Neutral Citation Number: [2013] EWHC 2495 (Comm)

Case No: 2011 FOLIO 792

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/08/2013

Before :

LADY JUSTICE GLOSTER

- -

Between :

Energy Venture Partners Limited	**Claimant**
- and -	
Malabu Oil and Gas Limited	**Defendant**

- -

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Mark Howard Esq, QC, Fionn Pilbrow Esq and Edward Harrison Esq (instructed by **McGuireWoods London LLP**) for the **Claimant**
Charles Graham esq, QC and Andrew Lodder Esq (instructed by **Edwards Wildman Palmer LLP**) for the **Defendant**

Hearing dates: Wednesday 17th July 2013
Thursday 18th July 2013

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SUPPLEMENTAL JUDGMENT in relation to post-judgment matters

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

LADY JUSTICE GLOSTER

Lady Justice Gloster :

Introduction

1. I handed down judgment in this action on 17 July 2013 ("the Judgment"). I heard submissions from counsel for the parties in relation to post-judgment matters on 17 and 18 July 2013. I refused Malabu permission to appeal and I determined all but one of the relevant issues consequent upon the Judgment. Following those hearings, the one matter which remained outstanding in respect of which I had not given judgment, was the basis upon which I should award the costs of the action to EVP, and what, if any, discount should be made to such award. Because of time constraints at the hearing, I also indicated that I would, in my subsequent judgment, briefly set out my reasons for refusing permission to appeal. This judgment addresses those points.

2. The definitions used in this judgment are the same as those used in the Judgment. It is not necessary for me to rehearse any of the facts relating to the case. They are fully set out in the Judgment.

Costs of the action

3. The outstanding issues in relation to costs are whether costs should be awarded to EVP on the indemnity or the standard basis and, whichever basis is applied, whether there should be a deduction to reflect the fact that EVP did not succeed on its primary claim that there was a binding contractual agreement between EVP and Malabu that EVP should receive the sum of $200 million by way of fee.

4. On behalf of EVP, Mr Howard submitted that EVP should be awarded all of its costs on an indemnity basis, despite the fact that its primary claim was not accepted, and that the Court concluded that it was a claim in which EVP, through Mr Obi, had no belief. Nonetheless, Mr Howard submitted that this was still an appropriate case for an award of indemnity costs and that there should be no, or very little, discount to reflect the fact that EVP had failed in its primary claim. In support of EVP's position, Mr Howard put forward the following arguments:

    i) The Court had found that, for the most part, it was able to rely on the evidence of Mr Obi. Indeed, even on the issue of the $200 million agreement, his oral evidence presented a '*far more realistic picture*'. This was in stark contrast to Malabu's witnesses. So far as Chief Etete was concerned, the Court had concluded (at paragraph 54) that it was '*almost impossible to accept any of Chief Etete's evidence*', that '*at times ... he was being deliberately dishonest*' and that the '*ultimate conclusion was that I could not rely upon him as a witness of truth*'. Equally, the Court could not '*place any reliance on the evidence of Mr Gbinigie where it was contentious*' and his evidence was '*in many respects wholly unsatisfactory*'.

    ii) Dishonest witness evidence, however, was only one of the many ways in which Malabu's conduct of the litigation was unsatisfactory. As the Court remarked in paragraphs 55 and 56 of the Judgment, there was, on Malabu's part a '*comprehensive failure to comply with its disclosure obligations*' for which there was no adequate explanation, and which left the Court with '*no*

confidence that all relevant documents in Malabu's possession custody or control have been disclosed to the court'.

iii) In addition, the entire episode surrounding the production of the purported Malabu accounts, and the statements made and explanations given, both on instructions and in evidence, in connection with them, also revealed a wholesale disregard, on Malabu's part, for the integrity of the Court process. That episode revealed that Malabu had no respect for the Court process, and was entirely willing to seek actively to mislead the Court. It was of a piece with its approach to disclosure.

iv) Moreover, Malabu was willing in its defence to run a fraud allegation that was (rightly) found to be entirely bogus, and then, in the course of the trial to make up further entirely bogus allegations of fraud and dishonesty. In both cases, the list of people accused of the fraud was an ever-changing, ever-growing list.

v) In those circumstances, Malabu's conduct was such as to make it appropriate for the Court to indicate its disapproval of such conduct by awarding costs on an indemnity basis. There had been substantial deliberate misconduct; on any view, the case was one that was far from the norm.

vi) As for Malabu's contention that EVP should be docked 50% of its costs to reflect the fact that it had, in part, been unsuccessful:

a) There could be no doubt but that EVP had been the successful party. It had achieved a resounding victory, resulting in the recovery of a very substantial sum. It should be entitled to recover its costs from the unsuccessful defendant, Malabu. That was the starting point as set out in CPR rule 44. 2 (2) (a) and there was no reason for departing from it.

b) It was right that EVP had run its claim on a number of alternatives, and that it did not succeed on its primary case (express agreement). But that was only a basis for penalising the successful party in costs if it could be said that costs were incurred specifically in connection with the arguments on which the successful party has lost. In the present case, there was no basis for any such suggestion. The trial would not have been prepared differently, or conducted differently, if the only allegation had been implied agreement/term and/or quantum meruit. It was necessary at trial to engage at considerable length with the detail of the negotiations between the parties in relation to EVP's fees, not only in relation to Malabu's termination and other claims, but also in relation to the quantum claim.

c) There was no authority giving guidance, as a matter of principle, as to the approach the Court should take to issues of costs in cases where it had found that *both* parties had acted dishonestly. Although there were cases where the Court had concluded that both parties had acted dishonestly in some respect, and had decided in light of that, and in light of all the other relevant factors arising in the case, what order as to costs it should make in the exercise of its discretion (see, for example, *Fiona Trust & Holding Corp v Privalov* [2011] EWHC 664 (Comm)),

there was no case in which any useful statement of principle applicable to such situations was set out.

d) There was, however, authority on the approach the Court should take, as a matter of principle, in cases in which a party has been successful in the proceedings, but has also been found by the Court to have acted dishonestly. However, in applying any such authority to the present case, one needed to keep clearly in mind that in such cases the court was seeking to balance the position between, on the one hand, a successful but dishonest party, and on the other hand, an unsuccessful but honest party. In the present case, the position was very different: one has a successful party, whose evidence has largely been accepted but has been found to be dishonest in one (it was acknowledged, important) respect, but, on the other hand, the unsuccessful party that had been found to have been thoroughly dishonest and to have conducted itself in a reprehensible and dishonest manner, the scale of which is out of all proportion to the successful party's dishonest conduct.

e) The relevant statements of principle (such as they were) were most fully set out in the judgment of Briggs J (as he then was) in *Bank of Tokyo-Mitsubishi UFJ Ltd v Baskan Gida Sanayi Ve Pazarlama AS* [2009] EWHC 1696 (Ch), [2010] 5 Costs LR 657. In *Hutchinson v Neale* [2012] EWCA Civ 345, the Court of Appeal reviewed the various authorities cited by Briggs J in *Bank of Tokyo-Mitsubishi,* before expressly approving the principles set out by Briggs J in that case; see paragraph 25 of the judgment of Patten LJ.

f) However, those statements of principle did not in fact add very much to what was obvious; namely, that the starting point was that the unsuccessful party would be ordered to pay the costs of the successful party (CPR r. 44.2(2)(a)), but the court '*may make a different order*' (CPR r. 44.2.(2)(b)) and that in considering whether to do so, the Court will have regard to '*all the circumstances, including the conduct of the parties [and] whether a party has succeeded on part of its case, even if that party has not been wholly successful*' (CPR r. 44.2(4)).

g) In the present case, the application of any of the principles identified by Briggs J should not lead to any reduction of EVP's recovery of more than 10%. Moreover, it was plainly the case that, in light of the conduct of Malabu, EVP should be entitled to its costs on an indemnity basis, and any discount or reduction applied thereafter. The practical effect of such an order would in substance be the same as an order that Malabu should pay EVP's costs on a standard basis. However, analytically, an approach of awarding costs on an indemnity basis and then applying a modest deduction was logically purer, than merely ordering costs on the standard basis.

5. Mr Graham, on behalf of Malabu, submitted that, given the Court's rejection of EVP's primary case and its limited success on its alternative case, the correct costs order, subject to any appeal, was: that EVP should be granted 50% of the costs of the action,

on the standard basis, to be assessed if not agreed; and that EVP should not recover any costs in relation to the freezing injunction, as it was obtained on the basis of a dishonest assertion that a sum of US$200 million had been agreed between the parties. Mr Graham pointed out that, when looked at in the round, EVP had recovered only slightly more than 50% (i.e. $110 million) of the $200 million which it had been claiming. A discount of 50% would reflect EVP's actual recovery and would also mark the Court's disapproval of EVP's reliance, both in the interlocutory proceedings for a freezing order, as well as in the action, on the dishonest assertion that a sum of $200 million had been agreed between the parties. Mr Graham referred to the fact that, at paragraph 97 of the Judgment, the court had found that, contrary to what Mr Obi had said in his affidavit on the injunction application, Mr Obi *"did not believe that he had achieved even a commercial acceptance of the quantum of that fee by the end of 2009"*.

6. In my judgment, and in the exercise of my discretion, I conclude that the appropriate order is that EVP should be awarded its costs on the indemnity basis, subject to a discount of 10% in respect of all its costs awarded on that basis. (As was in fact accepted by both Mr Howard and Mr Graham, in his order dated 29 July 2011, David Steel J had definitively determined the costs in relation to the freezing injunction, and therefore the basis on which those costs fell to be awarded did not arise for further consideration by me.)

7. My reasons for reaching this result may be summarised as follows:

   i) Leaving aside what I have concluded to have been Mr Obi's dishonest evidence, there is no doubt that Malabu's conduct of, and approach to, the litigation has demonstrated a total lack of integrity and a complete disregard, and abuse, of the court's process. Apart from the scale of the dishonest evidence given by Chief Etete, as Mr Howard submitted, Malabu's attitude to disclosure and the presentation of its so-called accounts made a mockery of the court's processes. To those features has to be added the wild, and ever-changing, allegations of forgery, fraud and conspiracy made by Chief Etete not only as against Mr Obi, but also against numerous other participants in the transaction - without a shred of evidence to support them. Through Chief Etete, Malabu not only contested almost every single factual premise of EVP's claim, but also raised numerous and unsubstantiated defences - ranging, for example from the forgery of the EVP Exclusivity Agreement to whether it had been terminated, from whether representatives of ENI and others had been acting corruptly to whether Chief Etete had been blackmailed.

   ii) I emphasise that I am not directing any criticism at Malabu's English solicitors or barristers; I appreciate that they must have had an extremely difficult road to hold, in discharging their respective duties both to the court and to their client. But the reality of Malabu's approach, and the manner in which Chief Etete gave evidence, was that, in consequence, a huge and disproportionate time at trial was spent on baseless issues, inadequately pleaded, and without the benefit of any, or any proper, disclosure of documents from Malabu. The manner in which the litigation was conducted by Malabu certainly took this case well outside the norm of fiercely contested commercial litigation. Leaving aside my findings in relation to Mr Obi's evidence as to the agreement of the

$200 million fee, I would have had no doubt that Malabu's conduct of the litigation clearly justified an award of costs on the full indemnity basis.

iii) I have carefully considered whether the fact that I have found Mr Obi to have been dishonest, in an important, albeit limited, respect in relation to the claim for $200 million, should preclude an award of indemnity costs in EVP's favour in its entirety, on the basis that the court should not countenance an award of indemnity costs to any party who has been found to put forward a dishonest case. In the particular circumstances of this commercial case, I take the view that such an approach would be unduly moralistic and would not reflect the practical realities between the parties to this case – namely:

a) that EVP has made a substantial recovery, in the face of a host of unsubstantiated defences put forward by Malabu; and

b) that Malabu has conducted its defence, and presented its evidence, in a dishonest and inappropriate manner.

iv) I take into account that, from the start of the proceedings, there was a genuine recognition on the part of EVP of the possible weakness of EVP's claim in relation to an alleged agreement for a $200 million fee. Thus, right from the start, the claim for an injunction was not merely based on the alleged specific agreement of a fee of $200 million, but also squarely based on EVP's alternative claims of implied agreement/term and/or restitutionary quantum meruit, justifying entitlement to a substantial fee in the sum of $200 million or thereabouts. This was clear not only from the original Particulars of Claim, which were before Griffith Williams J in draft, but also from the submissions put forward at that hearing, and the submissions and evidence put forward on both sides at the subsequent inter partes hearing. Moreover the fact that the claim was not simply based on the alleged $200 million agreement was expressly addressed in the judgment of David Steel J on 29 July 2011 (following the lengthy, contested return date hearing). He said, in paragraphs 24-26 of his judgment:

'24. The claimant has an alternative case based upon quantum meruit. It is not challenged by Chief Etete that Mr. Obi worked very hard for him, and spent a lot of money on advisors, solicitors, geological consultants, valuers, banks, and so on. As the Attorney confirms, this is all against the background of a particularly messy history. Mr. Obi's asserts that Chief Etete, having been involved in the middle of it, would have gained very much from his independent assistance. For my part I am not actually sure that it really is seriously suggested that there is no arguable case on quantum meruit.

25. However, what is the figure? That is more difficult. I can well see that a figure of $200 million in relation to a deal which is "only" worth $1.3 billion looks on the high side, particularly when it is conjoined with a payment of $74 million to his co-broker. There is some evidence to suggest that Chief Etete was at least contemplating fees in the region of $100 million to $200 million. Indeed he was actually proposing figures like 7.5 percent of the total value (a value ranging variously between $1 billion and $3 billion). I do not think it

can be said that there is no realistic prospect of successfully contending that a quantum meruit claim might be as much as $200 million.

26. It follows that so far as what I call the "main debate" is concerned, I accept that the claimant does have a good arguable case and in that respect are entitled to renew, or maintain, the freezing order. "

v) As I said in paragraph 51 of the Judgment, when Mr Obi came to give his oral evidence, his description of what had actually occurred did not, as I find, actually demonstrate that any such agreement had been reached. Thus the picture he presented in his oral evidence was, if not entirely honest, a far more realistic one than that contained in his written evidence. Whilst I did not accept his evidence that he genuinely believed that he did have such an agreement, nonetheless his dishonesty in this respect, was on a far lesser scale than that of Chief Etete's widespread disregard for the truth.

vi) Most importantly, I accepted Mr Obi's evidence that the figure of $200 million was indeed discussed in negotiations with the Chief. This was clearly relevant not only to the implied agreement/term quantum claim but also to the termination issue. I thus accept Mr Howard's argument that the majority of the evidence relating to the $200 million, and the fee negotiations, would necessarily have had to have been explored in any event, irrespective of whether EVP was asserting a contractually binding agreement in that amount. However, the fact that this was so, does not detract from the fact that time and effort were wasted, and no doubt consequential costs were incurred, in attacking EVP's case, and Mr Obi's evidence, on this issue. For that reason it is appropriate to apply a discount to EVP's recovery.

vii) Briggs J in *Bank of Tokyo-Mitsubishi* supra stated what he saw as the relevant principles as follows:

"*19. The principles which I derive from the cases to which I have referred are as follows:*

(i) There is no general principle that where an otherwise successful party has put forward a dishonest case in relation to an issue in the litigation, the general rule that costs follow the event is thereby wholly displaced. I leave on one side cases such as Molloy and Arrow Nominees Inc v. Blackledge [2000] 2 BCLC 167, where the conduct in question is so grave that the entire case of the party can properly be described as amounting to an abuse of process. In such cases it is difficult to conceive how that party would ever be the successful party in the litigation. For reasons which will be apparent from the main judgment, and to which I will return, this is not one of those cases.

(ii) The court's powers in relation to the putting forward of a dishonest case include (a) disallowance of that party's costs in advancing that case, (b) an order that he pay the other party's costs attributable to proving that dishonesty, and (c) the imposition of an additional penalty which, while it must be proportionate to the gravity of the misconduct, may in an

appropriate case extend to a disallowance of the whole of the successful party's costs, or an order that he pay all or part of the unsuccessful party's costs.

(iii) In framing an appropriate response to such misconduct, the trial judge must constantly bear in mind the effect of his order upon the process of detailed assessment which will follow, in the absence of agreement, in particular to avoid unintended double jeopardy: see per Waller LJ in Ultraframe at paragraphs 33 to 34.

(iv) "There is no general rule that a losing party who can establish dishonesty must receive all his costs of establishing that dishonesty, however disproportionate they may be.": per Waller LJ in Ultraframe at paragraph 36'.

In addition, having gone on to consider the principles on which it was right to award indemnity-costs, he identified one further relevant point of principle in the following terms:

'28. *To those conclusions on the issues of principle separating the parties I would add this. Whenever the court is asked to make some out-of-the-ordinary costs order in consequence of the alleged misconduct of the party against whom the application is made, the court must bear constantly in mind the conduct of the party making the application. I consider this to be so for two main reasons. The first is that the conduct of the party making the application may have been, in some respect, a contributory cause of the conduct complained about. It may even lead to the conclusion that the conduct complained about, although unsuccessful, was nonetheless not unreasonable in the circumstances.*

29. *The second reason is one of common sense and justice. Penal costs orders (like all costs orders) lead to a financial adjustment between the parties, not to penalties in the nature of fines payable into the Consolidated Fund. Although there may be cases where the conduct criticised is such that a public example needs to be made of the guilty party, to an extent which overrides the practical justice of the matter between the litigants before the court, they are in my judgment likely to be the exception rather than the rule*'.

In *Hutchinson v Neale* supra Patten LJ stated the principle as follows thus (see paragraph 28):

'*The starting point for the consideration of any order for costs of an action is (CPR 44.3(2)(a)) that costs should follow the event. It is from this point that the court will, in an appropriate case, consider the conduct of the parties (rule 44.3(2)(b)). There is no general rule that a finding of dishonest conduct by the successful party will replace the usual starting point. What is required is an evaluation of the nature and degree of the misconduct, its relevance to and*

effect upon the issues arising in the trial, and its tendency to create an unwarranted increase in the costs of the action to either or both of the parties. As Briggs J observed at para 19 of his judgment in Bank of Tokyo the full range of measures is available to ensure that the dishonest but successful party does not gain, and the honest but unsuccessful party does not lose, in consequence of the wrongdoing established'.

viii) With respect to these statements of so-called principle, they do little more than to emphasise and reflect: (i) the starting point as set out in CPR r. 44.2(2)(a) that the unsuccessful party will be ordered to pay the costs of the successful party; (ii) but the court '*may make a different order*' as set out in CPR r. 44.2.(2)(b); and (iii) that, in considering whether to do so, the Court will have regard to '*all the circumstances, including the conduct of the parties [and] whether a party has succeeded on part of its case, even if that party has not been wholly successful*' as set out in CPR r. 44.2(4). This is the approach which I have adopted.

ix) Bearing in mind the need for simplicity and clarity on any detailed assessment of costs, I consider that the best way to achieve a just result is for there to be an "across-the-board" discount, rather than for me to take any of the other courses mentioned by Briggs J, such as a disallowance of EVP's costs in advancing its case on the $200 million fee, or an order that EVP pay Malabu's costs attributable to proving the relevant dishonesty, or some other penalty marking the court's disapproval of the dishonest evidence given by Mr Obi.

x) I consider that the 50% figure proposed by Mr Graham as the appropriate discount is far too high and does not in any way reflect the actual waste of time and costs on the issue of the alleged fee agreement. For the reasons which I have already given, the evidence in relation to the putting forward of the $200 million as a proposed fee, and the negotiations, would have had to have been adduced and explored in any event. Necessarily 10% is a somewhat rough and ready figure, and I have carefully considered whether it should be higher, or indeed lower, given that most of the same evidence (other than the assertion that the fee had been actually agreed), would have been given in any event. However that percentage discount does, in my judgment, most nearly reflect the wasted time and costs involved. This is not a case, in the words of Briggs J, "*where the conduct criticised is such that a public example needs to be made of the guilty party, to an extent which overrides the practical justice of the matter between the litigants before the court*". Accordingly the discount figure does not reflect any punitive element.

Reasons for refusal of permission to appeal

8. In his written submissions in support of Malabu's application for permission to appeal, Mr Graham set out nine proposed grounds of appeal. Despite his detailed and strenuous efforts to characterise the points as principally points of law, the reality, on analysis, is that each of the proposed grounds involved a wholesale attack on my findings of fact, which were based on my view of the evidence and the credibility of the principal witnesses.

9. Grounds 1-7 are directed at the conclusion that there was an implied agreement, alternatively an implied term. To a considerable extent, the various grounds overlap one another. They all necessarily involve a fundamental challenge to my findings in relation to the critical factual issue as to what the parties actually agreed, whether as to formation of contract, variation, implied agreement, termination and other matters.

10. Nor do I consider that any real issue of law arises in relation to the effect of clauses such as the "for the avoidance of doubt" clause and the "Entire Agreement" clause." Whether, and if so the extent to which, the effect of such clauses can be overridden by the subsequent express or implied agreement of the parties to operate in a different manner from that envisaged by the contract, by a consensual variation of the contract, or other conduct as between them, must necessarily be a question which is heavily dependent on the facts of the individual case. There is a world of difference between, on the one hand, a party seeking to raise a pre-contractual misrepresentation in defiance of such a clause, and a consensual departure from, or consensual variation to, the agreed contractual machinery or payment mechanism.

11. As I pointed out in paragraph 274 of the Judgment, the question whether the entire agreement clause (or indeed an agreed contractual mechanism) has been overridden is necessarily fact-sensitive; see the passage quoted from Sedley LJ in *World Online Telecom Limited v I-Way Limited* at paragraphs 10-13. Given the nature of the relationship between EVP and Malabu, and the terms of the EVP Exclusivity Agreement, I would regard an argument that the law in this area, relating to clauses of the type in question, *necessarily* restricted the contractual freedom of the parties, and prevented them, expressly or by implication, from varying or departing from the terms of the contract, as having no real prospect of success.

12. Moreover, as I indicated in paragraphs 271 and following of the Judgment, Malabu in effect adopted the approach of trial, at least in relation to the Entire Agreement clause, that such a clause:

> "can of course be over-ridden when the evidence suggests that the parties intended to over-ride it, but that such evidence must be strong and convincing."

The evidence was strong and convincing in the present case. Moreover there is no substance in Malabu's argument that the parties had actually and expressly to address their minds to the particular numbered clause in question, and expressly agree that it should not apply. What matters is whether their conduct, objectively analysed, on the basis of the evidence, demonstrated that there had been such a departure from the originally agreed contractual position.

13. Accordingly, I regard Malabu's attempt to characterise (for example) Ground 1 of its proposed appeal as "the perfect vehicle for this difficult aspect of English contract law to be resolved by the Court of Appeal" as ill-founded.

14. Ground 8 is a challenge to the Court's conclusion on quantum. That too was a purely factual question. Neither party sought to suggest at trial that any issue of law arose to its determination in the context of implied agreement.

15. Ground 9, in relation to the alleged Secret Commission Agreement, is also essentially a factual challenge. Moreover, notwithstanding Mr Obi's assertions in relation to this alleged agreement, I concluded that there was not sufficient evidence before me to establish that there was in fact any such agreement concluded between EVP and ILC. This did not appear to be challenged by Malabu; see paragraph 66 of the Judgment. In any event, the arguments which Malabu wishes to raise on appeal, in relation to fiduciary and contractual duty, have no real prospect of success.

IN THE HIGH COURT OF JUSTICE

SCCO Ref: JMS 1403421

2011 Folio 792

ROYAL COURTS OF JUSTICE

SENIOR COURTS COSTS OFFICE

BEFORE COSTS JUDGE, MASTER WHALAN

BETWEEN:

ENERGY VENTURE PARTNERS LIMITED

Claimant

-v-

MALABU OIL AND GAS LIMITED

Defendant

ORDER

UPON the detailed assessment of the Claimant's costs payable by the Defendant pursuant to paragraph 2 of the Judgment Order of Lady Justice Gloster dated 18 July 2013 (**"the Judgment Order"**)

AND UPON considering the Claimant's bill of costs ("the bill of costs"), the Defendant's Points of Dispute and the Claimant's Replies thereto and having conducted a detailed assessment on May 16, 17, 18 and 19 2016

AND UPON hearing Leading Counsel, Nicholas Bacon QC, for the Claimant

IT IS ORDERED THAT:

1. The Claimant's application dated 26 May 2015 for relief from sanction pursuant to CPR 3.9 is allowed with costs in the assessment.

2. The bill of costs is assessed in the sum of £7,759,258.24.

MWW 19.5.16

3. The Defendant shall pay the said sum of £7,759,258.24 less the sum of £2,500,000 received by the Claimant on 21 March 2014 from the Defendant on account of the Claimant's costs ("**the payment on account**"), but in addition shall pay accrued interest (after having taken into account the payment on account) in the amount of £1,178,160.35.

4. The Defendant shall pay the Claimant's costs of the detailed assessment summarily assessed in the sum of £258,101.50 against which there shall be a set off in the sum of £22,230 in respect of interim costs orders made in favour of the Defendant on: 8 September 2014 in the sum of £5,080; 11 November 2014 in the sum of £2,400; and 13 April 2015 in the sum of £1,250 and £13,500.

5. For the avoidance of doubt the Defendant shall forthwith pay to the Claimant, taking into account the terms of paragraphs 2, 3, 4 and 5 above, the sum of £6,695,520.09.

6. Interest shall continue to run on the said figure of £6,695,520.09 from the date hereof and continuing at the daily rate of £1,467.51.

7. The said sum of £6,695,520.09 calculated into dollars by reference to the Eversheds Finance Dollar Exchange Rate for May 2016 (£1:$1.42330) is US $9,529,733.74.

8. Of the sum of US$10,651,384.00 presently standing in court on account of the Claimant's costs, interest and costs of assessment as ordered to be paid by the Defendant pursuant to paragraphs 2 and 3 of the Judgment Order, the following shall be paid out forthwith, as follows:

   (a) US$ 9,529,733.74 to the following client account of the Claimant's solicitors, Eversheds LLP US$ Account:

Sort Code	IBAN Number	BIC/Swift Code	Account Number
60-60-05	GB46NWBK60730110268472	NWBKGB2L	10268472

Dated 19 May 2016.

Final costs certificate

Name of court IN THE COMMERCIAL COURT IN THE SCCO	Claim No. 2011 Folio 972 JMS1403421
Name of Claimant (including ref.) Energy Venture Partners Limited 298867.000001/newberg	
Name of Defendant (including ref.) Malabu Oil and Gas Limited	
[Defendant's][Claimant's] date of birth	
Date 19 May 2016	

To Defendant

Malabu Oil and Gas Limited
35 Alfred Rewane Rd
Ikoyi,
Nigeria

In accordance with the order of Gloster LJ dated 18 July 2013

Master Whalan has assessed the total costs as £7,759,258.24 plus £258,101.50 for the costs of the detailed assessment

And £2,500,000 already having been paid under the terms of the order of 18 July 2013

You must pay the balance of £5,517,359.75 (plus interest) to the claimant forthwith

The date from which any entitlement to interest under this certificate to run is:-

1. as to the amount of the bill as assessed excluding the costs of assessment, 18 July 2013

2. and as to £258,101.50 being the costs of assessment, the date of this certificate.

- Take Notice -

To the defendant (claimant)

If you do not pay in accordance with this order your goods may be removed and sold or other enforcement proceedings may be taken against you. If your circumstances change and you cannot pay, ask at the court office about what you can do

Further interest may be added if judgment has been given for £5,000 or more or is in respect of debt which attracts contractual or statutory interest for late payment.

If you do not pay as ordered, this judgment may be registered on the Register of Judgments, Orders and Fines. This may make it difficult for you to get credit. **If you then pay in full within one month** you can ask the court to cancel the entry on the Register. You will need to give proof of payment. You can (for a fee) also obtain a Certificate of Cancellation from the court. If you pay the debt in full after one month you can ask the court to mark the entry on the Register as satisfied and (for a fee) obtain a Certificate of Satisfaction to prove that the debt has been paid.

- Address for Payment -

Eversheds LLP
One Wood Street
London
EC2V 7WS

- How to Pay -

- **PAYMENT(S) MUST BE MADE to the person named at the address for payment quoting their reference and the court case number.**
- **DO NOT bring or send payments to the court. THEY WILL NOT BE ACCEPTED.**
- You should allow at least 4 days for your payment to reach the claimant (defendant) or his representative.
- Make sure that you keep records and can account for all payments made.
- Proof may be required if there is any disagreement. It is not safe to send cash unless you use registered post.
- A leaflet giving further advice about payment can be obtained from the court.
- If you need more information you should contact the claimant (defendant) or his representative.

The court office at
is open between 10 am and 4 pm Monday to Friday. Address all communications to the Court Manager quoting the claim number.

N256 (HC) Final cost certificate (04.06)
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Case No: 2011 FOLIO 792

Neutral Citation Number: [2013] EWHC 2118 (Comm)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2013

Before :

LADY JUSTICE GLOSTER

- -

Between :

Energy Venture Partners Limited	**Claimant**
- and -	
Malabu Oil and Gas Limited	**Defendant**

- -
- -

Mark Howard Esq, QC, Fionn Pilbrow Esq and Edward Harrison Esq (instructed by **McGuireWoods London LLP**) for the **Claimant**
Charles Graham esq, QC and Andrew Lodder Esq (instructed by **Edwards Wildman Palmer LLP**) for the **Defendant**

Hearing dates: 27th - 29th November 2012; 3rd - 5th December 2012; 10th - 14th December 2012; 17th and 20th December 2012
Additional written submissions: 21st December 2012; 10th January 2013; 11th March 2013; 14th March 2013

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Judgment

Lady Justice Gloster:

Introduction

1. In this claim, the Claimant, Energy Venture Partners Ltd ("EVP" or "the Claimant"), a company registered under the laws of the British Virgin Islands, seeks payment of fees allegedly due to it from the Defendant, Malabu Oil and Gas Ltd ("Malabu" or "the Defendant"), a company registered under the laws of Nigeria, in relation to the sale of Malabu's 100% ownership interest in an oil prospecting licence for Block 245, an oil field located in the Eastern Niger Delta in the offshore territorial waters of Nigeria ("OPL245" or "the OPL Assets").

2. EVP's primary case is that, pursuant to an oral variation to a written agreement concluded between EVP and Malabu in or about January 2010 ("the EVP Exclusivity Agreement"), Malabu agreed to pay a minimum figure of US$ ("$") 200 million to EVP in respect of its fees for services provided in connection with the sale of the OPL Assets. In the alternative to its primary case, EVP claims a fee of $200 million, or "… such other sum as shall seem to the Court to be just and reasonable", (a) pursuant to an implied contract arising out of the parties conduct in their performance of the EVP Exclusivity Agreement, to the effect that EVP would be paid a reasonable sum for its services, alternatively pursuant to an implied term to similar effect; (b) as a *quantum meruit* pursuant to a restitutionary claim on unjust enrichment grounds for the services provided by EVP (see paragraph 55 of the Amended Particulars of Claim).

3. Malabu denies that it ever agreed to pay the alleged fees, or that, in the events which happened, any fees are due, whether on a contractual or on a restitutionary basis. In particular, Malabu contends, amongst its myriad of defences, that the EVP Exclusivity Agreement was a forgery, a sham, or part of a fraudulent scheme to deceive Malabu, was never concluded on *ad idem* terms, or was terminated, or abandoned; that there was never any oral agreement to pay $200 million or any sum; that, even if there were, such oral variation was precluded by an "Entire Agreement" clause; and that any contractual or restitutionary claim was fatally barred by a corrupt agreement, entered into between EVP and a third party ("the Secret Commission Agreement") which constituted a breach of EVP's fiduciary duties to Malabu. Malabu also contends that the transaction or transactions by which Malabu ultimately disposed of the OPL Assets in April 2011 did not entitle EVP to commission under the terms of the EVP Exclusivity Agreement.

4. I shall have to analyse and examine these defences in due course. I comment at this stage, however, that they shifted and expanded over time, particularly during the course of the trial, principally to reflect the ever-changing nature of Chief Etete's evidence on the critical issues. This did nothing to enhance their credibility.

The Parties

5. EVP, which was incorporated on 30 August 2007, was set up to identify and to develop transaction and exploration opportunities within the global oil and gas industry. Its initial focus had been to do so in Nigeria. EVP's sole director and shareholder is Zubelum Chukwuemeka Obi, who is known as Emeka Obi ("Mr. Obi"). Mr. Obi is the sole director and shareholder of EVP. According to his own evidence, which I accept in this respect:

i) he was from one of Nigeria's most prominent and respected families;

ii) he had been well-educated at schools and university in the UK, obtaining an economics degree from SOAS at London University, and holding both UK and Nigerian citizenship;

iii) he had a well-grounded professional background; he was a former investment banker with, in addition, many years of experience acting for and advising the Federal Government of Nigeria, in particular in relation to, and in connection with, a number of privatisation transactions; he was well-connected both in Nigeria and on the international oil and gas scene;

iv) since 2007, he has acted, through his own corporate vehicles, identifying, developing and participating in merger and acquisition opportunities in Nigeria (in particular) across a range of industries, including in particular the oil and gas sector.

6. Mr. Obi dealt personally with all aspects of the transaction which is the subject matter of these proceedings on behalf of EVP. Mr. Obi was the principal witness at trial called on behalf of EVP. By a hearsay notice dated 22 November 2012, EVP also sought to rely on certain evidence given by a Mr. Ednan Agaev ("Mr. Agaev"), a Russian consultant, both in various emails and in certain arbitration proceedings between Mr. Agaev's company, International Legal Consulting Limited ("ILC") and Malabu, ("the ILC Arbitration"). The subject of the ILC Arbitration is a claim by ILC for commission allegedly due from Malabu in respect of services provided by ILC in connection with the sale of the OPL Assets.

7. Malabu's principal witness was Chief Dauzia Loyal Etete, otherwise known as Dan Etete ("Chief Etete"). He was the Minister for Petroleum Resources from 1995-1998 in the government of the notorious Nigerian military dictator, General Sani Abacha, who died in June 1998, and who was president of Nigeria from 1993-1998. President Abacha's regime was subject to widespread allegations of corruption and human rights abuses. On or about 29 April 1998, at a time when Chief Etete was the Minister of Petroleum Resources, or shortly thereafter, the Federal Government of Nigeria ("the FGN") awarded Malabu a 100% interest in the licence for the OPL Assets, subject to a liability to make payment to the FGN of a signature bonus of $20 million. It was not in dispute that at all material times Chief Etete was a consultant to Malabu, with authority to negotiate in connection with the sale of the OPL Assets and was the sole point of contact at Malabu for EVP in its dealings with Malabu in connection with the proposed sale, transfer or disposal of Malabu's interest in the OPL Assets. However the precise extent of his authority as such consultant was in dispute. EVP also contends that Chief Etete was at all material times a, and latterly the, substantial beneficial owner of Malabu. Malabu and Chief Etete deny this contention, asserting that the Chief had merely, and subsequent to the grant of the licence, been appointed as a consultant to Malabu.

8. In 2007 Chief Etete was convicted of money laundering in France. That conviction was upheld by the French Court of Appeal in 2009. The case is currently the subject of an application by Chief Etete to the European Court of Human Rights. The conviction related to the deployment in France of funds allegedly received by Chief Etete by way of corrupt payments or bribes from representatives of the company,

Addax. Chief Etete was also widely reported to have been involved in the high profile Halliburton bribery scandal (in which it was alleged that substantial bribes were paid to Nigerian ministers, in order to procure substantial contracts). Chief Etete was alleged to have been paid $2.5 million in bribes between 1996 and 1998 when he was Petroleum Minister.

9. In January 2009, Chief Etete was refused entry clearance into the UK under s320 (7A) of the then Immigration Rules: "using deception by failing to disclose a material fact", it appeared that this fact was a document relating to his conviction in France. At the time of trial before this Court, Chief Etete was the subject of a UK visa ban, having been informed that, because of the earlier deception, any future visa applications would be automatically refused for ten years. For that reason his evidence was taken by the court on commission in Paris.

10. Malabu's other factual witness was a Mr. Rasky Gbinigie ("Mr. Gbinigie"), Malabu's company secretary, a role he has performed since Malabu's incorporation.

The course of the trial

11. Mr. Mark Howard QC, Mr. Fionn Pilbrow and Mr. Edward Harrison, instructed by McGuireWoods London LLP, appeared on behalf of EVP. Mr. Charles Graham QC and Mr. Andrew Lodder, instructed by Edwards Wildman Palmer LLP, appeared on behalf of Malabu.

12. The trial lasted 13 days in court, between 27 November and 20 December 2012. Because of Chief Etete's inability to enter the UK, the court took his evidence in Paris on 10-13 December 2012. The court had the benefit of extensive written closing submissions from both sides, before resuming for oral closing submissions on 20 December 2012. Following the oral closings, further written submissions were received from EVP on 21 December 2012, pursuant to a request from the court for assistance on specific questions. On 10 January 2013, Malabu served a Re-re-Amended Defence and Counterclaim, which was said to give effect to:

> "… the amendments to its defence foreshadowed in its oral closing submissions and reflecting the case in its written closing submissions at paragraph 542 subject to the portion of that paragraph withdrawn during oral closing submissions."

In fact, the amendments pleaded yet a further new case in forgery against EVP with which I shall deal in the appropriate passage of this judgment below. EVP responded to the amendments by further written submissions dated 14 January 2013.

