CIVIL JURISDICTION

2005: No. 406

BETWEEN:

ADRIAN NASH
ARTURO SARMIENTO **Plaintiffs**

-and-

GULF DEVELOPMENT INTERNATIONAL LTD
(a company incorporated in Bermuda)

KEMP HOLDINGS II LLC
(A company incorporated in Delaware)

RAVENSWOOD LLC
(A company incorporated in Delaware)

FREEMARKET GLOBAL LTD
(A company incorporated in Bermuda)

FREEMARKET PETROLEUM LTD
(A company incorporated in Bermuda) **Defendants**

JUDGMENT

Date of Hearing: 22 – 25 January and 2 February 2007
Date of Judgment: 16 February 2007

Mr. David Kessaram, Cox Hallett Wilkinson, for the Plaintiffs
Mr. Paul Smith, Conyers Dill & Pearman, for the Defendants

Introduction

1. These proceedings arise from the provisions of a settlement agreement ("the Settlement Agreement") entered into between all of the parties to these proceedings, dated 13 April 2005. The Settlement Agreement itself followed litigation in the Supreme Court of Bermuda which had been commenced by the plaintiffs (together "the Plaintiffs", separately "Mr. Nash" or "Mr. Sarmiento") in the form of a petition taken pursuant to the provisions of section 111 of the Companies Act 1981. Prior to the execution of the Settlement Agreement, the

Plaintiffs had been shareholders in and directors of the fourth defendant ("FMG"). The Settlement Agreement provided that the Plaintiffs would resign from their offices as directors, and execute stock transfer forms in respect of their shareholdings. In return, the first defendant ("GDI") agreed to pay a substantial sum to the Plaintiffs, and the fifth defendant ("FMP") agreed to use its best endeavours to procure that a proposed joint venture agreement with an oil trading company named Arcadia Petroleum Limited ("Arcadia") would include provision for certain terms. The agreement to be entered into between FMP and Arcadia was referred to in the Settlement Agreement as the Arcadia Agreement, and is also referred to in this judgment as the Joint Venture Agreement.

2. It is essentially these obligations on the part of FMP which have given rise to this litigation, and for this reason it is appropriate to set out in full the provisions of clause 5 of the Settlement Agreement, which is in the following terms:

> " 5. FMP agrees and undertakes to use its best endeavours to procure that Arcadia agrees that the terms of the executed joint venture agreement for the supply of crude oil to be entered into between FMP and Arcadia Petroleum Limited ("Arcadia") ("the Arcadia Agreement") include provision for the following:
>
> (a) the Trading Profits (as defined in clause 7.3 of the Arcadia Agreement) to be distributed by Arcadia pursuant to clause 7.5 (b) of the Arcadia Agreement as follows:
>
> (i) Arcadia – 50%
> 29 FMP – 32.5%; and
> 29 Fox Energy Limited (a company owned by the Petitioners) – 17.5%;
>
> (b) the appointment of Mr. Sarmiento to the Petroleum Committee (as defined in clause 1.1 of the Arcadia Agreement), such appointment to be for the term of the Arcadia Agreement with no party to such agreement having the right to remove Mr. Sarmiento from such committee; and
>
> (c) FMP and Arcadia entering into an agency agreement with Fox Energy Limited (or any other company nominated by Mr. Sarmiento) and/or its assignees (the

"Agent") on terms consistent with those set out in the summary of principal terms in Appendix D to this Settlement Agreement.

FMP further undertakes to use its best endeavours to procure that the Arcadia Agreement is executed by the parties thereto by no later than 30 days from the date of this Settlement Agreement.

Each of GDI, Kemp Holdings and Ravenswood undertakes to procure that the directors of FMP appointed by each of them take all such actions as are necessary to ensure that FMP complies with its obligations under this paragraph 5. Further, each of FMG and GDI, as shareholders of FMP, will instruct FMP to comply with its obligations under this paragraph 5 and take all such actions as are necessary to ensure that it does so;"

3. In the event, the Joint Venture Agreement was executed within the thirty day period envisaged by clause 5 of the Settlement Agreement, on 26 April 2005, although there remained an issue between the parties concerning execution. However, it did not provide for the three matters contained in clause 5, in terms of Fox Energy Limited ("Fox") receiving 17.5% of the trading profits of the Joint Venture Agreement, Mr. Sarmiento's appointment to the Petroleum Committee as defined in the Joint Venture Agreement, or the entering into of an agency agreement (which I will refer to as "the Agency Agreement", even though no such agreement was ever concluded or signed) by FMP and Arcadia with Fox, on terms consistent with those set out in Appendix D to the Settlement Agreement. I will come to the pleadings shortly, but in broad terms the complaints in respect of the three matters mentioned above do not rest on their not having been included in the Joint Venture Agreement at the time of its execution. In respect of the first two items the complaints are that the Joint Venture Agreement was not amended to make the appropriate provision, and in respect of the Agency Agreement, that no such agreement was in fact entered into between FMP, Arcadia and Fox.

4. At the end of the day, Mr. Kessaram did not press the position in relation to the first two of the three matters referred to in clause 5 of the Settlement Agreement, or the timing of the execution of the Settlement Agreement. In his opening submissions, Mr. Kessaram had noted that the two were "of little concern", and when Mr. Smith for the defendants ("the Defendants") indicated in his closing address that he understood that the case was now concerned only with the Agency Agreement, Mr. Kessaram conceded that the first two may have been technical

breaches, but said that they did not take the case very far and that the main point was indeed the Agency Agreement. So that was not a complete confirmation that the Plaintiffs' case was now restricted to the issues relating to the Agency Agreement, although that was the position in his written submissions. I will nevertheless deal with those matters which were originally pleaded, and which were also the subject of evidence, not least because those matters form an important part of the background to the dispute between the parties.

5. Finally, in relation to the factual background, the purpose of the Joint Venture Agreement was to take advantage of what was perceived to be a favourable contract which Arcadia had with Petroleos de Venezuela SA ("PDVSA"), which is described in the witness statements as being either a Venezuelan state owned oil company or the Venezuelan national oil company. This agreement, dated 8 October 2004 was known as the Revised Petroleum Agreement, or RPA, and was itself a successor contract to one which FMP had had with the Venezuelan Ministry of Energy and Mines. It was this history which led to FMP and Arcadia entering into the Joint Venture Agreement.

The Pleadings

6. For the Plaintiffs, following reference to the parties, the statement of claim covered the issue of the section 111 petition, and the subsequent settlement of those proceedings. It described the obligations of the Plaintiffs under the Settlement Agreement, and how these were satisfied. It then set out clause 5 of the Settlement Agreement, and the obligations of the various defendants in relation to the terms of that clause, before concluding that FMP, operating through its chief executive officer William Hickman ("Mr. Hickman") "has failed to comply and continues to fail to comply with its obligations under the terms of the Settlement Agreement".

7. Particulars were then given in relation to the three principal provisions of clause 5 and there was the further complaint that the Plaintiffs had not received confirmation that the Joint Venture Agreement had been executed within the thirty day time period provided for. In relation to the three principal provisions, the particulars provided were in the following terms:

    (i) "As at the date of this document the terms of the executed Arcadia Agreement have not been amended in order to make provision for the distribution of the Trading Profit as set out in clause 5 (a) of the Settlement Agreement."

(ii) "As at the date of this document the terms of the executed Arcadia Agreement have not been amended in order to provide for the appointment of the Second Plaintiff to the Petroleum Committee regardless of the fact that his appointment is to be for the term of the Arcadia Agreement." and

(iii) "As at the date of this document no agency agreement has been entered into between the Fifth Defendant, Arcadia Petroleum Limited and Fox Energy Limited (a company that is controlled by the Plaintiffs)."

