THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2017-03546

IN THE MATTER OF ARCELORMITTAL POINT LISAS LIMITED

IN VOLUNTARY LIQUIDATION

AND

IN THE MATTER OF SECTION 434 OF THE COMPANIES ACT CHAPTER 81:01

AND

IN THE MATTER OF THE WINDING UP RULES, SECOND SCHEDULE, COMPANIES ACT, CHAPTER 81:01- see Rules 6 & 89

BETWEEN

THE NATIONAL GAS COMPANY

OF TRINIDAD AND TOBAGO LIMITED

Applicant

AND

CHRISTOPHER J. KELSHALL

(as the Liquidator of ArcelorMittal Point Lisas Limited

In voluntary liquidation)

Respondent

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Ian Benjamin SC instructed by Ms Nalini Jagnarine for the Applicant

Mr Martin Daly SC leading Ms Vanessa Gopaul instructed by Mrs Radha Maharaj for the Respondent

Date: 1 November 2018

JUDGMENT

1. The National Gas Company of Trinidad and Tobago (NGC) is the applicant in these proceedings. The application is made under Rule 89 of the **Winding Up Rules, Second Schedule, Companies Act, Chap. 81:01**.

2. The respondent is the liquidator (the liquidator) of ArcelorMittal Point Lisas Limited (Mittal) which is in voluntary receivership. Mr Kelshall is the liquidator.

3. NGC submitted two claims to the liquidator pursuant to arrangements which the NGC had with Mittal for the supply of natural gas to Mittal for the operation of its plants at Point Lisas.

4. The first claim was for USD 819,164.13 plus interest claimed. The second was for USD 12,635,661.06, which NGC said was due to it by Mittal under contractual arrangements called "take or pay."

5. The liquidator considered these claims and denied them both.

6. NGC has accordingly "appealed" to the High Court under Rule 89 for the court to vary or reverse the liquidator's decision.

7. A point on the court's powers and jurisdiction under this appeal process was raised by the liquidator. This, therefore, is the first matter that I must decide on. Both parties made written and oral submissions on this matter.

8. In particular, the liquidator submitted a narrower approach has to be taken to reviewing the liquidator's decision. NGC suggests that the court's powers are by way of re-hearing and the court is entitled to take a wider approach in this determination.

9. Rule 89 provides as follows:

> 89. If a creditor or contributory is dissatisfied with the decision of the Liquidator in respect of a proof, the Court may, on the application of the creditor or contributory, reverse or vary the decision; but subject to the power of the Court to extend the time, no application to reverse or vary the decision of the Liquidator in a winding up by the Court rejecting a proof sent to him by a creditor, or person claiming to be a creditor, shall be entertained, unless notice of the application is given before the expiration of twenty-one days from the date of the service of the notice of rejection;

10. Based on this NGC says the court must look at all the evidence before it and examine the question afresh.

11. In **Re: Kentwood Construction Ltd. [1960] 1WLR 646** Buckley J. stated as follows:

> "I do not think that is really the function of the court on an appeal from a rejection of a proof. When application is made to the court to reverse a decision of a liquidator in rejecting a proof, evidence is filed which is very commonly much fuller than the evidence available to the liquidator at the time when he decided to reject the proof; and the court is bound to decide the rights of the claimant in the light of the evidence which is before the court, and not merely to express a view as to whether the liquidator was right or wrong in rejecting the proof when he rejected it. It is, perhaps, significant that the Companies (Winding-Up) Rules, 1949, provide by rule 108 that if a creditor or contributory is dissatisfied with the decision of the liquidator in respect of a proof, the court may, on the application of the creditor or contributory, reverse or vary the decision. It is not merely the function of the court to say that a decision is right or wrong; it may vary it in any way it thinks necessary in the light of the evidence before the court. The court must approach the question de novo and determine to what extent the claimants ought to be allowed to rank as a proving creditor."

