



Neutral Citation Number: [2020] EWCA Civ 503

Case No: A4/2019/1379 & A4/2019/1380

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**QUEEN’S BENCH DIVISION**  
**COMMERCIAL COURT**  
**Mr Justice Butcher**  
**[2019] EWHC 1220 (Comm)**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 07/04/2020

**Before:**  
**SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT**  
**LORD JUSTICE NEWEY**  
and  
**LORD JUSTICE MALES**

**Between:**  
**TEESSIDE GAS TRANSPORTATION LIMITED** **Appellant**  
- and -  
1) **CATS NORTH SEA LIMITED** **Respondents**  
2) **ANTIN CATS LIMITED**  
3) **CONOCOPHILLIPS PETROLEUM COMPANY**  
**UK LIMITED**  
4) **ENI UK LIMITED**

**Mr Bankim Thanki QC & Mr Nik Yeo** (instructed by **Boies Schiller Flexner (UK) LLP**) for the **Appellant**  
**Mr Tim Lord QC & Mr Richard Eschwege** (instructed by **Pinsent Masons LLP**) for the **Respondents**

Remote Hearing dates: 24<sup>th</sup> & 25<sup>th</sup> March 2020

**Approved Judgment**

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties’ representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be on Tuesday 7<sup>th</sup> April 2020 at 10.30 a.m.

## Lord Justice Males:

### Introduction

1. This is an appeal from the judgment of Butcher J dated 14<sup>th</sup> May 2019 by which he determined various issues concerning the amount payable by the appellant (“TGTL”) to the respondents (“the CATS Parties”) for the right to use part of the capacity of a pipeline for the transportation of North Sea gas. The pipeline ran from an offshore riser platform (“the platform”) located some 230 km east of Aberdeen to an onshore redelivery terminal and gas processing plant (“the terminal”) at Seal Sands, Teesside. It transported gas, not only for TGTL, but also for other shippers who concluded contracts with the CATS Parties.
2. Only one of the issues decided by the judge is live on this appeal, namely the interpretation of a phrase in the definition of “CATS Capacity”, which formed part of the formula agreed by the parties for determining the “Capacity Fee” payable by TGTL in the Contract Years 2013 to 2018.
3. The phrase in question is:

“the aggregate maximum rates of delivery of Non-Capacity Gas notified by the CATS Operator pursuant to Clause 4.6(a)(vii), subject to any changes notified pursuant to Clause 4.6(b)(i).”
4. Clause 4.6(a)(vii) required notification to TGTL, for each shipper other than TGTL, of:

“the maximum rate of delivery of Non-Capacity Gas at such point during the proposed period of transportation.”
5. The issue is whether, for the purpose of the Capacity Fee formula, the relevant figure for each third party shipper, was (a) the maximum rate of delivery by that shipper over the whole period covered by its contract with the CATS Parties or (b) a figure (known as the Daily Reserved Capacity Rate, or “DRCR”) agreed from time to time between the CATS Parties and the third party shipper as that shipper’s firm booked capacity in the pipeline.
6. TGTL contends for the former (and higher) figure; the CATS Parties contend (and the judge concluded) that the latter (and lower) figure is correct. We were told that some £37 million turns on this issue.

### Background

7. A full account of the background to this dispute is set out in the judge’s judgment. For present purposes the following (slightly simplified) summary will suffice.
8. The platform is owned and operated by the CATS Parties. A 404 km high-pressure gas pipeline runs from the platform to the terminal. It was constructed in the 1980s and early 1990s and became operational in 1993. It has been one of six principal pipelines delivering North Sea gas to the UK mainland. Gas is delivered to the pipeline from several production fields in the North Sea.

9. On 10<sup>th</sup> September 1990 TGTL and the predecessors of the CATS Parties entered into a “Capacity Reservation and Transportation Agreement” (“the Agreement” or “the CRTA”). This entitled TGTL to a pre-determined capacity of pipeline gas, through the exclusive use of specified points of entry (for gas entering the system) and exit (for redelivery of the gas from the pipeline into the terminal). The capacity reserved to TGTL was referred to as the “Capacity Reservation”. Gas transported as part of the Capacity Reservation was referred to as “Capacity Gas”.
10. The effect of this was to grant TGTL what was described as “a pipeline within a pipeline”. TGTL’s sole business activity was to acquire capacity within the pipeline and to sell that capacity on to a consortium operating a collection of fields downstream of the platform.
11. The Agreement provided for two different payment regimes. From April 1993 (when the pipeline became operational) until 1<sup>st</sup> October 2013, TGTL paid a fixed “Transportation Fee” (which consisted of a high initial tariff from 1993 to 2008, and a considerably reduced tariff from 2008 to 2013). From 1<sup>st</sup> October 2013 to 1<sup>st</sup> October 2018 (when the Agreement ended), TGTL was to pay a “Capacity Fee” which was to be calculated according to a formula. The Transportation Fee and subsequently the Capacity Fee were payable whether or not TGTL used the capacity reserved to it. Thus the Capacity Fee and the formula for its calculation would only become relevant after the contract had been performed for over 20 years.
12. Under clause 4.5 of the Agreement, the CATS Parties were free to use or sell all capacity other than TGTL's Capacity Reservation. If they contracted for the sale of capacity to third parties (by way of a “Non-Capacity Gas” contract), the CATS Parties were required by clause 4.6 to provide TGTL with certain information about that contract, including its estimated period of life, the proposed points at which gas would enter and leave the pipeline, and a *bona fide* estimate of the aggregate quantity and composition of the Non-Capacity Gas in the system. Of particular importance for this appeal, the information to be provided to TGTL included “the maximum rate of delivery of Non-Capacity Gas at such point during the proposed period of transportation”.
13. On 20<sup>th</sup> November 1998, the CATS Parties, TGTL, and a number of third-party shippers entered into a multilateral Transportation Allocation Agreement (“the TAA”). The purpose of this agreement, in broad terms, was to make provision for the allocation of gas to shippers on redelivery. Gas entered the pipeline with varying quality and composition at a number of entry points and was necessarily mingled within the pipeline. Arrangements therefore needed to be established to determine how the commingled gas being redelivered from the pipeline at the terminal should be allocated between the various shippers of which TGTL was only one. The arrangements set out in the TAA replaced allocation principles which, as between TGTL and the CATS Parties, had been contained in Schedule XIII to the Agreement, considered below.