8. The pleading continued that those matters constituted breaches of the Settlement Agreement, and referred to correspondence written to FMP in the form of Mr. Hickman and to FMP's lawyers in September and October 2005, which correspondence reminded FMP of its obligations under the Settlement Agreement and required action to be taken to remedy the alleged failures. The pleading concluded that the Defendants had therefore failed to comply with their contractual obligations pursuant to the terms of the Settlement Agreement, and that such failure had resulted in loss and damage to the Plaintiffs.

9. The defence of the Defendants denied that the Defendants or any of them were in breach of their obligations under the Settlement Agreement. In relation to the Joint Venture Agreement, it pleaded that this had been executed on or about 26 April 2005, and pleaded that the Defendants were not required to confirm execution of the Joint Venture Agreement within thirty days, but carried on to plead that this had in any event been done, because the letter which FMP had sent to Arcadia on 28 April 2005 had started by referring to the fact that they had been able to "finalize our joint venture agreement", and a copy of this letter had been sent to the Plaintiffs.

10. In relation to the division of profits under the Joint Venture Agreement so as to provide a share for Fox, and Mr. Sarmiento's appointment to the Petroleum Committee, the defence pleaded that the first of these had been agreed to by Arcadia in the form of an e-mail from Mr. Striano of Arcadia to Mr. Hickman in May 2005, subject to agreeing the mechanism for payment. As to the appointment of Mr. Sarmiento to the Petroleum Committee, it was pleaded that this had been agreed during the course of telephone conversations between Mr. Striano and Mr. Hickman. The pleading continued that in a letter dated 2 December 2005 from FMP to Arcadia, these matters had been confirmed and agreed to by Arcadia in the form of a countersignature. Accordingly, it was pleaded that the terms of the Arcadia Agreement had been amended both to provide that 17.5% of the trading profits under that agreement would be paid to

Fox, and that Mr. Sarmiento would be appointed a member of the Petroleum Committee when it was formed.

11. The position in relation to the Agency Agreement was that there was an admission that no Agency Agreement had been finalised or agreed between FMP, Arcadia and Fox. However, it was pleaded that negotiations for such an agreement had taken place over many months, that the Defendants had used their best endeavours to procure that Arcadia enter into such an Agency Agreement but that thus far the Defendants' best endeavours had been unsuccessful. The pleading continued that Mr. Sarmiento had himself tried to negotiate the Agency Agreement with Arcadia, and had thereby hindered or impeded the efforts of the Defendants. The pleading then gave particulars of the best endeavours undertaken by the Defendants, generally in the form of communications between Mr. Hickman and Mr. Striano. I will deal with those efforts when I come to consider the evidence, and there is no point in duplicating that detail. What is important is to put the requirements of clause 5 of the Settlement Agreement in context by means of a little more detail. As can be seen from the terms of clause 5 set out above, the requirement for the Agency Agreement to be entered into by FMP and Arcadia with Fox was that it should be on terms consistent with those set out in the summary of principal terms contained in Appendix D to the Settlement Agreement. In relation to the fee payable under the Agency Agreement (which was the contentious issue) clause 3 of Appendix D was in the following terms:

> "FMP and Arcadia to pay an agency fee to the Agent (the "Fee") to one or more entities designated by the Agent *equivalent to a total amount of US$ 0.15 per barrel of oil lifted and supplied* under the Arcadia Agreement." (emphasis added)

12. The defence continued to the effect that FMP had used its best endeavours to agree an Agency Agreement which provided for a flat fee of $0.15 per barrel for Fox, that Arcadia was willing to have Mr. Sarmiento or Fox act as agents but that the only sticking point had been remuneration. FMP pleaded that it had throughout attempted to negotiate the $0.15 flat agency fee but had been unsuccessful, and pleaded that its attempts in this regard had been impeded and undermined by the production and negotiation by Mr. Sarmiento with Arcadia of a draft Agency Agreement containing a sliding scale fee. That sliding scale provided for an agency fee of fifteen cents per barrel where the profit per barrel was one dollar or more, ten cents per barrel where the profit was between zero and one dollar, and five cents per barrel where there was no profit or a loss.

13. There followed a reply, but for the purposes of this judgment it is not necessary to refer to that pleading in any detail.

The Relevant Documents

14. The documents in relation to the arrangements for the 17.5% share of the profits of the Joint Venture to be paid to Fox, and for the appointment of Mr. Sarmiento to the Petroleum Committee are brief. First, there is the letter which Mr. Hickman sent to Mr. Striano on 28 April 2005, immediately after the execution of the Joint Venture Agreement, which dealt with the first of these two issues only, in the following terms:

> "We should be grateful if 17.5% of the trading profits under the agreement (i.e. 35% of the total trading amounts due FreeMarket Petroleum (FMP)) could be paid direct to a company nominated by FMP, called Fox Energy Limited. Please confirm that this payment mechanism can be agreed and we will provide you with the relevant account details."

15. Then there is the May e-mail from Mr. Striano to Mr. Hickman, the original of which was lost, so that the date cannot be accurately identified. However, the important part of its text was set out in an e-mail sent by Mr. Hickman to his London solicitor on 16 May 2005. As did the letter from Mr. Hickman, this referred to the division of profits but not to Mr. Sarmiento's appointment to the Petroleum Committee. The relevant part of the e-mail from Mr. Striano read:

> "At this stage, I am happy to say that we can accept your first proposal to pay from FreeMarket Petroleum (FMP) share of the trading profits (if any) 17.5% of such proceeds to Fox Energy Limited. How to make such payment still needs to be developed but the principle is accepted."

16. In the letter from FMP to Arcadia of 2 December 2005, to which Arcadia indicated its agreement, the matter was put in the following terms:

> "As we have discussed, FMP wishes 35% of the Trading Profits due to it (i.e. 17.5% of the total Trading Profits due) to be paid directly to a third party company called Fox Energy Limited. The specifics of this can obviously be sorted out directly with Fox Energy"

17. And in relation to Mr. Sarmiento's appointment to the Petroleum Committee, the letter of 2 December 2005 referred to who would be FMP's representatives on the Petroleum Committee when constituted. In this regard, both FMP and Arcadia were entitled to appoint two representatives. The letter of 2 December said:

> "So far as the Petroleum Committee is concerned, it is FMP's intention to appoint Arturo Sarmiento as one of its representatives on the Committee."

18. In relation to the Agency Agreement, there is rather more documentation, and again the starting point is FMP's letter of 28 April 2005. After a reference to previous discussions concerning the need to have an agent on the ground in Venezuela to facilitate the marketing, lifting and supply of oil under the Joint Venture Agreement, and the need for provision of local office services as defined, the letter stated:

> "As we have previously stated, FMP is happy that the joint venture use the services of Mr. Arturo Sarmiento and it is very much our view that the joint venture should enter into an agreement with Mr. Sarmiento (or his nominated company) to provide such services. Mr. Sarmiento has suggested to us that the fee for such services should be equivalent to US $0.15 per barrel of oil lifted under the agreement (as a direct cost under paragraph 3 (k) of schedule 1 to the agreement), which is acceptable to us."

19. However, this proposal did not find favour with Arcadia, and the relevant part of the e-mail from Mr. Striano (taken from Mr. Hickman's e-mail to his London solicitor) read:

> "With regards to the agency agreement proposal, I am not able to accept such terms. I believe more discussions are needed in order to find a mutual acceptable solution."