12. In **Mc Phearson and Keay, The Law of Company Liquidation (4th Ed, Sweet & Maxwell, 2018 at 12-066)** the learned authors write:

> "An appeal to the court against the liquidator's rejection of proof is, it appears, a rehearing de novo and the court is not confined to the evidence that was before the convener so either party is entitled to adduce fresh evidence in support of his or her contention….It does not have to be established that there was some impropriety, in the sense of moral opprobrium, in the exclusion of the claim. It is not necessary that the liquidator has had to have made a mistake of fact of some sort at the time he or she admitted the proof before it could be said that there was a question of the proof being improperly admitted. The court's task in hearing the appeal has been traditionally, expressed as being to examine the evidence placed before it and come to a view whether on the balance and taking into account the merits of the claims of the creditor whose proof is being considered, the claim was established, and, if so, in what amount."

13. Section 43(1) of the Companies Act is the legislative basis for the liquidator's powers where proofs of debt are submitted to the liquidator for his/her consideration.

14. Rule 88 sets out the process to be adopted:

> 88. The Liquidator shall examine every proof of debt lodged with him, and the grounds of debt, and in writing admit or reject it, in whole or in part, or require further evidence in support of it. If he rejects a proof he shall state in writing to the creditor the grounds of the rejection.

15. The issue raised by the liquidator is what is the nature and scope of the process. The liquidator used the analogy of an appeal court and cites in aid the powers of an appeal court.

16. The liquidator refers to the relevant part of the Civil Proceedings Rules, 1998, as amended (CPR), Part 64. He also refers the court to **R v Eastman [2000] HCA 29, paras. 105 to 107 per** Mc Hugh J. – a decision of the Supreme Court of Australia.

17. Respectfully, these two sources are not on all fours with the instant case. The appeals dealt with there are from the decision of a trial court where a judge has made findings of fact after a trial process involving evidence being put forward and being tested in cross-examination. No such process obtains before a liquidator.

18. It has also been advanced that the dicta in the Re: Kentwood is limited by it being a quantum meruit claim and that at best it can only be of limited persuasive value.

19. It is suggested that the Court should pay little attention to it in the circumstances of this jurisdiction.

20. The liquidator cites **Plowman J. in Leon v Yorke-o-matic Ltd and Others [1966] 3 All ER 277 at page 280 C:**

> "Here as I have said, there is no question of fraud and, having considered all the evidence, which is fairly voluminous and lengthy, I am not satisfied that the liquidator did not exercise his discretion bona fide; nor am I satisfied that he acted in a way in which no reasonable liquidator could have acted……"

21. In consequence it is suggested that the court may examine the nature of NGC's proof of debt, the liquidator's reasons and the nature and weight of the evidence before the court.

22. What the cases tell me can be summarised as follows. The court is not limited to what was placed before the liquidator. The parties may put before the court more evidence than what was placed before the liquidator. This may allow fuller consideration of the issues. For example, before this court evidence in the form of affidavits have been put before the court to justify the debts. The liquidator has, in addition to his reasons, had an opportunity to file an affidavit to explain in some ways his reasons and to advance what he considered to be relevant facts. He has also put before the court further evidence. Each side has had the opportunity to fine tune their respective cases and to put their best foot forward as to why the claims should be accepted or rejected.

23. If the court is to have regard to additional evidence in this manner, it is entitled to form its own view of the issues and is not limited to reviewing the decision of the liquidator in the sense of scrutinising his reasons.

24. In some cases, also, cross-examination may be needed where there are contested facts or sharp disputes on relevant facts. In that sense, the court may have to make its own findings of fact.

25. In this matter I have been urged to accept certain facts, which are disputed between NGC and the liquidator relying on the records of Mittal.

26. Howsoever, the court's powers are labelled, it is clear that the court conducts an independent assessment of the matter and in so doing is given the power to vary or reverse the decision of the liquidator.

27. I also take account of the fact that a liquidator may or may not be a person who is legally trained. In consequence, where determinations have to be made on whether a certain legal position obtained, consequences may follow from this.