### **The Capacity Fee formula**

14. The contractual formula for calculating the Capacity Fee payable by TGTL was contained in clause 7.10 of the Agreement and was as follows:

$$CF = (CRR/CC) (OE + EOE + CE) 1.15$$

15. These abbreviations were defined by clause 7.10:
- (1) **CF** was the “Capacity Fee payable for the Contract Year in question”. (A “Contract Year” ran from 6 a.m. on 1st October to 6 am on 1<sup>st</sup> October of the following calendar year).
  - (2) **CRR** was the amount of gas reserved by TGTL, defined as “an amount equal to the sum of the Capacity Reservation Rates (expressed in Cubic Metres per Day) applicable on each Day of the Contract Year in question ...”. The CRR was stated to be 8,334,900 Cubic Metres per Day. TGTL was entitled to reduce the CRR on giving two years’ prior notice, but only with effect from 1<sup>st</sup> October 2008. Any reduction could not be reversed. In the event the CRR was reduced for the 2017-18 Contract Year to 6,515,000 cubic metres per Day.
  - (3) **CC** was “an amount equal to the sum of the CATS Capacities (expressed in Cubic Metres per Day) applicable on each Day of the Contract Year in question”. The term “CATS Capacity” was defined as “the summation of the Capacity Reservation Rate and the aggregate maximum rates of delivery of Non-Capacity Gas notified by the CATS Operator pursuant to Clause 4.6(a)(vii), subject to any changes notified pursuant to Clause 4.6(b)(i)”. Thus, for the purpose of this part of the formula, it is necessary to consider what it is that was required to be notified pursuant to clause 4.6(a)(vii) and what changes had been notified pursuant to clause 4.6(b)(i).
  - (4) **OE** was “reasonable Operating Expenditures (expressed in Pounds) incurred by the CATS Parties in connection with the CATS Transportation Facilities in the Contract Year in question”. “Operating Expenditure” was defined as “all direct costs borne or paid by the CATS Parties to maintain and operate the CATS Transportation Facilities”.
  - (5) **EOE** was “reasonable Extraordinary Operating Expenditures (expressed in Pounds) incurred by the CATS Parties in connection with the CATS Transportation Facilities in the Contract Year in question”. “Extraordinary Operating Expenditures” were defined as “expenditures of a non-capital non-recurring nature with respect to the operation of the CATS Transportation Facilities”, not including (so far as is relevant) “any costs or expenditures that may arise in respect of matters occurring prior to the date when the Capacity Fee ... becomes effective”.
  - (6) **CE** was “Capital Expenditures (expressed in Pounds) amortised over their useful life reasonably and necessarily incurred by the CATS Parties after 6 o'clock a.m. on 1<sup>st</sup> October 2013 to operate the CATS Transportation Facilities”. “Capital Expenditures” were defined as “all costs and expenditures of a capital nature for the design, purchase, construction, installation, repair or replacement of property, materials, plant and equipment, provided that Capital Expenditures shall not include any Abandonment Costs attributable to such property, materials, plant and equipment”.
  - (7) The term “CATS Transportation Facilities” (“CTF”) was defined as “the facilities to be constructed, owned and operated by the CATS Parties, as described in Schedule I”.

16. The first part of the Capacity Fee formula, **CRR/CC**, was a quotient with TGTL's reserved gas as the numerator and the total CATS Capacities (including TGTL's reserved gas) as the denominator. The second part of the formula, **(OE + EOE + CE)**, was the sum of the expenses incurred on the CTF. The first and second parts, when multiplied together (**(CRR/CC) (OE + EOE + CE)**), provided for the operating and capital expenses of maintaining and operating the CTF to be shared between TGTL and the CATS Parties, with TGTL's share being that proportion of the total expenditure which the share of pipeline capacity reserved for TGTL bore to the total CATS Capacities figure. The third and final part of the formula gave the CATS Parties a 15% uplift on the sum arrived at by multiplying the first two parts.
17. Undoubtedly, therefore, the formula provided for a cost sharing arrangement, albeit with an element of profit for the CATS Parties. The issue is how those costs were intended to be shared.

#### **Clause 4.6**

18. This appeal is concerned with the **CC** element of the formula. As already indicated, for this purpose it is necessary to consider what it is that had to be notified pursuant to clause 4.6(a)(vii) and what changes had been notified pursuant to clause 4.6(b)(i).
19. Clause 4.6(a) provided as follows:

“In the event that the CATS parties have contracted the use of the CATS Transportation Facilities for Non-Capacity Gas, the CATS Operator shall promptly, subject to the provisions of clause 24.4, give [TGTL] a notice containing the following information:

(i) the field from which such Non-Capacity Gas shall be produced and the facilities from which such Non-Capacity Gas will be metered and delivered to the CATS Transportation Facilities;

(ii) the proposed point of delivery of such Non-Capacity Gas into the CATS Transportation Facilities;

(iii) the proposed point at which such Non-Capacity Gas is to be re-delivered from the CATS Transportation Facilities;

(iv) the date on which the transportation of such Non-Capacity Gas is proposed to commence;

(v) the estimated date on which the transportation of such Non-Capacity Gas is proposed to terminate;

(vi) the specification in a format to be agreed of such Non-Capacity Gas at the point referred to in paragraph (ii) above together with a bona fide estimate of the composition of such Non-Capacity Gas during the proposed period of transportation of such Non-Capacity Gas;

(vii) the maximum rate of delivery of Non-Capacity Gas at such point during the proposed period of transportation; and

(viii) the bona fide but non-binding estimate of the aggregate quantity and composition of Non-Capacity Gas (including Non-Capacity Gas under the contract the subject of the notice under this Clause 4.6(a)) to be delivered to the CATS Transportation Facilities for each Month of the current and each of the next 5 Contract Years and for each Quarter during the remaining term of this Agreement.”

20. As originally agreed in 1990, clause 4.6(b) provided:

“No less frequently than Quarterly, the CATS Operator shall, subject to the provisions of Clause 24.4, give [TGTL] a notice containing the following information:

(i) any changes in the information previously provided pursuant to Clause 4.6(a); and

(ii) the CATS Capacity for the ensuing Contract Year.”

21. This clause was amended by Agreement No. 2 dated 14<sup>th</sup> September 1998 between TGTL and the predecessors of the CATS Parties by deleting the words “No less frequently than Quarterly” and replacing them with “From time to time upon receipt of a request from [TGTL], which requests may be made on no more than one occasion in each Quarter”.

22. Clause 4.6(c) provided:

“The foregoing information is provided for operational and planning purposes only and, so long as the information has been provided in good faith, the CATS Parties and the CATS Operator shall not be liable for the accuracy of any such information, nor shall any such information vary the respective rights and obligations of the Parties under this Agreement.”

