mr Guest a draft minute recording (i) that Mr Kozel had reported that he was going on a visit to Erbil on behalf of Texas to discuss oil and gas opportunities only open to American oil companies; (ii) that Mr Patrick and David Clark, Vice President of

[32] At the 10 December 2005 board meeting it was agreed to focus on an 'A' list of Sudan, Egypt, Oman and UAE.

Exploration (New Ventures) of Gulf UK were to accompany him on the understanding that, if the opportunity was of interest, Texas and Gulf would agree a basis on which both companies would participate jointly; and recognising that there was no conflict of interest in Mr Kozel pursuing this opportunity on behalf of Texas.

276. At the Gulf Board meeting on **14 July 2006** Mr Patrick reported on the visit to Kurdistan with Mr Kozel "*representing Texas Keystone*" and a representative of Excalibur who had made the initial arrangements for the meeting. He said that the Oil Minister had received the visitation well and invited the group to make a specific proposal for one or more exploration areas in Kurdistan. Mr Patrick reported that work was now proceeding to prepare such a proposal, with any commitment being subject to a full investment recommendation being made to and approved by the Board, and to a satisfactory agreement with Texas Keystone regarding their respective interests.

277. At the Board meeting on **22 September 2006** Mr Patrick reminded the Board that negotiations to date had been led by Texas and that Gulf's involvement required finalisation of an agreement with Texas which had not yet been done. At the same meeting Mr Kozel told the Board that he had come to the conclusion that his skills as an entrepreneur were not consistent with Gulf's needs for the next stage of its development. He, therefore, supported the search for a new CEO. He would remain as CEO until the December Board meeting or earlier appointment of his replacement and then remain a non-executive director.

278. On **26 September 2006** Mr Patrick emailed Mr Guest to point out that the existing agreement between Texas and Excalibur "*envisaged [Gulf] becoming party to it...*" and suggested an agreement that provided that GKP "*will become a party*" to the agreement. On **15 December 2006** the Board (with the exception of Mr Kozel) resolved to conclude the proposed agreement to assume the current 70% interest of Texas in the Agreement with Excalibur.

279. On **1 March 2007** Mr Parsons emailed Mr Patrick recording that he had told Mr Kozel that an agreement had to be signed sharpish "*if only for the obvious reasons that ... we are representing this as being ours when we currently have no legal interest whatsoever*". The minutes of **10 May 2007** record Mr Kozel as confirming that Texas had agreed to assign its 70% interest but that its partners had not agreed due to the uncertainty over the ownership of Gulf and had counter proposed for Gulf to have a 35% interest as a non-operator. It was agreed that Gulf would incur no more expense until it had received written confirmation of its right to participate. The reference to uncertainty over ownership was a reference to the then pending prospect of a takeover of Gulf by RAK Petroleum Plc ("RAK"), an energy investment company incorporated in the Ras Al Khaimah Emirate of the U.A.E. founded by Sheikh Sultan Bin Saqr Al-Qassimi. On **13 June 2007** Mr Parsons wrote a long letter to Mr Kozel complaining that he had failed to conclude Gulf participation in the Kurdistan project and "*the group*".

280. These communications, which show Gulf as seeking to become a party to the agreement and/or to obtain an assignment of Texas' interest, are inconsistent with Gulf having been a party since February 2006.

Excalibur's post contract conduct

281. Excalibur also proceeded, on the basis that its agreement was with Texas alone. A letter from Texas of **17 February 2006,** into which Mr Wempen had input, referred to Texas' partners as Excalibur and Dabin. Emails written by Mr Wempen to the KRG in the first part of 2006 refer to a two party consortium of Excalibur and Texas e.g. his emails to Dr Yacu of **22 April** and **17 May 2006;** and to Dabin on **21 June 2006**. In **January 2007**, Mr Wempen emailed Mr Kinnear to say: "*We signed a deal with Texas Keystone, which will have to be expanded to include Gulf Keystone…*".

282. In **March 2007** Mr Wempen wanted to keep the Collaboration Agreement with Texas alone. This was when he learnt that there was a prospect of Gulf being taken over by a third party. On **21 March 2007** he emailed Mr Kinnear to say "*You may wish to have Ali* [Mr Al-Qabandi] *put the pressure on Todd NOT to assign the Kurdistan bid deal to Gulf. That would give us maximum control.*" On the same day he emailed his brother a draft of an email to Mr Kozel stating that he had not been averse to a partial assignment to Gulf by Texas but expressing concern at a possible management change at Gulf in consequence of a buyout of Gulf. He floated the idea of some kind of buyout clause in the event of a management change at Gulf[33]. On **22 March 2007** Mr Kinnear expressed concern that the Kurds might give the deal to someone else if they did not like the new buyer of Gulf.

283. On Friday **23 March 2007** there was a meeting between Mr Kinnear and Mr Al-Qabandi either at the Gulf office or in a restaurant nearby. Mr Kozel may have met Mr Kinnear briefly but was not at the body of the meeting. Its purpose was to bring Mr Kinnear up to date with what was happening.

284. On **24 March 2007** Mr Kinnear reported on the meeting to Mr Wempen, telling him that on Monday or Tuesday Gulf would be taken over by "*a crew of Arab UAE investors*". He said:

> "*It would be disasterious [sic] for our venture for them to appear complete with flowing robes and headgear in Kurdistan.*"

285. It is apparent from this sequence that Excalibur was maintaining that Gulf should not become a party to the Collaboration Agreement. Consistently with that on **May 5** Mr Wempen sent Mr Kozel an email which said "*To correct any misunderstandings here, at this time Gulf Keystone is not part of this deal*" and that "*the deal is between Texas Keystone, Excalibur Ventures and the Government of Kurdistan*"[34].

286. On **31 May 2007** Mr Wempen submitted an application to the US Department of Commerce requesting advocacy assistance in relation to Shaikan/Gulley Keer and Ain Sifni: see para 522. He described the project in a questionnaire as involving "*a completely US consortium consisting of Texas Keystone, Inc. (TKI), a Pittsburgh, PA based US oil exploration and production company operating since 1988, and Excalibur Ventures, LLC a US advisory firm*". The information in the questionnaire was certified by Mr Wempen to be complete and accurate. No mention was made of Gulf, the supposed majority partner of the consortium.

[33] The draft was changed somewhat by Eric Wempen and it is not clear whether that to which I have referred is the original or the amended version.

[34] In evidence Mr Wempen initially said that he said nothing in this email which he did not believe to be true, but said later that Gulf was always a party to the Collaboration Agreement. His suggestion, which I do not accept, appears to have been that he was talking about the position vis à vis the KRG.

287. In an email to Mr Maguire, a contact of Mr Wempen's and a lobbyist with The Decapolis Group in Washington, dated **21 June 2007** Mr Wempen described the relationship of the parties as follows:

> *"The rights to operate are **owned exclusively by Texas Keystone with Excalibur Ventures as a financial investor**. We are both American entities, **and only the two of us have any shares at present**. Texas Keystone is the majority shareholder in our joint venture. Dabin brought us in to be an American led consortium, we always have been **and always will be**. The final investment will be insured by OPIC, which requires majority US ownership.*
>
> *Todd Kozel, Vice Chairman of Texas Keystone ... ran both Texas Keystone and Gulf Keystone through 2006. This recently changed when RAK bought Gulf Keystone in a friendly acquisition, as you may have read in the press. In the interests of full disclosure up front, I was simply stating that **Gulf Keystone, which is now owned by RAK, had been interested in backing part of the Texas side of the deal, that is, becoming a non-voting, non-operating financial investor. This is currently under consideration and does not have to occur. If it did occur it would not change the final signatories on the deal, nor voting rights. Gulf may or may not participate now, depending on the preferences of both partners, including us, and of course, the KRG**. Excalibur Ventures has a separate agreement with Dabin to provide them with a minority interest in any Excalibur investment in Kurdistan…..*
>
> ***As to Gulf Keystone, if Arab investors are a problem for Kurdistan, then we do not have to accept them**…*"

288. This description of the relationship between the parties is wholly inconsistent with Gulf already being a party and having been so since February 2006. I do not accept Excalibur's submission that it is "*specific to the immediate context*" and, therefore, "*not a reliable indicator of Excalibur's overall attitude to the agreement reached when the Collaboration Agreement was entered into*". When asked about the description of the consortium as American led "*and always will be*" Mr Wempen said that he was "*expressing intentions as I saw them at the time*" – a position inconsistent with Gulf already being the real party through the agency of Texas.

289. One reason why it was important for Gulf not to be a party to the Collaboration Agreement from the outset was because OPIC insurance was only available to a consortium which was US majority owned or controlled. On **19 July 2006** Mr Wempen pressed Mr Kozel for a draft proposal to present to Dr Hawrami in Erbil and noted that "*we should complete preliminary registration with OPIC and start pushing that registration through the diplomatic process*" – a suggestion inconsistent with the consortium already being a Gulf majority consortium.

290. On **25 April 2007** Excalibur sent a letter to Mr Kozel refusing any transfer from Texas to Gulf of Texas' rights in the Collaboration Agreement in which Mr Wempen said:

> "*You asked and we approved the option for you to sign over your interest to Gulf Keystone, Ltd., with the understanding that you personally would be leading both companies and would maintain significant personal equity*

> *ownership in GulfKeystone, Ltd., effectively making Gulf Keystone an affiliate of Texas Keystone, in our view. As Gulf Keystone has now been sold to non-US parties, US government Overseas Private Investment Corporation (OPIC) insurance will no longer be available for our agreement. This entire deal is contingent upon OPIC insurance and the absolute requirement of the Kurds for a US partner.*
>
> *We must therefore withdraw our approval for any transfer of ownership rights at the present*"

291. Last, but by no means least, at no time before the service of the pleadings, did Mr Wempen or his brother assert that Gulf, through the agency of Texas, always had been a party to the Collaboration Agreement. If that had been their understanding in 2006 or 2007, they would surely have done so. In fact Mr Wempen later invited Mr Kozel to sign a letter acknowledging Excalibur's interest (see para 780 below) which referred to the Collaboration Agreement as being with Texas, not with Texas and Gulf. On **14 November 2007** he suggested in an email to his brother that they could argue that Gulf's participation in the deal would not become valid until Excalibur received a signed Deed of Adherence: see para 833. On the same day he prepared a draft email to Mr Kozel asserting that Excalibur had waived the requirement for its prior consent to an assignment in Erbil in July 2007, whether in whole or in part. In an email of **28 November 2007** Eric Wempen observed that "*Not having counsel involved is what screwed you in the first place with the deed of Adherence and letting them continue with no docs in place*". This was a recognition of the weakness of Excalibur's claim to have a contractual relationship with Gulf. He also produced a suggested script for a meeting which Mr Wempen had on **3 December 2007** (see para 1023 below) with Mr Kozel which referred to December 2005 as "*the time I partnered with TKI*".

292. In short, reference to subsequent evidence, if admissible, confirms me in the conclusion that Gulf was not a party to the Collaboration Agreement. The matters to which I have referred are not the only indicators that Gulf was not a party. There are many others: including the matters referred to in paras 275, 281-287, 291, 302, 347, 368-9, 381-4, 415-417, 424-5, 430-431, 436-439, 449-455, 808.

The agency issue

293. If that analysis be right, the agency issue does not arise. If it does, there are two questions: first whether Texas authorised Mr Kozel to constitute Texas as Gulf's agent when entering into the Collaboration Agreement; second, whether Gulf authorised Texas to act as its agent when entering into the agreement.

Actual authority

294. I am quite satisfied that Mr Kozel did not have *actual* authority from Texas to act in its name as agent for Gulf or from Gulf to bind Gulf to the Collaboration Agreement. He was, of course, Chief Executive Officer of Gulf and Vice Chairman of Texas. But, as he confirmed, he did not have the authority of either Board to commit either company to such a contract with Excalibur without the consent of the boards. He had authority from the Texas Board to contract on its behalf. He neither sought nor obtained the authority of the Texas Board to contract in Texas' name on behalf of

Gulf; nor from the Gulf Board to enter into the contract (in the name of Texas) on behalf of Gulf. Nor would I regard it as part of the usual authority of someone in his position to enter into an agreement of this kind without it being considered and agreed (if necessary by an appropriate majority) by the Gulf Board.

295. Mr Wempen's evidence was that at the Tampa meeting Mr Kozel said that he was able to deliver both companies. Mr Kozel described that evidence as fanciful. Such a statement, if made, is capable of more than one meaning. The first is that he could procure the agreement of the relevant board. The second is that he could act on behalf of the company without reference to them. As to the first, I think it unlikely that Mr Kozel said that he would be able to deliver the Gulf Board. He may have said that he would be able to get the Texas Board to embark on the venture (as in the event he did) and, in that sense, deliver. As to the second, I regard it as most unlikely that he said anything to the effect that he could act without reference to or without securing authority from either board, not least because, had he said it, it would have been inaccurate.

296. I also accept Mr Robert Kozel's evidence that Texas did not act as agent for Gulf, which necessarily implies that the Texas Board did not authorise Mr Kozel to constitute Texas the agent of Gulf. There is no evidence that the Gulf Board even considered the idea of Texas signing the Collaboration Agreement on Gulf's behalf. Had it authorised Mr Kozel to act, via Texas, on behalf of Gulf, it is inconceivable that there should be no reference in the minutes of any board meeting to this curious arrangement whereby Gulf would become a party, but not on the face of the document, to an agreement in which it had no specified Consortium Interest, where, in the absence of an assignment, its rights were at worst non-existent and at best unclear, and which contained terms indicating that it was not yet a party at all.

297. There were discussions with Gulf Board members, in particular Mr Parsons and Mr Guest, about Mr Kozel signing the agreement on behalf of Texas because of the potential conflict of interest. Mr Kozel had told Mr Wempen that he would need to speak to the Gulf Board on this account.

298. Lastly, the terms of the Collaboration Agreement are inconsistent with Texas acting on behalf of Gulf so as to make it a party *ab initio*. The terms are not dispositive on the agency question. But they are powerful evidence that Texas was not authorised to act on behalf of Gulf.

Apparent authority

299. Under the law of New York an agent will have apparent authority if (i) the words or conduct of the principal cause the third party reasonably to believe that the agent has authority to contract on the principal's behalf and (ii) the third party reasonably relies on that belief. **Hallock v. State**, 64 N.Y.2d 224, 231 (N.Y. 1984). The requirement of reasonable reliance may mean that the third party cannot rely on an appearance of authority if it has not taken steps to determine the true scope of the agent's authority. There is no general duty of inquiry but it may be incumbent on the third party to do so "*when the facts and circumstances are such as to put him on inquiry*": **Herbert Constr. Co. v. Continental Ins. Co.**, 931 F.2d 989, 995-96 (2d Cir. 1991). This is another way of asking whether the third party reasonably relied on the representation of the agent that he possessed authority: *ibid.*

300. In order, therefore, for there to be apparent authority it is necessary for Excalibur to show that Texas, through Mr Kozel, purported to act on behalf of Gulf. I am not persuaded that it did so. Excalibur relies on the fact that Mr Kozel is said to have said that he could deliver both companies. As I have already held (para 295), I think it unlikely that he said that in relation to Gulf. Even if I am wrong about that I do not accept that such an expression should (in the absence of further inquiry as to what was meant) be taken as meaning that Mr Kozel was holding himself out as having authority to commit either company without reference to the relevant board. If that is what he is to be taken as saying, I do not regard it as right to treat that as a statement made (through him) by Gulf *as principal* in relation to the position of an agent, namely himself. On that hypothesis the reality is that he, the putative agent, was claiming to have the authority of a principal, which does not amount to a holding out by the principal.

301. In any event, if that is too strict a view or simply wrong, it was not in my judgment reasonable for Excalibur to rely on Mr Kozel as having the authority of Gulf to enter into that agreement on Gulf's behalf in circumstances where:

i) the draft joint venture agreement had been rejected;

ii) the agreement proffered for acceptance (a) was couched in terms which did not state that Gulf was a party or that Texas was entering into it on Gulf's behalf; and (b) contained provisions (see para 262 above) inconsistent with Gulf then being a party; and

iii) no attempt had been made, after the rejection of the joint venture agreement, to raise with Gulf the issue as to whether it was intended to be a party.

302. As to (i), the effect of the rejection of the joint venture in favour of the draft Collaboration Agreement was an indication that Gulf was not intended by Mr Kozel to be a party.

303. As to (ii), it is clear that the terms of the contract itself may make it unreasonable to rely on any appearance of authority: ***Zigabarra v. Falk,*** 143 AD 2d 901 (App Div, 2d Dept 1988)[35]. I regard this as just such a case.

304. As to (iii), it is apparent from Mr Eric Wempen's evidence (see para 182 above) that there was a question mark for him over whether Gulf was a party to the Agreement. He took the risk that, on the language of the agreement, it was not a party, in circumstances where he or Mr Wempen could have easily asked whether any assumption that Gulf was a party was correct. If, which I doubt, the Wempens had a firm understanding that Gulf was a party, nothing could be more natural than for them to confirm it with Gulf.

305. In reaching this conclusion I have borne in mind that Eric Wempen was a lawyer, although my conclusions would have been the same if Excalibur had no lawyer on board. It would have been apparent to any commercial lawyer, as it would to any intelligent businessman, that the proposition that Gulf was a party to the Collaboration

[35] "*The contract clearly indicates that the plaintiffs were entering this transaction solely with [defendant] and, accordingly, any reliance upon apparent authority was unreasonable.*"

Agreement was, at the very lowest, problematic, and that whether that was truly so was something that cried out for inquiry, not least as to how the agreement was intended to work if Gulf had no specified Consortium interest. It was not reasonable to rely upon any appearance of authority without further inquiry. Excalibur had no reason to feel inhibited from any such inquiry if, as it claims, it was poised to begin a three-way consortium.

306. Excalibur's case is that the role of Texas was, from the beginning, to lend its name to the project as the US face of a three-way consortium consisting of Excalibur, Texas and Gulf, in which Gulf would be the *de facto* operator both during the bidding phase and thereafter if the consortium's efforts to obtain a PSC were successful. In the light of the terms of the Collaboration Agreement and the way in which the parties conducted themselves I do not regard this analysis as correct. The fact that from early 2007 onwards Gulf came to play an ever increasing role in the quest for a PSC in Kurdistan, including carrying out the technical work in preparation for visits to Erbil and the bid, and that the interest of the Texas Board in participating in Kurdistan waned as that of Gulf waxed, did not (subject to the question of assignment with which I deal below) alter the character of the contractual relationships (or the lack of them) between the parties, particularly in circumstances where Gulf was under the terms of the Collaboration Agreement a *prospective* party.

Conclusion on issues (i) and (ii) *Index*

307. In short:

i) a party to the Collaboration Agreement who does not participate in the Consortium Bid because he does not wish, or is content not to be on, the PSC, and thereby withdraws from the Consortium Bid is not, if the Bid is successful, entitled to an indirect interest under the PSC;

and

ii) Gulf was not a party to the Collaboration Agreement.

Alter ego and Assignment

308. Excalibur also claims that Texas is to be regarded as the *alter ego* of Gulf such that Gulf is to be treated as a party to the PSC or that Gulf became a party to the Agreement by a partial oral assignment in late 2007. I do not accept either of these claims which I address below.

Alternative contractual claims *Index*

309. If, as I hold, the Collaboration Agreement confers no indirect interest, Excalibur has six alternative contractual claims (to damages) under the following clauses of the Collaboration Agreement: (i) clause 8.2; (ii) clause 2.1(a); (iii) clause 2.1.b; (iv) clause 2.2.(a); and (v) clause 9.1. It is convenient to set out my conclusions on these claims before addressing the very lengthy history of events.

Clause 8.2.

310. Clause 8.2. provides that:

> "*If agreed upon by the Operating Committee …. **the parcel of Acreage shall be the subject of a Consortium Bid submitted by the Operator** to the Minister…, on the terms agreed by the Parties and **such Parties** shall use their best endeavours to acquire such Acreage in proportion to their respective Participating Interests.*"

311. This clause obliges those who have agreed to participate in a Consortium Bid (and have thereby undertaken the obligations on bidding parties imposed by clauses 8.2, 8.6.1 and 8.7) to use their best endeavours to acquire the Acreage that they are to bid for in the ratio of their Participating Interests. It does not oblige them to use any endeavours to secure an interest for a Party, which has (or is deemed to have) withdrawn from the Bid and has undertaken no such obligations. Excalibur never committed itself to a bid; never gave notice of its commitment to participate in the Bid; and, in effect withdrew from the Bid, or, at the lowest, is deemed to have done so: see clause 8.1.

312. Excalibur contends that, if it was necessary for it to be a *direct* party to the PSC in order to acquire an interest, clause 8.2 obliged the defendants to use their best endeavours to ensure that all of the parties to the Collaboration Agreement, including Excalibur, became parties to the Shaikan and Akri-Bijeel PSCs, and acquired *direct* interests in those blocks. It would be extraordinary if it did this, since, if so, the non-bidding party could not have any of the obligations of a bidder foist upon him (see the proviso to clause 2.1), nor would it have to bear any of the associated costs of the bid; and yet, if and when the bid succeeded, it would be entitled (presumably at its option) to a share in the Acreage equal to what would have been its Participating Interest, if it had committed to participate, that share coming out of the share which the parties to the Bid intended for themselves. Further, so far as Akri-Bijeel is concerned there never was a Consortium Bid agreed upon. The construction contended for has the bizarre consequence, which the parties cannot have intended, that Texas and Gulf (if a party) and Excalibur were bound to seek to secure a direct participation on the PSC when Excalibur had consented not to be on it.

313. Even if Excalibur had been and remained a party to the Consortium Bid, I would not regard the clause as a mutual assistance clause whereby each Party was bound to assist its fellow bidders to acquire their interest. The obligation on the parties was to use their best endeavours to acquire (not to enable others to acquire) Acreage in proportion to their *respective* percentages. The purpose of the provision is to ensure that no member of the Consortium is left holding a greater share of liabilities than the one to which it had committed.

314. In any event Excalibur consented to not being a party on the PSC. It cannot now complain that it was not on it. Even if Mr Wempen was mistaken as to the consequences of Excalibur not being on the PSC, it is not suggested that any such mistake was known to Gulf (the proposition was not put to Mr Kozel) and it was not; any mistake is therefore irrelevant. I do not accept that Mr Kozel "*knew that Excalibur had not truly agreed*" to not being a party to the PSC. So far as appeared to Mr Kozel, Mr Wempen, for Excalibur, did consent. That he did so was not surprising to Mr Kozel because of Excalibur's difficulty (as matters stood in July 2007) in getting on the PSC. In any event it was a matter for Excalibur to choose. It was not

incumbent on Mr Kozel to advise him. Whatever was going on in Mr Wempen's mind did not vitiate or qualify his consent.

315. Lastly, even if there was a breach, Excalibur has not established that it has suffered loss in consequence. In order to do so it would be necessary to show that, had Gulf and Texas used their best endeavours, Excalibur could and would have taken a direct interest.

316. As to that, it is not at all clear that Excalibur would have chosen to participate directly if told by Gulf that it must do that or not at all. There appear to have been a number of reasons why Mr Wempen was not keen on direct participation (see para 928 below); and it is not even clear that Mr Wempen would have accepted that advice. In the course of his evidence he was asked this:

> "*MR JUSTICE CLARKE: But you appeared to be suggesting that it was the obligation of somebody other than yourself or Excalibur to take or secure advice as to what the collaboration agreement did or did not give you. Was that the suggestion?*
>
> *A: If Gulf or Texas thought that if I was not on the PSC, that then I was no longer part of a bid, yes, my Lord, I do think it was incumbent upon them to tell me. They did not.* ***I'm not saying that I would have agreed with them if they had said that****, but I'm saying if they had thought that then it was incumbent upon them to tell me*."

He had earlier said that if he had been told he would have taken some immediate action (unspecified) to protect Excalibur's interest.

317. On the assumption that Mr Wempen would in fact have accepted that advice, the question is whether, even with the defendants' best endeavours, Excalibur would have got on the PSC – which would have required it to have the necessary technical and financial capabilities and be acceptable to the KRG. As will become apparent, my judgment is that it would not have succeeded. Further MOL would not have agreed to participate alongside Excalibur without some form of financial guarantee which Gulf was neither prepared nor obliged to provide.

Clause 2.1 (a) and 2.2. (a) - Akri-Bijeel only

318. Excalibur claims that, in relation to Akri-Bijeel (in which Gulf acquired a 20% interest in return for MOL's 20% interest in Shaikan) Texas and Gulf were in breach of clause 2.1 (a) which provided that:

> "*The Parties shall act in consortium to:*
>
> *(a) Acquire, share and review data and opportunities for the acquisition of Acreage by way of Consortium Bid.*"

319. Excalibur says that the information received by Gulf and Texas about the possibility of bidding for Akri-Bijeel as part of a 'swap' under which MOL would join in their bid for Shaikan, and in turn Gulf Keystone would join in MOL's bid for Akri-Bijeel, fell squarely into 2.1 (a). But neither of them shared that information with Excalibur,

or gave it the opportunity to join Gulf in bidding for an interest in the Akri-Bijeel block. The result was that Excalibur:

> " *... was not afforded the opportunity to acquire 30% of the interest which the Gulf Defendants acquired in the Akri-Bijeel block; it also resulted in Gulf Keystone applying for an interest in that block independently, without obtaining Excalibur's prior written agreement to doing so, and consequently also amounted to a breach of clause 2.2 (a)*" (Excalibur's Opening – paragraph 12.5)

320. I do not accept this for a number of reasons. First, Texas was not involved in MOL's bid for Akri-Bijeel or in the assignment by MOL to Gulf of a 20% interest in the block and had no opportunity to share. Under clause 2.2 (b) Texas was bound to procure that its Affiliates did not become involved in transactions falling within the scope of that clause. But Gulf was, expressly, not an Affiliate of Texas. Second, Gulf, as I have held, is not a party to the Collaboration Agreement. Third, Gulf did not bid for Akri-Bijeel and there was never any question of it doing so. The opportunity of a farm in from MOL was not an opportunity to bid for a block (i.e. "*the acquisition of Acreage by way of Consortium Bid*") even if the farm in was approved by the KRG. Fourth, insofar as reliance is placed on clause 2.2 (a), that prevented the independent pursuit of "*the Transactions*", which are, relevantly, defined as the pursuit and preparation of bids to acquire Acreage by way of Consortium Bid. That would preclude a party bidding independently for Acreage; but not, in my view, acquiring Acreage by way of assignment from another successful bidder. Fifth, and in any event, Akri-Bijeel was a farm in opportunity which was not realistically available to Excalibur. Excalibur would never have joined with MOL in bidding for Akri-Bijeel or sought to acquire by assignment a share of MOL's interest. It did not wish to be on the Shaikan PSC either originally or by a farm in from Gulf and there is no reason to believe that it would have a different attitude to Akri-Bijeel. MOL would not have entertained Excalibur as a co-bidder on the block or been prepared to have it on the PSC by way of farm in, in the absence of a guarantee from Gulf, which Gulf would not provide. Nor would the KRG. If there was any breach, no substantial damage resulted from it.

Clause 2.1 (b)

321. Clause 2.1(b) provides for the Parties to:

> "*Submit Consortium Bids to the National Owner when agreed by the Parties Agreement*"

322. In paragraph 12.6 of its Opening Excalibur claimed that:

> "*On the facts, even if the parties did not ultimately submit a Consortium Bid for the Shaikan block, they at least agreed to submit one. It was thus a breach of clause 2.1(b) for the Defendants not to have proceeded with that bid and instead to have applied for interests in the Shaikan block without Excalibur.*"

323. In paragraph 7.16 (b) of Excalibur's Closing, the defendants are said to have been in breach of 2.1 (b):

> "*by bidding for the Shaikan block without Excalibur despite the fact it had been agreed that the block would be the subject of a Consortium Bid on behalf of all members of the consortium*"

324. This borders on the nonsensical. Excalibur, as it's pleading makes plain, consented to a bid proceeding on the basis that it would not be a party to the PSC. It withdrew from any Consortium Bid as it was entitled to do. Neither Texas nor Gulf was bound, or entitled, to bid on behalf of Excalibur, when Excalibur was unwilling to do so. They were entitled to continue with the bid. It was Excalibur which under clause 8.5 was prevented from applying independently.

Clause 2.2 (a)

325. This clause, in full, provides:

> "*During the term of this Agreement,* ***otherwise than in accordance with and subject to this Agreement:***
>
> *a. The Parties shall work exclusively together in the pursuit of the Transactions described in the Recitals and no Party shall at any time pursue all or any part of the Transactions independently or with or through any Affiliate or with or by any third party unless otherwise agreed in writing between the Parties. ...*"

326. I do not regard Texas or, if they were a party, Gulf as in breach of this clause. The prohibition against pursuing the Transactions independently does not apply if the Agreement provides otherwise. The Agreement provides that, upon the actual or deemed withdrawal of a party from the Bid, the withdrawer is not required to submit a Bid (proviso to clause 2.1), but remains bound by the Agreement and may not itself apply for Acreage: clause 8.5. The effect of the withdrawal of a party is that the Transaction/Consortium Bid becomes that of the remaining parties, who are entitled to proceed with it by themselves.

327. Further, Recital D recorded that Texas "*wishes to reserve the right to introduce Gulf as a Party to this Agreement and/or as a participant in any Consortium Bid pursuant to the terms of this Agreement*". The right reserved was thus a right to introduce Gulf as a participant whether it was a party or not. Accordingly for Texas to introduce Gulf as a participant in a Bid was in accordance with the terms of the agreement, the Recitals of which, by clause 1.2.a, constitute an integral part of it.

328. If, contrary to my view, Excalibur's consent in writing was required, the bar for what constitutes agreement in writing ought not to be set too high, given the relative informality with which parties to agreements such as these are wont to proceed. Consent to Gulf and Texas proceeding was given orally. Thereafter Excalibur was notified in writing of Gulf's proposed participation by its inclusion as a party to the draft PSC sent to Rex Wempen on 26 July 2007, and again on 30 July 2007. Mr Wempen's response on 29 July was to say "*Todd, good to hear from you. ...Looks as if we are back in the driver's seat in Kurdistan*". In context that was sufficient consent in writing.

329. In any event, if consent in writing was required but not given, Excalibur, in my view, waived any right for its consent to be required to Texas proceeding with the Shaikan bid along with Gulf and MOL. Under New York law, as the experts agree, a waiver involves a "*voluntary abandonment or relinquishment of a known contract right.*" - see the 1st report of Judge Pratt at paragraph 7.50. Excalibur knew of its rights because it was party to the Agreement and plainly gave up on any requirement for its agreement to be in writing (insofar as it was not).

330. Excalibur suffered no loss as a result of the failure to secure its written consent. The Shaikan PSC would never have been obtained by any party prepared to share with Excalibur without the participation of Gulf. Texas would probably not have participated without a guarantee from Gulf, and certainly not for any substantial percentage. Lastly, Excalibur was in no position to participate directly in the PSC for want of funds.

Clause 9.1.

331. Clause 9.1 expresses the mutual obligation of good faith and fair dealing that is implicit generally in contracts governed by New York law. Its effect is "*not to create a new obligation. It is to give effect to what the obligations of the parties were*": per Judge Bellacosa. As he said, the obligation of good faith "*cannot substitute for a non-viable breach of contract*" and cannot oblige the parties to operate in a manner inconsistent with the express terms. The mutual obligation of good faith operates to give effect to what the parties have agreed but cannot be used to force upon them a mode of performance different from and inconsistent with the substantive terms: see **Murphy v. American Home Products Corp**. 58 N.Y.2d 293, 304 (N.Y. 1983) ("*the implied obligation [of good faith and fair dealing] is in aid and furtherance of other terms of the agreement of the parties. No obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship.*"). Nor can it impose new obligations which go beyond what the parties have agreed. But encompassed within the implied obligation of each promisor to exercise good faith are "*any promises which a reasonable person in the position of the promisee would be justified in understanding were included*": **Rowe v. Great Atlantic & Pacific Tea Co.**, N.Y.2d 62, 69 (N.Y. 1978).

332. The term precludes a party from taking some positive step that would prevent performance or frustrate the contract:

> "*New York law implies a covenant of good faith and fair dealing, pursuant to which neither party to a contract shall do anything which has the effect of destroying or injuring the right of the other party to receive the fruits of the contract. However, this covenant only applies where an implied promise is so interwoven into the contract as to be necessary for effectuation of the purposes of the contract. For this to occur, a party's action must directly violate an obligation that may be presumed to have been intended by the parties. However, the implied covenant does not extend so far as to undermine a party's general right to act on its own interests in a way that may incidentally lessen the other party's anticipated fruits from the contract.*" **Thyroff v. Nationwide Mut. Ins. Co**., 460 F.3d 400, 407 (2d Cir. 2006), citing **M /A-COM Security Corp. v. Galesi**, 904 F.2d 134, 136 (2 d Cir. 1990). [Internal quotations omitted].

It entails "*a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.*" **511 W. 232nd Owners Corp. v. Jennifer Realty Co.**, 98 N.Y.2d 144, 153 (N.Y. 2002).

333. The good faith duty may oblige a party to act in a particular way if such an obligation is necessary to give business efficacy to the transaction. Thus if one party grants another party some exclusive right, such as a celebrity's product endorsement, in return for a share of the profits to be made from the exercise of that right, there may be an implied obligation to use reasonable efforts to bring profits and revenues into existence: **Wood v. Lucy, Lady Duff-Gordon**, 222 N.Y. 88 (1917) per Cardozo J. A party may even be in breach although it has abided by the strict terms of the contract e.g. if it exercises a contractual right as part of a bad faith scheme to deprive the other party of the fruits of his bargain: **Serdarevic v. Centex Homes LLC,** 760 F. Supp. 2d 322, 333 (S.D.N.Y. 2010).

334. Excalibur's pleaded case is that in breach of clause 9.1 of the Collaboration Agreement:

i) Texas and Gulf bid for the Shaikan and/or Akri-Bijeel Blocks on their own behalf without Excalibur and without telling Excalibur that they were doing so;

ii) Texas and Gulf failed to inform Excalibur that Dr Hawrami had in August 2007 expressed an unwillingness to deal with Excalibur (if he had) and failed to advise Excalibur that it needed to take steps to persuade Dr Hawrami to allow it to participate in any concession; and

iii) Texas and Gulf failed to take any steps to intervene on Excalibur's behalf to persuade Dr Hawrami to allow Excalibur to participate in the two blocks.

335. As to (i) Excalibur was well aware that Gulf was bidding for the Shaikan PSC without it and consented to that. It was also aware of MOL's involvement. The contract did not oblige Gulf to tell Excalibur about Akri-Bijeel. As to (ii) Mr Kozel did tell Mr Wempen what Dr Hawrami had said in August 2007: see para 580 below. In any event I do not regard the duty of good faith as obliging Gulf to inform Mr Wempen what Excalibur needed to do to get on the PSC (in respect of which he claimed to be indifferent) or what Dr Hawrami had said. As to (iii) the duty of good faith did not require Gulf to take positive steps to advocate Excalibur's cause to Dr Hawrami, particularly in circumstances where to do so might risk alienating him.

336. Two further breaches were alleged in Excalibur's Written Opening viz:

iv) Texas and Gulf failed to inform Excalibur that it was necessary for it to be a party to the PSCs and/or JOAs in order to have its interests recognised and encouraged or acquiesced in Excalibur's belief that it was not necessary;

v) If the defendants' intervention on behalf of Excalibur with Dr Hawrami proved unsuccessful, Gulf failed to give effect to Excalibur's alleged interests by means which did not require the KRG's consent (or that of anyone else).

337. As to (iv) the contract did not impose on Gulf an obligation to advise Excalibur as to the true meaning and effect of the Collaboration Agreement, which was an agreement between two commercial parties each of whom could be expected to take their own legal or other advice in respect of the Collaboration Agreement, the PSC and Article 24 of the Kurdistan Region Oil and Gas Law 2007, particularly when Eric Wempen was, himself, a lawyer and Excalibur had retained Dabin. Further it was not suggested to Mr Kozel that he was aware that Mr Wempen had a mistaken understanding of the effect of the Agreement. Nor is it clear that Mr Wempen, who still asserts that the Agreement gives Excalibur an entitlement to an indirect interest, would have accepted advice to the contrary from Mr Kozel: see para 316 above.

338. As to (v) nothing in the Agreement contemplated or required that Texas or Gulf should provide for Excalibur some (undefined) indirect mode of participation; and the duty of good faith cannot fashion a substantive obligation which the parties have not agreed; nor create a viable case in breach of contract if none otherwise arises.

339. In short, I do not regard Texas or Gulf as in breach of the obligation of good faith and fair dealing.

340. Excalibur contends that, had the defendants taken the steps they ought to have taken under para 334 (i) – (iii) above, Excalibur would have insisted that it participate in the bid for both blocks and would, with the help of Texas and Gulf, have persuaded both MOL and the KRG to allow it to participate. These contentions are only relevant if I am wrong on the question of breach and are dependent on facts which I do not find established. In those circumstances there is limited use in considering the issue. It is sufficient to say that I do not regard the case as made out.

341. As to (i) Excalibur knew that Gulf was to bid for Shaikan without it and was content with that course. In those circumstances the proposition that Excalibur would have done something different if told that Gulf was bidding is untenable. In relation to Akri-Bijeel, the fifth point mentioned in para 320 applies. As to (ii) even if Excalibur was not told of Dr Hawrami's misgivings, it is doubtful that, if it had been, it would have acted differently, given that it claims an entitlement to an indirect interest without becoming a party to the PSC: see para 317 above. As to (iii) it seems to me unlikely that Gulf would have been able to cause Dr Hawrami to change his mind or persuade MOL to accept Excalibur, absent a Gulf guarantee.

The history – Part 2: After the Collaboration Agreement *Index*

342. I deal in the paragraphs that follow with the complicated factual history following the making of the Collaboration Agreement on 16 February 2006. It is relevant for an understanding as to how the dispute arose; and in relation to the following issues: (i) the intentions of those concerned in relation to whether Gulf was a party to the Collaboration Agreement; (ii) whether Texas was the *alter ego* of Gulf; (iii) the deceit and fraudulent concealment claims; (iv) the claim that Texas assigned the Collaboration Agreement to Gulf; (v) the defendants' case on deemed withdrawal under clause 8.6.2; (vi) the alleged plan to cut Excalibur out of the deal; (vii) specific contractual defences: impossibility, material breach and anticipatory repudiation; (viii) particular tortious claims; (ix) Excalibur's "prevention" case; and (x) whether Excalibur could ever have raised the necessary funds and got on any PSC.

Events from 17 February 2006 onwards

343. On **17 February 2006**, Mr Kinnear emailed Mr Wempen to say that "*If this is to work you and Todd need to get together as these brinkmanship area [sic] could be serious later. Also you have a deal that looks good but nothing substantial to back it hence the wary touch from Gulfkeystone*". He advised him that it would be "*prudent to prepare a partner profile of your backers. That may be a stumbling block if you do not. You are not in the oil business and they will need reassurance of who is who and can you deliver*". This advice, which referred to Mr Wempen's supposed financial backers, was sound and far sighted. Two years later, relations between Mr Kozel and Mr Wempen (and Mr Kinnear) broke down when Mr Wempen's lack of financial backing became apparent.

344. Mr Kinnear gave similar advice in an email to Mr Wempen of **27 February 2006** in which he urged Mr Wempen to be "*proactive and gain trust by arrangeing [sic] the visit for the Gulfkeystone team. Also to outline you[r] backers and contacts in Iraq.*" In a second email of that date he said that Mr Kozel and Mr Al-Qabandi knew nothing about Excalibur and were going on Mr Kinnear's reassurance. Mr Kinnear advised:

> "*It's all about risk in oil companies and they are a medium sized company and have to manage risk. The larger boys do not touch risk. What I was hinting at is that you need to declare who your partners are in this game before being asked. This will help build confidence with Gulfkeystone. When I mean partner just who they are dealing with in the US and Iraq*".

345. Also on **17 February 2006** Mr Wempen emailed Mr Kozel to say that there was a "*significant meeting*" coming up in Kurdistan and that they should release the draft introductory letter of 11 January 2006 referred to in para 162 above, which he attached. The letter was addressed to Dr Yacu. Mr Kozel signed and sent that letter. Mr Wempen also asked Mr Kozel to arrange for a version of the letter to be sent directly to Prime Minister Barzani and Mr Kozel did so. This version of the letter said:

> *"I am pleased to provide you with information on Texas Keystone Inc., a United States exploration and production company which, by way of this letter, expresses its serious interest in meeting with you to introduce the company and explore the opportunities available in Kurdistan for participating in oil and natural gas production projects together with our partners, Excalibur Ventures and the Dabin Group"*

thereby representing to the KRG that the partnership was Texas, Excalibur and Dabin.

346. On **20 February 2006** Mr Wempen emailed Mr Kozel to say that he was "*considering sending a letter of financial support from Excalibur to accompany [Texas' letter of 17 February] and I would appreciate a ballpark neighbourhood of what you are thinking the exploration activity is going to cost*". This was pure bravado. Excalibur was in no position to send such a letter.

Gulf Board – 1 March 2006

347. On **1 March 2006** the Gulf Board met in Zurich. It confirmed the appointment of a new Legal and Commercial Director, Mr Iain Patrick, and a new Finance Director, Mr Jon Cooper. Neither Excalibur nor Kurdistan was mentioned in the minutes. At this stage Kurdistan was not a priority because Gulf had made no commitment to it. Some minutes of a management meeting on **8 March 2006** contain a one line phrase "*Approval for Kurdistan*". It is not clear what exactly that referred to. It may have been approval for Mr Kozel to continue with Kurdistan, or for a visit to Kurdistan, or for expenditure of money or the allocation of management time to considering Kurdistan.

348. Mr Wempen was expecting an invitation to come to Erbil. It was not immediately forthcoming. One reason for the delay appears to have been that Dr Barzani and others had gone to Baghdad to resolve a dispute over who would be the next Prime Minister of Iraq.

349. On **4 March 2006**, Mr Wempen wrote to Dr Yacu to say that Excalibur believed that Texas and "*its affiliate Gulf Keystone*" were the best candidates to support initiatives in Kurdistan, and that "*Keystone*" had "*ready access to the billions of dollars in funding which would be required to fully exploit a significant oil fund*". Mr Kozel had told Mr Wempen no such thing. Mr Wempen's evidence was that there was "*some very positive salesmanship there*", which he sought to justify on the basis that anyone such as Gulf/Texas with a good enough asset can raise very large sums of money. In reality it was wholly unrealistic to suppose that billions of dollars could easily be raised and untruthful to say that it was ready to hand. The letter ended by saying that the President of Texas and Mr Wempen looked forward to a meeting in Erbil.

Mr Patrick joins Gulf

350. When he joined Gulf, Mr Patrick reviewed all its activities. On **7 March 2006** he emailed Mr Wempen to say that Mr Kozel had asked him to get in touch "*about how we might proceed when events permit*". He said that he would like to arrange to meet him and the "*principal shareholders of Excalibur to make sure we understand as fully as possible the nature of the opportunities and how the relationship between our companies would work*". He asked a number of detailed questions. It is apparent that Mr Patrick thought that Excalibur was an organisation of some standing, not a one or two man band with no shareholders and no assets. Mr Wempen's evidence was that he discussed Excalibur in detail with Mr Patrick and told him that they were a small outfit consisting of him and his brother with the help of Dabin and industry partners, and highly connected. I doubt whether the discussion was in detail, and the likelihood is that he spoke in grand sounding terms. What he did not say was that Excalibur was a company without shareholders (only Membership interests and only two at that) or assets. The likelihood is that he indicated that Excalibur had financial backing. That would be consistent with the document "*Kurdistan talking points*" that Mr Wempen emailed to Mr Patrick on **4 April 2006**: see para 353.

351. On **29 March 2006** the Chairman of KRG's Oil, Gas and Petroleum Establishment ("OGE"), Mr Sarbaz Hawrami, emailed Mr Wempen inviting him and the President of Texas Keystone and "*your technical group*" to visit the OGE in Erbil to explore opportunities and projects for cooperation in, *inter alia*, exploration and oil field development projects. Those attending would meet Mr Sarbaz Hawrami and Dr Yacu, the Vice Chairman of the OGE, and other members of the OGE. Mr Wempen replied:

> "*...In cooperation with the Dabin Group and our operating partner, Texas Keystone, we will shortly revert with specific meeting dates in the coming month which we hope will meet your approval.*"

352. No mention was made of Gulf. If in reality Excalibur had two contractual partners, with Gulf in the lead, and, as Mr Wempen says, the KRG knew what was going on, there was no need to be silent about Gulf. If they did not the email was misleading. In fact it was accurate. On **4 April 2006** Mr Wempen emailed Mr Hawrami to give details of availability, saying that "*Accompanying us will be the president of Texas Keystone and appropriate technical and commercial staff*". I do not accept that Mr Wempen and Mr Kozel agreed a course of action whereby the correspondence with the KRG would reflect a two person consortium when the reality was that it was three.[36]

353. On **4 April 2006**, in response to Mr Patrick's questions in his email of 7 March 2006, Mr Wempen emailed Mr Patrick a document entitled "*Kurdistan Talking Points*". It provided basic information about Kurdistan and Excalibur and noted that OPIC was offering 90% coverage to US investors in Kurdistan and US majority controlled consortia. The document suggested that it was the "*intent of EXV to offer to co-finance a refinery with our JV partner, the Dabin Group*". It also claimed that "*The area of exploration is up to us*". Excalibur had at the time no means of co-financing the project (the IRF was no more than an idea) nor would the consortium have a free choice as to where to prospect.

354. On **15 April 2006** Mr Kinnear raised again the lack of information about Excalibur. He said that Keystone "*need to know more about you guys and names to make them feel comfortable*". Mr Wempen's response ignored the point. On **16 April 2006**, Mr Kinnear emailed Mr Wempen again to report that Mr Al-Qabandi had been asked at a board meeting "*who you all were and Ali could not answer*"; nor could Mr Kozel: this was "*not well received*". Mr Kinnear went on to say that Mr Kozel and Mr Al-Qabandi "*came back to me and I did not answer*." He asked Mr Wempen if he had a company profile. As is apparent, Mr Wempen was being warned by Mr Kinnear that he was losing credibility.

355. In response on **18 April 2006** Mr Wempen sent Mr Kinnear a summary in respect of the IRF "*which will take our part of the deal*". On the same day he emailed Mr Paul Behrends, a senior policy adviser with the law firm Crowell & Moring LLP (although not himself a lawyer) asking him to ask a Mr Shemdin for help in arranging meeting dates with Mr Hawrami and Dr Yacu, saying:

> "*We need to get a move-on or we are going to lose face with the oil company.*
> *...*
>
> *PS I mentioned your name as our DC rep to the Oil Company. I had to say something. They put me on the spot as to what I was doing to get the final logistics sorted.*"

[36] After giving this evidence Mr Wempen added: "*Hopefully that's the right answer. Or that is the right answer, excuse me*". The answer was wrong but revealing.

Mr Behrends had not been engaged as Excalibur's representative in Washington. His name was being used to give an appearance of resources. Mr Wempen was anxious to get to Erbil as soon as possible in order to preserve or restore credibility.

356. A technical team was needed in order to assess the prospects in Kurdistan. Texas had geological and technical capability but did not have specific experience in the Middle East. In the event that was supplied by Gulf, in the person of David Clark (now deceased), a geologist who was its head of exploration. He had previously spent time working on geological studies and consulting projects in Kurdistan and had worked for Dr Ashti Hawrami at ECL. The Gulf Board, although hesitant about Kurdistan, was prepared to provide this support in order to see what the opportunity might amount to. Texas paid all third party invoices for the trip to Erbil in June 2006 (see para 370) in the sum of about $ 350,000 including the fees of Mr Samarrai.

357. On **22 April 2006** Mr Wempen emailed Dr Yacu to tell him that "*...Texas Keystone and Excalibur Ventures are ready to come and visit you any time starting this week. The technical team has been prepared and the Texas Keystone CEO and I are ready to accompany them*". A similar reference to a consortium of Texas and Excalibur was contained in an email of **17 May 2006**.

The change of Government in Kurdistan

358. From the mid-1990s the KDP controlled the governorates of Erbil and Dohuk, and the PUK controlled Suleimaniyah. After the Iraq Constitution had been adopted in October 2005, the KDP and PUK drafted a Kurdistan Region constitution, and in May 2006 the two KDP and PUK dominated administrations were merged into the Kurdistan Regional Government of Iraq.

359. Mr Wempen's contacts had been predominantly with the KDP. The leader of the KDP was Mr Massoud Barzani, who became President of the unified KRG. His nephew Nichervan Barzani was Prime Minister of the KDP controlled region from 1996 to 2006 and Prime Minister of the unified KRG from 2006 to 2009 and from March 2012 to the present.

360. By April 2006 the prospect of any award of any Concession was on hold pending the formation of a new government. Mr Wempen was concerned that if there was a change in government and Dr Hawrami of the PUK (whom he had not met) took control of oil matters Excalibur might be out of any deal (see his email to Azzat of 26 April). In the event, in May 2006 Dr Hawrami became Minister for National Resources, one of the most important portfolios in the KRG. He knew Mr Clark, Mr Samarrai and Mr Kozel. Dr Hawrami is a qualified oil engineer with a PhD in oil reserve engineering. He had significant international upstream experience having worked in the oil industry in the UK since 1975. He is agreed, on all sides, to have detailed technical knowledge, to be a man of integrity and someone who would appreciate what was in the best interests of the KRG in considering bids and awarding contracts. In practice it would be he who would decide who would get the award of any contract.

Gulf Board Meeting 5 May 2006

361. Gulf had a liquidity crisis at this time, in part because of its Algerian commitments and also because it needed to pay a $ 906,044 invoice from a subsidiary of SONATRACH, called Enageo. At its Board meeting on **5 May 2006**, Mr Kozel told the Board that the invoice would be paid by Texas under the Management Services Agreement and the cost recovered in the usual way. It was proposed that Gulf's "*cornerstone investors*", i.e. the shareholders in Gulf LLC who had founded the company, should provide a short term facility of $ 5 million to ease the liquidity difficulties. Both the Kozel family and GIBCA confirmed a willingness to do this. On **9 June 2006** Falcon Partners and GIBCA entered into loan agreements with Gulf to provide facilities of $2.5 million each on standard terms[37]. Both loans were repaid in January 2007 in full together with interest on completion of the farm out of Gulf's HBH licence to the BG group.

362. The board also considered Mr Kozel's position. Mr Parsons, supported by Sheikh Sultan, proposed that Mr Kozel should step down as CEO so that he could concentrate on doing what he did best – developing the business and doing deals – while Mr Guest concentrated on managing the company. This marked the beginning of a period of marked tension between Mr Kozel and other members of the Board.

Mr Franchi

363. Dan Franchi was a contact of Mr Wempen. He was a former Assistant Treasurer of Unocal Corporation, a US based oil company. According to his CV he had a particular strength in project financing (which was never an option for Excalibur). He had played a part in raising $ 2.6 billion for the Baku-Tbilisi-Ceyhan pipeline by way of limited recourse debt. Mr Wempen wanted him as a Chief Financial Officer ("CFO") for Excalibur and made him an offer of employment. On **6 April 2006** Mr Franchi expressed enthusiasm and accepted the terms of employment proposed, on the basis that the offer was "*conditional on funding*". This condition was never fulfilled because the funding never came.

364. On **10 April 2006**, Mr Franchi sent a draft employment contract. It provided for him to be a full-time CFO at a salary of $ 300,000 per annum. Under its terms, any compensation would accrue until funding, but if funding had not occurred before 1 July 2006, he had the option to cancel the contract and Excalibur would owe him $ 20,000. The employment contract was never signed. That did not stop Mr Wempen from emailing Mr Kinnear on **14 April 2006** to say "*we are building a bit of momentum, having signed the former vice-treasurer of Unocal*". Mr Franchi was never contractually bound to Excalibur (although he provided some help on an *ad hoc* basis) and could not accurately be represented as Excalibur's CFO or acting CFO. Nevertheless on **2 May 2006** Mr Wempen emailed Mr Patrick about having a "*conference call with our CFO in LA*" – a reference to Mr Franchi. He had also mentioned Mr Franchi to Mr Kozel as being a director of Excalibur.

365. On **3 May 2006**, Mr Wempen emailed Mr Franchi to update him on the planned visit to Kurdistan. The plan was "*to strike a deal for as large an exploratory concession as we can.*" He went on to say:

[37] The amount advanced by Falcon appears to have been the amount of the facility less the amount of the Enageo invoice.

> "*We will then have to find a way to finance our 30%. I am anticipating raising some private equity capital and/or launching our own business development company on the AIM or in Amsterdam. We probably want to stress with them our ability to raise financing to cover our portion. Would appreciate your suggestions*."

The idea that Excalibur or some company like it could be launched on a stock exchange was wishful thinking. It was not feasible for a company such as Excalibur even if it obtained a concession..

366. On **7 May 2006**, after a meeting on **4 May 2006** between Mr Wempen, Mr Clark and Mr Patrick to talk about the Kurdistan opportunity, possible areas and local contacts, Mr Clark of Gulf suggested to Mr Kozel that he should invite Mr Samarrai to help select areas that might be prospective and advise on how they might obtain data prior to the visit and what they should ask for during it. Mr Kozel agreed to this. Mr Samarrai met Mr Clark, Mr Kozel and Mr Al-Khaldi at Gulf's premises and discussed structures in Kurdistan. On **15 May 2006**, Mr Clark asked Mr Samarrai for a summary of his thoughts on the prospective areas in Kurdistan, which he produced in return for £ 1000 (2 days at £ 500 per day), and he came on the trip to Erbil in June 2006.

367. On **15 May 2006**, Mr Clark also informed Mr Kozel that Dr Hawrami had resigned from ECL and taken up his new post in Kurdistan. Mr Kozel appears not to have taken this email about Dr Hawrami properly on board: when he went to Erbil the following month he was pleasantly surprised to see Dr Hawrami as the Oil Minister.

The position of Texas and Gulf in respect of the Erbil visit.

368. The Texas board had authorised Mr Kozel to take matters forward on Texas' behalf in relation to Kurdistan. The Gulf Board was, at this stage, not particularly interested in Kurdistan, nor prepared to commit to any exploration, although (at any rate so far as Mr Guest was concerned) potentially interested in the opportunity.

369. On **13 June 2006** Mr Kozel met with Mr Guest and Mr Patrick to discuss the trip. He also had discussions with other board members around this time. It was agreed that Mr Kozel would, in relation to Kurdistan, act for Texas. The position was reflected in a draft minute[38] prepared by Gulf's solicitors, Memery Crystal, which (as later amended by Mr Patrick) read:

> "*It was reported to the meeting that Mr Kozel had been invited by the Kurdistan Government to fly to the country on Saturday to discuss potential oil and gas opportunities in Iraqi Kurdistan. The opportunities themselves are* ***only open to American oil companies and Mr Kozel has been invited to attend Kurdistan as a director and owning shareholder in Texas Keystone, a US corporation****. Mr Kozel reported to the meeting that he wanted to ensure that the company was aware of the opportunity which he was pursuing, that he was pursuing the opportunity on behalf of Texas Keystone. Gulf Keystone personnel, namely Iain Patrick and David Clarke are accompanying Mr Kozel on the trip to Iraqi Kurdistan* ***on the understanding that if the opportunity is***

[38] The idea was that a subsequent board meeting would formalise the previous verbal discussions of directors.

> ***of interest, Texas Keystone and Gulf Keystone would agree a basis on which both companies would participate in it jointly***. *It was recognised that Mr Kozel will be attending Iraqi Kurdistan as a director of Texas Keystone and that there is no conflict of interest in him pursuing this opportunity on behalf of Texas Keystone.*"

If, as Excalibur contends, Gulf was already a party to the Agreement, this minute is inexplicable. The understanding reflected in the minute was to cause Mr Kozel considerable difficulty with Gulf later. It recorded an understanding of a future agreement which Mr Kozel became reluctant to make but which Gulf desired to achieve.

The visit to Erbil

370. Between **17** and **20 June 2006** Mr Wempen (for Excalibur) and Mr Kozel (for Texas), accompanied by Mr Patrick and Mr Clark, together with Mr Samarrai visited Kurdistan and met Dr Hawrami[39]. Their purpose was to explore the possibility of obtaining a concession for oil exploration. Mr Kozel met Izzeddin Berwari and Azzat of the Dabin group.

371. A meeting took place (either on **18** or **19 June 2006**) at the Oil Ministry with Dr Hawrami. Dr Yacu was there. Dr Hawrami came into the room with a big smile on his face; Mr Kozel was taken aback to see him; Dr Hawrami asked Mr Clark, whom he knew well, why the group had come to Kurdistan. Mr Kozel told Dr Hawrami that the purpose was as set out in Texas' introduction letter and gave him his Texas business card. Dr Hawrami also asked about how things were going for Gulf (with which he had had a business relationship) in Algeria. He was also particularly interested in the fact that Mr Kozel owned Falcon Drilling. I do not accept that there was a presentation first for Gulf and then for Texas or that there was talk of Texas taking the lead in front but with Gulf being the main player.

372. There was no presentation by Excalibur. Whilst Mr Kozel was speaking Mr Wempen started to say that Excalibur could build roads, power plants, infrastructure and hospitals. He was cut off by Dr Hawrami who told him that he had created an unfavourable impression in Erbil because he had made lots of promises but had not delivered, and that there were a number of people in the KRG who were not happy with him. He was told by Dr Hawrami not to speak further at the meeting[40]. This was embarrassing for Mr Wempen. Mr Kozel says (but Mr Wempen disputes) that he later agreed with Mr Wempen that he should not attend further meetings at the Oil Ministry. Whether or not that was so, he did not meet Dr Hawrami more than once thereafter (August 2006) and even that is in dispute. Mr Kozel says that he turned up at Gulf's offices but did not attend the meeting with Dr Hawrami.

373. Dr Hawrami made clear during the discussion that it was only a preliminary meeting and that no new contracts would be awarded until a new Oil Law had been put in place.

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[39] Mr Loic Giraudet, Gulf's security manager, came too.

[40] That something like this occurred is corroborated by the evidence of Mr Samarrai to the effect that Dr Hawrami told him at some time between September 2006 and November 2007 that he had told Mr Wempen off at the June 2006 meeting. He repeated that in early 2011.

374. During the visit the group visited a number of sites, including Taq Taq[41]. They were denied entry to Taq Taq where the licence was held by a Turkish consortium including Genel Enerji, into which Addax Petroleum had farmed-in in July 2005, but the drilling was being performed by personnel from a Chinese company, Great Wall Drilling, who were in some form of joint venture with a company – Taq Taq Operating Company – owned by Genel and Addax. I do not regard the fact that sites other than Taq Taq were visited as an indication that Taq Taq had never been presented as an opportunity; indeed the fact that an attempt was made to visit Taq Taq suggests that it was an opportunity that had been contemplated. I accept Mr Kozel's evidence that it was a complete shock to Mr Wempen to find that Taq Taq had already been licensed and that he tried to blame Texas for not moving fast enough.

375. On **21 June 2006,** Mr Wempen emailed Mr Berwari of Dabin to thank him and noted that "*Our new partners, the Texas Keystone Petroleum corporation and I will be working on a final proposal for Dr Ashti Hawrami over the next month*". He spoke in similar terms to Dr Yacu on **28 June 2006**. All the thank you letters (copied to Mr Wempen and sent at his request) came from Texas.

376. The Kurdistan trip had gone well. It had not produced the promise or offer of a contract which Mr Wempen had implied that it would. But contact had been made with Dr Hawrami who was happy for the consortium to study whatever sites it wanted to. After the return home, work started on preparing a proposal. Dr Hawrami invited Mr Kozel and Mr Patrick to the Henley Regatta on **30 June 2006** when he told Mr Kozel that he was keen for him to follow up on the Erbil trip with a proposal.

377. On **23 June 2006**, Mr Clark emailed Mr Kozel with recommendations on what needed to be done in the light of the visit, which included retaining the services of Mr Samarrai, who started to gather together the best available maps. Mr Samarrai commenced working for Gulf on a consultancy basis. (A formal consultancy agreement was entered into on **21 July 2006** in respect of his services from 10 July 2006 and some, at any rate, of his fees were charged to Texas). He and Mr Clark were keen to investigate and to make a proposal to Dr Hawrami for the Demir Dagh structure, a prospect on which oil had been found to the west of Erbil.

378. Mr Wempen realised the need to raise money for Excalibur's participation. On **25 June 2006,** Mr Wempen submitted some sort of financing proposal to Mr Franchi which the latter described as "*laughable*". Mr Franchi appears to have developed (without reward) some indicative investment returns for Iraq. On **26 June 2006**, Mr Wempen emailed Mr Franchi to say that "*We will have to arrange some significant 8 figure exploration finance to support our 30% of the Keystone work plan, and in short order.*" Mr Wempen told him "*we are not just doing energy here, but power and infrastructure*" and that he was glad that he had Mr Franchi because he was a "*finance professional and you can speak to investment bankers and investors in their language*".

379. Mr Franchi, however, was not optimistic. He told Mr Wempen that "*to engage an investor in this difficult area we need to present information that is factually accurate.*

[41] There is a dispute as to whether these included Tawke: probably not in view of the distances involved in travelling from Erbil to Taq Taq and Tawke and the need at that time not to travel after sunset. Mr Samarrai who was on the trip said that it did not include Tawke, which he had only been to once – in early 2007.

It will still be difficult to raise the funds, but credibility is a must". The product of Mr Franchi's work appears to consist of a single piece of paper entitled "*II The Case for Iraq*" which suggested that Iraq would have returns similar to the 11% P/E ratio for Pakistan.

Gulf's attitude

380. As a result of the visit Gulf's geologists' interest in Kurdistan was stirred. Mr Kozel was enthused by Kurdistan. But he had decided to step down as CEO of Gulf because he thought the board was taking it in the wrong direction and because he had a very different and more entrepreneurial management philosophy than them.

381. Mr Patrick wanted to discuss with Mr Kozel the arrangements that would need to be put in place if Gulf was to take part in the project. A note prepared by Iain Patrick dated **13 July 2006** recorded (correctly): (i) that the only arrangement in place was the Collaboration Agreement between Texas and Excalibur; (ii) that Texas had the right under the agreement to introduce Gulf into the consortium; and (iii) that it was now appropriate to determine arrangements between Texas and Gulf[42] so that both parties were clear on their roles going forward.

382. At a Gulf Board meeting in Algiers on **14 July 2006**, the Board was presented with a paper on Kurdistan prepared by Mr Patrick which summarised the existing position including the fact (a) that the initial approach was from Excalibur to Mr Kozel "*presumably as a representative of Texas*"; (b) that the Collaboration Agreement had been entered into between Excalibur and Texas; (c) that under it Texas had a right to introduce Gulf into the consortium "*and this would be an appropriate [time] to determine the arrangements between Texas and [Gulf] so that both parties are clear on their roles going forward*"; and (d) that the third party costs of the initial trip were paid by Texas. He assumed that "*all technical, commercial and legal work will continue to be done by [Gulf], assuming it is part of the consortium*". He said that, if the Board supported the continuation of an evaluation of this opportunity, the next step would be to agree the basis for cooperation with Texas Keystone (and Excalibur/Dabin) before much more cost and time was incurred.

383. The minutes of the meeting record that Mr Kozel was representing Texas in relation to Kurdistan and that there was no agreement between Texas and Gulf as to their respective roles in Kurdistan. They say:

> "*Mr Patrick reported that he and David Clark[e] had attended a meeting with the [O]il Minister of Kurdistan Iraq, together with Todd Kozel representing Texas Keystone and a representative of Excalibur Ventures of the USA, who had made the initial arrangement for the meeting. Mr Kozel pointed out that the initial contact with Excalibur [had] been with Ali Al-Qabandi. The Minister had received the visitation well and invited the group to make a specific proposal for one or more exploration areaS in Kurdistan. Mr Patrick said that the work was now proceeding to prepare such a proposal, with any commitment being subject to a full investment recommendation being made to*

[42] Excalibur places some reliance on the fact that Mr Patrick refers to making arrangements between Texas and Gulf without reference to Excalibur. This is not particularly surprising given that Texas had a right to assign to Gulf. In any event, as appears from the next paragraph, in his paper for the Board he referred to the need to reach agreement with Excalibur as well.

> *and approved by the board, and to a satisfactory agreement with Texas Keystone regarding their respective interests and roles going forward*."

The minutes also recorded that Mr Kozel no longer wished to continue as CEO.

384. It is apparent from the above that Gulf did not consider itself already a party to any agreement.

385. On **4 August 2006** Gulf farmed out 49% of its interest in the HBH concession in Algeria to BG North Sea Holdings Ltd ("BG") which became the operator of the licence. The farm out raised $ 55 million and a further £ 13.4 million (less expenses) was raised later in the month with a successful share placement.

386. A return trip to Erbil for Saturday 13 August 2006 was planned to see Dr Hawrami. On **25 July 2006** Mr Wempen asked Dabin how he could get an appointment with Mr Barzani, the Prime Minister, to show him the final proposal. He also asked Mr Kozel to send him a letter to the PM letting him know that they were returning to Erbil on Saturday 13 August with a final proposal. Mr Wempen made arrangements to fly there via London.

387. By a letter of **31 July 2006** Mr Kozel requested a meeting with Dr Hawrami in between 7 and 10 August in Kurdistan. He told Mr Wempen that he declined to write to anyone until that meeting was fixed. In his instructions to Ms Berry Mr Kozel had asked her to write a letter requesting a meeting to review the "*gkp proposal*". The letter of 31 July was on Texas paper (as Mr Kozel had instructed) and included the phrase:

> "*In as much as we have enjoyed Kurdistan and the great opportunities it holds within the oil and gas sector, Gulf Keystone would like to be considered a party towards its development and construction efforts.*"

Mr Kozel described the reference to Gulf Keystone as being a natural mistake on Ms Berry's part. It probably was. She was employed by Gulf and worked at its offices for Mr Kozel, Gulf's CEO, who, in giving her instructions, had referred to the "*gkp proposal*".

388. Mr Wempen turned up at Gulf's offices on Tuesday **1 August 2006** at a time when Mr Kozel was occupied with the Gulf Algeria farm out and was not around. He also attended a meeting with Mr Clark on **4 August 2006** when he was shown the presentation to be made to Dr Hawrami.

389. On Monday **7 August 2006** Dr Hawrami came to Gulf's offices in London for a meeting. There is a dispute as to (i) whether Mr Wempen had been asked to attend a follow up meeting in London with Dr Hawrami; and (ii) whether he attended this meeting. Mr Wempen says that he was flown over by Gulf; he, together with Azzat, attended the meeting, which lasted for 1 ½ hours; Dr Hawrami was friendly; Mr Clark gave his presentation; Dr Hawrami said that for $ 60 million the consortium could have Demir Dagh. After it Mr Kozel said that Demir Dagh was "*a dog*" and that Gulf did not have the funds for that sort of bonus. But he told Mr Clark to prepare a full proposal.

390. Mr Kozel says that he had not expected Mr Wempen to turn up for the meeting (in the light of what had been agreed in Erbil) and he was not particularly welcome to Dr Hawrami. He had told Mr Wempen about the meeting for information; but, although he turned up at the office, he did not attend the meeting; nor did Azzat, who was with him. They stayed in the reception area. Either on that or a later evening he, Mr Kozel and Azzat, met at his house and went out to dinner. They spent other time together over the weekend.

391. I prefer the account of Mr Kozel. The likelihood is that Mr Wempen had not been asked to attend a meeting with Dr Hawrami, whose email to Mr Al-Qabandi of 4 August 2006 shows that he was planning to see Gulf and makes no mention of Mr Wempen. Mr Wempen came to London on his way to Kurdistan where he hoped to meet the PM. He turned up at the office with Azzat, who had been invited by Mr Kozel to London at Mr Wempen's suggestion because Azzat was keen to get to know Texas – and Mr Wempen was keen that he should – and who was combining his visit with a holiday to see family in Holland. Neither were present at the actual meeting itself. Although Mr Wempen gives evidence of the content of the meeting, the figure of $ 60 million to which he refers is likely to be incorrect. It appears from an email from Mr Clark on **18 August 2006** that Dr Hawrami mentioned a signature bonus of US $ 250 million. Mr Kozel says that his reference to Demir Dagh as "*a dog*" was much later and that is consistent with Texas' continued interest in Demir Dagh (see para 398 below).

392. An email of **3 August 2006** from Azzat indicates that Mr Berwari of Dabin wanted him to be at the meeting with Dr Hawrami (which may explain his presence at the office). But that does not mean that he was necessarily there; and his relatively junior position means that it is not surprising that the meeting took place between the Oil Minister and Mr Kozel alone.

393. The meeting lasted about half an hour (in the absence of much geological information). Mr Clark made a power point presentation identifying Demir Dagh as an area of interest, as well as 3 others.

394. On **7 August 2006**, the KRG produced a draft Petroleum Law and draft model PSC. Mr Clark emailed it to Mr Kozel, Mr Patrick and Mr Samarrai.

The Texas proposal for Shaikan

395. On **9 August 2006** Mr Clark emailed Dr Hawrami a list of structures that were of interest. On **11 August 2006** Mr Wempen emailed Azzat referring to a US lobbying group to "*help with plan B*" which was to take more than one area. He urged Azzat to contact Dr Hawrami and take 4 prospective areas "*and anything else you can*".

396. On **14 August 2006** Mr Wempen emailed a contact at Morgan Stanley saying: "*I have got the ball rolling on a deal in Kurdistan, but it can take care of itself, and I am looking at infrastructure and energy analyst jobs in London.*" This email is illustrative not only of Mr Wempen's grandiose ambitions but of his mind-set, which was that he had performed the valuable introduction, which was his contribution to the venture, and it would take care of itself (through the activities of others).

397. On **20 August 2006** Azzat told Mr Wempen that he was arranging a meeting with Dr Hawrami and implored Mr Wempen to "*Find funds*", a request that Mr Wempen ignored. He replied expressing his concern that he had wanted to finalise the deal with Mr Barzani on the latter's trip outside the country, and was worried they were late. He urged Azzat to make a map of the properties that were available, to give the map to Mr Clark and to get a formal letter to Dr Hawrami and, via Mr Berwari, to the PM from Gulf; and to get an appointment with the PM. A little later he told Azzat that he needed to put pressure on the PM "*so he knows our project is important to his friends and supporters. I hope Dabin is more important to him than the lobbying firm he hired in Washington*". As we shall see (para 1337 below), attempts by Mr Wempen to procure influence did not go down well with Dr Hawrami.

398. Gulf (in particular Mr Guest and Mr Clark) was becoming more interested in Kurdistan and Mr Clark worked on a draft proposal to send to the KRG. On **24 August 2006** Mr Clark sent Mr Kozel a draft ("*We would like to confirm Gulf Keystone's strong interest in … Demir Dagh*") but told Mr Kozel that he might wish to change the references from Gulf to Texas, which he did. On the same day Texas submitted a proposal to the KRG to confirm Texas' strong interest in the exploration of the Demir Dagh structure. The following day Mr Clark emailed Dr Hawrami with the areas of interest in order of priority (Demir Dagh, Ain Sifni, Qadir Karam, Udhaim). Excalibur relies on this sequence of events as showing that Texas was fulfilling a purely nominal role. It seems to me, however, a recognition of the fact that the Collaboration Agreement was with Texas and that any participation of Gulf would be dependent on the preparedness of the KRG to have a non US company on the PSC.

The identification of Shaikan

399. In early **September 2006**, Dr Yacu told Mr Samarrai on a confidential basis that Dr Hawrami was going to force DNO to give up certain areas including Shaikan and Gulley Keer. The names of the blocks did not remain constant. At this time reference to Shaikan usually meant what became Sheikh Adi and reference to Gully Keer meant what became Shaikan[43]. DNO's PSC had been awarded to it by the previous KRG administration and covered the whole of the Duhok area (considered by Dr Hawrami to be too large for one company). As a result the focus of Mr Samarrai's attention shifted to these areas.

400. Excalibur claims credit for having, through Dabin, identified the area now known as Shaikan. According to Mr Wempen, at a meeting between Dabin (Azzat and Mr Berwari) and Dr Hawrami on **31 August 2006** Dabin went over a map and (according to Azzat's account to Mr Wempen on that day or shortly thereafter, confirmed in another conversation on 17 September) Mr Berwari pointed out the Shaikan area (as now is) and Azzat said "*we want these worms*". Dr Hawrami then agreed to allocate the Shaikan area to the consortium.

401. In an email of **1 September 2006** Mr Wempen reported on the meeting to Mr Kozel saying that "*Azzat is saying Demir Dagh is ours to lose*"; that Dabin and Dr Hawrami would meet Dr Barzani about Pirmum Dagh; that the KRG wanted Mr Clark to return and look at more areas; and that "*Azzat thinks he has found a good area for us*". In an

[43] Gulf has produced a set of drawings which show the locations of the different areas referred to in emails of 13 (Clark), 17 (Wempen) September, Mr Kozel's letter of 20 September and Mr Clark's email of 3 October 2006.

email the next day he noted that they had discussed "*Demir Dagh, Pirmum Dagh, and other options*"; and that Azzat was convinced that he had found a great area near Ain Sifni, "*but you know how that goes. David should probably validate that, and will probably have to visit and create his own map*".

402. Azzat probably had identified an area he thought would be good, although where exactly that was is unclear. Any such identification cannot have been based on any geological or petrochemical experience since Dabin had none. Dr Hawrami may well have responded positively to Dabin at the meeting. (He appears to have had a map in his office on which he pinned names of which companies he was considering for what blocks). But he did not make any allocation. There appears to have been an indication at some stage that one exploration and one production block would be available.

403. Thereafter Mr Wempen was impatient to close the deal he understood to be available as soon as possible and for Mr Kozel to contact Dr Hawrami. He feared that others might get in first. On Monday **4 September 2006** he sent Mr Kozel, by mistake, an email intended for Mr Kinnear, entitled "*Todd is wasting time*", which asked Mr Kinnear whether he had met Mr Kozel and Mr Al-Qabandi to emphasize that "*We need to move to closure in Kurdistan*". He did not identify to Mr Kozel where Mr Clark should investigate. Mr Kozel responded that he had been told over the weekend by Mr Berwari to await a call from Dr Hawrami.

404. On **7 September 2006** Mr Wempen told Mr Kozel that "*Basically this deal should be done. You have reserved blocks*". This was a reference to whatever block(s) Azzat had been referring to, which Mr Wempen could not in evidence identify. On **9 September 2006** he emailed Mr Kinnear to say that he wanted Mr Kozel to meet Mr Hawrami one to one, to sign a commitment letter and hopefully a contract too and then they should "*move on to Uzbekistan*". The email includes the following:

> "*This is a done deal because the Kurds want an American company, and that is why the deal is being done with Texas Keystone, Todd's US company, for the contract. Afterward, we both know Todd will flip it to Gulf and Ali, but that is second stage*."

- a recognition that Gulf was not then party to the contract. He stressed that the Minister had set aside a specific block, complained that Mr Kozel was not following through to set up a meeting and said "*All Todd has to do is show up and sign*". On **10 September 2006**, Mr Wempen emailed Mr Kinnear to say that everything had come down to the next 48 hours. This was quite unrealistic. No block had been identified to Mr Kozel; no terms had been mooted; no draft PSC existed; no oil and gas law had been passed.

405. On **10 September 2006**, Mr Kozel had emailed Mr Clark to tell him to speak to Mr Samarrai because they were being directed to a structure, which Dr Yacu had come up with Azzat, north east of Ain Sifni and east of the DNO licence. On **13 September 2006**, Mr Clark emailed Mr Kozel saying that the area they should press for was to the South East of the DNO block including Shaikan, Ain Sifni and Sheikh Adi. These were identified on an attached map.

406. On **17 September 2006**, Mr Wempen, who had received a copy of the map from Mr Clark, emailed Mr Kozel and Mr Clark and said:

> "*After a call with Azzat...we straightened out the area Azzat discussed with Ashti, and which Ashti verbally committed to.*
>
> *Please find a rough outline in white blocks on the attached slide.*
>
> *It seems consistent with what you mention below* [i.e. Mr Clark's 13 September email – see previous para], *David*."

The slide attached had a white ellipse marked on it in the area of Sheikh Adi, which also embraced most of what became called Shaikan.

407. On **18 September 2006**, Mr Clark responded to Mr Wempen's email, saying:

> "*This seems very encouraging. The area indicated corresponds to two of the structures identified by us as being prospective. We should try to get it extended slightly to include Ain Sifni...Obviously we will need to see a map with an outline of the exact area marked on it, or obtain the coordinates of the area from Ashti before signing any agreement.*"

408. On **20 September 2006**, the KRG held a petroleum briefing in London, at which Dr Hawrami was present and which Mr Kozel attended. After it he wrote to Dr Hawrami expressing an interest in a rectangular block ("the rectangle") of which he gave the relevant coordinates, which had been supplied to him by Mr Clark, who himself had had discussions with Dr Hawrami. This block included most but not the entire ellipse and extended beyond it to the south.

409. On **26 September 2006** a meeting took place at Gulf's offices attended by Dr Hawrami, Mr Kozel and Mr Clark. As appears from Mr Clark's emails to Mr Kozel of 28 September and 3 October 2006 there was discussion of blocks. Texas asked for the Shaikan and Ain Sifni anticlines. Dr Hawrami preferred to offer the Shaikan and Atrush anticlines (as they were all then named). The Gully Keer anticline appears to have been included with Shaikan. After the meeting Mr Clark reviewed the structure proposed and found Shaikan "*very prospective*" although Atrush less so. The coordinates of the somewhat odd shaped block discussed with Dr Hawrami were set out by Mr Clark in his email of **3 October 2006**. This block included some of the area within the rectangle and almost all of what later came to be known as Shaikan. No agreement was reached for the allocation of a block.

410. Nevertheless Mr Wempen sent out messages suggesting that he had now clinched the deal. On **25 September 2006**, he emailed Mr Franchi to report that the "*Minister says we have a block reserved*" but that it would be another month or two until the Kurdish Parliament enabled him to sign an agreement. On **27 September 2006**, Mr Wempen emailed a "*congratulatory message*" to Mr Kinnear: "*Looks like we have winner on this one...Now, on to Uzbekistan*".

Progress in October

411. On **28 September 2006** Mr Wempen sent Mr Kinnear a draft joint venture agreement between Excalibur and Fuel Handling Systems to acquire voting interests in multiple petroleum exploration and production projects. On **2 October 2006** he emailed Talal al Ghalib of Gulf Finance House undertaking to seek to raise $ 50 million for a Sharia

compliant bank in Qatar. He then emailed his brother to see if he could find some UBS capital partners for this purpose; and contacted Mr John Allen of Lehman Bros, from whom he had previously got some advice about an Iraq fund, asking for advice in relation to the Qatar funding. He got no reply. None of the $ 50 million was ever raised by Mr Wempen.

412. Throughout October 2006 Mr Wempen was repeatedly asking about progress and when a contract would be signed. His impatience, borne of inexperience in respect of oil deals, ignored the need for an enacted oil and gas law, a draft PSC, identification of the coordinates of the field, consideration of the commercial terms proposed, and further geological assessment. He was also in contact with Dabin about various projects: housing, cement, tuna, security and a refinery. On **25 October 2006** he emailed Mr Kinnear to say that his "*partners and I*" were scheduling fundraising meetings for "*a company to do business internationally, starting with taking passive positions in exploration rights in Iraq, Congo and Uzbekistan*". There were no partners and no such meetings took place. On **30 October 2006** he sent him an email seeking to exchange information so as to get "*the team*" started on fundraising. Nothing came of this.

413. On **13 October 2006**, following further geological work by Mr Clark and Mr Samarrai, Texas wrote to Dr Hawrami seeking permission to negotiate a PSC for an area that included Shaikan (now Sheikh Adi), Gulley Keer (now Shaikan) and Atrush, as bounded by the coordinates in Mr Clark's email of 3 October.

414. Gulf was now becoming increasingly eager to put in place arrangements which would secure it an interest in the Kurdistan deal, which, at that stage could only be achieved with a US company as operator. Since it was not a party to the Collaboration Agreement its participation in Kurdistan could be, but did not have to be, by an assignment to it of a Consortium Interest. On **25 August 2006** Mr Guest, who together with Mr Clark was particularly keen, emailed Mr Kozel to say that there needed to be a formal agreement in place between Gulf and Texas vis-à-vis Kurdistan "*before we roll our sleeves up and go much further*". Following a further email from Mr Guest, on **11 September 2006**, Mr Patrick re-circulated his note of 13 July 2006 (see para 381) discussing a partnership proposal with Texas, and suggested that Gulf take "*50% of the project*", with costs, including time-writing (i.e. recorded hours), adjusted accordingly.

Gulf Board Meeting 22 October 2006

415. On **22 October 2006** Mr Kozel and Mr Patrick reported on the discussions with Dr Hawrami "*which appear to have stalled recently*" and expressed the hope that a forthcoming industry presentation would offer an opportunity to resume negotiations. Mr Parsons:

> "*reminded the board that negotiations to date had been led by Texas Keystone and that [Gulf Keystone's]involvement in a project in Kurdistan requires finalisation of an agreement with Texas Keystone, which had not yet been done, and which [Mr Parsons] requested be pursued as a priority.*"

At the same meeting Mr Kozel announced that he would remain as CEO until December or the earlier appointment of a successor, but that he would then step down.

This was because he disagreed with the way in which the Board was seeking to have the company run i.e. not as a small entrepreneurial exploration focused company and more like an oil major.

Gulf's attempts to become a party to the Collaboration Agreement

416. On **27 September 2006**, Mr Guest emailed Mr Kozel to "*get the GKP/TK relationship sorted out*" proposing Heads of Agreement with Texas involving a working interest split of the 70% presently available to the non-Excalibur "*group*"[44]. He attached a list of the costs incurred by Gulf (£ 134,072 & $ 248,142) and Texas (£ 99,554 & $ 234,872) so far. Gulf, in the form of Mr Guest, was trying to muscle its way into the deal. On account of difficulties with members of the Gulf Board and in particular Mr Guest, on **18 September 2006** Mr Clark resigned and was replaced by David Mackertich as Executive Vice-President (Technical and Exploration), who had been hired without Mr Kozel's knowledge. On **28 September 2006**, Mr Clark emailed Mr Kozel to complain about the way in which Mr Guest was behaving. As he noted, "*[Mr Guest] said that GKP will be operator and the operation will be run from the London office. This is contrary to the expressed wishes of Ashti [Dr Hawrami]*."

417. On **29 September 2006**, Mr Patrick emailed Mr Guest with draft proposals for Gulf to become a party to the Collaboration Agreement. His email noted that the "*existing agreement between TK and Excalibur is quite detailed and envisages GKP becoming party to it*." He proposed wording providing that "*GKP will become party to the Collaboration [Agreement]*" and for Texas to remain the "*operator of record*" whilst subcontracting the role of operator to Gulf.

418. During the autumn of 2006 and beyond Mr Kozel's relationship with the other members of the Gulf Board got markedly worse. In respect of Kurdistan, Mr Kozel represented Texas, while Mr Guest acted on behalf of Gulf. Mr Kozel was then thought to be about to leave Gulf, and no arrangement for Gulf's participation had been made in circumstances where it was increasingly interested in doing so. There was, therefore, the prospect that he might leave Gulf and take the Kurdistan project with him.

419. Mr Kozel's view was that, if the Gulf Board wanted to participate in the Kurdistan opportunity, it needed to start paying the invoices for expenditure incurred in relation to it because it was requiring expenditure to be made which was not necessary in order to decide whether to go ahead with the project. On **15 November 2006**, he emailed Mr Hinderliter, the head of accounting at Texas, to tell him to send back two recent invoices to Gulf because Gulf was "*taking over the project*", which should, he said, have read "*taking over the expenses of the project*". On **16** and **17 November 2006**, there was an exchange of emails between Gulf's executives (not including Mr Kozel) which discussed what should now happen for Gulf to "*take over*" the project. The main issue was to ascertain the feasibility of getting a licence. As to that Mr Patrick asked "*Is the original requirement for an American group still applicable (if so are we wasting our time?)*".

[44] The inverted commas are in the email.