20. Mr. Hickman reported this development to Mr. Sarmiento and Mr. Nash by e-mail on 19 May 2005. He forwarded a copy of his response e-mail to Mr. Striano, in which he had replied to Mr. Striano in the following terms:

> "I believe we both agree that Arturo's services are needed. I wish to reiterate that FMP believes the fee proposal to be acceptable to us, and I also look forward to having further discussions with you at the soonest."

Having referred to that response, Mr. Hickman then wrote to the Plaintiffs:

> "Arturo, could you provide me any additional information that you believe would assist in my further discussions with Arcadia? I would appreciate your thoughts."

21. The next document is one which did not appear in the bundle as such, but was referred to in Mr. Hickman's witness statement, on the basis that this too had been lost as a result of Mr. Hickman's computer difficulties, but reconstructed because he had communicated its contents to his solicitor. This was in early June, and was an e-mail sent by Mr. Hickman to Mr. Striano. It expressed concern at what Mr. Hickman took to be a breach of the confidentiality provisions of the Settlement Agreement by Mr. Sarmiento, but in relation to the proposed Agency Agreement, the e-mail reiterated FMP's support in the following terms:

> "However, as Arturo has discussed these with you, please know that while we agree with and continue to support and urge the 15 cent per barrel fee for Arturo, our buy-out agreement is not conditioned by that event. Rather we have agreed to use our best endeavours to agree that fee with you."

22. The next document was a draft Agency Agreement prepared by the Plaintiffs' Bermuda attorneys Cox Hallett Wilkinson on 14 June 2005, which provided for a fixed fee of US $0.15 for each barrel of oil lifted. However, this draft agreement was sent directly to Arcadia, and was not copied to FMP or Mr. Hickman.

23. Thereafter, Cox Hallett Wilkinson wrote to Mr. Hickman on 1 August 2005. That letter complained of FMP's failure to comply with its obligations under the Settlement Agreement, saying:

> "Of primary concern is the absolute failure of FMP to deliver on its obligations under clause 5 (c) to procure that Arcadia Petroleum Limited ("Arcadia") enters into an Agency Agreement with Fox Energy Limited ("Fox") or another company nominated by Mr. Sarmiento."

The letter continued by saying that the only evidence that Cox Hallett Wilkinson had that FMP had taken its obligations under the Settlement Agreement remotely seriously was the letter of 28 April 2005, which letter was then inaccurately characterised. The Cox Hallett Wilkinson letter did not refer to the fact that on 19

May 2005 Mr. Hickman had asked Mr. Sarmiento to provide him with additional information to assist in his further discussions with Arcadia, and nor did it mention that Mr. Sarmiento had failed to produce a written response to this request. The letter carried on to disclose that Cox Hallett Wilkinson had sent a draft Agency Agreement to Arcadia, that it had received no response and had followed up without success.

24. That letter drew a detailed response from Mr. Hickman on 9 August, writing on FMG letterhead. He denied that FMP had breached any of its obligations under clause 5 of the Settlement Agreement, and went through the relevant correspondence, starting with FMP's letter of 28 April 2005, commenting that Cox Hallett Wilkinson had failed to quote the relevant part of that letter. Mr. Hickman then moved on to the e-mails of 19 May, noting that Mr. Sarmiento had failed to respond to his request that he provide additional information that he believed would assist in Mr. Hickman's further discussions with Arcadia. Mr. Hickman noted that instead of replying, Mr. Sarmiento had excluded FMP and had continued to negotiate with Arcadia without advising FMP of his position or counter arguments. He noted that Cox Hallett Wilkinson had sent a proposed Agency Agreement to Arcadia and not to FMP, and asked how FMP could make its best efforts to support something in a document which FMP had had no opportunity to review or comment on. Finally, Mr. Hickman referred to the alleged breach of the confidentiality provisions of the Settlement Agreement by reason of the fact that Mr. Sarmiento had advised Mr. Striano that acceptance of the fee proposal was a condition of the Settlement Agreement, and that FMP would be in breach if this was not agreed to.

25. This letter from FMP prompted a response from Cox Hallett Wilkinson dated 16 August 2005. There are two matters to be noted in connection with this letter. First, it confirmed that Mr. Sarmiento had not replied to Mr. Hickman's e-mail of 19 May, saying that this was correct. This statement is relevant when the time comes to consider Mr. Sarmiento's evidence. Secondly, the letter did not respond to the complaint which Mr. Hickman had made as to the nature of FMP's obligation to secure Arcadia's agreement to the fee proposal which Arcadia was at that time resisting.

26. There was then an e-mail exchange between Mr. Hickman and Mr. Sarmiento at the end of August and beginning of September, relating particularly to the consultants hired by FMP to assist in resolving matters. This was followed by a letter from Taylor Wessing, FMP's London solicitors, to Cox Hallett Wilkinson commenting on the letter of 16 August 2005, and this in turn led to further correspondence between attorneys.

27. The next significant development came in an e-mail exchange of 24 October 2005, between Mr. Sarmiento and Arcadia. Mr. Sarmiento's e-mail to Mr. Striano was copied to the latter's superior Mr. Bosworth, and was in the following terms:

> "Following our conversations last week I have sat down with Adrian and would propose to you the following arrangement which would be acceptable to Fox.
>
> Agency fee of US$0.10/bbl base case, with a clause that allows its adjustment up or down on a case by case basis by mutual agreement."

This was the first indication that the Plaintiffs would accept any departure from the fixed fee of US$ 0.15 per barrel, and Mr. Bosworth responded immediately by e-mailing back "I agree". It is to be noted that at this stage the formula for adjusting the $0.10 fee up or down had not been established. Matters were left to be dealt with "on a case by case basis by mutual agreement."

28. The next document is a further letter to the Defendants, this time from the Plaintiffs' London solicitors Herbert Smith, dated 28 October 2005. This letter repeated the complaints previously made by Cox Hallett Wilkinson, and indicated an intention to issue proceedings in England. What is most significant is that in setting out the current position in relation to the three principal grounds of complaint, Herbert Smith made no mention of the fact that, just days before, the Plaintiffs had for the first time made a proposal directly to Arcadia, which was not copied to any of the Defendants, that the agency fee might be calculated on the sliding scale basis for which Arcadia had by then been pressing for months, instead of the fixed fee basis which the Plaintiffs and Fox had declined to depart from until that time, and that Arcadia had indicated its agreement to this new proposal, albeit that the mechanism for adjustment had not been addressed.

29. There followed an e-mail from Cox Hallett Wilkinson to Arcadia on 16 November 2005, enclosing a revised draft Agency Agreement which adjusted the previous draft Agency Agreement so as to provide for the sliding scale on the basis referred to in paragraph 12 above, that is to say by reference to the level of profit, rather than by mutual agreement on a case by case basis. I note at this point that there is nothing in reply from Arcadia to indicate that this more detailed sliding scale proposal was acceptable to it, and Mr. Sarmiento's witness statement on this subject simply said "No formal reply was received from Mr. Striano in response to these revised terms."

30. Next there was the FMP letter of 2 December 2005, referred to in paragraphs 16 and 17 above, the purpose of which was to document the agreement between FMP and Arcadia in relation to the first two matters covered by clause 5 of the Settlement Agreement.