### **The Allocation Principles**

23. The Agreement as originally entered into in 1990 included Schedule XIII which contained various “Allocation Principles”. These were to apply until such time as a formal Allocation Agreement was concluded between all users of the pipeline. This was eventually concluded in 1998 in the form of the TAA. As already noted, allocation was necessary because the gas entered the pipeline with varying quality and composition at a number of entry points from different fields and was necessarily commingled within the pipeline. Thus a shipper could not get back at redelivery the same gas or even gas of the same quality and composition as it had delivered into the pipeline. A mechanism was therefore needed to determine what each shipper would get back.

24. Schedule XIII obliged the CATS Operator to operate the allocation procedures “on a basis that is demonstrably fair and equitable to all CATS Fields” (i.e. to all shippers using the pipeline). Demonstrably fair arrangements were essential for at least two

reasons: first, because each field was required to contribute towards the “Static Volume” of gas in the pipeline, that is to say the minimum volume of gas which was necessary to maintain the pipeline at the desired operating pressure, in circumstances where the composition of such gas varied from field to field so that a simple quantitative comparison would be inappropriate; and second, to ensure, for example, that a shipper delivering gas of higher quality into the pipeline which was then commingled with gas of lower quality would obtain back on redelivery an appropriate proportion of the commingled gas. It was therefore important that a shipper (such as TGTL) should know such matters as the quantity and composition of gas to be delivered into the pipeline by other shippers during any relevant period so that it could calculate by reference to the allocation principles what quantity and composition of gas would be returned to it at the redelivery point. Consequently the allocation principles, whether contained in Schedule XIII to the Agreement or (from 1998) the TAA, were fundamental to the operation of the pipeline from the outset.

25. The way in which Schedule XIII sought to achieve these objectives was through a series of formulae which used the Capacity Reservation Rate (i.e. the capacity reserved by TGTL) plus (for third party shippers) the concept of “Booked Capacity”. This was defined as follows:

“‘Booked Capacity’ means for a Producing Designated Field the Notified Rate for that field and for a Non-Designated Field the maximum rate of delivery of Non-Capacity Gas notified by the CATS Operator pursuant to Clause 4.6(a)(vii) of the Agreement”.

26. A “Producing Designated Field” was a field from which TGTL was shipping gas, while a “Non-Designated Field” was a field from which a third-party shipper was shipping gas. The “Notified Rate” (applicable to TGTL fields) was defined as “the maximum rate of delivery (which ... shall not exceed the Capacity Reservation Rate) of such Capacity Gas at the proposed Entry Point during the proposed period of Transportation Service”. In essence, having reserved the right to ship gas up to the maximum rate reserved (i.e. the Capacity Reservation Rate), TGTL was required to notify the CATS Parties how much of the capacity which it had reserved it intended to use to ship from any particular field.

27. Thus the “Booked Capacity” consisted of the total of two elements, namely (a) the maximum rate of delivery of gas to be shipped from a field by TGTL during a relevant period pursuant to the Agreement, and (b) the maximum rate of delivery of Non-Capacity Gas which had been notified pursuant to a clause 4.6(a)(vii) notice. It is sufficient to take one example of the formulae in which these concepts were deployed, namely the formula for calculating each field’s contribution to the Static Volume. This was contained in Section IX.2 of Schedule XIII as follows:

“The contribution to the Static Volume for each CATS Field will be as follows:

(a) where the total of the Notified Rates for all Producing Designated Fields does not exceed the Capacity Reservation Rate, the product of (i) a fraction, the numerator of which is that CATS Field’s Booked Capacity and the denominator of which is

the total of the Booked Capacities for all CATS Fields, times (ii) Static Volume;

(b) where the total of the Notified Rates for all Producing Designated Fields exceeds the Capacity Reservation Rate, for each Producing Designated Field:

(CRR / CRR + Total Booked Capacity for all Non-Designated Fields) \* (Producing Designated Field's Notified Rate / Total Notified Rate for all Producing Designated Fields) \* (the Static Volume)"

28. Other formulae made similar use of the concept of "Booked Capacity".
29. In the case of shipments by third party shippers from Non-Designated Fields, this concept (as the name suggests and the context makes clear) can only be a reference to the capacity actually reserved (or booked) from time to time, yet it is defined as "the maximum rate of delivery of Non-Capacity Gas notified by the CATS Operator pursuant to Clause 4.6(a)(vii)".
30. Evidently the denominator "CRR + Total Booked Capacity for all Non-Designated Fields" was intended to play essentially the same role in the calculation of the Static Volume as played by the concept of "CATS Capacities" in the calculation of the Capacity Fee payable by TGTL in the later years of the Agreement.

### **The TAA**

31. In 1998 the provisions of Schedule XIII of the CRTA were deleted and were replaced by the Allocation Provisions of the TAA. Under the TAA, the concept of "Booked Capacity" was retained but it was defined differently as follows:

"... With respect to a CATS Field Meter(s) the number of Cubic Metres per Day for such CATS Field Meter(s) in the line marked 'Booked Capacity' in table 1 of Schedule VII, as shall be updated from time to time in accordance with clause 10.8, being the aggregate of all the Firm Shipper Capacities reserved under the applicable Transportation Agreements by the Shippers at such CATS Field Meter(s)..."

32. The TAA defined "Firm Shipper Capacity" as (1) the Daily Reserved Capacity Rate ("DRCR") for all transportation agreements other than the Agreement, and (2) the CRR for the Agreement. The concept of "Firm Shipper Capacities" was used, under the TAA, to determine each shipper's contribution to the calculation of "Static Volume".

### **The Transportation & Processing Agreements**

33. As foreshadowed in the Agreement, a number of Transportation & Processing Agreements with third party shippers ("TPAs") were concluded by the CATS Parties. These also provided for a "Daily Reserved Capacity Rate" which was defined (in all but two cases) as:



“the maximum rate (expressed in Cubic Metres) of [name of field] Gas per Day as varied from time to time in accordance with these Heads of Agreement ... at which the [third party shipper] wishes to reserve capacity in the CTF.”

