JUDGMENT : The Hon. Mr Justice Langley: Commercial Court. 31st July 2007

INTRODUCTION

The Claimants

1. The first claimant ("Loon") is a Canadian company involved in the international exploration and development of oil and gas resources. The second claimant ("Loon Brunei") is a wholly-owned subsidiary of Loon incorporated under the laws of Cyprus in June 2006 specifically for the purposes of the project in Brunei ("the Block L project") which is the subject of these proceedings.

The Defendants

2. The first defendant ("Integra") and the second defendant ("Bumico") are both Brunei companies. They are (or were at material times) both owned and controlled by Dr George Wulf III, based in Texas, and Pengiran Hashim ("Pg Hashim") a Bruneian. Bumico was incorporated specifically for the Block L project.

PB and QAF

3. The mineral rights to Block L were and are owned by the state-owned oil company, Brunei National Petroleum Company Sendirian Berhad ("PB"). Integra had investigated the prospects of finding and producing oil from Block L for some time before Loon appeared on the scene. In September 2004 Integra had entered into a Joint Venture agreement with another Brunei company shortly described as "QAF" in respect of Block L. In early 2005 Loon and Integra agreed to pursue the Block L project together and entered into a series of agreements to that end. The issues arise out of these agreements. It will be necessary to refer to some of the detailed terms of the agreements. What follows is simply a general description of them.

The Confidentiality Agreement

4. The first agreement, signed by Dr Wulf on 7 March 2005 and by Mr Graham (a vice-president of Loon) on 13 March 2005, was entitled "Confidentiality and Non-Circumvention Agreement." I shall refer to it as "the Confidentiality Agreement". Its main purpose was to protect the rights of Integra in the technical information Integra had on Block L in the context of that information being made available to Loon. Clause 9 of the Confidentiality Agreement provided for Texas law and arbitration. Integra (and Bumico by assignment) claim rights against Loon under the Confidentiality Agreement and have, on 20 April 2007, commenced an arbitration in Texas against Loon seeking relief accordingly.

The Letter of Intent

5. On 18 March 2005 Loon and Integra agreed a Letter of Intent which allowed Loon a period of 45 days in which to decide whether or not to move to the stage of a Joint Bidding Agreement to provide for terms on which Loon and Integra would together bid to PB for the rights in Block L.

The first JBA

6. By 7 April 2005 Loon and Integra had agreed and entered into a Joint Bidding Agreement on the basis of a 50% interest each but with 10% of Integra's interest being held for QAF. This Agreement has been referred to as the first Joint Bidding Agreement. I shall refer to it as "the first JBA".

The Termination Agreement; the Trust Agreement and the Loon/QAF JBA.

7. Integra decided not to be a formal bid partner for the rights in Block L and by early November 2005 a new structure for the bid had been agreed which was incorporated in a set of three agreements which were executed in November/December. These agreements were:
   i) A Termination Agreement made between Loon and Integra which terminated the first JBA and to which I will refer as the "Termination Agreement";
   ii) A Trust Agreement made between Loon and Integra whereby Loon agreed to hold Integra's 40% interest on trust for Integra subject to the terms of the Agreement ("the Trust Agreement"); and
   iii) A Joint Bidding Agreement made between Loon and QAF under which Loon and QAF agreed to act as bid partners for the rights in Block L. I shall refer to this Agreement as "the Loon/QAF JBA".

The PSA

8. On 3 January 2006 Loon and QAF duly bid for the rights. On 6 February 2006 PB announced that the bid had been successful, subject to the signing of a Production Sharing Agreement ("PSA") by Loon, QAF and PB.

9. In the course of negotiating the PSA, and in the terms of the PSA, which were finally agreed on 28 August 2006, PB made clear that neither Loon nor QAF were permitted to hold any part of their interest in trust. But the PSA, in Article 33.2, did contain a right of assignment of an interest with the written consent of PB.

The JOA; Trust Termination Agreement and the Assignment and Novation Agreement

10. Also on 28 August Loon Brunei and QAF entered into a Joint Operating Agreement ("the JOA") for Block L. The next day, on 29 August, two further Agreements were effected:
    (i) An Agreement between Loon and Integra terminating the Trust Agreement (as was in effect required by the PSA) and to which I will refer as "the Trust Termination Agreement"; and
    (ii) An Agreement between Loon, Bumico and QAF reciting (as was the fact) that Loon had agreed to assign to Bumico a direct interest in the Loon/QAF JBA and that Loon had agreed to submit a request to PB for PB's consent to assign a 40% interest in the PSA to Bumico. This Agreement ("the Assignment and Novation Agreement") provided expressly by way of amendment to Article 20 of the Loon/QAF JBA, in a clause which underlies the present dispute, that:

"This Agreement shall terminate with respect to Bumico in the event [PB] does not grant its consent to the assignment of interest to Bumico pursuant to clause 33.2 of the PSA."

Integra/Bumico Assignment

11. It is Integra's case that on 15 May 2006 it assigned the benefit of all of its rights, title and interest in and to Block L and all related contracts and agreements and data files to Bumico.

PB refuse assignment

12. Also on 29 August, Loon and QAF submitted a request to PB for consent to the assignment of a 40% interest in the PSA from Loon to Bumico. Dr Wulf had been confident there would be no difficulty in obtaining consent. Loon had stressed to Integra the need for Bumico to provide evidence of its financial ability to finance a 40% share. Dr Wulf's confidence was misplaced. The financial evidence provided, to use his own word, was "pathetic". On 28 September 2006 PB refused its consent.

Nations Energy

13. On 6 October an application for assignment of a 50% interest in the rights to Nations Energy Company Ltd ("Nations Energy") another Canadian company, was submitted. The application was officially approved by PB on 26 December 2006. Nations Energy had entered into a farm out agreement with Loon in respect of Block L on 4 October 2006. Under that agreement, Nations Energy were to be the operator of and to have a 50% interest in the Block L project and were to pay 100% of the initial work commitment of USD 20.5 million.

14. The Nations Energy farm out agreement was subsequently (in April 2007) terminated and replaced with an option agreement. The uncertainties created by the present dispute have played their part in that development.

The present Proceedings

15. Those uncertainties also led, on 14 March 2007, to Loon and Loon Brunei issuing the present proceedings seeking declaratory relief as to Integra/Bumico's interest (or lack of it) in Block L.

Applicable Law

16. The first JBA, the Termination Agreement, the Trust Agreement, the Loon/QAF JBA and the Trust Termination Agreement are all subject to English law and the non-exclusive jurisdiction of these courts. The Assignment and Novation Agreement is subject to English law and the exclusive jurisdiction of these courts (I refer to these Agreements collectively as "the English Law agreements"). The PSA is subject to the law of Brunei Darussalam and Singapore arbitration.

The Texas Arbitration

17. On 20 April 2007, as I have said, Integra and Bumico commenced arbitration in Texas against Loon seeking relief under the Confidentiality Agreement the effect of which would be to require the assignment to Integra/Bumico of the entire 90% interest in the Block L project currently held by Loon, 40% of which was undoubtedly to be held by Loon in trust for Integra until the Trust Termination Agreement, and was to be assigned by Loon to Bumico until that became impossible upon PB refusing its consent to the assignment.