31. There was then some further correspondence which took place after proceedings had been commenced on 20 December 2005. The only piece of correspondence which requires mention is the letter from PDVSA to Arcadia in July 2006, confirming that as far as PDVSA was concerned, the RPA had come to an end in December 2005, pursuant to clause 1 (d). This clause provided that if no processing agreement had been entered into between Arcadia and a refinery in the US Gulf Coast following the initial three month waiver period, the contract would be suspended, and if there were no processing agreement within ninety days of the suspension, the agreement would be terminated. One might have expected that since no processing agreement was ever entered into, the RPA would have terminated somewhat earlier, but all of that is academic to the issues before the Court.

The Evidence of Fact

32. The first witness of fact for the Plaintiffs was Mr. Sarmiento, who provided three witness statements. The first dealt largely with the history of the efforts to secure Arcadia's agreement to the proposed Agency Agreement. The second dealt largely with matters arising from the expert report of the Defendants' expert Ms. Bossley, and the third dealt with matters covered in a statement made by Mr. Striano dated 19 January 2007, notice of which was given pursuant to the provisions of the Evidence Act 1905 and the Rules of the Supreme Court 1985.

33. In relation to the first aspect of clause 5 of the Settlement Agreement, Mr. Sarmiento maintained that FMP was in breach of its best endeavours in this regard. When he was referred to the terms of the e-mail from Mr. Striano set out in paragraph 15 above, Mr. Sarmiento characterised this as being an agreement in principle, which he then equated to an agreement to agree, on the basis that the necessary account details had never been provided.

34. There is a distinction to be drawn between an agreement in principle and an agreement to agree. The latter will almost always represent an incomplete agreement, whereas the enforceability of the former will depend on the nature of the outstanding detail. In the instant case, Mr. Striano had accepted the proposal to pay part of FMP's share of trading profits to Fox. It was clearly a matter for Fox to supply its account details to Arcadia at the appropriate stage, and no doubt

premature to do so until there was at least an expectation that there would in fact be some trading profit to divide between the parties.

35. In relation to the second matter, that of Mr. Sarmiento's appointment to the Petroleum Committee, Mr. Sarmiento accepted that Arcadia had no power to object and did not object to his appointment, and that FMP had indicated to Arcadia its intention to appoint him as one of its representatives on the Petroleum Committee when this was constituted. However, Mr. Sarmiento maintained his complaint that he had not in fact been nominated. He said that there was a need for the Petroleum Committee to look at the accounts and settle financial matters, particularly in relation to the first lifting, which had of course made a loss. Mr. Sarmiento then said that the Petroleum Committee should have met to consider what was going wrong and how to move forward with the joint venture. However, he was bound to concede that there was no obligation imposed on FMP under the Settlement Agreement to establish the Petroleum Committee.

36. I now turn to the major area of dispute, namely FMP's obligations in relation to the Agency Agreement. In relation to the provisions of Appendix D to the Settlement Agreement, Mr. Sarmiento acknowledged that the words "equivalent to a total amount of US$ 0.15 per barrel of oil lifted" equated to 15 cents per barrel, and confirmed that he would not have agreed to a fee of 14 cents per barrel. Later in his evidence, Mr. Sarmiento described the course of the direct negotiations which he had had with Arcadia. The first of these was at about the end of May 2005, and he said that he had then had frequent meetings with Mr. Striano if he was in London. He had not told Mr. Hickman that he was entering into direct negotiations with Arcadia. That was something Mr. Hickman learned from Arcadia. From the time of that first meeting at the end of May, Mr. Sarmiento understood that Arcadia was generally happy with the concept of Fox being the agent, but not happy with the fixed fee which was provided for in the Settlement Agreement, and which FMP had sought to procure, starting with its letter of 28 April 2005. From the time of the conversations at the end of May, Mr. Sarmiento understood that Arcadia was seeking a sliding scale for the relevant fees, but continued to press for a fixed fee. This was something which in his opening Mr. Kessaram had criticised FMP and Mr. Hickman for, but it was abundantly clear from Mr. Sarmiento's evidence that he did just the same. Over a period of four months or so, he had no success whatsoever in persuading Arcadia that a fixed fee scale was appropriate, yet apparently persevered in his attempts to secure a fixed fee.

37. One is necessarily bound to ask how Mr. Sarmiento, having taken the conduct of negotiations into his own hands, and having failed to achieve the sought after fixed fee, could have expected FMP and Mr. Hickman to have done any better

than he did. The answer, according to Mr. Kessaram's submission, is that FMP should have been considering alternative ways to achieve payment of a fee of $0.15 per barrel, even though the Plaintiffs themselves continued to reject a sliding scale. And this rejection continued for months despite Mr. Sarmiento's confident assertion that the sliding scale would produce the same amount as the fixed fee. Mr. Sarmiento's evidence was that the negotiations which he undertook with Arcadia did not get anywhere, and he said that the Plaintiffs had done everything they could to try to persuade Arcadia that a fixed fee was appropriate, without success. As late as the meeting which took place on 16 September 2005 between Mr. Striano, Mr. Nash and Mr. Sarmiento, the Plaintiffs were continuing to press for the 15 cents agency fee, and Arcadia was continuing to refuse and responding that a sliding scale was the way to go. Mr. Sarmiento conceded that they had given way on the sliding scale only in October, and that as soon as they had given way on that issue, agreement in principle had been reached. He was therefore bound to concede that it followed that if the Plaintiffs had given way earlier on the sliding scale, agreement in principle would no doubt have been reached earlier.

38. One area on which Mr. Sarmiento was cross-examined was in regard to Mr. Hickman's e-mail of 19 May 2005. Mr. Sarmiento asserted that he had provided Mr. Hickman with a response, by telling him what his leverage was in terms of Arcadia's need for local office services. Mr. Sarmiento said that this had been in a telephone call in the days immediately following receipt of the e-mail, and said that he had also spoken to Mr. Tatanaki, another FMP shareholder and director, when he had seen him in London. However, Mr. Sarmiento was bound to concede that this conversation with Mr. Hickman had not featured in his witness statement, and he was also referred to Mr. Hickman's letter of 9 August 2005, when Mr. Hickman had set out the relevant part of his e-mail and said that Mr. Sarmiento had not replied to it. Mr. Sarmiento's response was to say that where Mr. Hickman had said that he did not reply, the true position was that he had not replied in writing. Mr. Sarmiento was then referred to the subsequent Cox Hallett Wilkinson letter of 16 August 2005, which stated:

> "We note your comment that Mr. Sarmiento did not reply to your e-mail of 19 May 2005. This is correct."

Mr. Sarmiento responded to this by saying that he did not see fit to cause his attorneys to mention his conversations with Mr. Hickman in this letter.

39. I should say at this stage that I do not accept that Mr. Sarmiento had the conversation with Mr. Hickman shortly after his receipt of the 19 May 2005 e-mail, as he described. Had he done so, I think it is inconceivable that he would

have failed to mention it in his witness statement, and he would have told his lawyers to reject the assertion made by Mr. Hickman in his 9 August 2005 letter, in their reply of 16 August, which he had approved before it was sent. That rejection of this part of Mr. Sarmiento's evidence necessarily casts doubt upon his evidence of his conversation with Mr. Tatanaki. In his witness statement, Mr. Sarmiento described this conversation as covering "the status of the arrangements between Arcadia and PDVSA and Arcadia and Fox". What Mr. Hickman had been looking for in his 19 May 2005 e-mail was information which could assist him in persuading Arcadia that the 15 cents flat fee was appropriate. I am satisfied, and find, that Mr. Sarmiento did not respond to this request at all to Mr. Hickman, either in writing or verbally, and that his conversation with Mr. Tatanaki (which was a chance meeting in a London hotel) did not address the issue in terms of providing a response to Mr. Hickman's question.