34. Thus the DRCR was referred to in these agreements as a “maximum rate”, but that maximum could be varied, and thus reduced, from time to time.
35. In the two cases where the provision was different, the DRCR was the rate at which the shipper had the right to deliver gas to the pipeline.
36. It was common ground that the CATS Parties gave a notice under clause 4.6(a) for each TPA which they concluded, although due to the passage of time not all these notices could be located for the trial. The TPAs related to 16 fields, but only six notices had been located. The six notices which were in evidence were given on dates between 18<sup>th</sup> February 1998 and 28<sup>th</sup> May 2015. In some but not all cases they covered the whole of the remaining period of the Agreement. In each case they stated the maximum rate to be delivered during the period of transportation covered by the TPA in question. In most but not all cases this maximum rate corresponded to the initial DRCR.
37. The combined totals of the maximum figures in the six clause 4.6(a) notices in evidence together with those not located but which TGTL contended must have been given plus the CRR (i.e., the capacity reserved for TGTL) amounted to some 62 million cubic metres per day for the 2013/14 to 2016/17 Contract Years and some 61 million cubic metres per day for the 2017/18 Contract Year. This exceeded the capacity of the pipeline, which was 48 million cubic metres per day, and far exceeded the throughput for the years from 2013 onwards, which was in the range of 14 to 18 million cubic metres per day. In contrast, the DRCRs plus CRR for those years was in the range of approximately 17 to 22 million cubic metres per day. The relatively low level of reserved capacity and throughput in these later years reflects the fact that gas fields deplete over time so that it is to be expected that maximum throughput will occur in the early years of production from the field and will gradually reduce over the field’s life.

### **The judgment**

38. The CATS Parties have always contended that CATS Capacity for the Capacity Fee period should be calculated using (for shippers other than TGTL) the sum of the DRCRs for the relevant Contract Year, i.e. the firm capacity booked for each shipper for that Contract Year, which the CATS Parties were obliged to make available to each shipper in that Contract Year. This represents an up to date figure for booked capacity for each relevant year. The CATS Parties contended that that information was provided by TAA Update Schedules, of which at least seven were produced and sent to TGTL in the period 2009 to 2017.
39. The judge pointed out that TGTL's case had changed and developed over the course of the proceedings. By the end of the trial, however, its case was that the CATS Parties were required by clause 4.6(a)(vii) to give a notice at the outset of each TPA concluded with a third party shipper stating the maximum rate at which it was expected that the shipper would deliver gas into the pipeline at any time during the whole life of that TPA. It was a forward-looking maximum, looking at the contract period as a whole. A maximum rate could increase, if the TPA in question was amended, but by definition

could not reduce. Absent such an increase in the maximum expected rate, the CATS Operator could not give a valid notice to amend the clause 4.6(a)(vii) information, either under clause 4.6(b) in its original form or under its amended form where, in any event, a clause 4.6(b) notice could only be given in response to a request by TGTL.

40. The judge began his discussion of this issue by posing the question whether the CATS Capacities figures were intended to be “up to date” or “historical”, with the former comprising actual up to date usage of the pipeline during the years in question and the latter consisting of quantities which might only have been shipped many years in the past. To answer that question he considered first “the nature of the Capacity Fee period under the CRTA”, which he described in these terms:

“149. ... For that period, towards the end of the duration of the CRTA, the parties agreed to substitute what may broadly be called a cost share regime for the earlier tariff regime. Under that cost share regime, the current costs (i.e. those relating to the Contract Years of the Capacity Fee regime) were to be divided up. Under such a cost share regime, it could be expected that those current costs would be divided amongst those actively using the facility during the period in which those costs were incurred and in proportion to their usage of the facility, and not on the basis of what they might have been shipping many years, and in some cases decades, earlier.”

41. His starting point, therefore, at [150], was that “one might not have expected to see an arrangement of the sort for which TGTL contends”, i.e. a division based on historic figures, but he recognised that it was necessary to consider carefully whether the parties did in fact make such an arrangement.
42. The judge identified four matters which, in his view, indicated that the “CATS Capacities” figures were intended to reflect contemporary usage of the pipeline.
43. First, the other element of the fraction involved in the clause 7.10(a) formula, the CRR, which was both the numerator and a part of the sum which constituted the CATS Capacities in the denominator, could be revised downwards:

“151. ... The CRR was defined in the CRTA as a rate of 8,334,900 cu m/d ‘as the same may be adjusted in accordance with this Agreement’. By clause 21.1 of the CRTA TGTL had the right, on not less than two years' notice, to reduce, but not thereafter to increase, the CRR, provided that such reduction should not be effective before 1 October 2008. Under this clause, TGTL thus had the right to reduce the CRR, apparently on multiple occasions. It did, as a matter of fact, exercise that right by reducing the CRR to 6,515,000 cu m/d with effect from 1 October 2017 by a letter dated 28 September 2015. The CRR to be used in the formula was the up to date CRR, as amended pursuant to clause 21.1. I consider that the fact that this aspect of the equation was up to date in this sense, lends support to the idea that the parties intended the other aspect of the fraction, and the other aspect of the denominator, also to be up to date.”

44. Second, “strong support” for holding that “CATS Capacities” was intended to be based on up to date usage was afforded by other provisions within the Agreement which made use of the concept, which were drafted on the basis that “CATS Capacity” referred to current contracted usage. The provisions which the judge identified in this regard were clause 12.1(b)(ii) of the unamended Agreement dealing with restrictions on throughput leading to a reduction in capacity, clause 16.1(c)(ii) dealing with substitution, and clause 22 dealing with abandonment of the system by the CATS Parties.
45. Third, the judge considered that the phrase “applicable on each Day of the Contract Year in question” in the definitions of both CRR and CC in the formula in clause 7.10 emphasised that the rates used would be up to date rates, which might vary during the course of the year.
46. Finally, the judge found support for the view that “CATS Capacity” was intended to be a varying, updated figure from the way in which the definition of “Booked Capacities” was dealt with through the process of amendment of the CRTA in 1998:

“154. The above analysis of the CRTA is further supported by the way in which the relevant concepts were expressed through the process of amendment. The phrase 'maximum rates of delivery of Non-Capacity Gas notified by the CATS Operator pursuant to clause 4.6(a)(vii)' was, in the unamended CRTA, adopted as the definition of 'Booked Capacities'. The contractual purpose of the phrase 'Booked Capacities' was in determining matters of allocation, under Schedule XIII. Upon amendment in 1998, Schedule XIII was deleted, the allocation provisions being thereafter found in the TAA, and the term 'Booked Capacity' was defined in the TAA as 'the aggregate of all the Firm Shipper Capacities'. The 'Firm Shipper Capacities' are the DRCRs for each shipper, as set out in Schedule VII to the TAA, as updated from time to time in accordance with clause 10.8 (which included a provision for the amendment of Schedule VII no more frequently than quarterly). Of course, the definitions in Schedule XIII and in the TAA never co-existed, and cannot properly be used to cross-define terms. Nevertheless, it is a reasonable inference, having regard to the whole contractual scheme, that what was being referred to as 'Booked Capacity' was never intended to change, and that that phrase, like 'CATS Capacity' was a varying, updated, figure.”