13. On 11 March 2013, Malabu sent to the court an "Addendum to the Defendant's Closing Submissions dated 11 March 2013" ("Malabu's Addendum"). This addendum attached a further witness statement given by Mr. Agaev in the ILC Arbitration and the transcripts of cross-examination in Paris on 25 February 2013, and of Malabu's oral submissions made on 26 February 2013 in the course of a further hearing forming part of the ILC Arbitration. This amounted to approximately 400 pages of additional transcript and 19 pages of witness statement which I need to consider, if only for the purposes of considering whether I should receive it into evidence.

14. On 14 March 2013, EVP lodged supplementary written submissions in response to Malabu's Addendum. This contended that:

    i) the court should not receive the further evidence sought to be introduced by Malabu; and

    ii) but, in the event that the court were minded to take such evidence into consideration, making submissions in relation thereto.

    Additionally, EVP attached to its submissions two further binders of material, not limited to the material supplied by Malabu, but including, additionally, other materials in the ILC Arbitration. In all, these March materials involved the court reading a further 380 pages of documentation, in the light of the parties' respective submissions.

15. Having read the additional material from the ILC Arbitration, which Malabu sought to introduce into evidence, I have come to the conclusion that it is, in all the circumstances, appropriate for me to take it into account. I do so for the purpose of considering whether, and, if so, the extent to which, I should rely upon the hearsay evidence of Mr Agaev in relation to the 13 topics set out in Annex 2 to EVP's written closing submissions and which were referred to in the hearsay notice served by EVP on 22 November 2012. I do not consider that it is unfair to EVP to do so, since it is EVP which seeks to rely on the hearsay evidence of Mr Agaev. The additional material is of assistance in deciding what weight, if any, I should attach to Mr Agaev's hearsay evidence. I have also taken into account in this context the additional materials which EVP attached to its further submissions.

The history of OPL 245 and the beneficial ownership of Malabu

16. In order to understand the background against which EVP was introduced to Malabu, it is necessary to explain something of the history of the OPL Assets and the shareholding structure of Malabu. This history was to a certain extent uncontentious. Insofar as facts were in dispute, the following account reflects my findings of fact. Whilst the circumstances in which the licence was granted to Malabu, and the issue relating to Chief Etete's alleged ownership interest in its shares, are not directly relevant to the issues which I have to decide, they form the necessary background evidence relating to the reputational issues which increased Malabu's difficulties in selling the OPL Assets and also impact upon Chief Etete's credibility and that of Mr. Gbinigie.

17. OPL 245 is an ultra-deep petroleum block. Two discoveries of reserves, the "Etan" discovery in 2005, and the later "Zabazaba" discovery, established that the block was highly prospective, but the block's depth and legal history created formidable obstacles to its exploitation.

18. The date of the award of the licence to Malabu was some five days after Malabu's incorporation on 24 April 1998. Chief Etete's evidence was that, during his time as oil minister, he allocated no more than three or four oil concessions. Of these, both OPL 245 and OPL 214 were awarded to Malabu (although the award of OPL 214 was later revoked). The award of the licence was subject to an obligation to pay a signature bonus to the Nigerian Government of $20 million. It was common ground

that the only sum ever paid by Malabu was the sum of US $2.04 million paid on 15 May 1999.

19. It was common ground that the initial shareholders of Malabu were a Mohammed Sani (10 million shares), a Kweku Amafegha (6 million shares) and a Hassan Hindu (4 million shares). Chief Etete and Mr. Gbinigie insisted, when they gave their evidence, that they did not know whether Mohammed Sani was an alias for Mohammed Abacha, the son of General Sani Abacha; but other evidence demonstrated that Mohammed Sani was indeed Mohammed Abacha, the son of General Sani Abacha. In November 2010 injunction proceedings were brought by Mohammed Abacha in connection with the sale of the block, on the premise that his shareholding had been unlawfully removed from the share register. I was unable to accept Mr. Gbinigie's evidence that, in the circumstances, he, as company secretary, did not know the identity of the principal shareholder and director of this newly incorporated company, which he had incorporated.

20. The evidence shows that Kweku Amafegha was widely reported to be an alias or front for Chief Etete. Chief Etete also accepted that, as he had conceded to the French Criminal Courts, "Omoni Amafegha" was an alias which he used. Chief Etete's evidence was that he used this name when he went on "secret missions internationally" in order to disguise his identity. However, Chief Etete denied in cross-examination that he also used Kweku Amafegha as an alias. The other evidence relating to payment of the incorporation expenses also strongly suggested that Hassan Hindu was a nominee for, and/or an associate of, Chief Etete. I find as a fact that, from its incorporation and at all material times, Chief Etete had a substantial beneficial interest in Malabu.

21. The award of the licence relating to OPL 245 was recorded in two letters from the Ministry of Petroleum Resources. Reference was made in these letters to a letter of application by Malabu. Although no copy of the letter of application has ever been disclosed by Malabu, Chief Etete claimed in cross-examination that he had seen a copy of the letter of application. I was unable to accept this evidence. In the Federal Government of Nigeria's ("FGN's") submissions to the House of Representatives in Nigeria (leading to a report in May 2003) it was stated that:

> "Block 245 was allocated as a discretionary allocation under which the applicant would normally write to the minister applying for a block and listing willingness to comply with provisions and conditions that would be imposed, and giving information about the proposed methods for developing the block. There was no application letter or form from Malabu. In other words, contrary to the assertions of Malabu Oil and Gas, at no time did Malabu ever apply for the block, either through a letter, an application form, or any other way. Nonetheless, the minister, Chief Dan Etete, gave instructions for OPL245 to be allocated to Malabu. The Department of Petroleum Resources, in obedience to the minister, carried out these instructions. It was bound to do this. However, the process of allocation was flawed and the allocation lacked transparency and was unethical."

22. The award was made under the provisions of the Petroleum Act 1969 ("the Act"). Chief Etete's recollection was that the provisions of the Act were "very wide, based on discretionary allocation." In fact every award under the Petroleum Act was discretionary, but an award could only be made in accordance with the provisions of the Act – a point made by FGN in its submissions to the House of Representatives. Chief Etete suggested that the provisions of the Petroleum Act under which the award were made had been amended by an "indigenization decree" which was intended to:

> "… allow Nigerian companies who are financially not strong enough to compete with foreign multinationals, to participate in the wealth of the country."

No such decree was produced. I was not able to accept the suggestion made by Chief Etete that the award of OPL 245 had been part of a programme to further the rights of indigenous companies. His suggestion overlooked the fact that Malabu had been incorporated five days prior to receiving the award of the licence, and failed to explain what criteria applied to such a company if not those contained in the Petroleum Act. His suggestion also overlooked Chief Etete's own evidence that, at the time of the allocation, he had been unaware of the identity and therefore the nationality of the shareholders and directors of Malabu.

23. Mr. Gbinigie gave evidence to the effect that, shortly after the award, in November 1998, there was an alteration to the shareholding of Malabu, following which the shareholders were listed in the share register as Alhaji Jabu Mohammed and Seidougha Munamuna. No documented reason was given for such change. EVP suggested that the most probable explanation was that, soon after the death of General Abacha in June 1998, Chief Etete took advantage of the situation to take full control of Malabu and to cut out the Abacha interests. This appeared to be the most realistic analysis, but, ultimately, this is not an issue which I need to decide. Mr. Munamuna has remained on the share register since this date, and, together with Mr. Joseph Amaran, is the current registered owner of 50% of Malabu. Other than Mr. Munamuna's brief statement in relation to the 2011 accounts, and in relation to the destination of certain payments made from Malabu's bank account, no evidence was given by either of these two gentlemen in relation to the question of the beneficial ownership of Malabu, or any of the more specific issues arising in the action. This was so notwithstanding the fact that, according to Chief Etete and Mr. Gbinigie, Mr. Munamuna and Joseph Amaran were intimately involved in the affairs of Malabu.

24. With the exception of the shares which were held for a short period by a company called Pecos Limited (which appears to have acted as some sort of nominee for President Obasanjo, a subsequent president of Nigeria), the evidence demonstrated, and I find as a fact, that Chief Etete has, at least since the exclusion of Mohammed Sani's interest, been the principal beneficial owner of Malabu. By substantial, I mean in excess of 50%. In addition to the above, the following evidential matters support this conclusion:

    i) Whereas Mr. Munamuna appears to act as Chief Etete's nominee, there is no clear evidence that Joseph Amaran exists. Chief Etete did not dispute in cross-examination that he had a connection with the name "Amaran"; "King Amaran" was the name given by Chief Etete to a yacht previously owned by him and had been the name of his great-grandfather.

ii) The evidence also showed that, when it suited his interests to do so, Chief Etete had accepted that he indeed was the beneficial owner of Malabu. Chief Etete gave evidence to the investigating magistrate in the proceedings which led to his French conviction for money laundering that he beneficially owned Malabu, since this suited Chief Etete's then purpose of characterising the allegations against him as an attempt by President Obasanjo to acquire OPL 245. In evidence quoted in the May 2003 Report of the Nigerian House of Representatives, Chief Etete also freely accepted that he was the owner of Malabu.

iii) The unsatisfactory, and inherently inconsistent, evidence given to the Court by Chief Etete and Mr. Gbinigie in relation to Chief Etete's consultancy arrangements with Malabu, which appeared to be designed to demonstrate that Chief Etete was not synonymous with Malabu, and thereby to suggest that the grant of the OPL 245 licence was not a dishonest grant by Chief Etete to himself and the Abacha interests, also supported my conclusion that the, or a significant part of the, beneficial ownership of Malabu was vested in Chief Etete at all material times.

iv) The evidence showed that the signature bonus of $2.04 million paid by Malabu on 15 May 1999 to the FGN derived from funds provided by Chief Etete. Chief Etete's evidence was that he had lent $2 million to Malabu in order that it could pay this sum to the relevant government department. This, however, conflicted with Malabu's accounts for 2009 which were recently disclosed by Malabu shortly before trial, which record that Malabu's only liability in respect of the signature bonus was to the company's directors. When this inconsistency was pointed out in cross-examination, Chief Etete sought to reconcile the position by suggesting that he had entered into an undocumented loan arrangement with Mr. Munamuna to advance funds for the payment of the signature bonus. That explanation was implausible. But whatever the true position, the fact that Chief Etete had provided the funds with which to pay the signature bonus supported EVP's contention that, at all material times, he had had a significant beneficial ownership interest in Malabu.

v) The evidence clearly demonstrated that substantial transfers had been made to Chief Etete and companies associated with him from Malabu's bank account from the proceeds of the sum of $1,016,540,000 paid by the FGN under a "Block 245 Resolution Agreement" as between the FGN and Malabu dated 29 April 2011 (to which I refer below). This sum effectively represented the proceeds of the disposal of the OPL Assets. Chief Etete was extensively cross examined on this issue. I am satisfied that for all intents and purposes the substantial majority of the monies received by Malabu have been invested at his direction and for his benefit, and that he controls their application. It is not necessary for me to deal with this evidence in any detail, since ultimately it only relates to credibility. However I am satisfied that the audited accounts of Malabu for the years ended respectively December 2009, 2010 and 2011, which were signed by the auditors on 30 November 2012, signed by Mr Munamuna on behalf of the board in November 2012, and produced during the course of the trial do not show anything approaching a true and fair view of

Malabu's financial position at the relevant dates, as the directors and Chief Etete must have been well aware.

25. On 29 May 1999 President Obasanjo was elected president of Nigeria. In early 2000, the new Government announced the revocation of a series of oil and gas licences that had been awarded during the previous regime. On 9 March 2000 a letter was received by Malabu from the Minister of Petroleum confirming that the OPL 245 licence would not be revoked.

26. From 2001 arrangements were made between Malabu and Shell Nigeria Ultra Deep Limited ("SNUD"), a subsidiary of the international oil major, Shell ("Shell"), for the joint exploitation of the block. The negotiations culminated in a heads of agreement, and later in a series of joint venture agreements that were executed on 30 March 2001. The agreements included the assignment to SNUD of a 40% participating interest, which required the approval of the FGN. It was also agreed that SNUD would pay the $18 million balance of the signature bonus.

27. The assignment to SNUD of a participating interest was not approved by the FGN; instead, on 4 July 2001, Malabu received notification that the FGN was revoking the award of the OPL Assets to Malabu and would require the return of the title deeds. Chief Etete's evidence was that the revocation and eventual reinstatement of the licence was a result of a conflict that had been caused by demands made by the Obasanjo administration for an interest in the block. Chief Etete also suggested that Pecos Limited, which was listed as a previous shareholder in Malabu's records with the Corporate Affairs Commission, was a company connected to the Obasanjo regime. It may well have been the case that President Obasanjo considered that he could step in to pick up the Abacha interests, which Chief Etete had, by this stage, apparently written out of Malabu. Again, this is not an issue which I need decide.

28. On 6 May 2002 SNUD wrote to Malabu stating that the contracts between SNUD and Malabu had been frustrated by the revocation of the licence for OPL 245. A further round of bidding followed, and on 23 May 2002 SNUD was awarded a licence to the OPL 245 assets subject to the payment to FGN of a signature bonus of $210 million.

29. Following the award of the licence to SNUD, Malabu took steps to achieve reinstatement of the licence. A letter was sent to President Obasanjo dated 4 September 2002, and a petition was made to the Nigerian House of Representatives dated 16 September 2002. In May 2003, the House Committee on Petroleum Resources issued its report. From that it is evident that the FGN for its part had no doubt that Chief Etete was the beneficial owner of Malabu. Despite this, the Committee noted that the history of Malabu's ownership of OPL 245 was not a matter which it had been tasked with addressing, and resolved that the revocation of the licence should be set aside:

> "The revocation of the petitioner's licence to operate OPL 245 should be set aside forthwith. This position is predicated on the facts before the Committee that Malabu was lawfully awarded OPL 245, and the fact that the revocation did not comply with laid-down procedure as stipulated in the Petroleum Act. Consequently, Malabu should be given unfettered access to the Oil Block OPL 245 forthwith."

30. Despite the findings of the House Committee, and despite legal proceedings issued by Malabu in the Abuja Division of the Federal High Court, on 22 December 2003 the Nigeria National Petroleum Corporation purported to grant contractor rights to OPL 245 to SNUD for 30 years under a Production Sharing Contract.

31. Against this background, Malabu, SNUD and Shell Nigeria Exploration and Production Company ("SNEPCO"), another subsidiary of Shell, became embroiled in litigation on multiple fronts:

    i) On 2 August 2002, SNUD commenced an ICC Arbitration against Malabu, under the terms of the 30 March 2001 agreements. On 23 November 2004, the ICC Tribunal found in SNUD's favour and made a substantial award, including $2.735 million in costs.

    ii) On 20 May 2003, after publication of the Report of the House Committee on Petroleum Resources, SNUD and SNEPCO issued proceedings in the Abuja Division of the Federal High Court of Nigeria seeking declarations that the House of Representatives had no jurisdiction to hear Malabu's petition. These proceedings were ultimately struck out on 25 June 2004, on the basis that, in the absence of a breach of the Constitution being shown, the Court had no jurisdiction to restrain the legislature.

    iii) On 10 September 2003, Malabu issued proceedings in the Abuja Division of the Federal High Court of Nigeria seeking an injunction restraining the allocation and reallocation of block 245 and declarations confirming its entitlement to OPL 245. On 16 March 2006, this claim was ruled to be time-barred for having been brought outside the applicable three-month limitation period.

32. On 30 November 2006, Malabu reached a settlement agreement with the FGN ("the 2006 Settlement Agreement"). Chief Etete's evidence was that President Obasanjo gave up his claim to OPL 245 as it became clear the revocation had been illegal. It is not necessary for me to decide whether this was indeed the case. The agreement provided for Malabu to pay to the FGN $210 million less the sum of $2.04 million that had previously been paid. In return, the FGN agreed to formally reinstate the licence to OPL 245 to Malabu.

33. It was a term of the 2006 Settlement Agreement that Malabu would pay the balance of the signature bonus within 12 months, with the result that from the end of 2007 Malabu was at risk of the licence being revoked for non-payment of the signature bonus. Although Chief Etete was reluctant to accept that this was the position, it was in fact confirmed by Malabu's own documents.

34. On 7 November 2007 Chief Etete was convicted in France of aiding, abetting the investment, concealment or conversion of the proceeds of a crime in relation to acts committed in 1999 and 2000 arising out of bribery offences committed in Nigeria by representatives of the company Addax. He was sentenced to three years imprisonment and a fine of €300,000. The conviction was upheld on appeal in March 2009. However, Chief Etete's prison sentence was varied to a fine of €8 million. During the course of the French proceedings, Chief Etete claimed that such

proceedings were a personal vendetta aimed at removing OPL 245 from Malabu of which he was "… the legal beneficiary and legal representative".

2007 – 2009: Malabu's failed attempts to attract an investor

35. Apart from the problem that Malabu had failed to pay the balance of the signature bonus pursuant to the terms of the 2006 Settlement Agreement, the position between Malabu and Shell remained unresolved, as Shell was not a party to that agreement. On 26 January 2007, SNUD commenced proceedings against the FGN and Malabu in the Abuja Division of the Federal High Court of Nigeria challenging the 2006 Settlement Agreement and seeking declarations that it had exclusive rights to OPL 245. Later that year, on 26 July 2007, SNUD registered a request for ICSID arbitration proceedings against the FGN.

36. Further intermittent without prejudice settlement discussions took place between Malabu and either the FGN or Shell during the period 2006-2009, but these discussions were not successful, and came to an end by October 2009 at the latest. As a result, Malabu began to look to third party buyers to break the deadlock. It was clear that the problems with Shell created difficulties in attracting investors. Chief Etete's evidence is that Shell was the "King" of the Nigerian oil industry, and that "everybody in the oil industry was scared of Shell and its claim to OPL 245". According to Chief Etete, nobody wanted to get on the "wrong side" of Shell, which adopted the practice of writing warning letters to investors that expressed an interest in the asset.

37. There were some very brief discussions in the early part of 2007 in Nigeria, between Chief Etete, on behalf of Malabu, and Chief Akinmade, the General Manager of Nigerian Agip Exploration Limited ("NAE"), a wholly-owned subsidiary of ENI SpA ("ENI"), an international Italian-based oil major, in relation to the OPL Assets. Malabu appears to have had an adviser called Jarara Ventures Ltd acting on its behalf at this stage, and a draft confidentiality agreement was generated. However, only two letters were produced by Malabu relating to these negotiations, which appear to have gone nowhere. According to Malabu, this was because NAE broke off the negotiations once Shell learned of them, and asserted its rights to the OPL Assets. I reject Chief Etete's evidence that there were several meetings in London with ENI/NAE at this time. No account of them appeared in his witness statements, there was no documentary support for their having taken place, and he had clearly confused them with meetings with Shell, which did take place in London in June and July 2007.

38. There was some very limited evidence about Malabu having been in communication with the Russian oil or energy companies, RUSAL and Gazprom in 2008 and/or 2009, but it was clear that these approaches came to nothing, possibly (at least in the case of RUSAL) because of Shell's hostile intervention. I reject Chief Etete's evidence that any serious negotiations took place in relation to OPL 245 between Malabu and the Chinese National Oil Company ("CNOC"), although Chief Etete had described to Mr. Obi certain studies that CNOC had apparently carried out in order to estimate the anticipated productivity of OPL 245.

39. The reality was that, in the period 2007-2009, minimal interest was being shown by potential investors in the OPL Assets.

40. As Chief Etete accepted in cross-examination, apart from what had been mentioned in his witness statement, none of the alleged contact between Malabu and other oil companies had ever been sufficiently far advanced for a single letter or communication to be exchanged by either party. The evidence clearly demonstrated that, in the period 2007-2009, Malabu failed to get past even the initial stages of approaches to any potential investors, notwithstanding the best efforts of Chief Etete, and the fact that OPL 245 was one of the most potentially lucrative blocks in Nigeria. Nor was Malabu ever approached by an intermediary, seeking to broker a deal between Malabu and an oil company in relation to the OPL Assets.

41. I find as a fact that it was highly probable that the lack of interest or willingness on the part of oil companies to engage in negotiations with Malabu over the purchase, development and exploitation of the OPL Assets was attributable, or largely attributable, to a combination of the following factors:

   i) the public perception of the circumstances in which Malabu had acquired the OPL Assets, including the historic attempts by the FGN to take the licence away from Malabu or revoke it;

   ii) the involvement of, and wide-ranging litigation by, Shell associated companies in connection with OPL 245, and Shell's attempts to ensure that no other oil company participated as joint venturer or investor in the block;

   iii) the reputational risk associated with Chief Etete, arising from his past connections with General Abacha, his conviction in France as a money launderer, and his involvement in the *Halliburton* bribes scandal;

   iv) the perception of Chief Etete as being a difficult man to do business with.

   This meant that Malabu did not have easy access to the conventional market of brokers or potential purchasers to dispose of its only asset. This evidence was supported by the evidence of the respective expert witnesses called by EVP and Malabu.

42. Furthermore, the evidence shows that, by the time Mr. Obi was introduced to Chief Etete, Malabu's position was dire, and the difficulties surrounding what were regarded as the "tainted" OPL Assets, were severe. I also find that Malabu had a desperate need to sell or exploit its interest in the OPL Assets as quickly as possible. It had not paid, and did not have the financial resources to pay, the $208 million outstanding by way of signature bonus, and was thus subject to the risk that the FGN might take the licence away again. It did not itself have the human or financial resources to market the OPL Assets. Nor, for the reasons which I have explained above, did it have access to the advisers, dealmakers or brokers of a calibre to achieve a sale on its behalf. The evidence showed an absence of any approaches by financiers or other advisers who could have assisted it.

The involvement of EVP in negotiations for the sale of the OPL Assets to ENI/NAE and Malabu's ultimate disposal of the assets

43. It was common ground that Mr. Obi and EVP were introduced to Chief Etete and Malabu by Mr. Agaev in or about December 2009, and that, in the period from then to

March 2011, Mr. Obi/EVP were involved to a greater or lesser extent, in negotiations with ENI/NAE to achieve a sale of the OPL Assets to NAE. The capacity in which EVP acted, its role in such negotiations and the existence, validity and terms of the agreements under which it was, or purported to be, operating during the relevant period, were hotly disputed. I address the evidence relating to these matters below.

44. What was not in dispute, however, was that, after the intervention of the Attorney-General of the FGN, Malabu, ultimately, on 29 April 2011, disposed (to use a neutral word) of the OPL Assets, in return for the receipt of the sum of $1,092,040,000. This transaction was effected by the execution of three inter-related agreements as between two or more of variously Malabu, the FGN, NAE and the two Shell companies, SNEPCO and SNUD, respectively. These comprised:

   i) a "Block 245 Malabu Resolution Agreement" as between Malabu and the FGN, whereby Malabu effectively surrendered the OPL Assets to the FGN and agreed to "settle and waive all claims to any interest in OPL 245 in consideration of receiving compensation from the FGN" in the sum of $1,092,040,000;

   ii) "the FGN Resolution Agreement" between the FGN, NNPC, SNUD, SNEPCO and NAE, whereby, in return for payment by SNUD, on behalf of SNEPCO and NAE, to the FGN of a signature bonus of $207 million, and a payment from NAE, on behalf of SNEPCO and NAE, of a further sum of $1,092,040,000, the FGN agreed to allocate the OPL Assets and grant an oil prospecting licence to SNEPCO and NAE; and

   iii) a separate "Settlement Agreement" as between Malabu of the one part and the two Shell companies, SNEPCO and SNUD, of the other part, to resolve the ongoing legal proceedings between them.

I shall refer to these agreements collectively as "the 29 April 2011 Transaction".

45. Mr. Obi was informed on 2 May 2011 by Mr. Agaev that a deal had been signed and that the purchase consideration was $1.3 billion. Mr. Agaev later confirmed to Mr. Obi that, pending satisfaction of various conditions precedent, the money was being held in escrow in a JP Morgan account managed from London (with the funds domiciled in New York). In due course, EVP brought the present proceedings, which began with it obtaining, on 3 July 2011, a freezing order, following a without notice application made by EVP on the morning of 3 July 2011 to Griffith Williams J. This order froze $200 million of the funds in court in London.

The issues

46. Because of the constantly shifting nature of Malabu's defence, in its formal pleadings, in its evidence and in its closing submissions, the identification of the principal issues which arose for determination in the case was something of a moving target. I attempt to summarise them by reference to EVP's primary and secondary cases and Malabu's defences.

EVP's primary case: an express oral agreement for a $200 million fee

47. The principal issues which arise in respect of EVP's primary case may be formulated as follows:

Issue 1

Did EVP and Malabu conclude a binding written agreement in January 2010 on agreed terms, namely the EVP Exclusivity Agreement? In particular:

i) were the parties *ad idem* as to its terms?

ii) was the final version of the written EVP Exclusivity Agreement contended for by EVP either unauthorised or a forgery, as contended by Malabu?

Issue 2

Did Chief Etete, on behalf of Malabu, orally agree at any time that EVP's success fee under the EVP Exclusivity Agreement would be a fixed sum of $200 million? If so, was such oral agreement precluded by other provisions of the EVP Exclusivity Agreement, and in particular, clause 5.4?

Issue 3

Was Mr. Obi, as Malabu contends, at all times acting on behalf of certain personnel at ENI/NAE pursuant to a fraudulent conspiracy with ENI/NAE personnel (namely Mr. Scaroni (the CEO of ENI), Mr. Descalzi (Chief Operating Officer and Head of Exploration and Production at ENI), Mr. Roberto Casula, the chairman of NAE and an Executive Vice-President of ENI ("Mr. Casula"), and Mr. Vincenzo Armanna, ENI's Vice-President for upstream activities in the sub-Saharan African region ("Mr. Armanna"); and also (at least at some point): Mr. Richard Granier-Deferre (a good friend and financial adviser to the Chief) ("Mr. Granier-Deferre") and Mr. Agaev; in an attempt to extract $200 million from the sale price paid by ENI to Malabu for the conspirators' own personal benefit, in a fraud on ENI/NAE. If so, should the EVP Exclusivity Agreement be regarded as a fraudulent scam which gave no enforceable rights to EVP as against Malabu?

Issue 4

Was EVP (irrespective of any fraud) in fact acting at all times for and on behalf of ENI/NAE in relation to the possible disposal by Malabu of all or part of its interest in OPL 245, with the result that the EVP Exclusivity Agreement was a sham which gave no enforceable rights to EVP as against Malabu?

Issue 5

Was the EVP Exclusivity Agreement:

iii) terminated on 27 April 2010, or at the end of May 2010; or

iv) abandoned in July 2010 when Malabu decided that it wanted to sell 100% of its interest in OPL 245 (and not the 40% expressly provided for in the EVP Exclusivity Agreement.); or

v) abandoned on 30 October or in early November 2010, following the rejection by Malabu of ENI's offer. If so, does it follow that EVP can have no entitlement to fees otherwise payable thereunder?

Issue 6

Was the 29 April 2011 Transaction a "… transaction effecting the disposal of the OPL Assets" by Malabu to NAI and Shell, such as to entitle EVP to the payment of the commission under the EVP Exclusivity agreement, or was it, as Malabu contends, "… radically different from the sort of transaction contemplated by the EVP Exclusivity Agreement".

EVP's secondary case: i) the existence of a contractual entitlement to a reasonable sum; or ii) a restitutionary entitlement to a reasonable sum

48. The issues which arise in respect of EVP's secondary claim may be formulated as follows (for convenience, I have continued the sequential numbering of the issues):

Issue 7

In circumstances where, on this hypothesis, the parties have deliberately not employed the mechanism for calculating the fee as set out in the EVP Exclusivity Agreement (namely the agreement of an "Agreed Malabu Price" - defined as "the AMP") or otherwise agreed a fixed fee for EVP's commission, was there an implied agreement between Malabu and EVP that the latter, as provider of services, should receive a reasonable fee in the event of the disposal of the OPL Assets? Alternatively was there an implied term in the EVP Exclusivity Agreement to that effect? In particular, was any such implied agreement/implied term inconsistent with:

i) the express terms of the EVP Exclusivity Agreement (in particular, the "For the Avoidance of Doubt" clause); or

ii) the fact that, as Malabu contends, after 27 April 2010 at the latest, EVP was working on its own account, and not pursuant to the terms of the EVP Exclusivity Agreement?

Issue 8

In the alternative to Issue 7 above, in the absence of any contractual entitlement, was EVP nonetheless entitled to a reasonable fee for its services, on the basis of a *quantum meruit* claim. In particular:

iii) was such a claim excluded by the express terms of the EVP Exclusivity Agreement;

iv) was Malabu "enriched" by the services provided by EVP; and

v) if so, was Malabu "unjustly enriched"?

Issue 9

On the hypothesis that:

vi) there was an implied agreement or implied term that EVP would be entitled to a reasonable fee; or

vii) EVP is entitled to a reasonable fee on the basis of a restitutionary claim for unjust enrichment;

what, in either case, is a “reasonable sum” for the court to award?

Malabu’s defences relating to the alleged Secret Commission Agreement

49. The following issues arise in relation to Malabu’s defence that the Secret Commission Agreement barred any contractual or restitutionary claim by EVP and commission:- (again, for convenience I have continued the sequential numbering of the issues):

Issue 10.

Did EVP conclude a contractually binding Secret Commission Agreement with ILC?

Issue 11.

If so, was it of such a nature (because of the potential for conflict of interest) that EVP’s agreement thereto resulted:

a) in EVP forfeiting its right to any remuneration, fee or commission to which it otherwise might be entitled under the EVP Exclusivity Agreement (or any variation thereof); and/or

b) in Malabu having the right to rescind the EVP Exclusivity Agreement (and any alleged variation thereof);

c) in EVP having an obligation to account to Malabu in respect of profits and/or to pay damages in respect of any sum which EVP might receive from ILC under the terms of the Secret Commission Agreement?

Issue 12.

If so, was EVP’s conflict of interest of such a nature as to bar EVP from receiving any sum by way of reasonable fee, whether on the basis of a claim under an implied agreement/implied term, or on the basis of an unjust enrichment restitutionary claim?

Credibility of the principal witnesses

50. This case was one which was, to a very large extent, but not entirely, dependent on the court's view of the credibility of Mr Obi and Chief Etete as witnesses.

51. Mr Obi was - to a certain extent - an honest, helpful and reliable witness. However there were major aspects of his evidence which I could not accept, in particular in relation to his claim that there had been a contractually binding agreement as between himself and Chief Etete in relation to a fee of $200 million for EVP. I do not believe that he ever genuinely thought that such an agreement had in fact ever been reached and his attempts to present such a picture in his written evidence were, in my judgment, dishonest. However, when he came to give his oral evidence his description of what had actually occurred did not, as I find, actually demonstrate that any such agreement had been reached. Thus the picture he presented in his oral evidence was, if not entirely honest, a far more realistic one. He had an aggressive negotiating style which reflected itself in a tendency to embellish the truth, both in his evidence and in his dealings with his business counterparties. He presented as somebody who would essentially try things on. However, despite this important failing in his credibility, which I took into account in assessing his credibility as a whole, nonetheless I did feel able to rely on his evidence in relation to most other issues. That was not least because his account was to a large extent supported by his contemporaneous notes, the large number of documents disclosed by EVP and the inferences which could be drawn from them. Furthermore Mr Obi gave careful and considered answers that revealed him as someone with a detailed knowledge and understanding of the contemporaneous events and documents. His recollection was extremely good and he was able to distinguish between what he did, and did not, remember and what he was reconstituting from documentary evidence. He was also frankly prepared to accept in cross-examination situations where contemporaneous documents showed him in a bad light, or where he had, usually for tactical reasons, deliberately "over-egged the position". He was also frank about accepting that he had produced in December 2010 a document that was "deliberately misleading". I was under no illusion that Mr Obi was prepared to be dishonest when such an approach served his purposes, but, despite Mr Graham's in-depth cross-examination, and trenchant criticisms of his integrity, at the end of the day I felt, subject to certain important exceptions, able to accept his evidence in relation to most, if not all, of the major issues.

52. EVP also adduced the evidence of a Mr Patrick Eyre, the managing director of Bayphase Limited (“Bayphase”), a company that was retained by EVP to provide an independent resource determination and valuation of the OPL Assets and to assist with the marketing of the OPL Assets. His evidence covered Bayphase’s work in connection with the resource determination and valuation, Bayphase’s dealings with ENI/NAE, and Bayphase’s dealings with other potential purchasers of the OPL Assets (other than ENI/NAE), which resulted, more or less immediately, in all other potential purchasers declining to pursue the opportunity. His evidence was not challenged.

53. My findings in relation to the hearsay evidence of Mr Agaev, upon which EVP sought to rely, are set out in the body of this judgment.

54. So far as Malabu's witnesses were concerned, it was almost impossible to accept any of Chief Etete's evidence, where it was in conflict with that of Mr Obi. Even in relation to the principal issue, as to whether there had been an agreement that EVP should receive a fee of $200 million, the Chief's evidence was wholly unconvincing in so far as it suggested there had been no discussions about the matter. In coming to my assessment as to Chief Etete’s credibility, I have entirely disregarded the allegations relating to his alleged involvement in the Halliburton scandal and his conviction for

money-laundering. I have based my assessment entirely upon his performance and demeanour as a witness in this case. Although, at all times when giving his evidence, Chief Etete was unfailingly courteous to the court, his evidence was almost invariably self-serving, self-contradictory, unrealistic, argumentative or, at times, almost impossible to follow. He frequently changed his story, often within a few minutes of having given a directly opposing answer. The manner in which he gave his evidence was argumentative and extravagant. He was prone to make wild allegations of fraud and forgery, or point the finger of blame at others, including his own trusted financial advisers and lawyers, without any appreciation of the serious implications of his accusations. His recollection was very poor and, at times, the only conclusion which I could reach was that he was being deliberately dishonest. At other times I concluded that he simply was not bothering to engage with the relevant issue. My ultimate conclusion was that I could not rely upon him as a witness of truth. I also conclude that, in a commercial context, he would have presented an almost insuperable challenge as a counter-party to negotiations.

55. Another critical feature of this case, which was relevant to Malabu's and Chief Etete's credibility, was what appeared to be Malabu's comprehensive failure to comply with its disclosure obligations. Only 176 documents were made available for inspection as a result of standard disclosure, and the bulk of those documents related to the historical dispute over ownership of OPL 245. Despite the fact that the transaction which was the subject matter of these proceedings spanned some 17 months, and involved a significant amount of interaction between the parties, including numerous meetings in various international locations, Malabu's disclosure did not include any meeting notes, or SMS messages, no travel records and only one handwritten note. Only three emails were disclosed. In his oral evidence, Chief Etete accepted that no electronic search was undertaken of his computer to determine whether it held any emails or other documents that might be relevant and no search was made in his offices for any documents of any kind whatsoever that might be relevant to the dispute. EVP's disclosure in these proceedings and ILC's disclosure in the ILC Arbitration revealed the existence of documents which Malabu clearly should have disclosed in these proceedings. In those circumstances I have no confidence that all relevant documents in Malabu's possession custody or control have been disclosed to the court.

56. Nor could I place any reliance on the evidence of Mr. Gbinigie where it was contentious. His role was clearly that of a "yes man" to Chief Etete. His evidence was in many respects wholly unsatisfactory. He had no adequate explanation for the defects in Malabu's disclosure.

Findings of fact

57. For the purposes of determining a number of the issues, it is necessary to set out my essential findings of fact. I have done so in a largely chronological format, which is the easiest way to impose some discipline on the vast universe of factual materials. Where appropriate in the chronological exposition, I interpose my conclusions in relation to certain relevant issues. In certain instances, where they reflect my findings of fact, I have utilised either EVP's or Malabu's summary of the evidence as set out in their respective written submissions (or a combination of the two).

Initial meetings between Malabu and ILC and ILC and EVP

58. It was common ground that a Russian consultant and former diplomat, Mr. Agaev, introduced Mr. Obi to Chief Etete on or about 8/9 December 2009. Shortly stated, Mr. Agaev had been introduced to Chief Etete in December 2008 as someone who might assist with the sale of OPL 245. Mr. Agaev apparently had a good pre-existing relationship with Shell, as well as Russian and other business connections, which made a relationship with him attractive to Chief Etete. A series of meetings took place between the two men during the course of 2009.

59. Mr. Obi and Mr. Agaev had known each other since 2006. Mr. Agaev had formed a good impression of Mr. Obi and had engaged his services through the latter's company, Eleda Capital Ltd ("Eleda"), as Mr. Agaev regarded Mr. Obi's experience and competence as an investment banker and knowledge of local Nigerian conditions as very useful to Mr. Agaev's clients.

60. The projects in which Mr. Agaev had previously engaged Mr. Obi's services had always been formalised by written contracts between Mr. Agaev's company, ILC, and Eleda, which operated as ILC's sub-contractor. Mr. Agaev's evidence, at paragraph 7 of his Fourth Witness Statement was that Mr. Obi was:

> "… meticulous about formalities and the contracts were concluded before the start of any work."

61. Having heard Mr. Obi's evidence, I have little doubt that Mr. Agaev's observation about Mr. Obi in this regard was correct. The evidence, both oral and documentary, was that Mr. Obi was always keen, indeed pushing, to have commitments recorded in writing.