THE UK PROCEEDINGS

The Claim Form and Particulars of Claim

18. It was Integra/Bumico's continued assertion that they were entitled to a 40% share in the Block L project, notwithstanding the refusal of consent by PB to the assignment of that interest to Bumico, that was the inspiration for the issue of the Claim Form in these proceedings on 14 March 2007. Although (unlike the other Agreements) no specific reference was made in the Claim Form to the Confidentiality Agreement, the declaratory relief sought included a declaration that Integra/Bumico had no interest at all in the project. The Particulars of Claim did refer to the Confidentiality Agreement, but again relied on the other Agreements to found the claim for a declaration that Integra/Bumico had no interest in the Block L project.

19. No claim under, or indeed reference, to the Confidentiality Agreement had been made by Integra/Bumico at the time. The justification for the declarations sought was (paragraph 28) the assertion by Integra/Bumico of a continuing 40% interest.

The declarations claimed

20. The declarations claimed were:

As against Integra:

"(1) a declaration that, by virtue of the operation of the First Termination Agreement dated 1 November 2005 entered into between the First Claimant and the First Defendant and/or on a true construction of the First Termination Agreement and the First Joint Bidding Agreement dated 7 April 2005 entered into between the First Claimant and the First Defendant, the First Joint Bidding Agreement dated 7 April 2005 was terminated with effect from 1 November 2005; and/or

(2) a declaration that, by virtue of the operation of the Trust Termination Agreement dated 29 August 2006 entered into between the First Claimant and the First Defendant and/or on a true construction of the Trust Termination Agreement and the Trust Agreement dated 1 November 2005 entered into between the First Claimant and the First Defendant, the trust arrangement whereby the First Claimant held a 40% Participating Interest (as defined in the Trust Agreement) on trust for the First Defendant was terminated with effect from 29 August 2006; and/or

(3) a declaration that, by virtue of the operation of the First Termination Agreement dated 1 November 2005 and the Trust Termination Agreement dated 29 August 2006 both entered into between the First Claimant and the First

Defendant and/or on a true construction of all the relevant contracts (including therefore the First Termination Agreement, the Trust Termination Agreement, the QAF Joint Bidding Agreement, the Production Sharing Agreement, and the Joint Operating Agreement), neither the First Claimant nor the Second Claimant holds any interest in the QAF Joint Bidding Agreement, the Production Sharing Agreement, the Joint Operating Agreement, or any other agreement concluded or to be concluded in the future by the Claimants in relation to Block L, on trust or in any other sense whatsoever for the First Defendant; and/or

As against Bumico:

(4) A declaration that, by virtue of the operation of the Assignment and Novation Agreement dated 29 August 2006 entered into between the First Claimant, the Second Defendant and QAF and/or on a true construction of the Assignment and Novation Agreement dated 29 August 2006 and/or the QAF Joint Bidding Agreement and the Assignment and Novation Agreement, the Second Defendant's contingent 40% interest in the QAF Joint Bidding Agreement terminated with effect from and upon PetroBrunei's rejection of the proposed assignment to the Second Defendant on 28 September 2006; and/or

(5) a declaration that, by virtue of the operation of the Assignment and Novation Agreement dated 29 August 2006 entered into between the First Claimant, the Second Defendant and QAF and/or on a true construction of all the relevant contracts (including therefore the Assignment and Novation Agreement, the QAF Joint Bidding Agreement, the Production Sharing Agreement, and the Joint Operating Agreement), neither the First Claimant nor the Second Claimant holds any interest in the QAF Joint Bidding Agreement, the Production Sharing Agreement, the Joint Operating Agreement or any other agreement concluded or to be concluded in the future by the Claimants in relation to Block L, on trust or in any other sense whatsoever for the Second Defendant…"

21. The first declaration was therefore specific, claiming termination of the first JBA. The second declaration was specific, claiming termination of the Trust Agreement. The third declaration was a general claim that Integra had no interest at all in the Block L project. The fourth declaration was a specific claim that Bumico had not acquired any interest in the Block L project by reason of PB's refusal of consent to the assignment of a 40% interest to Bumico. The fifth declaration was a general claim that Bumico had no interest at all in the Block L project.

Service out and Expedition

22. On 15 March 2007 Loon and Loon Brunei applied for permission to serve the proceedings out of the jurisdiction relying on the English law and jurisdiction clauses. Permission was granted by Field J on 19 March. The claimants also sought an expedited trial on the basis that there was an urgent need to proceed with the Block L project and Loon was committed under the PSA and the JOA to pay a sum in excess of USD20 million, unless it could secure a contribution under a farm-out agreement with Nations Energy.

23. The application for expedition came before me on 17 April. I then ordered (without prejudice to Integra/Bumico's rights to object to jurisdiction or to apply for a stay) that if service of the proceedings was to be acknowledged Integra/Bumico would at the same time serve a statement in summary form of any grounds on which they intended to contest jurisdiction and of the grounds on which (if they did so) they intended to defend the action. Directions were also given intended to lead to an expedited hearing of any jurisdiction application and the trial itself, should that be appropriate.

The defendant's case

24. On 23 April, Integra/Bumico acknowledged service and served the summary statement in accordance with the 17 April Order. The statement, in effect, conceded that the declarations numbered (1) (2) and (4) in the prayer to the Particulars of Claim were appropriate, but challenged the jurisdiction of the court to make the general declarations numbered (3) and (5). The "grounds of the challenge" were, in relevant summary, that these declarations would extend to claims under the Confidentiality Agreement which were subject to Texas law and arbitration. The statement referred to the arbitration commenced by Integra/Bumico two days previously and stated that an application to stay under section 9 of the Arbitration Act 1996 would also be made.

The 4 May Orders

25. The proceedings came back before me on 4 May. I made two Orders that day.

26. The first Order simply reflected the concession made in respect of the three declarations and made declarations in those terms. The effect of those declarations was and is that Integra/Bumico's asserted claims to a 40% interest in the Block L project were and are at an end.

27. The second Order is important to the present issues. There was some debate at the hearing which led to the Order about how, if at all, matters should be taken forward. Mr Picken QC, for the claimants, conceded that the arbitration clause in the Confidentiality Agreement remained in force. This was reflected in paragraph 2 of the Order:

"2. Subject to any subsequent Order or agreement as between the parties, the sole issue to be determined and which there is jurisdiction to determine is as follows:

"On a true construction of the contracts between the parties which are subject to English law ("the English Law Contracts") in the context of all the relevant agreements and other relevant matrix, are the Defendants precluded from asserting now or in the future any interest in Block L (other than the rights asserted in the Texan law arbitration under the Confidentiality and Non-Circumvention Agreement)? "

The Defence

28. On 11 May, Integra and Bumico served their defence. Consistently with the 4 May Orders, the defence, in paragraph 6, stated that the court had no jurisdiction to grant Loon or Loon Brunei any relief in relation to the Confidentiality Agreement which was "relevant to these proceedings only by way of factual matrix for the construction of other agreements."

29. Paragraph 28 of the defence (so far as material) reads:

"(a) The Defendants do not assert any interest arising under the terms of or pursuant to the First Bidding Agreement, the First Termination Agreement, the QAF Bidding Agreement, the Trust Agreement, the Trust Termination Agreement or the Assignment and Novation Agreement.

(b) The Defendants do assert an interest in Block L under the Confidentiality Agreement, but do not do so in these proceedings but do assert such interest by way of the Texas Arbitration.

