REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CA S024 of 2016
CV 2018-00148

BETWEEN

A & V OIL & GAS LIMITED

Applicant/Claimant/Appellant

AND

PETROLEUM COMPANY OF TRINIDAD AND TOBAGO LIMITED

Defendant/Respondent

Before the Honourable Justice Prakash Moosai J.A.
Civil Chamber Court

Appearances

Appellant:	**Mr. Ramesh Lawrence Maharaj SC.**
	Mr. R. Bissessar
	Ms. V. Maharaj
	Mr. V. Gopaul-Gosine
Respondent:	**Mrs. Deborah Peake SC.**
	Mr. R. Heffes Doon
	Ms. M. Ferdinand

Dated of Delivery: 26 January, 2018

REASONS

Introduction

1. By virtue of a contract, namely the Incremental Production Service Contract (IPSC) made on 18 November 2009 between A&V Oil and Gas Ltd (A&V) and Petrotrin, the parties mutually agreed that in consideration of Petrotrin paying the service fee and A&V undertaking to observe the terms and conditions contained therein, Petrotrin engaged A&V with effect from 18 November 2009 to perform the work for the production, transportation and delivery of petroleum from the well-head in relation to each of the wells in the Catshill Block to Petrotrin's delivery point. The contract term was for a period of 10 years. By Fixed Date Claim Form filed 15 January, 2018, the Claimant/Appellant, A&V, commenced proceedings against the Defendant/Respondent, Petrotrin, for:

    A. Enforcement of the terms of an oil services and supply contracted between A&V and Petrotrin dated 18 November, 2009, namely the IPSC, and for interlocutory relief to preserve A&V's rights pending arbitration under Article 36 of the IPSC, pursuant to the terms of the parties' agreement governing recourse to the Court for interim relief and pursuant to the Court's powers under the Second Schedule to the Arbitration Act, Chapter 5:01.

    B. Further, A &V claimed that Petrotrin has wrongly and in breach of the IPSC:

        (i) Purported to terminate the IPSC without proper grounds;
        (ii) withheld payment for oil in the sum of $83,929,671.34; and
        (iii) terminated the IPSC without first submitting to the Dispute Resolution Procedures contained therein.

    C. A&V also claimed, *inter alia*, the following against Petrotrin by way of interim and final relief:

        (i) An order staying or suspending the operation of the notice of termination dated 19 December, 2017 (the termination notice) by which Petrotrin purported to terminate the IPSC, pending the determination of the disputes between the parties by arbitration pursuant to Article 36 of the IPSC.
        (ii) An injunction restraining Petrotrin its servants and/or agents and howsoever otherwise from giving effect to the termination notice served on A&V purporting to terminate the IPSC effective midnight on 18 January, 2018.

(iii) Orders restraining Petrotrin pending the determination of the disputes between the parties by arbitration pursuant to Article 36 of the IPSC from:

(a) Taking any steps to prevent A&V its servants or agents from carrying out the Work under the IPSC;

(b) Taking any steps to eject A&V its servants or agents from the Catshill Field where it carries out the Work under the IPSC or preventing A&V, its servants or agents from gaining access to the Catshill Field; or

(c) Otherwise acting pursuant to the purported termination notice.

(iv) An order that Petrotrin permit A&V to continue to deliver crude oil to Petrotrin in accordance with the procedure provided for by the IPSC, pending the determination of the disputes between the parties by arbitration pursuant to Article 36 of the IPSC.

(v) An order that the sum of $83,929,671.34 (or US$12,360,776.34) which Petrotrin has withheld from A&V (referable to A&V's unpaid invoices for crude oil supplied to Petrotrin during the period 1 July 2017 to 31 December 2017) be paid by Petrotrin into an escrow account pending the determination of the disputes between the parties by artbitration pursuant to Article 36 of the IPSC.

(vi) If necessary, an interim order to preserve the status quo of the parties and staying the termination notice pending the hearing and determination of the *inter partes* application for interim relief.

(vii) An order that sums payable to A&V referable to invoices for crude supplied to Petrotrin from 1 January 2018 be paid by Petrotrin directly to A&V.

(viii) An order that Petrotrin do forthwith provide to A&V un-redacted copies of:

(a) the reports by Kroll Consulting Canada CO and Gaffney Cline and Associates, referred to in Petrotrin's letter to A&V dated 1 December 20017; and

(b) any other reports, measurements, calculation and any other documents relied upon by Petrotrin as grounds for terminating the IPSC.