420. On **22 November 2006** Dr Hawrami emailed a model PSC to Ms Berry. On **24 November 2006**, Mr Patrick emailed Mr Kozel to insist that they needed to "*finalise the partnership arrangements*" with Texas next week. Mr Kozel responded saying:

> "*there is not much to finalise. I asked you to finish the paperwork with gkp assuming all interest and that tki would be willing to support if a us company is needed. I will be happy to have tki sign the amendment when it is prepared.*"

421. Mr Kozel's evidence is that, at this stage, he was in a very uncomfortable position. He knew that Dr Hawrami (a) wanted a US company, (b) was negotiating with Texas, and (c) would not accept Gulf, a non US company, instead of Texas. He was about to leave Gulf, from which he regarded himself as being pushed out, and did not want an interesting project to be lost if it was denied to Gulf. At the same time he was being put under immense pressure by the Gulf Board, with whom he was scarcely on speaking terms, to secure a Gulf participation, in accordance with the understanding recorded in the draft minute in June (see para 370), and did not wish to appear to be obstructive. Gulf would not accept him telling them that the offer was only open to a US company. To get them off his back he decided he would take the proposal to the Texas board, which would have to decide whether to accept it. It would also be for Dr Hawrami to decide whether the proposal was acceptable to the KRG, which, in Mr Kozel's understanding, it would not be. If there was to be a transfer to Gulf of the whole of Texas' interest Excalibur would have to consent as well and Mr Kozel reckoned that they would not consent to a transfer of Texas' interest because the American flag would be lost. By proceeding in this way he thought that he was keeping his options open. When he wrote the email he was, he said, being a touch sarcastic – as a sort of jibe about Gulf assuming that it could be involved. In essence he was going through the motions of 100% transfer, anticipating, rightly in the event, that it would not be acceptable to Excalibur or the KRG.

422. Excalibur submits that this is nonsense. The reality is that Mr Kozel was recognising that Gulf should now formally take its place as leader of the consortium of which it was already the effective leader.

423. I accept Mr Kozel's evidence. He was about to leave Gulf and would not have been happy for the project, which was at that stage a Texas project, simply to pass to Gulf, who, as matters stood, could not be on the PSC. However, I am not sure that he was being sarcastic; any sarcasm would not be apparent from reading his email and it seems to me that his approach involved misleading Gulf as to, at any rate, his preparedness to assign.

The draft assignment of 24 November 2006

424. On **24 November 2006** Mr Patrick sent a revised draft assignment agreement to Mr Kozel. He said:

> "*This assumes GKP will assume TK's whole 70% interest. We need to agree whether this is feasible in the context of the apparent wish to have a "US-lead" group....We would also need Excalibur's consent to the transfer of the whole equity as TK's existing right is only to transfer part of it.*

> *Either way, I think this is close to what we need. Let me have any thoughts on i[t] from your side.*"

The fact that the draft was a 100% assignment was of some help to Mr Kozel. A 100% assignment would require Excalibur's consent and, if that was refused, he would avoid the confrontation to be expected with the Board of Gulf if Texas refused.

425. On **28 November 2006**, Mr Patrick emailed Mr Kozel to say that, if he was happy to sign the draft, which transferred the entire Texas interest to Gulf, then "*GKP would pick up all costs from now on and would reimburse Texas Keystone's past costs*." The idea of Texas bowing out with nothing other than payment of its past costs (a position which in discussion with Mr Guest Mr Kozel had said was inadequate) did not appeal to Mr Kozel. At this stage he wanted the deal to stay with Texas.

The first draft of the PSC

426. On **30 October 2006** Mr Wempen had sent to Mr Kozel the Council of Ministers' draft of the KRG Petroleum Law which had been produced on 21 October 2006 together with an explanatory memorandum. This included details of the statutory requirements for participants. On the same day the Texas proposal of 13 October 2006 (see para 413) which had been sent to the wrong email address and not received by the KRG was re-sent to Azzat for the Minister. On **12 November 2006** Texas sent a further letter to him asking for a meeting to consider the Texas proposal in order to begin negotiations for an exploration contract[45].

427. On **22 November 2006**, Dr Hawrami emailed a model PSC to Ms Berry inviting a proposal for Shaikan (now Sheikh Adi) and Gulley Keer (now Shaikan) but not Atrush. He said that the proposal needed to include a signature bonus and made it clear that the amount would be at least $ 10 million to $ 15 million as well as production bonuses and other commitments. He said that the KRG would be happy to proceed to completion in December. It was also clear from the model PSC that contractors would be required to make a very substantial investment including a minimum exploration programme and phased payments of production bonuses. Mr Kozel circulated Dr Hawrami's email and PSC to Mr Wempen.

428. This was a very important development. From this point onwards Mr Wempen was aware that the parties to a PSC would be likely to have to pay a signature bonus within 30 days of signature as the model PSC provided. The 22 November email did not make clear whether the bonus was for each or for both structures. But at the lowest Excalibur would have to raise $ 3 million in short order. In his evidence Mr Wempen said he had complete confidence in being able to raise whatever sum of money was needed "*given sufficient documentation*". In discussion with Mr Kozel he indicated that Excalibur would be able to come up with its share of the bonus.

[45] Meanwhile Mr Wempen had in an email to Mr Kinnear wrongly blamed Mr Kozel and Dabin for the failure to sign any PSC when the delay arose because Dr Hawrami was preparing for negotiations with the Federal Government about the new law.

429. In December 2006 Dr Hawrami was due in London and on **6 December 2006** Texas emailed him to ask to arrange a meeting to give a presentation on Demir Dagh and to finalise the discussions in relation to Shaikan and Gulley Keer.

Gulf Board Meeting 15 December 2006

430. On **15 December 2006** the Gulf Board met in Zurich. It noted RAK's interest in taking over Gulf. This interest arose, at least in part, because Sheikh Sultan Al Qassimi was never happy with the public listing of Gulf, which meant that the board had to be reformed to reflect various regulatory requirements and led to the removal of some of his family members. The takeover would be a means of regaining control of the company.

431. In relation to Kurdistan the Board, according to the minutes, agreed to pursue negotiations to secure on acceptable terms the areas offered by the KRG to Gulf and it was proposed:

> "*that the company should conclude the proposed agreement to assume the current 70% interest of Texas Keystone in the Bidding Agreement with Excalibur Ventures by repaying the documented past expenses of approximately $250,000 funded by Texas Keystone to date. TK declared his interest as a 33% shareholder of Texas Keystone and then confirmed that Texas Keystone had agreed to this. It was RESOLVED by the board, with the exception of TK, that this represented a fair and reasonable basis for assuming a 70% interest in the application and should conclude this agreement with Texas Keystone.*"

Mr Kozel's evidence was that he did not confirm that Texas had so agreed. This is likely to be correct since the Board of Texas had not agreed this and he did not have the authority to commit Texas by himself. But he may well have said that Texas would agree (as a few months later they did) or that he would get them to agree.

432. Although he was due to leave by December 2006, in the light of the fact that a suitable successor had not been selected and the approach from RAK, it was thought to be better for him to stay as CEO until the deal had been completed.

433. On **19 December 2006** Mr Mackertich circulated within Gulf a Kurdistan proposal for submission to the KRG. This included costings and a work programme for the Gulley Keer and Shaikan areas. It gave the prospects of success as 21%.

2007

434. In early 2007 the bidding process for exploration blocks in Kurdistan was on hold as Dr Hawrami was negotiating a Federal Petroleum law.

435. Texas itself was becoming increasingly interested in pursuing exploration prospects in North America and, in particular in the Marcellus Shale formation in Pennsylvania, West Virginia and New York, which was amenable to "fracking"[46]. Texas' increased

[46] The first Marcellus Shale wells were dug in March or April 2007 and Texas must have decided to do that about 3 months before. The results were "*good but not great*": Robert Kozel. Range Resources was having great success.

interest in moving away from a high risk exploratory play in remote Kurdistan thus began to tally with Gulf's increasing interest towards it. Mr Kozel discussed with his brother Robert a possible assignment by Texas of all or some of its interest to Gulf.

436. On **15 January 2007**, Mr Kozel forwarded the draft assignment of 24 November 2006 to Robert Kozel and Steve Goda at Texas. Mr Kozel asked for the draft to be passed to Mr Wempen.

437. On **22 January 2007** Mr Wempen emailed Mr Kozel to say that matters were on hold because of the draft law in Baghdad and asked him to "*let me know your thoughts on strategy, including whether you want to use Gulf Keystone instead of Texas for Iraq, and whether you want to look at other portfolio options ventured by Iain while we wait for Iraq to break, such as Uzbekistan*." On **24 January 2007** he emailed Mr Kinnear to say "*We signed a deal with Texas Keystone, which will have to be expanded to include Gulf Keystone and will have to include other properties besides Kurdistan now, per our MOU, discussions, etc.*" These communications are not consistent with any belief or understanding that Excalibur contracted with Gulf from the outset.

438. On **24 January 2007**, Mr Kozel told Mr Patrick that the amendment to the bidding agreement had been sent by Texas to Mr Wempen. On **26 January 2007**, Mr Patrick emailed Mr Wempen asking him to sign this amendment. He explained that "*This brings Gulf Keystone in as a partner **in place of** Texas Keystone*." Mr Wempen said that he would check the mail and send a copy.

439. Mr Wempen was aware that Mr Kozel was having difficulties with the Gulf Board and that Gulf wanted to take over the deal. On **26 January 2007** he told Mr Kozel that he could transfer 95% unilaterally but that the Kurds had expressed a preference for and, he believed, still wanted a US company to lead the consortium.

Gulf Board Meeting 3 February 2007

440. On **3 February 2007** the Gulf Board met in Dubai. The minutes record that Gulf was waiting for Texas to sign the assignment agreement and that Mr Kozel would try to chase it up. The board decided to open an office in Erbil and that Mr Samarrai should be the Country Manager. Mr Kozel agreed to step down as CEO when requested and to continue as a consultant thereafter as requested.

441. On **28 January 2007**, Mr Wempen emailed Azzat. He said that he "*ke[pt] telling Todd to be patient*" and that "*Todd's board gave him a very very hard time for not closing the deal. Our investors are doing the same to us.*" The latter was not true. There were no investors doing that. At most there were contacts such as Mr Halpert wondering what was going on.

The Fund

442. On **8** and **9 February 2007**, there was an email exchange in which the Wempen brothers argued about whether a fund was the best way to proceed to raise finance. Mr Wempen expressed himself frustrated about trying, and failing, over 4 years to raise funds on a "*deal by deal*" basis, and was adamant that "*we need a fund to get started with it*". Eric Wempen's advice was: "*Enough of 'the fund' stuff*". In effect he was

saying – rightly – that Mr Wempen created an additional problem for himself by going down the fund route, because Mr Wempen had no experience of fund management. Mr Wempen was insistent that "*these guys*"[47] were insistent on a fund idea. He went on:

> "*We are already working with Gulf Keystone on putting together deals in Uzbekistan and Kurdistan. We are packaging the deals. We have to come up with 30% of the financing for those deals. It will be a great thing when or if the deals ever close, except for the* ***terrible fact*** *that we will face a capital call when the deals close...we need some backup, unless UBS promises to back us when the capital calls come through*."

443. As is apparent Mr Wempen was aware at an early stage of the need to find a sizeable amount of money as soon as any PSC was signed. In the spring of 2007 he made some efforts to get funding in place including looking at raising money via his Thames Chesapeake fund. There was no realistic prospect of this. Nor was there ever any prospect of UBS (or any other bank) providing debt finance for an exploration project such as this.

RAK proposed takeover of Gulf

444. On **6 February 2007** Gulf made an official regulatory news announcement of the receipt of an approach to it to purchase its entire share capital. The possibility of such a takeover had first arisen in mid-December 2006 and Sheikh Sultan Al-Qassimi had declared his interest at the December Board meeting. The announcement did not identify the bidder. Mr Wempen's immediate reaction was to tell Mr Kozel, in an email of **9 February 2007**, not to sell Gulf until the deal in Kurdistan had been closed.

445. On **11 February 2007**, in an email dealing with the idea of raising a fund, Mr Wempen emailed Mr Kinnear:

> "*You had also mentioned that Todd had sent me something in the mail about* ***revising*** *the agreement to put Gulf Keystone in the lead as an affiliate of Texas Keystone, but I never received it. It would be nice to have the agreement revised to say Gulf Keystone if the[y] want to switch it over, since Gulf is an international public oil company and Texas is a private US gas company*."

This is yet another indication that Gulf was not yet a party to the Collaboration Agreement.

446. After several weeks of discussions, on **16 March 2007** the Gulf Board approved the terms on which it would recommend the offer to the Gulf shareholders. The official public announcement that recommended the takeover was not made until **13 April 2007**. As part of its due diligence, RAK investigated Gulf's contracts, and asked when Gulf would enter into an agreement with Texas and Excalibur on the Kurdistan opportunity: RAK was told that no agreement had yet been signed between Gulf, Texas and Excalibur.

[47] It is not clear whom he meant. Mr Wempen thought it was Mr Kinnear which does not seem likely.

Dabin

447. On **4 March 2007** Azzat reported to Mr Kozel on a technical trip which Mr Mackertich and Mike Adams of Gulf had made to Kurdistan. He sought a contract between Gulf and Texas and the Dabin Group. Mr Kozel was surprised at this since he knew that Dabin was Excalibur's partner, and did not want to get involved. In the end nothing resulted from the approach, although Mr Patrick and Mr Mackertich had thought it would be helpful to have Dabin committed to the project.

The proposed assignment to Gulf

448. On **1 March 2007**, Mr Parsons emailed Mr Patrick to say that he had spoken to Mr Kozel about Iraq and told him that the assignment agreement transferring Texas' interest to Gulf had to be:

> "*signed sharpish if only for the obvious reason that, if Jewel* [RAK's acquisition of Gulf] *goes ahead, we are representing this as being ours when we currently have no legal interest whatsoever*."

This was another recognition that Gulf was not a party to the Collaboration Agreement.

Texas signs an assignment to Gulf

449. In the light of Texas' increased interest in the Marcellus Shale Robert Kozel signed, on behalf of Texas, the draft Assignment Agreement for the transfer of the whole of Texas' 70% Consortium Interest to Gulf. He also signed a Deed of Adherence in the form prescribed by Schedule 4 to the Collaboration Agreement on Texas' behalf. That signature simply acknowledges delivery of the Deed. He had previously asked counsel to review the assignment agreement and some changes had been made. Mr Kozel had also emailed his brother with proposed revisions.

450. On **9 March 2007** Mr Kozel forwarded these documents to Mr Patrick. Excalibur's consent was (as Texas realised) needed if this transfer (of the whole of Texas' interest) was to take effect. Accordingly on or around 9 March 2007 Steve Goda sent copies of the transfer with attached Deed of Adherence to Mr Wempen for Excalibur's signature.

451. Mr Wempen did not give that consent. Nor did Gulf execute the Deed of Adherence. On **15 March 2007** Mr Wempen emailed the documentation to his brother for review. On **16 March 2007**, he emailed Todd Stevens of Occidental attaching the Thames Chesapeake term sheet, and sought his thoughts on the document. As the email noted "*At this point, we have an agreement signed with an independent for co-investment on the deal we discussed, and wish to start lining up sources to back us when the deal closes*". There was no response.

452. At this stage Mr Wempen did not know who was seeking to acquire Gulf. On **21 March 2007** he mailed Mr Kinnear to ask him who it was and in a further email of the same date told him:

> "*You may wish to have Ali put the pressure on Todd to NOT assign the Kurdistan deal to Gulf. That would give us maximum control.*
>
> *I have not signed the acknowledgment yet, and they can withdraw the transfer agreement with a simple notification...*"

453. Also on **21 March 2007** Mr Wempen emailed his brother with a draft email to Mr Kozel expressing concern at an assignment of Texas' entire interest to Gulf "*coupled with a change in management that might be disadvantageous*" and floating the idea of a buyout clause in the event of a management change at Gulf. Eric Wempen advised his brother to wait before sending that letter (which was never sent).

454. On **22 March 2007** Mr Kinnear replied to Mr Wempen. He expressed concern about what could happen if Gulf was taken over and the Kurds did not like the new buyer.

455. It is plain from these communications that, even before the meeting of March 23 2007 – see para 457 below – Mr Wempen and Mr Kinnear were against Texas assigning the deal to Gulf. Mr Wempen's idea, as he acknowledged in evidence, was to keep the agreement with Texas alone. This stance is wholly inconsistent with Gulf already being a party to the Collaboration Agreement.

456. By **23 March 2007** Mr Wempen was in Washington having attempted to raise interest in his fund with Mr Javellana of Deutsche Bank in Los Angeles. They were not interested in a fund, nor was anyone Mr Javellana called. He met Mr Franchi as well. Nothing came of this either.

The March 23 meeting

457. On Friday **23 March 2007** there was a meeting between Mr Kinnear and Mr Al-Qabandi. Mr Kozel, who was engaged with the RAK takeover, did not attend.

458. On Saturday **24 March 2007** Mr Kinnear reported to Mr Wempen that Gulf was to be taken over "*by a crew of Arab UAE investors...It would be disasterious [sic] for our venture for them to appear complete with flowing robes and headgear in Kurdistan.*" Mr Kinnear set out what was needed from Excalibur. This included:

> "*...A letter from Excalibur to Gulfkeystone (for attention Todd) stating that we do not agree to any alteration of the agreement as it will jeopardise the current talks and that we are saddened that after 2 years of work, the insensitivity and lack of understanding of the main client requirements have not been understood. We will not agree to any transfer and wish the status quo to remain until the deal is up and running. I will assist with this.*
>
> *..We need a second letter from your Kurdish end* [i.e. Dabin] *that I suggest we draft and get them to sign sent to rei[n]force this...*
>
> *We need to speak, no urgency, but please do NOT agree to the name change on the agreement. That is critical. In fact please do not send anything until we have spoken.*"

459. There is a dispute as to whether Mr Kozel was present at this meeting. Mr Wempen, who was not at the meeting, says that Mr Kozel was present. Mr Kozel says that he

had agreed with Mr Al-Qabandi that Mr Al-Qabandi should tell Mr Wempen what was happening, namely that Excalibur was being asked to consent to an assignment to Gulf which would prejudice the project because Gulf was not US owned; that he might have met Mr Kinnear in passing at Gulf's office; but he was not at the meeting proper, being involved with the RAK takeover.

460. On Wednesday **21 March 2007** there had been a number of relevant email exchanges. Mr Kinnear emailed Mr Wempen to say that Mr Kozel was meeting with the Minister on Thursday 22 March (as he did – at a seminar in London) and he hoped to meet with Mr Kozel on Friday 23 March and added "*I have spoken to Ali about chasing an ghost* [sic] *called Todd and I will info you*". Mr Kozel emailed Mr Kinnear asking for a time when he could call him or meet up. A little later Mr Kozel told Mr Kinnear he had earmarked Friday for a meeting and invited confirmation. Mr Wempen suggested to Mr Kinnear setting up a conference call while "*you are meeting with Todd and Ali*". His email of **22 March 2007** to Mr Kozel said "*I had heard you were possibly meeting with Ashti today and Iain and Ali tomorrow*". Mr Kinnear's emails of **24 March 2007** reporting on the meeting observed that "*Todd & Ali will be working with us more* …" and refers to a six hour meeting, although that may have included lunch. The report of what was discussed uses the plural (e.g. the reference "*they now support us and will agree to leave Texaskeystone in control with them technical back up partner*.").

461. I have come to the conclusion that Mr Kozel is unlikely to be wrong when he says he did not attend a six hour meeting with Mr Kinnear. I accept his evidence that he was not at the meeting. Whether he attended or not it is clear that the idea of a letter came from Mr Kinnear, who was concerned at the loss of a US owned Texas and the effect of an Arab owned Gulf, although it served Mr Kozel's interests as well, since he did not want the deal to leave Texas. Mr Kinnear reiterated the need for two letters in an email to Mr Wempen on **25 March 2007**. Mr Wempen emailed Mr Kinnear on **26 March 2007** to say "*We should keep the deal with Texas if at all possible*". Mr Kinnear replied that "*we need*" a letter from "*your mates in Kurdistan*" saying the same thing. Mr Wempen agreed to write the Excalibur letter.

Excalibur declines to consent to the transfer – first letter

462. On **27 March 2007**, in an email entitled "*Please keep this deal at Keystone – I am attempting to secure the new bid format*", Mr Wempen informed Mr Kozel that any bid should be made in the name of Texas and not Gulf. He said:

> "*When you do bid, I highly suggest you bid under the name of Texas Keystone, as I think it would be a mistake for the incoming owners of Gulf Keystone to take a lead role at this late stage, regardless of your future intentions. Let us wait until after a deal is signed to transfer, please.*"

463. In a formal letter attached addressed to Mr Kozel as Vice President of Texas he wrote:

> "*We are in receipt of your letter of March 6, 2007, stating your intention to transfer the share of Texas Keystone in our Joint Bid Agreement to Gulf Keystone.*

> *As we are currently at a crucial stage in our negotiations with the Kurdish Regional Government, while your intention is noted and appreciated, we suggest you delay any transfer until after the bidding process has been concluded and an award made. We believe a transfer at this time would unnecessarily complicate proceedings*."

464. Mr Wempen's position is set out in his witness statement:

> "*Transferring 100% of the interest to a non-US company would have meant that Texas Keystone could no longer be named as the operator and the KRG would no longer be able to say that the consortium was US-led. As I have explained above, it had always been made very clear to us by Dabin and the KRG that it was important that the consortium would be seen to be US-led. Furthermore, we were now faced with the prospect that Gulf Keystone would be sold to Arab investors whom we did not know… and I was concerned that this could cause major problems for the consortium's negotiations with the KRG….*"

465. I reject the suggestion that the stance being taken by Mr Wempen was largely Mr Kozel's idea, or his and Mr Al Qabandi's, or that Mr Kozel was procuring a reluctant Mr Wempen to object. I am also satisfied that, although it may not have been able to prevent it, Excalibur did not want a *partial* transfer to Gulf, at any rate after the identity of the bidder was known. A partial transfer of any size would have given rise to similar problems in relation to Arab ownership as a 100% transfer and loss of control.

The draft Thames Chesapeake term sheet

466. Excalibur's position at this time is reflected in a pitch page that accompanies the draft Thames Chesapeake term sheet dated **1 April 2007** where the "*Team*" is listed as Mr Franchi, Mr Kinnear and Mr Wempen, and the "*Public Partner*" as "*Texas Keystone Inc, Joint Bid Agreement Partner for Kurdistan, and potential partner for future acquisitions.*" No mention is made of Gulf.

467. The pitch was extravagant in its pretensions. The "*Concept*" was described as:

> "*Team [of] successful oil executives, analysts, and field developers from the Oil Majors to pursue small-midsize oil property, equity, and trading opportunities neglected by the Oil Majors due to size, location, or stage of development.*"

The existing team did not merit that description.

468. The pitch described "*Direct Investments in Oil Fields*" and said of Kurdistan "*Technical survey completed with conclusion of high probability of success*". No such conclusion had been drawn. Kurdistan was said to be "*In final stages of approval with Oil Ministry*", when it was not. The pitch made claims in relation to Uzbekistan ("*Producing fields located*") even though Mr Kinnear had previously told Mr Wempen that the target for Uzbekistan had fallen through. Under "*Private Investment in Public Equities*" it claimed "*imminent expansion of midstream capabilities (pipelines)*" – a reference which Mr Wempen could not explain. The document would

not have withstood any sustained scrutiny by a banker or investor. The pitch also referred to investments in oil fields in the Middle East, North America, Central Asia, and Africa; it mentioned Uzbekistan, the Congo, and Kurdistan.

469. The term sheet itself misleadingly referred to the Fund's two investment advisers – Excalibur and Fuel Handling Systems. Neither had any expertise in the provision of investment advice. Excalibur was described as an emerging market advisory firm investing globally from Washington whose two primary officers had "*a combined 35 years in the energy business including three years on the ground in Iraq and participation in previous deals as members of other entities in the Gulf, Central and South East Asia, Africa and Latin America*". Excalibur had no officers and, even if Mr Franchi is to be counted as one, there was no combined 35 years' experience in the energy business. Mr Wempen had none.

470. On **4 April 2007,** Mr Wempen emailed Mr Kozel to say that "*As it appears we are getting ready to bid, please send any further technical data you have, so we may provide further information to our investors. Please advise if Texas continues to lead the bidding, or Gulf.*" This was another example of Mr Wempen referring to (non-existent) investors when he meant potential investors whom he hoped to be able to attract using the network of contacts on his Rolodex[48]. These and similar statements caused people like Mr Kinnear and Mr Kozel to think that there were persons waiting to invest when there were not.

471. On **6 April 2007**, Mr Kinnear reported to Mr Wempen that Mr Kozel had submitted his resignation and noted they would be "*dealing with a crew of new faces all run from Dubai*" and that we should "*keep it as Texas*". Mr Wempen in reply said that "*We have been at this over a year, and Texas Keystone was supposed to bid five months ago. I am not sure how they managed to screw it up... Anyhow, I agree we need to keep it with Texas...*". This exchange shows that the idea of not having Texas assign to Gulf was very much a Wempen/Kinnear idea. I do not accept that all that was in discussion was the operatorship.

The April draft PSC

472. On **7 April 2007** Dr Hawrami emailed Mr Kozel a draft PSC for the Shaikan exploration block. The covering email read:

> "*Here is the Draft PSC again (hopefully it reaches you this time). To save time it also includes our best terms. The proposed area is also attached with coordinates. Please note that the name (Sheck Adi) is incorrect, it should say Sheckan [Shaikan]. The model PSA is a legal document, in line with the Law, so not negotiable, the terms reflect the prospectivity of the area which know [sic] to be very attractive indeed. So, please prepare all the required documents as soon as possible, and if in agreement then let me know we will meet to finalise soon.*"

473. On **17 April 2007** Ms Berry forwarded the draft PSC and a copy of Dr Hawrami's email to Mr Wempen and Robert Kozel. Mr Wempen read it, he said, as carefully as he could but did not recall looking at it in detail.

[48] Who exactly they were is unknown.

474. On **9 April 2007**, Mr Wempen emailed Mr Kozel to say that "*[s]o we may further communicate with our investors as to the timing and structure of this deal, please let me know whether you intend to submit under the Texas Keystone name (recommended) or Gulf, and forward both technical data and financial/valuation projections.*" There were no such investors; nor had there been any communication to further. As is apparent Mr Wempen intended to rely on Texas/Gulf's technical and valuation data.

475. The draft PSC left blank the names of the contractor entity. "*Contractor*" was defined to mean "*either jointly or individually, []*" so that if there were two they would be jointly liable. Article 9 required the provision by each entity constituting the Contractor of a guarantee to the KRG in respect of the Minimum Exploration Obligations, which were substantial: see Article 10.2. Mr Wempen's evidence was that he did not recall seeing the guarantee; did not think he would have had a problem if he had seen it; and that Excalibur was not going to provide a guarantee because it was a consulting firm with no assets working alongside an operator who would be able to provide one. This, itself, would rule it out as a party to the PSC.

476. Article 32 provided for a signature bonus of $ 15,000,000 and a capacity building bonus of $ 10,000,000 (the combination is hereafter referred to as "the signature bonus") payable within 30 days of the Effective Date, being the date when the conditions in Article 48 – signature by both parties and notice of ratification by the Prime Minister – were fulfilled[49]. It was thus apparent to Mr Wempen from then onwards that Excalibur, if on the PSC, was going to become liable to pay to the KRG at least some $ 7.5 million (30% of $ 25 million) within 30 days of any PSC becoming effective. In fact it would be jointly liable to pay the whole bonus (with rights of contribution). It was also apparent that Dr Hawrami had described the terms as non-negotiable.

477. In his evidence Mr Wempen suggested that Excalibur would not as between itself and Texas/Gulf be liable to make payment of its proportion of the signature bonus unless and until a JOA had been agreed between them incorporating a schedule of payments, which he said he anticipated signing fairly soon after the PSC. When such a JOA had been agreed (but not before) interest would accrue at 2% above LIBOR on due but unpaid amounts. He referred to the Accounting Procedure laid down in Schedule 1 to the Collaboration Agreement which provides for such interest on any advance required of a Party by the Operator but unpaid. In fact Schedule 1 does not have anything to do with unpaid bonuses. It relates to costs incurred pursuant to a program and budget in respect of the costs of data acquisition, joint studies and the preparation of any Consortium Bid and negotiation with the Government for any acreage: clause 5.2. It does not provide an indefinite "carry" by one Party of the other in respect of bonus obligations owed by the Parties to a PSC to the KRG.

478. In one version of the PSC sent to Mr Wempen on **5 May 2007** Mr Patrick had put the names of Texas and Excalibur on the PSC. In his oral evidence Mr Wempen said that he did not recollect discussing having Excalibur on or off the PSC with Mr Kozel and the likelihood is that at this stage he did not.

[49] In the PSC as signed the relevant Article was 47 and it called only for signature by the Government and the Contractor.

479. Mr Wempen's evidence was that Mr Kozel and Mr Kinnear were always aware of Excalibur's true financial position and that it was looking to raise a Fund or to obtain funds, on the back of the Kurdistan deal. They were, no doubt, aware of the fund idea, but, in my judgment, they were not, until much later, aware of Excalibur's true financial position, namely that it was a company without any assets, without what could properly be called backers or investors ready to go, or anywhere near it; or that the oft repeated references to "*our investors*" and the like were illusory.

480. When he received the draft PSC Mr Wempen emailed Mr Kozel telling him to "*send the bid in*". He asked for information to "*update our investors*" and "*strongly recommend[ed]*" that the bid should be made by Texas. Mr Wempen's support for a bid implied that Excalibur would shoulder its share of the obligations of a contractor under the PSC when they arose. In effect, as he agreed, Mr Wempen was indicating that Excalibur would be good for the money when the time came and able to pay by one means or another. He gave no indication to Mr Kozel that there would be any problem. The investors were, of course, non-existent.

481. On **17 April 2007**, Mr Wempen emailed Mr Javellana saying that he was heading out to New York to "*meet with our oil company partner for the Kurdistan deal*". He said that "*We are starting to move to closure now...*" and that "*We ... need fundraising partners to commit in coming weeks*". Nothing came of this and around this time he gave up trying to raise money in advance of the deal. As Mr Wempen put it:

> "*We needed to get a deal done first and we had Gulf next to us and if we had that we would be able to get capital without a problem and so we stopped exploring [financing] at that point.* "

482. That approach amounted in effect to a recognition that, prior to the award of a PSC, Excalibur had no prospect of raising finance. It also meant that it might well have no finance available to meet its share of the bonus when the "*terrible fact*" materialised.

The Meeting at JFK airport

483. On **18 April 2007** Mr Compton, a petroleum economist at Gulf, emailed Mr Kozel a detailed analysis of the terms of the PSC, the gist of which was that they showed a significant downgrade on what had been expected in early January, noting that their initial expectation was to pay in the region of $ 10 million "*for signature – and in some way stage this on milestones during the work program*" whereas the draft provided for $ 25 million per block within 30 days of signature. He suggested a counter offer of $ 10 million per structure on signature and $ 10 million on commercial success. Mr Kozel forwarded that analysis to Mr Wempen on 19 April just before their meeting on that day. There was some discussion of the terms at that meeting.

484. On the evening of **19 April 2007** Mr Wempen and Mr Kozel met at JFK Airport in New York for about half an hour. Mr Kozel was on the way back to London. The meeting was at Mr Wempen's suggestion. Mr Kozel handed over a package of data including geology work programmes, capital expenditure projections and contract information and contract economics based on an economic model of Mr Compton. He did some page turning. There was no detailed discussion, but it was apparent from what was there that a large amount of money had to be raised for the signature bonus

and work programme budgets. This led to Mr Wempen suggesting that Mr Kozel or his father or one of his brothers should join the board of an energy fund which would finance Excalibur i.e. the Thames Chesapeake Fund. Their presence would give oil and gas credibility. Mr Kozel said that he was not interested. Mr Wempen asked him to speak to his family.

485. Mr Wempen's evidence is that, in the telephone call arranging to meet at JFK, Mr Kozel invited Mr Wempen to work with him in any new company he formed after leaving Gulf; and that he repeated the offer, extending it to Mr Wempen, at the JFK meeting. Mr Picken QC suggested to Mr Kozel that this was because there was a possibility that Mr Wempen might agree to the transfer from Texas to Gulf and Mr Kozel wanted to keep him on side i.e. against the transfer. I think this is unlikely, even though Mr Wempen recorded such an invitation in an email to Mr Kinnear of 22 April 2007. Mr Wempen, with no oil or gas experience, would not be of use to Mr Kozel in any new company. Nor did Mr Kozel want, when poised to start a new company of his own, to embark on raising a fund for Excalibur. Mr Kozel was also quite likely to be able to persuade Texas not to transfer to Gulf if he was no longer part of Gulf. What Mr Kozel probably did indicate was that, if he formed a new company, Excalibur and that company could work together.

486. There was discussion about the consequences of any RAK takeover of Gulf. Mr Wempen was displeased that he had not been informed about the proposed RAK takeover in advance. Mr Kozel explained the constraints on reporting given that Gulf was a public company. Mr Kozel said that Excalibur should write formally recording its views, with reference to the public announcement of the forthcoming takeover and the fact that he was now going to leave Gulf. He did not tell him what to write.

487. On **20 April 2007**, David Mackertich emailed members of the Gulf Board (but not Mr Kozel) to report on a conversation he had had with Mr Kozel on his return from New York. He reported that Mr Kozel had said that "*Excalibur and Dabin had both provided letters saying that they would not accept a arab/muslim company (ie RAK) as operator*". He also recorded Mr Kozel as saying that "*Excalibur were good for the money and were well connected (with some big US wigs) assoc with the company*". Mr Guest replied that Gulf had a number of choices which it needed to discuss, but that "*In the meantime...we need to continue to adopt a position of total confidentiality and security in respect of all data and documentation associated with Kurdistan. No more information, data or thoughts must be shared with Texas Keystone...*". Gulf suggests that this is an unlikely approach for a company to have adopted towards another company which it is alleged to have used as its alter ego. I agree.

488. On **23 April 2007** Mr Wempen sent Mr Kozel the Thames Chesapeake term sheet and the Excalibur pitch page – see para 466 above – and invited Mr Kozel to have his name added to the Team. On **22 April 2007** he sent the pitch page to Eric Wempen and on **25 April 2007** he sent both documents to Mr Javellana following a discussion with him as to "*how we might support Deutsche Bank's energy strategy*" and offered to give a presentation. Nothing came of this.

489. On **22 April 2007** Mr Wempen told Mr Kinnear that he was having "*investor meetings*" in New York. This was a reference to meeting UBS in relation to an oil deal involving a company called QTC and a man called Taleb al Nabet with a purported offer of large quantities of Russian diesel over a 12 month period. This

deal, which may have been entirely illusory, came to nothing. In the email, he described UBS as "*the same people raising our fund*". This was completely untrue. UBS was doing no such thing.

490. In his witness statement Mr Wempen says that he "*believe[s]*" that he also had "*positive*" meetings with Rodman & Renshaw and David Halpert of Prince Street Capital around this time, and that Rodman & Renshaw "*invited me for further discussions should any deal be signed with the KRG*". There is no documentary evidence of any such meetings or discussions. There are no references in the disclosure to Rodman & Renshaw after 18 March 2006 when Cameron Smith sent a list of possible contacts to approach; and no references to Mr Halpert after an IRF document in 2005. If there were any such meetings, which I doubt, they did not come to anything.

491. On **23 April 2007** Mr Wempen emailed Mr Kozel: "*Send the bid!*".

The second Excalibur letter

492. On **25 April 2007** Mr Wempen emailed to Mr Kozel the letter which had been discussed at JFK under cover of an email which said:

> "*After careful consideration, and for the reasons stated in the attached letter, we find that we will be unable to approve transfer of the ownership interest of Texas Keystone, Inc, in our Joint Bid Agreement for exploration concessions in Kurdistan to Gulf Keystone Ltd.*
>
> *Please proceed accordingly with Texas Keystone in the lead and Excalibur Ventures as Joint Bid partners*."

493. The letter addressed to Mr Kozel as Vice-Chairman of Texas, said:

> "*Per our discussion of April 19, 2007 in New York, we cannot approve a transfer of your ownership rights in our joint bid agreement of February 16, 2006 with Texas Keystone, Inc., a US entity, to Gulf Keystone Ltd., a non-US entity.*
>
> *You asked and we approved the* ***option for you to sign over your interest*** *to Gulf Keystone, Ltd., with the understanding that you personally would be leading both companies and would maintain significant personal equity ownership in Gulf Keystone, Ltd., effectively making Gulf Keystone an affiliate of Texas Keystone, in our view. As Gulf Keystone has now been sold to non-US parties, US government Overseas Private Investment Corporation (OPIC) insurance will no longer be available for our agreement. This entire deal is contingent upon OPIC insurance and* ***the absolute requirement*** *of the Kurds for a US partner.*
>
> *We must therefore withdraw our approval for* ***any*** *transfer of ownership rights at the present time.*

> *If Texas Keystone, Inc., wishes to involve Gulf Keystone, Ltd. in a capacity other than owner or operator of record, then that is entirely within your purview, and we have no objection.*"

494. Mr Kozel asked Mr Wempen to address the letter to Robert Kozel as President of Texas with a copy to him as CEO of Gulf and Mr Wempen then did so.

495. This letter is (a) wholly inconsistent with Gulf already being a party to the Collaboration Agreement; and (b) shows that Excalibur/Mr Wempen was opposing any transfer of ownership rights (albeit Excalibur could not stop a 99% transfer) because of the KRG requirement for a US partner and the need for OPIC insurance, which would require a US controlled consortium. There is no indication that everyone knew that in reality Gulf was already party to the agreement and that what they were engaged on was a deceptive sleight of hand.

496. Mr Kozel discussed the letter with Robert Kozel. Mr Kozel told him that Mr Wempen felt that having an American company bid would maximise the chances of success; and that he could not force Excalibur to consent to the assignment. They agreed that Texas would continue to investigate the potential opportunities in Kurdistan and Texas' participation, if any, could be sorted out over time.

497. In the light of Excalibur's refusal, which amounted to a rejection of any offer of Texas to Excalibur to assign to Gulf, the status quo remained. Gulf was not party to the Collaboration Agreement and Texas was to pursue the Kurdistan opportunity, which, as Mr Kozel understood it, required at least 51% American interests and Texas as operator.

The Draft Memorandum of Agreement

498. On **26 April 2007**, Mr Patrick sent Mr Kozel and others at Gulf a draft memorandum of agreement to be signed by Texas, Gulf, Excalibur and Dabin setting out the possible terms for participation by Gulf in a bid for the "*Shekh Adi area in Kurdistan*" (now broadly the Shaikan block as shown in the map attached to the memorandum). The draft provided for a bidding group comprised of Texas (35%), Gulf (35%), and Excalibur + Dabin (30% to be split in unspecified proportions). It envisaged that the parties would sign a new bidding agreement based on the Collaboration Agreement, as part of which they would agree a form of joint operating agreement, the principles of which were to include the following: (a) Texas was to be the official operator and Gulf the technical operator; (b) the costs of the Joint Operations would be funded in the specified proportions; each party was to provide a guarantee or cash collateral for its share of the signature bonus and work commitment under the PSC; and (c) any party that failed to pay its share of costs by the due date would be liable to forfeit and lose its whole interest in the Area.

499. Mr Patrick's accompanying email expressed the understanding that the terms of the Memorandum were "*acceptable to all parties*" and asked Mr Kozel to confirm that they were agreed by Texas and to ask Dabin and Excalibur for their confirmation. The inclusion of Dabin as a party had not formed part of any previous proposal.

500. The exact genesis of the 35%/35% split is unclear. Since it would mean a transfer of only a portion of Texas' interest it would avoid the need for Excalibur's consent. It

would also mean that there was a majority US ownership. Mr Kozel's evidence was that this was simply Gulf's proposal; Mr Patrick and Mr Guest had now understood that there would be no 100% transfer of Texas' interest to Gulf and suggested that Gulf should now come up with another arrangement. Mr Kozel had said "make me a proposal". Mr Kozel objected to the 35%/35% proposal because Texas would, if it was to be operator, as the KRG then wished, want a 51% interest at least and he made that clear. Excalibur suggests that Mr Kozel had indicated that a 35%/35% split would be acceptable.

501. The likelihood is that Mr Kozel said that, because of the need for a US led consortium, only a minority interest could be transferred. Since Texas had been prepared to assign 100% of its interest Mr Patrick, who was promoting Gulf's interests, thought that assigning 50% of the interest, which would still mean US control, would be no problem.

502. On **1 May 2007** Mr Compton emailed to Mr Kozel, who forwarded it to Mr Wempen, his suggested terms for a proposed counter-offer for the PSCs for Gulley Keer and Ain Sifni. These envisaged in particular a $ 10 million signature bonus for each structure, making $ 20 million in all and production bonuses thereafter.

Mr Wempen announces Dr Hawrami's agreement to terms for PSCs

503. On **2 May 2007** Mr Wempen emailed Mr Kozel, saying that he had "*good news*" from Washington: Dr Hawrami had agreed to "*the attached terms verbally*". Those terms included total signature bonuses of $ 5 million for each of the Gulley Keer (referred to by the Ministry as Shaikan) and Ain Sifni structures, i.e. US $ 10 million in all. Mr Wempen asked to be sent the full contract with financial terms and geographic coordinates and told Mr Kozel not to contact Dr Hawrami separately. He said that "*our envoy*" was accompanying Dr Hawrami to Erbil that night. The "*envoy*" was, according to Mr Wempen, Mr Jonathan Morrow, a partner in the law firm Hill Stern and the senior legal adviser to the KRG's Ministry of Natural Resources. Mr Wempen had had discussions with him earlier in the year and again at this time, when, according to his evidence, Mr Morrow had told him over the telephone on a bad line as they were getting ready to get on the plane that Dr Hawrami had verbally agreed the terms. Mr Morrow was not an envoy of Excalibur. The email, Mr Wempen said, should have read "*his envoy*". Mr Wempen accepted that he may have misheard what Mr Morrow was saying.

504. I do not accept that Mr Morrow told Mr Wempen that Dr Hawrami accepted these proposals. The signature bonuses stipulated by Dr Hawrami on 7 April 2007 were $ 25 million for one block, and there had been no counterbid. It is impossible to suppose that he now agreed bonuses which were 80% less than bonuses previously said to be non-negotiable. What exactly happened is not clear; but Mr Wempen must have got the wrong end of the stick.

505. Mr Mackertich then drafted a letter to be sent to the KRG which set out the terms referred to in the penultimate paragraph, with a total $ 10 million signature bonus, which he sent to Mr Goda; Mr Kozel signed it (on Texas paper) and forwarded it by email to Mr Wempen.

506. On **4 May 2007** Mr Patrick emailed Mr Kozel an amended draft Memorandum which deleted Dabin as a party and asked that Texas and Excalibur sign it as soon as possible "*as you confirmed this morning that this is now agreed*". Mr Kozel replied "*I confirm that the structure is verbally agreed and I will persue (sic) appropriate signatures*". According to Mr Kozel he meant that it was verbally agreed at Gulf but not yet at Texas. I doubt this. Mr Robert Kozel's evidence was that he was content with the terms but understood that the percentages were not yet set in stone. Mr Kozel was trying to get Gulf off his back. What Mr Kozel said indicated to Mr Patrick (see the next para) that the 35% was agreed. Either he intended or was content for Mr Patrick to have that impression or he was intending to say that the idea of Gulf and Texas sharing an interest carved out from Texas' 70% was verbally agreed (as in effect Mr Robert Kozel had done) but leaving room for a different percentage (e.g. one which would leave Texas with at least 51% of the whole).

507. On **5 May 2007** Mr Patrick sent Mr Kozel a revised PSC which included the changes in the proposed counter-offer set out in Texas' draft letter to Dr Hawrami: see para 505. Mr Patrick wrote:

> "*...This is drafted with Texas Keystone and Excalibur as the partners, however you have confirmed that both these companies have fully accepted the Memorandum of Agreement which I sent to you yesterday which records that GKP has a 35% interest and that both companies will be sending back a signed copy of the Memorandum in order that this can move forward...*"

508. The draft PSC, which covered Gulley Keer (now Shaikan) and Ain Sifni, named the KRG, Excalibur and Texas as Parties and included an obligation on the latter two to pay the signature bonuses. On **5 May 2007**, Mr Kozel forwarded the PSC to Mr Wempen, saying "*Here is a DRAFT PSC that we have taken a stab at quickly amending as per your instructions*". The forwarded email chain included Mr Patrick's email in the previous paragraph with its reference to Gulf having a 35% interest.

Should Excalibur be on the PSC?

509. Mr Wempen said in evidence that he was somewhat surprised to find Excalibur's name on the PSC but at the time did not have any problem with it. At that stage he had not considered in detail how to structure Excalibur's participation. In his view, which he came to form some time in or after spring 2007, it did not matter whether Excalibur was to be a party to the PSC. He did not expect that it would necessarily have to be a party, and whether it was would depend on "*how our financiers would want to arrange things*". He came to agree that the bid for a Shaikan PSC could go ahead without Excalibur being a party since under the Collaboration Agreement Excalibur's interests could, as he thought, be recognised indirectly.

510. If Mr Wempen thought that the Collaboration Agreement gave Excalibur such an indirect entitlement, it was not as a result of any discussion with Mr Kozel (with whom he had not discussed the pros and cons of being on the PSC) nor was that understanding ever communicated to him. His misreading of the Collaboration Agreement was not induced by anything said or done by Gulf or Texas. Nor was it incumbent on Mr Kozel to have realised Mr Wempen's mistake or corrected it.

511. Texas and Gulf suggest that Mr Wempen never believed that the Collaboration Agreement entitled Excalibur to participate on an indirect basis. In reality he realised that Excalibur was never going to get on the PSC because the KRG would not accept it as a bidding party since it lacked finance or competence. He therefore pinned his hope on being able to participate in some way by arrangement with Texas/Gulf after the PSC had been won and finance would be easier to find.

512. I do not believe that in 2007 Mr Wempen gave any careful consideration or clear thought to the question whether and, if so, how, the Collaboration Agreement entitled Excalibur to an indirect interest. The proposition itself does not spring from its terms; and even Mr Park had difficulty in formulating how it might. Mr Wempen was never particularly interested in the exact terms of the agreement. He no doubt regarded Excalibur as entitled to participate in some way if Texas and/or Gulf became parties to a PSC as his reward for introducing the deal, in a manner to be decided and subject to Excalibur bearing its share of the concomitant obligations at some stage[50]. He assumed that, in the event that a PSC was obtained, the funds would follow the deal. But how, if at all, any legal entitlement to an interest arose either from the Collaboration Agreement or the conduct of the parties, was not something to which at the time he gave much, if any, thought. So far as the documentation goes the idea of taking an indirect interest seems first to have been articulated – by Eric Wempen – on 13 November 2007.

513. I do not accept that it did not matter to Mr Wempen whether Excalibur was on the PSC or not. What happened, in my view, is that it became increasingly apparent to him that Excalibur would have the greatest difficulty in financing the obligations of a party under the PSC and in satisfying Dr Hawrami of Excalibur's suitability. It had no assets of its own to speak of and, at some time in the spring, Mr Wempen had abandoned the idea of raising money in advance of the deal. It was, therefore, in Excalibur's interest not to seek to become a party originally (or, at any rate, in early 2007 to defer any decision) in the hope or expectation that, with the PSC signed, it could raise funds and participate in the venture either by a farm in (so that it became a party) or in some other way. There may also have been other reasons why he came to regard it as in his interests for Excalibur not to be on the PSC: see para 928.

514. Mr Wempen immediately replied to Mr Kozel on 5 May 2007 "*to correct any misunderstandings*" and to make clear that:

> "*...at this time Gulf Keystone* ***is not part of this deal.***
>
> *I have no message from Iain [Patrick] about a 35% interest for GKP.*
>
> *The deal is between Texas Keystone, Excalibur Ventures, and the Government of Kurdistan.*"

515. Mr Wempen's evidence was that this was all a "*branding issue*", whatever that means. This email, in which, according to his evidence, Mr Wempen did not say anything he did not believe to be true, is, like so many others, inconsistent with the idea that Gulf was the main or "real" partner in the consortium in which Texas'

[50] He was later to refer to Excalibur having "*a participation set aside through origination activity*": see para 906.

participation was "*cosmetic*". There could scarcely be a plainer denial – in an email to which the KRG was not privy and where no cosmetics were needed – of any current interest of Gulf in the deal. I do not accept that all that Mr Wempen was saying was that the current PSC did not name Gulf. In the end Mr Wempen accepted in his evidence that he was anxious to avoid even a partial transfer to Gulf at this stage because of the possible consequences of an RAK takeover, subject to the qualification that he had no problem with "*split issues being resolved later on down the line*".

516. On **6 May 2007**, Mr Patrick emailed Mr Kozel again seeking the signature of Mr Wempen and Mr Robert Kozel to the Memorandum of Agreement "*before we go any further*". Mr Kozel duly emailed them a copy of the draft memorandum, which set out the proposed Texas 35%/Gulf 35%/Excalibur 30% split.

517. On the same day Mr Wempen replied to Mr Kozel:

> "*I understand your eventual goals, but right now I think it prudent to remain consistent with our originally broached TKI-EXV deal. Let us see what the Minister comes back with this week. His main issue should be with the terms, not the participants. Naturally you will have to accommodate GKP and I will have to accommodate Dabin, per our respective promises to our partners. Personally, I recommend this be done after the next stage, as it would complicate things to introduce new split issues now.*"

This email also contradicts the idea that Gulf was then a party to the Collaboration Agreement. The original Texas - Excalibur deal was to stay for the moment.

Gulf Board meeting 10 May 2007

518. On **10 May 2007** the Board met in Zurich. Mr Kozel participated by telephone from Paris. Mr Patrick had circulated a note in advance dated 9 May 2007 reporting that Excalibur and Dabin had rejected the "*previous understanding*" for Gulf to take over Texas' 70% interest in a bidding consortium, and had instead offered a non-operated 35% interest, which Mr Kozel had confirmed that the parties had agreed. The note included the memorandum providing for a 35%/35%/30% split.

519. The minutes record:

> "*Kurdistan – Mr Kozel confirmed that Texas Keystone had agreed to assign its 70% interest in the Kurdistan application and operatorship to the company but that its partners had not agreed to this due to the uncertainty over the ownership of the company and their preference for Texas Keystone as a US company to retain a meaningful role in the group. It was agreed that Mr Kozel would provide copies of the letters which he had received from the partners stating this position. The partners' counter proposal was for the company to have a 35% interest as non-operator. The terms for such participation have been set out in a Memorandum of Agreement (included in the Board Papers) prepared by the company, which Mr Kozel confirmed was currently being reviewed by the partners' lawyers and undertook to ask the partners to respond as soon as possible. It was agreed that the company should not incur any further material cost on this venture until it had received written confirmation of its right to participate in the application*."

These minutes are not wholly accurate. Excalibur (the "partners") had not just failed to agree but had strongly rejected any transfer to Gulf – albeit in emails of which Mr Patrick was not an addressee.

520. After the meeting Mr Patrick emailed Mr Kozel as follows:

> "*As discussed earlier GKP's board has asked for written clarification of Texas Keystone and its partners' position with respect to GKP's participation in the Consortium applying for the Gully Keer area in Kurdistan.*
>
> *Specifically:*
>
> *1 Please forward copies of the letters from Excalibur and Dabin in response to the previous proposal for the transfer of a 70 per cent interest to GKP*
>
> *2 Please send confirmation from all partners of their agreement in principle (or not) to the latest Memorandum of Agreement which we understand their lawyers are now reviewing (subject to any detailed comments from lawyers)*
>
> *3 Can you clarify how and when GKP would acquire a legal interest under the PSC. Our strong preference is to sign and contribute financially from day 1 but if this is not possible we need to agree the process in advance to ensure that title and funding are consistent*
>
> *4 Please provide information on the corporate structure, including the shareholders, management, activities and financial resources of all partners. Full information on GKP is on our website from which the partners can evaluate GKP.*
>
> *As we need to determine GKP's strategy for Kurdistan an early response would be appreciated.*"

521. As is apparent, there had been no assignment to Gulf; which, as matters stood, would have no legal interest under the PSC.

The Advocacy Questionnaire

522. On **31 May 2007** Excalibur submitted an application to the US Department of Commerce requesting advocacy assistance in relation to Shaikan/Gulley Keer and Ain Sifni. The email accompanying the application said the following:

> "*...we have been working with Texas Keystone, a US oil company, and our local partner, the Dabin Group, conducting geologic surveys of and negotiating with the government of Iraqi Kurdistan. We have submitted a bid for the Gulley Keer (Sheckhan) and Ain Sifni exploration blocks in Iraqi Kurdistan, and are requesting advocacy from the Department of State with the provincial government of Iraqi Kurdistan in Erbil, Iraq in this regard.*
>
> *Our US consortium consists of Texas Keystone as operator and Excalibur Ventures, a Delaware LLC, as financial investor. The Dabin Group of Iraqi Kurdistan, a local trading and investment company... holds a minority interest in the Excalibur Ventures portion of the bid and is our local partner.*

> *We are requesting advocacy from the Department of Commerce in order to level the playing field against non-US competition. We have received repeated verbal approvals of our project over the past year, but...the Minister of Natural Resources has delayed signing the final approval, and is allowing foreign state owned enterprises to bid on our agreed project. We hope to engage our own government to ensure our bid is able to compete in this new environment....*"

523. The Questionnaire itself, whose contents Mr Wempen certified to be true, described the project in this way:

> "*Exploration and production of petroleum resources in the Gulley Keer (Sheckan) and Ain Sifni blocks in Iraqi Kurdistan.* ***A completely US consortium*** *consisting of Texas Keystone, Inc. (TKI), a Pittsburgh, PA based US oil exploration and production company operating since 1988, and Excalibur Ventures, LLC a US advisory firm. The exploration blocks in question are estimated to have over 250 million barrels of oil, based on the Texas Keystone administered field survey of 2006 and 2007.*"

524. Question A 8 asked whether the applicant was bidding in partnership or in consortium with other companies and then asked for the "*Ownership/structure/control of consortium...*". Mr Wempen answered "*70% Texas Keystone, Inc., 30% Excalibur Ventures, LLC.*" Texas was described as the operator and Excalibur as investor. Dabin was mentioned as the local advocate and partner. The answer to question B 6 revealed that Excalibur planned to apply for OPIC insurance for the project once it was awarded.

525. Nowhere was there any reference to Gulf.

526. If, as Excalibur contends, Gulf was always the majority or real partner and Texas merely the outward face of the consortium and "*place-holder for Gulf*" this application was based on a lie. In fact it was not. The consortium at this stage was, by design, a consortium of Excalibur and Texas.

Developments in thinking at Texas

527. Robert Kozel, Mr Kozel and their father discussed the position of Texas in relation to Kurdistan from time to time. Robert Kozel's view was increasingly that, if Texas was to participate at all, it would probably only want to do so at the smallest percentage that it could negotiate, so as to preserve its capital for projects in the Marcellus Shale formation, which would be less risky, less capital intensive and, it was thought, potentially more profitable. The likely future costs of the Kurdistan project were becoming apparent and they would be substantial. Robert Kozel had reviewed the draft PSC with its bonuses and other commitments.

528. What split was possible, and with whom, depended very much on the attitude of the KRG. At around early to mid-May Dr Hawrami was indicating to Mr Kozel that participants in Kurdistan would need to have a big enough balance sheet, both because the financial commitments would be large but also because of the need to avoid criticism from Baghdad that the PSCs were not being made with serious players.

529. On **6 June 2007** Mr Kozel emailed to Mr Guest Excalibur's letter of 26 April refusing consent to an assignment by Texas to Gulf. By now his relationship with the Gulf Board had completely broken down and he was under serious pressure to secure Gulf an interest in Kurdistan. On **14 June 2007** he was sent a formal letter from Mr Parsons, the Gulf Chairman, setting out the Board's concerns and the lack of any "*satisfactory written confirmation of [Gulf's] right to participate*" and asking him to explain the status of all discussions and negotiations relating to his efforts on Gulf's behalf in respect of Kurdistan. Mr Kozel did not read the letter at the time. He told Mr Parsons to send it to his lawyers. Mr Parsons reiterated his request for a response at the Board Meeting on 19 July 2007.

530. In his evidence Mr Kozel described the letter as an attempt to rewrite history insofar as it stated that he had been entrusted with the task of concluding Gulf's participation in the Group. It took no account of the fact that he had declared his interest from the start and that it had been agreed that in relation to Kurdistan he would act for Texas. He had presented Gulf's proposal for an assignment to Texas. In the light of (a) the understanding recorded in the draft minute; and (b) the way Mr Kozel had kept his options open in respect of any transfer and (c) Gulf's increasing keenness to obtain all of Texas' interest, the letter is not wholly surprising.

531. On **14 June 2007** Robert Kozel emailed Mr Kozel and Mr Wempen a revised Collaboration Agreement reflecting (by an additional recital to the Deed of Adherence) the possibility of a transfer of half of Texas' interest to Gulf. Mr Kozel forwarded it to Mr Patrick and on **15 June 2007** Mr Patrick circulated a draft JOA between Gulf, Texas and Excalibur to Mr Kozel, Robert Kozel and Mr Guest. This provided for participating interests of 35%, 35% and 30%. All of this was soon to be overtaken by events.

Lobbying by Excalibur

532. On **14 May 2007**, Mr Wempen sent an email to Mr Keith Schuette (a consultant to Prime Minister Barzani and a contact of Mr Wempen) to arrange a time to hand over to him "*our proposal*" at his yacht before he went to the airport in Washington. A later email of the same day refers to the handover of a "*proposal packet*". Mr Schuette, who was introduced to Mr Wempen by Mr Behrens, is said by Mr Wempen to be a "*longstanding consultant to Prime Minister Barzani*", working between Washington and Erbil. He was a US army officer who had been an adviser to the Kurds. According to Mr Wempen's witness statement he was to take with him a copy of Texas' letter of 1 May signed by Mr Kozel (see para 505) to Dr Hawrami. But in his oral evidence Mr Wempen said that it was a big presentation, too large to email, written by him, before reverting to saying that it was the 1 May 2007 letter, with an accompanying folder of documents. It is not at all clear what Mr Wempen in fact delivered for Mr Schuette to take, and why it had to be delivered by hand. I assume that it was some form of presentation of the project.

533. On **23 May 2007**, Mr Wempen thanked Mr Schuette for "*bringing our offer to Nichervan*", i.e. the Prime Minister. On **24 May 2007** Mr Schuette reported that he had left Erbil after a few days because the PM and Dr Hawrami had gone to Baghdad but would return. On **6 June 2007** he replied to the 23 May email saying that he was en route back to the US "*essentially empty-handed*" because Dr Hawrami was away

most of the time and the PM said that lack of agreement on the oil law with Baghdad meant that it was not possible to finalize new deals.

534. On **14 June 2007**, Mr Wempen emailed Mr Behrends to say that his (Mr Wempen's) plane tickets were on hold and he wanted Mr Behrends to become involved in the deal, because Dabin was not getting the deal done. He suggested that if Mr Behrends was friends with "*Talibani's son*[51]*, maybe we should just go straight through him and forget about Ashti and the Deputy Prime Minister*". He also said that he had received "*interest in funding this thing from several quarters*". He had received no interest worth the name.

535. Mr Wempen also turned to Mr John Maguire (JM) of the Decapolis Group, who had previously worked for the CIA in Baghdad. He hoped that they would bring "*some pressure to bear on Dr Hawrami to sign our deal*". On **19 June 2007**, Mr Wempen emailed Mr Behrends about the need to talk to Mr Maguire. His email said that they were "*moving forward with both a good public and private diplomacy strategy*". Mr Wempen noted "*I think it would be best for me to talk to JM and address some specific issues regarding the private approach to the Barzanis. JM is taking off in a few days for Erbil, and we do not want to miss this opportunity. Schuette is apparently not going to hand our packet to the Barzanis, but John should, especially if we mention certain friends of mine*". Mr Wempen suggested initially that "*certain friends*" was a reference to Dabin. It is more likely that it was a reference to some US politicians, members of the Congressional Kurdish caucus or the like. PM Barzani knew Dabin, as Excalibur's agent, so mention of their name was unlikely to have any helpful effect. Later on 19 June Mr Wempen emailed Mr Behrends to say that he had been pushing to try to meet Mr Maguire before he, Mr Wempen, left "*so he could carry the packet*".

536. As is apparent from the previous paragraphs Mr Wempen was attempting to set up a parallel route to influence the KRG not involving Dabin. This may not have been a good idea. Dr Hawrami did not welcome this sort of alternative approach.

537. On **19 June 2007**, Mr Wempen emailed Mr Maguire. Mr Wempen described the consortium as including Texas, Dabin and Excalibur, with Texas as operator of record. It referred to a plan for Texas to accept a minority interest from Gulf. Excalibur was said to be a "*special purpose vehicle backed by international investors*". This was untrue – there were no such backers.

538. On **21 June 2007**, in response to some questions from Mr Maguire of 20 June, Mr Wempen wrote:

> "*The rights to operate are owned exclusively by Texas Keystone with Excalibur Ventures as a financial investor. We are both American entities, and only the two of us have any shares at present.* ***Texas Keystone is the majority shareholder in our joint venture.*** *Dabin brought us in to be an American led consortium, we always have been and always will be. The final investment will be insured by OPIC, which requires majority US ownership.*

[51] This was a reference to Qabad Talabani, who was the son of Jalal Talabani, the leader of the PUK and currently President of the Republic of Iraq. He was the KRG representative in the United States.

> *Todd Kozel, Vice Chairman of Texas Keystone ... ran both Texas Keystone and Gulf Keystone through 2006. This recently changed when RAK bought Gulf Keystone in a friendly acquisition, as you may have read in the press. In the interests of full disclosure up front, I was simply stating that Gulf Keystone, which is now owned by RAK, had been interested in backing part of the Texas side of the deal, that is, becoming a non-voting, non-operating financial investor.* ***This is currently under consideration and does not have to occur.*** *If it did occur it would not change the final signatories on the deal, nor voting rights. Gulf may or may not participate now, depending on the preferences of both partners, including us, and of course, the KRG. Excalibur Ventures has a separate agreement with Dabin to provide them with a minority interest in any Excalibur investment in Kurdistan, per previous agreement (a minority of a minority). This is compensation for their involvement and assistance. They do not have a voting interest and are not providing any investment. However, as local partner, they are present at the table during negotiations and have had significant influence on the deal.*
>
> *As for Gulf Keystone, if Arab investors are a problem for Kurdistan,* ***then we do not have to accept them...***"

539. On **19 June 2007**, Mr Wempen emailed Mr Behrends to discuss Mr Maguire and his company. Mr Behrends had forwarded to Mr Wempen an email recording that Mr Maguire had successfully brokered a PSC between an American oil company and the KRG. Mr Wempen said:

> "*They have apparently closed one more deal than we have, so that is a good enough record to run on.*
>
> *I have never head of an American company signing a PSC (DNO is Norwegian and Genel is Turkish, and they are the only two companies of record with deals), so apparently their deal was done under the radar, which is exactly how we want ours done, if at all possible.*"

540. When asked why he wanted the deal to be "*under the radar*" Mr Wempen suggested that it was because Baghdad had not approved the Kurdish deals, although later he said that he wanted the *negotiations* kept confidential which is not the same thing. He persistently failed to give any clear explanation of his reasons other than general statements about wishing to operate in as confidential a way as possible. The likelihood, as it seems to me, is that one reason why he wanted the deal to be "*under the radar*", so far as Excalibur was concerned, was so as to preserve his options for doing business in southern Iraq. He appears also to have been concerned that he might lose or imperil his top secret security clearance (then under, or about to be under review) and harm his political connections if his company was party to a PSC with the KRG – which was against US policy at the time.

Termination of the RAK offer

541. On **21 June 2007** Gulf announced that negotiations with RAK had terminated. This happened because the takeover had been conditional on the approval of the Algerian government and RAK was not prepared to make the $ 10 million payment which it required.

542. The effect was very marked. Mr Kozel, who had been wanting to leave, together with Mr Al-Qabandi and Mr Al-Khaldi, because they envisaged a different strategy, now thought it was those who had championed the takeover – (i) Messrs Parsons and Guest, who wanted to sell and get out; (ii) Sheikh Sultan Al-Qassimi, who wanted to take over the company through RAK; and (iii) Messrs Patrick and Cooper who had wanted a greater financial stake – who should consider their positions.

543. On **29 June 2007** the KRG published its final draft of the Oil and Gas Law.

Thames Chesapeake

544. On **1 July 2007**, Mr Wempen revised the Thames Chesapeake term sheet. He added a biography of Mr Kozel and a sentence to the body of the text: "*The fund is led by a management with deep global experience in energy, property acquisition and portfolio analysis*", a reference to Mr Kozel. There is a dispute as to whether Mr Kozel did in principle agree to join Thames Chesapeake. Excalibur points to the fact that Mr Kozel sent no email saying in plain terms that he was not interested. Mr Kozel says that he made plain that he was not interested; but that Mr Wempen was like a dog with a bone who would not take no for an answer.

545. I think it unlikely that Mr Kozel agreed to join the fund in principle. He had enough to be getting on with without raising a fund for Excalibur. There was a discussion between him and Mr Wempen on or about **5 July 2007** at which Mr Wempen went through the draft term sheet and a proposed service agreement between Excalibur and Mr Kozel under which he would act as managing director of Thames Chesapeake Limited Partners, both of which documents he mailed to Mr Kozel the next day. Mr Kozel may have said that he would think about it or that he would show the term sheet to his attorney, as a way of getting Mr Wempen off his back. On **6 July 2007** Mr Wempen emailed Mr Kozel the draft term sheet for forwarding to Mr Kozel's attorney saying:

> "*If you decide you like it, we may need to beef up your one sentence bio a bit on the term sheet …*
>
> *Thanks for coming on board.*"

Dabin

546. On **2 July 2007** Mr Wempen met Mr Kozel and Mr Al-Qabandi at lunch in London. They discussed Dabin's desire for an enhanced profits share and a separate agreement with Texas. Mr Wempen drafted an agreement between Dabin and Texas based on the Excalibur-Dabin agreement that afternoon under which Texas would pay Dabin 10% of Texas' net profits generated by the Kurdistan project and sent it to Mr Kozel and Mr Al-Qabandi. Mr Kozel forwarded it to his brother. It was never executed.

547. Excalibur still wished to maintain an exclusively US consortium involving only Excalibur and Texas. On **5 July 2007**, Mr Wempen emailed Azzat asking for a letter from Dabin to Mr Kozel setting out its insistence that Texas remain the lead company with Excalibur. He had discussed with Mr Kozel what needed to go into the letter. The draft provided by Mr Wempen read:

> "*Per our initial discussions regarding the strong Kurdish government preference for US companies and for the requirement of the Dabin Group that any oil exploration project we are involved in must have a US company as operator or record, we regret to inform you that we must maintain Texas Keystone as the lead company in our joint project with Excalibur Ventures.*
>
> *We welcome future involvement by Gulf Keystone in follow on investment and production activities but Texas Keystone must remain the operator of record.* ***We will be unable to support Gulf Keystone as a partner in Kurdistan at this time.***"

Mr Wempen wanted the deal to remain with Texas until it had been done.

548. As is apparent Excalibur had for a prolonged period refused to consent to Texas assigning any of its Consortium Interest to Gulf. That it did so is not only inconsistent with the case that Gulf was already a party to the Collaboration Agreement; but also with (a) Gulf having the ability to dominate Texas (or control it); or (b) the existence of a *de facto* joint venture or three way bidding consortium of Texas, Excalibur and Gulf by virtue of which all three participants owed each other fiduciary duties of loyalty. Excalibur plainly did not regard itself as under any such duty to Gulf. Given that Gulf was not a party to the Collaboration Agreement it was entitled to act independently of Excalibur, including bidding for a PSC by itself and would commit no breach of contract or tort if it did so.

The second visit to Erbil

549. At this moment Dr Hawrami invited Mr Kozel to go to Erbil for a meeting. He wanted to hold discussions with the six interested companies before the bid round got under way. Mr Kozel went there like a shot. He told Mr Wempen of the trip and Mr Wempen, who was in London, asked to come along. On Sunday **8 July 2007** the two of them, together with Mr Mackertich, left for Erbil.

Meetings on Wednesday 11 and Thursday 12 July

550. It is common ground that Mr Wempen did not meet Dr Hawrami on the trip. But there is a dispute as to the precise sequence of events.

551. Mr Kozel says that on the evening of **Wednesday 11 July 2007** there was a barbecue at Mr Berwari's house, to which Mr Wempen was not invited and at which neither Dr Hawrami nor Mr Mackertich were present. Either then or later on the trip Mr Berwari asked for an agreement with Texas. On **Thursday 12 July 2007** Mr Kozel met Dr Hawrami for dinner at his government residence during which Mr Mackertich gave a technical presentation. Mr Khaled Shah from the Minister's office was also there.

552. Mr Wempen says that there was a meeting between Mr Kozel and Dr Hawrami at Mr Berwari's house on 12 July 2007 which neither he nor Mr Mackertich attended. They both stayed at the hotel.

553. I prefer the evidence of Mr Kozel. It seems to me unlikely that he has wholly misremembered Mr Mackertich's participation at the meeting of 12 July or its

location. That meeting is referred to by Mr Mackertich in his email to Gulf colleagues dated **13 July 2007** (see para 559 below).

554. Mr Kozel's evidence was that at the meeting with Dr Hawrami Mr Mackertich gave a presentation in respect of Shaikan and Ain Sifni which Dr Hawrami said was one of the best he had seen. In addition to these Mr Mackertich had identified block K 38[52] as of interest. Dr Hawrami was not prepared to allow one operator to have 3 blocks. He wanted one block per operator, or at most two, because he wanted as many foreign flags as possible. He discussed the need for participants in the PSC to have big balance sheets, something he had mentioned to Mr Kozel before. Mr Kozel asked whether it would be possible to have two blocks with the participants' interests being split between the two, and suggested various partners including MOL, Lundin and Premier Oil. Dr Hawrami could not assent without consulting the PM and the next day he telephoned, having consulted the PM, to agree this in principle[53].

555. In the course of the meeting Excalibur's name was mentioned. Dr Hawrami did not say that Excalibur was not welcome. What he did say was that small companies were not of interest to him and that what he wanted was bigger companies. This signalled to Mr Kozel that Excalibur would struggle to persuade Dr Hawrami to let it on the PSC.

Reporting on the meeting Friday 13 July 2007

556. It is common ground that after the meeting with Dr Hawrami Mr Kozel told Mr Wempen that he had the impression that Dr Hawrami no longer needed to have a US company as operator; that Mr Wempen said that he would leave the final negotiations to Mr Kozel as well as the final split between Texas and Gulf; and that he said that it made no difference whether Excalibur was named as a party to the PSC.

557. Mr Kozel's evidence is that he came back from the meeting and reported that it looked strongly as if they would get one block; and that they were waiting for Dr Hawrami to get back to them (having spoken to the PM) on the possibility of two. He told Mr Wempen that the Minister did not think that a company like Excalibur would be acceptable on the consortium – he wanted bigger companies – and that Mr Wempen would have to get himself sorted out, with the assistance of Dabin and any other contacts, if he wanted Excalibur to be approved. It was in that context that Mr Wempen said that it was not necessary or made no difference to him whether or not Excalibur was on the PSC. There were drinks on the lawn but no celebration.

558. Mr Wempen's evidence was that after his meeting with Dr Hawrami Mr Kozel returned to the hotel with Azzat and reported that the deal was done and the details would be discussed the next day. A joyous celebration ensued. On the following morning – Friday **13 July 2007** – Mr Kozel and Mr Mackertich went back to the Ministry to give the technical presentation. It was on that morning that he was told by

[52] This block included Qadir Kararn and Udhairi, structures in which Mr Samarrai and Mr Clark had been interested in August 2006. The Gulf Board minutes for 19 July 2007 record that the presentation covered this block; but Mr Kozel's evidence was that it did not.

[53] This is reflected in a manuscript note, not in Mr Kozel's hand, which includes the words "*Ashti – pick one block – consortium acceptable*". Dr Hawrami had invited Mr Kozel and Mr Mackertich to pick a block out of Blocks 5 [Shaikan], 6 [Akri-Bijeel] and 38. The note also includes possible permutations of minority interests for those blocks, including Excalibur.

Mr Kozel that he had the impression that Dr Hawrami no longer needed a US company named as operator. Mr Wempen said that that was fine with him and that he left everything in Mr Kozel's hands – the final negotiations with the KRG and the final spilt between Texas and Gulf. He also said that it made no difference to him whether Excalibur was a named party to the PSC. In reply Mr Kozel said that he would not "*screw [him] over*" in Kurdistan. The group posed for a celebratory photograph in the parking lot (as they did).

559. I prefer Mr Kozel's account, which I found credible for a number of reasons. First, however positive the meeting, no deal was done, as appears from Mr Mackertich's email of **13 July 2007** which is much more modest. It records:

> "*...We had a meeting with the [O]il [M]inister which was very eventually happened in [T]hursday night/Friday am I gave a brief presentation to the [O]il [M]inister which was very well received – he was very impressed with the quality and depth of work that we had undertaken (pre award)...*
>
> *We are firmly in the running for an interest in at least at one block perhaps up to 3 – I also think we could make a move on some farm ins if we are quick...*"

560. Secondly, it seems to me unlikely that Mr Kozel and Mr Mackertich should have secured some sort of deal without making any presentation and then return to the Ministry after the deal to make one, let alone on a Friday when the Ministry would be closed.

561. Thirdly, Mr Kozel's explanation of the problem facing Excalibur in getting on the PSC provides the likely context in which Mr Wempen would have said that it made no difference to him whether Excalibur was on the PSC or not.

562. There is a dispute as to whether the conversation between Mr Wempen and Mr Kozel took place in the evening after the meeting or the next morning. Since the meeting went on until the small hours there is not a great deal of difference. The likelihood is that Mr Wempen was told about it as soon as Mr Kozel came back from the meeting. On the evening of Thursday 12 July Mr Wempen learnt from his brother that his mother had only weeks to live (both he and Mr Kozel recall that he was called to the phone after Mr Kozel had reported back when they were having a drink at a table or on the lawn) and he was heavily shaken by the news. Mr Kozel arranged the flight for Mr Wempen to return to the United States the next morning. He flew back to Los Angeles via London.

563. Mr Kozel accepts that there was an occasion when he told Mr Wempen that he would not screw Mr Wempen over Kurdistan. Mr Wempen says that it was as he was about to set off to the airport with Mr Mackertich. Mr Kozel does not recall when it was. I think that it was probably said at a later date in November 2007. In an email to his brother of 18 November 2007 Mr Wempen records the use of that phrase in the context of the dispute which then arose as to the terms of a Non-Disclosure Agreement.

564. Even if I am wrong on that, Mr Wempen accepts that he was not in this conversation seeking to effect any change in the legal position of Excalibur vis à vis Texas and Gulf nor did he think that Mr Kozel was doing so either.

565. After he had returned home Mr Wempen emailed Mr Kozel from Los Angeles on **15 July 2007** "*Did we get it*". Mr Kozel sarcastically replied "*Did we get what?*" Mr Wempen said "*R u kidding*". These exchanges shows that nothing that could be called a deal can have been thought to have been done in the evening of 12 July.

Cutting Excalibur out?

566. What happened in Erbil did not, in my judgment, mark the inception of, or prelude to, a cunning plan on the part of Mr Kozel to steal the deal from Excalibur, much less to do so by taking advantage of Mr Wempen's departure to see his dying mother. In a discussion that cannot have lasted very long Mr Kozel reported truthfully on the upshot of his meeting with Dr Hawrami and its implications for Excalibur. In response Mr Wempen volunteered the fact that he did not mind whether Excalibur was on the PSC or not.

567. Mr Wempen did not resile from that position at any time prior to the signature of the PSC. He was also content for MOL to be a party to the PSC. As Excalibur's Reply (para 8) and Mr Wempen's oral evidence confirm, he consented to Excalibur not being on the PSC. He was content to adopt that stance because, as he must have recognised, Excalibur would face great difficulties in getting on the PSC, and would probably have to postpone its participation (in whatever form) until it had raised funds once the PSC had been signed and the deal struck. Mr Kozel realised that, if Excalibur did not want to be on the PSC, that would mean that it would be withdrawing from the process provided for by the Collaboration Agreement, which was designed to lead, via a bid, to a PSC and a JOA. But, if it could raise the necessary funds and become acceptable to the KRG, it might be able to participate in the PSC after that had been obtained. If Excalibur could come up with the money Mr Kozel was happy to have it on board.[54]

Events post Erbil

568. Mr Kozel left Erbil on **15 July 2007**. He then left London for a Gulf Board meeting which was to take place in Zurich.

569. On **17 July 2007** Mr Wempen again emailed Mr Kozel his proposal that Mr Kozel join his fund by forwarding his email of 6 July. The next day he re-sent it, saying "*Let's get this done and head out to Uzbekistan and beyond*".

Gulf Board Meeting 19 July 2007

570. The Gulf Board was now rift with dissension. On **19 July 2007** at its meeting in Zurich (where most of the directors attended by telephone) Mr Parsons, Mr Guest and Sheikh Sultan resigned. So did Mr Patrick and Mr Cooper although they were to stay until their notice expired. The meeting was adjourned to **23 July 2007** in Budapest. Mr Kozel was appointed Executive Chairman and Mr Al-Qabandi as a director.

571. By this stage Gulf was critically short of funds. Mr Cooper produced a paper for the Board meeting and an update for the adjourned meeting which predicted that Gulf

[54] Or, as Mr Kozel put it: "*I considered the consortium to be dead. I encouraged Rex to take care of his own business in hopes that he would and he would write a cheque one day ... I was being a nice honest guy*."

would run out of funds during the second quarter of 2008 on account of the funding needed for Algeria. Mr Mackertich presented a technical update. The minutes record:

> "*Kurdistan – 48 defined blocks have now been announced by the KRG. The KRG Minister has advised the Company that he is prepared to consider firm proposals for blocks which have been under negotiation and invited the Company to submit a proposal for one block. He confirmed that no company would be awarded more than one block as majority partner/operator but that a company could acquire minority interests in several blocks if it wished. At meetings in Erbil last week, Mr Kozel and Mr Mackertich had made presentations to the Minister on blocks 5 [Shaikan], 6 [Ain Sifni] and 38 [Qadir Karam and Udhaim]. Mr Kozel confirmed that Texas Keystone was acting as a conduit for Gulf Keystone to acquire interests in Kurdistan and that Texas Keystone would take only the minimum equity required by the Minister to satisfy his requirement for the principal group to have an American identity. It was agreed that the Company should seek to negotiate interests in blocks 5, 6 and 38 on terms consistent with the company's resources, subject to the final approval of the board.*"

The expression "*acting as a conduit*" was probably not one that Mr Kozel used. He probably said that Texas was providing Gulf with the opportunity or means of participating (or something like it), as it was. The minute is inaccurate in that the presentation had been made in respect of blocks 5 and 6 with interest being expressed in relation to block 38.

572. As is apparent from the minute, by this stage it was looking likely that Texas would only take a small proportion of the equity to the extent required by Dr Hawrami. As matters progressed through 2007 Gulf had sought to have as much of Texas' 70% as it could get. The proportion of its 70% interest that Texas might transfer – reflected in communications passing between Gulf (in the form of Mr Patrick or Mr Guest) through Mr Kozel to Mr Robert Kozel – had varied from a possible 100% to nil (when RAK was poised to take over Gulf) to 50% (when the RAK takeover had failed and as suggested by Gulf). Mr Kozel's view was that, if Texas, as a US company was needed for the deal, it would want to have at least 51% and be operator. If it was not needed for the deal, it could take a much lesser percentage (or even none at all). By this stage (a) it was beginning to look likely that the operator would not have to be a US entity; (b) the Texas board wanted little involvement in Kurdistan; and (c) Mr Kozel was in the ascendant with Gulf. In those circumstances a minimal Texas participation made sense for Texas, Gulf and Mr Kozel.

573. On **19 July 2007**, whilst Mr Kozel was in Zurich for the board meeting, Dr Hawrami telephoned him to offer him a choice between blocks 5 (Shaikan) and 6 (Ain Sifni) and he chose Shaikan.

The Shaikan proposal

574. By this stage Gulf had been in discussions with MOL about some form of collaboration in relation to Kurdistan. MOL was looking at taking an interest in Gulf and, in the light of what Dr Hawrami had said about the need for the parties to PSCs to have large balance sheets, Mr Mackertich was keen to get them involved in a partnership for block K 38. On **20 July 2007** Mr Kozel and Mr Mackertich met MOL

in Budapest. At this stage he and Mr Patrick proceeded on the basis that for the block 5 (Shaikan) bid Gulf, Texas and Excalibur would be parties with Texas as operator and for the Block K 38 bid (Qadir Karam and Udhaim) MOL and Gulf would be parties with MOL as operator.

575. On **25 July 2007**, Mr Mackertich emailed to Mr Kozel a draft proposal to Dr Hawrami on Gulf headed paper for the K 5 block (Shaikan) which enclosed a draft PSC (the "July draft PSC"), naming Gulf, Texas and Excalibur as parties. He also enclosed the draft proposal for the K 38 PSC. The K 5 proposal said:

> "*Your Excellency,*
>
> *Thank you for your time at our recent meetings in Erbil. We were grateful for the opportunity to present some of the technical work that we have undertaken in Kurdistan and to discuss our proposed application. Further to this we are making a proposal for Block K.5.*
>
> *Submitted for your Excellency's review and approval is a contract draft which includes commercial terms for Block K.5. We have inserted figures that we believe are in line with those that we discussed at our recent meeting.*
>
> [It then drew attention to the fact that the draft PSC reflected the terms of the draft sent by the KRG in April 2007, including a $ 25 million bonus within 30 days of signature and production bonus payments thereafter[55].]
>
> *We look forward to meeting with you to finalise this draft at your earliest convenience*."

576. On **26 July 2007**, Mr Kozel emailed the draft proposal and PSC for Shaikan and the cover letter to Dr Hawrami to Texas (Mr Robert Kozel), Excalibur (Mr Wempen) and Dabin (Azzat). This served to underline the fact that if Excalibur wanted to be on the PSC it would have to fund over $ 7.5 million of bonus within 30 days of signature. Mr Wempen did not at this stage tell Mr Kozel that he would have any difficulty in raising the money in time, or suggest some alternative structure for Excalibur's investment. On **29 July 2007** he emailed Mr Kozel to say that it looked like they were "*back in the driver's seat*" in Kurdistan.

577. Mr Wempen accepts that at about this time he spoke with Mr Kozel on the telephone and was told that Dr Hawrami wanted to bring in a larger player to take a minority interest and that he had begun discussions with MOL.

The meeting at the Lanesborough Hotel

578. According to Mr Kozel, at the end of July or beginning of **August 2007**, he met Dr Hawrami at the Lanesborough Hotel in London. He puts the meeting at some point between Monday 30 July 2007 and Thursday 2 August 2007 as it was during this timeframe that Excalibur's name was removed from the draft K 5 PSC (see para 587 below). I accept his evidence as to this meeting. Mr Kozel may have been on holiday on and after Thursday 26 July 2007, but he is likely to have been back in London by

[55] Although the attached PSC in fact only provides for a total bonus of $ 20 million within 30 days of signature.

at least Wednesday 1 August 2007 because this is when Mr Cooper on 25 July 2007 suggested a meeting to discuss Gulf's finances.

579. At the meeting the two of them discussed the possibility of a PSC and who would be acceptable as a party to the PSC. Mr Kozel believes he probably showed Dr Hawrami a copy of the July draft PSC which shows Excalibur as a party. He certainly spoke of the parties. Dr Hawrami told him that Excalibur was not acceptable as a party to the Shaikan PSC because it was not an oil company or a serious player. He made it clear that he would not approve Excalibur. Mr Kozel told Mr Mackertich that Dr Hawrami wanted Excalibur removed from the PSC.

580. I accept his evidence that he also told Mr Wempen not very long afterwards words to the effect that Dr Hawrami had said that he did not want Excalibur to be on the Shaikan PSC; that it had not got itself organised or shown that it was a serious party for a PSC; and that Mr Wempen/Excalibur needed to get its act together (or some vernacular phrase which conveyed that message) by getting approval using Dabin and whatever contacts he had, if it wished to be on the PSC. In his evidence Mr Kozel indicated that this could be done by proving that Excalibur had finance and technical capabilities, which would involve assembling the right team, by using Dabin with its access to the Prime Minister, and by pitching Excalibur as a serious player to Dr Hawrami[56].

581. I accept that evidence because I regarded Mr Kozel as a reliable witness in this respect and because there seems to me no good reason why he should not have revealed that which he had been told, particularly in circumstances where Excalibur indicated that it made no difference to it whether or not it was on the PSC.

582. Excalibur disputes that this meeting between Dr Hawrami and Mr Kozel took place or, if it did, that the content of it was passed on. It points to (i) the absence of any contemporaneous note of the meeting or the arranging of it; (ii) the fact that on 14 and 21 August 2007 Mr Kozel made written requests for a meeting with Dr Hawrami without reference to this earlier meeting; and (iii) to the absence of any email to Mr Wempen delivering this important and unwelcome news.

583. I do not regard these points as compelling. Mr Kozel was not in the habit of making notes of his meetings with Dr Hawrami. They would meet from time to time either at the Lanesborough (Dr Hawrami's favourite hotel in London in 2007) or at Gulf's office when they were both in London. There were several (unminuted) meetings in August and September 2007. Both Dr Hawrami and Mr Kozel, who had a friendly business relationship (and socialised a bit), were peripatetic. Dr Hawrami would call up when he was in London and invite Mr Kozel to walk round to see him at the hotel a few blocks away from Gulf's offices.

