SC/CIV/05/14

JUDGMENT

Geophysical Service Incorporated
(a company incorporated in Canada)

Plaintiff

v

Her Majesty in Right of Her Government of the Falkland Islands

Respondent

before
Simon Bryan QC, Chief Justice

JUDGMENT GIVEN ON 9th December 2016

Representation	
Matti Lemmens & Leah Mangano	*Plaintiff*
Jim Cormack & Susan Fallan	*Respondent*

This judgment will be published indefinitely for this reason:

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CLAIM NO SC/CIV/05/14

IN THE SUPREME COURT OF THE FALKLAND ISLANDS

Courts and Tribunal Service
Town Hall
Ross Road
Stanley
Falkland Islands

Date: 9 December 2016

Before:

SIMON BRYAN QC (CHIEF JUSTICE OF THE FALKLAND ISLANDS)

- -

BETWEEN:

GEOPHYSICAL SERVICE INCORPORATED
(a company incorporated in Canada)

Plaintiff

and

HER MAJESTY IN RIGHT OF HER GOVERNMENT OF THE FALKLAND ISLANDS

Defendant

- -
- -

Matti Lemmens and **Leah Mangano** (**Borden Ladner Gervais LLP**) for the **Plaintiff**
Jim Cormack and **Susan Fallan** (**Pinsent Masons LLP**) for the **Defendant**

Hearing dates: 11, 12, 13 and 14 October 2016

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Approved Judgment

I direct that no official shorthand note need be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE CHIEF JUSTICE:

A. GSI'S LICENCE

1. The Plaintiff Geophysical Service Incorporated ("GSI" or the "Licensee") is a Canadian corporation which is in the business of seismic surveying, and acquiring and processing geophysical data in the context of prospecting for hydrocarbons. The Board Chair and Chief Operating Officer of the Plaintiff is Mr Paul Einarsson. The Defendant (the "Defendant" or "Licensor") governs the Falkland Islands through successive Governors.

2. The exploration and exploitation of minerals in the Falkland Islands controlled waters ("Offshore Exploration") is regulated by The Offshore Minerals Ordinance 1994 (No. 16 of 1994) (the "Offshore Minerals Ordinance") which repealed the Continental Shelf Ordinance 1991, *"to replace it so as to make further and better provision for the exploration and exploitation of minerals in the Continental Shelf and other controlled waters of the Falkland Islands and for matters connected with or relating to the foregoing matters"*. The Offshore Minerals Ordinance prohibits Offshore Exploration unless it is conducted in accordance with the terms and conditions of a licence granted under the Ordinance. Offshore Exploration without a licence is a criminal offence. The Offshore Minerals Ordinance authorizes the Governor of the Falkland Islands to grant exploration licences, upon such terms and conditions as the Governor sees fit, provided the Secretary of State consents to the granting, and the terms and conditions imposed.

3. The Offshore Petroleum (Licensing) Regulations, 2000 (the "Licensing Regulations") were made in accordance with the Offshore Minerals Ordinance and provide for applications for exploration licences. The Licensing Regulations provide that any person may apply for an exploration licence in accordance with the Licensing Regulations, and with every application for an exploration licence, the applicant shall pay a prescribed fee of £1,000.

4. The Petroleum Survey Licences (Model Clauses) Regulations 1992 SR & O 25/1992 (the "Model Clauses Regulations") provide that the clauses set out in the

Schedule thereto (the “Model Clauses” or “Model Clause”) are deemed to be incorporated in every licence granted under the Offshore Minerals Ordinance unless specifically excluded, modified or varied by any provision of the licence.

5. The issues that arise in this action are set against the backdrop of, and involve a consideration of, the proper interpretation of an exploration licence (the "Licence") between the Governor (acting for and on behalf of Her Majesty) and GSI, that GSI had applied for under the Offshore Minerals Ordinance, and in particular Clause 17(2)(e) of the Model Clauses incorporated therein. The Licence is dated 7 December 2004 and is signed by the then Governor on behalf of Her Majesty, and Mr Paul Einarsson on behalf of GSI. GSI required the Licence to fulfil a contract to provide seismic surveying services to various parties that had production licences from the Falkland Islands Government ("FIG" or the "Government").

6. Paragraph A of the Licence provides that, “*Clauses 1 to 3, 5 to 14 and 16 to 26 of the [Model Clauses] shall be incorporated in [the] Licence and shall have effect as if set out at length in [the] Licence"*. The Model Clauses are accordingly incorporated in the Licence, and have effect as if they were set out at length in the Licence. Clause 2(1) of the Model Clauses provides that the Licence is governed by the law of the Falkland Islands, and Clause 2(2) provides that the Supreme Court of the Falkland Islands has sole and exclusive jurisdiction *"in relation to any dispute, difference or question arising between the Governor and the Licensee under or by this Licence or their respective rights and liabilities in respect thereof."*

7. Paragraph B of the Licence contains the Grant of the Licence. It provides, amongst other matters that, *"In consideration of the payments provided for by the Model Clauses and the performance and observation by the Licensee of all the terms and conditions of the Model Clauses or hereinafter contained…."* the Governor grants to GSI as Licensee the licence and liberty to search for petroleum in the sea-bed and sub-soil subject to the provisions of the Licence and over the area defined in Schedule 1 to the Licence. The initial Licence was for a year from 20 December 2004 to 20 December 2005, but it was subsequently renewed for a further year from 20 December 2005.

8. Paragraph D of the Licence provides that the additional conditions set out in Schedule 5 shall have effect in addition to the obligations contained in the Model Clauses.

9. Condition 5 of Schedule 5 provides that *"The Licensee shall provide the Director of Mineral Resources copies of all data acquired by the Licensee under this Licence as required by Petroleum Operations Notice No.1"* ("PON 1"). This data comprises seismic, gravity and magnetic data.

10. Condition 6 of Schedule 5 provides:

> "Notwithstanding the terms of Model Clause 17(2), the Governor shall be entitled to exhibit and display for the purpose of promoting minerals exploration in the South Atlantic all or part of the data acquired by the Licensee under this Licence, but the Governor shall not allow such data to be copied or taken away by any person without the consent of the Licensee, which consent may be withheld if the Licensee intends selling or licensing such data within the five year confidentiality period before the data is published by the Governor."

11. Clause 16 of the Model Clauses provides:

> "16.(1) The Falkland Islands Government may, subject to paragraph (2) of this clause, at its own cost, produce for sale and distribution, and, if for sale, so that any revenue derived from sales is entirely for the benefit of the Falkland Islands Government, an interpretation report in relation to any data communicated by the Licensee under any preceding provision of this Licence.
>
> (2) If any interpretation report to which paragraph (1) of this clause relates is produced, it shall not without the prior consent of the Licensee contain illustrated examples of more than fifteen per cent of the total line lengths of the surveys undertaken by the Licensee, but this restriction shall cease to have effect at such time as clause 17(2) ceases to have effect so as to restrict the disclosure of any of the specified data referred to in clause 17(1).
>
> (3) Nothing in clause 17 shall have effect so as to preclude or inhibit the exercise by the Falkland Islands Government of its rights under paragraphs (1) and (2) of this clause."

12. Clause 17 of the Model Clauses provides

"17.1(1) For the purpose of this clause "the specified data" means all records, returns, plans, maps, samples, accounts and information which the Licensee is obliged under any provision of this Licence to furnish or supply to the Governor or to the Secretary of State.

(2) The specified data shall not, except with the written consent of the Licensee, which shall not unreasonably be withheld, be disclosed to any person not in the service of or engaged by the Crown:

Provided that -

(a) the Governor shall be entitled at any time to make use of the specified data for the purpose of preparing and publishing such returns and reports as may be required by law;

(b) the Secretary of State shall be entitled at any time to make any use of the specified data -

(i) for any purpose for which the Governor may use it under (a) above; or

(ii) for any non-commercial purpose related to the international relations of the United Kingdom or the Falkland Islands as he sees fit;

(c) the Governor may at any time, under such conditions he may consider necessary to protect the commercial confidentiality of the information, disclose any of the specified data to any elected member of the Legislative Council of the Falkland Islands;

(d) the Governor or the Secretary of State may at any time, under such conditions as the Governor or the Secretary of State, as the case may be, may consider to be necessary to protect the commercial confidentiality of the information, disclose any of the specified data to -

(i) the British Geological Survey; and

(ii) the British Antarctic Survey;

(e) at the expiration of a period of five years (or such greater period as is specified in the Licence) from the date on which any particular item of specified data is received by the Governor that item of specified data may be published or disclosed by the Governor to any person;"

13. The British Geographical Survey ("BGS") is a component body of the National Environment Research Council ("NERC") which is the UK's main agency for funding and managing research, training and knowledge exchange in the environmental sciences. BGS, through NERC, has been contracted by the FIG to

provide geological and associated hydrocarbon and minerals exploration advice to the FIG since March 1992.

14. The specified data includes the seismic data collected and processed by GSI under its Licence (as well as gravity and magnetic data). How the seismic data is collected and processed will be addressed in due course when considering the issues that arise as to any copyright in the specified data. However, it is appropriate to say something at this point about seismic data so as to put the issues that arise in context. Seismic data, in its fully processed and finished form, is an illustration of the geological layers beneath the Earth's surface (or the seabed). Seismic data represents an image that is produced using sound waves, and is the output of remote sensing images of the subsea rocks as collected in digital format. The licence holder uses a vessel and associated towed equipment to send pulses of energy into the seabed. Some of this energy bounces back off the various geological layers through which it passes, and the time taken for the energy to return to the ship's sensors from the various geological layers is recorded. The time taken for the energy wave-paths to travel down to the various geological layers and reflect back off them to the ship's sensors are processed using sophisticated algorithms in order to produce images of the depth at which the various geological reflecting layers occur beneath the seabed.

15. The raw or unprocessed energy data is known as field data, and is recorded on field tapes. It is also known as "SEG-D data". The processed output of the data once it has been manipulated through the various algorithms used to turn it into an image of the sub-surface is known as "SEG-Y data".

16. On 2 September 2005, 23 November 2005 and 1 September 2006, and pursuant to Condition 5 of Schedule 5 of the Licence, GSI submitted to the Government all data created by GSI's ship whilst operating in Government controlled waters and all data GSI derived from it (the "Data"). This included the SEG-D data and the SEG-Y data. GSI did this by transmitting the Data to the BGS in the UK who store it on servers in the UK. Any access to the Data is through an FTP site monitored, controlled and hosted, by the BGS in the UK, with access controlled by user name and password.

17. GSI submits that the Data is confidential, that it owns the copyright in the Data and that the Government may not publish or disclose the Data to any third party (alternatively may not do so without its consent and without such third party paying GSI a fee or royalty).

18. In contrast, the Defendant submits that after five years any obligation of confidentiality is at an end, and to the extent that there is any copyright in the Data in favour of GSI (which the Defendant denies), the Licence, and Clause 17(2)(e) thereof, grants a copyright licence to the Defendant to publish or disclose the Data to any person, without qualification, and without any requirement of consent of GSI or payment to GSI.

19. In this regard the Defendant refers, in particular, to Condition 6 of Schedule 5 of the Licence and Clause 17(2) of the Model Clauses (quoted above) as incorporated into the Licence as providing for a five-year confidentiality period subject to the provisions of Clauses 16 and 17(2), and refers to Clause 17(2)(e) of the Model Clauses as incorporated in the Licence, which it will be recalled provides *"at the expiration of a period of five years (or such greater period as is specified in the Licence) from the date on which any particular item of specified data is received by the Governor that item of specified data may be published or disclosed by the Governor to any person"*.

20. The events leading up to this action are addressed in the Chronology of Events in section D below. In summary, in October 2010 Mrs Phyllis Rendell ("Phyl Rendell"), the then Director of Mineral Resources for FIG, notified GSI that it was more than five years since the Data was acquired and that FIG intended shortly to make the Data publically available. Following correspondence with Mr Paul Einarsson on behalf of GSI, FIG proposed an extension to December 2012, a date that was subsequently extended to 31 December 2013, FIG making it clear that it was FIG's intent to release the Data from 1 January 2014.

21. Shortly thereafter (on 31 March 2014) GSI commenced the present action by Writ of Summons and accompanying Statement of Claim seeking, amongst other matters, declarations about the interpretation of Clause 17(2)(e) of the Model Clauses as

incorporated into the Licence, and an injunction to restrain the Defendant from disclosing the Data. To date, the Government has not disclosed or published the Data pending the outcome of this action.

B. THE AGREED JOINT LIST OF ISSUES

22. In advance of filing their respective written Closing Submissions, the parties agreed a Joint List of Issues (with accompanying Notes) (the "Joint List of Issues") identifying the issues for determination in the action, as follows:-

Issues

1. Whether the Court should find that the Data comprises works in respect of which copyright subsists, which would be enforceable by the Plaintiff against the Defendant in light of the proper interpretation of Model Clause 17(2) and all the relevant circumstances.

2. Whether the Court should find that the Data is subject to confidentiality which would be enforceable by the Plaintiff against the Defendant arising from the proper interpretation of Model Clause 17(2) or whether there is confidentiality which would be so enforceable otherwise in all the relevant circumstances.

3. Whether the claim is barred by estoppel.

4. Whether the claim is barred by laches.

5. Whether the Court can issue an injunction in the form sought in the pleadings and if so whether it should do so in the circumstances.

Notes

1. The above joint list of issues aims to provide a convenient framework for submissions in this case. Agreement to it does not prevent either party making a submission which would otherwise properly be available to it.

2. The Data referred to is the data submitted by the Plaintiff to the Defendant pursuant to the terms of the Exploration Licence in issue.

3. Costs have not been included as an issue at this stage on the understanding that the Court will reserve costs in giving judgment in order that further submissions on costs can follow in light of the result.

23. In GSI's Closing Submissions GSI invites the Court to answer these issues as follows:-

1. Yes, copyright subsists. Model Clause 17(2)(e) is void and inoperative to the extent that it is repugnant to section 31(3) of the Copyright Act 1956. In the alternative, discretion [should be exercised] by the Governor under Model Clause 17(2)(e), taking into account GSI's copyright in the Data.
In the alternative, if the Licence is a contract, which GSI denies, then it was entered into on the basis of a mutual mistake of law such that it is void to the extent that it is mistaken in law. The Licence is not an assignment or licence of the copyright in the Data.

2. Yes, the Data is confidential regardless of the interpretation of Model Clause 17(2)(e). If the Licence is a public law instrument as GSI submits, GSI has not agreed to any limitation of its confidentiality as the terms of the Licence were imposed upon it. In those circumstances, the Government's duty to keep the Data confidential is not restricted by the terms of the Licence and exists in equity. If the Licence is a valid contract and is not void for mistake of law, which GSI denies, the Government's obligation in equity nevertheless co-exists with its obligation in contract and continues to bind the Government past the terms of the Licence.

3. No, the Defendant has not established that GSI's claim is barred by estoppel.

4. No, the Defendant has not established that GSI's claim is barred by laches.

5. Yes, an injunction can issue restraining the Government from disclosing or publishing the Data in these circumstances.

24. In contrast the Defendant invites the Court to answer these issues as follows:-

1. GSI has not proved that the Data comprises works in respect of which copyright belonging to GSI subsists, but if such copyright subsists then the permission in Model Clause 17(2)(e) amounts to a licence in the Defendant's favour for the purpose of section 1(2) of the Copyright Act 1956, and Model Clause 17(2)(e) is not repugnant to section 31(3) of the Copyright Act 1956 or null and void.

2. Confidentiality is provided for and regulated by the Licence, and the effect of Model Clause 17(2)(e) is that no confidentiality remains that would prevent publication or disclosure after the expiration of the five-year period.

3. GSI's claim is barred by estoppel.

4. GSI's claim is barred by laches.

5. The injunction sought would be neither available nor appropriate.

C. THE WITNESSES

25. I heard oral evidence from six witnesses who were involved in the events in question, three for GSI and three for the Defendant.

26. For GSI, the following witnesses were called and cross-examined:

    a. Mr Paul Einarsson, Chair and Chief Operating Officer of GSI.
    b. Mr Russell Einarsson, former Senior Vice-President of GSI.
    c. Mr Allan Feir, Vice President of Operations of GSI.

27. For the Defendant, the following witnesses were called and cross-examined:

    a. Mrs Phyllis (Phyl) Rendell, former Director of Mineral Resources ("DMR")
    b. Mr Stephen Luxton, the current DMR.
    c. Dr Philip Richards, formerly of the British Geological Survey (BGS).

28. It will be apparent that the central issue in dispute is as to the true interpretation (or construction) of Model Clause 17(2)(e). The relevance of factual evidence to such matters is limited, although to the extent that the exercise is one of contractual construction (so that factual evidence as to the admissible factual matrix is relevant) there is a potential for factual evidence to be of assistance. Factual evidence is also relevant in the context of the Defendant's pleas of estoppel and laches and the relief that is sought.

29. A number of the witnesses saw fit to opine on their understanding of the terms of the Licence and Model Clause 17(2)(e). Such evidence is inadmissible - questions of interpretation or construction are for me, and I have not taken such evidence into account.

30. It is fair to say that, on occasions, the witnesses also strayed into expressing views as to their subjective intentions which is inadmissible (see *Prenn v Simmons* [1971] 1 WLR 1381, 1384-1386; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] 1 WLR 989, 995-997, per Lord Wilberforce; *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in *Rainy Sky* [2011] 1 WLR 2900, paras 21-30, per Lord Clarke of Stone-cum-Ebony

JSC). I have ignored such evidence. Equally it is also well-established that evidence of the parties' negotiations is inadmissible as an aid to contractual construction, although such evidence may be of relevance in the context of a plea of estoppel. I have borne that distinction in mind when considering the evidence relating to the circumstances in which the Licence was entered into.

31. Both parties made submissions in closing as to how I should treat the evidence of their respective witnesses and particular witnesses in that regard, which I have borne in mind. Where necessary I have commented on the evidence of particular witnesses as it arises in the context of particular issues. Generally speaking, however, I consider that the witnesses were doing their best to assist the Court in relation to events which occurred some considerable time ago, and which can hardly have been fresh in any of their minds absent consideration of the contemporary documentation.

32. Mr Paul Einarsson is in a category of his own. Mr Einarsson would, I consider, be the first to admit that he feels passionately about the merit of GSI's claim to the Data and what he sees as the expropriation of that data by the Government. This has led him to say in relation to governmental data release in the context of other litigation with which GSI is involved: "*It's obscene……I think it's expropriation, and it's a violation of international laws*" (transcript p. 254/1-4), "*we have gone after these pirates that are reselling our data because it costs them nothing...*" (transcript p. 288/23), "*it's a law and order issue….*" [transcript p.289/4] and in relation to the Defendant "*…My whole life is not focused on going after every single criminal.....*" (transcript p. 372/8-9).

33. I have been alive to distinguish the truly disinterested factual evidence that Mr Einarsson is in a position to give (for example his evidence as to the nature of the work undertaken by GSI in relation to the seismic data) from that where I consider he was acting as an advocate for his own cause (typified by his views as to the effect of the Government's interpretation of Model Clause 17(2)(e) on GSI's Data). I reject, however, the suggestion that Mr Einarsson is to be regarded as an inherently unreliable witness, and where necessary I comment on particular aspects of his evidence when addressing particular issues.

D. CHRONOLOGY OF EVENTS

34. On 8 September 2004 GSI applied for an exploration licence to FIG with the accompanying fee of £1,000. The licence application form, which was signed by Mr Paul Einarsson, made reference, amongst other matters, to the Model Clauses and the notification requirements of PON 1. Mr Paul Einarsson, when cross-examined, confirmed that, at the time he submitted the application form, he knew that the Model Clauses were potentially important and that he would have wanted to look at them (transcript 294/1-6).

35. On around 11 November 2004 Mrs Phyl Rendell, as DMR of FIG, sent GSI a copy of the proposed licence which GSI subsequently confirmed, in an email on 16 November 2004, that it had received. On 17 November 2004 GSI emailed FIG asking where they could find the Model Clauses, and Mrs Rendell directed them to the Defendant's website. In a further email the same day Mr Cheremovsky of GSI asked for confirmation and clarification in relation to Schedule 5, Clause 6 stating:-

> "As you know, GSI is going to acquire the program on a non-exclusive basis. The Clause provides that if the oil company releases its production licence, the government can disclose the non-exclusive seismic data? I believe it would apply to the proprietory data owned by the oil company, but hardly to non-exclusive data owned by the geophysical company. Obviously, it is our major concern that the data in which GSI will have invested may be disclosed with no benefit whatsoever to GSI? Please, clarify."

36. Mrs Rendell replied on 18 November indicating that she would consult the legal people about Schedule 5 Clause 6 and would get back to GSI. The following day she sent GSI a further version of the proposed licence amending Schedule 5, Clause 6 to take into account GSI's contract arrangements with FOGL/Hardman. Mr Cheremovsky replied by email the same day pointing out a typographical error in Schedule 5, Clause 6. Save for the correction of that typographical error the version of the proposed licence sent on 18 November was in the same terms as that subsequently awarded and signed.

37. Mr Paul Einarsson emailed Mrs Rendell on 19 November identifying some concerns. In this regard he stated amongst other matters:-

> "1. Publishing data via revised clause 6 of the licence. GSI did not consider that after a short 5 years that its data would be published, this would seriously affect the economics of a non-exclusive program which is designed to provide the client (and the government) with more information at a lower cost because future licenses to the data can accrue to the owner of the data. As we have seen in other jurisdictions the provision of data in fact is not an incentive to attract new players because seismic data is not the barrier or one of the main economic drivers. Rather the royalty terms, license terms, and of course the geologic potential are the main economic drivers. Providing free or publishing data only serves to reduce non-exclusive seismic companies from investing and promoting your potential. Our investment and promotion is far more valuable than any free data that could be provided. While we have no problem with the government utilising this data and promoting the area we see no purpose in publishing and eliminating the value of this data to the detriment of our commercial business. The restricting of non-exclusive seismic will only serve to limit exploration and the future of discovered strategic reserves and production of resources."

38. Mr Paul Einarsson suggested that the Defendant consider the agreement reached between the International Association of Geophysical Contracts ("IAGC") and the DTI in the UK as a model for the Defendant's policy (which has a ten-year confidentiality period and provides for all released data to be licensed from the seismic contractor and restrictions on what could be released together with phased (escalating) licence fee payments). Mr Paul Einarsson said that *"Otherwise it...will necessitate that GSI increase our rates potentially delaying the project and resulting in less information being acquired as a result."* Mr Paul Einarsson also included a proposed modified Clause 6.

39. Mrs Rendell responded on 23 November 2004 rejecting any change to the five-year confidentiality period, stating:-

> "We have considered your concerns about the terms of your licence in Schedule 5, Point 6. I am advised that the legislation is quite clear on this matter and the Falkland Islands Government is not able to alter the five year confidentiality period in the case of your Exploration Licence. The situation with data here is that the processed tapes can be released by FIG to companies with a genuine interest in investing in the area after five years but the field tapes have to be accessed from the contractor (in this case GSI) at cost..."

40. Mr Paul Einarsson responded the same day in these terms:-

> "This practice is no incentive to oil companies that would easily pay for the minute cost of seismic, but it does discourage more data being acquired by spec companies and in the long run is a poor policy that achieves the opposite of what is intended."

41. Whilst Mr Paul Einarsson described this as a "poor policy" in his response the same day, he understood what that policy was, as he confirmed when cross-examined (transcript 323/24-324/2, 324/24). He accepted that he understood that the Defendant had rejected all three elements of his proposal (10 year period, licence fees after that and licence agreement with the exploration company) (transcript 326/1-4).

42. At 20.06hrs the same day Mr Paul Einarsson emailed Mrs Rendell and questioned the fact that there was no place on the licence indicating where his signature was to go. Mrs Rendell replied the following day having spoken to the lawyer who drafted the licence, with the drafter's suggestion that GSI sign directly underneath the text. Mr Paul Einarsson so signed the Licence with the stamp of GSI also being affixed. In an email on 24 November to Mrs Rendell, Mr Paul Einarsson asked that when the Governor had signed the Licence, a faxed copy be sent to GSI and one original copy be sent to GSI. Mrs Rendell faxed Mr Paul Einarsson on 10 December 2004 attaching a copy of the signed Licence, and stating that an Original would be dispatched via DHL the following day.

43. In an email on 3 May 2005 from Mr Cheremovsky of GSI to Mrs Rendell, GSI asked in relation to the procedure to renew the Licence for another year, and in due course GSI sought and was granted an extension of the term of the Licence in return for a payment of £5,000, the signed extension being returned by GSI to Mrs Rendell under cover of a letter dated 5 October 2005.