62. In mid-2009, before Mr. Agaev or ILC had accepted any mandate from Malabu, Mr. Agaev made a proposal to Mr. Obi that Mr. Obi should be involved in Mr. Agaev's discussions with Shell in connection with OPL 245. Mr. Agaev's evidence in the ILC Arbitration was that the proposal involved Mr. Obi acting as ILC's sub-contractor, although Mr. Obi resisted that suggestion in cross-examination.

63. No agreement was reached of this type as to the contractual arrangements between the two men for this assistance. Mr. Obi duly took part in some of Mr. Agaev's preliminary meetings with Shell in 2009. Independently of his involvement with Mr. Agaev, since the middle of 2009, Mr. Obi had simultaneously been building a relationship with ENI/NAE. Mr. Obi had had previous experience of ENI/NAE, through work carried out in Nigeria on behalf of a company controlled by a Russian businessman. During the summer and autumn of 2009, Mr. Obi cultivated his relationship with Mr. Casula, who had recently been appointed to Nigeria. Mr. Obi also met with Mr. Armanna, who reported directly to Mr. Casula, who had been posted to Nigeria on a temporary basis.

64. In late 2009, Mr. Agaev proposed to Mr. Obi that he assist in brokering the sale of OPL 245 in return for a share of the 6% fee being negotiated between ILC and Malabu. Mr. Agaev's evidence in the ILC Arbitration was that this proposal was made because Mr. Obi had the competence, experience and "… deep understanding of local matters" that were needed. Mr. Obi's reaction to Mr. Agaev's proposal was to

point out that this would be a daunting investment. Mr. Obi considered a 6% fee (or a share of 6%) would not reflect the time, effort, costs and risk required to bring a sale to fruition.

65. During the course of December 2009, Mr. Obi asserts that he accepted Mr. Agaev's offer for EVP to receive 2% of the 6% that Malabu had agreed to pay to ILC. Mr. Agaev, on the other hand, in his evidence in the ILC Arbitration, denied that Mr. Obi ever accepted his offer. He said that Mr Obi had neither accepted, nor rejected, it. He claimed that the 2% proposal was never discussed as between him and Mr Obi after January 2010, by which time it was clear that Mr Obi wished to proceed with a separate mandate agreement as between Malabu and EVP and that, accordingly, by that time, the 2% proposal was dead.

66. It is highly unsatisfactory, in these proceedings (to which Mr Agaev is not a party), to have to reach any conclusive finding as to whether Mr Obi and Mr Agaev ever reached any contractually binding agreement in relation to EVP receiving one third of the 6% commission to which ILC was apparently entitled under the terms of the ILC Agreement, which was signed by Chief Etete on behalf of Malabu, and Mr Agaev on behalf of ILC at a meeting in Vienna on 15 December 2009. In so far as it necessary for me to do so, I can say, however, that I am not satisfied on the evidence before me that either EVP or Malabu has established, on the balance of probabilities, that EVP ever reached any such binding agreement with ILC. EVP has no need, for the purposes of its claim against Malabu, to establish any such commission sharing agreement with ILC; Malabu on the other hand needs to establish such an agreement to make good its defences in relation to issues 10-12. I deal with these defences later in this judgment.

The period from the Abuja meeting on or about 9 December 2009

67. It was common ground that Mr Agaev introduced Mr Obi to Chief Etete at a meeting in Chief Etete's house in Abuja, Nigeria on or about 9 December 2009. I accept Mr Obi's account of this meeting which, to a limited extent, was confirmed by Mr Agaev's evidence in the ILC Arbitration - see e.g. paragraph 21 of his first witness statement; paragraph 21 of his third witness statement; and paragraphs 12 and 13 of his fourth witness statement. This account was broadly as follows: the purpose of the meeting was to discuss the disposal of an interest in the OPL Assets; Mr Obi was introduced by Mr Agaev as an independent dealmaker who could be instrumental in the sale of the OPL Assets; the Chief was impressed by Mr Obi's credentials; Mr Obi made it clear to the Chief that if he (Mr Obi) was successful in making the deal happen he would require a large "chunk" of the proceeds, and there was some discussion of the terms of a probable mandate between Malabu and EVP. I reject Chief Etete's account that Mr Obi was only introduced as someone who was working for Mr Agaev and that there was no discussion about a separate mandate for EVP. It would, as Mr Obi said, have been unlikely that Mr Obi would have been invited to the Chief's house if the former's only role was simply as someone working in a subordinate role to Mr Agaev. I also accept that, at that stage, it would have been unlikely that, whatever his private concerns, Chief Etete would have openly rejected Mr Obi's suggestion that he wanted a large commission, given the Chief's by then desperate need and wish to sell the OPL Assets.

68. On 14 December 2009 Mr Obi emailed Mr Armanna at EVP, copying Mr Casula, in order to provide an overview of an opportunity to purchase an interest in OPL245.

69. It is common ground that, during the course of 14-15 December 2009, Mr Obi, Mr Agaev and Chief Etete attended meetings in Vienna. The original ILC Mandate was signed by Chief Etete at a lunch meeting at a hotel in Vienna on 15 December 2009. That agreement was dated 10 December 2009 and provided for a 12 month exclusivity period, and a success fee of 6% if ILC was successful in procuring a buyer. I find that Mr Obi, Mr Agaev and Chief Etete discussed at the meeting how to structure ILC and EVP's respective mandates, that it was agreed in principle that EVP would be granted a separate mandate; and that, although the parties appreciated that the original ILC Agreement would need to be amended in due course, Mr Agaev was keen to have a commitment in writing from the Chief.

70. Mr Obi explained in his evidence that it was clear at the meeting that both Mr Agaev and Mr Obi would be involved in the transaction in different capacities, but the process of working out the final form of the arrangements was still in progress and the situation was a fluid one. The question of a separate mandate for Mr Obi was already agreed; what was left at this stage was the question of preparing the paperwork. Mr Obi explained that since the situation was fluid he would have preferred for Mr Agaev to have waited before signing his agreement, although Mr Obi did not accept he was disappointed by this, since by that stage it had been established that Mr Obi was to bring an investor (the identity of which Mr Obi had not yet divulged). I accept that, certainly by this stage, the distinct nature of Mr Obi's role had already been discussed in principle.

71. Chief Etete accepted that the original ILC Agreement was signed at this meeting; his evidence was that Mr Obi 'appeared to be working' for Mr Agaev at the meeting. Chief Etete disputed, notwithstanding the evidence of the drafting process that was already underway, that there was any discussion of any separate mandate for Mr Obi or EVP at this meeting and denied that he had he seen a draft of the EVP Exclusivity Agreement by this stage. The latter point may well have been the case. But it is not necessary for me to decide this issue. I am satisfied that, by this stage, the concept of a separate mandate for EVP was indeed on the table.

72. On 14 December 2009, Mr Obi emailed a solicitor, a Mr Nwakodo at Sheridans, one of Mr Obi's legal advisers, outlining the transaction envisaged. Mr Obi explained that

> "we will not charge Malibou [sic] an upfront fee but will instead cap and agree the purchase consideration with Malibou [sic] and agree any proceeds received in excess of the cap be ours as fees…".

EVP's disclosure included numerous emails between Mr Obi and Mr Nwakodo subsequent to this meeting, and throughout December 2009, which attached or commented upon drafts of the EVP Exclusivity Agreement.

73. Mr Graham QC submitted that Chief Etete's evidence in relation to the meetings in Abuja and in Vienna was "clearly correct" and that Mr Obi's version was "plainly false". He submitted, inter alia, that;

i) Mr Obi's version of events required the Court to accept that, although all present at the meeting on 9 December 2009 understood that EVP would have a separate and independent role in the transaction acting as Malabu's business partner, in return for a large part of the proceeds of the transaction, they all - Chief Etete, Mr Agaev and Mr Obi - nonetheless devoted themselves to the task of concluding the original ILC Agreement, an agreement entirely at odds with that arrangement, over the course of the next week or so and then executed it on 15 December 2009 in Vienna.

ii) The original ILC Agreement conferred on ILC an exclusive sell-side mandate encompassing all of the services which Mr Obi said were already understood were to be provided by EVP. Further, it would have been a clear breach of the original ILC Contract for Malabu also to mandate EVP to source an investor, since ILC was entitled to exclusivity.

iii) Mr Obi's involvement with the drafting of the original ILC Agreement was inconsistent with EVP having any separate role under a separate mandate.

74. I preferred the evidence of Mr Obi on this point. His account is supported by what ultimately occurred - namely the grant of a separate mandate to EVP. His participation in the drafting of the original ILC Agreement was explicable, not merely on the grounds of his friendship with Mr Agaev, and the need to ensure the latter's participation in the deal as someone who would and could influence and manage the Chief, but also on the grounds that, at this stage, given Mr Agaev 's offer, there was the possibility of Mr Obi participating in a share of the 6% commission which ILC/Mr Agaev was going to be paid under the terms of the Original ILC Agreement.

75. Mr Obi, because of his previous successful dealings, clearly regarded himself as working in cooperation with Mr Agaev and his references in some of the documents to ILC as "his" partner or "partners" are to be viewed in this light. They do not, in my judgment, prove that Mr Obi was working under the umbrella of ILC, or that there had been no discussion of a separate EVP mandate prior to or at the Vienna meeting. Nor does Mr Graham's detailed examination of the drafts then under consideration by Mr Obi, persuade me otherwise. In any event, other than in relation to issues of credibility, the precise date at which the concept of a separate mandate for EVP emerged is not relevant to the issues which I have to decide. What is clear is that subsequently the EVP Exclusivity Agreement as between Malabu and EVP was indeed signed, as was a revised ILC Agreement.

The meeting in Lagos on 28 December 2009.

76. On 23 December 2009, Mr Obi was contacted by email by Mr Casula of ENI. Mr Obi then spoke by telephone with Mr Casula, who expressed ENI/NAE's interest in OPL 245. Mr Obi emailed Mr Casula following the call, requesting that ENI/NAE's interest be formalised by submitting a letter of interest to EVP. A formal letter of interest from NAE addressed to EVP was then received by Mr Obi on 24 December 2009. It was in the following terms:

> "Attention: Mr Emeka Obi
>
> Dear Sir,

OPL 245 Opportunity - expression of Interest

Following our recent conservation and e-mail exchange on the subject, I would like to inform you that NAE Ltd is interested in the acquisition of a participating interest in the deep offshore block OPL 245.

We kindly require you to send us an extract of the current mandate from the Principal to you with respect to this opportunity.

Furthermore, we would like to acknowledge the competitive process outlined in your e-mail on the subject dated Dec 24, 2009 and to highlight that, while it is not NAE's practice to pay non-refundable deposits, we would like to receive a detailed description of the requirements for Payment of the Process Participation and data Room fee.

Finally, please accept my assurances that NAE is ready and able to move quickly on this opportunity.

I look forward to hearing from you soon.

Your faithfully,

NIGERIAN AGIP EXPLORATION

ROBERTO CASULA

Chairman"

77. Although Mr Obi in fact introduced ENI/NAE to Chief Etete at a meeting in Lagos on 28 December 2009, before any written agreement as between Malabu and EVP had been signed, Mr Obi explained that he had been reassured by this letter, as it meant that it would be very difficult for anyone to deny that he personally had been responsible for introducing ENI/NAE to Malabu.

78. The meeting at Lagos on 28 December 2009 was attended by Mr Obi, Mr Armanna and Chief Etete. I accept that Mr Obi was responsible for setting up the meeting and that Mr Obi travelled with Mr Armanna from Abuja to Lagos for the meeting. It was common ground that Mr Agaev did not attend the meeting. I accept Mr Obi's evidence that Chief Etete was visibly delighted to be introduced to a senior representative of ENI, and that the introduction represented a major step forward for the Chief. I reject Chief Etete's account that he was disappointed about the identity of the prospective purchaser, because the Chief had previously failed to undertake a deal with NAE in 2007. I find that, once the meeting was concluded, Mr Obi, seeing that Chief Etete was clearly pleased with the introduction, did indeed take Chief Etete aside and mentioned that EVP would require a minimum fee of $200 million to make the transaction happen. I find that Chief Etete accused Mr Obi of seeking to come in at the tail end, and profit unjustifiably after he, the Chief, had invested 10 years of hard work in the block. But I also find that Chief Etete did not expressly reject the suggestion of a $200 million fee for EVP; rather I find that, as described in Mr Obi's evidence, the Chief responded in a "teasing nudging manner". Indeed this was

corroborated to a certain extent in the Chief's own description of his conversations relating to the $200 million figure discussed on this occasion.

79. Chief Etete did not deny that the figure of $200 million had been mentioned at the Lagos meeting. But his evidence was that it had been mentioned in a very different context. I now summarise briefly Malabu's case on this issue as it developed over time.

Malabu's case as to the alleged fraud on ENI

80. In Malabu's defence, the following was alleged as to what had been said in relation to the $200 million at the Lagos meeting:

> 23.5.6 "During an occasion during the meeting when Mr Obi was out of the room, Chief Etete said to Mr Armanna that he did not like Mr Obi, expressed surprise that he was working for Mr Agaev, and questioned how he was making money from the transaction;
>
> 23.5.7 Mr Armanna then told Chief Etete that Mr Obi was in fact working for ENI;
>
> 23.5.8 Mr Armanna also said that ENI wanted Mr Obi to represent them in the discussions, but that they wanted Mr Obi to be appointed by Malabu, so that Mr Obi appeared to be acting for Malabu. Mr Armanna said this was because ENI needed an intermediary between it and Malabu, which ENI feared could trigger difficulties with Shell;
>
> 23.5.9 Mr Armanna also disclosed that there was also a plan whereby Mr Obi was going to be paid $200 million over and above the purchase price agreed between Malabu and NAE/ENI, and that $200 million was to be shared between Mr Obi and other ENI/NAE executives, including Mr Descalzi, who was ENI/NAE's Chief Operating Officer (Exploration and Production), and apparently assuming that Chief Etete would not object to such a transaction;
>
> 23.5.10 Chief Etete said that Malabu would not participate in such a deal, and that it wanted a clean sale of the asset, after so many years of disputes;
>
> 23.5.11 After Mr Armanna had left, Chief Etete told Mr Obi that he was mad and the sort of deal Mr Armanna had outlined would put people in jail. Chief Etete said that such a plan was just stealing from ENI, and money laundering, and that he would not participate in it.
>
> 23.6 Save as aforesaid Paragraph 16 is denied. In particular, it is denied that Mr Obi told Chief Etete that EVP's success fee would be a minimum of $200 million.
>
> **(1) subsequent call with Mr Agaev; the role of Mr Agaev/ILC**
>
> 24. Chief Etete subsequently spoke to Mr Agaev by telephone:

24.1 Chief Etete explained what he had been told by Mr Armanna, and said that Malabu would not participate in any scheme to steal from ENI, and that the asset had to be sold cleanly.

24.2 Mr Agaev said he understood, and the suggested plan would not happen. He said, however, that it was necessary for Malabu to appoint Mr Obi, but that ENI would pay Mr Obi's fees and that this would be arranged by Malabu agreeing a purchase price with ENI, which would simply be increased to reflect the payment of Mr Obi's fees. The price paid to Malabu would not change.

24.3 After further conversations with Mr Agaev, Chief Etete was persuaded by him that this arrangement with Mr Obi was an important part of ENI's plan for avoiding difficulties with Shell, that any fee would be reasonable and legitimate, there was no choice but to enter into such an arrangement if ENI were to negotiate to buy a share of the OPL Assets, and that the proposed arrangement would not impact on the purchase price that Malabu would receive.

24.4 Thereafter, Mr Agaev acted as an intermediary between Chief Etete and Mr Obi and his backers at ENI/NAE on any matters relevant to the proposed arrangement between Malabu and Mr Obi; with the knowledge and acquiescence of Mr Obi and his backers at ENI/NAE Mr Agaev represented to Chief Etete that he had authority to speak for Mr Obi and his backers at ENI/NAE concerning this proposed arrangement and in his dealings with Malabu (through Chief Etete) acted accordingly.

24.5 In the circumstances Mr Agaev had the actual or ostensible authority of Mr Obi and his backers to act on their behalf in relation to this proposed arrangement.

81. Surprisingly, although Chief Etete said in his oral evidence that he had informed Malabu's lawyers of this alleged "fraud" case, it did not feature in the evidence adduced in opposition to the continuation of the freezing order; (see the second witness statement of James Maton, Malabu's solicitor). Nor was there any reference in that statement to any discussion of the $200 million.

82. In his witness statement Chief Etete said that:

i) Mr Obi was repeatedly out of the room on telephone calls and, during one of Mr Obi's absences, Mr Armanna raised the fact that Mr Obi was working for ENI, and that it was ENI who wanted Mr Obi to act as an intermediary between it and Malabu to avoid being seen by Shell to be dealing directly with Malabu. He explained further that in order for this strategy to work Mr Obi would have to appear to be acting for Malabu.

ii) Chief Etete says that Mr Armanna went on to tell Chief Etete that Mr Obi planned to be paid $200 million over and above the purchase price agreed between Malabu and NAE/ENI, which would then be shared between Mr Obi and certain ENI executives, including Mr Descalzi.

iii) Chief Etete then says he told Mr Armanna that Malabu would not participate in a deal of that kind under any circumstances. He said after so many years of complicated legal disputes involving the block, Malabu wanted a straightforward and clean sale of the asset, and then a straight-forward and clean joint venture arrangement to exploit it going forward.

iv) Chief Etete also says he then raised the fraud with Mr Obi at the meeting and told him Malabu would have no part of it, particularly due to the prior money laundering allegations he had personally faced and the protracted litigation and disputes Malabu had experienced over the OPL Assets.

83. Mr Obi's evidence was that:

i) He denied that he had any knowledge of, or involvement in, the scheme Chief Etete says was described to him by Mr Armanna and says Chief Etete never raised it with him at the Lagos meeting.

ii) He was careful not to leave Mr Armanna alone with Chief Etete and that he would have ensured no conversation of the sort described by Chief Etete could have taken place in the time available.

84. In his witness statement Chief Etete said that, shortly after the meeting, he spoke with Mr Agaev by telephone and told him what Mr Armanna had told him; that there were several calls between Chief Etete and Mr Agaev over the days immediately following the meeting. Chief Etete said that he made it clear that Malabu wanted to proceed with the transaction but would not participate in an arrangement which paid an illegitimate sum to Mr Obi. Chief Etete explained that:

i) Mr Agaev was initially "stubborn" and wanted to proceed with the fraud, but Chief Etete asked Mr Grainer-Deferre to intervene with Mr Agaev and, after several discussions, Mr Agaev and Mr Grainer-Deferre both agreed that the fraud should not proceed.

ii) As a result of these conversations, Mr Agaev eventually reassured Chief Etete that the scheme would not go forward, but told him that Mr Obi would need to be engaged as an intermediary in order to prevent Shell learning that ENI/NAE was dealing with Malabu directly. Mr Agaev told Chief Etete that Malabu would need to appoint Mr Obi, but would not be responsible for his fees. Rather, Malabu would agree a purchase price with ENI which would then be increased by the amount of Mr Obi's fee to make up the total that ENI would in fact pay out.

iii) While he was not happy about the arrangement, Chief Etete says that he acquiesced in it to deal with the issue posed by Shell and on condition that the received guarantees from Mr Agaev and Mr Granier-Deferre that Mr Obi's fee would be reasonable and legitimate, that the price paid to Malabu would not be affected and Malabu would not be obliged to pay any fee to Mr Obi.

85. There were many further discrepancies in Chief Etete's oral evidence in relation to this issue as compared with Malabu's pleaded defence. For example in cross-examination, Chief Etete said that he had confronted Mr Obi about the plan to exact

$200 million from ENI in the presence of Mr Armanna. That was inconsistent with Malabu's Defence, which pleaded that this confrontation took place after Mr Armanna had left. Chief Etete's response was that there had in fact been an error in the Defence, as the issue had been discussed at "various times" with his lawyers. Likewise, when pressed as to who, he had been informed, was involved in the fraud, Chief Etete cast the net ever wider. Ultimately, it was his evidence that, in addition to the involvement of Mr Descalzi and Mr Armanna (the only two individuals whose involvement is referred to in the pleadings or in Chief Etete's witness statement), Mr Agaev, Mr Granier-Deferre, Mr Casula and Mr Scaroni were also implicated in the fraud. Perhaps not surprisingly, the Re-re-amended Defence and Counterclaim (served after trial) did not name any of these additional people as allegedly involved in the fraud. Mr Gbinigie, in his evidence, also sought to support Chief Etete's evidence in this topic, by claiming that the Chief had told him about the suggestion at the time.

86. I conclude that Chief Etete's evidence about this alleged fraud, claiming that senior personnel at ENI were involved, was fabricated. The allegations were inherently implausible. It beggared belief that Mr Armanna, having just met Chief Etete, would reveal to the Chief that Mr Armanna and his colleagues were seeking to defraud their employers by taking a secret commission of this magnitude. Moreover, it was highly improbable that, in relation, to a transaction such as the purchase of the OPL Assets from an entity such as Malabu, senior executives of ENI would have been able successfully to have pulled off an illegal scheme, whereby they were going artificially to inflate the purchase price paid for the asset, so that the "inflated" element could be creamed off by them. As Mr Moyes, Malabu's expert witness explained in cross-examination, the process by which ENI/NAE set the price at which it would bid, would have involved 60 to 80 people examining the deal and 'having to go through five or six committees before it actually gets to the board level'. Moreover, he explained that any addition to that price would have required the same process to be investigated again. All of this would have been well known to those at ENI. The risks of such a scheme would have been enormous. Moreover even if (contrary to this view) the ENI executives were indeed proposing to use the interposition of EVP as a front for creaming off illegal secret commissions for themselves, it is inconceivable, in my judgment, that they would have told Chief Etete of their plans. There would have been no need for them to have done so. In order to support his suggestion that this was in fact what was going on – i.e. EVP was working for ENI at the insistence of corrupt ENI executives for the express purpose of defrauding ENI in the course of the OPL 245 transaction - Chief Etete invented a string of events, meetings and occasions, which I find never took place - or at least never took place for the purposes which he alleged. In his witness statements, he invented an alleged dinner in April 2010 and an alleged meeting involving Mr Agaev, Mr Obi, Mr Casula and Mr Armanna in Milan in late November/early December 2010. In cross-examination, he invented the further allegation that he was blackmailed into entering into the EVP Exclusivity agreement, which allegation he sought to support by the invention of two further events, namely an alleged meeting at Le Fouquet restaurant in January 2010 and an alleged meeting in the Hotel Bristol in December 2010 where Mr Armanna is said to have told Chief Etete that he was a 'living dead man'. These are matters to which I refer below.

87. I reject these allegations of a fraudulent conspiracy between EVP and the ENI representatives (and indeed others) to perpetrate a fraud on ENI/NAE. I conclude that they are fabrications deliberately concocted to support Malabu's case. Apart from being inherently implausible, they are not supported by any contemporaneous documentation and featured for the first time as, and when, Chief Etete thought it appropriate to mention them. The manner in which he gave his evidence in relation to these matters was also highly unsatisfactory.

88. Moreover, in his evidence in the ILC Arbitration Mr Agaev was clear that, contrary to Malabu's defence in these proceedings and Chief Etete's witness statement in the ILC Arbitration, Chief Etete never told Mr Agaev about alleged plans involving a fraud against ENI. On the contrary Mr Agaev stated that Chief Etete "was obviously happy during this call because Mr Armanna confirmed ENI's interest in OPL 245 and he asked me to proceed further".

89. He also denied that there was any question of he, Mr Agaev, suggesting to the Chief that Malabu would not be responsible for EVP's fees or that EVP should play a limited role. Mr Agaev's evidence rejecting Malabu's fraud case was unchallenged in cross-examination in the ILC Arbitration. I am able to rely upon Mr Agaev's evidence in this respect as supportive of Mr Obi's evidence. I reject Malabu's allegation of a proposed fraud on ENI, and the allegation that Mr Obi was working for ENI. I find as a fact that there was indeed discussion of a figure of $200 million, but that it was raised by Mr Obi in the context that EVP would require a minimum fee of $200 million. I also find as a fact that, irrespective of whether the Chief mentioned a figure to Mr Agaev in their telephone conversation after the Lagos meeting, Mr Agaev was told on this occasion by Chief Etete to proceed with the transaction with due despatch.

Events after the Lagos meeting

90. Mr Obi alleges that, in the aftermath of the Lagos meeting with NAE/ENI, on 28 or 29 December 2009, two telephone conversations took place: the first a call between Mr Agaev and Mr Obi; and the second a call between Chief Etete and Mr Obi. Mr Obi alleges that what was said in these two calls was as follows:

    i) in the first call Mr Obi spoke with Mr Agaev, who was pleased to have learned that Mr Obi had been able to bring an ENI representative to see Chief Etete; Mr Agaev said he had spoken to Chief Etete, who had informed him that he would agree to EVP's success fee being a minimum of $200 million;

    ii) in the second call, Mr Obi spoke directly with Chief Etete, who agreed on behalf of Malabu that EVP's success fee would be a minimum of $200 million.

91. Chief Etete denied that the content of such conversations was as alleged. As I have already mentioned above, he admitted having had a telephone call with Mr Agaev but said that he had informed Mr Agaev that the plan disclosed by Mr Armanna was 'fraud and money laundering' in which he would not participate; however, upon assurance from Mr Agaev that ENI would be responsible for EVP's fees, and that these would be 'reasonable and legitimate', Chief Etete says he was prepared to agree to EVP's involvement, since this appeared to be required by ENI; Mr Agaev, in his

evidence in the ILC Arbitration, has also denied that he ever told Mr Obi that the Chief had agreed a $200 million fee.

92. In his written closing submissions, Mr Howard submitted that it was not at all surprising that Mr Obi did not record in writing the oral acceptance of his proposal; he submitted that, in the days that followed the meeting, as both Mr Obi and Chief Etete were well aware, a mechanism had been proposed and agreed (and was in the course of being drawn up in writing and documented) that would allow for EVP to be paid its fee in manner that served the interests of both parties by obscuring the size of that fee – namely the AMP mechanism; the Chief's agreement to Mr Obi's proposal was in effect an agreement that he would, in the course of agreeing the AMP with Mr Obi (as was anticipated at that stage) set the AMP at a level which, to the satisfaction of both Malabu and EVP, would seek to ensure (as far as one could in advance) that EVP's fee was at least $200 million. Thus, submitted Mr Howard, there was no need to document this independently, since it would necessarily come to be properly documented, when the parties in fact agreed the AMP (as it was anticipated that it would be); Chief Etete knew the position, Mr Agaev knew the position and Mr Obi knew the position; if Chief Etete sought to resile from what he had agreed in the course of agreeing the AMP, the AMP would not get agreed; if he did not resile, the agreement would come to be (properly) documented; accordingly there was nothing odd about the fact that the agreed $200 million position was not expressly documented at this stage.

93. In his closing oral submissions, however, Mr Howard made it clear that EVP was not contending that any such apparent acceptance of the $200 million fee by the Chief during the course of this telephone conversation with Mr Obi on 28/29 December 2009 amounted to a binding contractual agreement at that stage; the fee still had to be paid through the proposed contractual mechanism of the "AMP" which was what the parties were envisaging at that time in the course of their drafting of the EVP Exclusivity Agreement. Mr Howard submitted that the relevance of these conversations was by way of background to show that Mr Obi had been raising the $200 million minimum fee at an early stage, and that, commercially if not contractually, the fee had been accepted by the Chief.

94. I find on the balance of probabilities that, in these two telephone calls, the Chief had told Mr Agaev (which Mr Agaev then communicated to Mr Obi) that the Chief wanted Mr Obi to proceed in relation to the transaction with all due despatch; and that, in the second call, Chief Etete had told Mr Obi likewise. I find on the balance of probabilities that Mr Obi mentioned his required minimum fee of at least $200 million in his conversation with the Chief; it is clear from the evidence that Mr Obi's negotiating style was what might euphemistically be described as "pushy", and I have little doubt that he would not have lost an opportunity in what was apparently his first direct telephone conversation with the Chief to have mentioned his proposed fee.

95. But I reject Mr Obi's evidence that, in the telephone call, Chief Etete agreed the fee, or expressly indicated that he found it acceptable. It was patently clear from the manner in which the Chief gave his evidence over the four days of the hearing which took place in Paris, that he would have been highly unlikely to have committed himself in such unequivocal terms, in relation to such a large sum, at this early stage, particularly when the evidence showed: (a) that he regarded Mr Obi's wish to make a large amount of money out of the transaction as demonstrating greed on the latter's

part; and (b) that the Chief clearly had an innate reluctance to commit to pay large commissions to anybody. Moreover, as Mr Graham submitted, it was inconceivable that the Chief would have agreed such a fee, without at least making a counter-proposal of a lesser sum. I find that the probability is, given what I have already found to have been Chief Etete's enthusiasm for Mr Obi's introduction of NAE/ENI, and the Chief 's desire to proceed speedily with the conclusion, that the Chief did not commit himself either way to accepting or rejecting the proposal, but, at the same time, being very keen to keep Mr Obi motivated and on the hook to produce an investor at a substantial price, within the shortest timeframe possible, just expressed general noncommittal sentiments of encouragement to Mr Obi, including in relation to fees.

96. Nor do I accept Mr Obi's evidence that Mr Agaev told him that Chief Etete had agreed his fee or indicated that he found it acceptable. If that had been the case, it is highly unlikely that Mr Obi would not have referred to the matter in the contemporaneous communications between himself and Mr Agaev or, at the least, made a note of the matter for himself. Mr Howard's submissions as to why the AMP contractual mechanism rendered any such note superfluous were not convincing against a background where Mr Obi was meticulous in making notes. Mr Obi's evidence that he went to Cape Town for the 2010 New Year for the purpose of celebrating the agreement of his fee was also unconvincing.

97. Thus I reject EVP's case that, by the end of 2009, there had been a non-binding (in the contractual sense) but commercial acceptance by Malabu of EVP's requirement for a fee of not less than $200 million. It may well be that, in the light of any demurral by Chief Etete to his suggested fee, Mr Obi was optimistic that EVP would, in due course, be likely to receive a substantial fee if the transaction proceeded. But I find that Mr Obi did not believe that he had achieved even a commercial acceptance of the quantum of that fee by the end of 2009.

Further drafting of the EVP Exclusivity Agreement

98. The drafting process of the EVP Exclusivity Agreement continued in January 2010, as was recorded in email correspondence between Mr Obi and his legal advisers, as well as in communications between Mr Obi and Mr Agaev. In summary the agreement conferred upon EVP an exclusive mandate for EVP to act on Malabu's behalf in connection with the sourcing of a purchaser for "the OPL Assets". The final draft of the agreement was for a minimum period of 3 months, and thereafter continuing indefinitely subject to termination on one month's notice. EVP was entitled to retain as a fee any sums or payments or consideration in relation to the acquisition of the OPL Assets received in excess of the AMP. The agreement also provided that within 30 days Malabu should notify EVP, in the form of an addendum to the agreement, of the level at which the Agreed Malabu Price should be set.

99. As had been envisaged in the drafts sent to Mr Agaev on 27 December 2009, to which I have already referred, the contractual mechanism of an "Agreed Malabu Price" ("AMP") was the method adopted for ascertaining EVP's spread. The concept remained constant through the drafting process. I accept to a certain extent Mr Obi's evidence that this was regarded as a convenient mechanism for both parties, as it ensured the level of EVP's fees was not apparent on the face of the agreement. Chief Etete had expressed to Mr Obi an interest in avoiding any express mention of EVP's fee on the face of the EVP Exclusivity Agreement; Mr Obi also considered that, for

various commercial reasons, it was useful for him to keep confidential, so far as possible, the quantum of EVP's fees. I accept that both men were concerned that third parties should not seek commissions quantified by reference to EVP's fees. As appears below, however, I do not accept that both parties' respective desire for confidentiality provides a reason why, when the AMP mechanism was abandoned, no written record was made of what Mr Obi contends was the replacement agreement that EVP should receive a fixed fee of $200 million.

100. In cross-examination it was suggested to Mr Obi that the structure of the agreement provided no protection in the event that Malabu chose to accept an offer below the AMP. Mr Obi explained that this overlooked the fact that it was an important part of the structure that EVP would control any offers made by investors, and would have a discretion whether to pass an offer on to Malabu; in the event that an offer came in under the required level to generate the required $200 million spread for EVP, it would simply not pass the offer on to Chief Etete. I accept that the mechanism provided control to EVP. I do not accept that this fact supports Mr Obi's evidence relating to the agreement for the fee. In addition, the terms of the EVP agreement gave Mr Obi the right to control the money, thereby giving him some assurance that he would be paid.

Execution of the Revised ILC Agreement

101. Because of the terms of the proposed EVP Exclusivity Agreement, it became necessary to execute a revised draft of the ILC Agreement (the "Revised ILC Agreement"). A final draft of the Revised ILC Agreement was prepared by Mr Agaev and sent by email from Mr Agaev to Mr Obi on 19 January 2010. The Revised ILC Agreement was in almost identical terms to its predecessor but with the references to exclusivity and to sourcing a buyer removed. It was not in dispute that these changes were required in order to accommodate the separate mandate for EVP. There was a dispute, on which nothing appeared to turn, between the recollections of Mr Agaev and Chief Etete as to when the Revised ILC Agreement was signed. Mr Agaev's evidence in the ILC Arbitration was that, although the agreement was dated 19 January 2010, and was signed by a director of ILC on that date, Chief Etete did not sign the new agreement until 23 January 2010. Chief Etete's evidence was that he signed the Revised ILC Agreement on Malabu's behalf on 19 January 2010.

The execution of the EVP Exclusivity Agreement

102. EVP's case is that the finalised version of the EVP Exclusivity Agreement is the document, a copy of which was contained in court bundle H 5, at pages 1043-1053 (referred to in the Re-re-amended Defence and Counterclaim as the Appendix B Agreement).

103. Malabu's case, as it emerged in Malabu's closing written submissions, was to the effect that there had been a forgery or a fraudulent collation of the EVP Exclusivity Agreement in the form of the Appendix B Agreement. Forgery and fraud had only been alleged for the first time in the re-amended Defence and Counterclaim dated 29 November 2012. Paragraphs 542-543 of the submissions were as follows:

> "542. However, by reason of the forgery and/or fraudulently collation of the EVP Exclusivity Agreement (as set out at

paragraphs 257 to 296 above), it is open to the Court to conclude either:

(1) That there is no contract because the parties were never ad idem: Chief Etete's handwritten amendments were a counter-offer by Malabu which was not accepted by EVP, which in turn made its own counter-offer incorporating some but not all of those revisions, which counter-offer [sic] never communicated to Malabu and therefore never accepted by it; or

(2) That there is a contract on Malabu's terms in the form set out at Appendix A to the Re-Amended Defence and Counter-Claim because Mr Agaev was acting as EVP's agent in agreeing that version with Malabu or because Mr Obi was involved in the forgery and/or fraudulent collation of the EVP Exclusivity Agreement.

543. If the Court reaches the first conclusion, then there is no contract between EVP and Malabu and, consequently, no fees can be payable under such contract. EVP would be left to its claim in unjust enrichment, which is examined below."

104. In Malabu's oral closing submissions, Mr Graham withdrew the allegation that Mr Obi was involved in the forgery. On 10 January 2013 Malabu served its Re-Re-Amended Defence and Counterclaim which was said to give effect to "the amendments to its defence foreshadowed in its oral closing submissions and reflecting the case in its written closing submissions at para 542 (subject to the portion of that paragraph withdrawn during oral closing submissions)". This attached as Appendix A, the version of the EVP Exclusivity Agreement which Malabu contended was the correct version (this had in fact been attached to the original Defence and counterclaim, before any allegations of fraud or forgery had been made); and, as Appendix B, the version of the EVP Exclusivity Agreement which EVP contended was the correct version.

105. The amended case advanced was, in essence:

i) that Mr Ednan Agaev and/or Mr Richard Granier-Deferre (but not their respective sons) had actual or ostensible authority to negotiate with Malabu the terms of the EVP Exclusivity Agreement on behalf of EVP and to procure, again on behalf of EVP, the execution by the parties of that agreement, and that they (or one of them) in fact bound EVP to the terms of the "Appendix A Agreement" (i.e. the agreement put forward by Malabu); and

ii) that the alleged knowledge of Mr Ednan Agaev and/or Mr Richard Granier-Deferre should be attributed to EVP, such that EVP had knowledge of the alleged forgery (said in paragraph 27.2B, from the previous round of amendments, to have been 'carried out by or at the direction of Mr Ednan Agaev and/or Mr Richard Granier-Deferre and/or Teimour Agaev and/or Stephane Granier-Deferre' and accordingly knew that Malabu had never assented to the terms of the "Appendix B Agreement" (i.e. the version of the

agreement put forward by EVP), and no agreement on such terms was concluded between the parties.

106. Malabu's case in relation to this issue was extremely difficult, if not impossible, to follow, and has frequently changed over time. In whatever version it was formulated, I found it wholly unconvincing. Chief Etete's evidence likewise fluctuated wildly; it included at various times allegations of forgery, or complicity in fraud, as against Mr Obi, which counsel quite properly did not feel able to include in the final version of the Re-re-Amended Defence and Counterclaim which, during the course of the hearing, I required Malabu to serve.