(c) The Defendants do not currently assert but reserve the right to assert any interest in Block L to which they may be entitled under any other agreement or under any other system of applicable law as a result of the conduct of the Claimants or otherwise in respect of Block L. Save in so far as the right to assert any such claim is precluded or otherwise affected by one of the agreements referred to in sub-paragraph (a) above, no relief is claimed in the Claim Form and the Court has no jurisdiction in relation thereto."

30. It is the reference in sub-paragraph (c) to a reservation of possible but unspecified rights in Block L which is the origin of a further concern of the claimants and accounts for some of the relief claimed as it was finally brought before the court.

The Reply

31. Paragraph 4 of the defence had set out the terms of clause 7 of the Confidentiality Agreement which is the basis for Integra/Bumico's claim in the Texas arbitration. Loon was the "Recipient Party" under the Agreement. The Reply pleaded as follows in relation to paragraphs 4 and 6 of the defence:

"2. As to paragraph 4 of the Defence:

2.1 The Confidentiality Agreement contained the following express term:

'7. During the Term of this Agreement Recipient Party agrees it will not, without Disclosing Party's prior written consent…(ii) attempt to circumvent Disclosing Party or otherwise acquire rights to, or interests in, the Concession Area.

In the event any rights or interest in the Concession Area are acquired by Recipient Party during the term of this agreement and there exists no written agreement between Recipient Party and Disclosing Party providing for Recipient Party and Disclosing Party's participation in such acquisition, Recipient Party shall thereafter immediately assign all rights and interests in the Concession Area to Disclosing Party.'

2.2 No admissions are made as to whether such a term is, as alleged, commonly found in the oil and gas industry.

2.3 Further, Loon and Loon Brunei make no admissions as to whether such information as was supplied to Loon by Integra under the Confidentiality Agreement was in fact confidential information as opposed to generally available information which would have been obtainable other than from Integra.

3. As to paragraph 5 of the Defence:

3.1 Again no admissions are made as to whether such a term is, as alleged, commonly found in the oil and gas industry.

3.2 It is expressly denied, for the avoidance of doubt and since the Defendants advance a case as to its effect, that Clause 7 of the Confidentiality Agreement has, or more accurately continues to have, the effect of protecting Integra and/or Bumico (if and to the extent that Integra's interest in the Confidentiality Agreement has been validly assigned to Bumico) from Loon using any information provided by Integra to obtain a concession in Block L without according Integra and/or (if applicable) Bumico a participation in Block L.

3.3 Clause 7 of the Confidentiality Agreement would only have such an effect in circumstances where (i) Loon had acquired 'rights or interest in the Concession Area…during the term of this agreement' and (ii) 'there exists no written agreement between Recipient Party and Disclosing Party providing for Recipient Party and Disclosing Party's participation in such acquisition'.

3.4 In the present case, a series of subsequent agreements (as set out in the Particulars of Claim) were entered into and came into existence providing for Loon and Integra's participation in Block L and superseded and/or replaced and/or terminated the Confidentiality Agreement.

3.5 Accordingly, Clause 7 of the Confidentiality Agreement (assuming that the Confidentiality Agreement continued to have any effect at all) has by now ceased to have the effect alleged by Integra and/or Bumico.

4. As to paragraph 6 of the Defence:

4.1 It is admitted that the Confidentiality Agreement is governed by Texas law.

4.2 It is admitted that the Confidentiality Agreement contains an arbitration agreement subject to Texas law.

4.3 It is admitted that Integra and Bumico have purported to make claims against Loon under that arbitration agreement.

4.4 As an arbitration agreement, it is to be regarded as distinct form the Confidentiality Agreement in which it was contained.

4.5 Accordingly, under Section 7 of the Arbitration Act 1996, the arbitration agreement remains valid even though, on the Claimants' case, the Confidentiality Agreement has been superseded and/or replaced and/or terminated by the agreements subsequently concluded between the parties.

4.6 It follows that it was open to Integra and/or Bumico (if and to the extent that Integra's interest in the Confidentiality Agreement has been validly assigned to Bumico) to commence the arbitration which has been commenced (subject to fulfilment of any additional pre-commencement requirements, such as the obligation to mediate).

4.7 It is admitted that the English Court has no jurisdiction to grant relief in respect of any dispute arising out of or relating to the Confidentiality Agreement. Loon and Loon Brunei do not claim any such relief.

4.8 The English Court does, however, have jurisdiction to determine whether on a true construction of the contracts between the parties which are subject to English law (the English Law Contracts), in the context of all the relevant agreements and other relevant matrix, Integra and/or Bumico are precluded from asserting now or in the future any interest in Block L arising under the Confidentiality Agreement either, in summary, because the Confidentiality Agreement (though not the arbitration agreement contained within it) has been superseded and/or replaced and/or terminated by the agreements subsequently concluded between the parties or on the basis that the English Law Contracts preclude Integra and/or Bumico from making any such assertion.

4.9 In this regard, Loon and Loon Brunei make it clear that they are not asking the English Court to construe the Confidentiality Agreement or to determine what entitlements (if any) Integra and/or Bumico enjoy under the Confidentiality Agreement, since they accept that that is a question for the Texas law arbitration.

4.10 Further, it is admitted and indeed averred that the Confidentiality Agreement is relevant to these proceedings by way of factual matrix for the construction of the subsequent agreements (including the English Law Contracts) entered into in respect of Block L.

32. These paragraphs of the Reply are important and I will have to return to them. Suffice it to say here that I think there is an obvious tension between paragraphs 4.7 and 4.8.

The defendants' strike out application

33. On 5 June the defendants applied to strike out several allegations in the Reply but in particular paragraphs 3.4 and 4.8. Alternatively they sought a stay of the "claims" made in those allegations under section 9 of the Arbitration Act on, among other grounds, that they:

(i) exceeded the scope of the second Order made on 4 May;

(ii) were the subject of the Texas arbitration and within the scope of the arbitration agreement in the Confidentiality Agreement.

34. I ordered that this application should be heard together with the claims for relief made by the claimants. Sensibly, the parties are agreed from a case management perspective that all issues should be addressed after hearing the evidence and argument.

THE NOTICE OF ARBITRATION

35. The Notice of Arbitration is dated 20 April 2007. Integra and Bumico (as assignee) are named as claimants. Loon alone is respondent. The claimants seek:

(i) a declaration that Loon is in breach of its obligations under the Confidentiality Agreement; and

(ii) an order that Loon arrange for the transfer of its indirectly held interest in Block L to Bumico; or

(iii) an order that a constructive trust for the claimants be impressed on any interest held in Block L by Loon.

36. This is, on any view, a strange claim. Loon's "interest" in Block L derives from the PSA. PB has already refused an assignment of a 40% part of that interest to Bumico. It must be fanciful to suppose that PB would consent to the 90% interest being held by Integra/Bumico.