40. There was also the issue between the parties as to how Mr. Sarmiento had described FMP's obligations under the Settlement Agreement to Mr. Striano during the course of their discussions. Mr. Hickman had complained in his letter of 9 August 2005 that Mr. Sarmiento had misrepresented FMP's obligation to use its best endeavours to secure the fee proposal then being sought, by advising Mr. Striano that FMP would be in breach of its obligations if this was not agreed to by Arcadia. Mr. Sarmiento had denied this in his witness statement, and at one point in cross-examination said that he did not tell Mr. Striano that it had been a condition of the Settlement Agreement that the fixed fee of 15 cents per barrel be achieved, or that FMP would then be in breach if that was not achieved. However, Mr. Sarmiento did say that he had told Mr. Striano that to appoint anyone other than Fox would cause FMP to be in breach of its obligations under the Settlement Agreement. This issue is one on which no finding is necessary.

41. Mr. Sarmiento was also cross-examined on the difference between the two fee proposals. The fixed fee of 15 cents per barrel had been contained in the draft Agency Agreement sent by Cox Hallett Wilkinson to Arcadia on 14 June 2005, and the sliding scale fee had first been contained in the revised document sent by Cox Hallett Wilkinson on 16 November 2005. It may be as well to detail how the sliding scale was put in that revised document. The fee to be received by the agent was described as the base fee, and this was set at $0.10 per barrel. There was then a formula for a 5 cents adjustment up or down as described in paragraph 12 above. From this it followed that the sum of the base fee and the adjustment could vary between 5 and 15 cents per barrel, and this was spelled out at the end of the relevant clause.

42. In my view this proposal is clearly different from that set out in clause 3 of Appendix D, but Mr. Sarmiento refused to accept that in practical terms there was

any difference. The reason for this was his estimation that in respect of any lifting there would be profits of over $1 per barrel, so that Fox would have secured its 15 cents agency fee. When pressed, Mr. Sarmiento indicated that it was "inevitable" that the profit would be in excess of $1 per barrel, and he maintained this even when shown the report of the Plaintiffs' expert, Mr. Barreto, which showed a profit of less than $1 a barrel both in 2003, and for the year through September 2006. When asked how he could say that it was inevitable that profits would exceed $1 per barrel, Mr. Sarmiento maintained that the Plaintiffs' expectation was not irrational, and that the Plaintiffs expected to make more than $1 per barrel on each trade.

43. Given the imponderables which were well described by Ms. Bossley in her report and expert evidence, and particularly the existence of the variable K factor, I do not see how it can possibly be maintained that a profit of at least $1 per barrel was "inevitable", and I reject that part of Mr. Sarmiento's evidence as representing a completely unrealistic expectation on his part. I also reject Mr. Kessaram's submission that the sliding scale was consistent with Appendix D to the Settlement Agreement. I am bound to conclude that whatever the profit level expectation, there is in fact a material difference between the fixed fee proposal of 15 cents per barrel consistently rejected by Arcadia, and the sliding scale proposal based on a base fee of 10 cents per barrel, with an adjustment mechanism, first put forward in the draft Agency Agreement of 16 November 2005. Arcadia's acceptance of the 24 October 2005 proposal would seem to indicate that it did not view that as being equivalent to the 15 cents fixed fee proposal which it had consistently rejected. The reality is that the fixed fee proposal conforms with the provisions of Appendix D to the Settlement Agreement and the sliding scale proposal does not, and I so find. No amount of optimism on Mr. Sarmiento's part can change that reality. The sliding scale proposal did not and could not guarantee a payment of 15 cents per barrel, and cannot be said to be equivalent to that level of fee. And as I have already noted, there is no evidence as to how Arcadia regarded this proposal, as opposed to the 24 October 2005 one.

44. The balance of Mr. Sarmiento's evidence was concerned with the level of loss sustained by Arcadia on the one and only trial lifting, and the factors which led to Arcadia's failure to effect any further liftings. That fact was not in dispute, and it does seem to me that evidence as to what Arcadia should or might have achieved in relation to the operation of the RPA with PDVSA is both speculative and irrelevant to the issues before me. It was Arcadia, not FMP, who was a party to the RPA, and it was Arcadia rather than FMP which had the responsibility under the Joint Venture Agreement in relation to trading matters. So when Mr. Sarmiento said in his evidence that he did not agree that it would be difficult for Arcadia to negotiate with a refinery on the US Gulf Coast on the basis of a K

factor which had not been fixed, I do not find that evidence either relevant or helpful. The fact of the matter is that Arcadia was either unwilling or unable to complete such negotiations, and the notion that it should be unwilling to do so in relation to a contract (the RPA) which was said to be vastly profitable simply does not make sense. Mr. Sarmiento conceded that Arcadia knew the Gulf refiners much better than he did, and although he sought to denigrate Arcadia's efforts to implement the RPA, he never sought to explain why an oil trading company such as Arcadia, described by Ms. Bossley as being both reputable and experienced, should fail to make sufficient effort to exploit a highly profitable contract. The obvious answer is that the difficulties in doing so were indeed highly challenging, as Mr. Barreto cautioned.

45. Mr. Nash's evidence was relatively brief. He gave details of the two meetings which he had attended with Arcadia in September, the first being that of 16 September at which he, Mr. Striano and Mr. Sarmiento had been present, and the second later in the month attended by himself, Mr. Striano and Mr. Hickman.

46. Mr. Nash described the second meeting as following the pattern of the first, where the Plaintiffs had continued to press for the 15 cents fixed fee, to which Mr. Striano had responded that he was struggling to gain support from senior management for two reasons; the first was that the fee was fixed, and the second was that senior management was at the time distracted by a management buy-out. Mr. Nash confirmed that at the second meeting, Mr. Hickman had supported the Fox position.

47. There were two other matters that Mr. Nash dealt with. First, he confirmed that in making his own calculation as to the value to the Plaintiffs of the Settlement Agreement, his calculations had been based on the 15 cents fixed fee, and not on a sliding scale. Perhaps no great weight should be attached to that in view of the fact that it was Mr. Sarmiento's expectation (and no doubt Mr. Nash's) that the sliding scale would produce the same profit as the fixed fee. Mr. Nash also confirmed that since the RPA had not operated after the Settlement Agreement, no trading profits had been generated, so that as events occurred, there could have been no agency fees.

48. I now turn to the evidence of the witness for the Defendants, Mr. Hickman. In his witness statement, Mr. Hickman had described how FMP was in the process of concluding a joint venture agreement with Arcadia when the Settlement Agreement was concluded, and how it was agreed between the Defendants that he would be charged with ensuring that FMP complied with its "best endeavours" undertakings, as set out in the Settlement Agreement. Mr. Hickman described how the negotiations with Arcadia had by that time taken place over many

months, and he took the view that it was not sensible at such a late stage to introduce amendments to the Joint Venture Agreement, preferring instead to ensure that the Joint Venture Agreement was executed within the designated time frame, and thereafter to take steps to ensure that the agreement provided for the matters covered in the Settlement Agreement. In relation to those matters, Mr. Hickman's letter of 28 April 2005 was of course the starting point, and Mr. Hickman described how with Mr. Striano's e-mail response in May, he took the view that there was then a valid and binding agreement between FMP and Arcadia to distribute the profits as provided for in the Settlement Agreement. In relation to Mr. Sarmiento's appointment to the Petroleum Committee, he pointed out that Arcadia's agreement to that appointment was not required. He referred to the fact that it was intended to set up the Petroleum Committee after the initial three month period provided for in the RPA, when it was anticipated that a processing agreement would have been secured, as required by the RPA. He said that the establishment of the Petroleum Committee was dependent upon securing a processing agreement, and referred to the correspondence in which the respective positions were canvassed. Lastly, in relation to the Agency Agreement, he pointed out that it had not been feasible to introduce this requirement into the Joint Venture Agreement at the eleventh hour. Mr. Hickman then went through the uncontested history of events, confirming that neither of the Plaintiffs had responded to his e-mail of 19 May 2005. He referred to the e-mail which he had sent to Mr. Striano in early June, which continued to press for the fixed fee of 15 cents per barrel, and described how Mr. Sarmiento's direct negotiations with Arcadia had, in his view, caused FMP's task to become more difficult.