584. The fact that a meeting of the kind described took place is consistent with the matters to which I refer below. Dr Hawrami was considering at this time who would be acceptable on the PSC. It is clear that he, in fact, had a low opinion of Excalibur. Mr Kozel was the natural person to whom to communicate this view. That Dr Hawrami,

[56] He "*told Rex that he needed to get himself organised, he needed to get approval, he needed to use Dabin and whatever contacts he had if he wished to be on a PSC*".

an experienced oil man, should have held this view at this time is not surprising. Excalibur was a Wempen name plate with neither oil and gas nor financial experience. It had submitted no information to the KRG that vouched its suitability as a party to a PSC. What happened at this meeting was, in effect, a more explicit confirmation of what had been apparent from what Dr Hawrami had said in Erbil in July.

585. There is corroboration of Mr Kozel's account from Robert Kozel. His evidence was that he had been informed by his brother during a telephone conversation in the first half of August 2007 that Dr Hawrami had specifically informed him that Excalibur would not be allowed to participate in the Shaikan PSC. His recollection of exact words was that Dr Hawrami had said that the Kurdistan government did not "recognise" Excalibur as a legitimate oil company and would not therefore "allow them to participate". Mr Kozel told his brother that he had informed Mr Wempen what Dr Hawrami had said.

586. Excalibur suggests that Mr Kozel has invented his account of the Lanesborough Hotel meeting as an explanation for the subsequent process of squeezing Excalibur out of the deal in Kurdistan and as a cover story allowing him to say that he considered the consortium to be dead. This is unconvincing. In the light of what had happened in Erbil in July such elaborate subterfuge would have been unnecessary. As will become apparent I do not accept that Gulf sought to squeeze Excalibur out.

Excalibur's name comes off the draft PSC

587. At around this time Excalibur's name disappeared from the draft PSC. On **2 August 2007**, Mr Mackertich sent Ms Berry the latest drafts of the Shaikan (K 5) and Qadir Karam and Udhaim (K 38) PSCs. The Shaikan (K 5) PSC no longer included Excalibur as a party. Mr Mackertich's email noted, "*These include the partners (exclude Excalibur as per Mr Kozel's advice)*". I take that to be a reference to what Mr Kozel had told Mr Mackertich following the meeting with Dr Hawrami. Mr Wempen could not recall whether he was sent a copy of this PSC without Excalibur's name on it, but he said in re-examination that if he had been sent it "*I would have been fine with it.*"

588. On **3 August 2007**, Ms Berry forwarded the latest draft of the Shaikan (K 5) PSC to Azzat, noting "*As you requested, Excalibur has been removed from these contracts*." The likely explanation of why Dabin requested the removal of Excalibur is that it was aware of Mr Kozel's conversation with Dr Hawrami at the Lanesborough Hotel; or at any rate of Dr Hawrami's views. Mr Kozel was aware that Dabin had spoken to Dr Hawrami about Excalibur.

589. Mr Wempen says that he became aware at some time in the end of August/September that Excalibur was not going to be on the PSC, probably in the course of telephone conversations with Mr Kozel about the way forward in the context of dealings with MOL. For practical purposes this must have been apparent from Mr Kozel's description of the meeting at the Lanesborough hotel. Excalibur was content for this to happen since a bid for a PSC with Excalibur (in its then state) as a party would not succeed. Mr Wempen also recalled discussions with him in August about assisting in securing delivery of a PSC (without Excalibur's name on it) to Azzat for Azzat to deliver to Dr Hawrami.

590. Mr Wempen complains that Mr Kozel never told him that Excalibur needed to be on the PSC in order to be entitled to an interest in Shaikan. Mr Kozel was under no such obligation. Nothing in the Collaboration Agreement (or anything else) required Mr Kozel to give Excalibur advice on what is in essence a question of the construction of an agreement governed by New York law. Mr Wempen did not tell Mr Kozel that Excalibur thought that the Collaboration Agreement entitled it to an indirect interest. Mr Kozel did not realise that that was what Mr Wempen thought, if he did. To him it was obvious that the participation contemplated by the Collaboration Agreement was secured by bidding for a PSC. Mr Wempen did not, prior to the Shaikan PSC, have any discussion with Texas or Gulf as to the means by which any indirect interest might be recognised.

The claim in deceit (English law) and fraudulent misrepresentation or concealment (New York law) *Index*

591. Excalibur claims that, if the Lanesborough Hotel meeting took place, but Mr Kozel did not tell Mr Wempen about it, then Mr Kozel deceived him. The claim pleaded in the Re-Re-Amended Particulars of Claim is as follows:

> "*3.25A.1. By continuing to involve Excalibur in, and to work closely with Excalibur on, the development and pursuit of the bid for the Shaikan Block following Mr Kozel's alleged meeting with Dr Hawrami in late July or early August 2007, the Defendants (and each of them) through their conduct and/or by implication represented that they did not know, and that they had no reasonable grounds to believe, that the KRG would not permit Excalibur to participate in any concessions awarded as a result of a Consortium Bid made under the Collaboration Agreement…*"

592. Since I have found that the meeting took place and that Mr Kozel told Mr Wempen about it, the claim necessarily fails. It would have done so even if I had found that the meeting had taken place but Mr Wempen was not told about it. This is for a number of reasons.

593. The first question is as to the applicable law. Excalibur accepts that the bulk of the events relevant to the tort took place in London (or alternatively Kurdistan, whose law must be assumed to be materially identical). It alleges however that, applying section 12 of the *Private International Law (Miscellaneous Provisions) Act 1995* the factors connecting the torts to New York significantly outweigh those connecting them to England (or, alternatively, to Kurdistan) because the fraud was essentially directed at bringing about a situation in which Excalibur would not take steps to protect its interests under the Collaboration Agreement, and thus at a denial of those interests which arise under New York law.

594. I disagree. I am not persuaded that New York law is substantially more appropriate to an independent claim for fraud said to arise from conduct which took place in London or Kurdistan and none of which occurred in New York. I shall, however, consider both laws. I consider first the position under English law.

Deceit

595. First, the fraudulent representation pleaded bears all the hallmarks of a lawyer's artefact. Mr Wempen, on whose authority the plea was entered, was unable when giving evidence to explain how, if the meeting happened and he was not told about it, he had been deceived ("*I must defer to counsel on this*").

596. Second, the representation is said to have arisen by a course of conduct in continuing to involve Excalibur in the development and pursuit of the Shaikan PSC, which gave the impression that the defendants regarded Excalibur as remaining a participant in the Shaikan bid. This is a puzzling suggestion since such involvement as Excalibur had was in circumstances where it had agreed not to be on the PSC, in which case Dr Hawrami's views about Excalibur's eligibility or suitability to be on it were irrelevant. Any failure to tell Mr Wempen of Dr Hawrami's attitude would be consistent with Mr Kozel regarding that attitude as irrelevant to Mr Wempen, or at any rate not something that he should disclose.

597. Third, the allegation is based on conduct. In order to succeed it would be necessary for Excalibur to establish (i) that Mr Kozel realised that his conduct was creating a false impression as to a particular state of facts, which impression he knew to be untrue; (ii) that he intended Mr Wempen to receive that impression; and (iii) that Mr Wempen did so. In short Excalibur must show that Mr Kozel made (as he understood) a representation which he knew to be false, intending that Mr Wempen should understand it in the sense in which it was false, and that Mr Wempen understood it in that sense: **The Kriti Palm** [2007] 1 Lloyd's Rep. 555. It has failed to do so.

598. Fourth, Mr Wempen could not explain how, if a representation like the one pleaded[57] had been made, he would have acted differently had it not been made ("*I don't see how it would have affected my behaviour*") – that being the relevant test: **Raiffeisen Zentralbank v. RBS** [2011] 1 Lloyds Rep 123 at [87]. This is not surprising. Since his case is that he was indifferent to whether or not Excalibur was on the PSC it is not easy to see how being wrongly told, in effect, that Gulf believed the KRG to be content for Excalibur to be on the PSC, could have induced Excalibur to act in a way in which it would not otherwise have done. The same applies if – as to which see paras 600-603 below – he was wrongly told, in effect, that Gulf believed the KRG was content for Excalibur *indirectly* to participate in the PSC – a matter over which the KRG could have no control, especially since the means of participation was, according to Excalibur, to be agreed or determined after the PSC was signed.

599. Excalibur contends that the only way in which Gulf could have avoided saying (as it is said impliedly to have done) that there was no problem would have been to say that there was a problem, and that it is therefore relevant to inquire what Excalibur would have done if so told. I do not regard this as the correct analysis. It does not seem to me impossible for Gulf to have said nothing, one way or the other, about its knowledge, belief or understanding of the attitude of the KRG otherwise than by saying that it believed that the KRG had a problem.

[57] In order to avoid the double negatives Mr Wempen was asked what his attitude would have been if Mr Kozel had dishonestly represented that the KRG said that Excalibur can be on the PSC compared with the position if he had made no representation to that effect. It is unrealistic to suppose that his answers would have been different with the addition of the words "directly or indirectly".

600. In its final submissions Excalibur suggested that (whilst its primary case was that the August meeting never took place at all) what Dr Hawrami said was to the effect that Excalibur could not participate on the PSC either directly *or indirectly*, and that the implied representation was that the defendants were not aware of any KRG objection to either such participation.

601. Gulf contends that this case is not open to Excalibur on the pleadings. Gulf pleaded that Dr Hawrami told Mr Kozel that Excalibur "*could not participate in a PSC*". The amended Particulars of Claim picked up this phrase and pleaded that the defendants represented that they did not know "*that the KRG would not permit Excalibur to participate in any concessions awarded as a result of a Consortium Bid*" and that that representation was false. The natural meaning of what Gulf pleaded was, it is submitted, that Dr Hawrami was saying that Excalibur could not be a party to the PSC.

602. I do not propose to determine the issue on that basis. Excalibur's pleading is far from clear but is (just) sufficient to allege that the defendants represented that they did not know that the KRG would not permit Excalibur to participate in any concession whether directly or indirectly.

603. I do not, however, accept that Dr Hawrami said anything about the KRG objecting to *indirect* participation. I accept Mr Kozel's evidence that what Dr Hawrami was talking about was participation on the PSC. For Mr Kozel the Collaboration Agreement was an agreement designed to lead to participation on the PSC by being a party to it (that being the only way, to his mind, that you participated in a PSC) and it was such participation that Dr Hawrami and he were talking about and concerned with. Nor did Mr Kozel realise that he was creating any impression, let alone a false one, about Dr Hawrami's views on indirect participation or intend to do so.

Fraudulent misrepresentation

604. The law of New York is not materially different to that of England in respect of this claim and Excalibur's reliance on it fails for essentially the same reasons. Thus:

> "*Under New York law, to state a claim for fraud a plaintiff must demonstrate: (1) a misrepresentation or omission of material fact; (2) which the defendant knew to be false; (3) which the defendant made with the intention of inducing reliance; (4) upon which the plaintiff reasonably relied; and (5) which caused injury to the plaintiff.*"

Woodhams v. Allstate Fire and Cas. Co., 748 F. Supp. 2d 211, 221 (S.D.N.Y 2010). A representation can be made implicitly and a misleading partial disclosure or half-truth may amount to a fraudulent misrepresentation.

605. Mr Wempen's evidence included the following:

> "*… Had I had the slightest inkling that Todd thought that, as a result of what Dr Hawrami had (allegedly) told him, Excalibur could not continue to participate as a consortium member, I would not have stood by and allowed him, Gulf Keystone or Texas Keystone to steal the deal away and leave Excalibur with nothing. I would have tried to persuade Todd to commit to*

> *entering into arrangements which safeguarded Excalibur's interest ahead of the entry into any PSCs, failing which I would have asked Dabin to intervene on Excalibur's behalf with Prime Minister Barzani, with Dr Hawrami and would have tried to see Dr Hawrami myself…*"

None of this makes sense. The KRG's concern and that of Dr Hawrami was as to who would be on the PSC. They would have had no interest in any safeguarding of Excalibur's interests if it was not on the PSC and are unlikely to have done anything about doing so, whatever was said to them. Nor is Dr Hawrami likely to have changed his views – whatever was said to him. Nor would Mr Kozel have been prepared, in advance of a PSC to which Excalibur was not to be a party, to enter into some arrangement securing for it some form of interest in the PSC once obtained. If the Collaboration Agreement gave Excalibur an indirect interest anyway, there was no need for such an arrangement. If it did not, there was no reason for Mr Kozel to make one.

606. At one point in his cross examination Mr Wempen suggested, for the first time, that "*We had a complete understanding that whether… Excalibur ... was on the PSC or not had no bearing on our participation...*" and that from the very beginning all parties to the Collaboration Agreement "*understood that if one member signs we were all on board*". I do not accept this. There was no such understanding.

Fraudulent concealment

607. In respect of this New York law claim Excalibur contends that Gulf owed it a duty of disclosure (a necessary incident of a claim in fraudulent concealment); that in breach of it Gulf intentionally failed to disclose that in July or August 2007 Dr Hawrami had made it clear that Excalibur could not participate in a PSC; and that:

> "*As a result of the aforesaid fraud by concealment, Excalibur allowed Mr Kozel to conduct negotiations and attend meetings with the KRG in relation to the Shaikan Block and the Akri-Bijeel Block without Excalibur and/or did not contact the KRG directly in order to protect its interests under the Collaboration Agreement in respect of those Blocks and the other Kurdistan Blocks in relation to which the Defendants have acquired an interest, and/or did not seek to protect its interests in other ways...*"

608. I do not regard Gulf as having a duty of disclosure. Gulf was not Excalibur's advisor, agent or fiduciary. Excalibur could legitimately be expected to look to its own commercial interests; to seek legal or commercial advice (e.g. as to the impact of Article 24) and to seek its own clarification as to Dr Hawrami's position either through Dabin or directly.

609. There is, under New York law, a "special facts" doctrine whereby a duty to disclose arises where "*one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair*": **Swerskv v. Dreyer & Traub,** 643 N.Y.S.2d 33, 37 (N.Y. App. Div. 1st Dep't 1996), (quoting **Beneficial Commercial Corp. v. Glick Datsun,** 601 F. Supp. 770, 773 (S.D.N.Y. 1985) (quoting **Chiarella v. United States,** 445 U.S. 222, 248 (1980); **Ferer & Sons v. Chase Manhattan Bank,** 731 F.2d 112, 123 (2d Cir. 1984))). But, as a threshold matter, the doctrine requires satisfaction of a two-prong test: that the material fact was information "*peculiarly*

within [the] knowledge" of the defendant, and that the information was not such that it could have been discovered by the claimant through the "*exercise of ordinary intelligence*" (**Black v. Chittenden**, 69 N.Y.2d 665, 669 (N.Y. 1986) (quoting **Schumaker v. Mather,** 133 N.Y. 590, 596 (N.Y. 1892) ["*[if] the other party has the means available to him of knowing... he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations*": **Jana L. v. West 129th St. Realty Corp.** 22 A.D.3d 274 (N.Y. App. Div. 1st Dep't 2005)]. In the present case I do not regard knowledge of the KRG's attitude to be peculiarly within Mr Kozel's knowledge and undiscoverable by the exercise of ordinary intelligence on the part of Mr Wempen (e.g. by making inquiries of the KRG, Dabin or Mr Kozel himself). Even if Gulf did not disclose what it knew of the KRG's attitude it must have been obvious to Mr Wempen by now that Excalibur, if it was to be on the PSC, needed to get itself into a position where it was acceptable to Dr Hawrami, and that, at this stage, it was not.

610. In any event, if Gulf did have such a duty, it fulfilled it. If I am wrong on that, Excalibur has not established that it was prejudicially affected by the alleged concealment. Revelation of Dr Hawrami's adverse attitude to Excalibur being on the PSC would have confirmed the wisdom of not attempting to get on it.

611. Further, to the extent that Mr Wempen considered it unnecessary for Excalibur to be on the PSC in order to obtain an interest, knowledge of Dr Hawrami's attitude would make no difference. Thus in evidence, Mr Wempen said this:

> "*Q. The conversation with Dr Hawrami is no more and no less than Dr Hawrami disapproves and is unwilling to accept Excalibur as a party to a PSC. ... what I'm trying to understand is why the matter would have gone any further because you would have said to yourself, to Eric or to anybody, "Well, that's lucky, it doesn't matter. There is a different route where we can achieve the same end." That's right, isn't it?*
>
> *A. I don't know if I would have said that it was lucky, but certainly I would agree there is a different route where we can achieve the same end.*"

612. A little later he agreed that "*If Dr Hawrami had said "You can't be on the PSC" for whatever reason, that would not have been a major issue.*"; and that he would only have been concerned "*If he had said "You can't be part of the consortium at all in any fashion" certainly that would have been a major problem for us and we would have taken immediate action in the manner described*."

613. It was this evidence that led Excalibur to suggest that what Dr Hawrami had said was that Excalibur could not participate on the PSC whether directly or indirectly. As I have said, I do not regard this allegation as correct in fact.

614. Even if (a) Dr Hawrami had said that Excalibur could not participate indirectly; (b) Mr Kozel had said nothing about what Dr Hawrami had said; (c) relief is to be assessed on the basis of what would have happened if Mr Kozel had told Mr Wempen what Dr Hawrami had said, it seems to me unlikely that Excalibur would have been in any better position. The KRG could not decide who could participate indirectly. If Excalibur was entitled to an indirect interest, that entitlement would not depend on the

KRG's approval. Nor is Dr Hawrami's objection likely to have been removable by any endeavour of Excalibur, Mr Wempen or Dabin.

615. These conclusions on causation are, also fatal to any deceit or fraudulent misrepresentation claim, insofar as, on the assumption that Excalibur was not told of the KRG's position, it is material to consider what difference it would have made if it had been.

616. In any event Mr Kozel was not guilty of any fraud or dishonesty[58]. I do not think he would necessarily have been guilty of either if, contrary to my view, he had not told Mr Wempen of Dr Hawrami's concerns. He could have taken the view that it was not incumbent on him to do so in circumstances where Mr Wempen had already agreed that Excalibur need not be on the PSC. He could have assumed that Mr Wempen appreciated the KRG's likely attitude and that Excalibur was, as matters then stood, not in a position to obtain KRG approval. Since, however, Mr Kozel's view was that he "s*hould have told Mr Wempen*" (as he said in evidence) of his conversation with Dr Hawrami and since, as I find, he did so, it is not necessary to consider this issue further.

617. I also reject the suggestion put to Mr Kozel that he kept Mr Wempen in the dark because he did not want to risk Mr Wempen, if apprised of the KRG's objections to Excalibur's participation, derailing Gulf's bid by going to the Minister to protect Excalibur's position in some way, or getting Dabin to do so. Any such approach by Mr Wempen is not likely to have derailed the bid.

618. Excalibur also claims that the defendants were under a duty to disclose that they intended not to observe Excalibur's interest in the Shaikan block. This claim fails. Excalibur had no such interest, save in the loose sense that it was a potential company to which an interest might be farmed in. None of the defendants knew or thought that it had any interest for them not to observe and none of them acted dishonestly.

The Oil and Gas Law

619. On **6 August 2007** the Kurdistan Regional Oil and Gas Law ("KROGL") was passed by the Kurdistan National Assembly. This was a culmination of Dr Hawrami's efforts to make the bidding process transparent and compliant with international norms. KROGL set out the framework by which petroleum operations would be regulated in the KRG and paved the way for the grant of PSCs. Article 24 laid down the criteria that had to be satisfied by anyone who wanted to participate in a PSC. It entitled the Minister to conclude a Petroleum Contract for exploration and development in respect of a specified area with "*a Person* – (defined as "*a natural person, or other legal entity*") – *or a group of Persons*".

620. The Article, which was in materially the same terms as in the draft sent to Mr Wempen in October 2006, provided in Article 24:

> "*First: The Minister may, after obtaining the approval of the Regional Council, conclude a Petroleum Contract for exploration and development in*

[58] It was put to Mr Kozel that he was deliberately keeping Mr Wempen in the dark but not that he realised that he was making a representation which he knew to be false, intending that Mr Wempen should understand it in the sense in which it was false.

> *respect of a specified area, with a Person or a group of Persons, provided that if a group, such group enters into a joint operating agreement approved by the Minister under Article 30 of this Law. The Person, or group of Persons, may include private companies in the Region and other parts of Iraq or foreign petroleum companies.*
>
> *….*
>
> *Third: In order to be eligible to enter into a Petroleum Contract, a Person must demonstrate:*
>
> *(1) the financial capability, and the technical knowledge and technical ability, to carry out the Petroleum Operations in the Contract Area, including direct experience in carrying out similar petroleum operations, and to submit reliable documents as proof; and*
>
> *(2) a record of compliance with principles of good corporate citizenship, and a commitment to the Ten Principles of the Global Compact, launched by the United Nations on 26 July 2000.*"

621. There is a dispute as to whether, as a matter of Kurdistan law, if there is a group of Persons, each member of the group must demonstrate both of the characteristics or whether it is sufficient that the group as a whole does so.

622. There is no evidence before me from any qualified Kurdistan lawyer that the law of Kurdistan approaches the question of statutory construction in any way differently to the courts of England and Wales. In those circumstances it is open to me to decide on the true construction of Article 24 of KROGL by applying English law principles, although there is a degree of artificiality in my determining a question which no Kurdistan court has ever decided or, so far as I am aware, considered.

623. Insofar as it is necessary to do so, I regard the Article as requiring that *each o*f the Persons who are to bid as a consortium demonstrates the necessary characteristics. The characteristics are required to be shown by "*a Person*" and the Article distinguishes between "*a Person*" and "*a group of Persons*". It is not the group that must demonstrate the necessary characteristics. This view is reinforced by Recital E of the Model PSC promulgated under KROGL which states in relation to each contracting entity that it is a company with the financial capability and the technical knowledge and technical ability to carry out Petroleum Operations in the Contract Area.

624. A company would demonstrate the necessary characteristics if it, itself, had the necessary financial resources and employed the requisite technical personnel. A more difficult question (particularly if considered in the abstract) is the extent to which it is sufficient for the company to have *access* to the necessary capabilities. As to that I would regard the defining criterion to be whether the capabilities in question can for practical purposes be regarded as those of the company. So far as finance is concerned, the backing of a financially sound parent should suffice. Similarly it would not be necessary for the relevant technical personnel to be employees of the company, provided they were available to it (e.g. because they are or can be engaged as consultants or seconded from a parent, subsidiary or other company in the group) to

do the work. I would not, however, regard Article 24 as satisfied by company X if, for instance, it had no technical resources but had agreed to be on the PSC with company Y, which had them, even if Y had agreed with X that Y would provide them.

625. There is, however, a further question, namely how Dr Hawrami and the KRG would in practice apply the law in 2007, of which there is no evidence other than that afforded by looking at the PSCs in fact awarded. It is not apparent from the list of the companies which were awarded PSCs that any of them lacked either financial or technical ability, let alone both, although in respect of some of them information is sparse. Excalibur cites the example of Impulse Energy which signed the Ain Sifni PSC alongside Hunt Oil. That was a company incorporated in the British Virgin Islands the day before it signed the PSC. But it is not clear to me that it lacked either capability. The KRG press release describes it as "*a private company that invests in the energy sector in developing economies targeting oil, gas and power*", which suggests significant financial resources. It had on its board Matthew Heysel who appears to have had a background in the oil and gas industry and financial experience.

626. In the absence of direct evidence as to Dr Hawrami's approach it is not, I think, possible to say that Dr Hawrami would invariably require strict compliance by each participant with Article 24. Insofar as he was prepared to be flexible I would expect him to adopt a purposive approach, i.e. to apply the criteria so as to secure that the members of a group had between them the financial and technical capability to carry out the relevant operations. He might not require that each member could, alone, finance the contemplated operations. Thus, if $ 200 million was needed and A and B could each provide $ 100 million, they would not necessarily be ruled out because they could not each provide $ 200 million. The position might be different if one of them could only provide $ 5 million. Similarly he might not necessarily require all the technical knowledge and ability needed to be present in, or available to, each Person. But he would require each member of the group to have what he regarded as a sufficient degree of financial capability and/or technical knowledge and ability. A party with very little financial or technical capability would reduce the attractiveness of the consortium and its operational capability (unless the other member[s] were financially/technically very strong). I use the phrase "and/or" because both capabilities would be desirable; both would be likely to be required by Dr Hawrami, and, at the very least, one of them: as Mr Park and Mr Codd, I think, agree: see para 3.1 (o) of their joint memorandum. Origination of the deal would not be sufficient.

627. Dr Hawrami was well aware that the participants in any PSC would be subject to public scrutiny, particularly in Baghdad, which challenged their legal validity. Awarding a PSC to financially or technically incompetent contractors would be most unwelcome to him.

628. Excalibur's problem was that it had neither financial nor technical capability (or the imminent prospect of either), let alone the ability to produce reliable documents as proof. In those circumstances it did not qualify under Article 24 either in terms or as ever likely to be applied by Dr Hawrami, and was, therefore, unacceptable to him. The fact that Excalibur had introduced Texas, and, as a result, Gulf, was not in 2007 a matter of significance. Excalibur relies on the fact that the KRG enlisted its help to get an oil company as an indication of its acceptability. But that enlistment was made by Dr Yacu and before the KRG underwent a substantial change in April 2006 and before KROGL became law.

629. As to financial capability, Excalibur as a company had no significant assets or income of its own and, from about the spring of 2007 abandoned efforts to secure funds during the bidding process. Mr Wempen's personal finances were not enough. He had some modest income from his work at the Pentagon. But in November 2007 (see para 958 below) he could not raise $ 10,000 on his credit card to pay a lawyer: see his email of 26 November 2007. In April 2008 he and Mr Franchi contemplated providing $ 100,000 for a SPAC idea (see para 1244); but how much might have come from him was unclear.

630. He and his brother had houses; but I do not believe that they would have been willing to sell or mortgage them in 2007 or 2008. What exactly their combined free assets were is unclear. Mr Wempen said that their personal assets were worth about $ 1.5 million, including their houses, with liquid assets of about $ 600-700,000. These included certain Blauner trust accounts said to be of in excess of $ 500,000, which passed or were due to pass to the brothers on the death of their mother. No disclosure has been given in relation to these accounts (or the extent of the brothers' entitlement thereto) and I am left in doubt as to how much they could realise from them and when. In any event (a) I regard it as unlikely that the brothers would have been prepared to use hundreds of thousands of their own dollars, including the value of their houses, for the Kurdistan project; and (b) any sums that might have been used were wholly inadequate. At one point in his evidence Mr Wempen accepted that he could not contribute a cent[59] to any fundraising, which he later qualified as meaning that Excalibur could not contribute a cent.

631. As to technical knowledge and ability, neither Excalibur nor Mr Wempen had any experience in the oil and gas industry or any relevant technical competence or experience. Excalibur sought to rely in this respect on its access to Mr Franchi. Excalibur had no contract with him and never formally employed or retained him: for his involvement see para 364 above. He has not been called, although he was an available witness. There is, therefore, no direct evidence from him as to his skills, availability, or involvement. His primary expertise was in project financing, particularly for oil pipelines – a physical and useable asset. This is something completely different to raising money for oil exploration. His c.v. reveals that he has degrees in industrial engineering and refers to the fact that he had provided "*production engineering and oversight and direction*" in relation to oil and gas operations of various oilfields whilst at Proteus Energy Corporation, of which he was acting President and COO under a consultancy agreement. His time at Proteus was said to be from March 2007 until the present. This part time experience was limited and is not in oil exploration.

632. Excalibur never took any steps which secured the necessary financial or technical capability. It was well aware of the provisions of Article 24. In October 2006 Mr Wempen had sent Mr Kozel a copy of the draft law, with terms (then in Article 30) materially identical to the law as passed in August 2007. His brother had looked at the draft at that time. Mr Wempen had sent Azzat a copy of the KRG Press Release in respect of the final draft on 1 July 2007. It must have been apparent to him that Excalibur lacked both relevant capabilities, or, at the very least that there was real risk that the KRG would treat it as ineligible or unacceptable.

[59] "*Q. Now, you couldn't contribute a cent, could you? A. No.*"

633. In the course of his evidence Mr Wempen said:

> "*.. we were not there to provide our financial capability. We were not there to provide our technical capability, we were there to bring the deal, and we had created a consortium and that was our function, our purpose and we executed that.*"

This, and other passages, demonstrate Mr Wempen's sense of entitlement arising from the introduction of the deal. But that was no substitute for compliance with Article 24.

634. In those circumstances it was, as matters stood in late 2007, impossible for Excalibur to get on the PSC either in terms of eligibility under Article 24 or acceptability to the KRG. By then Excalibur did not seek to be on the PSC. So, in one sense this did not matter. However, since Excalibur was not entitled to a Participating Interest without being a party to the relevant PSC, the fact that it was impossible for it to do so, itself brought the contract to an end.

Impossibility *Index*

635. Under New York law, impossibility of performance due to a supervening event, the non-occurrence of which was a basic assumption on which the contract was made, relieves a party from any further obligation to perform the contract. The Collaboration Agreement assumed that it would be lawful and possible for Excalibur to get on the PSC. The effect of the impossibility was, thus, as Judge Pratt explained, to discharge Excalibur and Texas/Gulf from any further obligation to perform. Whether that would give rise to any claim in damages would depend on whether the impossibility resulted from Excalibur's breach.

636. Excalibur had no contractual entitlement to a Participating Interest without being a party to the relevant PSC. Since it could not be the defence of impossibility is applicable. Insofar as Excalibur's alternative claims recognise that Excalibur had no entitlement unless a party to the relevant PSC, the defence is available in respect of those claims also.

Negotiating and closing the Shaikan bid

637. By now it was Gulf which was leading the negotiations with the KRG. Nevertheless on **22 August 2007** Mr Kozel emailed Mr Wempen to tell him that he had been in touch with Azzat (as on 3 August 2007 he had) about delivering the contract to Dr Hawrami. The plan had been that Dabin should hand deliver the draft to Dr Hawrami in Erbil, as he had required. This never happened because Azzat was involved in a road accident in Jordan. In the email Mr Kozel said:

> "*Any comments on the contract? I haven't heard from you. We cannot formalize a contract with the krg for block 5 without your comment and approval/refusal to move forward. Get back to me.*"

638. Excalibur relies on this email as a recognition by Mr Kozel of Excalibur's continued participation in the Excalibur/Gulf/Texas consortium; and as deceitful if Mr Kozel had by then planned to exclude Excalibur. Mr Kozel's evidence was that he was

asking for Excalibur's comments because it was a potential participant, if it proved able to join the contract, in which case it would be a welcome contributor. Since the contract was one which Excalibur might later join (it was not to be on the PSC at this stage) it was important to get its comments on the draft at this stage, in order to avoid going back to Dr Hawrami later with a second round of changes if Excalibur showed enough financial strength to be acceptable to Dr Hawrami but did not like some of the terms. I accept that evidence. This email was not a recognition of an Excalibur/Gulf/Texas consortium in the sense of a binding collaboration agreement to which all three continued to be parties. It was an example of holding the door open for possible participation by Excalibur. That was certainly how Robert Kozel, one of the recipients, viewed it.

639. Mr Wempen said that he treated this as a request for approval of a PSC submission without Excalibur; and that it was possible that he had actually been sent the PSC without Excalibur's name on it. He did approve. That did not, on Excalibur's case, mean that it would be under any lesser obligation than it would have been under if a direct participant. As Mr Wempen put it "*I certainly intended to pay my way as well*". Mr Wempen also accepted that after the July meeting in Erbil Mr Kozel was proceeding on the understanding that when the time came Excalibur would be good for the money.

Developments in September 2007

640. Meanwhile Gulf continued its discussions and negotiations with MOL which were protracted. In addition the KRG decided that it wanted to have the right to grant an interest of between 5 and 25% in a PSC to a "local partner". It wanted to able to award such an interest to companies in order to obtain other benefits in exchange. The effect would be to dilute the equity and significantly affect the economics of any deal to the considerable disadvantage of the existing parties.

641. Gulf was vigorously opposed to this proposal and in the end managed to negotiate the percentage down to 15%. It appears to have prayed in aid the 10% net profit interest to Dabin in support of this reduction.

642. On **8 September 2007** the KRG signed a PSC with Hunt Oil Company and Impulse Energy in respect of Ain Sifni. This was the first PSC to be signed since the KROGL was passed. Hunt Oil was one of the largest privately held US oil companies. The presence of an American flag company in oil in Kurdistan caused Mr Kozel to think that it might be possible to have a deal with KRG without Texas. After the July Meeting in Erbil it was, Mr Kozel said, clear that Dr Hawrami would consider Texas' removal. He had many discussions with Dr Hawrami about Texas' involvement in September and October. Dr Hawrami's views fluctuated.

Gulf Board Meeting 11 September 2007

643. The Gulf Board met on **11 September 2007**. Mr Kozel reported on Kurdistan. He said that the technical people thought that Kurdistan "*represented the greatest unexploited onshore oil exploration opportunity other than Iraq*". He reported that he had met with Dr Hawrami and made a proposal in respect of block 5 (Shaikan). As the minutes record:

> "*…this was to be a contract between Texas Keystone (a family vehicle) the Company and Kurdistan as the Kurds were keen to have US parties involved. Mr Kozel said that is [sic] was for the Kurds to determine the amount of Texas Keystone involvement that they wanted.*
>
> *He reported that a new petroleum law had been passed and some smaller exploration companies (including Hunt Oil) were entering into arrangements (with the larger oil companies waiting on the sidelines).*
>
> *Mr Kozel stated that he did not feel it was necessary for Texas Keystone to be involved as his preference was to drop Texas Keystone and proceed with the Company. He said that he would instruct Iain Patrick to instruct the Company's lawyers to rework the contract to reflect this*
>
> *…*
>
> *The current proposal was for the Company to have 70% interest and [Excalibur] taking a 30% interest but he stated that the Company had approached MOL, the Hungarian ex-state owned oil and gas company, Premier Oil, Lundin Petroleum and a Kuwaiti drilling company owned by Hamad Al Hamad (each of which had been approved by the Minister) with a view to them taking a 20% interest so that the Company would end up with a 50% interest*[60]."

644. The square brackets around Excalibur are in the original. Excalibur was thereby envisaged as a possible participant, taking 30%, with Gulf taking 50%. At this meeting the proposed establishment of Gulf International (then "Gulf Kurdistan Petroleum Limited") as a Gulf subsidiary for the purpose of Kurdistan projects was noted.

645. Mr Cooper reported to the meeting that although the company had $90 million in cash, its projects were capital-intensive and the worst case scenario was that it might run out of cash by the third quarter of 2008, but this was fairly pessimistic. Thus Gulf needed to find partners to share the risks and costs. Gulf's 2007-2009 work programme and budget presented to the board noted that in relation to Kurdistan the company was "*confident of its ability to, and would most likely wish to, bring in partners*" to its application "*by means of farm out or swap*". A number of potential partners were under consideration.

646. On **7 September 2007** a new model PSC was promulgated, which was circulated by Mr Kozel to Texas and Excalibur on 13 September 2007.

647. On **12 September 2007**, Mr Kozel circulated to Mr Robert Kozel and Mr Wempen the draft assignment agreement. He did so by forwarding an email which he had received from Mr Patrick on 10 September 2007, which had forwarded the 24 November 2006 email with the draft assignment which provided for the assignment of Texas' entire interest pursuant to clause 3.2.2 of the Collaboration Agreement. Mr Kozel said:

[60] This assumes that the whole 20% comes from Texas/Gulf. If 20% comes off the top, a 30% Excalibur interest in Texas/Gulf's 80% would mean a split of Gulf 56% and Excalibur 24%.

> "*Rob since life has evolved in Kurdistan, can you and tki's lawyers review the attached for discussion at the tki board meeting this Friday.*"

This was a reference to the fact that the KRG was ready to sign contracts and that Gulf wanted a strategic partner with a bigger balance sheet. I accept Mr Kozel's evidence in this respect. Mr Wempen replied: "*Not unexpected*".

648. At this stage MOL wanted to apply for the Qadir Karam and Udhaim (K 38) block with Gulf as a partner. In the event the block went to Sterling Energy. This was good fortune. It was a dry hole.

649. Internal Gulf emails at this stage proceeded on the assumption that Excalibur would participate in the Kurdistan opportunity. On **20 September 2007**, Mr Mackertich emailed Mr Compton, one of Gulf's oil economists, to discuss Block K 5, and said "*All being well we will sign gkp 70% (plus excal I guess for 30%).*" On **24 September 2007**, Mr Mackertich emailed Mr Samarrai on his visit to Erbil and said: "*Think we will sign with gkp, excalibur and I think this company (hamid al hamid). Not quite sure what percentages yet.*"

650. Negotiations with the KRG and MOL continued. On **26 September 2007** Mr Kozel travelled from Erbil to Budapest to continue discussions. Agreement was reached in principle that Gulf and MOL would take a 20% participation in blocks 5 (Shaikan) and 10 (Akri-Bijeel). On **27 September 2007**, Mr Patrick sent to MOL the latest drafts for the Shaikan PSC that included MOL as a party, and proposed a confidentiality agreement so that Gulf could review the Akri-Bijeel data. On **28 September 2007**, Mr Patrick emailed Mr Kozel a draft bidding agreement between MOL and Gulf. This provided for Gulf to have an 80% interest and MOL a 20% interest in the Shaikan bid and for MOL to have an 80% and Gulf a 20% interest in the Akri-Bijeel bid. Clause 3 expressly provided for Gulf to be able to assign its consortium interests to Excalibur. This shows that Excalibur had, as Mr Kozel recalled, been mentioned to MOL at this stage.

651. On **2 October 2007**, Mr Patrick emailed to Mr Cooper, Gulf's financial director, copying in a number of documents, but noting that "*We have still nothing from Texas Keystone or Excalibur*". One of the documents was a draft Dabin agreement with Gulf International. Mr Patrick also sent Mr Kozel the latest version of the model PSC for Kurdistan and a document with the main commercial terms for the Shaikan block and suggested that he pass these to Excalibur.

Assignment

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652. It is convenient now to consider Excalibur's case on assignment. Excalibur contends that at some stage in the early part of September 2007 and in advance of the Texas Board meeting on 14 September 2007 there was an oral agreement pursuant to which Texas agreed to assign to Gulf as much of its interest under the Collaboration Agreement as the KRG would permit ("the assignment contract").

Applicable law – common ground

653. The first question to determine is which law should decide the issue (and what exactly is the issue).

654. The Collaboration Agreement is governed by the law of New York and the transferability of rights and obligations from Texas to Gulf under that Agreement and the conditions (if any) required to be met to entitle Gulf to assert any rights against Excalibur are matters for the law of New York. So much is common ground.

Applicable law – Gulf's submissions

655. Excalibur seeks to rely on the assignment contract, to which it does not claim to be a party, in order to enforce obligations against Gulf. Gulf submits that, in those circumstances, it is claiming the benefit of the assignment by reference to the New York law third party beneficiary principle. The extent to which an assignment occurred and the extent to which it confers rights on Excalibur is a matter for the proper law of the putative assignment contract. For contracts concluded prior to 17 December 2009 the choice of law governing contractual obligations is determined by the Rome Convention, implemented by the *Contracts (Applicable Law) Act 1990*. By the application of Article 4 of the Convention the applicable law of the alleged oral contract is that of Pennsylvania (where Texas had its principal place of business). Since there is no evidence that the law of Pennsylvania differs from English law, the latter is to be applied.

656. This is because, unless there has been a choice of law within Article 3 (which there has not), Article 4 provides that the applicable law is the law of the *country* with which the contract is most closely connected (article 4(1)). Under article 4(2) that country is presumed to be the place where the party who is to effect the performance which is characteristic of the contract (in this case Texas as the party who is to transfer rights and obligations under the Collaboration Agreement) has its principal place of business, i.e. Pennsylvania. The article 4(2) presumption can be disapplied under article 4(5), if the characteristic performance cannot be determined, or if it appears from the circumstances as a whole that the contract is more closely connected with another country. Neither of these conditions applies. In particular, the fact that the draft assignment contract, in circulation since November 2006 provided for New York law, is immaterial. Excalibur is not alleging that this contract ever became legally binding. Nor can it be said that the assignment contract is more closely connected with New York. The fact that the Collaboration Agreement which is the subject of the assignment contract is governed by New York law is irrelevant: the test is one of connection of the alleged assignment contract with a country, not a system of law.

Applicable law – Excalibur's submissions

657. Excalibur contends that this is the wrong approach. Excalibur does not need to rely upon the third party beneficiary principle. Excalibur is suing under the Collaboration Agreement because there has been a completed assignment of a Consortium Interest. Even if the obligations of Texas and Gulf as between each other are governed by the law of Pennsylvania, the question whether an interest under the Collaboration Agreement was assigned so as to confer rights upon Excalibur must be one of New York law because that law governs the interest allegedly assigned.

658. In any case, the assignment contract was governed by New York law, either because (i) the circumstances of the case demonstrate a choice of New York law with reasonable certainty for the purposes of Article 3(1) of the Rome Convention, or

because (ii) the agreement is most closely connected to New York and so would be governed by New York law under Article 4(5) of the Convention. That this is so appears from the fact that the assignment agreement was wholly directed to a New York law contract and that the draft assignment agreement chose New York law.

Conclusion on applicable law

659. As a matter of English law, if A has a contract with B and A assigns the benefit of that contract to C, C may, generally speaking, take the benefit of the contract and enforce the obligations of B. If C is also to become liable to B, there needs to be a novation (if C is to replace A) or an agreement between C, A and B, or at least between C and B, that C will shoulder A's obligations to B, in whole or in part. The law of New York is similar save that it recognises that C's contractual assumption of liability can be by way of contract with A, the assignor, if entered into for the benefit of B, or directly with B.

660. That this is so appears from the 1928 decision of the New York Court of Appeals in **Langel v Betz** 250 N.Y. 159, 164 N.E. 890 (N.Y. 1928):

> "*the mere assignment of a bilateral executory contract may not be interpreted as a promise by the assignee to the assignor to assume the performance of the assignor's duties, so as to have the effect of creating a new liability on the part of the assignee to the other party to the contract assigned. The assignee of the vendee is under no personal engagement to the vendor where there is no privity between them. The assignee may, however, exp ressly or impliedly bind himself to perform the assignor's duties.* ***This he may do by contract with the assignor or with the other party to the contract****. ... A judgement requiring the assignee of the vendee to perform at the suit of the vendor would operate as the imposition of a new liability on the assignee which would be an act of oppression and injustice, unless the assignee had, expressly or by implication, entered into a personal and binding contract* ***with the assignor or with the vendor*** *to assume the obligations of the assignor*."[61]

661. The assumption of liability by the assignee may be express or implied from affirmative conduct – see **Amalgamated Transit Union v. City of New York**, 846 N.Y.S.2d 336, 338 (2d Dept 2007) – but it must, as Judge Bellacosa confirmed, be a *contractual* assumption. If the assumption is said to be implied from conduct, the conduct must be only consistent with the assumption alleged. If there is such a contractual assumption by C of A's obligations, the person in the position of B may be able to rely on the third party beneficiary principle – classically expounded in **Lawrence v. Fox** 20 N.Y. 268 (N.Y. 1859) – to claim against C. That principle is based on contractual intention. The New York Court of Appeals has held that a party asserting third party beneficiary rights has the burden of establishing:

> "*(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [his or her] benefit and (3) that the benefit*

[61] See also: **Sillman v. Twentieth Century Fox** 3 N.Y. 2d 395 (N.Y. 1957) (New York Court of Appeals) p 1674; **Kagan v. K-Tell Entm't, Inc.,** 172 A.D.2d 375 (1991) (Supreme Court, Appellate Division); **A. Brod, Inc. v. SK&I, Co.,** 998 F. Supp. 314, 321 (S.D.N.Y. 1998), quoting **Lachmar v. Trunkline LNG Co**., 753 F.2d 8, 9-10 (2d Cir. 1985); **Amalgamated Transit Union v. City of New York**, 846 N.Y.S.2d 336, 338 (2d Dept 2007).

> *to [him or her] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [him or her] if the benefit is lost.*"
>
> **Mendel v. Henry Phipps Plaza West, Inc.,** 6 N.Y.3d 783, 786 (2006), (quoting **Burns Jackson Miller Summit & Spitzer v. Lindner,** 59 N.Y.2d 314, 336 (1983)).

662. It is, therefore, necessary in New York law for Excalibur (B) to show an express or implied contract under which Gulf (C) assumed the obligations of Texas (A) under the Collaboration Agreement. That contract could be between Gulf and Excalibur or between Gulf and Texas for the benefit of Excalibur. It is the law of that contract, not the law of the Collaboration Agreement, which determines whether Excalibur has rights against Gulf. Here there is said to be the assignment contract between Texas and Gulf and an assumption of burdens by Gulf entering into an indemnity agreement with Texas ("the First Indemnity Agreement"), proceeding with the Consortium Bid alongside Texas and undertaking to be bound by the rights and obligation arising from the acreage acquired in that Consortium Bid.

663. If there was such a contract it had no express choice of law and neither the supposed terms nor the circumstances are, in my judgment, such as to demonstrate any choice with reasonable certainty. The contract is, therefore, governed by the law of the *country* with which it is most closely connected, and it is presumed to be most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has its principal place of business.

664. It seems to me that that party was Texas, which, as the assignor, was to effect the performance characteristic of the contract. The assumption by Gulf of liability on which Excalibur need to rely is an assumption of liability to Texas to perform the obligations of the Collaboration Agreement for the benefit of Excalibur. That assumption of liability was part and parcel of the contract of assignment. Accordingly the relevant law is that of Pennsylvania.

665. Alternatively, if the relevant contract is to be regarded as a stand-alone contract between Gulf and Texas for Gulf to assume liabilities for the benefit of Excalibur, or if the performance characteristic of the assignment contract is to be regarded, for present purposes, as that of the liability bearing assignee, the relevant law is the law of the country where Gulf has its principal place of business. Accordingly the relevant law is that of Bermuda and not, in any event, that of New York.

666. The fact that the contract putatively assigned was subject to New York law does not mean that the parties to the assignment contract must be taken to have chosen the same law for their contract. Nor does it mean that the country with which that contract has a closer connection is New York. I do not regard the choice of law in the Collaboration Agreement or in the draft assignment agreement between Texas and Gulf (neither of whom are New York parties – nor is Excalibur) as indicating that the assignment contract is more closely connected with New York *as a country*[62].

[62] The decisions of the Court of Appeal in **Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd** [2002] EWCA 2019 and **Credit Lyonnais v New Hampshire Insurance Company** [1997] 2 Lloyd's Rep 1 suggest that the choice of law in the Collaboration Agreement may not even be a connecting factor.

667. For these reasons I hold that the applicable law as to whether (a) the assignment contract was made; and (b) whether it confers rights on Excalibur as against Gulf is that of Pennsylvania and, thus, for present purposes, the same as English law. Alternatively it is English law.

668. If that is so, then Excalibur's claim fails. English law does not, absent novation, recognise the right of a third party to sue an assignee on an assignment contract.

669. I shall, none the less, consider the claim on the basis that New York law is applicable.

Assignment – the facts

670. It is not wholly clear whether there is said to have been an agreement to assign or an actual assignment (Excalibur's written closing uses both expressions), and what the exact nature of the agreement/assignment was. In opening it was described as a partial assignment. In closing the agreement was said to be an agreement to a total assignment if Texas could drop out altogether (which would, in practice, require KRG consent) but a partial assignment if some minimal participation was needed i.e. an assignment of such a proportion as the KRG would allow. I shall proceed on the basis that that is the agreement relied on. In his final oral submissions Mr Picken QC said that there was an assignment because there was an agreement to assign that was acted on by Texas and Gulf. Given that the quantum of interest to be assigned was dependent on the attitude of the KRG, I do not see how there can have been an actual assignment and, in any event, it is unlikely that the parties regarded themselves as having effected one. A 100% assignment would also have required Excalibur's consent, which might well have been forthcoming, but was never sought in or after early September 2007.

671. The assignment contract is not said to have included an express assumption of any liability on the part of Gulf. Gulf is said to have affirmatively assumed liabilities under the Collaboration Agreement by virtue of the First Indemnity Agreement, by proceeding with the bid alongside Texas, and by signing the Shaikan and Akri-Bijeel PSCs and undertaking the obligations arising in respect of the acreage covered by those agreements.

672. As appears from paras 424-5 above on **24 November 2006** Mr Patrick sent Mr Kozel a draft assignment agreement in respect of the whole of Texas' 70% interest and on **28 November 2006** said that, if Mr Kozel was happy, Gulf would pick up the costs from now on and reimburse Texas' past costs. The draft provided for a payment of $ 230,972.78 on completion. Mr Kozel, who was under pressure from the Gulf Board to procure an assignment to Gulf, was prepared to forward the proposal to the Texas Board. But he was not in favour of an arrangement by which, in return only for past costs, Texas assigned the whole project to Gulf, with whose board he was in conflict, and whose business approach he found insufficiently entrepreneurial. He was also interested in working on the project after he left Gulf.

673. He forwarded the draft to Robert Kozel on **15 January 2007** (para 436). Robert Kozel and Mr Kozel had discussions about the transfer on the telephone. At this stage Texas was losing interest in Kurdistan, which was no more to it than a *potential* interest in a project, and was focusing on the Marcellus Shale formation which, according to oil industry reports, might be the second largest gas reserve in the world. On **1 March**

2007 Mr Patrick forwarded to Mr Kozel his previous email of 24 November 2006. Between **6** and **9 March 2007** Robert Kozel, having consulted with his brother David and his father Frank, executed a copy of the assignment agreement and signed a Deed of Adherence in the form prescribed, acknowledging delivery: see para 449 above. On or around **9 March 2007** Mr Goda sent copies of the agreement to Mr Wempen for execution on behalf of Excalibur but Excalibur refused to consent: para 450. The effect was that, so far as the Texas Board was concerned, it had agreed to relinquish any interest in Kurdistan. But Excalibur had not consented and Gulf had not signed.

674. In its final submissions Excalibur drew particular attention to a passage in the cross examination of Robert Kozel which it said merited citation in full. As cited by Excalibur the passage reads as follows:

> "*Q. […] You appreciate that I say the real work was done by Gulf as opposed to Texas and that Gulf was part of a three-way consortium involving Gulf, Texas and Excalibur. You follow that? That's what I say.*
>
> *A. I believe that it was intended at some point to be a three-way agreement, correct.*
>
> *Q. And you understand that I'm putting to you that it wasn't just intended at some point, but that it was a three-way consortium and the collaboration agreement was an agreement between indeed the three parties?*
>
> *A. That is not the specific language of the agreement. Gulf is allowed by assignment from Texas Keystone to be a party. They were not a party at the signing of the collaboration agreement.*
>
> *[…]*
>
> *Q. As I say, I was putting to you that regardless of whether Gulf was and is to be treated as being a party to the collaboration agreement, in fact there was a three-way consortium consisting of Gulf, Texas and Excalibur that then set to work in pursuit of the Kurdistan opportunities. Do you not accept that?*
>
> *A. At this specific time of signing, no, but later we did act that way.*
>
> *Q. When is later?*
>
> *A. 2007.*
>
> *Q. When in 2007*?
>
> *A. During the course of the year and the majority of the year when Gulf expressed an interest in having an assignment and wanting to be involved [xxxxxxxxxxxxxxxxxxxx]*
>
> *Q. […] Just as a matter of fact I think you agreed with me that there was as a matter of fact at a point in time – you said some time in 2007 – a three-way consortium, regardless of-*

> *A. Right, that I viewed that there was because Texas Keystone had agreed to assign a portion if not all of its interest to Gulf and so* ***at that point in time*** *I would say that they* ***became a party to the agreement, yes.***
>
> *Q. Right. And then they owed all the obligations that we see in the agreement, the express ones and also the type of duties of loyalty and so forth I have just been putting to you?*
>
> *A. Yes, once they became a party to the agreement they would have the same obligations.*
>
> *Q. Yes. So by the time that the PSC, the Shaikan PSC came to be entered into, as far as you were concerned we had a three-way consortium with Gulf as a party to the collaboration agreement?*
>
> *A. Leading into it, yes.*
>
> *Q. Very good. Now, even if Gulf did not become a party to the collaboration agreement – just assume on the hypothesis, which you don't accept and that's fine. Even on the basis that they were not a party to the collaboration agreement but they nevertheless operated on the basis of as a matter of fact … a consortium comprising Gulf, Texas and Excalibur, you would also accept presumably that Gulf owed the similar duties of loyalty to its fellow de facto consortium members that we have been talking about earlier, just as Texas and Excalibur owed them to Gulf as well?*
>
> *A. I don't know that we owed them anything until the point when they became a party to the agreement.*"

675. The passage omitted at *[xxxxxxxxxxxxxxxxxxxxx]* in the citation reads :

> "*I don't have the specific date in my mind. I believe it was* ***in the Spring****. You probably have the documents when we floated the first assignment drafts to Excalibur*".

676. When that passage is included it is apparent that Robert Kozel, who is not a lawyer, was treating the execution by him of the assignment contract in March 2007 as making Gulf a party to the Collaboration Agreement. In that he was, in my judgment, mistaken.

677. The assignment issue arose again in September 2007. On **10 September 2007** Mr Patrick sent Mr Kozel the email of 24 November 2006 with the draft assignment agreement: see para 647. The draft recited (as it always had) that Texas and Excalibur were parties to the Collaboration Agreement, and that Texas now wished to assign its interest, which it was stated as being entitled to do under the Collaboration Agreement. Clause 2.1 envisaged Gulf becoming party to the Collaboration Agreement (a) by notice to Excalibur and (b) execution of the Deed of Adherence, and making the completion payment of $ 230,000. The new consortium interests were identified as follows: Gulf 70% and Excalibur 30% i.e. what was contemplated was a 100% transfer. This would require, but did not receive, Excalibur's consent. Mr

Patrick asked Mr Kozel to send the assignment documents to Texas. Mr Patrick's email suggested that only minor changes were necessary to the draft.

678. The Gulf Board met on **11 September 2007**. The minutes contain the passage set out at para 643 above referring to a contract proposal in respect of block 5, being a contract between Texas and Kurdistan, which Mr Patrick was to rework by omitting Texas. This must have been a reference to the draft PSC for the Shaikan block (with Texas still a party) which Ms Berry forwarded to Mr Patrick on the same day. On **12 September 200**7 Mr Kozel circulated to Robert Kozel and Mr Wempen Mr Patrick's email of 10 September 2007 forwarding the email of 24 November 2006 with the draft assignment agreement, and referred to the fact that "*life has evolved in Kurdistan*": see para 647 above. I do not regard this as an acknowledgement that an assignment from Texas to Gulf had already taken place.

679. Excalibur also relies on a further passage in Robert Kozel's cross examination as showing an agreement for Texas to assign to Gulf as much of Texas' Consortium Interest as the KRG would permit and that this had been agreed upon in the run up to the Texas Board meeting of 14 September 2007:

> "*Q. Would I be right in concluding that such discussion there may have been about Kurdistan at this board meeting cannot have been a particularly major discussion given the lack of reference to it in these minutes?*
>
> *A. I don't think it was on the agenda.*
>
> *Q. Right. It would, however, have been a matter that was addressed, would it not, albeit briefly?*
>
> *A. It was addressed among the four of us; not at the board meeting, but there were other people present.*
>
> *Q. I see. Is this one of these discussions amongst the four of you were you are all having a discussion at the same time, or is it were you are having disparate discussions but one way or the other all four of you have spoken?*
>
> *A. No, we were all together but the decision had already been made. It didn't need to be discussed here* ***because we had already made the decision that Texas Keystone would transfer all of its interest, if possible, and stay in at a minimum if necessary. That decision had already been made between the four of us****. It didn't need to be readdressed.*
>
> *Q. That actually was what I was going to ask you, because that seems likely, I agree. That is consistent I think also with what you said on the first day of your evidence when you referred to Gulf taking over from Texas in the consortium.*
>
> *A. Yes, we would – at this time in 2007 we would have been happy to transfer 100 per cent of our interest, that's right.*"

680. I do not regard this evidence as indicating that some new binding agreement had been reached between Texas and Gulf in the early part of September 2007 for the assignment of an interest under the Collaboration Agreement to Gulf. Texas had made the decision to transfer 100% – in March 2007 – and Robert Kozel had signed an assignment agreement on behalf of Texas. A decision that Texas would transfer its interest (or all save the minimum required by the KRG) had been made (although different percentages had been under consideration thereafter). It did not need to be readdressed. Further any agreement between the Kozel brothers would not have been, or been regarded by them, as an agreement between Texas and Gulf.

681. There was, however, a *draft* assignment contract in circulation. On **27 September 2007**, Texas[63], having filled in certain details in the draft agreement, sent it to Mr Kozel for his review and comments. The draft agreement, dated **27 September 2007**, provided, as before, for Texas to introduce Gulf as a party to the Collaboration Agreement by notice to Excalibur and for it to assign and transfer to Gulf the Gulf Consortium Interest (defined as Texas' 70% Consortium Interest) by acknowledgments of the executed Deed of Adherence. Gulf was to accept that assignment and pay to Texas a Completion Payment of $ 258,878.31 (a slightly different figure from the original Completion Payment amount, and one which, itself, was out of date – the covering email indicated the need to add a further $ 239,081.13). At Completion Gulf was to execute the Deed and Texas was, unless it had already done so, to notify Excalibur of its assignment of the Gulf Consortium Interest and execute its acknowledgment of the Deed.

682. This is obviously not the same as an agreement, not dependent on a Deed of Adherence, to enter into whatever interest the KRG might agree. Further the draft 27 September agreement could not proceed to contract without (i) the KRG agreeing that there was no need for Texas (in the event it did not so agree); (ii) finalisation of the costs to be included in the Completion Payment; and (iii) Excalibur's consent.

683. There are several difficulties in the way of concluding that a contract of the type now relied on was made, let alone an actual assignment: (a) it is unlikely that Texas and Gulf would have made a contract of this type orally, and without written confirmation; (b) Excalibur was never told of it so that it would not appear to be binding on Excalibur or give Gulf rights against Excalibur; (c) the Texas Board Minutes of 14 September 2007 make no reference to it; (d) the alleged agreement is barren of terms in relation to costs, particularly past costs; (e) the alleged agreement is not in the same terms as the drafts of 10 and 27 September 2007 and it is implausible to suppose that Texas and Gulf made a binding agreement or assignment in one form and then started negotiating a different one; and (f) Gulf had no need of such an assignment.

684. As to (e) the 10 and 27 September emails show that the parties were still in negotiation in respect of a 100% transfer and were contemplating that any assignment would be by the method stipulated in the contract (albeit for a partial transfer) i.e. with Gulf executing a Deed of Adherence and Texas notifying Excalibur of its assignment and acknowledging execution of the Deed.

[63] In the person of Christine Raizin, Robert Kozel's PA.

685. As to (f), by September 2007 it was apparent that Excalibur was not going to bid for the PSC. Gulf was not a party to the Collaboration Agreement, and, not being a party, was entirely free to go ahead as it wished. It also had it in mind to bid for Block K 38 or K 10 (Akri-Bijeel), for which Excalibur would not be bidding, and which the Collaboration Agreement would preclude it from pursuing independently of Excalibur: clause 2.2 (a). In those circumstances there was no advantage in it becoming a party to the Collaboration Agreement. It is apparent from Mr Kozel's evidence that he realised that Gulf had now no need to become party to the Collaboration Agreement, and that Texas and Gulf could proceed, as he put it, "*straight to the PSC stage*".

686. In my judgment there was no oral contract of assignment in early September 2007 of the type alleged. Nor was there an actual assignment. Texas and Gulf did not intend to contract to assign until the draft was executed or to assign until the Deed of Adherence stipulated in the Collaboration Agreement was executed. It would have been odd of them to do so when the amount that could be assigned was unclear.

687. I also cannot accept that Gulf by conduct assumed a liability to Excalibur, either directly, or to Texas for the benefit of Excalibur. The parties had prescribed a method for Gulf to assume obligations under the Collaboration Agreement in the event of a partial transfer to Gulf, namely by the execution by Gulf of a Deed of Adherence. If they wished they could, no doubt, have agreed to adopt another method. But they showed no sign of doing so. On the contrary, mindful no doubt of the contractual provisions, the parties circulated and referred to drafts which envisaged, *inter alia*, execution by Gulf of the Deed.

688. The fact that Gulf (a) proceeded with a bid; (b) entered into the First Indemnity Agreement with *Texas;* and (c) entered into the PSCs with the *KRG* was not an assumption by Gulf of any obligation under the Collaboration Agreement to *Excalibur* or to Texas for the benefit of Excalibur. As to (a) if Gulf was not a party to the Collaboration Agreement it was entitled to proceed to bid without regard to that agreement. The fact that it did so does not signify that it was, unnecessarily for it, assuming an obligation to Excalibur. As to (b) and (c), Gulf's agreements with Texas and the KRG did not provide for any undertaking of liability to Excalibur and were agreements which Gulf could enter into without undertaking any such liability. Further para 12 (a) of the First Indemnity Agreement provides that:

> "*Nothing in this Agreement is intended to confer upon any party other than the parties hereto and the Indemnified Parties or their respective successors and assigns any rights, remedies, obligations or liability under or by reason of this Agreement, except as expressly provided in this Agreement.*"

Under New York law "*An express provision negating an intent to permit enforcement of the contract by nonparties is decisive as to the rights of said parties to enforce it.*": **New York Jurisprudence 2d, Contracts, section 311 (2013)**. The Indemnity Agreement is not, therefore, an indication of an intent that Excalibur should be entitled to rely on any promise contained in it.

689. Excalibur places some reliance on the recitals in the original draft of the First Indemnity Agreement and the terms of the draft JOA sent to MOL on 15 November 2007. The recital to the draft of the First Indemnity Agreement provides that:

> "*prior to the date hereof, TKI assigned (through the execution and delivery of a Deed of Adherence) all of its interests, including its Consortium Interests, under and pursuant to [the Collaboration Agreement] to Gulf Keystone.*"

By the time the indemnity agreement was in fact signed, there had been no such assignment and the recital was deleted. This, as Gulf rightly submits, shows (a) that the mutual intention of Texas and Gulf was that, if there was to be an assignment, it would be through execution of the Deed of Adherence; and (b) that no assignment was ever executed. I consider the significance of the draft JOA in paras 748-9 below.

690. Lastly, clause 3.2.3 of the Collaboration Agreement provides that no transfer of all or part of a Consortium Interest shall "*in any circumstances be effective*" unless and until the transferee undertakes in writing to the Parties (here Texas and Excalibur) to be bound by and adhere to its terms. The Deed of Adherence would have satisfied that clause. But that Deed was not executed by Gulf. In those circumstances no assignment could be effective. Clause 3.3.1, which applies to a partial assignment to Gulf, provides that such an assignment shall become effective upon the execution by Gulf of a Deed of Adherence. The necessary implication of that, especially in the light of clause 3.2.3, is that it shall not become effective without the execution of a Deed of Adherence.

691. New York law distinguishes between (a) a personal promise by the purported assignor not to assign the contract either at all or without consent (which merely renders the assignor liable for breach of promise if he does so); and (b) a clause that relates to the validity or effectiveness of the assignment itself. New York law has a general policy of favouring freedom of assignability. But a New York Court will give effect to a clause that renders an assignment invalid or ineffective if it uses "*clear, definite and appropriate language*": **Macklowe v. 42nd St Dev. Corp.,** 170 A.D. 2d 388 (N.Y. App. Div. 1st Dep't 1991) (citing **Allhusen v. Caristo Const. Corp.,** 303 N.Y. 446 (N.Y. 1952). There is no need for the words "void" or "invalid" to appear. If the contract says (as in clause 3.2.3) that unless X or Y occurs, the assignment will not take effect, then that is sufficient.

692. Excalibur claims (i) that clause 3.2.3 is inoperative because it is only clause 3.3.1 which is relevant to the case of a partial assignment by Texas to Gulf ("a relevant assignment") and (ii) that clause 3.3.1 only provides a way, but not the exclusive way, in which Gulf could elect to be treated as if it were a party.

693. I disagree. clause 3.2.3 is in the most absolute and general terms "*No transfer of all or part ... shall in any circumstances be effective*". The execution of a Deed of Adherence would satisfy clause 3.2.3, which achieves the same effect as that clause. But that is no reason to regard clause 3.2.3 as inapplicable to a relevant assignment. The provision in clause 3.3.1 that an assignment shall become effective upon the execution of a deed *prima facie* implies that it shall not become effective until then. Insofar as there is any doubt on the question, clause 3.2.3 makes the position clear. The parties who agreed clause 3, which must be read as a whole, cannot have intended that a relevant assignment should take effect without a written undertaking by Gulf to Texas and Excalibur to adhere to the Collaboration Agreement. There was no variation of this provision.

694. Excalibur claims that it waived the requirement of a Deed of Adherence. Under New York law a party can waive a contractual right if it is designed solely for its benefit: **W.W.W. Assocs. v. Giancontieri**, 77 N.Y.2d 157, 162 (N.Y. 1990). It is not apparent to me that it ever purported to do so. In any event the requirement is not solely for its benefit. Execution of a Deed of Adherence would benefit Texas because it would mean that Texas was not left in the position of someone who had given up rights under the Collaboration Agreement but without Gulf having – beyond any argument – assumed its obligations thereunder.

695. Lastly, Excalibur claims that there was, at least, an assignment in equity. Judge Bellacosa, in a passage in his evidence which I found somewhat general in character, contemplated that, in a suitably exceptional case, where there had been some kind of "*implied representations and acceptance of burdens as between the parties*" the court might uphold an assignment in equity, even if one was not sustainable as a matter of law under the contractual documentation.

696. I do not regard this as of assistance to Excalibur. First, it does not seem to me that obligations on the part of Gulf would arise otherwise than by an express or implied assumption of liability i.e. as a result of an implied contract. Judge Bellacosa was unaware of any New York authority which showed that there could be an equitable imposition of liabilities. Secondly, I see no basis for holding that there was an assignment in equity where no Deed of Adherence was executed and there was no agreement that it was not needed. Thirdly, there were no representations and acceptance of burdens which might give rise to such an equity. It may be that, if Gulf had acted as if it had rights and obligations under the Collaboration Agreement and Excalibur and Texas had proceeded on a basis that made clear that they treated Gulf as a party to the Collaboration Agreement (notwithstanding the absence of a Deed of Adherence), that Gulf could be treated as such a party. That would, in essence, amount to the parties agreeing to vary the contractual scheme. But they did not do so.

Deemed withdrawal?

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697. Mr Kozel sent the draft PSC and commercial terms as received from Mr Patrick to Mr Goda of Texas on **9 October 2007**. Mr Goda then circulated them to Mr Wempen at Mr Robert Kozel's request. Mr Goda's email read:

> "*Rob Kozel asked me to forward the attached to you. There is a Partners' meeting scheduled for 10.00AM London time, Monday, 15 October 2007 in the London office.*
>
> *It is asked that you please review and pass comments as soon as possible. We have been informed that we must get this information back to the Oil Minister in Kurdistan immediately. We were informed alot [sic] has changed with regards to the Com terms and PSA structure to reflect competition and legal changes that have occurred in Kurdistan. The Minister has given guidelines that he wants [the contract] signed by 20 October 2007. This being said, it is urgent your legal advisor reviews the documents and that everything is concluded by close of business on 15 October.*
>
> *Please advise as to whether you will attend in London or would like to speak in advance.*"

698. On the same day Mr Wempen replied to Mr Goda that he would not be able to attend the meeting, but that he would "*review and revert with comments as appropriate*". He never did so. Nor did he go to London for the meeting (he could have done but chose not to) which did not, in the event take place (although there were extensive discussions between Mr Kozel and Robert Kozel).

699. Mr Wempen forwarded Mr Goda's email to his brother, who had been unwell, asking him to review the draft. Eric Wempen replied on 12 October 2007:

> "*My thoughts...and note that I have not looked at the original docs and have no idea about industry standards, how this deal went down, etc:*
>
> *It looks like a lot has changed – the government can nominate at its own option a third party contractor to work alongside you guys....I can't see how any contractor would agree to such a thing without an additional 100 page agreement permitting the contractor to kick out the third party contractor at any time. What if the third party contractor is some local idiot with friends in the government? Also, there's a 4M minimum outlay per well.*
>
> *Is this normal? I have no idea whether any of this is industry standard. If not, and if the government is just jockeying for as much control as it can without the need to put up any cash, your guys may want to walk. No skin off your back of course, so if they want to move forward, I can't see how you would have an issue*."

Mr Wempen replied: "*Thanks this is very helpful*".

700. The draft attached to Mr Goda's email was a version on which the changes could readily be identified. These included, as Eric Wempen spotted, the Third Party Interest clauses (4.1 ff) which entitled the Government to nominate a public company to have up to a 25% interest in the contract subject to payment of its share of the costs up to the date of payment, not including any bonuses payable.

701. The Third Party Interest clause alone appears to me to have constituted a material change within the meaning of clause 8.6.2. *bis* of the Collaboration Agreement. Excalibur gave no notice of a wish to continue to participate. This is scarcely surprising since it had already decided not to participate in the bid ("*No skin off your back of course*"). The defendants submit that the fact that it did not do so means that it is conclusively deemed to have disapproved such change (as Eric Wempen plainly did) and to have withdrawn from the Consortium Bid. On this ground alone it was disentitled to any Participating Interest in the Shaikan PSC and Texas and Gulf were free to proceed without it.

702. Mr Wempen says that he understood that he was being asked to agree to the KRG's new requirement for a local partner interest. He characterised the proposed meeting as a "*technical meeting*" or a "*partner meeting of the experts for the bid*"; and that he did not see any need to go; and that it was Mr Kozel's function to consider the commercial terms of the PSC. He, Mr Wempen, had brought the deal to Mr Kozel "*on a silver platter*" and it was "*up to him…as the expert and the leader of our consortium to... carry the ball across the finish line so to speak*". This evidence reflects, again, his

approach to Kurdistan. He had found the deal and, having done so, others could be expected to do the negotiations.

703. Mr Picken QC submits that this point, advanced late in the day, bears all the hallmarks of a lawyer's afterthought; that it might have been tenable if there had been a formal application process or bidding round in train; but that, in circumstances where the parties were in a process of negotiation with the KRG and working towards a satisfactory conclusion, the court should be slow to conclude that a failure to comply with the formalities of the Collaboration Agreement, to which formalities the parties paid scant regard, should have the consequence of depriving Excalibur of an interest to which it would otherwise be entitled.

704. Since I have concluded that Excalibur had already withdrawn, or is deemed to have withdrawn from the Bid, the question of a deemed withdrawal at this stage does not arise. If it does, I do not accept that there was a deemed withdrawal because I do not regard Mr Goda's email of 9 October 2007 as a notice of a proposed change for the purposes of clause 8.6.2 *bis* of the Collaboration Agreement. The email makes no reference to that clause; it does not ask whether or not Excalibur wishes to continue to participate; what it does do is to ask for comments within rather less than 6 full days, as opposed to the 7 days specified in the clause. If a communication is to have the draconian consequences stipulated by the clause it must, in my judgment, be quite clear, particularly where the parties have not shown themselves sticklers for the formalities of the Collaboration Agreement, that it is a notice for the purpose of that clause. Mr Goda's email does not fulfil that requirement.

Mr Kinnear reports on a meeting with Mr Kozel and Mr Al-Qabandi

705. On **19 October 2007**, Mr Kinnear emailed Mr Wempen to report on a meeting which he had had with Mr Kozel and Mr Al-Qabandi the day before. Mr Kinnear understood that the deal would have been signed but for the local partner requirement, as part of which the local partner did not need to put up any upfront cash but only share operating costs. He explained that as a result:

> "*...I think Todd, hence Gulf Keystone, are looking at a new deal. Their costs have risen from an outlay of $5/6M to almost $30M without starting to work. They are risk taking and with the new move loosing [sic] their market share. It also means that we have to raise more money.*
>
> *Todd has offer[ed] to meet next week in London and present what he thinks is a solution.* ***Or he will travel to the US if you require him to present to investors****?*[64]*Asti [sic] wishes him to sign NOW so real reverse pressure?*
>
> *Kinnear's thought: Todd will be looking to reduce his exposure/risk. He will require more cash input from our side and try to reduce our equity (That's what I would do). I would suggest we get him the cash but hang onto our share and even ask to increase our slice. We are now taking on the burden of risk and hence need reward. He provides the technical input and has his slice but looses [sic] a bit of the driving seat. We maybe [..] should also suggest that to reduce his risk this is made into a JV for Kurdistan and a separate*

[64] An offer inconsistent with an intent to exclude.

> *Board so that we have a say to protect the investors and the direction this moves plus a seat for your guys in Kurdistan…*"

Later in the email he refers to "*your investor group*".

706. This email repeated Eric Wempen's warning about the worsening of the PSC terms, and the increasing costs. Mr Kinnear had evidently been led by Mr Wempen to believe that there were investors ready to invest. There were none; and the idea that Excalibur should increase its stake, with an accompanying increase in expenditure, parted company with reality. Mr Wempen's reply did not correct Mr Kinnear's understanding. Mr Wempen said he had had "s*ome good meetings in Washington about sorting the very issues you describe. I think we shouldn't rock the boat until we are signing, then we will be in a stronger position*". This was, Mr Wempen said, a reference to a meeting with Mr Maguire.

707. Mr Patrick sent Mr Kozel a revised draft agreement between Gulf and Dabin. This followed the wording of the Excalibur – Dabin agreement and contained in clause 2 a new provision that Dabin should not provide any of the Services "*to any company in the oil and gas exploration and production business except GKP and, in particular will not assist any other company to compete with GKP in the oil and gas business in any part of Kurdistan, provided that Company will provide similar Services to the other companies comprising the Contractor Entity in respect (only) of block 5*." If Excalibur became party to the PSC it could still enjoy Dabin's services. But the effect of the Agreement would be to preclude Dabin from providing services to Excalibur until then. Mr Kozel said that the purpose of the clause, drafted by Mr Patrick, was to prevent Dabin acting for potential competitors and that, as far as he was concerned, whatever it said, Dabin and Excalibur were still partners and could still act as such. I accept that evidence. There is no indication that Gulf sought to prevent Dabin from working for Excalibur, who were potential PSC participants.

708. Negotiations between Gulf and the KRG continued throughout October, principally between Mr Patrick and Mr Morrow to finalise the terms of the Shaikan PSC.

Gulf Board Meeting 25 October 2007

709. The Gulf Board met in Zurich on **25 October 2007**. Mr Cooper gave a financial update which included the fact that, if a Kurdistan PSC was signed with Gulf's share of the $ 25 million bonus due within 30 days of signature, Gulf needed to start securing additional funding immediately. He expressed the belief that Gulf would need to farm out part of its share in the Kurdistan Blocks for a "promote"[65]and consider another secondary placing. The minutes record:

> "*Mr. Kozel reported that MOL had initialled its K10 [Akri Bijeel] Block PSC on Monday, and that they had agreed 20% for the Government and 20% for the third party back in right.*
>
> *GKP was now under time pressure to get the K5 [Shaikan] PSC initialled by the weekend.*

[65] A "promote" is a farm out of an interest where the farmor receives a premium. If the farmee participates without a premium he does so on "ground floor terms".

> *... MOL has confirmed that it was prepared to swap 20% in K10 [Akri Bijeel] for 20% in K5 [Shaikan]*. ***Excalibur had not yet signed any documentation, but had indicated that they wanted their 30% of GKP's interest in K5 and had the money in place to pay their share of costs.***
>
> …
>
> *Mr Kozel stated that Dr Ashti wants Texas Keystone, an American Company, on the licence. Currently Iain Patrick was ignoring these requests but that Jonathan Morrow had brought this issue up again. It was likely that Texas Keystone would have to come on the licence as a minority interest as with the Turkish troops on the border Dr Ashti wanted another American flag.*
>
> *It was resolved by the Board that the Company should proceed to try [to] secure the Kurdistan opportunity, and that Mr Kozel and Mr Qabandi form a subcommittee responsible for finalising these negotiations along the lines discussed and authorising the signature by the Company or its subsidiary, Gulf Keystone International Limited, of the production sharing contract for Block K5 [Shaikan] and the necessary documentation to complete the acquisition of a 20% interest in Block K10 [Akri Bijeel]...*"

710. These minutes (a) show that Gulf, far from being aware of Excalibur's true financial position, understood that Excalibur would have the money to pay its share of the costs as they fell due; and (b) are wholly inconsistent with the idea that Gulf and Mr Kozel were trying to cut Excalibur out of the deal and had no interest in its participation. Gulf, which was facing huge expenditure, would have welcomed Excalibur if it could contribute its 30%. A number of papers were prepared for the meeting which assumed Excalibur's participation. The budget recorded an assumption that Gulf had a 50% interest in Shaikan (K 5), with 20% for MOL and 30% for Excalibur, and that Dabin and Excalibur were not involved in the Akri-Bijeel (K 10) licence. Its Executive Summary noted the need for Gulf to raise funds in 2008 and that the most likely option would be a "*farm out/sale of Kurdistan in event of success...*". Mr Mackertich's technical paper assumed that Excalibur would have a 30% interest in K 5 but that its interest had "*yet to be finalised*" and that it had no interest in Block K 10. Mr Compton produced a paper on "*Kurdistan economics*" which contemplated Excalibur as a partner.

711. On **26 October 2007** Mr Compton emailed within Gulf further calculations of Net Present Value (NPV) which assumed that Excalibur would have a 30% share of Gulf's 80% interest in Shaikan. (This appears to be after allowing for a KRG share of 20% and a local partner interest of 15%). He concluded:

> "*GKP share if we are at initial 56% (80% less 24% for Excalibur) = $116.2MM*
>
> *Excalibur share if they are initially at 24% (30% of our 80%) = $49.8MM.*"

712. On **26 October 2007**, MOL informed Mr Patrick that it would participate on the Shaikan PSC through its subsidiary Kalegran. Both Gulf and MOL were required to give parent company guarantees in respect of their subsidiaries that were going to sign the PSC.

Texas is required to join

713. The upshot of Dr Hawrami's changes of mind on US participation was that it became clear that Texas would have to take at least 5%. On **27 October 2007**, Mr Patrick emailed Mr Kozel to say that he had spoken to Mr Morrow and that Dr Hawrami "*now wants Texas to have a working interest in the PSC*". He emailed Mr Morrow the same day to confirm that Texas would accept a 5% interest.

714. Texas did not really want to participate in the Shaikan deal. But Robert Kozel "*did not want to be the person to kill the deal*." Texas was, therefore, prepared to sign up but only against an indemnity from Gulf. The Texas Board agreed to the Shaikan PSC and related agreements by a written resolution of all four directors dated **29 October 2007**. The indemnity agreement was dated as of 30 October 2007. Its second recital recorded:

> "*Whereas TKI is signing the PSC due to a requirement imposed by the relevant governmental authorities in Kurdistan and is willing to sign the PSC as a 5% non-controlling party, subject to the terms and conditions of this Agreement.*"

715. Under the agreement, Texas was to receive its interest in the PSC for no charge. Any expenses or contributions with respect to such interest would be paid by Gulf International, which would be entitled to any income and benefits from Texas' interest. Texas was given the option, upon receipt of the Authorisation for Expenditure (AFE) for the initial exploratory well, to pay for its share of the authorised expenses and thereafter to receive any benefits with respect to its interest under the PSC. If Texas did not exercise its option, it was to hold its interest on trust for Gulf until the KRG approved a formal assignment. The option gave Texas flexibility at no cost. If it changed its mind about participating it could do so. Gulf gave Texas a wide ranging indemnity in respect of any losses related to the PSC.

716. Excalibur suggests that this is an example of an indirect beneficial interest and shows how simply such arrangements can be effected. In fact Texas was a 5% direct participant. The agreement gave Texas a right to be carried until the AFE for the first exploratory well at which time it had to choose whether to maintain its interest (and pay the costs) or not. In the latter event its interest would be held on trust for Gulf pending KRG approval of an assignment. At that stage the interest would be beneficially owned by Gulf. That could be described as an indirect interest but its terms would require no amplification. Gulf would be entitled to all the revenues and liable for all the costs attributable to the interest. Any arrangement with Excalibur would not be as simple as that.

717. The authorisation for expenditure for the initial exploratory well to be spud at Shaikan (the Initial AFE) was received on **5 December 2008**, following the successful completion of seismic studies earlier in the year. Texas' opinion of the relative merits of pursuing opportunities in the Marcellus Shale and Kurdistan remained the same. Texas did not, therefore, exercise its option and consequently no longer holds any beneficial interest in the Shaikan PSC, although, pending the approval of the KRG, it retains the legal interest.

The arrangements with MOL

718. As appears from para 650 above MOL had agreed in principle to take a 20% interest in Shaikan and to transfer to Gulf in exchange a 20% interest in its application for the K10 (Akri-Bijeel) block.

30 October 2007

719. On **30 October 2007** a number of events happened:

i) Mr Morrow informed Mr Patrick that Dr Hawrami was prepared, simultaneously with the execution of the Akri-Bijeel PSC, to approve an assignment to Gulf of a 20% interest in Block K 10 (Akri-Bijeel).

ii) The PSC for the Akri-Bijeel block between Kalegran and the KRG was signed.

iii) MOL and Gulf International entered into a side-letter agreement whereby in consideration for the 20% interest in Shaikan, Kalegran undertook to assign by way of a farm out agreement a 20% interest in Akri-Bijeel. The letter agreement provided MOL with a put option and Gulf International with a call option to reassign the Shaikan interest if the farm out agreement was not entered into and completed within a certain timeframe.

iv) In a letter to the KRG MOL said:

> "*Kalegran has agreed, subject to the approval of the Kurdistan Regional Government, to assign a 20% interest under the Contract to Gulf Keystone Petroleum International Limited ("Gulf") in consideration of our participation for 20% with Gulf in the Shaikan Production Sharing Contract due to be finalised today*."

Enclosed with the letter was a draft assignment and novation agreement between Kalegran and Gulf International assigning a 20% interest in Akri-Bijeel.

720. The first draft of the farm out agreement in respect of the Akri-Bijeel block was sent by MOL to Mr Patrick on 5 November 2007. The negotiations were somewhat drawn out. Gulf International only finally concluded the Akri-Bijeel JOA and farm out agreement on **21 December 2007**. The KRG had approved the assignment on 6 November 2007.

The financial effect on Gulf

721. Also on **30 October 2007** Mr Cooper sent Mr Kozel and Mr Al-Qabandi an email about the "*financial implications of the latest working assumptions of Kurdistan and production licences*". His email said:

> "*The estimate of requiring additional funds in Q2 2008 was based upon Excalibur taking and paying for a 30% interest in K5 [Shaikan]. If they are to take 24% or fail to sign or fail to pay for their interest then this will bring forward the need for GKP's financing. As I emphasised at the Board meeting Gulf Keystone's finances are incredibly tight, and if we do sign K5 [Shaikan] and K10 [Akri Bijeel] we need to raise money immediately. Particularly, as we are not signing any deal to farm out an interest in K5 [Shaikan] to*

> *Excalibur simultaneously, and have not had confirmation that Excalibur is adequately funded...*
>
> *As we discussed at the Board meeting, the result is that GKP needs to successfully farm down its interest in K5 immediately in order to secure additional funds. That being the case we need to be convinced that i) Dr Ashti will approve GKP farming down so soon after signing the Block; and ii) GKP can find a party willing to pay a promote.*"

As is apparent he had prepared financial calculations on the basis that Excalibur would pay for a 30% share. He realised that Gulf needed the money, and was not looking to cut Excalibur out.

722. On the same day Mr Mackertich circulated to Gulf a document setting out the "*Kurdistan paying percentages*". It explored the economics of various percentages, and assumed a work programme of $ 60 million for Shaikan and again assumed that Excalibur would take up a 24% interest. His email noted that he had previously assumed that "*GKP would have 50% and Excalibur 30% on signature*" but now understood that "*this should be 30% of GKP's 'available interest' – hence 24% as opposed to 30%..*." The document attached showed Excalibur having 0% on the K 5 licence, but being a 24% participant in Shaikan at cost. Its past costs were estimated to be $ 360,000; signature phase costs $ 6.24 million[66]; exploration phase $ 7.14 million; development phase $ 81.6 million. Excalibur was shown as having no interest in block K 10.

The Award of the Shaikan PSC

723. On **30 October 2007** the Shaikan PSC was signed and initialled in London by Gulf International, Texas and Kalegran. Mr Kozel sent a text message to Mr Wempen "*Contract erbil finished*". Mr Wempen's recollection is that he spoke with Mr Kozel on the telephone and was invited to come to a big party with MOL in Budapest. Mr Kozel said there would be a formal signing ceremony in Erbil and he would send an itinerary. On the same day Gulf wrote a letter to Dr Hawrami confirming that the interests of the parties were: Gulf International 75%; Kalegran 20%; Texas 5%.