THE DECLARATIONS SOUGHT

37. At the beginning of his opening oral submissions for Loon, Mr Picken circulated a document setting out what he submitted (subject to "a little bit of flexibility") were the declarations which, as things had developed, it would be appropriate for the court to grant. These declarations remained at the forefront of the debate and issues throughout the hearing and remain the relief now sought by Loon. I will therefore set out the document in full:

"1. In all the circumstances, Loon would seek declarations as follows:

1.1 *'On a true construction of the contracts between the parties which are subject to English law ('the English Law Contracts') in the context of all the relevant agreements (including, for the avoidance of doubt, the Confidentiality and Non-Circumvention Agreement) and other relevant matrix, the First and Second Defendants have neither an actual or contingent interest in Block L nor an entitlement to assert now or in the future any rights or claims against Loon or Loon Brunei in relation to Block L arising out of or pursuant to the English Law Contracts, save for the First Defendant's entitlement under Clause 5.2 of the Trust Agreement.'*

1.2 *'On a true construction of the contracts between the parties which are subject to English law ('the English Law Contracts') in the context of all the relevant agreements (including, for the avoidance of doubt, the Confidentiality and Non-Circumvention Agreement) and other relevant matrix, the First and Second Defendants are precluded from asserting now or in the future any interest or rights or claims against Loon or Loon Brunei in relation to Block L.'*

2. The first declaration is, on any view, appropriate… The second declaration is appropriate if the Court agrees with Loon on what Integra/Bumico have described as 'Loon's broad proposition'.
3. Alternatively, it is appropriate that (in addition to the first declaration) a further declaration is made as follows: *'On a true construction of the contracts between the parties which are subject to English law ('the English Law Contracts') in the context of all the relevant agreements (including, for the avoidance of doubt, the Confidentiality and Non-Circumvention Agreement) and other relevant matrix, the First and Second Defendants are precluded from asserting now or in the future any interest or rights or claims against Loon or Loon Brunei in relation to Block L which is inconsistent with or contrary to the terms of the English Law Contracts.'*
4. Further, if the declaration referred to in the previous paragraph is to be made, Loon seeks additional declarations as follows: *'On a true construction of the contracts between the parties which are subject to English law ('the English Law Contracts') in the context of all the relevant agreements (including, for the avoidance of doubt, the Confidentiality and Non-Circumvention Agreement) and other relevant matrix, the First and Second Defendants are precluded from asserting now or in the future any interest or rights or claims against Loon or Loon Brunei in relation to Block L, as follows (by reference to the categories of claims described in Integra/Bumico's skeleton at trial: (i) 'the PSA Conspiracy Claim', (ii) 'the Post-Termination Misfeasance Claim'; (iii) 'the Estoppel/Constructive Trust Claim'.'*
5. At a minimum, it would be appropriate for the Court to make a declaration as follows: *'On a true construction of the contracts between the parties which are subject to English law ('the English Law Contracts', in particular the First Termination Agreement and the Trust Termination Agreement by virtue of Clauses 2.2 and 2.3 thereof) in the context of all the relevant agreements (including, for the avoidance of doubt, the Confidentiality and Non-Circumvention Agreement) and other relevant matrix, the First and Second Defendants are precluded from asserting now or in the future any interest or rights or claims against Loon or Loon Brunei in connection with the Trust Agreement or the First Joint Bidding Agreement.'*
6. If necessary, Loon would also seek a declaration which addresses the Confidentiality Agreement but which does so in a manner which makes it clear that the Court is not meaning to deprive the Texas law arbitrators of their own ability to decide any relevant issue."

38. By way of introductory comment I would note the following. Declaration 1.1 is said by Mr Picken not to be in issue. It is limited to the English Law agreements. Mr Stanley, for Integra/Bumico, questioned the breadth of the words "arising out of or."

39. Declaration 1.2 is the first major battleground. It would require a decision that the English law agreements had in effect superseded the Confidentiality Agreement. But that, submits Mr Stanley, is to trespass on the Texas Arbitration.

40. Declaration 3 is what might be called a limited version of Declaration 1.2. Mr Stanley accepts that no claim could be made between the parties to the English Law agreements which would be contrary to their terms, but questions the utility of such a declaration.

41. Declaration 4 to an extent obscures the second major battleground. Loon seeks a declaration to shut out Integra/Bumico from making any other claims than those it has already made. Mr Stanley responded with examples of claims shortly described by the three descriptions in Declaration 4 by way only of illustration of what he submitted would be the type of claims which would be but should not be precluded by such a declaration.

42. Declaration 5 tracks the wording of specific clauses (the releases) in the Trust Termination Agreement.

43. Paragraph 6 of the document is an attempt at a half-way house. It seeks to encourage the court to express its own view (and to do so by some form of qualified declaration) even if it is decided that the issues arising relating to the Confidentiality Agreement are for the arbitration to determine. The final fall-back position of Mr Picken was to encourage the court to express its views simply because they might be helpful to and possibly respected by the arbitrator. Mr Stanley, with the wisdom of experience, said that was a matter for me.

44. There is no dispute that the Confidentiality Agreement is part of the context in which the English Law agreements fall to be construed.

THE FACTS AND AGREEMENTS

The Confidentiality Agreement

45. Mr Graham travelled to Texas on 16 March 2005 to meet Dr Wulf and review the information relating to Block L. Prior to seeing the information, the Confidentiality Agreement was signed by both of them. Oddly, Dr Wulf says he did not retain a copy of the Agreement signed by Mr Graham albeit Mr Graham says he delivered it to him.

46. The evidence is that such Agreements are typical. It covered two pages and contained 10 clauses. It provided for Loon ("Recipient Party") to keep the information confidential save as expressly permitted. Clause 9 provided for Texas law and arbitration. Clauses 7, 8 and 10 provided:

> *"7. During the Term of this Agreement Recipient Party agrees it will not, without Disclosing Party's prior written consent (i) directly or indirectly contact the government of Brunei or any other ministry, state-owned or operated oil company, agency or organization, department, office and/or bureau of the Government of said country regarding the Concession Area; or (ii) attempt to circumvent Disclosing Party or otherwise acquire rights to, or interests in, the Concession Area.*

In the event any rights or interests in the Concession Area are acquired by Recipient Party during the term of this agreement and there exists no written agreement between Recipient Party and Disclosing Party providing for Recipient Party and Disclosing Party's participation in such acquisition, Recipient Party shall thereafter immediately assign all rights and interests in the Concession Area to Disclosing Party.

8. The obligations of the parties hereunder shall terminate three (3) years from the date of this Agreement.

10. This Agreement comprises the full and complete agreement of the parties hereto with respect to the disclosure of Confidential Information and supersedes and cancels all prior communications, understandings, and agreements between the parties hereto, whether written or oral, express or implied."

47. The arbitration clause (clause 9) so far as relevant provided that: *"The Confidentiality Agreement shall be governed by and construed in accordance with the laws of the State of Texas, United States of America. Any dispute arising out of or relating to this Agreement, including any question regarding its existence, validity or termination, which can not be amicably resolved by the parties, shall be settled first by mediation. If settlement can not be achieved by the mediation process, then the dispute shall be settled under the provisions of the Texas General Arbitration Act… A dispute shall be deemed to have arisen when either Party notifies the other Party in writing to that effect. Any award in arbitration shall not include an award of attorneys fees and costs, except reasonable fees and costs incurred for the collection of an award in said arbitration."*

48. It is not alleged that Loon was in breach of the first paragraph of clause 7. Integra/Bumico's claim in the arbitration is founded on the second paragraph of the clause. Essentially it is this. "Rights or interests" in Block L were acquired by Loon when, on 28 August 2006, the PSA was agreed; there was then no written agreement between Loon and Integra providing for their participation in Block L, hence Loon should then have immediately assigned all rights and interests in Block L to Integra (my emphasis). The first time a demand for such an assignment was made was in the Arbitration Notice in April 2007.