(ix) Such further orders as the Court may consider just in the circumstances for the preservation of A&V's rights and interests, pursuant to the powers of the Court under the Second Schedule to the Arbitration Act.

2. By its Notice of Application filed on 15 January 2018 with notice to Petrotrin, A&V sought interim relief, similar to that claimed in its Fixed Date Claim Form.
3. In support of this application, A&V relied on the affidavits of Hanif Baksh, Nikita Kumarsingh, Nazir Ali, and the joint affidavit of Isaac Soogrim, Sanathan Maharaj and Mervyn Meyers, all sworn on 15 January 2018; and the affidavits of James Krissa and Brian Lorne Smart, both sworn on 12 January 2018.
4. Both the Fixed Date Claim Form and the Notice of Application were served on Petrotrin on 15 January 2018. This application for interim relief was heard promptly on 16 January 2018 between 1.30 pm and 8.15 pm. Remarkably and commendably Madam Justice Quinlan-Williams gave an oral decision at 9.15 pm which she reduced to writing on 17 January 2018.

Interim Relief

5. The principal issue that arises for determination in this appeal is whether the trial judge was plainly wrong in holding that there was no serious issue to be tried when considering A&V's claim for interim relief. By its very nature, the grant of interim relief of the type sought here involves the exercise of a discretion. Accordingly, as de la Bastide CJ recognised in ***Jetpack Services Ltd v BWIA International Airways Ltd.*** (1998) 55 WIR 362 at 368:

> "*I accept the submissions made on behalf of the respondent with regard to the limitation on the power of the Court of Appeal to interfere with the exercise of the discretion of the High Court judge who has decided either to grant or to refuse an interlocutory injunction. The Court of Appeal is not free to approach the matter as though it were hearing it de novo and was being called upon to exercise an independent discretion of its own. We have not had the benefit of any further evidence, nor has there been any change of circumstances since the order of Stollmeyer J. Accordingly, I accept that we can only set aside the exercise of the judge's discretion if he has misunderstood or misapplied either the law or the evidence.*"

6. In my view, the judge was correct in applying the principles laid down in ***American Cyanamid Co. v Ethicon Ltd*** [1975] AC 396, in deciding whether to grant injunctive relief,[1] namely:

   (i) Whether the court is satisfied that the claim is not frivolous or vexations, in other words, whether there is a serious issue to be tried.

   (ii) If the answer to that question is yes, would damages provide an adequate remedy, or more appropriately, is it just in all the circumstances that a claimant should be confined to his remedy in damages: ***Jetpack p 369***.

[1] See paragraph 12 of the trial judge's Decision.

(iii) If there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, the court must consider the wide range of matters which go to make up the general balance of convenience.

(iv) Where other factors appear to be evenly balanced it is a counsel of prudence to take such matters as are calculated to preserve the status quo.

Where a claimant has not satisfied the threshold requirement of showing a serious question to be tried, he/she should fail, irrespective of the balance of convenience.

Construction and Interpretation of the IPSC

7. In arriving at her decision, the judge was called upon to construe the contract, including the termination clause contained in Article 29 of the IPSC and the dispute resolution clause contained in Article 36. Article 29 provides:

> "*In addition to the right to terminate this Agreement contained in Articles 27, 41 and 46 the Client may terminate this Agreement by thirty (30) days' Notice to the Contractor if the Client has reasonable grounds for suspecting that any member of the Contractor's group has misconducted itself or otherwise has been involved in wrongful or fraudulent activity and the Client shall be entitled to exercise its right to continue the Work in similar terms and conditions as contained in Article 27.4. Termination of this Agreement shall become effective upon expiry of the said thirty (30) days from date of receipt of the Notice by the Contractor.*"

Articles 36.2 and 36.11 provide:

> "*36.2 The parties will attempt in good faith to resolve any dispute or difference arising out of or relating to this Agreement promptly through amicable negotiations to settle same.*
>
> *…*
>
> *36.11 In the event of an ongoing breach or imminent breach and without prejudice to the powers of the arbitrators to order any provisional measures or finally resolve the dispute, either the Client…or the Contractor…may apply to the Courts of Trinidad and Tobago to seek an order for injunctive relief or other equitable relief of any interim nature or any provisional or conservatory measure, at any time prior to the arbitration proceedings, for preservation of such person's rights and interests*."