28. In this case, the court has to determine if force majeure applied to the first debt claimed and whether the take or pay obligations continued during the short term contract periods which followed the last negotiated full year contract between NGC and Mittal. Both of these matters require the consideration and determination of legal issues.

29. All of these point to the court looking at all the available relevant admissible evidence to make a determination. In doing so, the court is also entitled to scrutinise the liquidator's reasons, bearing in mind that the liquidator would have been obviously limited to the records available to him at the time and what was advanced to him by the creditor seeking to prove the debts in question. But the court has available to it this and more, including submissions on the law and evidence. I am, therefore, inclined to consider that the court engages in a re-hearing, but that part of this allows the court to examine the reasons and evidence advanced by the liquidator in so doing. In this way the court can decide whether to reverse, vary or uphold the liquidator's determination.

30. What, therefore, follows from this is whether the parties would have required an opportunity to cross-examine any of the deponents on the affidavits put before the Court. Mittal had indicated it was reserving its position on cross-examination regarding the force majeure circumstances. Having regard to my decision below on the evidence before me, I considered this to be unnecessary. Neither party expressed that cross-examination was required on the take or pay matter. Consequently, I considered it appropriate to resolve the claim in its entirety without the need for a further hearing for cross-examination.

Ruling on Affidavit filed 24 January, 2018

31. Mittal took objection to an affidavit filed by NGC on 24 January 2018. This sought to address certain matters raised in the affidavits of Mr Ali and Mr Mansingh filed in support of the liquidator.

32. The matters set out therein can properly be considered to be matters of reply, contesting assertions in the responses of Mr Mansingh and Mr Ali.

33. These are on relevant matters for the court's determination if it is to decide on whether force majeure circumstances applied.

34. In some cases the statements made in that affidavit were merely re-affirmation of NGC's previously stated case.

35. The court can appropriately give the necessary weight to the evidence set out and make determinations accordingly.

36. As such the reply affidavit was allowed in evidence.

The First Debt: Force Majeure Claim

37. NGC claimed a debt owed to it of USD 819,164.13. NGC on 5 February, 2013 had sent an invoice of USD 1,887,483.77 for gas supplied. On 8 March 2013 Mittal paid a portion in the sum of USD1, 068, 319.64. Mittal "set off" the sum of USD 819,164.13.

38. This set off, Mittal claimed, was due to losses caused by NGC's failure to supply Mittal's operations with liquid free gas on 14 and 15 November, 2012. NGC said that its failure to supply liquid free gas was due to forced majeure circumstances as provided for in the gas contracts.

39. NGC's operations are in the nature of a middleman or gas broker. NGC has a pipeline network connected to the major industries and the power supply company in Trinidad. NGC gets its gas from various supplies including BP, Shell, BHP Billiton and EOG.

40. Another company related to NGC is Phoenix Gas Processors (Phoenix). Phoenix has a role of "cleaning" the gas supplied at times for NGC before the gas is sent to the energy industries like Mittal, which operated steel plants and downstream production.

41. It is not in dispute that the gas supplied on the 14 and 15 November, 2012 had more liquid in it than it should have had. This is call "wet gas." Gas can contain some liquids; however, too much wetness in the gas can cause damage to plant and equipment.

42. NGC says all the circumstances for a force majeure event were there. These were that:

(i) NGC was unable to carry out or observe a term of the gas contract;

(ii) The event was not within its control;

(iii) NGC exercised due diligence to overcome the force majeure event.

43. The relevant clause in the gas contracts read as follows:

> "14.1. No failure or omission to carry out or observe any of the terms, conditions or covenants of this Contract by either party hereto, shall, except as herein expressly provided to the contrary, give rise to any claim against such Party or be deemed a breach of this Contract if such failure or omission arises from any cause or causes reasonably beyond the control of such party.