49. It is Loon's case that the subsequent Agreements predicate the "supersession" of the Confidentiality Agreement and/or that they fulfil the requirements of the second paragraph of clause 7.

The Letter of Intent

50. During the course of the same visit to Texas, Mr Graham and Dr Wulf negotiated the terms of the Letter of intent which was signed on 18 March 2005 and provided that Loon had 45 days to decide whether or not to execute a Joint Bidding Agreement (JBA) with Integra. The letter provided for the basic terms of the JBA including equal working and expenditure interests, the securing of an operating company (such as Nations Energy) for which Loon was to take primary responsibility, and the payment by Loon to Integra of USD 25,000 within 7 days and USD 75,000 on signing the JBA and funding by Loon of a further USD 200,000. The USD 25,000 was duly paid.

The First JBA

51. Some 3 weeks later, effective on 7 April 2005, the First JBA was entered into. It duly reflected the terms of the letter of intent. It was a substantial document. It provided that the "Participating Interests" of Loon and Integra would each be 50%. It recorded Loon's agreement to pay a further USD 75,000 to Integra which Loon did. It also recorded, in clause 3, the USD 200,000 funding obligation and that Loon would pay USD 1 million to Integra on signature of a PSA and an additional USD 1.5 million out of Loon's 50% entitlement to hydrocarbons produced and sold under the PSA. By clause 6 provision was made for the mutual disclosure and ownership of confidential information; clause 9 provided for the situation in which one party decided not to participate; clause 14 provided for "default" and the consequences for the interest of a party in default; and clause 17 provided for "confidentiality" in terms more comprehensive and certainly of longer duration than those in the Confidentiality Agreement. Clause 15 contained non-circumvention provisions by which each party undertook, in effect, only to pursue an interest in Block L in accordance with the terms of the first JBA for so long as it remained in force and for 5 years thereafter. A breach of the undertaking entitled the other party to request an assignment of the interest for the same consideration as was paid for it.

52. It is, I think, plainly arguable, as Loon contends, that the first JBA was intended to and did provide a comprehensive and exclusive statement of the contractual rights of the parties in the future, including the rights addressed in the Confidentiality Agreement, to which no reference at all was made. That may also be illustrated by the change in the choice of law and jurisdiction agreed by the parties. It is also, I think, reflected in clause 2 of the Agreement which provided that: *"The scope of this Agreement is to set forth the terms and conditions under which the Parties have agreed to participate jointly in the Application for the Bidding Area as well as the terms and conditions which shall govern their relationship during the negotiation of the Production Sharing Agreement."*

The Change of Plan

53. Between May and October discussions took place about which companies should make the bid to PB. Both Loon and Integra considered that QAF should be a party to the bid. Dr Wulf said (albeit not without some changes of mind) that he did not want Integra to be a party to the bid apparently because a Bruneian national (Pg Hashim) holding 50% of the shares in Integra and through that holding owning national assets would be a problem. He also agreed in his evidence that Integra could not be a party to the bid itself because it could not meet the requirements of PB. It was these considerations which led to the contractual arrangements being restructured by entry into the Termination and Trust Agreements made on 1 November 2005 and the Loon/QAF JBA made on 8 December 2005.

The Termination Agreement

54. The Termination Agreement brought to an end the first JBA. Clause 2.1 provided: *"The Parties hereby agree that [the first JBA] shall terminate with effect from the Termination Date."*

55. The "Termination Date" was defined to mean the date of the Loon/QAF JBA and the Trust Agreement which the parties agreed to execute. The Termination Agreement contained comprehensive mutual releases and an "entire agreement" clause drafted with express reference to the first JBA. Again no reference was made to the Confidentiality Agreement. It is, to my mind, difficult to comprehend any reason, let alone a commercially sensible reason, why if the Confidentiality Agreement was or was understood to be extant, it was not also the subject of such releases.

The Trust Agreement

56. The purpose of the Trust Agreement was to replace Integra's 40% (50% less 10% for QAF) interest as a direct participant in the bid with an agreement whereby Loon was to hold a 40% part of what would now be a 90% interest in the bid on trust for Integra. The terms of the Trust Agreement incorporated the respective rights and obligations previously provided for in the first JBA including (by clause 5.2) Loon's obligations to make the payments to Integra of USD 1 million following the PSA and USD 1.5 million out of Loon's share of production under the PSA, and Integra's obligations to fund its own and QAF's shares of expenses.

57. Again I think it plainly arguable that the Trust Agreement was intended to and did provide a comprehensive and exclusive statement of the future contractual rights of the parties.

The Loon/QAF JBA

58. The Loon/QAF JBA contained essentially the same terms as the first JBA. The Participating Interests were QAF 10% and Loon 90%.

Success of the Bid/the PSA

59. The Loon/QAF bid was submitted to PB on 3 January 2006. On 6 February Loon/QAF were awarded the rights to Block L subject to agreeing the terms of a PSA with PB. Integra was in the process of establishing Bumico and contemplating dissolution of the Trust Agreement and Bumico becoming a direct party to the PSA. That was acceptable to Loon. The Trust Agreement would, as both Loon and Integra acknowledged, in any event have to be disclosed to PB. The proposed terms of the PSA forbad a trust interest. Moreover PB did not want Integra or Bumico to become a party to the PSA before it was signed, as Integra had not been part of the approved bidding group, but said Bumico could seek to justify an assignment to it of a 40% interest in the PSA and make a formal application for consent after the conclusion of the PSA. PB's lawyers in fact started to prepare and provided draft assignment documentation accordingly which was considered by Loon, Integra and QAF and agreed with PB.

60. Loon's own wish to use Loon Brunei to enter into the PSA was approved upon provision of a guarantee by Loon.

August 2006

61. By late August 2006 the terms of the PSA and the JOA had been agreed and were due to be signed on 28 August. Mr Elliott, the President and Chief Executive Officer of Loon and a director of Loon Brunei, circulated on 20 August the covering letter for Bumico's application for PB's consent to the assignment noting that evidence of Bumico's ability to fund its obligations was still required. The course proposed was that the PSA and the JOA should be signed on 28 August and the Trust Termination Agreement and the Assignment and Novation Agreement should be signed on the next day when the application for PB's consent should also be submitted. On receipt of consent a Deed of Assumption and Assignment making Bumico a party to the PSA would be signed.

62. On 22 August, Mr Elliott sent an e-mail to Dr Wulf. "Dato" is a reference to Dato Chua, the General Manager of Business Development at QAF. The "PSC" is the PSA. The e-mail read:

"George,

I look forward to receiving the information from Pg and to progressing this matter. With respect to the information required, PB have advised us that the same kind of information required for the bid would be required for an assignment of interest. Consequently evidence of Bumico's financial capability would be required.

As I have not been privy to your correspondence with Dato, I cannot comment on your statement, however given that Bumico is supposed to be paying for QAF, it would be perfectly understandable for Dato to ask for evidence that Bumico can cover 50% of the required bank guarantee, 50% of the signature bonus and 50% of the US$20.5 million financial obligation. This means that Bumico should demonstrate that it has approximately US$15 million.