44. In an email from Mr Paul Einarsson to Mrs Rendell on 16 March 2007, Mr Einarsson noted that he was planning to fly to London to attend a Falklands Forum on 18 April 2007. In that letter he said (amongst other matters) that:-

> "GSI has not had any secondary sales on our seismic data after investing millions of dollars. I want to inquire if the DTI - IAGC agreement (attached) captures this data, and if not, if we can discuss putting this agreement in place

for this data. I would like to discuss this with you as it makes no sense and is of no benefit to anyone to give perfectly good seismic data away for free, rather it is counterproductive."

45. When cross-examined Mr Paul Einarsson accepted that when he was corresponding with Mrs Rendell in March 2007, he knew that the IAGC/DTI agreement did not apply to the Licence (transcript 348/12).

46. On 19 April 2017 a breakfast meeting took place between Mr Paul Einarsson, Mrs Phyl Rendell and Dr Philip Richards at a hotel in London. During that meeting Dr Richards explained FIG's licensing terms and stated that it was unlikely that the policy would change. The meeting became acrimonious and was then terminated.

47. On 7 June 2007 Mr Paul Einarsson sent Mrs Rendell an email in which he requested, amongst other matters, that FIG entertain either an extended time limit regarding release of data or change release practices. In her reply, Mrs Rendell stated that she *"thought it was made clear at our breakfast meeting in London that the Falkland Islands Government does not intend changing its policy on exploration licences and that the terms of the licence that GSI signed in 2004 would remain in place. Those terms clearly allow for FIG to promote the region using data acquired by your company."* After quoting Schedule 5, Clause 6 she stated, *"The five year confidentiality period for data release does not end until after December 2009, on the date when data was submitted to FIG. I suggest the matter of extended confidentiality is considered in mid 2009 by which time the financial return to your company will be clearer".*

48. In due course, on 28 October 2010, Mrs Rendell, as DMR, wrote to GSI in these terms:-

> "Under the terms of the Exploration Licence awarded to Geophysical Service Incorporated to acquire these data, Petroleum Survey Licences (Model Clauses) Regulations 1992 provide for a confidentiality period of five years.
>
> I am writing to advise you that our records show that it is in excess of five years since data was acquired by GSI for Falklands Oil and Gas Limited (FOGL) and Borders & Southern Petroleum (BSP). It is the intention of the Falkland Islands Government to shortly make these data publicly available, however, as with other data releases, only original migrated data in seg-y format will be released. GSI still hold the field tapes and any companies

seeking access to copies of these field tapes would need to contact GSI concerning charges for their release."

49. Mr Paul Einarsson responded on behalf of GSI in an email on 2 November 2010 taking issue with the Government's notification, and asking whether there was any government discretion in relation to delaying the proposed release of data:

> "...Thank you for this notification. GSI due to the BP well blow out, the economic downturn, ever increasing government regulations around the world, and the practice of some governments to release our intellectual property have taken a big toll on our company and we are doing very poorly. GSI does not agree with this essential confiscation of our intellectual property as GSI has not even recovered costs on the data to date. The data was acquired on a non-exclusive basis with the intent of licensing it to other parties and to date only a small portion of the entire dataset has been licensed a second time. GSI requires a minimum three data licenses to reach a point where coverage of costs and a return on its investment occurs. Please advise if there is any government discretion in relation to delaying this proposed release due to these circumstances?
>
> Also can you please provide the three executed exploration licences applicable to these surveys and any referenced documents so that we may study these as we are unable to locate completed copies in our records."

50. After consulting with Dr. Philip Richards of the BGS, in an email to Mr Einarsson on 5 November 2010 Mrs Rendell suggested an extension until December 2012 *"to give [GSI] time to gain more benefit from the survey"*. She also pointed out that FIG, under clause 6 of the Licence, has the right to exhibit and display the Data at any time, and reserved the right between the initial planned release date of March 2011 and an extended release date of December 2012 to publish in appropriate journals, interpretations of certain parts of certain lines, in order to help generate interest in the region. She stated that this was an essential condition of extending the period before the release of the Data. She asked for confirmation that GSI accepted this position stating that she would then delay the publication date to December 2012.

51. When Mr Paul Einarsson responded in an email on 26 November 2010 he said that he was *"most appreciative of your approval of an extension to December 2012"* and *"GSI most certainly desires to recover our costs and earn a financial return on our investment in the Falklands."* Mr Paul Einarsson also asked that in relation to any

display pursuant to clause 6, image files of data not be sent to interested parties. After consulting Dr Richards, Mrs Rendell replied that the extension until release of Data to December 2012 would be strictly on the understanding that under clause 6 of the licence, FIG has the right to exhibit and display the Data at any time but that, as Mr Einarsson had requested, FIG would not send images of the data to any potential purchasers. She also identified that FIG reserved the right to publish on the FIG website or in appropriate journals, interpretations of certain parts of certain lines, in order to help generate interest in the region. She stated that this was an essential condition of extending the period before release of the Data, and that if Mr Einarsson agreed to these terms she should be able to arrange for the extension to be considered for formal agreement early in the New Year. The extension was granted although GSI did not respond agreeing the terms.

52. In an email to Mrs Rendell on 9 February 2011 Mr Paul Einarsson stated that he was *"concerned that the time you are providing will not allow GSI to break even on this investment"* and referred to a paper from GSI's UK solicitor *"regarding intellectual property rights and our position regarding the legality of this type of data confiscation without compensation"*. Following a response from Mrs Rendell and a letter from the FIG Attorney General, Mr Paul Einarsson emailed Mrs Rendell on 22 February 2011 asking for a two-year extension that was subject to a further review in two years by FIG, and followed this up with a further email on 24 February 2011 asking FIG to reconsider its position in relation to publishing the Data.

53. Mrs Rendell responded in these terms in an email on 1 March 2011:-

> "Thank you for your email. We in FIG would much prefer to come to an amicable agreement with you as well. Having taken your circumstances into account, FIG could consider an extension to the date for data release to December 2013 but there would be no negotiation beyond that. FIG also requires the right, as mentioned in earlier correspondence, to display, use or publish elements of the data as this was a condition of the Exploration Licence that you entered into. If you are content with this I will seek approval from FIG to the extension of confidentiality up to December 2013. Please advise."

54. It is unclear whether GSI responded to this email (Mr Paul Einarsson was unsure whether he did so, identifying when cross-examined that he wanted to delay the

disclosure of Data as long as possible). In an email to Mr Paul Einarsson dated 17 October 2013, Mrs Rendell's successor as Director of Mineral Resources, Mr Stephen Luxton, emailed in these terms:-

> "You corresponded with my predecessor Phyl Rendell on the subject of GSI 2D seismic data collected under an Exploration Licence in the Falkland Islands. The most recent exchange of correspondence is copied below for ease of reference.
> Despite the fact we have no response on file to our offer in the email below dated 1 March 2011 FIG elected to extend the GSI confidentiality period, as previously offered, to 31 December 2013. This date is now approaching and I write to confirm that it is FIG's intent to release the data from 1 January 2014."

55. Mr Paul Einarsson replied the same day in these terms:-

> "Mr Luxton, Thank you for the extension and notice. My position remains that this is an unnecessary expropriation without compensation. Is there a formal appeal process or other method to resist this under your applicable regulations or governing legislation?"

56. In his email in response on 25 October 2013, Mr Luxton attached a copy of the Licence and a copy of the Model Clauses, and stated that if GSI wished to dispute the right of FIG to release the data in question GSI should use the procedure set out in the Model Clauses.

57. In the event, on 31 March 2014, GSI commenced the present action by Writ of Summons and accompanying Statement of Claim seeking, amongst other matters, declarations about the interpretation of Clause 17(2)(e) of the Model Clauses as incorporated into the Licence, and an injunction to restrain the Defendant from disclosing the Data. To date, the Government has not disclosed or published the Data.

E. THE ISSUES

Whether the Court should find that the Data comprises works in respect of which copyright subsists, which would be enforceable by the Plaintiff against the Defendant in light of the proper interpretation of Model Clause 17(2) and all the relevant circumstances (Issue 1)

Whether the Court should find that the Data is subject to confidentiality which would be enforceable by the Plaintiff against the Defendant arising from the proper interpretation of Model Clause 17(2) or whether there is confidentiality which would be so enforceable otherwise in all the relevant circumstances (Issue 2).

E1: Introduction to Issues 1 and 2

58. Issues 1 and 2 are the central issues under consideration. They each involve a consideration of the proper interpretation of the Model Clauses, and in particular Model Clause 17(2) and 17(2)(e), set against the backdrop of any copyright and/or confidentiality in the Data. In that context, I will first address general issues relating to copyright and confidentiality before turning to the interpretation of the Licence and the Model Clauses, and the specific questions for determination under Issues 1 and 2.

E2(a) Copyright: Introduction

59. The first issue that arises is whether the Data comprises works in which copyright subsists. The Defendant is entitled to, and has, put GSI to proof in this respect. The Defendant points out that it is a basic requirement of an action for alleged infringement of copyright for GSI properly to establish what the works are and how it is said that copyright subsists in them. Whilst the Defendant accepts that, in general terms, a seismic survey, like many other acts, is something which can conceivably generate copyright protected works, the Defendant submits that GSI has failed to establish such matters in relation to the Data.

60. In order to address the issues that arise in relation to copyright it is first necessary to say something about copyright law, and its application in the Falkland Islands. The applicable principles are helpfully set out in an agreed document on copyright which parties have agreed and on which sections E2(b) to E2(e) of my judgment that follow are based.

E2(b) Copyright: Relevant legislation and the nature of copyright

61. The Copyright law of the Falkland Islands is set out in the Copyright Act 1956 (the "1956 Act") as amended by The Copyright (Falkland Islands) Order 1963 (the "1963 Order"). The 1956 Act repealed and replaced the Copyright Act 1911 (the

"1911 Act"). The 1911 Act still applies to works created or published whilst it was in force, with various amendments. The present proceedings relate to works created since the 1956 Act has been in force.

62. Copyright seeks to protect the form of expression of ideas and not ideas themselves. The primary purpose of copyright law is to reward authors or creators of a work for the effort expended in creating something original. This purpose was originally set out in the preamble of the *Statute of Anne, 8 Ann c.21* which provides as follows

> "Whereas Printers, Booksellers, and other Persons, have of late frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For Preventing therefore such Practices for the future, and for the Encouragement of Learned Men to Compose and Write useful Books; May it please Your Majesty, that it may be Enacted ..."

E2(c) Subsistence of Copyright

63. Works capable of attracting copyright protection under the 1956 Act are literary works, dramatic works, musical works and artistic works. The potentially relevant categories of work for the purposes of the present proceedings are literary and artistic works.

64. In the 1956 Act, section 48(1) provides that the various expressions there referred to, shall have the meaning thereby assigned to them. In this regard “literary work" includes, "...*any written table or compilation”* and “writing" includes, "…*any form of notation, whether by hand or by printing, typewriting or any similar process"*.

65. Section 3(1) of the 1956 Act provides that in the 1956 Act:-

> " artistic work " means a work of any of the following descriptions, that is to say,—
>
> (a) the following, irrespective of artistic quality, namely paintings, sculptures, drawings, engravings and photographs;

(b)works of architecture, being either buildings or models for buildings;
(c)works of artistic craftsmanship, not falling within either of the preceding paragraphs.

66. Section 48(1) of the 1956 Act further provides that "drawing" includes, "...*any diagram, map, chart or plan."*

67. The 1956 Act makes no reference to technological works such as computer generated works or software. However, the common law has confirmed that copyright can subsist in computer generated works and that the requirements of the 1956 Act for copyright to subsist are relevant in that regard (see *Express Newspapers plc v Liverpool Daily Post and Echo plc* [1985] 1 WLR 1089).

68. The 1956 Act provides that copyright shall subsist in every original literary, dramatic, musical or artistic work, whether published or unpublished, of which the author was a "qualified person" at the time when the work was made (emphasis added). The relevant sections of the 1956 Act are sections 2(1) and 2(2) for literary, dramatic or musical works and sections 3(2) and 3(3) for artistic works.

69. Subsistence of copyright in the work to which an action relates is presumed under s.20(1)(a) of the 1956 Act unless subsistence is put in issue by the Defendant.

70. As noted above, the 1956 Act provides that in order for a work to be protected by copyright it must, among other things, be "original". There is no statutory definition of "original" and so its meaning is a matter of common law. In this regard originality means that the author or creator must have created the work through his own skill, judgment and individual effort and that it is not copied from other works (*Ascot Jockey Club Ltd v Simons* [1968] 64 WWR 411). A work may still be considered original even in circumstances where the author or creator has drawn on common knowledge (see, for example, *Macmillan & Co Ltd v Cooper (K. & J.)* (1923) 40 T.L.R) or has used pre-existing material (see, for example, *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 W.L.R. 273). Where pre-existing material has been used, the question then becomes whether sufficient skill, judgment and effort has been expended to justify copyright protection of the new material (*Cala Homes (South) v Alfred McAlpine Homes East Ltd* [1995] F.S.R. 818).

71. "Original" does not mean that the work must be the expression of original or inventive thought; the originality required relates to the expression of thought (*University of London Press Ltd v University of Tutorial Press Ltd* [1916] 2 Ch. 601).

72. As noted above, the 1956 Act also provides that in order for a work to be protected by copyright it must, among other things, be made by a "qualified person".

73. In the case of a body corporate, s.1(5) provides as follows:-

> "s.1(5) For the purposes of any provision of this Act which specifies the conditions under which copyright may subsist in any description of work or other subject-matter, "qualified person":-
>
> …(b) in the case of a body corporate, means a body incorporated under the laws of any part of the United Kingdom or in another country to which that provision extends"

74. The reference to "*or in another country to which that provision extends"* is a reference to the extension of the protection provided by the 1956 Act to countries which are signatories of the Berne Convention for the Protection of Literary and Artistic Works (the "Berne Convention"). The Berne Convention is an international agreement governing copyright protection which was first accepted in Berne, Switzerland, in 1886. The Berne Convention requires its signatories to recognise the copyright of works of authors from other signatory countries in the same way as it recognises the copyright of its own nationals.

75. Copyright protection in the Falkland Islands was first extended to Berne Convention countries, specifically including Canada, from 10 October 1963 by virtue of The Copyright (International Conventions) Order 1957. The Copyright (International Conventions) Order 1957 was then revoked and replaced by The Copyright (International Conventions) Order 1964, which was then revoked and replaced by The Copyright (International Conventions) Order 1972, which was then revoked and replaced by The Copyright (International Conventions) Order 1979 (the "1979 Order"). The 1979 Order is still in force in the Falkland Islands today.

E2(d) Duration of Copyright

76. Copyright in literary, dramatic and musical works subsists for the life of the author plus an additional 50 years from the end of the calendar year in which the author dies (s.2(3) of the 1956 Act). Copyright in artistic works also subsists for the life of the author plus an additional 50 years from the end of the calendar year in which the author dies (s.3(4) of the 1956 Act).

E2(e) Ownership of Copyright

77. The default position under s.4(1) of the 1956 Act is that the author of a work is entitled to any copyright subsisting in that work by virtue of the 1956 Act. There are exceptions to this default position, which are provided by s.4(2) – (4) of the 1956 Act. In particular, s.4(4) states:-

> "Where… a work is made in the course of the author's employment by another person under a contract of service or apprenticeship, that other person shall be entitled to any copyright subsisting in the work by virtue of this Part of this Act"

78. Under s.4(5) of the 1956 Act, s.4(2) - 4(4) can be excluded by agreement between parties, in which case the default position provided by s.4(1) of the Act applies.

79. Any copyright proven, admitted or presumed to subsist in the work to which an action relates is presumed to belong to the plaintiff under s.20(1)(b) of the 1956 Act unless ownership is put in issue by the defendant.

E2(f) Licencing and Assignment of Copyright

80. Sections 1(1) and 1(2) of the 1956 Act provide, amongst other matters, as follows:-

> "1.-(1) In this Act "copyright" in relation to a work (except where the context otherwise requires) means the exclusive right, by virtue and subject to the provisions of this Act, to do, and to authorise other persons to do, certain acts in relation to that work in the United Kingdom or in any other country to which the relevant provision of this Act extends.
> .....
> (2) In accordance with the preceding subsection, but subject to the following provisions of this Act, the copyright in a work is infringed by any person who, not being the owner of the copyright, and without the licence of the owner thereof, does, or authorises another person to do, any of the said acts in relation

to the work in the United Kingdom or in any other country to which the relevant provisions of this Act extends."

(emphasis added)

81. In relation to "literary, dramatic or musical works" section 2(5) of the 1956 Act provides:-

> "(5) The acts restricted by the copyright in a literary, dramatic or musical work are-
> (a) reproducing the work in any material form;
> (b) publishing the work;
> (c) performing the work in public;
> (d) broadcasting the work;
> (e) causing the work to be transmitted to subscribers to a diffusion service;
> (f) making any adaptation of the work;
> (g) doing, in relation to an adaptation of the work, any of the acts specified in relation to the work in paragraphs (a) to (e) of this subsection."

82. In relation to an "artistic work" section 3(5) of the 1956 Act provides:-

> "(5) The acts restricted by the copyright in an artistic work are-
> (a) reproducing the work in any material form;
> (b) publishing the work;
> (c) including the work in a television broadcast;
> (d) causing a television programme which includes the work to be transmitted to subscribers to a diffusion service."

83. Thus pursuant to section 1(1) of the 1956 Act the owner of the copyright in a work may authorise other persons to do the acts, restricted by the copyright, as specified in sections 2(5) and 3(5) of the 1956 Act, and copyright in a work is not infringed if a person who is not the owner of the copyright in a work, has the licence of the owner, and does any of the acts specified in sections 2(5) or 3(5) of the 1956 Act – i.e. copyright will only be infringed if one or more of the relevant acts is done without the licence of the owner of the copyright.

84. Section 36 of the 1956 Act deals with assignments and licences in respect of copyright. In this regard section 36(1) provides that *"copyright shall be transmissible by assignment, by testamentary disposition, or by operation of law, as personal or moveable property"* whilst section 36(3) provides that *"No assignment*

of copyright (whether total or partial) shall have effect unless it is in writing signed by or on behalf of the assignor."

85. Section 36(4) of the 1956 Act provides:

> "(4) A licence granted in respect of any copyright by the person who, in relation to the matters to which the licence relates, is the owner of the copyright shall be binding upon every successor in title to his interest in the copyright..."

86. It will be noted that, in contra-distinction to an assignment, there is no requirement that a licence be in writing or comply with any other formalities. A licence is a permission to do something which would otherwise be unlawful - see *Thomas v Sorrell* (1673) Vaugh 330 referred to in *Canon Kabushiki Kaisha v Green Cartridge Co (Hong Kong) Ltd* [1997] AC 728). In the latter case Lord Hoffman, delivering the judgment of the Privy Council, observed (at p. 735) that the concept of a licence is something which, "*makes an action lawful, which without it had been unlawful."*

87. A licence need not be express, it can also be implied. Thus, in *Robin Ray v Classic FM* [1998] FSR 622, when considering the concept of an implied grant by commission, Lightman J recognised that a licence may be implied and drew a distinction between use of the copyright work (where a licence would suffice) and the right to exclude a contractor from using the work and the ability to enforce the copyright against third parties (which would necessitate an assignment), stating at page 642 at (6)-(7):-

> "(6) accordingly if it is necessary to imply some grant of rights in respect of a copyright work, and the need could be satisfied by the grant of a licence or an assignment of the copyright, the implication will be of the grant of a licence only;
> (7) circumstances may exist when the necessity for an assignment of copyright may be established. As Mr Howe has submitted, these circumstances are, however, only likely to arise if the client needs in addition to the right to use the copyright works the right to exclude the contractor from using the work and the ability to enforce the copyright against third parties."

88. On the facts, Lightman J found that on the true construction of the consultancy agreement in that case in its matrix of facts, the limits of what was contemplated at the date of agreement were that the plaintiff's work would be used for the purpose of

enabling the defendant to carry on its business of broadcasting in the United Kingdom. The only necessary implication to give purpose and effect to the agreement was accordingly the grant of a licence to the defendant to use the copyright material for the indefinite future for this purpose and this purpose only.

89. The Defendant submits that in the above passage, Lightman J is accepting that a right to use copyright works is a sufficient basis for the implication of a licence. Lightman J does not so state expressly - what he was doing was drawing a distinction between a situation where a right to use the copyright exists - in which case a licence will suffice and a situation where there is a right to exclude the contractor from using the work in which case an assignment is necessary. However, I consider that it is implicit from the passage quoted above that Lightman J was envisaging that a right to use copyright works would carry with it an implied licence. Whether Lightman J was so envisaging or not, the question of whether a right to use copyright works will give rise to the implication of a licence is to be determined based on a consideration of all relevant facts in a particular case (including, for example, the terms of any consent, express or tacit, or agreement, express or implied). In principle, however, a consent or agreement for another to use a copyrighted work in a specified way is likely to carry with it an implied licence, so as to give effect to the purpose of such consent or agreement (as illustrated by cases such as *Barrett v Universal-Island Records Ltd* [2006] EMLR 21 and *Mellor v Australian Broadcasting Commission* [1940] AC 491). Whether that is so in the present case in the context of the Model Clauses and Model Clause 17(2)(e) is a matter for consideration in due course below.

90. A licence does not have to be contained in a contract. In the case of *Barrett v Universal-Island Records Ltd* [2006] EMLR 21 Lewison J found, amongst other matters, that two members of the group Bob Marley and the Wailers (the Barrett brothers) could not claim to be the authors of any of the seven contested works under consideration in that case, but that in any case they had given their consent to the record company Island Records Limited and its predecessors in title to reproduce those seven compositions by recording them for the purpose of reproduction and sale, Lewison J quoting (at pages 669-670) from the judgment of Lightman J in *Robin Ray v Classic FM* in that regard.

91. In *Barrett* Lewison J recognised that an implied licence need not be contractual. In this regard, he stated at paragraph 362:

> "Mr Bate submits that since neither of the Barrett brothers knew they were entitled to copyright there can be no intention to create legal relations with respect to any "licence" to reproduce a copyright work. I am prepared to accept that until the 1980s the underlying factual premise is correct. If the question of licence is analysed as a matter of contract, I think that Mr Bate may well be right. But a licence need not be contractual. An explicit or tacit consent to reproduce a work can amount in law to a licence, whether or not the person giving the consent meant to contract. But it does follow from Mr Bate's submission that the licence would not have been a contractual one. I would have reached this conclusion anyway, since I have found that there was no contract between the Barratt brothers and Island."

92. It follows, also, that there does not need to be explicit reference to the word "copyright" or indeed to the word "licence" in order to create a licence for the purposes of copyright. The court looks to the substance of the provisions. For example, in *Mellor v Australian Broadcasting Commission* [1940] AC 491 the House of Lords considered wording in pamphlets about the terms on which the appellants sold their brass and military band music, which contained references (for example to *"all our music is free for public performances*" and the like) which the members of the Judicial Committee considered guaranteed complete freedom from trouble as to copyrights to bands who had bought the music. As Viscount Maugham stated (at page 502):-

> "The sentences "all our subscribers should note especially that all our music is 'free for public performances' anywhere" and "we make one price cover both the music and the performing rights thereof" enforce the argument that the appellants are not retaining for themselves any performing rights as against the persons who subscribe for or buy the musical pieces published by the appellants. Taken as a whole the extracts above set forth seem to their Lordships to guarantee complete freedom from trouble as to copyrights to bands, who having bought the music published by the appellants, play the musical works in public. As the learned judge remarked, the appellants "must have known that band performances were frequently broadcast". If they desired to exclude such broadcasting - included as it is in the statutory "performing right" - it was for them to exclude it.
>
> Their Lordships are therefore of the opinion that the licence or consent given in the pamphlets included the broadcasting by bands with any necessary consequences of such broadcasting such as the use of receivers by persons entitled to use them."

93. The editors of *Copinger and Scone James on Copyright 17th edn* (albeit in the context of the Copyright, Designs and Patents Act 1988 (the "1988 Act")), note as follows at paragraph 5-203 in relation to the wide range of circumstances in which a licence may arise:

> "**Types of Licence.** The 1988 Act confers on the copyright holder the exclusive right to do the various acts restricted by the copyright. An infringement of copyright occurs if one of those acts is done without his licence. Except in certain situations specified by statute, there is no requirement that a licence be in writing or comply with any other formalities. In general, therefore, a licence can be written or oral, express or implied (e.g. on the grounds of business efficacy, from trade practice and custom) or inferred (e.g. from conduct), contractual or gratuitous."