8. Mr Maharaj SC submits that the conditions precedent for the exercise of the power to terminate in Article 29.1 of the IPSC had not been satisfied as Petrotrin did not have reasonable grounds for suspecting that A&V had misconducted itself or had otherwise been involved in wrongful or fraudulent activity. He further submits as an independent ground of appeal that Petrotrin was not entitled to terminate the IPSC pursuant to Article 29.1 without first having recourse to the comprehensive dispute resolution provisions set out in Article 36, which were triggered upon A&V's giving of formal notice of dispute in their letter of 8 December 2017.

9. As it relates to the interpretation of commercial contracts, Clarke LJ in ***Rainy Sky SA & Ors v Kookmin Bank*** [2012] 1 All ER 1137 espouses the point quite succinctly.

> "*[21] The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.*"

This dicta of Lord Clarke was cited with approval in the recent Supreme Court decision of ***Wood v Capita Insurance Services Ltd.*** [2017] UKSC 24.

10. In interpreting this negotiated commercial agreement in accordance with sound commercial principles and sound business sense, I agree with the construction placed on Article 29.1 as proposed by the respondent, giving Petrotrin a free-standing right (in addition to the right to terminate this Agreement contained in Articles 27, 41 and 46) to terminate the IPSC by 30 days' notice. It is worth emphasizing that the parties have deliberately sought to confer the exclusive right to terminate not on both parties, but on Petrotrin alone.

11. Further, Article 29 prescribes the circumstances in which the contract may be terminated by Petrotrin, namely if Petrotrin has reasonable grounds for suspecting that any member of the Contractor's group has misconducted itself or otherwise has been involved in wrongful or fraudulent activity.

12. In my view, on a proper construction of the contract, it cannot be sensibly argued that Petrotrin is restrained from terminating pursuant to Article 29.1, without first having recourse to the dispute resolution procedure set out in Article 36. Where the impugned conduct is egregious enough to warrant termination under Article 29, it would be contrary to business common sense for Petrotrin to not be able to terminate in reliance on this express contractual right of termination. Any other construction or interpretation is not supported by the wording of the contract, nor is any such intention reflected. The assertion that Petrotrin would contract to effectively 'freeze' the commercially significant contractual right to terminate under Article 29 pending dispute resolution proceedings is, in my view, unsustainable in the absence of precise and unequivocal wording to that effect. Put simply, there is no legal right under the Agreement to stop implementation of the

termination notice pursuant to Article 29 because the dispute resolution process has been triggered, and it is not the function of the court to rewrite their bargain to that effect.

13. And in any event, a termination under Article 29 does not preclude A&V from challenging its merits under Article 36 and even seeking equitable relief to avoid injustice, which it has done via the second limb of this application.

Reasonable Grounds for Suspicion.

14. The second issue that arises for consideration is as to the lawfulness of the termination. To successfully obtain interim relief, A&V has to raise as a serious issue to be tried that Petrotrin did not have reasonable grounds for suspecting that A&V had misconducted itself or otherwise had been involved in wrongful or fraudulent activity. For the purposes of Article 29, the decision to terminate must be premised upon Petrotrin having reasonable grounds to suspect the type of misconduct referred to therein. Mrs Peake, in relying on several authorities from different jurisdictions, has correctly, in my view, submitted that all that was required to satisfy the requirements of this Article are facts and circumstances which would create in the mind of a reasonable person, in the position of Petrotrin, an actual apprehension or fear that A&V had misconducted itself or been involved in wrongful or fraudulent activity: see ***Queensland Beacon Proprietary Ltd v Rees*** (1965) 115 CLR 266 at 303 to 304 per Kitto J [HCA]. The test to be applied is objective. Information required to form a reasonable suspicion is lower than that required to establish a *prima facie* case. *Prima facie* proof must be based on admissible evidence, whereas reasonable suspicion may take into account matters which are not admissible in evidence or matters which, while admissible, could not form a *prima facie* case: ***Hussien Chong Fook Kam*** [1970] AC 942 [PC].

15. The exchange of correspondence between the parties throughout the period 14 August 2017 until the eventual termination of the contract on 19 December 2017 reveals that A&V could have been under no illusions as to the fundamentals of Petrotrin's complaint which appeared to be based on impropriety. On 14 August 2017 Petrotrin informed A&V of the discovery of certain inappropriate practices in the process of delivery of crude oil between January 2017 and June 2017 and was completing its investigation in relation thereto. In the meantime Petrotrin advised that it would withhold payments until such time as the volumes delivered from the Catshill Block had been verified and any necessary adjustments made to the sums, if any, due to A&V.