Excalibur's problem

724. Excalibur now had a big problem. It had no money, no available finance, and nothing in the way of commitments, conditional or otherwise, statements of intent or indications of support. Since the spring of 2007 Mr Wempen had made no significant attempts at fundraising. It was only at this point that Excalibur turned to capital raising preparation. Mr Wempen said that his entire plan was to fundraise against an asset and that investment bankers had told him "you need a deal to raise a dollar". Even if they had, that does not mean that advance preparation cannot begin until it is signed. There was a deal in the offing in the form of the PSC; but Excalibur was not to be on it. That itself would put many potential financiers off. Participation in the deal would require raising finance to pay its $ 6 million share of the signature bonus [24% of $ 25 million] in short order.

[66] He put the cost of the signature phase at $ 26,000,000.

725. Excalibur also lacked any satisfactory team for finance raising purposes. There was Mr Wempen, his brother, Mr Behrends, and Mr Franchi. Mr Wempen had a number of contacts; but he was not a finance man, and had never successfully raised any funds before. His brother was a tax lawyer at UBS. Mr Behrends was a partner at Crowell & Moring but not a fundraiser. Mr Franchi's history is at para 363 above. In the event Eric Wempen sounded out UBS; Mr Behrends sounded out China Petroleum; and Mr Franchi sounded out Lazard; and, in the case of each of them, no one else. All came to nothing. There were several other approaches but they got nowhere at all.

726. Excalibur contends that all its efforts to raise finance were stymied because Gulf failed to acknowledge its interest in Shaikan.

Excalibur attempts to raise funds

727. On **30 October 2007** Mr Wempen emailed his contact **Mr Amir Makov** to say the Kurdistan deal had closed and that he was "*looking for funding*" and asked him to call back. Mr Wempen spoke with, and went to visit, him but this approach went nowhere.

728. On **31 October 2007** Mr Wempen emailed Mr Shayne Nelson of Standard Chartered Bank: "*We signed our deal in Kurdistan. Are you interested?*". He replied to say that they were not bullish on the KRG or Iraq. Mr Wempen did not try to get them involved again. This, as Mr Wempen acknowledged, had nothing to do with Gulf or any lack of acknowledgment of title. This did not stop Excalibur pleading and Mr Wempen's third statement asserting that Excalibur's want of success was because of Gulf's refusal to acknowledge Excalibur's rights. Mr Wempen emailed Mr Nelson again in December 2007 saying "*I have Kurdistan*".

729. On the same day Eric Wempen sent his brother a long email offering advice. He told his brother that his trip to Hungary was critical (in the end he did not go) and that he should "*think about what you'll say to get Tod to be a backstop if all else fails (it's essentially Plan D)*". Mr Wempen said that Plans A to C were to go through an investment bank to raise funds and then turn to his personal network, whereas Plan D was to lean on Gulf for short-term funding. Eric Wempen said:

> "*(2) We need to create a slick pitchbook for the $35...To do this, we need every last bit of info you can gather. Much of this you'll need to get from Todd or others on his team. Since he takes forever to get back to you, make sure he commits to getting you everything you need on his company (since an investor will want complete due diligence on Todd and his Keystone) and the deal. You'll need annual reports…and any financial statements you can get, brochures, bios on Tod[d] and his top management, etc. Ask Todd whom you can speak with to get it and have his people send it while you're there. On your own, you'll want to gather any relevant newspaper…or magazine articles on the situation there, other deals that have been approved in Kurdistan ... It goes without saying that you need every contract, plus, try to get every letter (if they'll give it) from the Kurdish gov't about their commitment to the deal, etc. See if the US has issued any favourable press releases. You'll also want to gather general info on Kurdistan....(you'll want to show stability to investors) and how calm it is in comparison....Then, you'll need to get your hands on every piece of geologic data they have....*

> *Ask Todd what info he would ask to see if he were looking at a deal for the first time (pick his brain). Ask him if there's an industry standard for oil pitchbooks. Ask if he has any samples....*
>
> *...Oh, and ask Dan [Franchi] tomorrow what items he wants you to ask for, and be specific.... We want the decision of an investor to be easy, and we don't have the time for each investor to do due diligence.*"

730. The "$ 35" was a reference to what Excalibur estimated would be its share of costs to first oil (the figure fluctuated between $ 30 and $ 40 million). This email shows the rudimentary nature of Excalibur's approach. It needed to get hold of a raft of information held by others; it proposed to put together a pitch book for the $ 35 million; but it had no idea what investors would be looking for in a pitch book; and envisaged, if all else failed, short term funding from Gulf.

731. Over the next month and beyond Mr Wempen did his best to raise investment interest. He approached at least six investment banks. On **1 November 2007** he emailed Mr Kinnear to say that he was sending off information to "*investors*" on Monday (i.e. 5 November). Once again there were, as yet, none. Mr Wempen's response, on this and other occasions, to the suggestion that he was giving Mr Kinnear a false impression, was that Mr Kinnear understood what Excalibur's fund raising plan was. I do not accept that Mr Kinnear realised that Excalibur had no investors who had given any indication of support of any kind.

732. On Friday **2 November 2007** Mr Kozel asked Mr Patrick to send him a copy of the final PSC and JOA for Shaikan so that he could pass them to Excalibur. He did so having been asked by Mr Kinnear, at Mr Wempen's prompting, to provide a copy. Mr Patrick replied attaching the final Shaikan (K 5) PSC in Word. On **4 November 2007** Mr Kozel sent it to himself at his Texas email address and went off to Erbil for the signing ceremony. A copy was, for some reason, not sent to Mr Wempen until **10 November 2007**, after Mr Kozel's return.

733. On the same day Eric Wempen emailed his brother with some thoughts on fundraising. Eric Wempen's boss at UBS was another tax lawyer called Christopher Pinho. His email recorded "*Pinho's little brother (Mark) suggested the Riverstone Group run by Carlisle ... and First Reserve*". Mark Pinho was probably with the Soros Fund. Riverstone was a private equity fund run by the Carlisle Group. First Reserve was also a private equity fund. The email went on:

> "*Due to the political risk, [Mark Pinho] didn't think it would be worth approaching most of the regular run-of-the-mill funds. He said that private equity funds run by major corporates is [sic] rare in the energy area...so beyond these two, he suggested simply contacting the big energy companies*"

Mr Wempen did not follow this advice. He did not approach an equity house or a big oil company. In evidence he said that the time was not right and that it would be for Excalibur's bankers to tell them what approach to adopt and to whom.

734. Mr Wempen contacted Mr Talal Al Ghalib, the executive director of Gulf Finance House in Bahrain. On **3 November 2007**, he sent him the Thames Chesapeake term sheet and an Excalibur Upstream Exploration Opportunity pitch sheet ("the teaser").

He wanted to interest Mr Al Ghalib in investing in the "*specific opportunity in Kurdistan*" or, if that was too small an investment, in raising an oil exploration fund, in which Kurdistan would be the "*anchor investment fund*". The teaser said:

> "*... 20% ownership interest of field available for $40 million*[67].
>
> *One year field survey and technical preparation by international oil company estimates reserves at 244 million barrels.*
>
> *Assuming oil prices of $80 per barrel, if reserves are proven within two years, the value of the field will be approximately twenty billion dollars….*"

735. This email assumed that an oil field could be valued by multiplying reserves by the price – an elementary error since the calculation takes no account, *inter alia*, of costs, variable price, or irrecoverability of reserves. Nothing came of the approach to Mr Al Ghalib.

736. Over the weekend of **3** and **4 November 2007** Mr Wempen met with Rodman & Renshaw, an investment bank. He was not put off by any want of evidence of title. There are no surviving documents relating to that meeting. Nothing came of it. This was, as Mr Wempen accepted, no fault of Gulf or the want of any letter of acknowledgement.

737. Mr Wempen did not at this time approach Mr Halpert, who, he said, had always said to him "*Come to me when you have a deal*". Mr Wempen's evidence was that it would be "*embarrassing*" for him to go to Mr Halpert when Excalibur lacked proof of title. I do not accept that that was his reasoning for not approaching his old friend, although why he did not do so is unclear (at one stage in his evidence Mr Wempen did not recall the reason before reverting to his original stance). Mr Wempen had been perfectly prepared to approach others at this stage without any acknowledgment.

738. On **5 November 2007,** Mr Patrick sent the text of the final Shaikan PSC as signed by Gulf International, Texas and Kalegran and the form of JOA tabled by Gulf as operator to Robert Kozel and said that he could pass them on to Excalibur on a confidential basis at his discretion. He does not appear to have done so.

The signing ceremony for the Shaikan PSC

739. Mr Kozel travelled to Erbil with MOL representatives. At a barbecue at Mr Berwari's house on **5 November 2007** Dr Hawrami suggested that as an alternative to payment to it of the signature bonuses in cash the KRG could subscribe for shares in Gulf. Mr Patrick produced a draft share subscription agreement, but, although there were some further discussions in late November and early December between Dr Hawrami and Mr Kozel, this idea went no further. Gulf paid the bonuses in cash.

740. The official signing ceremony for the Shaikan and Akri-Bijeel PSCs took place on **6 November 2007** in Erbil. The Shaikan PSC was executed by Texas, Gulf International, Kalegran Limited and the KRG. Gulf was named as the Operator. Excalibur was not named as a party, and, although Mr Wempen had wanted to attend,

[67] This was what Mr Wempen understood as a result of discussions with Mr Kozel to be the likely costs to first oil.

he had no invitation to do so. (Nor, although expecting to go, had he been invited to Budapest). Mr Kozel could not influence whether Mr Wempen was invited to Erbil and was indifferent to whether or not he came. The signing "ceremony" took place in the Prime Minister's office in a large compound with no spectators or press. The Prime Minister signed the PSC.

741. Immediately after Mr Kozel had attended the signing he went to see Dabin and signed the agreement for Dabin to be Gulf's representative in Kurdistan. Dabin was to provide "*consulting and government relations services*", advice as to political developments, arranging meetings and introductions to political and financial organisations and individuals in Kurdistan and Iraq and consulting service for transportation, accommodation and security. The agreement granted Dabin a 10% share in Gulf International's net profits from the Shaikan PSC on account of the services which Dabin was to provide in relation to it – a potentially valuable (if distant) benefit. Since it involved Gulf in carrying the expenditure it amounted to something like a 17% equity interest. Gulf obviously thought Dabin would be valuable to it in providing political and strategic information, including introducing Gulf to local leaders. Dabin also had a construction company which could build drilling locations and a security company.

742. An announcement was made to the market on **7 November 2007**. It referred to the interests under the Shaikan PSC as being Gulf International – 75%; Kalegran – 20%; and Texas – 5%; with Texas' interest being carried. No mention was made of Excalibur. There was nothing sinister in this. Excalibur was not a party to the PSC.

Negotiations with MOL for the Shaikan JOA

743. Gulf and MOL (Kalegran) needed to enter into a JOA for Shaikan. MOL wanted to include a pre-emption right in the event that another party to the PSC sought to sell its interest to a third party. Gulf wanted to be able to farm out part of its interest and not to be subject to any restriction that could affect the value of that interest.

744. On 26 September 2007, Gulf met MOL in Budapest. On 28 September 2007 Mr Patrick emailed a draft bidding agreement for MOL to Mr Kozel in respect of Shaikan (K 5) and Akri-Bijeel (K 10).

745. On **9 November 2007**, Mr Patrick emailed Mr Kozel to report that the only significant part of the discussion with MOL of the previous day was MOL's wish to include a pre-emption right. Mr Patrick noted that:

> "*In Shaikan GKP must preserve a specific right to transfer equity to Excalibur (about whom MOL would like further information) and to take back the TKI 5 per cent.*"

Mr Kozel replied: "*No pre-emption rights*". This exchange is impossible to square with the idea that Gulf was planning to keep Excalibur out of the deal come what may. On the same day Mr Patrick emailed MOL to express Gulf's strong opposition to pre-emption rights.

746. On **10 November 2007** Mr Patrick emailed MOL to express Gulf's very strong opposition to any rights of pre-emption. MOL, which wanted to ensure that in the

event of change it had an acceptable partner, would not sign a JOA without such rights.

747. On **15 November 2007**, MOL emailed Mr Patrick an amended draft Shaikan JOA. The amendments included reference in article 3.3F to Excalibur's participation. The recital provided:

> "*The Parties acknowledge that TKI has concluded an agreement with- Excalibur Ventures LLC. a company registered in Delaware to the effect that TKI undertook to assign 30% of its participating interest acquired in the Contract Area as a Contractor Party in connection with the Contract. And that TKI assigned all of its interests, including its consortium interests, under and pursuant to that certain Collaboration. Evaluation and Bidding Agreement in respect of Iraqi Kurdistan dated... to Gulf: and considering that the participating interest of a Party mav not be less than 5 % according to the Contract Gulf agreed to fulfil TKI's obligation to Excalibur by assigning 24% from its 75% participating interest*".

748. The Article went on to provide:

> "*The Parties agree that such assignment shall be the sole responsibility- of Gulf and neither MOL nor Kalegran or any entity of the MOL Group shall incur any obligation or liability in relation thereto. In addition Gulf shall indemnify MOL or Kalegran or any entity belonging to the MOL Group, or any directors, officers or employees thereof and hold them harmless against any [sic] they may incur or suffer arising from or in connection with damage, loss, cost expense or liability for claims, demands or cause of action they may incur in connection with any such agreements, assignments or other arrangements between TKI, Gulf and Excalibur Ventures LLC.*"

Excalibur relies on this draft Article 3.3F in support of its claim that there had by now been an agreed assignment by Texas to Gulf.

749. Exactly how MOL came to draft the somewhat obscure Article 3.3F is not clear. But I am satisfied that it cannot have been because Mr Patrick told MOL that there had already been an assignment from Texas to Gulf. He had denied any relationship between Excalibur and Gulf only two days before, saying that Gulf had "*no contractual relationship with, or legal obligation to, Excalibur*": see para 808 below. The likelihood is that MOL had learned of the intended assignment from Texas to Gulf and had either assumed that it had taken place or drafted on the assumption that by the time the agreement was executed it would have done.

750. Discussions between MOL and Gulf continued. On **28 November 2007**, MOL asked Mr Patrick for his comments on the JOA and also asked to be updated "*in respect of the negotiation status with Excalibur and provide us information about this company if they are still willing to enter into Shaikan*". As is apparent MOL knew little about Excalibur.

751. On the same day Mr Patrick emailed Mr Kozel to report:

> "*...Ferenc (MOL) also called. He had been trying to reach you. He restated that MOL needs some form of pre-emption in the JOA and wants information on Excalibur if they are a potential partner. The only other outstanding issue in the JOA is the wording MOL has added to protect them from GKLIP's relationships with Dabin and Excalibur... I cannot do any more to resolve these points, as we have reached an impasse. In order to finalise our arrangements with MOL we need a management discussion/decision on how to clarify the position with Excalibur and address the outstanding JOA points with MOL – well before the deadline of 6 December.*"

752. On **30 November 2007**, Mr Benko of MOL, who on 28 November had asked to be updated in respect of the negotiation status with Excalibur and asked for information about the company if they were still willing to enter into Shaikan, emailed Mr Patrick with comments on the Shaikan JOA. He said:

> "*Just to accelerate the process we are ready to provide a waiver for Excalibur concerning with the pre-emption right of the JOA if Gulf Keystone is ready to provide a guarantee for Excalibur's paying interest.*"

Gulf was not prepared to provide such a guarantee and was under no obligation, legal or moral, to do so. What, however, these emails show is that Gulf and MOL were exploring ways of making room for Excalibur.

753. A compromise was eventually reached in order to give MOL protection if any Gulf transfer reduced its participating interest to less than 20% or if Gulf transferred the operatorship and this was incorporated in Article 11.1 of the JOA, which was signed on **21 December 2007**. There was no Article 3.3(F).

Events after the signing of the PSC

754. On **6 November 2007** Mr Wempen emailed his congratulations, saying:

> "*Congratulations all around for the successful close. Please send the terms ahead of your arrival Stateside.*"

The signing of the agreement meant, as Mr Wempen appreciated, that the signature bonus was due in 30 days' time. So the need for funding was on Mr Wempen's mind.

755. Mr Wempen and Mr Kozel spoke on the telephone and, as a joke, Mr Kozel offered Mr Wempen an interest free loan. Mr Wempen's evidence was that:

> "*I thought Todd's offer of an interest free loan was generous since, under the terms of the Collaboration Agreement, we were supposed to pay other parties interest at LIBOR +2% if they carried our position for a period while we raised capital.*"

This was a misunderstanding in two senses. First he mistook a joke for a serious offer. Mr Kozel told him it was a joke on **10 November 2007**. Second, the Collaboration Agreement did not provide for any form of carry in respect of amounts due under the PSC.

756. On **6 November 2007** Mr Wempen emailed a friend, Paul Westhead, the manager of Rimrock Capital, which was a California-based hedge fund. He asked "*know anybody with $50 million laying around... ...I need a drink because the real work is finally starting*." He got no answer. The same day he emailed Mr Javellana at Deutsche Bank to point out the press release on Shaikan and ask "*Can you do anything with that?*" On **16 November 2007** he sent him a Non-Disclosure Agreement ("NDA"), but Deutsche Bank never signed it.

Eric Wempen gives advice

757. On **7 November 2007** Eric Wempen sent his brother a long email of advice as his "*consigliere*". He described it in evidence as a "*stream of consciousness*". In it he recognised that Mr Wempen was in a "*real vulnerable position ... with almost no leverage*". Eric Wempen's evidence was that that was because the PSC mentioned the block and the Collaboration Agreement mentioned Excalibur; but nothing in writing linked Excalibur to the block. That was, indeed, a problem. But the critical problem was that Excalibur neither had, nor had access to, any money. Eric Wempen urged his brother to make sure that the terms of the relationship with Mr Kozel were in writing "*including a) the dilution and resulting amendment of your original agreement if necessary...and b) the interest free loan he discussed (you MUST get this in writing).*" He told Mr Wempen he needed to create a paper trail to show that he had attempted to determine the terms of the deal from day 1 (by this he was referring to the terms of the PSC and day 1 was 6 November); that he had a plan regarding the obtaining of financing; and that the plan was feasible. He also needed to send Mr Kozel a list of the information/documentation he required.

758. The paper trail was intended, as Mr Wempen agreed, to meet any case that Gulf might make that it was entitled to proceed without Excalibur because Excalibur had no funding. The claim would be that Gulf prevented the plan from working.

759. As to the loan Eric Wempen, who plainly realised that Excalibur might not be able to participate in a PSC for want of funds, said:

> "*Since he offered you the interest free loan (which is quite an offer), you need to know if he really expects you to bring financing or is comfortable with what you've done so far (and if he doesn't expect you to obtain financing, does he plan on working with you or using this as a way to push you out).*"

760. He pointed out that:

> "*….The most important thing is that you, Rex Wempen, **set up this deal**, and you need to obtain as much documentation on this as you can. The most important thing is for your company's name to **stay on the deal documents so that you can point to this in the future** so you should verify whether your name is even mentioned… you need to mention to Todd that this is a huge thing for you since you (a private individual) set this up, and **for your own reputation**, you need something in writing from him **verifying Excalibur's position in the deal**. **Perhaps an acknowledgement letter or letter of intent from Keystone stating that you were the one who brought the deal or were instrumental in its creation and are part of the team**. Perhaps you can put this as a front page on the legal agreement for the interest free loan or*

> *amendment.* ***Better yet****, if the official signing docs don't mention Excalibur, you will need something current from Todd* ***verifying that you are involved*** *in order to obtain financing. This would be a good reason to ask for this document...*"

761. Mr Wempen explained that his brother never really trusted Mr Kozel (although they had neither met nor spoken). This is apparent from this email written only a day after the PSC was signed, in which he was contemplating the possibility of legal action or the threat of it (his proposals would, he said, "*give you leverage if you should ever need to hint at legal action (or God forbid, bring a lawsuit*)". The reference to a weak position was realistic. Excalibur was not on the PSC or any JOA, had no money and precious little plan for getting it – hence the supposed offer of a loan was welcome. What was wholly unrealistic was the idea that Excalibur might not have to bring any finance.

762. In this email Eric Wempen raised for the first time the need for an acknowledgment of Mr Wempen's origination of the deal ("an origination letter"). The idea appears to have come to him in the course of drafting ("*Perhaps an acknowledgment letter…*"). Towards the end of the email he contemplated that a letter verifying that Mr Wempen was "*involved*" would be needed for obtaining finance and that that would be a good reason for asking Mr Kozel for an origination letter. The predominant purpose of such a letter was to burnish Mr Wempen's reputation for the future. The idea that it would be needed in order to obtain finance was something of an afterthought, which soon faded out of the picture. As Eric Wempen put in an email of **24 November 2007** "*Think of your future first, so try to get the origination letter*". On **25 November 2007** he advised his brother to let Mr Kozel know what he wanted viz: "*1, origination letter for your future, 2., the chance to fund the deal in a reasonable time or 3 a buyout or settlement*".

763. Eric Wempen was not in this email envisaging a letter acknowledging a legal interest but something "*stating that you were the one who brought the deal or were instrumental in its creation and are part of the team*". Moreover the Wempens did not know what exactly financiers would be looking for at this stage and certainly did not know that they would be looking for verification of title.

764. Eric Wempen suggested that Mr Wempen should make contact with "*funds/corporations*"; and suggested that Dan Franchi should be asked "*what you need to speak with folks*". It is clear that he and his brother had little idea what they would want. There is a dispute as to whether at this stage Excalibur was looking for funds and corporations to provide finance, or whether the plan was for Excalibur to be taken on as a client by an investment bank which would then try to raise funds from others.

765. Mr Wempen replied to his brother's email, noting that the "*interest free loan is not so much generosity, but built into the contract itself*". This was nonsense. The Collaboration Agreement does not provide for an interest free loan; nor does it provide, as Mr Wempen said his email meant, that Excalibur would be under no obligation to produce any money until the operating committee under the Collaboration Agreement had authorised expenditure or, as he suggested in evidence (and Cadwalader, Excalibur's attorneys, asserted in its letter of 8 October 2008 to the

KRG), that it was entitled, prior to agreement of a JOA, to an indefinite carry without penalty or forfeiture, subject only to paying interest at 2% over LIBOR.

766. On the same day Mr Wempen sent an email, drafted by his brother, to Mr Kozel, congratulating him on the conclusion of the PSC and "*taking our consortium to a successful close*". He thanked him and requested a copy of the PSC (along with any amendments relating to "*our new partnership with MOL*"), and copies of the documents transferring "*part of your percentage*" from Texas to Gulf, so that he could review them with "*our investment team*" prior to meeting. He thanked Mr Kozel for the offer of an interest free loan "*while our investment team is closing funding*". According to Mr Wempen the "*team*" was Mr Wempen and Mr Franchi. That was scarcely an investment team and it was not closing funding or anywhere near it.

767. The email went on to say:

> "*When providing documentation to sponsors, we will of course need to provide documentation of our interest in the consortium. As I have not yet reviewed the final agreement, I do not know the extent to which this was detailed in that*
>
> *document. As you will recall, our original joint bid agreement called for a separate Joint Operating Agreement to be drawn up between TKI and Excalibur upon award of a concession. We can discuss when we meet how best to document our relationship going forward in conjunction with the agreement just signed*…"

and, following Eric Wempen's advice, it asked for a brief memorandum from Texas (sic):

> "*documenting our origination of the deal and our interest in the consortium which we may provide to our sponsors*".

768. There were no actual sponsors. They were, according to Eric Wempen, "*generic*". Excalibur's submission is that this expression was, and must have been understood as, a reference to potential sponsors. Mr Wempen claimed that in this and other instances Mr Kozel was aware of the true position. However, the "potential" qualification was never expressed; its omission created the impression that there were entities in existence which could properly be described as sponsors; and Mr Kozel was not aware of the true position namely that there was nobody who merited that description and that no progress had been made in securing finance.

769. The reference to a JOA was misplaced. The JOA contemplated by the Collaboration Agreement was one for the parties to the PSC. This was, however, the means initially suggested by Excalibur of addressing the funding timeline. The idea of taking an indirect interest came later.

770. Mr Wempen sent this email to Mr Kozel again on **9 November 2007** saying that he was not sure if he had seen it "*during your 3-continent tour of the last week*" and saying that he was arriving in Sarasota on Sunday 11 November 2007.

771. Mr Wempen also emailed Mr Franchi:

> "*The Keystone people are en route back stateside and I will meet them here and obtain all the paperwork stateside. We may want to think about alternative sources of capital, such as First Reserve or Carlyle Riverstone, in addition to your Lazard referral.*
>
> *As soon as we have the paperwork in order, I will send it along and prepare the road show.*"

772. Also on **7 November 2007** Mr Wempen had an email exchange with Glen Carey, a friend and Bloomberg journalist. He emailed to inform him "*Done Deal*" saying "*We originated and are co-investors in the Keystone deal*". He attached the KRG press releases (which revealed Gulf's role). Mr Carey said that he had written a story on Mr Wempen's oil deal; Mr Wempen replied: "*U better not have*". Mr Carey emailed "*Dude, I have put your name all over the place. Rex this, Rex that..you're f-cked.*" Mr Wempen told Mr Carey that he would give him background, but "*no attribution*". When Mr Carey sent Mr Wempen an advance copy of the article, Mr Wempen thanked him for "*keeping my name out of it*".

773. It is not clear why Mr Wempen did not want his name in the story. I found his initial explanation that it would have been more proper to mention Gulf in the lead with Mr Kozel as its CEO, with Excalibur in a supporting role, wholly unconvincing. Since Mr Carey had the press releases there was no reason for him to downplay Gulf's role and Mr Wempen was not a man unused to putting himself forward. A better explanation is that his "*default position*", as he put it, was to keep his name out of the press, because of his work on security matters (Mr Carey may have known that and been teasing him).

774. On **8 November 2007** Mr Wempen exchanged emails with a Mr Wadstone. Mr Wempen wanted to meet directly with the Emir of the UAE, which they had been talking about for some time: "*We will not have a better deal to offer than we have now... Now we have something of value, and can realistically raise a large fund without him. With him, we could raise a truly huge fund...To give you an idea, we are talking to Deutsche Bank and Lazard Freres about representing us*." This was wildly optimistic.

775. Also on **8 November 2007**, Gulf's accountant, Mr Ahmad Bilal, sent Mr Cooper two spread sheets. One was entitled "...*Excal_0%*" and showed Gulf's budget calculated on the basis that Excalibur did not have an interest in Shaikan. The other, sent a minute later, was entitled "...*Excal_24%&20.4%*" and showed the budget calculated on the basis that Excalibur would have the funds to take up a 24% interest in Shaikan. These are inconsistent with Gulf having decided to keep Excalibur out.

The Meeting at Sarasota – 11 November 2007

776. Mr Wempen and Mr Kozel had discussed meeting in the US once the PSC had been formally agreed. On **10 November 2007**, Mr Kozel, who had arrived back in Florida from Erbil, emailed Mr Wempen to say that because there had been no chance to discuss the documentation, he thought that a meeting would be premature and fail to be productive; and suggested that they talk on the telephone to "*map out a way forward*". Mr Wempen, who thought that Mr Kozel was avoiding him, forwarded to his brother Mr Kozel's email and said "*Todd is trying something, and I don't like it*." I

do not believe that there was any sound basis for this unspecific suspicion, which seems to have arisen because Mr Wempen had not been invited to Erbil for the signing and Mr Kozel had been out of touch for some days (not surprisingly since he was en route to Erbil and back). Mr Kozel now forwarded an unexecuted copy of the final PSC for Shaikan to Mr Wempen.

777. Mr Wempen insisted on meeting in Sarasota and Mr Kozel booked him a hotel room there. They met either at dinner or at lunch and dinner. Mr Kozel discussed with Mr Wempen the possibility of Excalibur participating in the Shaikan PSC by way of a farm out of 30% of Gulf's interest (being 80% for this purpose because Gulf assumed that Texas would drop out). Mr Wempen sought to argue that the introduction of MOL should only dilute Gulf's interest and not that of Excalibur. Mr Kozel's position was that any interest of Excalibur would have to be diluted by MOL's 20%, just as Gulf's had been, because MOL had been needed to do the deal. Mr Kozel indicated that he considered that Excalibur did not have any interest in Akri-Bijeel and he should not seek to maintain any claim to so small an interest (i.e. 30% of 20%). He made plain that Excalibur would have to pay its share of the signature bonus if it was to be part of the deal and impressed on Mr Wempen the need to get busy and raise capital. Mr Wempen did not reveal that no progress had been made in fund raising.

778. Mr Wempen said that they did not discuss a farm out but that there was a general acknowledgment that Excalibur had an indirect interest and that there was no specific reference to the signature bonus; they were talking about raising the full amount. It is unlikely that no reference was made to a farm out. If, as is accepted, the need for money in short order was raised, it is likely that the signature bonus (which created the need) was discussed; or, at the very least, referred to, even if that was part of a discussion of the total funds to be raised. No form of interest other than a farm out was discussed.

Monday 12 November

The Acknowledgment Letters

779. On **12 November 2007** Mr Wempen sent two draft letters to Mr Kozel "*which we discussed*" and requested a copy of the signed PSC and "*a proposed funding timeline*". There probably had been some discussion about Mr Kozel providing a letter – on the lines of "*Look, we are going to need something from you; some kind of acknowledgment*": as Mr Wempen indicated in evidence – but no draft was provided at the meeting, much less agreed.

780. The first letter, which appears to have been composed before the meeting, read:

> "*Dear Mr Wempen, in consideration for you introducing Gulf Keystone Petroleum and Texas Keystone Petroleum into negotiations with the Kurdish Government and per your contract of February 17 2006 with our partner, Texas Keystone Inc, Excalibur Ventures* ***has received a 24% interest on a ground floor basis in the Shaikan partnership,*** *and a 6.6% interest in the adjacent Akri Bijeel partnerships*."

It is the absence of a letter recording Excalibur's entitlement to an interest in Shaikan (and Akri-Bijeel) in this or similar form which Excalibur claims to have been the

main impediment to Excalibur's ability to raise funds. Noticeably the letter proffered for signature (a) refers to Excalibur's contract of 17 February 2006 with Texas and (b) purports to acknowledge actual receipt of an interest in "*the Shaikan partnership*".

781. The second letter read:

> "*Dear Mr. Wempen, in consideration for you introducing Gulf Keystone Petroleum and Texas Keystone Petroleum into the ultimately successful negotiations with the Kurdish government, we will be able to offer you identical terms in additional negotiated blocks. This includes a 30% percent participation right in any fields negotiated in Uzbekistan, and opportunities Excalibur Ventures and its partners may introduce to us in Africa or internationally*."

The purpose of this letter was to burnish Mr Wempen's credentials and to interest financiers in him and any fund he and they might raise.

782. The first letter is a mixture of the interesting and the inaccurate: interesting because it does not claim that Gulf was a party to the Collaboration Agreement; inaccurate because Excalibur had not received an interest in either block. Even on Excalibur's case, it was, at best, entitled to an indirect interest to which effect could be given in a number of different ways none of which had been discussed, let alone agreed.

Contact with UBS

783. On **Monday 12 November 2007** Eric Wempen emailed Christopher Pinho, his boss, attaching a KRG press release in respect of the award of 7 new PSCs including Shaikan, saying:

> "*The partners on the deal are: (1) Gulf Keystone, a UK (AIM) listed oil and gas, exploration and production company whose focus is in North Africa and the Middle East, and (2) Kalegran Limited, a wholly owned subsidiary of MOL Hungarian Oil and Gas Plc.*"

784. What appears to have happened is that Eric Wempen asked Mr Pinho what he should do to try to get UBS interested in the Kurdistan deal. He found out from him that UBS had an Energy Finance Division. Mr Pinho arranged for a UBS colleague, Mr David Lessen, to call him. Mr Lessen was not in the UBS Energy Group; he was in the Healthcare Group[68]. Mr Lessen called Mr Pinho when Mr Pinho was out. At 15:39 Mr Pinho emailed Mr Lessen noting that the partners on the deal were Gulf, Kalegran and "*this guy Rex Wempen*" and saying that he would be back in the office by 17:00.

785. Mr Lessen spoke to Mr Lance Loeffler, who was in the Energy Group (but had been in the Healthcare Group). Mr Loeffler asked for "*some brief background materials*" (i.e. some form of pitch or teaser). That this is so appears from Mr Lessen's email of Wednesday **14 November 2007** to Mr Pinho in which he said:

> "*I'm copying Lance Loeffler of the Energy Group at UBS. I spoke with him about this on Monday and he asked for some brief background materials*

[68] He was, however, responsible for convertible origination for the investment bank and, according to Mr Pinho, at some point expressed interest in organising finance for Excalibur through a convertible bond issue.

> *before taking it to more senior people in the group. Lance is a friend and colleague who previously worked in the Healthcare Group and I would be happy to introduce you to him.*"

786. On his way home from work that evening Eric Wempen emailed his brother on his Blackberry to say "*UBS is interested. Need full write up*". What led to that message is in dispute. As to that there seem to me two possibilities. The first is that on Monday 12 November Mr Lessen asked Mr Pinho to ask for brief details of the proposal or sent him a message to that effect; and spoke to Mr Loeffler of the Energy Department, who asked for brief background materials but did not tell Mr Pinho that he had spoken to Mr Loeffler, possibly because when he spoke to Mr Pinho he had not yet done so. He did, however, tell Mr Pinho that he had spoken to Mr Loeffler on 14 November. The other is that on 12 November 2007 Mr Lessen told Mr Pinho about his conversation with Mr Loeffler after which Mr Pinho spoke to Eric Wempen. Mr Lessen relayed to Mr Pinho Mr Loeffler's request for brief background materials, and it was this that led to the instruction "*need full write up*". The email of 14 November 2007 refers to this conversation, as a reminder to Mr Loeffler of how matters stood and an introduction of Mr Loeffler to Mr Pinho.

787. I do not find it necessary to decide between the two. I incline to the former since, if Mr Pinho had been told by Mr Lessen on 12 November 2007 that Mr Lessen had contacted Mr Loeffler, it is slightly surprising to see Mr Lessen repeating the fact to Mr Pinho on 14 November 2007. In favour of the latter is that Eric Wempen's account of what happened on 12 November 2007 is that Mr Pinho said that he had spoken with the Energy Group.

788. Later on Monday 12 November 2007 Mr Wempen emailed his brother a pack of documents: maps of the blocks, a Word version of the PSC, the 7 November 2007 Press Release and a copy of the Thames Chesapeake term sheet.

789. I am satisfied that the approach to UBS at this stage was with a view to UBS itself funding the deal: that is the tenor of Mr Wempen's 1st witness statement (para 23.12.); and that of Eric Wempen (para 6.8 and 6.19); and with Excalibur's pleading (para 14 (d) of its Response to Request for Further Information). The same applies to Lazard (Mr Wempen para 23.23) and Deutsche Bank (*ibid* paras 23.23 and 23. 68: see also 23.71).

The conversation with Mr Pinho

790. According to Eric Wempen's oral evidence, on Monday **12 November 2007** he had a conversation with Mr Pinho who, having (as he said) just come off the phone from the Energy Group, told him, whilst leaning against the door jamb of Eric Wempen's office, that he had got his brother hooked up and that he, Eric Wempen, should take down the information which that department needed. Eric Wempen took notes. He then went home with a view to drafting an email the next day, emailing his brother from his Blackberry on the way. The email of the next day (see paras 798-9) set out six specific requests. Curiously it makes no request for the Collaboration Agreement or the PSC even though, according to Eric Wempen, he did discuss these documents.

791. I do not accept Eric Wempen's account of this conversation. It is not referred to in any surviving document nor does it feature in the written evidence of either brother.

In his 3rd witness statement Mr Wempen recalled that around 12/13 November 2007 his brother indicated that UBS would need more information to perform due diligence but could not recall whether that was his own view or he had been told it by Mr Pinho. In his 1st witness statement Eric Wempen refers to his having told his brother that he needed to put together a full write up and says that, when he received the information which Mr Wempen sent, he thought it would not be sufficient to enable UBS to evaluate the deal. He does not say that UBS had previously made a very specific request for documents.

792. The account also fits ill with the "*full write up*" email (para 786), which suggests that Mr Wempen should produce a description of the transaction such as the one he in fact produced on 16 November (see para 856 below). No written list of the requirements of the Energy Group was ever made by that Group or forwarded by it, directly or indirectly, to Mr Pinho. A wholly oral transmission to Mr Pinho and by him to Eric Wempen is unlikely. The only reference to Mr Lessen having spoken to Mr Loeffler on 12 November 2007 is in Mr Lessen's email to Mr Pinho of 14 November 2007: see para 785. It is apparent from that that Mr Pinho had not himself spoken to the Energy Group on the Monday, and, if he was told on the Monday what that Group wanted, it would not have been the six items in the 13 November 2007 email.

793. I do not, therefore, accept that on Monday 12 November 2007 Mr Pinho dictated to Eric Wempen a list of 6 items derived from the Energy division; or, as suggested by Eric Wempen, that Mr Lessen did not speak to Mr Loeffler on that day but, incorrectly, anticipated Mr Loeffler's requirements. Since Mr Lessen was not in the Energy Department this is unlikely[69]. Nor do I accept that the "*full write-up*" message was a reference to the list of six types of documents specifically required by the Energy Department, expressed very shortly because of the cold weather on the way home.

794. In his affidavit of 29 November 2012 Mr Pinho denies that he ever suggested to Eric Wempen that he seek the information specified in items 1-6 of the 13 November email or that he passed on any request for it from other UBS personnel. He gave evidence by deposition in the US in the course of the trial, which, in this respect was to the same effect[70]. I accept that evidence. He had no specific recollection of discussing with anyone in the Energy Group the general kind of information they would be interested in learning or the general kind of documents they would be interested in seeing in relation to the Kurdistan investment. He had a recollection of a general discussion with Eric Wempen around the time of the 13 November email as to what kind of documents the Energy Group would need to evaluate the deal. He did not recall discussing with Eric Wempen that the Energy Group would be interested in the documents in para (2) and (5) of para 799 but, so he said, he understood that the Energy Group would be interested in that kind of documents.

Tuesday 13 November

[69] Eric Wempen referred in his evidence to writing the message on his Blackberry "*after having spoken with my supervisor about his discussion with the energy group. I believe it was David Lessen*". This suggests that Mr Lessen (not in the Energy Group) was passing on information which had been derived from that group.
[70] "*Q. Do you recall at any time giving Eric Wempen a list of document requests to make to anyone regarding Excalibur transaction? A. I do not*".

795. On 13 November a number of significant conversations took place.

Mr Wempen speaks to Mr Patrick

796. Mr Wempen spoke to Mr Patrick and, according to the latter's email to Ms Berry and Mr Mackertich, said that UBS would be funding Excalibur's obligations. I accept that that was the gist of what he said. Any such statement was seriously premature.

Mr Patrick speaks to Eric Wempen

797. Mr Patrick spoke to Eric Wempen in what was for Mr Patrick the afternoon. He recorded the conversation in an email to Mr Kozel on the same day as follows:

> "*Excalibur has asked UBS to finance its share of Shaikan.*
>
> ***Wempen was not aware that the deadline for payment of the signature bonuses is 6 December*** *so is concerned that UBS may not be able to move quickly enough for Excalibur to fund its share. He asked if we could give them more time.*
>
> *UBS has a list of requests (which I asked him to confirm by email):*
>
> *1. Copy of signed PSC and draft JOA. I sent these last week to Robert Kozel to forward to Excalibur but they seem not to have reached Wempen. I said I would provide these as soon as the CA* [Confidentiality Agreement] *is signed by Excalibur and UBS.*
>
> *2. A letter from GKP setting out the terms of the offer of equity to Excalibur.* ***As GKP has no contractual relationship with Excalibur, I see no reason to do this****.*
>
> *3. A letter from GKP offering cooperation with Excalibur in other areas in order to make it easier for UBS to finance Excalibur (!?!)*
>
> *4. Technical data on Shaikan.*
>
> *I will deal with 1 but suggest that we discuss 2, 3 and 4 and their request for more time.*"

Eric Wempen emails Mr Patrick

798. Eric Wempen duly emailed Mr Patrick a list of what was wanted. In his email ("the Eric Wempen email") he said:

> "*Thank you for taking the time to discuss the funding issues for the Kurdish concessions with me today and agreeing to assist us by providing the information we require to move forward on this project. As discussed, UBS is* ***interested in funding the project via an equity investment****. So that UBS can begin performing the necessary due diligence to evaluate and fund the project, we would like to request the below information. We would therefore like to request the following information …*"

What he said about UBS was incorrect. No one in the Energy Division had even agreed to meet or talk to Mr Wempen or decided that UBS was interested in an equity investment. As appears from the words in bold Excalibur was assuming that UBS would itself be an equity investor.

799. The information sought was:

> "*1) Copy of final signed contract with Kurdish government;*
>
> *2) Letter detailing Excalibur's role as originator and percentage interest in the two concessions…. ;*
>
> *3) Workplan regarding funding requirements for the entire Kurdistan project;*
>
> *4) Any and all geological survey information available, including the most recent reports, tests, etc Please forward whatever documentation and agreement you require in order to release this information to Excalibur, UBS (and any other parties).;*
>
> *5) Documentation detailing Gulf Keystone's current relationship with Excalibur. … and*
>
> *6) Since UBS is interested in follow-on funding for future projects, please provide a letter detailing Gulf Keystone's plans to work with Excalibur on additional oil concessions, including those in Uzbekistan, Africa, and elsewhere.*"

800. The Eric Wempen email ended:

> "*As discussed, you are proposing an extremely aggressive timetable for funding (although we were aware that the funding timeline is short, this was the first that either we or Excalibur became aware of the December 6 deadline). My understanding of the Joint Bid Agreement with Excalibur is that a final funding timetable was to be agreed upon either by an Operating Committee or in the Joint Operating Agreement (which has obviously not yet been executed or even negotiated). Accordingly, we are assuming that you and Excalibur, as well as UBS, will be able to come to a funding timetable that is mutually acceptable to all parties.*"

801. The text of the Eric Wempen email had been discussed between Mr Wempen and his brother by email some hours earlier in the morning. Eric Wempen had drafted it as a letter to be sent to Mr Kozel and to be signed by him as "*Director and Counsel, UBS AG, Stamford Branch*". When Mr Wempen said that that made it look as if Eric Wempen was at a brokerage outfit Eric Wempen (who had two signature blocks) changed the signature block to refer to himself as "*Director and Counsel, UBS Investment Bank*". The fact that a version of the Eric Wempen email had passed between the Wempen brothers before it was sent (slightly amended) lends support to the conclusion that it was not in substance dictated by Mr Pinho as a list of what the Energy Group wanted. So does the fact that, as Eric Wempen accepted, the Energy Department did not in fact request a letter dealing with Mr Wempen's role as

originator or for details of other projects. Eric Wempen was not acting officially on behalf of UBS but making it look as if he was.

802. Eric Wempen's statement (para 797) that he was unaware of the 6 December deadline was disingenuous. The PSC, as he knew, provided for the signature bonus to be payable within 30 days of signature. His evidence was that he did not think it applied to Excalibur and that it was for Gulf to notify Excalibur that there was a "*hard*" deadline. The former proposition assumes that Excalibur was entitled to participate in the PSC without paying its share in accordance with the timetable of the PSC (so that someone else would have to pay initially); the latter that it did not have to pay until told by Gulf that it really must. The two propositions marry up with the argument at the end of the Eric Wempen email that, whilst Excalibur was entitled to an interest in the block, payment would only be due when some further agreement was made.

803. The construction of the Collaboration Agreement put forward was untenable. The Collaboration Agreement did not deal with the question of payment of the signature bonuses, which was governed by the PSC. Both Mr Wempen and Eric Wempen were aware of the 30 day deadline in the PSC (which takes you to December 6) and had been for months.

804. The material that was being sought by Eric Wempen was in reality material that Excalibur was seeking, dressed up as a UBS request. All that UBS had sought was brief background materials. It is unlikely that the Energy Group of UBS wanted a letter offering co-operation in other areas when it had not even begun to address its mind to this one nor expressed any interest in any others; or that it requested technical data before it had signed an NDA (non-disclosure agreement). The Energy Group had not (as Eric Wempen accepted) asked for a letter detailing Excalibur's role as originator nor would it have been interested in one. Nor is it likely that the Energy Group asked for documentation concerning Gulf's current relationship with Excalibur.

Problems over Gulf being a party

805. On **13 November 2007** Mr Wempen forwarded to his brother his emails to Mr Kozel of 6 May and 12 September 2007 (paras 517 and 647) which related to the question whether Gulf should be a party to the Collaboration Agreement. I infer that Mr Wempen was beginning to realise the problem in asserting that Gulf was or had become a party to the Collaboration Agreement in the light of such emails. The email of 6 May 2007 had said (unhelpfully in this context): "*I think it prudent to remain consistent with our originally broached TKI- EXV deal*."

806. Para 5 of Eric Wempen's **13 November 2007** email read in full as follows:

> "*5) Documentation detailing Gulf Keystone's current relationship with Excalibur. (You and I discussed that although you and Excalibur are currently partners in this project, the legal documentation reflecting the terms of your interest with Excalibur has not yet been finalized due to incomplete documentation of Excalibur's approval of Texas Keystone's transfer of its interest in the project to Gulf Keystone. However, you indicated that this should not have an effect on the final terms and that you will be working internally and with Excalibur on an expedited basis to determine how best to*

> *document the existing understanding and verbal agreement between both parties. Based on your assurances, we are operating on the assumption that this will not create an issue.)*"

807. Mr Wempen's recollection in cross examination – that what Mr Patrick actually said was that Excalibur had not executed the necessary contractual documentation, in the absence of which there was no subsisting contractual relationship – is likely to be right. Mr Patrick may also have said that, if Excalibur was to take up an interest, Gulf would deal with matters as quickly as possible. The way in which Eric Wempen expressed himself in para 5 was part of a paper trail intended to support Excalibur's claims.

808. Not surprisingly Mr Patrick replied:

> "*One point of clarification on your paragraph 5 [documentation detailing Gulf's current relationship with Excalibur]. I did not and cannot give any assurance regarding Gulf Keystone's position beyond the fact that this company has no contractual relationship with, or legal obligation to, Excalibur. Any discussion about Excalibur taking any interest in Shaikan will be without prejudice to that position.*"

809. This response, which Mr Wempen characterised as nonsensical and silly, insofar as it denied a contractual relationship with Gulf, was correct. It made sense for Mr Patrick to tell UBS that. Insofar as it records what he did not say, it is accurate. There was no response asserting that Gulf was and always had been a contractual partner.

810. Eric Wempen forwarded Mr Patrick's response to his brother saying:

> "*Now would be an excellent time to call Todd. Beforehand, I would suggest we re-read the contract, gather all of your emails and the letter you sent Todd earlier regarding you[r] 'approval', and ask him how he intends to address this issue. If it weren't for me, you would certainly look bad in front of an investor right now.*"

811. The problem that Excalibur faced was how to show that it had a contract with Gulf. That that is so is apparent from the fact that on **13 November 2007** Eric Wempen, who was about to go on holiday in Morocco, sent Mr Wempen a draft email for Mr Wempen to send to Mr Kozel which argued that Gulf and Excalibur did have a legally binding agreement or, at least, that Gulf owed it legal obligations. The draft is muddled, perhaps because Eric Wempen did not know what had happened between Texas and Gulf. It referred to "*the assignment to Gulf*" without identifying how it arose; it said, wrongly, that Gulf had executed a Deed of Adherence, when it had not, and that Gulf was arguably an Affiliate when the Collaboration Agreement expressly provided to the contrary; and it referred to unidentified emails as constituting Excalibur's consent to the transfer of a Consortium Interest. The email stated that the issues had been discussed "*briefly with outside counsel*", which Eric Wempen said he included to signal that there was a real dispute rather than a claim to have had full advice.

812. A little later Eric Wempen emailed his brother:

> "*Since there is a dispute here and they probably don't want to go back to the government or MOL, one option that might work better for them while still permitting you to keep your fund concept alive is for* ***Gulf to permit you to invest in their SPV.*** *This would also give you more time since any sponsor investment would simply reimburse them for their outlay.*"

813. This was the first time that the idea of Excalibur taking an indirect interest in a Gulf vehicle appears in the correspondence. Texas submits, and I agree, that the language used is not that of perceived entitlement or long held conviction. Eric Wempen raised the possibility as a way of buying time beyond 6 December 2007. This would have involved Gulf and Texas paying the non MOL share of the signature bonus and being reimbursed later when Excalibur found investors.

814. Mr Wempen replied a little later to say that he had talked to Mr Kozel and all was well; that Mr Kozel was slightly miffed that the Wempens had talked to Mr Patrick at all; that they would go through Mr Kozel in future; and that they would have a call the next day to discuss things further[71]. Eric Wempen, who may have been on a plane, replied:

> "*Lawyers suck...Let me know what transpires...And get the stuff for Excalibur (write-up) to Todd (instead of Iain!). Hey, don't forget that you absolutely need to get a delay from Todd on the funding of the bonus.* ***There's no way to get funding in 2 weeks. We don't even have a contract in place****, let alone the info for UBS or others. Is JP also pulling in DB? Let hik [sic] know UBS is interested.*"

815. Mr Wempen could have told Mr Kozel that he had no funding at all. He did not do so. He claims that Mr Kozel fully understood the position. He did not. Mr Kozel realised that Excalibur was raising funds. He did not know that it had hardly started and had got nowhere. Only the Wempens were aware that there was no prospect whatever of Excalibur raising funds by 6 December.

Plan to exclude Excalibur?

816. Excalibur in its opening claimed that it was at or about this stage i.e. in the period between 9 and 13 November 2007 that a plan to exclude Excalibur crystallized, the former date being when negotiations began with MOL to secure their consent to a potential farm out to Excalibur and the latter date being when Mr Patrick said that there was no legal relationship between Gulf and Excalibur. In Excalibur's closing it was said that the plan was probably formulated in the immediate lead up to the signing on 6 November 2007.

817. I do not accept that there was such a plan on either set of dates (or any other). By November 2007 Excalibur was not to be on the PSC, by its own consent. It had no legal entitlement to an indirect interest or to any form of preferential treatment, whatever Mr Wempen may have thought. At the same time Gulf wanted funding, if Excalibur could provide it. An internal Gulf financial memo of 13 November 2007 assumed that Excalibur would take 24% of the K 5 licence on a ground floor basis. Mr Patrick had been led to understand that UBS would be financing Excalibur. He

[71] Adding "*So, Iain is a counsel, and like most lawyers, operates on a different plane than the rest of us*".

sent Mr Mackertich a copy of his email to Ms Berry (para 796) recording that UBS would be funding Excalibur; and in reply Mr Mackertich emailed Mr Patrick to ask what information should be provided to Excalibur: he assumed that it would include some form of technical summary, as had been provided to MOL.

818. Mr Mackertich also emailed Mr Kozel to find out the position with respect to any participation on the part of Excalibur in Block K 10 (i.e. Akri-Bijeel). Mr Kozel replied that he had told Mr Wempen on 11 November 2007 that Gulf did not consider that Excalibur had any interest in Block K 10.

Details of the alleged plan

Individuals

819. Mr Wempen suggested that the individuals concerned in the plan to steal the deal, in addition to Mr Kozel, probably included Mr Patrick and Mr Robert Kozel, "*perhaps for no other reason than that [he was Mr Kozel's brother]*", and Mr Al Qabandi. Mr Patrick is an unlikely conspirator; by November his relations with Mr Kozel were poor and he was on the way out. Further, as we shall see, on **24 November 2007**, after resolution of a dispute about a Non-Disclosure Agreement, he provided Excalibur with a raft of data and information.

820. As to Mr Robert Kozel, on 9 October 2007 (para 697) Mr Goda, on his behalf, sent Mr Wempen an email inviting him to review the latest draft of a PSC and attend a partners' meeting in London. It was not suggested to him in cross examination that he was party to some form of conspiracy and I have no doubt, having heard him, that he was not. There is no reason to take any different view in relation to Mr Al-Qabandi, or, leaving Mr Kozel aside, any other member of the Gulf Board or its senior management.

821. That leaves only Mr Kozel. Whilst he may have been at times difficult to locate and at others uncommunicative, and realised the tough reality that Excalibur could not participate without the funds, he was not, in my judgment, hatching a plan to exclude it anyway.

Timing

822. Mr Wempen's evidence was that he had no idea when the plan was formed, or when Mr Kozel started to act in bad faith, although it could have been from day 1, or in the summer of 2007, or later. The first two were unrealistic, particularly day 1.

Motive

823. Gulf was critically short of funds in the second half of 2007; wished to spread the cost of bonus and exploration and thus reduce the risk; and would have welcomed a farm in partner who could contribute. Gulf's internal documents (a) before the signature of the Shaikan PSC on 30 October 2007 by the parties other than the KRG; (b) between 30 October and 6 November 2007, when the KRG signed; and (c) after 6 November

2007 show this and also show Gulf assuming that Excalibur could participate (if it was able to)[72]. This does not fit with the supposed exclusion plan.

824. The prime motive that is suggested for seeking to cut Excalibur out is that Mr Kozel, who was very enthusiastic about Kurdistan (as, indeed, he was) wanted to preserve as much of the equity for Gulf as he could and that, insofar as Gulf sought a farm in partner, it wanted one who would, either in November 2007 or at a later date, take a share in the PSC *at a premium*.

825. As to the preservation of equity, Excalibur points out that by November 2007 the equity available was reduced by MOL's 20%; and potentially by an option in favour of the KRG for between 5 and 20% (for which the PSC provided – as do most PSCs) and/or a local partner interest of up to 15%. If Excalibur was to have 24% and the latter two options were exercised Gulf might no longer hold at least 51% (which Mr Kozel regarded as important)[73]. In addition Dabin was to have a 10% Net Profit Interest.

826. As to a premium, Excalibur relies on the facts (a) that Mr Kozel was by November 2007 confident that oil would be found and would have liked a further block in Kurdistan if he could have got it; and told the Gulf Board on 25 October 2007 that he had no doubt about his ability to farm out Shaikan for a promote; (b) that in discussions between August and October 2007 with Premier Oil about a partnership, and with Lundin about a farm in, Gulf was looking for a promote; (c) that the negotiations with Lundin stalled because Lundin only offered ground floor terms and the interest in a farm in they expressed after the PSC was not followed up.

827. All of this is true but none of it causes me to conclude that Gulf's willingness for Excalibur to participate and its offer of a farm in were not genuine or that the many Gulf internal documents which contemplate Excalibur's participation are either written by personnel who were unaware of the plan or were, themselves, part of an attempt to create the false impression that Excalibur was getting a fair crack of the whip. Excalibur contends that the documents show that Gulf saw itself as "in an existing relationship" with Excalibur. This imprecise formulation begs the question as to what the relationship was. The relationship was that of a party to the Collaboration Agreement (Excalibur), which had decided not to participate in the Bid which that agreement contemplated and another (Gulf) which it was expected or hoped would in fact come onto the PSC, if it could.

828. Keeping all the equity (other than that of MOL) would mean keeping all the cost and risk; and Gulf was not in a position to do that. It needed to raise more money soon

[72] See (**a**) Gulf's 2007-9 work programme and budget presented to the Board on 11 September ; (**b**) the Board minutes of 11 September; (**c**) emails of September 20 (Mackertich [M] to Compton [C], 23 [M to Samarrai], 26 [C to M], and 28 (Patrick [P] to Mr Kozel[K]), October 2 (P to C and P to K), and 19 (M to K); (**d**) M and C's papers for the 25 October board meeting; (**e**) the minutes of that meeting; (**f**) C's email to Mr Cooper and P of 26 October and to K and Mr Al-Qabandi of 30 October; (**g**) emails of October 30 (M to Mr Cooper and K), 31 (P to Samarrai), November 2 (K to P) ; 5 (P to K); and 9 (P to K); **(h**) an internal memo of 13 November; (**i**) emails between M and P on 13 November; (**j**) emails of November 16 (P to Mr Cooper and K), 19 (P to Mr Morrow and Mr Wempen), and 23 (C to P & M, P to M, M to several, M to P{x3}, and P to K); (**k**) the communications between P and K and Mr Wempen about the economic model; (**l**) emails of November 28 (Mr Cooper to K and K to P).

[73] This would not mean that Gulf ceased to be the operator: since the existing interests would be reduced rateably. Further neither the KRG nor any local partner would want to be operator.

after the PSC: see the Board minutes of **6 December 2007** when Mr Kozel noted the "*imperative for funding*" and suggested that Gulf should start marketing the interest in early 2008: para 1085 below.

829. The farm out idea was not new. The work programme and budget presented to the Gulf board at the Board meeting on **11 September 2007** had noted that Gulf would most likely wish to bring in partners by means of a farm out; and the terms worsened after that with the unwelcome introduction of the third party interest. At the meeting Mr Kozel said that he believed that Shaikan was "*a world class asset ... a very valuable project*" and that it was "*a question of how much oil would be found rather than if it would be found*". He said that his preference was to drop Texas, that the current proposal was for a 70%/30% split and that Gulf had approached MOL, Premier Oil, Lundin Petroleum and a Kuwaiti drilling company with a view to them taking 20% so that Gulf would end up with 50%.

830. At the meeting on **25 October 2007** Mr Cooper had said he believed that Gulf, if successful, would need to farm out part of its share for a promote (even if Excalibur took its 30%). In an email to Mr Kozel on 28 November he predicted that Gulf would run out of cash during the second quarter of 2008. He set out the company's options to raise further funds, including "*promoting/farming out an interest in Kurdistan assets*".

831. Gulf would undoubtedly have liked to receive a premium. But Mr Kozel's confidence in his ability to secure a promote was misplaced. A promote was hard to come by; and none was obtained in 2007 (or 2008 and 2009). The fact that Gulf hoped for one did not mean that its preparedness to accept Excalibur on ground floor terms was illusory. The fact that Excalibur was being offered such terms when others such as Premier Oil and Lundin were not meant that it was being treated more favourably than them, on account of its introduction of the project.

Overt acts

832. Excalibur relied on a number of matters in support of its claim that there was a plan to cut out Excalibur. The first is that Excalibur was excluded from the signing ceremony. This does not have the significance suggested. The "ceremony" was at the Prime Minister's office and was attended by Mr Kozel, someone representing MOL, the Prime Minister and some aides. Mr Wempen was not invited because Excalibur was not on the PSC.

833. The second is Mr Patrick's email of **13 November 2007** (see para 808 above) to Eric Wempen stating that Gulf had no contractual relationship with Excalibur. This was an accurate statement, appropriately addressed to someone who appeared to be representing UBS, in order to avoid misunderstanding. Even if it had been wrong, it would have been a view reasonably open to Mr Patrick and was, I have no doubt, held by him. Even the Wempens themselves were alive to the problems of saying Gulf was already a party. They realised the formidable problem they faced that Gulf had never signed a Deed of Adherence; see the email of 14 November at para 847 below ("*We could say that Gulf's participation in the deal will not become valid until we received a signed Deed of Adherence from Gulf…*").

834. Other matters relied on are (i) Gulf's requirement for Excalibur to sign an NDA before providing it with data in respect of Shaikan; (ii) Gulf's refusal to acknowledge Excalibur's entitlement to an indirect interest; (iii) the unrealistic terms of the farm in offer of 23 November 2007; (iv) the provision of a negative economic model. I consider (i), (iii) and (iv) below. As to (ii) Excalibur had no entitlement to an indirect interest. Even if it did, Gulf could reasonably think that it did not. The earliest time when an indirect interest was suggested was 13 November 2007. Excalibur never clearly asserted in 2007 that the Collaboration Agreement entitled it to such an interest: or how.

835. The plan to exclude is also inconsistent with (a) Gulf's internal documents which show that Gulf regarded Excalibur as having no interest in Akri-Bijeel but a potential interest in Shaikan; (b) the negotiations with MOL to preserve a right to assign to Excalibur; and (c) the communication with Mr Morrow for guidance as to the characteristics that the KRG would expect of a party to the PSC: see para 893 below. Unless these were a sizeable and elaborate charade they are inexplicable if there was such a plan. I am satisfied that there was no charade. It is also noticeable that, after the PSC was signed, on 8 November 2007 Mr Bilal, Gulf's accountant, sent Mr Cooper two spreadsheets. One showed Gulf's budget calculated on the basis that Excalibur did not have an interest in Shaikan. The other spreadsheet, sent a minute later, showed the budget calculated on the basis that Excalibur would have the funds to take up a 24% interest in Shaikan.

836. Mr Kozel's evidence in relation to the Lanesborough Hotel meeting was:

> "*I stuck my neck out for Rex. I made a further attempt, or an attempt, to get him included. I knew the minister's displeasure but I risked his strong opinion. Why not? I have maintained through this entire case if Rex could get him[self] on a PSC I would love to have him as a partner if he could pay*."

I accept that. As he also put it "*Rex had his moments, but overall Texas was happy to have Excalibur as a partner and see if it was possible to get a contract in Kurdistan*".

The dispute about the Non-Disclosure Agreement

837. Gulf had confidential legal and technical information. Mr Wempen was aware that Gulf owed obligations of confidentiality to the KRG and MOL under the PSC and that third parties would have to give promises of confidentiality to Excalibur. Gulf was prepared to release information to Excalibur provided that Excalibur signed an NDA.

838. On **14 November 2007** Mr Patrick emailed Mr Wempen a copy of an NDA to be signed by Excalibur. He also asked for some further information on Excalibur so that this could be supplied to the KRG. He emailed Eric Wempen with another NDA for UBS to sign ("the third party NDA"). Mr Wempen forwarded the email to Mr Kozel saying that he believed "*all confidentiality issues for Excalibur were settled two years ago*" with the signature of the Collaboration Agreement and during the two years of interaction with Mr Patrick and the Gulf staff. He also said that Excalibur needed to receive information for "*our investors*" in order to honour "*our funding commitments under contract*".

839. The NDAs were industry standard. Such documents are, as Mr Wilkinson and Mr Park agreed, typically required and given in circumstances such as these. Article 36.7 of the Shaikan PSC provides that, subject to certain exceptions, the Parties undertook to keep all data and information relating to the Contract and the Petroleum Operations confidential during its entire term, and not to divulge or disclose such data or information to third parties without the specific consent of the other Parties, such consent not to be unreasonably withheld or delayed. In relation to third parties Article 36.8 provides that data could be disclosed to "*banks or financial institutions retained by any contractor entity with a view to financing petroleum operations*" provided that a confidentiality undertaking was entered into. The Collaboration Agreement has similar provisions but they relate to Data obtained in pursuance of that agreement, not in pursuance of the PSC. Even for such data disclosure to financial institutions required a confidentiality undertaking from them.

840. On the same day Mr Wempen emailed his brother to say that UBS needed to sign the NDA and later on the same day he emailed Mr Pinho to ask for the NDA to be signed so that Excalibur could then provide "*the information you need to initiate due diligence on the Kurdistan oil deal*". Mr Pinho forwarded the NDA to Mr Lessen and asked him to pass it to the right person. Mr Lessen copied Mr Pinho's email to Mr Loeffler.

841. On **16 November 2007** Mr Wempen asked Mr Javellana of Deutsche Bank to sign an NDA; and sent one to Messrs Loeffler and Van Os of UBS; and Messrs Gidney and Malhotra of Lazard. He also asked Mr Al Ghalib Executive Director at Gulf Finance House to sign one too. None of these did so.

842. Mr Wempen said that he did not think that Excalibur needed to have an NDA because under the Collaboration Agreement there was no need for one in order to pass information. This was not a good reason, particularly as Gulf was not a party to the Collaboration Agreement, and Excalibur was not a party to the PSC; and the Collaboration Agreement did not deal with information obtained under or following the PSC.

843. Mr Wempen became concerned about the time it would take for UBS to sign an NDA. He called a number of people at UBS about the need for UBS to sign, causing Mr Pinho to say that he should desist from calling everyone in the department. In response Mr Wempen told Mr Pinho that the oil company was breathing down his neck. Mr Pinho told him that he would let him know as soon as he heard something but this was not going to be a short process. Getting funds by 6 December 2007 was not going to be an option.

844. Mr Wempen sought some advice from his brother, now on holiday. Eric Wempen had no practical experience of the use of NDAs in this sort of deal. He told Mr Wempen that he did not need to sign an NDA to sell what he was permitted to sell by contract and that he must contact Mr Kozel.

845. Gulf was beginning to become suspicious. On **14 November 2007** Mr Cooper emailed Mr Patrick, copying in Mr Mackertich and Mr Kozel, to pose some "*Questions about UBS's involvement with Excalibur*". He had discovered that Eric Wempen was a tax lawyer:

> "*...so it would seem strange that he is leading a financing deal for UBS. I find it hard to believe UBS would debt finance such a project*[74]*, unless Excalibur are proposing some sort of alternative security or unless it's a short term bridge for an IPO take out, but unlikely given the asset and risk profile.*
>
> *I think we need to confirm in what capacity UBS are acting for Excalibur and that it's an official capacity, we could do this by getting UBS to sign a CA and inserting a clause stating that they are acting for Excalibur.*
>
> *UBS must have conducted due diligence on Excalibur as part of the new business authorisation procedures, if they are acting for them. We should request information on Excalibur from UBS on the basis that our partner MOL requires it.*"

Working out how to establish a contract with Gulf

846. On **14 November 2007** the Wempens exchanged draft emails, intended to be sent by Mr Wempen to Mr Kozel, the purpose of which was to support the contention that there was a contractual relationship with Gulf. In one of them Mr Wempen proposed to say that "*the easy fix*" was for Gulf to execute the Deed of Adherence and that "*according to our counsel*" the Transfer from Texas to Gulf was "*automatic on 6 March 2007 when you sent me the signed Deed*": a reference to the sending by Texas of the Deed of Adherence scheduled to the Assignment Agreement. This draft alleged that delay over resolving the assignment issue was preventing the raising of capital and asked, *inter alia*, for a letter "*acknowledging our origination and participation under the contract*". In fact no discussions with UBS or Lazard had yet taken place.

847. Another draft contained the suggestion that there had been an agreement in Erbil in July that advance permission for a transfer was not required, that Mr Kozel was authorised to sign on behalf of the entire consortium and divide the percentages and notify the result which would take effect forthwith. A further draft called for a letter "*acknowledging I originated the deal*" and claimed that only notification of the assignment was needed for it to be effective. It also asserted an understanding that Mr Wempen and Mr Kozel were supposed to agree a funding timetable and that he was told by outside counsel it would take upwards of a month to receive Confidentiality Agreements from each institution. It was in another email, sent about half an hour later, that Mr Wempen suggested that "*We could say that Gulf Keystone's participation in the deal will not become valid until we receive a signed Deed of Adherence from Gulf Keystone*". The idea may have been viewed as a false point to rebut a Gulf contention. In fact it was a good one.

848. This internal casting around for a basis for claiming that there was a contract between Excalibur and Gulf because there had been a valid assignment from Texas to Gulf is not reconcilable with the contention that Gulf was always a contracting party.

Litigation looms

849. The Wempens were increasingly thinking about litigation. On **15 November 2007**, Eric Wempen emailed to his brother a lengthy draft email to send to Mr Kozel. In his

[74] He was right. The experts agree that debt finance was not a realistic option.

covering email, he mentioned that they needed "*not only to put everything on the table, but also to document everything (so make sure you get a 'read' receipt when you send it)*." His email went on:

> "*Their delays may save us since they can't now claim a breach by Excalibur and are themselves open to suit. They never kept Excalibur in the loop. Since you can make a lot of cash by placing funds, we actually need this to get more time.*"

He was plainly envisaging an argument that Excalibur had been prevented from raising money to pay the signature bonus by lack of information. From then onwards the correspondence between the Wempens considered what they regarded as an opportunity to blame Gulf.

Excalibur's concerns

850. On **15 November 2007** Mr Wempen sent Mr Kozel a long email setting out "*current issues and immediate concerns*" with a covering letter. In the letter Excalibur said that its position was that the assignment of Texas' interest to Gulf was "*valid*". Enclosed was a copy of the Deed of Adherence signed by Excalibur by way of acknowledgment of delivery. The email asked Gulf to sign it. The email, which was the culmination of the 14 November drafting, included the following:

i) a complaint that Excalibur was being prevented from raising capital in the near term because of the requirement for NDAs and the lack of basic deal information. In fact Excalibur had not spoken to UBS or Lazard or any other bank or institution;

ii) Mr Wempen asked for the final executed agreements with the KRG and a letter acknowledging Excalibur's "*origination and participation under contract*". Mr Wempen claimed "*I cannot operate without these*". No potential sponsor had asked for this;

iii) Mr Wempen said that the easy fix was for Gulf to sign the Deed of Adherence. He contended that the reassignment (sic) by Texas to Gulf was automatic on receipt by Excalibur of the signed deed on 6 March 2007 and that Gulf should have signed the Deed of Adherence beforehand. He claimed that there had been an agreement in Erbil to leave "*the timing and percentages of Texas and Gulf Keystone holdings in a final agreement with the KRG to you, as it would not affect our position in the consortium*." There had been no agreement that leaving Texas and Gulf to bid would have no effect on Excalibur;

iv) Mr Wempen said that the geological data and contractual information was not confidential and that the NDA was not market standard;

v) UBS was described as one of Excalibur's "primary sponsors". Mr Wempen claimed that the requirement for a NDA was "preventing me from fundraising since I can't even address the most basic issues with the business units of investment banks until their legal departments get out of the way. Moreover it has effectively foreclosed further discussions with my primary sponsor for the time being". UBS was only a possible sponsor. It had only received the NDA

the previous day. Mr Wempen was to have a call with it the following day. Discussion had not been foreclosed. The basics could have been discussed before any NDA and UBS had made no complaint about the requirement to sign an NDA, with which it must have been familiar. Mr Wempen was unable in evidence to identify any specific sources of capital he had been prevented from accessing at this stage. His complaint was entirely generic; and

vi) The email also said that UBS was estimating 3-4 weeks before they could approve a full blown confidentiality agreement. Mr Wempen could recall no such communication from UBS; and it is unlikely that there was one.

851. The email continued:

> "*Since the above-described delays are preventing me from fundraising, Gulf has foreclosed any possibility of Excalibur meeting the December 6 fundraising call for the signature bonus Iain just mentioned to us only two days ago. Excalibur has not had a chance to even examine any proposed fundraising timeline to date. We therefore need to address the funding timeline through the contract approved vehicle of the joint operating committee Excalibur Ventures is a member of with TKI and GKP and determine together how best to structure Excalibur's investment in the project given these delays.* ***We are amenable to whatever adjustments would make this work. One solution may be, for example, having Excalibur's funding vehicle invest in a Gulf vehicle would make our investment transparent to MOL****. This could benefit Gulf as it would relieve you of the need to renegotiate new contracts with MOL and may be the most efficient option given the time constraints on the entire Shaikan partnership.*"

852. The signature bonus had not been mentioned to Excalibur only on 13 November 2007. Its existence had been known for months. The joint operating committee was not a contractually agreed medium for addressing a funding timeline in relation to the PSC. Adjustment to the structure of Excalibur's investment would constitute a variation of the Collaboration Agreement. These issues and concerns were expressed in order to provide a justification for Excalibur's inability to fund any share of the signature bonus on 6 December 2007. The idea of an Excalibur vehicle investing in a Gulf vehicle was a new idea and no part of the Collaboration Agreement.

853. On **15 November 2007** Eric Wempen emailed his brother on his Blackberry:

> "*Everything okay on your end? I'm guessing it's just a waiting game now since you can't speak to UBS, Deutsche, or get Dan Franchi to put you in touch with anyone else until Todd comes through, right? Keep me informed.*"

854. Gulf contends that this was a transparent attempt by Eric Wempen to create a paper trail. I am not convinced about that. It may have been an off the cuff view that speaking to others should follow Mr Kozel's response to a carefully drafted message. Whether it was or not, what it said was wrong. Mr Wempen was about to speak to UBS and could speak to Deutsche and get Mr Franchi to put him in touch with anyone.

Thursday 16 November 2007

The conference call with Lazard

855. On **13 November 2007**, Mr Franchi had spoken with a contact at Lazard, Mark Gidney, about the project.

856. On **16 November 2007** Mr Wempen had a conference call with Mr Gidney and Mr John Malhotra of Lazard in London. Mr Wempen's evidence was that the call was "*generally positive*", but he could not recall much more about it. He said that it was "*certainly my impression that they wanted to know more*" and asked for "*documentation and whatnot*". After the call, Mr Wempen sent Lazard an NDA and a 2 page document ("the teaser"), which offered a "*10% ownership interest of field available for $40 million secured through Excalibur Ventures, which originated the deal*." The teaser referred to Mr Kinnear and Mr Franchi as managing directors and partners of Excalibur, which they were not. This was the only telephone call that Mr Wempen had with Lazard; nothing ever came of this approach.

The conference call with UBS

857. On **14 November 2007** Mr Pinho emailed Mr Lessen to say that "*the background information package*" was ready to be sent to UBS and that Gulf would like UBS to sign the NDA. That is a reference to what Mr Wempen had said in an email that day when he had asked Mr Pinho to sign an NDA "*so we can forward it back to Gulf…and provide you the information you need to initiate due diligence*". It was not a reference to a list of specific requirements which Mr Pinho had given to Eric Wempen.

858. Mr Lessen replied to Mr Pinho, copying Mr Loeffler, and referred to his telephone conversation with Mr Loeffler on Monday 14th. Mr Loeffler forwarded the exchange to Mr Van Os, the Executive director of the Energy group. On **15 November 2007** Mr Pinho emailed Mr Wempen to ask if he was available for a call the following day with Mr Van Os and Mr Loeffler of the Texas office of UBS and said:

> "*UBS will not sign the NDA unless we think that there is a trade to get done. You can speak with the two bankers tomorrow and if they like what you have to say UBS would proceed with the nda*."

He told Mr Wempen "*I have buttered them up for you. You should emphasize that this is potentially just the first of various opportunities to do business. Don't be overly aggressive...*" It is clear (a) that Mr Pinho was not surprised to be asked to sign an NDA; (b) that UBS would have to be interested in the idea before doing so; and (c) that Mr Pinho feared that Mr Wempen's manner might put the UBS men off.

859. On **16 November 2007** Mr Wempen also sent the NDA to Mr Javellana to ask Deutsche Bank to execute it "*so we can get you the information you need to make a decision*".

Eric Wempen's advice to his brother about the telephone conference with UBS

860. On the same day Eric Wempen sent his brother a long email of advice "*re briefing for UBS call*" giving his thoughts as "*consigliere*". He did not think it would be appropriate at all for him to join the call because "*UBS isn't supposed to be involved*

yet and I'm in tax". Eric Wempen said in evidence he was not sure precisely what he was saying in the first half of the sentence; but it is apparent from it that he should not have been holding himself out to Gulf as representing UBS. He advised Mr Wempen to provide Mr Kozel, after the call, with any and all descriptions of Excalibur as soon as he could "*so that everything is in Todd's court as far as failure to provide info*". Towards the end of his email he said:

> "*Since there's no way to provide the funds by Dec 6 (maybe tell them [i.e. UBS] you're assuming their turnaround time is longer to confirm that's the case) there's really no rush here. Let's just get past this hurdle, and if they [UBS] don't go for it, then [you] have additional backup for a legal case since [you] had nothing to show*."

861. Eric Wempen was looking on any failure of Excalibur to interest UBS as at least providing ammunition for a claim in future litigation that it had been prevented from doing so because of Gulf's failure to provide information and/or an origination letter. In fact the absence of such a letter had not been any impediment at this stage.

862. In a section entitled "*THE CURRENT TO STRUCTURE*" Eric Wempen set out for his brother what he needed to describe to UBS on the call. He needed to explain that "*your company has a contractual right to invest in the project due to your origination activities*" and continued:

> "*Pursuant to your relationship with Gulf, the concept is for this deal to be funded through a separate and new Excalibur entity – most likely a Delaware LLC (i.e. in your name) which will invest in either the primary partnership (Shaikan) or a feeder entity, depending on how long it takes to get your funding together, because an initial payment to secure the contract must be made to the Kurdish government by Dec 6.*"

863. What was envisaged by Eric Wempen was a separate and new company in which funders who had invested would acquire equity, which would invest in the partnership holding the PSC (Eric Wempen erroneously thought that the PSC was held by a partnership entity) or in an entity owning the partnership. This had not been discussed with Gulf. Eric Wempen continued that "ONLY THEN" should Mr Wempen explain to UBS that he had "*other deals in the works*". This is inconsistent with Eric Wempen's evidence that one of the matters that the UBS Energy Group was already seeking was information about other deals.

864. Further advice given included the following:

> "*DO NOT discuss the idea of a 'fund' unless they say that's what they want. It will introduce too much risk for them and you will look like you're trying to be more than you are (ie. you now have per se experience and credentials as an originator, but have no fund experience*)." and

> "*If they ask for docs today, send them a copy of the Joint Bid Agmt, and tell them that since Gulf brought in MOL to change the deal, Gulf is currently working with MOL to determine how best to contractually structure your investment*."

What Eric Wempen said about a fund was good advice, which he had given before. As Mr Wilkinson's evidence makes plain, the interposition of a fund made Excalibur's task in raising finance more difficult. Excalibur had no track record or experience which would commend it as a fund manager and no specialist knowledge. There was no good reason for an investor to hand over his money to the Fund, in which Excalibur showed no sign of investing, for a fee. The advice as to what to do "*If they ask for docs today*" cannot be reconciled with the idea that the Energy Group had already made a detailed demand for documents.

865. In part of his advice he said:

> "*Although you have earlier geological data (I don't even know if you can release it without Gulf's approval, especially based on the new agreements since you don't want to start out by breaching Gulfs relationship with MOL), you can't get them the newest info without the NDA since the partners have put in a lot of additional work and although you're negotiating with MOL to delete this requirement, not only are they a bureaucracy, they're a gov't entity! So this is why you're on a call now for an NDA without all of the info.*
>
> *It may be hard without any info, but then again, maybe not, because that's what the NDA is for.*"

Eric Wempen well understood the function of an NDA; that the absence of an NDA would be a reason for not providing UBS with more information immediately; and that it would follow once an NDA was signed.

The Call with Mr Van Os and Mr Loeffler

866. On **16 November 2007,** Mr Wempen spoke to Mr Van Os and Mr Loeffler of UBS in a conference call. Mr Wempen said that in the course of the discussion UBS wanted to know the "*nature of my interest*", that he said that "*I had an interest through [Gulf] into the deal which was a 30% interest in the block*", and that UBS had no reason to believe that what Mr Wempen said was incorrect. Evidently he felt under no inhibition in asserting such an interest, and, as he accepted, they had no reason to believe that what he said was incorrect. Mr Wempen was asked what documentation UBS asked for during the conversation. He said that UBS asked for "*the same things*" that Lazard asked for, and referred to the acknowledgment documentation, work plan, signed PSC, and all the things they had asked for previously via Eric.

867. After the call Mr Wempen emailed his brother:

> "*Seemed to go OK with UBS, but they seemed to think that the opportunity should be handled out of London, and that it was too small at $40 million for the bank to be interested in, and they would pass it off to private placement. They did think it 'was exciting' though. We'll see.*
>
> *Maybe we should send the fund prospectus too*".

I do not accept that UBS asked Mr Wempen for any specific documentation during the telephone call as stated by Mr Wempen in his evidence. (He did not suggest that they did in any of his witness statements – only that he had the *perception* that any

confidence UBS might otherwise have had in Excalibur's credentials was undermined by its inability to present documentation acknowledging its interest in the PSCs.). The Energy Division in Texas was just not interested in something this small.

868. After the call, Mr Wempen sent Mr Van Os and Mr Loeffler an NDA and the teaser.

The language of the NDA

869. Excalibur complained that the language of the NDA was objectionable because it failed to recognise Excalibur's interest in the PSC. Para 1 of the NDA intended to be signed by Excalibur read as follows:

> "*1 In connection with the evaluation and* ***the possible participation*** *by the Receiving Party in the Production Sharing Contract for the Shaikan block in Kurdistan Iraq (hereinafter referred to as the "PSC") the Disclosing Party is willing, in accordance with the terms and conditions of this Agreement, to disclose to the Receiving Party certain confidential information on a nonexclusive basis, relating to the PSC which includes…*"

870. The NDA intended for UBS contained the following preamble:

> "*WHEREAS the Receiving Party is considering providing finance to its client Excalibur Ventures LLC ("Excalibur") for* ***the possible acquisition*** *by Excalibur of an interest in the Production Sharing Contract for the Shaikan block in Kurdistan Iraq (hereinafter referred to as the "PSC") and wishes to carry out due diligence on the PSC …*"

871. This language was not inaccurate. Excalibur was, by its own consent, not on the PSC. It might participate in the PSC by virtue of an assignment if it secured the finance to do so. The wording did not deny Excalibur anything that it possessed. At best, on Excalibur's case, it had a right to have an interest recognised and given effect to in some manner to be determined. If, as Excalibur contends, the Collaboration Agreement entitled it to an interest, it, itself, could be shown to prospective investors.

872. On the afternoon of Friday **16 November 2007** Mr Wempen emailed his brother to say that he had spoken to Mr Kozel, who had said "*We are not going to screw you out of this deal*" but that they needed to have Excalibur sign the NDA in accordance with Gulf's own agreements with the KRG and that Excalibur could not show anything to UBS until it also signed. The likelihood is that this is the (single) occasion when Mr Kozel used the quoted words. Mr Wempen's email also records that Mr Kozel said that Mr Patrick "*misspoke when he said that we don't have an agreement*". I accept that what Mr Kozel was saying was that Gulf agreed that Excalibur could come on the PSC if it did what needed to be done i.e. secure the necessary finance and be or become acceptable to MOL and the KRG.

873. Eric Wempen replied:

> "*Great to hear he actually stepped up!!! I guess the last thing they need - is a publicized lawsuit - forgot you can screw them there too!!! Make him firm things up with a contract immediately. Okay on the NDA with UBS. Yes we*

> *still need to change the wording 4 yours since u still have nothing in writing and it's flat out wrong. I'll do it.*
>
> *U still need docs saying that you're the originator. When you send the info + NDA with Todd, then u should ask for it. I'll change the wording …*"

874. The fact that at this stage the NDA for third parties was acceptable, but that for Excalibur was not, is somewhat curious when they both say much the same thing. The reason for the apprehension was that Excalibur claimed "*an existing equity interest [which was] an indirect interest, not dependent on the PSC*" (per Mr Wempen in evidence) and feared that, if it signed the NDA, Gulf would use that fact to exclude it from the deal because the language would recognise the absence of a present interest.

875. Also on **16 November 2007** Eric Wempen asked his brother what he had said to Mr Kozel about the deadline. "*Please tell me [you] brought up the 6 Dec deadline...? Or did he hint that it wasn't an issue now?*". Mr Wempen replied that Mr Kinnear had "*talked to them*" about the deadline and "*they know mid-December is unrealistic*".

876. On Tuesday **20 November 2007** Mr Wempen emailed Mr Kozel to say that "*outside counsel*" (meaning Eric) had reviewed the two NDAs and made alterations. One of the alterations sought to be made to the Excalibur NDA was to replace the wording "*In connection with the evaluation and the possible participation by the Receiving Party..."* with "*In connection with the participation by the Receiving Party"*. In respect of the NDA for third parties one of the alterations sought was to replace "*...providing finance to its client Excalibur for the possible acquisition by Excalibur of an interest in the Production Sharing Contract*" with "*…providing finance for an investment in an interest in the Production Sharing Contract*".

Signature of the NDA

877. On **16 November 2007**, Mr Wempen emailed Mr Kinnear, urging him to get Mr Kozel to send a Deed of Adherence and the geologic data. He complained that the timeline was "*not a dictation on their part to ram down our throats either, as we have to agree to it before it becomes effective*", and complained that "*these guys are already in breach of our agreement. Todd is not returning my phone calls or emails and his attorney Iain Patrick, says we have no agreement and refuses to send us data*". It was true that Excalibur did not have to pay anything if it did not agree to do so and that it had not made any agreement other than the Collaboration Agreement. But, if it was to join the PSC on ground floor terms it would have to pay its share of the signature bonus and other amounts becoming due. Further, Excalibur accepts that if it was to have an indirect interest it would have to shoulder the same financial burden as if its interest was direct. As to data, Gulf was not refusing to send any ever; it was refusing to send confidential data until a NDA had been executed.

878. Mr Wempen was increasingly in touch with Mr Kinnear with a view to resolving the impasse. On **16 November 2007** Mr Kinnear emailed Mr Kozel and Mr Al-Qabandi to express sadness at what he termed a failure of communication. He stressed that "*Rex has built a strong alliance with the bank UBS who have always agreed, provided that we have the correct paper outlining our involvement and share, to release the funds*." This understanding, which was inaccurate, must have been derived from Mr Wempen.

879. Mr Kinnear said that Mr Wempen needed a Deed of Adherence from Gulf, geologic data and a proposed funding timeline "*so that we can raise our end of the cash*". He complained that the timeline had been drawn up without discussion. Mr Wempen, he said, had a travel programme including a visit to London, "*so that the cash will be raised. However without some fundamental support from Gulfkeystone this will be embarrassing to us and end in the courts*". He urged them to ring Mr Wempen.