E2(g) statutory licences of copyright

94. As noted by the editors of *Copinger* (at paragraph 5-208) *"there are numerous cases in which a licence, or a right to call for one, is conferred by statute rather than arising by agreement"*. For example, (and as noted at paragraph 9-20 of *Copinger*), the Broadcasting Act 1990 imposes a statutory duty on broadcasters to supply information about their programmes and confers a statutory licence on publishers enabling such information to be reproduced and published (Broadcasting Act 1990 s. 176 and Schedule 17). The subject of compulsory statutory licences is addressed by the editors of *Copinger* at Chapter 28. Whilst much of that chapter is concerned with broadcasting, there are other areas where statutory licences may arise as is apparent from the detailed subject matter of that chapter. There is no principle that the ability of a statutory provision to grant a licence is limited to any particular type of statute. In each case the applicable statutory provision must be interpreted to see what (if any) licence is granted thereby. Whilst *Copinger* is addressing the 1988 Act, and the Broadcasting Act 1990 is an English statute, and neither Act is applicable to the Falkland Islands, the Chapter concerned is addressing the possibility of a licence being granted in a statute.

95. A copyright licence can, therefore, arise by statute, and there is no reason, in principle, why a licence cannot arise in the context of, for example, an exploration

licence granted pursuant to a statutory regime for the licensing of oil exploration, and the provisions thereof, whether the exploration licence is to be characterised as a public law instrument or as a contract.

96. For completeness, I note that after the hearing Pinsent Masons provided an extract from *Copinger* on 24 October 2016 (previously referred to orally by Mr Cormack in closing together with the Broadcasting Act 1990). No further submissions were made on behalf of the Defendant. In response BLG, on behalf of GSI, served a seven page letter on 3 November 2016 (the "November Submissions") which contained detailed further submissions, and re-visited authorities and submissions addressed at the time of the written and oral closings. I consider that the November Submissions go far beyond what was contemplated at the hearing as a response to the matters raised by Mr Cormack in his oral closing (by reference to *Copinger* and the Broadcasting Act 1990).

97. GSI is not entitled to re-open submissions or augment their previous submissions. That said I have read the November Submissions and had regard to the submissions raised therein. They include further submissions about implied licences and statutory licences. As to the former I reject the submission that an implied licence can only arise out of a relationship where there is a contract. The applicable principles are not so limited, as I have already addressed. Equally I reject the submission that a statutory licence (or a compulsory licence as GSI categories such licences) must be express in the sense of actually using words such as "copyright", or "licence" or indeed "publish" or "disclose" or the like. A statute can make provision for what may be done with works which are subject to copyright by its language and it may be that particular words, or provisions in the licence construed as a whole, may demonstrate a legislative intent to grant a licence. Whether that is so in the present case (where, amongst other matters, the words "published" and disclosed" are used) is addressed in due course. It is unhelpful to talk of express versus implied licences in that context or to make sweeping submissions as to what a statute can or cannot do. The particular statutory provision must always be interpreted so as to identify the legislative intent. If the legislative intent is to provide for a licence in respect of copyrighted works then that is what is provided for.

98. I also did not find the submissions on the distinction between author's rights and neighbouring rights of assistance. A licence may be granted in respect of works where there are author's rights. There is no conceptual reason why a statute cannot provide a licence in respect of such works, including in a scenario where the statutory provision concerned is the only basis on which the copyrighted work could have been created by its author in the first place.

E2(h) prospective ownership of copyright

99. Section 37 of the 1956 Act contemplates the possibility of an agreement in relation to any future copyright in a work that has yet to be created. Section 37(3) expressly contemplates that it is possible for a licence to be granted by a prospective owner of copyright. In this regard sections 37(3) to (5) provide:-

> "(3) Subsection (4) of the last preceding section [ie section 36(4) already quoted above] shall apply in relation to a licence granted by a prospective owner of any copyright as it applies in relation to a licence granted by the owner of a subsisting copyright, as if any reference in that sub-section to the owner's interest in the copyright included a reference to his prospective interest therein.
> (4) The provisions of the Fifth Schedule to this Act shall have effect with respect to assignments and licences in respect of copyright (including future copyright) in television broadcasts.
> (5) In this Act "future copyright" means copyright which will or may come into existence in respect of any future work or class of works or other subject-matter, or on the coming into operation of any provisions of this Act, or in any other future event, and "prospective owner" shall be construed accordingly and, in relation to any such copyright, includes a person prospectively entitled thereto by virtue of such an agreement as is mentioned in subsection (1) of this section."

100. In circumstances where it is possible for a licence to be granted by the prospective owner of copyright, it follows that the provisions of section 1(2) of the 1956 Act (the contemplated possibility of a licence permitting acts to be done by a person which would otherwise infringe the copyright of the copyright holder) apply to such licences just as much as to a situation where the copyrighted work is already in existence.

E2(i) section 31(3) of the 1956 Act and section 2 of the Colonial Laws Validity Act 1865

101. GSI relies on the provisions of section 31(3) of the 1956 Act and section 2 of the Colonial Laws Validity Act 1865 and submits that to the extent that Model Clause 17(2)(e) purports to modify the 1956 Act in respect of the protections or infringement of any copyright of GSI in the Data, Model Clause 17(2)(e) is void and inoperative.

102. Section 31(3) of the 1956 Act provides:-

> "(3) The legislature of any country to which any provisions of this Act have been extended may modify or add to those provisions, in their operation as part of the law of that country, in such manner as that legislature may consider necessary to adapt the provisions to the circumstances of that country:
> Provided that no such modifications or additions, except in so far as they relate to procedure and remedies, shall be made so as to apply to any work or other subject-matter in which copyright can subsist unless –
>
> > (a) in the case of a literary, dramatic, musical or artistic work, the author of the work, or, in the case of a sound recording or a cinematograph film, the maker of the recording or film, was domiciled or resident in that country at the time when, or during the period while, the work, recording or film was made, or"

103. Section 2 of the Colonial Laws Validity Act 1865 provides:-

> "Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

104. In the context of the reference to "domicile" in section 31(3) of the 1956 Act, GSI rely upon the definition of "domicile" in *Jowitt's Dictionary of English law* (at pp 649-650) as, *"the permanent home of a person, or that place where the law presumes that he has the intention of permanently residing"*, and of "residence"

being used *"to denote the fact that a person dwells in a given place, or, in the case of a corporation, that its management is carried on there"* (*Jowitt* at 1562). GSI rightly point out that neither it nor Precision Seismic Processing and Consultants Ltd ("Precision") (acting on GSI's behalf) are domiciled or resident in the Falkland Islands either now or at the relevant times.

105. As to the operation and effect of section 2 of the Colonial Laws Validity Act 1865 and section 31(3) of the 1956 Act, GSI refer to the Privy Council case of *Rediffusion (Hong Kong) Ltd v Appellants v AG of Hong Kong and other Respondents* [1970] A.C. 1136, an appeal from the Supreme Court of Hong Kong (at the time a colony of Her Majesty and subject to the Colonial Laws Validity Act, 1865). In that case the Attorney-General of Hong Kong conceded that for the purpose of the cause of action summons under consideration the court could assume that the whole of a proposed bill introduced by the Legislative Assembly of Hong Kong, if enacted as an Ordinance, would be repugnant to the provisions of the Acts of the United Kingdom Parliament (see p. 1160A), specifically provisions of the 1956 Copyright Act. The concession was made solely for the purpose of testing whether it was plain and obvious that it was not unlawful for the members of the Legislative Council to pass a bill which is repugnant to an Act of the Imperial Parliament extending to Hong Kong.

106. The members of the Privy Council (Lord Morris of Borth-y-Gest dissenting) held that the proposed bill in itself could not affect the legal rights of any individual, including the plaintiffs, and, even if it was passed by the Legislative Council and received the Governor's assent the resulting Ordinance would to the extent that it was repugnant to any Act of Parliament be null and void under section 2 of the Colonial Laws Validity Act 1865, but the fact that the resulting Ordinance would be null and void did not make unlawful the act of the Legislative Council in debating, passing and presenting a bill for assent containing any matter repugnant to an Act of Parliament.

107. In the context of the issues arising, as identified above, the members of the Privy Council considered the effect of section 2 of the Colonial Laws Validity Act

1865 and section 31(3) of the 1956 Act. As to the former Lord Diplock (delivering the judgment of the majority) stated (at p. 1160F-G):

> "Section 2 provides as a matter of construction that a colonial law shall be read as subject to any Act of Parliament, Order or Regulation extending to the colony, and secondly, as a matter of effect, that it shall be void and inoperative to the extent of its repugnancy to any such Act of Parliament, Order or Regulation but not otherwise."

However aside from that elucidation of the effect of section 2, and a general recognition of the provisions of section 31(3) of the 1956 Act during the course of the judgments, I do not consider that the *Rediffusion* case provides any assistance when addressing the issues that arise in the present case, given the concessions made in that case as to the effect of the proposed bill.

108. GSI submits that to the extent that Model Clause 17(2)(e) purports to modify the 1956 Act in respect of the protections or infringement of any copyright of GSI in the Data, Model Clause 17(2)(e) is void and inoperative as repugnant to section 31(3) of the 1956 Act. In this regard GSI also refer to section 28 of the Interpretation Ordinance, which provides that, "*Where an Ordinance confers power on any authority to make subsidiary legislation, the following provisions shall have effect with reference to the making thereof -- (b) no subsidiary legislation shall be inconsistent with the provisions of any Ordinance"*. Pursuant to section 80 of the Interpretation Ordinance, the term "Ordinance" includes any imperial enactment, including the 1956 Act. Therefore, the Model Clauses Regulation cannot be inconsistent with the 1956 Act. GSI then submit that the Model Clauses Regulation is inconsistent with section 31(3) of the 1956 Act and as such is void and inoperative.

109. The Defendant's primary riposte (it also says any challenge should have been by way of judicial review) is that, quite simply, GSI's submissions are misconceived. The 1956 Act contemplates the authorisation of a person to do acts restricted by copyright (section 1(1) as quoted above) and if copyright subsists then the permission in Model Clause 17(2)(e) amounts to a licence in the Defendant's favour for the purpose of section 1(2) of the 1956 Act. In such circumstances Model

Clause 17(2)(e) does not, and does not purport, to modify the 1956 Act in respect of the protections or infringement of any copyright of GSI in the Data but rather to grant a licence which is contemplated by the copyright regime under the 1956 Act, and as such is not a modification or addition within section 31(3) of the 1956 Act and is not repugnant to the provisions of the 1956 Act. Nor is the Model Clause Regulation inconsistent with the 1956 Act.

110. I address these matters in section H3 below in the context of addressing the proper interpretation of Model Clause 17(2)(e), and its consequences.

E2(j): seismic data and copyright

111. Mr Cormack on behalf of the Defendant rightly accepted that, in general terms, a seismic survey is capable of giving rise to copyright protected works (transcript p. 683/17-19), but denied, on behalf of the Defendant, that GSI has established that the Data comprises works in which copyright subsists.

112. In relation to the issue as to whether the Data comprises works in which copyright subsists, GSI place some considerable reliance upon a recent decision of the Alberta Court of Queen's Bench in Canada, involving GSI, namely *Geophysical Service Inc. v. Encana Corp 2016 ABQB 230.*

113. The Alberta Court of Queen's Bench decided in *Encana* that copyright had been proven to subsist in the seismic data in that case under section 5 of the Canadian Copyright Act RSC 1985 (the "Canadian Copyright Act"). The relevant part of that section provides as follows:

> "5(1) Subject to this Act, **copyright shall subsist** in Canada, for the term hereinafter mentioned, **in every original literary, dramatic, musical and artistic work** if any one of the following conditions are met:
> (a) In the case of a work, the author was, at the date of the making of the work, a citizen or subject of, or a person ordinarily resident in, a treaty country;"
>
> (emphasis added)

114. It will be seen that there is a similarity between the language in section 5(1) of the Canadian Copyright Act and sections 2(1) and (2) of the 1956 Act. It will be recalled that the latter provide:

> 2(1) **Copyright shall subsist**, subject to the provisions of this Act, **in every original literary, dramatic or musical work** which is unpublished and of which the author was a qualified person at the time when the work was made, or, if the making of the work extended over a period, was a qualified person for a substantial part of that period…
>
> 3(1) In this Act "artistic work" means a work of any of the following descriptions, that is to say,—
>
> (a) the following, irrespective of artistic quality, namely paintings, sculptures, drawings, engravings and photographs
>
> (2) **Copyright shall subsist**, subject to the provisions of this Act, **in every original artistic work** which is unpublished, and of which the author was a qualified person at the time when the work was made, or, if the making of the work extended over a period, was a qualified person for a substantial part of that period.
>
> (emphasis added)

115. The similarity between the language in section 5(1) of the Canadian Copyright Act and sections 2(1) and 3(2) of the 1956 Act arises because both statutes are closely based on the UK Copyright Act, 1911, Geo.6 5(1911) c.46 (the "1911 Act"). The originality standard under the 1911 Act and the 1956 Act are the same (see *Interlego A.G. v Tyco Industries Inc and Others* [1989] AC 219). In *Interlego* Lord Oliver (delivering the judgment of the Privy Council) at p.260C-D quoted with approval the words of Lord Atkinson in the Privy Council case of *Macmillan & Co Ltd v* Cooper (1924) 40 T.L.R. 186, 188 in the context of originality:-

> "it is the product of the labour, skill, and capital of one man which must not be appropriated by another, not the elements, the raw material, if one may use the expression, upon which the labour and skill and capital of the first have been expended. To secure copyright for this product it is necessary that labour, skill and capital should be expended sufficiently to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material."

116. As is the case in relation to the 1956 Act (as already addressed above), there is no statutory definition of "original" in the Canadian Copyright Act. The meaning of “original” under the Canadian Copyright Act was discussed at common law by Chief Justice McLachlin, of the Supreme Court of Canada, in *CCH Canadian Ltd. v. Law Society of Upper Canada,* 2004 SCC13 at para 16:

> "For a work to be “original” within the meaning of the Copyright Act, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work"

117. Applying the “skill and judgement” test to seismic data in *Encana*, Justice Eidsvik of the Alberta Court of Queen’s Bench made the following findings:

> ″78 In my view, based on the evidence presented, both the raw or field data and the processed data meet the "skill and judgment" test laid out by the Supreme Court in CCH and should be considered "original" artistic or literary productions in the scientific domain, therefore protected "works".
>
> 79 "Skill" is required to produce seismic field data because its production requires the "knowledge, developed aptitude and practiced ability" of the seismic crew. The planning stage involves various decisions, but the true creative effort occurs as the air guns create the sound that is recorded by the hydrophones and collected in a certain way to make it usable for the next stage of processing. The data is created, not merely collected, through the intervention of human skill.
>
> 80 The Plaintiff argued that data creation is akin to taking a photograph. I agree. In this case, the photograph is not just a quick snapshot; rather, it is one that requires careful selection of the location, angle of technological instruments (e.g. the size and depth of the airguns, the length and depth of the streamers, and the number and placement of hydrophones), and finally the filtering and refining of the product.
>
> 81 Dr. Wren's comparison is even more compelling - he suggests the creative effort compares to that of the conductor of an orchestra, who ensures that some instruments are played louder, or softer, or faster or slower, to make a beautiful creation. The same types of decisions are

made on board the seismic acquisition ship to obtain "beautiful" raw seismic data.

82 Judgment is evident in the production of field data through the multitude of decisions made by the seismic crew. The crew must have the "capacity for discernment or ability to form an opinion or evaluation by comparing different possible options." Mr. Paul Einarsson's evidence was helpful on this point. As he put it, the field data is analysed as it is being acquired and checked for its quality. To the extent that there are problems that could affect the quality beyond certain parameters, the collection process may have to be restarted with different parameters. Only skilled experts are able to make these decisions.

83 As for the processed data, the processors exercise skill and judgment in the decisions they make to create a usable product from the field data. The raw data is not simply pumped into a computer and a useful product comes out. The evidence is clear that the processed product can be quite different depending on the skill of the processor and that exploration companies have their favourite processors who create the best quality product for their purposes.

84 The fact that on a gross basis the product may be similar - like in cases where a geological formation is as big as Everest, to use the Defendants' example, does not take away from the fact that to get a more refined product, (i.e. one that can be relied upon by exploration companies for their exploration investment), the best image will be made by the processor with the most skill.

85 For all of the above reasons, I conclude that the seismic data is an "original" work.

86 I have considered the Defendants' arguments to the contrary but find none to be compelling. They argue that copyright cannot subsist if there are limited ways to express an idea; if the expression uses common industry practice; or, if the expression is in part utilitarian or determined by practical considerations. These suggestions come from various cases where originality was not found. They are all ways of saying that a work is not original. But these are not the tests for originality; the test is in CCH, as quoted above."

(my emphasis added)

118. The Defendant's position is that this decision should be treated by this Court (ie the Supreme Court of the Falkland Islands) with caution given that it was made in a different jurisdiction and that no evidence of Canadian law has been led in this case. It will be apparent, however, that there is a considerable similarity between the 1956

Act and the Canadian Copyright Act, and in relation to originality in terms of the case law concerning the 1956 Act (as already identified) and the *CCH* case. Set against that backdrop I regard *Encana* as a helpful illustration of the fact that a seismic survey may give rise to copyright protected works in the context of seismic data processing. However, the actual findings in that case are based on the evidence presented in that case, whereas the question of whether there is copyright in the Data is to be determined on the basis of the evidence that I have heard in this case and the application of the applicable principles under the 1956 Act as already identified.

E2(k): does the Data comprise works in respect of which copyright subsists?

119. GSI submits that the collection of data (i.e. the Data) amounts to a literary work, referring to section 48 of the 1956 Act which defines a literary work as including *"any written table or compilation"*. GSI also relies in this regard, on written reports produced including, in particular, Exhibit PE3 to the third witness statement of Paul Einarsson, namely a "Process Summary Report" of GSI which includes a summary of lines processed and an outline of processing parameters applied. It includes a section in respect of data "acquisition" identifying the source of the sound, parameters in relation to the cable (with cable length, numbers of groups, group interval), instruments and positioning, and a section on "processing sequence" setting out how the data is processed to reduce noise (with various specified steps including re-formatting of the SEG-D data and application of various filters). GSI also says that insofar as there are drawings, diagrams and alike, these constitute artistic works.

120. GSI points out that copyright subsists in tables or compilations if they are to be regarded as "original"; in other words, they have not been copied and result from the author's skill, labour and judgment in creating the copyright work. Such works exist following the investment of labour, skill and judgment. GSI relies upon the evidence of Paul Einarsson, Russell Einarsson and Allan Feir as leading to the conclusion that the Data that is the subject of this litigation is the product of "considerable skill and judgment" by reason of the acquisition and creation of the data, the processing of it into a more readily analysable form, which is then

manipulated, interpreted, and compiled into compilations, which can then be understood by a geophysicist.

121. Some of the works at issue were produced by those working for GSI and Precision (GSI's wholly owned subsidiary at the time that has since amalgamated into GSI) by planning, designing, monitoring, making choices and selections in setting up and creating the seismic data which in part utilizes computers for the tuned source array, recording systems and processing. The list of data at issue was identified by Mr Paul Einarsson as the list to be found in Bundle F/40.

122. In cross-examination of GSI's witnesses Mr Cormack, on behalf of the Defendant, explored the possibility that FOGL had specified much of the parameters for the survey, and that therefore they had a significant role in how the survey was conducted. Mr Paul Einarsson denied that this was the case (transcript 381/23), and said he was not sure that the parameters that they had specified were used in the conduct of the survey (transcript 382/12). Mr Allan Feir said that he did have conversations with FOGL but, *"we were handling the processing at our end"*, and the people at FOGL *"weren't involved in the production of the material"* and "*They had no input as to the actual parameters or processing"* (transcript 417/1-12).

123. I do not consider, based on a review of the documents relied upon by the Defendant, and the evidence given, that it is possible to conclude that any involvement of FOGL, or any other third party, was such as to detract from the works being produced based on the skill and judgment of GSI. In fact, on the evidence I have heard, FOGL do not appear to have been involved in the production of the material or to have had input as to the actual parameters or processing.

124. The Defendant explored with GSI's witnesses whether FOGL appointed a quality control person. Mr Russell Einarsson's evidence was that he did not know the answer to that but that he did not recall ever consulting with such a person or them ever having any say in the quality or the acquisition part of the survey (transcript 396/18-23), whilst Mr Allan Feir said he wasn't sure that he came to know of such a person, though it was possible such a person was involved without him being aware of it (transcript 416/3-12). Even if there was such a quality control

person, I do not consider that the evidence justifies the conclusion that there was any involvement which would detract from the work undertaken being the product of the exercise of skill and judgment by GSI and those acting on GSI's behalf.

125. In paragraph 8 of his third witness statement, Paul Einarsson stated that in relation to the creation, processing and re-processing of the seismic data he deferred to Allan Feir as to how the final reports and processed data to the Defendant came about (a point relied upon by the Defendant). However, he identifies at some length the activities which led to the creation of the works in which the data was set down, under sub-paragraphs (a) to (g) of paragraph 8 of his third statement in the following terms:-

> "a. Hiring of skilled, highly educated, and trained employees; ownership (at the relevant time), outfitting and operating a 90 meter specialized research ship (Russell Einarsson corrected my memory because I have previously referenced an 89 m ship whereas it was 90 m) with a value of something in the region of $50 -60m; equipping the ship with over $50m of seismic data source (sound generating) and recording equipment which utilizes a 6 -10 km long hydrophone containing streamer(s) deployed behind the ship; the obtaining of all necessary certificates, licenses, insurance, and regulatory requirements from local and international agencies to operate and conduct this sort of work; obtaining site specific permits and environmental approvals; the use of skill and judgement as well as research to place the survey lines, design the source and recording systems selected and then the parameters; the use of skill and judgement, knowledge of the subsurface, as well as testing and research to set the acquisition parameters and quality control limits for the source and receiver systems specific to the area ; obtaining financing or funding to pay for the costs of the survey, actual collection of the survey data in a dynamic environment; the use of skill, judgement as well as testing and research to have the proprietary and non -proprietary hardware and software needed to process the field data; skill, judgement and knowledge to select parameters, methods, and processes to create the best possible processed data; the marketing and promotion of those data to obtain pre-funding and late sales license revenues, knowledge and know how in order to create and negotiate license agreements to protect against piracy, breaches of confidentiality, and violations of Copyright in those data; securing (to maintain its confidentiality) storing and maintaining those data including periodic transcriptions to new media and reprocessing.
>
> b. Deployment of source and receiver systems in the water, followed by the activation of the source periodically based on the parameters set, and then the recording of the reflections from sub -surface acoustic boundaries by the

recording system, and then storing this unprocessed field survey data on tape or hard drive media.

c. Human involvement occurs in every process from the planning of the survey, the ship's crew to run the ship and acquire the survey, the processing of the data, to a marketing person delivering those data to the end licensee and obtaining a license agreement and all the steps in between.

d. Selection and arrangement occurs in selection of personnel, ship, equipment, placement of the lines, setting of acquisition parameters, collection of those data, and processing steps. When there are existing data acquired by the Plaintiff in a given area then reviewing that data can assist in placement of new lines to provide additional information on interesting prospective geologic features shown on the other lines. If there are little or no other data acquired by the Plaintiff in the area then other data from a client, reports, publications, well logs and synthetic seismograms, gravity or magnetic data, potential licensee input, or lines may be selected for ease of collecting and processing, such as tying in with lines previously collected or processed and well locations.

e. Most of the steps above involve the application of skill, judgement, and labour of some very highly trained and highly educated employees.

f. Depending on the equipment and software used on a particular survey GSI made use of recording systems, streamers, software for acquisition and processing, and hardware for processing. Some of the equipment used in the collecting and processing of data is proprietary. Even the ship used in data acquisition has unique design features and were built to specifications and designs created by GSI to acquire seismic data in harsh and remote environments, with unique and cost effective methods. The Plaintiff is the only company to work year round in the stormy Canadian North Atlantic and was the first if not the only to work year round in the stormy seas around the Falklands. Those data were very costly to acquire due to the location and very harsh sea conditions (the worst in the world our crew had ever seen) which significantly reduces production rates thus increasing costs of those data significantly. The winds and sea state contribute significant noise that has to be addressed in the processing of the acoustic imaging seismic data also driving up the time and effort in the processing phase.

g. Processing is really the final step to create the finished product where many hands touch those data and process it into a usable final product that can be viewed on a screen or printed on paper and the digital format can be loaded onto specialized workstations with powerful geophysical specific interpretation software . This phase was under the supervision of Allan Feir who has given a statement on the matter.
These workstations can obtain significant information from those data including rock properties, and many other attributes necessary in the job of determining prospects for oil and gas drilling. The final product shows an image generally of the sub surface of the earth like seeing the wall of the grand canyon. GSI used its wholly owned subsidiary Precision Seismic which

employed about 40 professionals to process this data using proprietary software and methods that we think provide us a competitive advantage."

126. Paul Einarsson also gave oral evidence in this regard during the course of answering supplemental questions in chief. In particular, he was asked to explain the process by which the Data that is listed in Bundle F/40 was created. His evidence in this regard was as follows (transcript 217/7- 224/13):-

A. That's a big undertaking. It tends to get minimized I find a lot the effort involved in purchasing a ship, purchasing tens of millions of dollars of equipment, putting the operation together, finding the skilled people and making sure they are trained, putting in place all of the safety aspects. Funding that whole operation, it's a massive undertaking that is very difficult, I think, for many people to even understand in running a company like this.