49. Mr. Hickman then described the further efforts he had made to try to secure the fixed fee, culminating in the meeting which he had with Mr. Striano on 2 December 2005, when Mr. Striano had signed the letter of that date referred to previously, and had then told Mr. Hickman that not only was Arcadia continuing to negotiate directly with the Plaintiffs and Mr. Sarmiento in particular, but that these negotiations were by then taking place not on the basis of a fixed fee, but on the basis of the sliding scale required by Arcadia.

50. It must be borne in mind that by this time the dispute was in the hands of attorneys in Bermuda and solicitors in London, and that the latter had indicated an intention to take proceedings in London. Mr. Hickman described the Plaintiffs' departure from insistence on a fixed fee to acceptance of a sliding scale as having made a mockery of his persistent attempts to pin Arcadia down to the fixed fee. I understand that sentiment and agree with it. I do not understand how those advising the Plaintiffs could have been continuing to make complaint at FMP's failure to comply with the terms of the Settlement Agreement with particular

reference to the Agency Agreement if they had known that the Plaintiffs had by then moved from a fixed fee to a sliding scale one, without advising Mr. Hickman or FMP of this highly material development. I have already rejected the notion that the sliding scale equated to the fixed fee, but if those advising the Plaintiffs had really believed that to be the case at the time, one would have expected them to say so.

51. In his evidence, Mr. Hickman also described the steps that he took when it became clear that Arcadia was having difficulty securing a processing agreement with a refinery on the Gulf Coast. He described how FMP had engaged consultants to assist Arcadia in securing the processing agreement, and had their consultant meet with Arcadia. Alternative strategies were developed, but Mr. Hickman said that these came to naught, after two months and the expenditure of a considerable sum of money.

52. There are no other features of Mr. Hickman's evidence, and particularly his cross-examination, to which I need to refer in this judgment. Suffice it to say that there was nothing said by Mr. Hickman which detracted from what had been stated in his witness statement.

53. Finally, there was Mr. Striano's hearsay statement dated 19 January 2007. In the event, nothing in this statement was controversial at the end of the day. It was accepted by all concerned that Arcadia had not concluded a processing agreement with any refinery, and in fact the reason behind that failure is irrelevant. That said, the reason given by Mr. Striano accords entirely with Ms. Bossley's evidence, which I have accepted (see below), by reason of the need to agree the K factor with PDVSA. With regard to the one cargo lifted, there is no question but that the K factor was changed, and whether or not it was this that led to the loss, or what the full extent of the loss was, is irrelevant to the issues before me. What is clear is that everybody except Mr. Sarmiento accepted that the one cargo which had been lifted had resulted in a loss. Mr. Sarmiento complained that he had never seen proper accounts of that loss and had been given different figures at different times, but the fact is that Mr. Barreto said in his report that he understood that Arcadia had made a loss on the first trial shipment, and the source of his information was Mr. Sarmiento. Finally, in relation to Arcadia's unwillingness to agree a fixed fee of 15 cents per barrel, Mr. Striano said that Arcadia had been asked to agree this fee on a number of occasions and that they had refused each time; he said that not only was the figure too high, but they had wanted to create an incentive and link the level of fee to advantageous results. This again accorded with the evidence of the other witnesses.

Findings of Fact

54. The first two provisions of clause 5 of the Settlement Agreement can be disposed of relatively easily, which is no doubt why Mr. Kessaram did not press them. In my view, in each case FMP had done sufficient to secure Arcadia's agreement, so as to satisfy the provisions of clause 5 of the Settlement Agreement. That clause provided that FMP should use its best endeavours to procure that Arcadia agree that the terms of the executed Joint Venture Agreement include provision for the new adjustment of trading profits, and the appointment of Mr. Sarmiento to the Petroleum Committee. Arcadia did so agree to the first requirement, and its agreement was not required in relation to the second, although the letter of 2 December 2005 confirmed that Arcadia had previously indicated that it had no difficulty with FMP's stated intention to appoint Mr. Sarmiento as one of its representatives on the Petroleum Committee. It seems to me irrelevant that the account details to enable payment to be made to Fox had not been given; that was a consequence of the fact that there had been no liftings under the RPA, and consequently no trading profits generated, and those matters similarly were the reasons for the Petroleum Committee not having been constituted, since its functions were to administer the joint venture operations, as defined in the Joint Venture Agreement, and not, as Mr. Sarmiento said in his evidence, to examine what had gone wrong with the first loss making lifting or how to move forward with the joint venture. Hence I find that FMP complied with its obligations in respect of the first two matters complained of.

55. Before turning to the major matter of the Agency Agreement, there is the matter of the alleged failure to procure the execution of the Joint Venture Agreement within 30 days of the date of the Settlement Agreement. That again was a "best endeavours" obligation, and in fact was achieved by FMP. As Mr. Hickman indicated, there was no obligation in the Settlement Agreement to inform the Plaintiffs when the Joint Venture Agreement had been executed, but in any event this was done.

56. In relation to the Agency Agreement, I have already commented on what seems to me to be the unreasonableness of the Plaintiffs' position. I am satisfied that FMP did all that it could in terms of its best endeavours to secure the Agency Agreement for Fox as provided for in Appendix D to the Settlement Agreement, and I agree with Mr. Hickman that each of

    - the Plaintiffs' failure to respond to Mr. Hickman's e-mail of 19 May 2005;

- the Plaintiffs' direct negotiations with Arcadia over a period of months; and
- most particularly, the Plaintiffs' departure from the fixed fee scale provided for in Appendix D to a sliding scale (which in my view did not comply with the terms of Appendix D), all without advising FMP of their change in position

necessarily frustrated and hindered FMP's best endeavours, exactly as described by Mr. Hickman. As late as the end of September 2005, FMP was continuing to press for Arcadia's agreement to the terms of Appendix D, and I do not think that FMP can be faulted for having failed to achieve Arcadia's agreement. Indeed, it is clear that the Plaintiffs themselves eventually recognised that securing Arcadia's agreement to the fixed fee proposal was impossible, which is no doubt why they moved to the sliding scale proposal in late October. And as I have said, to continue to make complaint of FMP's failure to secure a fixed fee at a time when the Plaintiffs had recognised the impossibility of this and had moved to a sliding scale fee, without informing FMP, seems to me to be the height of unreasonableness.

57. Having made that general comment, no doubt I should address Mr. Kessaram's submissions in this regard in more detail. First, he said, FMP had failed to consider alternative ways in which the payment of a fee of $0.15 might be achieved. But Mr. Hickman had asked the Plaintiffs in his 19 May e-mail if they could provide him with additional information that they believed would assist him in his further discussions with Arcadia. As I have found, the Plaintiffs did not respond, and by early June, Mr. Hickman had become aware (from Arcadia, not from the Plaintiffs) that negotiations were proceeding between the two of them directly. If there were alternative ways of securing the fee of 15 cents per barrel, they had to be acceptable to both Arcadia and Fox.