880. Mr Kozel responded (initially to the wrong Iain, i.e. Mr Patrick) to say that he found the email confusing because Gulf had forwarded information without response and was cooperating. He said the ball was in Mr Wempen's court as Gulf was waiting for his response.

881. Mr Wempen forwarded this to his brother who thought at this stage that Mr Wempen should execute the confidentiality agreement so that "*no one can come back and say it's your fault [you] missed the deadline.*" In relation to Mr Patrick's request for information about Excalibur (on **14 November 2007** he had emailed to ask for "*the information on Excalibur that we discussed*") he said that Mr Wempen should "*send him a write-up on Excal explaining since Excal is a consulting company, there's no reason to give more*."

882. In the evening of **16 November 2007**, Mr Kinnear emailed Mr Wempen after he had spoken to Mr Kozel and Mr Al-Qabandi. Mr Kinnear thought Excalibur was on weak ground as regards a confidentiality agreement:

> "*My lawyer says this is a must before Gulfkeystone will release anything to the bank. We just need to think this through as both Todd and Ali wish to support us but we need to ensure that we are talking from the same song sheet. I have spoken to both and there is a mismatch of what is needed. I would suggest that we list what we need for the release of the funds. Then speak with Todd and Ali as how best to achieve that.* ***They wish our money and are not trying to squeeze us out that I feel sure over****...*"

I do not think that Mr Kinnear misread the situation.

883. At the end of the week Eric Wempen reviewed the position in the following terms:

> "*Todd seems [to] be on your side again*
>
> *You got some extra time to raise funding*
>
> *The whole blowup likely saved you from having Todd push you out*
>
> *UBS is maybe interested (and at the very least acted as a catalyst to move things along AND put you in a good legal position)*
>
> *And maybe Lazard is interested*
>
> *And Todd knows [you] can bring the heat with the big boys (which obviously [you] can).*"

Eric Wempen was again contemplating Plan B i.e. in the event that finance was not obtained to contend that Gulf had prevented it by refusing to provide an origination letter and requiring an NDA.

884. On **17 November 2007** Mr Kinnear sent a further email to Mr Kozel to say that he had spoken with Mr Wempen and Mr Al-Qabandi and that Mr Wempen understood the need for the confidentiality document before disclosure. Excalibur needed a Deed of Adherence "*so that it all connects for the bank*". UBS had, he said, agreed in principle to lend the funds but were "*quite rightly checking each line of the offer and demanding to see how the deal works*".

885. What Mr Kinnear said about UBS on 16 and 17 November 2007 was, as both Wempens agreed, wholly wrong. UBS had never agreed to release any funds whether conditionally on receipt of documentation or otherwise. Either he made this up or he got the impression that matters were as stated by him from one Wempen or another. The likelihood is that this, or something like it, is what he was given to understand by Mr Wempen.

886. On **18 November 2007**, Excalibur conceded the principle that it had to sign an NDA. Mr Wempen emailed Mr Kozel to say that he had sent the executed NDA to Mr Patrick. He asked for letters of acknowledgment (drafts of which he attached) to "*provide to our investors*" (the same drafts that Mr Kozel had previously refused to sign), and sought (i) a copy of the signed PSC and JOA; (ii) a letter of acknowledgment "*of our role as deal originators for the KRG blocks and our existing contractual relationship*"; (iii) a letter of acknowledgment regarding on-going origination activity (i.e. Iraq, Central Asia and Africa); (iv) an executed copy of the Deed of Adherence; and (v) an estimate of anticipated expenses regarding the joint exploration plan for both Shaikan and Akri-Bijeel. He included another copy of the Deed of Adherence signed (by way of acknowledgment of delivery) by Excalibur (as well as Texas).

887. On the same day he emailed Mr Patrick with two attachments. The first was an executed copy of the NDA with the removal of the word "*possible*" before "*participation*". The email said that Excalibur had reworked a couple of clauses in the NDA it had signed "*and provided that to sponsors*".

888. The second attachment was some information about Excalibur consisting of a very brief description of the company and brief biographical sketches of Messrs Franchi, Kinnear and Wempen, each described as "*Managing Director, Partner*". The email described the attachment as: "*a full description along with bios*" and added, in accordance with Eric Wempen's advice:

> "*since we are a consulting company, have been acting in an origination role, and the balance sheets of future sponsors (and obviously not Excalibur) are what concerns MOL and other interested parties, we will provide the relevant financial data regarding our sponsors as soon as we have a commitment*".

19 November 2007

889. In the morning of **19 November 2007** Gulf had a meeting on Kurdistan to discuss strategy. Mr Kozel could remember nothing about it. Excalibur suggested that it was

at this meeting that the strategy of getting rid of Excalibur by making a farm in offer on terms which it was known it could not satisfy was devised.

890. At 12.29 GMT Mr Patrick replied to Mr Wempen objecting to the terms of the redrafted NDA. He said that "*the main area of your redraft that is unacceptable is that it would allow the confidential data to be given to any number of potential funders, without our control*". The Excalibur draft had provided for the release of information by Excalibur to potential funding sources on their executing a confidentiality agreement in favour of Gulf. Mr Patrick said that Gulf needed to see the signed NDAs before the third parties received the data.

891. As regards the information from Excalibur, he said (correctly):

> "*The information you have sent on Excalibur is very brief and does not address its ownership, financial position, track record or technical capability. Information on Excalibur's sponsors may provide some comfort to MOL and other interested parties, but as Excalibur would be their partner, only information on Excalibur itself will carry any real weight. I will try to ascertain their requirements and let you know*."

MOL had previously told Mr Patrick that they wanted information about Excalibur: see Mr Patrick's email of 9 November 2007, para 745.

892. Mr Wempen forwarded Mr Patrick's email to Mr Kinnear saying "*As for more information on us, they know who we are—we are the guys who gave them this deal. I am not about to give them my bank statements, and neither are you, I assume*". In evidence he said that he regarded the email as outrageous because "*we were already part of the consortium by right*". This was unrealistic. If MOL was to accept Excalibur on the PSC it would need to know all about them. Mr Wempen said in evidence that there would have been no problem in providing the information if they were providing it directly to MOL but there was a problem in providing it through Mr Patrick who was not acknowledging their interest. He was not prepared to provide any information in those circumstances. No further information was in fact provided to Gulf for transmission to MOL; nor was there much that could usefully be said to commend Excalibur as a partner.

893. At 12.12 GMT Mr Patrick emailed Mr Morrow:

> "*Can you give me any guidance with respect to the information (regarding ownership, financial capability, technical capability, track record etc) that the KRG would expect to see with respect to a potential new partner if we were to request a partial assignment of Shaikan in due course.*"

In making this inquiry Mr Patrick was not, in my view, seeking to establish hurdles which Excalibur could not surmount in order successfully to exclude it. He was simply asking what would, so far as the KRG was concerned, need to be shown in respect of any assignee – a prudent inquiry if there was to be a farm in in the light of Article 39.2 of the Shaikan PSC which provided that a request to assign an interest to a third party "*shall be accompanied by reasonable evidence of the technical and financial capability of the proposed third party assignee*". On **11 December 2007** Mr Morrow replied to say that he would speak to Dr Hawrami.

894. Mr Wempen replied (using Eric Wempen's draft) to Mr Patrick discussing the redraft of the NDA. He made it clear that Excalibur had no objection to Gulf pre- approving the transfer of data to third parties, provided only that such approval would not be unreasonably withheld, and that arrangements were put in place to enable the disclosure process to move quickly. He told Mr Patrick:

> "*So that you have language you are comfortable with, please feel free to draft and insert the wording you prefer on this issue … Since your email did not address any other issues with our revisions and the language in the document you sent does not reflect our current and previous relationship, please make any edits to the attached documents employing „track changes and revert.*"

895. In relation to the information sought about Excalibur he said:

> "*I would refer you to our earlier correspondence where we noted that we do understand that there may be timing, inefficiency, and other issues surrounding renegotiating final contracts with MOL by adding Excalibur in as a direct partner. For that very reason, we noted that we would be amenable to* ***certain changes to the structure of our investment****, including having* ***Excalibur's funding vehicle invest in a Gulf vehicle*** *(which would, as an added benefit, make our investment transparent to MOL), and would be more than happy to discuss these structural changes with you. We are quite aware that Excalibur does not have as strong a balance sheet as Gulf. As we are not a public company, we do not issue audited financials and brought in Gulf and the rest of your team for this very reason. Our goal is not to overshadow or impact the deal in a negative manner, but merely to maintain our equity ownership in this deal in return for our role as originator. If this means that Excalibur is not in the forefront of each negotiation with MOL, that is acceptable to us, especially since* ***many of our sponsors are seeking a passive investment****. Accordingly, if and when you discuss the role, track record, and technical capabilities of Excalibur with MOL, we would suggest that you focus on our origination of the current transaction. Again, I respectfully refer you to your corporate leadership and our pre-existing agreements with your company.*"

896. It is apparent from this email – which Mr Wempen forwarded to Mr Kinnear, observing that "*we are giving them a reasonable way out. I have signed their NDA and proposed specific solutions to our difficulties*" – that Excalibur did not want to invest side by side with Gulf (although that was the basis of the Collaboration Agreement); and was seeking to move towards a change[75] of structure whereby Excalibur's funding vehicle would invest in a Gulf vehicle, and investors would invest in the Excalibur vehicle. Excalibur was also displaying an unsurprising reluctance to have its financial position and capabilities examined; and taking its familiar position that having originated the deal it could look to other investors to provide the finance to ensure that it had an interest.

897. Excalibur had no sponsors, let alone any which had sought a passive investment.

[75] Mr Wempen said in evidence that to use "*change*" was a mistake. It was, in fact, accurate.

898. The Wempens must have realised that it would be very difficult to persuade MOL and the KRG that Excalibur should participate in the PSC. It was wishful thinking to suppose that any actual sponsor would be interested in investing in an Excalibur vehicle which invested in a Gulf vehicle. It would want to invest in the Gulf vehicle or in Gulf itself. In addition MOL, if contemplating having Excalibur with it on the PSC, would not find comfort on that question from knowing that Gulf was in the lead, or from looking at the Collaboration Agreement.

899. There was continued dispute about the terms of the NDA. Mr Patrick emailed to say that the NDAs Gulf had provided for Excalibur and its potential sponsors to sign were consistent with the parties' objectives without the need for further changes and he was "*concerned that the available time would be better used evaluating the data rather than debating the wording of the CAs. If you will sign and return the version I sent earlier then we will be able to let you have the confidential information regarding Shaikan.*"

900. Mr Wempen emailed his brother:

> "*We cannot sign this NDA their lawyer Iain Patrick wants because it does not acknowledge our previous relationship. This is really bad news for us.*
>
> *Are Todd and Ali going to help, or let us twist in the wind?*"

Mr Wempen had an idée fixe that if Excalibur signed the NDA Gulf would use it to deny Excalibur's interest (so that the request for an NDA was a trap) and, if it did not, would not provide it with information.

Tuesday 20 November

901. On **20 November 2007**, Mr Wempen emailed Mr Kozel (para 876) to complain again about the NDA and the non-provision of information. He said (at Eric Wempen's suggestion: see his email of 19 November) that he had referred the issue to "*outside counsel, and am advised that Iain Patrick does not appear to be negotiating in good faith*". The "*outside counsel*" was Eric Wempen, who was not outside Excalibur at all. Mr Wempen referred to "*providing the sponsors the due diligence documentation we desperately need*". Excalibur was not at the due diligence stage with any financial institution nor desperately needing documentation for that purpose. Mr Wempen said that he "*might be able to cut corners*" if he had (i) "*letters of acknowledgment of deal origination*"*;* (ii) the Deed of Adherence; and (iii) a costs estimate.

902. In this and other instances (e.g. the email of 21 November 2007: para 906) what was being sought was letters confirming that the deal owed its *origin* to Excalibur – rather than that Excalibur had some *interest*. Mr Wempen's evidence was that it was inherent in the concept of origination that Excalibur was entitled to an equity interest in the deal which he had, in his view, originated. Insofar as he held this view at the time it was fallacious. Origination *per se* does not carry an interest with it.

903. Mr Kozel, who thought that Excalibur was wasting time, replied expressing surprise that a standard oil field NDA had not been worked out; saying that Gulf was more than happy to provide the information after receipt of the NDA; and suggesting that

Excalibur's outside legal counsel contact Mr Patrick to work out the details. He copied the email to Nick Davis of Memery Crystal.

904. On the same day Eric Wempen, still in Morocco, emailed his brother on the subject of "*Iain's delay*":

> "*Actually, I keep forgetting...let him dick around a bit more. December 6 is still a ways off, and he's the best thing we've got going for us until they decide to draw up the contracts or restructure Excalibur's investment. If [you] think about it, we're not really in such balls to the wall hurry...*"

905. This was a recognition that, in the absence of some new contract or a restructuring arrangement, the best that Excalibur had to hope for was for the information not to be provided and to rely on Plan B.

Wednesday 21 November

906. On **21 November 2007** Mr Wempen emailed Mr Kozel attaching the draft acknowledgment letters, a signed deed of adherence and an executed NDA. The executed NDA was Excalibur's version referring to "*participation*" rather than "*possible participation*". Mr Wempen said that Excalibur's single priority was to receive sufficient documentation from Gulf "*to proceed to the fund-raising stage*". Excalibur claimed that as originator and contractual partner, it was "*looking for further documentation of our position. This is a requirement for investment banks and investors.*" It was not. Mr Wempen referred to Excalibur as having "*a participation set aside through origination activity*" and set out again the three sets of documents he wanted: (i) letters of acknowledgment "*including credit for deal origination in Kurdistan and ongoing activity on your behalf in Uzbekistan and elsewhere*"; (ii) a Deed of Adherence signed by Gulf; and (iii) an estimate of the costs involved in the exploration. The Deed was obviously sought in order to create contractual relations with Gulf.

907. Mr Wempen had sent a draft to Eric Wempen the day before who had replied: "*Oh boy, it looks like you play the game even better than I. This is perfect!!! Guess I'm being replaced*". The game involved seeking to get material which would support the claim to an interest on the footing that it was urgently needed in order to proceed with waiting investors (when it was not); and, if it was not provided, to rely on such non provision in order to claim that Gulf had wrongly prevented the securing of finance i.e. Plan B. On the same day, Eric Wempen emailed his brother about that:

> "*In case we need to go to Plan B and have counsel hop on the phone with Iain and Todd, I'm trying to think of options.*
>
> *Todd told you that they're not going to cut you out. Did you get the impression that this meant even after December 6?*
>
> *The more I think about it, even if the NDA goes through, they still haven't said word 1 about restructuring the investment or what happens after that date, and though it might hurt a bit now, it would probably be worth its weight in gold to address these issues before that date comes and goes.*

> *Do you think we should hire counsel (perhaps a top flight firm) for a call? Or can you go back to Kinnear after the NDA thing is over and see if you all can't get Todd on the phone with you guys (and maybe others) to discuss? You need to nip this thing in the bud before you're playing catch-up and your only chance is a lawsuit.*"

908. On the same day Mr Wempen spoke to Mr Patrick on the telephone and had, as he told his brother, a "*cordial discussion*". According to Mr Wempen's email account of the conversation, Mr Patrick "*does not want to give us credit for origination; he wants Texas to do that.*" Mr Patrick also said that Excalibur was not a part of Akri-Bijeel and that he did not wish to sign a Deed of Adherence. (He obviously regarded Shaikan as different and was not excluding the possibility of participation). Eric Wempen's response was that it was time to get Mr Kozel on the telephone "*with a high powered outside counsel since they obviously haven't even started talking about the new agreement between us. The discussion will need to be cordial but with the underlying tone that litigation will be forthcoming*". Eric Wempen must have appreciated that Excalibur needed to reach a new agreement with the Keystone companies in order to have some form of indirect interest.

909. Mr Wempen replied to his brother on **21 November 2007** that Mr Kinnear recommended signing Gulf's NDA "*verbatim*" because the Keystone board would not approve any changes.

Thursday 22 November Thanksgiving

910. On **22 November 2007** Eric Wempen sent another long email to his brother. He disagreed with Mr Kinnear's advice, but said that if Mr Wempen were to sign the NDA then he needed to get something in hand first "*especially given the Dec 6 issue*". His email observed:

> "*Nevertheless, I think we've put quite enough paperwork on our side at this point. If they are playing games, then they are complete psycho freaks, and you ought to nail Todd as we discussed. On the other hand, if they are just simpleminded, unsophisticated, egotistical, and emotionally unstable folks, as appears to be the case, (i.e. it's either a well thought out plan, like a conspiracy, or that's just how they are) then you won't get any further at this point....*"

911. The paperwork was the paper trail for Plan B. The "nailing" in contemplation was to embarrass Mr Kozel on matters to do with his private life. Eric Wempen urged his brother to push for whatever origination letter he could get and, in relation to the NDA, recommended waiting a little longer and then signing. As he said at the end:

> "*In summary, I think we've papered our objections enough, but we've gained valuable stall time on the Dec 6 deadline (which we may need counsel to reinforce) so let's take advantage of it...*"

912. Gaining valuable stall time was part of Plan B, for the purposes of which it would be helpful to have the absence of information continue as close to the deadline as possible. The longer the delay in providing information, the more plausible would be the assertion that its non-provision prevented funds being available by 6 December.

The absence of any interested investor meant that there was no urgency in signing an NDA. If there had been one that would have been an incentive to secure the documentation.

913. In his email Eric Wempen had also said:

> "*I think the critical thing is to get them to start thinking about Excalibur's role, which means we need 2 things: (1) an extension of the Dec 6 deadline, and (2) a joint operating agrmt. I think that investing through a Gulf entity will be required for both of these, and since they haven't addressed either of these (or how you will invest) even once, I think we need to move now at light speed*".

He suggested engaging outside counsel to look at the Collaboration Agreement and the Deed of Adherence, the email traffic and the discussions with Mr Kozel and Mr Patrick and advise.

Gulf's confidential information

Friday 23 November 2007

914. Gulf collected a quantity of confidential information for disclosure to Excalibur once an NDA was signed. On Friday **23 November 2007**, Mr Mackertich circulated an updated budget, which presented costs to "*our partners (MOL, Excalibur and Texas Keystone)*". It estimated costs for the years 2007 to 2009 of $ 82.5 million.

915. On the same day Mr Compton sent Mr Patrick an economic model specially prepared in respect of Excalibur which showed projected revenues and costs in respect of Excalibur. This used a probability of success in finding oil of 20% and showed an Expected Market Value (EMV) on a 12.5% discount rate of minus $ 9.2 million. This model was not sent to Excalibur**.**

916. Mr Patrick asked Mr Mackertich for a technical presentation for Excalibur. Mr Mackertich sent Mr Patrick a presentation prepared for some investors and on the Gulf website and listed the documents which Mr Patrick now had for Excalibur: (a) the latest budget, (b) the technical presentation to the KRG; (c) the investor presentation; and (d) the economic model. Mr Mackertich said that he was happy for Excalibur to have a "*physical data room if they wish*". One of Gulf's geologists, Mr Gibbs, also sent Mr Patrick a modified version of the presentation given to MOL, observing that it was something that Excalibur would probably struggle to present to anyone with confidence owing to its lack of technical knowledge.

917. Mr Patrick told Mr Kozel what he intended to send to Mr Wempen once he had signed the NDA: (a) the technical presentation; (b) the Dabin agreement with Gulf; (c) a copy of the Shaikan PSC; and (d) the budget.

Gulf makes its farm in offer

918. On Friday **23 November 2007** Gulf made Excalibur a farm in offer. The email, to which Mr Wempen took violent objection, began by seeking to clarify the basis on which Gulf would provide confidential information in relation to the Shaikan block.

Gulf required the information and negotiations to be covered by an NDA signed by Excalibur as drafted by Gulf and agreed to permit the information to be made available to financial institutions provided they signed an NDA in the form already sent to UBS.

919. The email then read as follows:

> "*Following your review of the confidential information, Gulf Keystone Petroleum Limited ("GKPIL") is prepared, in principle, subject to contract, to commence negotiations for a potential assignment of a 24% interest in the Shaikan block in Kurdistan to Excalibur.*
>
> *Any assignment to Excalibur will be conditional on the signature of a mutually agreed transfer document between Excalibur and GKPIL and upon the written approval of the [KRG] and our partners Kalegran and Texas Keystone being received no later than 31 January 2008. In the event that such approvals are not received, all agreements and understandings between GKPIL and Excalibur will automatically terminate and there will be no liability or claims by either party against the other.*
>
> *Any interest assigned by GKPIL to Excalibur will be subject to the terms of the Shaikan PSC, including potential dilution pursuant to the KRG's rights thereunder, and to a 10% net profit interest payable out of such interest to Dabin Group in recognition of Dabin's role as local representative.*
>
> *Excalibur will reimburse 24% of the* ***past costs*** *incurred by Gulf Keystone Petroleum and GKPIL in obtaining and evaluating the Shaikan block amounting to approximately $1.4m (until now).*
>
> *Excalibur will become a party to a Joint Operating Agreement with the existing partners in the Shaikan PSC. It is acknowledged that any failure to pay cash calls when due under the JOA will result in the forfeiture of a party's interest under the JOA and the Shaikan PSC.*
>
> *Excalibur will pay its 24% share of the bonuses amounting to $25m (100%) payable to the KRG by 6th December 2007 into an escrow account pending satisfaction of the conditions referred to above. All other amounts due in respect of the 24% interest will be paid by Excalibur when due under the JOA with effect from the effective date of the Shaikan PSC.*
>
> *Any transfer of interest to Excalibur pursuant to these discussions supersedes the Collaboration Agreement between Excalibur and Texas Keystone, which will terminate with no liability or claims by any party*."

920. This was, in effect, an offer to negotiate a farm out of a 24% interest in the PSC. It would be on ground floor terms in that Excalibur would have to pay its 24% of the signature bonus and become a party to the JOA and pay amounts due in accordance with it; but there would be no premium or "promote". These terms were industry standard for a farm out. Save in two respects they were no more onerous than would have applied if Excalibur had joined in the bid and become a party to the PSC initially. The difference was, firstly, the requirement to reimburse 24% of Gulf's past

costs, whereas under the Collaboration Agreement joint account costs are borne by the parties in proportion to their interests. Such a requirement is a standard one for a ground floor terms farm out offer. The second difference was the need to accommodate Dabin's 10% net profit interest in respect of Gulf's share. That was to be expected if there was to be a farm out of part of that share.

921. The consent of Texas, Kalegran/MOL and the KRG (as well as Gulf) would be required under Article 39.2 of the PSC (although not to be unreasonably delayed or withheld) and would, in practice, have been needed for Excalibur to be able to participate in the PSC originally. A requirement for such consent is standard in the case of a farm in since the existing parties to the PSC need to know that the assignee will be able to perform its financial obligations[76] and Excalibur would have to have proved its financial capability to the other parties if it was to be on the PSC in the first place. Gulf was making the offer and Texas would not object. The consent of Kalegran/MOL and the KRG was more problematic but that was simply a fact of life. Further, Gulf, in its negotiations with MOL on the JOA had retained the ability to assign to Excalibur[77].

922. There was no reason for Excalibur not to put money in escrow pending approval in respect of the signature bonus then thought to be due on the contractual date of 6 December[78]. The time limit for approval by the KRG was not unreasonable.

923. Further, the email was expressed as a preparedness to commence negotiations.

924. To be offered such terms was, itself, a recognition of Excalibur's origination of the process that had led to the PSC, and could properly be represented to be such to financial institutions, who could be asked to finance the acquisition of the direct interest on offer. A direct interest was likely to be more attractive than an invitation to take some as yet undetermined indirect interest, which would have at least two disadvantages: (a) the investment would carry the risk of total loss if Gulf defaulted; and (b) Excalibur would have no place on the operating committee.

925. In short I do not regard the offer contained in the 23 November 2007 email, or the requirement for signatures of NDAs, as part of a plan to ensure that Excalibur did not participate in the PSC. Even if it had been, in the light of my findings as to the construction of, and parties to, the Collaboration Agreement, any such plan would not have entitled Excalibur to relief. The offer imposed tight deadlines (subsequently relaxed) but they reflected the deadlines in the PSC in which Excalibur claimed to be entitled to an interest. At the lowest Gulf, acting in its own interest, was reasonably entitled to regard these terms as appropriate.

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[76] See also clause 4.14 of the Shaikan PSC which provides as follows: *"Any Joint Operating Agreement entered into in relation to this Contract shall be consistent with the principles of this Article 4 and shall provide as follows: … (b) in the event of a proposed transfer by any CONTRACTOR Entity of part of a participating interest under such Joint Operating Agreement, including any Government Interest or Third-Party Interest:…(ii) the proposed third party assignee must demonstrate to the reasonable satisfaction of each of the extant CONTRACTOR Entities that it has the financial capability to perform its payment obligations under the Contract and under the Joint Operating Agreement.*"

[77] The JOA for Shaikan of 21 December 2007 gave Kalegran a right of pre-emption if a proposed assignment by Gulf would reduce its Participation Interest below 20% or include a transfer of the Operatorship to someone not already a party.

[78] Mr Park said that he had never in 30 years in practice seen a situation where the operator "*paid the funds and then collected later. They always request funds in advance.*"

Mr Wempen's reaction to the offer

926. Mr Wempen objected vehemently to this offer. His complaint, as expressed in evidence, was (a) that the offer was an illusion and a trap because the KRG would not let Excalibur get on the PSC; (b) that Gulf did not recognize that Excalibur had an entitlement to an indirect interest in the deal (in some form yet to be determined); (c) that without such recognition of an existing interest he could not raise money, whereas with such recognition he had an asset in respect of which he could readily raise funds; and (d) that Excalibur could not be required to come up with its share of the signature bonus otherwise than in accordance with a timetable that it had agreed.

927. As to (a) the offer was made bona fide. As to (b) Excalibur did not have any entitlement to an indirect interest. The Collaboration Agreement contemplated a bid which would, if successful, lead to a side-by-side direct participation in the PSC as a party thereto. As to (c) I consider below the practical effect of an absence of acknowledgment of an existing interest, which, noticeably, did not feature as a matter of contemporaneous complaint to Gulf. As to (d) Excalibur was not entitled to set the timetable for its contribution to the bonus, which, as matters stood, had to be paid on 6 December 2007.

928. I cannot tell exactly why Excalibur wished to participate indirectly and Mr Wempen's evidence was not at all clear on the subject. He claimed that he simply did not believe that it was necessary for Excalibur to be named as a party in order to be entitled to an interest. But that does not explain why, when the Collaboration Agreement was structured so as to lead to Excalibur being a party, he chose not to become one. It would appear to have been for one or more, perhaps all, of the following reasons:

a) Mr Wempen's realisation that Excalibur was not in a position to undertake the financial obligations involved in direct participation in a PSC including the requirement to pay the signature bonus and to provide a guarantee (Article 9); that it lacked the necessary financial and technical credentials to participate and that Dr Hawrami was unlikely to accept it on the PSC because it could not comply with Article 24, and that MOL would not either;

b) The establishment of a structure whereby Excalibur took an indirect interest would take some time and postpone the date when money would have to be provided beyond the 30 days after signature deadline;

c) It would avoid or reduce the risk that open participation in a PSC might offend both the Iraqi and the US Governments. When the KRG entered into a PSC with Hunt Oil in September 2007 the Iraqi Government contended that the agreement had no legal standing and said that they would blacklist any company entering into PSCs with the KRG. Both the KRG and the US Government expressed annoyance and a US State Department spokesman said that any such contract had no legal

standing[79]. Mr Wempen had Republican political connections. These circumstances would provide good reason to adopt a low profile.

d) Excalibur would remain "*below the radar*", a position which suited Mr Wempen (having regard to his security activities);

e) An alternative structure might be used to enable Excalibur to expand into other areas.

Excalibur expresses its objection

929. On the evening of **23 November 2007** Mr Wempen emailed his brother: "*They are trying to screw us completely. I am very glad that you advised me not to sign the NDA in its original form*". Later in the evening he asked his brother whether they could get an injunction against Gulf to stop them from sending in their signature bonus or starting work until they signed the Deed of Adherence and agreed to negotiate a work plan.

930. On **23 November 2007** Mr Wempen emailed Mr Kozel proposing a meeting to resolve the issues in Mr Patrick's email. He complained that none of their concerns had been understood by Gulf staff. Mr Kozel asked Mr Wempen to respond with "*specifics*". He said "*Gkp staff have understood what needs to be done. There is no confusion on our part on how to do an upstream oil deal*". He suggested a conference call and urged Mr Wempen to get on and sign the NDA: "*The ball is in your court to end these delays*". Mr Wempen's evidence was that Mr Kozel's attitude was ridiculous.

Saturday 24 November

931. On **24 November 2007** Mr Wempen angrily emailed Mr Kinnear to ask for Mr Kinnear to help sort out the problem. Of the farm in offer he said "*If Todd signed off on this declaration of war email, then he has been trying to steal this deal from the beginning. They know full well we could never accept the terms in that e-mail*". It is unclear what Mr Wempen meant by "*from the beginning*". Mr Wempen suggested that it could have been a reference to when they "*first signed the deal*" or to the events of the summer. The farm out offer was described as unacceptable because (a) it dictated a funding timeline "*we never agreed to and we cannot meet*"; (b) it did not give Excalibur credit for the origination of the deal; (c) it did not give it credit for having by contract a stake in the deal; (d) it asked for payment of a 10% NPI to Dabin when Excalibur already had a 10% obligation to Dabin; (e) it gave the "*Kurds and the Hungarians*" power to veto Excalibur's participation after we have given out money. The email accused Gulf of "*mafia like behaviour*" and committing criminal fraud. It ended by him saying:

> "*We don't even want our participation to be mentioned. We simply want to finance part of Gulf's participation*"

a course which Excalibur had no right to demand.

[79] On 25 November 2007 Mr Wempen emailed his brother what he described as an "*interesting*" article in The American Lawyer to that effect.

932. Mr Kinnear replied:

> "*I believe that this email* [i.e. the farm out offer] *is 90% correct. The time frame I believe was place[d] out of frustration and is unreal. That's what I would have done as well. The deal is standard Upstream practice and I took the liberty of checking this with the deputy head of Shell HQ legal team who is an ex military colleague. They also said without an NDA which should have been signed before now nob[o]dy should even be speaking to us*?"
>
> *It is my opinion that we should tum the clock back and sign the NDA then get a stay for cash raising. Please note that all parties need to be cleared by the principle with subsequent NDA's if they are invited to see the info needed to raise the cash. I also believe that GKS have been good to extend the share size to 24%. Apparently that is unusual*."

933. To Mr Wempen's intense annoyance Mr Kinnear added:

> "*My Shell man also said that usually "people like us", (his terminology) only get a finders fee and never equity*"

Excalibur has always claimed that it is not in the position of someone who at best would get a fee. It demands an equity interest. His reply to Mr Kinnear was that Excalibur had brought the deal in; Gulf was now screwing it because Gulf thought it small and weak; and Gulf could "*come back after we have sent money and say, sorry, Kalegran and the Kurds have decided you have no equity in the deal? Thank you for the deal of a lifetime, now get out*".

934. Mr Wempen's analysis of the situation was seriously unbalanced, culminating with the irrational suggestion that MOL and the KRG could retain money paid in escrow if they did not approve the deal. Even if Excalibur had the right to participate indirectly, it could not, as Mr Wempen on occasion accepted, be on more favourable terms than if it participated directly. Credit for origination did not bear on the terms for participation. If Excalibur was to take an interest derived from that of Gulf it would have to be subject to the obligations to Dabin attaching to that interest. The requirement that the KRG and MOL should consent was no different from what would have been the position if Excalibur had participated in the PSC initially. Excalibur's root and branch objection to the farm in offer sits uneasily with the fact that a farm in to the Shaikan PSC is one of the potential remedies which it seeks in this action.

935. Dr Hawrami's stance towards Excalibur was an obstacle: but it was not necessarily irremovable. As Mr Kozel put it:

> "*[Dr Hawrami] didn't consent to [Excalibur] participating but ...that didn't forbid him [Mr Wempen] from rectifying the situation ... He could prove he was a serious company. He could prove he had finance, he could prove he had technical capabilities. He had Dabin and theoretically the Prime Minister on his side. He could go pitch his case to Dr Ashti ... The problem was he just never attempted to do it.*"

Litigation considered

936. On **24 November 2007** Eric Wempen sent his brother a long email entitled "*Re:Injunction*". He began by saying that it was obvious that Mr Wempen would never make the 6 December deadline so that legal action was now the only alternative. He set out a number of points including these:

i) Excalibur's damages were speculative "*since they may not (and probably) won't find oil*" as at November 2007; and so Mr Wempen should keep what he wanted out of the affair in perspective;

ii) He should press for a letter from Texas stating that Excalibur was the originator. Later in his email Eric Wempen urged Mr Wempen to figure out what the usual finder's fee would be and document it. Both Wempens denied that the letter was being sought in order to claim such a fee, but it must have been contemplated that the information would help any claim for such a fee or something like it. Eric said that Mr Wempen should claim as damages "*primarily your placement fee, plus some potential upside in the deal...though this upside portion again is speculative*"*;* according to Mr Wempen this was some sort of management fee for Excalibur's fund;

iii) Mr Wempen should pay for a law firm to lay out Excalibur's case and threaten a press release, a personal lawsuit against Mr Kozel and maybe an injunction. The last would need to apply in Kurdistan, to which he said, "*good luck, especially considering Barzani's payment*". He speculated that the "*payoff to the Kurdish Gov't [was] a violation of Foreign Corrupt Practices Act - though this is a long shot*". If this was, as it appears to have been, a reference to the payment of the signature bonus, the suggestion was absurd;

iv) He thought that Mr Kozel's position would be that if Excalibur could put up the money, it could get its percentage. He was right on that.

v) He thought that Excalibur had a very good claim that Gulf was acting in bad faith because "*you weren't informed and never had a chance of meeting the deadline of 6 December especially with no info. I think we papered it just right.*" In fact Excalibur had known for months about the contractual date for payment of the bonuses. Insofar as that was a deadline Excalibur knew about it. If, as Excalibur contended, it was under no obligation to make payment otherwise than in accordance with a timetable it had agreed, it was not a deadline. He suggested that Gulf had a "*contractual duty*" to "*inform Excalibur every step of the way and instead there was radio silence*". This was incorrect on both counts.

937. Eric Wempen set out a to-do list which included the following:

> "*See if you can't get a letter from UBS London or Lazard* ***stating that they're interested pending receipt of additional documentatio****n. Don't think you'll ever see the geologic data, so you'll never get anything from anyone saying they would have funded it – this is the best you can get. If Lazard and UBS won't do it, ask Dan if he knows anyone else who might be willing.*"

938. Neither UBS London or Lazard had expressed any such interest. It is apparent that the focus of attention was not on getting an offer, or indication, of funding in the light of

information revealed, but on creating a paper trail for litigation. Eric Wempen urged his brother to "*Think of your future first, so try to get the origination letter from Kozel*". By this stage its purpose was simply to burnish his future credentials. Eric Wempen ended by advising his brother to hurt Mr Kozel "*personally and professionally*":

> "*Two can play …(See Ocean's 13) Let him know (after you see if he'll send you a letter regarding origination of course) that you consider this a personal betrayal, and you are going for a scorched earth policy – of course, let him know through your lawyer and never put anything in writing. - F him, his wife, his kids, bury the bastard …*[80]
>
> *This is dirty and he needs to pay, but be sly. 'I will have my revenge in this life or the next!!*"

939. Later in the day Eric Wempen sent his brother another long email with various proposals to put pressure on Mr Kozel in the following terms:

> "*Chances are they won't strike oil anyway. And if the battle lines are drawn, then you let Todd know through your lawyer that nothing is sacred and every conversation you had will come to light, regardless of whether he was cheating on his wife at the time. He'll settle; don't worry about that. He's got a lot more to lose than you do. Hell, I'd even draft a complaint which you will serve on Todd and his wife (as an accomplice in civil fraud) where you will lay out these facts and send it to him. There's probably a way to go through everything he's done and legally create a scandal that can be issue[d] as a press release...payoffs to Barzani? Even forgetting that, aren't there people that are angry that the Kurds are going on off on their own? They're your ally and might love posting a story about the big guys screwing the little guy.*"

940. In essence what was being contemplated (although never put into effect) was to blackmail Mr Kozel, to take advantage of difficulties in his private life and to put pressure on him by including his wife in a draft complaint of fraud, alleging or implying infidelity on Mr Kozel's part, and send it to him and his wife, and to create a scandal by use of a press release referring, *inter alia*, to a pay off by Gulf to Mr Barzani, the Prime Minister, when nothing of the kind had ever happened.

941. These angry and wild thoughts by Eric Wempen, still on holiday in Morocco, do not invalidate any claim. But they show what a hole the Wempens perceived themselves (correctly) to be in; and display an absence of any reasoned articulation of Excalibur's claim that withstands scrutiny. They also show that Eric Wempen was contemplating conduct unacceptable for a member of the Californian (or any) Bar.

The signature of the NDA

942. On **24 November 2007** Eric Wempen emailed his brother in response to an email from Mr Wempen saying that he thought he had to sign the NDA: *"Do NOT send*

[80] Mr Wempen told me that this was a misquote from Robert de Niro in the film "The Untouchables". The email also contains quotes from "Ocean's 13" and "The Gladiator" ("*I will have my revenge...*"). It is plain that Eric Wempen tended to express himself in language from the movies; and some of his approach appears to have been guided by them.

NDA!!!!" Either he had come to the view that Excalibur was better off with no information so that it could claim that it was prevented from fundraising on account of the lack of it, or he was concerned that Mr Wempen might sign without a reservation of rights and that to do so would be prejudicial. The latter is more likely. Mr Wempen had meanwhile told Mr Kozel that he had already responded with specific points and had sent an NDA (the Excalibur version). He emailed Mr Kozel once again about the terms of the NDA expressing his concern that the Gulf wording "*appears to set a precedent to kick us out of the deal*".

943. Mr Wempen did not follow his brother's advice. He signed the NDA in Gulf's form. His accompanying email said that "*the funding timeline you have proposed is unreasonable, and the approval by Kalegran and the Kurdish government after the first round of investment has been made is clearly something no sponsor would agree to*". He asked for a call to discuss (i) "*Clear origination letters...as requested by our sponsors as sent previously*"; (ii) a "*reasonable funding timeline*"; and (iii) "*Investing through Texas Keystone or Gulf Keystone itself via an alternative investment mechanism, e.g. preferred stock, convertible note, etc. This would help Gulf by precluding the need to renegotiate its contracts with KRG, and would help to spread Gulf exploration risk while defraying expenses.*"

944. This was a repetition of familiar themes. There were as yet no sponsors. No one had requested origination letters. The request for a funding timeline assumed that Excalibur did not have to pay a participant's share of costs as they fell due. The indirect investment route was not something to which Excalibur was entitled. Nor was it thought through: it was apparent from his evidence that Mr Wempen did not really know what a convertible note was. Mr Wempen accepted that Gulf, although (as he claimed) obliged to recognize Excalibur's indirect interest, was not obliged to accept any specific restructuring, unless dictated to by the court.

Gulf provides information to Excalibur

945. In the evening of Saturday **24 November 2007** Mr Patrick sent to Excalibur copies of (i) the Gulf technical presentation of July 2007; (ii) the Dabin agreement; (iii) the executed Shaikan PSC; and (iv) the Shaikan preliminary budget. The email was sent in sections because of the size of the attachments. This process took some time. The technical presentation was sent at 11.17 p.m. London time. The second half of the PSC went out on Monday morning.

946. The despatch of these documents cannot be reconciled with the supposed plan to exclude or any bad faith.

947. Mr Wempen, having received some but not all of the material, emailed Mr Patrick to thank him for his swift response. About half an hour later he emailed Mr Kinnear to complain that only half the data had been received: "*Not exactly the response we were looking for.*" After about another hour he emailed his brother:

> "*Should have stopped at "herewith" and waited for the NDA data to come in. No call, no acknowledgment from Todd and they only sent half the data. I think Iain Patrick* ***probably got a call from Todd to stop sending data after Todd read my email.*** *We have zero technical data, and half the contract with a proposed budget and their new contract with Dabin. Basically all the stuff an*

> *informed investment decision would depend on is still missing. At least we know their intent.*
>
> *Well, I'm off to work out and consider litigation. This deal was supposed to launch the new career. Not a happy time.*"

It was a complete misreading of the situation to think that Mr Kozel had stepped in on a Saturday evening to stop the flow of information.

948. Eric Wempen then sent a long email with advice (containing the paragraph cited at para 939 above). He considered that if Mr Kozel were digging his heels in, then he would have immediately sent the technical information and said on 6 December "*hey, you didn't make the deadline*". As it is, Eric Wempen thought, "*he is giving you more ammo … like an idiot*" i.e. by not giving all the information. Eric Wempen was also exercised by the Dabin agreement with Gulf:

> "*You're saying they signed a new contract with Dabin? So after they admitted that Dabin comes out of your side, they actually signed their own contract with them (which shows they never expected you to make the deadline and already planned around it)? Just another sign of bad faith...*"

He made similar observations in another email of the same day:

> "*The more I think about it, what are they thinking sending you a copy of new agreement with Dabin Group? If they did this without telling you, there's your bad faith claim in a nutshell: "Gulf already went around me and executed an entirely new deal with my partner without my knowledge and then tried to make it look like their portion still came out of my percentage." ...Iain is stupid stupid stupid.*"

949. This was another misreading of the situation and an overreaction. Mr Wempen had been suggesting that Texas should make an agreement with Dabin since early July: on 2 July he sent Mr Kozel a draft of one; and the agreement had been signed after the PSC had been entered into (without Excalibur).

950. In the course of his long email Eric Wempen observed that the more he looked at it Mr Wempen had enough for a new job. It was to that, together with building a case for litigation, that the Wempens' energy now turned.

951. On the same day Eric Wempen emailed his brother again:

> "*You know what? I think we're being paranoid about them stopping the flow of info. If they did that after you signed their agreement as is – even over objections via email since those aren't as valid as the agreement and don't touch on any of the issues they're concerned about with MOL – they would just be making your case for you (thank you very much).*
>
> *What is more likely is that they want to show that they are acting in good faith and sent whatever they had handy on a Saturday since we've been whining about "bad faith" on their part and obviously have "counsel" already advising us (you must admit we've now taken every step to protect our*

> *interest, and it doesn't take even an armchair lawyer to realize we're building a case if we need one...*
>
> *...You actually might just get a nice payout of this since they probably don't want a lawsuit hitting the papers if they're really worried about their share prices, and since you probably could ask for a piece of the deal, it might as you say be initially a 25M case.*"

952. Excalibur never deployed any of the material that it had been sent by Gulf either with or without the Collaboration Agreement or the email offering a farm out. That was, no doubt, because no one ever signed an NDA. Excalibur would, in any event, have had difficulty explaining some of it. According to Excalibur's pleading the packet of information which it was presenting to investors in early December 2007 contained (i) the draft NDA, (ii) press releases about the Consortium, and (iii) the Thames Chesapeake term sheet. In the event no investors had sufficient interest to sign a NDA. Excalibur claims that no one was interested because they could not validate their title. As will become apparent I do not accept that at these initial stages, prior to the signing of any NDA, it is necessary to have an acknowledgment of title. The first step is to interest the financier sufficiently in the project to get him to sign an NDA. Excalibur had spoken to Lazard and UBS without any request for such an acknowledgment.

Sunday 25 November

953. On Sunday **25 November 2007** Mr Wempen asked his brother whether he should engage Cadwalader or Baker Botts as attorneys. Later in the day he told his brother:

> "*I am only realizing now that Texas Keystone has different terms...Gulf is carrying their 5% until the first oil well is drilled which is what we want. That will be June.*"

This understanding, which was not entirely correct – the arrangements in respect of Texas were as set out in para 714 – is likely to have given Mr Wempen the idea of asking Gulf (as he did at a meeting of 3 December 2007) to extend the time for Excalibur to raise funds until June. Mr Wempen's evidence was that although he may have requested this at the 3 December meeting he never expected to get it because the request was an unreasonable one. I find this difficult to believe: an extension until June was certainly what Mr Wempen wanted.

954. Later in the email chain Mr Wempen told his brother that he should explain to any counsel instructed:

> "*why we think Gulf is doing this (not just to make money, but also since they – as we now know – can't renegotiate with KRG and MOL). Of course, they could have just told you and explored alternate methods, but they're dicks.* ***Also explain our potential fix to this issue (restructuring the investment) – what we're trying to do is negotiate...***"

In short the Wempens were of the view that, as they could not get on the PSC, the only way out was a restructuring of the investment. The Collaboration Agreement did not provide for such a restructuring.

955. On the same day Mr Wempen spoke to Azzat, after which he reported to Mr Kinnear that Dabin "*are on our side. I am not sure that Gulf realizes we can have them thrown out of Kurdistan much faster than it took us to get them in*". He told his brother that he had talked to Azzat who "*said he could have Gulf thrown out of the country. Maybe he could! Emotionally encouraging anyway*". He also said: "Azzat and I agree that KRG will never let anyone else, including Excalibur, into the deal partnership. We need to invest through Gulf." Eric Wempen thought this was good for the litigation strategy:

> "*The fact that KRG won't approve is another excellent point to include in your description of the case to counsel. Can you get Azzat to write an email to you about this? See if he can't ask around too, so if we need to, it can be used as evidence*".

956. Mr Wempen said he would ask Azzat to confirm that the KRG would "*not approve another addition to the consortium after the fact*". Eric Wempen thought that whatever Azzat said, he was just trying to make Mr Wempen feel good, and that Dabin would never kick out their paymaster.

957. The factual basis (if any) for Azzat's reported view is not apparent. The KRG might well have been reluctant to consent to a transfer to a new party of part of Gulf's share at a premium. Such "flipping" shortly after the grant of a concession is unattractive, not least because it suggests that the original grant may have been at an undervalue. It is not, however, apparent to me that the KRG would have ruled out a transfer by Gulf to a technically and/or financially capable company on ground floor terms.

958. On the same day Eric Wempen gave his brother advice on dealing with a lawyer. He said that Mr Wempen would probably need to pay a retainer and asked whether Mr Wempen had cash available up front on a credit card advance. As he noted, it "*gets real expensive real fast*" and that was why Mr Wempen needed to produce a factual timeline to save time in building a file. He advised his brother to let the lawyer know "*what you want: (1) origination letter for your future, (2) the chance to fund the deal in a reasonable time, or (3) a buyout or settlement*". The purpose of the origination letter at this stage was simply for Mr Wempen's future. If evidence of title had really been needed to raise finance, it would surely have been included in the list. Mr Wempen replied that he did not have "*10K in credit card cash advancement available*" and needed to call Blauner (the trustee).

Monday 26 November

959. On **26 November 2007**, Eric Wempen sought an update from his brother. One of the matters he asked about was whether anything had come of Mr Behrends' contacts. Mr Wempen replied that Mr Behrends had interest from the Taiwanese and went on to say, "*Maybe if they are interested we can get UBS interested, and then we will have a real case. I have not asked him for legal help yet because of this*". This was a reference to the legal case which Mr Wempen was seeking to build.

960. On the same day Mr Kinnear, who had spoken with Mr Wempen the previous evening about setting up a telephone call with Mr Kozel and Mr Al-Qabandi in order to set up a meeting with Mr Kozel in the US, emailed Mr Wempen. He was concerned about Mr Wempen's tactics:

> "*Take care as Todd is NOT Gulfkeystone he is the CEO, he cannot operate in isolation and needs his board on money transactions of this magnitude. They are a public company with shareholders.*"

He warned Mr Wempen not to "*try any heavy hammer at this stage*"; said that "*they are on our side*" and went on:

> "*Todd had his fingers burned by talking directly to you before and now that money is involved he will be cautious, hence the Iain Patrick mail cleared by all in Gulf as I understand from Ali. They felt we were becoming unreasonable and wanted just to remind us that we are part not all of the show and without them we were back at square one. However they understand that we brought in the deal and want to get us on board but under standard oil company rules...*"

He told Mr Wempen, in response to the latter's suggestion that Mr Kinnear might want to tell Mr Al-Qabandi what "*the Kurds said*" (i.e. that they could get Gulf out of Iraq), that that "*was the wrong move at this stage. We need to work with them not on the threat [sic] at each corner. You can only play a card once. In my opinion this is not the time*".

961. I do not think that Mr Kinnear misjudged the situation in not accepting that Gulf was acting in bad faith and in saying that Gulf wanted Excalibur on side.

Approach to investors in November

962. Excalibur does not appear to have made many approaches to investors in November. On **26 November 2007** Eric Wempen emailed Robert Colvin at the Colvin Trust seeking a contact at Baker Botts, saying that his brother's oil deal had just got approved but that "*his partner (a public oil company) is trying to push him out*" and:

> "*Oh, and if you know anyone or any company that might be interested in investing a few million into the concession alongside the public oil company and the state-owned company of Hungary (the other partner), that would actually solve the issue much quicker (since they're essentially trying to push him out by setting unreasonable funding deadlines).*"

963. Mr Colvin's dispiriting reply was:

> "*I don't know of anyone who might be interested in the oil deal. All of my oil based clients take a painfully long time before they invest in overseas deals.*"

The Gulf economic model

964. On **25 November 2007** Mr Kozel, who had been copied in on the email to Mr Wempen enclosing the four documents sent on 24 November 2007, emailed Mr Patrick to query why he had not sent the economic model. Mr Patrick thought that the model could be controversial, but in Mr Kozel's view "*We already decided that presenting it to Excalibur would provide a clear view of project risk from gkp's side and probably speed up the process*". He suggested that the model go to Excalibur

with appropriate caveats on which Mr Davis of Memery Crystal should be consulted. This is not the behaviour of someone seeking to cut Excalibur out of a deal.

965. On Monday **26 November 2007**, Mr Patrick re-sent to Mr Wempen the second half of the PSC which had failed to go through on Saturday. Mr Patrick said this:

> "*I have NOT included in the data I have sent to you Gulf Keystone's economic evaluation of the Shaikan project because it is based on a propriet[a]ry economic model and contains some of our own internal assumptions. If you would like to have this – on the clear understanding that it represents only one subjective set of assumptions and that Excalibur should not rely on it as a definitive view of the potential risks and rewards of the Shaikan block but must conduct its own economic evaluation of Shaikan – I can send it to you under the terms of the Confidentiality Agreement.*"

966. Mr Wempen gratefully accepted the offer under the terms of the NDA. Mr Patrick offered to arrange a call with Gulf's economist, if Excalibur wished to discuss it, and Mr Wempen said he looked forward to a call.

967. On **27 November 2007** Mr Patrick sent Mr Wempen the model with the following caveat:

> "*Here is our Shaikan economic model, which attempts to model the terms that apply to the 80% non-MOL Contractor share of Shaikan, including Dabin's carry.*
>
> *This can be used to input whatever assumptions regarding risk factors, reserves, oil price etc Excalibur wishes. This model has been created by GKP for our own purposes and would not normally be provided to any third party. We cannot accept any responsibility for the accuracy of the model itself or any of the assumptions used in it. It is entirely Excalibur's responsibility to conduct its own evaluation of the Shaikan block and reach its own conclusions on it.*
>
> *The summary tab shows one economic case based upon our current assumptions regarding potential reserves, oil price etc. as an example of the output from the model and should not be understood as 'the answer'.*"

968. These actions were marks of good faith. The material provided was confidential to Gulf. It would not normally be provided to any third party or potential farm in partner. The model was Gulf's general model based on its 80% interest and not the one prepared for Excalibur by Mr Compton on 23 November. It was a particularly useful tool because its output could be manipulated to work out the results on changed assumptions e.g. as to oil price, which could be presented to investors. Mr Patrick's initial reluctance to provide information was because of concerns about possible exposure to liability towards those who might rely on it.

969. The model assumed a chance of success of 20% rather than 25% which had been used in the economics paper presented to the Gulf Board on 25 October. I do not regard this as in any way sinister. Gulf used models with both 20 and 25% between 2006 and 2008. On 22 February 2008 Mr Compton emailed this very model to Mr Ainsworth,

the new finance director, who had asked for "*economics for Kurdistan*". Mr Kozel's personal view was that 20% was the appropriate assumption for "*raw green field exploration*" in an area where the closest well dug was 45 kilometres away and it was dry. At this stage of the process these types of assumptions are, as Mr Kozel put it, little more than "*arm waving*".

970. Excalibur placed reliance on the following matters: Mr Compton's economic analysis presented to the Gulf Board on 25 October 2007 (based on a 25% prospect of success) referred (in its updated version) to an EMV of $ 7.75 million for a 100% share at a discount rate of 12.5%; his email of 26 October 2007 sent to Mr Cooper, Mr Patrick and Mr Mackertich referred to an EMV (on a 25% basis and with a 12.5% discount rate) of $ 16.3 million for 100% share (approximately $ 4.9 million for Excalibur's share, if 30% or $ 3.9 million if 24%); the Excalibur-specific model prepared on 23 November 2007, but not sent to Excalibur, referred to an EMV of minus $ 9.2 million for Excalibur's share; an EMV of minus $ 30.5 million for an 80% interest was contained in the model that was actually sent to Excalibur on 27 November 2007. Both of the latter two variations were based on a 20% chance of success and the figures I have quoted were those produced by using a 12.5% discount rate. The calculations set out a range of rates from 0% to 20%.

971. I do not regard this as of significance. If Excalibur thought that 20% was too pessimistic it could have used the model with 25%. In any event the difference between a positive $ 4 million and a negative $ 9 million (for Excalibur's share) is minimal in this context. Even on the former figure the upside outweighed the downside by "*only a very thin margin*", as Mr Kozel put it. At the then assumed potential reserves of 200 MMbbl the project was essentially neutral. If investment was to be justified it would have to be on the gamble that much more oil was there. As Mr Compton put it in his paper to the board referring to the EMV of $ 7.75 million "*risked economics do not appear robust*" and, as a result of proposed changes to the contract terms, "*marginal*".

28 November 2007

Mr Wempen's telephone conversation with Mr Patrick

972. On **28 November 2007** Mr Patrick emailed Mr Kozel:

> "*Rex called this morning*
>
> *He says that Excalibur is not now looking at taking a direct stake in the Shaikan PSC, but wants to find another way to have a financial interest in the project. He is talking about providing some form of project finance to Gulf Keystone. I responded that he should talk to his financial advisers and come up with some specific ideas to put forward very soon. He would like to meet to discuss this with you this Friday or Monday next week.*
>
> *Ferenc (MOL) also called. He has been trying to reach you. He restated that MOL needs some form of preemption in the JOA and wants information on Excalibur if they are a potential partner. The only other outstanding issue in the JOA is the wording MOL has added to protect them from GKPIL's relationships with Dabin and Excalibur...*"

973. Although Mr Wempen said that he could not recall this specific discussion I have little doubt that it took place substantially in the terms described. The previous communications between the Wempen brothers show that they had given up on the idea of a direct stake (as contemplated by the Collaboration Agreement) and were seeking some form of indirect interest in the project involving investment in Gulf. Mr Wempen's oral evidence was that Excalibur had not been looking at taking a direct stake since the late summer i.e. when he had the discussion with Mr Kozel in Erbil in July. Mr Patrick may well have used the expression "*not now looking*" in his email because he had not realised that that was the position from July onwards or because he thought that the offer of a farm in was something which had, or would have been, of interest to Excalibur. Mr Wempen probably did not mean "*project finance*" in the usual sense of the word i.e. finance where the debt is only paid out of the assets and revenues of the project itself rather than those of the borrowers. It was plain from his evidence that he was not aware of that sense and used the phrase to refer simply to finance for a project.

974. It is apparent from this email that Mr Patrick was prepared to consider Mr Wempen's proposal to take an indirect interest, if and when some specific ideas were put forward. This is not consistent with the idea that he was part of a plan to cut Excalibur out.

The attitude of Lazard, UBS and China Petroleum

Lazard

975. Mr Wempen had had a conference call with Lazard on **16 November 2007**: see para 856 above. The ball was, as Mr Wempen thought, in their court to respond but they had not done so. On **30 November 2007** as a follow-up to the call, Mr Wempen sent the Thames Chesapeake term sheet to Mr Gidney and Mr Malhotra and re-sent the NDA and the teaser. He noted that "*we are looking to raise $400 million in commitments, with at least 10% up front to cover committed expenses to our operating partners through this year*". Mr Gidney replied:

> "*We are very busy at this point in time and frankly I do not think we are in a position to give this the attention it deserves...I think it is better if we pass on this at this stage...*"

976. Mr Franchi, who has not given evidence, had made contact with Lazard. But he appears to have done little else. He did not talk to Mr Wempen after the conference call to see how it went. He was – according to his CV – now working part-time for Proteus Energy Corporation as acting President, and part time for Watt Mineral Holdings as Director, Petroleum Operations. He had no contractual obligation towards Excalibur. On **26 November 2007**, Eric Wempen asked Mr Wempen whether Mr Kinnear and Mr Franchi were partners in Excalibur, "*[o]r have they just agreed to put their name on the oil deal?*". Mr Wempen replied to his brother that "*[t]hey agreed to let us use their name*" and said that there was "*a contract with Dan Franchi and Ian Kinnear to bring them into an investment fund if we start one up*". There was no binding contract with Mr Franchi.

977. No further meeting with Lazard took place. On **5 December 2007**, Mr Wempen emailed Mr Behrends to say that Lazard was "*busy*" until the New Year. On **11**

January 2008 Mr Franchi emailed Mr Wempen to say that he had heard from Mr Gidney and that it sounded as if Lazard did not have an interest in Iraq. He quoted Lazard's email to him:

> "*Our priorities have changed recently and as a result we are focussing on a limited number of transactions. In this case I do not think we have the interest or capabilities to help Rex in a meaningful way.*"

978. Lazard's lack of interest had nothing to do with any absence of proof of title, acknowledgment of Excalibur's interest, or origination letter. It was simply not interested in this sort of deal. Mr Wempen conceded in evidence that that could not be blamed on Gulf. Excalibur had, however, in its pleadings blamed its failure to get anywhere with, *inter alia*, Lazard on Gulf's refusal to recognize Excalibur's rights. Mr Wempen's witness statement had suggested that Mr Franchi had said that Lazard had private clients keen to fund who would require documentation of Excalibur's claim. Eric Wempen had said that it was his "*perception*" that UBS, Lazard and Gulf Finance House had "*difficulty getting comfortable with the fundamentals of the deal in the absence of properly documented recognition of Excalibur's interest*". Mr Wempen confirmed that what Eric Wempen said he perceived was not true in respect of Lazard. The fact that Excalibur wrongly suggested that want of documentation of interest was what put Lazard off casts doubt on the reliability of the claim that, even if that was not the case with Lazard, it was so with other financiers.

UBS

979. Mr Wempen's call with UBS was on **16 November 2007**. He did not send them any of the material that he had received from Gulf after that; nor did he ever send them the Collaboration Agreement. Mr Wempen accepted that the ball had, as with Lazard, been left in UBS' court. This is not consistent with there being any outstanding request for documents from Excalibur.

980. On **26 November 2007**, he emailed Mr Van Os and Mr Loeffler to "*check in after the holiday and see where we sit on this*." Disregarding his brother's advice not to mention the fund, he proposed that UBS invest in his fund. The email said:

> "*After further economic evaluation, we are going to require a long term commitment o[f] the order of 350-400 million exchange rate adjusted dollars. Year one will be o[f] the order of thirty to forty, but assuming commerciality is proven (as was proven with one well in the first award in Kurdistan to DNO), we will need to be able to make a cash call of the remainder of the funds to finance our percentage of what would be an estimated billion dollar development plan.*
>
> *This is why we believe a fund with an initial commitment of 10% of fund value with cash call-ups upon commercial success and or follow on deal closures for additional blocks is the best model.*
>
> *Please let me know if this is of further interest to UBS internally or its international clientele.*"

981. Excalibur contends that UBS declined to fund Excalibur because of Gulf's failure to acknowledge Excalibur's title or provide any documentation that did so. The validity of this claim must be considered in the light of UBS' internal and external communications.

982. Late on **26 November 2007** Mr Van Os emailed a colleague in the investment banking division in London, Martin Copeland, to discuss Mr Wempen's proposal.

> "*This is something that came into us from an unseal* [sic] *way. There is a group in Iraq that is looking for financing the development of oil wells in Kurdistan. I don't think this is something UBS would do but before deep sixing* [i.e. throwing overboard], *wanted to see if you may know any banks over in Europe that may have an interest in helping these guys*."

to which on **27 November 2007** Mr Copeland replied:

> "*Not sure I know what 'deep sixing' means, but Chris [Grieve] and I definitely think you shoul[d] be doing that to these guys!*
>
> *Issue is that a pure-play Kurdistan proposition is definitely going to be tough... - you might want to see what Latimer thinks potential is in Canada though, esp since Western Zagros now out there?*"

This marked lack of enthusiasm was not the fault of Gulf and had nothing to do with any requirement to sign an NDA or the absence of an origination letter or a letter acknowledging interest. As Mr Wempen recorded in an email of **21 July 2008** Mr Van Os and Mr Loeffler were not interested in partial ownership percentages.

983. Mr Van Os forwarded the email to Mr Steven Latimer in UBS' Canadian office saying "*Not sure you know anyone who may have interest, but thought I would check before calling them back*". Mr Latimer said he would love to take a look at it and "*see if we think it financeable*" and asked "*can you get them to send us some info and we can go through the vetting process*." Mr Van Os replied:

> "*I am not sure what info he has. I know he has requested that we sign a CA before looking at anything. I told him that probably didn't make sense from my end as it wasn't something we could pursue in the US. If you like, may make sense to set up a call between the two of you and you can vet how to move forward that way.*"

Mr Latimer replied to say that he would be pleased to call him – "*we have a few balls in the air in this region now*". Mr Latimer and UBS in Canada had clients interested in Kurdistan including, in particular, Western Zagros, in whose public listing he had been involved in October 2007. In February 2008 the UBS Canadian office acted as the lead manager in a private placement of shares in order to raise funds for the exploration of the Kurdamir block in Kurdistan.

984. Mr Van Os told Mr Wempen that Mr Latimer would call. The next day – **28 November 2007 –** Mr Wempen emailed his brother "*I really need UBS to sign an NDA so I can show we have some progress on fundraising. Any visibility on that? What about Steve Latimer? Could he pull the trigger in short order?*" I infer that he

made this inquiry because it was important to him, for the meeting that he was about to have with Mr Kozel, to show some progress on fundraising.

The call with Mr Latimer on 28 November

985. Mr Wempen spoke to Mr Latimer by telephone on **28 November 2007**. Prior to the call he sent Mr Latimer an email "*in case you wish further documentation than already provided [to] UBS*", attaching the NDA and the Thames Chesapeake term sheet. This call occurred shortly after his call with Mr Patrick that morning during which he spoke to Mr Patrick about the idea of Excalibur taking an indirect interest. Mr Wempen said that it was entirely possible that he had sent Mr Latimer the teaser.

986. No note exists of this telephone call and there is only the briefest reference to it in later emails. Mr Wempen's evidence about it was contradictory. In his witness statement he said, in two short sentences, that he had been seeking to get a large investment bank involved in order to obtain a "*secure line of funding*". Unfortunately Mr Latimer called and "*told me that the Thames Chesapeake Fund was not the right structure for UBS*", and he, Mr Wempen, was not able to suggest alternative structures in the "*absence of origination letters or other confirmation of Excalibur's interest from Gulf Keystone*". What I take Mr Wempen's evidence to have meant is that UBS was being invited to invest its own money in the fund (which is why a large bank was needed) and that the subject matter of the discussion was the Chesapeake Fund.

987. In his oral evidence he said he followed his brother's advice (given in relation to the first call on 16 November 2007) and did *not* discuss the idea of a fund with Mr Latimer. The majority of the conversation was spent talking about Kurdistan and how Excalibur got there, and then at the end Mr Latimer asked "*Okay, what do you have?*" and "*I had to tell him that we didn't have very much except this highly unlikely offer*." Mr Wempen said that Mr Latimer "*expected me to say, you know, 'Do you have an interest in the field as I have been led to believe?*", but that, on account of Mr Patrick's email of 23 November 2007, "*I had to say rather instead we have an invitation to enter into negotiations if we can put up $6.5 million and pass through certain unlikely conditions and this seemed like a very unlikely proposition to him, unlikely structure*." Mr Wempen insisted that he "*had to go through the conditions which had been laid out by Gulf there for these negotiations and [Mr Latimer] did not find that very appealing*". Mr Latimer was "*taken aback when I didn't have title, when I was unable to show title and this specifically led to the failure of those efforts*"; and he was "*rather taken aback when I didn't have an equity interest, which he had been led to believe that I had*". He could not remember the exact words that Mr Latimer used to express his surprise.

988. When the contradiction between his witness statement and his oral evidence was put to him, Mr Wempen said that the main thrust of the conversation was on the deal but at the end he added on a reference to the Thames Chesapeake fund as "*a positive way forward*". In answer to a question from me he said:

> "*We were attempting to engage an investment bank to fundraise for us, to fund us by placing securities for our interest in the deal and then he asked me what the nature of the deal was and I had to explain, "Well, actually, Steve, we don't have an interest at this time. We are attempting to negotiate for it. We*

> *have a possible structure to make this happen. We have this idea for this fund, Thames Chesapeake. If you can put some money into the fund or fundraise for the fund then we can put $6.5 million into escrow and we can start negotiating for a deal that we are familiar with, and of course it is my responsibility to add we have these veto hurdles we have to go through." He was very non-plussed at the idea of Kurdistan having to okay us joining the PSC right after they had just signed a PSC award.*"

989. Mr Wempen's accounts are inconsistent on the following issues: (i) whether the Fund was discussed; (ii) whether funding ideas other than the Fund were discussed (in his oral evidence he said that the discussion was about "*the bank funding Excalibur by placing securities for our interest in the deal*"); (iii) whether there was reference to direct participation in the PSC if certain conditions could be met; (iv) whether or not issues of title were explicitly raised. As to the last Mr Wempen said in his witness statement that: "*although it was **never expressly said**, my perception was that any confidence that UBS might otherwise have had in our credential was undermined by our inability to present documentation acknowledging Excalibur's interest in the PSCs*". When the inconsistency of this with his oral evidence was drawn to his attention Mr Wempen said that he would go with his witness statement.

990. After the conversation Mr Wempen emailed Mr Latimer:

> "*Due to available structures for this transaction, I understand why you think it best to refer this back to [Van Os] in Houston and to work from there*"

and to his brother:

> "*Steve Latimer just called me. Not the right structure for them. Oh well.*
>
> *Iain says Todd agrees to change the funding timeline but wants to be sure we can come up with the money That is why we want a major i-Bank on board*".

991. I regard it as most unlikely that Mr Wempen gave the downbeat description of a possible deal to take a direct interest, listing the conditions attached, which he described in his oral evidence. The hallmark of Mr Wempen's approach was always positive salesmanship even at the risk of inaccuracy. Nor is he likely to have said that Excalibur had no interest in the deal: his case was that it did have such an interest. The Excalibur teaser, which UBS had received and which Mr Latimer may have seen, had offered an interest; and Mr Wempen laid claim to an interest in other communications at this time e.g. in an email of 7 December 2007 to Mr Kitterman of Peregrine ("*We originated the deal. We know [sic] own 30% of it. We need to raise about $40 million in the next month, with $400 available down the line, so we are raising an investment fund for that purpose.*"). Nor do I accept that Mr Latimer expressed surprise and concern about Excalibur's want of title documentation, or that that was the reason for UBS' lack of interest.

992. What is likely to have happened is that Mr Wempen discussed Kurdistan in general terms; indicated that he was not now thinking in terms of a direct investment (as he had told Mr Patrick); and sought to interest Mr Latimer in the Thames Chesapeake Fund, whose term sheet he had sent to him beforehand. Mr Patrick had invited him to come back with ideas on the form of any indirect participation and had suggested that

he talk to his financial advisers, which is what Mr Wempen hoped UBS would be. He probably asked Mr Latimer for advice about means of structuring an indirect interest: hence the reference in the email to Mr Latimer to "*available structures*".

993. Mr Latimer was not interested in participating in the Thames Chesapeake Fund – "*not the right structure*" as he told his brother. Noticeably Mr Wempen did not tell his brother about having to paint Mr Latimer a gloomy picture of Gulf's offer of a direct interest and the conditions attaching to it, or about any surprise or concern expressed by Mr Latimer as to the absence of title or of proof of title. Nor did he make any reference to any such concern in his email to Mr Latimer. If Mr Latimer had said anything of the kind it would have been recorded or referred to in one or other of the two emails on account of its value for any "prevention" case; and because of the Wempen brothers' habit of expressing to each other their anger at the effect of what they regarded as Mr Kozel's betrayal. It would also have appeared in a complaint to Mr Kozel and/or Mr Kinnear and in a witness statement.

994. In his reply to Mr Wempen Eric Wempen said:

> "*As far as UBS is concerned, does Latimer's call mean that no one in UBS is interested, including London, or just Canada? Second, any chance you could call Latimer back and ask him the following:*
>
> *(1) If they had been interested, what type of structure would have been appropriate – i.e. do they generally require direct investments in the partnership, or would a special funding entity established by Gulf (which would take the funds and invest their own alongside) or a note or other contract suffice? And*
>
> *(2) What his funding timeline would have been*."

995. On **28 November 2007** Mr Van Os emailed Mr Pinho to say:

> "*I have spoken to both our European and Canadian guys and there just isn't anything we can do here to be helpful … nothing more to discuss with Rex.*"

996. He sent a further email to Mr Wempen:

> "*I've spoken to our European and Canadian teams and doesn't sound like this is something they can do. Unfortunately, nothing we can do either. UBS just isn't set up to fund these types of exploration projects or provide seed capital for individuals to invest into projects. I'll keep my ears open to listen for anyone who may be looking to invest E&P dollars into the Middle East*."

Mr Wempen forwarded it to his brother saying: "*Called him afterwards - no go for UBS*".

997. In the result, therefore, Excalibur got nowhere with UBS – not even to the stage of signature of a NDA. UBS was simply not interested in the Kurdistan deal. This was not on account of obstruction by Gulf, or want of acknowledgment of title, but for one or more, and probably all, of the following reasons. UBS was not interested in funding partial ownership in an exploration project of this type. It was not being

offered an investment in a company with a direct interest in the PSC. The Thames Chesapeake Fund structure involved the unappealing complication of establishing a fund, for which Excalibur had no qualifications, with the fund taking an indirect interest in the PSC in some way via Excalibur or an Excalibur vehicle. Excalibur itself had nothing to offer other than possible access to the deal. The terms on offer in the Excalibur teaser were decidedly unattractive. Mr Wempen sought $40 million in exchange for a 10% ownership interest, but the $40 million was in respect of the costs of a 24% interest. In effect, UBS would be paying a significant premium.

998. Mr Wempen emailed to Mr Van Os:

> "*We do know all the sources of capital we need globally and don't really need your help for that. We just want a bank to help structure it and advise us. We have been planning this for three years. Our investors are ready, we just need a financial advisor to structure the deal for us.*"

999. This email was extraordinary. Excalibur did not have any investors ready; it had gone to UBS as a source of capital, which it still needed, and it was running out of options for securing it. What it does, however, show is that Mr Wempen wanted to speak to financiers for advice as to how to structure a deal. He also wanted to be able to say that he had UBS as an advisor for the purposes of his forthcoming meeting with Mr Kozel. The idea that UBS advice without UBS funds would help him with Mr Kozel was a forlorn hope.

China Petroleum

1000. China Petroleum was based in Taiwan. On **8 November 2007** Mr Behrends had said that he wanted to "*itch*" the deal to the Taiwanese and Mr Wempen sent him the Thames Chesapeake term sheet.

1001. On **26 November 2007**, Mr Wempen sent Mr Behrends a draft letter to accompany the Thames Chesapeake term sheet. The letter said:

> "*Through our origination activity on behalf of Gulf and Texas Keystone Petroleum we have been awarded a stake in one of the newly awarded petroleum exploration blocks in Kurdistan...*
>
> *In order to pursue these opportunities and finance our current award, we are setting up an investment fund which will be eligible for US government insurance and diplomatic support. Our model is to use proprietary access to secure deals with US and international operators, and invest alongside them, bringing in US diplomatic support through Overseas Private Investment Corporation (OPIC) insurance as available.*
>
> *We are looking for a long term commitment of four hundred million dollars, with an initial short term cash call-up of 10% ($40MM) to support first year exploration and business development activity, with full commitment ...of funding when fundraising is completed by the end of the first quarter of 2008.*"

Mr Wempen evidently had no difficulty in saying that Excalibur had an interest.

1002. On **28 November 2007** Mr Behrends asked whether it would be possible to invest in the deal directly and play a role as the operator. On the same date Mr Wempen replied: "*No, we cannot let anyone in as an operator. That is explicitly NOT an option*". China Petroleum was only interested in being the operator. In those circumstances there was no prospect of it getting involved. This was no fault of Gulf.

Gulf's cash call

1003. On **27 November 2007**, Ahmad Bilal of Gulf told MOL that he would soon be sending a cash call for about $ 6 million to cover the signature bonuses and initial set up costs, and that payment was expected early next week. The following day, Gulf sent a cash call to MOL requiring payment of $ 5,030,000 by 2 December 2007. At this stage the parties to the Shaikan PSC were proceeding on the basis that the signature bonuses were to be paid by 6 December 2007 (as Mr Bilal stated in his emails).

1004. Mr Wempen's evidence was that if he had received any such email the stance he would have taken is that, whilst doing his utmost to pay, he would not be under any obligation to do so until the Operating Committee under the JOA had agreed the expenditure.

1005. On **28 November 2007**, Mr Cooper emailed Mr Kozel in relation to the forthcoming cash call, and noted the uncertainty about the Kurdistan contract, given that Baghdad was threatening to nullify any contract with the KRG. He also circulated a "*Funding and cash position update*" on Gulf's financial position. He noted that Gulf had $ 90 million in cash. He said:

> "*We are due to pay our signature bonuses on Blocks K5 [Shaikan] and K10 [Akri Bijeel] next week which is approximately $25 million. I have not heard anything further re the possibility of issuing the KRG shares so am assuming that that initiative is no longer being considered. I am also assuming that Excalibur do not produce the necessary funds to take a 24% interest in K5 [Shaikan]*.
>
> *... GKP has available cash resources of $68.4 million ($90 million less $21.6 million), compared to short/medium term requirement of $135 million, hence the company needs to raise in the region of $55-65 million to satisfy the auditors that the business is a going concern when they look to sign off the 2007 audit in April/May 2007. Currently it is expected that* ***GKP will exhaust its current cash resources during Q2 2008****.*
>
> *Clearly there are a number of options by which the company could raise further funds, these possibly include issuing further equity to institutions or even possibly the KRG, promoting/farming out an interest in Kurdistan assets, selling a further interest in HBH or some combination of all of these.*"

He also recorded that Gulf's share of expenditure was $ 50 million by the end of 2009 for K 5 and $ 15 million for K 10. It is apparent from these figures that Gulf would have welcomed Excalibur if it had the requisite funds.

Preparations for a meeting

1006. By this stage a meeting in London was being contemplated. On **27 November 2007** Mr Wempen emailed Mr Kinnear to say that the matter will be "*sorted one way or the other, lawsuit or settlement, by next week*". He set out what he needed. First, he told Mr Kinnear that the origination letters were "*very important for raising capital*". In addition, as he said:

> "*2) We want what Todd and Texas Keystone gave themselves – A reasonable funding timeline – We want the same timeline Todd gave himself and Texas Keystone for their 5% of the deal, which is until the first well is dug in Kurdistan, Gulf Keystone picks up the costs. We pay them back. This will be six months while they perform seismic and setup. We should have the money well within that timeframe, probably 60-90 days. More, we have 30% of the deal. Too bad for them that is the deal we signed, and without us, they would have nothing. No sympathy from our end.*
>
> *3) We want to invest in preferred stock or convertible bonds directly into Gulf Keystone. We are financing part of their project, like a bank. A bank does not get a separate clearance from the Kurds like they are asking for. It would be impossible for the Kurds to let Excalibur Ventures or anyone else into the deal after it has already been signed, and Gulf Keystone knows that. Both the timeline and the conditions they sent are impossible.*"

The role that Mr Wempen envisaged in the last paragraph was not one provided for by the Collaboration Agreement.

1007. An origination letter was not in fact important for raising capital, as both Mr Park and Mr Wilkinson agree. Financiers have little interest in who originated an opportunity; only in what it is. A letter acknowledging Excalibur's interest was not important at the stage that Excalibur was at, namely trying to interest financiers in the deal. At that stage they will assume that the company has legal title and any representation that Excalibur had an interest would have been taken at face value. If they became interested and signed an NDA and proceeded to the "due diligence" stage it would have been necessary to establish Excalibur's interest; and a mere letter would be insufficient. I accept Mr Wilkinson's evidence to that effect. Mr Park says that it is important to have comfort that you have or will get an interest in the PSC so that fundraising activities are worth initiating and pursuing. That is no doubt true in general terms; but relates to someone in the position of Excalibur not any prospective investors. He also suggested that if there was no acknowledgment of interest that would mean that Mr Wempen could not go into a room and represent to investors that Excalibur had an interest. This was not an inhibition from which Mr Wempen suffered.

1008. Mr Wempen's evidence was that he was confident that, with a valuable asset, he could raise the necessary funds within 60-90, or even 30, days. But nothing had happened to suggest that Excalibur would be able to raise the requisite funds within such time periods. Further, Excalibur had no entitlement to an arrangement such as that which Texas had reached with Gulf or to invest in Gulf by way of preferred stock or bonds.

1009. On **27 November 2007** Mr Kinnear emailed Mr Kozel to propose a minuted meeting to resolve the issues. He said that "*we need to put a structure on our involvement and*

develop a better business relationship. This cannot be done on a one to one as [Gulf] is a Public Company and you have a board that is responsible for all actions within that company". He suggested that Mr Kozel should contact Mr Wempen and agree a meeting when he, Mr Al-Qabandi and any other key members were available in London.

1010. On the same day Mr Kinnear told Mr Wempen that Mr Kozel was on his way to London, but that he, Mr Kinnear, was unwilling to go to the meeting not being well briefed and understanding all the issues. He did not know "*where we are raising money*" and was unsure about which field they had and what percentage. He understood that Excalibur had 46% which would mean "*some serious work to do as that's a lot of cash. I also [am] slight[ly] suspicious as how we came to have as much? This is highly unusual for a finder to have? Too much of this is blind to me*."

1011. Mr Wempen replied:

> "*Please note that we have 30% of their share, not 46%, but we have to finance our end. We do not get the 30% for showing up. This kind of deal is not uncommon for investment banks and private equity funds with good deal access to do.*
>
> *Usually deal originators take 2-3% for setting up the deal and walk away, job done.*
>
> *We structured it differently. We are not just deal originators, we are acting as private equity players.*
>
> *Why this is important is that this enables us to set up a fund. Otherwise we are pikers forever, making comfortable scraps opening doors for big companies.*
>
> *This is our big break, and these guys are trying to steal it.*
>
> *We want to settle this now so we can do the same thing for Uzbekistan and other places in Africa with or without Keystone, if they lose their appetite*."

1012. On **28 November 2007** Mr Kozel replied to Mr Kinnear's message of 27 November 2007 to say that:

> "*As always I am more than happy to speak to Rex and you. Gkp is doing everything it can to cooperate with Excalibur and will continue to do so. Pls recommend time and date options for a meeting and I would be happy to confirm meeting with you and Rex.*"

1013. Mr Kinnear emailed Mr Kozel:

> "*Thanks for the prompt reply It was most reassuring. I would suggest Monday 3rd Dec in London. That may well be tight but it is driven by the date that the GKP mail to Rex stating that all monies to be paid in by Dec 6 2007. This date is just impossible, and I openly admit, not helped by our own farting around with NDA's. If that meeting date cannot be met then it would be appreciated if a mail rescinding that Dec 6 date pending this meeting could be issued. We have otherwise to lodge a legal notice on the 4 Dec at the latest to also protect*

> *our interests. An event that I DO NOT wish to do as its expensive and wrecks the good will and future dealings we have and hope to have with other projects that are moving along well.*
>
> *In addition we need to minute our meeting so that there is no confusion …*"

1014. Mr Kinnear then suggested to Mr Wempen meeting in London on Monday 3 December 2007. He thought Gulf was a "*willing partner*" but that, as it was a public company, the meeting needed to be "*formal and documentated [sic]*".

1015. Eric Wempen was concerned that at the meeting Gulf would try to force Excalibur out, relying on the 6 December deadline. In an email to his brother on **28 November 2007** he said:

> "*You should ask Ia[i]n exactly what Todd said. Is it going to be friendly? If they dig their heels in without lawyers present, it could very easily degenerate into a mudslinging context which would be counterproductive for us. "Solving things without lawyers" is usually done so that people feel less pressure, but it also gives them the chance to be weasels, so it's fine as long as you absolutely do not sign anything without a lawyer. Not having counsel involved is what* ***screwed you in the first place with the Deed of Adherence and letting them continue with no docs in place*** *(eg we should always have had an optional buyout provision, a mandatory buyout provision, etc, something which would have prevented this). They are not gentlemen by any stretch, and the only reason they might go along is because it's to their benefit to defray costs, not because they are honourable, as they have shown to date...*"

1016. As Eric Wempen recognised, the absence of a Deed of Adherence or some buyout provision rendered the contractual claim at best difficult. A little later he emailed his brother to say that, after some thought, he thought that the meeting on Monday was probably the best thing that could have happened in the circumstances. In his email he observed:

> "*As far as Todd goes, this just shows what an ass he really is. He'll only honor his contract with you if you know you can get the money? You have no idea in what form you will be offering an investment, so what was his plan the whole time? Thank you Rex and f off? Tell him "of course" you can, and who cares if it's an I-bank or a bunch of individuals.*"

For Mr Kozel to want to defray Gulf's costs was understandable and for him to require Excalibur to have the money to honour any contract was not unreasonable. The suggestion that Mr Wempen should say that "*of course*" he could raise the money was over confident in the extreme. It also does not fit well with the suggestion that money could not be raised because of the absence of an acknowledgment of title.

1017. In the same email Eric Wempen also suggested, no doubt with litigation in mind, that his brother should go back to UBS to find out what type of structure would have been appropriate and what the funding timeline would have been if UBS had been interested (see para 994 above) and to do the same with Mr Al Ghalib of Gulf Finance House and Deutsche Bank. He then said:

> "*If Kinnear is stepping up and Kozel is listening, this may be exactly what we need to (a) get enough to go forward to other I-banks or private equity funds as well as get one of your primary 2 objectives accomplished — Why don't you tell Kinnear* ***that UBS is asking for an origination letter in order to discuss further with you the different investment structures you*** *need to have a line on by Monday's meeting (actually, you'll need it before in order to prepare). Then, at least, you can move on with other things regardless of how this pans out.*"

1018. One of the two primary objectives was to secure an origination letter which would enable Mr Wempen to go forward in his career. What Eric Wempen suggested Mr Kinnear should be told was false. UBS was not asking for an origination letter in order to have further discussions with Mr Wempen. Mr Latimer and Mr Van Os had already indicated that UBS was not interested. I do not believe his suggestion that he was referring to some other division(s) of UBS. Eric Wempen was recommending that his brother tell Mr Kinnear an untruth in order to procure an origination letter from Gulf to burnish Mr Wempen's credentials so that he could at least move on with that.

1019. Arrangements were made between Mr Kinnear and Mr Kozel for a meeting on Monday 3 December 2007. According to Mr Wempen, Mr Kinnear spoke to Mr Kozel by telephone and Mr Kozel was "*apparently willing to change the funding deadline, but wanted to be sure that we could come up with the money*". This may well be so.

Meeting with Baker Botts

1020. On **28 November 2007** Mr Wempen went to Baker Botts, the law firm, for advice. After the meeting he emailed his brother to say "*This will be very expensive if it comes to it. We have to settle. We could cause problems with press and shareholders, but to go toe to toe is one million*".

1021. Eric Wempen, still in Morocco, wanted to go ahead with creating Sharia-compliant investments in oil for (as he said to his brother) "*stupid/impulsive individual investors*", an idea he had raised with a UBS colleague which went nowhere. Mr Wempen replied to say that he liked the idea which looked like a winner and said "*If I could just get a call back from UBS or DB or anybody we could go forward*". Nothing was said about want of title, let alone its being an insuperable obstacle.

1022. Eric Wempen asked Mr Wempen to follow his suggestion and "*have Kinnear ask Kozel for an origination letter. (You've asked eight times yourself). With the letter, you're a star, and regardless of Monday, you're in business*". As is apparent the predominant purpose of the letter now was not to raise funds; it was to give Excalibur credibility for the future. Eric Wempen also advised that if on Monday the Gulf Board said no, Mr Wempen should ask the board for a letter and secondly a bonus for setting it all up. He also thought that he should ask Dabin to get a letter from the KRG, noting that it "could really be useful in court!"