It's all funded by, in our case, the license revenues from the data. And so what's involved is you have essentially all the normal things that a company has, the administration, the financing of it, the operations, the human resources, all of the equipment maintenance and issues involved with the hardware and the ships themselves, which is no small undertaking. You have to have experts to deal with all of this and know what they're doing. And I'm proud to say we never had any safety issues in all the years we operated ships.

So we spend -- once you kind of have all of that,

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then you are in the process of planning a survey. In planning a survey, you have to understand all of the logistics, where you are going, how much fuel you are going to need, where people are coming from, where are they coming and where can you get supplies. All of

that has to be arranged.

Then you have the actual technical aspects which are we have a tuned air source array. So when you are conducting seismic data, you actually design the sound that is put in the water. It's very much like a music studio, you are creating the sound which will then later be recorded.

In our case we are not making music which is a direct recording of what we create; we are recording the reflections of that sound that we designed in a specific way. And those reflections come from every single subsurface layer, and it's a massive amount of data. And that is used essentially to create an image like looking at the Grand Canyon, you can see all the layers of the earth and their orientation and so forth.

But it's more than that. You can also get raw properties, whether it's a liquid, a gas, how dense the material is. And that all comes from a study of the velocities. So the sound will move at different speeds through the materials that it goes through. The harder material, the speed of sound is faster; softer material or a liquid, it's slower.

So there is a lot of information that can be obtained from the seismic data making it extremely valuable information about the subsurface.

So you design this source array. Then you determine the configuration of it. You determine the configuration of the recording system. So there are many options and selections. The types of receivers you use, we even have now multi-components; so you can choose some three different components, you can choose two, you can choose one. You can choose using multiple streamers, you can use one streamer. The distance of the streamer from the ship and the source, the depth of

it, all of these things have science behind them and judgment and choices that have to be made otherwise you will end up with basically garbage. You will end up with noise.

We have people that have 34 years of experience, 20 of them, that do very discrete little pieces of this. So it's a highly complex operation. So once you set all these parameters, the configuration of the equipment, then you have on the recording system itself about 40 different parameters you can set.

So those parameters are set based on the geologic conditions that you are dealing with: Is the subsurface -- is the bottom of the ocean hard rock, or is it some soft sand that's 20 metres thick? Is the water 3,000 metres deep or is it 30 metres deep? So

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all of these things have to come into play. And then also the depths of the sediments that you are acquiring in, that will impact the choices and selections that are made. And these are based on the experience of the people designing the survey and its location.

And so then you get into the actual creation of the data on the ship. You are then presented with many choices and challenges along the way. You have a storm. You have a bunch of surface noise for one reason or another. You have currents. And all of these can effect the streamer. For example it can go crooked, and in some cases that is an issue that has to be corrected for. And in some cases it will go beyond tolerance limits that we have in the industry that may degrade the quality of the data.

So we have a number of judgment calls during the acquisition process itself where choices and selections

have to be made, changes, and you have to in the field address these issues.

Now you have a what we call field data. And it's in a format -- there is a universal format in our industry, we call it SAGD [SEG-D]. And that data then has to be verified that it's good and that you also have all the location information properly attached to it so that you know where the data is because it's no good to have the data and not have good positioning and navigation with it.

So all of this has to be checked and quality controlled. Then it is sent to a processing centre. And essentially the easiest way to explain processing is, and it way oversimplifies it, is it does two things.

Number 1, as my learned counsel explained earlier, you are trying to remove sources of noise. There is noise inherent in the process of acquiring the data because you are on a ship. And you have wave noise, you could have rain. There's all kinds of -- ship could go by you. You could have another seismic survey going on, which is something we had happen here in the Falklands that was occurring in Argentina and was causing interference with our survey. So you have to make judgment calls there about can you remove that and will you have a product that is of sufficient quality, it's good quality. It's acceptable.

So in the data processing, you are removing essentially noise. And it can come from many different sources. And you have to identify that, and then you are using tools to -- and filters and different tools to attenuate that. And that essentially means -- one of the things Ms. Lemmens mentioned is the concept of stacking. Essentially what stacking is is think of

taking a picture of that desk 100 times. And her fingers are moving, typing, and if you take the picture 100 times and you overlay all 100 of them, you will

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eliminate that movement. That's how we eliminate noise. So you are able to identify what is the real picture that you are trying to capture and what is the noise you are removing. So that's what's called stacking.

There are other very complicated aspects involved here too in that with a picture, for example, that was given before, you take a picture and you are getting direct light rays off of a subject that you are putting on to film.

With seismic data it's much more complex. You have a sound wave that is coming from near the surface. It's going through some amount of water, which can change, depending on the water depth even along one line. Then it has to go through 10, 50, 60 different layers of earth containing some gas, some liquids, different densities.

So that wave has to go down through there. And at each acoustic interval, a small percentage of that sound wave is reflected back to one of more of these receivers at the surface spread out for 6 kilometres behind the ship.

So you -- what happens with that signal is it gets damaged. It gets a lot of -- it has a lot of issues that happen to it because it not only goes down through all these layers, it's got to come back up. So unlike a picture where you are getting a direct reflection

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into your film, we have something much more complicated.

So one of the things you have to do in the processing is you are also correcting for actually where something is. So the original picture on the field data may show this book to be here, but in reality it's over here.

So these are some of the things that we have to correct for. And some of it is using principles of physics. And some of it is knowledge and know-how because we know that when a wave goes through so much water, you get -- you have this much correction you have to deal with. Or if it goes through these subsurface layers.

So it's a very complicated process. It is extremely competitive in our industry. There are 10 or 15 different pieces of software that will be utilized that all require skill and input and selections and choices to try and get the most out of this seismic data. And some of these programs are proprietary. So there is a lot of competition in that area. That's why you have this new processing that sometimes occurs with data from time to time.

So then you get to a final product, which is these lines here."

127. I accept the evidence of Mr Paul Einarsson in his witness evidence and his oral evidence, as quoted above, in terms of what was involved in the collection of seismic data and its processing resulting in the Data. I consider he was in a position to give this evidence as the senior manager of GSI. I reject the submission that I should treat him as an unreliable witness so far as relates to this aspect of his evidence. On the contrary, having heard his evidence, and assessed that evidence first hand, I consider his evidence on such matters to be reliable.

128. I also received evidence from Mr Russell Einarsson, a Senior Vice-President with GSI who was in charge of the day-to-day ship operations of the Falkland Island marine surveys carried out by GSI, and he explained what was involved in survey preparation and GSI's surveying to collect the raw data. Whilst this did not add greatly to the evidence given by Mr Paul Einarsson, I accept Mr Russell Einarsson's evidence in this regard as to what was involved in such matters.

129. Mr Allan Feir also gave evidence on GSI's behalf. He was the most senior marine processor and was in charge of all the processing done by Precision. He explained at paragraphs 7 to 10 of his witness statement how the raw field data (that is SEG-D data) was processed to produce the SEG-Y data.

130. The Defendant submits that in relation to the coming about of the reports and processed data, Paul Einarsson and Russell Einarsson defer to Allan Feir. Whilst that is to an extent true (as reflected in paragraph 8 of Mr Paul Einarsson's third witness statement), Mr Paul Einarsson did give evidence both at paragraph 8 of his third witness statement and in his oral evidence (both as quoted above) as to the obtaining and processing of the seismic data. In relation to the evidence of Mr Feir, it is said by the Defendant that Allan Feir speaks only to the first 43 pages of PE3, so it is said that the remaining 113 pages of PE3 are not spoken to at all. It is also submitted that in relation to the first 43 pages of PE3, the evidence of Mr Feir is scant to a point characterised as *"well beyond inadequacy"*. Those pages contain a variety of different text, maps, tables and charts, many of which are evidently computer generated. It is said that Mr Feir should have been asked by GSI to address them one by one and to explain the manner of generation of each of them, which would not have been a big exercise for him but would have assisted in assessing the question of copyright.

131. So far as the seismic lines themselves are concerned, and in relation to Mr Paul Einarsson's description of the document at F/40 as a summary of the Data followed by lists of each line that comprise each of three surveys (transcript 215/24-216/4), the Defendant suggests that the evidence that Mr Paul Einarsson then gave in relation to this (which I have quoted in full above) is to be characterised as "*very general evidence*".

132. More generally, it is said by the Defendant that the standard of originality required for copyright is highly fact specific - giving as an illustration the case of *MacMillan v Cooper* (1924) 40 TLR 186, 36-37. That is obviously right. It is also said that particular care is needed when the evidence is dealing with computer generated works - with reference being made to the case of *Express Newspapers plc v Liverpool Daily Post and Echo Plc* [1985] 1 WLR 1089 at 1092F-1093G (a case in which it was recognised that computer generated works were covered by the 1956 Act and owned by the person operating the computer). In the present case, the evidence is that computers were used including the use of various algorithms, those computers being owned by GSI or those acting for them. Words thereby generated are capable of being subject to copyright.

133. Whilst it is right that GSI could have adduced more evidence as to the detail of the stages of creation of examples of each type of work in which copyright was claimed, and whilst I agree that Mr Feir's evidence could have been more detailed as to the processing of the data, I find based on the evidence that I have heard, including that which I have referred to above, that the Data (including the SEG-Y data) are compilations that are to be regarded as original in that they have not been copied and are the product of the exercise of considerable skill and judgment in the acquisition and creation of the data, the processing of it into a more readily analysable form, and in the data's manipulation, interpretation and compilation through both human intervention and the use of computers. In such circumstances, I find that the Data is a series of works, some computer generated some not, all of which are literary and/or artistic works protected by copyright within the Falkland Islands pursuant to the 1956 Act.

134. In reaching this conclusion I have had regard to the evidence before me and the test of originality in the 1956 Act without regard, in the first instance, to the particular findings of Justice Eidsvik of the Alberta Court of Queen's Bench in the *Encana Corp* case that I have already referred to and quoted. However, on re-visiting this decision and the findings there made (at paragraphs 78 to 85 of the judgment, as quoted above), I agree with those findings and the conclusion reached (based on his description of the evidence) and I find that they are equally apt to

cover the works created by GSI, and that the reasons that Justice Eidsvik gives as to "originality" based on those facts apply equally to the Data created by GSI under consideration in this action. This is, perhaps, unsurprising, given that the judge is addressing the practices of GSI as to seismic data collection and processing in that case as well.

135. At paragraph 18 of the Defendant's Closing Submissions the Defendant does not dispute that the Data was in general terms generated by equipment operated by employees of GSI (working in the course of their employment) or subcontractors of GSI engaged on terms which entitle GSI, as between it and those subcontractors, to any copyright arising. Whilst the Defendant again submits that there has been a failure to identify and speak to each of the works for which copyright protection is sought and therefore how ownership comes to be vested in GSI, I am satisfied, and find, that GSI are the authors of the works within the meaning of section 4 of the 1956 Act, the works being created by equipment operated by employees of GSI (working in the course of their employment) or by such employees themselves, or by subcontractors of GSI (Precision) engaged on terms which entitle GSI, as between it and those subcontractors, to the copyright arising. I am also satisfied, and find, that the copyrighted works of a Canadian company are protected under the 1956 Act in the Falkland Islands.

136. I address the central question of the effect of the terms of the Exploration Licence on such copyright in section H2 below.

F. Confidentiality

F1: Introduction

137. GSI submits that the Data is confidential and that the Exploration Licence and Model Clause 17(2)(e) do not relieve the Government of the obligation to keep the Data confidential which GSI says arises both under the Exploration Licence's terms and because it is said that the Government is under an obligation to maintain the confidentiality of the Data regardless of the interpretation of the Model Clauses. In contrast, the Defendant submits that confidentiality is provided for and regulated by the express terms of the Exploration Licence to the extent, and subject to, the limitations, stated in those terms, with the consequence that at the end of the five-

year confidentiality period, the obligation to maintain confidentiality is at an end and pursuant to Model Clause 17(2)(e) the Data may be published or disclosed to any person.

138. I address the issues that arise under Issue 2 in relation to confidentiality in the context of my consideration of the Exploration Licence and Model Clause 17(2)(e). In what follows I address the applicable principles in relation to the law of confidence.

F2 Applicable Principles re: the law of confidence

139. There was a large measure of common ground as to the law of confidence and general principles concerning confidentiality. What follows below is largely based on the document on confidentiality agreed by both parties.

F2(a): The Nature of Confidential Information

140. The law of confidence is concerned with secrets of any kind. Whilst other intellectual property rights such as patents or copyright are particularly useful when the relevant subject matter is made public by the owner, the law of breach of confidence gives protection to things not released into the public (or part of the public) domain.

F2(b): General principles of Confidentiality

141. There are two broad requirements in order for information to be protected by the law of confidence:

(a) the information must "have the necessary quality of confidence" (*Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413 per Lord Greene MR at 415);

(b) the information must be provided in circumstances which impose an obligation of confidence (*Coco v AN Clark (Engineers) Ltd* [1969] RPC 415).

142. The test as to whether the information has the necessary quality of confidence is provided at common law and has been expressed as follows, "*…there must be some product of the human brain which suffices to confer a confidential nature on the information"* (*Coco v AN Clark (Engineers) Ltd* [1969] RPC 415 at 47 per Megarry J.). It is the substance of the information which is relevant to the application of this test. For example, merely describing information as "confidential" will not make it confidential (*Dalrymples Application* [1959] RPC 449).

143. In terms of the circumstances which impose an obligation of confidence, an obligation of confidence can be express or implied and there are three main circumstances in which it can arise:

(a) it may be imposed by the terms of a contract;

(b) it may be implied because of the circumstances surrounding the provision of the information; and

(c) it may be implied because of the relationship between the parties e.g. if they are in a fiduciary or quasi-fiduciary relationship.

144. In *Attorney-General v Times Newspapers Ltd* [1990] 1 A.C. 109, 281 Lord Goff stated:

> "I start with the broad general principle (which I do not intend in any way to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others. I have used the word "notice" advisedly, in order to avoid the (here unnecessary) question of the extent to which actual knowledge is necessary; though I of course understand knowledge to include circumstances where the confidant has deliberately closed his eyes to the obvious. The existence of this broad general principle reflects the fact that there is such a public interest in the maintenance of confidences, that the law will provide remedies for their protection.
>
> I realise that, in the vast majority of cases, in particular those concerned with trade secrets, the duty of confidence will arise from a transaction or relationship between the parties - often a contract, in which event the duty may arise by reason of either an express or an implied term of that contract. It is in such cases as these that the expressions "confider" and "confidant" are perhaps most aptly employed. But it is well settled that a duty of confidence may arise

> in equity independently of such cases; and I have expressed the circumstances in which the duty arises in broad terms, not merely to embrace those cases where a third party receives information from a person who is under a duty of confidence in respect of it, knowing that it has been disclosed by that person to him in breach of his duty of confidence, but also to include certain situations, beloved of law teachers - where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by."

F2(d): Obligations of confidence created by contract

145. This is the most common means by which obligations of confidence are created and such obligations are generally enforceable in accordance with their terms (*HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776), unless they are signed under duress (*R v A-G for England and Wales* [2003] UKPC 22) or in restraint of trade (*Herbert Morris Ltd v Saxelby* [1916] 1 AC 688).

146. Confidentiality in the contract sense is guided by ordinary principles of contractual construction - the most recent restatement being that of Lord Neuberger PSC in *Arnold v Britton*, supra at [15], referring to what was stated by Lord Hoffmann in *Chartbrook*, supra at [14] that *"[T]he question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean."*. It is for the court to identify who the reasonable person is in this instance, and what background knowledge he/she would have available to them (see *IBM Holdings Ltd and anor v. Dalgleish and ors* [2014] EWHC 980 (Ch) at [220]).

147. In terms of the implication of terms, the latest re-statement of the applicable principles is that of Lord Neuberger PSC in *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and another* [2016] A.C. 742 at [16] – [20].

148. An example of an obligation of confidence created by contract is the case of *HRH Princes of Wales v Associated Newspapers Ltd*, supra. In that case, an ex member of the staff of the Prince of Wales, whose employment contract specified that any information she received during her employment regarding the Prince was

subject to an obligation of confidence and not to be disclosed, provided information to Associated Newspapers. The High Court and the Court of Appeal held that the obligation of confidence was enforceable and the Prince of Wales was granted an injunction and an inquiry as to damages.

F2(e): Obligations of confidence in equity

149. The test has been expressed as being whether "*any reasonable man standing in the shoes of the recipient would have realised that upon reasonable grounds the information was being given to him in confidence"* (*Coco v AN Clark (Engineers) Ltd* [1969] RPC 415).

150. An example of an implied obligation of confidence is the case of *CF Partners (UK) LLP v Barclays Bank plc and ors* [2014] EWHC 3049 (Ch). In that case, a corporate customer had sought a bank loan to finance a takeover bid. The bank then misused confidential information supplied by that corporate customer in support of the loan application by exploiting the acquisition opportunity for itself. The court held that a duty of confidence, whether arising in equity or contract, related to the protection of information which the recipient knew or ought to have known would be regarded as confidential. The court considered the basic attributes which information had to contain in order to be treated as confidential and found that the customer had given valuable information to the bank which gave rise to a duty of confidence.

F2(e): Obligations of confidence arising from the relationship between the parties

151. A wide number of relationships can give rise to an obligation of confidence including employer and employee (*Vestergaard Frandsen A/S and others v Bestnet Europe Limited and Others* [2009] EWHC 657 (Ch), married couples, doctor and patient, solicitor and client, and patent agent and client (see *Halsbury's Laws of England, Confidence and Informational Privacy*, (Volume 19 (2011)) 1(19)). The key commonality between all these relationships is a duty of good faith.

F2(f): Co-existence of obligations of confidence arising in equity and by contract

152. The obligation of confidence which arises in equity can co-exist with the obligation of confidence that is created by contract. In *CF Partners (UK) LLP v. Barclays Bank plc and ors* [2014] EWHC 3049 (Ch) Hildyard J stated at [130]-[133] as follows:-

> 130 Contractual obligations and equitable duties may co-exist: the one does not necessarily trump, exclude or extinguish the other: see *Robb v Green [1895] 2 QB 315* and *Nichrotherm Electrical Company Ltd and others v Percy [1957] RPC 207 (both in the Court of Appeal).*
>
> 131 However, where the parties have specified the information to be treated as confidential and/or the extent and duration of the obligations in respect of it, the court will not ordinarily superimpose additional or more extensive equitable obligations: and see *per* Sales J in *Vercoe and Pratt v Rutland Fund Management Ltd [2010] EWHC 424 (Ch)*, who found in that case that the duty of confidence was confirmed and defined by the contract, and observed (at [329]):
>
> > "Where parties to a contract have negotiated and agreed the terms governing how confidential information may be used, their respective rights and obligations are then governed by the contract and in the ordinary case there is no wider set of obligations imposed by the general law of confidence: see e.g. Coco v Clark at 419."
>
> 132 Nevertheless, that does not preclude wider equitable duties of confidence in circumstances that are not ordinary. For example, as it seems to me, a circumstance could arise where the obligations of the parties in respect of information with the quality of confidentiality are not clearly prescribed or governed by the contractual terms but where the use of certain information would plainly excite and offend a reasonable man's conscience. In such circumstances, as it seems to me, an equitable duty not to use the information having that quality would be recognised, even if that went further than the definition, duration or restraint prescribed by the contract.
>
> 133 Put another way, whilst it will not usually be unconscionable to use information in conformity with, or in a manner that does not offend, the terms consensually agreed, and the contract will shape the commitment, contract does not necessarily assuage conscience, and equity may yet give force to conscience: see *per* Simon Brown LJ (as he then was) in *R v Department of Health, Ex p Source Informatics Ltd [2001] QB 424* at [31]; see also the emphasis on conscience as being the basis of both the duty and any action for its enforcement or vindication *per* Lord Neuberger of Abbotsbury PSC in *Vestergaard Fraudsen A/S v Bestnet Europe Ltd and others [2013] UKSC 31; [2013] 1 WLR 1556*."

F2(g) Protected Information

153. As to what is protected information, the approach in the decision of Sir Robert Megarry V-C in *Thomas Marshall Ltd v. Guinle* [1979] Ch. 227, expressed in the context of an employer/employee relationship, is of general application. He stated (at 248 E-H):

> "If one turns from the authorities and looks at the matter as a question of principle, I think (and I say this very tentatively, because the principle has not been argued out) that four elements may be discerned which may be of some assistance in identifying confidential information or trade secrets which the court will protect. I speak of such information or secrets only in an industrial or trade setting. First, I think that the information must be information the release of which the owner believes would be injurious to him or of advantage to his rivals or others. Second, I think the owner must believe that the information is confidential or secret, i.e., that it is not already in the public domain. It may be that some or all of his rivals already have the information: but as long as the owner believes it to be confidential I think he is entitled to try and protect it. Third, I think that the owner's belief under the two previous heads must be reasonable. Fourth, I think that the information must be judged in the light of the usage and practices of the particular industry or trade concerned. It may be that information which does not satisfy all these requirements may be entitled to protection as confidential information or trade secrets: but I think that any information which does satisfy them must be of a type which is entitled to protection."

F2(h) Establishing a breach of confidence

154. There are two ways in which a breach of confidence can occur:-

(a) Unauthorised disclosure of the information to others;

(b) Using the information for an unauthorised purpose

By obvious implication, in both cases there will be no breach if there was authorisation.

155. An example of a breach of confidence by unauthorised disclosure is provided by the case of *Catnic v Evans* [1983] F.S.R. 401. In that case, an invention which had not yet been patented was shown to individuals under a duty of confidence.

156. There are a number of situations where a person can make unauthorised use of confidential information and thereby commit a breach of confidence.

157. An example of unauthorised use of information is provided by the case of *Personnel Hygiene Services Ltd v Rentokil Initial UK Ltd* [2014] EWCA Civ 29. In that case, the claimants provided information to the defendants subject to a contractual clause that the information was to be treated as confidential and not to be disclosed or used for any purposes other than authorised purposes, as the claimants had been considering becoming a sub-contractor of the defendants. The information provided included customer lists. The defendants used these customer lists to write to the claimants' customers suggesting that they move their business to the defendants and the court subsequently granted a permanent injunction.

F2(i) Defence to a claim for breach of confidence

158. Defences to a claim for breach of confidence include reliance on any limitations of the scope of any duty of confidence (contractual or otherwise) - ie disclosure that is permitted, for example by contract or that it is outwith any confidence in equity, as well as defences such as waiver, estoppel and acquiescence.

159. There are also certain other circumstances which will give rise to a defence to a claim for breach of confidence. These include:

(a) That a claim will be defeated where the disclosure was in the public interest (*Lion Laboratories v Evans* [1985] QB 526). In that case it was held that there was an established defence of public interest to actions for breach of confidence that was not limited to cases of wrongdoing by the plaintiffs, though it was held that there was a wrongdoing by the plaintiff. If the court decides that such a defence can be raised it then must go on to weigh the competing interests of preserving the rights of individuals and organisations to maintain secrecy of confidential information against the interest of the public to be informed of matters of real public concern. Examples of real public concern include the exposure of crimes or other wrongdoing that endangers the public. GSI submits that this case, at most, suggests the possibility of a defence to breach of confidence where there is no wrongdoing of a plaintiff. GSI also

denies that the principle extends more widely than the examples given or that it would apply to disclosure of the Data in this case. I do not consider it necessary to explore the boundaries of this defence in the circumstances that arise in this action.

(b) Circumstances permitted by statute (see *Halsbury's Laws of England, Confidence and Informational Privacy*, (Volume 19 (2011)). I consider this turns on the construction of the statute or statutory provision in question rather than being confined to any particular circumstances (such as disclosure to public bodies or public servants as advocated by GSI).

(c) Disclosure made in order to protect a legitimate interest (*Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461; *Westminster International BV v Dornoch BV* [2009] EWCA Civ 1323). I do not consider it necessary to explore the boundaries of this defence in the circumstances that arise in this action.

G The approach to interpretation of the Licence and incorporated Model Clauses

G1: Introduction - GSI's previous stance

160. There has been much debate between GSI and the Defendant as to the applicable principles to be applied when interpreting or construing provisions in the Licence, and in particular the incorporated Model Clauses. For reasons that will become apparent I do not consider that anything turns on this debate in the context of the interpretation (or construction) of Model Clause 17(2)(e) itself as I consider that the provisions of the Licence are clear in their meaning. However, I will address the matter as GSI submits that it impacts on other issues (specifically whether there can be, and was, the granting of a copyright licence to the Defendant by Model Clause 17(2)(e) if the Model Clauses are construed as a public law instrument). For its part the Defendant submits that the answers to the issues are the same whether the Model Clauses are construed as a public law instrument or in accordance with contractual principles of construction.