107. Initially, at the interlocutory stage, the case as presented in Malabu's solicitor's affidavit appeared to be that the true agreement was contained in a version of the agreement containing Mr Agaev's manuscript additions and that those additions were only in fact initialled by Chief Etete. The argument at this point in time was that the agreement had never come into force. Once Malabu's original defence was served, it appeared that this point was no longer being taken, on the basis that there were no material differences between the two versions of the agreements. However, as Mr Howard pointed out, that stance raised the problem as to how it could plausibly have been said that was the version of the agreement that was relied on by Malabu, when that version (i.e. the one containing manuscript amendments) plainly did have material differences with the version relied on by EVP. Further problems also arose in relation to this alleged version.

108. In the course of Mr Obi's cross-examination a new case emerged. The case now was that the Malabu version had not been agreed by EVP but that Malabu was deceived into believing that it had and indeed that both EVP and Malabu were deceived by one or more of Mr Agaev, Agaev Junior, Mr Graniere Deferre and Graniere Deferre Junior. Subsequently, in Chief Etete's cross-examination, a further allegation emerged to the effect that Mr Obi, in collaboration with Mr Agaev forged the document, although as I have already said the allegation that Mr Obi was complicit in the forgery, or fraudulent collation of pages of the agreement, was not pursued in the Re-re-amended Defence that was ultimately served.

109. It is not necessary for me to rehearse every minute piece of the Byzantine chronological evidence relating to the signing and execution of the EVP Exclusivity Agreement. It suffices for me to say that I reject Chief Etete's evidence in relation to this issue to the extent that it sought to suggest (as variously pleaded in different versions of the defence from time to time):

i) any fraudulent collation of pages, or forgery, on the part of EVP, Mr Obi, or any of Mr Agaev, Mr Agaev junior, Mr Granier-Deferre and Mr Granier-Deferre junior in relation to the signing or execution of the EVP Exclusivity Agreement in the form put forward by EVP, namely the Appendix B Agreement;

ii) that, in relation to the signing or execution of the EVP Exclusivity Agreement, either of Mr Agaev or Mr Granier-Deferre had been or were authorised by EVP to act as EVP's agents (whether actually or apparently) for the purpose of negotiating with Malabu the terms of the EVP Exclusivity Agreement, or for procuring the execution by Malabu of the agreement;

iii) that any knowledge on the part of Mr Agaev or Mr Granier-Deferre as to the alleged forgery or fraud fell to be attributed to EVP or that EVP "knew that the signature and initials purporting to be those of Chief Etete on the Appendix B Agreement were forged and EVP knew that Malabu had never assented to the terms of the Appendix B Agreement."; see paragraph 27.2 D of the Re-Re-Amended Defence and Counterclaim;

iv) that EVP was in the circumstances bound to the terms of the EVP Exclusivity Agreement in the form put forward by Malabu, namely the Appendix A Agreement.

110. I am satisfied, having reviewed the entirety of the evidence, including Malabu's detailed analysis of the evidence at paragraphs 257-286 of its written closing submissions relating to this issue, that the Appendix B Agreement, namely the version of the agreement put forward by EVP, and found at bundle H 5, pages 1053-A to 1053-K is indeed the correct version of the EVP Exclusivity Agreement, to which Chief Etete, on behalf of Malabu agreed. I reject Chief Etete's evidence to the effect that the signature on the final page and his initials on previous pages were forgeries. There was nothing in the evidence to support the contention that any of Mr Agaev, Mr Agaev junior, Mr Graniere Deferre and Mr Graniere Deferre junior were acting on behalf of EVP or would have had any reason to have participated in sharp practice or fraudulent activity of the type alleged. There was no documentary evidence to support such an assertion, whether in the form of e-mails or text messages or otherwise.

111. In summary, I find that, on the balance of probabilities, what happened is that Malabu was presented with two original versions of the agreement. Amendments were made on those originals by Mr Agaev on Malabu's behalf; but a number of Chief Etete's suggested amendments did not make sense and so were rejected by Mr Obi; but he accepted certain non-controversial ones. His amendments were returned to the Chief and agreed by him. The Chief initialled all the relevant pages. It is probable that Chief Etete signed and initialled two versions of the agreement.

112. In slightly more detail, the chronology appears to have been that, on 24 January 2010, Mr Obi received an email from Mr Teimour Agaev attaching a copy of the EVP Exclusivity Agreement as signed by Chief Etete, and containing manuscript amendments on pages 1-4. Mr Obi accepted certain of the amendments but did not accept others, including the requirement to secure a non-refundable deposit. The relevant changes were made to pages 1-3 (there being no changes to page 4 other than the deposit requirement, which Mr Obi had not accepted). A PDF of the amended agreement was forwarded by Mr Obi to Mr Agaev on 25 January 2010 asking for Chief Etete to initial the amended pages. When questioned on how he could know that Chief Etete would consent to his changes, Mr Obi referred to the fact that he had received a text message from Mr Agaev confirming that Chief Etete was "okay with the revised version of the agreement".

113. On 26 January 2010 Mr Obi travelled to Geneva and met with Mr Agaev and Mr Granier-Deferre. A later email from Mr Teimour Agaev on 27 January 2010 was sent to Chief Etete attaching pages 1-4, which had by then been initialled by Mr Obi. Mr Obi later signed the agreement and recorded the date as 27 January 2010. Mr Obi later collected a copy of the new pages 1-4 containing Chief Etete's initials. It seems likely that initially page 3 of the document had not been initialled and an initialled

version of that page was supplied between 4 February and 10 February 2010. The finalised copy of the EVP Exclusivity Agreement was sent to Mr Nwakodo of Sheridans on 10 February 2010.

114. The original of the agreement as held by EVP (the Appendix B Agreement) was produced by EVP as part of its disclosure. Malabu was unable to produce any original version of the agreement for which it was contending (the Appendix A Agreement). Its so-called “original” of its version was in fact merely a photocopy. Even in relation to this version, Chief Etete appeared to be suggesting in his oral evidence that his initials on pages 3 and 4 were a forgery. Chief Etete could provide no explanation as to why, whereas his scratch alone appears on the first four pages of the document, both his scratch and Mr Obi's appear on the final four pages. The overwhelming inference, and I so conclude, is that the Appendix A Agreement is a composite document put together by someone at Malabu, who took the final pages from its original version of the Appendix B Agreement, signed and scratched by EVP, added to them the first four pages from the marked up un-agreed draft, which contained Mr Agaev's manuscript annotations, and copied the result. It is not necessary for me to identify who was responsible for this, or whether Malabu’s collation was fraudulent, or merely the product of wishful thinking. In either event, this version was relied upon to support Malabu's case at the date of the interlocutory hearings that the Malabu Exclusivity Agreement "never commenced" because a deposit purportedly required pursuant to the version of the agreement put forward by Malabu was not provided.

115. In essence, the material differences between the terms of the two versions of the EVP Exclusivity Agreement respectively relied upon by Malabu and EVP were as follows:

i) The Appendix A Agreement had the following manuscript addition at the end of the first paragraph of the letter:

> "simultaneously, we shall provide you with the letter of intent of the investor which will contain the readiness of the investor to pay a non-refundable deposit in accordance with the terms of the actual agreement, which are specified in the paragraph "non-refundable deposit payment";

ii) The Appendix A Agreement had the following manuscript addition to the paragraph on the third page of the letter headed "Payment Instructions" after the words "(if applicable.." the insertion of the words "as stipulated in the paragraph above)";

iii) The Appendix A Agreement had the following manuscript addition after paragraph 1.3.2 at the bottom of the fourth page of the letter:

> “For the avoidance of doubt, it is understood that the exclusivity period will be effective upon receiving the non-refundable deposit into the Malabou account.”

116. As I have already said, I reject Malabu’s case that the EVP Exclusivity Agreement as finally agreed included provisions reflecting these manuscript amendments.

The letter dated 1 February 2010

117. By a letter dated 1 February 2010, EVP wrote to Malabu confirming receipt of its "duly executed exclusivity mandate which we have received today, February 1, 2010". This letter was handed to Chief Etete in Milan on 4 February 2010, following Chief Etete's introduction to Mr Descalzi of ENI. The terms of the letter were consistent with EVP's case in relation to the negotiation and signing of the EVP Exclusivity Agreement (namely that there was a considerable amount of negotiation before the final version was signed) and inconsistent with Malabu's case that the EVP Exclusivity Agreement included terms that provided that the agreement only began upon receipt of a non-refundable deposit, or that its exclusivity period was conditional upon receipt of such a deposit. There was no suggestion made at the time by Chief Etete or Malabu that the 1 February letter inaccurately reflected the terms of the agreement as signed. Whilst the letter clearly referred to the fact that Mr Obi was *proposing* to obtain "a conditional financial offer backed by a reasonable non-refundable deposit" from any proposed investor, I reject Malabu's submission that this supported its case that the Appendix A Agreement (with the inclusion of such a provision as a condition) reflected the true agreement between the parties. I accept Mr Obi's evidence in this respect; it was not in dispute that Chief Etete, who desperately needed the money, was eager to obtain a deposit as quickly as possible. The proposal that a so-called non-refundable deposit would be sought from a prospective purchaser (but which was in fact immediately refundable in the event that another offer was accepted, or the first offer was not accepted within a stipulated deadline) did not predicate that EVP was only entitled to its exclusive mandate conditional upon obtaining such a deposit.

118. The 1 February letter also attached an expression of interest from NAE dated 24 December 2009, a preliminary list of due diligence questions and data requirements, a Joint Venture Agreement questionnaire for NAE and a timetable to completion of the sale within six weeks.

119. In cross-examination Chief Etete gave evidence for the first time to the effect that he had only entered into the EVP Exclusivity Agreement, as a result of being blackmailed at a meeting which he said had taken place in January 2010, at *Le Fouquet* restaurant in Paris. The allegation was that, at a dinner attended at least by Mr Obi and Mr Armanna of ENI, he was blackmailed by them into agreeing to sign the EVP Exclusivity Agreement, on the basis that there would be no transaction with ENI unless the EVP Exclusivity Agreement was put in place so as to enable commissions to be diverted to ENI representatives. No such allegation was put to Mr Obi in cross-examination; nor had any prior reference been made in Chief Etete's witness statements to this alleged incident. I reject the suggestion as an invention on Chief Etete's part.

The terms of the EVP Exclusivity Agreement

120. Insofar as is material for the purposes of this case, the EVP Exclusivity Agreement (in the form of Appendix B) provided as follows: -

"RE: EXCLUSIVITY AGREEMENT IN RESPECT OF PROPOSED TRANSACTION / ARRANGEMENTS FOR THE DISPOSAL OF INTERESTS, BUSINESS AND / OR ASSETS OF OPL 245

We refer to the proposed disposal of the assets, business, property and/or interests and rights whatsoever (including but not limited to Contractors Rights and Equity) of Chief Dan Etete and / or Malabou [sic] Oil and Gas Limited (or any entities directly or indirectly owned or controlled by them), representing forty percent of the Oil Prospecting License for block 245, and any extension, renewal or amendment thereof (the "OPL Assets"). This letter Agreement fully records the mandate granted by you to us on the 15th December 2009 and arrangements, reached between us in respect of our engagement and the disposal of the OPL Assets.

Agreement to Sell
You have agreed subject to contract to sell and dispose of the OPL Assets for a total purchase consideration to be agreed with or by you following review of the OPL Assets on your behalf by your advisers and to be set out in a notice to us in the form of an addendum to this Agreement ("Agreed Malabou Price"). Given that time is of the essence and our exclusivity period starts to run from the date of this letter Agreement, you hereby undertake to provide us with the written notice of the Agreed Malabou Price in the specified form as soon as reasonably practicable but in any event no later than thirty (30) days after the date of this letter Agreement.

Exclusivity
By this Agreement you grant us for a minimum period of three (3) months from the date of this Agreement (the "Exclusivity Period"):

(i) an exclusive mandate and agency to seek to procure up to three potential acquirers of the OPL Assets in order to negotiate the disposal of the OPL Assets having regard to the Agreed Malabu Price. On that basis, any sale of the OPL Assets concluded within that Exclusivity Period or pursuant to this Agreement will be covered by the arrangements set out in this Agreement. Thereafter, our mandate will continue, subject to termination by you in writing at one (1) month's notice.

(ii) during which to allow potential buyers of the OPL Assets to investigate the OPL Assets and negotiate the proposed purchase.

(iii) direct access to all such information, and documents relating to the OPL Assets as we have requested or may request including certain information, documents and confidential information relating to the OPL Assets, any related rights, business or grant or retention of the OPL Assets and its ownership ("Confidential Information") which may be available in Malabu's possession.

Services
During the Exclusivity Period, you have also engaged us to provide advisory~ negotiation and consulting services in respect of the OPL Assets (the "Services"), with a focus on:

(i) Assisting you in the sourcing for a new investor/acquirer/buyer (being a credible entity possessing a solid reputation and background in the field of oil and gas exploration and production) in order to assign, sell, transfer or otherwise dispose of a part or all of your rights to the OPL Assets;
(ii) Assisting in negotiations generally in so far as we are able or in connection with relevant negotiations with the investor/acquirer/buyer with respect to

the offer made in respect of the OPL Assets by applicable credible buyers/acquirers/investors;

(iii) In so far as we are able, assisting your advisers in the legal structuring and formalization of an acquisition of the OPL Assets or relevant transaction With up to three identified investors and/or acquirers of the OPL Assets;

(iv) Supporting you (in so far as we are able) in your relations with Governmental bodies in Nigeria in seeking to obtain necessary waivers and approvals for the proposed transaction in respect of the disposal of the OPL Assets.

Fees and Entitlement

Retention of Excess Amount Over Agreed Fee: You acknowledge and agree that:

(i) we shall also be entitled to retain as our fee and payment for procuring the buyer/investor/acquirer, managing the transaction and assisting in completing the disposal of the OPL Assets, any sums or payments or consideration relating to the acquisition of the OPL Assets in excess of the Agreed Malabu Price;

(ii) you are and shall not under any circumstances be entitled to any sums or payments or consideration relating to the acquisition of 40 (forty) % the OPL Assets in excess of the Agreed Malabu Price.

Non-Refundable Deposit Payment: In the event that the proposed transaction disposal of the OPL Assets fails to complete (as anticipated by us) following identification of potential buyers/investors and provided that the final purchase consideration offered by the buyer is greater than the Agreed Malibou Price you agree to pay to us an amount equivalent to one hundred per cent (100%) of the entire monies and other consideration received by you (or on your behalf) as non-refundable deposit payment from any potential investor or buyer (or on their behalf) in respect of the OPL Assets or any related transaction provided that such investor/buyer was identified or introduced by or through us. In the event that the proposed transaction for the disposal of the OPL Assets fails to complete (as anticipated by us) following identification of potential buyers/investors and provided that the final purchase consideration offered by the buyer is less than the Agreed Malabu Price you agree to pay to us an amount equivalent to fifty per cent (50%) of the entire monies and other consideration received by you (or on your behalf) as non-refundable deposit payment from any potential investor or buyer (or on their behalf) in respect of the OPL Assets or the related transaction provided that such investor/buyer was identified or introduced by or through us. You undertake to us and agree that any payment of a non-refundable deposit must be held in escrow and paid into an escrow account with instructions to the escrow agent or escrow bank to release the funds subject to the foregoing terms or conditions. We may both be required to enter into an escrow agreement with the escrow agent.

Payment Instructions: The relevant percentage of the non-refundable deposit (if Applicable as stipulated in the paragraph above) shall be paid to us, in line with the payment instructions provided by us and in accordance with our requirements. You acknowledge and agree that your sole entitlement on the disposal of the OPL Assets shall be to the payment to you of the Agreed Malabu Price.

Long Stop Fee: If a transaction in respect of the OPL Assets is completed or an agreement reached (whether signed or not) with a prospective investor/buyer in the twelve (12) months period following the latter of the termination, dis-engagement by one or both of the parties or expiration of the Exclusivity Period or this Exclusivity

Agreement, you agree and shall pay to us the payment in excess of the Agreed Malabu Price Provided that such investor/buyer was identified or introduced by or through us.

For the avoidance of doubt, you shall not be liable to pay us in advance any fees or sums whatsoever in connection with or for our provision of the Services or this Agreement (except as provided in this Agreement) and your only obligation to pay us any fees shall only relate to our entitlements as expressly set out in this Agreement in connection with fees generated by us and our retention of any purchase consideration whatsoever secured over and above the Agreed Malabu Price and/or the percentage of the non-refundable deposit, if applicable.

1 EXCLUSIVITY

1.1 In consideration of our entering into this Agreement and the obligations hereunder, you warrant and undertake to us that during the Exclusivity Period, you shall not (and shall procure that your directors, employees, agents and advisers shall not):

1.1.1 advertise the OPL Assets for sale through any medium;

1.1.2 sell or otherwise dispose or seek to dispose of the whole of the OPL Assets to any third party;

1.1.3 continue or enter into any or further discussions or negotiations with any third party potential buyer, investor or acquirer (other than your professional advisers) relating to the acquisition or disposal of the OPL Assets; or

1.1.4 grant to any third party (other than pursuant to this Agreement) access to the Confidential Information, books, accounts, records and other information relating to the OPL Assets for the purpose of making an offer to buy the OPL Assets.

1.1.5 withdraw from any introductions made by us or negotiations procured by us for the acquisition or disposal of the OPL Assets;

1.1.6 enter into or continue, facilitate or encourage, any discussions or negotiations with any other party relating to the possible purchase or disposal of the OPL Assets;

1.1.7 enter into any agreement or arrangement with any other party relating to a competing offer for the OPL Assets;

1.1.8 withdraw from negotiations with us or any third party introduced by us for the acquisition of the OPL Assets; or engage in any conduct likely to be prejudicial to our interests or the interests of any buyer, investor or acquirer;

1.1.9 do or omit to do anything which frustrates the ability to dispose of the OPL Assets or affects the willingness of any third party or buyer to sign and complete the legal documents for the acquisition of the

OPL Assets or which may cause us or any of us or the buyer loss;

1.1.10 and shall procure that none of our employees, agents, directors or representatives shall carry out any of the foregoing.

1.2 If at any time you are in breach of any of your obligations contained in this Agreement or you indicate that you wish to increase the Agreed Malabu Price (following determination as set out in the signed Addendum), change the principal terms set out in this Agreement or propose any material change in the terms of our appointment and exclusivity, we reserve the right to terminate this Agreement with immediate effect. In the event of such termination, you will indemnify us and keep us indemnified against for all costs, losses and expenses (including legal fees) incurred by us up until such termination date or resulting from any breach or non-performance by you of any of your obligations under this Agreement.

1.3 During the Exclusivity Period, you undertake to us to:

1.3.1 supply us (or such associated company as we shall direct) as requested with such available information and documents, deal with enquiries and due diligence requests from us and/or the proposed buyers, investors or acquirers (and/or their respective advisers) of the OPL Assets as soon as reasonably practicable.

1.3.2 act in good faith and with reasonable expedition (and procure that third parties under your control shall so act) in an effort to complete the sale and purchase of the OPL Assets on or before the expiry of the Exclusivity Period.

2. **ACKNOWLEDGEMENTS AND UNDERTAKINGS**

2.1 You undertake and confirm that neither you nor any of your advisers including International legal consulting Limited; agents or representatives (or any third party) are now, directly or indirectly, in discussions or negotiations relating to the acquisition or disposal of the OPL Assets or a disposal of all or a material part of the OPL Assets with any person, organisation, company or entity other than ourselves or as fully disclosed to us in writing as attached to this Agreement.

2.2 You acknowledge that we have incurred costs to date and will continue to incur costs and expenses from the date of this letter Agreement in connection with the introduction of potential acquirers or investors and the proposed acquisition and/or disposal of the OPL Assets in reliance on your representations and obligations set out in this Agreement.

2.3 ……..

2.4 You agree at all times that both parties (subject to our respective separate interests under or pursuant to this Agreement) are to act towards each other and under the terms of this Agreement in good faith and that you

shall use your best endeavours (and instruct your advisors) to negotiate in good faith (subject to applicable separate interests) and promptly agree any formal legal agreements with the buyer or any other third parties in respect of the disposal and acquisition of the OPL Assets.

2.5 You confirm that you are duly authorized and empowered to act as Principal in the following transaction. Further, you undertake to us (and for the benefit of any acquirer, we approach on your behalf) that you have all right and title in respect of the OPL Assets and shall in any event be entitled without restriction to procure the transfer of (all beneficial and legal rights) the OPL Assets to an acquirer free of encumbrances. You acknowledge that we are acting on the basis of the exclusive mandate as a broker and agent with no liability whatsoever in respect of the OPL Assets or in respect of any buyer of the OPL Assets. For the avoidance of doubt, by this Agreement you appoint us your sole and exclusive agent during the Exclusivity Period for the disposal of the OPL Assets with authority to negotiate with the three prospective buyers of the OPL Assets in respect of the purchase price and approval of transaction documentation.

………….

3 **OUR AGENCY AND TRANSACTION RIGHTS**

In respect of the mandate granted to us during the Exclusivity Period, you irrevocably agree in respect of the disposal of the OPL Assets as follows:

3.1 That you are and/or will be satisfied with the Agreed Malabou Price and will dispose the OPL Assets to a buyer as procured by us in consideration of the agreement to pay the Agreed Malabu Price and shall not seek to increase or renegotiate the Agreed Malabu Price following determination in the Addendum.

3.2 That as we shall not receive any costs and expenses, other payment or upfront fee from you, we shall be free to agree and retain any (i) transaction participation and data-room access fee with the proposed buyer or buyers of the OPL Assets, and/or (ii) purchase price for the OPL Assets in excess of the Agreed Malabou Price.

3.3 We shall be entitled to and shall fully retain (without accounting to you) any and all fees or remuneration agreed with any third parties or potential investors in or buyers of the OPL Assets (including any process, data access or participation fees charged to third parties or potential buyers/investors) and or the excess purchase price secured from or agreed with any proposed buyer of the OPL Assets over and above the Agreed Malabu Price in respect of the OPL Assets.

3.4 We shall during the Exclusivity Period and following determination of the Agreed Malabou Price, have an unfettered right to deal with you, your nominated advisers and all third parties or proposed buyers in negotiating the purchase price for the OPL Assets together with specifying or approving the arrangements for settling the purchase price for the OPL Assets including payment to you of the Agreed Malabou Price.

3.5 We shall be entitled to and are hereby expressly authorised by you in the conduct of our exclusive mandate and for the purposes of this Agreement to agree the payment arrangements or mechanism with potential buyers or the buyer for the OPL Assets including the right to receive the entire purchase price for the OPL Assets (subject always to the agreement to pay you the Agreed Malabu Price). Accordingly, We reserve the right of set off in respect of any *sums* due to you pursuant to the disposal of the OPL Assets or other arrangements.

3.6 You agree to produce and allow us and any buyer/investor, and the our and/or the buyer's advisers access to such available information as is requested by us or the buyer, to evaluate the proposed acquisition and will assist us and the buyer in any commercial, financial and legal due diligence work. Notwithstanding any other provision to the contrary, you hereby expressly authorise us without restriction to disclose all relevant information and data provided by you (or on your behalf) to us to potential buyers/investors for the purpose of evaluating the OPL Assets and/or any potential acquisition.

3.7 No sale agreement shall be entered into between you and any buyer during the Exclusivity Period without our prior written consent or approval in respect of the agreed terms and particularly to reflect the payment arrangements agreed between us as set out in this Agreement. You undertake to us that you shall not accept any refundable deposit or other payments from any potential acquirer or investor introduced by us, without our prior written consent. However, you shall be free to accept non-refundable deposit payments subject as always to the terms of this Agreement and our percentage entitlement. The terms of this Agreement shall apply notwithstanding the form of consideration or payment procured or accepted in connection with the evaluation or disposal of the OPL Assets.

3.8 We shall have no responsibility or liability whatsoever to you or the buyer of the OPL Assets or any third party-whatsoever and you acknowledge that our role shall be limited to that of exclusive agent, introducer and broker solely with a financial interest in the proposed transaction payments set out in this Agreement including with an interest in the fee negotiated for successfully procuring the relevant buyer for the OPL Assets and/or any purchase price agreed with the buyer in excess of the Agreed Malabu Price.

3.9 For the avoidance of doubt, we will not be liable to you or any third party for any indirect, consequential, incidental loss or damages or any other loss under this Agreement such as but not limited to loss of profit, loss of production, loss of revenue, loss of opportunity and in no event shall we have any liability whatsoever to you as we act as an agent in all circumstances relating to or governing this Agreement. You undertake to us that you shall at all times rely exclusively on your commercial, financial and professional advisors in connection with the determination of the Agreed

Malabou Price, the disposal of the OPL Assets and all relevant documentation.

3.10 We shall at our option and sale discretion instruct the buyer of the OPL Assets (and you hereby authorise us and also agree to re-confirm in writing if required and/or for us to disclose this Agreement for such purpose) to:

3.10.1 Pay to us the entire purchase price (including any excess over the Agreed Malabou Price) with authority to deduct the excess prior to paying you the Agreed Malabou Price in line with the same payment terms and conditions of the acquirer.

3.10.2 Make separate transfers or payments reflecting the relevant Agreed Malabou Price due to you and any excess or agreed fees to us directly.

4 **INDEMNITY AND NON-CIRCUMVENTION**

4.1 You undertake, represent and warrant to us that you shall not in any manner, directly or indirectly circumvent or seek to circumvent the operation of this Agreement or otherwise, deprive or seek to deprive us of any of its benefits, remuneration, fees or protections intended pursuant to this Agreement.

4.2 You will reimburse us all and indemnify us and keep us indemnified against all costs, losses and expenses (i) resulting from any breach or non-performance by you of any of your obligations under this Agreement or in the event that notwithstanding our procuring a buyer for the Agreed Malabou Price, or resulting from your refusal or failure to enter into a relevant sale or other agreement to dispose of the OPL Assets to such buyer at the Agreed Malabou Price.

4.3 Any sums due under this Agreement and unpaid shall be recoverable as a debt on a full indemnity basis. Our certification for such purpose in the absence of manifest error shall be final and binding. Any such payment not made on the due date shall be subject to default interest at the rate of four (4) per cent above the base rate of Lloyds TSB Bank plc from time to time, from the due date for payment until payment in full.

5.3 Counterparts: This Agreement may be executed in any number of counterparts, but shall not take effect until each party has executed at least one counterpart. Each counterpart (including taxed counterparts) shall constitute an original but all the counterparts together shall constitute a single agreement.

5.4 Entire Agreement: This Agreement (and the Adendum) constitutes the entire agreement and understanding of the parties and supersedes any previous agreement between the parties relating to the subject matter of this Agreement and no additions, amendment to or modifications of this Agreement shall be effective unless it is in writing duly signed on behalf of the parties You hereby irrevocably confirm that you shall not (and

neither you nor your associates or other entities shall) in any manner whatsoever circumvent or attempt to circumvent the Agreement.

5.5 Time of the Essence: Time shall be of the essence of this Agreement, both as regards the dates and periods specifically mentioned and as to any dates and periods which may be substituted by agreement in writing between or on behalf of the parties.

5.6 Further assurance: At any time after the date of this Agreement you agree promptly at our request to execute or procure the execution of such documents and do or procure the doing of such acts and things as we may require for the purpose of giving to us full benefit of all the provisions of this Agreement.

5.7 Severance: If a term in or provision of this Agreement is held to be illegal or unenforceable, in whole or in part, under an enactment or rule of law, it shall to that extent be deemed not to form part of this Agreement and the enforceability of the remainder of this Agreement shall not be affected. The parties shall however in good faith agree a provision which best reflects the parties original commercial intention as set out by us.

5.8 Waiver/Liability: No single or partial exercise, or failure or delay in exercising any of our right, power or remedy shall constitute a waiver by us of, or impair or preclude any further exercise of that or any right, power or remedy arising under this Agreement or otherwise. All undertakings, representations and liability under this Agreement by you shall be on a joint and several basis.

5.9 Assignment: You shall not at any time, assign, transfer, create a trust over or otherwise encumber or transfer all or any part of your rights and benefits under this Agreement.

5.10 Survival: Any provision intended to or capable of surviving termination of this Agreement shall continue to have effect notwithstanding the expiry or other termination of this Agreement.

6 GOVERNING LAW

This Agreement shall be governed by and construed in accordance with the laws of England and Wales. For our benefit, you hereby submit to the exclusive jurisdiction of the courts of England and Wales and waive any objections to proceedings in such courts on the grounds of venue on the grounds that the proceedings have been brought in an inconvenient forum. Nothing in this Agreement shall prevent us from commencing or pursuing proceedings in any other jurisdiction whether concurrently or not.

Please confirm your Agreement to the above terms and conditions by signing, dating and returning to us the attached copy of this letter Agreement."

Dinner on 4 February 2010

121. On 4 February 2010, a dinner took place at the Principe di Savoia Hotel, in Milan. The dinner had been arranged by Mr Obi. The dinner was attended by Mr Obi, Mr Agaev, Chief Etete and Mr Descalzi. It was the first and only occasion on which Chief Etete met Mr Descalzi, the Chief Operating Officer of ENI. There were no negotiations at the dinner. I accept Mr Obi's account that the purpose of the dinner was for the main personalities to meet and obtain a sense of the seriousness of each other's intentions. Chief Etete recalled attending the dinner, but did not remember the date.

122. The dinner's importance in relation to the issues which I have to decide is as follows. In his evidence, Chief Etete sought to denigrate Mr Obi's role at this dinner; he suggested that Mr Obi was seeking to show he was "in" with ENI and was "fawning" on its representatives. I find that, on the contrary, that the dinner showed to the Chief precisely what Mr Obi's connections were able to achieve for Malabu. I accept Mr Obi's evidence that this was a significant advance for Malabu; Chief Etete was meeting, for the first time, a senior officer of ENI. In the previous four years Chief Etete had not succeeded in meeting such a senior representative of an international oil company. Moreover, if Chief Etete's fraud and conspiracy theory had been correct, it was perhaps surprising that, at the dinner, no mention was made, even according to Chief Etete, about the proposed plan and the need to involve EVP. According to Chief Etete, Mr Descalzi was a prominent player in the alleged fraudulent conspiracy.

The 18 February Letter

123. Chief Etete gave evidence to the effect that, in the light of the timetable set out in the 1 February letter, he was expecting things to move quickly on the transaction and that he was disappointed by the lack of progress following this meeting. On 18 February 2010 he wrote a letter addressed to EVP, for the attention of Mr Obi, which was copied to Mr Agaev and Mr Granier-Deferre. Chief Etete claimed that it was couriered to Mr Teimour Agaev (Mr Agaev's son) for onward transmission to EVP. I find as a fact that the letter was received by Mr Agaev senior on 20 February 2010 by fax and that he decided not to pass it on to Mr Obi, because it was very confusing and he did not want the latter to stop his work and his communications with ENI. In this respect, I accept Mr Agaev's hearsay evidence in the ILC Arbitration. I likewise accept Mr Obi's evidence, which is supported by Mr Agaev's evidence, that he did not receive the letter until it was handed to him at the meeting with Chief Etete on 6 March 2010 in Milan, to which I refer below. I do not accept that any of the matters set out in paragraph 319 of Malabu's written closing submissions establishes the contrary.

124. The letter was in the following terms:

> "May we refer to the agreement signed and entered into between your goodselves (Energy Venture Partners) and our Malabu Oil & Gas Ltd, dated in one hand and International Legal Consulting Ltd of Cyprus all on the 15th December 2009 respectively.

It was agreed with clear understanding that after the execution of all the agreements by all the parties, the following commitments will take place within a reasonable time frame:

a) An irrevocable letter of intent from the Ultimate Final Investor and

b) The payment of USD 100,000,000= (One Hundred Million US Dollars) as non-refundable in favour of Malabu Oil & Gas

These commitments from the investor are key to the success of the above agreements. You may recall that Malabu has made her position clear before now.

Exclusivity Period: Malabu Oil & Gas Ltd accepts to give Energy Venture Partners 3 Months form the 15th of December 2009 based on full acceptance and understanding that the investor will make good on their commitments to Malabu. We have since exceeded Two Months into the 3 Month 'Exclusivity' period. Unfortunately none of these commitments have been made.

Notice: Malabu Oil & Gas Ltd hereby gives both International Legal Consulting Ltd, Energy Venture Partner and the Ultimate investor-ENI-Italy 2 Weeks from today's date 18/2/2010 to issue the Irrevocable Letter of Intent and pay US 100,000,000 (One Hundred Million) Dollars in favour of Malabu Oil & Gas Ltd on or before the 04/03/2010.

If the above commitments are not met by the end of the 2 Weeks, Malabu Oil & Gas Ltd will cancel, revoke, withdraw from all legal obligations, engagements with all parties involved in this OPL 245 transaction and these engagements/agreements become null and void.

Malabu Oil & Gas Ltd also gives 30 days notice to withdraw all legal engagements to Energy Venture Partners and International Legal Consulting Ltd from the 04/03/2010."

125. As Mr Agaev described, this letter was, in the light of the terms of the EVP Exclusivity Agreement, and the introduction of ENI, confusing and irrational. I accept Mr Howard's submission, that, in addition to being incoherent in a number of respects, there were in particular the following peculiar aspects:

i) It referred to the EVP Exclusivity Agreement having been signed and entered into on 15 December 2009, when it had in fact only been concluded at the end of January 2010.

ii) It referred to the need for an irrevocable letter of intent: by this stage Malabu had received ENI's letter of intent dated 24 December 2009 and the reference to "irrevocable" made no sense.

iii) It referred to a non-refundable deposit of $100 million whereas it was clear that no such thing could be provided – at best, Mr Obi was seeking a refundable deposit from ENI. It was wholly unrealistic to suppose that a major investor such as ENI would agree to an ultimatum to pay a $100 million non-refundable deposit; indeed as Mr Agaev explained in his evidence, "merely presenting such an irrational demand to ENI could fatally poison the relationship with ENI."

iv) The letter purported to claim that two months of the EVP Exclusivity Agreement had already expired. This was inconsistent with what Chief Etete claimed were the terms of the agreement; it was also inconsistent with what were the actual terms.

v) It referred to "commitments from the investor", i.e. ENI, whereas in fact, as Chief Etete knew, no such commitments had been given.

vi) It purported to give an ultimatum to ILC, EVP and ENI to deliver within two weeks (i.e. on or before 4 March 2010) an irrevocable letter of intent and pay $100,000,000 in favour of Malabu, failing which Malabu world cancel, revoke and withdraw from all legal obligations in relation to OPL 245 .

vii) It purported to give 30 days' notice to "withdraw all legal engagements to [EVP and ILC] from 4 March 2010.

126. So far as the first of the last two requirements was concerned, it was clear that Malabu had no entitlement to impose such requirements contractually or to terminate the mandate on the basis that they were not complied with. So far as notice was concerned, there was no right to give 30 days notice from 4 March 2010. The earliest date on which the agreement could have ended was arguably 27 April; it could not have ended on 3 April, as the letter envisaged.

127. It appeared clear from other evidence (see for example a letter purportedly dated 24 February 2010 that was said to have been sent by Chief Etete to Mr Richard Granier-Deferre), that Chief Etete's purpose in writing this letter was an attempt, by imposing unrealistic conditions that could not be met, to cut out ILC and EVP, to bring about a result whereby Malabu was engaged in direct negotiations with ENI and, by such means, avoid Malabu's large fee exposure to ILC and EVP.

Confidentiality agreement between EVP and NAE

128. On 24 February 2010 EVP and NAE entered into a Confidentiality Agreement ("the Confidentiality Agreement") in relation to the information which EVP was going to provide to ENI/NAE for the purposes of the latter's giving consideration to the making of an offer. In so far as is material, the Confidentiality Agreement provided as follows:

> "Clause 1: In connection with the potential divestment of certain assets in Malabou, specifically an interest in License OPL245, offshore Nigeria, (referred to herein as the

> “Transaction", EVP (referred to as the "Disclosing Party") in furtherance of specific instructions received from Malabou to such effect and included in the contractual agreement dated January 27, 2010 between Malabou and EVP (EVP Mandate), is willing, in accordance with the terms and conditions of this Agreement, to disclose to the Receiving Party, certain confidential information relating to the Transaction…
>
> Clause 11. Without the prior written consent of the Disclosing Party, the Receiving Party shall not make contact with any employee, customer, supplier or agent of Malabou or any of their affiliates with regard to the Transaction until expiry or termination of the EVP Mandate. The Receiving Party hereby undertakes, represents and warrants to the Disclosing Party that they shall not in any manner, directly or indirectly circumvent or seek to circumvent the operation of this Agreement or otherwise deprive or seek to deprive the Disclosing Party or Malabou of any of its benefits or protections intended pursuant to this Agreement. Further to at all times to act in good faith in respect of this Agreement. The parties acknowledge and agree that the Disclosing Party is “acting on behalf” of Malabou and shall in no circumstances have any liability whatsoever to the Receiving Party or any other person under or pursuant to this Agreement in respect of the Confidential Information. The Disclosing Party's sole liability under this Agreement shall relate to the material breach of clauses 1, 8, 12, 13”.

Meeting at the Hotel Bedford in Paris on 6 March 2010

129. On 23 February 2010 Mr Obi and Mr Agaev met with representatives from Drake & Bart, the valuers. The purpose of the meeting was to discuss a presentation by Drake & Bart on the valuation of OPL 245 to Malabu. Mr Obi's evidence, which I accept, was that the presentation was being prepared to assist in the process of an agreeing an AMP pursuant to the terms of the EVP Exclusivity Agreement. The meeting was, I find, recorded in Mr Obi’s handwritten notes.