Eric Wempen's draft statement

1023. Eric Wempen produced a very lengthy draft statement for his brother for the meeting on 3 December 2007. It referred to the fact that the relationship between the companies began in December 2005 and that "*At the time I partnered with TKI*". Mr Wempen said that was a misunderstanding on his brother's part. It was not[81]. It described Mr Wempen's two years in Iraq before that and continued:

> "*Since I am also cognizant of the constraints that you are under with respect to this deal, both contractual and reputational, I fully realize that for Gulf, continuing to work with Excalibur can no longer be on a side-by-side basis. You have contracts which would be difficult to renegotiate, and changing the framework of this deal to put Excalibur... into a more visible role is likely not going to be politically feasible with the other parties involved. As with many things in life, when the situation on the ground changes, one must make adjustments*."

1024. What was being proposed was a departure from the arrangement contemplated by the Collaboration Agreement, or the farm out offer, under both of which Excalibur would end up as co-parties with Texas or Texas and Gulf under a PSC. The draft speech went on to lay out a framework for moving forward in a manner which would make the investment by "*Excalibur's sponsors more palatable to Gulf*":

> "*Instead of offering some type of preferred or convertible stock which would, of course, risk diluting Gulf's shareholders, we are proposing that Gulf simply establish a special purpose vehicle or "SPV" in an offshore jurisdiction such as the Cayman Islands or Jersey. Gulf would cede the allocable percentage of profits and losses from the [Shaikan partnership] to the SPV. In return for cash investments, the SPV would then issue preferred interests or structured certificates or notes which would track the relevant percentage of the [Shaikan partnership]. The legal fees and operating costs for the SPV would be borne by the SPV's investors*."

1025. Quite how this was supposed to work and over what timescale is unclear and the evidence of both Wempens did not make it much clearer. The whole idea was inchoate and, however it was supposed to work, it would need some form of shareholders' agreement and the input of lawyers.

1026. As an alternative the draft suggested the following:

> "*In order to further reduce Gulf's risk from this structure, Excalibur could establish its own wholly-owned SPV which would invest in Gulf's SPV. By separating the ultimate investors from Gulf, any risks the investors might bring would be fully borne by Excalibur, as they should be. Although there are countless available ways to structure this, the basic idea will remain the same -- Excalibur will direct its investment through Gulf in a way that does not interfere with Gulf's obligations under or operation of the [Shaikan partnership]*."

Friday 29 November

[81] The draft also referred to Excalibur as having been "*the originator of this deal for Gulf*."

1027. On **29 November 2007**, Mr Wempen emailed Mr Al Ghalib of Gulf Finance House. The last contact with him had been on 3 November 2007. He sent him the NDA and Thames Chesapeake term sheet:

> "*We finally got all the documentation yesterday on Kurdistan.*
>
> *Here is a draft term sheet and a confidentiality agreement. If you are still interested, I need you or someone at the bank to sign the agreement before we hand over the technical information...*"

Mr Wempen understood, at any rate by now, the process of (a) pitch, (b) NDA, followed by (c) the provision of documentation.

1028. In his third witness statement, Mr Wempen said that after this email he had a telephone call with Mr Al Ghalib in which Mr Al Ghalib stated that "*without any documentation acknowledging Excalibur's interest in the PSC, his firm was ultimately not able to get past the draft confidentiality agreement stage*." I do not accept this. It seems to me an unlikely thing for him to say at this stage. In the teaser sent on 3 November 2007 Excalibur had already claimed an interest. Mr Al Ghalib is unlikely to have raised documentary proof as an issue before any NDA had been signed. The email was offering "*all the documentation*" if an NDA was signed and he would have known that one signs the NDA before one gets the documents. There is no email from Mr Al Ghalib expressing any such concern; nor is there one from Eric Wempen or Mr Wempen referring to it. The alleged statement is not mentioned in Excalibur's further information describing fundraising attempts obstructed by Gulf's failure to recognize an interest; nor was the incident referred to in Mr Wempen's first witness statement when discussing his contact with Mr Al Ghalib, notwithstanding that in the first half of the relevant paragraph he asserts that, in the absence of origination letters, he could get nowhere with Mr Latimer. Mr Wempen's oral evidence on the topic was vague and meandering. In any event Mr Ghalib was a long shot. Oil investment was not his main interest.

Preparations for the meeting

1029. On **29 November 2007**, Mr Wempen attended a reception in Washington at which Dr Hawrami was present. According to Mr Wempen he chatted with Dr Hawrami who referred to the Shaikan PSC as "*the MOL deal*" and the conversation ended by him saying that he looked forward to "*working with us*". Mr Kinnear had meanwhile spoken to Mr Al-Qabandi on the evening of Thursday 28 November 2007. He was not best pleased at being disturbed and said that he would talk to Mr Kozel and revert. Mr Kinnear thought that they needed to think about their strategy and asked: "*Should we consider a fall back of a 'Finder's Fee' It's risk free?*" Mr Wempen emailed Ms Berry to find out the schedule for the meeting. She knew nothing about it, and Mr Wempen immediately thought that Mr Kozel might be "*playing games*". He was not. On **30 November 2007** Mr Kozel told Mr Al-Qabandi to make sure he was in London because it was going to be an "*important meeting*".

1030. Mr Wempen understood from Mr Kinnear that he was to meet the Gulf Board, and Eric Wempen's draft was of a statement to the Board. I infer that this was because of the terms of Mr Kinnear's email to Mr Kozel of **27 November 2007** asking for the

meeting: see para 1009 above. Mr Kozel had not, however, said or agreed that the meeting should be a board meeting.

1031. When Eric Wempen received news of the meeting he emailed his brother to say: "*Outstanding!!!*". He told Mr Wempen that:

> "*My guess...is that they will not offer you a dime, and they will wait to see if you can bring in the cash. You should hold out for a long funding period (don't take March for example, or HERE'S A GOOD IDEA --...why not say you will take the same deal as TKI, but offer them the right to buy you out if they want funding beforehand*…"

1032. Eric Wempen was obviously pessimistic as to the prospects of Excalibur's ability to raise the funds prior to the end of March, and recognised that Excalibur needed to hold out for a long funding period. Eric Wempen suggested in his evidence that the funding to which he was referring may have been funding of more than the signature bonus, but, whether that is so or not, what was being contemplated was that Gulf would carry 24% of the bonus due on 6 December 2007 until some later date when Excalibur could raise the funds.

1033. In advance of the meeting Mr Wempen tried other sources for funds:

a) He emailed Peter Watson of the Dwight Group, a consulting firm: "*At long last our Kurdistan oil deal closed. You may have read about it. We need to raise about $40 million in the next month, with $400 available down the line, so we are raising a fund for that purpose.*" Mr Watson did not respond to this.

b) He also approached Tom Gibian, chairman of Emerging Capital Partners which raises capital for investments in Africa. He thanked him for circulating the term sheet to "*interested investors in the Middle East earlier this year*", told him that "*our deal in Kurdistan finally closed*" and asked him whether he was "*interested in working together to raise a fund*". Mr Gibian was not interested and did not respond.

The 3 December meeting

1034. On **Monday 3 December 2007**, Mr Wempen and Mr Kinnear met Mr Kozel, Mr Patrick and Mr Nick Davis of Memery Crystal at Gulf's offices.

1035. The focus of the meeting was on the timescale within which Excalibur would have to raise its share of funding. There is dispute as to (a) whether the funding under discussion was Excalibur's share of the signature bonuses or of the costs to first oil (hereafter "the entire amount"); (b) what was the timescale which Mr Wempen sought; (c) whether there was a discussion of Gulf's denial of Excalibur's interest.

1036. Mr Wempen's oral evidence was that Mr Kozel was looking for Excalibur to put up its share of the entire amount by the end of January. I do not think this likely. There was every reason for Mr Kozel to want Excalibur to pay its share of the signature bonus which was due on Thursday 6 December 2007. There was no sound basis for asking for the entire amount by the end of January, which would have been (a)

unknown and (b) not due. It was the signature bonus which Mr Patrick had asked Excalibur to put in escrow in the 23 November 2007 email and it is unlikely that he and Mr Kozel were asking for two different things. On 16 November 2007 Eric Wempen had said that Excalibur "*absolutely need[ed] to get a delay from Todd on the funding of the bonus*".

1037. Excalibur pleads in its Re-Re-Amended Reply that at the 3 December 2007 meeting "*Mr Wempen indicated that Excalibur would need about two months to obtain the funding to pay its respective share of... **the signature and capacity bonuses***". Mr Wempen's second witness statement only talks of Mr Wempen speaking of the time needed for Excalibur's share of **the signature bonus**. It may be that, in order to raise finance for the signature bonus, Excalibur would have to persuade financiers to cover the costs up to the drilling of the first well or beyond; but that which was discussed at the meeting was payment of the imminently due bonus.

1038. On **2 January 2008** Mr Wempen produced a note of the meeting which included the following:

> "*I began the meeting by stating we were going to be unable t**o raise the money by Friday to meet their request for our 30% share of funding for the project**, and went [on] to describe how it would be difficult to raise money under the timeline imposed by Todd recently, in other words, the end of January*[82]*. **I asked if we could extend the timeline until June**, as Todd had given to Texas Keystone to raise funding for their 5% of the deal. Todd responded by stating that **we had a much larger share of the deal**, and that we would need to raise our share of the money, they could not carry us that long. I responded that we had never convened the Operating Committee as described in Clause 7 of our Joint Bid Agreement to discuss this timeline, and Todd said that this issue was behind us now and we needed to move forward, we had a time schedule to keep under his agreement with the Kurdish government.*"

1039. The expression "***raise the money by Friday to meet their request for our 30% share of funding for the project***" is unspecific as to what "*the money*" was. I am satisfied that what Mr Wempen was saying was that he could not raise by Friday the money needed to pay the signature bonus due by that date (in fact due on Thursday), which is what had been requested. It may be that Mr Wempen realised that in order to raise the money for the signature bonus he would, in practice, need to raise more: but the message to Mr Kozel was that he was not able to raise whatever money was needed in order to pay Excalibur's share of the signature bonus. Mr Wempen no doubt raised the (bad) argument that the money was not due because the Operating Committee under the Collaboration Agreement had not been convened to discuss it[83]. Mr Kozel said, correctly, words to the effect that the Collaboration Agreement and/or its JOC were "*behind us now*" and that the applicable schedule was that prescribed by the PSC.

[82] The date specified in the farm in offer of 23 November 2007 as the date by which the agreed transfer document and KRG and MOL approval had to be obtained.
[83] In his oral evidence he said that it would be for the Operating Committee to document Excalibur's title. It would not; and I do not believe that he said as much at the meeting.

1040. Mr Kozel's evidence was that Mr Wempen said that Excalibur could not meet the 6 December 2007 deadline for payment of the signature bonus and "*needed*" about 6 to 8 months to raise the money: he suggested initially that they agree the same timeline as had been agreed with Texas[84]; Mr Kozel said that Gulf was not a bank and was only prepared to keep the farm out offer open until the end of January. I regard this evidence as essentially correct. In my judgment the substance of what was being said was that Excalibur needed until June (nearly 7 months away if you take the end of June). That timeline is consistent with the 2 January 2008 note. I do not find it necessary to decide whether (as Mr Kozel recalled at one point in his oral evidence) the 31 January extension had been mentioned by him at the beginning of the discussion, or only in response to the 6-8 months proposal, or both.

1041. Mr Wempen's note continues:

> "*I then asked if Gulf would consider warrants or convertible notes in the deal under their name for us to raise financing for together [sic] with them, so we would not have to ask permission of the Kurdish government to join the deal separately after we had raised financing and they said that they could not do so.*"

There was no reason why Gulf should issue warrants or convertible notes as part of a joint fundraising initiative in respect of what were Excalibur's obligations. As I understand it the idea was that Gulf International or Gulf in some form would issue these instruments to Excalibur and its investors. The proposal was unrealistic.

1042. There are two matters which I do not accept were mentioned. First it seems to me unlikely that there was any discussion about Excalibur's interest/title or Gulf's denial of it preventing Excalibur from raising finance. Mr Wempen's note makes no reference to those matters. So far as Mr Kozel was concerned the issue was whether the farm in, which was what was on offer, could go ahead. When, as Mr Wempen's note records, he began the meeting by saying that he could not raise the money by Friday that was a form of response to the farm in offer, whether or not the words "farm in" were used. So far as Excalibur was concerned the question was how to move forward in a positive way "*as opposed to throwing around blame and so forth*" (Eric Wempen's evidence).

1043. Second, the note records that Mr Wempen and Mr Kozel agreed that the KRG would not agree to let Excalibur in the deal after the fact, and, even if they did, it was highly doubtful they would do so by the end of January. I think it unlikely that Mr Kozel spoke in those highly negative terms (he did not recall doing so). He was to tell the Gulf Board three days later that Dr Hawrami had said that he would consider a request for Gulf to farm down its interest favourably. There was a discussion about the need for Mr Wempen to get himself approved by the KRG and that Gulf would help with that. That may well have included reference to the hurdles that Excalibur had to climb. But, as Mr Kozel viewed it, the ball was in Excalibur's court:

[84] Mr Wempen erroneously thought that Texas had a carry up to first oil. In fact it had (as the Gulf press release of 7 November 2007 recorded) a carry for the costs and expenses prior to drilling the first well i.e. the spudding - beginning of the drilling process - of the first exploration well. Thereafter there would, before first oil, probably be the cost of an exploration and an appraisal well. Mr Wempen did not in fact expect to get the same terms.

> "*You get finance, you hire a technical team, you put people on your board of directors that have oil and gas experience. It is not rocket science, it just takes the ability to get it done*".

1044. By this stage of the meeting the parties had reached an impasse over timing. Mr Wempen's note records:

> "*Iain then asked for a moment to discuss our options alone with me.* ***Todd and Nick left the room****, and Iain asked me to bring up the possibility of a buyout. After five minutes we continued the meeting, and I brought up the possibility of a buyout. Todd said he would be willing to consider any economically reasonable offer. Nick asked if we could have the option of trying to raise the money until the end of January, and if we were unsuccessful then buying us out. Todd said his board would never approve that, and we had reached a fork in the road, and that we would* ***either need to take a buyout offer, or we would have to try to raise the money, and if we failed to meet the deadline we would be out of the deal****. I then asked what he thought would be a fair buyout, and Todd then offered to go down to the bar across the street, and decide the issue on a coin toss, which I declined*."

1045. According to Mr Wempen's note:

> "*Iain had to leave at that point, approximately 4:30... and I asked Todd to go on record with Iain present that he would not "screw us out of the deal". Todd smiled and said he would not. Iain left. Todd and I continued to speak for another thirty minutes and agreed in principle to a buyout worth several million dollars. The meeting adjourned for drink and dinner after work.*"

1046. Mr Kozel's recollection is that Mr Kinnear stayed for a few minutes after Mr Wempen had left. I think that he is probably wrong on that. But he agreed that his position was that he did not intend to screw Excalibur out of the deal and he is likely to have said so.

1047. There is a dispute as to (a) whether Mr Kozel offered a buyout as an alternative and (b) whether there was an agreement in principle to a buyout worth several million dollars.

1048. According to Mr Kozel during the meeting (a) Mr Wempen mentioned the possibility of a finder's fee and he, Mr Kozel, told Mr Kinnear that the Collaboration Agreement was a joint bidding, and not an originating deal, agreement; and (b) after Mr Wempen had said he needed 6-8 months, Mr Kinnear suggested that Mr Wempen talk to his potential funders overnight and return first thing in the morning with new proposals for Excalibur to participate in the farm in. I think both of these are likely to be correct. Mr Kozel also says that Mr Wempen asked Mr Kozel to buy him out. There was no way Mr Kozel was prepared to do that. As a joke he asked Mr Wempen to make him an offer and offered to go to a bar and decide the issue of whether there should be a buy out on a coin toss. In oral evidence he said that the sense of what he was saying was: "*Rex, this is ridiculous. Are we just flipping coins for this?*" because he thought that there was nothing of value to buy out.

1049. Mr Wempen denies that there was any mention of a finder's fee. He relied on the contents of his note and said, in his written statement, that towards the end of the meeting Mr Kozel offered to flip a coin at a nearby bar to determine whether he would remain in the deal.

1050. It is not easy to discern exactly how the meeting went when Mr Kozel and Mr Davis returned to the room, as I am satisfied they did after a short interval following Mr Kinnear's request to discuss things alone. I am wholly unconvinced that there was any agreement in principle to buy Excalibur out for several million dollars, although there may have been some discussion about a buyout. There is no reference to such an agreement in the subsequent email correspondence. There clearly was at the meeting a sarcastic reference by Mr Kozel to tossing a coin.

1051. The likelihood is that after the meeting resumed Mr Wempen brought up the possibility of a buyout by Gulf and Mr Kinnear (not Mr Davis) suggested the option of raising the money by the end of January, or, if that failed, a buyout. Mr Kozel said that his board would never wear that. A fork in the road had been reached. Either there would have to be a buyout *or* Excalibur would have to try and raise the money, in which case they would have to raise it by the end of January. As to the former, Mr Kozel suggested to Mr Wempen that he should make him an offer – as a joke because he did not see why he should buy Excalibur out of something it did not own. His suggestion that they flip a coin was intended to convey that there was nothing really to talk about. It is not clear to me, and I do not find it necessary to decide, whether the issue which the toss was to decide was whether there should be a buyout (which could be determined by the toss of a coin) or, as the January 2008 note records, what would be the fair value of a buyout (which could not readily be determined that way); and it may not have been clear at the time. Mr Kozel may just have said "let's go down to the bar and toss for it". It may well be that Mr Kozel's humour was opaque to Mr Wempen who, with characteristic over optimism, interpreted what Mr Kozel said as indicating a receptiveness on his part to the idea of Gulf paying a substantial buyout price.

1052. It was at this meeting that the extent of Excalibur's problems in raising finance – there were no sponsors – became apparent to Mr Kozel and Mr Kinnear. Mr Kozel recalled thinking that Mr Kinnear was sitting there having chest pains[85]. He was obviously uncomfortable.

1053. Soon after the meeting, Mr Wempen emailed his brother: "*Either they are going to give me 60 days or buy me out. I have to decide*". Eric Wempen replied:

> "*Outstanding!!!...but I don't think 60 days is long enough. Too much can happen, and you don't have a head start. You and I spent 3 weeks trying to drum up interest, and it takes 60 days to get even through a fast track approval process at an I-bank, which means you either need private equity money ASAP or individuals. Plus, it will leave you with nothing, A bird in the hand...Go for the buyout…..*

[85] On 27 November 2007 he had emailed Mr Wempen to say that he needed him to brief him "*on the partners other investors etc*", clearly understanding that there were some.

> *Any idea about the price? Any way to get a buyout plus a very small percentage of profits.*"

When he came to give evidence Eric Wempen was not entirely sure what he meant by this email. The likelihood is that he realised that, if Excalibur tried to raise money through private equity, his brother would be left with nothing because Excalibur's interest would be diluted.

Tuesday 4 December

1054. On **4 December 2007**, Mr Wempen says that he met Mr Kozel in the morning and that he offered Excalibur's share for $ 5 million. Mr Kozel said that he would run the numbers past his economic people and see if it made sense and they should talk in the afternoon; but when Mr Wempen came back in the afternoon, Mr Kozel had left for Switzerland. Mr Kozel does not remember any such meeting. There probably was such a meeting at which the offer was made and Mr Kozel may have said that he would talk to his economic people.

1055. At any rate on **5 December 2007** Mr Wempen sent an email to Mr Kozel, referring to the meeting, offering to sell 85% of Excalibur's stake for $ 5 million. On **6 December 2007** Mr Kinnear, who obviously thought the offer unreal, emailed Mr Kozel:

> "*I understand that Rex made you an offer you cannot refuse? It is resolvable but perhaps when you said make me an offer he felt the need to dream*."

Postponing the deadline for the signature bonus

1056. Around this time Mr Kozel met Dr Hawrami, following which on **6 December 2007** Mr Patrick drafted a letter recording an agreement with Dr Hawrami to postpone the date for payment of the signature bonus until 31 January 2008 in order to allow time to explore the possibility of the KRG taking part of the initial payments in the form of shares in Gulf instead of cash, an idea which the KRG had mooted. No agreement for an extension had yet been made but one had been proposed. Mr Wempen was not informed of this discussion. There was no reason why he should have been told about a proposal in relation to the KRG taking equity in Gulf.

Excalibur's approach to MOL

1057. At around this stage Excalibur decided to approach MOL. On **28 November 2007** Mr Wempen had met Baker Botts with a view to them acting for Excalibur against Gulf. They declined to do so. On what was probably **4 December 2007**, Mr Wempen emailed Mr Jay Alexander of that firm to report on the "*fruitful meetings*" with Gulf and saying "*We would like to present MOL with the opportunity to increase their share of the deal through us*." He asked to be put in contact with an appropriate person at MOL. Not surprisingly Baker Botts reported to MOL that Excalibur was looking to sell its interest. Mr Wempen was evidently not inhibited by the lack of any acknowledgment of that interest.

1058. Mr Wempen said in his first witness statement that he thought that Mr Alexander would give him the contact details of the relevant person at MOL for him to call and that it did not occur to him that Baker Botts would themselves write to MOL with the

offer. This was untrue, as he accepted in oral evidence. Mr Wempen's note of **2 January 2008** records that "*I had asked a partner at Baker Botts, who represents MOL in the US to pass along our offer, but it was a minority share which would not give MOL control over the deal*".

1059. No one told Gulf about this approach. On **5 December 2007**, Mr Kozel was in Budapest to discuss the JOA, which was under negotiation, with MOL. It was then that he was informed by MOL that Excalibur had approached it to see if it could "sell" its alleged "interest" in the Shaikan Block to MOL for $ 5 million. Mr Kozel was very annoyed and embarrassed by this approach.

1060. On **7 December 2007** Mr Wempen spoke to Mr Kozel on the phone. Mr Wempen was having dinner with Azzat who telephoned Mr Kozel and handed Mr Wempen the telephone. His note records what happened:

> "*Todd … accused me of trying to go behind his back by selling our share to … MOL ... He related that the Chairman of MOL had summoned him to Budapest on Wednesday and showed him an offer letter sent by Baker Botts for our share of the deal, and told him to relate [sic] to us they were not interested, and that he was involved with partners who were not trustworthy. He said that he was extremely embarrassed by this, we had betrayed him, and that he was not interested in doing business with us again.*"

1061. That was Mr Kozel's attitude. He regarded Mr Wempen as having tried in an underhand way to sell an asset that Excalibur did not possess to Gulf's contractual partner on the PSC, when Gulf had been trying, in the negotiations in respect of the JOA, to preserve Excalibur's ability to join the PSC by a partial farm out from Gulf. It also caused MOL to think that Excalibur was untrustworthy and unsuitable as a partner. Both Mr Kozel and MOL now wanted nothing more to do with Mr Wempen.

1062. On **7 December 2007** Mr Wempen had an email exchange with Mr Kinnear, who was aware that some problem had arisen but not what it was, in which Mr Wempen said:

> "*We need to find out what is in that letter. If it is a letter saying we are in default for not paying by yesterday, we are in real trouble and have to file a legal case. I hope not.*"

Mr Wempen was obviously concerned (he described himself as "*paranoid*") that there was a letter from Gulf saying that Excalibur was in default for not having paid its share of the signature bonus.

1063. On the same day there was an email exchange between Mr Wempen, who had received no response to his buyout proposal, and his brother. Mr Wempen emailed "*No Deal...No time for crying. Have to perform*". Eric Wempen replied:

> "*….The buyout is by far your best (and perhaps only) option. Quite frankly, it's not reasonable for an individual to sell an oil concession in a war-torn country in 60 days (and you can't even have an origination letter...*"

He advised his brother to abandon the buyout offer of 85% and offer 100% which "*makes the most sense, unless you have a current funding source*".

1064. On **8 December 2007**, Eric Wempen emailed his brother: "*What you did was stupid, but it's possible to negotiate out of bad spots*". He told him to forget about keeping 15% of the interest and "*offer to give up your entire interest to increase the buy-out....Talk about giving up all 100% and going for 2-2.5M. And don't send anything to anyone else until we figure out how to play it*". Mr Wempen replied: "*Okay. Well, what else is there to say? My life record is perfect now*". Eric Wempen replied that his brother's "*aggressive approach to many problems*" had landed him in trouble before although it had got the deal off the ground. He said:

> "*...to be honest $1M is a hell of a good payday considering that you probably **couldn't have found funding in time**...I would have been ecstatic for 1M. 5M was unreasonable, so let's just see how it goes with Iain.*"

1065. On the same day Mr Wempen emailed Mr Kinnear to explain what had happened:

> "*It was not Deutsche Bank that said something*[86]*. It was the law firm that I talked to in the States before I left, Baker Botts.*
>
> *I last met with them last Thursday. They also represent MOL.*
>
> *In [the] course of discussing legal avenues to pursue against Keystone if we had to, we discussed the possibility that we might be able to get out of this situation quickly if MOL wanted to buy our share, and asked if it came to it, would they approach MOL. I honestly didn't think they would do it without consulting me*[87]*. They did.*
>
> *My back was against the wall before I came to London. Yes it was a stupid mistake to discuss this with Baker Botts...*
>
> *I think it best if you negotiate for us, as Todd is extremely angry. He is making an offer of 10-20% of what we had, namely 500K-$1M. No upside.*
>
> *I am asking Baker Botts to write an apology letter. I don't know if they will or not.*
>
> *I think it best if you negotiate with Ali and Todd and I step out.*
>
> *My apologies for this screw-up. Desperation leads to bad decisions*".

1066. Mr Kinnear was, by now, seriously embarrassed. (There had been an agreement that he should receive a portion of any buyout: at one stage 25% and later increased to 50%). On **8 December 2007** he emailed Mr Kozel to apologise for introducing Mr Wempen to him. He was incensed that Mr Wempen had "*forgot*" to tell him about his meeting with Baker Botts and the offer of a share to MOL which Mr Wempen had in mind at the time of the 3 December meeting. He recorded that he had told Mr Wempen that he would help him at the 3 December meeting but after that wished to

[86] Mr Kinnear had thought that Mr Kozel might be angry because confidential information produced following the NDA had been revealed.

[87] This was a lie. He had asked the partner at Baker Botts to pass on Excalibur's offer, as he said in the 2 January 2008 note of the meeting of 3 December 2007. It seems that the idea of approaching MOL had been raised at the meeting on 28 November 2007.

sever their business agreement based only on his "*recent conduct and increasing irrational statements which were on investigation unfounded*". On **21 December 2007** he did so. The statements referred to are likely to be statements about sponsors and funding.

1067. It is apparent that in December 2007 Excalibur was attempting to sell its purported interest because it could not raise money. The likelihood is that if, even with the sort of acknowledgment it says it should have received, it continued to find difficulty in raising the necessary funds it would have made a similar attempt to sell its "interest".

Fundraising attempts in early December 2007

1068. Mr Wempen continued his fundraising attempts. He made approaches to Deutsche Bank, Lazard, UBS and China Petroleum which I consider in greater detail below.

1069. He also sent a draft NDA, the Thames Chesapeake Term Sheet and the KRG press release to eight potential investors: (i) RJI Capital, (ii) Faisal Private Bank, (iii) Renaissance Capital, (iv) Global, (v) Scotia Waterous, (vi) Peregrine Management LLC, (vii) Harrison Lovegrove (Hargrove), and (viii) Northern Oil and Gas.

1070. The exercise had certain notable characteristics. First, Mr Wempen had no difficulty in claiming that Excalibur had rights in a deal in Kurdistan. Second, none of the addressees asked for proof of interest or title or any form of acknowledgment. Third, none of the addressees was interested in the Thames Chesapeake fund, and several probably never responded at all.

1071. A number of other investors were approached for finance (without reference to the fund) but nothing came of it. This was no fault of Gulf or attributable to any want of documentation acknowledging title. The total number of potential investors approached appears to be about 25.

1072. No NDA was ever signed by any third party and, in consequence, Excalibur did not use any of the information provided to it by Gulf (such as the technical data). If Excalibur had done so, it would not have been able to speak competently to any of the technical material.

Deutsche Bank

1073. Mr Wempen had sent the NDA to Mr Javellana on **16 November 2007** asking Deutsche Bank (in Los Angeles) to execute it. They did not. Mr Javellana suggested contacting a Bahrain based institution. Nothing came from this suggestion.

1074. Mr Javellana put Mr Wempen in touch with a colleague, Mr Frank Kelly, and on **28 November 2007**, Mr Wempen met Frank Kelly to discuss the possibility of Deutsche Bank investing in the Shaikan deal via participation in the Thames Chesapeake Fund. After the meeting, Mr Wempen emailed Mr Kelly the draft NDA and the Thames Chesapeake term sheet. His email said:

> "*The model we are most attracted to, per our discussion, is to operate as an investment fund which would specifically focus on originating its own deals for operating company partners, thus providing added value for those*

> *operating companies we would originate dealflow for and invest alongside. This is the model **we have executed in Kurdistan**. We are looking for an investment bank to help us raise the fund. We are open to different models for the fund, including co-management with an institution*."

1075. On **29 November 2007** Mr Kelly suggested that Mr Wempen meet Deutsche Bank in London; Mr Wempen agreed and asked Mr Kelly to get the NDA signed "*so I can present the opportunity in detail*". On **4 December 2007** Mr Kelly suggested that Mr Wempen call Mr Ben Morgan, the head of European Energy at the Bank and a meeting was arranged for 6 December 2007. On the same day Mr Behrends emailed Mr Wempen to report that Mr Kelly had told him that Mr Morgan did not know much about Kurdistan and was "*unsure it [was] a good idea to invest there*".

1076. Aside from Deutsche Bank, on **5 December 2007** Mr Wempen approached Mr Kiez of Global and told him: "*We have the rights to part of the deal. We are in a position to sell a portion of the deal to a qualified investor*". Want of acknowledgment was obviously no inhibition. He made a similar claim to RP Capital on 12 December 2007: "*In exchange for originating the deal we have been allocated over 20% of the equity in the winning consortium. We have received a buyout offer from the company we arranged the deal for…*"

1077. On **6 December 2007** Mr Wempen sent Mr Morgan of Deutsche Bank a summary of the opportunity and attached the KRG press release, the Gulf announcement, the NDA and the Thames Chesapeake term sheet. His email read:

> "*We are setting up a fund with an initial outlay of $40MM this year with commitments to cash calls of up to $400MM for out-years.*
>
> *We have closed our first deal, and are now looking further afield. We are originating a deal in Uzbekistan now with the same company (Gulf Keystone), so now is the time to start this fund, while we have two deals on the table, one closed, one originating. We would also like to be free to set up further deals …*
>
> *My bio and that of my partners are included in the draft term sheet. The Kurdistan deal is public: www.gulfkeystone.com, and www.krg.org. Operator of the Kurdistan field is Gulf Keystone Petroleum, an AIM listed Bermuda company with London HQ, run by an American CEO whom I know. Their partner is MOL, the national oil company of Hungary. We have already contacted some prospective investors, and the appetite is there. We are now looking for a financial advisor to assist.*
>
> *The deal we recently originated and closed is to explore Shaikan, block 5 (Kurdistan has several blocks to explore, we have one of them). We are asking $40 million year one. That will buy 30% of Gulf Keystone's side of the deal. That will pay for our share of seismic surveys, the signature bonus for the government, and year one exploration, which means drilling two wells. If we are successful, it will be a multibillion dollar field, and we will need more development, meaning we will need to put in another $300-$400 million to support a billion or more in commercial development. Pretty straightforward. It is a calculated risk in one of the last great oil producing regions open to*

> *developments. The block is near Kirkuk and the oil is literally seeping out of the ground.*"

As is apparent Mr Wempen was claiming that Excalibur had already closed the deal and had an asset – one of the Kurdistan blocks (as well as having already contacted some prospective investors with an appetite, which was, as he knew, untrue – there had JIbeen none[88]).

1078. In the afternoon he met Mr Ben Morgan and Mr John Mulbrecht of Deutsche Bank in London. Mr Wempen has given different accounts of this meeting. Thus:

i) In his first witness statement, he described the meeting as "*positive*"; they discussed "*Excalibur's target investor group and the possibility of raising some funds to finance Excalibur's 30% stake in the Gulf Keystone/Texas Keystone portion of the blocks in Kurdistan*". Mr Morgan said that he would contact some investors including the Alpha Group, which is a large Russian investment group.

ii) In his third witness statement, Mr Wempen said that he recalled Mr Morgan expressing "*concerns*" about the lack of documentation acknowledging Excalibur's interest:

> "*Ben Morgan was unclear as to the true basis of any funding opportunity for Excalibur. He at first thought that I wanted to take the funding and simply purchase shares in Gulf Keystone and I was actually asked in the meeting why an investor interested in the Shaikan block wouldn't simply invest in Gulf directly themselves. I was forced to explain that the investment opportunity had to do with Excalibur's own proprietary share in the deal.*"

In his oral evidence he claimed that the last sentence was "*a bad sentence*", which probably should not be there.

iii) In his oral evidence Mr Wempen said that Mr Morgan began the meeting understanding as a result of what he had been told by Mr Behrends or Mr Kelly that Excalibur had an equity interest. According to Mr Wempen:

> "*[Mr Morgan] is under the impression that I have an equity interest to sell or raise money against and I have to say "No, rather we would like you to provide us millions to put into escrow so we can begin to talk to Gulf about entering into a farm out", and he asks me if I know an investor that wants to get into a farm out with Gulf why can't I just put them into this conversation directly, what do I need you for?" It was a very embarrassing discussion.*"

He said that he went through the conditions in Mr Patrick's email orally (he did not have it with him). Mr Wempen described the meeting as a very embarrassing failure. His inability to show title led, he said, specifically to the failure of his efforts.

1079. The descriptions of the meeting as "*positive*" and a very "*embarrassing failure*" are irreconcilable. This, together with the absence of any note or record, make it difficult

[88] He said the same thing in emails to Scotia Waterous, Faisal Private Bank, Renaissance Capital and Hargrove.

to determine what did happen at it. Mr Wempen described the former characterisation as "*obviously a mistake*". I do not accept this. I am prepared to accept (i) that Mr Morgan initially understood that the proposal was that finance should be provided to enable Excalibur to invest in Gulf; (ii) that he asked why, in that case, an investor should not make the investment in Gulf itself – a question which would naturally occur to a potential investor; and (iii) that he was then told that the finance was sought to enable Excalibur to take the stake in the block to which it was entitled. He may then have asked why, in that case, an investor should not approach Gulf directly.

1080. It is unlikely that Mr Morgan was concerned at the lack of an acknowledgment of title, as opposed to not understanding, initially, what Excalibur was looking for. It is most unlikely that Mr Wempen spoke in the downbeat tones he describes, as opposed to his usual positive salesmanship; or that the meeting was a terrible embarrassment. As is apparent from his first and third witness statements, and his answers to me, he is likely to have explained that Excalibur was entitled to a stake in the Shaikan block, provided that it could pay its way, and that it sought finance to secure the interest that it had ("*Excalibur's own proprietary share*"). He made similar claims to other potential investors at the time. It is not clear to me that he made a reference to Gulf's farm in offer but he may well have said that the deal would need the consent of the existing participants and the KRG but that the existing participants were eager to raise funds. He was certainly promoting the idea of a fund.

1081. After the meeting Mr Wempen emailed Mr Morgan and Mr Mulbrecht to tell them that their assessment of "*our target investor group*" was spot on and that Excalibur, through Mr Behrends, had a "*prior positive relationship*" with Alpha Group because Mr Behrends had accompanied them on an investment trip to Croatia the previous year. He said that if the NDA was returned he could send technical details, the contract itself and a completed economic assessment of the Kurdistan block. Title did not feature as an issue or a problem.

1082. Mr Kelly asked Mr Wempen how the meeting went and he replied:

> *"I think it went as well as could be expected. You will have to ask Ben* [i.e. Mr Morgan]. *He said he would call some investors, gauge their appetite, and get back to us.*
>
> *1 will certainly keep you informed every step of the way, and I greatly appreciate your referral. With DB on board, we could do amazing things globally, originating some major deals with our current network.*"

1083. Mr Wempen forwarded to Mr Behrends his email to Mr Morgan and Mr Mulbrecht saying "*Good job on getting us that meeting today. I am not sure they are convinced yet*". He asked Mr Behrends to forward the email to Deutsche Bank in Singapore and to ask Peter O'Malley in the Singapore office of Deutsche Bank if he would like to help Mr Morgan raise the fund. In the light of these emails Mr Wempen cannot have regarded the meeting as a complete failure. It was positive rather than negative.

1084. In the event Deutsche Bank was not interested in the fund idea and the indirect interest this would have entailed. This was not the fault of Gulf.

The Gulf Board meeting of 6 December

1085. In a briefing paper to the Gulf Board dated **3 December 2007** Mr Cooper said that it had been assumed that Excalibur would not produce the necessary funds to take a 24% interest in Shaikan. He recorded that Gulf was due to pay the signature bonuses on Shaikan and Akri-Bijeel of c $ 25 million on 6 December.

1086. On **6 December 2007** the Gulf Board met in Zurich. As the minutes record:

> "*...Mr Kozel explained to the Board that following discussions with Mr Wempen of Excalibur, it was clear that Excalibur had failed to raise the necessary funds to participate in the Shaikan PSC. Excalibur is currently considering its position, however, it was made clear to Excalibur that GKP needed Excalibur to either pay up and seek approval from the KRG or withdraw. Mr. Kozel stated that Mr Wempen was due to revert to him by the end of the week, and had indicated that he would likely seek some sort of finder's fee in recognition of his early stage contribution.*
>
> *... Dr Hawrami was aware that the KRG's bank details had not yet been supplied to GKP and was prepared to extend the deadline for signature bonus payments while these discussions were ongoing.* ***Dr Ashti had also stated that he would consider a request from GKP to farm down its interest favourably.***
>
> *Mr Kozel indicated that he had already had expressions of interest to farm in, and that this was a process that the company should expedite...*"

1087. Mr Cooper reported to the Board on Gulf's cash and cash flow position. As the minutes record:

> "*Dr Cooper concluded GKP's need for additional funding is immediate and funds should be secured at the earliest opportunity, if the company is to avoid solvency problems and remain a going concern. Dr Cooper noted that there were a number of options i.e. issue of shares to the KRG, farmouts and equity issues.*
>
> *Mr Kozel noted the imperative for funding, suggesting that the Technical team should prepare the relevant documentation and that GKP should start marketing its interest in Kurdistan early in 2008. Further that GKP should look to approach the equity markets once the discussion with the KRG had reached their conclusion and the farm out was underway, i.e. February 2008*."

1088. Excalibur contends that at some stage Gulf and, in particular, Mr Kozel had decided to cut Excalibur out; that the farm in offer with its unfulfillable conditions was part of the plan; and that the reason for it was a desire to increase the equity which Gulf would enjoy. I do not accept this. Whatever may have been the position later, at this stage Gulf was strapped for cash. It would have welcomed a farm out of 24% which would, *pro tanto*, relieve it of some of the financial pressure.

1089. On **6 December 2007**, Mr Eric Wempen emailed Mr Wempen to ask how negotiations were going. He told Mr Wempen that if there was a settlement, the buyout documentation needed to reflect the fact that Gulf was purchasing the "*rights you acquired pursuant to the Joint Bid Agreement*" and "*not, e.g., your interest in the Shaikan partnership*". He advised Mr Wempen to explain that this was for US tax

purposes, and observed "*...you definitely do not have a direct interest in the contract signed with the KRG and did acquire your rights under the Joint Bid Agreement…*"

Termination of negotiations with Excalibur

1090. By now Mr Kozel had concluded that Excalibur "*could not realistically participate in the project*". On **20 December 2007**, Gulf terminated further negotiations with Excalibur in relation to the farm out of a share of the Shaikan PSC in the light of Excalibur's inability to raise funds and its inappropriate approach to MOL. Mr Patrick emailed Excalibur as follows:

> "*I refer to my email of 23 November and various subsequent meetings in our offices in London.*
>
> *We note that Excalibur did not make a payment of its share of the USD$25m signature bonuses under the Shaikan PSC into an escrow account by 6 December 2007 and, at the meetings in London during the week of 7 December, you indicated that it was unlikely Excalibur would be able to raise financing to acquire an interest in Shaikan. Since then we have heard nothing from you on this. Also around that time, you made an unsuccessful and inappropriate attempt to engage Gulf Keystone's partner, MOL, in a discussion about Shaikan. For these reasons we do not believe that further negotiations between Gulf Keystone and Excalibur are likely to be fruitful and hereby advise you that we are terminating our negotiations with you...*
>
> *Please return the data which we have provided to you in accordance with the Confidentiality Agreement signed by you on 24 November 2007 and confirm that no copies of it have been retained by Excalibur or shown to any third party.*"

1091. Mr Wempen described this email in his witness statement as "*outrageous*" and said that he was incredulous. His contemporaneous emails do not show this. He immediately forwarded it to Mr Kinnear asking "*What do you think of this?*" Mr Kinnear replied the following day that "*This is to be expected and only formulises [sic] the words said by Todd. Since we spoke I have been thinking about this and it's all gone as we say 'egg shaped'*". He said that he was not prepared to pursue claims again Gulf because that would damage his relationship with Mr Al-Qabandi. He said "*Rex the plan was great but our execution was not so hot… We need to break our business relationship and seek our fortunes elsewhere*". He referred to the fact that his name had taken a battering.

Payment of signature bonuses

1092. The KRG had not, by 6 December 2007 finalised its banking arrangements or told Gulf where to pay the signature bonus. On **8 January 2008,** the KRG informed Gulf that it was now ready to receive the signature bonus payments. On **4 February 2008** Gulf transferred the funds for payment of its share of the signature and capacity bonuses to the KRG. The sums due to the KRG for the Shaikan PSC and the Akri-Bijeel PSC were $ 25 million in each case. Gulf's interest in Akri-Bijeel was the same as Kalegran's interest in Shaikan. Accordingly Gulf and Kalegran netted off their

respective shares of the bonuses: Gulf paid all the sums due under the Shaikan PSC and MOL paid all the sums due under the Akri-Bijeel PSC.

The termination of the Collaboration Agreement

1093. On **16 February 2008**, the Collaboration Agreement, if then subsisting, expired, in accordance with clause 11.

Condition precedent, material breach and repudiation

1094. I now consider the defendants' case on these topics. They arise upon the hypothesis that the Collaboration Agreement entitled Excalibur to an indirect interest in the Shaikan Block, or in that block and Akri-Bijeel, and raise the questions (i) what payment obligations would in that event arise; (ii) whether, and to what extent Excalibur was in breach of them; and (iii) with what consequences. The hypothesis is one that I have rejected, in part because the express terms of the Collaboration Agreement give no answer to the first of these questions.

Condition precedent

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1095. Excalibur's contention is that it was entitled to an indirect interest in the PSC to which the defendants were bound to give effect by reaching some further agreement as to how to do so; and that, in default, the court must decide on the means. If that be right, any such obligation on Texas or Gulf must, in my view, necessarily be conditional upon Excalibur showing itself ready, willing and able to put up the funds to cover payment of the costs and liabilities referable to its interest, starting with the signature bonus. The implied obligation to give effect to the entitlement to an indirect interest is matched by an implied obligation to be ready able and willing to pay for it. The holder of a direct interest would be bound to provide its share when due and the same must apply to someone claiming an indirect one. This condition was never fulfilled. In consequence (subject to any question of prevention by the defendants) the obligation of Texas and Gulf never arose.

1096. Since the condition was never fulfilled it is immaterial whether the obligation was open ended so that, provided Excalibur could contribute its share at some time, it would be entitled to have an indirect interest whenever it did. That cannot be right. Excalibur would have to be ready and able within a reasonable time which I would regard as 60 or, at most, 90 days from the date when the signature bonus was due for the reasons set out in paras 1111-1112 below.

Material breach

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1097. If I am wrong in that analysis, Excalibur was, in any event, bound, as a corollary to its entitlement to an indirect interest, to put Gulf as operator in funds to enable it to discharge Excalibur's share of the signature bonus, as well as the costs and expenses which became due for payment under the PSC thereafter.

1098. A Participating Interest (which, according to Excalibur, includes an indirect interest) is a share in the rights and *obligations* acquired pursuant to the PSC. If Excalibur is entitled to an indirect interest, and thereby entitled to share in the rights, it must also be bound to pay its share of the costs and expenses under the PSC. Were it otherwise

Texas, Gulf and MOL would owe monies to the KRG under the PSC, and to each other under the JOA, without recourse to Excalibur as holder of an indirect interest to fund its share. There could be no commercial justification for that. Further, the obligation must be to put the fronting party in funds before the due date (or, at the very latest, on it) because there is no reason why the fronting party should bear any credit risk at all and the agreement does not provide for it.

1099. Further, as Mr Park's evidence confirmed, in ordinary course the operator will call for the funds in advance rather than pay and call later. In 30 years he had never come across the contrary. Mr Wempen in his oral evidence agreed that the payment obligations were the same whether the Collaboration Agreement gave Excalibur a direct or an indirect interest. Mr Park in effect accepted that, if Excalibur had an indirect interest under the Collaboration Agreement, the "trustee" (i.e. the party to the PSC from whom the beneficial interest was derived) would have the right to be put in funds in advance to enable it to discharge the beneficiary's share of liabilities when due.

1100. Moreover Excalibur contends that, although it consented not to be on the PSC, it remained a party to the Consortium Bid. I do not accept this; but, if it is correct, Excalibur is caught by clause 8.6.1 by which the parties undertook to each other to be jointly bound to the National Owner in accordance with the terms of the bid. This must, as Mr Park agreed, implicitly carry with it the obligation to put the other bidding parties into a position where they can discharge Excalibur's share of the liabilities.

1101. As I have already said, the Accounting Procedure in Schedule 1, provided for by clause 5.2 does not relate to payments under the PSC (nor is it a cost of Joint Operations within the meaning of the JOA for Shaikan of 21 December 2007) and that procedure does not afford Excalibur a ground for any failure to satisfy its payment obligations.

1102. Excalibur did not at any stage put Gulf in funds to pay the signature bonus. I do not regard a prior demand as having been necessary for Excalibur's obligation to arise. Excalibur was well aware of the relevant provisions of both the Collaboration Agreement and the PSC and, in particular, when the signature bonus was due.

1103. But, if I am wrong on that, there was, in my judgment, such a demand by Gulf. On **13 November 2007** Mr Patrick raised the 6 December deadline with Eric Wempen. That produced the response "*although we were aware that the funding timeline is short, this was the first that either we or Excalibur became aware of the December 6 deadline*". The **23 November 2007** farm in offer specified that Excalibur's share was payable to the KRG by 6 December 2007 and required it to be paid into an escrow account. That seems to me sufficient as a demand. It was treated by Excalibur as a cash call (although claimed to be an invalid one: see the attachment to Cadwalader's letter of **8 October 2008** to Mr Talabani – see para 1266 below). The meeting of 3 December 2007 discussed a possible postponement of the deadline. Mr Wempen's note of it records that he began the meeting by stating that "*we were going to be unable to raise the money by Friday to meet their request for our funding for the project*".

1104. Excalibur contends that none of the above can count as demands since they were not premised on any acceptance of an existing legal relationship with Excalibur; were not said to be demands pursuant to the Collaboration Agreement; and were no more than negotiations. The defendants, it is said, cannot have it both ways – denying the agreement but claiming to have made demands under it. However if, as Excalibur claims, there was an existing relationship with it, pursuant to which an obligation to pay arose only if demanded, it is legitimate to see whether, despite a denial of that relationship, there was what amounted to a demand.

1105. It seems to me that the demands in question, which were for the whole of Excalibur's share and not just for Excalibur's share of Gulf's 75% must be regarded as made on behalf of Texas as well.

1106. Excalibur, therefore, failed to comply with its payment obligations under the contract. Under the law of New York such failure will discharge the other party(ies) from further performance if (a) the breach was material; or (b) Excalibur unequivocally repudiated its future unperformed obligations.

1107. A breach will be "material" under the law of New York if it is one that goes to the root of the contract or which substantially deprives the other party of the benefit for which it had contracted. It is the New York equivalent of a repudiatory breach in English law. An uncured material breach absolves the other party from further performance of the contract. The party not in breach may stop performance and assume the contract is voided.

1108. The defendants contend that Excalibur's breach was material on 6 December 2007 because Excalibur's failure to pay its share of the price of acquiring exploration rights went to the root of the contract. Due payment of the signature bonus was particularly critical. It was the price of entry into a risky venture and had to be paid when matters were at their riskiest. If Excalibur was in default further fund raising efforts would be difficult, and might be impossible, if for instance negative seismic results were recorded, and the other parties' cash flow strained. Prompt payment was thus of the essence.

1109. Whilst I see the force of these submissions, I do not accept that Excalibur was in material breach on 6 December. Such a failure was, no doubt, significant, but not critical, particularly in circumstances where the KRG did not provide details of an account into which payment could be made until 8 January 2008 and payment was only made by Gulf on 4 February 2008. Further at the meeting on 3 December 2007 Mr Kozel was prepared to keep the farm in offer open until 31 January 2008. The offer was not accepted but the fact that it was made is an indication that payment by 6 December 2007 was not imperative.

1110. The reason why Mr Kozel was prepared to extend time until 31 January 2008 was probably because, as at 3 December 2007 it was fairly clear that Gulf would not have to pay the KRG by 6 December 2007. On 3 December 2007 Mr Kozel received an email from Dr Hawrami seeking to meet him to discuss the KRG's proposal that it should take equity in Gulf in place of some part of the bonus and the two of them met to discuss that subject that week. In addition the KRG had not specified a bank account for receipt of the bonus. The minutes of the Gulf Board meeting on 6 December 2007 record that "*Dr Hawrami was aware that the KRGs bank details had*

not yet been supplied to GKP and was prepared to extend the deadline for signature bonus payments while these discussions were ongoing" and also state "*The KRG had not formally requested payment while the discussions wrt to [sic] issuing GKP equity were still ongoing*". On the same day Mr Patrick produced a draft letter to Dr Hawrami inviting agreement to an amendment to the PSC extending time for payment of the bonus until 31 January 2008 in order to explore the equity possibility.

1111. By the end of **4 February 2008**, however, the failure had in my judgment become material. 31 January 2008 had passed; and no payment had then been made for 60 days since 6 December 2007. That is the period specified in Clause 16.3.3 of the UK OOA 20th Round Model Form JOA at the end of which the other contracting parties may elect to forfeit the interest of a party whose default in respect of any monies due in respect of Joint Operations has not been remedied. It was a JOA based on that form which clause 8.7 of the Collaboration Agreement required the bidding parties to enter into, and it forms an appropriate measure of the period after which any breach of an obligation to pay a share of the signature bonus is to be regarded as material.

1112. I recognise that the JOA regime relates to the cost of Joint Operations; whereas the payment here in question is a portion of the signature bonus, which is an obligation arising under the PSC. But the provisions of the stipulated JOA are, as it seems to me, a useful pointer as to the appropriate period after the expiry of which the breach becomes material. If that be too strict a view, then I would regard a delay beyond 90 days from the due date (the period provided for in the actual JOA – clause 8.5) as the date by which the breach became material. Texas and Gulf did nothing which could be regarded as a waiver of any entitlement to rely upon material breach. Even if the breach did not become material until 90 days after 31 January 2008 or 90 days after payment by Gulf of the signature bonus on 4 February 2008 (i.e. in early May 2008), the breach is one on which the defendants may still rely.

1113. Insofar as any acceptance of the breach was required, it was effected in the manner specified in para 1118 below (other than the events specified on 20 and 21 December 2007).

Anticipatory breach

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1114. The conclusions in the previous paragraphs assume that there had been no anticipatory breach. However, there was, in my judgment, such a breach prior to the time when any breach became material.

1115. Anticipatory, (or as it is sometimes called in New York repudiatory) breach occurs when the statements or conduct of a party manifest unequivocally an inability or an intention not to perform future material obligations. As under English law, the other party may in such circumstances elect to treat the contract as discharged without waiting for the due time for performance. The election can be communicated by the innocent party taking action or by the innocent party failing to perform the contract and thereby indicating that it has decided to bring the contract to an end: **AG Props. of Kingston, LLC v. Besicorp-Empire Dev. Co.,** 14 A.D.3d 971, 973 (N.Y. App. Div. 3d Dep't 2005). There is no particular time within which the non-breaching party must make the election: **Marvel Entertainment Group, Inc. v. A R P Films, Inc.,** 684 F.Supp. 818, 820 (S.D.N.Y. 1988).

1116. In my judgment Excalibur was in anticipatory breach of its obligations to Texas and, if a party, Gulf, in the light of the following facts and matters on which the defendants rely (which are set out in greater detail above):

i) During November 2007 Excalibur, both directly and through Iain Kinnear, represented to Todd Kozel that its fund raising efforts were well advanced and that UBS in particular had agreed in principle to provide funding, when neither of these was true.

ii) Mr Wempen and his brother claimed that they were only recently aware of the 6 December deadline (see Eric Wempen's email of 13 November 2007: para 1103) when they had been aware of when the signature bonus was due under the PSC for months. Excalibur admits that by 24 October 2006 it was aware that contracting parties to the PSC would be likely to have to pay a signature bonus and that the KRG was proposing that part at least be paid within 30 days. The draft PSC was forwarded in April 2007 and both Mr Wempen and Eric Wempen saw it. Mr Kozel forwarded Mr Compton's analysis of the PSC to Mr Wempen on 19 April 2007. Gulf's letter to the KRG, which referred to the bonus and the fact that it was payable within 30 days of signature, was forwarded to him on 26 July 2007.

iii) Excalibur had also claimed that they were entitled not to pay until payment had been agreed through the medium of the Operating Committee under clause 7 of the Collaboration Agreement or in the JOA: see Eric Wempen's email to Mr Patrick of 13 November 2007. The argument was repeated on 3 December. These were bad points and untenable constructions.

iv) Excalibur had declined to accept or negotiate on the basis of the farm in offer of 23 November 2007; instead it indicated (see Mr Patrick's email of 28 November 2007) that it was not now looking at taking a direct interest in Shaikan and was looking for some form of project finance of indeterminate nature.

v) At the meeting on 3 December 2007 it became clear that Excalibur had been misrepresenting its fund raising position, had barely started fund raising and had no current prospect of raising funds and no potential investors who were even interested in backing it. Rex Wempen said he needed until June 2008 for Excalibur's share of the Shaikan costs. Mr Kozel said that that was not acceptable and offered an extension until the end of January 2008 for Excalibur to raise and tender its share of the signature bonus. This offer was not accepted. Mr Wempen never put forward a date other than June.

vi) At the meeting Mr Wempen proposed a joint fundraising effort with Excalibur and Gulf, using Gulf warrants or convertible notes, which itself indicated that Excalibur could not raise the funds by itself. That was unacceptable to Gulf.

vii) After a short interval in the meeting Excalibur proposed that Gulf buy out its claim to an interest as an alternative to Excalibur continuing with attempts to raise funding, and suggested that it try to raise funds by January and, if that failed, be bought out. This was unacceptable to Gulf. The buyout proposal itself signalled an inability to raise finance. It was put forward as a means of

avoiding having to do so. Mr Kozel was understandably contemptuous of the buyout idea.

viii) The meeting concluded on the basis that Excalibur could either have until the end of January 2008 to find funds for payment of its share of the signature bonus; or commence negotiations for a buy out of its claim to an interest.

ix) The effect of the meeting was to make it apparent to Texas and Gulf that Excalibur needed the extension sought in order to be able to find the funds. Even with the extension that was problematic.

x) Following Eric Wempen's unequivocal advice to his brother that he should, in effect, abandon attempts to find funding and "*Go for the buy out*", Mr Wempen immediately opened negotiations with Gulf/Texas for the buyout of his claim. He thereby communicated to Gulf/Texas that he was opting not to continue with his attempts to find funds to enable Excalibur to perform its share of the Shaikan PSC obligations i.e. the first of the two options put to him.

xi) In particular, on 4 December 2007 Mr Wempen made an oral offer to Mr Kozel to sell Excalibur's "interest" for $ 5 million. On the same day Excalibur approached MOL to sell its alleged interest.

xii) On 5 December 2007 Excalibur offered to sell to Gulf 85% of its alleged interest in Shaikan for $ 5 million.

xiii) Excalibur's approach to MOL was referred by MOL to Mr Kozel. The approach confirmed that Excalibur was going down the buyout route.

xiv) After 3 December 2007 Excalibur did not come forward with any indication of funding proposals.

xv) By email to Excalibur of 20 December 2007 Gulf broke off further negotiations with Excalibur for a farm out to Excalibur of a 24% share in the Shaikan PSC.

xvi) Thereafter negotiations continued between Excalibur and Gulf/Texas and their respective attorneys for a buyout of Excalibur's claim to an interest until such negotiations were broken off by Excalibur during June 2008.

1117. The effect of the conduct summarised in paras (i) – (xvi) above was to represent to Texas and Gulf that Excalibur could not and would not fund its share of the Shaikan signature bonus either by 6 December 2007 or by 60 or 90 days, or by May 2008, and was seeking to go down the buyout route.

1118. That anticipatory breach was accepted by Gulf terminating all negotiations on 20 December 2007, and by Gulf and Texas by entering into the JOA in respect of Shaikan on 21 December 2007 and continuing with exploration activities thereafter without Excalibur; and by failing then or thereafter to take any steps (a) to give effect to any interest of Excalibur (which clearly indicated that they were proceeding on the

basis that Excalibur had no such entitlement); or (b) to recognise any subsisting contract with Excalibur. All of these matters came to the notice of Excalibur.

1119. Clause 11.4.1 of the Collaboration Agreement provides a termination procedure which requires that the defaulting party be given 10 days to cure its breach. Under New York law that does not rule out a termination for material or anticipatory breach at common law unless the relevant clause clearly excludes that right. I do not think that this clause does so.

1120. Moreover "*once it becomes clear that one party will not live up to the contract, the aggrieved party is relieved from the performance of futile acts, such as conditions precedent.*" **Petrocelli Constr Inc v. Realm Electrical Contractors Inc** 15 A.D. 3d 444, 446 (2d Dept 2005). The condition precedent in that case was the giving of a notice to terminate. It seems to me that that principle applies here. There was no way in which 10 days' notice could make any difference.

Prevention *Index*

1121. Under the law of New York[89] one party cannot rely on another party's breach of contract if he, himself, has, by his conduct (whether act or omission), wrongfully prevented the contractual performance in question. If Party A establishes that, *prima facie*, Party B was in breach, it is then for Party B to show that his performance was prevented by the conduct of Party A. In order for the doctrine to apply the conduct preventing performance must have been wrongful in that it was either (i) a breach of an express or implied term of the contract that Party A would provide the assistance or facility (such as access to a property) the absence of which prevented the relevant performance: **BGW Dev. Corp. v. Mount Kisco Lodge No. 1552 of the Benevolent & Protective Order of Elks of the United States**, 247 A.D.2d 565, 565-67 (N.Y. App Div. 2d Dep't 1998), or (ii) a breach of an implied obligation on the parties not to frustrate the contract into which they have entered or withhold cooperation where that is necessary to allow performance by the other party: **Novick v. Axa Network, LLC** 642 F.3d 304 (2011).

1122. The doctrine is often viewed as an aspect or variant of the implied duty of good faith and fair dealing because it operates as a means of giving effect to the agreement which the parties have made and a restraint on conduct which is calculated to frustrate the performance of the bargain.

1123. There is, however, no general contractual duty to render assistance. The act or omission must be wrongful in the sense described. This was illustrated in the evidence of Judge Pratt who was asked to consider a case where Party A is obliged to pay Party B a sum of money and asks Party B to make a presentation on its behalf to a bank from which it seeks funds to enable it to perform. Party B's refusal to make the presentation would not engage the prevention doctrine because, in the absence of some custom of the trade which imposed such an obligation, Party B would not be obliged to provide such assistance. It would (or might), as I observed, be different, if Party B wrote to the bank and sought to dissuade it from lending the funds. The example illustrates that, whilst a party may be under an obligation not intentionally to

[89] Which is very similar to that of England & Wales: see *Mona Oil Equipment v Rhodesia Railways* [1950] 83 Lloyd's Rep 178.

do that which prevents the other party from performing its obligations, the prevention doctrine and the good faith covenant cannot be used so as to create new duties that negate explicit rights under the contract or are inconsistent with the contractual terms, as may be the case if the duty is not one that the party in question agreed to undertake.

1124. Excalibur relied on two cases which were said to support the proposition that the preventing conduct does not have to consist of some tort or breach of contract and that the doctrine operates whenever the conduct of Party A prevents the performance of Party B. I do not accept that the cases relied on have that effect. The two cases are these:

a) *WPA/Partners v. Port Imperial Ferry Corp.* WPA 307 A.D.2d 234 (N.Y. App. Div. 1st Dep't 2003)

A general proposition was referred to in that case that "*one who frustrates another's performance may not hold the frustrated party in breach of contract*". The case itself concerned the grant of an injunction restraining forfeiture of a lease by "*obtaining a stay tolling the cure period so that upon an adverse determination on the merits the tenant may cure the default and avoid a forfeiture*". The frustration referred to is not wholly clear. The facts were that the landlord (the City of New York) had failed to pay its share of the renovation costs of a visitor centre on a pier in New York and then evicted the tenant for non-payment of rent. The frustration referred to appears to be that the City, by failing to pay its share of the costs it was *obliged* to pay caused or contributed to the tenant's inability to pay. So the preventing conduct was wrongful.

b) *Vandergift v. Cowles* 48 L.R.A. 685

In this shipbuilding case the buyer took possession of the ship prior to completion, without any legal right to do so. It was held that, having taken the ship prematurely, the buyer could not then sue the shipbuilder for failing to complete. Here again the prevention was wrongful. The buyer was in breach in taking possession of the ship before the vendor was bound to have completed it; and it thereby prevented performance.

1125. Excalibur contends that it was prevented from raising the funds necessary for the signature bonus and subsequent expenditure because Texas and Gulf refused to provide an "origination letter" acknowledging Excalibur's interest. I must, for this purpose, assume, contrary to what I have decided, (a) that Gulf was a party to the Collaboration Agreement; and (b) that Excalibur was entitled under that agreement to an indirect interest. Even so, it does not seem to me that Texas/Gulf were impliedly obliged to confirm that entitlement to third parties in circumstances where there was a *bona fide* dispute as to whether it existed and when the agreement from which it was said to derive was available for all to see. Further, even if lenders would not provide funds to Excalibur without an origination letter, Excalibur, itself, if it had the money, could satisfy the condition required to be fulfilled if it was to secure an indirect interest. An origination letter was not a precondition of participation itself and the contract was workable without it. The scheme of the Collaboration Agreement was that each party was to provide its own finance. There was no obligation of any party to assist the other in raising it.

1126. In any event, it is apparent that the absence of such a letter was not the, or a, cause, of Excalibur's failure to find funding. The experts are in agreement that a bank would not in the early "pitch" stage seek to look behind a statement (e.g. in a teaser) declaring an ownership interest: see para 3.6 of the Park-Wilkinson joint memo and the oral evidence of Messrs Park, Wilkinson and Jull. At this stage the bank would take any representation that Excalibur had or was entitled to an interest at face value. (None of the institutions approached appears to have done anything different). Investigation of title would come later, if the bank was interested, and after signature of an NDA. A request to sign an NDA would, itself, indicate that the opportunity was a genuine one. That stage was never reached. If it ever was reached an acknowledgment letter would be inadequate. The bank would want to see whatever agreement was or would be in place to give effect to any indirect interest.

1127. A bank or other financial institution *would* be interested in the type of interest the person seeking finance has or is going to have. In this respect, not being on the PSC put Excalibur at a distinct disadvantage (in Mr Wilkinson's view it was probably fatal to any prospects of finance from private equity). Private equity investors would expect a company, such as Excalibur, embarking on a wildcat venture, to be on the PSC, since, if it was not, (a) it would be at least one stage removed from direct participation; (b) it would have no place on the operating committee; and (c) those financing it would run the risk of the party on the PSC defaulting on its terms and forfeiting its interest. An indirect interest may also be less easy to sell and private equity generally aims to realise its investment in 5 – 7 years[90]. If Excalibur was not on the PSC, investors would want to know why not, to which Excalibur would have no answer which was likely to satisfy them. If what was contemplated was an indirect interest, they would want to know what Excalibur had in mind. It is difficult to know what Excalibur's answer would be other than that it was looking to the banks to advise on the question. The farm in offer was a far more attractive bet; but that was the one thing which Excalibur did not wish to take up.

1128. Excalibur, which had no money of its own to speak of or to access, never got to first base, not because would-be financiers could see no written acknowledgment of an interest, or because they had asked for one and did not get it, but because the venture was one which they were not interested in financing. Nothing prevented Mr Wempen from making initial approaches to would be financiers and he did so.

1129. Excalibur spent considerable effort in "papering" its prevention argument: but in truth it had no greater thickness. It is noticeable (a) that in no contemporaneous document passing between them (or sent to Gulf) do the Wempens complain that the language of the NDA or the absence of an origination or acknowledgment letter had affected or hampered any actual fundraising attempt; (b) that there is no reference to such prevention in the note of the 3 December 2007 meeting or Eric Wempen's emails to his brother thereafter; (c) that there is no contemporaneous record of (or from) any potential fundraiser expressing a concern or reservation based on Excalibur's

[90] There are examples of companies holding indirect interests in Kurdistan PSCs through share ownership but in non-comparable circumstances. Longford Energy Inc, which was in the Forbes & Manhattan group, held an interest in the Chia Surkh block through Forbes & Manhattan (Kurdistan) Inc, where there was no realistic credit risk. Range Energy Resources also held an indirect interest in the Khalakan PSC in circumstances where the credit risk was also negligible.

supposed want of title or lack of an acknowledgment of interest or the terms of the NDA.

1130. There is also a problem in respect of the draft letter which Excalibur wanted Gulf to sign: see para 780 above. The draft recorded that Excalibur "*had received*" an interest in Shaikan and Akri-Bijeel. But it had not. It might farm in; but had not done so. If it was entitled to an indirect interest it would have to be given effect by some means that had been neither discussed nor agreed. If Mr Wempen had shown the letter to a financier and had been asked the exact nature of Excalibur's interest, he would have to have said that it was as yet undetermined; and, if asked how it arose, he could only point to the Collaboration Agreement and assert that Gulf was a party. The draft letter itself would have created more problems than it solved. Mr Jull said he would have regarded it as more cause for alarm than comfort.

1131. In Mr Park's view the importance of a letter of acknowledgment of interest was to give comfort to Excalibur that it had or would get an interest. But Mr Wempen was perfectly happy to assert that Excalibur had an interest anyway: as appears from the teaser. The idea that want of an acknowledgment letter materially inhibited him from claiming an interest parts company with reality. Further, Gulf had offered Excalibur a farm in and had not ruled out the possibility of it acquiring an indirect interest: see Mr Patrick's email of 28 November 2007: para 972 above.

1132. The requirement for would be financiers to sign an NDA in order to be given further information was not a breach of any obligation of Gulf and did not prevent Excalibur from fundraising. The proposed letters to be signed by third parties were standard and would have been expected by them. None of them was signed because those concerned were not interested. The NDA to be signed by Excalibur was appropriate and could, in any event, have been signed under protest at any time, as happened on 24 November 2007. The material provided by Gulf in consequence of that signature was never provided to third parties because none had signed an NDA.

1133. There is no evidence whatever that anything Gulf did or did not do affected Mr Franchi's willingness to assist Excalibur. Mr Franchi had no contract with Excalibur; and was employed on other matters. He introduced Mr Wempen to Lazard and then bowed out.

1134. In those circumstances Excalibur's prevention case is not made out. It follows that its failure to come up with the money for the signature bonus was its responsibility alone.

Alter ego

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1135. I now consider Excalibur's claim that Texas is to be regarded as the *alter ego* of Gulf, so that the court may pierce the corporate veil and look to Gulf to make good the wrongs committed by Texas.

Applicable law

1136. The claim is not said to arise under any system of law other than that of New York, so that, if that law is not applicable it fails at first base. Gulf claims that the applicable law is either that of Texas, being the *lex incorporationis*, or that of England and

Wales, as the *lex fori*. Excalibur claims that it is the law of New York as the *lex contractus*.

1137. The issue is not the subject of any clear authority. In **VTB Capital PLC v Nutritek International Corp** [2013] UKSC 5 Lord Neuberger suggested that it may be that there is no room for a single choice of law rule. But the Supreme Court did not need to reach a decision because it was common ground that English law applied.

1138. The New York law doctrine arose as a means of imposing liability on shareholders who had complete domination over the corporation of which they were the owners. Generally speaking it required showing "*(1) [that] the owners exercised complete domination of the corporation in respect to the transaction attacked, and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury*": **In the Matter of Morris v. New York State Dept. of Taxation & Fin.,** 82 N.Y.2d 135, 141 (1993). The paradigm case is where a third party seeks to impose a corporate obligation on a controlling owner by penetrating the shield of limited liability:

> "*The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene*": *ibid.*

1139. It is probably not necessary for the alleged dominator to be a shareholder: **Marketplace LaGuardia Ltd v. Harkey Enterprises Inc**. No. 07 – 1003 2008 WL 905188 at *2 (E.D.N.Y. 2008). That has not definitively been resolved by the Court of Appeals but the proposition is, as both experts agreed, in accordance with the principle which is based on the fact of domination rather than the shareholder-company relationship *per se*.

1140. Excalibur contends that:

> "*The real issue raised by Excalibur's claims based on the alter ego doctrine is whether the circumstances in which Texas Keystone came to breach the Collaboration Agreement, and in particular the extent to which Gulf Keystone caused it to do so, are such as to justify the application of a rule of law by which Gulf Keystone can be held liable (whether as a party or otherwise) for any breaches of contract thereby perpetrated. The applicable law should therefore be the law most closely connected with the alleged breaches, since they are the events which are said to have been caused by Gulf Keystone's alleged domination of Texas Keystone*."

1141. I do not regard this as the right approach. It proceeds upon the basis that because the claim is to make Gulf liable for Texas' breach of contract, it is the law of the contract which should determine whether that should be so. But Gulf is not a party to that contract and, even if Texas was its *alter ego,* would not become one. Any claim against Gulf under New York law has as its source an equitable doctrine whereby the courts have pierced the veil whenever necessary "*to prevent fraud or to achieve equity*": **International Aircraft Trading Co. v. Manufacturers Trust Co.,** 297 N.Y. 285, 293 (N.Y. 1948).

1142. **Dicey, Morris & Collins, The Conflict of Laws**, 15th ed. (2012), Volume 2, ¶ 34-084 notes that the recent trend is not to create a set of choice of law rules for equitable claims but to seek to fit them within other legal categories. I regard this approach as satisfactory. As the authors put it:

> " *Given that the distinction between equity and the common law is unknown in the majority of legal systems, the approach of seeking to bring equitable claims within other established legal categories in order to determine the law applicable is consistent with a broad, internationalist approach to characterisation*": **Dicey** ¶34-085.

1143. If one adopts that approach, then, as it seems to me, there is a relatively close analogy between a claim against an allegedly dominating non-owner and a claim to make an individual member liable for the engagements of a particular company. As to that:

> "*It is generally accepted as a matter of private international law that the law of the place of incorporation determines the capacity of the company, the composition and powers of the various organs of the company, the formalities and procedures laid down for them, the extent of an individual member's liability for the debts and liabilities of the company, and other matters of that kind.*"

Grupo Torras SA v Al-Sabah (No.1) [1996] 1 Lloyd's Rep. 7, 15 (column 2) (CA) per Stuart-Smith LJ. See also **Risdon Iron and Locomotive Work v Furness** [1906] 1 KB 49, where the Court of Appeal assumed the application of English law to the question whether members of an English company were liable for the contractual debts of a Californian company when a Californian Statute would have had that effect.

1144. Accordingly, as I hold, the relevant law is that of Texas, whether or not the dominator is a member of the company. It would make no sense to have a different applicable law according to whether he is or not. In each of them liability arises because of the relationship of the puppeteer to the company and its effect on the company's internal management. Such an approach avoids the prospect of a different law applying according to the wrong that the puppeteer has procured the company to commit. It is inherently possible that a company entirely dominated by another may, in respect of the same course of conduct, commit breaches of contracts governed by the laws of countries A and B and torts whose applicable law is that of countries C and D. It would be anomalous if the liability of the dominator (if any) for these wrongs was determined by four different laws. It would appear that New York Law takes the same view: **R.F.M.A.S., Inc. v. Mimo So**, 619 F. Supp. 2d 39, 67 (S.D.N.Y. 2009).

1145. Excalibur's alter ego claim, therefore, fails.

Alter ego – if New York law applies

1146. If, contrary to my view, the law of New York applies, Excalibur's claim fails on the facts.

1147. In New York law the domination of the *alter ego* must, so far as the relevant transaction is concerned, be complete. As it was put in **Tellium, Inc v. Corning Inc.,** No. 03-8487, 2004 WL 307238, at *7 (S.D.N.Y.) (S.D.N.Y. Feb. 13, 2004):

> "*piercing the corporate veil is appropriate when one Corporation is subject to complete domination and control by another such that the subjugated Corporation "had at the time of the relevant transaction no separate mind, will or existence of its own*."" citing **Fisserv. International Bank**, 282 F.2d 231, 238 (2d C ir.1960).

1148. The factors relevant to show the requisite domination are said to include the following:

> "*(1) the absence of the formalities and paraphernalia that are part and parcel of the corporate existence, i.e., issuance of stock, election of directors, keeping of corporate records and the like, (2) inadequate capitalization, (3) whether funds are put in and taken out of the corporation for personal rather than corporate purposes, (4) overlap in ownership, officers, directors, and personnel, (5) common office space, address and telephone numbers of corporate entities, (6) the amount of business discretion displayed by the allegedly dominated corporation, (7) whether the related corporations deal with the dominated corporation at arm's length, (8) whether the corporations are treated as independent profit centers, (9) the payment or guarantee of debts of the dominated corporation by other corporations in the group, and (10) whether the corporation in question had property that was used by other of the corporations as if it were its own*."

Wm. Passalacqua Builders, Inc. v. Resnick Developers S., Inc., 933 F.2d 131, 139 (2d Cir. 1991).

1149. Gulf did not completely dominate Texas through Mr Kozel so that it had no will of its own. Gulf and Texas were two independent corporations with their own boards and shareholders. Neither Gulf nor any of its shareholders (other than Mr Kozel) was a shareholder in Texas. Mr Kozel had only a 25% share in Texas, and, whilst the Texas Board left him to get on with it in Kurdistan, it made its own decisions as to what Texas should do. The idea that Mr Kozel dominated his father and his brother Robert borders on the risible. Both Gulf and Texas acted through their own independent boards. As Mr Robert Kozel put it: "…[Mr Kozel] *could not make a decision or put [sic] Texas' fate without the approval of me and our board members*". The fact that Texas was prepared, against an indemnity from Gulf, to retain a 5% interest in Shaikan, in order that the deal should not fail, comes nowhere near showing domination by Gulf. That decision was essentially made by Robert Kozel. Mr Kozel recused himself in relation to the negotiations over the indemnity agreement.

1150. Nor can Mr Kozel be equated with Gulf. For most of the time with which this action is concerned it was agreed at Gulf that Mr Kozel would act for Texas in respect of Kurdistan. In May 2006 Mr Kozel was asked to step down and in July 2006 he agreed to do so and continued in post pending the hiring of a replacement. Until July 2007 he was at loggerheads with the Gulf Board. Thereafter he was, although chief executive, only one member of the Board.

1151. Excalibur placed some reliance on the fact that Texas had enabled Mr Al-Khaldi to get a US visa by representing that he was employed by Texas when the reality was that he was employed by Gulf. I do not regard what Texas did, even if it amounted to misleading the US authorities, as establishing that Gulf dominated Texas.

1152. Gulf did not use Texas to commit a wrong against Excalibur. It did not procure a breach of contract by Texas or any other wrong.

1153. If Texas had been Gulf's *alter ego*, the effect of the doctrine would have been to make Gulf responsible for Texas' wrongs. It would not make Gulf a party to Texas' contract; or liable otherwise than for Texas' wrongs: **Morris v New York State Dept of Taxation & Fin,** 82 N.Y. 2d 135,141 144 (N.Y. 1993). So at best, the doctrine could only apply in relation to Shaikan. Judge Bellacosa did not rule out the possibility of a development of the equitable doctrine but that is the position as the law stands. In a number of cases New York Courts have held the dominant company bound by an arbitration clause in the relevant contract but there is no authority which turns the dominator into a contracting party.

1154. Excalibur referred to **Horsehead Industries v. Metallgesellschaft** 239 A.D.2d 171, 172 (N.Y. App. Div 1st Dep't 1997) (a motion to dismiss case) in which there is a reference to being held "*liable as a party... if the parent's conduct manifests an intent to be bound by the contract which intent is inferable ... if the subsidiary is a dummy for the parent*". I do not regard that as authority, and certainly not binding authority, to a contrary effect. A manifestation of an intent to be bound by contract amounts to an assumption of contractual liability by conduct. I am not satisfied that anything Gulf did amounted to such an assumption.

Fiduciary duty *Index*

1155. Excalibur contends that Texas and Gulf owed it fiduciary duties either (i) because such duties arose by virtue of the Collaboration Agreement to which they are both said to be parties; or (ii) "*by virtue of the nature of the consortium relationship that arose from the conduct of, and/or the course of dealings between, ...[the parties], which was, or was akin to, a joint venture*"[91]; or (iii) because Texas and Gulf acted as agents of the joint venture in its dealings with the KRG. The first is inapplicable to Gulf if, as I have held, it was not a party to the Collaboration Agreement.

1156. Insofar as the duty is said to arise from the Collaboration Agreement the applicable law is that of New York. Under that law there are four elements which are essential to the establishment of a fiduciary relationship: (1) the vulnerability of one party to the other which (2) results in the empowerment of the stronger party by the weaker which empowerment (3) has been solicited or accepted by the stronger party and (4) prevents the weaker party from effectively protecting itself: **Atlantis Information Technology, GmbH v. CA, Inc,** 485 F.Supp.2d 224, 231 (E.D.N.Y.2007). "*[W]hen parties deal at arms length in a commercial transaction, no relation of confidence or trust sufficient to find the existence of a fiduciary relationship will arise absent extraordinary circumstances*": **Cal Distributor, Inc. v. Cadbury Schweppes Ams. Bevs. Inc**., No 06 Cic 0496, 2007 WL 54534 *9 (S.D.N.Y. Jan 5, 2007).

[91] APOC 3.17.2.

Joint ventures

1157. One of the categories of relationship from which fiduciary duties typically arise is that of a joint venture. Excalibur claims that the relationship between Excalibur, Texas and Gulf was that of joint venturers.

1158. Under New York law a joint venture requires five elements: (1) two or more persons must enter into a specific agreement to carry on an enterprise for profit; (2) their agreement must evidence their intent to be joint venturers; (3) each must make a contribution of property, financing, skill, knowledge or effort; (4) each must have some degree of joint control over the venture; (5) there must be a provision for the sharing of profits and losses: see, for example, **Dinaco, Inc. v. Time Warner, Inc.,** 346 F.3d 64 (2d Cir, 2003). Judge Bellacosa agreed in his oral evidence that the authorities on which he relied in his written report to suggest that the fifth requirement had not always been strictly applied did not, on analysis, indicate any liberality in the interpretation of the five elements which were essential.

1159. That the parties intended to form a joint venture must be clear: **Learning Annex Holdings, LLC v Whitney Educ. Group Inc.,** 765 F. Supp. 2d 403, 412 (S.D.N.Y. 2011). In that case the court said:

> "*Because the creation of a joint venture imposes significant duties and obligations on the parties involved, "the parties must be clear that they intend to form a joint venture, which is a fiduciary relationship and not a simple contract".* Therefore, "*the absence of any one of these elements* [i.e. those identified in Dinaco] *is fatal to the establishment of a joint venture*."

1160. Under New York law a joint venture is in a sense a partnership for a limited purpose: **Eskenazi v. Shapiro** 27 A.D.3d 312, 314-15 (N.Y. App. Div. 1st Dep't 2006).

1161. In determining whether a relationship gives rise to fiduciary duties the first place to look, and the primary source of reference, is the contract between the parties. In **Northeast General Corp v. Wellington Advertising** 82 N.Y.2d 158 (N.Y. 1993), there was an attempt to characterise an agreement to find a purchaser of the defendant as giving rise to fiduciary duties. In a helpful and definitive judgment Judge Bellacosa himself said:

> "*Unless the particular agreement establishes a relationship of trust, one will not spring from a finder's contract in and of itself, for without some agreed-to-nexus, there is no relationship of trust and, thus, no duty of highest loyalty.*"
>
> "*Before courts can infer and superimpose a duty of the finest loyalty, the contract and relationship of the parties must be plumbed. We recognize that "[m]any forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties" (**Meinhard v. Salmon,** 249 N Y 458, 464). Chief Judge Cardozo's oft-quoted maxim is a timeless reminder that "[a] trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive" (id., at 464). If the parties find themselves or place themselves in the milieu of the "workaday" mundane marketplace, and if they do not create their own relationship of higher trust, **courts should not***

> ***ordinarily transport them to the higher realm of relationship*** *and fashion the stricter duty for them? "Courts look to the parties' agreements to discover, not generate, the nexus of relationship and the particular contractual expression establishing the parties' interdependency."*"
>
> "*If Wellington wanted fiduciary-like relationships or responsibilities, it could have bargained for and specified for them in the contract.*"

Fiduciary obligations under the Collaboration Agreement

1162. In my judgment the Collaboration Agreement was not a joint venture in New York law; did not create a fiduciary relationship; and did not give rise to fiduciary duties. The characteristics specified in **Atlantis Information** are absent. Texas (and Gulf, if it was a party) did not solicit or accept empowerment over Excalibur from which Excalibur could not effectively protect itself.

1163. The Collaboration Agreement lacks the required characteristics of a joint venture or fiduciary relationship. It is a joint bidding agreement under which each party has a free choice as to whether to join in a bid: clause 2.1. Neither party has the ability to control or dominate the other. Neither party is exposed to a risk of loss from the abuse of the discretion of another or is vulnerable to the exercise of unilateral power. No party has to acquire data or to submit or join in submitting a bid if it does not wish to participate and, if it does not wish to participate, there is no provision for a bid to be submitted on its behalf. If the National Government requires prejudicial amendments to the terms of the bid, a party cannot be forced to accept the revised terms: clause 8.6.2. Clause 10 provides that, subject to the sharing of data as provided by clause 4, confidential information remains the property of its owner.

1164. As to the sharing of profits and losses, clause 5.1 provides that, unless agreed otherwise, all costs incurred are for the account of the parties incurring those costs. Clause 5.2 provides for the parties to agree a program for data acquisition, joint studies and the preparation of a Bid. These accounts are to be joint account costs. If the bid is successful the parties who participate in the successful Consortium Bid will become parties to the PSC and will enter into a JOA to regulate the exploration and development of the block. As a result they will then embark upon a venture in which they will share profits and losses. The Collaboration Agreement does not, of itself provide for that share save in the limited sense that, if a PSC is signed but no JOA has yet been entered into, the relevant parties' shares in the rights and obligations will be in proportion to their Participating Interest, which may be said to have the effect of sharing profits and losses. The agreement that is contemplated as regulating the sharing of profits and losses is the JOA. There is nothing in the Collaboration Agreement applicable to Excalibur which, on the facts of this case, required it to share profits or losses. Excalibur declined to join in the Consortium Bid, as it was entitled to do. I do not regard the agreement as to Consortium Interests – which, so far as Excalibur is concerned, never became a Participating Interest – as a provision for the sharing of profits and losses as contemplated by **Dinaco**.

1165. Not only did the parties fail to specify that their relationship was to be that of fiduciaries but by clause 9.2. they provided that:

> "*The interests, rights, duties, obligations and liabilities of the parties as between themselves shall be several and not joint or collective. Nothing herein contained shall be construed as creating* ***a partnership of any kind, an association or trust.***"

1166. Such a clause is likely to be fatal to the contention that a joint venture or fiduciary relationship exists: **Castillo Grand LLC v. Sheraton Operating Corp**. 2009 WL 2001441, *9 (S.D.N.Y. July 9, 2009) – where the clause specified that the parties were neither joint venturers, partners or joint owners. A clause in the form of clause 9.2. ("*nothing herein contained shall ever be construed as creating a partnership of any kind…*") precluded a partnership/fiduciary claim arising out of a joint bidding agreement in the 9th Circuit Court of Appeals case of **Chevron USA Inc. v. Phillips Petroleum Co**. 2003 WL 22006008, 1 (9th Cir. (Alaska) 2003)[92].

1167. It is not wholly impossible to hold that a fiduciary obligation arises even in the face of language such as that set out above. The court is not bound by the disclaimer of the parties. But I see no good reason, in this case, to hold that, whilst disclaiming any form of partnership the parties in effect created one.