47. All this led the judge to the conclusion, at [155], that “it was not intended, and is not the proper construction of the Agreement, that the figure for CATS Capacities should include historical rates of delivery for Non-Capacity Gas”.
48. The judge then turned to TGTL’s primary submission that the terms of the relevant definition and of clause 4.6(a)(vii) of the CRTA, in particular the critical words “the maximum rate of delivery of Non-Capacity Gas at such point during the proposed period of transportation”, did not permit the construction which he had indicated. He found this submission unconvincing as a matter of language:

“158. In my judgment the argument is unconvincing. In providing that what should be notified was the 'maximum rate of delivery' during the proposed period of transportation under a newly-entered into TPA, the parties were not seeking to identify a figure which would be the highest at any point during that period, which would then be the figure set in stone for the purposes of the CATS Capacity, absent a variation of the TPA. Instead, I consider that what was being sought was the relevant DRCR figure. In this regard, it is significant that in the TPAs, the DRCR was regularly referred to as the 'maximum rate' of reserved capacity. While I was not shown any transportation agreement pre-dating the conclusion of the CRTA in 1990, and thus was not shown any definition of a DRCR in terms of a 'maximum rate' which formed part of the background matrix to the contract as initially concluded, this usage was contained in almost all the TPAs, including the very first which dates from January 1991. I considered that it was very probable that in entering into the CRTA the parties had had such a way of referring to a DRCR in mind. In any event this type of definition of DRCRs was used in a number of other TPAs dating from the period between 1991 and 1998, and these can, I consider, be taken into account as part of the background known or taken to be known to the parties, when construing the CRTA as amended in 1998.

159. Accordingly, I consider that what clause 4.6(a)(vii) was requiring should be notified was the DRCR figure specified in the TPA. ...

160. Furthermore, and consistently with the above, I consider that it is plain that the parties intended that the figure notified under 4.6(a)(vii) should be kept up to date, and that this was the purpose of the reference to 'subject to any changes notified pursuant to clause 4.6(b)(i)'. Under the unamended CRTA, the information notified under clause 4.6(a) was to be updated no less frequently than quarterly. That would have allowed the updating of the figures for the maximum rate of delivery of Non-Capacity Gas. In this way the up to date DRCR figure would be available for the calculation of CATS Capacity, consistently with the overall intention of the CRTA for this to be an up to date figure, as discussed in the previous section of this judgment.”

49. Having rejected TGTL’s primary case, the judge dealt with its fallback position that even if the information required under clause 4.6(a)(vii) was the DRCR, the figure notified could only be amended if there was a request for such an amendment from TGTL, which there had not been. This was said to be the effect of the amendment to clause 4.6(b) in 1998 to provide that notices under that clause were to be provided “from time to time, upon receipt of a request from [TGTL]”. That was said to create a condition precedent, namely a request from TGTL. It was further submitted that, in any

event, the CATS Parties had not in fact updated the clause 4.6(a) information pursuant to clause 4.6(b).

50. The judge rejected this alternative case both as a matter of construction of the amended clause 4.6(b), which he held did not require the information to be provided in any particular form and did not mean that a request by TGTL was a condition precedent to the provision of updated information, and also because, as a matter of fact, updated information satisfying the requirements of clause 4.6(b) had been provided to TGTL through various update schedules served upon it pursuant to the TAA.

### **The parties' submissions on appeal**

51. It was common ground before us, as it had been at the trial, that the meaning of clause 4.6(a) was not affected by the amendments made in 1998, including the amendment to clause 4.6(b), and therefore remained the same after those amendments as it had been when the Agreement was concluded in 1990.
52. For TGTL Mr Bankim Thanki QC focused principally on the language of clause 4.6(a)(vii) and in particular on the underlined words in the phrase “the maximum rate of delivery of Non-Capacity Gas during the proposed period of transportation”. He submitted that “the proposed period of transportation” was, and was only capable of being, the period between the commencement date to be notified under paragraph (iv) of the clause and the termination date to be notified under paragraph (v), so that what was required by paragraph (vii) was a forward-looking statement, made promptly after the conclusion of each TPA, of the maximum rate of delivery of gas during the whole of the period covered by the TPA in question.
53. Mr Thanki identified three principal errors, as he submitted, on the part of the judge. The first such error was that the judge had significantly undervalued the language of clause 4.6(a)(vii) of the Agreement, for example by his express rejection at [158] of the proposition that “the maximum rate of delivery ... during the proposed period of transportation” meant the “figure which would be the highest at any point during that period” when that, said Mr Thanki, was precisely what the words meant. The second such error was to allow his view that the Capacity Fee provided for a cost sharing regime based on usage of the pipeline to drive his construction of the Agreement. The third such error was to construe the CRTA by reference to the TPAs, with their concept of DRCRs which would fluctuate from time to time, when those TPAs were only concluded some years after the Agreement (which contained no mention of DRCRs) and were therefore irrelevant to its construction in 1990; when TGTL had no knowledge of the terms of those TPAs even when they were concluded; and when in any event the DRCRs were not maximum rates for the whole period of each TPA, but were merely current rates for firm booked capacity which could be adjusted upwards or downwards from time to time.
54. For the CATS Parties Mr Tim Lord QC supported the judge's reasoning. He emphasised that the Agreement should be viewed as a whole and that it was intended to operate for over 20 years before the Capacity Fee formula even became relevant. Viewing the contract as a whole it was plain that the language used in clause 4.6(a)(vii) which was incorporated into the definition of “CATS Capacity”, as well as the term “CATS Capacity” itself, was used elsewhere to refer to the up to date figure for the capacity reserved by a third-party shipper and not to whatever had been the maximum

rate applicable during the whole period covered by a TPA which, by the time it was necessary to calculate the Capacity Fee payable by TGTL, was likely to be very out of date. Mr Lord emphasised that the definition of “CATS Capacity” referred not only to a notice given pursuant to clause 4.6(a)(vii), but was also expressly “subject to any changes notified pursuant to Clause 4.6(b)(i)”, while clause 4.6(b)(ii) required regular notification of the CATS Capacity to TGTL. All that, said Mr Lord, showed that third party shippers’ contribution to CATS Capacity was an up to date figure representing the capacity actually booked by them during any given Contract Year. So too did the express recognition in clause 4.6(c) that the information provided pursuant to paragraph (a) of the clause was provided “for operational and planning purposes only”. That would be so if the information to be provided was an up-to-date figure, but not if what was required was a figure which might be many years out of date.