130. There is no dispute that, subsequently, on 6 March 2010 a meeting took place in the Hotel Bedford in Paris, at which, as planned, a presentation on the valuation of OPL 245 was delivered to the meeting by two representatives of Drake & Bart. What was in dispute was who attended the meeting and what happened at it. Evidentially this was a critical meeting for both Malabu's and EVP's respective cases.

131. EVP's case in relation to this meeting, based on Mr Obi's evidence in these proceedings, and Mr Agaev's evidence in the ILC Arbitration, introduced by way of hearsay notice, is that:

    i) The principal purpose of the meeting was to fix the AMP, once Chief Etete had heard the presentation on valuation from Drake & Bart.

    ii) Mr Obi attended the entirety of the meeting.

iii) At the outset of the meeting, Chief Etete handed Mr Obi a letter from Malabu to EVP dated 18 February 2010 purporting to terminate the Revised ILC Agreement and the EVP Exclusivity Agreement if an irrevocable letter of intent and non-refundable deposit were not provided by an investor within two weeks. The letter came as a considerable shock to Mr Obi, as it was the first occasion on which he had seen it and there had been no prior discussion of it with Mr Agaev in the run-up to the meeting. Mr Obi was initially unable to mention anything about the letter since the presentation was continuing. Instead, Mr Obi had to read the letter and consider its contents whilst the presentation continued.

iv) As the presentation continued, it became clear that the Drake & Bart valuation was relatively meaningless, as it was apparent that Drake & Bart had not relied on any data in arriving at their assumptions. Mr Obi's impression was that Chief Etete had become concerned during the course of the presentation that Mr Obi and Mr Agaev were in fact conspiring to set an artificially low AMP. This could potentially lead to a result whereby the spread between the AMP and the final purchase consideration led to EVP receiving a fee significantly in excess of the $200 million that had been agreed.

v) Once the presentation had finished, Mr Obi left the room whilst Chief Etete, Mr Agaev and the Drake & Bart representatives had a discussion about the presentation. Once the Drake & Bart representatives had left, Mr Obi returned to the room and the 18 February 2010 letter was discussed. Mr Obi immediately expressed serious reservations about his continued involvement in the project. At this point, Mr Agaev intervened, and explained to Mr Obi that Chief Etete was under serious pressure to find a buyer. Mr Agaev explained to Chief Etete, in a diplomatic fashion, that it was totally unrealistic to expect a major investor such as ENI to pay a non-refundable deposit of $100 million. Chief Etete saw the force of Mr Agaev's remarks and agreed not to demand a $100 million non-refundable deposit from ENI. He also agreed that the 18 February 2010 letter would be withdrawn, and not discussed again. Nothing was said about either the ILC or EVP mandate terminating either on 27 April 2010 or at any other date.

vi) Chief Etete, Mr Agaev and Mr Obi then went on to discuss the AMP, the fixing of which had been the principal purpose of the meeting. Chief Etete's position was that he did not want to agree an AMP at the meeting. The Drake & Bart presentation had caused Chief Etete to become concerned that a fixed AMP would lead to EVP earning a fee that was potentially significantly above the $200 million that had been agreed. To address these concerns, it was expressly agreed between Mr Obi and Chief Etete that the mechanism for payment of EVP's fee would be varied. The concept of an AMP would be retained, but instead of being agreed in advance, the addendum to the EVP Exclusivity Agreement would be completed once an acceptable offer had been received, and this would fix the Agreed Malabu Price at $200 million less than the amount of the offer. This basis – that is to say that EVP would receive a fee of $200 million on the successful disposal of the OPL Assets – was the agreed basis on which EVP continued its engagement from this point in time. Whilst the question of EVP's fee was revisited in later discussions, no

agreement to alter this arrangement was ever concluded. The new arrangement had advantages for both parties. From Chief Etete's perspective, this avoided the risk that EVP would achieve a higher than expected price and earn a fee considerably above the $200 million that had been agreed. From EVP's perspective, this reduced the risk that, if the AMP was set too high, EVP would be unable to attract an offer at the necessary level to allow EVP to earn its minimum fee.

132. On the other hand, Malabu's case in relation to the 6 March meeting, based on Chief Etete's evidence, was as follows:

i) The 6 March meeting was attended by Chief Etete, Mr Agaev and Mr Granier-Deferre and representatives from Drake & Bart. Chief Etete was adamant that Mr Obi was not present during the meeting, but comments by Mr Agaev suggested to Chief Etete that he was in the hotel somewhere.

ii) There was a presentation from Drake & Bart on the valuation of the OPL Assets. They provided a valuation of 100% of the OPL Assets from a low of $1.77 billion to a high of about $2.5 billion.

iii) The Drake & Bart representatives left and there followed a discussion about price. Chief Etete said that the valuation was low, and repeated his view that 100% of the OPL Assets was worth $5 billion, but that Malabu would contemplate a quick sale of 40% that valued the asset at $2.5 billion, i.e. a sale price of $1 billion.

iv) At the end of a long discussion, Chief Etete said that Malabu would insist on a price no lower than the mid-point of the Drake & Bart range, which valued 100% of the OPL Assets at $2.2 billion. He made it clear again that a deal at that level would have to happen quickly and in particular that an irrevocable letter of intent and a non-refundable deposit had to come quickly.

v) Mr Agaev said he thought $2.2 billion was still too high. Chief Etete told him that Malabu was reducing the acceptable level of the purchase price by approximately $300 million.

vi) Mr Agaev also said that the agreements with ILC and EVP should be given more time. He pointed out that the EVP Exclusivity Agreement could not actually be terminated until 27 April 2010.

vii) In response, Chief Etete told Mr Agaev, that he and EVP could have until 27 April 2010 to put an acceptable deal together, but repeated that the mandates with ILC and EVP would both come to an end on that date, unless NAE/ENI had by then made an offer that was at an acceptable level for Malabu and had produced an irrevocable letter of intent and a non-refundable deposit in the sum of at least $100 million. Mr Agaev was not happy, but said he understood and accepted that this was the position. In paragraph 38.9 of the Amended Defence and Counterclaim this allegation was formulated as follows:

> "[that Mr Agaev agreed with Chief Etete on 6 March 2010 that]
> the EVP Exclusivity Agreement would come to an end on [27

> April 2010] unless by then NAE and/or ENI had made a satisfactory offer and had produced an irrevocable letter of intent and a non-refundable deposit in the sum of at least $100 million [... and] that EVP would in those circumstances not insist on being given a month's written notice of the termination of the Agreement".

viii) There was no agreement about a minimum fee for EVP of $200 million.

My conclusions in relation to the 6 March meeting

133. First, I find as a fact that Mr Obi was indeed present at the meeting and that its purpose was for Malabu and EVP to agree the AMP. Mr Maton's second witness statement, in support of Malabu's application to set aside the freezing order, positively asserted as common ground that Mr Obi had attended the meeting. At that stage Malabu was running a different case that Chief Etete had notified Mr Obi of a minimum AMP at the meeting. In paragraphs 58 and 59 of his witness statement, Mr Maton said:

> "It is common ground that Mr Etete and Mr Obi agreed to meet in Paris on 6 March 2010 to attend a presentation given by Drake & Bart who were consultants who had been retained for the purpose of arriving at a valuation of Block 245 with a view to fixing the Agreement Malabu Price... It is Malabu's case that, at the meeting on 6 March 2010 in Paris, Mr Etete told Mr Obi that the Agreed Malabu Price had to be at least $2.1 billion, being the central market value placed on the asset by Drake & Bart, and that Malabu never regarded to the Agreed Malabu Price as being any lower than that".

134. Chief Etete's explanation of why (if it were not true) this evidence had been put forward at the interlocutory stage, in circumstances where it must have been based on his instructions, since he was the only representative of Malabu who attended the meeting, was wholly inadequate. The idea that Mr Obi had not attended the meeting was demonstrably unrealistic, even on Chief Etete's version of events, particularly in circumstances where the letter dated 18 February 2010 to EVP was under discussion. Moreover Mr Obi's evidence that he was present at the meeting was clearly supported by what I find to be his contemporaneous notes of the meeting.

135. Second, whilst I accept that, as submitted by Mr Graham, there were some (in the circumstances, unsurprising) discrepancies in Mr Obi's various accounts of what transpired at the meeting, and his evidence as to the order of events, I nonetheless find as a fact that, so far as the termination issue is concerned, Mr Obi's account was broadly correct. I accept that, as described in detail by Mr Obi and by Mr Agaev, in his evidence given in the ILC Arbitration, as relied upon by EVP, the letter dated 18 February 2010 was indeed withdrawn by Chief Etete. Whatever was discussed at the meeting, the final agreed position was that: when Mr Agaev and Mr Obi asked Chief

Etete whether he wanted them to stop work and walk out, Chief Etete was adamant that he did not want that to happen; accordingly, both EVP's and ILC's mandates remained in place; there was no condition laid down by Chief Etete, to the effect that their respective mandates would terminate on 27 April 2010, if no irrevocable letter of intent and no non-refundable deposit were produced by that date, or otherwise. I also accept that the issue of termination was not revisited. Whatever its flaws, Mr Obi's evidence on this issue was convincing and corroborated by Mr Agaev's hearsay evidence which I accept in this respect. Chief Etete's evidence, on the other hand, was inherently inconsistent and implausible.

136. Accordingly I reject Malabu's case that Mr Agaev agreed with Chief Etete on 6 March 2010 that:

> “the EVP Exclusivity Agreement would come to an end on [27 April 2010] unless by then NAE and/or ENI had made a satisfactory offer and had produced an irrevocable letter of intent and a non-refundable deposit in the sum of at least $100 million [... and] that EVP would in those circumstances not insist on being given a month’s written notice of the termination of the Agreement;”

as pleaded in paragraph 38.9 of the Amended Defence and Counterclaim. I also reject the suggestion that Mr Agaev was in some way acting on behalf of, and was authorised to bind, EVP. There was nothing in the evidence to support such an assertion. On the contrary, the contemporaneous materials, such as the dealings and exchanges between the relevant parties, the actual roles performed by them and the conclusion of separate agreements for ILC and EVP made the position manifestly clear - Mr Obi alone was authorised to act on behalf of, and bind, EVP. I reject the Chief's evidence that Mr Obi was "Agaev’s man".

137. Third, I accept Mr Obi's evidence that it was expressly agreed between Mr Obi and Chief Etete that the mechanism for payment of EVP’s fee would be varied; and in particular that the concept of an AMP would be retained, but, instead of being agreed in advance, the addendum to the EVP Exclusivity Agreement would be completed only once an acceptable offer had been received, which in turn would fix the Agreed Malabu Price.

138. Fourth, however I do not accept that Mr Obi and Chief Etete expressly orally agreed at the meeting that EVP would receive a fixed fee of $200 million or that the AMP would necessarily be retrospectively set at $200 million less than the purchase price. I accept that Mr Obi suggested that a figure of $200 million was the size of the fee for which EVP was looking but, in my judgment, EVP has not demonstrated, on the balance of probabilities, that Chief Etete ever actually agreed to this specific figure in a contractually binding way. I find that the probability is that Chief Etete "brushed off” Mr Obi’s suggestion to agree a fee, on the one hand not wanting to discourage him from producing ENI/ NAE as a purchaser, but, on the other hand, not being prepared to commit either to an AMP or to any agreement as to EVP's fee. I find that, on the balance of probabilities, being the sort of man which he was, Chief Etete said something to the effect that Mr Obi should get on with doing the work to produce an investor under the terms of the EVP Exclusivity Agreement and that, if and when, he did, at a price that was acceptable, there would be no problem about agreeing an

appropriate fee for EVP. I find that, rather than antagonise Chief Etete at that stage, in circumstances where the Chief was clearly reluctant to commit to any AMP, or a specific sum for EVP's fee, Mr Obi would have gone along with the suggestion, confident that the contractual protections and control which the EVP Exclusivity Agreement afforded him would have enabled EVP to negotiate, and obtain Chief Etete's agreement to, an appropriate fee when the time came.

139. My reasons for reaching this conclusion may be summarised as follows:

i) Whilst I found Mr Obi to be in general terms a truthful witness, he was not always honest or reliable. I was not able to accept his evidence on this issue. He presented as a highly sophisticated businessman, who had considerable experience in pressing his advantage, and who, in commercial correspondence, had a tendency to exaggerate facts and situations, in order to promote or achieve his ends. He was essentially a gilder of the lily.

ii) In my judgment it was inconceivable that, if Mr Obi had indeed reached what EVP is now contending was a contractually binding agreement with Malabu on 6 March for payment of a fixed fee of $200 million, he would not have recorded such an agreement either in a letter to Malabu, or, at the least, in a contemporaneous note, either for his own file or for the purposes of a confirmatory e-mail to Mr Agaev (who, of course, was at the meeting) or to his own lawyers. The evidence showed that Mr Obi was meticulous in the recording of transactional events.

iii) Mr Howard submitted that it was not surprising that Mr Obi had not maintained any contemporaneous documentary record; Mr Obi did not need to do so, since, as he himself explained, he had commercial control of the situation – in the sense that he controlled the offers, the communications with both the buyer and the seller, and the sale process; and therefore he considered himself to be adequately protected. Mr Howard further submitted that Mr Obi recognised that the position would have to be documented at the end of the process, when the AMP was in fact agreed at $200 million less than the purchase price and for this reason also, there was no need to document the deal. Mr Howard also pointed out that Mr Obi had had no experience of, or need to, litigate in connection with any of his deals, and for this reason also it was not surprising he had not documented the deal; he had no need to record the fact for his own purposes - he was the only person who needed to know what the position was and indeed, positively did not want other people on "his side" to know what the position was, since that might encourage them to seek a fee for their services, that was linked to the quantum of his fee. In my judgment, however, these factors are not persuasive. On the contrary, EVP's and Mr Obi's perceived control of the bidding process and the negotiations with the investor under the terms of the EVP Exclusivity Agreement provide the very reason why Mr Obi would not have thought it necessary, in the circumstances, to have insisted upon an agreement of EVP's fee at this stage with Chief Etete. Chief Etete was clearly being difficult, if not capricious, about agreeing the AMP because he was suspicious that Mr Obi and Mr Agaev were trying to fix it too low, in order to maximise EVP's spread; Chief Etete was also expressing concerns to Mr Agaev and Mr Obi about the size of the fee for which EVP was asking; thus the overwhelming likelihood in my view

is that, in that situation, and, given what Mr Obi perceived to be EVP's protected position, I have little doubt that Mr Obi would have thought that the best, and most realistic, course was to progress the ENI deal to the stage where the latter was ready to sign; and then, when he effectively had Malabu over a barrel, to negotiate and agree EVP's fee at that stage, rather than to attempt to do so at a time when the Chief was being so difficult about the price at which Malabu was prepared to sell and clearly reluctant to commit to paying EVP a large fee.

iv) Mr Howard submitted that since the purpose of the meeting was to agree the AMP, it would have been highly unlikely that either party would have been content to go forward without certainty as to the position. I disagree. EVP had the comfort that it controlled the process, the investor and the money; but, from a practical point of view, it was simply not in a commercial position to compel Chief Etete's agreement to the AMP at that stage. Nor am I persuaded by Mr Howard's argument that Malabu would have wanted to have documented the position in relation to EVP's fee, given the latter's control of the process and the money. Chief Etete would, I find, have had little regard to Malabu's contractual obligations under the EVP Exclusivity Agreement, and, as the evidence shows, he would have been quite prepared at that stage to have cut EVP out of the whole process, if he could have done so. No doubt Chief Etete thought that he would have some sort of commercial leverage if he put off agreeing either the AMP or EVP's fee.

v) Moreover, as Mr Graham submitted, and as variously described in his affidavit and witness statements, Mr Obi took a dim view of Chief Etete's character and characteristics. For example, in paragraph 19 of his affidavit, Mr Obi described Chief Etete's negotiating style in the following terms:

> "The executives of multinational oil and gas companies were no longer at his beck and call and following recent reform in corporate governance procedures, international oil companies ("IOCs") were generally no longer conducting "business as usual" trade practices and were keen to follow or to be seen to follow regulatory requirements with regard to ethics, transparency and due process. Etete did not, and did not want to understand the new paradigm, and as a result was not ideally suited to negotiations and interactions in this "brave new world". Having previously been minister of Petroleum, he was not accustomed to having to accommodate the internal workings of the major international oil companies; he expected them to act as supplicants and he felt it beneath him to have to sit round the table with them to negotiate a deal. I cannot emphasize enough how Etete's personality, his habit of constantly changing his mind and his desire to just make demands instead of properly negotiating were significant factors in why he may have been unable to sell Malabu's interest OPL 245."

Likewise, in paragraphs 37 and 39, of his first witness statement Mr Obi expressed the same views:

> "37…In addition to the issues surrounding Chief Etete that made potential purchasers reluctant to deal with him from a reputational point of view, the manner in which he approached negotiations created further problems. As I explained at paragraph 19 of my Affidavit, his habit of capriciously changing his mind and constantly making demands (as opposed to negotiating) were significant factors that had inhibited a sale. He expected even senior representatives of major oil companies to act as supplicants and clearly felt a sense of entitlement…..
>
> 39. In addition to this general conduct, the Chief's behaviour at face-to-face meetings was highly unpredictable and sometimes inappropriate. I refer in Section VI below to the Chief's behaviour at the meeting in Lagos with Mr Armanna. Further, I recall Mr Agaev informing me after one meeting that the Chief had burst into tears for reasons which were not at all clear. "

The manner in which Chief Etete gave his evidence in the witness box demonstrably bore out this description. On frequent occasions he was incapable of giving a straight answer to even a simple question; on other occasions he was evasive or changed answers which he had previously given. As I have already said above, I have no doubt that, as a counter-party to negotiations, he would have presented an extremely difficult challenge – someone who needed to be extremely delicately handled. In such circumstances it is inherently implausible that, if Mr Obi and the Chief had indeed agreed a fee, Mr Obi would not have attempted to record it either in a letter to Malabu or in a contemporaneous note or memorandum.

vi) I also find it surprising that, as Mr Graham submitted, Mr Obi did not at any time mention the fact that, allegedly, Malabu had agreed EVP's fee. Thus he made no mention of the fact either to his solicitors, Sheridan's, or to EVP's other advisers, such as Raffeisen, the investment bankers, or Shearman & Sterling, lawyers, when he was seeking advice as to where to bring court proceedings against Malabu. Whilst I can understand that Mr Obi might well have been reluctant to mention the quantum of the fee agreed, because it might have inspired enthusiasm on the part of his advisers to claim disproportionately large success fees, I do find it surprising that nothing was said about a fixed fee agreement having been made in March 2010.

vii) Mr Obi's attempt in his subsequent e-mail dated 1 July 2011, to get Mr Agaev to confirm that Mr Obi's account of the alleged agreement about the $200 million fee was correct, was not impressive. In his e-mail Mr Obi asked:

> "As discussed I am preparing to take legal action with respect to my unpaid fee for EVP's work on OPL 245. Given your involvement in a number of the key meetings I had with Etete, I would appreciate it if you could please confirm that the following details are correct to the best of your recollection or let me know if you have any differing recollections"

Paragraphs 5 and 6 of the e-mail were in the following terms:

> "5. Etete had insisted that I introduce him to at least one of my prospective investors. You will recall my concerns about doing this especially in the absence of a finalized EVP mandate. After you persuaded and reassured me, I took a representative of the investor to meet Etete at his Lagos house where we all had lunch together. You will recall that both you and Etete were pleasantly surprised and happy by the quality of investor that I had introduced. The following the meeting, Etete and I proceeded to negotiate and finalize the EVP mandate after having agreed a minimum fixed fee of $200 mm based on $1 bn of cash proceeds. Whilst you were not present, we had both independently confirmed this amount to you.
>
> 6. On 6 March 2010 after watching the presentation by Drake & Bart, you joined Etete and I while we discussed agreeing a sales prices. Etete used a Nigerian parable to demonstrate why he did not want to agree a "Malabu" price with EVP but wanted to wait until the investor had made their offer then he would deduct my minimum fee from that amount and keep the rest for Malabu. Etete was concerned that if he agreed a price, I might secure a much higher offer and make a significant greater amount than my minimum fee. I thought this approach made sense and agreed with Chief's proposal."

In an e-mail of the same date, Mr Agaev replied as follows:

> "Basically the facts in your statement are corresponding to my recollection of the facts. The only detail: the former Hilton Hotel is not in the suburbs, but in Paris, near Tour Eiffel. Upon checking once more all the facts, I shall send to you my statement of facts. There have been many important facts that happened in fall 2010, in Milano, where your role was crucial to keep the transaction alive and when the investor was ready to walk out."

In its Hearsay Notice before trial, EVP sought to rely on the truth of the contents of Mr Agaev's e-mail as confirming Mr Obi's account. However, by the time of its closing submissions, wisely any such reliance had been abandoned. Mr Agaev never did provide such a statement, and, in his subsequent cross-examination in the ILC Arbitration in February 2013, Mr Agaev made it quite clear:

a) that Mr Obi had been pressing him in an irritating fashion to provide a statement;

b) that he had never provided confirmation or "reconfirmation", as he put it, to Mr Obi of what Mr Obi had said;

c) that it was quite wrong for Mr Obi to have suggested that either Mr Obi or Chief Etete had ever independently confirmed an amount of $200

million to him and that no such figure had ever been mentioned in subsequent phone calls; and

d) that it was inconceivable that if, any such sum had indeed been agreed by way of fee, Chief Etete would not have mentioned the matter either to Mr Agaev or to Mr Granier-Deferre.

In those circumstances, I certainly could not rely upon Mr Agaev as in any way supporting Mr Obi's account of the alleged agreement relating to the $200 million fee. On the contrary, his evidence undermined it. Moreover Mr Obi's attempt to obtain such support from Mr Agaev was discreditable and reflected badly on him. Finally, his account in the e-mail differed widely from the account which he subsequently gave in his evidence in these proceedings.

140. But, as I have already found, whilst I could not accept Mr Obi's assertion that there had been any agreement on Chief Etete's part to pay EVP a $200 million fee, I do accept that the figure may well have been discussed and that, otherwise, Mr Obi's account of the meeting was generally correct. I could not rely on Chief Etete's account in any way whatsoever.

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141. I find that both prior to and after the March meeting, Mr Obi was heavily involved in taking the project forward. I set out in a separate section of this judgment what I find to be the work carried out by EVP in accordance with the Exclusivity Agreement.

142. On 8 March 2010 a letter was sent from EVP to ENI indicating that it was breaking off the relationship due to a lack of confidence that a credible offer would be forthcoming in the anticipated timeframe. As Mr Obi explained, that letter was sent as a negotiating tactic with the aim of focusing ENI's attention. The letter had the desired effect and, on 11 March 2010, a response was received from ENI indicating renewed enthusiasm in OPL 245.

143. Malabu sought to rely on various draft documentation and correspondence passing variously as between Mr Obi and his solicitors, Sheridans, between Mr Obi and Mr Agaev, and between Mr Obi and Raffeisen, in support of Malabu's case that the termination letter dated 18 February had not been withdrawn at the 6 March meeting. Mr Graham argued that the fact that Mr Obi had requested Sheridan's to prepare a one page addendum (entitled "Variation and Amendment of the EVP Mandate Agreement") to the EVP Exclusivity Agreement providing for a three month extension to the mandate which would be contingent upon a non-refundable deposit by the end of March 2010 showed that Mr Obi considered the 18 February Letter still to be effective notice of Malabu's termination of EVP and that he was hoping to secure an extension to the mandate by obtaining a deposit before his mandate expired. Mr Graham further submitted that the fact that the draft assumed that the current mandate expired on 27 April 2010 and that Mr Obi sent the draft variation agreement to Mr Agaev on 15 March 2010, likewise supported Malabu's case on termination. He also relied upon a draft letter dated 16 March 2010 from EVP to Malabu, seeking a 60 day extension to the EVP Exclusivity Agreement.

144. Mr Obi was extensively cross-examined about these documents; he explained that he had asked Sheridans to draft the variation in agreement as a precaution, particularly in light of the further mention of a non-refundable deposit in a draft term sheet which he had received the day before from Mr Teimour Agaev on behalf of Malabu. The draft document was never executed, but Mr Obi wanted the option of proposing an alternative arrangement to Chief Etete if it became necessary to do so.

145. Likewise, the draft letter from EVP to Malabu seeking a 60 day extension to the EVP Exclusivity Mandate also remained in draft and was never completed, or sent to Malabu. According to Mr Obi it was prepared to anticipate a situation where Chief Etete tried to withdraw EVP’s mandate, including over the non-refundable deposit issue. The letter was incomplete and was based on the format of a completely separate letter to ENI. Mr Obi explained that he realised there was no need for the letter, and so it was never finished.

146. I found Mr Obi's explanation on this issue credible, notwithstanding the changes in some of the detail of his evidence. His account in relation to the termination issue was also supported by what subsequently happened to which I refer below.

Alleged meeting between Malabu and ENI in April 2010

147. Malabu alleged that a meeting took place in April 2010 in Milan between Chief Etete, Mr Agaev, Mr Obi, Mr Armanna, Mr Descalzi and Mr Casula. According to Chief Etete's evidence, Mr Armanna is said to have repeated at this meeting that there would be a fee sharing arrangement between Mr Obi and certain ENI executives, to which Chief Etete’s response was that any fee had to be reasonable and representative of ‘*Mr Obi’s minimal role*’ in the transaction. Chief Etete also asserted that Mr Obi handed Chief Etete at this meeting a draft variation to the EVP Exclusivity Agreement, which provided for an extension to EVP’s mandate.

148. I reject Chief Etete's evidence that such a meeting ever took place in Milan in April 2010 as alleged. Either Chief Etete was confused, and was in fact referring to the earlier meeting which had taken place in Milan on 4 February 2010 at the *“Principe di Savoia”* hotel, which was the only occasion at which Chief Etete and Mr Descalzi met or Chief Etete was simply inventing the later meeting. In cross-examination on this issue Chief Etete's evidence was self-contradictory and confused. I accept Mr Obi's evidence that the meeting never took place. Malabu did not produce any document to corroborate the meeting or Chief Etete's presence in Milan in April and, although Mr Obi was frequently in touch with ENI representatives during April, there was no reference in Mr Obi’s SMS or email communications of a meeting with Chief Etete in Milan. In his evidence in the ILC Arbitration Mr Agaev said that no such meeting had taken place and that the only meeting between Mr Descalzi and Chief Etete was the 4 February 2010 meeting. I rely on that evidence as corroborating Mr Obi's account.

The first ENI/NAE Offer and its aftermath

149. On 27 April 2010, Mr Obi received an email from Mr Armanna attaching ENI/NAE’s first non-binding offer for 40% of the OPL Assets. Mr Obi's evidence was that a copy of the offer was passed to Chief Etete but the level of the offer was redacted and a redacted copy was also sent to Mr Agaev. Mr Obi said that neither was informed of

the offer until about 4 May 2010. The consideration offered by ENI was a cash amount of $617 million or $462 million for 40% of the asset, dependent upon certain scenarios. Mr Obi said that he was surprised at the low level of the consideration and the reserve estimates and so did not want Chief Etete or his advisers to know the exact figures. The offer was subject to a series of conditions precedent, which included approval by Shell of the sale of the asset, and the settlement of any existing disputes or claims relating to the Asset. The offer was also subject to Malabu obtaining the necessary approvals in respect of the transaction from the authorities in Nigeria.

150. Chief Etete's evidence was to the following effect:

i) Following this preliminary offer, Chief Etete received a call from Mr Agaev who communicated to him the offer from NAE. The date of this phone call was 27 April 2010 or, if not on that specific date sometime towards the end of April.

ii) Chief Etete told Mr Agaev that the offer would not be acceptable to Malabu. Chief Etete asked Mr Agaev whether ENI had issued an irrevocable letter of intent or provided a deposit of $100 million or more and Mr Agaev said that it had not.

iii) Chief Etete told him that Malabu's agreements with ILC and EVP were therefore at an end. Mr Agaev asked for longer, but Chief Etete said that he had not delivered what was promised. Mr Agaev accepted the agreements had finished. On the basis of this evidence, Malabu's case (as pleaded in paragraphs 42 and 43 of the Re-Re-Amended Defence and Counterclaim) was that, since no satisfactory offer had been made, and since ENI had not produced an irrevocable letter of intent or provided a deposit of $100 million or more, Mr Agaev, acting on EVP's behalf, agreed to discharge the EVP Exclusivity Agreement which thereupon terminated with immediate effect, thereby waiving EVP's right to a month's written notice of the termination of the EVP Exclusivity Agreement.

iv) Mr Agaev also said that he believed ENI remained interested in the OPL Assets and would increase its offer but that Malabu had to adjust its price. Mr Agaev also said that he and Mr Obi would continue to look to broker a sale to ENI and that he would expect to be paid if they were successful.

151. Despite Mr Graham's criticisms of Mr Obi's evidence, I accept that he did not tell Chief Etete of the price which was being offered by ENI. Whether or not Mr Agaev knew the actual amount of ENI's preliminary offer, and whether or not Chief Etete was told the amount by Mr Agaev, are not matters which it is necessary for me to decide, although, given what Mr Obi thought about the size of the offer, I consider it is unlikely that Chief Etete was ever told.

152. More importantly, I reject Chief Etete's evidence to the effect that, in the alleged telephone conversation with Mr Agaev, or at any date around this time, Chief Etete purported to terminate the EVP Exclusivity Agreement or that Mr Agaev agreed that it had been terminated, whether on EVP's behalf or at all. Chief Etete's evidence on the point was highly unconvincing; it was not supported by any contemporaneous documentary material; and was consistently contradicted by Mr Agaev in the

evidence which he gave throughout the ILC Arbitration. Moreover, apart from the fact that, according to Mr Obi and as I accept, Mr Agaev was not informed of the fact of the preliminary offer from ENI until early May 2010 (so it is unlikely that any telephone call took place in April), it is also inherently implausible that, immediately after receiving the first serious bid for OPL 245 which Malabu had received for many years, Chief Etete would adopt the high risk tactic of terminating EVP's mandate, and discouraging EVP's efforts, when EVP had been responsible for the introduction of ENI as a serious and potential bidder.

Letters from Malabu to EVP of April 2010/ 8 May 2010 Meeting

153. In order to proceed with the transaction, ENI had for several months been requesting a letter from Malabu to provide re-confirmation of EVP’s mandate. In particular, ENI was concerned that the EVP Exclusivity Agreement was signed by Chief Etete rather than an officer of Malabu. A letter bearing the date 8 April 2010 ("the 8 April letter") was drafted by Mr Obi and sent by email from Mr Agaev to Chief Etete on 9 April 2010. I accept Mr Obi's evidence that the draft letter was amended by, or at the direction of, Chief Etete to add words to the effect that EVP’s mandate was limited to the end of May. The actual letter, which was signed by Mr Gbinigie and Mr Munamuna, and still bore the date 8 April 2010, was then provided to Mr Obi at a meeting in Paris with Chief Etete on or about 8 May 2010 for the purpose of him providing the letter to ENI. He did so on 10 May 2010. The letter was in the following terms

> “Attention: MR ROBERTO CASULA
>
> Dear Sir,
>
> RE: PROJECT CLEAR VISION-SALE OF A 40% PARTICIPATING INTEREST IN OPL 245
>
> BY MALABU OIL & GAS LIMITED TO AGIP NIGERIA LIMITED - ENI
>
> Malabu Oil & Gas Limited ("Malabu") a Nigerian company with Registration Number RG 334442, hereby confirms that there exists an exclusivity mandate limited to the end of May 2010 between Malabu and Energy Venture Partners Limited (EVP) in connection with the proposed sales, lease, or disposal of part of Malabu’s interest in Oil Prospecting License of 40% in OPL 245.
>
> EVP has been authorized on behalf of Malabu, to provide corporate, technical and operational data and other confidential information including 3-D Seismic Data, belonging to Malabu and relating to Malabu’s operations this to assist the assessment of the opportunity.
>
> (Assets) OPL 245

> EVP is also authorized, on behalf of Malabu to receive binding financial offers and proposals from AGIP NIGERIA LIMITED- ENI
>
> However, EVP is not authorized to approve, on behalf of Malabu, any offer, received by Malabu, or to enter into any sales or lease agreement on behalf of Malabu in connection with the proposed sale; All offers, received by Malabu, in connection with the proposed sales, lease or disposal of part or all of Malabu's interest in Oil Prospecting License 245 will be subject to the consideration and approval by the shareholder and the Directors of Malabu Oil & Gas Limited.
>
> Yours Sincerely
>
> [It was then signed by Mr Munamuna, as director and Mr Gbinigie, as secretary.]"

154. I am satisfied that the 8 April letter, although dated 8 April, was not in fact prepared on that date because the draft, which was amended by Malabu, was only provided to it on 9 April and the actual letter itself only provided to Mr Obi on 8 May. I reject Mr Gbinigie's evidence that he wrote the letter on 8 April.

155. I also reject Malabu 's case that the 8 April letter was in some way superseded, or was intended to be superseded, by a second letter dated 12 April 2010, which was signed by Chief Etete, as opposed to by Mr Gbinigie and Mr Munamuna and which purported to impose conditions on the extension of EVP's mandate to the end of May. This letter ("the 12 April letter") was disclosed by ILC in the ILC Arbitration. The 12 April letter was in similar terms, but included an additional provision at the end of the first paragraph making the confirmation of EVP's mandate conditional upon ENI agreeing to pay Malabu a refundable deposit. This additional sentence was in the following terms

> "Provided AGIP NIGERIA LIMITED-EN1 agrees to pay to Malabu Oil & Gas Ltd the Refundable fee proposed by Malabu in Paris within Seven (7) days of this mandate Malabu agrees to pledge" 2%"of its 40% asset of OPL 245, Furthermore, AGIP-ENI will close this transaction within this Exclusive Period,"

156. The letter was emailed by Chief Etete to Mr Teimour Agaev on 12 April 2010, but, as confirmed by Mr Gbinigie, and I so find, was never provided to EVP. Nor was it provided to ENI, not least because the avenue for communication to ENI was via EVP in accordance with the terms of the EVP Exclusivity Agreement.

157. Chief Etete's written evidence was to the following effect:

    i) He was asked by Mr Agaev, not Mr Obi, to prepare a letter to NAE from Malabu confirming that the EVP Exclusivity Agreement remained in place.

    ii) Malabu arranged for this confirmation in a letter addressed to Mr Casula that was dated 8 April 2010 and signed by Mr Munamuna, the Chairman of

Malabu, and Mr Gbinigie, the company secretary. This letter was based on a draft that Mr Agaev sent Chief Etete that did not contain any date for termination of the EVP Exclusivity Agreement.

iii) Chief Etete says that Mr Agaev's draft letter was incorrectly amended by Mr Gbinigie, who produced a version of the letter stating that EVP's mandate was limited to the end of May but without stating the conditions for such an extension.

iv) As the 8 April Letter was erroneous, Chief Etete drafted the 12 April 2010 letter to supersede the 8 April Letter. This stated that Malabu would only extend EVP's mandate to the end of May on condition that ENI/NAE paid the requested deposit within seven days of 12 April 2010 and closed the deal by the end of May.

158. In Malabu's written closing submissions it was variously contended:

i) that Mr Obi received the 8 April letter without Malabu's authority;

ii) that either Mr Obi was lying when he said that he had never received the 12 April letter, or Mr Agaev deliberately withheld that letter from EVP;

iii) that Mr Agaev knew that Chief Etete had received the 8 April Letter and also knew that, because of the erroneous unconditional extension of EVP's mandate in the 8 April Letter, Chief Etete had decided to write his own letter rather than arrange for a fresh draft to be prepared by Mr Munamuna and Mr Gbinigie incorporating the stipulated conditions;

iv) that nonetheless, despite this knowledge, Mr Agaev, who was supposed to be working as Malabu's adviser, provided the 8 April letter to EVP, presumably at some point in May, without Malabu's authority;

v) that Malabu's case was supported by the fact that Mr Obi sent Mr Agaev a draft three-month extension to EVP's mandate on both 4 May and 20 May, but neither request was granted because Chief Etete refused to sign any agreement extending Malabu's mandate unconditionally.

159. Despite Mr Graham's criticisms of Mr Obi's evidence, I accept that, despite certain inconsistencies, it was generally correct in relation to this issue. There was every reason for ENI to require a properly executed confirmation from Malabu's officers as to the existence of EVP's mandate, and Mr Obi's explanations as to the sequence of events, and the reason for the inclusion of the statement that the mandate was "limited to May 2010", were entirely credible. Chief Etete's evidence in cross examination, on the contrary, was verging on the incoherent and it was impossible to place any reliance on his confused account of events. Likewise he was wholly unable to provide any explanation as to how the two letters could sit alongside Malabu's case on termination. Accordingly I reject Malabu's case that the 12 April letter was the letter that was, or should have been, provided to EVP and/or ENI, and its case that Mr Agaev was acting without authority when he provided the 8 April letter to EVP.