16. It is to be noted that in all the material correspondence emanating from Petrotrin from 14 August 2017 onwards, Petrotrin concluded same by what on the face of it appears to be a clear reservation of rights clause in the following or similar terms:

> "*For the avoidance of doubt, Petrotrin has made no election to affirm or terminate the IPSC. We reserve any and all rights and remedies we may have at law, in equity, under the IPSC, under statute or otherwise available and nothing contained in this letter shall prejudice or constitute a waiver of such rights and remedies, whether or not specifically asserted herein.*"

17. A&V responded on 15 August 2017 indicating, inter alia: (i) its willingness to co-operate fully in respect of any investigation; and (ii) its significant increase in production being attributable to the drilling of forty wells.

18. By letter of 25 August 2017, Petrotrin advised A&V that it was currently evaluating the situation and seeking independent confirmation of the findings of its Internal Audit Department with respect to several discrepancies and inappropriate practices specific to the delivery of crude oil between January to July 2017. Thereafter A&V would be informed of its findings and given an opportunity to respond.

19. On or about 11 September 2017, Hanif Baksh, the sole shareholder and the CEO of A&V, received a copy of the Internal Audit Report (IAR) from social media.[2] The IAR was dated 17 August 2017. It highlighted the need for an investigation into persistent shortages between the crude oil purchased by one division of Petrotrin (E&P Department), where the custody transfer takes place, and the oil pumped to the Point-a-Pierre Refinery (R&M). These shortages had been occurring since August 2016 and surpassed the acceptable limits. It set out in significant detail the methodology employed to arrive at its findings, which was supported by data, graphs, tables and appendices.

20. Paragraph 5.0 of the IAR contains a summary of findings and conclusions. There was a significant cumulative shortfall between August 2016 to June 2017 of over 400,000 barrels. At page 21 the following conclusion is recorded:

> "*Based on the number of control issues identified during our visit to the Catshill Field and our analysis of Sales Tickets and GPS records, Internal Audit has concluded that the custody transfer process at Catshill has been compromised. This has resulted in the fraudulent overstatement of production and leakage of… cash from the company. In Internal Audit's opinion, this purchase of non-existent crude oil from Catshill is the main contributing factor to R&M Custody transfer* receiving significantly less oil than the volumes fiscalised by E&P."

21. The IAR then lists the following issues which led to a conclusion of fraudulent activity at Catshill:

[2] Affidavit of Hanif Baksh filed 15 January 2018 at para 28.

"*(1). Catshill's monthly production during the period 2017 January to June increased from 60,034 barrels to 149,741 barrels, an increase of almost 150% in just six months. The Joint Venture Department failed to conduct independent well testing to verify that this huge increase was valid. Instead, the unverified well test information provided by the Operator was accepted by Petrotrin.*

(2). The Senior Manager – Joint Ventures in an e-mail dated June 2007 July 14… indicated that his department only started conducting bulk tests in Catshill in 2017 April which suggests that prior to this date these tests were not done. However, during Internal Audit's site visit to Catshill, the JV Production supervisors seem comfortable in allowing the Operator's personnel to perform the bulk tank dips unaccompanied and was satisfied to simply accept the Operator's figures. Internal Audit also confirmed that some of the bulk tanks have not been calibrated and the JV Production Supervisors responsible for witnessing the bulk tank testing were unable to calculate the volume of oil in one of the tanks when requested to do so by Internal Audit.

(3). Catshill production increased significantly from 2017 January to June which coincided with Vidya Deokiesingh's stint as the Crude Procurement Specialist responsible for fiscalisation of crude from the Catshill field. Internal Audit identified many anomalies in the Sales Tickets signed off by Mr. Deokiesingh. For example, there were many instances where the volumes of crude specified in the sales ticket could not be pumped in the stipulated time frame given the available pump flow rate.

(4). Internal Audit also identified instances when Mr. Deokiesingh was not present at the Catshill location when the fiscalisation was being done (at the times stated on the Sales Ticket) which meant that he signed the Sales Tickets after the fact and accepted the figures specified by the Operator.

(5). There were also cases where Mr. Deokiesingh was present for a very short period of time when high gauges were being taken and therefore could not have been present for the entire fiscalisation process which, if done properly, can take at least 30 minutes. This not only presented the Operator with opportunities to manipulate quantities but also facilitate the tampering of the crude sample used by the Santa Flora lab to determine the crude oil's quality.