161. GSI's stance as to the approach to be adopted has changed fundamentally during the history of the action. In their original Submissions for trial dated 6 March 2015 (the "Original Opening Submissions"), served for a trial fixed to take place on 23-27 March 2015, GSI advocated a contractual construction of the Model Clauses, for example at paragraphs 54 and 66, by reference to principles of objective contractual construction, implied terms and commercial common sense. It was also Mr Paul Einarsson's evidence in his third statement at paragraph 9 that, *"contracts which have been entered into (and which I refer to below) were entered into between the Plaintiff"* and the Defendant (emphasis added). He also refers at paragraph 12 of that statement to the *"original licence agreement"* and at paragraph 60 of that statement to "*the contracts in question"* (emphasis added). When Mr Einarsson came to give his oral evidence in chief before me in October 2016 he said that he *"did not like the way [his] previous counsel referred to this as a contract or a licence"*, he said *"These are permits that we normally deal with. That's how I would have referred to it"* [transcript 244/18]. He confirmed, however, that he had signed his statement which was in the terms I have quoted.

162. The trial in the event did not take place in March 2015 and it was re-fixed and heard before me in October 2016. Due, I understand, to unavailability of the lawyer previously acting for GSI at Pillsbury Winthrop Shaw Pittman LLP ("Pillsbury") for the re-fixed dates, conduct of the action was taken over by Borden Ladner Gervais LLP with Ms Matti Lemmens and Ms Leah Mangano acting on GSI's behalf. In the Revised Pre-Trial Submissions dated 26 September 2016 the Original Opening Submissions were heavily amended, and GSI's case re-cast. I would note in passing that permission has neither been sought nor obtained to amend the Statement of Claim so far as that is necessary in relation to any of the arguments now advanced by GSI. Amongst other matters all references to the Licence and Model Clauses being construed by reference to principles of contractual construction have been deleted, and it is now submitted that the Licence and incorporated Model Clauses are public law instruments, and that principles of statutory interpretation and legal policy apply.

163. Whilst it is open to GSI to perform the above *volte face*, and whilst ultimately it is a question for consideration and determination what the nature of the Licence and incorporated Model Clauses is, and whilst the stance or otherwise of a particular

party is irrelevant when answering that question, GSI's previous stance is consistent, if nothing else, with the facts that there are aspects of the Licence (specifically the Model Clauses) which contain reciprocal rights and obligations upon both the Defendant and GSI of a nature often found in contracts.

G2: The nature of the Licence and Model Clauses

164. For its part the Defendant recognises that it has been held that licences under a statutory regime may more naturally be regarded as public law instruments and not as contracts referring to *R (on the application of Data Broadcasting International Limited) v The Office of Communications* [2010] EWHC 1243 (Admin). In that case at paragraph [88] Cranston J stated:-

> "88 In my view these licences are not contracts. A contractual analysis distorts their juridical character. The licences are public law instruments. They constitute statutory authorisation permitting the licensees to undertake activities which would otherwise be unlawful and, in this case, place them under particular obligations, breach of which exposes them to the risk of the imposition of statutory financial penalties or ultimately to revocation of the licenses. In granting them, the licensing authority acts pursuant to its statutory duties and functions, and there is no intention to enter into any private law legal relations with the licensees. There is no express agreement between the parties in the contract sense. In the main the conditions in the licences are derived directly from statutory provisions."

165. A licence is the legal mechanism allowing something to be done that is required by the general law to be officially authorised. It is, however, also the product of the voluntary acts of the parties to the license. The fact that a licence is granted under, and in accordance with, legislation does not make it legislation or any other form of law - see *Floe Telecom Ltd v Office of Communications* [2009] Bus LR 1116 at paragraphs 103, 104 and 107, where Mummery LJ stated as follows (in considering whether the *Marleasing* principle of compliant construction to EU Directives applied to the licence in that case):

> "103 The decision of the national regulatory authority to grant a licence and the carrying out of that decision is an administrative act done under and in accordance with the law. A licence is obtained to do things which it is

unlawful to do without that licence. It is the legal mechanism for authorising something which is required by the general law to be officially authorised.

104 A licence is also the product of the voluntary acts of the parties to the licence. The person who requires the licence applies to the body responsible for issuing it. That body decides whether to grant it or not and on what terms and conditions. The fact that that process is prescribed by law does not make the product of the process in the form of the licence part of that body of law or rules to which the Marleasing principle is applicable.

105 This was made clear by Lord Nicholls in *White v. White and the Motor Insurers' Bureau [2001] UKHL 9; [2001] 2 CMLR 1* at paragraph 22.

> "The present case does not involve legislation. Despite the contrary argument submitted to your Lordships, I do not see how the Marleasing principle, as such, can apply to the interpretation of the [Motor Insurers Bureau] agreement…The Marleasing principle cannot be stretched to the length of requiring contracts to be interpreted in a manner that would impose on one or other of the parties obligations which, Marleasing apart, the contract did not impose. This is so even in the case of a contract where one of the parties is an emanation of government, here, the Secretary of State. The citizens' obligations are those to which he agreed, as construed in accordance with normal principles of interpretation."

106 That was a case in which the agreement was intended to implement the relevant requirements of Community law: see paragraphs 23 and 46. I note that White v. White and Pfeiffer (see above) were considered by the Court of Appeal on 21 November 2008 in McCall v. Poulton & ors [2008] EWCA Civ 1263 . The Court upheld the decision of the County Court Judge to refer to the Court of Justice questions whether Marleasing applies to the Motor Insurers Bureau (MIB) Agreement and the question whether the Bureau is an emanation of the State. In that case the MIB Agreement was relied on as fulfilling the obligation of the member state under EC law and the Court held that it was arguable that the Marleasing principle should apply to it. Hence the reference to the Court of Justice.

107 In this case the licence is a permission granted on terms laid down by the Secretary of State and accepted by Vodafone. The fact that it is granted under and in accordance with legislation does not make it legislation or any other form of law. Ms Carss-Frisk argued that it is wrong to assume that legislation and administration are fundamentally different forms of power and that there is only a "hazy borderline" between them, so that there is a large area of overlap (see Wade on Administrative Law 9th Edition at pages 857-8). But, as also written in Wade, there are obvious general differences between legislation and administration. The licence, which binds only the parties to it and can even be revoked for non-payment of the fees provided for in it, cannot reasonably be described as law caught by the Marleasing principle."

166. The fact that there is some element of negotiation (which is a characteristic of a contract) does not, in itself, mean that what is being construed is a contract as

opposed to a public law instrument. Thus, in *Lambert and another v Cardiff County Council*, [2007] EWHC 869, HHJ Hickinbottom (as he then was) considered whether a series of foster parent agreements between the plaintiffs and the defendant could be characterized as contracts. On the facts of *Lambert*, foster parents had to apply under the applicable legislation and be approved by the defendant council before they could enter into specific foster parent agreements. The form and content of the foster parent agreements themselves were largely prescribed by the regulations, although the parties did add several additional terms which were beyond the scope of the regulations.

167. The court held that the foster parent agreements could not be construed as contracts. At paragraph 114 the court affirmed the reasoning in *W v Essex CC* [1998] 2 FCR 269 at 50-51, in which a similar foster parent agreement was not considered a contract:

> [50] There are, in my judgment, a number of reasons why the plaintiff's claim in contract must fail. First, although the Specialist Foster Carer Agreement had a number of features which one would expect to find in a contract, such as the payment of an allowance and expenses, provisions as to national insurance, termination and restriction on receiving a legacy or engaging in other gainful employment and other matters to which the judge has referred…, I do not accept that this makes the agreement a contract in the circumstances of this case. A contract is essentially an agreement that is freely entered into on terms that are freely negotiated. If there is a statutory obligation to enter into a form of agreement the terms of which are laid down, at any rate in their most important respects, there is no contract: see *Norweb Plc v Dixon* [1995] 1 WLR 636, at page 643F.
>
> [51] In *S v Walsall Metropolitan Borough Council* [1985] 1 WLR 1150 the question was whether foster parents were the agents of the defendant council who had placed the child in care. Oliver LJ, with whose judgment Balcombe LJ agreed, reviewed the statutory provisions which are similar to those relevant in this case. He said, at page 1154F, that the statute and the regulations "provide a statutory code and they underline the fact that the whole of this area is covered by a complicated and detailed statutory scheme". And later he said, at page 1155E, that the "relationship between the child and the local authority, and indeed between the child and the foster parents, is one regulated simply and solely by the provisions of the statutory scheme". It is true that he does not include the relationship between the foster

> parents and the council as being so regulated; but it must, in my judgment, follow. The contents of the agreement are strictly laid down in the regulations and cannot be varied. The remuneration is set by the statutory scheme and cannot be freely negotiated."

168. At paragraphs 117 and 129 HHJ Hickinbottom further stated:

> "[117] However, in any event, even if W were not binding upon me, I would respectfully adopt its reasoning. The February 1991 and May 1995 Agreements contained primarily provisions required by the respective statutory schemes. Stuart-Smith LJ allowed for the fact that here might be some provisions in the agreement that were not so mandated. These agreements were not private law contracts. The relationship between authority and carers is not regulated by private law, but by the comprehensive statutory scheme, of which these agreements formed part."
> ...
>
> [129] As indicated above ([114]), Oliver LJ concluded that, far from there being a contract of employment between authority and foster parent, there was no contract at all--the relationship between them being one governed by statute."

169. In *Oceangas (Gibraltar) Ltd v. Port of London Authority (The Cavendish)* [1993] 2 Lloyd's Rep 292, the Court determined whether a piloting agreement made pursuant to the *Pilotage Act 1987* could be construed as a contract. The *Pilotage Act 1987* required that a harbor authority provide pilotage services where the harbor authority considered them necessary. On the facts, a ship owned by the plaintiff incurred damage whilst being operated by a pilot provided by the harbor authority. The Court found that such an agreement could not be considered a contract. Specifically, all of the terms of the agreement were statutorily imposed, and, other than the plaintiff requesting and paying for services, the agreement existed strictly to comply with statutory obligations.

170. In *Norweb PLC v Dixon* [1995] 1 WLR 636 the court determined whether an electricity tariff customer’s agreement for electricity supply with a public electricity supplier could be construed as a contract. The Electricity Act 1989 required a public electricity supplier to provide electricity to a premises upon the request of a tariff

customer. On the facts, there was a dispute over the tariff customer's payment for electricity delivered by the public electricity supplier pursuant to such an agreement. In order to resolve this dispute, the Court had to determine whether an agreement for the supply of electricity between a tariff customer and a public electricity supplier could be characterized as a contract. Ultimately the Court found that such an agreement could not be characterized as a contract (643 F). Specifically, the Court found this to be the case for two reasons. First, the supplier was legally compelled to enter into the agreement with the tariff customer pursuant to the mandatory wording of the Electricity Act 1989 (643 G). Secondly, the Electricity Act 1989 created a complete code for the terms of the agreement, including the price to be paid, expenses incurred and other similar terms; there was no room for the parties to negotiate extra terms (643 H).

171. In *Rushton v Worcester City Council* [2002] HLR 9, the Court decided whether a tenant's exercise of a 'right to buy' pursuant to the Housing Act 1985 could be construed as a contract. The Housing Act 1985 gave the tenant a right to purchase a piece of property from the Worcester City Council for a discounted price. The Housing Act 1985 required that a tenant apply for such a "right to buy", following which the Worcester City Council was obligated to provide the tenant with a notice setting out a discounted purchase price and other terms required by the Housing Act 1985. The House of Lords held that the exercise of the "right to buy" could not be construed as a contract (at [57]). Specifically, the Court found that the *Housing Act 1985* prescribed a complete set of terms, including price and specific procedure, such that the parties could not negotiate additional terms.

172. In support of the Licence being regarded as contractual in nature the Defendant refers to the fact that the Model Clauses contain many provisions that are characteristic of a contract - including Clauses 2 (governing law and jurisdiction), 6 (prohibition of assignment), 19 (indemnity), 21 (arbitration), 23 (continuance in force), 25(1) ("this Licence represents the entire agreement of the parties") and 25(2) ("no variation in the provisions of this Licence shall have effect unless it is in writing and it is signed by the Governor"). However these are, as GSI point out, common features of contracts and public law instruments alike.

173. The mere fact that the Model Clauses contain provisions that are also found in contracts does not mean that the Licence and incorporated Model Clauses are a contract, just as in the *Data Broadcasting* case, the fact that there were clauses reminiscent of a contract did not mean that contractual agreements came into existence. As Cranston J stated in that case at paragraphs [92]-[93]:

> 92 Whatever freedom the parties had to negotiate the terms of the renewed licences, the key feature in fixing their juridical character is in my view that they were issued pursuant to a comprehensive statutory scheme governing the relationship between the parties. *Floe Telecom v Ofcom [2009] EWCA Civ 47; [2009] Bus LR 1116* did not concern specifically whether a licence under the WTA 1949 had contractual effect but considered instead whether it was an instrument to which the Marleasing obligation applied, so that it would be construed conformably with European Union law. In the course of his reasoning, however, Mummery LJ observed:
>
> "[103] The decision of the national regulatory authority to grant a licence and the carrying out of that decision is an administrative act done under and in accordance with the law. A licence is obtained to do things which it is unlawful to do without that licence. It is the legal mechanism for authorising something which is required by the general law to be officially authorised."
>
> Similarly in this case the issue of the renewed licences was an administrative act, and those licences enabled DBI and SA to provide additional services by use of the spectrum, which would otherwise have been unlawful.
>
> 93 The conduct of the ITC in offering the renewed licences to DBI and SA, and their conduct in accepting them, are not inconsistent with the parties acting pursuant to a statutory scheme. In the absence of any express provision to that effect there is no material which could justify the conclusion that in these circumstances it is necessary for a contract to ensue. The discussions leading to the issue of these statutory licences do not support any inference of an intention to contract. Some of the conditions such as those for a governing law and force majeure may have been reminiscent of contract, but that does not mean contractual agreements came into existence. The situation is comparable to other instances where, as here, a comprehensive statutory scheme governing the relations between the parties displaces the existence of any common law rights and duties: *Johnson v Unisys [2001] UKHL 13; [2003] 1 AC 518* , [21] per Lord Steyn; *Monro v Revenue and Customs Commissioners [2008] EWCA Civ 306; [2009] Ch 69* , [22], per Arden LJ."

174. In the present case, the Licencing Regulations (which were made in accordance with the Offshore Minerals Ordinance) provide that any person may apply for an exploration licence in accordance with the Licensing Regulations. The Model

Clauses Regulations provide that the clauses set out in the Schedule (ie the Model Clauses) are deemed to be incorporated in every Licence granted under the Offshore Minerals Ordinance unless specifically excluded, modified, or varied by any provision of the licence. Thus, the Licence itself, and the incorporated Model Clauses, are the product of statutory provisions which dictate the form of the agreement in which the terms are laid down.

175. It is true that the legislation does not stipulate that the terms of a licence must only comprise the Model Clauses and therefore it is legally competent to add additional provisions in the licence (as was done in this case). There were, in fact, limited amendments to the draft additional provisions in the Licence itself in this case, reflecting an element of negotiation (albeit that Model Clauses themselves were the product of the Model Clauses Regulations). That is a point of distinction from cases such as *Data Broadcasting, The "Cavendish", Norweb PLC v Dixon* and *Rushton v Worcester City Council* as discussed above.

176. The Defendant also referred me to the position in relation to petroleum licences in the UK, and what is stated in *United Kingdom Oil and Gas Law* Volume 1 at 1-323, in support of the proposition that petroleum licences in the UK are, in the main, considered contractual in form. Issues may arise as to how petroleum licences are properly to be characterised. There does not appear to be any definitive authority addressing that subject. Albeit in the context of a finance statute, Harman J held that a petroleum production licence was not a "contract" within the contemplation of the Finance Act 1981 s. 111(7) in *IRC v Mobil North Sea* Ltd [1986] 1 WLR 296, 300-301. I do not consider it to be of assistance to strive to identify the nature of petroleum licences as an aid to addressing the proper construction of the Licence in question. In any event, I do not consider that the position in respect of petroleum licences in the UK does, on analysis, advance the Defendant's submissions as to the proper construction of the Licence, which is to be construed against the backdrop of the particular regulatory regime in question.

177. Ultimately, I consider that the better view is that the Licence, and the incorporated Model Clauses, are not a contract, and are not to be construed applying contractual principles, but rather are a public law instrument to be construed in

accordance with the principles of statutory interpretation. They are the product of the Licencing Regulations (which were made in accordance with the Offshore Minerals Ordinance) and the Model Clauses Regulations, and the Licence authorized the doing of that which would otherwise be unlawful. The licence is the legal mechanism for authorizing something which is required by the general law to be officially authorized. I will, however, also address in due course, the approach to be adopted if it is appropriate and legitimate to apply contractual principles of construction in relation to the issues that arise.

178. The fact that the Licence and the Model Clauses are to be construed as public law instruments and in accordance with principles of statutory interpretation does not mean, however, that the Licence and Model Clauses do not contain enforceable rights and obligations on GSI and the Government - they do. This can be seen from the provisions of the Licence and in particular paragraph B of the Licence which contains the Grant of the Licence. It provides, amongst other matters that, *"In consideration of the payments provided for by the Model Clauses and the performance and observation by the Licensee of all the terms and conditions of the Model Clauses or hereinafter contained…."* the Governor grants to GSI as Licensee the licence and liberty to search for petroleum in the sea-bed and sub-soil subject to the provisions of the Licence and over the area defined in Schedule 1 to the Licence.

179. Thus, part of the consideration for the granting of the Licence (in addition to the payment of Licence fees which were nominal, namely £1,000 for its grant and £5,000 for its extension) was the agreement of GSI to perform and observe the terms and conditions of the Licence, including the incorporated Model Clauses. Those terms and conditions are enforceable against GSI. For example, if GSI were to commence proceedings other than in the Falkland Islands, in breach of clause 2 of the Model Clauses, the Defendant would be in a position to obtain an injunction restraining GSI from doing so.

G3: Statutory Interpretation

180. The sole object of statutory interpretation is to arrive at the legislative intention - see generally the discussion in *Bennion on Statutory Interpretation* 6th edition Part

VIII. In this regard Lord Radcliffe stated in *A-G for Canada v Hallett & Carey Ltd* [1952] AC 427 at 449:

> "There are many so-called rules of construction that courts of law have resorted to in their interpretation of statutes but the paramount rule remains that every statute is to be expounded according to its manifest and expressed intention."

181. The interpreter is required to determine the legal meaning, which is the meaning that correctly conveys the legislative intention (*Bennion* Code sections 2 and 150).

182. The starting point in statutory interpretation is to consider the ordinary meaning of the word or phrase in question, that is its proper and most known signification (*Bennion* Code section 363).

183. It is a rule of law (*Bennion* Code section 197) that when considering, in relation to the facts of an instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, the court should presume that the legislator intended common sense to be used in construing the enactment.

184. Equally a purposive interpretation of a statute is one which furthers the purpose or object of the enactment. In this regard, and as Lord Nicholls stated in *A-G's Reference (No.5 of 2002)*[2005] 1 A.C. 167 at [31]:-

> "It is true, as Lord Bingham has pointed out, that the inclusion in section 17(2) of an offence under section 1(2) of the Act creates a linguistic difficulty given the language in which section 17(2) is expressed. In my view, however, this point is decisively outweighed by a purposive interpretation of the statute. No explanation for resorting to purposive interpretation of a statute is necessary. One can confidently assume that Parliament intends its legislation to be interpreted not in the way of a black letter lawyer, but in a meaningful and purposive way giving effect to the basic objectives of the legislation."

185. However, as Cranston J pointed out in the *Data Broadcasting* case at [69], it is neither necessary nor helpful to draw a dichotomy between a literal and purposive approach. As he stated:-

> "In broad terms one must give meaning to the words in the light of their context. Among the contextual features here are the statutory background and the commercial nature of additional services licences. In my view it is unhelpful to draw a dichotomy between the literal and purposive approaches so that the interpretative exercise demands a choice of one over the other. One must begin with the words but give them meaning with the relevant background features in mind. That encompasses both literal and interpretative elements."

186. Whilst the background knowledge of the particular parties (the admissible factual matrix in construing a contract) falls out of account when construing public law instruments, such instruments still have to be construed in the context of the factual matrix in which they are set, albeit that such matrix will be limited to the material reasonably available to the public at large. As was said by the CAT in *British Telecommunications v Cable & Wireless* [2011] CAT 5 at [201]-[203]:

> "201 Public law instruments like statutes and, we consider, SMP conditions are – like contracts – to be construed in the context of the factual matrix in which they are set (Black-*Clawson International Limited v Papierwerke Waldorf-Aschaffenburg AG [1975] AC 591* at [646]). What comprises the relevant matrix of fact in any given case depends upon the nature of the instrument being construed. As was noted by Lord Hoffmann in *Attorney-General of Belize v Belize Telecom Limited [2009] 2 All ER 1127* at [16], the law "permits reference to all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed".
> 202 Whereas in the case of a contract, the relevant factual matrix will extend to what was reasonably available to the contracting parties, in the case of a public law instrument, which (as in the case of an SMP condition) is promulgated to the world at large, the relevant factual material will only extend to the material reasonably available to the public at large (and so will typically be narrower than the relevant factual matrix in a contractual context).
> 203 In the present case, we consider the relevant factual matrix to be quite limited, and to be confined to the relevant statutory framework for the imposition of SMP conditions (specifically, the 2003 Act and the EU directives comprising the common regulatory framework) and to the published documents that led up to the SMP conditions imposed in this case (including, in particular, the 2004 LLMR Statement)."

187. In the present case, therefore, the Licence is to be construed against the backdrop of the Offshore Minerals Ordinance, the Licencing Regulations and the Model Clauses Regulations, and any relevant material reasonably available to the public at large.

H. The interpretation of the Licence and incorporated Model Clauses

188. I will first consider the proper interpretation of the Licence and the Model Clauses as a public law instrument, in the context of the issues as to confidentiality and copyright that arise under Issues 1 and 2, before considering the issues that arise if a contractual approach to interpretation of the Licence and Model Clauses is appropriate.

189. The Licence is a licence between the Defendant and GSI as expressed on its face. It is signed by the then Governor Howard Pearce under the Public Seal. It is also signed by Mr Paul Einarsson as COO (ie Chief Operating Officer) of GSI on behalf of GSI together with the stamp of GSI. Although the Licence is not, on the above analysis, a contract, in signing the licence Mr Paul Einarsson is at the very least acknowledging the provisions of the Licence, which contain mutual rights and obligations binding upon both parties by reason of the provisions in the Licence. I address this aspect further when considering the question of any licencing of copyright.

190. Paragraph A of the Licence stipulates that Clauses 1 to 3, 5 to 14 and 16 to 26 of the Model Clauses shall be incorporated in it and shall have effect as if set out at length in this Licence. There is no dispute that these clauses were incorporated into the Licence. It is also clear that those incorporated clauses give rise to rights and obligations on each party to the Licence, and the Model Clauses expressly refer to the obligations of the Licensee (see, for example, Model Clause 3(1)). The parties to the Licence clearly intended to be bound by these incorporated Clauses and, as already identified, these provisions would be enforceable against each other (for example the jurisdiction provision in Clause 2(4) which provides that, *"The Licensee irrevocably submits itself to the jurisdiction of the Supreme Court of the Falkland Islands").*

191. Paragraph B of the Licence, which contains the grant, is expressly "In consideration of the payments provided for by the Model Clauses and the performance and observation of all the terms and conditions of the Model Clauses or hereinafter contained…." (emphasis added). Thus, in exchange for the licence and

liberty to carry out exploration granted by the Licence (for which GSI paid), GSI agrees to perform and observe the terms and conditions of the Licence, including the incorporated Model Clauses.

192. Paragraph D of the Licence stipulates that the additional conditions set out in Schedule 5 shall have effect in addition to the obligations contained in the Model Clauses. As has already been noted, Condition 5 of Schedule 5 stipulates that the Licensee shall provide the Director of Mineral Resources (DMR) with copies of all data acquired by the Licensee under this Licence as required by Petroleum Operations Notice 1 (PON 1).

H1 Confidentiality

193. Condition 6 of Schedule 5 (which happens to be almost immediately above Mr Paul Einarsson's signature) is an important stipulation in the context of any obligation of confidentiality:-

> "Notwithstanding the terms of Model Clause 17(2), the Governor shall be entitled to exhibit and display for the purpose of promoting minerals exploration in the South Atlantic all or part of the data acquired by the Licensee under this Licence, but the Governor shall not allow such data to be copied or taken away by any person without the consent of the Licensee, which consent may be withheld if the Licensee intends selling or licensing such data **within the five year confidentiality period** before the data is **published** by the Governor."
>
> (emphasis added)

194. The ordinary meaning of these words could not be any clearer when Condition 6 is read together with Clause 17(2)(e) which it will be recalled provides:-

> "(e) **at the end of a period of five years** (or such greater period as is specified in the Licence) from the date on which any particular item of specified data is received by the Governor **that item of specified data may be published or disclosed** by the Governor to any person."