14.2. Without limiting the generality of Section 14.1 hereof, the following causes shall be deemed to be reasonably beyond the control of the parties hereto, viz. strikes, lockouts, or other similar industrial disturbances, acts of an enemy, blockades, insurrections, riots, Acts of God, epidemics, landslides, lighting, earthquakes, fire, storms, floods, washouts, arrest, restrains of government, orders or requirements of any civil or military power, civil disturbances, explosions, breakages, or accidents to machinery or lines of pipe, shortages (including, but not limited to, shortages caused by the failure of Seller's suppliers to deliver Gas to Seller), interruptions or delays in transportation (including the ocean transportation out of Trinidad of steel and other products produced by Buyer and the transportation of iron are into Trinidad and Tobago due to any of the foregoing of iron are into Trinidad and Tobago due to any of the foregoing circumstances) or any other cause or causes, whether of the kind herein enumerated or otherwise, not within the control of the Part claiming suspension and which by the exercise of due diligence such Party is unable to prevent or overcome."

44. Another relevant clause in the gas contracts read as follows:

"7.11. The Gas upon delivery shall meet the following specifications:

(a) Be reasonably free from dust, gum, gum-forming constituents, and other deleterious solid and/or liquid matter;

(b) Contain no free water;

(c) Be at a temperature not to exceed one hundred (100) degrees Fahrenheit."

45. Clause 7.1.2 provided further specifications. Under 7.2 the seller was responsible for testing the gas quality and reporting on this to the buyer.

46. Before going further, it is important to set out the chronology of circumstances relating to this force majeure claim.

15 November 2012:	NGC claimed force majeure circumstances.
30 January 2013:	Mittal rejected force majeure claim and claimed losses of USD 819,164.13 due to losses from the "wet gas: principally by it having to shut down its plant.
February 2013:	Invoice sent to Mittal by NGC for gas supplied.
11 March 2013:	Mittal informed NGC that having not heard from them they were deducting the sum of USD 819,164.13 from the invoice sent.
27 March 2013:	NGC maintained its position that the "wet gas" was a force majeure event and requested that Mittal substantiate its claim for the losses claimed.
17 July 2013:	Mittal submitted details of its claim. No immediate response was forthcoming from NGC.
July 2014:	An employee of NGC wrote to Mittal to enquire about the payment.
18 May 2016:	The proof of debt was submitted.

47. The gas contracts had provided that all disputes arising between the parties concerning the interpretation of the operation of the contracts which could not be settled by agreement were to be settled by arbitration. The place of arbitration was Trinidad and Tobago and there would be a single arbitrator whose award would be final and binding.

48. The liquidator rejected the claim on the basis that NGC had essentially acquiesced in the claim made by Mittal for set off. They had taken no step to have any dispute resolved according to the terms of the contract up to May 2016 – more than four years since the set off was applied and thus this could not be advanced as a debt owing to NGC.

49. Neither side had sent the matter to arbitration. However, Mittal had taken the step to set off its claimed losses against an invoice submitted. Mittal was not saying that it had not taken gas to justify the invoice sum. They were saying they were setting off their losses against what was due to NGC.

50. It seems to me that the onus had to be on NGC to either agree with Mittal a position or alternatively refer the matter to arbitration as provided for under the contract.

51. They had not done so for four (4) years.

52. As far as the liquidator was concerned therefore, there was no proven debt due to NGC at the time he was called upon to decide on their proof of debt.

53. It is to be noted that Mittal went into voluntary liquidation on 5 April, 2016. NGC therefore had had over four (4) years to refer the matter to arbitration, but it did not.

54. Respectfully, it is not this court's function at this time to decide whether a force majeure event occurred on 14 and 15 November, 2012.

55. The issue is whether there was relevant information before the liquidator regarding that matter. The power to vary or reverse the decision allows the court to examine all the evidence placed before it – but that evidence must be in relation to the decision of the liquidator.

56. Whether there was a force majeure event was a matter which had to be dealt with before an arbitrator.

57. Had an arbitrator decided the dispute in NGC's favour, the liquidator would have had to order the payment of the sum of money set out by Mittal.

58. In the event that I am wrong in concluding that there was no basis for the liquidator dealing with the force majeure claim, I will now consider whether the circumstances as outlined by the parties was a force majeure event.