(6) The Pressure Chart recorder attached to the Sales Pump was not functioning and Mr. Deokiesingh failed to inform either the JV Department or the Head Custody Transfer E&P. The Pressure Chart recorder was installed at the request of the JV Department to independently confirm whether any fluid was being pumped to the Barrackpore Tank Farm.

(7) ***Internal Audit's visit to the Catshill Field on 2017 July 11 and the removal of Mr. Deokiesingh as the Crude Procurement Specialist for Catshill seemed to have a debilitating and paralyzing effect on the Operator's production.***

On the day of Internal Audit's site visit, Catshill's high producing wells suddenly "waxed up" or "sanded up" while the other wells simply stopped producing.

Since 2017 July 11, there has been increased oversight by both JV and Custody Transfer departments. Subsequently, the reported and fiscalised production at Catshill decreased significantly……

The production reported for the twelve-day period (2017 July 13 – 24) by the Operator was 32,594 barrels (2746 bbls/day) while Petrotrin reported fiscalised sales of 17,590 barrels

(1465.83 bbls/day for the same period. ***The fiscalised production was just about 50% of the Operator's reported production which suggests that even now the Operator is overstating its production. Internal Audit believes that the fiscalised production that we are seeing now is an indication of Catshill's true production.***

(8). For the six-month period 2017 January to June, the Operator's reported total production was 574,890 barrels of crude oil compared to fiscalised crude oil volume (as per Custody Transfer Tickets) of 578,740 barrels. The fiscalised production for 2017 June was 149,741 barrels (daily average of 4991 bbls). Accordingly, ***the fiscalised production during that period was actually greater than the Operator's reported production which again signifies that the Sales Ticket information was being manipulated to agree with the Operator's inflated reported production figures.***

The impact of this fraud is far-reaching as outlined below:

(1). Petrotrin has been paying the Operator for oil it has not produced. Based on past and current production data, an optimistic estimate of the production from the Catshill field is somewhere between 1400 and 1600 barrels a day. Fiscalised sales as per Sales Tickets have averaged 5000 barrels a day in the month of 2017 June alone and we estimate that production for this month would have been overstated by about 90,000 barrels which at a conservative USD $33 a barrel payment to the Operator works out to an overpayment of USD 2.97 million. Internal Audit estimates that for the period 2017 January to June, Catshill overstated its production by at least 350,000 barrels and Petrotrin would have overpaid USD 11.5 million.

……"

22. In coming to its conclusion at paragraph (7) above with respect to numerous wells not producing, the IAR detailed the following at paragraph 4.2.1:

> "*On 2017 July 11, as per the Operator's daily production report there were 13 wells that were not producing. This included six of the 10 reported "high producing" wells (CO 161 to 166) that came on stream from 2017 April to June. In addition, wells that were producing high volumes in previous weeks suddenly stopped producing when the auditors turned up at the Catshill field.*
>
> *Subsequent to Mr. Deokiesingh's removal as the Custody Transfer representative for the Catshill field on 2017 July 11, the Operator's reported production and fiscalised volumes decreased significantly. The Operator's reported production on the day of Internal Audit's visit was 3,228 barrels compared to the all-time high daily production figure of 7,266 barrels reported by the Operator just 3 weeks prior on 2017 June 23.*
>
> *For the period 2017 July 13-24 the Operator reported a total production of 32,594 barrels (average of 2746 bbls/day) while Petrotrin reported fiscalised sales of 17,590 barrels (average of 1,465 bbls/day). This is evidence that the Operator has been overstating its production during this period*."

Pausing there, it is clear that there were serious allegations of wrongdoing or fraud.

23. The IAR at paragraph 4.6 documents what transpired on visits made shortly after on July 20 and 21, 2017:

> "*... JV personnel went out to the Catshill field to conduct well tests. However, they were unable to obtain samples from 54 of the 69 Catshill wells which is an indication that the vast majority of Catshill's wells were not producing on those days. Internal Audit therefore questions the accuracy of the Operator's daily reports from previous months which routinely showed that the vast majority of wells were producing daily."*

24. Even prior to that, for the period January to June 2017, the IAR recognises that there were a number of anomalies (paragraph 21 (3) above; and paragraph 4.5 of the IAR).

25. It is not necessary for me to consider the IAR in any greater detail. Suffice it to say that I have factored in the entire report as well as the other documentary evidence in this matter in determining the issues in this application. But it is pellucidly clear that this is not a perfunctory report. Far from it.