## Discussion

55. The court’s approach to the construction of commercial contracts is now well known and was not in dispute. Absent further intervention by the Supreme Court, the principles can now be taken as settled. They have been re-stated in *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 and need not be repeated here.
56. I propose to undertake the “unitary exercise” of construction by considering (1) the language of clause 4.6, (2) other relevant provisions of the Agreement, (3) the overall structure of the Agreement’s payment provisions, (4) the background circumstances known to the parties at the time the Agreement was concluded, and (5) commercial common sense.

### *The language of clause 4.6*

57. Clause 4.6 is set out at [19] to [22] above. It requires a notice to be given to TGTL whenever the CATS Parties conclude a contract for the use of the pipeline with a third-party shipper. The notice must be given “promptly”, that is to say within a short time of the conclusion of the TPA in question, and must contain the information specified in paragraphs (i) to (viii) of clause 4.6(a). That information will typically be given before performance of the TPA has even commenced, as is apparent from the repeated use of the word “proposed” (e.g. “the date on which the transportation ... is proposed to commence”). However, the information notified is not set in stone. Provision is made by clause 4.6(b) for updated information to be given.
58. The information required includes, in paragraph (vii):
- “the maximum rate of delivery of Non-Capacity Gas at such point during the proposed period of transportation;”
59. The “point” referred to is “the proposed point of delivery” notified pursuant to paragraph (ii). Further, there are strong linguistic grounds for thinking, at any rate when the notice is first given, promptly after conclusion of the TPA and before its performance has even commenced, that “the proposed period of transportation” must refer to the period between “the date on which the transportation ... is proposed to commence” and “the estimated date on which [it] is proposed to terminate” referred to in paragraphs (iv) and (v). That is consistent with the language of the clause and, so far,

no other “proposed period of transportation” is referred to. I would accept, therefore, focusing on clause 4.6(a)(vii) in isolation, that there appears to be force in TGTL’s submission that what the clause requires is notification of the maximum rate which will apply at any time during the period covered by the TPA.

60. When clause 4.6 is viewed as a whole, however, the position is less straightforward. I have already noted that clause 4.6(b) provides for updated information to be provided. This had to be done at least quarterly under the terms originally agreed in 1990. The provision for changes to be notified does not exclude “the maximum rate of delivery” referred to in paragraph (vii) and thus appears to contemplate that this figure may change, and may do so often. That seems inconsistent with TGTL’s case that the only possible changes to the maximum rate were increases as a result of amendments.
61. Moreover, there had also to be notification at least quarterly of “the CATS Capacity for the ensuing Contract Year”. It will be recalled that “CATS Capacity” comprises two components, namely (a) the CRR and (b) “the aggregate maximum rates of delivery of Non-Capacity Gas notified by the CATS Operator pursuant to Clause 4.6(a)(vii), subject to any changes notified pursuant to Clause 4.6(b)(i)”. The requirement for quarterly notification of the “CATS Capacity” carries two important implications.
62. The first is that “CATS Capacity” was liable to change throughout the period of the CRTA. The CRR component of “CATS Capacity” either would not change or, if it did, TGTL would already know about the change. The changes to CATS Capacity contemplated by the clause about which TGTL needed to be notified must therefore refer to changes in the maximum rates notified under clause 4.6(a)(vii). While it can be accepted that the CATS Capacity figure would increase during the early years of the contract as new contracts were concluded with third party shippers, this would be a finite process due to the limited number of gas fields physically capable of connecting to the pipeline. Any suggestion that quarterly changes would or might continue throughout the period of the Agreement seems inconsistent with TGTL’s case.
63. The second implication is that it would be important to TGTL to be kept informed of the latest updated figure throughout the period of the Agreement. That is inconsistent with any suggestion that “CATS Capacity” was only relevant for the purpose of calculating the Capacity Fee in the last five years of the CRTA.
64. Indeed, clause 4.6(c) states expressly that the information was to be provided “for operational and planning purposes only”. That must refer not only to the information initially provided under clause 4.6(a), but also to the updated information provided under 4.6(b). Mr Thanki suggested that TGTL would need to know both the maximum rate of delivery under each TPA and also the overall CATS Capacity figure for the purpose of calculating the Capacity Fee, but notably did not suggest any other reason why TGTL would need to know the maximum rate of delivery under each TPA. However, I would not regard calculation of the Capacity Fee as an operational or planning purpose and, in any event, the suggestion begs the question why TGTL would need this information during the first 20 years of the operation of the Agreement before the Capacity Fee regime applied. If we start from the premise, stated in clause 4.6(c), that information about the CATS Capacity for each ensuing Contract Year was indeed required for operational and planning purposes, and then ask what kind of information would be useful to TGTL for such purposes, the answer must be that current up-to-date

information will be useful whereas historical information based on quantities shipped in the past, and in some cases many years ago, will be of no real use at all.

65. In the light of these considerations, I return to the question of what is meant by “the proposed period of transportation” in clause 4.6(a)(vii). I have already accepted that there are strong linguistic grounds for thinking that this refers to the period between the two dates referred to in paragraphs (iv) and (v) or, in other words, to the entire period covered by each TPA. But when the clause is viewed as a whole, it is apparent that, for operational and planning purposes, the information in which the parties are really interested is that which will apply as current information “for the ensuing Contract Year”. To my mind this casts at any rate some doubt on the literal approach advocated by TGTL.
66. I would conclude from this analysis, focusing so far only on clause 4.6, that there are indications in the clause which support each party’s proposed construction, but that the language is not decisive either way.