58. Then Mr. Kessaram said that it was up to FMP to consider whether the agency fee of $0.15 per barrel could be achieved in any other way within the terms of the Settlement Agreement, and he carried on to say that if FMP had diligently cooperated with the Plaintiffs in formulating and putting forward a contract for the Agency Agreement with a sliding scale, it was more probable than not that Arcadia would have accepted such a proposal. But Mr. Kessaram's proposition depends on accepting that the sliding scale equated to the fixed fee of 15 cents per barrel, something which I do not accept. It also ignores the fact that the Plaintiffs had consistently and resolutely resisted the sliding scale until 24 October 2005. The Plaintiffs had known from the time of their first meeting with Mr. Striano of

Arcadia in late May that Arcadia wished a sliding scale rather than a fixed fee, but it was they who had refused to abandon the fixed fee scale in favour of a sliding scale. They were still pressing for the fixed fee scale at the meetings with Arcadia which were held in mid and late September, which would have been four months after they had first known of Arcadia's wishes in this regard. And as mentioned in paragraph 37 above, Mr. Sarmiento had conceded that if the Plaintiffs had given way on the sliding scale earlier, agreement in principle would no doubt have been reached earlier. How FMP could be blamed for that delay is quite beyond me.

59. Finally, FMP was criticised by Mr. Kessaram for not relaying to the Plaintiffs in a timely manner Arcadia's recommendation for a sliding scale fee. But Mr. Hickman did communicate in a timely manner that Mr. Striano was not prepared to accept the terms of the Agency Agreement proposal, and in fact the Plaintiffs were aware before Mr. Hickman and FMP that Arcadia favoured the sliding scale approach. Indeed, Mr. Sarmiento knew (but Mr. Hickman did not) that one of the reasons for Arcadia's position in relation to the sliding scale was that it would keep him "better incentivised".

60. It seems to me that all of these complaints on behalf of the Plaintiffs are wholly unjustified when one looks of the factual background which I have described above. The key is the distinction to which I have referred between the flat or fixed fee referred to in Appendix D to the Settlement Agreement, and the sliding scale proposal which Mr. Sarmiento said he believed would generate a fee of 15 cents per barrel. I dealt with this aspect of matters when considering Mr. Sarmiento's evidence, but for the avoidance of doubt I find that the sliding scale proposal which was accepted in principle by the Plaintiffs on 24 October 2005 was not "equivalent to a total amount of US $0.15 per barrel" and hence did not comply with the provisions of Appendix D to the Settlement Agreement. That proposal was for an agency fee of $0.10 per barrel, with provision for "adjustment up or down on a case by case basis by mutual agreement." Neither did the proposal contained in the draft Agency Agreement of 16 November 2005 comply with the provisions of Appendix D, for the reasons previously stated, and as I have said, I have no evidence whether this was in fact accepted by Arcadia.

61. In this regard, Mr. Kessaram referred to the well known speech of Lord Hoffmann in the case of *ICS Limited –v- West Bromwich BS* [1998] 1WLR 896 at 912, where he summarised the principles by which contractual documents are now to be construed. The fifth of Lord Hoffmann's principles was that the "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would

nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.

62. Mr. Kessaram used this passage as support for his contention that a sliding scale fee which was "reasonably anticipated" to produce the sum of $0.15 per barrel was consistent with Appendix D. I reject that contention because I find the sliding scale fee proposal to be inconsistent with Appendix D. In rejecting it, I would comment that there is nothing in the words of clause 3 of Appendix D which would suggest any linguistic mistakes on the part of the parties. The words are perfectly clear and understandable, and no doubt represented the intention of the parties.

63. It follows, and I find, that the Defendants have not failed to comply with their contractual obligations pursuant to the terms of the Settlement Agreement, notwithstanding that no Agency Agreement, between FMP, Arcadia and Fox was ever entered into. In relation to the meaning of "best endeavours" there is in practical terms nothing between the two sides. The obligation of FMP in this case was that it was bound to take all those steps in its power which a prudent, determined and reasonable company, acting in its own interests, and desiring to achieve the execution of an Agency Agreement on the terms set out in Appendix D, would take. Given my earlier finding as to the distinction between the fixed fee and the sliding scale, that means achieving the execution of an Agency Agreement providing for a fee equivalent to 15 cents per barrel, something Arcadia was throughout adamantly opposed to. In my view, FMP did all that could reasonably be expected of it, and I therefore reject the Plaintiffs' claims for the orders sought in the prayer to the statement of claim, and the alternative claim for damages.

Damages

64. It is nevertheless appropriate for me to consider the question of damages, in case I were to be wrong in relation to the above findings, and the starting point on the issue of damages is to consider the reports of the two experts who filed reports and gave evidence.

65. The issue before the Court in relation to damages is to seek to determine the value to the Plaintiffs if the Defendants, and particularly FMP, had complied with their contractual obligations under the Settlement Agreement. It was accepted on both sides that the liability of the Defendants as a group was tied to FMP's liability. In relation to the payment of trading fees to Fox, the position is obviously as described by Mr. Nash in his evidence. Since the RPA had never operated after

the date of the Settlement Agreement, no trading profits had been generated, so that no agency fees could have been earned, and this would be the case whether or not an agency agreement had been entered into between FMP, Arcadia and Fox as provided for in Appendix D to the Settlement Agreement. It is important to bear in mind that FMP's obligation under the Settlement Agreement was not to secure the processing agreement which was a necessary precondition to the activation of the RPA. Neither was it to usurp Arcadia's obligations under the RPA, which the Joint Venture Agreement between FMP and Arcadia did not change. As Mr. Hickman said in his evidence, procuring a processing agreement was not a function of the Agency Agreement. Arcadia had to procure that, and Arcadia would necessarily have to do all the negotiations to achieve it. But more importantly, the functions of the Petroleum Committee and the Agency Agreement could begin only after the joint venture operations of FMP and Arcadia had become operative, which would necessarily be after Arcadia had concluded a processing agreement and the RPA had itself started to function. Marketing under the Agency Agreement did not, as Mr. Kessaram submitted, mean finding a refinery willing to enter into a processing agreement. It related to the crude oil to be lifted under the Joint Venture Agreement, something which could only happen after a processing agreement had been entered into and liftings had started to take place under the RPA.

66. So the first point to be made is that if FMP's best endeavours had led to the execution of the Agency Agreement on the required terms, that does not at all mean that Arcadia would have secured a processing agreement which would have enabled the RPA to be activated and make trading profits. There is no causal connection whatsoever between securing the Agency Agreement as proposed, and Arcadia securing a processing agreement and/or trading profits being generated from the RPA.

The Expert Evidence

67. Against that background, it is necessary to look at the questions which Mr. Barreto, the Plaintiffs' expert, addressed in his report. Of these, the first two are the important ones, since the third question addressed any other criteria or issue which might be relevant. Even then, Mr. Barreto's response to this last question is illuminating. However, the first two questions were:

    1. What were the likely chances of success of FMP procuring the agency agreement terms with Arcadia in accordance with the terms of the Settlement Agreement?

2. What would have been the value of the agreement to Fox if agreement had been able to be reached between Arcadia and Fox?