59. I conclude it was not.

60. Several of the force majeure circumstances were detailed in the contract documents. While I accept as a proposition of law that the parties will not, except where specifically so provided, be limited to the circumstances listed by them, I do, however, note that the issue of the quality of gas was specifically provided for in the contract.

61. The parties contemplated that gas supplied could be "wet gas" but the gas supplied had to be of a sufficient quality, that is to say, the amount of liquid in the gas supplied was limited to a specified amount.

62. In this regard, NGC had undertaken the obligation whether by itself, through its BUD plants or through Phoenix Gas or in arrangements with its supplies or others to clean the gas so that it would meet an acceptable standard for the use of its customers such as Mittal.

63. Quality of the gas was a matter for which they could be liable.

64. NGC could not have control over a shortfall or non-availability of gas. However, once gas was available it was responsible for ensuring, by whatever means, that the gas met the standard required by its customers.

65. NGC suggested that the amount of liquid on the 14 -15 November period was of such a quantity that this was a most unusual event and therefore amounted to a force majeure circumstance. I disagree.

66. NGC has not shown why Phoenix went into bypass mode. The arrangement NGC had was for Phoenix to clean the gas of liquid content. They also had another mechanism through its BUD plant.

67. Furthermore, the purported notification that there was "wet gas" in the system to Mittal was not in my view, sufficient to alert Mittal that it needed to shut down its operation. (At 20:54 on 14/11/12). Based on the evidence presented here, I did not accept NGC's evidence that it had clearly and categorically communicated these circumstances to Mittal on when the events occurred on the 14/15 November period.

68. NGC had a responsibility to ensure that there was a clear and specific notification that the gas in the system was not of the required standard and that the operation should accordingly be shut down.

69. Based on the documents available to me, it appears to be the case that Mittal had already detected that the gas was unsuitable on 15 November and had begun the process to shut the operations down when specific notification came from NGC that the plant should be shut down.

70. I also note from the evidence that NGC had gas suppliers who were mandated to ensure a certain quality of gas free of liquids to a particular degree was supplied to NGC. Thus in any event, NGC would have a claim against them if gas was not of the correct quality. This too, goes against the proposition that the "wet gas" could be a force majeure event.

71. Force majeure clauses must necessarily be construed narrowly: **Hess Corporation v Eni Petroleum USA 86 A.3d 723**. I have also noted that NGC was unable to sufficiently clean the wet gas. Under the contract this was their obligation. As already noted, wet gas will from time to time be supplied by NGC's suppliers. NGC in their contract with Mittal had to ensure the gas met an acceptable standard. Thus NGC could not rely on its own failure, either through the inadequacy of its BUD plant or Phoenix Gas' default, to claim force majeure. If they were engaged in selling gas produced by others, their responsibility was to ensure that their facilities were adequate to clean the wet gas, howsoever it was supplied to them. If their facilities were inadequate they must take responsibility for any losses incurred by buyer.

72. Wet gas was not included in a detailed clause as to what constituted force majeure. Given the importance of the quality of the gas, had the parties intended this to be a force majeure event, it would have been reasonable and prudent business sense to specifically include it in the force majeure clause. It was NGC's obligation to ensure that it had adequate arrangements in place to deal with wetness above the permitted levels. This was an eventuality that could occur at any time.

73. Accordingly, I conclude that the liquidator was right to reject this claim and I affirm his decision.

The Second Debt: Take or Pay Obligation

74. Two gas contracts between the NGC and Mittal expired on 30 April, 2014 and 30 June, 2014.

75. After that a series of letters passed providing for continued supply of gas by NGC to Mittal for the period up to October 2015.

76. NGC says payment due under the Take or Pay Obligation amounted to USD 12, 635, 661.06 plus interest for 2015.

77. The liquidator found this did not arise as the Take or Pay Obligation was not extended along with the gas supply as provided for in the letters.