*Other relevant provisions of the Agreement*

67. Clause 4.6(a)(vii) refers to “the maximum rate of delivery of Non-Capacity Gas at such point during the proposed period of transportation”. As already noted, however, the same language (“the maximum rate of delivery of Non-Capacity Gas notified by the CATS Operator pursuant to Clause 4.6(a)(vii) of the Agreement”) is also used in Schedule XIII as part of the definition of “Booked Capacity”. I would therefore accept Mr Lord’s submission that the concept of “Booked Capacity” is likely to provide a good insight into what the parties meant by the “maximum rate” referred to in clause 4.6(a)(vii).
68. In the context of Schedule XIII (dealing with allocation principles) it is clear that Booked Capacity refers, in the case of shipments by third party shippers from Non-Designated Fields, to the capacity actually reserved (or booked) from time to time. Historical maximum figures would have no relationship with what was actually being shipped at any given time (or, if different, with capacity which was actually booked) and could be of no relevance to the allocation exercise with which Schedule XIII is concerned. Indeed, the use of historical figures would make it impossible for allocation to be carried out “on a basis that is demonstrably fair and equitable to all CATS Fields” as required by that Schedule.
69. In my judgment this is a strong indication that the updated maximum rate required to be notified from time to time under clause 4.6(a)(vii) and clause 4.6(b) was intended to be a current rate, referring to the capacity actually reserved (or booked). That could properly be regarded as a maximum rate for ascertaining the CATS Capacity for the ensuing Contract Year, as it was always possible that capacity reserved would not actually be taken up.
70. The fact that Schedule XIII was deleted in its entirety and replaced by the TAA does not affect this conclusion. Schedule XIII formed part of the Agreement when it was concluded in 1990 and is therefore relevant for the purpose of ascertaining the meaning of the contract as at that date which, as is common ground, did not change thereafter so far as the meaning of clause 4.6(a) is concerned.



71. There are, moreover, other provisions of the Agreement which refer to “CATS Capacity” and which shed light on the parties’ understanding of this concept.
72. Clause 12 of the Agreement dealt with emergency situations leading to a reduction in capacity. It provided for the capacity which remained physically available to be allocated between the users of the pipeline, distinguishing between the first 36 hours of any period of reduced capacity and continuing reduction thereafter. In the event that the reduction continued beyond the initial period, clause 12(b)(ii) provided that:

“the Capacity Users shall in aggregate be entitled to a portion of the Available Capacity equal to the proportion which the Capacity Reservation Rate bears to the CATS Capacity.”

73. It is obvious that this provision was intended to effect a fair sharing of the available capacity between the users of the pipeline affected by the reduction. That objective would be achieved if the CATS Parties’ construction of “CATS Capacity” is correct, but not if TGTL is correct in its submission that third party shippers’ contribution to the ascertainment of “CATS Capacity” depended on historic and out of date maximum rates which (as time went by) were likely to be far in excess of capacity which those shippers had actually booked at the relevant time. That would be liable to result in some shippers being allocated a share of the available capacity out of proportion to the capacity which they had actually reserved merely because of an outdated maximum rate in their TPA. This would benefit those shippers and would unfairly prejudice TGTL. TGTL seeks to meet this point by submitting that this was the deal which the parties had struck but, given the obvious purpose of clause 12, I find that submission unconvincing.
74. Clause 16 dealt with the topic of substitution, which in this context refers to treating Capacity Gas as Non-Capacity Gas and *vice versa*. It would be to all parties’ benefit for this to be possible from time to time as it would add to operational flexibility. Clause 16.1(c) provided for the circumstances in which substitution could occur:

“The Right of Substitution may only be exercised by [TGTL] or the CATS Parties to the extent that:

(i) there is spare capacity in the Capacity Reservation, as determined by [TGTL] (in the case of Substitution In);

(ii) there is spare capacity in the CATS Capacity (other than the Capacity Reservation), as determined by the CATS Operator (in the case of Substitution Out); and

(iii) in the reasonable opinion of the CATS Operator, the commingled stream in the CATS Transportation Facilities resulting from the exercise of the Right of Substitution can be transported, processed and redelivered in compliance with the relevant redelivery specifications according to the standards of a Reasonable and Prudent Operator and with no material adverse effect on any other CATS user.”

75. Thus the existence of spare capacity rendering Substitution Out a possibility is to be determined by reference to “CATS Capacity”. This can only sensibly be done on the basis that “CATS Capacity” refers to up-to-date figures for booked capacity. An assessment done by reference to historic figures would be meaningless.
76. Finally, clause 22 permitted the CATS Parties, on giving two years notice, to abandon the pipeline, with effect from (at the earliest) 1<sup>st</sup> October 2008. Thus abandonment could only occur at the earliest 15 years after commencement of operations, by which time it was to be expected that the fields would be substantially depleted so that throughput (and thus booked capacity) would be substantially lower than in the initial years of operation. In the event of such abandonment, provision was made for the CATS Parties to sell the abandoned facilities to users of the pipeline (including TGTL). Those users, defined as “Relevant Parties”, were those having a contract with the CATS Parties providing either for a capacity reservation or for the transportation of gas “on a firm basis”. Clause 22.3(b)(ii) provided that ownership of the abandoned facilities was to be allocated among Relevant Parties “pro rata to their proportionate shares of the CATS Capacity on the date of expiry of the notice” of abandonment.
77. Three points follow from this. First, although not given the name, the concept of a contract for the reservation of capacity “on a firm basis” is essentially the same as “Booked Capacity” and the concept which was later referred to in the TPAs as the DRCC. Second, the stipulation that the relevant CATS Capacity was that prevailing “on the date of expiry of the notice” indicates that the CATS Capacity was expected to fluctuate from time to time, even in the later period of operation of the pipeline. Third, it is evident that the parties had in mind up-to-date booked capacity as the basis on which ownership of the facilities should be allocated in the event of abandonment and not out of date historic figures.
78. Accordingly I agree with the judge that relevant provisions of the Agreement which either expressly use the concept of “CATS Capacity” or use language materially identical to clause 4.6(a)(vii) proceed on the basis that these concepts refer to up-to-date capacity reservation. While these can be seen as a limited number of instances in a very lengthy and detailed contract, they represent in my judgment a further strong indication in favour of the CATS Parties’ construction. In contrast we were shown no provisions of the Agreement which support TGTL’s construction.
79. I do not, however, derive much assistance from the phrase “applicable on each Day of the Contract Year in question” in the definitions of both CRR and CC in the formula in clause 7.10. In my judgment this is essentially neutral.

*The overall structure of the Agreement’s payment provisions*

80. I have already referred to the fact that the Capacity Fee calculation would only be relevant from 1<sup>st</sup> October 2013 during the last five years of the Agreement. As Mr Lord pointed out, this was very much the tail end of the overall contract period. During the first 20 years of operation, TGTL was to pay a fixed “Transportation Fee”, initially at a high level and, from 2008, at a reduced level. Thus the payments to be made by TGTL corresponded, broadly speaking, to an initial period when production from the gas fields could be expected to be at its highest level, an intermediate period when production would begin to reduce, and a final period as the fields were depleted when payment (i.e. the Capacity Fee) was to be on a cost sharing basis.