Given the terms of the PSC we cannot hold Bumico's interest in trust as this could be a breach of Article 33 and make the PSC subject to termination. This matter was specifically discussed with PB during out negotiating sessions. As you are no doubt aware, our preference was to have Bumico sign the PSC and that request was not approved by PB as Bumico was not a bidder. Consequently it was agreed with PB that we would submit the proposed assignment immediately following the signing of the PSC.

As you know we have previously prepared the relevant agreements to effect this process, which agreements I will re-issue with some minor changes shortly. The changes will reflect the fact that it is Bumico that becomes a party to the joint bidding agreement and that if PB does not approve the assignment the agreement terminates, other than that the agreements should remain substantially unchanged from those previously agreed.

I will be arriving in Brunei Saturday morning and plan to stay through most of the week to resolve this matter and deal with other issues. "

63. On the same day (22 August) Mr Elliott sent a further e-mail to Pg Hashim and Dr Wulf (among others) enclosing a copy of the proposed Assignment and Novation Agreement marked up to show changes from the previous draft and drawing express attention to "the only material change is to cover the possibility of PB not approving the assignment". That change was the one which I have quoted in paragraph 10 and paragraph 73 below.

The PSA

64. The PSA was signed on 28 August, at an official ceremony, by PB, Loon and QAF. Article 33.1 outlawed any assignment or encumbrance of Loon's 90% interest in Block L without PB's consent.

65. The PSA is a very substantial document containing 34 Articles over 120 pages and 5 Annexes. It required a minimum expenditure for "Phase 1" by Loon and QAF of USD 20.5 million (Article 8.1) and substantial further commitments.

The JOA

66. Also on 28 August, the JOA was signed by Loon and QAF. It recorded the 90/10 split of interests. Loon paid Integra the USD 1 million due under clause 3 of the first JBA and clause 5.2 of the Trust Agreement: see paragraph 56. The Trust Agreement was therefore still in existence and binding on the parties when the PSA was agreed. It is Loon's case that even if, which it disputes, the Confidentiality Agreement had not been superseded by now, that was sufficient to satisfy the second paragraph of clause 7 of the Agreement. I admit to seeing no real answer to that case, despite Integra/Bumico asserting the contrary.

The Trust Termination Agreement

67. The Trust Termination Agreement was signed by Loon and Integra the next day, 29 August. The Agreement brought to an end on its terms the arrangement whereby Loon held a 40% interest on trust for Integra. The "Termination Date" was defined to be "the date on which the Assignment and Novation Agreement is signed on behalf of or by each party thereto." Loon and Integra agreed to execute that Agreement. They also agreed, in clauses 2.2 and 2.3, comprehensive mutual releases in respect of any liabilities arising under the Trust Agreement.

68. Clauses 2.1 and 4.1 provided:

> *"2.1 The Parties hereby agree that the Trust Agreement shall terminate with effect from the Termination Date, PROVIDED HOWEVER that the obligations contained in article 5 of the Trust Agreement shall survive its termination and shall remain continuing obligations of Loon and Integra under this Agreement.*
>
> *4.1 This Agreement constitutes the entire agreement between the Parties in relation to the termination of the Trust Agreement and cancels and supersedes all negotiations, representations or agreements, whether written or oral, between the Parties in relation to the termination of the Trust Agreement prior to the Termination Date."*

69. The effect of clause 2.1 was that Loon remained under the obligation to pay USD 1.5 million to Integra out of its share of production under the PSA: paragraph 56. If Integra is right in its present claim in the Arbitration, Loon would have no economic share in production at all but would also be under the liabilities to PB under the PSA. That would truly be a remarkable and wholly uncommercial outcome. It would also be an outcome which PB would not accept as PB had made it clear and Integra had accepted that Integra was not to hold any interest in Block L.

70. Clause 4.1 is said by Mr Picken to be wide enough to preclude claims in negligence and possibly even fraud "in relation to" the Trust Agreement. I prefer to express no opinion on that save to say that I very much doubt that it does have that effect at least if fraud was alleged and proved.

71. Again, it is Loon's case that the Trust Termination Agreement, read with the Assignment and Novation Agreement, were intended to provide a comprehensive and exclusive statement of the future contractual rights of the parties. Indeed granted that PB required that whatever interests there were in the Block L project should be known to and approved by PB, and that was the very reason for the Trust Termination Agreement, it would be remarkable if any of Loon, Integra/Bumico or QAF had or believed they had some hidden interest or any claim to such an interest arising under any agreement or otherwise.

The Assignment and Novation Agreement

72. The Assignment and Novation Agreement is the only contract to which Bumico is a party. It, too, was entered into on 29 August. Loon and QAF were the other parties. The purpose of the Agreement was to record Loon's agreement and QAF's consent to the assignment by Loon to Bumico of a direct 40% interest in the Loon/QAF JBA and to amend that JBA to accord with that intention (for example to show interests of 50% Loon, 40% Bumico and 10% QAF). It was also recited that Loon had agreed to submit a request to PB for PB's consent to the assignment to Bumico.

73. Article 20 of the Loon/QAF JBA provided for "Termination" of the Loon/QAF JBA upon the occurrence of certain specified events. Clause 2.3(d) of the Assignment and Novation Agreement provided in relation to this Article that:

> *"(d) Article 20 is amended by inserting the following to the end of that Article:*
>
> *"20.5 This Agreement shall terminate with respect to Bumico in the event PetroleumBRUNEI does not grant its consent to the assignment of interest to Bumico pursuant to clause 33.2 of the PSA."*

PB Consent Refused

74. The application to PB for consent to the assignment to Bumico was submitted on 29 August. It was only on that day that the financial information was supplied by Bumico. On 28 September PB notified the parties that consent was refused. The rejection was discussed in early October but was final. There is now no dispute that the effect was that Bumico had no interest at all in Block L. Integra, under the English Law Agreements, was left only with its rights

to USD 1.5 million. The effect was also that Loon was faced with funding the PSA (including QAF's 10%) without the expected 40% contribution from Bumico. Nonetheless, if Integra/Bumico are right in their claim in the arbitration, they have 90% of the project with no obligations, and in all probability PB's refusal to work with them, when they were expecting to and had agreed to a 40% interest with matching obligations.

Integra's Claims

75. Integra/Bumico, in the person of Dr Wulf, despite expressly recognising the patent inadequacy of the financial information provided by Bumico, asserted that the companies had a 40% interest in Block L to Loon, QAF, and third parties. Although, when he gave evidence, Dr Wulf denied that he was responsible for some communications to Nations Energy asserting a 40% interest I have little doubt that he was.

THE HEARING

Evidence of Fact

76. Loon served witness statements from Mr Elliott and Mr Graham. Mr Stanley objected to the admissibility and relevance of much of their contents. Sensibly, however, he chose not to require them to give oral evidence without waiving any right to challenge their evidence in any future proceedings. Insofar as their evidence is admissible and relevant on the history and context of the various agreements, I have referred to it in the previous section of this judgment.

77. Their evidence also referred to what may be called the volatile conduct of Dr Wulf and his willingness to make unfounded and serious accusations against others and in particular the representatives of Loon. A statement by Dr Wulf was served on behalf of Integra/Bumico. It was agreed, on the basis that he was not fit to attend the trial in person, that his evidence should be given by way of a video-conference from Dallas, Texas, limited to two hours in the afternoon of 17 July. That was duly done.