160. What was perfectly clear was that both the 8 April and 12 April letters were wholly inconsistent with Malabu's case that EVP had been notified (via Mr Agaev) on 6 March 2010 that the EVP Agreement was to terminate on 27 April 2010 or that, in a telephone conversation on or about that date, Chief Etete had terminated the EVP Exclusivity Agreement and that Mr Agaev had agreed on behalf of EVP that such was the case. The 8 April letter, and the fact that the 12 April letter was never provided to ENI, were also inconsistent with Malabu's case that EVP was required to obtain a non-refundable deposit. The two letters clearly confirmed that, whatever Malabu's intention was so far as the future was concerned as to serving notice under the EVP Exclusivity Agreement, it had remained in existence throughout the period March/April 2010 and had at no time been terminated.

The period from May to July 2010

161. It was common ground that over the summer of 2010 there were several meetings between Chief Etete, Mr Obi and Mr Agaev in relation to the sale of the OPL Assets. Chief Etete said that he did not have any interest in maintaining a relationship with Mr Obi, but nonetheless Mr Agaev did bring Mr Obi with him to meetings on a few occasions during the summer of 2010, namely:

  i) A meeting on or around 6 May 2010;

  ii) A meeting on or around 5/6 July 2010; and

  iii) A meeting on or around 15 July 2010.

  Chief Etete gave evidence to the effect that, during these meetings, Chief Etete and Mr Agaev discussed the progress of the settlement discussions between the FGN and Malabu, and the possibility of other business deals. Chief Etete's evidence was that Mr Obi did not take a very active role in the meetings that did take place.

162. Mr Obi's evidence was to different effect. He said that during the period May to July 2010 there were a series of meetings between Chief Etete and Mr Obi, many just between the two of them, but sometimes Mr Agaev was present as well; he said that the frequency of meetings between Malabu and EVP intensified in the period from May to July 2010; that there were also meetings as between EVP and ILC; and that most of the meetings took place at various hotels in Paris. I accept Mr Obi's evidence that a number of meetings did take place as between him and Chief Etete (and on occasions, Mr Agaev) as part of EVP's ongoing work under the terms of the extant EVP Exclusivity Agreement to progress the proposed deal with ENI. I reject Chief Etete's attempt to marginalise Mr Obi's role in these meetings and his suggestion that, effectively, Mr Obi and Mr Agaev were simply acting on their own behalf, as opposed to under the terms of EVP's and ILC's respective mandates.

163. On 11 May 2010 Malabu wrote to the Attorney General seeking permission to perform the 2006 Settlement Agreement. As Mr Gbinigie said in cross examination, the purpose of this letter was to elicit a letter in response whereby the FGN confirmed the 2006 Settlement Agreement. I accept Mr Obi's evidence that he had previously advised Malabu that it should obtain this confirmation in order to weaken the position

of Shell, prevent Shell from hiding behind the lack of any clear statement confirming Malabu's rights to 100% of OPL 245, and to facilitate the entry of other investors who were unsure about the block's ownership status.

164. On 16 June 2010 a second non-binding offer was made by ENI/NAE to EVP for 40% of the OPL Assets. The offer formed part of the ongoing negotiation between EVP and ENI/NAE, but was not forwarded to Malabu.

165. On 18 June 2010 Malabu received a response to its letter to the Attorney General which endorsed the 2006 Settlement Agreement. (The letter was subsequently passed to Mr Obi on 27 August 2010). On 2 July 2010, Malabu received a separate letter from the Ministry of Petroleum that confirmed the approval of the 2006 Settlement Agreement.

166. Mr Obi learnt about this and on 5 July 2010 he emailed Raiffeisen informing them Malabu was dropping its demand for a cash deposit, and had consented to sell 100% of OPL 245. Mr Obi's evidence was that, at a meeting which took place on or about 5 or 6 July 2010, Chief Etete informed Mr Obi that he had secured approval from the FGN to sell 100% of the OPL Assets and showed Mr Obi official confirmation from the FGN of that fact; that it was agreed and understood from this point that the EVP mandate would extend to a sale of up to 100% of the OPL Assets; that thereafter EVP's focus switched to sourcing a buyer for 100% of OPL 245; and that EVP subsequently revised the term sheet with its advisers to reflect the fact that anything up to and including a 100% sale was now possible; although, as was common ground, there was no amendment to the EVP Exclusivity Agreement to reflect this point. Mr Obi explained the fact that he had made no attempt to amend the EVP Exclusivity Agreement in cross examination as follows:

> "20 Q. But the point I wanted to make to you, Mr Obi, is this.
> 21 If your contract was not terminated, you would have
> 22 needed to revise it at this stage, would you not,
> 23 because it expressly stated that it related to only
> 24 40 per cent?
> 25 **A. It says 40 per cent on the contract.**
> 1 Q. Yes, so if you were going to be responsible for selling
> 2 100 per cent, would you have needed a revision or
> 3 amendment to your contract?
> 4 **A. We had an oral – we had agreements to sell**
> 5 **100 per cent.**
> 6 Q. Well, surely you would have needed to change your
> 7 mandate?
> 8 **A. Well, all that would have been captured in the addendum**
> 9 **when it was signed. Everything on the contract would**
> 10 **have been captured. There was an addendum which was**
> 11 **attached to the contract which had the 200 million**
> 12 **minus, would have had this 100 per cent sale. So**

13 everything would have been in that addendum.

14. Q. Was it not important to you -- you were concerned about

15 your mandate protection --

16 A. Right.

17 Q. – and making sure your rights were properly protected

18 legally -- to see that you had a mandate that related to

19 the changed environment, namely a sale of 100 per cent?

20 A. I had -- I believe I had a mandate, and the fact that

21 the chief had communicated to me written documents such

22 that I had forwarded to him for his comments the SPA for

23 a t00 per cent sale was consistent with that mandate,

24 The chief had also given me back his comments on the

25 100 per cent SPA and given me Malabu's version of the

1 SPA for 100 per cent. I'm sure that was consistent with

2 me working on the 100 per cent, I think.

3 Q. I think what you are telling me is it didn't cross your

4 mind to seek a variation or amendment to your mandate

5 for the purpose of extending it to 100 per cent?

6 A. I didn't believe it crossed my mind for the 100 per cent

7 issue at that point. It was it didn't cross my mind.

167. However, Chief Etete said that he had no discussion in these meetings with Mr Agaev or Mr Obi about resuscitating EVP's mandate or extending it to 100% of the OPL Assets. Accordingly Malabu's case was that the evidence did not show any agreement that EVP's mandate would extend to a 100% sale; but rather showed that EVP simply did not have any mandate at that time; and that, accordingly, as the addendum to the EVP Exclusivity Agreement made no mention whatsoever of a 100% sale and used the same defined term "OPL Assets" (defined in the agreement restrictively to refer to 40% of OPL 245), the addendum could not be regarded as referring to a 100% sale; that Mr Obi's position that he had yet another oral variation to the EVP Exclusivity Agreement was implausible and that the far more likely position was that Mr Obi did

not seek an amendment to this agreement because he did not have any existing mandate; and that he would no more have got an amendment to cover a 100% sale than he would an amendment to revive his mandate.

168. I prefer Mr Obi's account and reject that of the Chief. It was perfectly clear from the contemporaneous drafts of the proposed sale and purchase agreement ("SPA") that were subsequently circulated between the parties, as well as other evidence, not only that they both proceeded on the basis that the subject matter of the sale was going to be 100% of the OPL Assets, but also that both parties regarded the EVP Exclusivity Agreement as remaining in operation and that it was the agreement under which EVP was providing services. These included provision by Mr Obi on 14 July 2010 of a draft of the SPA which he had been negotiating with the assistance of professionals engaged by him and the subsequent provision by Chief Etete of his suggested version of an SPA on 27 July. Chief Etete was unable in cross-examination to provide any sensible explanation as to why he was engaging in this process with EVP unless - as he must have been aware - the EVP mandate was ongoing and efforts were being made by EVP thereunder to conclude an agreement with ENI. Nor do I find, in the circumstances, Mr Obi's explanation that there was no need to produce an amendment to the EVP Exclusivity Agreement surprising. It is true that either the EVP Exclusivity Agreement or the Addendum would have required modification if the definition of "the OPL Assets" was intended to refer to a 100% interest but the evidence clearly showed that the parties were proceeding on the agreed basis that EVP was being tasked to secure an offer for 100% of the OPL Assets, and that any SPA with the purchaser would refer to 100%, but there would have been no difficulty in making any such amendment to EVP's mandate.

169. It is relevant for the purposes of EVP's implied contract/quantum meruit claim to deal with what occurred at certain of the meetings between Chief Etete and Mr Obi during the period. The evidence relating to them was also relied upon by Malabu in support of its termination and other defences. It is not necessary for me to deal with all the alleged meetings or to find conclusively whether they did or did not take place. It is not surprising that both men were somewhat vague about the dates of meetings where there was no supporting documentary evidence.

15 July 2010 meeting at the Hotel Le Bristol in Paris

170. It was common ground that a meeting took place at the Hotel Le Bristol in Paris on 15 July 2010. On 14 July 2010, in advance of the meeting Mr Obi emailed Chief Etete attaching a draft SPA with ENI for 100% of OPL 245.

171. Chief Etete's written evidence was to the effect that:

i) He attended the meeting at Mr Agaev's request and Mr Obi attended only part of this meeting.

ii) He told Mr Agaev that the FGN was trying to force Shell to settle on a sensible basis. Mr Agaev said that a deal remained possible with ENI, but Malabu's price was too high. Chief Etete said that the minimum purchase price Malabu

would accept would be based on a valuation of $2.2 billion for 100% of the OPL Assets.

iii) Mr Obi suggested that the EVP Exclusivity Agreement should be implemented again, but Chief Etete told Mr Obi to come back to him if he had a serious offer from ENI. Chief Etete says there was no discussion of Mr Obi's fees at all, let alone a minimum fee of $200 million.

172. In his oral evidence Chief Etete reiterated that there had been no discussion about these matters at the meeting.

173. Mr Obi's written evidence of this meeting was to the effect that:

i) The purpose of the meeting was to discuss the transaction with ENI as well as to discuss the draft SPA which Mr Obi had circulated the day before. In light of statements made by Chief Etete at the meeting that appeared to be shifting the goalposts, Mr Obi reiterated that he would not do the deal for less than $200 million. Mr Obi made clear that he would walk away if Chief Etete was not prepared to accept this.

ii) Thus in his affidavit, following on from his evidence that Chief Etete was getting wind of ENI's thinking from time to time and kept increasing his expectations as a result, Mr Obi said that:

> "On 15 July 2010, things came to a head at a meeting at the Bristol Hotel between Chief Etete, Agaev and me. Chief Etete was once again trying to shift the goalposts by insisting on a higher offer to do the deal when we had all anticipated that an ENI deal was imminent."

iii) Mr Obi then recalls saying to Chief Etete something to the effect of "Sir, we can go on like this forever, but regardless of price I'm not doing this deal for less than $200 million" and that he made it clear that he would walk away from the deal if this was not accepted.

iv) Mr Obi says Chief Etete was silent in response and that Mr Agaev took him to one side to say that he should not have reiterated the figure as it had already been agreed with Chief Etete.

174. In his oral evidence, Mr Obi said that after the 15 July meeting he effectively went on strike for the next 10 days or, rather, made it appear to Chief Etete that he was going on strike, although in fact he was still working on the deal. Mr Obi was extensively cross examined about what occurred at this meeting by reference to various documents and to his notes.

175. Having reviewed the available evidence, I am satisfied that there was indeed a discussion about fees as between Chief Etete and Mr Obi at this meeting; I accept that Mr Obi may indeed have mentioned a figure of $200 million and may indeed have made the point that he was not prepared to go on working unless EVP's fee was agreed. But I am not satisfied on the balance of probabilities that Mr Obi made a threat in such clear terms as he now suggests about going on strike if he did not get

Chief Etete's agreement to a fee in the specific sum of $200 million. Certainly there was no agreement on Chief Etete's part at this meeting to pay such a fee and indeed Mr Obi did not suggest that there was. Again, I infer that the overwhelming likelihood is that (either at this meeting or the subsequent meeting) once again, Chief Etete fobbed Mr Obi off with an assurance along the lines that, if and when Mr Obi came up with an offer that was acceptable, there would be no problem about agreeing an appropriate fee for EVP and that thereafter the parties proceeded on that basis. Again, I find that Mr Obi would have been reluctant to have antagonised Chief Etete at that stage, by insisting on Malabu's specific agreement to a fee of $200 million.

27-28 July 2010 meetings in Paris

176. I find as a fact that on 27 July 2010 Mr Obi, Mr Agaev and Chief Etete met in Paris. The meeting is recorded in Mr Obi's handwritten notes under the heading *"MBU Meeting - Paris"*.

177. I also find that on the following day, on 28 July 2010, Mr Obi and Chief Etete met again within Mr Agaev. The fact that the meetings took place is also supported by other contemporaneous documentation.

178. Malabu denied that any meetings took place between Mr Obi and Chief Etete on 27/28 July. I reject its case on this aspect. The fact that the meetings took place is inconsistent with Malabu's defence that the EVP Exclusivity Agreement had already been terminated, and with its case that Mr Obi's involvement in the transaction was minimal.

179. Mr Obi's affidavit evidence was that he and Chief Etete did not discuss fees at these meetings and that, because there was no further discussion, Mr Obi took Chief Etete's desire to get things moving again as re-confirmation of his minimum fee of $200 million.

180. In cross-examination, Mr Obi said the following:

> "5 Q. Mr Obi, I suggest to you that is a ridiculous
> 6 suggestion. No one would take silence as confirmation
> 7 of a $200 million minimum fee.
> 8 **A. Mr Graham, what would happen is after the 15 July**
> 9 **meeting, I effectively went on strike. Rather,**
> 10 **I appeared to Chief Etete that I went on strike. Of**
> 11 **course I was not going to ruin my transaction. So**
> 12 **I kept things just bubbling in the background in terms**
> 13 **of investors, et cetera. But my message to the chief at**
> 14 **the 15 July meeting was that I'm going on strike, and I**
> 15 **went on strike, and there was no contact with he and I**
> 16 **in that period.**
> 17 **Of course, Mr Agaev was clearly working with the**
> 18 **chief and trying to get him to behave.**
> 19 **Now, I knew the chief. The chief was one of those**
> 20 **people who made a lot of noise. He tried it on. But**
> 21 **I knew he was sensible at the end of the day, and he**
> 22 **would do the right thing. So I thought I'm just going**

> 23 **to go on strike for a couple of weeks and the chief will**
> 24 **come back to me. And the chief did come back to me,**
> 25 **because Mr Agaev called me and said: the chief wants you**
> Page 44
> 1 **to come back and wants you to speak to him. So I called**
> 2 **the chief, and the chief said: I want to speak to you,**
> 3 **it's okay, let's get back to work. And then I had this**
> 4 **meeting on 27 July and 28 July. And of course these are**
> 5 **meetings the chief denied I even attended."**

181. However, although I accept that the meeting took place, I do not accept that Mr Obi at the time regarded Chief Etete's request that the work should continue, or the latter's silence on the issue of fees, as a tacit agreement to pay Mr Obi's requested fee of $200 million. Nor objectively would a reasonable person in Mr Obi's position so have concluded. The likelihood was that both parties realistically retreated from their aggressive negotiating stance and decided to get on with the business of securing a deal from ENI, with Chief Etete no doubt making reassuring comments about there being no difficulty in agreeing a fee for EVP's services once the deal was on the table. Again I found Mr Obi's evidence on this issue to be an example of his tendency to embellish the truth, notwithstanding that I did conclude he was telling the truth in general terms about the fact that the meetings indeed took place. Again I find it inconsistent with Mr Obi's account that there is no record in either his notes of the meetings or any other document of the alleged confirmation of EVP's $200 million fee. It was wholly inconsistent with Mr Obi's general approach not to have recorded such a confirmation.

The period August to October 2010

182. I find as a fact that, during this period:

i) Mr Obi had a number of meetings with Shell representatives in order to explore ways in which Shell's involvement in the OPL assets and its claimed interest could be resolved; the detail of these meetings and the considerable amount of work which Mr Obi carried out in relation to resolution of the Shell issue is set out at paragraphs 287-308 of his first statement, which I accept as broadly correct; indeed Mr Obi had had a number of meetings in 2009 with Shell representatives in relation to OPL 245, even prior to his first meeting with Chief Etete; it became obvious to Mr Obi that a settlement with Shell had to be part of any transaction with ENI;

ii) Mr Obi continued to meet frequently with ENI, and in particular with Mr Descalzi; these meetings discussed the resolution of the Shell issue and it was clear that ENI was itself in direct negotiations with Shell;

iii) numerous meetings and calls took place between EVP, ENI and EVP’s advisers to discuss the draft SPA and other transaction documentation that were being prepared, including resolution of the Shell issue; indeed by 15 October at the latest a draft of a multi-party settlement document was being worked on by EVP and its retained advisers.

Mr Obi's own evidence on this issue was supported by Mr Obi's contemporaneous handwritten notes and other documentary materials.

183. At some stage during September, Malabu appears to have attended a meeting with Gazprom in Paris in relation to the proposed sale of the OPL Assets. When questioned about the meeting, Chief Etete accepted that the only proposals that Gazprom were prepared to put forward were not acceptable and that the contact went no further than this.

Alleged negotiations as between Malabu and the FGN in the period June to September 2010

184. In his witness statement Mr Gbinigie sought to suggest that he had a series of without prejudice meetings and discussions with the Attorney General and his advisers, at the Attorney General's office in the Federal Ministry of Justice in respect of OPL 245 during June, August and September 2010. He said that:

i) In early June 2010, following a letter from Malabu to the Federal Attorney General on 11 May 2010, Mr Gbinigie was called by one of the advisers to the Federal Attorney General, and asked to attend a meeting at the Attorney General's office in the Federal Ministry of Justice regarding the OPL Assets. He met with the Attorney General in his office, together with some of the Attorney General's advisers. In this meeting:

ii) The Attorney General told Mr Gbinigie that he intended to broker a settlement meeting between Shell, the FGN and Malabu to sort out the disputes regarding the OPL Assets once and for all.

iii) He said the Government wanted negotiations to lead to a solution, he wanted OPL 245 in production and generating revenue, and that the Government was going to force Malabu and Shell to co-operate for the good of Nigeria.

iv) The Attorney General also said that Shell and the FGN did not want to fight each other, they had a wide relationship, that the ICSID dispute was interfering with that relationship and that both the FGN and Shell wanted to reach a deal before a decision in that arbitration. He told Mr Gbinigie that Malabu had to play its part in getting a deal done, and that Malabu had to be open to all options, including joint venture arrangements with Shell or by relinquishing its claim to the OPL Assets if Shell paid it sufficient money to do so.

v) Mr Gbinigie told the Attorney General that Malabu was willing for the Federal Government to try to broker a deal. Malabu requested that the Attorney General write to Malabu confirming the validity of the settlement agreement ahead of any meeting in which Shell would participate.

vi) That thereafter without prejudice discussions continued between Malabu and the Attorney General or his advisers and that Mr Gbinigie had led the discussions for Malabu. Various solutions were debated in the settlement meetings between Malabu and the FGN including a return to the joint-venture

arrangements between Malabu and SNUD or a solution in which Malabu would keep all of the OPL Assets and refund SNUD's expenses with the FGN allocating an alternative block to SNUD.

185. Chief Etete also gave evidence to the effect that Mr Gbinigie had attended such meetings although he personally had not been present. The function of this evidence was to support Malabu's case that Malabu was engaged in a separate and independent stream of negotiating activity, eventually leading to a meeting with the Attorney General on 15 November 2010, and that accordingly the transaction ultimately entered into in 2011 did not fall within the terms of the EVP Exclusivity Agreement.

186. However, in cross-examination, Mr Gbinigie accepted that there was no documentary evidence whatsoever relating to the alleged meetings which had taken place, although he tried to suggest that they were so confidential that no record was taken. Mr Gbinigie's evidence was not impressive on this point and, in the absence of any documentation relating to these alleged meetings, I am not prepared to accept that any such meetings did in fact take place until the meeting on 15 November 2010 or shortly before. As Mr Howard submitted, the suggestion that Mr Gbinigie could have attended high level meetings as company secretary to Malabu, but had not written down a single word, and not a single document was generated, was difficult to accept. In particular, whereas an attendance record has been produced in relation to a subsequent meeting with the Attorney General of Nigeria on 15 November 2010, no such record was produced in relation to these alleged meetings.

187. I am prepared to accept however that by late September 2010 the FGN may have been involved at some level in discussions with Shell and possibly also Malabu in relation to resolution of the issues relating to OPL 245. That appears to be supported by Mr Obi's own note of a meeting with Shell on 21 September 2010.

20 October 2010 - Meeting at the George V Hotel in Paris

188. I find as in fact that there was a very brief meeting at the George V Hotel in Paris on 20 October 2010. Chief Etete was late and Mr Obi needed to leave to go to Milan. Mr Obi explained in his oral evidence that, as he was departing, he briefly bumped into Chief Etete in the corridor and that, during the course of the encounter, Chief Etete said words to the following effect:

> “what are you doing here, you shouldn't be here, hurry up, go back and get your 200 million.. ”

189. This was somewhat different from the account which Mr Obi had given in his affidavit where he said:

> “in October 2010, I met with Etete and Agaev at the George V in Paris. A formal offer from NAE/ENI was imminent. I recall

> that at this meeting when talking about moving the deal forward, the Chief said words to the effect that you should hurry things up so you will "get your 200 million". At this meeting at the George V the Chief expressly recognised my entitlement to a $200 million fee, so what had previously been agreed was now re-confirmed. ”

190. In cross-examination, Chief Etete denied that he had met with Mr Obi on this date, or that there had been any meeting at the George V hotel (which he said he would have remembered). This position was contradicted by the documentary record, and in particular by the text message received that Mr Obi received from Mr Agaev at 10.37am: ‘*We are waiting for u in G5*’. I reject Chief Etete's evidence on this aspect.

191. I accept Mr Obi's evidence that there was such a brief meeting on that date and that, during the course of this encounter, Chief Etete said something along the lines that Mr Obi should hurry up and get his $200 million fee. However I do not accept that what was clearly a jocular comment on the part of the Chief, no doubt teasing Mr Obi about his repeated insistence that he wanted such a fee, amounted to any sort of confirmation that the Chief had previously agreed it. My observation of the way in which Chief Etete behaved in the witness box suggests that it would have been entirely typical of him to have made such a comment. Nor do I accept that Mr Obi can have genuinely thought that such a remark amounted to anything more than a tease.

28 October 2010 - Meeting at the Hotel Le Bristol in Paris

192. On 28 October 2010 Mr Obi and Chief Etete met, without Mr Agaev, at the Hotel Le Bristol in Paris. Mr Obi’s handwritten notes include a record of the meeting. There was also an express reference to the meeting in an email from Mr Obi to Chief Etete on 30 October 2010. Chief Etete denied that the meeting took place but I do not accept his evidence. Because of its relevance to a note of a later meeting, I refer to Mr Obi's evidence that his handwritten notes of the meeting include a reference to rumours that EVP was to receive money in some sort of side deal with Shell and ENI, relating to $85 million that Shell was considering investing in the transaction at the time. I also accept that at the meeting Mr Obi told Chief Etete that there was no truth in these rumours.

30 October 2010 – Offer by ENI for 100% of the OPL Assets

193. On 30 October 2010 ENI/NAE made a third offer for the purchase from Malabu of a 100% participating interest in the OPL Assets at a price of $1.26 billion. This offer followed a period of about a month of negotiations as between the ENI executives and EVP and its financial and legal team, in which I find that Mr Obi was directly involved. The meetings had taken place at ENI's headquarters in Milan. The letter was addressed to Raiffeisen (EVP's advisers) with a copy to EVP. The offer, which was made by NAE, was expressed to be conditional upon execution of an SPA between Malabu and NAE in substantially the same form as the draft produced by EVP which was attached to the offer. The proposed consideration of $1.26 billion consisted of a $1.05 billion payment to Malabu and a payment of the outstanding $207,960 million signature bonus to the FGN. It was a condition precedent to the SPA (reflected at clause 2.6-2.7 of the offer) that the FGN should re-issue the OPL 245 licence jointly to NAE and SNEPCO. It was also a condition that FGN, SNUD and Malabu should

withdraw / discontinue all ongoing and pending claims as between them. I also accept Mr Obi's evidence that it was envisaged by ENI/NAE that, as part of the transaction being proposed, a multiparty settlement agreement would also be entered into between the parties, and that a multi-party settlement document had in fact been drawn up by ENI based on discussions with EVP.

194. The structure of the offer (in particular the requirement that the FGN should re-issue the OPL 245 licence jointly to NAE and SNEPCO) clearly reflected the fact that during the summer of 2010 there had been negotiations and discussions between Shell, EVP and ENI to arrive at a consensus for cooperation for the joint acquisition of the OPL Assets and the settlement of the outstanding disputes with Shell. The transaction was to be governed by English law and subject to the non-exclusive jurisdiction of the English courts. The offer was open for acceptance by Malabu by no later than 3 November 2010.

195. The following terms of the 30 October 2010 offer are material to a consideration of Issue 6, namely whether the 29 April 2011 Transaction attracted commission under the terms of the EVP Exclusivity Agreement:

“NAE is pleased to submit this offer (the **“Offer”**) to acquire from Malabu Oil and Gas Limited (**“Malabu”**) 100% (one hundred percent) participating interest in OPL 245 offshore Nigeria and in any relevant license, contracts and other ancillary documents (collectively referred to as the **“Asset”**)……

1. **Consideration**

Subject to: (i) NAE’s Board of Directors approval; (ii) the terms and conditions contained in this offer in this Offer; (iii) the underlying assumptions detailed in Section 1 below; and (iv) the execution of a mutually acceptable Sale and Purchase Agreement substantially in the form attached hereto as Annex 1 (**“SPA”**), NAE is willing to acquire the Asset for a total cash amount of USD 1,260,960,000 (one billion and two hundred sixty million nine hundred sixty thousand) (the **“Gross Consideration”**) which shall be paid (or procured to be paid) by NAE upon the date when the transfer of the Asset is fully effective under the terms of the SPA and applicable law (the **“Transaction”**).

The Consideration consists of:

(1) an amount of USD 207,960,000.00 (two hundred and seven million nine hundred sixty thousand) which will be paid directly to the Federal Government of Nigeria in satisfaction of any and all payment obligations with respect to the signature bonus for the Asset (**“Bonus Element”**); and

(2) an amount of USD 1,053,000,000 (one billion and fifty three million) which shall be paid directly to Malabu (“**Consideration”**).

The Gross Consideration represents the total and maximum amount that NAE is ready to pay for the Asset, provided that the contractual, fiscal and commercial assumptions listed in section 1 prove to be true and correct in all material respects:

(1) ………

(2) Tax deductibility, on a block basis, of the sum of three hundred thirty five million and six hundred thousand (USD 335,600,000.00) consisting of the past costs incurred by Shell Nigeria Ultra Deep Limited ("**SNUD**") in the execution of the work programme on the Asset pursuant to the terms of the Production Sharing Agreement between SNUD and National Nigerian Petroleum Company ("**NNPC**") dated 22 December 2003.

(3) Asset consisting in one hundred percent (100%) title and interest in OPL 245, corresponding to a one hundred percent (100%) production entitlement;

(4) No rights by Federal Government of Nigeria ("**FGN**"), NNPC and/or any of their relevant agencies and institutions to acquire any participating interest in, or any title to any portion of production from, OPL 245 or in any OMLs deriving thereform.

(5) OPL 245 having a duration of ten (10) years from the date it is reissued, and any OMLs which may derive therefrom having an initial duration of 20 years;

(6) The Transaction (including re-issuance of the new OPL 245 licence) being fully exempted from any and all direct and indirect taxes, duties and/or other levies in any form whatsoever (including by way of withholding) or, in case any such taxes duties or other levies become payable, the same shall be entirely borne by Malabu.

Malabu expressly acknowledges that any material deviation from the assumptions set out under items from (1) to (6) would lead to a revision of the Gross Consideration by NAE. NAE expressly reserves its rights to revise the Gross Consideration or to withdraw entirely this Offer at its sole discretion, should any of such assumptions prove to be untrue or incorrect in any material respect.

2. **Completion of the Transaction**

Completion of the Transaction shall be subject to certain conditions to be met either before or after the execution of the SPA, including, but not limited to:

(1) All the assumptions listed in items from (1) to (6) of Section 1 above being confirmed and satisfied in all material respects by means of valid and fully effective instruments (contractual or otherwise, to the satisfaction of NAE) in accordance with the laws of the Republic of Nigeria;

(2) The guarantee, by means of a valid and fully effective instrument (contractual or otherwise, to the satisfaction of NAE) in accordance with the laws of the Republic of Nigeria, that the fiscal terms referred to in item (1) of Section 1, as well as any other terms applicable to the Asset, are stabilised against any changes in the applicable laws for the entire duration of OPL 245 and any OML which may derive therefrom.

(3) SNUD and Malabu withdrawing and wholly discontinuing all ongoing and pending claims, suits and arbitration between themselves in respect of OPL 245 and releasing and discharging each other of all obligations and liabilities arising from any proceedings and claims with respect to OPL 245.

(4) FGN and SNUD withdrawing and wholly discontinuing all ongoing and pending claims, suits and arbitration between themselves in respect of OPL 245 and releasing and discharging each other of all obligations and liabilities arising from any proceedings and claims with respect to OPL 245.

(5) The Ministry of Petroleum Resources approving, by means of valid and fully effective instrument in accordance with the laws of the Republic of Nigeria, the transfer of Asset from Malabu to NAE.

(6) The Department of Petroleum Resources or any other competent government authority of FGN confirming, by means of a valid and fully effective instrument in accordance with the laws of the Republic of Nigeria, the re-issuance of OPL 245 jointly to NAE and Shell Nigeria Exploration and Production Company Limited ("**SNEPCO**");

(7) The Minister of Petroleum Resources re-issuing, by means of a valid and fully effective instrument in accordance with the laws of the Republic of Nigeria, a new License in respect of OPL 245 (title deed) jointly in favour of NAE and SNEPCO for a duration of ten (10) years;

(8) Reciept of any other approval from any other third parties having an interest in the Asset, to the extent applicable;

(9) ……."

31 October 2010 – Meeting at the Hotel Le Bristol in Paris

196. Although, according to the witness statements it was apparently common ground that, on 31 October 2010, two further meetings took place at the Hotel Le Bristol between Mr Obi and Chief Etete, in cross-examination Chief Etete sought to deny that he had met with Mr Obi on that date. Instead he insisted that he had met with Mr Agaev, and possibly also Mr Obi, either on that date or on 1 November 2010 and that it was Mr Agaev who presented the terms of ENI's 30 October 2010 offer to him. However it was clear from a copy of Mr Agaev's passport that Mr Agaev did not arrive in Paris until 1 November 2010. I accept Mr Obi 's evidence that the meetings took place on 31 October 2010 as between Chief Etete and Mr Obi alone. I also accept that the purpose of the meetings, which had been pre-arranged by an email from Mr Obi directly to Chief Etete, was for Mr Obi to present to Chief Etete the offer from ENI/NAE. At the first meeting, Chief Etete rejected the offer, and wrote on EVP's covering letter that he rejected both the amount of the offer and also the references to Shell's involvement in the deal. He noted in manuscript

> "your offer is totally unacceptable, this also [sic] the mention of Shell is the document is not only unacceptable but a gross insult. It must be very clear that Malabu Oil & Gas has no business transactions with Shell".

197. Chief Etete then wrote and signed a letter directly to ENI/NAE rejecting the offer for similar reasons. The letter was in intemperate, uncommercial terms and stated that

Malabu would only accept $2.2 billion "no less, no more" and that the transaction had to be closed no later than close of business on 2 November 2010 otherwise Malabu "shall close with other interested investors thereafter without any notice". I find that this letter was handed to Mr Obi at the second meeting with Chief Etete later on 31 October 2010, but that Mr Obi did not hand over the letter to ENI/NAE due to the risk of jeopardizing the transaction with ENI. I accept Mr Obi's evidence that he correctly recognised that Chief Etete's reaction was likely to cause problems and get in the way of the chance to negotiate a higher price. A separate copy of the letter was then sent to ENI/NAE, by email, under the signature of Diane Arnold, who signed herself as simply "secretary" but who in fact had no involvement in the transaction. This event caused considerable confusion at ENI/NAE, and considerable time was spent by Mr Obi seeking to resolve the situation.

1 November 2010 - Meeting in Paris

198. On the following day, once Mr Agaev had arrived, a further meeting took place as between Mr Obi, Mr Agaev and Chief Etete. The meeting was recorded in Mr Obi's handwritten notes. The notes state "Refused to sign - claims no problem with 85 will sign all the papers upon closing". Mr Obi was strongly cross-examined by Mr Graham to the effect that this was a reference to Chief Etete being agreeable to selling 85% of Malabu's interest in the OPL Assets and keeping 15%. In closing submissions Mr Graham also argued that it was unlikely that Mr Obi was telling the truth about this meeting and the earlier meeting on 28 October 2010, where the figure of $85 million was also mentioned (according to Mr Obi), as this would mean that Chief Etete was alleging that EVP had entered into a side deal with ENI and/or Shell to receive $85 million only a few days before he was also allegedly proposing to pay Mr Obi $85 million. Mr Graham submitted that the more likely explanation was that both references were to the 85% holding in OPL 245 that Chief Etete was saying he was willing to part with at this stage. Chief Etete was also cross-examined to the effect that, at the meeting on 1 November, he sought to renegotiate Mr Obi's fee, suggesting that the $85 million would be a figure that he would have no problem with. Chief Etete claimed that there was no discussion at all about the figure of 85 at the meeting, and that the notes were a complete fabrication. He was unable to explain, however, why he had not addressed this issue at all in any of his witness statements.

199. In relation to this issue I accept Mr Obi's evidence. I find that, as Mr Obi described in cross-examination, this was an attempt by Mr Obi to lay the ground for the Chief or Malabu to sign the addendum to the EVP Exclusivity Agreement, which would record the deduction of the $200 million fee which Mr Obi was seeking from the price of $1.26 billion. I accept Mr Obi's evidence that at this meeting Chief Etete indicated to Mr Obi that he had no problem with Malabu paying EVP $85 million. I reject Chief Etete's evidence to the contrary. In cross-examination on this issue Mr Obi said:

14 Q. My suggestion to you is that is a reference to he has no

15 problem with selling 85 per cent and keeping

16 15 per cent?

17 A. Totally wrong. That is -- when he says refused to sign,

18 as I had explained to you at the 6 March meeting, the

19 deal was I would get the offer, and then we would do an

20 addendum, deduct the 200.

21 So the offer had come in on the 31st. So what I was

22 now doing was laying the ground for the chief or for

23 Malabu to sign the addendum, deducting the 200 from the

24 1.26, if he accepts that that was a fair deal.

25 So this conversation starts where I'm asking the

1 chief: chief, I need to get my addendum signed; and he

2 refused -- he says: no, no, I'm not going to sign, I'm

3 not going to sign that now. Then he throws in the 85

4 from the previous conversation: I have no problem with

5 the 85, I will sign all the papers upon closing, ie all

6 your backdated addendums reflecting the fee. That is

7 entirely what we're talking about in this discussion."

200. However this description by Mr Obi supports my conclusion that, despite Malabu's obligations under the EVP Exclusivity Agreement to agree the AMP, Chief Etete was in fact refusing either to agree the AMP or to go along with Mr Obi's alternate suggestion that they should simply agree EVP's fee at the specified amount put forward by Mr Obi. Once again the Chief was prevaricating by fobbing Mr Obi off with the assurance that he would sign the necessary addendum, thereby fixing EVP's fee, once a deal with ENI had been closed and that he, Chief Etete had no problem with the fee of $85 million. It was in fact clear that by this time Chief Etete had already contemplated the possibility of circumventing EVP altogether.

201. On 3 and 4 November 2010, Mr Obi sent emails to ENI/NAE and his advisory team confirming that Malabu and ENI were not able to reach an understanding and that the deal was off. According to Mr Obi, this email was a negotiating tactic and everyone was clear that the negotiations would continue thereafter and that the 30 October offer would be improved upon. I accept Mr Obi's evidence in this respect.

Meeting with the Attorney General of Nigeria on 15 November 2010

202. On 15 November 2010 a meeting was held at the offices of the Attorney General of Nigeria in Abuja. EVP was not invited to the meeting, and Mr Obi did not receive advance notice that it was going to happen. The meeting was attended by

representatives of Shell, ENI/NAE, Malabu and the FGN. The representatives of Malabu who attended the meeting were Mr Munamuna, Mr Gbinigie and an external legal adviser, Dele Adesina. Neither Chief Etete nor Mr Agaev attended. Mr Armanna attended on behalf of ENI (and possibly also Mr Casula) and Mr Peter Robinson attended on behalf of Shell. Mr Obi found out about the meeting and what had been discussed at it, from communications and conversations with Mr Agaev (who had been informed about it by Chief Etete), and also from communications and discussions with Mr Descalzi of ENI.