81. Mr Thanki criticised the judge for saying that the Capacity Fee represented costs sharing on the basis of current usage of the pipeline. Strictly speaking this would be wrong as the costs sharing was on the basis of reserved capacity. However, I do not accept that this was an error which the judge made. In any event, it was to be expected that, broadly speaking, usage and current reserved capacity would in practice substantially correspond.
82. The Agreement included a protection for TGTL in the event that it considered that the costs sharing regime would operate unfairly to it. This was its right, contained in clause 21.1, to terminate the Agreement. It should be noted, however, that if TGTL's construction were correct, the Capacity Fee would not operate unfairly to TGTL but, on the contrary, would cast by far the greater burden of the costs of operating the pipeline on to CATS Parties by reference to outdated historic maximum rates of delivery of gas into the pipeline. This is a further indication calling TGTL's construction into question.

*Background circumstances known to the parties at the time the Agreement was concluded*

83. As I have indicated, the parties would have recognised that gas fields deplete over time, so that the period of maximum production and therefore of usage of the pipeline would have been in the early years of operation, while usage during the later period when the Capacity Fee was payable would be substantially reduced. It was to be expected, therefore, that the highest rates of capacity reservation (or, in the language of the TPAs, the maximum DRCRs) would be in the early years, and would reduce thereafter. Thus a construction of the Capacity Fee payment obligation based upon maximum figures representing capacity booked by third party shippers during the early years of the contract would on the face of things produce a distorted figure by reference to which to share the cost of the pipeline.
84. I would accept Mr Thanki's submission that it would be wrong to construe the Agreement concluded in 1990 by reference to later contracts, the TPAs, to which TGTL was not a party. However, I am not persuaded that this is what the judge did. I accept Mr Lord's submission that the concepts used in those later contracts (such as DRCRs) were within the contemplation of the parties in 1990 even if the names given to them and the detailed terms of the TPAs were not. While the contractual provisions and definitions are complex, ultimately the concept of firm booked capacity is relatively straightforward.

*Commercial common sense*

85. For reasons which will already be apparent, I consider that the CATS Parties' construction makes far better commercial sense. It accords, as the judge said, with what the parties would sensibly be expected to have agreed, although (as the judge also made plain) that expectation is no substitute for analysis of the contract terms. Moreover, a construction of "CATS Capacity" which results (as TGTL's construction does) in a figure substantially in excess of the actual capacity of the pipeline and far in excess of the usage of the pipeline which would have been expected during the final years of the CRTA when the Capacity Fee was payable makes very little sense.

**Conclusion on construction**

86. While there is considerable force in TGTL's proposed construction if the focus is confined to the terms of clause 4.6(a)(vii) itself, the position is more nuanced if clause 4.6 is considered as a whole. However, when the Agreement is construed as a whole and is seen in its commercial setting, the true construction of the clauses relevant to this dispute is reasonably clear. In my judgment, for the reasons which I have given, the CATS Parties' construction of the Capacity Fee provision makes better sense of the contract, including the terms of clause 4.6, and is to be preferred. Although the language is not entirely free from difficulty on either party's construction of the contract, I consider that the judge was right to accept the construction proposed by the CATS Parties. It is of some interest, if only to confirm that this is not a manifestly uncommercial construction, that it was only belatedly challenged by TGTL.

#### **Changes notified under clause 4.6(b)**

87. The maximum rates initially notified to TGTL were in practice the highest rates which would apply throughout the period of each TPA. The question therefore arises whether changes to these rates were notified pursuant to clause 4.6(b)(i). Although TGTL developed a submission in its skeleton argument that such changes could only be notified pursuant to a request from TGTL which had not occurred, Mr Thanki abandoned that submission (which in any event was not within the scope of TGTL's permission to appeal) in oral argument. I can therefore deal very briefly with this point.
88. In my judgment the short answer is that the judge found as a fact that the CATS Parties notified TGTL of updates to the clause 4.6(a)(vii) information through seven schedules, described as "TAA Update Schedules", served on dates between 19<sup>th</sup> March 2009 and 22<sup>nd</sup> December 2017. He found at [175] and [176] that:

"Having regard to each of the seven schedules, I consider that they do constitute update notices in accordance with clause 4.6(b) and that a reasonable observer would interpret them in that way. ... In my judgment, the schedules clearly provide updates of the information which is properly (on the view I have set out above) to be provided pursuant to clause 4.6(a)(vii). I consider that a reasonable observer would understand that the information originally provided under clause 4.6(a) was intended to be amended by these detailed schedules."

89. There is no appeal from this finding.
90. Accordingly the CATS Parties are correct to say that the Capacity Fee payable by TGTL must be calculated by reference to the figures in these updated schedules.

#### **Disposal**

91. I would dismiss the appeal.

#### **Lord Justice Newey :**

92. I agree.

#### **Sir Geoffrey Vos, Chancellor of the High Court :**

93. I entirely agree with Males LJ's judgment. I want only to mention briefly the way in which the hearing of this appeal was conducted. Thanks to the hard work and cooperation of court staff, the parties and their lawyers, this appeal was conducted entirely remotely by the use of Skype for Business. It was completed comfortably within the 1.5-day estimate, and both leading counsel had a proper opportunity to make their submissions, to confer with their junior counsel, and to take proper instructions from their instructing solicitors and clients. It was obviously not possible during the current coronavirus pandemic for the hearing safely to be conducted in court whilst observing the necessary social distancing. Some 19 individuals, including the members of the court, were signed in to the Skype conferencing facility at any one time.
94. During the hearing, Practice Direction 51Y came into force for a temporary period to cater for video and audio hearings during the pandemic. It provides that, where the court directs that proceedings are to be conducted wholly in that way, and it is not practicable for the hearing to be broadcast in a court building, the court may direct that the hearing must take place in private where it is necessary to do so to secure the proper administration of justice. The parties accepted that these criteria applied to this hearing and accordingly the court made an order on the second day of the hearing that the hearing should take place in private. These judgments will, of course, be published.
95. The civil courts are dealing at this time with a rapidly moving situation. They are undertaking urgent business, and, so far as possible, business as usual, so as to avoid delays and backlogs building up during the period of lock-down caused by the pandemic. Most importantly of all, judges are taking every step they possibly can to avoid the risk of unnecessary transmission of the coronavirus.
96. I have explained how this hearing was undertaken in an attempt to demonstrate the flexibility of the arrangements that can be made, with the cooperation of the parties and their lawyers, to continue to deliver fair, open and transparent justice in a period of national difficulty.