78. The issue, therefore, for me to have considered was whether the Take or Pay Obligation survived the expiration of the contract. I found this a matter that could be determined based on the documents provided and there was no need for cross-examination of witnesses. This determination really amounted to the construction of the correspondence and course of dealings between the parties.

79. NGC cited the case of **BSG, LLC –v- Chech Velocity Inc. 395 S.W. 3d 90** from the Supreme Court of Tennessee at page 94 as follows:

> "When parties continue to perform the same services after a contract for a definite period has expired it is presumed that they are operating under a new contract having the same terms and conditions of the original contract… By continuing to operate under the terms of the ECR Agreement, Check Velocity and Weight Watchers implicitly renewed the ECR Agreement with the same terms."

80. The case of **Mannlife Bank of Canada v Conlin [1996] 3SCR 415** was also cited. This case was about a mortgage agreement and whether it could be said that it was extended. It was suggested that the terms would continue.

81. NGC submits that the parties acted on the basis of the same terms and conditions pending re-negotiation. They point to the various letters passing between the parties.

82. NGC suggests that if the Take or Pay Obligation was not to continue it was necessary for Mittal to specifically raise this matter and expressly set it out, which they did not do. They cite the dicta of Buckley J. in **Spiro v Lintern and Others [1973] 3All ER 319 at page 326 (j-h):**

> "if A sees B acting in the mistaken belief that A is under some binding obligation to him and in a manner consistent only with the existence of such an obligation, which would be to B's disadvantage if A were thereafter to deny the obligation, A is under a duty to B to disclose the non-existence of the supposed obligation.

83. NGC says it reduced what was payable by Mittal under the Take or Pay Obligation due to force majeure events. It was for Mittal to have call for suspended gas deliveries if it found the supply was inadequate to maintain its operations.

84. The language used in the letters were "on the terms and conditions" of the gas contracts. The letters also stated "kindly confirm agreement with the extension…."

The Liquidator's Case on Take or Pay

85. The liquidator submits that on the expiry of the gas supply contracts only short term arrangements occurred. These short term arrangements were inconsistent with a Take or Pay Obligation.

86. Article 2 provided:

> "2.1 Subject to the other provisions of this contract, Seller agrees to deliver to Buyer at the Delivery Point established pursuant to section 4.1 hereof, and Buyer, provided that Gas is available and tendered for delivery by Seller, agrees to take and purchase the ACQ during each contract year of the term hereof.:
>
> 2.2. During the Supply Period, the DCQ shall be 37MMSCF and the ACQ shall be 12,500mm SCF.
>
> 2.3. To meet the exigencies of its operation, Buyer may vary its receipt of Gas hereunder and shall be entitled to receive on any day in any contract year, subject to the availability of Gas and the capacity of Seller's facilities, the maximum quantity of available Gas that the Seller is capable of delivering, but Seller shall have no obligation under this contract to supply quantities above DCQ."

87. These clauses incorporated the requirement for gas to be available. They also provided that Mittal could take more gas than the daily amount of 37MMSCF but that the seller did not have to provide more than this. But if they were able to, NGC could provide more if it was needed.

88. Clause 2.5 allowed for any deficiency gas paid for to be made up (make up gas) during the next succeeding five years. However, make up gas would only be provided after the buyer has taken its ACQ.

89. Thus the arrangement allowed for Mittal to not be left out of pocket for deficiency gas it did not receive once it could take the gas at a later stage.

90. Underlying this arrangement was an assumption that there would be a long term arrangement.

91. Indeed, as the correspondence showed, there was a proposal by Mittal during the negotiation process for the Take or Pay Obligation to move from 80% to 75%. However, NGC counter proposed that it should remain at 80%.

92. What this, therefore, suggested was that it was contemplated by Mittal that the Take or Pay arrangement would continue under the newly negotiated arrangements. At the time of the contract extension and negotiations it was contemplated that a long term arrangement would follow.