78. It was Mr Picken's submission that Dr Wulf's conduct was material to the exercise of the court's discretion whether or not to grant declarations and in particular Declaration 4 or a similar declaration seeking to shut out any other claims by Integra/Bumico. Mr Picken submitted that Dr Wulf had shown that he would continue to make wild and unsubstantiated claims with no other object than to ruin Loon's chances of a profitable enterprise in Block L or to exact a price for walking away.

79. The consequence was that I heard and saw Dr Wulf cross-examined for some 2 hours. Even allowing for the limitation of the video-conference, it was I think plain that Mr Picken's submission had a solid foundation in the documentary evidence he was able to deploy and which Dr Wulf could not satisfactorily explain. Dr Wulf is resentful. He thinks (not without justification) that a project he lit upon will now proceed without him. He finds it hard to acknowledge now (although he came very close to it at the time) that the result is of his own making as regards Bumico and PB. I am quite sure, despite his denials, that he has sought to disrupt Loon's relations with Nations Energy. There is also evidence of his making serious allegations which are the product of nothing more than his own over-heated suspicions.

Expert Evidence

80. Integra/Bumico served an expert's report on the Texas law governing contracts and in particular arbitration agreements. The report was by Professor Alan Scott Rau, the Burg Family Professor of Law at the University of Texas at Austin School of Law. Loon had, but did not take, the opportunities to serve a report of their own and to cross-examine Professor Rau. In effect, therefore, this evidence is unchallenged. It is not, in any event, controversial to an English lawyer. Essentially, the law of Texas is that the arbitration clause in the Confidentiality Agreement is binding and bestows on the arbitrator jurisdiction to determine whether or not subsequent agreements or events have "superseded" the rights of the parties under the agreement in which the arbitration clause is contained. The question is one of who is the appropriate decision-maker not one of the proper law of any agreement said to have that effect.

81. Professor Rau acknowledged there is an exception where it is contended that the arbitration clause itself no longer survives as a result of some subsequent event or agreement. But Loon has conceded that such a contention is not open to it in paragraph 4.5 of the Reply.

THE ARBITRATION ACT

82. Section 9 of the Arbitration Act 1996, so far as relevant, provides:

> *"(1) A party to an arbitration agreement against whom legal proceedings are brought … in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.*
>
> *(2) An application may be made notwithstanding the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.*
>
> *(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.*
>
> *(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."*

83. Loon does not suggest that the arbitration agreement in the Confidentiality Agreement is null or void or inoperative or incapable of being performed. Nor does it suggest that Integra had "taken a step" in the proceedings such as to preclude the grant of a stay.

THE CARVE-OUT AND DECLARATION 1.2

84. The terms of my second order on 4 May and the acceptance of Professor Rau's evidence create to my mind an insuperable difficulty for Loon in seeking to maintain both the efficacy of the arbitration and the right of this court to make declarations to the effect that the Confidentiality Agreement has been superseded and so is of no effect. Paragraphs 3.4 and 4.8 and the last sentence of Paragraph 4.7 of the Reply cannot in my judgment stand with the first sentence of paragraph 4.7. They are inconsistent. The arbitration clause (Clause 9) in the Confidentiality Agreement is in wide terms ("any dispute arising out of or relating to" the Agreement). If, as it is, it is accepted that this court has no jurisdiction to grant relief in respect of any such dispute then only the arbitrator can grant relief addressing the continued efficacy and application of the Agreement. Declaration 1.2, however, purports to do just that.

85. Faced with this, Mr Picken had another string to his bow. He submitted that Clause 9 of the Confidentiality Agreement and so section 9 of the Arbitration Act 1996 required there to be a "dispute" at the time the relevant "legal proceedings" were commenced and, so he submitted, there was not because at that time Integra/Bumico had not even referred to the Confidentiality Agreement let alone asserted any rights under it. Mr Picken referred to the provision in clause 9 that "a dispute shall be deemed to have arisen when either Party notifies the other Party in writing to that effect." But I see nothing significant in that of itself as it does not follow that a dispute cannot arise otherwise and the clause itself extends to disputes "relating to" the Confidentiality Agreement. Perhaps more compellingly, I think Loon is once again on the horns of a dilemma. The relief claimed in the Claim Form and Particulars of Claim did extend to a claim relating to the Confidentiality Agreement by seeking a quite general declaration that Integra/ Bumico had no interest at all in the Block L project: paragraphs 18, 20 and 21. It would be a remarkable and, I think, wrong construction of the arbitration clause if a claim of that kind could be made and the clause circumvented on the basis that the claim was not in "dispute" at the time it was made. If that was so the claim should not have been brought at all. The claim itself, in my judgment, acknowledges the dispute. Moreover, upon service of Integra/Bumico's defence, the dispute under the Confidentiality Agreement was manifest. As it is, Loon has accepted the validity of the reference to and scope of the arbitration: see paragraphs 4.6 and 4.7 of the Reply.

86. Mr Picken's submission was founded in part on the decision of the Court of Appeal in ***Ellerine Bros v Klinger*** [1982] 2 All ER 737 on the provisions of section 1(1) of the 1975 Arbitration Act which, unlike section 9 of the 1996 Act, qualified the requirement for the court to stay the legal proceedings expressly in circumstances where "there is not in fact any dispute between the parties with regard to the matter agreed to be referred." The decision arguably requires that question to be decided at the time of the issue of the legal proceedings and Mr Picken emphasised as much. Whilst for my part I can see no good reason why section 9 should be circumscribed by time in that way (as opposed to addressing the question at the time a stay is sought) ***Ellerine*** is itself authority that what constitutes a "dispute" is no more than an analysis that "what the plaintiff is asking or demanding involves a matter on which agreement has not been reached and which falls fairly and squarely within the arbitration clause" per Templeman LJ at 741f. In my judgment that applies here. As Mr Stanley submitted, and Templeman LJ commented, were it otherwise pre-emptive strikes would provide a fruitful opportunity to circumvent arbitration clauses.

87. Mr Picken also referred to the unreported decision of Lloyd J in ***T&N Limited v Royal & Sun Alliance Plc*** [2002] EWHC 2420 (Ch). That is not an easy decision and the context was an unusual one. I think the outcome turned on sub-section (3) of section 9 (which is not in issue here) and discretion and in this case, as I have said, I think the relief originally sought by Loon included relief relating to the Confidentiality Agreement and so within the arbitration clause which was not the case in ***T&N,*** where the arbitration clause was in a settlement agreement which was only relied upon by way of defence to the claim on certain insurance policies.

88. In my judgment it must follow that the claim for Declaration 1.2 fails. It raises an issue which it is for the arbitrator to decide. As Mr Picken hoped and Mr Stanley acknowledged I have not resisted the temptation to express my views. Of course the arbitrator can wholly ignore them or disagree or agree with them. That is entirely a matter for him.

DECLARATION 4 AND OTHER CLAIMS

89. I have considerable sympathy with Loon's apprehension that Integra/Bumico, by Dr Wulf, is determined to make and promote claims to an interest in Block L regardless of whether those claims have any legal or factual merit.