26. The exchange of correspondence between 14 September, 2017 and 1 December, 2017 makes clear that Petrotrin did not regard the IAR as a preliminary report; nor did A&V admit any wrongdoing.

27. On 1 December 2017 Petrotrin advised A&V that, after a review by two independent consultants (Kroll and Cline), it had formed the view that there were reasonable grounds for suspecting that A&V had misconducted itself or had otherwise been involved in wrongful or fraudulent activity and had participated in inappropriate practices in the process of the delivery of crude oil to Petrotrin over the period April 2016 to July 2017. Petrotrin went on to stipulate reasons, thirteen in all, for their conclusion. Petrotrin further invited A&V to provide Petrotrin with its comments, if any, on the above within seven days of the receipt of its letter. These thirteen reasons effectively comport with those of the IAR and may be succinctly summarised as follows: shortages of crude oil did not originate from the Western Tank Farm or the Western District; the only significant discrepancy between the estimated volumes of oil which were provided to the Barrackpore Tank Farm related to the Catshill Field; the extraordinary increase in production reported by A&V to 4,991 bopd between 2016 and 2017; the wells in the Catshill Field were incapable of producing the volume of oil that A&V represented that it produced and sold to Petrotrin; an almost 150% increase in fiscalised monthly production in six months between January 2017 to June 2017; steep production declines in all wells at the same time after Internal Audit visited the Catshill Field on 11 July 2007 could not be attributed to normal phenomena; on 20 and 21 July 2017 Petrotrin personnel were unable, after conducting well tests, to obtain samples from fifty-four of the sixty-nine wells, which is an indication that many wells had ceased production; the many instances where the volume of crude oil specified in the Custody Transfer Tickets could not be pumped in the time periods given the available pump

flow rate; several instances of multiple Custody Transfer Tickets with duplicate net sales volumes; a number of instances of irregular and/or suspicious activities of Mr Deokiesingh, E&P Crude Procurement Specialist between January to July 2017; the verification by Petrotrin that the cause of the shortages could not be attributed to it; as a consequence, A&V overstated the volume of oil it produced and sold to Petrotrin and the Custody Transfer Tickets between April 2016 and July 2017 could not be relied upon; and A&V has been overpaid the sum of $60,579,215.70 in respect of the period April 2016 to May 2017.

28. In response by letter dated 8 December 2017 A&V, *inter alia*, denied Petrotrin's allegations that:

    i. it had overstated the volume of crude oil delivered to Petrotrin between April 2016 to July 2017;
    ii. Petrotrin had overpaid A&V as a result thereof.

It also denied that Petrotrin had reasonable grounds to conclude that A&V had participated in fraudulent, wrongful or inappropriate practices. Further, A&V contended that Petrotrin had now requested that A&V respond to broad allegations without providing proper particulars or the evidence and data to support those allegations. A&V also considered that the Kroll and Cline reports were not privileged and confidential, moreso as Petrotrin had expressly relied on both as confirmation of the grounds for the continued retention of monies owing to it. A&V also set out specific responses to the thirteen reasons advanced by Petrotrin.. In summary:

1. A&V rejected the allegations or imputation of misconduct or breach of the IPSC or that it is or was involved in wrongful or fraudulent activity or that it participated in inappropriate practices in the process of discovery of crude oil over the period 1 April 2016 to 31 July 2017 or any period.

2. A&V did not accept or agree that it overstated its crude oil production or that it received overpayment.

3. A&V rejected Petrotrin's interpretation of Article 14.5 and maintained that Petrotrin had and was acting in breach of contract by retaining monies due and owing to A&V during the period 1 June 2017 and continuing (which it contended as at October 2017 was approximately seventy million dollars).

4. A&V reserved the right in due course to set out a full response to these allegations upon receipt of the various reports, documents, figures and calculations which have not yet been supplied to A&V.

5. A&V contended that a dispute had now arisen under Article 36 of the IPSC and invited Petrotrin to: (i) negotiate in good faith; and (ii) take steps to agree the identity of an independent third-party mediator, three of whom had been identified in its previous letter dated 1 December 2017.

29. The following observations are appropriate with respect to A&V's response to these thirteen reasons relied on by Petrotrin. As it relates to reasons 1 and 2 (origin of shortage; discrepancy in volumes of oil related to Catshill Field), A&V stated that it could not accept or comment on those because Petrotrin has not provided the measurements and figures in support of these assertions. I note however, the IAR (in particular pages 6 through 12) sets out the methodology used in coming to these conclusions and should have enabled A&V to provide a satisfactory response.