93. The liquidator submitted that the inclusion of the words "when available" in the letters sent by NGC to Mittal meant that in some way the arrangement had been changed and therefore the Take or Pay Obligation formed no part of the short term arrangements. I disagree with this assertion.

94. The words "when available" had been part of the contract arrangements before. NGC could not provide gas if it was not available and these words did no more than explicitly record that there may be circumstances, such as force majeure events, which could prevent it having the ability to supply gas at all.

95. NGC also had sent out a media release which was published in the newspapers. It noted the challenges being faced by NGC in supplying gas. Mittal had also expressed concerns at certain points in correspondence sent to Mittal. The liquidator sought to rely on this to show that NGC had been having difficulties in supplying gas. It was suggested that this made the Take or Pay Obligation no longer sustainable.

96. Unfortunately, however, for Mittal, it never communicated to NGC that the Take or Pay Obligation would not continue. That, in my view, would have been important to do.

97. The letters sent by NGC (some of which were countersigned by Mittal and some were not) had specified that the gas supply arrangements would continue as provided in the contract before. The terms and conditions were to continue. If certain terms were not to continue either party would have had to bring that expressly to the attention of the other party.

98. As noted by NGC also, there was a mechanism to deduct for gas not supplied to Mittal.

99. Considering it from a commercial sense perspective, therefore, it is reasonable to conclude that Mittal did contemplate that the Take or Pay arrangements would continue in effect. There is no evidence from which to conclude that Mittal contemplated NGC would not be supplying them with gas for some time to come. Indeed, NGC is the gas supplier to the Point Lisas plants. There is no evidence that an alternative supply other than through NGC was available. Thus, once Mittal's operations were to continue NGC would likely have been the supplier.

100. In any event, NGC could not unilaterally change the arrangement without this being expressly agreed to by Mittal. The use of the words "when available" in the correspondence cannot in the present context be seen as NGC changing the terms or the parties agreeing to any change in the terms of the arrangement.

101. The liquidator is his reasons pointed to the shortfall in gas ranging from 10% to 36% due to force majeure circumstances. However, the contract had provided a mechanism for this issue in that gas not provided due to force majeure events had to be deducted.

102. It was submitted by Mittal that NGC had not demonstrated by evidence that it had the ability to supply the gas to meet 80% of the Annual Contract Quantity (ACQ) for 2015. Accordingly it was submitted that NGC could not call on Mittal to comply with the Take or Pay Obligation. The evidence did however show that Mittal did not take the ACQ for 2015. Thus deficiency gas was owed. Additionally, by letter of 17 March 2016 NGC accepted it had failed to deliver 2,540,191.888 NTBTU of gas and subtracted this from Mittal's Take or Pay Obligation. It is unfortunate that

Mittal went into liquidation after. However, at the time there was a mechanism within the contract terms for dealing with this matter. Thus the obligation to pay remained.

103. Another matter raised by the liquidator was that there was inequity in the supply of gas to Mittal as compared to other companies in the Point Lisas area. Based on what is before me, however, this was not proven. At its highest, it was an allegation being made by Mittal which has been hotly disputed by NGC. In my view, therefore, the liquidator could not rely on this as a proven fact to justify his rejection of the Take or Pay proof of debt.

104. In my view, therefore, the rejection of the Take or Pay claim by the liquidator cannot stand. I would respectfully, reverse the liquidator's finding on this aspect of the claim.

105. The order therefore is that the liquidator's decision on the first debt is affirmed. The liquidator's decision on the second debt is reversed.

106. There were no specific submissions on the interest that should be payable. I would leave this to the parties to work out. In the event, they are unable to agree, they may return to the court on liberty to apply for the court to make a determination of this issue.

107. NGC has succeeded on one aspect. Mittal has succeeded on one aspect. Both of these claims have a monetary value. Costs should follow the event. Ordinarily prescribed costs would follow. If the parties are unable to agree on the costs payable by either party to the other, they are at liberty to provide written submissions on the costs order by 31 January 2019.

108. There is a stay on the judgment of 28 days.

Ronnie Boodoosingh
Judge