90. But if Loon is to be granted a declaration of the type sought in Declaration 4 Loon would have to show that the effect of the English Law Agreements was to preclude such rights and that such declaratory relief was appropriate as a matter of discretion,

91. To put this claim in context, I should set out passages from Section 5 of Mr Stanley's Skeleton Argument for the trial. References to the AANA are to the Assignment and Novation Agreement:

> *"5.1 … Integra/Bumico does not in fact assert that it has any Other Rights. But it is almost impossible even to begin to approach the question of whether the assertion of Other Rights would be precluded by the English Law Agreements in a vacuum.*

5.2 As is expanded upon below, that is in fact a powerful reason why it is inappropriate to make a declaration at all.

5.3 Nevertheless, as a first stab at the problem, it is inevitably necessary to consider a few hypothetical examples of Other Rights that Integra/Bumico might conceivably assert, if the underlying factual substratum for them were present. For the purposes of testing whether the English Law Agreements preclude the assertion of such rights, one has to assume that the Other Rights exist, even though such an assumption may very well be wrong. One is asking the question: If Integra/Bumico had such-and-such a right acquired in such-and-such a manner, would its assertion be precluded by the English Law Agreements?

5.4 For these purposes, it is suggested that the following hypothetical examples are considered. It should be stressed:

(a) Integra/Bumico do not assert they are true or that Loon has committed any of the acts hypothetically assumed. Integra/Bumico are not asserting any of these claims, or even suggesting an intention to assert them;

(b) they are simply examples, designed to enable the proposition advanced by Loon to be tested; it is in practical terms impossible to arrive at any all-encompassing set of examples; and

(c) in canvassing these hypothetical examples, Integra/Bumico does not threaten any claim based on any of them, or intimate that any such claim is currently in contemplation or likely to be made.

5.5 If it be objected: but these are hypothetical examples, and not true, the answer is, Yes, absolutely – and that simply highlights the essential problem with the whole claim for declarations in relation to Other Rights: that it is a claim made in a complete factual vacuum. It is indeed Integra/Bumico's primary submission – as set out in section 6 of this skeleton argument – that the correct and principled answer to Loon's claim is that it should be dismissed (as things stand) as premature and hypothetical. But in practical terms, if the substantive proposition is to be tested, it must be against some concrete examples.

5.6 The following hypothetical examples are therefore taken:

(a) Quite apart from the agreements between Loon and Integra/Bumico, PetroBrunei assured Integra/Bumico that they would be given an interest in Block L – but then reneged on this assurance by refusing to permit the assignment to Bumico (the "PetroBrunei Assurance Claim").

(b) During the negotiations of the PSA, Loon deliberately refrained from taking any steps to negotiate amendments which would have permitted the trust arrangement to continue, but allowed Integra/Bumico to believe that the only and safe way to deal with the matter was to apply for an assignment after the PSA had been concluded. In fact, Loon intended (and had agreed with PetroBrunei) that the application would be rejected, Loon's objective being to lull Integra/Bumico into a position where they gave up their trust interest in the expectation of getting an assignment which Loon secretly knew would not be forthcoming (the "PSA Conspiracy Claim").

(c) Loon acted in perfectly good faith during the negotiations of the PSA, but after it and the Trust Termination Agreement and AANA had been concluded decided that it would rather that Integra/Bumico was not part of the project, and at that point began to work behind Integra/Bumico's back to persuade PetroBrunei not to grant consent to the assignment (the "Post-Termination Misfeasance Claim").

(d) Loon appreciated that Integra/Bumico expected that if the AANA proved ineffective, some other mechanism would be found by the parties to allow Integra/Bumico to participate in Block L; it understood that this was not the effect of the agreements being signed, but allowed and/or encouraged Integra/Bumico to persist in that misapprehension. Under Brunei law, that would give Integra/Bumico an equitable interest by way of estoppel over Loon's rights in Block L (the "Estoppel/Constructive Trust Claim")."

92. It would be right to note that some of the "hypothetical" examples at least bear some resemblance to allegations Dr Wulf has made since consent to the assignment to Bumico was refused. Of the examples in paragraph 5.6, example (a) is directed to PB not Loon and so is not a relevant consideration (hence its omission from the terms of Declaration 4). Nonetheless if such a claim did have any foundation, Integra/Bumico must have been aware of it some time ago. Example (b), whist bearing no factual resemblance to and being inconsistent with documented events, would in my judgment be a claim to which there would be no clear answer as to whether it was precluded by any of the releases or other terms of the various English Law Agreements. It would very much depend on the precise facts and allegation. Example (c) is another example which is contradicted in fact by the documents but which would depend on the precise facts and allegations to determine if it was precluded by any of the Agreements. Example (d) Mr Stanley acknowledged was an example which should be ignored.

93. I think the fact that these examples are fanciful is not, as Mr Stanley submitted it was not, in point. The question is whether or not such claims are necessarily excluded by the English Law Agreements. The effect of the comprehensive declarations sought would be, as discussed in argument, rather more extensive (as it would leave no discretion) than an order against a vexatious litigant. No doubt, and with some justification, Loon consider Dr Wulf to be vexatious.

94. But that, too, is not the point. The point is that I cannot see how it can be said that the English Law Agreements preclude any and all claims that might be made by Integra/Bumico, nor, as any further claims are presently and expressly eschewed, do I think, even allowing for Loon's concerns, it would be right to grant Declaration 4. The scope and application of the various releases in the Agreements cannot, in my judgment, sensibly be viewed in the abstract. The very fact that Integra/Bumico have expressly acknowledged that they know of no other claims available to them than those currently advanced in the arbitration (and they have had extensive disclosure from Loon) should be of considerable comfort to Loon in the commercial situation which currently exists. But I do not think it right to grant a Declaration in respect of matters which are entirely hypothetical. I think the position can now be

seen to be, as Mr Stanley submitted it was, similar to the position in ***Clay v Booth*** [1919] 1 Ch 66 (see in particular at pages 75 and 76) and although the jurisdiction to grant Declarations has moved on from those days I do not think it has moved so far as to sustain this claim.

DECLARATION 1.1

95. I do think a Declaration in the form of 1.1 (omitting the words "arising out of or") appropriate. There is now no issue about the English law agreements. They give Integra/Bumico no interest in Block L. The reason for omitting the words is to ensure that the Declaration goes no further than the Agreements. I will hear the parties on the precise wording if there are any other legitimate concerns. Although arguably the Declaration provides Loon with no greater comfort than the Declarations made on 4 May (paragraph 25), I do think a Declaration in substantially this form is justified so that the parameters of any other claims are at least to that extent circumscribed.

DECLARATION 3

96. The terms of the Declaration reflect the law. Should a claim be made which is inconsistent with one or more of the English Law Contracts no doubt the claim would be defended and defeated on that basis. The issue would be whether the claim was inconsistent with the Contracts, some of which have, of course, been expressly terminated. I do not think a Declaration in this form is likely to serve any useful purpose. It will not address the issue of inconsistency should it arise.

DECLARATION 5

97. Declaration 5 simply rehearses the terms of the releases in the Trust Termination Agreement. Again, should it arise, the issue will be whether the releases apply. For essentially the same reasons as apply to Declaration 3 I do not therefore think it appropriate to grant relief in this form.

OVERALL CONCLUSION

98. I will only grant relief substantially in the form of Declaration 1.1. I will hear the parties on the form of an Order and any ancillary matters which cannot be agreed on a date to be fixed. The judgment was provided to the parties in draft on 27 July 2007.

Mr Simon Picken QC and Ms Josephine Higgs (instructed by Clifford Chance) for the Claimants
Mr Paul Stanley (instructed by Vinson & Elkins RLLP) for the Defendants