195. There is accordingly a five-year confidentiality period with the Data being published by the Governor after the end of that five-year period. That is precisely what is said in Condition 6 of Schedule 5 of the Licence and Clause 17(2)(e) of the

Model Clauses. No other interpretation is possible. That is the ordinary meaning of the provisions of the Licence, and I find that this represents the legislative intention.

196. The word "period" itself delineates a portion or length of time during which an obligation of confidence subsists. It also delineates that at the end of that portion or length of time (specified as five years) no confidentiality will subsist in the Data. Again, that is the ordinary meaning of these provisions.

197. Confidentiality is provided for to the extent, and subject to the limitations, stated in the Licence. Under the terms of the Licence GSI is required to provide the DMR with copies of all data acquired by the Licensee under the Licence (Condition 5 of Schedule 5) and see Model Clause 17(1).

198. The Licence provides at Clause 17(2) that (subject to the proviso), *"The specified data shall not, except with the written consent of the Licensee, which shall not unreasonably be withheld, be disclosed to any other person not in the service of or engaged by the Crown:.."*. This creates the obligation of confidence and then, together with the provisions of Clause 16(1), 16(2), and the provisos in Clause 17(2)(a)-(e) delineates the extent, and duration of that obligation of confidence, as reiterated in the reference to *"protect the commercial confidentiality of the information"* in Clause 17(2)(c) of the proviso to Clause 17(2).

199. The words "Provided that" in Model Clause 17(2) introduce and give effect to the six lettered provisos. These words are ordinarily used to introduce an exception from, or qualification of, a general rule and that is the sense in which these words are used in Clause 17 (see *Emmerton and another v Federal Commissioner of Land Tax* [1916] 22 CLR 40 at 49).

200. The Licence expressly addresses, and provides for, the limits on the confidentiality of that data, including each sub-paragraph of the proviso culminating in Clause 17(2)(e), the express effect of which is that it will be kept confidential for the period of five years (subject to the exceptions specified in clauses 16(1) and (2) and 17(2)(a)-(d)) but that after five years the confidentiality period (and the obligation of confidence) is at an end, from which time the Data may be published

and disclosed. This follows inexorably from the language of Condition 6 of Schedule 5 and Model Clauses 16, 17(2) and 17(2)(e) - upon publication and disclosure under Clause 17(2(e) the information is no longer confidential (it is in the public domain), and any obligation of confidence is at an end.

201. After the five-year period the permission is unconditional. In particular, the provision cannot require publication or disclosure under proviso 17(2)(e) still to be with the consent of the Licensee because that consent is a feature of the basic position under Clause 17(2) which is expressly qualified by proviso 17(2)(e). This is made clear by the use of the words "Provided that" in Clause 17(2) which carry the meaning identified above.

202. The terms of Model Clause 16 are also of relevance. Clause 16(1) permits FIG to produce an interpretation report in relation to the data at any time for distribution and sale. This is qualified by the restriction in Clause 16(2) but the restriction only applies until Clause 17(2) ceases to have effect so as to restrict the disclosure of any specified data (here the Data). The restriction is that an interpretation report shall not without the prior consent of the Licensee contain illustrated examples of more than fifteen per cent of the total line lengths of the surveys undertaken by the Licensee. I agree with the Government's submission that the inescapable conclusion is that after the restriction ceases to have effect an interpretation report may contain up to 100 per cent of the total line lengths of the surveys undertaken by the Licensee. That again reflects a position whereby publication or disclosure under proviso 17(2)(e) is unconditional after the five-year period has expired. Model Clause 16(2) expressly states in terms that the restriction to not more than fifteen per cent of the total line lengths, *"shall cease to have effect at such time as clause 17(2) ceases to have effect so as to restrict the disclosure of any of the specified data referred to in clause 17(1)*". The disclosure of specified data (here the Data) is unrestricted after the five-year period has expired.

203. The word "disclose" is itself unqualified, as is the word "publish". Both are apt to encapsulate disclosure to the world at large. There is no warrant (not least in the context of a public law instrument) for cutting down the breadth of such provision by some alleged implied limitation to (for example) disclosure to a specific person,

or allowing a specific person to see the Data (as submitted by GSI). I do not accept, and reject, the suggestion of GSI that the word "publish" relates only to copyright (GSI Closing Submissions paragraph 153). The word "publish" is apt to include making previously confidential information publically and generally available as well as addressing copyright. Indeed, the Shorter Oxford English Dictionary refers to the verb to publish as to *"make generally known, declare or report openly; announce"*. Condition 6 of Schedule 5 itself uses "confidentiality period" and "publish" in the same phrase, contemplating that upon the ending of the confidentiality period the Defendant may publish the Data (ie make the Data publically available). The language of Model Clause 17(2)(e) is not qualified in any way.

204. I also reject the suggestion that the provision *"may be disclosed by the Governor to any person"*, in reference to the Data, means that it may only be made available for inspection and that it may not be *"reproduced by being put on a website for all to access and review, or otherwise."* (GSI Closing Submissions paragraph 154). There is no warrant for imposing any such (implied) restriction on the clear and unambiguous language used in Model Clause 17(2)(e) as a public law instrument.

205. I address separately in due course (having considered the question of copyright) GSI's arguments that "may" in this context is a qualifying word that mandates that the Governor exercises discretion in any publication or disclosure, that such discretion is to be exercised in a reasonable manner and in accordance with the purpose of the Act under which it was granted, and that any decision to publish or disclose the Data is subject to challenge on administrative law grounds of challenge.

206. The obligation of confidence arises out of, and is the creature of, the Licence itself. Even if that were not so, and there was also an obligation of confidence in equity, in the context of the provisions of the Licence any such obligation would be no more than co-extensive with the obligation of confidence provided for in the Licence given the terms of the Licence which expressly address the question of confidence and its limits. Confidence is expressly addressed in Model Clause 17(2),

as then qualified by Clauses 16(1) and (2), Condition 6 of Schedule 5 of the Licence and Model Clause 17(2)(e). The provisions of the Licence are inconsistent with there being any wider obligation of confidence in equity. However, if there would otherwise be an equitable obligation of confidence I can see no equitable reason for declining to regard any equitable obligation of confidence as being confined, and circumscribed, by the terms of the Licence itself, and I find that there is no such reason. The Licence addresses and defines the circumstances in which publication and disclosure may be permitted in clear and unambiguous terms, and GSI, as Licensee, is bound by these provisions.

207. In circumstances where, by the very terms of Condition 6 of Schedule 5 and Model Clause 17(2)(e), the Defendant is at liberty to publish and disclose the Data after five years, there can be no unauthorised disclosure of the Data and no unauthorised use of the Data that would amount to a breach of confidence if the Data is published or disclosed after the five-year period. By reason of the provisions of the Licence the Defendant is authorised by GSI to publish and disclose the Data, and there is no restriction imposed upon the purpose for which the Data may be used after five years. This would give a complete defence to any claim based on a breach of confidence. This is not a case where there is any scope for any obligation of confidence in equity surviving, or trumping, the express provisions of the Licence.

H2 Copyright

208. For the reasons I have given in Section E2(k) the Data comprises works in respect of which copyright subsists. The reproducing and/or publishing of the Data are acts that are restricted by sections 2(5)(a) and (b) and 3(5)(a) and (b) of the 1956 Act (in relation to "literary, dramatic and musical works" and "artistic work" respectively). The doing of other matters (such as adapting the work or summarising it) would also be restricted acts (see section 2(5)(f) of the 1956 Act).

209. The various matters that are expressly permitted by Clauses 16 and 17(2) of the Model Clauses clearly and indisputably involve acts which, absent a licence, would be in breach of the copyright of the author of the works (GSI). Clause 16(1) provides for the production (and sale for the benefit of the Government) of an

interpretation report in relation to GSI's Data as communicated to the Defendant under the Licence, Clause 16(2) provides for the inclusion of illustrated examples containing not more than fifteen percent of the total line lengths of the surveys undertaken during the five-year period (with no such limit after five years) and the provisos in Clause 17(2)(a)-(e) provide for use or publication of specified Data for identified purposes and to identified bodies in each case without obtaining the consent of GSI.

210. Thus, it will be recalled that Clause 17(2) provides:

> (2) The specified data shall not, except with the written consent of the Licensee, which shall not unreasonably be withheld, be disclosed to any person not in the service of or engaged by the Crown:
>
> Provided that -
> (a) the Governor shall be entitled at any time to make use of the specified data for the purpose of preparing and publishing such returns and reports as may be required by law;
> (b) the Secretary of State shall be entitled at any time to make any use of the specified data -
> (i) for any purpose for which the Governor may use it under (a) above; or
> (ii) for any non-commercial purpose related to the international relations of the United Kingdom or the Falkland Islands as he sees fit;
> (c) the Governor may at any time, under such conditions he may consider necessary to protect the commercial confidentiality of the information, disclose any of the specified data to any elected member of the Legislative Council of the Falkland Islands;
> (d) the Governor or the Secretary of State may at any time, under such conditions as the Governor or the Secretary of State, as the case may be, may consider to be necessary to protect the commercial confidentiality of the information, disclose any of the specified data to -
> (i) the British Geological Survey; and
> (ii) the British Antarctic Survey;
> (e) at the expiration of a period of five years (or such greater period as is specified in the Licence) from the date on which any particular item of specified data is received by the Governor that item of specified data may be published or disclosed by the Governor to any person;"

211. As I have already identified in section E2(f) above, pursuant to section 1(1) of the 1956 Act the owner of the copyright in a work may authorise other persons to do the acts, restricted by the copyright, as specified in sections 2(5) and 3(5) of the 1956 Act, and copyright in a work is not infringed if a person who is not the owner of the copyright in a work, has the licence of the owner, and does any of the acts

specified in sections 2(5) or 3(5) of the 1956 Act - ie copyright will only be infringed if one or more of the relevant acts is done without the licence of the owner of the copyright.

212. In contradistinction to assignment of copyright (which must be in writing pursuant to section 36(3) of the 1956 Act), there is no requirement that a licence be in writing or comply with any other formalities. Section 36(4) provides that, *"(4) A licence granted in respect of any copyright by the person who, in relation to the matters to which the licence relates, is the owner of the copyright shall be binding upon every successor in title to his interest in the copyright..."* It is also possible for a licence to be granted by a prospective owner of copyright, and the provisions of section 1(2) of the Act (and the contemplated possibility of a licence permitting acts to be done by a person which would otherwise infringe the copyright of the copyright holder) apply to such licences (see section E2(h) above).

213. As already identified in section E2(f) above, a licence is a permission to do something which would otherwise be unlawful - see *Thomas v Sorrell* (1673) Vaugh 330 referred to in *Canon Kabushiki Kaisha v Green Cartridge Co (Hong Kong) Ltd* [1997] AC 728 in which case Lord Hoffman, delivering the judgment of the Privy Council observed (at p. 735) that the concept of a licence is something which, "*makes an action lawful, which without it had been unlawful.*".

214. A licence need not be express, it can also be implied or inferred (see the discussion in section E2(f) above of the case of *Robin Ray v Classic FM* [1998] FSR 622, and *Copinger* para 5-203 (albeit in the context of the 1988 Act)). The question of whether a right to use copyright works will give rise to the implication of a licence is to be determined based on a consideration of all relevant facts in a particular case (including, for example, the terms of any consent (express or tacit) or agreement (express or implied). In principle, however, a consent or agreement for another to use a copyrighted work in a specified way is likely to carry with it an implied licence, so as to give effect to the purpose of such consent or agreement (as illustrated by cases such as *Barrett v Universal-Island Records Ltd* [2006] EMLR 21 and *Mellor v Australian Broadcasting Commission* [1940] AC 491). Equally a licence does not have to be contained in a contract (see the case of *Barrett v*

Universal-Island Records Ltd [2006] EMLR 21 at [362] addressed in section E2(f) above).

215. There does not need to be explicit reference to the word "copyright" or indeed to the word "licence" in order to create a licence for the purposes of copyright. The court looks to the substance of the provisions (see the case of *Mellor v Australian Broadcasting Commission* [1940] AC 491, 502, addressed in section E2(f) above). There can also be statutory licences of copyright as addressed in section E2(g) above.

216. As I have identified, the various matters that are permitted by Clauses 16 and 17(2) of the Model Clauses clearly and indisputably involve acts which are restricted and which absent a licence would be in breach of the copyright of the author of the works (GSI). Looking at the substance of these provisions, each of these provisions would make no sense if they did not amount to the granting of a licence in respect of GSI's copyright in the works. They each contemplate the Government using the Data for purposes which would amount to restricted acts that would not be permissible absent a licence. Applying the ordinary and natural meaning of the express language of these provisions set against the backdrop of the applicable principles as to copyright that I have identified, I find that the manifest and expressed legislative intention of each of these provisions is to provide a licence to use the copyrighted works in the respects so specified. Such licence is express rather than implied, it is an inherent part of what is statutorily permitted. If that were not to be the case then, on any view, it is to be inferred from that which is expressly stated in the Model Clauses.

217. Any other interpretation makes no sense, and would amount to a failure to give effect to the words of the Licence and the incorporated Model Clauses, and the legislative intent there expressed. Absent a copyright licence the Defendant could not do any of these matters in respect of the copyrighted works. Furthermore, to suggest that there is to be implied into that statutory language words of qualification such as *" provided that in doing so the Governor does not infringe any copyright or other rights owned by the Licensee"* is not a permissible principle of statutory interpretation and there is no warrant for doing so in any event given the express

language and apparent legislative intent. Equally the Licence and incorporated Model Clauses are not a contract, but even if it were permissible to apply contractual principles such as the implication of terms, the requirements for the terms alleged by GSI would not be met given the inconsistency with the express language of Clauses 16 and 17.

218. Clause 17(1) is itself in the widest possible terms and provides that *"for the purpose of this clause "the specified data" means all records, plans, maps, samples, accounts and information which the Licensee is obliged under any provision of this Licence to furnish or supply to the Governor or to the Secretary of State" (*emphasis added). The legislative intent is clearly that all data, and that thereby encompasses any data that amounts to a copyrighted work, is subject to these provisions.

219. In contrast to the provisions of Clause 17(2)(e) which are very wide and general in their ambit, the provisions of Clauses 16(1) and 16(2) and 17(2)(a)-(d) are highly specific and the statutory draftsman has provided, with considerable particularity, what may be disclosed or used, as there identified. It is untenable to suggest that in doing so such express language is to be cut-down so as to exclude all works in respect of which there is copyright. This is most obviously exemplified by the interpretation report and the use of illustrated examples of not more than 15 per cent of the total line lengths of the survey - this is the very information in respect of which GSI asserts copyright.

220. As for Clause 17(2)(e), this provides that, *"at the expiration of a period of five years....from the date on which any particular item of specified data is received by the Governor that item of specified data may be published or disclosed to any person"* (emphasis added). This legislative provision, on its face, permits the Governor to publish or disclose the Data to any person after five years. GSI accepted this (subject to its qualification as to the exercise of discretion) in its oral closing submissions (transcript 603/21-25). As Ms Lemmens (rightly) said in her oral closing, *"The provision speaks for itself. It has the words it has"* (transcript 605/11012).

221. GSI did not suggest that Clause 17(2)(e) (or for that matter Clauses 16(1), 16(2) or 17(2)(a)-(d)) contained any ambiguity or had any other meaning than that the Governor could do the specified acts, and that after five years could publish or disclose the specified data (as defined in Clause 17(1)), here the Data, to any person. Indeed, that is no doubt why GSI is ultimately forced to allege that such provisions are null and void as its central line of attack in relation to the effect of such provisions (which I will address in due course below), rather than by suggesting that these provisions do not have the meaning that they would appear to have on their face.

222. GSI further recognises at paragraph 153 of their Closing Submissions, when considering the meaning of the words *"item of specified data may be published or disclosed"* in Model Clause 17(2)(e), that " 'publish' relates to copyright" (emphasis added). GSI is right to so recognise. I consider, and find, that the legislative intent, in using the word "publish", is to provide that works in respect of which copyright subsists, may be published by the Defendant though, as I have also found, the word is wide enough to cover, and does cover, not only works in respect of which copyright subsists, but any information (including information that otherwise might have been subject to an obligation of confidence). In this regard the word "publish" is being used to permit the doing of those acts which would otherwise be restricted acts under the 1956 Act, and giving that word its ordinary and natural meaning, encompasses publication to the world at large and in any form. I reject the submission that there is any restriction as to the form of such publication, or as to the recipient of such information, by reason of the use of the word "publish", rather than, for example, the word "release". I consider separately in due course whether any limitations arise from the use of the words "may be" in Clause 17(2)(e).

223. I also note that until shortly before the final hearing, GSI submitted in the context of the Defendant's submissions on the interpretation of Clause 16, at paragraphs 37 to 38 of its Pre-trial Submissions as follows:-

> "37. The data thus becomes part of FIG's interpretative report, in which the FIG will have its own copyright. Accordingly the licence between GSI and FIG contains a provision in which GSI consents to the FIG 'publishing' part of GSI's

data. There is therefore a very limited royalty free licence (which by its nature must be non exclusive) in respect of GSI's copyright.

38. To the extent that this interpretative report has not achieved its objective, or there is need of further enticement or clarification, after a 5 year period, the 15% restriction is lifted (by the effect of the operation of clause 17(2) on clause 16(2)), so that in terms of copyright, the FIG may potentially use all of the copyrighted works. However it is still subject to GSI's written consent, and because the 15% restriction is only lifted because of clause 17(2)(e) (which is the only other place 'publish' is mentioned, and so must tie in to clause 16), then GSI can withhold its consent if it is reasonable to do so. That may mean that while more than 15% can be used, it must be less than, for example, 50%, and GSI can receive a royalty in respect of the sale of any interpretative reports"

Later, in those Pre-Trial Submissions GSI asserted that, *"In summary, in relation to copyright, the FIG cannot, therefore, allow or consent to copies being made by a third party, as its copyright licence does not extend that far."*

(emphasis added)

224. All the above submissions have been deleted from GSI's Revised Pre-Trial Submissions. Whilst a party is always at liberty to seek to change tack in its submissions (subject to any constraints imposed by its pleadings), GSI was, I consider, right to acknowledge previously that, by virtue of the provisions of Clauses 16 and 17(2), the Defendant has a copyright licence, albeit that I find that such licence is wider than was previously acknowledged by GSI.

225. If works are subject to copyright, then the Defendant would need the consent of GSI to publish them unless a licence has been granted to do so. Both Clause 16 and Clause 17 of the Model Clauses reflect and recognise this. Thus, in Clause 16 any interpretative report produced shall not *"without the prior consent of the Licensee"* contain illustrated examples of more than fifteen per cent of the total line lengths of the surveys undertaken by GSI, whilst Clause 17(2) provides that (subject to the proviso) "*The specified data shall not, except with the written consent of the Licensee, which shall not unreasonably be withheld, be disclosed to any person not in the service of or engaged by the Crown".* The fact that consent is not stated to be required to do any of the other matters in Clause 16(1) and (2) or in the proviso to Clause 17(2) is because no consent is needed in the specified circumstances as a

copyright licence is granted to the Defendant in those provisions, and in those circumstances, as part of the mutual rights and obligations recognised and stated in the Licence and Model Clauses.

226. It is for the same reason that after five years the specified data, which includes the Data, may be published or disclosed by the Governor to any person. There is no requirement in Clause 17(2) or 17(2)(e) that consent be obtained from GSI before publication or disclosure after five years because no consent is needed in the specified circumstances as a copyright licence is granted to the Defendant in those provisions, and in those circumstances, as part of the mutual rights and obligations recognised and stated in the Licence and Model Clauses.

227. The fact that Model Clauses 16 and 17 address consent expressly also evidences that these clauses are addressing the position in respect of all works including works that may be subject to copyright, and the nature of the matters concerned are clearly directed at copyright as well as confidentiality. Furthermore, the fact that there is no requirement of consent also means (contrary to GSI's submission) that there can be no question of a royalty payment to GSI in respect of disclosure or publication of the Data (as alleged by GSI at paragraph 30 of its Statement of Claim).

228. It is clear from the face of the Model Clauses that the Model Clauses in the Licence set out the respective rights and obligations of the parties to the Licence (the Defendant and GSI) as I have already identified and found. This is most obviously reflected in Paragraph B of the Licence, as already quoted above, but it is also reflected in the very nature and wording of the various Model Clauses on numerous matters not only relating to such matters as law and jurisdiction, but to the subject matter of various other clauses including Clauses 16 and 17.

229. Clauses 16 and 17 on their face contain mutual rights and obligations. For example in Clause 17(2) GSI gets an enforceable obligation against the Defendant not to disclose the specified data to any person not in the service of or engaged by the Crown (subject to written consent of GSI, not to be unreasonably withheld) and this applies to <u>all</u> of the specified data and whether or not it would otherwise be

subject to any obligation of confidence, and whether or not copyright would subsist in such data (neither of which would necessarily be clear in advance of disclosure of the data or at the time of disclosure, or indeed subsequently). In return the Governor gets the various abilities and entitlements conveyed by the lettered provisos of 17(2)(a)-(f), which it might not otherwise have (and if the specified data was confidential, or subject to copyright would not otherwise have). Thus, amongst other matters, GSI gets the benefit of an enforceable obligation of confidence, and protection for the specified data (subject to the provisions of Clauses 16 and 17(2)), but in return the Defendant gets the right to publish or disclose the specified data (here the Data), in unqualified terms, after five years.

230. Furthermore, it is unsurprising that the Licence and incorporated Model Clauses specify the respective rights and obligations of the parties to the Licence as this is common place with public law instruments and contracts alike, as GSI themselves recognise at paragraph 38 of their Closing Submissions. These are all provisions of a Licence which permit the Licensee (here GSI) to do something that it would otherwise be prohibited from doing (that is collect seismic data). The specified data (here the Data), and any rights of the Licensee in relation to that, only exist in consequence of the granting of a licence to carry out exploratory activity, and it is entirely apposite in such circumstances that the Licence should set out the respective rights and obligations of the parties, and the (only) basis on which the Licensee was entitled to do that which it has done, and out of which the Data has arisen.

231. Of course, if the Licensee (here GSI) had objected to the terms on which the Defendant was prepared to grant it a licence (or indeed did grant it a Licence) its remedy would have been to apply for judicial review, and by reference to Order 53 pursuant to which any application should have been made promptly and in any event within three months from the date when grounds for the application first arose - logically when the decision was made to grant a Licence on the terms it did. In any event, no such application for judicial review, or indeed any application for judicial review, has been made, and in oral closing Ms Lemmens, on behalf of GSI, confirmed that GSI did not have a claim for judicial review, and did not assert one by any means (transcript 668/15-16).

232. In the circumstances identified above in this section of my judgment, and applying the principles in relation to copyright that I have identified, I hold and find that Clauses 16 and 17(2) of the Model Clauses grant the Defendant a copyright licence to publish the Data in accordance with the provisions of Clauses 16 and 17(2) and to do all acts that would otherwise be restricted to GSI under sections 2(5) and 3(5) of the 1956 Act. In this regard, and in relation to Clause 17(2)(e), the Governor may publish and disclose the Data to any person, by reason of the aforesaid copyright licence and do so without any consent or royalty payment to GSI, and without any of the other limitations alleged at paragraph 30 of the Statement of Claim. I consider the use of the word "may" in Clause 17(2)(e) in section H6 below.

233. The findings I have made, in the first instance, in relation to the Licence itself as a public law instrument, are on the basis of the manifest and expressed legislative intent as reflected in the ordinary meaning of the words and phrases I have interpreted. However, I consider that the expressed legislative intention is also apparent, and is indeed reinforced, if the provisions under consideration are interpreted having regard to the wider purpose of such provisions and the relevant statutory background.

234. As I have already referred to, the Model Clauses Regulations were created in accordance with the Offshore Minerals Ordinance which repealed the Continental Shelf Ordinance 1991, *"to replace it so as to make further and better provision for the exploration and exploitation of minerals in the Continental Shelf and other controlled waters of the Falkland Islands and for matters connected with or relating to the foregoing matters."* The purpose of the Offshore Mineral Ordinance, which authorises the Governor to grant exploration licences upon such terms and conditions as the Governor sees fit, is accordingly to make further and better provision for the exploration and exploitation of minerals, including oil and gas. Whilst this is a wide and general purpose, it logically extends to the promotion of exploration and exploitation.