203. I accept Mr Howard's submission that on the evidence the likely catalyst for the meeting was Malabu's precipitous and uncommercial letter rejecting the 30 October 2010 offer. It is likely that ENI and Shell had become exasperated by Chief Etete's reaction and so sought the assistance of the Attorney General. I also accept that the SPA which had been negotiated between EVP and ENI/NAE was used as the basis for an effort to conclude the transaction, and that Chief Etete agreed on the phone in principle to accept a price of $1.3 billion after NAE had offered to increase the price by $40 million. The latter fact is supported by the fact that the figure of $1.3 billion was discussed at the meetings that followed in late November 2010. This was denied by Chief Etete in cross-examination, although he was unable to explain how it was that the price was increased by $40 million. Mr Gbinigie also denied in cross-examination that the SPA which had been negotiated between EVP and ENI/NAE or ENI's offer of 30 October 2010 was discussed at the meeting on 15 November. I find this impossible to accept, given the necessary involvement of both Shell and ENI in the offer and a joint presence at the meeting.

204. I am able to accept Mr Gbinigie's evidence in general terms that, at the meeting, the Attorney General said that the FGN's objectives were to settle the ICSID arbitration proceedings and finally to put the oil-field into operation; that a deal was essential; that he expected Malabu and Shell to compromise to get a deal done, without the disputes dragging on; and that his approach was to reach negotiated solutions to the conflict for the good of all. I am also prepared to accept that various solutions were discussed including: a joint venture between Malabu on the one hand, and SNUD with ENI on the other; Malabu taking OPL245 with a third party investor and refunding SNUD for any costs incurred in relation to the block; and the FGN allocating a different block to SNUD, and Malabu surrendering the block to the Government for cash. It was clear that there was discussion generally about how the settlement talks were to be progressed.

205. I should say that, by detailed reference in cross-examination and closing submissions to certain Italian newspaper articles, and texts passing as between Mr Obi and certain of the ENI representatives, Mr Graham submitted that the evidence demonstrated that Mr Obi had "private arrangements to be remunerated by ENI (whether as part of a fraud on that company or not)"; see paragraph 413(3) of Malabu's closing submissions. The allegations were un-particularised and changed over time. I do not find them proved.

206. However it did appear from the evidence given by Mr Obi in cross-examination that he took the view that certain representatives of ENI had "circumvented EVP with the [Nigerian] Government" and that a friend of his attempted to prevent that from happening.

207. Following the meeting on 15 November 2010, details also began to emerge of a lawsuit that had been filed by Mohammed Sani, the son of General Abacha, on 24 November 2010 against inter alia Malabu, its shareholders as shown on the register and Shell, in an attempt to obtain recognition of his shareholding in Malabu, and that he had commenced injunction proceedings in connection with the sale of the block. In his evidence in the ILC Arbitration, Mr Agaev, who was informed of this development by Shell, said of this development:

> "The name of Chief Etete did not shine but the ghost of Sani Abacha's reputation seemed likely to kill the deal. Moreover the legal risks around OPL 245 effectively doubled..."

208. I conclude that it was probable that, as submitted by EVP, the Mohammed Abacha claims prompted Shell and ENI to rethink their willingness to be seen to deal with Malabu, which ultimately led to the transaction being structured in the form of two separate resolution agreements with the FGN. This avoided the need for either ENI or Shell to contract directly with Malabu, something that was emphasised in the later press release by ENI, in which it denied that it had entered into any direct transaction with Malabu.

November / December 2010 – Meetings in Milan

209. On 27 November 2010 Mr Obi met Mr Agaev in London. Mr Agaev requested Mr Obi's assistance in arranging a meeting in Milan between Malabu and the ENI executives. Mr Obi claims that he agreed, but made clear that Chief Etete would need to "reconfirm" in writing EVP's fee entitlements, including the right for the purchase consideration to be held in escrow pending the deduction of EVP's fees. It would not have been surprising if Mr Obi had indeed insisted that his fee arrangements should be agreed and reduced to writing but what was precisely discussed between the two men I do not need to decide.

210. It was common ground that Mr Obi arrived in Milan on 29 November 2010 and that Chief Etete and Mr Agaev had arrived earlier the same day and that various meetings took place in Milan on that date and on the days following. What was in dispute was the people between whom the meetings took place and what was discussed at the various meetings. It is not necessary for me to rehearse the extensive evidence relating to these meetings summarised in both sides' closing submissions or to make detailed findings of fact. Having reviewed the relevant evidence, I basically, but subject to important exceptions, accept Mr Obi's evidence and reject that given by Chief Etete. In summary, I make the following findings:

   i) Mr Obi met initially with Mr Casula and Mr Descalzi of ENI, on 29 November who attempted to explain to Mr Obi what had happened at the Attorney General's office at the meeting on 15 November 2010. They stressed that they had been forced to come to the negotiating table and that they wanted to find a workable solution to enable ENI/NAE to continue with the transaction.

   ii) After the meeting, Mr Obi and Mr Casula went straight to the Four Seasons Hotel where Chief Etete and Mr Agaev were staying and had a meeting with them. Chief Etete was adamant that he had never accepted \$1.3 billion during the course of his telephone conversation on 15 November 2010 and wanted Mr

Obi to renegotiate. The parties agreed that they would continue with the negotiating process.

iii) Mr Obi then returned to speak with Chief Etete and Mr Agaev. Chief Etete repeated his assertion that he had not in fact accepted a price of $1.3 billion and told Mr Obi that Mr Obi needed to get him a better price.

iv) Further meetings took place between Mr Obi, Mr Agaev and Chief Etete on the following day, 30 November, and over the next couple of days.

v) During the course of these meetings Mr Obi said he was confident he could achieve a price above $1.3 billion, but he wanted Chief Etete first to commit in writing to a figure for EVP's fees in the sum of $200 million, which was the figure Mr Obi had previously said was the fee EVP required and which had been discussed. Mr Obi also wanted provision for an escrow account to be included. Chief Etete's position was that the previously discussed $200 million was too much, as he was being 'pressured' into accepting a price of $1.3 billion, despite having stakeholders and debts to pay.

vi) In the light of the threatened circumvention of EVP's involvement, arising as a result of the 15 November meeting, Mr Obi was prepared to be flexible about the quantum of EVP's fees. Mr Obi and Chief Etete then proceeded to conduct negotiations about the amount of EVP's fees over the course of the next few days. Contrary to Mr Obi's assertion (see paragraph 186 of EVP's closing submissions) however, such negotiations were not "premised on, or understood by the parties to be premised on, the existing and persisting agreement" that EVP's fee was to be $200 million. As I have already held there was no such existing agreement.

vii) Figures of $150 million and $100 million were discussed as between Mr Obi and Chief Etete over the course of the next couple of days. Mr Obi then proposed a straight fee for EVP of 7⅔% on all proceeds. This was calculated to guarantee a minimum $100 million if the sale went ahead at the anticipated price of $1.3 billion, but to provide an uplift if an improved offer could be obtained. I reject Chief Etete's evidence in cross-examination that no negotiations took place on 29–30 November 2010 in relation to EVP's fees. The fact that negotiations took place is clearly supported by contemporaneous, documentary evidence and by Mr Obi's evidence which I accept in this respect.

viii) Mr Obi then drafted a proposed addendum to the EVP Exclusivity Agreement which recorded an agreement for a 7 ⅔ % fee, and set the AMP at $846mm if a sale went ahead of 40%, or $2.15 billion if the sale was for 100%, of Malabu's interest and rights in OPL 245. Both parties realised it was unlikely that a price of $2.15 billion would be achieved. From Mr Obi's position, the proposed agreement was intended to ensure a minimum fee of $100 million, with the possibility for uplift in the event that Mr Obi was able to obtain a higher offer from ENI/NAE, which Mr Obi at that stage was confident he could obtain. Mr Obi and Chief Etete discussed the $100 million figure and Mr Obi indicated that EVP would be prepared to accept a fee in the sum of $100 million or 7 ⅔ % of whatever the purchase consideration turned out to be. It was common ground that the draft addendum was not signed. It bore the date

15 July 2010 but it is not necessary for me to deal with the evidence relating to the dating of the document.

ix) Chief Etete responded with a handwritten counterproposal dated 2 December 2010, which was written on the back of the draft addendum prepared by Mr Obi and which was given to Mr Obi by Mr Agaev. The proposal envisaged EVP being paid 7% (equivalent to $147 million) as an "Agency / Brokerage fee" upon the completion of a transaction for $2.1 billion within 3 days of 2 December 2010, or alternatively a fee of $150 million on a sale price of $1.6 billion (a rate of 9.4%).

x) Mr Obi did not take Chief Etete's counter-proposal seriously, and left Milan on 3 December 2010 knowing that he had still been unable to obtain Chief Etete's agreement, or commitment in writing, to the amount of EVP's fee. In this context I reject Mr Obi's assertion that "he left Milan on the basis that, nothing having been agreed, he remained entitled to a minimum fee of $200 million." I do not accept that Mr Obi genuinely thought that, in the absence of further agreement, EVP had any such contractual entitlement to a minimum fee of $200 million.

xi) On 3 December 2010 Mr Obi sent a SMS to Mr Roland Ewubare, an associate of the Attorney General, and one of Mr Obi's contacts in Abuja, in the following terms:

> 'Just to update you. We started off with 13.3%, we went down to 10% and now down to further 7⅔%. We will not shift anymore...'.

The reference to 13.3% was a typographical error, and was intended to be to 15.3% (i.e.$200 million on a transaction of US$1.3 billion). I accept Mr Obi's evidence that this was him explaining to Mr Ewubare the various levels at which fees for EVP's services had been discussed with Chief Etete. I do not accept Mr Obi's evidence to the extent that he suggested that such fees had been agreed

xii) Shortly thereafter, Mr Obi was informed by Mr Ewubare, that Chief Etete had informed the Attorney General that he would be prepared to pay EVP a fee of $55 million out of the $1.3 billion, and that EVP could take 100% of any amount that Mr Obi was able to negotiate from ENI/NAE in excess of that figure. Mr Obi regarded this as unacceptable and rejected the offer. Chief Etete denied that any such offer had emanated from him and said that he was informed by the Attorney General that Mr Obi had volunteered to accept $55 million. I reject Chief Etete's evidence in this respect and find that he did indeed offer to pay EVP a fee of $55 million, together with the additional proceeds of any offer that EVP could negotiate. Mr Obi's evidence is corroborated by the evidence given by Mr Agaev in the ILC Arbitration in relation to this issue, but I would accept Mr Obi's account even in the absence of Mr Agaev's evidence.

xiii) Chief Etete left Milan on 5 December 2010. I reject Chief Etete's evidence that he left Milan, without any further contact with Mr Agaev, Mr Obi or ENI,

because of concerns for his safety after an alleged meeting attended by Mr Agaev, Mr Obi, Mr Armanna and Mr Casula, at which Mr Armanna demanded that Malabu commit to paying $200 million out of any sums which Malabu received for surrendering OPL 245 to the Federal Government. There was no evidence to suggest that Mr Armanna was present at any meeting in Milan with Chief Etete in December 2010 or made any threat to Chief Etete's safety. I also reject Chief Etete's further evidence that the counter-proposal to pay $150 million for a sale at a price of $1.6 billion (or 7% on a sale within 3 days at a price of $2.1 billion) was made against this background, and under the influence of '*serious pressure*' to reach agreement. But what Chief Etete's evidence in relation to this alleged meeting did show was that figures of $200 million, $100 million and $50 million respectively in relation to EVP's fees were clearly discussed as between himself and Mr Obi during the course of the negotiations which took place at these December meetings.

xiv) On the contrary, as Mr Agaev explained in the ILC Arbitration, far from fearing for his safety, Chief Etete left Milan in a good mood, still believing his offer of $55 million would be sufficient to settle the claim which Mr Obi was making for a fee of $200 million.

Alleged meeting at the Hotel Bristol in Paris

211. For the first time in cross examination, Chief Etete gave evidence to the effect that a meeting took place in Paris following the meetings in Milan, which was attended by Mr Armanna, Mr Akinmade and Chief Etete. He gave an account of a dinner which he said took place at the Hotel Bristol after which the three men went to the Chief's room. There Mr Armanna allegedly threatened Chief Etete that if Chief Etete took the OPL 245 deal elsewhere the Chief was a *"living dead man"*; this was said to have prompted an emotional response from Chief Etete along the lines that he would hunt down Mr Armanna and his colleagues if they threatened the Chief's life, following which both Mr Akinmade and Mr Armanna in turn knelt down and held the Chief's feet, repeatedly saying that they were sorry and asking for forgiveness. Whilst I am perfectly prepared to accept that, as the Chief suggested, in Nigeria it is a custom that a person seeking forgiveness would behave in such a way, I am wholly unable to accept that Chief's evidence that such a meeting in fact took place. The whole incident, which I can only suppose the Chief thought lent credence to his earlier suggestion that he had been blackmailed into signing the EVP Exclusivity Agreement, was so unusual that, if it had been true, it is inconceivable that it would not have featured earlier in any of his witness statements. Chief Etete's account of this alleged meeting was incredible, apart from being inconsistent with his earlier evidence that, because of concerns for his personal safety, following an earlier meeting with Mr Armanna, he had fled from Milan. Unsurprisingly, the alleged incident did not feature in Malabu's written closing submissions. It provided another reason why I was unable to rely on the Chief's credibility as a witness.

Mr Obi's meetings with Attorney General Adoke

212. On 11 December 2010 Mr Obi had a meeting with the Attorney General of Nigeria at the Hilton Paddington Hotel in London. Mr Obi's evidence was that the Attorney General passed on to Mr Obi information from Malabu to the effect that it was prepared to accept a "reduced" fee of $55 million, plus any amount negotiated above

$1.3 billion; and that Mr Obi confirmed to the Attorney General that this was unacceptably low.

213. Chief Etete's evidence in his witness statement was to the following effect; in the middle of December 2010, he was called by the Attorney General who told him that Mr Obi had come to see him, and told him that he had previously been Malabu's agent and involved with the introduction of ENI as an investor in OPL245; that Mr Obi had pleaded with the Attorney General to persuade Malabu to pay him a fee if a sale to ENI went ahead; and that Mr Obi had told the Attorney General that he, Mr Obi, thought that $50 million was appropriate for the work which he had undertaken; the Attorney General told Chief Etete that he knew nothing of Mr Obi's relationship with Malabu, and that Mr Obi should deal directly with Malabu.

214. In general terms I accept Mr Obi's evidence about what was said at this meeting with the Attorney General, except that I do not accept that the word "reduced" was used by the Attorney General. In paragraph 83 of Mr Obi's first affidavit, this was not how he then described what was said at the meeting. In that description, it was Mr Obi who was said to have claimed that "a reduction of the minimum fee from the original $200 million to $55 million was totally unacceptable". It was clear from Mr Obi's own evidence and his contemporary notes, and indeed other evidence from the Malabu side that, by this stage, the Attorney General was attempting to broker a satisfactory deal, which provided an equitable result for all participants in the transaction, in order to achieve a final resolution of the historic problems which had befallen OPL 245, and the start of production at the oilfield. That was no doubt why the Attorney General was prepared to meet with Mr Obi, not only on 11 December 2010 but also on subsequent occasions.

215. I do not accept what Chief Etete said was the thrust of his telephone conversation with the Attorney General. The notion that the latter would have said that "he knew nothing of Mr Obi's relationship with Malabu, and that Mr Obi should deal directly with Malabu" is inconsistent with the Attorney General's subsequent meetings with Mr Obi. I find that Chief Etete did indeed inform the Attorney General that Malabu would be prepared to pay EVP a fee of $55 million by way of commission, and indicated that such a proposal could be communicated via the Attorney General to Mr Obi, which duly happened at the meeting in London between the two men on 11 December 2010.

Meeting between ENI/NAE, Shell and the Attorney General on 15 December 2010

216. On 15 December 2010 a further meeting was held at the Attorney General's offices in Nigeria. The meeting was not attended by EVP or Malabu, but was attended by ENI/NAE and Shell. A new transaction structure was discussed at the meeting, which involved the FGN cancelling Malabu's licence to OPL 245, re-issuing the license to ENI/NAE and Shell, and paying compensation to Malabu out of the proceeds.

January to April 2011

217. Mr Obi attended a further meeting with the Attorney General on 17 January 2011 in Abuja. I accept his evidence that the Attorney General sent for Mr Obi specifically for

the purpose of discussing EVP's fees; there was every reason why, in the context of the resolution of the problems relating to OPL 245, the Attorney General would have been keen to ensure that the sale or other disposal proceeded smoothly, without EVP attempting to create difficulties by blocking the sale or otherwise. Mr Obi's evidence was that he used the influence of his friends and associates in Nigeria in an attempt to ensure that EVP was not cut out of the envisaged transaction and in an attempt to create a situation where the Attorney General and "the Government people recognised that… they needed me in this transaction". In that respect he failed, however. Mr Obi's handwritten notes of this meeting support EVP's case.

218. In cross-examination, Mr Graham attempted to suggest that Mr Obi's notes of the meeting, with their cryptic reference to the Attorney-General saying "Adviser needs to finalise mandate with seller", demonstrated that EVP indeed did not have any mandate from Malabu, as it had been terminated since 27 April 2010. As Mr Obi said in cross-examination, the fact that the Chief had, or may have, told the Attorney General that Mr Obi "didn't have a mandate" was hardly surprising. The Chief's attitude by this stage was clearly that he was reluctant to pay anything to EVP under the EVP Exclusivity Agreement and such a statement made by him did no more than reflect his reluctance to accept that Malabu had any obligations to EVP under the terms of the agreement. Such a stance was consistent with the stance which he adopted throughout cross-examination in this case; including repeated allegations of blackmail and forgery as against EVP and others. The fact that such a statement was made however provides no serious evidential support as to whether the EVP Exclusivity Agreement in fact remained in force as at this date.

219. On 18 January 2011, Mr Obi had yet another meeting with the Attorney General, this time also with Mr Casula, to discuss the monies payable to Malabu, Shell's conduct, the proposed settlement agreement, approval of the licence, fiscal terms and the proposed reallocation strategy.

220. I accept that EVP continued its efforts to achieve a sale in early 2011 to achieve an improved offer from ENI/NAE. Mr Obi attended a number of further meetings with ENI/NAE representatives, including a number of meetings with Mr Casula. But I find that it was apparent to Mr Obi by this stage that EVP was being increasingly cut out of the transaction, not only by Chief Etete but also by ENI, who, no doubt in the light of the multi-party negotiations with Shell and the Attorney General, saw little need to deal directly with EVP.

221. I also accept that by early 2011 Malabu was coming under increased pressure from the FGN to resolve the position in relation to the disposal of all of its interest in the OPL Assets; that Malabu was told by the FGN that SNUD and ENI/NAE were keen to undertake a joint venture; and that the FGN was willing to accommodate that, as a minimum the FGN wanted a net profit of at least the amount of the signature bonus; and that Malabu's position was that Block 245 was worth at least $2.2 billion. I am also prepared to accept that at a meeting between Malabu and the Attorney-General in early 2011, the Attorney General told Malabu's representatives that the Malabu could "do" a deal for $1,092,040,000, being the maximum that SNUD and ENI/NAE were willing to pay to the FGN minus the Signature Bonus or face years more disputes with an uncertain outcome. He also said that Malabu's relationship with Government could be damaged if a resolution could not be achieved, and that it was difficult to see how Malabu could pay the signature bonus and move ahead with the development in

light of all of the disputes. I am also prepared to accept that the FGN put a certain amount of pressure on Malabu to do a deal at $1,092,040,000.

222. Malabu, through Mr Gbinigie, also had direct discussions with Mr Casula of NAE in January 2011 and wrote requesting an offer that was an improvement on those that had previously been made. However, no offer was made to Malabu by ENI. In addition, Malabu held some preliminary discussions with the Nigerian subsidiaries of the Korea National Oil Company, but these came to nothing.

223. Meanwhile, the settlement discussions with the FGN continued and, save as described above and below, neither Mr Agaev nor Mr Obi played any part in those negotiations.

224. Chief Etete did, however, meet with Mr Agaev again on a couple of occasions in Paris in the early part of 2011, and Chief Etete spoke with him fairly regularly. Mr Agaev asked how the settlement discussions were progressing and asked Chief Etete to keep him informed.

225. Mr Obi met with Mr Casula on 14 April 2011. Mr Casula gave Mr Obi a "status update" on the all party negotiations that preceded the 29 April 2011 Settlement Agreements. Mr Casula explained that the negotiations involved back to back agreements but was far from concluded, and that nothing had been signed. By this time Mr Obi was becoming increasingly concerned that the deal was proceeding without EVP's involvement, that both ENI and Malabu were trying to cut EVP out of the process, and that he was being lied to by ENI about progress. At the meeting he accused ENI of breaching the terms of the confidentiality agreement which it had signed with EVP, as well as accusing Malabu of breaching the terms of the EVP Exclusivity Agreement. In response to this accusation, Mr Obi recorded Mr Casula as saying that NAE had not breached its confidentiality agreement with EVP because "This is a separate transaction". According to Mr Obi, such a comment was not surprising in circumstances where Mr Casula was keen to give the impression that ENI was not in breach of the agreement.

226. After the meeting, Mr Obi drafted a letter for Raiffeisen to send to NAE complaining about breaches and potential breaches of "certain provisions contained in the binding legal agreements executed bilaterally between EVP and some of the parties to the proposed transaction." The letter reiterated EVP's entitlement to "fees [which] were payable by Malabu and were to be deducted from the proceeds of the said transfer of the OPL 245 assets regardless of the transaction structure ultimately adopted." Contrary to Malabu's submission, I find nothing surprising in the fact that Mr Obi instructed Raiffeisen to write to NAE in such terms or did not write to Malabu until 5 May 2011. Certainly I do not regard the terms of the letter or Mr Obi's explanation of his tactics in writing it in any way supportive of Malabu's case that somehow Mr Obi regarded EVP's commission as payable by ENI/NAE as opposed to by Malabu.

The April 2011 Transaction

227. A further three-way settlement meeting was held, arranged by the Attorney General and held at his office in Abuja, on 11 April 2011. According to Mr Gbinigie's evidence:

i) He attended with Mr Adesina on behalf of Malabu; Mr Robinson led a delegation from Shell, with two other Shell representatives but without ENI/NAE; Ms Yinka Omorogbe, Company Secretary and Legal Adviser to the NNPC attended, together with various NNPC Counsel.

ii) The Attorney General told those at the meeting that a settlement had to be reached before the end of the Presidential term, which was shortly approaching. He told the Malabu representatives that Malabu should accept $1,092,040,000 from the FGN as compensation for the surrender of Malabu's claims to the OPL Assets, and that FGN would reallocate those Assets to Shell companies and ENI/NAE. Malabu's representatives said that this was way too low. The Attorney General said it was the best that could be achieved, and that Malabu should take it. The alternative was yet more years of dispute. They also raised the possibility of a joint venture arrangement, but Mr Robinson said that Shell would prefer to take 100% of the OPL Assets, working with ENI/NAE as its partner.

228. As I have already mentioned in paragraph 44 above, Malabu finally disposed of the OPL Assets by means of the 29 April 2011 Transaction. This involved the execution of three inter-related agreements as between variously two or more of Malabu, the FGN, NAE and the two Shell companies, SNEPCO and SNUD. The agreements were executed at a meeting in the Federal Ministry of Justice on 29 April 2011.The transaction was effected by the execution of three inter-related agreements as between two or more of variously Malabu, the FGN, NAE and Shell respectively. Again, as I have already mentioned, these comprised:

i) a "Block 245 Malabu Resolution Agreement" as between Malabu and the FGN, whereby Malabu effectively surrendered the OPL Assets to the FGN and agreed to "settle and waive all claims to any interest in OPL 245 in consideration of receiving compensation from the FGN" in the sum of $1,092,040,000 ("the Block 245 Malabu Resolution Agreement");

ii) "the FGN Resolution Agreement" between the FGN, NNPC, SNUD, SNEPCO and NAE, whereby, in return for payment by SNUD, on behalf of SNEPCO and NAE, to the FGN of a signature bonus of $207 million, and a payment from NAE, on behalf of SNEPCO and NAE, of a further sum of $1,092,040,000, the FGN agreed to allocate the 245 OPL Assets and grant an oil prospecting licence jointly to SNEPCO and NAE ("the FGN Resolution Agreement") and;

iii) a separate "Settlement Agreement" as between Malabu of the one part and the two Shell companies, SNEPCO and SNUD, of the other part, to resolve the ongoing legal proceedings between them ("the 2011 Settlement Agreement").

229. However an intermediate draft "Resolution Agreement" disclosed by Malabu, as part of its late disclosure, apparently dated sometime in December 2010, envisaged that Malabu would be a party to one composite settlement agreement to which FGN, Malabu, SNUD, NNPC, SNEPCO and NAE would all be parties, reflecting the earlier multi-party settlement agreement that had been drafted by ENI with EVP's input and which I have referred to above. It can therefore be inferred that, at a comparatively late stage, and particularly following the additional risks presented by the Mohammed Abacha claim, ENI/NAE and Shell had cold feet about executing the same agreement

as Malabu; and accordingly, Malabu was consequently removed as a party to the proposed agreement, but instead entered its own two-party "Block 245 Malabu Resolution Agreement" with the FGN.

230. In a press release dated 20 May 2012, the Attorney General stated as follows:

> "In furtherance of the Resolution Agreement, SNUD and ENI agreed to pay Malabu through the Federal Government acting as an obligor, the sum of US$1,092,040,000 Billion in full and final settlement of any and all claims, interest or rights relating to or in connection with Block 245 and Malabu agreed to settle and waive any and all claims, interest or rights relating to or in connection with Block 245 and also consented to the re-allocation of Block 245 to Nigerian Agip Exploration Limited ("NAE") and Shell Nigeria Exploration and Production Company Limited ("SNEPCO").
>
> It is therefore quite evident from the foregoing that the role played by the Federal Government, its agencies and officials in relation to Block 245 was essentially that of facilitator of the resolution of a long standing dispute between Malabu and SNUD over the ownership and right to operate Block 245. At all times material to the resolution of the dispute, the Federal Government was not aware of any subsisting third party interest in Malabu's claim to OPL 245 and neither did any person or company apply to be joined in the negotiations as an interested party.
>
> Government has overtime demonstrated its commitment to attract investment in the oil and gas sector of the economy and encourage genuine investors (local and foreign) by creating the enabling environment for their business to thrive. The resolution of the lingering dispute over Block 245 was in furtherance of that objective. Accordingly, the FGN, its agencies and officials should not be dragged into a purely commercial dispute between Malabu and its purported partners. It is also clear that the allegation of round-tripping levelled against the FGN is without basis and cannot be substantiated having regard the role it played as mere facilitator of an amicable settlement between two disputing parties over a long standing dispute with obvious economic implications for the country."

231. The evidence at trial did not demonstrate the background against, or the context in, which this press release was issued.

232. In his evidence in the ILC arbitration. Mr Agaev described the revised proposal as follows. He stated that shortly before the end of January 2011, he was approached by ENI/Shell, and this revised proposal was then accepted by Chief Etete in March 2011. He described the new transaction as follows:

> "The proposal involved replacing the SPA with a resolution document and, despite the new form of the transaction, the substance of the final outcome was the same, as Malabu was to receive $1.1 billion. During further negotiations with the active participation of the Attorney General's team and agreement was reached as to the payment procedure, entailing the establishment of escrow accounts through which ENI and Shell would pay FGN and FGN would pay Malabu. On 3 March 2011, I met with Mr. Etete in Paris and discussed this proposal and verified his consent to it"

Mr Obi's conduct after the 29 April 2011 Transaction

233. On 1 May 2011, a fax was sent from EVP to Chief Etete, which was later forwarded on 5 May to the Bristol Hotel. The letter was addressed to the CEO of Malabu and enclosed a draft of a letter dated 1 May 2011 which EVP wanted Malabu to send to EVP confirming that unspecified fees would be paid to EVP. The draft provided, in relevant part:

> "As you are aware, Malabu is in the process of settling all outstanding claims in connection with the relinquishment of its interest in OPL 245 to the Federal Government of Nigeria (the "FGN") by way of a series of settlement agreements to be executed by various parties including Malabu and the FGN (collectively referred to as the "Settlement Agreements").
>
> Pursuant to the contractual agreement between Malabu and EVP dated January 27th 2010 (the "Exclusivity Agreement") and the Addendum to the Malabu/EVP Engagement Letter dated July 15 2010, we are pleased to provide, in line with our recent discussions, a confirmation of the fees payable to EVP as full and final settlement of all fees and compensation due to EVP, for services rendered to Malabu, in connection with Malabu's exit from its interest in OPL 245
>
> We confirm that the fee payable to EVP, subject to EVP's acceptance, is as follows:
>
> 1. Malabu shall ensure that EVP is paid, as EVP's fees, a lump sum of € {TBA} MM (TBA Euros) (the "Fees") ..."

234. Mr Obi gave an explanation in cross-examination as to why the amount of the fee was left as "TBA"; he said that this was a final attempt on his part to reach a mutually acceptable amount in full and final settlement without the need for recourse to litigation. He said:

> "So all I was doing here was saying: chief, I have a legal entitlement to US$200 million, that's fine, what I'm trying to do here is to give you one last chance so we can agree a sensible figure, you know, with the range of the 100 and the

> 200 that I can be comfortable with before I start, commence to take legal action. So this was a last ditch attempt to reach a sensible figure between 100 and 200 that the chief could live with."

235. I accept Mr Graham's submission that the terms of the letter are inconsistent with a previously binding agreement that Malabu would pay EVP an agreed fee of $200 million. If Mr Obi had seriously considered that such were the case, I have no doubt that the letter would have said something to that effect. What the letter would not have done is suggested that EVP was in fact only asking for the fee payable under the draft addendum bearing the date 15 July, which had been produced by Mr Obi at the Milan meetings in November/December 2010, discussed by both Mr Obi and Chief Etete at those meetings, and which had never been signed. Mr Obi's explanation was not convincing in this respect.

236. A further email was sent by Mr Obi to Mr Gbinigie, and from EVP's advisers, seeking payment of fees. No reply whatsoever was sent by Malabu or Chief Etete to these demands.

No Names case outline

237. On 11 May 2011, Mr Obi forwarded a draft case outline, which he had prepared himself, to Raiffeisen that set out an anonymised précis of EVP's case against ENI/NAE. The document did not refer to a $200 million fee, a fixed fee, or an oral agreement or variation. Whilst, given that it was prepared as a brief summary for lawyers, I do not regard the document as having the significance which Mr Graham sought to attach to it, I accept Mr Graham's submission that the absence of any reference to an orally agreed fee of $200 million is corroborative of the absence of any such agreement. However I do not accept that the terms in which the outline is drafted support Malabu's case that EVP had some sort of commission agreement with ENI/NAE or that EVP was working exclusively as an independent broker.

Mr Obi's e-mail to Mr Agaev dated 1 July 2011

238. On 1 July 2011, Mr Obi e-mailed Mr Agaev in the following terms:

> "As discussed I am preparing to take legal action with respect to my unpaid fee for EVP's work on OPL245."
>
> Given your involvement in a-number of the key meetings I had with Etete, I would appreciate it if you could please confirm that the following details are correct to the best of your recollection or let me know if you have any differing recollections"

239. Paragraph 5 of Mr Obi's summary of facts was in the following form:

> "Etete had insisted that I introduce him to at least one of my prospective investors. You will recall my concerns about doing this especially in the absence of a finalized EVP mandate. After you persuaded and reassured me, I took a representative of the

> investor to meet Etete at his Lagos house where we all had lunch together. You will recall that both you and Etete were pleasantly surprised and happy by the quality of investor that I had introduced. Following the meeting, Etete and I proceeded to negotiate and finalize the EVP mandate after having agreed a minimum fixed fee of $200 mm based on $1 bn of cash proceeds. Whilst you were not present, we had both independently confirmed this amount to you."

240. On the same date, Mr Agaev e-mailed back in the following terms:

> "Basically the facts in your statement are corresponding to my recollection of the facts. The only detail: the former Hilton Hotel is not in the suburbs, but in Paris, near Tour Eiffel. Upon checking once more all the facts, I shall send to you my statement of facts. There have been many important facts that happened in fall 2010 in Milano, where your role was crucial to keep the transaction alive and when the investor was ready to walk out... "

241. However, Mr Agaev never did respond with his "statement of facts" and it is quite clear from evidence which he gave in the ILC arbitration on 25 February 2013 (i.e. after the conclusion of the trial in this case) that he regarded Mr Obi's request for confirmation as an irritant and that he was not prepared to support the statement about the agreement of the $200 million fee at the Lagos meeting, in relation to which in any event he was not present at the critical time. Indeed he stated that "there are many lies.. in these documents".

242. In the circumstances I do not rely on Mr Agaev's e-mail, as in any way supporting Mr Obi's case in relation to the alleged agreement in relation to the $200 million fee or otherwise. Where I have relied on the other evidence given by Mr Agaev in the ILC Arbitration, I have specifically said so in the narrative of this judgment.

Determination of the issues

243. In the light of my factual findings as set out above, my determination of the issues is as follows.

EVP's primary case: an express oral agreement for a $200 million fee

Issue 1: Did EVP and Malabu conclude a binding written agreement in January 2010 on agreed terms, namely the EVP Exclusivity Agreement? In particular: (i) were the parties *ad idem* as to its terms; and (ii) was the final version of the written EVP Exclusivity Agreement contended for by EVP either unauthorised or a forgery, as contended by Malabu?

244. As is apparent from the findings of fact which I have made above, I find that that EVP and Malabu did indeed conclude a binding written agreement in January 2010 in the terms of the EVP Exclusivity Agreement in the form contended for by EVP. I reject Malabu's various assertions that the parties were not *ad idem* as to its terms, that Malabu had not authorised the final version of the EVP Exclusivity Agreement or that

it was a forgery. It did not appear that Chief Etete's allegations that he was blackmailed or forced to enter into the EVP Exclusivity Agreement formed any part of Malabu's case as presented to me. If, and in so far as, it might be said hereafter that such allegations did form part of Malabu's case, I reject those allegations as well. Apart from Chief Etete's wild and incredible allegations, there was no evidence to support such a case.

Issue 2: Did Chief Etete, on behalf of Malabu, orally agree at any time that EVP's success fee under the EVP Exclusivity Agreement would be a fixed sum of $200 million? If so, was such oral agreement precluded by other provisions of the EVP Exclusivity Agreement, and in particular, clause 5.4?

245. As is clear from my detailed findings of fact, as set out above, EVP has not proved that there was any such oral agreement by Chief Etete, on behalf of Malabu, to pay EVP a fixed success fee of $200 million. There was clearly discussion about the figure of $200 million but I reject EVP's case that Chief Etete ever agreed, in a contractually binding way, to this figure. In the circumstances, whether such an agreement was excluded by other provisions of the EVP Exclusivity Agreement does not arise.

Issue 3: Was Mr. Obi, as Malabu contends, at all times acting on behalf of certain personnel at ENI/NAE pursuant to a fraudulent conspiracy with ENI/NAE personnel Mr. Granier-Deferre and Mr. Agaev; in an attempt to extract $200 million from the sale price paid by ENI/NAE to Malabu for the conspirators' own personal benefit, in fraud of ENI/NAE? If so, should the EVP Exclusivity Agreement be regarded as a fraudulent scam which gave no enforceable rights to EVP as against Malabu?

246. As I have already found, Chief Etete's evidence to the effect that there was a proposal by Mr Armanna that Malabu should assist in a fraud on ENI/NAE by agreeing to a proposal whereby $200 million should be diverted from the sale price paid by ENI/NAE for the benefit of certain ENI/NAE representatives and Mr Obi, was incredible and I rejected it. Accordingly I conclude that the EVP Exclusivity Agreement is not to be regarded as a fraudulent scam which gave no enforceable rights to EVP as against Malabu.

Issue 4: Was EVP (irrespective of any fraud) in fact acting at all times for and on behalf of ENI/NAE in relation to the possible disposal by Malabu of all or part of its interest in OPL 245, with the result that the EVP Exclusivity Agreement was a sham which gave no enforceable rights to EVP as against Malabu?

247. Likewise, in my judgment, there was no evidential basis to support Malabu's alternate case that, even in the absence of fraud, the reality was that:

> "(1) ….EVP was indeed acting for ENI in relation to the possible disposal by Malabu of all or part of its interest in OPL245, with the result that the EVP Exclusivity Agreement was a sham which can give no rights to EVP as against Malabu;"

see paragraph 15(1) of Malabu's closing submissions.

248. Moreover any such analysis would be contrary to the express terms of the Confidentiality Agreement as between EVP and NAE which expressly stated that EVP was acting on behalf of Malabu. It was also belied by Chief Etete's own evidence which accepted that the EVP Exclusivity Agreement was a genuine agreement.

249. Accordingly I reject this argument.

250. Malabu's further alternative case, as set out in paragraph 15(2) of Malabu's closing submissions, that:

> "from the end of April 2010 or subsequently, EVP was actually acting as an independent broker or intermediary trying to put together a deal between Malabu and ENI, without being retained by either side, but acting in the hope that it would be able to control the process sufficiently closely to be able to persuade Malabu and/or ENI to reward it by means of a spread or a commission."

was dependent upon Malabu establishing that the EVP Exclusivity Agreement had indeed been terminated, which is the issue to which I next turn.

Issue 5: Was the EVP Exclusivity Agreement: terminated on 27 April 2010, or at the end of May 2010; or abandoned in July 2010 when Malabu decided that it wanted to sell 100% of its interest in OPL 245 (and not the 40% expressly provided for in the EVP Exclusivity Agreement); or abandoned on 30 October or in early November 2010, following the rejection by Malabu of ENI's offer? If so, does it follow that EVP can have no entitlement to fees otherwise payable thereunder?