Reasons Nos. 3,4,5,6 and 7

30. A&V acknowledged as true production being far greater than the volumes being produced by the old wells in the mature part of the Catshill Field at the end of 2015. However, A&V attributed this, not to any suspicious circumstances or fraudulent overstatement, but, *inter alia*:

    i. To the increase in their drilling performance, including the drilling of 23 new wells in the Western part, which was as yet an unproven and exploratory area and which had not been optimized by Petrotrin;

    ii. Its embarking on a heavy and expensive programme of drilling and well servicing;

    iii. It not being unusual for new wells to come in with an initial flush production of unsustainably high flows. If a batch of new wells come in around the same time a noticeable production spike can result. Further, if production techniques overestimate or overburden the capacity of a reservoir, the flow can be exhausted in a short time;

    iv. The fact that wells had ceased producing is no ground for inferring that prior volumes were overstated nor is it unusual for a number of wells to go down at the same time in a remote field.

    It is noteworthy that A&V did not deny Petrotrin's assertion that, on the day that Internal Audit visited (11 July 2017), production had steeply declined to 3,228 barrels from 7,266 barrels reported by A&V just three weeks earlier: ROA Volume 1 page 285.

31. In response, Petrotrin on 19 December stated:

"*What is inescapable is that the wells in the Catshill Field (the details of which are well documented and known to Petrotrin) are incapable of producing the volume of oil that A&V represented that it produced and sold to Petrotrin. As to the allegation at page 4, paragraph 3.2 of the 8 December 2017 letter that the western part of the Catshill Field was "an unproven and exploratory area", A&V is well aware that the Field is a mature one and that the wells drilled by A&V were designed to exploit 'sand' reservoirs penetrated by older producing wells. The fact that the production volumes from the Field have not returned to anything close to levels reported prior to the site visit conducted by our Audit Department in July 2017 supports this.*"

Reason No. 8[3]

32. With respect to Petrotrin's contention that the volume of crude specified in the Custody Transfer Tickets could not be pumped in the time periods given the available pump rate, "A&V rejects this ungrounded assertion. Petrotrin has not provided any particulars, still less the measurements or the reasoning to support it."

33. Surprisingly, A&V purported to treat with such a critical issue, which ought to have been within its knowledge, in a thoroughly unsatisfactory manner. The IAR from paragraphs 4.2.4 to 4.3 addresses in great detail the pump flow rate and pump capacity. The particulars provided by Petrotrin were such as to require a comprehensive response or at least one which suggested that there was at least a serious issue to be tried.

Reason No. 10[4]

34. Insofar as Petrotrin contends that there were a number of instances of irregular and/or suspicious activities on the part of Mr Deokiesingh during January 2017 to July 2017, A&V denies that his visits to or contact with A&V's head office would amount to suspicious conduct on his part, or that there could be no operational reason for such contact. Yet A&V does not condescend to particulars, notwithstanding that Petrotrin's GPS data reveals nine instances where Mr Deokiesingh was parked at A&V's office, including two occasions of some five hours and two hours duration; and the IAR stated (at p 19) that Mr Deokiesingh had no reason to visit the Contractor's office.

[3] ROA Volume 1 p 294.
[4] ROA Volume 1 p 295.

Reason No. 11[5]

35. With respect to Petrotrin's contention as to the number of steps it took to verify whether the case of the shortages could be attributed to it, A&V countered that this assertion was at odds with A&V's own experience and highlighted examples. Again I note that Petrotrin, in its letter of termination (19 December 2017) stated that alleged leakages could not be the cause of the discrepancies of the magnitude we are concerned with here. Such a leakage or leakages would have produced a large-scale environmental disaster.

36. By its letter of termination dated 19 December 2017, Petrotrin stated, *inter alia*:

    i. By its letter of 1 December 2017 it detailed Petrotin's reasonable grounds;

    ii. It invited A&V to provide its comments on the matters set out as Petrotrin considered what steps shall be taken under the IPSC;

    iii. It referred to A&V's letter of 8 December 2017, which set out in detail A&V's response to the letter of 1 December 2017;

    iv. It had given careful consideration to A&V's full responses;

    v. A&V has had access to the IAR since 14 September 2017 and has had full opportunity to refute the findings. In the meantime, Petrotrin had taken steps to verify the findings of the IAR by retaining two independent consultants who had verified the findings therein;

    vi. A&V had at all material times full particulars of the reasonable grounds for suspecting the impugned conduct and had ample opportunity to respond to same.