235. Clauses 16 of the Model Clauses is clearly directed at promoting both exploration and exploitation by making available for sale and distribution interpretation reports based on surveys undertaken by Licensees. The provisos in Clause 17(2) are in the same vein - they contemplate use or disclosure to further that purpose. Specifically when, in Clause 17(2)(e), it is provided that at the expiration of five years the specified data may be published or disclosed by the Governor to any person - the context of any such publication or disclosure is most obviously the promotion of the exploration and exploitation of minerals - indeed it remains GSI's pleaded case at paragraph 30(e) of the Statement of Claim that the specific purpose of Clauses 16 and 17 is to, *"attract interest and only interest in hydrocarbon exploration"*.

236. An interpretation of Clauses 16 and 17 (and in particular Clause 17(2)(e)) which maximizes the amount of information that the Governor is entitled to disseminate is, on the weight of the evidence before me, one that furthers the purpose of the exploration and exploitation of minerals, whereas GSI's interpretation of these provisions would limit the available data, and indeed prevent the dissemination of works in respect of which copyright subsisted in favour of GSI. Of these two interpretations, I consider that the former furthers the purpose of the overall statutory framework, whereas GSI's interpretation does not. This further supports the interpretation that I have found.

237. In saying this I have not lost sight of the fact that GSI (and Mr Paul Einarsson in particular) disagrees that the widespread dissemination of copyrighted information furthers the exploration and exploitation of minerals (indeed in his email to Phyl Rendell of 23 November 2004 he said in relation to release of data after five years to companies with a genuine interest in investing in the area, "*This practice is no incentive to oil companies that would easily pay for the minute cost of the seismic, but it does discourage more data being acquired by spec companies and in the long run is a poor policy that achieves the opposite of what is intended"* a view he maintained when cross-examined).

238. However, I consider that the weight of the evidence was to the contrary, having regard, in particular, to the evidence of Phyl Rendell (paragraph 67 of her first

witness statement and transcript 457/5-16), Stephen Luxton (paragraphs 29, 42 and 136 of his first witness statement) and Dr Philip Richards (paragraphs 46-49 of his first witness statement). In any event, and whatever differences there might be as to the perceived benefits of data dissemination, the language of Clauses 16 and 17(2), including in particular 17(2)(e), makes provision for data dissemination (in specified cases without consent) and does so using expansive language supportive of the interpretation that I have found.

239. I have found that a copyright licence is granted by the Licence construed as a public law instrument which contains mutual rights and obligations upon GSI and FIG. It is express on the true interpretation of Model Clauses 16 and 17(2), or is to be inferred from the provisions of the Licence (including Model Clauses 16 and 17(2) and the language used therein).

240. Such a licence has accordingly been granted in accordance with the principles I have already identified in sections E2(f) and (g) above as to licensing of copyright and statutory licences of copyright. As addressed in section E2(g) a licence can be provided for in a statutory provision. Examples of where this has been done previously in other statutes are but illustrations. Contrary to GSI's submissions, there is no principle limiting the type of statute in which this may be done (e.g. to those concerning broadcasting) - every statute or public law instrument must be interpreted in accordance with its own provisions to see whether or not provision is made for a copyright licence. Nor is there any reason to limit such licences to a situation where the recipient needs such licence to do something it is required to do - again each statute or public law instrument must be interpreted in accordance with its own provisions to see whether or not provision is made for a copyright licence.

241. In any event, I also conclude that the copyright licence I have found in respect of the Data is also to be inferred from all the circumstances - specifically the offer of a licence by the Defendant on the terms of the Licence to GSI to which GSI then agreed, not in the sense of contractually agreeing (on this hypothesis) but in the sense of consenting to accept a licence on such terms - and indeed affixing its stamp and the signature of its Chief Operating Officer to the Licence. I consider and find that this amounts to the explicit (alternatively tacit) consent by GSI to the terms of

the Licence, and to the Defendant performing restricted acts in accordance with its provisions, and that such consent amounts to the granting of a copyright licence in terms I have found. It is well established that a copyright licence can be inferred in all the circumstances even where no reference is made to copyright (see, for example, *Mellor v Australian Broadcasting Corporation*, supra) and where there is no contract (see, for example, *Barrett v Universal-Island Records* Ltd, supra), and an explicit or tacit consent to reproduce a work can amount in law to a licence (*Barrett v Universal-Island Records Ltd*), supra. This is such a case.

H3 GSI's allegation that Model Clause 17(2)(e) is null and void and associated allegations

242. As has already been identified, and addressed at section E2(i) above, GSI rely on the provisions of section 31(3) of the 1956 Act and section 2 of the Colonial Laws Validity Act 1865 and submits that to the extent that Model Clause 17(2)(e) purports to modify the 1956 Act in respect of the protections or infringement of any copyright of GSI in the Data, Model Clause 17(2)(e) is void and inoperative.

243. The answer to GSI's submission is that Model Clause 17(2)(e) does not purport to modify the 1956 Act in respect of the protections or infringements of GSI's copyright in the Data, and I so find. The 1956 Act contemplates the authorisation of a person to do acts restricted by copyright (section 1(1) as quoted above) and if, as I have found, copyright subsists then the permission in Model Clause 17(2)(e) to publish amounts to a licence in the Defendant's favour for the purpose of section 1(2) of the Copyright Act 1956. In such circumstances Model Clause 17(2)(e) does not, and does not purport to, modify the 1956 Act in respect of the protections or infringement of any copyright of GSI in the Data but rather provides for a copyright licence which is contemplated by the copyright regime under the 1956 Act. As such it is not a modification or addition within section 31(3) of the 1956 Act and is not repugnant to the provisions of the 1956 Act. Nor is the Model Clause Regulation inconsistent with the 1956 Act.

244. GSI's argument is not open to GSI in any event. If GSI had wished to allege that Model Clause 17(2)(e), which is set out in the Schedule to the Model Clauses

Regulations, is void and ineffective, it should have commenced proceedings for judicial review and should have done so by reference to Order 53 pursuant to which any application for judicial review should have been made promptly and in any event within three months from the date when grounds for the application first arose which I consider would be from the date when the Licence was granted. Even if that were not so, and the time for any challenge was when GSI became aware of the Defendant's stance on release of Data based on its interpretation of Clause 17(2)(e), that was at the latest on 28 October 2010 as is apparent from the Chronology of Events. In any event, no such application for judicial review, or indeed any application for judicial review, has been made and, as I have already noted, in oral closing Ms Lemmens, on behalf of GSI, confirmed that GSI did not have a claim for judicial review, and did not assert one by any means (transcript 668/15-16). I would only add that had an application been made seeking leave to advance a claim for judicial review I would have refused it for two reasons. First, on the basis that it was made out of time, and no good reason has been identified, still less demonstrated, to justify an extension of time. Secondly on the merits, as GSI has no arguable claim that Clause 17(2)(e) is null and void, for the reasons I have found.

245. At various points in their submissions at trial, GSI have made allegations which are unpleaded (including the plea addressed above in relation to the 1956 Act). They have not applied to amend their pleadings to advance such allegations as they ought to have done if they wished to advance them. Any such application would have been made at a late stage, at trial. These allegations include the alleged contravention of the 1956 Act and of the Berne Convention and EU Directive 2006/116/EC, and an alleged deprivation of property. None of these allegations are pleaded and, in relation to the Directive, that Directive is not applicable to the Falkland Islands. All these allegations relate to publication and disclosure in the context of Model Clause 17(2)(e). I do not consider that any of these allegations would have stood any real prospect of success and as such would not have passed the threshold test for the allowing of any such amendment. In any event, and for the reasons I have identified, publication and disclosure within Model Clause 17(2)(e) are acts done with the consent of GSI in a manner consistent with the law of copyright and as a consequence of the voluntary act of GSI in applying for, accepting, and undertaking exploration under the Licence. In such circumstances

there was, in any event, no contravention of the 1956 or the Berne Convention or indeed EU Directive 2006/116/EC nor any actionable deprivation of property.

246. Finally I would add that had it been the case (which it is not) that publication or disclosure would otherwise have infringed copyright, then I would have found that such acts would not amount to an infringement of copyright as such acts are permitted under the law of exploration licensing of the Falkland Islands, and as such the defence of statutory authority would have applied - see *Copinger* at paragraph 9-148, *Allen v Gulf Oil Refining Ltd* [1981] A.C. 1001 at 1012 F-H, 1014 B-C, 1016 B, E-F and 1024B, and *Stovin v Wise* [1996] A.C. 923 per Lord Hoffman at 946 G-H.

H4 Application of contractual principles of construction to the Licence and Model Clauses

247. If it is appropriate to have regard to contractual principles of construction when construing the Licence and the Model Clauses incorporated therein (as advocated by the Defendant) then my findings as to the proper construction of Model Clauses 16 and 17(2) are the same as those that I have made as to the proper interpretation of the Licence and the Model Clauses interpreted as a public law instrument and for the same reasons (so far as these relate to the meaning of the words used), though my findings are further fortified by additional considerations that are permissible in a contractual context, and which I address below.

248. The applicable principles of contractual construction are well-established. Indeed it is common ground (by reference to the judgment of Lord Neuberger PSC in *Arnold v Britton* [2015] AC 1619 at [15]]) that the Court, on this hypothesis, is concerned to identify the intention of the parties by reference to *"what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean"*, to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14.

249. The Court does so by focussing on the meaning of the relevant words, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the clause, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions (see para [15] of the judgment of Lord Neuberger in *Arnold v Britton*, supra).

250. I have already made findings as to the ordinary meaning of Model Clauses 16(2) and 17(2) including 17(2)(e) in the context of legislative intention. These are equally applicable to the ordinary and natural meaning of the words in the context of a contractual analysis and the objective common intention of the parties.

251. First (on this hypothesis) any obligation of confidence is contractual, and on the ordinary and natural meaning of the words used, by the very terms of Condition 6 of Schedule 5 and Model Clause 17(2)(e), the Defendant is at liberty to publish and disclose the Data after five years and there can be no unauthorised disclosure of the Data and no unauthorised use of the Data that would amount to a breach of confidence if the Data is published or disclosed after the five-year period.

252. By reason of the (on this hypothesis) contractual provisions of the Licence the Defendant is expressly authorised by GSI to publish and disclose the Data, and there is no restriction imposed upon the purpose for which the Data may be used after five years. Once again this would give a complete defence to any claim based on a breach of confidence, and as with the situation where the Licence is construed as a public law instrument, this is not a case where there is any scope for any obligation of confidence in equity surviving, or trumping the express provisions of the Licence. Any obligation of confidence arises out of the contract and is circumscribed by the contract. Equally even if there was any obligation of confidence in equity the present case is one where the contractual provisions in Clause 17(2)(e) are clear and are to be construed as governing the position on the expiry of the five-year confidentiality period.

253. Secondly, in relation to the granting of a copyright licence, the position is *a fortiori* if contractual principles of construction arise. The copyright licence that I have found would arise (on this hypothesis) as a matter of contract or applying contractual principles. GSI has contractually consented and agreed to such a licence given the express terms of Clauses 16 and 17(2) including the provisos thereto including Clause 17(2)(e). It is well-established that a copyright licence may arise in contract (that is one of the most common ways for a licence to arise), and such licence is either express (as I have found) or it is to be inferred (as I have found). On a contractual analysis, the issue as to whether a licence can arise by statute is not relevant (though a licence can arise by statute for the reasons already given).

254. Additionally, the same route can be reached by reference to the implication of terms. If (contrary to my findings) it is not an express term, I find that it would be an implied term of the Licence (to be implied by reason of the express terms and/or to give business efficacy to the Licence) that the Defendant is granted a copyright licence to do those acts which would otherwise be restricted acts within the 1956 Act, including to publish and disclose the Data after five years without restriction as to the form of such publication, or as to the recipient of such information.

255. As to the facts and circumstances known or assumed by the parties at the time the Licence was entered into (ie what is often referred to as the factual matrix), these also support the construction that appears from the ordinary and natural meaning of the words used in Clauses 16 and 17(2), in particular 17(2)(e).

256. Data release by licensing authorities, after a restricted period designed to enable commercial exploitation of the data by the survey company, is a not uncommon feature of exploration licensing regimes around the world. Those regimes differ as to the length of the restricted period and may or may not provide for a royalty to be paid to the survey company. I refer, in particular, in this regard to the evidence of Dr Philip Richards at paragraphs 31, 85 and 92-93 of his first witness statement, which was not challenged in cross-examination, and which I accept. As has already noted, these considerations regarding data release (and the differing views of Mr Einarsson and Mrs Rendell which nevertheless recognise the practice of data release) featured in the exchange of emails between them on 23

November 2004. Whilst evidence of negotiations is inadmissible as an aid to contractual construction, evidence emerging in the course of negotiations may provide background information, as well as being admissible in the context of estoppel (see *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2011] 1 AC 662 at [37], [40], [47] and [48], a case concerning without prejudice negotiations).

257. The Defendant's policy, as embodied in the legislation, was for the release of processed data within the control of the Defendant after five years and that the Defendant did not pay royalties. Mr Paul Einarsson (in his email of 19 November 2004) had sought a ten-year confidentiality period and compliance with the IAGC/DTI Agreement which provided for all released data to be licensed from the seismic contractor, for restrictions on what could be released and for phased (escalating) licence fee payments. Mrs Phyl Rendell rejected this in her email on 23 November 2004 in which she made the Defendant's policy (and its interpretation of the legislation) quite clear, stating *"….I am advised that the legislation is quite clear on this matter and the Falkland Islands Government is not able to alter the five year confidentiality period in the case of your Exploration Licence. The situation with data here is that the processed tapes can be released by FIG to companies with a genuine interest in investing in the area after five years but the field tapes have to be accessed from the contractor (in this case GSI) at cost...*"

258. Whilst Mr Paul Einarsson described this as a *"poor policy"* in his response the same day, he understood what that policy was, as he confirmed when cross-examined (transcript 323/24-324/2, 324/24). He accepted that he understood that the Defendant had rejected all three elements of his proposal (ten year period, licence fees after that and licence agreement with the exploration company) (transcript 326/1-4), and later in his evidence he accepted that when he corresponded with Mrs Rendell in March 2007, he knew that the IAGC/DTI agreement did not apply (transcript 348/12).

259. In relation to the Defendant's policy, exploration in the Falkland Islands was at an early stage and the circumstances of the Falkland Islands set some particular challenges for attracting and carrying out exploration and production activity by oil and gas companies. This is addressed, in particular, in the evidence of Dr Philip

Richards at paragraphs 23, 62 and 94 of his first witness statement, which was not challenged in cross examination, and which I accept.

260. As is apparent from paragraphs 21, 50-51, 101-102 and 122-123 of Dr Philip Richard's first witness statement, the background to GSI's licence application was that it was being engaged by production licence holders to provide them with data for the purposes of their production licences and but for that engagement the survey would not have happened (see Mrs Rendell's first statement at paragraphs 21, 50-51, 101-2, 122-123).

261. Accordingly, GSI's survey was not a speculative one whereby it was envisaged that there would be no return on the survey other than that obtained from data sales which were only made after the data had been collected and relative costs incurred. It would therefore have been within the contemplation of the parties (as addressed by Dr Richards at paragraphs 38 to 39 and 52 of his first witness statement) that the data would be subject to the provisions of the production licences as well as those of the Exploration Licence to be granted to GSI, and GSI would be proceeding on the basis of contracts with the production licence holders providing for a return to GSI, the terms of which GSI might well have been in a position to negotiate to reflect the commercial consequences of the Defendant's policy on data release (depending, of course, on its commercial bargaining power). In this regard Mr Paul Einarsson had said in his email of 19 November 2004 to the Defendant that if the Defendant did not adopt the IAGC/DTI agreement, *"it will necessitate that GSI increase our rates, potentially delaying the project and resulting in less data being acquired as a result."*

262. Whilst the points addressed in the preceding two paragraphs relate to GSI's application, similar points would arise in relation to any potential licence holder in GSI's position and would be known to them. The background facts I have identified above are essentially matters of common knowledge amongst the relevant class of persons who would be expected to use the Model Clauses, and they all support a construction of the Licence whereby it provides an unconditional permission to publish or disclose data (here the Data) after the expiry of the five-year period.

263. I also consider that this interpretation accords with common sense. In circumstances where the parties have agreed detailed provisions setting out what can and cannot be done within the five-year period, it makes sense for the position after the expiry of that period to be unrestricted, as reflected in the language of Model Clause 17(2)(e).

264. Accordingly, if one approaches the issues that arise applying contractual principles of construction, then I hold and find that after the five-year period there is no obligation of confidence in relation to the Data and Clauses 16 and 17(2) of the Model Clauses grant the Defendant a copyright licence to publish the Data in accordance with the provisions of Clauses 16 and 17(2) and to do all acts that would otherwise be restricted to GSI under sections 2(5) and 3(5) of the 1956 Act. In this regard, and in relation to Clause 17(2)(e), the Governor may publish and disclose the Data to any person, by reason of the aforesaid copyright licence and do so without any consent or royalty payment to GSI, and without any of the other limitations alleged at paragraph 30 of the Statement of Claim. I consider the use of the word "may" in Clause 17(2)(e) in section H6 below.

H5 Contractual interpretation and mutual mistake

265. GSI denies that the Licence is a contract. I have not found that the Licence is a contract. Had I found that the Licence was a contract then it would be GSI's submission that such contract was entered into on the basis of a mutual mistake that Model Clause 17(2)(e) was valid enforceable law, and if Model Clause 17(2)(e) was not valid enforceable law then Model Clause 17(2)(e) was included by the mutual mistake of the parties, the parties having entered into the contract on the basis of such shared and fundamental misapprehension of the law, with the result that the parties' consent would have been nullified and rendered ineffective as a contract - relying upon *Bell v Lever Bros Ltd* [1932] A.C. 161, 224 G .

266. In circumstances where I have not found that the Licence is a contract this point does not arise. In any event, even if the Licence should properly be regarded as a contract, I have found that Model Clause 17(2(e) is valid and enforceable (rejecting GSI's case that it is null and void) so there can be no question of a shared

and fundamental misapprehension of the law (either on the proper interpretation of the law or given that the Defendant's apprehension as to the validity of Model Clause 17(2)(e) accords with my finding). In any event Mr Paul Einarsson gave variable evidence as to when he came to the view that Model Clause 17(2)(e) was invalid. Of the answers that he gave in cross-examination I consider that the first he gave reflects his actual belief at the time of contracting, namely, *"I always thought this was invalid*" (transcript 325/5), although subsequent answers do not support a shared misapprehension either. For example, he went on to say, *"Well, I didn't really know about this at the time. I had to educate myself on the law and what was going on here"* (transcript 326/9 and 329/22-25). In such circumstances, there was not any shared apprehension, still less any shared misapprehension. GSI's plea in relation to alleged mutual mistake would fail for all the above reasons.

H6 The meaning of specified data "may" be published or disclosed by the Government to any person

267. On its face, and whether one approaches Model Clause 17(2)(e) as a matter of interpretation of a public law instrument, or as a matter of construction applying contractual principles of construction, Model Clause 17(2)(e) provides that at the expiration of the five year period an item of specified data "*may be published or disclosed by the Governor to any person"* and no limitations are placed in this regard in terms of what may be published or disclosed or to whom, or when, or in what terms. That is the ordinary meaning of the words as a matter of legislative intent and that is the ordinary and natural meaning of the words as a matter of contractual construction. An issue arises, however, as to whether the inclusion of the word "may" restricts the circumstances in which the Governor can publish and disclose the Data.

268. GSI argues that the word “may" in this context is a qualifying word that mandates that the Governor exercises discretion in any publication or disclosure, that such discretion is to be exercised in a reasonable manner and in accordance with the purpose of the Act under which it was granted, and that any decision to publish or disclose the Data is subject to challenge on administrative law grounds of challenge.

269. It should be noted, however, that GSI has no positive pleaded case that if a challenge on administrative law grounds is possible, the Defendant has erred in that regard in any pleaded respect on grounds that are amenable to judicial review. What is more any such challenge would need to have been made by way of judicial review under Order 53 pursuant to which any application seeking leave would need to have been made promptly and in any event within three months from the date when grounds for the application first arose. In the present case, this would logically have been on 28 October 2010 (when GSI was notified of the Defendant's decision and intention to make the SEG-Y data publically available). That decision was reiterated in Mr Luxton's letter of 17 October 2013 in which he informed GSI that the Defendant intended to release the Data from 1 January 2014.

270. As already noted, Ms Lemmens, on behalf of GSI, has confirmed that GSI does not have a claim for judicial review, and does not assert one by any means (transcript 668/15-16). Therefore, there is no challenge by way of judicial review before me for determination. I would only add that had an application been made seeking leave to advance a claim for judicial review at this time I would have refused it for two reasons. First, on the basis that it was made out of time, and no good reason has been identified, still less demonstrated, to justify an extension of time. Secondly on the merits, as no properly formulated public law claim has been pleaded or sought to be made out. Any such case would have been unarguable, in any event, in the context of the evidence that exists as to what publication is contemplated (as addressed below).

271. Equally, and to the extent that GSI alleges that the issue is one of contractual construction (which is not GSI's primary case, if GSI's case at all), GSI has no pleaded case that the Defendant has acted arbitrarily, capriciously or irrationally in a contractual sense (if Clause 17(2)(e) is to be construed as a contractual discretion as opposed to an absolute contractual right).

272. In light of the above, GSI’s pleadings do not permit it to advance any challenge by way of judicial review to the decisions made by the Defendant to publish the Data nor to advance any claim based on breach of any contractual power to disclose

or publish the Data. I am satisfied, however, that the proper interpretation or construction of Model Clause 17(2)(e), and any limits therein as to the disclosure and publication of the Data, are properly before me as issues for determination at this time. That being the case it is appropriate, necessary, and in the interests of justice, that I make further findings as to the proper interpretation or construction of Clause 17(2)(e) which will form part of the ratio of my judgment, and as such will bind the parties hereto.

273. As already noted, GSI submits that Model Clause 17(2)(e) is qualified by the word "may" which mandates that the Governor exercises discretion in a particular way. GSI submits that the exercise of this discretion must be exercised in a reasonable manner and in accordance with the purpose of the Act under which it was granted. GSI submits that the exercise of such discretion is to be carried out in accordance with public law principles and as such is amenable to challenge by way of judicial review based on public law grounds of challenge.

274. The Defendant's primary case is that the exercise of discretion under Model Clause 17(2)(e) is contractual in nature and is a discretion or decision as to whether to exercise what is characterised as an absolute contractual right. On that basis, the Defendant submits that there are no constraints on the Governor as to the exercise of such discretion or decision. Alternatively, the Defendant submits that Clause 17(2)(e) is a contractual discretion which it recognises will usually be subject to a requirement not to exercise the discretion arbitrarily, capriciously or irrationally. In relation to this distinction the Defendant refers to the case of *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (trading as Medirest)* [2013] EWCA Civ 200 at [83] and [91]. The Defendant also refers to the decision of *Braganza v BP Shipping Ltd and another* [2015] 1 WLR 1661 in which Baroness Hale DPSC described a contractual discretion as being where a party is charged with making decisions which affect the rights of both parties to the contract. In relation to the distinction between a contractual discretion and the ability to make a choice to do something or not, the Defendant refers to the cases of *Myers v Kestrel Acquisitions Limited* [2015] EWHC 916 (Ch) at [61] and *Monde Petroleum SA v Western Zagros Ltd* [2016] EWHC 1472 (Comm) at [266] and [267]. The

Defendants also refer, in this regard, to the recent case of *Monk v Largo Foods Ltd* [2016] EWHC 1837 (Comm) at [52]-[58].

275. The Defendant denies that the decision of the Defendant regarding the Data is judicially reviewable (or otherwise challengeable on public law grounds). It submits that there is no (or at least no sufficient) public law element referring in this regard to the decisions of *R (Tucker) v Director General of the National Crime Squad* [2003] ICR 599 at [24]-[26], [32] and [35] and *R (Supportways Community Services Limited) v Hampshire County Council* [2006] EWCA Civ 1035 at [42], [43], [56] and [59]. It is said that public law principles should not be superimposed on the decision because that would undercut or distort the terms agreed between the parties referring to *R (Molinaro) v The Royal Borough of Kensington and Chelsea* [2001] EWHC Admin 896 at [69] and [73].

276. In *R(Tucker) v Director General of the National Crime Squad* [2003] ICR 599, at [24] Scott Baker LJ (with whom Sir Philip Otton and Aldous LJ agreed) quoted with approval what Pitchford J identified in *The Queen on the application of Hopley v Liverpool Health Authority & Others (unreported) 30 July 2002* when considering whether a public body with statutory powers was exercising a public function amenable to judicial review or a private function that was not:-

> 24. In *The Queen on the application of Hopley v Liverpool Health Authority & Others (unreported) 30 July 2002* Pitchford J helpfully set out three things that had to be identified when considering whether a public body with statutory powers was exercising a public function amenable to judicial review or a private function that was not. These are:
>
> > i) Whether the defendant was a public body exercising statutory powers;
> > ii) Whether the function being performed in the exercise of those powers was a public or a private one; and
> > iii) Whether the defendant was performing a public duty owed to the claimant in the particular circumstances under consideration."