68. As I indicated to counsel at the outset, it seemed to me that the first question should properly be a matter for the Court, rather than the subject of expert evidence, but leaving that point aside, it does seem to me that Mr. Barreto has confused the securing of the Agency Agreement with the profitability of the RPA. The latter is something which is completely different, and was in any event dependent upon Arcadia securing a processing agreement, something which in the event was not achieved. There is exactly the same difficulty in relation to Mr. Barreto's second question, and the same criticisms apply. This disconnect seems to have been acknowledged by Mr. Barreto in his response to the third question. Mr. Barreto first commented that the volume of 50,000 barrels of Santa Barbara crude (the daily level to be lifted under the RPA if that were to become operational, and an amount which represented one third of the entire production of Santa Barbara crude) would have required a considerable marketing effort from Arcadia in order to place such a large volume in the US Gulf Coast market. He then noted that Arcadia had made a loss on the first trial shipment and commented that that was an indication of the challenge.

69. But his second point was that because the RPA had never been made operational by Arcadia, it followed that the losses to Fox and the joint venture estimated in his report were "notional". The use of that word by Mr. Barreto seems to constitute an acknowledgment that the exercise which he undertook related to the profitability of the RPA if a processing agreement had been entered into, as opposed to the consequences of any failure to secure the proposed Agency Agreement. In regard to that issue, as previously stated, the value of the loss of the Agency Agreement would have been zero, for the reason given by Mr. Nash. For the Agency Agreement to have any value, the RPA had to be operational. In the event, for reasons unrelated to the issues before me, the RPA never was, and thus never generated any trading profit. Hence, there would have been no value in the Agency Agreement even if this had been executed, and the Plaintiffs have not suffered any loss from the Defendants' alleged failures, as specified in the statement of claim, were those to have been proved.

70. I can and should go further in regard to this question, because if I were to be wrong on my findings above, and a calculation based on the profitability of the RPA were to be appropriate, I would be bound to say that I prefer Ms. Bossley's approach to that of Mr. Barreto, and the comments made in her report and in her evidence. In summary, when Ms. Bossley was asked why she had not sought to put a value on the RPA, she responded that she was aware that Mr. Barreto had,

but she said that she thought his calculations were spurious and based on assumptions which could not be justified when there was so many imponderables. She said that she could have done such a calculation, but there was so many unknowns involved that it would have been fantasy, to such an extent that she did not think that the exercise was worth doing; there were too many assumptions which needed to be made, not least the variable K factor, which Mr. Barreto took as minus 50 cents only because that was the figure given to him by Mr. Sarmiento. Whilst it may well have been that a long term K factor could have been agreed, it never was, and the RPA provided for a K factor to be negotiated and agreed between the parties every month. Whatever level the K factor was fixed at would make a potentially huge difference to the profitability of any particular lifting, and to the consequent profitability of the RPA as a whole. As Ms. Bossley said (and I accept her evidence in this regard), no refinery would contract with Arcadia for a long term contract which included a variable K factor, because of the lack of certainty and the consequent risk exposure.

Loss of Chance Calculation

71. I entirely accept the submissions of counsel in regard to the assessment of damages. Essentially the Court has to look first at the likelihood of the Agency Agreement having been entered into in consequence of FMP's best endeavours, and then look at the likelihood of the RPA being successfully exploited if the Agency Agreement had been entered into. Each chance has to be measured in percentage terms, and the composite chance then has to be evaluated as a percentage of a percentage.

72. Dealing firstly with the Agency Agreement, I have already found that FMP did indeed use its best endeavours to try to procure an Agency Agreement, and if I am wrong in this regard and FMP in fact fell short of the requisite level of "best endeavours", in failing to persuade Arcadia to agree the sliding scale which the Plaintiffs eventually proposed, it remains necessary to put a percentage figure on the chance involved. One might expect the percentage to be 100 percent, on the basis that both Arcadia and the Plaintiffs were then agreed on the principle, but if that were the case, presumably those two parties would have gone ahead and entered into the Agency Agreement. And although they had reached an agreement in principle, that in principle agreement did not reflect the detailed terms contained in the 16 November 2005 draft Agency agreement. So I do not know why that agreement in principle did not result in the execution of an Agency Agreement, but I do know that the in principle agreement provided for adjustment by mutual agreement on a case by case basis, whereas the draft agreement prepared by attorneys included a formula to fix the fee by reference to the profit level on a particular lifting. Since I do not know if this formula was acceptable to

Arcadia, I have difficulty accepting Mr. Kessaram's submission that it was more probable than not that Arcadia would have accepted it. Nevertheless, I have to decide whether, in the absence of any breach by the Defendants, there was a real or substantial chance of the Agency Agreement being secured, and the Court must undertake the exercise of assessing damages if satisfied that the Plaintiffs have lost a real or substantial chance, no matter how great the difficulty of assessment. Here what seems to me most significant is the comment made by Mr. Striano at the end of his statement that Arcadia wanted to create an incentive, by linking the level of the fee to advantageous results. This accords with what Mr. Sarmiento said, and is what the 16 November 2005 draft sought to achieve. I do not think the percentage could properly be placed at 100 per cent, for the reason given above, but I would regard the prospect as real and substantial. Had it been necessary for me to fix a percentage for this loss of chance, I would have put the figure at 75 per cent.

73. But when one then comes to consider the second contingency, namely the likelihood of the RPA being successfully exploited in consequence of the entering into of the Agency Agreement, the appropriate percentage has to be considered bearing in mind my finding that I do not believe there to be any causal connection between the two. The functions of the appointed agent were to assist FMP and Arcadia in facilitating the marketing, lifting and supply of crude oil under the Joint Venture Agreement, and to provide local office services. I indicated in paragraph 65 above that it was not FMP's obligation under the Settlement Agreement to secure the processing agreement which was a necessary precondition to the activation of the RPA. Neither was it the agent's; it was Arcadia's. As it turned out, Arcadia was never able to secure a processing agreement and thus never able to profit from the RPA. There was no evidence before me to indicate that Mr. Sarmiento's talents and efforts could have changed that position, so if I had been obliged to consider the matter further on the basis that an Agency Agreement would have been entered into if FMP had used its best endeavours in this regard, I would still have been obliged to conclude that that event would have made no difference to the securing of a processing agreement and the generation of trading profits under the RPA, and the Plaintiffs' claim for damages would fail in any event. Put another way, I would be bound to find that the possibility of that second chance was zero, so that the percentage of a percentage calculation was similarly zero.

Whether any loss would have been the Plaintiffs'

74. The simple point here is that Mr. Smith maintained that any loss would be the lost opportunity of Fox, not that of the Plaintiffs. The issue is whether clause 17 of the Settlement Agreement changes the principle that the proper plaintiff in an

action in respect of a wrong alleged to be done to a company is, prima facie, the company.

75. Clause 17 of the Settlement Agreement provides in terms that the intention of the Settlement Agreement is to confer a benefit on each of the Plaintiffs, so that each of them will be entitled to enforce the terms of the Settlement Agreement against the Defendants. Had it been necessary for me to rule on this point, I would have accepted Mr. Kessaram's submission on the point. No doubt the parties had in mind at the time the Settlement Agreement was entered into that not only was Fox not a party to the Settlement Agreement and hence not able to enforce its terms, but it had not in fact been incorporated at that time. In my view, clause 17 was designed to, and did, give the Plaintiffs the causes of action which would otherwise have accrued to Fox.

Costs

76. I would expect that costs would follow the event in the normal way, but will hear counsel on the issue should they so wish.

Dated the 16th day of February 2007

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Hon. Geoffrey R. Bell
Puisne Judge