Petrotrin came to the conclusion:

> "*…that, for the reasons set out in our letter dated 1 December 2017, and after considering A&V's responses contained in the 8 December letter that there are reasonable grounds for suspecting that A&V has misconducted itself or otherwise has been involved in wrongful or fraudulent activity in the overstatement of the value of oil produced and sold to Petrotrin for the period April 2016 to July 2017 and that the Custody Transfer Tickets for the Catshill Field for this period cannot be relied upon.*"

[5] ROA Volume 1 p 296.

Analysis

37. In my view, A&V has not satisfied me, on this second issue, that the judge was plainly wrong in holding that it had not passed the threshold test of demonstrating that there was a serious issue to be tried. In other words, A&V has not demonstrated that there was at least an arguable case that Petrotrin did not have reasonable grounds for suspecting that it had misconducted itself or otherwise had been involved in wrongful or fraudulent activity. And the relevant date for determining whether Petrotrin had such reasonable grounds for suspicion would be at the time it purported to terminate the contract, namely 19 December 2017. Reasonableness is to be evaluated without reference to hindsight: ***Redman-Bate v DPP*** [1999] 7 BHRC 375 at paragraph 5 per Sedley LJ. It would appear therefore that the production of the Krissa and Smart reports after the date of termination on 19 December 2017 cannot be utilised to invalidate the decision. The court notes however that A&V was able to commission these reports putting in issue the conclusions of the IAR, despite having previously stated via correspondence that the IAR was bereft of particulars to which they could be expected to reasonably respond. The production of these reports, addressing the very issues raised in the IAR, invites questions as to why they were not timeously commissioned and placed before Petrotrin in answer to its concerns.

38. In the instant case, A&V was put on notice from as early as 14 August 2017 as to the discovery of certain inappropriate practices in the process of the delivering of crude oil. The IAR came into its possession on or about 11 September 2017.[6] Thus, from August 2017 until the eventual termination of the contract on 19 December 2017, Petrotrin acted reasonably by providing A&V with full particulars of their reasonable grounds for suspicion, giving A&V the fullest opportunity to dispel Petrotrin's suspicions, and seeking independent confirmation of the findings of the IAR. Of the thirteen reasons provided to A&V to justify termination, some went unanswered or unsatisfactorily answered. They include: (i) pump flow rate and capacity; (ii) the steep decline in production rates for nearly all wells; (iii) cessation of production from fifty-four of sixty-nine wells and their inability to recover notwithstanding the advanced drilling techniques and sums of monies invested by A&V; and (iv) Mr Deokiesingh's conduct and his interactions with A&V. Petrotrin would, as indicated earlier, have had to justify termination by the satisfaction of the following test: were the facts and circumstances such as to create in the mind of a reasonable person, in the position of Petrotrin, an actual apprehension or fear that A&V had misconducted itself or been involved in wrongful or fraudulent activity.

[6] Fn 2.

39. Having regard to the proper inferences to be drawn from all the circumstances, I am of the view that A&V has not satisfied the threshold requirement of showing that it has an arguable case that Petrotrin did not have reasonable grounds for suspecting that A&V had misconducted itself or otherwise had been involved in wrongful or fraudulent activity.

Waiver

40. On the question of waiver, I am satisfied that there is no serious question to be tried in respect of waiver or affirmation or election. The clear, unequivocal reservation of rights deployed by Petrotrin in the material correspondence would defeat any suggestion of waiver by A&V.

Orders

41. It is hereby ordered as follows:

    I. The application for a stay of the operation of the notice of termination issued by Petrotrin to A&V on 19 December 2017 is dismissed. The effect of the operation of this order is stayed however for a period of Fourteen Days from the date of my oral decision on 25 January, 2018.

    II. Costs of the application to be paid by the Applicant to the Respondent certified fit for one Senior Counsel and one Juniour Counsel.

On 25 January 2018, the date of the delivery of my oral decision, the parties by consent agreed:

    I. That the monies withheld by Petrotrin from A&V for the period 1 July 2017 to 31 December 2017 be placed into an escrow account in the name of Petrotrin pending the hearing and determination of dispute resolution proceedings.

    II. With respect to the relief sought by A&V that Petrotrin pay directly to it all monies owing on invoices from 1 January 2018 onward, to work out an amicable arrangement between themselves.

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PRAKASH MOOSAI
JUSTICE OF APPEAL