277. In the present case I have already concluded that the better view is that the Licence and Model Clause 17(2)(e) is to be interpreted as a public law instrument rather than terms and conditions to be construed on contractual principles. In that context Model Clause 17(2)(e) effectively confers a power on the Governor to

publish or disclose data (here the Data) to any person. That power is granted by the provisions of the Model Clauses which are themselves the product of a regulation, namely the Model Clauses Regulations which provide that the Clauses set out in the Schedule (ie the Model Clauses) are deemed to be incorporated in every Licence granted under the Offshore Minerals Ordinance which it will be recalled repealed the Continental Shelf Ordinance 1991, *"to replace it so as to make further and better provision for the exploration and exploitation of minerals in the Continental Shelf and other controlled waters of the Falkland Islands and for matters connected with or relating to the foregoing matters."*

278. Set against such statutory backdrop, I consider and find, that the Governor is to be regarded as in the same position as a public body exercising statutory powers, and that the function that the Governor is performing, namely deciding whether to exercise the power to publish or disclose the Data to any person is a public function. That leaves the question of whether the Governor is performing a public duty owed to GSI in the particular circumstances under consideration. I do not consider that the Governor owes a specific public law duty to GSI. However, when exercising his discretion, the Governor is acting in furtherance of the statutory licencing regime and the purposes expressed in the Offshore Mineral Ordinance. In such circumstances, I consider and find that the decision of the Governor does have a sufficient public law element for any decision of the Governor to be judicially reviewable and challengeable on judicial review grounds, and that GSI would have sufficient *locus standi* to bring a claim for judicial review.

279. The next question is as to the precise circumstances in which the exercise of discretion is amenable to public law challenge. Clause 17(2)(e) grants the Governor a discretion to publish or disclose the Data to any person. On its face this discretion is unqualified. The Defendant submits that in such circumstances the discretion can only be attacked on the basis either of bad faith or on the basis that it is so unreasonably exercised as to show that there cannot have been any real or genuine exercise of the discretion, relying upon what was said by Lord Reid in *British Oxygen Co Ltd v Ministry of Technology* [1971] AC 610 at 624F-G:-

"I cannot find that these provisions give any right to any person to get a grant. It was argued that the object of the Act is to promote the modernisation of machinery and plant and that the Board were bound to pay grants to all who are eligible unless, in their view, particular eligible expenditure would not promote that object. That might be good advice for an advisory committee to give but I find nothing in the Act to require the Board to act in that way. If the Minister who now administers the Act, acting on behalf of the Government, should decide not to give grants in respect of certain kinds of expenditure, I can find nothing to prevent him. There are two general grounds on which the exercise of an unqualified discretion can be attacked. It must not be exercised in bad faith, and it must not be so unreasonably exercised as to show that there cannot have been any real or genuine exercise of the discretion. But, apart from that, if the Minister thinks that policy or good administration requires the operation of some limiting rule, I find nothing to stop him."

280. In the context of the particular statutory provision under consideration, namely Model Clause 17(2)(e) and the discretion to publish or disclose the Data to any person after five years (which are wide and unqualified words), I consider that the legislative intent was indeed to give the Governor an unqualified discretion when set against the statutory backdrop of the other statutory provisions in Clauses 16 and 17(2) which imposed limitations on what the Governor might do prior to that but no limitations as to what he might do after that.

281. I agree that the exercise of discretion must also be in accordance with the purpose of the underlying Act or in this case the Offshore Minerals Ordinance, namely the, "*the exploration and exploitation of minerals in the Continental Shelf and other controlled waters of the Falkland Islands and...matters connected with or relating to the foregoing matter"* but I do not agree that this Preamble is "vague" or "ambiguous" (in contrast to GSI's submissions at paragraphs 95 and 96 of GSI's Closing Submissions). Rather I consider it to be general in nature, and to provide a wide statutory purpose.

282. That being the case, a decision by the Governor to publish or disclose the Data if made in accordance with what he considers to be the furtherance of the exploration and exploitation of minerals in the Continental Shelf and other controlled waters of the Falkland Islands, and not made in bad faith nor so

unreasonably exercised as to show that there cannot have been any real or genuine exercise of the discretion is not amenable to challenge.

283. In this regard it matters not whether someone else (for example GSI) would agree or disagree with what is in such furtherance - so for example, the fact that GSI regards the free distribution of seismic data to the public as "poor policy" (as Mr Paul Einarsson does) is irrelevant, and not a ground for public law challenge. Equally there is no obligation on the Governor to consider the interests of GSI or the previous confidential nature of the Data or the fact that GSI has copyright in the works, in the context of the terms of Model Clause 17(2)(e) and the findings I have made in relation thereto, including the provision of a licence.

284. At paragraph 14 of the Defence the Defendant pleads that, *"Disclosure and publication of data are considered essential to inform and promote further exploration work and are therefore strongly in the public interest"* and GSI has identified this as the Defendant's expressed purpose in disclosing data (which it clearly is). This is also consistent with the evidence given by the Defendant's witnesses, which I accept (see, for example, paragraph 67 of Mrs Rendell's first statement, paragraphs 135 to 140 of Mr Luxton's first witness statement and paragraphs 84-99 of Dr Richards' first statement). It will be recalled that Mrs Rendell's email of 23 November 2004 also referred to the release of data, *"to companies with a genuine interest in investing in the area"*. If the Governor publishes or discloses the Data for the purpose of informing and promoting further exploration work, that is within the breadth of the exercise of discretion granted to him, and is not amenable to challenge by way of judicial review on public law grounds. In this regard, it matters not whether others would agree or disagree that disclosure will have that desired effect.

285. I reject the (unpleaded) suggestion at paragraph 105 of GSI's Written Closing Submissions that a consideration of whether the publication and/or disclosure would promote further exploration work would require the Governor to have regard to the matters there alleged specifically:-

a. GSI's copyright and confidentiality rights in the Data, which requires consideration of:
    i. whether GSI's copyright subsists in the Data;
    ii. whether the Data remains confidential;
b. the specific recipient to which disclosure is to be made and whether that recipient has the financial wherewithal to pay licence fees for the Data to GSI;
c. the specific data which would be disclosed and whether the disclosure will be partial or all of the Data;
d. whether the specific data is available for license already to explorers from the owner;
e. whether disclosing to the specific recipient will interfere with contractual arrangement that that recipient has with GSI or whether it is likely that that recipient will interfere with other contractual arrangements GSI has;
f. the purpose of the disclosure, for example;
    i. whether or not there are any available areas to be licenced for exploration; and
    ii. whether disclosing data would encourage further exploration in the current oil and gas market;
    iii. whether disclosure would inhibit further seismic exploration, which involves a consideration of, inter alia:
        1. what terms of confidentiality the recipient will be subjected to; and
        2. whether the survey under consideration has reached a profitable stage or not.

286. If, contrary to the findings I have made, the discretion in Model Clause 17(2)(e) is not an unqualified discretion challengeable only for bad faith or on the basis that it has been so unreasonably exercised as to show that there cannot have been any real or genuine exercise of the discretion, then the alternative, based on public law principles, would be that the exercise of discretion would be amenable to challenge on wider public law grounds of challenge.

287. In this regard the Defendant notes that it is only where legislation, *"expressly or impliedly identifies considerations required to be considered by the authority as a matter of legal obligation"* that a decision will be invalid because relevant matters were ignored (see *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172 as approved in *Re Finlay* [1985] A.C. 318, 333-334). Otherwise it is for the decision maker to decide what is and what is not a relevant consideration and this decision will only be subject to review on *Wednesbury* grounds (see *R v Secretary of State for Transport* [1994] 1 WLR 74, 95). The decision on how much weight to place on any relevant consideration is one for the decision maker (see *Tesco Stores Ltd v*

Secretary of State for the Environment [1995] 1 WLR 759, 764, 780). Any flaw must be shown to be a material one (*R v Parliamentary Commissioner for Administration, ex parte Balchin* [1998] 1 PLR 1). The Defendant submits that in a challenge based on alleged irrationality, the court should be very slow indeed to interfere with the decision of a body having expertise (relying, by way of example, on the case of *Great North Eastern Railway Ltd v Office of Rail Regulation* [2006] EWHC 1942 (Admin) at [39]).

288. The *Wednesbury* principles laid down by Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223, at 233-234 are well-known:-

> "The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it."

289. In the present case I do not consider that the statutory provisions expressly or impliedly identify any considerations that are required to be taken into account by the Governor as a matter of legal obligation. At most it might be said that a relevant consideration would be for the Governor to consider whether he considers that the disclosure of data would be in the furtherance of the exploration and exploitation of minerals in the Continental Shelf and other controlled waters of the Falkland Islands.

290. It is neither explicit nor implicit in the statutory regime that the Governor would have to take into account the matters asserted by GSI at paragraph 105 of GSI's Closing Submissions. On the contrary, I find that he would not have to do so as they are not relevant considerations. As identified above, the only consideration that might fall into a different category is whether the Governor considered disclosing data would encourage further exploration in the current oil and gas

market (ie 105(f)(ii) of GSI's Written Closing Submissions). However the evidence shows that that is done, and is intended to be done - the only circumstance in which disclosure is contemplated is disclosure for such purpose (as reflected in paragraph 14 of the Defence and the evidence that I have already referred to). Again, I would emphasise that that would not require the Governor to have regard to the views or interests of GSI including GSI's rights concerning copyright (not least in the light of the findings I have made in relation to a copyright licence). Nor would it require him to impose conditions of the type proposed by GSI (payment of a royalty to GSI and the like), not least in the context of the findings I have made in relation to copyright and confidentiality.

291. For the avoidance of doubt, and had they arose for consideration (which they do not as they are unpleaded, and no claim is made by way of judicial review), I would also have concluded that the Government had not committed any error of law in the respects alleged at paragraph 108 of GSI's Closing Submissions. Nor is there any evidence of any procedural unfairness, breach of natural justice or any other unlawful conduct.

292. That leaves the question of what the position would be if the exercise of discretion under Model Clause 17(2)(e) is contractual in nature. On that scenario, I do not consider that the Governor would have an absolute contractual right, but rather that Clause 17(2)(e) is a contractual discretion which would be subject to a requirement not to exercise the discretion arbitrarily, capriciously or irrationally. In the present case there is no pleaded case that the Governor has acted arbitrarily, capriciously or irrationally, and there is no evidence that would support such a conclusion in relation to the disclosure that has been contemplated, and I so find. Equally I do not consider that the Licence, if contractually construed, would be subject to a contractual implied term that the Governor act in good faith (contrary to GSI's submission in this regard and reliance upon, amongst other cases, Y*am Seng Pte Limited v International Trade Corporation Limited* [2013] EWHC 111 (QB)). The requirements for implication of such a term are not met, and the present category of case is not one in which it would be appropriate to imply such a term. In any event the evidence does not support a plea that the Governor has not acted in

good faith, which would almost certainly have involved an allegation of bad faith, and no such plea has been made in any event.

293. Finally, GSI takes issue with who may exercise the discretion. I do not consider that there is anything in this point. The discretion is that of the Governor, but the acts of officers of the Defendant are his acts, and the Governor is acting through the DMR (see, in this regard, what was said by Lord Greene M.R. in *Carltona v Commissioners of Works and Others [1943] 2 All E.R. 560, 563*). I also reject the suggestion that the Governor, or anyone acting on his behalf, has abrogated the Governor's discretion in having regard to views expressed by Dr Richards or the BGS. The BGS are the technical adviser to FIG and it is appropriate to have regard to their views. In this regard the views of Dr Richards in any event accord with those of Phyll Rendell and Stephen Luxton in the evidence I have already referred to. Yet further the evidence does not support the conclusion that the decision was delegated to Dr Richards or the BGS (had that been a pleaded issue, which it is not).

H7 Findings on Issues 1 and 2

294. In the above circumstances:-

(1) In relation to Issue 1, I find and declare that the Data comprises works in respect of which copyright belonging to the Plaintiff subsists, but that there is a licence in the Defendant's favour for the purpose of section 1(2) of the Copyright Act 1956, and Model Clause 17(2)(e) is not repugnant to section 31(3) of the Copyright Act 1956 or null and void. Subject only to the findings in my judgment, after the five-year period the Governor may publish or disclose the Data to any person.

(2) In relation to Issue 2, I find and declare that confidentiality is provided for and regulated by the Licence, and the effect of Model Clause 17(2) and 17(2)(e) is that no confidentiality remains that would prevent publication or disclosure by the Defendant after the expiration of the five-year period.

I Issue 3: Estoppel by Convention

295. The Defendant submits that GSI is in any event prevented from asserting the claim it advances by the operation of an estoppel. Although reliance is placed at paragraph 15.8 of the Defence upon estoppel by representation and/or convention or by acquiescence, at trial the Defendant focussed on estoppel by convention.

296. In the light of the findings I have made in relation to Issues 1 and 2, and the interpretation of Model Clause 17(2)(e) that I have found, the question of whether an estoppel by mutual convention arises is academic, because the Defendant's submission, that the basis on which the parties conducted their dealings was that the Plaintiff accepted that Data received by the Defendant under the terms of the Licence could be published or disclosed by the Defendant after the five-year period had expired without objection on the part of GSI, accords with the proper interpretation of Model Clause 17(2)(e) that I have found.

297. However, having heard argument on the plea, I will address the issues that arise. A preliminary point is whether there is any scope for the operation of the principle of estoppel by convention where the conventional understanding of a statutory provision is contrary to its true meaning as subsequently found. It has been found that as parties to a contract cannot effectively oust the protective provisions of an Act of Parliament by agreeing that they should be treated as inapplicable, so the statutory inability to contract out cannot be avoided by appealing to an estoppel - see *Keen v Holland* [1984] 1 W.L.R. 251, 261D-E (a decision concerning security of tenure under the Agricultural Holdings Act 1948). However, the present case is not one where the Model Clauses on their proper interpretation prohibit that which the Defendant wishes to do (GSI accepts that Clause 17(2(e), on its face, would appear to allow publication or disclosure to any person after five years), nor is what is contemplated prohibited by any Act or subsidiary legislation (in this regard the 1956 Act itself contemplates the possibility of a copyright licence, as has already been addressed).

298. In addition, the issue of interpretation is in relation to Model Clauses incorporated into a Licence, which is not itself a statute or secondary legislation but

rather a licence created thereunder which identifies rights and obligations and which (on this hypothesis) simply falls to be construed as a public law instrument. In that context, I do not consider that there is any reason in principle why the rights and obligations of the parties based on the true interpretation of the public law instrument could not be affected by a mutual understanding between them as to their respective rights and obligations provided that such understanding was not contrary to any statutory prohibition. Of course, if the Licence is to be construed in accordance with contractual principles, this preliminary point does not arise in any event.

299. As to the applicable principles in relation to estoppel by convention these are well established. They are conveniently summarised at paragraph [56] of the judgment of Moore-Bick J (as he then was) in *Petromec Inc v Petroleo Brasileiro Sa Petrobas* [2004] EWHC 127 (Comm):-

> 56. The principles of estoppel by convention are to be found in *Amalgamated Investment & Property Co. Ltd v Texas Commerce International Bank Ltd [1982] 1 Q.B. 84* and *Norwegian American Cruises A/S v Paul Mundy Ltd (The 'Vistafjord')* [1988] 2 Lloyd's Rep. 343 . At their heart lies an agreed assumption, whether of fact or law, which each party knows is held by the other and which forms the basis on which they have subsequently conducted their dealings so as to make it unjust to allow either of them to challenge the assumption later on: see per Bingham L.J. in *The Vistafjord* at pages 351–352 approving a passage in the judgment of Peter Gibson J. in *Hamel-Smith v Pycroft & Jetsave Ltd (unreported).*"

300. The relevant aspects of course of dealing and reliance can be found in the negotiation and entering into of a contract or other legal instrument (*Petromec* above at paragraph 57, *Helden v Strathmore Ltd [2011] EWCA Civ 542* at paragraph 24). The party who is sought to be estopped must have contributed in some active way towards the creation or continuance of the basis on which the parties thereafter conducted their dealings, so that it would be unconscionable to allow him to resile from the stance he had taken, which had to a certain extent influenced the other party to behave as it did (*Bank of Scotland v Wright* [1990] BCC 663 at 677 to 678).

301. The Defendant submits that GSI is estopped from asserting its present claim because the basis on which the parties conducted their dealings was that GSI accepted that Data received by the Defendant under the terms of the Exploration Licence could be published or disclosed by the Defendant after the five-year period had expired without objection on the part of GSI. The Defendant relies, in particular, upon the email exchange of 19 and 23 November 2004 between Mr Paul Einarsson and Mrs Phyl Rendell that has already been referred to, and quoted, in section D above. This culminated in Mr Paul Einarsson signing and returning the Licence to FIG without the amendments that Mr Einarsson had sought.

302. GSI denies that there was any mutual understanding. GSI submits that it disputed the Defendant's interpretation and protested repeatedly, as well as asserting its proprietary rights. I do not consider that this is an accurate characterisation of the contemporaneous responses to the position as advanced by the Defendant before and after the Licence was granted in the circumstances identified below.

303. It will be recalled that in his email of 19 November 2004 Mr Einarsson expressed concern about the publication of data after five years, and when he was cross-examined he confirmed that he knew full well what was being proposed (transcript 317/18-23). Mrs Rendell then made clear that FIG was not able to alter the five-year confidentiality period and that FIG's position was that the processed data could be released to companies with a genuine interest in investing (at the end of the five years) in her email of 23 November 2004. This provoked Mr Einarsson's response in his email of 23 November 2004, that has already been quoted in which he expressed the view that, *"This practice is no incentive to oil companies that would easily pay for the minute cost of seismic, but it does discourage more data being acquired by spec companies and in the long run is a poor policy that achieves the opposite of what is intended."* He did not refuse to enter into the Licence on such terms or deny that this was the effect of the provisions of the Licence. On the contrary he raised a question as to where his signature was to go (in an email at 20.06hrs on 23 November 2004) and after receiving an email from Mrs Rendell proposing, on advice, that he sign underneath the text, Mr Einarsson signed the Licence and returned it as confirmed in his email of 24 November 2004 to Mrs Rendell.

304. In such circumstances, I find that Mr Paul Einarsson was well aware that the Defendant was proceeding on the basis of an assumption that after five years it was free to disclose and publish the Data, and that Mr Einarsson on behalf of GSI acquiesced in such understanding by signing and returning the Licence in such terms. Mr Einarsson's reference to the Defendant's policy as "poor" supports the conclusion that Mr Einarsson was either accepting, or acquiescing in, the Defendant's understanding of the position even though he did not like it.

305. This was also the Defendant's understanding of GSI's position. In this regard, I accept the evidence of Mrs Rendell as to her understanding, namely that she "*...assumed from this that, although Mr Einarsson had queried the policy, he was content to accept and abide by the terms of the licence, including the position on data disclosure which had been confirmed to him in [G41]. Had Mr Einarsson's position been otherwise then I do not believe that GSI would have signed the Licence. At no stage did Mr Einarsson indicate to me that he would not abide by the terms of the Licence. If he had said that GSI would sign the licence but only on the basis that it would not abide by it, and indeed would challenge the data release provisions later, then FIG would not have entered into the Licence.…..*". That evidence was not challenged in cross-examination, and I accept it.

306. It was put to Mr Einarsson in cross-examination that, *"if you had said to Mrs Rendell that you were either going to challenge or were reserving the ability to challenge data disclosure under the licence in the future then the reality is that the government would not have given you the licence"* to which he replied, *"Well, that was my concern. And then I'd be in the same boat and have a huge financial and contractual issue and it would end up crashing my company..."* (transcript 330/15-22).

307. I am satisfied that the Defendant (through Mrs Rendell) did rely upon GSI's acquiescence (through Mr Paul Einarsson) in the Defendant's understanding as to its ability to publish and disclose the Data after five years and that the Defendant would not have granted the Licence to GSI had it been aware that GSI would not abide by this understanding, and that Mr Einarsson was aware of this. In the above

circumstances, I find that it would have been unconscionable for GSI to resile from that understanding, and that GSI would have been estopped from doing so had Model Clause 17(2)(e) had the interpretation that GSI has proposed. However as Model Clause 17(2)(e) does not have the interpretation that GSI has proposed, but rather is to be interpreted as I have found, it is not necessary for the Defendant to rely upon any such estoppel because the understanding represents the proper interpretation of Model Clause 17(2)(e).

308. I would add that were it necessary for the Defendant to rely on the principle of estoppel by convention, subsequent events show that the parties continued to proceed on the basis of such understanding for a number of years. In this regard-

(1) GSI sought and was granted an extension of the term of the Exploration Licence in return for a payment of £5,000 (raised by GSI in an email of 3 May 2005, and granted by the Defendant (as evidenced by the signed extension returned by GSI on 5 October 2005)).

(2) In March 2007, in an email from Mr Paul Einarsson to Mrs Rendell on 16 March 2007, GSI sought amended data release terms (on the basis of the DTI-IAGC agreement), but did not complain about the Defendant's position or challenge the same, when the Defendant maintained its policy regarding data release after five years in Mrs Rendell's email in June 2007. In that email Mrs Rendell suggested the matter of consideration of extended confidentiality in mid 2009 by which time she envisaged the financial return to GSI would be clearer.

(3) In response to Mrs Rendell's letter of 28 October 2010 notifying GSI of the Defendant's intention to release the Data, Mr Paul Einarsson (in his email of 2 November 2010) whilst expressing the view that GSI did not agree with *"the essential confiscation of our intellectual property"* asked whether there was any discretion to delay the proposed release in circumstances where GSI said it required a minimum of three data licence sales in order to obtain a commercial return. As addressed in the Chronology of Events, GSI in Mr Paul Einarsson's email of 26 November 2010 accepted (and expressed appreciation for) an extension to December 2012 that the Defendant had indicated it would grant in Mrs Rendell's

email of 5 November 2010. Following subsequent correspondence, as addressed in the Chronology of Events, the Defendant ultimately granted GSI an extension up to the end of December 2013 in Mrs Rendell's email of 1 March 2011.

309. Thus, in this subsequent correspondence, it is clear that the Defendant still had the intention to disclose the Data at the end of the period, and GSI did not indicate any intention to challenge this, being content to secure as long a period during which Data would not be disclosed as possible. As Mr Paul Einarsson put it when cross examined, "*Well, the only thing I was interested in was delaying any disclosure of this data as long as possible, by any means I could. Avoiding costly litigation as much as I could and trying to do it through negotiation first*" (transcript 356/19-23). He also stated in the context of time being extended to end 2012: "*....but read fairly you asked for more time and you got it and you accepted it. A: Yeah, I accepted more time*" (transcript 358/1-3), and later in the context about time being extended to end 2013: "*Well I think she [Mrs Rendell] drew a line here. She said there would be no further negotiations beyond December 2013.*" He also said: "*…I wasn't really concerned, as long as the data was not being disclosed here that's all I was worried about*" [370/11-13].

310. In the light of my findings on issues 1 and 2 above and the proper interpretation of Model Clause 17(2)(e), I answer issue 3 as follows, "In the light of the answers I have given to issues 1 and 2 above, the question of estoppel by convention does not arise. However, had it arisen, GSI would have been estopped by convention from resiling from the understanding that the Defendant could publish and disclose the Data after five years, and the Defendant would have had a defence to GSI's claim on the basis of such estoppel".

J Issue 4 : Laches

311. In the light of my findings in relation to Issues 1 and 2 concerning copyright and confidentiality the question of whether the doctrine of laches would bar GSI from seeking a declaration in respect of copyright and confidentiality does not arise, and I do not consider that it would be appropriate to address the various issues that would have arisen in relation to this equitable doctrine had I found that there was no

copyright licence or that the Data remained confidential. Issue 4 is accordingly to be answered "In the light of my findings on Issues 1 and 2, Issue 4 does not arise."

K Issue 5 : Whether the Court can issue an injunction in the form sought in the pleadings and if so whether it should do so in the circumstances

312. In the light of my findings in relation to Issues 1 and 2 GSI is not entitled to the relief it claims, or any relief, in this action, and Issue 5 is answered accordingly. Had GSI been entitled to any relief it was agreed in oral closing that the parties would provide further written submissions after judgment in relation to what relief was available and appropriate in all the circumstances, but that scenario does not arise.

K Conclusion

313. In the light of my findings in this judgment GSI's claim is dismissed. In advance of the handing down of judgment, the parties should agree an Order, for my approval, reflecting my findings. If any issues remain outstanding I will hear argument on such matters from the parties at the time of hand down. As requested by the parties, costs are reserved pending agreement on costs, or further submissions on costs should agreement on costs not be possible.