1168. Moreover Article 13 of the Shaikan JOA provided that:

> "*The rights, duties, obligations and liabilities of the Parties under this Agreement shall be individual, not joint or collective, and each Party shall be*
>
> *liable only for its obligations as they are specified in this Agreement. It is not the intention of the Parties to create, nor shall this Agreement be deemed or*
>
> *construed to create, a mining, tax or other partnership,* ***joint venture,*** *association or trust …*"

It would be curious if the Collaboration Agreement were held to create a joint venture or other form of partnership when the JOA, which that Agreement called upon the parties to enter into, expressly disavowed it.

1169. It is material in this connection to consider the custom and practice of the oil industry: **N.V. Leo de Winter & Co v. B.N.S. Intern. Sales Corp**. 16 A.D.2d 763,764, 227 N.Y. S.2d 735,736 (1st Dep't 1962). The unchallenged evidence of Mr Codd in this case was that participants in the upstream oil industry look on joint bidding agreements as arm's length commercial agreements which specify the rights and obligations of the parties in relation to the bidding process (in which they may or may not participate in accordance with what they regard as their commercial interests) and do not give rise to fiduciary obligations. Mr Park had never heard it suggested that such an agreement did so[93].

1170. These considerations provide added reasons not to regard the Collaboration Agreement as creating or recognising a fiduciary relationship.

Fiduciary duty based on a de facto joint venture

[92] The case is Alaskan but the law described in the parties' briefs is in substance the same as that of New York.
[93] He thought that the subsequent behaviour of the parties might give rise to such a duty. Mr Codd had never heard that suggested in 32 years.

1171. The contract is not necessarily dispositive of the issue because there may be more to the relationship between the parties than the contract alone or the relationship may develop after the contract is made. Excalibur claims that, under New York law a fiduciary relationship arose from the conduct of the parties which was akin to a joint venture. I do not regard that claim as well founded.

1172. The relationship between the parties (assuming for the moment that Gulf was one of them) was established by the Collaboration Agreement. The actions of the parties must be looked at in the light of the contract which they made. If the contract does not create such a relationship but expressly disavows it, the factual circumstances would need to provide cogent reason to conclude that the relationship of the parties was or had become fiduciary. I do not regard anything that the parties did after (or before) the contract as showing that to be the case.

1173. In particular, neither Texas nor Gulf exercised domination or control over Excalibur. The fact that Excalibur approached Texas and Gulf and introduced them to Kurdistan, that the parties co-operated and communicated with each other in pressing forward to a situation where a PSC was signed, and that on at least one occasion, after Mr Wempen had indicated that Excalibur need not be on the PSC, Mr Kozel said that he would not "*screw Excalibur over*" is inapt to create such a relationship. The fact that Mr Wempen's indifference to Excalibur being on the PSC was first expressed when Mr Wempen had learnt that his mother was dying (and never qualified thereafter) and that Excalibur lacked technical knowledge or experience, or financial backing, does not do so either.

1174. In this respect it is necessary to have regard to what Excalibur did. It was undoubtedly an introducer – an important but not a fiduciary role. Thereafter Mr Wempen liaised with Dabin, the local agent which Excalibur had engaged, and attempted to exercise influence with the KRG (unsuccessfully). Mr Wempen came to Erbil in June 2006, on which occasion there was no presentation by Excalibur. The meeting was one at which he hardly spoke and at which he was embarrassingly cut off. After that Mr Wempen, on his own evidence, only met Dr Hawrami once – in August 2006 – and that is in dispute. On the second visit to Erbil it is common ground that he did not meet Dr Hawrami. Mr Wempen regarded Excalibur's function as that of bringing the deal. He thought that it was for Gulf to do most of the rest, such as the scrutiny of the terms of the PSC and negotiating with the KRG. Origination apart, his contribution was of no practical utility. Excalibur took no part in the bid. As events after the signing of the PSC showed Mr Wempen came to expect Gulf to accommodate Excalibur with an indirect interest of some sort; and to extend time for coming up with funds. Mr Wempen's expectations were not, however, the measure of the defendants' duties.

1175. Excalibur claims that there was a mutual agreement and understanding between Excalibur and the defendants that they would act together to prepare bids for petroleum blocks in Kurdistan for profit and that this *de facto* venture gave rise to fiduciary duties. Of course each of Excalibur, Texas and Gulf was acting with a view to profit. No business does not. That does not create a fiduciary obligation even if the parties repose trust and confidence in each other and expect loyalty. Many businessmen do so in respect of those with whom they labour. But, as has been said, "*high expectations do not necessarily lead to equitable remedies*": **In re Goldcorp Exchange** [1995] 1 AC 74 at 98F per Lord Mustill.

1176. Here the parties entered into a carefully structured agreement which imposed some restraints on their commercial freedom of action. Where it did not do so they were entitled to pursue their own best interests; and, save to the extent that the agreement provided, they were not obliged to give financial, advisory or advocacy assistance. Excalibur's contention that there was an implicit fiduciary relationship between it and the defendants is, in my judgment, ill-founded and sits ill with its denial to Gulf, in the first half of 2007, of any right whatever to participate in a US owned consortium.

1177. Gulf was in any event, as I have held, not even a party to the Collaboration Agreement, and, thus, under no contractual obligations thereunder; although there was an understanding – barren of legal obligation – that Gulf might in due course become a party. In those circumstances it is almost impossible to see how Gulf was party to a *de facto* joint venture (an inherently contractual relationship in this context) unless there was some implied agreement under which Gulf and Excalibur were under a mutual obligation to submit a bid[94].

1178. That begs the question as to the applicable law of any such agreement. There is no express choice of law nor, in my judgment would the terms of the supposed contract or the circumstances of the case establish a clear choice of New York law. The Collaboration Agreement was subject to that law, but, *ex hypothesi*, it is not that agreement which is, at this point, under consideration. Since Gulf was to be doing most of the work under the putative joint venture it seems to me that it was the party required to effect the characteristic performance of the contract and that, under the Rome Convention, it is the place of its principal place of business which determines the governing law. That is not New York. In any event there was no such agreement.

1179. If it is not necessary to point to some underlying joint venture contract, then the relationship asserted is sufficiently consensual to attract, by analogy, the Rome Convention rules. If not, it is necessary to discern the proper law of the supposed fiduciary obligation. In this respect New York law does not seem to me the winning candidate. Excalibur and Gulf had, at the relevant period meetings in Florida, London and Kurdistan, but not New York. Neither of them provided services to the venture in New York. Gulf did so in Kurdistan and London where it was based. The venture related to the acquisition of blocks in Kurdistan. In those circumstances the appropriate law is not that of New York; but that of England, or Kurdistan.

1180. Neither Texas nor Gulf acted as agents for Excalibur in entering into the PSCs with the KRG. After Excalibur accepted not being on the PSCs neither defendant had any agency function in that regard.

1181. If, contrary to my view, Texas and Gulf were in a fiduciary relationship with, or owed fiduciary duties to, Excalibur, it would be necessary to determine (a) what was the nature of the duty; (b) whether there was a breach; and (c) what was the consequence.

The nature of the alleged duties and their breach

[94] If Gulf was under no contractual duty to pursue a bid in consortium, and thus free to proceed on its own contractually, it can scarcely have been under a fiduciary obligation to subordinate its own commercial obligations to those of Excalibur.

1182. Excalibur contends that the fiduciary obligation of Gulf (and Texas) obliged them to refrain from acting in their own interests at the expense of Excalibur and to disclose to Excalibur all facts material to the Collaboration Agreement and/or joint venture.

1183. They were said to have been in breach in:

a) bidding for interests in the Shaikan and Akri-Bijeel blocks for themselves rather than for the consortium as a whole without informing Excalibur what they were doing;

b) encouraging or failing to correct Excalibur's mistaken belief that it did not need to be on the PSC in order to secure an interest;

c) failing to assist Excalibur to get on the PSC by failing to relay Mr Kozel's conversation with Dr Hawrami and the latter's negative opinion of Mr Wempen/Excalibur; and failing to persuade him that his opinion was unjustified and that he should allow Excalibur to participate;

d) failing to inform Kalegran/MOL about Excalibur's involvement in the consortium and its right to share in the Shaikan and Akri-Bijeel blocks and taking no steps to obtain their agreement to its participation;

e) failing to give Excalibur an opportunity to share in the 20% interest in Akri-Bijeel; and

f) treating Excalibur as if it had no right to an indirect interest following the success of the bid for Shaikan and refusing to give it the information and documentation it needed to secure an interest.

1184. Since I do not regard Texas and Gulf as precluded from acting in their own interests or under a general duty of disclosure, the foundation for the asserted breaches falls away. I nevertheless consider the individual breaches asserted.

1185. As to (a) Excalibur, through Mr Wempen, was well aware that Gulf and Texas were bidding for a PSC for Shaikan to which it would not be a party. They were not bidding for Akri-Bijeel.

1186. As to (b) I am not convinced that Mr Wempen had any clear idea as to how and why Excalibur was entitled to any form of interest if not on the PSC. In any event, even if he was labouring under a mistake, neither Texas nor Gulf undertook a role as advisor and there is no basis from the facts for some implied fiduciary obligation to advise or correct a misunderstanding. Any obligation to correct a misunderstanding would be dependent on Mr Kozel having been aware of it and he was not; nor should he have been. If he had attempted to correct the misunderstanding it is not clear to me that Mr Wempen would have accepted his advice and acted differently: see para 316 above. Further, if, as I hold, Gulf was not a party, it cannot have been under an obligation to correct a misreading of a contract which did not bind it or to assist Excalibur to get on the PSC.

1187. As to (c) I do not regard Gulf (or Texas) as having been under a legal obligation to relay what Dr Hawrami said, but, if they were, they fulfilled it. Mr Kozel learnt of Dr Hawrami's current view in August 2007. In circumstances where Excalibur had consented not to be on the PSC it was not incumbent on Gulf/Texas to help it to do so. Even if Excalibur thought that it did need to be on the PSC (or would have done if advised that its view of the Collaboration Agreement was mistaken) there was no fiduciary duty which obliged Gulf/Texas to assist it to get there. If Gulf was not a party to the Collaboration Agreement it could have had no such duty. Even if it was a party, like Texas, it was the responsibility of the parties to secure that they got on the PSC in their respective proportions. They were not obliged to assist each other with finance or persuasion. As Mr Kozel told Mr Wempen, it was for Excalibur to sort itself out. Even if Mr Kozel had made further attempts to get Excalibur on the PSC he is not likely to have achieved anything other than to learn earlier than he did how bereft of access to capital Excalibur was.

1188. Nor do I accept that Excalibur has shown that, if it had been told in terms in July 2007 that it could not have an interest without being on the PSC, it would not only have accepted that advice but would also have secured the necessary financial and technical characteristics so as to be acceptable to Dr Hawrami as a participant on the PSC in or around October/November 2007 or early 2008. Excalibur has not established that, if supplied with the acknowledgment it claims it should have received, it could have raised the money necessary to pay its share of the signature bonus either on time or within a sufficient time to avoid a forfeiture of its interest.

1189. As to (d) Gulf/Texas did tell Excalibur about MOL and sought to persuade MOL to agree to allow Excalibur's participation. MOL's attitude was that they were prepared to do so against a guarantee, which Gulf was not prepared, or obliged, to give.

1190. As to (e) Gulf was under no obligation to allow Excalibur to participate in Akri-Bijeel.

1191. As to (f) the Collaboration Agreement either does or does not give a contractual right to an indirect interest. If, as I hold, it did not, Gulf, even if a party, was under no duty to treat Excalibur as entitled to that which the Collaboration Agreement did not provide. Nor was Texas. If the agreement did give rise to an indirect interest, the supposed duty is unnecessary and adds nothing to Excalibur's claim. As it was, Gulf was willing to allow Excalibur to participate if it could come up with the money. Mr Patrick was willing to entertain ideas of alternative structures. A letter of acknowledgment was not needed for finance raising purposes at any material time. Gulf gave Excalibur the information that it had when Excalibur signed an NDA.

1192. As to the claim based on agency, Gulf was not appointed as agent of Excalibur to negotiate a PSC on its behalf nor did Gulf accept such an appointment. Nor was it appointed on behalf of a joint venture. From July 2007 Excalibur was not to be on the PSC at all. Gulf was left to negotiate for itself and Texas.

English law

1193. Insofar as the question of fiduciary relationship is governed by English law the answer is in my judgment the same. In English law a "joint venture" has no settled legal meaning. It is a business, not a legal, term. Further, the circumstances in which

someone will be classified as a fiduciary are not precisely defined. I am content to proceed on the basis of the summary in Chapter 7 of **Snell's Equity**, approved in **Ross River Ltd v Waverly Communications** [2012] EWHC 81 at [235]-[238] per Morgan J that (i) a fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence; (ii) the concept captures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position in a way which is adverse to the interests of the principal. Whilst fiduciary relationships may arise in a commercial relationship, this is uncommon, not least because it is normally "*inappropriate to expect a commercial party to subordinate its own interests to those of another commercial party. But if that expectation is not inappropriate in the circumstances of the relationship, then fiduciary duties will arise*": *ibid.*

1194. The most familiar exposition of the nature of a fiduciary duty is the decision of the Court of Appeal in **Bristol and West Building Society v Mothew** [1998] Ch 1. In that case Millett LJ, as he then was, with whom the other members of the court agreed, said:

> "*The expression "fiduciary duty" is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility. In this sense it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty.*
>
> *… A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.*"

1195. Neither Texas nor Gulf was a fiduciary in the sense described.

Excalibur's other non contractual claims *Index*

1196. If, as I have held, Gulf was not a party to the Collaboration Agreement, Excalibur contends that Gulf either (a) tortiously interfered with the Collaboration Agreement; or (b) tortiously interfered with Excalibur's prospective interests.

Tortious interference with the Collaboration Agreement

English law

1197. Under English law Excalibur must establish (a) that Texas was in breach of the Collaboration Agreement and that (b) Gulf knowingly and intentionally induced that breach. The law has been relatively recently clarified in *OBG v Allan* [2008] 1 AC 1. That case confirms that, in order to be liable, the party concerned must *know* that he is inducing a breach of contract. It is not sufficient that he knows that he is committing an act which is, as a matter of law, a breach, if he does not believe it to be so. But blind eye knowledge, where a party makes a conscious decision not to enquire into the existence of a fact can in many cases be treated as the equivalent of knowledge. So far as *intention* is concerned a party must either intend the breach as an end in itself or as a means to an end. But, if neither of these applies, a party will not be taken to have intended a breach simply because it is a foreseeable consequence of what he does.

New York law

1198. Under New York law a plaintiff must show (a) the existence of a valid contract with a third party; (b) the defendant's knowledge of that contract; (c) the defendant's intentional and improper procuring of a breach; and (d) resulting damage: **White Plains Coat & Apron Co. v. Cintas Corp.,** 8 N.Y.3d 422, 426 (2007).

1199. As to (c):

> "*The intention prong of the interference cause of action is satisfied "if the actor acts for the primary purpose of interfering with the performance of the contract, and also if he desires to interfere, even though he acts for some other purpose in addition. The rule applies also to intentional interference … in which the actor does not act for the purpose of interfering with the contract or desire it but knows that the interference is certain or substantially certain to occur as a result of his action. The rule applies, in other words, to an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action*.""

See Judge Pratt's first report citing the **Restatement (Second) of Torts**.

1200. The inducement must also be improper. As to that:

> "*The issue in each case is whether the interference is improper or not under the circumstances; whether, upon a consideration of the relative significance of the factors involved, the conduct should be permitted without liability, despite its effect of harm to another*.": **Guard-Life Corp v. S Parker Hardware Mfg Corp.**, 50 N.Y. 2d 183 (1980), at 190.

1201. It appears, however, that ignorance of the legal effect of a contract may not provide a defence: see the **Restatement (Second) of Torts**, § 766:

> "*To be subject to liability under the rule stated in this Section, the actor must have knowledge of the contract with which he is interfering and of the fact that he is interfering with the performance of the contract. Although the actor's conduct is in fact the cause of another's failure to perform a contract, the actor does not induce or otherwise intentionally cause that failure if he has no knowledge of the contract. But it is not necessary that the actor appreciate the*

> *legal significance of the facts giving rise to the contractual duty, at least in the case of an express contract. If he knows those facts, he is subject to liability even though he is mistaken as to their legal significance and believes that the agreement is not legally binding or has a different legal effect to what it is judicially held to have.*"

It is not clear to me exactly what situation is contemplated by the expression "*the legal significance of the facts giving rise to the contractual duty*" and how the proposition that there is liability even though the actor believes the agreement is not binding fits with the proposition that the actor must know that he is interfering with the contract. Judge Bellacosa accepted, as I understood him, that ignorance of the effect of a contract may be a factor in determining whether the inducement was improper. It is not, however, necessary to resolve these issues.

1202. I do not regard this claim as maintainable under either law. Firstly, it does not seem to me that Texas was in breach of any obligation which it owed to Excalibur under the Collaboration Agreement. It was not bound to bid at all. In the event it agreed to participate for a nominal 5% against an indemnity from Gulf. That meant that it was, *pro tanto*, a party to a Consortium Bid with a Participating Interest of 5%. But, even so, Texas was under no obligation to hold any part of that 5% for, or cede it to, Excalibur. *A fortiori* it was not bound to seek a 30% interest (or a 100% one) and cede (a) its whole interest, if 30%; or (b) 30% of it, if 100%. It did not bid for 100% on behalf of itself and Excalibur.

1203. Secondly, Gulf did not knowingly and intentionally induce any breach by Texas. That was neither its primary purpose nor its desire. Nor did it know that a breach by Texas was certain or substantially certain to occur as a result of what it did. To persuade Texas to bid for a nominal percentage was not an inducement to breach the Collaboration Agreement. Gulf was not aware that anything it was doing meant that Texas would be in breach nor did it close its eyes to the possibility that that might be so. Nor was anything that Gulf did improper. Getting Texas to take a small percentage, against Gulf's indemnity, was a way of securing the PSC, without which Excalibur could not hope to participate at all.

Applicable law

1204. In those circumstances it is unnecessary, under this heading, to decide whether it is the law of New York or that of England and Wales which applies. But, as it seems to me, it is not the law of New York. Under section 11 of the **Private International Law (Miscellaneous Provision) Act 1995**, the general rule is that the applicable law should be that of the country in which the events constituting the tort occur; or, where elements of those events occur in different countries, the country where the most significant elements occurred. None of the events alleged to constitute this tort took place in New York. They happened either in London or in Kurdistan.

1205. Section 12 of the 1995 Act permits the application of the law of a country other than that identified by section 11 if, in all the circumstances, following a comparison of the various factors connecting the tort with the country whose law would be applicable under the general rule and any other country, the law of that other country appears "*substantially more appropriate … for determining the issues arising in the case, or any of those issues*". Section 12 further indicates that the factors that may be taken

into account for these purposes include "*factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events*".

1206. Excalibur submits that there are factors connecting the tort with New York which make the law of that State substantially more appropriate. The contract which has been interfered with is governed by the law of New York. The rights interfered with were New York law rights and the business relationship between Texas and Excalibur was governed by New York law.

1207. I do not accept that the fact that the Collaboration Agreement is governed by New York law makes it substantially more appropriate for the law of New York to determine this tortious claim. The general rule is not to be easily displaced; hence the need for it to be substantially more appropriate to apply another law: **VTB Capital PLC v Nutritek International Corp** [2013] UKSC 5 at [205]-[206] per Lord Clarke, approving **Dicey, Morris & Collins, The Conflict of Laws**, 15th ed. (2012), Volume 2, ¶ 35-148.

1208. On the footing on which this claim is put forward there is no pre-existing contractual relationship between Excalibur and Gulf. Neither of them is incorporated or based in New York. None of the acts or omissions occurred in New York. The tort in question is not one which is said to have led to the creation of a New York law contract. Had it been it might have been substantially more appropriate to have questions of representation and contractual terms all decided by the same law: **Kingspan Environmental Ltd & Ors v Borealis A/S** [2012] EWHC 1147 (Comm). Nor is it one, as in **Trafigura Beheer BV v Kookmin Bank Co.** [2006] 2 Lloyd's Rep 455 where an existing contractual relationship with the defendant was necessary in order to give rise to the tortious duty. There are many cases in which inducement of breach of contract has not been determined by the law of the contract: **Protea Leasing Limited v Royal Air Cambridge Company Limited** (7 March 2000, unreported); **The Amur-2528** [2001]1 Lloyd's Rep 421 per Tomlinson J at 426-427; **Anton Durbeck v Den Norske Bank** [2006]1 Lloyd's Rep 93 per Christopher Clarke J at [27]-[29].

Tortious interference with Excalibur's prospective interests.

1209. Insofar as this is a matter of English law, Excalibur no longer pursues a claim.

1210. I am satisfied that the applicable law is that of England. The events constituting the alleged interference took place principally in London and, in any event, not in New York. The alleged interference allegedly led to the loss of the PSC, an English law contract. Excalibur relies on the fact that interference with the Collaboration Agreement was the means by which Gulf interfered with Excalibur's relationship with the KRG. But interference with that contract would not, itself, be governed by English law.

1211. Insofar as the question is one of New York law Excalibur must prove that:

a) it had a business relationship with a third party, here said to be the KRG;

b) Gulf knew of the relationship and intentionally interfered with it;

c) Gulf acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and

d) Gulf's interference caused injury to the relationship with the third party and, in particular, that but for the wrongful interference, the plaintiff would have "*gotten the contract*": **Mandelblatt v. Devon Stores**, 132 A.D.2d 162, 169 (1st Dept 1987).

Amaranth LLC v. JP Morgan Chase & Co., 888 N.Y.S.2d 489, 494 (1st Dep't 2009), citing **Carvel Corp. v. Norton**, 3 N.Y.3d 182, 189 (2004).

1212. Excalibur has not established this. In view of Dr Hawrami's attitude to Excalibur from July 2007 onwards I do not regard Excalibur as having what can properly be regarded as a subsisting business relationship with the KRG. If and to the extent that it had, I do not regard Gulf as having intentionally interfered with it. Gulf did not act out of malice or use improper or illegal means amounting to a crime or an independent tort. Nor did it interfere in such a way that, had it not done so, Excalibur would have got a contract with the KRG.

1213. Excalibur also has a claim that Texas is secondarily liable under New York law as a conspirator and/or aider and abettor of the torts committed by Gulf. Since there is no primary liability there is no secondary liability either.

Conspiracy by unlawful means

1214. This is an English law claim. It fails. The unlawful means relied on are the breaches of contract, breaches of fiduciary duty and other torts relied on. Texas was not, in my judgment, in breach of contract. Gulf was not a party to the contract. The tortious claims are not well founded. Nor has it been established that Texas or Gulf intended to cause harm to Excalibur, agreed to do so, or did so.

Unjust enrichment

1215. Excalibur claims against Gulf a remedy under the New York law of unjust enrichment. That provides a remedy if the factual circumstances are such as to give rise to an equitable obligation on the part of the defendant towards the claimant. The claimant must show that the defendant was enriched at the claimant's expense and that equity and good conscience militate against the defendant retaining the benefit that he has obtained. As has been said:

> "*The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in 'equity and good conscience' should be paid to the plaintiff … In a broad sense, this may be true in many cases, but unjust enrichment is* ***not a catchall cause of action*** *to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognised tort, circumstances create an equitable obligation running from the defendant to the plaintiff. …An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim*."

Corsello v. Verizon N.Y., Inc 18 N.Y. 3d 777, 790 N.E. 2d 1177, (N.Y. 2012.

1216. In the present case the pleaded claim was that Texas and Gulf were unjustly enriched at Excalibur's expense, by the benefits they have acquired in respect of PSCs in Kurdistan as a result of Excalibur's introduction and the breaches of contract and torts complained of. In opening that was expressed as a claim to recover the reasonable value of the services rendered by it in an amount "*equivalent or close to the remuneration which the parties to the Collaboration Agreement agreed Excalibur would have if their venture was successful, namely the value of 30% of the interest the defendants have acquired as a result of the opportunity Excalibur brought to them*".

1217. If A performs services for the benefit of C pursuant to, and in the expectation of a reward, on certain conditions, under a contract with B, then ordinarily it is the contract with B to which A must look for his remuneration; and it is A's risk if the contractual conditions for the reward are not fulfilled. A cannot recover the reward from C simply because A cannot recover it from B or because C has benefited from the work.

1218. As to this see **Feigen v. Advance Capital Mgt. Corp.,** 541 N.Y.S.2d 797, 799 (N.Y. App. Div.1st Dep't 1989):

> "*There is no dispute herein concerning the fact that plaintiffs had a valid and enforceable agreement with Advance, and a nonsignatory to a contract cannot be held liable [for unjust enrichment] where there is an express* ***contract covering the same subject matter***."

and **Clark v. Daby**, 300 A.D.2d 732 (N.Y. App. Div. 3d Dep'tr 2002) at 623, quoting **Kagan v. K-Tel Ent., Inc.,** 568 N.Y.S.2d 756, (1st Dept 1991):

> "*Notably, it is the plaintiff's burden to demonstrate that services were performed* ***for the defendant*** *resulting in the latter's unjust enrichment, and the mere fact that the plaintiff's activities bestowed a benefit on the defendant is insufficient to establish a cause of action for unjust enrichment.*" Id. at 623.
>
> "*It is not enough that the defendant received a benefit from the activities of the plaintiff; if services were performed at the behest of someone other than the defendant, the plaintiff must look to that person for recovery.*" **Kagan** at 757.

1219. Excalibur performed services for Texas in respect of or incidental to the Collaboration Agreement and undertook the obligations contained in it. The fact that it was unable to obtain a reward under the Collaboration Agreement because it was ineligible, or chose not, to participate in the bid for the PSC, does not justify it in looking for some reward directly from Texas or Gulf. A claimant cannot recover in *quantum meruit* if there is "*a valid, enforceable contract that governs the same subject-matter as the quantum meruit claim.*" **Argilus v. PNC Financial Services Group** 419 Fed. Appx. 115, 2011 WL 1458700 (CA 2) (NY) (United States Court of Appeals, 2nd Circuit)[95];

[95] The facts are not dissimilar to the present case. Williamson sought to acquire Griffith, an oil company. Williamson promised Argilus a fee if it did so. Williamson, Argilus and PNC were then involved in the effort to acquire Griffith. That failed. Later PNC did acquire Griffith. Argilus failed to recover the fee or any *quantum meruit* because the work that it did for Williamson was governed by the agreement with Williamson and the claim against PNC was thus foreclosed as a matter of law.

and several other cases to the same effect. The Collaboration Agreement is such an agreement.

1220. Judge Pratt accepted the following example:

> "*MR JUSTICE CLARKE: What I understand you to be saying is that if, to take the examples put to you, A and B have an agreement to develop the golf course, that agreement will contain a bundle of rights and obligations, whatever they may be. In relation to the golf course, A may have rights against B, in which case he can enforce them and if B is insolvent that's bad luck, or he may not have rights against B, but if the position is either that he can't enforce against B because B hasn't got any money, or he hasn't got any rights against B anyway, there is no justice and equity in regarding somebody who ex hypothesi is not a party to the contract to have to account for benefit that he receives in relation to the development of the golf course because of the way in which things have turned out as far as the operation of the agreement between A and B is concerned.*
>
> *A. Yes, I agree with that*."

1221. The claim against Texas and Gulf fails for a number of reasons. First, because its subject matter is governed by the Collaboration Agreement. If it has no claim thereunder the principle of unjust enrichment will not avail it either against Texas, a party, or Gulf, if it was a party or Gulf if it was not. Secondly, I do not regard it as correct to say that any enrichment of Gulf has been at the expense of Excalibur. That cannot be so if Excalibur could not in practice have participated in the venture, as seems to me to be the case.

1222. Thirdly, I am not in any event persuaded that Texas or Gulf have been *unjustly* enriched. If Excalibur was entitled to an indirect interest under the Collaboration Agreement, its rights must be governed by that agreement. If, as I hold, it was not so entitled, it seems to me that the offer of a farm in was amply sufficient consideration for such contribution as Excalibur had made. It does not seem to me that justice or equity demand that Excalibur, which has borne none of the severe risk and high cost of exploration in Kurdistan, because it lacked technical competence and financial clout, should now – and after opportunistic delay in the bringing of proceedings – receive in effect an enormous risk free reward.

1223. In any event it does not seem to me that the matter is governed by the law of New York. The claim against Gulf arises on the hypothesis that Gulf was not a party to the Collaboration Agreement. The claim is based on a duty on its part to pay Excalibur 30% of the value of certain Kurdistan oil fields in return for its origination of the deal and other services. That origination was in Kurdistan and such services as were performed were not performed in New York. In those circumstances it does not seem to me that the relevant law is to be determined by a contract into which it did not enter and that the proper law of the obligation to make restitution should be the law of that country with which the activities which are said to give rise to the obligation have their closest and most real connection. That is not the law of New York. It is probably that of Kurdistan where the origination began and the enrichment occurred.

2008

1224. I return to the narrative.

1225. On **27 December 2007**, David Williams of Cadwalader Wickersham & Taft ("Cadwalader") emailed Mr Kozel to say that he had been retained to represent Excalibur's interest.

1226. On **7 January 2008**, David Williams proposed to Mr Kozel a settlement consisting of an upfront payment of $ 750,000 and a $ 500,000 success fee if and when oil was discovered, together with an origination letter. This was in response to an offer which Mr Kozel had made where the figures were $ 500,000 /$ 500,000.

1227. On the same day, Mr Wempen emailed Eric Wempen a draft letter for Mr Williams. That letter was to ask Gulf for two letters: a settlement letter and an origination letter. The first letter was for tax purposes and was to refer to Excalibur's interest in the Collaboration Agreement. As the draft letter to Mr Williams was to tell him: "*We don't want to mention the Shaikan block in this letter*". This was because the sale of an interest which has been held for more than a year is taxed at a preferential rate under US Capital Gains Tax law. The second letter was to refer to the buyout by Gulf of Excalibur's share in the "Shaikan Block agreement" i.e. the PSC, of which Excalibur was to be described as the originator.

1228. The following day, **8 January 2008**, Eric Wempen emailed a revised draft. It read:

> "*...Since my only claim to the deal is through the Joint Bid Agreement, an asset I have held much longer than 1 year, I shouldn't have a problem obtaining the desired tax treatment, provided that the buyout is structured as a sale of my contractual interests under the contract. On the other hand, if the buyout is structured as a sale of my rights to the Shaikan partnership* ***(which I currently have no interest in****), my ability to claim a long-term holding period would be greatly reduced*."

The draft then suggested that *the settlement agreement* be in consideration of Excalibur's interest in the Collaboration Agreement and *the origination letter* should acknowledge an agreement to buy out "*Excalibur('s) … share in the Shaikan Block Agreement,…We appreciate your successful efforts to originate the transaction*".

1229. This was an attempt to have it both ways, when both cannot be right. The claim in the draft origination letter that the proposed settlement was a purchase of rights in the PSC would either have been true, in which case the US Internal Revenue Service (IRS) was to be deceived; or false because it was not those rights that Excalibur was to dispose. The only way of squaring that circle is to contend, as Eric Wempen did, that Excalibur had no interest in Shaikan for tax purposes (because it was not on the PSC) but, under the Collaboration Agreement, a legal right to an interest, which right would not be treated as equivalent to an interest in the PSC for tax purposes. In circumstances where Excalibur claims to be entitled to specific performance of an alleged entitlement to an indirect interest this distinction appears somewhat contrived; and, even if it were valid in US tax law, about which I express no view, would mean that the acknowledgment letter which Mr Wempen had asked for in 2007, which stated that there was an actual interest, was inappropriate – as was any reference to a "proprietary share" or the like.

1230. The true position, in my judgment, was that the IRS was not about to be deceived. Excalibur had, as Eric Wempen pointed out, no interest in the PSC of any kind nor (although Excalibur does not accept this) any right to one.

1231. On **22 January 2008**, Mr Wempen and Eric Wempen exchanged emails about the need for two letters, one for tax and one for "*legal, security clearance and also origination purposes*". Mr Wempen sent his brother a draft of an email to Mr Williams. In it he said that he needed an origination letter; that "*they need to pay me and get rid of me*"; that he needed the letter to mention his role; and that he was highly concerned about receiving a payment from an offshore entity "*in the present national security environment*" because his security clearance was under review and any complications were the last thing he needed. A further draft by Eric Wempen of an email to Mr Williams, based on Mr Wempen's own draft, dealt with the need to show that any funds from which the payment to Excalibur was to be derived were based on legitimate business activities and for some protection if Gulf engaged in some legally questionable activities in the future or if the legalities of the PSCs came under international scrutiny. At this time, as Mr Wempen was aware, the US authorities had disapproved of the Hunt Oil deal with the KRG and had said that such deals could have no legal standing and might hurt peace prospects in the area.

1232. On **24 January 2008**, Mr Eric Wempen drafted a memorandum discussing the characterisation of the sale of Excalibur's '*interest*' to Gulf, intended for submission to the US tax authorities. It noted that Excalibur had entered a joint bid agreement with Texas (not Gulf). The email included the following:

> "*Excalibur sold all of its contractual rights in the Joint Bid Agreement to Gulf on February XX, 2008. Since the contractual rights are capital assets and Excalibur obtained them on February 2006, the rights had been held for greater than 1 year, Excalibur is entitled to long term capital gain treatment.*
>
> *With respect to the second payment, Excalibur* ***never owned an interest in*** *the Shaikan block and was never party to the joint venture between Gulf and MOL...*"

The second paragraph was true.

Settlement negotiations

1233. Excalibur pressed for settlement. On **18 January 2008** Mr Williams of Cadwalader asked for a response to his 7 January proposal. On **31 January 2008** Cadwalader emailed to Mr Kozel a draft "*sale agreement*" and letter in connection with Excalibur's alleged interest in the Shaikan block. It provided for a sale of Excalibur's alleged interest in Shaikan under the Collaboration Agreement and a mutual release in exchange for a $ 500,000 payment and a further $ 500,000 in the event of the discovery of oil. Cadwalader also attached the draft acknowledgment letter that referred to Excalibur's interest in the PSC (which he was not supposed to have for tax purposes). Cadwalader chased Mr Kozel again on **28 February** and **7 March 2008**. Discussions continued between Mr Powell of Jones Day representing Texas and Mr Williams of Cadwalader.

1234. On **24 March 2008**, Jones Day emailed a revised "*settlement*" agreement. On **1 April 2008** Excalibur dropped its demand for an origination letter, although it continued to insist that the agreement be in the form of a "*sale*" agreement, apparently for tax purposes.

Developments with the Shaikan concession

1235. Excalibur was looking to see what was happening with the Shaikan concession. On **2 April 2008** Eric Wempen emailed his brother with the news that Gulf had started seismic work in Kurdistan. He noted that:

> "*If they finish (or know what the outcome will be) before we conclude negotiations, it will either be very good or very bad for us.*"

1236. On **11 April 2008**, Eric Wempen was anxious to know whether his brother, who had just spoken to Azzat, had found out from him whether the seismic was successful. Mr Wempen replied that Azzat had not said so, adding: "*The big thing is whether they drill a successful well*". He said that if the seismic results were positive, he wanted to readdress with Cadwalader the "*merits of [the] case*". The Wempens appreciated that, if the seismic was negative, Excalibur's chances of a substantial settlement would recede, in which case it could walk away without payment, whereas if it was positive it could increase its demands. Meanwhile Gulf was taking all the risk, and Excalibur was not in a position to pay any expenses.

1237. On **2 May 2008** Mr Wempen emailed his brother to say that things were "*not working out as planned on contract sale*", i.e. the settlement negotiations. He suggested that he should contact Azzat and "*ask for Dabin's help in getting the 30% back, in exchange for giving them 50% of what we would finance*". The idea appears to have been that Excalibur could somehow re-acquire the 30% and then become 50/50 partners with Dabin in respect of that. A few minutes later he suggested:

> "*Or I could offer the 50% to Barzani for getting it back...it may be difficult to get another deal done. I don't have another company waiting in the wings*."

1238. This must have been a reference to the Prime Minister. Mr Wempen said the idea of a 50% offer to Mr Barzani was just a joke. The phraseology does not suggest that and I do not think it was. It was another wild idea. The Wempens had had ideas about a Barzani pay off before: see para 939.

1239. On **18 May 2008** Eric Wempen emailed his brother to say that he had been looking at Gulf's website, and had seen the announcement that the seismic finished on **19 April 2008** and a Gulf report that the progress being made on both Shaikan and Akri-Bijeel was outstanding. He commented to his brother, "*if it's looking good, that may bode well for the home team*" i.e. Excalibur.

1240. On **6 June 2008**, Jones Day sent a further version of the proposed settlement agreement. Excalibur had by now entered into discussions with a potential financier called Prime Natural Resources and wanted to get back into the deal. On **24 June 2008** Cadwalader told Jones Day that:

> "*….Excalibur has a major new potential financial investor and Excalibur and the investor would be interested in exploring with your client Excalibur's return to the deal by fully financing its portion of the PSC*"

1241. On **1 July 2008** Cadwalader sent a further letter to Jones Day, rejecting Jones Day's mark-up of a settlement draft and reiterating its offer that it would "*fully finance its share in accordance*" with the Collaboration Agreement, but:

> "*If we cannot proceed on this basis, Excalibur fully reserves its rights under the Collaboration Agreement and otherwise, and will revisit its options once the exploratory drilling phrase is complete. We believe that the completion of that phase will lend clarity to the circumstances faced by the parties in resolving their difference through litigation or otherwise*."

Excalibur's activities in the first half of 2008

1242. In the first half of 2008 Mr Wempen offered to help Occidental Petroleum to complete the pre-qualification submission forms for bidding for exploration licences in Southern Iraq; but nothing came of that. On **1 February 2008** Eric Wempen spoke with Mr Javellana who came up with a proposal to form a Special Purpose Acquisition Company ("SPAC"). This was not related to Kurdistan. The idea, as Eric Wempen explained, was to get retired or semi-retired senior executives on board, raise some cash e.g. $ 100 million and identify an acquisition target in a high growth or large field.

1243. In late February 2008 Mr Wempen produced a term sheet for a new fund – River Resources LP – whose focus was to be on exploration opportunities in 8 countries. This was an idea very similar to the Thames Chesapeake fund. The fund's "international investment Advisor" was Excalibur. The partners were listed as Paul Behrends, Dan Franchi, and Mr Wempen. One idea was that that fund would invest in the SPAC.

1244. Nothing came of the River Resources fund. On **18 April 2008**, Mr Wempen sent the SPAC material to a Mr Burt of BMA Securities, asking for advice and interest. Mr Wempen had spoken to another bank called Maxim but it was only prepared to do an "*initial deal*" on "*very expensive*" terms. Mr Wempen said to Mr Burt, "*I don't think Dan and I have more than $100k between us to put into this, and they [sc. Maxim] want $1.3 million to raise 10*". In other words Maxim wanted a 13% capital contribution from Mr Wempen if they were to invest in the SPAC, but he and Mr Franchi could only raise $100,000. Mr Wempen confirmed that "*without selling our homes, or doing something drastic certainly that's correct*".

The Hungarian Ambassador

1245. In **April 2008**, Mr Wempen planned to meet the Hungarian Ambassador to the United States in Washington to discuss the "*MOL situation*". In the event, the meeting did not take place. Mr Wempen sent Eric Wempen a draft of the speech he was going to give. The draft said that MOL had a contract in Kurdistan only because of Excalibur, but:

> "*Now, they appear to be cutting us out of the deal. To many in Congress, it appears that an American company, led by a volunteer who fought in the*

> *battle of Kirkuk, who made this deal possible, is being ripped off by a Hungarian company (not sure whether I want to include that part on Kirkuk or not..).*"

This rant (as Mr Wempen characterised it in evidence) was absurd in the light of MOL's willingness to have Excalibur as party to the JOA subject to a Gulf guarantee. The draft also claimed that Excalibur had a right to 30% of any deal.

Prime

1246. In **May 2008**, after the positive seismic indications, which improved the financial landscape somewhat, Excalibur entered into discussions with Prime Natural Resources ("Prime"), a Cayman Islands company, which was funded by Elliott Associates LP, a New York hedge fund, and Hilwood Development Corporation, a private real estate and oil and gas company. Mr Wempen had been introduced to Prime by Robert Gordon ("Mr Gordon"), the Washington representative of the KAR Group, a Kurdish sub-contractor to Prime. Hawler Energy, a subsidiary of Prime, was a party to the Bina Bawi PSC awarded by the KRG on 6 March 2008.

1247. Mr Wempen approached Prime both for funding Excalibur's legal claim and for financing its claimed interest in the Shaikan PSC. On **12 June 2008**, Cadwalader wrote to Prime's lawyers, Akin Gump, to follow up on the interest that Prime "*expressed in purchasing a portion of the interest of [Excalibur] in the Shaikan Block*".

1248. On **18 June 2008**, Mr Wempen, with Eric Wempen's assistance, prepared a large bundle of documents to send to Akin Gump, setting out Excalibur's case and its allegations about the Shaikan bid. These included Mr Patrick's email of 23 November 2007, the Deed of Adherence signed by Excalibur, the NDA, the draft assignment of March 2007 and the draft origination letters of 18 November 2007. The Wempens prepared a draft covering email from Mr Wempen to accompany the bundle:

> "*...I would like to note that in addition to making a cash call without convening the operating committee required by our previous agreement, Gulf Keystone unilaterally brought MOL, another oil company, into the deal thereby substantially diluting my interest. When Keystone provided me with a deadline for a cash call which I could not possibly meet through outside sources and then refused to discuss financing options, I turned to the only other partner in the deal. When I contacted MOL though their legal counsel in order to explore buyout of financing options, this embarrassed Keystone as they had failed to fully explain to MOL our pre-existing contractual relationship*."

1249. This was inaccurate. Gulf brought MOL in because Dr Hawrami wanted a company with a big balance sheet. Mr Wempen was agreeable to it being brought in. If it was brought in dilution was inevitable – of the interests of both Excalibur and Gulf. There was no good reason why it should not apply to Excalibur. Noticeably the draft made no mention of a denial of title. Gulf was embarrassed because Mr Wempen had gone behind Mr Kozel's back.

1250. Prime was not impressed with Excalibur's claim. On **19 June 2008** Mr Jan Veldwijk of Prime emailed Mr Gordon to report on a discussion he had had with Mr Wempen:

> "*I talked him through our views which he called disappointing.*
>
> *I shared that since they actually had made him the offer to obtain his 30% of their interest (24% in the PSC), they had fulfilled their obligations.*
>
> *The cash call they made was primarily for the sign on bonus, which has nothing to do with the operating committee but is a PSC requirement*.
>
> *I told him that we would advise him to try to restart the option to buy in alternatively he could see how far his settlement amount could be stretched.*
>
> *Also shared that should he be successful in getting the option to buy in back on the table, we would be interested to start a discussion about financing him…*"

His analysis was correct.

1251. In the light of the view that it took Prime was not prepared to provide litigation funding. It was, however, prepared to offer finance to Excalibur provided that it could become party to the PSC.

1252. On **20 June 2008**, Mr Veldwijk emailed Mr Wempen to say that KAR Group and Elliott Group were:

> "*interested in providing financing for minority shareholders in PSCs in Kurdistan.*
>
> *Should you be able to revitalize your option to become a party to the PSC, we are certainly willing to discuss financing your company to fulfil the obligations you would take on under the PSC.*"

The reference to revitalising Excalibur's option to become a party to the PSC was a reference to the farm in offer contained in Mr Patrick's email of 23 November 2007. Prime's requirement that Excalibur should get on the PSC was never cancelled.

1253. Mr Veldwijk said that his initial thoughts were that Prime should finance 100% of Excalibur's share of the obligations under the PSC in return for "*50% of your interest in the PSC (assigned but we do not expect to become a party to the PSC*)". Any initial income was to be used first to repay the investment including a preferential return of 12% and then there would be a 50/50 split.

1254. Excalibur points to the fact that Prime was prepared to consider financing it, without requiring a business plan, audited accounts or requiring a change to Excalibur's management. When, on 22 May 2008, Prime signed an NDA Gulf had announced that seismic had finished (on April 19 2008), that they were proceeding to drill an exploration well on Shaikan and that the progress on both blocks was "*outstanding*" ("*So if it's looking good, that may bode well for the home team*" – as Eric Wempen put it), and Mr Wempen knew from speaking to Mr Mackertich that the seismic had found a structure. But there had been no announcement of any seismic results. (Gulf

made an operational update confirming the existence of a structure on 25 June 2008). Further positive seismic, although it de-risks the project (as Mr Park put it), is of limited significance. It tells you whether there is a drillable structure and its size, depth and closure[96] but does not tell you whether oil is present.

1255. Excalibur submits that Prime's position at this stage is an indication that there were private investors who did not take the dim view of Excalibur which the defendants suggest such investors would take, who were prepared to invest, and who would act with expedition and did not require financial contribution from Excalibur. However, in May 2008 matters were more advanced than in 2007; Prime was at this stage only prepared to enter into discussions; and it always insisted on Excalibur being on the PSC. It was not prepared to consider financing otherwise.

Excalibur tries to get onto the PSC

1256. In the light of the Prime proposal, on **24 June 2008** Eric Wempen produced a draft of a message to be sent to Cadwalader (and by them to Gulf) saying that Excalibur would like to "*request re-engagement in the PSC based on Prime's financial backing*". The wording he proposed to be sent to Gulf was that Excalibur "*has acquired a major financial backer and is now prepared to fully finance its portion of the PSC.*" This was further than Prime had agreed to go ("*willing to discuss financing*"). The email that Cadwalader in fact sent to Jones Day was more restrained (see para 1247 above).

1257. Excalibur now considered making use of its political connections. On **25 June 2008**, Mr Wempen emailed his brother draft letters to be sent to Prime Minister Barzani from Senator Colburn and Congressman Rohrabacher. The draft letter from Senator Colburn read:

> "*By contract, Gulf Keystone owes 30% of their block to Excalibur Ventures, however due to the haste with which the original PSC was signed, Excalibur Ventures was not able to participate as a signatory to the PSC. We ask that this be remedied at this time.*"

This explanation was untrue. Excalibur's inability to participate in the PSC was not the result of haste in the signing of the PSC.

1258. On **27 June 2008** Mr Wempen sent Congressman Rohrabacher two letters and asked him to call the KRG Prime Minister. One of the letters appears to have been intended to be sent by Mr Wempen with the Congressman's endorsement. It read:

> "*Please help us attain justice in this matter. We have the financial backing to honor our commitments, and we look forward to investing in Kurdistan.*"

That, too, was misleading. Prime had only said it was willing to enter into discussions regarding the provision of finance. It had not agreed to back Excalibur.

1259. Prime remained concerned that Excalibur was not on the PSC. On **1 July 2008** Mr Veldwijk emailed Mr Gordon to tell him of a conversation with Mr Wempen:

[96] The actual seismic showed that there was only one drillable structure when more had been hoped for. It was also of questionable quality on the Western side of the structure. It did not improve the picture much.

> "*He requested that we would not make a distinction regarding the name of Excalibur being on the PSC.*
>
> *I shared with him that his partner was not a very large company either and that should they default under the PSC, we would have no ability to safe[guard] our investment.*
>
> *He understood that this was an issue, but was concerned that he would not be able to get his name on the PSC*."

1260. Prime was understandably concerned that, if Gulf defaulted, it risked losing any interest or security on account of that default so that it would be taking a double risk – on Excalibur and Gulf. Mr Wempen made two further unsuccessful attempts to have the condition removed.

1261. On **7 August 2008**, Mr Gordon reported to Mr Veldwijk on further discussions with Mr Wempen. Mr Gordon recorded Mr Wempen as having said that "*there is no way that Excalibur will be named on the PSC even if he wins*". This was the second attempt to persuade Prime to relax its condition that Excalibur be on the PSC. Mr Veldwijk replied: "*The issue of not being on the PSC is an important issue, which we have to think through. Should Key Stone default for whatever reason on the PSC, the rights that Excalibur has are only against Key Stone, not under the PSC. The contract (new one?) between Key Stone and Excalibur would become very important*."

1262. Nothing seems to have happened vis-à-vis Prime for a couple of months. On **29 September 2008** Mr Wempen emailed Mr Gordon to ask whether Prime would still back Excalibur. Mr Gordon said he would look into the matter. Mr Wempen suggested that the KRG was taking a look at Excalibur's case and that it "*want[ed] to be sure that we have the backing for our bid to take back our share*". Mr Gordon asked for details so that he could "*make as strong a case as possible to reopen this discussion*" with Prime.

The further approach to UBS

1263. On **21 July 2008** Mr Wempen emailed Messrs Loeffler and Van Os. He noted that in November 2007 UBS had indicated it was not able to work on financing partial ownership percentages of oil blocks but only full blocks. He now offered a new proposal:

> "*At this time, my partners and I are forming a new consortium to compete for remaining blocks, and I wanted to re-open our discussion. Would UBS consider signing on to support a deal before the bid is won?*"

UBS did not reply.

1264. On **21 August 2008**, Eric Wempen emailed Ms Michelle Grajek of the KRG representative office in Washington. He said that "*UBS is considering entering into some oil infrastructure deals/transactions in the KRG*" and asked for some information on local companies engaged in the oil exploration and/or oil development industry who could assist. Eric Wempen said that he wrote this following an inquiry from a senior energy trader who was interested in UBS doing something with Mr

Wempen in Kurdistan, possibly in relation to pipelines. I have considerable doubts as to that.

1265. On **29 September 2008** Mr Wempen drafted another letter for the KRG expressing the belief that Excalibur and its new joint venture companies could make a positive difference in Kurdistan. This approach was, as he accepted, part of Excalibur's attempt to persuade the KRG to sanction a farm out to Excalibur of an interest in a PSC, not necessarily Shaikan, as were the emails of 21 July and 21 August 2008.

Excalibur's letter to the KRG

1266. On **8 October 2008**, Cadwalader sent a letter on behalf of Excalibur to Mr Qubad Talabani, the KRG's representative in the United States. This was a formal letter of complaint following a meeting on 12 September 2008. The letter, which referred to Gulf and Texas as Excalibur's joint venture partners, claimed that Excalibur had been unjustly cut out and requested that Excalibur's "*investment consortium*" be admitted to the PSCs in respect of Shaikan and Akri-Bijeel. It claimed that Excalibur had "*assembled a strong team of new joint venture partners and gathered the necessary funding for a major participation in one or more Kurdistan PSCs*". This was, according to Mr Wempen, a reference to Prime. But Prime was not a joint venture partner and had not promised the necessary funding. Nor had Excalibur gathered any team. The proposal was that the KRG should use the option of Government participation contained in the PSC to award the consortium 20% in Shaikan and 10% in Akri-Bijeel on the footing that Excalibur's 24% entitlement in respect of Shaikan should be covered by the 20% and the increase of its 6% entitlement in respect of Akri-Bijeel (30% x 20%) by 4%.

1267. Attached to the letter was a timeline, in which "*Keystone*" is described as a "*consortium of Texas Keystone and Gulf Keystone, both run by Todd Kozel*" but in which the Collaboration Agreement is described as having been entered into with Texas, "*affiliated with Gulf*". In the timeline Excalibur claimed that, pursuant to the Collaboration Agreement, Excalibur was "*not required to have funding in-hand upon award of a PSC*" but that "*Keystone contractually agreed to float Excalibur's portion until it Excalibur could obtain funding...*". Excalibur stressed that it was an "*integral part and centerpiece of Excalibur's contractual arrangements*" that it did not need to have funding in-hand upon award of a PSC, that no timeline was ever provided for by contract for Excalibur's funding responsibilities, that Gulf was contractually prohibited from using Excalibur's delay in fundraising to exclude it from the PSC because Gulf (sic) specifically agreed to float Excalibur's portion until it had funding in hand in return for LIBOR + 2% interest under Article 2.5 of Schedule 1 of the Collaboration Agreement, and that Excalibur's funding requirements were "*secondary and unnecessary for Excalibur's role*". These were all misconceptions. The Collaboration Agreement contemplated a side by side participation and reflected the basic principle in oil exploration that each party has to pay in proportion to its interest in respect of amounts becoming due under the PSC when they become due. Excalibur received no response to this letter, either written or oral.

Prime makes a financing offer

1268. On **29 October 2008**, Excalibur sent Mr Veldwijk a draft letter of intent for Prime. Mr Wempen suggested that there could be a "*golden opportunity*" to push for an

additional farm in with respect to Akri-Bijeel or other comparable block "*based on Excalibur's legal claim*". The Excalibur draft provided in clause 7(b):

> "*Prime's agreement to finance Excalibur's Participation Interest as provided herein shall not be affected by whether Excalibur or Prime is signatory to the PSCs or to any other contracts relating to the Shaikan or Akri Bijeel blocks or any Comparable Blocks to which the KRG is a signatory.*"

This was Excalibur's third attempt to get the condition of getting on the PSC removed.

1269. On **11 November 2008**, Prime sent Excalibur its draft letter of intent (in the name of Strategic Venture Capital Ltd, a member of the Elliott Group). The terms were expressly stated to be non-binding. They included:

> "*2. Conditions Precedent to Financing. SVC's obligation to provide funding to Excalibur in connection with the PSC (either directly or through a SVC Lender) would be conditioned upon Excalibur becoming a party to the PSC and assigning fifty percent (50%) of its interest there under to SVC. Prime's obligation to provide funding to Excalibur in connection with the PSC (either directly or through a Prime Lender) would also be conditioned upon the completion of usual and customary due diligence in connection with the Proposed Financing Transaction.*"

The 100% financing was in exchange for 50% of Excalibur's interest in the PSC. This was, therefore, to be an acquisition of an interest in the PSC. Any advances were to be at an interest rate of 15% above LIBOR compounded semi-annually (a rate the Wempens had not expected). The proposal was accompanied by a spreadsheet, which indicated (albeit only in a line) the structure of the deal: there would be a NewCo structure owned partly by Excalibur and partly by Prime, to which Excalibur's PSC rights would be assigned[97].

1270. On **19 November 2008**, Eric Wempen sent his brother a long email discussing the Prime proposal. He did not fully understand the contents of the spreadsheet. He thought that Excalibur should ask for an upfront payment because, as he noted, "*Prime will only fund if Excalibur/Prime is given an interest in the PSC. Once this happens, Prime will have something of value which it can sell*". He also thought there should be "*Tiered Interest Payments*" with the rate reducing if the field was not as successful as the spreadsheet calculations assumed. This was intended to avoid a situation where Prime recovered something and Excalibur nothing. Excalibur should, in his view, "*hang tough*". He thought what was on offer was unreasonable, especially since Prime would not agree to fund the litigation.

1271. On **22 November 2008**, Mr Gordon emailed Mr Veldwijk to report on his discussions with Mr Wempen who, he said, was complaining about the interest rate and wanted an upfront payment if Excalibur got back into the deal. Mr Gordon had told Mr Wempen that the deal was risky because of the "*lack of a solid claim*" and the small size of the

[97] It is not clear to me how well Mr Wempen understood the structure proposed. His evidence displayed a somewhat obtuse failure to distinguish between an investment in the equity of Excalibur, the purchase of an asset of Excalibur and an investment in a new company which had acquired an asset from Excalibur.

field. Mr Veldwijk replied that an upfront payment was possible but that in return the interest rate would rise dramatically to reflect the increased risk. His view was that Mr Wempen was lucky that Prime had offered 15% on a "*high risk deal*"; in short, Mr Wempen had "*a hell of a deal*".

1272. On **23 November 2008**, Mr Gordon duly reported to Mr Wempen that an upfront payment was possible, but that the interest rate would go up, and 15% was the lowest interest rate Prime would accept, which was a good deal given the "*uncertainty, risk and current market conditions*". Mr Wempen had suggested paying no interest at all, with Prime simply taking 50% of Excalibur's interest. This was an unrealistic position.

1273. Excalibur continued to try to improve the terms. On **24 November 2008**, Eric Wempen emailed Mr Gordon seeking to explore a tiered return. Mr Gordon emailed back: Prime was not prepared to accept any lower interest rate; it thought that this was a "*sweet deal*" for Excalibur and was growing impatient. Mr Gordon advised him to accept the terms; there was no other option to offer: "*Don't be the guy who can't take 'yes' for an answer*".

1274. On **1 December 2008**, Mr Veldwijk emailed Mr Wempen to say that Prime was willing to make a payment of $ 1.5 million to Excalibur if it was officially added to the PSC, but on terms that it increased the interest rate to 17.5% (from 15%) compounded semi-annually and the split in the economic interests became 60/40 in its favour (from 50/50) – "*pretty harsh terms*", as Mr Wempen described them to his brother.

1275. The next day, **2 December 2008**, Mr Wempen replied to Mr Veldwijk, saying that since Prime seemed to be well compensated in either case, he would appreciate it if they could have both alternatives worked into a letter of intent. Mr Veldwijk did not appreciate this remark, saying:

> "*Regarding your initial remark, I believe that is incorrect. We are putting up the money for an investment, which has many risks, such as reservoir risk (there might be no hydro carbons (!!!) and other risks such as country risks. There is a potential that there could be no returns to us, whilst your investment is pure sweat equity and you have the right to take 1.5 Million out irrespectively.*"

1276. Eric's reaction was as follows:

> "*This is obviously ridiculous – since he said to let him know whether this 'is preferred' over the earlier proposal, he obviously doesn't want to make an upfront payment. Kind of stupid not to come out and say it. He seems ready to pull out, so it probably makes sense to go ahead and execute the* ***nonbinding*** *letter without the upfront payment as soon as possible (and make sure it's non-binding). He's still not planning to help out at all with negotiations, right? So really all they are is a back-up. Even Robert said you'd need to 'watch' Prime after signing the deal – i.e. 'Don't trust Jan'.* ***If Gulf caves****, you can probably shop it around big time, and we'd make sure that the 'due diligence' period would be long enough to obtain another funding source... In fact if oil is found Excalibur might even make more $$ by spurning Prime's*

> *offer and just suing in court…and a settlement offer will obviously be much higher. We probably only have a few more months of this anyhow until we know*."

1277. On **5 December 2008**, he emailed Mr Veldwijk as follows:

> "*We accept the choice of options, but do not wish to commit immediately to one or the other as our own internal situation may change in coming months. In all likelihood this will not be resolved immediately*."

1278. The upshot of these negotiations was, therefore, that Prime made a non-binding offer of two options for finance. Both were conditional on Excalibur getting on the PSC. The terms on offer were very stringent involving interest rates of 15% or 17.5% compound, and a 50/50 or 60(Prime)/40(Excalibur) split of the interest according to whether or not an upfront payment was made. Although the choice of options was "accepted" the non-binding letter of intent was never signed. Excalibur did not want to commit to anything. The plan was to wait and see how Shaikan developed in the hope that, if oil was found, finance on better terms would probably become available and that Excalibur might do better by suing. Meanwhile the Prime offer could be used as a backup to support any approach to Gulf.

Cadwalader's letter - 5 December 2008

1279. On **5 December 2008** Cadwalader wrote to Jones Day noting Gulf's possible farm out of its interest in Shaikan (which had been the subject of a press release) saying:

> "*Excalibur currently has funding sources ready to invest in the Shaikan Block and is prepared to fund its interests pursuant to the original terms of our agreement, as well as to purchase any additional interests that Gulf may seek to farm out. We remain optimistic that we can continue our business relationship in a cordial manner and are, of course, amenable to negotiating the structure of the buy-in in a way that meets with Gulf's approval.*
>
> *Please note that Excalibur continues to assert its legal right to an interest in the Shaikan Block pursuant to the terms of the 2006 Joint Bid Agreement. As noted, we hope to work with Gulf and Texas Keystone to reach a mutually acceptable agreement on a buy-in arrangement that would resolve Excalibur's claim. However, if we are unable to reach such an agreement, Excalibur intends to protect and enforce its legal position as to Gulf and Texas Keystone, as well as to any subsequent transferee of Gulf's and/or Texas Keystone's interests*."

Mr Wempen had provided Prime with a draft of this letter in advance and they had said that they raised no objection to him sending it. As is apparent, Excalibur was not by its offer insisting on going back on the PSC, although the only finance potentially available to it made that a condition.

Prime's further letter of intent

1280. On **15 December 2008**, Prime emailed Excalibur a further letter of intent. The terms were again expressed to be non-binding and the financing was subject to conditions

precedent including Excalibur becoming party to the PSC. The letter gave Excalibur the option of financing based on a 50/50 share of Excalibur's interest financed at 15% per annum, or a 60/40 split at 17.5% per annum with an upfront payment of $ 1.5 million. Interest was, as before, to be compounded semi-annually. There was a corporate governance provision that, whilst any money was outstanding to Prime, Excalibur should not be entitled to cast any votes or make any decisions in connection with the PSC and Prime would nominate the Excalibur representative on the operating committee. Prime also had the right to conduct six months' due diligence, during which Excalibur could not seek financing from elsewhere. (This would have enabled them to see how the seismic and drilling went and then, at the end, decline to provide any finance at all).

1281. These terms were unacceptable to the Wempens. On **16 December 2008** Eric Wempen emailed his brother:

> "*Hey,*
>
> *It just gets worse and worse, doesn't it? In my view, this is significantly worse than the first version, and since we haven't heard anything yet from Gulf, there's probably no reason to execute it immediately.*"

1282. He advised Mr Wempen to "*let things simmer*" for a couple of weeks; and to seek to delete the exclusive due diligence period. Mr Wempen thought that "*These guys are not better than Todd on the severity of the terms are they? Just more up front...slightly more up front...*". Eric Wempen said that Prime was trying to get away with whatever it could and "*having a great return while limiting you to nothing*" and ended by saying: "*In the end, if we play ou[r] cards right and bide our time, the bargaining position will change, maybe even to where we just don't need them.*"

1283. By contrast, Mr Wempen characterised Prime in his evidence as "*certainly the best partner we could ever wish for*". In fact Prime was the only potential partner that Excalibur had; but it never had any contractual entitlement to any money from them; and the non-contractual terms on offer were deeply unattractive to it.

Gulf's exploration activities in Kurdistan

1284. Gulf prepared a corporate overview in early January 2008, which suggested that the Shaikan prospect might have the potential to be in the range of 100 to 300 million barrels of oil. In the event this turned out to be a considerable underestimate. On **11 January 2008**, the first operations committee meeting for Shaikan took place. An extensive work development programme for the block commenced and continued thereafter: see Annexe 1 to Mr Gerstenlauer's statement.

Eureka

1285. On **28 April 2009**, Gulf announced the spudding (i.e. commencement of drilling) of the first Shaikan exploration oil well. After extensive drilling and exploratory works, oil was discovered at Shaikan on **3 August 2009** and was announced to the market on **6 August 2009**.

1286. The work of exploration and appraisal has cost hundreds of millions of dollars. Gulf International had paid nearly $ 254 million up to the date of Mr Gerstenlauer's first statement.

Gulf's efforts at fundraising

1287. After it paid its share of the signature bonuses Gulf made strenuous fundraising efforts in order to meet the costs. In 2008 it tried to farm out its interest in Shaikan but its attempts were unsuccessful. On **14 March 2008**, Mr Kozel emailed the KRG to propose a trip to Kurdistan for fund managers and analysts who were "*a little apprehensive because of their lack of familiarity*" with the country. The trip took place in June 2008.

1288. In **July 2008** Gulf raised £ 25.1 million through a fully subscribed private placement of equity, following some arm twisting by Gulf's broker RBC Capital Markets ("RBC"). The proceeds were to be used to fund the further exploration and appraisal of the HBH Permit in Algeria and the drilling of an additional well in Kurdistan. Before then Mr Kozel and Mr Ainsworth of Gulf, assisted by their brokers RBC and Tristone Capital, went on road shows in Europe and North America to talk to potential investors including investors in New York and Toronto. None of those to whom presentations were made in New York and Toronto became subscribers. RBC subscribed £ 100,000 worth of the new shares [0.4%] to make up the new total and the Gulf Directors £ 3,996,712. The main focus of this fundraise was in fact on Algeria.

1289. Excalibur suggests that Gulf's lack of success in North America should not be treated as reflective of the market there generally given the difference in the efforts made to attract investors in those markets (5 presentations in Canada, 5 in New York, 25 in the UK, and 4 in Geneva). That Gulf failed to raise funds in these markets is no definitive guide to how others might have fared with entities which Gulf had not contacted. It is, however, a fair indication of the sort of difficulties which Excalibur, a far less sophisticated applicant, would have faced even in the summer of 2008. I am also somewhat sceptical as to whether RBS and Tristone simply missed many potential investors.

1290. In the autumn of 2008, Gulf again tried to farm out a 25% interest in Shaikan. Gulf offered a third of its working interest in Shaikan in return for a carry of Gulf's share of the costs of two exploration wells and reimbursement of past costs of $ 28.75 million. This would make $ 58.75 million, the cost of the two wells being expected to be $ 15 million net each. (Of that 2/3rd would represent a "carry" since the farm out was only of a 1/3rd interest). Gulf was also looking for a premium, but none was offered.

1291. This farm out attempt was unsuccessful. Gulf approached about 20 companies. The majority of those approached were not interested, being deterred by the political or technical risks. For example, Talisman was concerned that there was a real possibility that there was no structural closure in the block, and considered that Shaikan might be a "*one shot wonder*" with "*no running room/follow up potential*". Gulf received an offer from Dogan Enerji, an affiliate of Dogan Holdings, a Turkish conglomerate, in

November 2008, but it was a low one[98]. In the end the Dogan offer fell through because OMV[99], an Austrian oil and gas company, declined to participate, probably on the basis that they took the oil seeps as a negative sign of the absence of closure. OMV had entered into two PSCs in November 2007 – so it was being selective about what it would invest in in Kurdistan.

1292. Thereafter Gulf re-approached over a dozen companies in **early 2009**. The response was poor. Three companies gave the offer serious consideration. One of them, Niko Resources, said it was not interested because it was concerned about the technical risks and doubted the future prospectivity, fearing that the "*Block could be perceived as a 'one well' block with no obvious follow up to a dry hole at this time*". The only offer Gulf received was from Perenco for a 37.5% interest (i.e. 50% of Gulf's 75%), but the terms of the offer were, in Mr Gerstenlauer's view, derisory. Perenco would acquire 50% of Gulf's interest in return for carrying Gulf's share of future well costs up to a cap of $ 11.4 million. There was no contribution to past costs and no premium.

1293. In **May 2009**, Gulf entered into a standby equity distribution agreement ("SEDA") with an investment fund managed by Yorkville Advisors LLC, which enabled it to draw down up to £ 30 million in tranches over a period of 3 years in exchange for the issue of new equity, which was issued at a price determined by a formula involving a discount of some 5 – 10% on the market price. (It drew down nearly £ 20 million). In **May 2009** and again in **August 2009**, Gulf made further share placements raising £ 153,900 and £ 6.8 million respectively. The shares were issued at a deep discount because, as Mr Gerstenlauer put it, "*investors could smell 'blood in the water"*". The money was needed to enable drilling at the Shaikan-1 well to continue to reach total depth or at least a targeted pay zone.

1294. In respect of the August 2009 fundraising Mr Kozel said that he had never found it so difficult to raise so little money. Only one existing institutional shareholder, Gartmore, was prepared to subscribe (for the whole) and only if the Gulf directors had 'skin in the game'. It also wanted a very large discount, eventually offering 5 p per share instead of 9 p. At the time the directors could not deal in the Gulf shares because it was in a 'close' period in relation to the interim results due to be published in September. The placing closed on Friday **31 July 2009**, and was announced to the market on Monday **3 August 2009**. Mr Kozel did not participate in the fundraising, but loaned funds to the Gokana Trust to enable it to do so.

1295. After the commercial discovery of oil in **August 2009**, Gulf found fundraising markedly and progressively easier, but not wholly without difficulty. Much of its funding came from existing investors who had previously been with Gulf. In 2010 Gulf had a number of successful placements: in **March 2010**, it raised £ 16 million; in **May 2010** it raised $ 165 million (£ 114.2 million); in **October 2010**, it raised £ 109.24 million; in **September 2011** it raised $ 200 million. In both September 2009 and May 2010, Gulf made presentations to potential Canadian investors, but failed to attract interest from the Toronto market.

[98] It offered (finally) to farm in and take a third of Gulf's interest in Shaikan, on the basis that it would pay a third of Gulf's share of past costs, carry Gulf for its share of the costs of one exploration well up to $ 9 million and carry Gulf for its share of the costs of a second well up to $ 5.4 million.
[99] Dogan had referred the bid to Petro Offisi, a subsidiary owned as to 54% by it and as to 34% by OMV.

Gulf's acquisition of interests in Sheikh Adi and Ber Bahr

1296. In **Spring 2009**, Mr Kozel asked Dr Hawrami if he had any interesting available blocks. Dr Hawrami brought the Sheikh Adi and Ber Bahr blocks to Gulf's attention. These had been relinquished by DNO. Dr Hawrami introduced Gulf to ETAMIC, a company that had been formed by a group of Middle Eastern investors[100], who were contemplating a water plant project in Dohuk in Kurdistan and who wanted to obtain an interest in an oil and gas licence. Dr Hawrami said that they had no oil and gas experience. He introduced them on the basis that he would not approve ETAMIC going on the PSC, but, if a structure was worked out to involve them, Gulf International would be entitled to obtain an interest in these two blocks. Mr Kozel went to Mr Marcus Hugelshofer, who (a) had a shareholding in the Near East Commercial Bank ("NECB") to which Dr Hawrami had referred ETAMIC; and (b) was Mr Kozel and Gulf's lawyer, to put together such a structure.

1297. Gulf agreed to enter into an arrangement with ETAMIC in which ETAMIC was to become a 50% shareholder in Gulf International in return for the latter acquiring interests in the Sheikh Adi and Ber Bahr Blocks, which had been earmarked for ETAMIC. On **16 June 2009** the Gulf Board discussed and approved the transaction. One benefit of the deal was that it reduced the risk in Kurdistan. If Shaikan dried up, the other two blocks, which were two and a half times the size of the two existing blocks might be more productive (in the event oil was discovered in Sheikh Adi).

1298. The agreement, which was never recorded in writing, was that, in consideration of ETAMIC becoming a 50% shareholder in Gulf International and paying 50% of all costs payable by Gulf International, it would procure the award of two new PSCs in the Sheikh Adi and Ber Bahr blocks in which Gulf International would hold interests of 80% and 40% respectively. In effect it was a swap in which Gulf International received an interest in two blocks in return for a 50% interest in itself and, therefore, indirectly Shaikan. Mr Gerstenlauer reviewed the transaction for the acceptability of the assets that Gulf was receiving.

1299. On **16 July 2009**, Gulf International duly entered into the Sheikh Adi PSC with the KRG, under which it acquired an 80% interest in Sheikh Adi (carrying the KRG for 20%). The Ber Bahr PSC had been entered into between Genel Energy and the KRG in March 2009. On **16 July 2009**, Gulf International entered into an Assignment and Novation Agreement with the KRG and Genel, whereby the KRG assigned a 40% interest in Ber Bahr to Gulf International.

1300. In the event ETAMIC was unable to pay its cash calls for expenses in relation to these Blocks. On **20 January 2010**, Gulf wrote to ETAMIC holding it in default of its obligations. Gulf then entered into discussions with the KRG in order to reorganise its holdings in the PSCs. As set out in its press release dated **10 March 2010**, as part of this reorganisation, the 50% shareholding in Gulf International held by ETAMIC reverted to Gulf[101]. Gulf International paid to the KRG the sums owed by ETAMIC, and the KRG become entitled to Additional Infrastructure Support Payments, amounting to 40% of Gulf's entitlement to Profit Petroleum in respect of all four PSCs. This was a very substantial reduction in Gulf's entitlement reducing its share in

[100] Mr Kozel never actually met any of the investors who remained anonymous.
[101] It is not clear whether the share allotment was ever formally completed.

any Shaikan field profits to between 9% and 18% – and an illustration of the risk involved in this field. Gulf also made a $ 12 million termination payment to ETAMIC in full and final settlement of any claims, a reasonable price for the certainty of unencumbered rights to the two new blocks.

1301. On **1 August 2010**, following negotiations with the KRG, amendments were made to all four PSCs (Shaikan, Akri-Bijeel, Sheikh Adi and Ber Bahr) requiring Gulf International to pay the additional payments referred to in the previous paragraph.

Mr Kozel's letter of 24 November 2007 to Dr Hawrami

1302. There is a letter dated **24 November 2007**, whose creation is a matter of considerable controversy. It is addressed from Mr Kozel to Dr Hawrami and reads, so far as material, as follows:

> "*Further to our recent discussions, we are formally requesting your approval to add Excalibur Ventures LLC as a non-operating partner in the Production Sharing Agreements of the Shaikan and Akri Bijeel blocks.*
>
> *We submit the documentation that was sent to us by Excalibur, which is minimal information but is all that has been provided to us by Excalibur. Even though we have advised Excalibur Ventures of the need to become a registered company*[102] *to be included as a partner in a PSA, they have informed us that they have not sought this approval. Therefore, Gulf Keystone Petroleum is taking the opportunity to seek your approval on behalf of Excalibur in order to resolve this issue.*
>
> ***Please inform us of your decision and procedure and any further information you may need from us and if you have any further questions** we can help you with, please get in touch with us.*"

1303. This letter was not written and sent in 2007. It was composed in October 2009. Excalibur submits that it was produced after oil had been discovered (in August 2009) as part of a paper trail to see off the litigation by procuring a response that said that the KRG would not allow Excalibur to participate.

1304. In his first witness statement of April 2012 Mr Kozel said three things about this letter. First, that he believed that he wrote a letter to Dr Hawrami requesting approval for Excalibur to go on the PSC, around Thanksgiving (22 November) 2007, and that he delivered it to Dr Hawrami in London in December 2007. In his fifth witness statement of 8 October 2012 he accepted that his recollection as to what he did in 2007 was probably incorrect.

1305. Second, he said that in 2009 Dr Hawrami asked what had happened to Excalibur's claims. (Mr Kozel had told him in 2008 about Excalibur's claim and the settlement discussions). Mr Kozel told Dr Hawrami that he "*owed me a letter*" about the Excalibur situation as he had not had a response to his 2007 letter. Dr Hawrami asked to be sent a copy. A copy could not be found. On **9 September 2009**, while on an aeroplane, he dictated to Ms Berry a brief outline of the letter which he thought he

[102] This was a reference to the need to become an approved bidder by registering with the Ministry of Natural Resources.

had written and delivered in 2007. This was not a verbatim dictation. He gave her an outline and she tried to put something together from what she understood he was saying. She told Mr Peart, Mr Patrick's successor, that she did not really understand what was going on with Excalibur and did not really know what she was writing. She asked for help. Ms Berry sent a second draft of the letter to Mr Kozel on **10 September 2009**, and on **26 October 2009**, which Mr Kozel then signed. Mr Kozel continued to believe that this evidence was correct.

1306. Third, Mr Kozel said that he believed he had delivered a copy of the reconstructed letter in 2009. He no longer believes that to be the case, since the original of the reconstructed letter – so it transpires but unknown to Mr Kozel until he was told by Gulf's solicitors in the course of the proceedings – remained on the file.

1307. I do not think that the letter was part of a plan to discredit Excalibur by, in effect, deliberately fabricating a letter which, when it was composed, was known never to have been written in any form. In September and October 2009, when the reconstruction of the supposed 2007 letter took place, litigation did not appear to be in the offing. Nothing had happened on that front, so far as Gulf was concerned, since Cadwalader's letter of 5 December 2008. In Mr Kozel's mind Excalibur had "*kind of gone away*" unless they came up in conversation. Unless there was also a response from the KRG the letter would be of precious little use. If the letter was never in fact delivered, the response would have to be fabricated. If, as Excalibur suggests in its closing submissions as an alternative, the letter was intended to show that Gulf was trying to help Excalibur in 2007, that was authentically apparent from Mr Patrick's email of 19 November 2007 to Mr Morrow: see para 893 above. The 24 November 2007 letter was referred to in a witness statement put before Gloster J, as she then was, in the application for an anti-arbitration injunction as part of the history of this litigation but it was of limited if any relevance to the issues which had to be determined.

1308. The more likely explanation is that in 2009 Mr Kozel thought (wrongly) that in 2007 he had asked for Dr Hawrami's approval of Excalibur and about the applicable procedure and whether any further information was needed, to which the KRG had not replied. Gulf had in fact asked the KRG in November 2007 about the type of information that the KRG wanted; and the KRG had not replied. But that had been done by Mr Patrick. Then in 2009 the events described in para 1305 occurred.

1309. It may be that in 2009 Mr Kozel thought that it would be no bad thing to have the KRG's formal response as to the acceptability of Excalibur because it would confirm that they were not acceptable. Ms Berry's first draft expressed the hope that the documentation sent to Gulf by Excalibur would "*allow you to confirm that there is no basis for their participation in the application as they do not conform to the minimum requirements*". But I do not accept that he knew in 2009 that he had never written a letter in 2007 or that he has invented the account of his dealings with Dr Hawrami in 2009.

Texas transfers its interest in the Shaikan PSC

1310. On **5 December 2008** Gulf International had sent the initial AFE for work on Shaikan to Texas and Kalegran. Under the terms of the Indemnity Agreement Texas had the option to pay its share of costs in respect of a 5% interest within 30 days failing which

it would hold its interest on trust for Gulf International. Robert and David Kozel and their father decided not to exercise the option.

1311. On **3 February 2010**, Gulf International and Texas entered into a second indemnity agreement and an assignment agreement pursuant to which Texas assigned its 5% interest in the Shaikan Block to Gulf International. The assignment has not yet been formally approved by the KRG. (The KRG wished to introduce the Korean National Oil Corporation as a party to the Shaikan PSC in return for the Koreans undertaking various infrastructure projects in Kurdistan.) When it is Gulf will reimburse Texas for its costs incurred in connection with Kurdistan.

The Dabin Agreement

1312. When the Shaikan PSC was signed, Dr Hawrami was not aware that Gulf was about to enter into its agreement with Dabin. Shortly afterwards Dr Hawrami indicated to Mr Kozel that Dabin could not participate in a PSC because locals and local companies should not benefit from a PSC. On **29 January 2010** Gulf asked the KRG whether the profit-sharing agreement with Dabin was legally valid in the light of KROGL. Their letter indicated that they had concluded that it was not. On **27 February 2010** the KRG replied that it was not its policy that a PSC contractor should involve any local service provider or individual with a direct or indirect interest in the PSC. In addition it said that KROGL prohibited participation of any individual or organisation linked to government officials, political parties or influential individuals. That applied to Dabin in the light of Mr Berwari's links to the KDP.

1313. On **2 March 2010** Gulf informed Dabin that, following a review of the agreement, it was not in compliance with KROGL and that Gulf International was therefore obliged to serve a notice of termination. Dabin indicated that it would respond, but did not do so. The agreement has for practical purposes been treated as void, and Dabin has not challenged that. Dr Hawrami took the view that the 10% net profit interest payable to Dabin should be paid to the KRG and that is what Gulf ended up having to do.

Excalibur seeks funding for its claim against Gulf and Texas.

1314. On **1 July 2008** Cadwalader had said that Excalibur would revisit its options once the exploratory drilling phase was complete. In **August 2008** Excalibur had made some contact with a Mr Jack Grynberg to try to interest him in litigation funding but nothing had come of this. On **5 December 2008** it had said, through Cadwalader, that it intended to protect and enforce its legal position.

1315. After oil had been discovered in **August 2009** Excalibur renewed its efforts to acquire litigation finance. Mr Javellana introduced it to Spruance Investments Ltd ("Spruance"), of which his uncle was a director. An NDA was signed and a draft engagement letter considered. But terms were not agreed. Spruance introduced Excalibur to other potential funders one of whom was Capinvest AG with whom terms were discussed. Nothing came of that either. Discussions took place with a number of other potential funders.

1316. In **early 2010**, Excalibur approached Credit Suisse. On **7 January 2010** Eric Wempen emailed Credit Suisse in New York to say that Excalibur would be submitting a

proposal shortly. In late **January 2010**, Credit Suisse emailed a draft term sheet for an agreement to fund Excalibur's "*litigation*". No executed copy has been disclosed.

1317. In **February 2010**, Excalibur entered into agreement with a company called LATOWI LLC under which LATOWI agreed to seek out potential litigation funding. LATOWI introduced Excalibur to an entity called Riata Management ("Riata"). Riata was a member of the Mitchell Group of companies controlled by its founder Malone Mitchell III who was founder and CEO of TransAtlantic Petroleum. On **25 March 2010**, Excalibur emailed Riata seeking litigation funding. Riata entered into an NDA with Excalibur on **6 April 2010**. Excalibur was in discussion with Credit Suisse in London to provide investment banking services and Credit Suisse in New York to provide litigation funding. In June 2010, Excalibur attempted to introduce Riata to Credit Suisse. Riata was interested in funding the litigation on a 50/50 basis with Credit Suisse and final terms were reached. But on **20 November 2010**, Riata emailed the Wempens to say that it was not going to pursue litigation funding of these proceedings. The reason given was that TransAtlantic Petroleum had just decided to become involved in petroleum deals within Kurdistan and did not want the litigation to impact negatively on its business activities there.

The agreement with Credit Suisse - introductions and advice

1318. On **12 August 2010** Excalibur entered into an agreement contained in an Engagement Letter whereby Credit Suisse Securities (Europe) Ltd (hereafter "Credit Suisse") agreed (*inter alia*) (i) to act as an agent to introduce Excalibur to parties interested in assisting it in connection with "*the Proceedings*"[103]; and, if an award was made in favour of Excalibur in the Proceedings, (ii) to act as its exclusive financial adviser in relation to the raising of capital, then anticipated as in the region of $ 150 million, in connection with a "*Shaikan transaction*" (defined to mean various specified ways of raising money in connection with the Shaikan block); and (iii) to act as its exclusive adviser with respect to the acquisition of a direct or indirect interest in the Shaikan block or the disposal of all or part of Excalibur's direct or indirect right to acquire an interest in that block; and (iv) to act as Excalibur's financial adviser with respect to the provision of strategic advice relating to Excalibur's interest in certain oil assets in Kurdistan. Credit Suisse gave no indication of being prepared to fund the litigation itself.

1319. The "*Proceedings*" were defined as "*arbitral proceedings with respect to an interest in the Shaikan Block*". The Gulf defendants are not currently parties to any arbitral proceedings and the actions involves four blocks. On **7 December 2012** Credit Suisse wrote to Excalibur to say that the Engagement Letter dated 12 August 2010 remained "*valid and binding*" and that the reference to arbitral proceedings did not "c*ompromise*" the validity of the letter. That serves as confirmation that the Engagement Letter remains effective in relation to these court proceedings; but, insofar as the letter is limited in its applicability to the Shaikan block, that limitation was not removed. It seems to me that, if Excalibur is successful in these proceeding, Credit Suisse would be bound and entitled to act as exclusive adviser in respect of Shaikan (in the respects set out in (ii) and (iii) above), and to act (but not exclusively) as strategic adviser to Excalibur in relation to all 4 blocks.

[103] Credit Suisse did not in the event procure any litigation funding opportunities to Excalibur.

1320. On **21 September 2012** Credit Suisse wrote Excalibur a letter setting out its views as to Excalibur's ability to obtain $ 185 million finance (being the estimated past development costs of the four blocks). The letter expressed the view, subject to a number of conditions, that Credit Suisse was "*highly confident*" that Excalibur could raise the required financing by means of one or more equity sales and/or the arrangement of one or more credit facilities. It also expressed confidence that Excalibur could obtain further finance in connection with future expenditure associated with the blocks. It was written subject to contract and ended as follows:

> "*Please note that this letter is not a commitment to place, arrange and/or underwrite the Equity Sale or the Credit Facilities or any other financing for Excalibur or in respect of the Assets and is not, except for your confidentiality obligations referred to above, intended to create legal relations between us or between [Credit Suisse] and any other person whatsoever.*"

1321. The engagement of Credit Suisse in 2010, after Gulf had struck oil, provides no indication that Excalibur would have raised the necessary finance in 2007 or 2008.

Excalibur's funding arrangements

Psari Holdings Ltd

1322. On **24 November 2010**, Excalibur entered into a litigation funding agreement with a company registered in the Cayman Islands called Psari Holdings Limited ("Psari") to which Excalibur's solicitors, Clifford Chance, were also party. Under its terms Psari agreed to advance to Excalibur an undisclosed sum for litigation costs together with a further amount to enable Excalibur to comply with any security for costs order made by the Court ("the Security Advance"). By an amendment agreement dated **9 March 2012** (5 days prior to the security for costs hearing on 14 March 2012), Psari agreed to increase the amount of the general litigation funding. It also agreed to an increase in the amount of its Security Advance by way of a bridging loan repayable as quickly as reasonably possible, on the condition that Excalibur obtained funding of a certain amount from other third parties for the purpose of covering the provision of any security. All the amounts set out in the agreements have been redacted.

1323. Under these agreements Excalibur, if it succeeds, would have (a) to assign to Psari a working interest in any interest that Excalibur receives in relation to the Shaikan block, increased if Psari provides funding towards security for costs; or (b) to pay to Psari a percentage of any damages that might be awarded to Excalibur. Because Psari is to have a working interest it will be required, if Excalibur obtains an interest, to pay its percentage share of past and future costs. The amount of the interest or share in damages to which Psari might be entitled was increased by the March 2012 agreement if Excalibur drew down under the additional funding arrangements made thereby. The increase attributable to the increased security for costs was only due if the funds advanced had not been repaid by 1 October 2012 (and *pro rata* if there had been partial repayment).

1324. In cross-examination, Mr Wempen revealed, but only on my direction, that Psari's owners were Andonis and Filippos Lemos, and that it had been approached by Clifford Chance. Mr Panayides of that firm has, however, stated that Psari is 100% owned by Andonis Lemos and that, as matters stood at the date of his 14th witness

statement, the working interest to which Psari will be entitled on success is 14.8% of whatever interest Excalibur may obtain. The actual amount of any interest is dependent on a number of factors including the funding drawn down under facilities provided by Psari. It will not in any circumstances exceed 20%. The agreement contains an obligation on Excalibur to monetise Psari's working interest and, if that does not occur within 12 months for a value at least equivalent to what Psari has advanced Excalibur must repay a set percentage of the funding advanced.

1325. By December 2010 the drilling of the appraisal wells known as Shaikan 1 and 3 had been completed (i.e. had reached Total Depth); and Shaikan 2 spudded. Shaikan 1 had made the first discovery of oil in August 2009. An "Extended Well Test" ("EWT") oil production facility was constructed adjacent to the Shaikan 1 and 3 wells and commissioned on 3 September 2010. This oil treatment and storage facility has the capacity for the production and sale of up to 10,000 barrels of oil per day (bopd) and has intermittently produced oil since then, recently producing at rates averaging greater than 6,000 bopd. This oil has been sold on the domestic market, transported to its destination by road tanker. Small test volumes have also been taken by road tanker to Faysh Khabur, on the Turkish border.

1326. Oil production started in September 2012 and the first domestic sales were made in October 2010. By June 2012 Shaikan 2 and 4 had been completed; Shaikan 5 and 6 were currently being drilled and plans were in place for Shaikan 7 and Shaikan 8 (a re-injection well).

The commencement of proceedings

1327. On **17 December 2010**, Excalibur issued parallel proceedings against Texas and the Gulf defendants both in ICC arbitration in New York and in the Commercial Court in London. On **21 December 2010** Gloster J refused Excalibur's application for a worldwide freezing order against Texas and the Gulf defendants. On **8 April 2011**, she granted an injunction restraining Excalibur from bringing arbitration proceedings against the Gulf defendants, and ordered a trial of a preliminary issue whether the Gulf defendants were bound by the arbitration clause in the Collaboration Agreement. She refused to stay Excalibur's claim in this Court. Excalibur later abandoned its arbitration proceedings and elected to have all substantive matters between it and the defendants determined in this court.

1328. On **14 March 2012** Popplewell J ordered Excalibur, which objected, to pay into court £ 3.5 million and £ 6 million as security for the costs of Texas and the Gulf defendants.

Blackrobe and Hamilton

1329. On **30 March 2012** Excalibur entered into separate Facility Agreements with:

i) Blackrobe AEO Investors I LLC ("Blackrobe"), a fund administered by Blackrobe Capital Partners LLC, a litigation finance company; and

ii) Hamilton Capital LLC ("Hamilton") a fund administered by Platinum, an investment management group based in New York.

for the purpose of providing security for costs and to meet any adverse costs. Blackrobe and Hamilton are Delaware companies. Under the agreements Blackrobe and Hamilton will, in the event of success, receive in addition to repayment of their capital and interest a share in Excalibur's Net Recoveries, being recoveries after deduction of payments made to first and second ranking creditors. The term "*Recoveries*" has the meaning assigned to it in an Inter-Creditor Agreement. This has a very broad definition encompassing, amongst other things:

> "*all of Excalibur's legal and/or equitable rights, title and interest in and/or to ... any and all gross, pre-Tax monetary award, damages, fees, recoveries, judgment or other property or value recovered by or on behalf of… Excalibur or its affiliates or owners on account or as a result or by virtue (directly or indirectly) of ... the Proceedings.*"

1330. On the same date, Blackrobe, Hamilton and Psari became secured creditors of Excalibur pursuant to three Pledge and Security Agreements. This gives them security over almost all of Excalibur's assets, expressly including the claims asserted in this litigation and any other litigation against the Defendants relating to the Kurdistan oil fields and any recoveries that Excalibur might be awarded as a result of this litigation.

1331. Pursuant to an Inter-Creditor Agreement of 30 March 2012 to the extent that Excalibur receives non-cash Recoveries, a process of monetisation will ensue so as to provide Blackrobe and Hamilton with monetary compensation.

1332. In its Facility Agreements with Blackrobe and Hamilton, Excalibur has warranted that it:

> "*shall make all reasonable, good faith efforts…to vigorously and in a commercially reasonable manner…[pursue the litigation claims] and ...bring about reasonable monetization of such claims*" (clause 4.1.8).

Figures

1333. The figures in this paragraph are all approximate. 30% of the historical costs associated with Gulf's interests in the Blocks was, as at March 2012, $ 120 million of which $ 76 million was attributable to Shaikan. Costs have increased since then. In his 14th witness statement of 26 November 2012 Mr Panayides took an illustrative figure of $ 150 million for all four blocks and explained that Psari would have to contribute $ 22.5 million (in respect of its c 15% interest) and Excalibur would have to fundraise **$ 127.5 million**. This assumes that Excalibur obtains an interest in all four blocks. On the footing that this figure was raised by equity finance Mr Panayides suggests that the equity to be given up would, in addition to the 15% to Psari, be between 17% and 10% depending on the market valuation of Excalibur's interest in the blocks and, therefore, the value of its equity.

1334. Excalibur's debt to the funders Blackrobe and Hamilton will depend on a number of things but is said to be a maximum of $ **170 million**[104]. Equity finance for this would mean that Excalibur needed to alienate between 22.66% and 13.6% of the equity.

[104] I have no means of checking these estimates since passages in the relevant agreements remain redacted and the information on which they are based has not been revealed.

Dr Hawrami's views of Excalibur

1335. A material issue in the present case is whether Excalibur would ever have got on the PSC, either with or without further financial or technical backing. Since the proceedings began the Gulf defendants have several times asked Dr Hawrami to give his views on the acceptability of Excalibur on the PSC. His response has been that he had been advised by his lawyers not to get involved.

1336. Mr Kozel met Dr Hawrami with Mr Gerstenlauer in Erbil on Friday **12 October 2012** after a meeting of the Management Committee in relation to Shaikan the previous day. Mr Kozel and Mr Gerstenlauer went to Dr Hawrami's house and, prior to the formal discussions about the meeting of the previous day, Dr Hawrami raised the subject of the forthcoming US Kurdistan Business Council visit (due to take place on 15-16 October 2012). Mr Kozel said that he had read in papers filed in Court[105] that Mr Wempen would have been part of the delegation had he not been required in court and that Mr Jeff Culpepper would be attending in his place. Dr Hawrami then got rather upset and said that he would not meet Excalibur's representative. He telephoned his Communications Advisor, Mr Michael Howard, an English speaker, in the presence of Mr Kozel and Mr Gerstenlauer, to ask him to prepare a letter to that effect. After the technical discussion Dr Hawrami made a second call to Mr Howard with some amendments to the letter and directions as to timing and who was to be copied. I am satisfied that Mr Kozel did not, as was suggested to him, make this evidence up. Mr Gerstenlauer, who was present, even if not for the whole of the meeting, corroborated it.

1337. On **16 October 2012**, Mr Kozel received 2 emails from Mr Howard. The first was sent to Mr Kozel, but was addressed to the Deputy Minister at the Ministry of Natural Resources, Mr Sirwan. It contained the text of an email letter of 14 October 2012 from Dr Hawrami to Mr Falah Bakir, the Minister at the KRG's Department for Foreign Relations. In the letter Dr Hawrami said that he had been advised that the USKBC delegation would contain a representative of Excalibur and that he was not happy to facilitate a meeting with the delegation if Excalibur was included. Dr Hawrami went on to observe that Excalibur had been unsuccessful in becoming involved in oil exploration in 2006-2007, because:

> "*they did not possess appropriate financial or technical means to participate working in this sector. Furthermore, at this time, they were also engaged in some serious non-transparent practices to manipulate the system to influence the decision-making process to include them in oil activities of the Kurdistan Region.*"

1338. The second email from Mr Howard to Mr Kozel, sent a few minutes later, said that the first email had been sent in error and was to be recalled. Mr Gerstenlauer suggested in evidence that Mr Howard, who knew that he and Mr Kozel had been in the room with Dr Hawrami, assumed that they were part of the process and should be copied in and was later told by Dr Hawrami that copying Mr Kozel in on an internal document was not appropriate. I think this is quite likely to be right.

[105] Mr Wempen's fourth witness statement dated 9 October 2012: para 5.2.

1339. I accept the authenticity of these two emails; and am satisfied that the first (i) was not solicited by Mr Kozel; (ii) set out the message which Dr Hawrami wished to convey to the Foreign Ministry; and (iii) reflected his true attitude both in 2012 and 2006-7. Mr Wempen, and many others, have the highest regard for Dr Hawrami and he is accepted, on all sides, to be a man of integrity. It is highly unlikely that he (or Mr Howard) would be parties to some underhand Kozel stratagem[106]. It is apparent from what he wrote that in 2006 and 2007 he regarded Excalibur as lacking the requisite technical and financial qualities to participate in the PSC – a matter to which he would naturally have addressed his mind at the time, having regard to his obligations as Oil Minister and the qualification provisions of KROGL.

1340. What exactly were the "*serious non-transparent practices*" to which Dr Hawrami referred is unclear but they are likely to include attempts to obtain influence with the Prime Minister in some form.

Could Excalibur ever have raised the money in time? Index

1341. Excalibur never raised the necessary (or any) capital. If, as I have held, it was not prevented from doing so by any wrongful act of Gulf it is immaterial what it might have done in different circumstances.

1342. In case I am wrong on that, it is necessary to consider whether, if Texas and Gulf had recognised its entitlement to an indirect interest in Shaikan and Akri-Bijeel, it would have been able to raise the necessary capital in sufficient time not to have forfeited its indirect interest. The relevant inquiry is not what a company like Excalibur *could* have done; but as to what Excalibur *would* probably have done with the necessary recognition, although the answer to the former question has some bearing on the answer to the second.

1343. For this purpose it is necessary to consider whether the actions which Excalibur in fact took would have had any better results if it had possessed the acknowledgement it claims it should have had or whether, if it had that acknowledgment, it would have approached or been put in touch with a different set of investors or done something else with a better result.

Gulf's submissions

1344. Gulf (with Texas' support) submits that Excalibur's case on this topic has changed during the course of the trial in a manner that has involved it (a) contradicting itself; and (b) developing theories which (i) are not open to it in the light of the way the case has developed and the contents of the Park-Wilkinson Joint Memorandum ("the joint memorandum"); and (ii) are unsupported by evidence. The basis of those submissions is set out in the following paragraphs.

1345. Mr Park began by saying that Excalibur had two options for raising finance in the necessary time scale: a *private placement* of unlisted shares or an asset sale in the form of a farm out: see the joint memorandum para 3.4.2. In his report Mr Wilkinson had explained the relatively slow process involved in a single private equity house or

[106] The stratagem theory is particularly difficult to reconcile with the recall email which suggests either a remarkable cunning or a sudden repentance.

fund making a substantial investment in a company like Excalibur. In his supplemental report in response ("Park 3"), Mr Park criticised Mr Wilkinson for not considering the most obvious and popular financing technique for E & P players namely to attract funds, not from a single private equity house, but, through brokers, from a wide net of interested investors, which could be done in weeks.

1346. He cited the example of a small listed company called Vast Exploration ("Vast"), which raised substantial finance for Kurdistan with no track record or relevant management experience. What his report did not reveal was that Vast was part of the Forbes & Manhattan Group ("Forbes & Manhattan"). Forbes & Manhattan is a leading private merchant bank with a global focus on the resource-based sectors. It has headquarters on Bay Street in Toronto, and offices, operations and assets across the globe. Its CEO – Stan Bharti – has a high reputation and it has acquired, restructured and financed mining assets worldwide and generated billions of dollars in market capitalisation. Its business model is to supply senior management boards and technical teams to its subsidiaries, of which it has a portfolio.

1347. The ability to raise funds differs according to whether or not the company is listed on an exchange. If the company is not listed (a) the market is significantly smaller and (b) the shares are often issued at a discount. The examples of successful fund raising in Canada on which Mr Park relies in Park 3 are of *public* companies. Fund raising experience in respect of public companies is not a reliable guide to the prospects of success in respect of the private placement of unquoted shares or the availability of private equity finance. Mr Wilkinson put it this way:

> "*... what we do as private equity, we invest early in a cycle and then we either sell the company or take it public, so we are really … trying to invest in a private company before it goes to the public market. The public market is in different cycles than what private equity will do, so the two are not tied at all in my view. Just based on my experience, when we would be investing might not have been the same time that the public markets would be out there buying shares or selling shares, or the IPO window would be open, in fact what we would do, sometimes we would have a private company, we would do our investment, we would develop it and our exit was an IPO. So I don't necessarily agree that the two go in cycle together. I don't know that this is indicative of private equity at all.*"

1348. In Park 3 Mr Park said that "*if there were a significant difference as between private and public companies in relation to access to capital, achieving listing on the TSXV was and remains a relatively quick and straight-forward process, either by way of bespoke listing on Tier 2 of the TSXV* [107]*, a reverse take-over or through the Capital Pool Company Program.*"

1349. In the joint memorandum the experts agreed that there were four minimum listing requirements for oil and gas companies on the TSXV – (i) working capital, (ii) experienced management and a board with industry experience, (iii) audited financial statements, and (iv) a Resources Report; and that financing by private placement of quoted shares was not a viable first option for Excalibur to raise funds since it could

[107] The TSX Venture Exchange is the junior market of the Toronto Stock Exchange (TSX), on which a significant number of natural resources companies are listed. .

not fulfil the listing requirements. In Park 3 Mr Park appeared to row back from this by saying "*it is inherently unlikely that any company will meet all of the requirements by happenstance before it elects to pursue listed status. The real question is, in my opinion, the extent to which Excalibur could have met those requirements had it pursued TSXV (or similar) listed status*".

1350. The defendants engaged Mr Jull, an investment banker based in Toronto to review Park 3. His evidence shows (a) that Mr Park had referred to the listing requirements in force as at 14 June 2010, when those in force in 2007 and 2008 were different and Excalibur did not satisfy them (see para 22); and (b) that Reverse Take Overs and Capital Pool Companies (as to which see Appendix 1) do not provide companies such as Excalibur with ready-made oil and gas management teams which would satisfy the Exchange's requirement for suitably qualified directors and management: para 27.

1351. Then in Park 4 Mr Park introduced the concept of the "can do" investment bank which would help to assemble a fully-fledged management team which would enable Excalibur to meet the criteria which the experts agreed to be important to a private equity investor. He gave as an example Forbes & Manhattan, the bank he had omitted to mention in Park 1 and Park 3.

1352. In his third report Mr Jull explained (in my view convincingly) that this is not what investment banks do: see paras 1-19. It is not their role to build businesses or to cure or remedy the wholesale deficiencies of companies. They do not operate in the same way as Forbes & Manhattan which is a private merchant bank and not an investment bank. Forbes & Manhattan does not take on other people's projects. It decides on its own projects, invests directly in subsidiaries which it establishes for that purpose; and, through the group's senior management, board and technical teams (including geologists, mining engineers, lawyers, accountants, investor relations etc.), is directly involved in the running of them.

1353. Towards the end of the expert evidence Excalibur developed a new thesis namely that Excalibur could go to a private equity house or fund with the requisite "can do" characteristics previously ascribed to investment banks which would, to the extent necessary, procure any missing management skills or technical expertise. By this route Excalibur returned to the previously down played one-shop private equity house or fund.

1354. Gulf submits that neither the case based on a Forbes & Manhattan equivalent nor that based on the "can do" one shop private equity house or fund is open to Excalibur. The former case is one which the defendants have not had the opportunity to address, not least because Mr Jull is not a merchant banker. In any event there is no evidence as to how many merchant banks (or similar) operate in the oil exploration sphere, where they are located, what criteria they apply when deciding whether to incubate a particular company, or what and how they charge. It is also not open to Excalibur because the joint memorandum only considered private equity or farm out.

1355. The latter case is, they say, not open to Excalibur because it conflicts with the terms of the joint memorandum. Paragraph 2.11 thereof reads, as one of the matters agreed, in the following terms:

> "*Private equity will* ***consider the following five attributes in deciding whether to invest:*** *a) management experience in oil and gas exploration, including track record of finding oil and gas and managing an oil and gas project; b) management track record of generating a return for investors on other projects; c) management investing own capital; d) technical expertise to interpret geological data; and e) financial expertise to develop and discuss the economics of the project including budgets, timing and potential returns*."

I call these "the five attributes".

1356. In relation to the matters of disagreement Para 3.13.1 and 3.13.2 of the joint memorandum read:

> "*3.13.1. JLW states that any company* ***must demonstrate … [attributes a-e]*** *to receive private equity funding.*
>
> *3.13.2. JJP contends that a company would be greatly assisted in securing financing if it were able to demonstrate all of these attributes, but it is* ***not necessary to have all of them*** *in order to raise private equity.*

1357. These paragraphs, Gulf submits, indicate that it is the inherent characteristics of a company like Excalibur that are relevant and not those that it might achieve after a private equity makeover. Mr Park was implicitly accepting that it is desirable to have all of them and necessary to have at least one. But Excalibur had none of them: no assets, no management team or track record[108], and no technical or financial experience. The proposition that private equity would, in those circumstances, come to Excalibur's rescue is inconsistent with what Mr Park was accepting in the joint memorandum. It is also inconsistent with the Park 3 claim that the funding option of choice is private placement with a wide range of investors and not the slow and laborious process of single investment by a private equity fund. In any event there is no credible evidential basis for finding that Excalibur would have gone to some house which would have been prepared and able to transform it into a company with the necessary financial and technical competence.

Conclusion

1358. The submissions in the previous paragraphs appear to me well founded. The joint memorandum is not to be treated as if it was a statute. But it, and the oral evidence, deal with what is needed to attract investment. As to the need to have at least one attribute, Mr Park said in his oral evidence that, if a company lacked all of the five attributes – as Excalibur did – it would have had "*a very low chance of being successful*" and that it would make private equity "*difficult or impossible to raise*" or "*very difficult or impossible… to attract private equity*". For practical purposes it can, in my view, be regarded as impossible for a company that lacked all the attributes to raise the sort of capital needed.

1359. In any event I am wholly unpersuaded, on the evidence which I have heard, that Excalibur, if only it had had the recognition to which it claims entitlement, would

[108] None of its Kurdistan projects had come to anything and only some limited consulting and survey work had generated any return at all.

have sought out, or, if it did, would have found, a merchant bank or a private equity house or fund which would have taken it under its wing and transformed it into the type of company that would attract finance to the necessary extent.

Options: farm out, debt and project finance

1360. Looking at the matter more generally, it is clear that Excalibur had only a limited range of options. It had effectively no assets and no personnel (other than Mr Wempen and his brother). No *farm out* of a direct interest was possible since Excalibur was not on the PSC and had no intention of being there. *Debt* and project finance were not available options for this sort of exploration adventure: see paras 2.3 and 2.4 of the joint memorandum. Nor was a private placement of *quoted* shares possible, since Excalibur could not fulfil the listing requirements at that stage: joint memorandum para 2.6. According to Mr Park, at one stage in his evidence, a company like Excalibur might start as a private company and then move to a public company over a period of 6 months to 2-3 years; and, in my view, it would only be at the latter end of that spectrum, if at all, that listing would have been achieved.

1361. A Reverse Takeover (RTO)[109]or a listing as part of a Capital Pool Qualifying Transactions (CPCs)[110] would not be available unless Excalibur was a sufficiently attractive proposition for that purpose (which it was not); and would not, in any event, provide any management team. Both require the "resulting issuer company"[111] after the takeover or merger to meet the minimum listing requirements. As the requirements stood in 2007 and 2008 this probably would not have been achievable at all[112].

Private equity

1362. That leaves private equity i.e. a private placement of unlisted shares. That can be done by an approach to a **private equity house or fund** (Mr Wilkinson's area of expertise) or **by private placements** (Mr Jull's area of expertise) to a range of would be investors, whether insurers, pension and mutual funds, university or similar endowments, which are those most likely to invest in a fund, or high net worth individuals or to groups of investors. The former is often a laborious and slow process. A private equity house or fund considering whether or not to make a single substantial investment is likely to take about 4-6 months or more to come to a decision. The latter, which was the method espoused by Mr Park, would require the assistance of an investment bank, which could also assist in an approach to an equity house or fund, although they could also be approached directly.

The market and the asset

1363. Excalibur contends that in late 2007 and early 2008 there was something of a gold rush mentality in respect of oil exploration in Kurdistan; that the defendants have consistently painted the gloomiest picture of the difficulties and risks at the time when

[109] In which Excalibur would exchange its shares for shares in an inactive or relatively inactive listed company (the shell).
[110] In which a shell company raises a maximum of $ 2 million and looks to find a suitable private company to merge with in a reverse takeover.
[111] i.e. the shell under the management of the private company.
[112] For details, see Appendix 1.

the original PSCs were signed (and of Excalibur's inadequacies) and that a more balanced approach supports the conclusion that there was a market for and a keen interest in an asset consisting of a share in the Shaikan PSC. (I consider in Appendix 1 the state of the market at that time). Even if Excalibur might not have secured investment from "*the worldwide investment community for oil exploration projects*" it would have been attractive to "*the sorts of high risk/high reward investors who would have been the target market*": Excalibur Closing 12.8.

1364. Mr Wempen's approach was that the quality of the asset was, and is, the key to raising finance. Given the quality of the asset represented by an acknowledged interest in Shaikan and Akri-Bijeel, finance would follow. This approach is fallacious. The asset (on Excalibur's case a right to have an interest in Shaikan and Akri-Bijeel in some form) was not the equivalent of an Old Master or a precious jewel of undoubted value. It was a high risk venture, a wildcat play, which might fail utterly, and which would require years of expenditure on exploration and then, hopefully, production to bring to fruition. There was great geological *potential* in the form of an almost entirely unexplored territory in a prolific oil and gas region with blocks available on trend with the large Kirkuk oil field. But no seismic had been conducted from which even a preliminary geological report could be written; and very little oil and gas exploration had occurred in Kurdistan at all.

1365. There were undoubtedly people interested in investing in Kurdistan (as well as other areas such as Alaska, Colombia and Brazil, particularly the last). But some, perhaps many, potential investors would have been deterred by a perception of country risk or geological risk or both.

Management

1366. In those circumstances the quality of the management of any venture company was of critical importance. Private equity is very much concerned with management, which can transform bad assets into good, and good into bad. It is the management which will realise whatever potential exists and turn it into economic value. As Mr Kozel put it, "*at this stage in the exploration investors are investing in a management team which they believe has enough experience to identify good structures, come up with a plan, a play concept and an idea.*" Mr Jull observed that the "*first and foremost thing*" that private equity investors look at is "*the calibre of the management team and the quality of its technical skills and its ability to describe what they are going after*". Investors want to see "*the whites of the eyes of the potential management team*". Mr Wilkinson's evidence was to the same effect. Mr Park agreed that it was essential for Excalibur to build a management team.

1367. In 2007 Excalibur had, in effect, no management team. Excalibur's origination of the deal, its experience in Iraq, the fact that Mr Wempen had a story to tell, his contact with the KRG (not very fruitful in 2007) and Excalibur's agreement with Dabin would not make up for the deficiency.

1368. The team needed would require technical competence, even though Excalibur was never to be the operator. Otherwise Excalibur could never hold its own, as its shareholders would expect it to do, at meetings of the operating committee under the JOA or contribute usefully thereto (as the operator itself would wish). Excalibur needed personnel with the technical competence to oversee, understand and monitor

the drilling project. It also needed personnel who could (i) provide their own technical and financial analyses; (ii) speak technical sense to potential investors and their advisors, and make informed presentations to them as to the merits of investing in oil exploration in Kurdistan; (iii) prepare financial and production models and (iv) prepare a business plan. I accept the evidence of Mr Wilkinson and Mr Jull to this effect.

1369. Excalibur points out that it was entitled (see clause 10 of the Collaboration Agreement), and had access, to some significant technical data (such as the impressive presentation sent to RPC Capital on 18 December 2007). But that was material which emanated from and showed Gulf's qualities, not those of Excalibur.

1370. Mr Park and Mr Jull were in disagreement as to whether two new executives would be sufficient for Excalibur. In Mr Park's view, as elucidated in his oral evidence, a CEO with a high degree of geological and engineering experience was needed from the very start, together with a CFO. Excalibur never had (or sought) such personnel, which, in Mr Jull's view, it would take 6-12 months to hire. Mr Codd thought two was an absolute minimum. In Mr Jull's view an E & P company, even if a non-operator, required "*a CEO with a record of unlocking value for shareholders, someone with relevant geological training and experience, someone with geophysical training and experience, someone with in-country experience (or experience of a like-country or basin), and a CFO*". He thought that it would be highly unusual to find two people with the experience to cover all these roles which would usually be filled by four or five.

1371. I regard Mr Jull's evidence as more reliable. Exactly how many would be needed would depend on the calibre of people available and the extent to which they had multiple skills. It might be possible to recruit the CEO and CFO in the first instance and others thereafter. Five may be too high, but it is likely that at least three would be needed in relatively short order and maybe more. Mr Park accepted in his oral evidence that, in addition to hiring a CEO and a CFO, Excalibur would have to hire a consultant or a consultant firm to interpret geological data; and Mr Jull's evidence was that private equity will always require a geological report.

1372. Excalibur places considerable reliance on the availability of Mr Franchi. As to that (a) he had no contract with Excalibur; (b) it is far from clear to me that he would have been willing and able to come on board at this juncture; and (c) whilst he had had financial skills, had secured $ 2.6 billion of debt (not equity) finance for an oil pipeline[113], and was an oil engineer by training, qualified to masters level, he had no experience of financing wildcat exploration. That was not an absolute requirement for a CFO. But both Mr Jull and Mr Wilkinson understandably regarded his lack of such experience as something which investors would regard as a problem. I agree. Further, although he had worked with investment banks, he only participated in a very limited way, and ineffectually, in Excalibur's fund raising efforts, principally by introducing Mr Wempen to Lazard.

Investment banks

[113] This is a different exercise. For such finance there was (a) a chargeable asset of undoubted value; and (b) cash flow from the operation of the pipeline. It is possible that there was some equity involved.

Finding one

1373. The first problem would be finding an investment bank to help raise finance (if that was the route to be taken). Investment banks are choosy as to who they take on. They do not wish to waste time or lose reputation on unsuccessful fund raising activity and they turn away many of those who approach them. They have procedures for taking clients on and will ask similar questions to those which an investor would ask, including consideration of the five attributes; the extent of management's skills and trustworthiness; whether they like the proposed management and whether potential investors will do so; what are the prospects and potential problems in relation to the assets; what capital management is contributing ("skin in the game"); and the quality of the business plan. They will also make background checks.

1374. I doubt that an investment bank would have agreed to act for Excalibur to raise finance in 2007 or 2008. Mr Jull would not have done so, nor would Mr Wilkinson. In Mr Jull's opinion any reputable investment banker on Bay Street would not have done so either. I regard his assessment as reliable and likely to be correct. His view was based on the facts (i) that Excalibur lacked all of the five attributes, including the lack of experienced management or any capital contribution from its members or managers; (ii) it had started the process of finding funds very late; (iii) it had no proper marketing material, financial or production model, presentation, budget or business plan; and (iv) it was not a direct party to the PSC or listed. It also had no accounts. Due diligence might not have taken very long; but the findings would not have been impressive. Excalibur did in fact approach some five or six investment banks unsuccessfully.

What investment banks do

1375. There was a fundamental point of disagreement between Mr Jull and Mr Park as to the extent to which an investment bank (of the "can-do" variety) would be prepared to work with a client whom they have taken on to improve the management of the client if it was deficient. In Mr Park's view such banks look to assist and add value and would help the company in question to secure the necessary skills so as to become an attractive investment proposition.

1376. Mr Jull did not recognise this description of what an investment bank does or the approach which it takes. Investment bankers, in his view, do not divide into those who have a can-do attitude and those who do not. (It is plain to me that, if there were such a division, he is in the former category). If they take on a client they will do whatever they can to close the transaction. But it is not their function, or wish, to act as company doctors, particularly in a case where something close to transplant surgery is involved. They will simply not accept a would-be client in that category. As he put it "*we look to identify weak investment proposals in order to reject them, not to save them*".

1377. I prefer the evidence of Mr Jull, whom I found an impressive and non-partisan witness. He is an investment banker; Mr Park is not. What he says accords with what I would expect in this business context.

1378. Mr Park gave two examples of the sort of approach he had in mind. The first was that in March 2011 in the context of two private equity placements an investment bank

called Raymond James had assisted in identifying a management team (CEO, CFO and board members) for Anatolia Energy Corp ("Anatolia")[114], a Canadian based company, which had a joint venture agreement of December 2010 with Calik Energy, a Turkish oil and gas company, after which it assisted in raising finance in two private equity placements with Canadian investors.

1379. Other facts, to which Mr Park did not refer, cast a different light on the matter. First, Anatolia was formed, in January 2011, at the instigation, and as a subsidiary, of a company called ONOC, a company which put together oil and gas deals. ONOC had been the original partner with Calik and the agreement was novated to Anatolia. ONOC's CEO between May 2009 and March 2011 was Robert Spring who had previously been VP, Exploration and Land of Conoco Phillips. He, therefore, did have oil and gas experience. It was he who was the CEO whom Raymond James was supposed to have located for Anatolia. In fact Mr Spring was involved in Anatolia from its creation, ONOC being, as Gulf observed, Anatolia's creator, predecessor, and parent. Whether Raymond James had any real part identifying any other employees is unclear.

1380. Second, a letter signed by Raymond James addressed to the board of Anatolia, dated 23 September 2011, said that "*in the last 2 years, Raymond James has not provided any financial advisory services or participated in any equity financing involving Anatolia except in July 2011*". This is a reference to an uncompleted IPO. This is difficult to square with Mr Park's description of its activities.

1381. The second example was that Nomura assisted Griffiths Energy International Ltd ("Griffiths"). But, as Mr Park effectively acknowledged, the example is inapposite. When Griffiths went to Nomura, it already had a thoroughly qualified oil and gas management team, working capital, some 47 employees and 8 consultants, and a valuable series of blocks that had been relinquished by ExxonMobil. Nomura was not asked to locate and build a management team from scratch or at all.

1382. Excalibur suggests that, even if an investment bank was not prepared to take Excalibur on immediately it, or some of them, would have pointed out Excalibur's shortcomings and told it what it needed to do, whereupon Excalibur would have gone on and done it. Mr Jull might have done the former but I do not regard it as established that investment banks in general are wont to spend much time explaining the deficiencies of a putative client and what it needs to repair them. Nor is it at all clear that Mr Wempen would have accepted any advice he was given. He viewed Excalibur's role as that of passive investor and would have been reluctant to take on high quality and expensive staff. In addition neither he nor his brother were fitted for the task of finding and selecting appropriate personnel and would certainly need to enlist assistance.

Paying for services

1383. Investment banks do not come cheap. Mr Jull said, that in his experience it would cost $ 300,000 to $ 500,000 as a minimum to go out and raise capital in substantial amounts for an international oil and gas company. Mr Park said in re-examination that he thought that the costs of raising Excalibur's share of the signature bonuses would

[114] Mr Park was a founder and the corporate secretary.

be between $ 10,000 and $ 100,000 – he had earlier indicated that the costs of seeking a financing run to hundreds of thousands of dollars. To raise the sort of money that Excalibur in fact looked for ($ 40 million) or even half of it would cost figures in Mr Jull's range.

1384. Excalibur did not have this sort of money available to it or anything like it. It itself had no assets with which to pay for these services. Excalibur has not identified any entity, partner or associate who would be likely to have provided any such funds. Nor are the Wempens likely to have provided it. There are entities which provide financing for seed capital, but not typically for projects as capital intensive as this. No approach was made to any such entity and there is no evidence of any preparedness of anyone to provide seed capital for Excalibur, the criteria they might apply, or the terms on which they might have done so. Mr Van Os' email of 28 November 2007 (para 988) shows that UBS was not prepared to provide it.

1385. Excalibur's financial plight had another consequence. It lacked the wherewithal to take on any new management team, which would require at least some part of its remuneration in cash, which Excalibur did not have, and a contractual commitment.

1386. Raising a management team would require Mr Wempen to have (a) identified the need, (b) found the right people and (c) persuaded them to work for it. I doubt that Excalibur would ever have done so, even if armed with an express acknowledgment of an interest, particularly as it would probably involve a dilution of the Wempens' equity as well as relegating Mr Wempen to a lesser role. Mr Wempen regarded Excalibur's role as that of originator and passive investor: see his email to Mr Patrick of 18 November 2007 (para 888). He might have relied on Mr Franchi and Mr Kinnear: but it is doubtful whether either would have been available – I have no evidence from the former and the latter gave up on Excalibur – and they were not sufficient for the task.

1387. In late 2007 Excalibur did not embark on the exercise of finding a competent financial and technical team with an appropriate track record or of engaging them on a conditional basis. Mr Wempen in his oral evidence confirmed that he regarded the Excalibur team as "*fine as it was to attract investment for a passive non-operating share*". He took the view that Excalibur's role was to have originated the deal; and showed no signs of wanting to turn it into an oil company. Even if Excalibur had embarked on the exercise it is dubious whether it would have secured the necessary personnel. In any event it would not be a process likely to have been completed in less than six months from the start.

How much finance?

1388. A material consideration for Excalibur and any investment banker, or other entity, advising it would be the amount of money that needed to be raised. The amount immediately needed would have been Excalibur's proportion of the signature bonus ($ 6 million for Shaikan and $ 1.5 million for Akri-Bijeel). But Excalibur did not, and could not sensibly, limit its attempt at fundraising to the signature bonus; it needed to raise funds in the first instance for at least the first year, or at least have some form of in principle commitment.

1389. In late 2007 Excalibur sought commitments from potential funders, in the region of $ 400 million with 10% up front: see, for example (there are several others), the emails to Lazard on 16 and 30 November, to UBS of 26 November, and to Mr Kitterman of Peregrine and to Deutsche Bank of 6 December. The source of the $ 40 million (10% of $ 400 million) is unclear. In Mr Mackertich's budget of 23 November 2007 the expenses for Shaikan projected through to end 2009 totalled $ 82.5 million of which Excalibur's projected share was $ 24.75 million, based on a 30% (not a 24%) interest and a contribution towards Gulf's past costs throughout 2007.

1390. Potential investors themselves would:

> "*not just confine their consideration to the initial/immediate bonus payment. Private equity, when considering whether to invest or not, would want to see and consider the projected capital expenditures through the initial exploration phase of the project, called being "all-in", since the two are tied together*": Joint memorandum para 2.13.

There is good reason for this. Financing of the signature bonus would never be enough: if further finance was not obtained the signature bonus would have produced nothing and the investment might be lost. Different financiers might take over after finance for the signature bonus had been raised, but that could never be guaranteed; and a would be financier of the venture would be unlikely to do so on the basis that he would do no more than finance the bonus.

1391. The actual costs incurred for 2007-8 were less than $ 40,000,000. For Shaikan and Akri-Bijeel a 30% share of them totalled nearly $ 11,500,000. There is, however, no reason to suppose that Excalibur would have approached funding in a different way if the alleged prevention had not occurred, and even if it had, the initial costs of raising finance do not, as Mr Jull explained, greatly differ according to the size of the funds being raised[115]. If Excalibur had sought to raise $ 20 million they would have been much the same.

Merchant banks

1392. There is little evidence as to the role and approach of merchant banks. This is not surprising because no reference to potential finance from this source appears in the pleadings or the joint memorandum and Excalibur never went to one. Merchant banks invest their own capital in equity, as opposed to seeking to raise capital as agent for the company seeking finance. They take a direct role in management or board direction. There is the example of Forbes & Manhattan, which identifies projects and launches or forwards them through its own subsidiaries, to which it seconds or allocates personnel from its group. I do not know what criteria they apply, what interest they had in further investment in Kurdistan in 2007/8, the extent to which there are others like them, and how long they take to make a decision. There is no indication that they have ever acquired a company off the street (as opposed to establishing one of their own) or one which has no more than an entitlement to an

[115] "…*in my experience it is sad to say there is kind of a minimum cost to go out and raise money whether it is 3 million, 5 million or 75 million. Unfortunately lawyers will charge what they are going to charge because of the amount that they do and the hours invested, irrespective of the amount raised*."

indirect interest in a PSC or, indeed, a company that was already on a PSC. Nor do I know on what terms and at what cost they would act, on the assumption, which I doubt, that they were prepared to act for Excalibur at all.

1393. Excalibur claims that it would not have sought out a merchant bank or private equity fund except on the advice of an investment bank. So the first question is whether any investment bank that Excalibur would have gone to would have advised this course. Since none of those to which it went did so, this seems unlikely. The next question is whether any such merchant bank would have taken Excalibur on. It is not apparent to me that it would.

1394. In short, I do not regard it as open to Excalibur to rely on the possibility of finance from a merchant bank and I do not regard the evidence as enabling me to make any findings in its favour on the availability of finance to it from such a source.

Private equity funds or houses

1395. Mr Wilkinson's evidence is that private equity does not, generally speaking, provide the sort of service needed i.e. producing or procuring a management team. They may require and supply a presence on the board, but they do not provide technical or financial direction (unless there is a problem with their investment) or procure management teams, whether technical or financial, or assist in providing a CEO, CFO or COO. Their technical personnel, if they have any, are there to evaluate investments, not to "babysit" the companies or fill in gaps or inadequacies. I accept this evidence.

1396. Further the idea that private equity funds will perform a makeover of a company before investing is difficult to reconcile with the agreed position that private equity will consider the five attributes of a company in deciding whether to invest i.e. its inherent attributes not its future potential characteristics. They would not be likely to seek to invest in a company like Excalibur which has none of the five attributes.

1397. Excalibur made reference to the private equity fund of Kohlberg Kravis Robert (KKR) as (i) an investor in the upstream oil industry (which it is), and (ii) a relevant comparator because it provides (as it does) management expertise to companies in which it takes a stake. The comparison is, however, inapposite. As Mr Wilkinson explained, KKR is a public company which invests in successful existing companies such as Samson Resources, the only oil and gas company featured on its website, which is a $ 7 billion private company.

1398. Mr Jull gave evidence that there were some private equity firms which, if they decide to take a client on board, do much the same thing as a merchant bank. Insofar as there is a difference between their evidence in relation to equity funds I prefer the evidence of Mr Wilkinson. He is the private equity fund specialist. Mr Jull did not claim that expertise. In fact I do not regard Mr Jull's evidence, taken as a whole, as meaning that a private equity fund will generally perform the sort of incubating role that Forbes & Manhattan may adopt. He made clear that, whilst, if Excalibur came to him, it was possible that he *might* have referred them to Forbes & Manhattan because of the latter's interests in Kurdistan (and because Mr Bharti will overlook many of the blemishes which private equity will not), he would not have approached equity funds such as ARC Financial or First Reserve or Natural Gap for Excalibur; and that such

funds generally do not second their own people to the company, let alone provide a complete management set starting from scratch. They may put someone on the board and become involved in selecting people to add to management. He had no personal experience of private equity firms supplying financial management expertise to companies. If and insofar as private equity firms act like merchant banks, it seems to me that they are, in effect fulfilling not an equity fund, but a merchant banking, function, to which the observations in the last three sentences of para 1392 apply.

1399. Excalibur would not have approached private equity unless advised and helped to do so by an investment bank and it does not seem likely that an investment bank would have advised it to do so. Noticeably Mr Wempen did not approach Riverstone or First Reserve as suggested by Mr Pinho's brother.

Skin in the game

1400. The fact that management was not prepared to put any of its own money into the venture would also, to use Mr Wilkinson's words, have been a "*red flag*". In his experience private equity requires a contribution of 10 to 20% (as Mr Wempen himself found: see para 1244).

1401. Mr Jull had never come across a situation where in relation to the first investment round of an oil and gas exploration venture investors did not insist on a cash contribution from management, although he thought that investors would give some credit for work done and connections made by the originator (probably a multiple of earnings foregone in the relevant period) and that the level of commitment required might depend on management's financial capacity. But the commitment would have to be sufficient to cause substantial loss if the venture failed. If the person seeking finance had very little money of his own that would be likely to cause him to be shown the door.

1402. Many investors would take Mr Wilkinson's view. But the world of investors is diverse and some would take Mr Jull's less absolute approach.

1403. Investors would not, in my view have been prepared to back a venture in which, if things went wrong, the Wempens would not lose a dime, or in which they were not to make any substantial contribution. I accept Mr Wilkinson's view that the investment community would have looked on him as someone who wanted to get rich quick, at his investors' expense, without anything significant to contribute to the fulfilment of the project.

1404. Mr Wempen was not looking to invest money of his own. He suggested in evidence that "sweat equity" (meaning in Mr Wempen's case the work done in originating the deal) would have sufficed. It would not. Private investors are not much concerned with who originated the deal; what they are concerned with is that management should, as Mr Jull put it, share their pain, particularly when they are being asked to invest at the riskiest stage.

Mr Wempen himself

1405. Lastly Mr Wempen's business acumen is not likely to have stood up well to scrutiny. His evidence in the course of the trial has shown that he is long on assertion and

confidence, but short on analysis and understanding. A would-be investor, with an inquiring mind, might well have concluded that he had little to offer except the fact that he had originated the deal. He would not have commended himself as a long term business partner.

1406. Mr Wempen's fixation with the idea of a fund would not have helped. It was, in reality, a complete non-starter. The idea was hopelessly grandiose. The suggested portfolio of the Thames Chesapeake fund, which had no track record at all, contained an extraordinary combination of some of the riskiest exploration assets in several different countries, together with utility assets at the other end of the risk spectrum. These are two radically different businesses with markedly different return profiles. No fund would combine the two, let alone do so and advertise the high returns mooted. Commodity trading was also proposed. The fund embraced a confusing mixture of businesses which required different types of expertise, training and skill. Mr Wempen had no experience of running a fund, and, if he was to solicit investments in Canada, would need a licence as a fund manager which he did not possess and was unlikely to obtain. The same applies to Eric Wempen, Mr Franchi and Mr Kinnear. The fund idea added another layer of complication and highlighted the shortcomings of Excalibur.

1407. Mr Wempen had also, as I have said left the business of fund raising far too late. No doubt finance, as opposed to a conditional commitment or statement of intent, could not actually be obtained until a deal was there to be signed. But the preliminary work – assembling a team with the right expertise, preparing or assembling, so far as possible, marketing materials such as a business plan, a budget, economic models and geological reports, working out how the indirect interest was to be taken and approaching sources of finance in a measured and organized way without the imminence of a deadline measured in weeks – needed to have been started well before 1 November 2007. It would require a lot of time and effort and, for Excalibur, would probably mean obtaining qualified professional help from an investment banker. Mr Wilkinson thought that a start should have been made a year in advance and in any event by early 2007. Mr Jull thought it would take 6-12 months to put in place everything he thought necessary to obtain finance in Canada. Mr Park thought it would take 3-6 months to raise equity finance, but 6-12 months to do all that Mr Jull thought was needed to be done for that purpose (procure competent management team, have solid business plan, solid understanding of the asset and reasonable evidence of its prospectivity, skin in the game, and a geological report), but that many of those factors could be fulfilled within weeks which would permit Excalibur to proceed with funding. I think Mr Jull's 6-12 months estimate for the time to raise equity finance (if it could be obtained) is a reasonable one. That assumes what is, itself, doubtful that Mr Wempen would have accepted the need to embark on this course, rather than insisting on a fund or Excalibur's entitlement to participation based on origination alone.

1408. In my view, therefore, Excalibur needed to start at the very least 6 months before the finance was needed and that could well be too late. If the approach was to a private equity fund or a merchant bank the process of acceptance might itself take months. That Excalibur had not realised this was, itself, a hurdle to fund raising. Excalibur suggests that, initially, there could be temporary consultants or part time officers; but,

as it seems to me, investors would not be satisfied with that, particularly the former, save that a geological report could be commissioned, possibly from Gulf.

1409. Lastly the fact that, at best, Excalibur was entitled to (but did not yet possess) an *indirect interest* (to be held by a mechanism yet to be determined) was not attractive to financiers. Mr Park accepted that it was a "*significant error*" for Mr Wempen to accept that Excalibur should not be on the PSC. It meant that what was on offer was a derivative interest. That added another layer of risk since the named party might fail and forfeit its interest. It would also require some convincing explanation as to why only an indirect interest was available. There are public companies which have raised funds on the basis of indirect interests in the PSC (e.g. Longford Energy Inc[116] and Range Oil & Gas Inc[117]), but Mr Wilkinson thought that private equity would never invest in a company with an indirect interest in a wildcat project, an investment from which it could prove very difficult to exit in 5-7 years.

1410. In the case of Excalibur an indirect interest is not likely to have been acceptable. At the lowest, finance for an indirect interest, if available at all, would not be likely to be forthcoming until the form of the interest had been agreed at least in principle. Until then there was, so far as Excalibur was concerned, no deal to finance. Agreement on the form might well have taken some time and would not necessarily have been reached.

1411. I have, so far, left out of account the question whether Article 39.2 of the PSCs (which requires the consent of the KRG to any transfer or disposal of rights or interests under the PSCs to a third party) applies to the creation of indirect interests. As to that it seems to me that several forms of indirect interest would not come within the Article. If, for instance, Excalibur had a shareholding in Gulf International the Article would – absent a change of control – not apply. But some means of taking an indirect interest might be caught by the clause e.g. if the proposed structure involved an assignment of the PSC to a joint venture company or a special purpose vehicle. I also incline to the view that an arrangement which constituted a disposition in equity e.g. an express trust of the benefit of the contract (such as in the Second Indemnity Agreement – even though Texas did not seek the KRG's prior consent) would come within the Article. I do not propose to analyse the position any further. The fact that the taking of an indirect interest in a particular form would or might arguably require KRG consent could contribute to the unattractiveness of an indirect interest.

Farm out

1412. The idea that in 2007 or 2008 Excalibur could have raised finance by selling part of its entitlement to an *indirect* interest, if recognised, can safely be discounted. There is no pleaded case to that effect; nor evidence of what proportion it might have sold and at what cost. A share of an entitlement to an indirect interest of the amorphous nature claimed would have been a most unattractive purchase. Any attempt to sell it would have been unlikely to get any further than Excalibur got with Prime, which insisted on Excalibur becoming a party to the PSC.

[116] The interest was held through a Forbes & Manhattan company.
[117] Which acquired a 24.95% interest in a block by acquiring 49.9% of the shares of a company which owned 50% of the shares in a company – Forbes & Manhattan Kurdistan – which was the sole contractor on a PSC.

Conclusion

1413. For all these reasons I conclude that, even with the recognition that it says it should have received, Excalibur would not have raised the requisite capital in time to avoid forfeiture – the time for which would have been 60 and, at the latest, 90 days after 6 December 2007 – or even before June 2008, whether by private placement of shares, securing investment from a fund or private equity house, a Forbes & Manhattan/merchant bank type investor, or any other means. The number of hurdles that it had to surmount, and the results of such attempts as it did make, satisfy me that this was not a task in which, even with some letter of acknowledgment, it would have succeeded. Possession of an express acknowledgment of an entitlement to an indirect interest would not have crowned the efforts it actually made with any better success or caused it to make others which would have secured the necessary finance in time.

1414. This conclusion is consistent with para 3.6 of the joint memorandum. Mr Wilkinson's expressed view is that:

> "*... no formal acknowledgment of an interest is necessary when investors are evaluating potential investments. At that stage, investors assume that the company has legal title to the interest as described and will rely on due diligence to confirm that is the case. Because Excalibur's financing efforts never progressed to the point where additional documentation would have been necessary to demonstrate Excalibur's interest, the Acknowledgement Letter was irrelevant to Excalibur's actual financing attempts*".

1415. In those circumstances, if, contrary to my view, there was prevention it was without causative effect.

Remedies

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Specific performance

1416. The primary remedy which Excalibur seeks is that of specific performance. It seeks an order requiring the defendants to give effect to its interest in such manner as the court thinks fit. It is not necessary to decide whether New York or English law should govern the issue of whether such an order should be made. Excalibur says that the relevant law is that of New York but that principles are the same in both laws, so that assistance may be derived from English law cases. I consider the claim on that basis.

1417. Specific performance is, under both laws, an extraordinary and discretionary remedy. Since it is discretionary, there are no absolute rules. In the light of the facts the Court may, as Judge Bellacosa put it, adopt a "*nuanced*" approach. When considering specific performance, courts have "*broad discretion in fashioning an appropriate remedy*." **Lotito v. Mazzeo**, 132 A.D.2d 650, 651 (2d Dept 1987); see also **Newman v. Sherbar Dev. Co**., 47 A.D.2d 648 (2d Dept 1975) ("*In the granting of equitable relief, the court may mold its relief to accord with the exigencies of the case*.").

1418. But specific performance will not usually be granted (i) if damages are an adequate remedy; (ii) unless the claimant was and is ready, willing and able to carry out its part of the contract; (iii) if the consent of a third party is required in order for the defendant to be able to perform; (iv) if it would force hostile parties into a continuing

business relationship; (v) if the claimant has been guilty of laches. In respect of (iv) there may be cases where the court is prepared to make an order which requires some degree of working together: see the cases cited by Judge Bellacosa at para 9.1.12 of his supplemental report.

1419. Had I decided that Excalibur was entitled to an indirect interest I would not have ordered specific performance. Such a course is open to a series of fundamental objections, some of which are related to the basic difficulty in concluding that the Collaboration Agreement gives rise to an entitlement to an indirect interest in the first place.

1420. First I am not persuaded that damages are an inadequate remedy. Second, I am not persuaded that Excalibur was in 2007 and 2008 ready, willing and able to perform its contractual obligations, even in respect of Shaikan alone. Third, there are various different ways in which Excalibur could be given an indirect interest. But the parties have not agreed any of them. Any order that the court might make would require Texas and/or Gulf to do that which they never actually undertook to do. Fourth, any order would compel the parties to an ongoing relationship when the relationship between them has completely broken down; and would, in some versions of possible relief, require the consent of third parties. Fifth, the remedy is barred by laches[118]. Wide though the discretion is I decline to order it in those circumstances.

The adequacy of damages *Index*

1421. Excalibur contends that an indirect interest in Shaikan and Akri-Bijeel is a unique asset; and that if, as the defendants claim, any damages are to be calculated at the date of the breach, it will not be adequately but massively under compensated. The unique nature of the asset lies in the fact that it was an interest in a risky venture which might come to nothing but which offered the prospect of huge gains at a later stage. These have in the event materialised. To take the value of the interest at the inception of the venture is unfair since it takes no account of what the true value of the interest is shown (albeit with the benefit of hindsight) to have been. Further an assessment of the value of an oil field, at any stage, is one that requires the making of a number of assumptions or assessments which involve a considerable degree of speculation. An order for specific performance would avoid this.

The assessment date

Which law?

1422. The date by reference to which damages are to be assessed is, in my view, a matter for New York law. Article 10(1)(c) of the Rome Convention provides that the law of the contract shall govern "*within the limits of the powers conferred on the court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by rules of law*".

1423. As **Chitty on Contracts** 31st Ed., Volume 1, ¶ 30-338 explains:

[118] In those circumstances it is unnecessary to determine whether any order could or should be made against Texas which enjoys no beneficial interest in the Shaikan PSC.

> "*Article 10(1)(c) …state[s] that assessment of damages is a matter for the applicable law in so far as it is governed by rules of law. According to the Giuliano-Lagarde Report, this formulation is intended to exclude assessment of damages which is only concerned with questions of fact (e.g. arithmetical calculation of loss where the formula for such calculation is not dictated by rules of law). Where, however, a rule of law imposes a limit on compensation, or draws distinctions between penalties and liquidated damages, or provides a* ***principle by which the measure of damages for, say, non-delivery of goods can be calculated****, the applicability of the rule will depend on the governing law.*"

1424. New York law contains principles for the calculation of damages to which I refer below. Excalibur submits that the rules of law to which Article 10(1)(c) refers are limited to matters such as the identification of damages that are recoverable and the types of loss that are too remote. These are items which qualify the right to claim damages for breach of a New York law contract. I disagree. It seems to me that the date at which damages are, or are, *prima facie*, to be calculated is a rule or principle of law. In **Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc**., 500 F.3d 171, 185 (2d Cir. 2007), the Circuit Court applied what it described as the "*well established principle that contract damages are measured at the time of the breach*". The principle is not a matter of procedure, quantification or determination of fact.

1425. Under New York law "*so long as [a] lost asset* ***has a determinable market value****, a plaintiff may seek to recover that value whether the asset is "tangible or intangible property or almost any kind of contract right*": **Schonfeld v. Hilliard** 218 F.3d 164 (2d Cir. 2000) – a decision of the Second Circuit Court of Appeal where the asset was intangible and unique being an exclusive contractual licence to broadcast a BBC international news service. As the Court said:

> "*[13] When the Defendant's conduct results in the loss of an income producing asset with an ascertainable market value, the most accurate and immediate measure of damages is the market value of the asset at the time of the breach- not the lost profits that the asset could have produced in the future…*
>
> *[18] When a defendant's breach of contract deprives a plaintiff of an asset, the courts look to compensate the plaintiff for the "market value" of the asset in contradistinction to any peculiar value the object in question may have had to the owner." …. Although it is easier to determine an asset's market value when it is actively traded on a standardized exchange or commodities market, an asset does not lose its value simply because no such market exists. …Admittedly, in such instances, "the determination of a market value involves something of a fiction ..."* ibid

The courts adopt the hypothetical market standard of the fair market value being the price at which the property would change hands between a willing buyer and a willing seller. In particular circumstances a determinable market value may be nil.

1426. "*The proper measure of damages for breach of contract is determined by the loss sustained or gain prevented at the time… of breach*": **Simon v. Electrospace Corp.**

28 N.Y.2d 136 (1971) – a decision of the Court of Appeals, in which Judge Bellacosa concurred. As was said in **Sharma v. Skaarup** 916 F.2d 820 (2d Cir. 2000):

> "*It is a fundamental proposition of contract law, including that of New York, that the loss caused by a breach is determined as of the time of the breach. It is also fundamental that, where a breach involves the deprivation of an item with a determinable market value, the market value at the time of breach is the measure of damages …*
>
> *Measuring contract damages by the value of the item at the date of breach is eminently sensible and actually takes expected lost future profits into account. The value of assets for which there is a market is the discounted value of the stream of future income that the assets are expected to produce. This stream of income ...includes expected future profits and/or capital appreciation…New York courts have expressly refused to adopt [a] "wait and see" theory of damages. They have explicitly rejected the use of subsequent changes in the value of profits where they would increase an award.*"

1427. In that case the Court distinguished **Greasy Spoon Inc v. Jefferson Towers, Inc.,** 75 N.Y.2d 792 (1990), to which Judge Bellacosa referred, on the ground that the licence and permits which in **Greasy Spoon** the defendant had prevented the claimant from obtaining did not have a market value (being purely personal non-transferable rights) and were not replaceable. Loss of profits of the sidewalk restaurant intended to be operated with the permit was, therefore, the best measure of the loss. In the present case the asset in question has, in my judgment, a determinable market value.

1428. The date of breach rule is generally applicable to breaches of fiduciary duty arising from the contract as it is with breaches of contract. It may not be applicable in some circumstances not presently relevant e.g. where an executor wrongly sells assets which it was his duty to *retain* by selling them to a person to whom he should not sell because of a conflict of interest: see **Matter of Rothko** 43 N.Y.2d 305 (1977) where there was an "*inherently wrong transfer*" when the executors of the estate of Mark Rothko sold in breach of trust and contrary to a court injunction. In such a case the beneficiary is entitled to be put in the same position as if the sale had never taken place at all; and the executor's liability is "*policy orientated*".

1429. Excalibur also relied on **Menzel v. List** 24 N.Y.2d 91 (1969). In that case Mr List was ordered to return or pay the value of a Chagall, which he had purchased from the Perls gallery, to the true owner, Mrs Menzel. Mr List was entitled to recover damages against Perls for breach of the implied warranty of quiet possession. The question was whether he was entitled to recover only the value of the painting when the gallery had sold it to him or its value ($ 22,500) at the time of the trial of Mrs Menzel's action. The Court held that he was entitled to the latter. Mrs Menzel's action against Mr List was in replevin and the $ 22,500 represented the cost to him of the disturbance of his quiet enjoyment. Further the court appears to have proceeded on the basis that his cause of action for breach of contract did not arise until the judgment in favour of Mrs Menzel. At any rate it was a continuing breach.

1430. Excalibur contends that the date of breach rule is not inflexible. It can and should be departed from if that is necessary in order to give effect to the basic principle that damages are to compensate the innocent party for the non performance of the contract

by putting him in the same position, so far as money can, as if the contract had been performed. That, it says, is the case here. To calculate damages by reference to the date of breach would (if the defendants are right to say that the interest had no value) equate the interest with a worthless and defunct item, and ignores its inherent potential. On any view the interest is worth immensely more now than at the date of breach. The nature of the venture between the parties was that they intended to develop any blocks acquired and not just to acquire an asset which could be sold off relatively soon after acquisition. Excalibur always intended to hold on, and would have held on, to the asset and would not have had to dilute its interest in order to fund participation. The asset is unique and Excalibur could not have mitigated its loss by buying in a substitute. For all these reasons to take the date of breach rule would not compensate Excalibur and would be neither fair nor reasonable. It would give Texas and Gulf a far greater share of profits than was ever agreed or intended.

1431. Judge Pratt was prepared to accept that, if a claimant could not replace the asset he should have had, the judge would need to determine an appropriate measure in the circumstances of the particular case in order to fulfil the basic aim of putting him in the position he would have been in if the breach had not occurred. He was also prepared to accept that taking the current value might be appropriate if the asset in question was truly unique such as a painting. Judge Bellacosa thought that the need to put the party in that position was "*a counterweight to the absolutism of a date of…breach formulation*".

1432. I do not accept that this is a case in which New York (or English) law would, or where I should, apply a rule other than that of the date of breach. The date of breach rule is, as the New York courts have consistently held, sound in principle. Assessing damages as at that date fulfils the basic aim. A valuation at that date of what is or is expected to be an income producing asset will take account of the prospect of future profits, as then viewed. If the asset in question is worth little or nothing at the date of breach and much more at the date of trial the claimant will obviously seek the later date; just as, if the value plummets he will seek the former. But if the court takes the date of trial it (a) exposes the parties to all the vagaries of post breach events, which may produce results favouring either side, or different sides at different times, as a result of events for which the parties or one of them may bear no responsibility; (b) assumes that which in this case is doubtful namely that the party claiming damages would not have disposed of any part of its interest in the interim, either to make a profit or to raise finance, as Mr Wempen sought to do when he tried to sell to MOL; (c) gives it the benefit of an increase in value when it has borne none of the costs or risks; and (d) enables it to hedge its bets by waiting until the venture has proved a success before making any claim.

1433. Excalibur says that the latter point should be discounted because the breach relied on precluded it from paying the costs or bearing the risk. But it never in fact made an offer to pay the costs (which it was never able to pay) and there can be no certainty that, if it had the interest claimed, it would in fact have continued to pay them. And nothing can alter the fact that it has borne no risk. If the date of trial is chosen as the date of assessment one party or another may secure a windfall benefit or detriment depending on accidents of timing or judicious selection of when to bring an action. If, in theory or in practice, a party is allowed to choose the date by reference to which

damages are to be calculated he is afforded the unjustifiable advantage of being able to hedge his bets.

1434. It is apparent that the date of breach rule is not displaced simply because the claimant could not mitigate its loss by buying in a substitute asset from another source at the date of breach: **Kovens v. Paul** No. 04 Civ 2238 (TPG), 2009 WL 562280, at p.5(SDNY Mar. 4, 2009); or because the plaintiff can prove that it would not have sold the asset immediately, but retained it: see **Sharma v. Skaarup** where the claimant complained that the bank's breach of contract resulted in foreclosure on certain oil tankers and claimed that, but for the breach, it would have retained them and traded them once the market improved; and **Oscar Gruss & Son, Inc. v. Hollander** 337 F.3d 186 (2d Cir. 2003) where the claimant argued that it would have held the warrants for longer after the breach date.

1435. In certain circumstances a claimant can recover loss of profit as a consequential loss. Where however the loss relates to the failure to provide an asset with a determinable market value, it is that value which determines the damages. It is not possible to recover consequential post breach loss of profits based on the absence of the asset: see **Sharma v. Skaarup** where the claimant unsuccessfully claimed, not the market value of the vessels at the date of the breach (c $ 15 million), but the profits (c $ 80 million) that would have been earned in future years had it retained the tankers.

1436. If such profits were recoverable they would (i) need to be ascertainable with reasonable certainty and (ii) the loss of them would need to have been within the reasonable contemplation of the parties when they contracted. The head of loss must be a liability for which the defendant can fairly be taken to have assumed, or to have warranted the plaintiff reasonably to suppose that it assumed, liability: **Bi-Economy Mkt., Inc. v. Harleysville Ins. Co. of New York,** 10 N.Y.3d 187 (2008).

1437. Neither of these conditions is satisfied. The calculations put forward by Mr Emslie are not a calculation of a loss of profits but an asset valuation based on discounted cash flows. Even if the first of those conditions was satisfied the second is not. I do not think that, at the time when the Collaboration Agreement was made, the parties to it can be taken to have assumed responsibility for a loss of profit consequent on a commercial oil discovery or to have given Excalibur reasonably to understand that they would do so. That would mean that Gulf would have been assuming a responsibility, if oil was discovered, to compensate Excalibur for ongoing loss of profits even though Gulf, and not Excalibur, had taken all of the risk.

1438. Damages are said to be inadequate because, if calculated at the date of the breach, they are either, as the defendants claim, nil or a very low figure compared with the present value of the interest. That does not, in my judgment, make them inadequate as a remedy. Under New York law specific performance can be ordered when the subject matter of a particular contract is unique and has no established or reasonably determinable market value: **Van Wagner Adv. Corp v. S & M Enters**, 67 N.Y.2d at 192-194 (1986) (denying specific performance of a lease when the purportedly unique qualities of the space could be determined with reasonable certainty and without imposing "*an unacceptably high risk of under compensation on the injured promisee*"). But, if a dependable (i.e. reasonably reliable) valuation of the interest at the date of breach produces the result that it is worth nothing or very little, so be it.

That means that that which Excalibur should have got had a nil or low value at the time when it should have got it. That is a misfortune, but not an injustice.

1439. The asset in **Van Wagner** – billboard space – although one the value of which would vary from time to time, did not have the characteristic of an entitlement to an indirect interest in an exploration block, namely that there could be an enormous increase in its value, if oil was discovered, or a total slump if it was not. Excalibur claims that when an entitlement of the latter kind has been denied, and the entitlement has proved to be immensely valuable, it would be unjust to refuse specific performance.

1440. I do not agree. If it is an injustice, it is significantly less than the injustice inherent in an award based on present values less incurred costs, which would give to Excalibur the whole net benefit of the venture when it has taken none of the risk and borne none of the cost. Such an award would give it, in respect of Shaikan, a proportion of the value of a discovered field with huge reserves when what it was denied was an indirect interest in a wildcat exploration site with huge inherent exploration, technical and political risks. That would not be equitable. The imposition of an equitable remedy must not itself work inequity.

Ready, willing and able? *Index*

1441. A party seeking specific performance must, under New York law, show that it was ready willing and able to perform its obligations under the contract at the time set for performance under the contract and at the time when specific performance is ordered: see **Gindi v. Intertrade Internationale Ltd**., 50 A.D.3d 575, 575-576, 856 N.Y.S.2d 104, 105 (App Div, 1st Dept 2008):

> "*Plaintiff, in order to establish that he is entitled to summary judgment on his claim for specific performance, must demonstrate that he was ready, willing and able to perform pursuant to the contract of sale on the original law day or, if time was not of the essence, on a subsequent date fixed by the parties or within a reasonable time thereafter*."

1442. I am not satisfied that Excalibur was able to perform its obligations when performance was due in respect of (a) its share of the signature bonus on or just before 6 December 2007 or within 60 or 90 days (or any commercially acceptable time thereafter) or (b) in respect of the ongoing expenses of exploration and development.

1443. That circumstance is also fatal to a claim for damages. Under New York law repudiation of obligations does not by itself give rise to a claim in damages. The non-repudiating party bears the further burden of proving, by a preponderance of the evidence, that it was "*ready, willing and able*" to perform its obligations under the contract: see the recent decision by the Court of Appeals in **Pesa v. Yoma Development Group, Inc**., 18 N.Y.3d 527, 532 (2012). A similar result would be reached in English law as a question of causation.

1444. If Excalibur were to be entitled to specific performance it would, as it accepts, have to be on the footing that it bore its share of the past costs of the relevant blocks. As to that Excalibur pleads in its Re-Re-Amended Reply that:

> "*Excalibur does not currently have the funding in place (whether in the form of cash or commitments from third parties) which would be necessary to enable it to pay for its share of the costs which have been incurred by the Defendants in relation to the Shaikan, Akri Bijeel, Sheikh Adi and Ber Bahr Blocks. This does not, however, preclude the Court from ordering specific performance of the Collaboration Agreement provided it is satisfied that Excalibur will be able to perform its obligations under whatever agreements or arrangements the Court orders should be put in place by the time it is obliged to do so under the terms of those agreements or arrangements*."

If Excalibur presently lacks the money to pay for past costs it necessarily lacks the money for future ones as well.

1445. Mr Rogers has calculated that a 30% share of the Gulf defendants' past costs on all four blocks up to 31 August 2012 was $ 207 million (with compounded interest on the basic figures), of which $ 137 million represents Shaikan alone. Mr Panayides took a figure of $ 150 million (without compounding). Future costs will be very substantial. Excalibur claims that, once its interests are recognised, it will be able to raise whatever funds are needed to finance its participation in the blocks including in respect of past costs.

1446. There are, accordingly, very substantial sums which, if specific performance is ordered, Excalibur will have to pay in respect of past costs and litigation costs. It will also have to pay future costs. The agreement which Excalibur has with Credit Suisse is not a commitment of funds but an agreement to act as an adviser. Credit Suisse's "*highly confident*" letter is of limited evidentiary value. Such letters have, as Mr Jull put it, "*little standing any longer in my industry*". No evidence, expert or otherwise, has been adduced from Credit Suisse. No attempt of which I am aware has yet been made to market to potential funders.

1447. It is, therefore, open to question whether Excalibur would, even now, become in a position to pay the cost of participation. I have, however, come to the conclusion that, in view of the immense value of the Shaikan field, the likelihood is that, if I were to order specific performance, Excalibur would be able to secure the finance necessary within the reasonable time within which I would have required the past costs to be paid, and to continue to pay costs in the future.

Giving effect to the interest *Index*

1448. There are many ways in which Excalibur could be given an indirect interest in the PSCs. In Further Information given on 27 May 2011 Excalibur indicated six different ways in which this might be done, without limiting itself to any of them. These included (i) a Joint Operating Agreement or similar agreement between Excalibur, Texas and Gulf International and Gulf if necessary; (ii) a profit sharing agreement; (iii) a trust in favour of Excalibur of its share of the net profits; (iv) an equity participation in Gulf International; (v) an assignment in favour of Excalibur of the defendants' interests in the PSCs; or a combination of any of these.

1449. By the time of the Opening the mechanisms suggested were:

a) a trust arrangement similar to that between Gulf/Gulf International and Texas under which 30% of their interest in the blocks in which Excalibur was entitled to an interest would be held in trust for Excalibur;

b) the issue or transfer by Gulf to Excalibur of an appropriate shareholding interest in Gulf International;

c) a net profit interest agreement or other profit sharing agreement whereby Excalibur would be entitled to a share in the profits derived from the block in accordance with an appropriate accounting mechanism;

d) subject to the necessary consents from third parties a direct farm out to Excalibur of a 30% interest in the PSCs and/or JOAs[119] in consideration for the payment by Excalibur of a purchase price equivalent to its share of historical costs; or, if Excalibur was only entitled to an interest in some of the blocks;

e) subject to the necessary consents, the assignment of Gulf International's interests and obligations under the PSCs and JOAs for those blocks in which Excalibur was entitled to an interest to an affiliate of Gulf International, if necessary to be established for this purpose, and the transfer of 30% of the shares in that company to Excalibur; or

f) if the necessary consents were unobtainable, the creation of a class of shares in Gulf International under which the shareholders would have the right to receive the revenue from the blocks in which Excalibur was entitled to an interest and liable to bear the costs associated with those blocks and the issue of 30% of those shares to Excalibur.

1450. In Excalibur's Closing the focus was on an arrangement such as (b) together with an agreement between Gulf/Gulf International and Excalibur whereby Excalibur received the revenue associated with a 30% interest in Gulf International and paid for its historical and future shares of the costs associated with that 30% interest; or, if Excalibur was not entitled to an interest in every block, an arrangement such as in (c) with an agreement for Excalibur to pay 30% of past and future costs in exchange for 30% of revenues. Excalibur also suggested a form of trust arrangement for the purpose of holding the ring pending a transfer of interest – even though this cannot be reconciled with clause 9.2 of the Collaboration Agreement.

1451. If, contrary to my view, there was some obligation to enter into an arrangement which would give effect to an indirect interest, it would be so uncertain in content and effect as to be unenforceable. An order for specific performance cannot order the parties, under threat of liability for contempt, to negotiate their own structure and their own terms. If they fail to agree, the court would have to make an agreement for them. The plethora of different mechanisms postulated, the complexities involved in

[119] This would need some adjustment. Excalibur is not entitled to a 30% interest in 100% of any of the PSCs.

implementing them, and the unlikelihood of agreement show that that is what the court is, in effect, being asked to do.

1452. If the court were to decide how to give effect to the interest, it would (a) be taking upon itself the function of making an agreement which the parties themselves never made, which is not contemplated by the agreement they did make and is not in, or based, on any form which they prescribed[120]; (b) be compelling the adoption of a mechanism of its own choice; and (c) be making an order the carrying into effect of which would be likely to require extensive, and possibly constant, supervision in the sense that there is "*the possibility of the court having to give an indefinite series of ... rulings in order to ensure the execution of the order*": **Cooperative Insurance Society Ltd. v Argyll Stores (Holdings) Ltd**. [1998] AC 1, 12F-G. In attempting to draft a workable and acceptably precise order I would scarcely know where to begin. Excalibur says that no complicated order or detailed contractual or other structure is required but has not essayed a draft of any order[121]. These considerations make the grant of specific performance inappropriate.

1453. Some of the suggested means of giving effect to Excalibur's alleged interest would require the consent of third parties such as the KRG and MOL. Article 39.2 of the Shaikan (and the three other) PSCs provides that the KRG's prior written consent (not to be unreasonably delayed or withheld) is required for any assignment, transfer or other disposition of all or part of a Contractor entity's rights and interests under a PSC.

1454. I would not have made any order for the assignment, transfer or other disposition of rights and interests under a PSC to take effect without the consent of the KRG and Gulf's co-contractor MOL. Whether any given arrangement would fall within those words might be debatable. Even if satisfied that the wording did not apply (a view that might not be shared by the KRG or a Kurdistan court) I might have been reluctant to adopt any particular means of giving effect to an indirect interest without knowing the attitude of these bodies to the result which the order was designed to achieve. To impose on the Gulf defendants a result which was unacceptable to the KRG (whether or not it involved a breach of the PSC) might well be unfair to Gulf, if it prejudiced Gulf in its relations with the KRG or, at worst exposed it to a claim that it was in breach of the PSC. As Mr Codd observed, an attempt to bypass the KRG by granting Excalibur shares in a holder of the PSC or giving Excalibur some indirect interest, when Dr Hawrami had not wanted Excalibur to participate directly, might be a practical disaster. Since I am not going to make any such order I do not propose to address further the considerations material to the question whether and on what terms I should have done so.

1455. Any order for specific performance would (to some extent depending on the form which it took) mean that the court was compelling the renewal and continuance of a relationship between hostile parties. It is obvious to me from the course which these

[120] Any reliance on the JOA provisions in the Collaboration Agreement is misplaced. JOAs are for parties to the PSC.

[121] It suggests that the court should declare that Excalibur is entitled to a working interest in the relevant blocks and require effect to be given to that interest on the condition of Excalibur meeting its *pro rata* share of past and future costs. Such an order would be inadequate because it makes no provision as to how the effect should be given.

proceedings have taken that the prospect of the parties being able to work satisfactorily together is remote.

1456. These are all classic objections to the making of an order for specific performance both in the law of England and that of New York. In **Brody v. W. & L. Enterprises, Inc.**, the Court stated[122]:

> "*In asking for specific performance, it devolves upon the plaintiff to show a state of facts which would enable the court to grant that form of relief without requiring the defendant to do something which it was not obligated to do. The remedy of specific performance presupposes the existence of an express agreement whereby the party complained against specifically undertook and obligated himself to do and perform a definite and certain act or thing. If such a contract does not exist or such undertaking or obligation is absent in the contract between the parties, specific performance cannot be decreed; to do so would result in the court making a new contract for the parties and then decreeing its specific performance; nor can it require the performance of any contract other than the one which the parties themselves have made*."

1457. This does not mean that the performance which the Court orders must be the exact performance contemplated by the contract: **Lary v. U.S. Postal Service**, 472 F.3d 1363, 1369 (Fed. Cir. 2006). A party may, also, be ordered to make what amounts to partial performance if he has disabled himself from full performance. But the court cannot require parties to take actions that would be materially different from those that they have agreed or which they have never agreed at all.

Laches *Index*

1458. Both under the law of New York and under that of England and Wales the court may decline to order specific performance if there has been unreasonable or inexcusable delay in the bringing of a claim and that delay makes it unfair or inequitable to grant the relief sought.

1459. Where the claim relates to an interest in an on-going business, particularly where that business is "*subject to extraordinary contingencies, and can be rendered productive only by a large and uncertain outlay*", any unreasonable delay in bringing the claim prejudices the defendant due to the fact that it has taken the risk and expended its capital alone. Under English law such delay is likely to preclude an order for specific performance: **Snell's Equity**, 32nd ed. 2010, 5-019[123]; **Clegg v Edmondson** (1857) 8 De G M&G 787 from which the previous quotation derives.

1460. In the latter case, in which the plaintiffs asserted a right to participate in the profits of a mine but took no steps to enforce that right for 9 years, Knight Bruce LJ said at p 814:

> "*A mine which a man works is in the nature of a trade carried on by him. It requires his time, care, attention and skill to be bestowed on it, besides the*

[122] Judge Bellacosa regarded this decision as embodying "*a dogmatic absolutism from a trial court judge*" when the expression of the position is usually more "*nuanced*". It seems to me a tolerably reliable guide.
[123] "*Delay will accordingly be fatal to a claim for equitable relief if ... the claim is to a business (for the claimant should not be allowed to wait and see if it prospers).*"

> *possible expenditure and risk of capital, nor can any degree of science, foresight and examination afford a sure guarantee against sudden losses, disappointment and reverses. In such cases a man having an adverse claim in equity on the ground of constructive trust should pursue it promptly, and not by empty words merely. He should shew himself in good time willing to participate in possible loss as well as profit, not play a game in which he alone risks nothing.*"

1461. In that case the plaintiffs had continually asserted their claim. But that did not save them. Turner LJ said at p 810:

> "*What the Plaintiffs, however, mainly relied upon was the continual claim on their part, and no doubt they have not ceased to assert their claim, but I cannot agree to a doctrine so dangerous as that the mere assertion of a claim unaccompanied by any act to give effect to it, can avail to keep alive a right which would otherwise be precluded.*"

1462. New York law also provides for a laches defence in cases of so called "*speculative delay*", where, for example, a claimant stands by whilst the defendant explores oil or mining opportunities. In **Patterson v. Hewitt**, 195 US 309 (1904), where the delay was 8 years, the court said:

> "*If appellants had expected a share in this property they should either have brought a bill promptly to enforce their rights, **or at least contributed their proportionate share to the subsequent work and labor**, and the expenses then incurred. To award them now a deed to their original interest in the property would be grossly unjust to the defendants, through whose exertions the value of the property was discovered and the mine put upon a paying basis. While it is true the court might impose upon the appellants the payment of their proportionate share of labor and expenses as a condition of relief, it could not compensate the defendants **for the risk assumed** by them that their exertions would come to nought. There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which to-day may have no saleable value may in a month become worth millions. Years may be spent in working such property, apparently to no purpose, when suddenly a mass of rich ore may be discovered, from which an immense fortune is realized. Under such circumstances, persons having claims to such property are bound to the utmost diligence in enforcing them, and **there is no class of cases in which the doctrine of laches has been more relentlessly enforced.***"

1463. There is authority under New York law that lack of knowledge of a claim must be shown before a defendant can assert laches. In **Cohen v. Kranz** 227 A.D.2d 581 (App Div, 2d Dept 1996) the New York Appellate Division said:

> "*To establish laches, a party must show: (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded [to] the complainant. All four elements are necessary for the proper invocation of the doctrine.*"

1464. I do not, however, accept that the fact that notice of a claim has at some time been given is a bar to the application of laches in a case such as the present. In his written evidence Judge Bellacosa said that a defendant must "*typically*" show that it lacked notice of the potential claim. Judge Pratt did not accept that ignorance of a claim was always necessary for laches to apply, observing, in my view correctly, that **Cohen v Kranz** does not address the case of speculative delay where the plaintiff holds back asserting a claim waiting to see how things work out. In such a case he thought that knowledge would be virtually irrelevant.

1465. In my judgment Excalibur's delay in bringing proceedings was unreasonable and it would be inequitable now to order specific performance. Excalibur did not bring any action until December 2010, well after the exploration stage. It has incurred none of the costs and borne none of the risk. It waited to see whether oil was discovered. As Excalibur said in a document prepared to attract litigation funding at the end of 2010, reflecting what was said in Cadwalader's letter of 1 July 2008 (see para 1314):

> "*Attempts to reach a settlement were unsuccessful, and Excalibur chose to wait out the drilling process on the advice of counsel.*"

The document went on to refer to the fact that "*The field is now proven and moving to production with several billion barrels of P50 announced*" and that Excalibur had legal counsel prepared to assert its contractual rights and was looking for litigation finance. Mr Wempen confirmed that it was not until the news from Shaikan indicated the presence of oil in large quantities[124] that Excalibur decided to proceed. Had the drilling process not borne fruit no more would have been heard of the claim. As it was, more than a year elapsed between the discovery of oil and the launch of proceedings.

1466. In those circumstances it would not be equitable to make an order for specific performance now. The fact that Excalibur asserted a claim and reserved its rights does not alter the position. As it was, such assertion was intermittent. So far as the defendants were concerned nothing material happened after the settlement discussions in the first half of 2008 apart from Cadwalader's letter of 5 December 2008. Excalibur also relies on the fact that in mid-2008 it indicated that its new investor would be interested in exploring Excalibur's return to the deal by fully financing its portion of the PSC. I do not regard this as saving the position. Excalibur had no real prospect of getting back on the PSC. In any event, what it decided to do was to postpone the issue of proceedings of any kind until satisfactory results from drilling.

1467. Excalibur also contends that it had no option but to delay bringing the claim because there was no point in trying to raise litigation funding because it was obvious that nobody would fund a claim unless it was clear that the interest claimed had real value. I do not regard this as an answer. Speculative delay does not lose its significance because litigation funders are not prepared to invest in their own speculation until oil is found.

1468. For all these reasons there would have been no question of the court ordering specific performance.

[124] The Gulf August 2009 press release gave a revised range of oil-in-place volumes of between 1.5 and 3 billion barrels.

Damages *Index*

1469. For the reasons set out in Appendix 2 hereto I have come to the conclusion that there was as at the end of 2007 and the beginning of 2008 no real monetary value to any entitlement of Excalibur to have a 30% indirect interest (of unspecified form) in the defendants' interests in the Shaikan PSC.

1470. If, contrary to my view, any assessment of damages should be made as if Excalibur had been denied a 30% direct interest in the defendants' interests in the Shaikan PSC (on the basis that an indirect interest could have been modelled which would have the same effect) the damages would be no more than $3.3 million. At most, therefore, Texas would be liable for 5/80th and Gulf for 75/80th of that sum.

Further problems in relation to damages

1471. Excalibur faces a further problem. It claims damages based on the value of the interest as of now (or, in the alternative at the date of breach). That assumes that it, itself, would have held 100% of the (indirect) interest to which it claims to have been entitled and of which it claims to have been deprived. But the likelihood is that any participation on an indirect basis would from the start either have been through (a) a Gulf SPV (as suggested by Eric Wempen on 28 November 2007 in his draft statement for Mr Wempen – see para 1024); or failing that (b) an Excalibur SPV (see Eric Wempen's advice of 16 November 2007: para 862); or (c) both. Eric Wempen's draft statement contemplated either a Gulf SPV or an Excalibur SPV which would invest in a Gulf SPV.

1472. Because Excalibur, itself, had no funds, the likelihood is that most of the shares in the SPV would be owned by Excalibur's "sponsors" and not by Excalibur. In those circumstances Excalibur cannot claim on the basis that it would have obtained 100% of the value of the 30% interest. Its interest would have been very heavily diluted.

1473. A similar problem would arise if investment took place through a fund investing in some SPV. Excalibur might have been entitled to a management fee; but the claim is not based on that.

1474. I cannot tell what the dilution would amount to. If it were essential to make an assessment I would think it likely that it would reduce Excalibur's beneficial interest in the SPV to no more than 20%. Accordingly, any assessment of Excalibur's damages would have to be made on the footing that Excalibur's loss is no more than 20% of the figure mentioned in para 1470 above.

Summary *Index*

1475. In summary, what I have decided is this:

a) the Collaboration Agreement does not create, give rise to, or recognise, any entitlement of Excalibur to an indirect interest in the Shaikan or any other PSC;

b) Excalibur consented not to be on the Shaikan PSC (on which it was impossible for it to get) and withdrew, or is deemed to have withdrawn,

from the Bid to be on it; it has, accordingly, no valid claim against either Texas or Gulf to an interest in that or any other PSC;

c) Gulf was not a party to the Collaboration Agreement *ab initio* and did not become one thereafter whether by assignment or otherwise. Excalibur has no claim against it for any breach of that agreement;

d) If, contrary to my view, the Collaboration Agreement does give Excalibur an entitlement to an indirect interest in the Shaikan PSC, then Excalibur (i) was not ready, willing and able to perform its obligations thereunder in 2007 and early 2008; (ii) repudiated its obligations under it; and (iii) was in material breach of it. As a result Texas, and, if it was a party, Gulf were not obliged to give effect to any entitlement to an indirect interest (had there been one) and were discharged from any obligation to Excalibur;

e) Excalibur did not have the necessary financial resources and technical ability to get on the Shaikan PSC in 2007. Its lack of financial resources prevented it from being able to fulfil its financial obligations as (according to its claim) an indirect participant in the Shaikan PSC before being in material breach of its obligations. For this reason Texas, and Gulf, if a party, are not under any liability to Excalibur;

f) Excalibur was not prevented from raising finance by any wrongful act of Texas or Gulf If in 2007 Texas and/or Gulf had provided some explicit acknowledgment of Excalibur's entitlement to an indirect interest in the Shaikan PSC, it would have made no difference to Excalibur's chances of raising the necessary finance in sufficient time to avoid the loss of its interest;

g) The *alter ego* doctrine of New York law does not apply because the question whether any such doctrine applies is, as a matter of English conflict of laws, to be determined by the laws of Texas, which are not shown to differ from those of England and Wales. If New York law applies, Texas was not the *alter ego* of Gulf for the purposes of that law;

h) Neither Texas nor Gulf owed to Excalibur the duties of a fiduciary whether under the law of New York or that of England and Wales;

i) Neither Texas nor Gulf was guilty of any fraud or deceit or any other tortious act or omission giving rise to a right of action in favour of Excalibur; nor is Gulf liable to Excalibur on the footing of unjust enrichment;

j) If I had held that the Collaboration Agreement entitled Excalibur to an indirect interest in the Shaikan PSC, I would not have made an order for specific performance in its favour;

k) If Excalibur had been entitled to damages for breach of contract or breach of fiduciary duty on account of the failure of Texas and/or Gulf

to recognise and give effect to its entitlement to an indirect interest in the Shaikan PSC, those damages would fall to be assessed at the date of breach, namely in late December 2007 and early 2008 when the defendants' failed to acknowledge Excalibur's interest;

l) On that basis Excalibur would only be entitled to nominal damages because the value at that time of a right to a 30% indirect interest (of an unspecified nature) in the defendants interests in the Shaikan PSC was nil;

m) Excalibur has in any event no valid claim in respect of any block other than Shaikan.

1476. Accordingly I shall give judgment for the defendants.