251. As is clear from my findings of fact set out above, I reject Malabu's case on termination.

252. Apart from what was said in the letter dated 18 February 2010, it was common ground that there was no document in writing from Malabu terminating EVP's mandate as from the expiration of the three months Exclusivity Period. In the absence of any written termination EVP's mandate continued automatically.

253. I have already set out above my conclusions on the facts in relation to the withdrawal of the letter dated 18 February at the meeting on 6 March 2010; and in rejection of Malabu's case that Mr Agaev agreed with Chief Etete on 27 April 2010 that the EVP Exclusivity Agreement had indeed come to an end and that Mr Agaev was authorised on EVP's behalf to waive a month's written notice of termination and to agree to such discharge.

254. Furthermore the evidence did not support Malabu's contention that the EVP Exclusivity Agreement was abandoned in July 2010 when Malabu decided that it wanted to sell 100% of its interest in OPL 245 (and not the 40% expressly provided for in the EVP Exclusivity Agreement). On the contrary, as I have found, regular meetings continued to take place between Chief Etete and Mr Obi throughout the summer and autumn of 2010 and Mr Obi and his retained advisers worked hard to procure an offer from, and negotiate draft documents with, ENI/NAE up to the production to Malabu of NAE's offer dated 30 October 2010 on the agreed basis that

EVP was being retained to secure an offer for 100% of the OPL Assets. Nor is there any evidence to suggest that, whatever Chief Etete's reluctance may have been about discharging Malabu's contractual obligations under the EVP Exclusivity Agreement, that agreement was consensually abandoned on 30 October or in early November 2010, following the rejection by Malabu of NAE's offer.

Issue 6

Was the 29 April 2011 Transaction a "… transaction effecting the disposal of the OPL Assets" by Malabu to ENI/NAI and Shell, such as to entitle EVP to the payment of the commission under the EVP Exclusivity agreement, or was it, as Malabu contends, "… radically different from the sort of transaction contemplated by the EVP Exclusivity Agreement".

255. Mr Graham presented detailed submissions as to why:

i) Malabu was not in breach of its obligations under clauses and and/or 4.1 of the EVP Exclusivity Agreement in dealing directly with ENI/NAE in connection with the negotiations leading up to the conclusion of the 29 April 2011 Transaction and in effectively circumventing EVP; and

ii) the subject matter of the 29 April 2011 Transaction did not fall within the EVP Exclusivity Agreement.

256. In particular Mr Graham submitted that:

i) The bilateral deal that was contemplated by the EVP Exclusivity Agreement and the subject matter of the 29 April 2011 Transaction differed markedly. In particular:

a) The deal contemplated by the EVP Exclusivity Agreement was a bilateral sale or disposal of a 40% interest in the OPL Assets to a potential joint venture partner.

b) On the other hand, the 29 April 2011 Transaction involved two separate agreements to settle historical disputes between Malabu and the FGN, on the one hand, and Shell and the FGN, on the other. The Block 245 Malabu Resolution Agreement did not involve the sale or disposal of any interest in the OPL Assets whatsoever; it involved Malabu giving up its legal claims against the FGN and Shell in respect of those Assets in return for compensation. A fundamental difference between the two situations was that the former (the bilateral sale) would have proceeded on the assumption that Malabu was the undisputed owner of the OPL Assets; whereas the latter proceeded on the footing that there was real uncertainty as to Malabu's right to dispose of those Assets because of the various actions brought against Malabu and the FGN by Shell.

ii) Even if (contrary to Malabu's submissions) a sale or disposal of 100% of the OPL Assets did fall within the terms of the EVP Exclusivity Agreement, there were fundamental differences between the deal that was proposed by

ENI/NAE on 30 October 2010 and the deal comprised by the 29 April 2011 Transaction.

iii) These were fundamental differences of type: the bilateral deal contemplated by the 30 October 2010 Offer was an upstream oil and gas transaction of the sort managed by brokers and investment banks, supported by teams of geophysicists and accountants; the settlement of litigation comprised in the 29 April 2011 Transaction was a compromise agreement, of the kind typically negotiated by lawyers.

iv) Under the terms of the 29 April 2011 Transaction Malabu achieved a significantly different and better outcome, when compared with what had been proposed by the 30 October 2010 Offer. In particular:

a) The Block 245 Malabu Resolution Agreement represented a much better deal than the 30 October 2010 Offer because under that offer letter Malabu would not receive the cash consideration of US$1,053,000,000 to the extent that certain assumptions made by ENI/NAE and referred to in its offer letter turned out to be incorrect.

b) The Block 245 Malabu Resolution Agreement also represented a much better deal than the 30 October 2010 Offer because under the 30 October 2010 Offer Malabu was to receive only US$1,053,000,000, net of the Signature Bonus that was to be paid by ENI to the FGN; whereas under the Block 245 Malabu Resolution Agreement it was to receive US$1,092,040,000, i.e. just over US$39 million more. The increase of US$39 million was a very significant one, and a much greater increase when the removal of condition precedents and the resultant uncertainty was factored in.

v) For those reasons, the Block 245 Resolution Agreement, although not a successful outcome from Malabu's point of view, nonetheless represented a very different deal, and a substantial improvement upon, the terms of the 30 October 2010 Offer.

vi) Moreover, the fact that Malabu had been able to obtain this different and materially improved deal was entirely due to:

a) the fact that the FGN led and insisted upon all parties accepting the 29 April 2011 Transaction; and

b) the negotiating patience and skill of those conducting the settlement negotiations on Malabu's behalf in the period from 15 November 2010 and leading to the signing of the 29 April 2011 Transaction.

257. In my judgment, the 29 April 2011 Transaction is to be regarded as a qualifying transaction which entitled EVP to a fee under the terms of the EVP Exclusivity Agreement (subject to the point raised by Malabu in relation to non-agreement as to the AMP, which I address in the next section of this judgment).

258. My reasons may be summarised as follows:

i) On the true construction of the EVP Exclusivity Agreement, EVP was entitled to a fee in circumstances where there was a sale or other disposal of the OPL Assets concluded during the currency of the Exclusivity Period as defined in the agreement or "pursuant to this Agreement". EVP's role was not restricted to introducing a purchaser by way of a sale transaction. The EVP Exclusivity Agreement refers variously to a “disposal" as well as to a "sale", and to the introduction not merely of a "buyer" but also of an "investor" or "acquirer". EVP's exclusive mandate continued beyond the three-month Exclusivity Period in the absence of written termination of the EVP Exclusivity Agreement. Throughout the currency of the agreement Malabu remained subject to its non-circumvention and other obligations thereunder. It was not suggested by Malabu that, if the mandate continued beyond the first three months, it was no longer exclusive. In such circumstances, necessarily any "acquirer of the OPL Assets" would have been an acquirer introduced by EVP, provided of course that Malabu was complying with its non-circumvention obligations. In circumstances where Malabu breached its non-circumvention obligations, so that, for example, an acquirer was not one introduced by EVP, the EVP Exclusivity Agreement expressly provided that Malabu was liable to pay EVP damages or compensation for such breach; see clause 4.2 by way of example. No doubt, in a case where Malabu circumvented EVP in relation to an investor introduced by the latter, the amount of such damages would be a sum equivalent to the fee which EVP would otherwise have earned. Under the terms of the long-stop provision, EVP was entitled to a fee in the event that during the 12 month period following "the later of the termination, dis-engagement by one or both of the parties or expiration of the Exclusivity Period or this Exclusivity Agreement" any transaction in respect of the OPL assets was completed or an agreement reached (whether signed or not) "with a prospective investor/buyer", provided that the relevant "investor/buyer" was "identified or introduced by or through" EVP.

ii) The above provisions thus demonstrate that EVP was entitled to its fee on the disposal of the OPL Assets in a wide variety of circumstances.

iii) I accept Mr Howard's submission that and leaving aside the increase in price, the offer submitted by NAE on 30 October 2010 and the transaction effected on 29 April 2011 were in substance, if not in form, commercially the same transaction. I also accept his submission that, whilst the 30 October 2010 offer was not a fully-worked out deal (since it was only an offer, supported by draft documents), the transaction contemplated by that offer was substantially the same transaction as the 29 April 2011 Transaction, subject only to a cosmetic change in structure, whereby the FGN was introduced as a conduit for passing the funds from ENI to Malabu, thereby obviating the need for NAE, SNUD or SNEPCO to have to contract directly with Malabu.

iv) I also accept Mr Howard's submission that such conclusion is supported by an analysis of the following points of comparison between the two transactions:

a) The offer of 30 October 2010 was an offer made by NAE. However, although NAE was the offeror, the offer in reality was one for its benefit and the benefit of the Shell companies, SNUD and SNEPCO (no doubt as a result of the negotiations already entered into between

them, to which as I have found, EVP was to a certain extent a party); thus the offer contemplated the execution of a raft of agreements including an agreement between SNUD and Malabu, and one between SNUD and the FGN. At the time of the offer there was already in circulation a draft multi-party settlement document being worked on by ENI, EVP and the latter's retained advisers. A comparison of this draft, with the subsequent intermediate draft referred to above, and with the final Resolution Agreement of April 2011 demonstrates that the latter evolved from the earlier draft.

b) The premise of the 30 October 2010 offer was that OPL 245 would be "reissued" by FGN to NAE and SNEPCO; the FGN Resolution Agreement was based on the same premise;

c) The proposed consideration under the terms of the 30 October 2010 offer was $1.26 billion, which consisted of $1.05 billion payable directly to Malabu and $207.96 million to be paid directly to FGN in respect of the signature bonus. Apart from the increase of $39 million received under the terms of the 29 April 2011 Transaction, the split of the consideration received by Malabu was the same as under the offer.

d) Both the offer and the 29 April 2011 transaction included taxation provisions, so as ensure that SNUD's past costs would be afforded tax relief.

v) Thus the two essential changes as between the 30 October 2010 offer and the 29 April 2011 Transaction were (a) the fact that the price receivable by Malabu went up by approximately $39 million and (b) the structure changed so that rather than Malabu transferring 100% interest in the OPL 245 assets to NAE and the FGN reissuing a new licence jointly to NAE and SNEPCO, as was envisaged under the terms of the offer, Malabu surrendered the licence to the FGN and the FGN reissued it to NAE and SNEPCO jointly.

vi) Neither of these changes would in my judgment have prevented EVP from having an entitlement to commission under the provisions of the EVP Exclusivity Agreement still in force or under the terms of the long stop clause. The only reason that EVP was not involved in the negotiation of the increase in price was because it had been circumvented in breach of clause 4.1 of the EVP Exclusivity Agreement. As Mr Howard submitted, the yardstick for entitlement to commission was not whether the deal was a deal at the same price and on the same terms as that introduced by EVP, but rather whether it was a transaction with an investor introduced by EVP; plainly the 29 April 2011 Transaction was such a transaction; moreover the earlier 30 October 2010 offer had itself envisaged the involvement of SNEPCO as a co-participator and the reissue of the licence to NAE and SNEPCO.

vii) Both the Attorney General's and Malabu's public statements to which I have already referred above support the proposition that the substance of the transaction remained the same, namely a disposal by Malabu of its rights to OPL 245 in return for a substantial payment from NAE, including the discharge of Malabu's liability in respect of the signature bonus.

EVP's secondary case: i) the existence of a contractual entitlement to a reasonable sum; or ii) a restitutionary entitlement to a reasonable sum

259. In circumstances where I have rejected EVP's case as to a contractually binding agreement for a payment of a fee of $200 million, the issues arising in relation to EVP's secondary claim accordingly fall for determination.

Issue 7: In circumstances where, on this hypothesis, the parties have deliberately not employed the mechanism for calculating the fee as set out in the EVP Exclusivity Agreement (namely the agreement of an "Agreed Malabu Price" - defined as "the AMP") or otherwise agreed a fixed fee for EVP's commission, was there an implied agreement between Malabu and EVP that the latter, as a provider of services, should receive a reasonable fee in the event of the disposal of the OPL Assets? Alternatively was there an implied term in the EVP Exclusivity Agreement to that effect?

260. In paragraph 33 of EVP's Amended Particulars of Claim, it is pleaded as follows:

> "In the further alternative, if no agreement was made as to the amount of the fee to be paid to EVP then a term is to be implied in any contract between EVP and Malabu that EVP should be paid a reasonable fee for the services provided to Malabu, such term being implied as a matter of business efficacy from the circumstances of the transaction and the conduct and communications of the parties as more particularly set out above"

In argument and in his written submissions, Mr Howard contended that, in the absence of an agreement for a specific fee, there was an implied agreement to the effect that EVP would be paid a reasonable sum for its services. Alternatively he submitted that there was an implied term in the EVP Exclusivity Agreement to that effect.

261. It was immaterial, Mr Howard submitted, whether one analysed the position as an implied term of the EVP Exclusivity Agreement (as varied or not) or as a fresh agreement that EVP would be paid a reasonable sum for its services, although Mr Howard preferred the implied agreement analysis. Such an implied agreement, Mr Howard submitted, was supported by the evidence as to the manner in which the parties had conducted themselves;

i) in agreeing in March 2010 not to invoke the AMP mechanism by way of completion of the addendum and to defer agreement of a fee for EVP to a later date;

ii) in both sides continuing throughout 2010 to operate on the basis that there was a continuing contractual relationship between EVP and Malabu under the terms of the EVP Exclusivity Agreement, and on the assumption that an appropriate fee for EVP would be agreed as and when Mr Obi came up with an acceptable offer

262. Mr Graham submitted that EVP's case rested on implication of a term in the original EVP Exclusivity Agreement that EVP would be paid a reasonable sum for its

services, and he referred to the Amended Particulars of Claim, paragraph 55(1); but, he submitted, the implication of such a term was "flatly inconsistent with the express terms of the EVP Exclusivity Agreement, including, in particular the mechanism for fixing EVP's fee by reference to the AMP, the "For the Avoidance of Doubt" clause, clause 5.4, the "Entire Agreement" clause and the "Long Stop" clause. He submitted that it was not legitimate for an implied term to do violence to the express provisions of the EVP Exclusivity Agreement. In particular he submitted that, by its terms, the EVP Exclusivity Agreement was an agreement for a success-based fee where success depended upon achieving a spread over an agreed price. He submitted that the proposed implied term appeared to provide that EVP should receive a reasonable sum regardless of success, which was entirely at odds with the remuneration agreed in the EVP Exclusivity Agreement.

263. Mr Graham also rejected Mr Howard's analysis that an implied agreement could be inferred from the conduct of the parties. He complained that there had been no adequate pleading of such an agreement and that no agreement could be inferred from the conduct of the parties. He submitted that likewise any such agreement would be excluded by the express provisions of the EVP Exclusivity Agreement referred to in the previous paragraph.

264. Malabu also contended that there was no scope for the implication of any such implied term or implied agreement, on the grounds that at all relevant times EVP was acting on its own account as an independent broker, or alternatively retained by ENI/NAE.

265. I conclude that the correct analysis, on the basis of the contractual arrangements as I have held them to be is that there was indeed an implied agreement between the parties that EVP would be paid a reasonable fee for its services in the event that it produced an offer in relation to which it would have been entitled to commission under the terms of the EVP Exclusivity Agreement as varied. That implied agreement is to be inferred from the parties' conduct at, and following, the 6 March 2010 meeting and subsequent meetings, and, in particular, on their express agreement that the AMP mechanism (which was the contractual mechanism under the terms of the agreement for calculating EVP's fee) should not apply. Once that agreement had been reached between the parties, not only was it necessary to imply some sort of agreement catering for the calculation of EVP's fee, but such a term could no longer be regarded as being inconsistent with the express terms of the EVP Exclusivity Agreement as varied. I emphasise that my conclusion is not based on whether or not Chief Etete ever expressly stated "Malabu agrees to pay EVP a reasonable fee". Rather it is based on my finding that such an agreement is to be inferred from an objective assessment of the entirety of the parties' conduct in the period from 6 March 2010.

266. Further or alternatively, I also conclude, if it is necessary to do so, that it was an implied term of the EVP Exclusivity Agreement, as originally concluded, that, in the event that subsequently, by variation to the original agreement, the parties agreed not to utilise the AMP contractual mechanism for the purposes of the calculation of EVP's fee, or to defer the specification of the AMP until such time as an offer, or acceptable offer, was forthcoming, that EVP would be paid a reasonable sum for its services.

267. My reasons for rejecting Mr Graham's arguments can be summarised as follows.

268. There is nothing in Malabu's pleading point in relation to the implied agreement allegation. The Amended Particulars of Claim adequately signalled the point and it was addressed in both EVP's opening and closing submissions.

269. The express clauses of the EVP Exclusivity Agreement (the "For avoidance of doubt" clause and the "Entire Agreement clause") do not operate, in the particular factual circumstances of this case, to preclude an agreed oral variation to the AMP mechanism or the implication of an agreement based on conduct. Malabu had an obligation to agree the AMP, so as to enable the agreed contractual mechanism for the calculation of EVP's remuneration to operate. In circumstances where the parties expressly agreed that Malabu's obligation to do so would not be discharged in that way, it cannot lie in Malabu's mouth subsequently to contend that such variation was not effective because of the Entire Agreement clause or the For avoidance of doubt clause. The variation to the terms of the original EVP Exclusivity Agreement had been supported by consideration, namely EVP's agreement not to compel performance of Malabu's obligation to agree the AMP. Moreover, if necessary to invoke it, the principle of estoppel by convention would have precluded Malabu from relying on the entire agreement clause. This was essentially a case where the parties, from 6 March 2010, conducted their contractual relationship on the basis of an assumed and shared state of facts - namely that the previously agreed contractual mechanism for calculation of EVP's remuneration would not operate, but that some other mechanism would do so. In such circumstances the doctrine of estoppel by convention would have precluded Malabu from relying on the express contractual clauses, since it would be unjust for it to do so, having been relieved of the requirement to discharge its original contractual obligations in accordance with the prescribed contractual mechanism; see e.g. per Lord Steyn in *Republic of India v India Steamship* [1998] AC 878 at 913E. Thus there was no inconsistency between the express clauses in the EVP Exclusivity Agreement and the implied term/ implied agreement for which EVP contends.

270. Mr Howard submitted in paragraph 45.3 of EVP's closing submissions:

> "The contrary conclusion is only supportable on the basis that the parties should be taken in their initial agreement to have anticipated the risk that they would not employ or adopt, and would agree not to employ or adopt, the mechanism and they have allocated the risk of that occurring to the service provider. This would mean that the parties would originally have agreed: that there was to be a mechanism for setting the fee to be obtained by the service provider (here, the AMP); that in the event that the mechanism was not agreed <u>for whatever reason</u> and/or the parties agreed not to employ the mechanism <u>for whatever reason</u>, the service provider would remain subject to the obligations and responsibilities imposed on him by the contract, but would have no entitlement to be paid at all. This conclusion is simply unreal. It makes no commercial sense. There is no basis to conclude that that was the position in this case. The contention should be rejected. "

I accept that submission.

271. There was some debate in the written arguments as to the circumstances in which a subsequent oral agreement or oral variation can override the provisions of an entire agreement clause. Thus EVP submitted that the law was correctly stated in *Spring Finance v HS Real Company LLC* [2011] EWHC 57 (Comm), a decision of HHJ Mackie CBE QC. In paragraph 53 of his judgment, having drawn attention to

> "the somewhat differing guidance given by the Court of Appeal in two decisions, *World Online Telecom Limited v I-Way Limited* [2002] EWCA CIV 413 and *United Bank Limited v Asif,* unreported, CA 11/2/00 ",

HHJ Mackie CBE QC expressed the view that there

> "could be an oral variation, notwithstanding a clause requiring that to be in writing, but that the court would be likely to require strong evidence before reaching such a finding."

In the subsequent case of *Globe Motors Inc and another v TRW Lucasvarity Electric Steering Ltd* [2012] EWHC 3134 (QB), 2011-645, a decision of the same judge, HHJ Mackie QC confirmed his view as expressed in the earlier case and added:

> "there may be more force in an argument to overcome the effect of art 6.3 [the relevant entire agreement clause] where, as Globe claims in this case the parties, without giving thought to the written contract, make significant changes to their basis of dealing."

272. In an earlier skeleton argument dated 21 July 2011, served for the purposes of argument at the return date of the freezing injunction, Malabu similarly argued that the law was as stated by EVP:

> "45.2. Malabu will submit that though at first glance those authorities may appear not to be speaking with one voice, in fact they do. They are all consistent with the position being that such an Entire Agreement clause can of course be over-ridden when the evidence suggests that the parties intended to over-ride it, but that such evidence must be strong and convincing.
>
> 45.3. The purpose of such clauses, is "not to prevent the recognition of oral variations, but, rather, [to prevent] causal and unfounded allegation of such variations being made.
>
> 45.4. So here, Malabu is entitled to rely on the above Entire Agreement clause to prevent EVP from establishing a good arguable case for these purposes based on the causal [sic - but query - casual?] and unfounded allegations of Mr. Obi."

So far as the entire agreement clause was concerned, the cases were not revisited by Mr Graham in his closing submissions.

273. The two cases before HHJ Mackie QC and the Court of Appeal cases of *World Online Telecom Limited v I-Way Limited* and *United Bank Limited v Asif* were all decisions on strikeout or summary judgment applications. None authoritatively decided what the relevant law was. Because both counsel appeared to accept that in appropriate circumstances an entire agreement clause can be overridden and that the enquiry was very much a fact-based one, I was not referred to whatever other authority there may be in relation to this issue. In such circumstances I do not consider that it is appropriate for me to decide the point, although, as at present advised, I incline to the view that there can be an oral variation in such circumstances, notwithstanding a clause requiring written modifications, where the evidence on the balance of probabilities establishes such variation was indeed concluded.

274. In many cases, such as *United Bank Limited v Asif (*where the relationship between the parties was a formal banking relationship) the factual matrix of the contract and other circumstances may well preclude the raising of an alleged oral variation to defeat an entire agreement clause. In others, the evidence may establish on the balance of probabilities that the parties by their oral agreement and/or conduct have varied the basis of their contractual dealings, and have effectively overridden a written clause excluding any unwritten modification. Such a situation might well arise in circumstances where, as in the present case, there are effectively only two individuals negotiating a variation to, and subsequently operating under, the terms of an unusual agreement in unusual circumstances. But the question whether the entire agreement clause has been overridden is necessarily fact-sensitive. This point is emphasised in the guidance given by Sedley LJ in *World Online Telecom Limited v I-Way Limited* at paragraphs 10-13:

> "**[10]**.......In a case like the present the parties have made their own law by contracting, and can in principle unmake or remake it. Among other things, far from fettering their freedom of contract, Mr Nasir can legitimately say that a preclusive clause like clause 21.1 gives effect to that freedom. But as he also recognises in his argument no firm authority in this country closes the door upon fact-based arguments to the contrary. One reason may be that the principle itself is neither simple nor unitary. A consensual oral variation, after all, is also an exercise of freedom of contract. In his skeleton argument Mr Nasir has relied on the United States Uniform Commercial Code, section 2-209(2), which provides:
>
> "A signed agreement which excludes modification or rescission except by signed writing cannot otherwise be modified or rescinded."
>
> **[11]** The previous position at common law in the United States, we are told, did allow the informal overriding of a written clause excluding any unwritten modification. Although this appears in its time to have been an American and not an English doctrine, it does to my mind illustrate well enough, in the absence of decisive English authority, that there is room for debate and movement on the question. Indeed, Mr Freedman QC in his skeleton argument, has been able to deploy both

> textbook and judicial support for a markedly more flexible approach than that taken by United States code.
>
> [12] In my judgment it was a sufficient justification of the refusal of Mitting J to give summary judgment on the counterclaim that the law on the topic is not settled. Mr Nasir's invitation to this court on what is an interlocutory appeal to declare the law of England and Wales to be the same as that of the United States is an essay in optimism which is doomed, I am afraid, to disappointment. It is of no assistance to him, beyond that point, to show us the inconclusive correspondence about the revision of the 80/20 split. The appellant says this was neither evidence of a variation, nor did it amount to an unequivocal course of conduct. The respondent says that it was part, though not necessarily the whole, of both things. These are issues which plainly have to be tried out. They cannot be short-circuited by Mr Nasir's submission, powerful though it is, that to countenance any variation by parole or by conduct is to render any clause like clause 21.1 a dead letter.
>
> [13] The reasons go further than this. I-Way have pleaded that World Online is estopped from relying on the prohibitory clause. No doubt because he did not need to do so the judge did not deal with that submission. But unless World Online can show it too to be an untenable pleading it affords a separate ground for letting their defence to the counterclaim go to trial. It may be that it should not have been pleaded in the claim, since one cannot sue on an estoppel; but it was certainly available in answer to World Online's counterclaim. Although Mr Nasir now argues that the evidence cannot sustain an estoppel by conduct, the fact that in their written argument in support of summary judgment World Online had to rely on a considerable body of contested evidence again demonstrates the unsuitability of the issue for summary disposal. Both issues – construction and estoppel – are capable in one measure or another of being fact-sensitive, the former in relation at least to the factual matrix of the contract, the latter in relation to transaction and reliance. …."

275. Accordingly I conclude that, despite the various express clauses of the EVP Exclusivity Agreement:

i) an agreement is to be implied from the subsequent conduct of the parties, that EVP would be paid a reasonable fee for its services in the event of the disposal of the OPL assets, if it would otherwise have been entitled to a fee under the terms of the EVP Exclusivity Agreement as varied;

ii) (if it is necessary to have recourse to the implied term analysis, as opposed to the implied agreement analysis), then:

a) as from the date of the EVP Exclusivity Agreement, a term is to be implied in that agreement that EVP was to be paid a reasonable fee in the event that the parties subsequently abandoned the agreed AMP contractual mechanism and EVP would otherwise have been entitled to a fee on the disposal of the OPL assets; and/or

b) as from the date on which on the EVP Exclusivity Agreement was varied, a term is to be implied in that agreement, as varied, that EVP was to be paid a reasonable fee in the event that EVP would otherwise have been entitled to a fee on the disposal of the OPL assets under the terms of the EVP Exclusivity Agreement as varied.

276. There was no dispute between the parties as to the law in relation to the implication of terms. In this context I was referred to recent authorities such as *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988, *Mediterranean Salvage & Towage Ltd v Seamar Trading & Commerce Inc (The "Reborn")* [2009] EWCA Civ 532, [2009] 2 Lloyds Rep 639 and *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900. As Lord Hoffmann in the Judicial Committee of the Privy Council said in *Attorney General of Belize v Belize Telecom Ltd (*at [21]):

> " … in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. …. There is only one question: "is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"

277. In my judgment the requirements for implication of the relevant term are satisfied in the present case, given the background to the agreement or, on the basis of the analysis at paragraph 275(ii)(b) above, the varied agreement. Whichever of the various indicia for the implication of a term one applies, construed as a whole against the relevant factual background, the EVP Exclusivity Agreement would reasonably be understood to have provided for EVP to have received a reasonable fee, in the event that, by subsequent variation, the parties agreed not to apply the AMP mechanism. Looked at objectively, on my analysis of the facts, it cannot be said that the parties intended that nothing should be payable to EVP; what they intended was merely to depart from the contractually agreed AMP mechanism in circumstances where, as I have found, the understanding was that a fee would be agreed at a later date. As Mr Howard submitted, in that situation the law imposes an implied agreement to pay a reasonable fee.

278. Malabu's further arguments against EVP's implied agreement/ implied term case, namely that EVP was operating on its own account, as an independent broker (or on the account of ENI/NAE), or on the basis that there was no subsisting contractual relationship between the parties, do not arise in the light of my factual findings that the EVP Exclusivity Agreement was not terminated and that EVP was not acting on ENI/NAE's behalf.

Issue 8

In the alternative to ii) above, in the absence of any contractual entitlement, was EVP nonetheless entitled to a reasonable fee for its services, on the basis of a quantum meruit claim. In particular: i) was such a claim excluded by the express terms of the EVP Exclusivity Agreement; ii) was Malabu "enriched" by the services provided by EVP; and, iii) if so, was Malabu "unjustly enriched"?

279. In the light of my factual findings, this issue does not arise. Because its determination would raise a number of hypothetical questions (in particular as to the factual reasons why there was no contractual entitlement), I do not consider that it is appropriate or necessary for me to determine the issue on an alternative, hypothetical basis.

Issue 9

On the hypothesis that: i) there was an implied agreement or implied term that EVP would be entitled to a reasonable fee; or ii) EVP is entitled to a reasonable fee on the basis of a restitutionary claim for unjust enrichment; what, in either case, is a "reasonable sum" for the court to award?

280. In the light of my finding that there was indeed an implied agreement / implied term to the effect that EVP would be entitled to be paid a reasonable fee, the only issue which now arises under this head is what is a reasonable sum for the court to award on the basis of the implied agreement/term. Accordingly I do not address the different question as to what would be a reasonable sum for the court to award on the basis of a restitutionary claim in unjust enrichment.

The law

281. There was no dispute between the parties that there is an important distinction between: (a) the situation where the court has to determine what is a reasonable sum, in a case where a contract either expressly or impliedly provides that a reasonable sum shall be payable; and (b) the situation where the court is having to assess what is the appropriate figure to award a claimant by way of quantum meruit, in a restitutionary claim for unjust enrichment claim. In the former case, the assessment of such a sum will depend upon all of the circumstances, the objective being to ascertain what the parties to the contract would have considered to have been a reasonable amount. In contrast, the objective in a restitutionary quantum meruit assessment is to reverse the unjust enrichment of a defendant, with the measure of any award reflecting the benefit to that defendant of the services received.

282. The distinction between the two was explained by Lord Justice Etherton at paragraph 140 of the Court of Appeal's decision in *Benedetti v Sawiris* [2010] EWCA Civ 1427, a restitutionary case:

> "140. It would be impossible to fault the careful and detailed analysis of the Judge if the legal issue was, as he posed it, to determine in the wide discretion of the Court what would, as between the parties, be a fair and reasonable sum to be paid by Mr Sawiris to Mr Benedetti for the services rendered by Mr Benedetti: ….. that, however is not a proper characterisation of

the legal issue. Judicial decisions and academic commentary in recent times have clarified that a quantum meruit claim is a restitutionary claim for unjust enrichment. The amount recoverable by a claimant is the objective value of the benefit at the time of receipt, namely the price which a reasonable person in the defendant's position would have had to pay for the services. It is to be contrasted with an express or implied contractual term to pay a reasonable amount for services provided pursuant to the contract. In such a case, the court can have regard to all the circumstances to determine what would be a reasonable amount as contemplated by the parties to the contract'. (Emphasis supplied.)

141. The common law cause of action for a quantum meruit, like other restitutionary claims, was formerly perceived to rest on the theory of an implied contract. That theory was rejected implicitly in *Lipkin Gorman v Karpnale Ltd* [1991] AC 548 and expressly in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1994] 1 WLR 938. In *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 Robert Goff J expressly characterised a quantum meruit claim for services as a claim, founded on the principle of unjust enrichment, which is concerned with restitution in respect of the benefit obtained by the defendant. The historical development and demise of the implied contract theory were described in *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] HLUK 34, [2008] 1 AC 561 by Lord Nicholls at paragraphs [105] and [107] and Lord Walker at paragraph [174].

142. In assessing an award of restitution in such a case, it is the defendant's benefit which must be identified and valued. Concentration is on the defendant's benefit rather than the expense, loss or other personal aspect of the claimant's condition: *BP* at pp. 839-840. In *Sempra* Lord Hope said that, for restitution, it is the gain that needs to be measured, not the loss of the claimant; that the claimant's remedy is the reversal of the defendant's gain; and that the process is one of subtraction, not compensation: [28] [33]. That gain is to be measured objectively, that is to say, what a reasonable person would pay for the benefit in question; and so, where there is a market, by reference to market rates: *BP* at p. 840; *Sempra* at [45] [103], [116]."

283. Accordingly I approach the question that, for the purposes of EVP's implied agreement/term case, the court has to approach the ascertainment of what is a reasonable sum, by reference to all the relevant circumstances in order to determine what the parties would objectively have considered to have been a reasonable amount and then award damages in that amount. I emphasise that the exercise of ascertaining

what objectively Malabu and EVP would have contemplated was a reasonable amount, is a very different exercise from that which is required of the court in the context of a restitutionary quantum meruit claim. In the latter case the court has to ascertain the objective value of the benefit to the defendant at the date of receipt; in other words, what a reasonable person would pay for the benefit in question, and thus, where there is a market, by reference to market rates.

EVP's case

284. EVP's case was that, on the analysis of implied agreement, a reasonable amount for its fee was $200 million (which was equivalent to 15.3% of $1.3 billion or 18.2% of $1.1 billion). Alternatively, Mr Howard submitted that, even if the Court were not persuaded that $200 million represented a "reasonable fee", nonetheless, in the unique circumstances of this case, a "reasonable fee" was a substantial, three-figure sum, well in excess of $100 million. Mr Howard submitted that $100 million represented a figure which Mr Obi was, when in a vulnerable position, prepared to accept for his services; that which the parties (or indeed the market) would have considered to be a reasonable sum would on any view be higher than such a low point. Alternatively he submitted that, if the matter were to be approached on a percentage basis, then, for essentially the same reasons, a reasonable percentage would be a double-digit percentage, well in excess of 10% (calculated by reference to a total transaction value of $1.3 billion).

Malabu's case

285. Mr Graham, on the other hand, essentially focused his attack on rejecting the implied agreement analysis on the grounds that the express terms of the EVP Exclusivity Agreement in relation to EVP's fee entitlement, and the "For the avoidance of doubt" clause, prevented the implication of any term or agreement that "EVP would be paid a reasonable sum for its services." Accordingly he submitted (at paragraph 633 of Malabu's written closing submissions) that:

> " EVP is therefore not entitled to contractual damages assessed as a reasonable sum (quantum meruit) for the services provided. It is left to its claim (if any) in unjust enrichment. "

(I have already dealt with this argument above.)

286. No doubt for this reason, Malabu's detailed submissions as to quantum addressed the issue on the hypothesis that EVP was (contrary to Malabu's submissions that there had been no unjust factor and no enrichment) successful in its restitutionary quantum meruit claim. On this basis, Mr Graham submitted that the appropriate measure was nothing like the $200 million claimed by EVP, but was an amount which had to be calculated by reference to the market value of these services provided by EVP to Malabu, which was a question for expert evidence. He further submitted:

> "On the basis of Mr Moyes' [Malabu's expert] evidence, Malabu submits that the claim should therefore be assessed at a figure of no more than US$7 million. Further, as (i) much of the work done by EVP was done on its own account (especially the engagement of Bayphase) and (ii) the work done by EVP

> was below the standard of a competent market professional like Moyes & Co, the award of quantum meruit must be discounted to reflect the diminished value of the services to Malabu."

The relevant evidence in relation to the quantum issue

287. Despite the fact that Mr Graham was addressing the quantum issues on what I have held to be an inappropriate restitutionary unjust enrichment premise, I have taken into account the evidence from Malabu's expert and Mr Graham's submissions in coming to my conclusion as to what objectively the parties would have considered to have been a reasonable amount. I have not taken into account, or made any discount for, Malabu's allegation "that much of the work done by EVP was done on its own account", since I have held that EVP was operating under the terms of the EVP Exclusivity Agreement and not as an independent broker. Nor have I taken into account or made any discount for the allegation that "much of the work done by EVP was below the standard of a competent market professional", since this allegation was neither pleaded nor adequately put to Mr Obi in cross-examination.

288. In coming to my conclusion as to what is a reasonable amount, I have had particular regard to the following evidential matters:

i) the work actually done by EVP pursuant to the terms of the EVP Exclusivity Agreement and the nature of EVP's role;

ii) the nature of the OPL Assets which were to be the subject of the proposed disposal, including government risk, political risk, potential adverse third-party interests and geological and technical risks;

iii) the financial and reputational risks associated with Malabu, as the vendor of the OPL Assets, and Chief Etete as the effective negotiating party in any disposal transaction, which would, or might, affect the willingness to deal with Malabu/Chief Etete not only on the part of any prospective purchaser/investor but also on the part of any adviser/broker;

iv) the financial position, resources and capabilities of Malabu;

v) time critical factors affecting the urgency of the disposal;

vi) the parties' contemporaneous exchanges and negotiations, and what it was envisaged EVP would recover under the terms of the EVP Exclusivity Agreement if performed in accordance with its terms; and

vii) the opinions of the parties' respective experts as to what was, objectively, a reasonable fee.

The work carried out by EVP under the terms of the EVP Exclusivity Agreement

289. In paragraphs 89 to 93 of Annex 1 to EVP's written closing submissions, EVP summarised the work which it claimed that it carried out under the terms of the EVP Exclusivity Agreement. I adopt that summary, as modified by me in the light of my factual findings, as set out below, for the purposes of my quantum calculation.

290. Following the conclusion of the EVP Exclusivity Agreement, during a period of almost one and half years, EVP allocated substantial time and resources in its attempt to achieve a successful disposal of Malabu's interest in OPL 245. There was little or no challenge by Malabu to the fact that such work had indeed been carried out by EVP and its advisory team.

291. Whilst it is correct, in my judgment, to characterise the role played by EVP as a broker/dealmaker, the services which EVP provided in fact went significantly beyond traditional brokerage services. It is not necessary for me to rehearse in any detail the work carried out by EVP; a summary was set out at paragraphs 190 - 339 of Mr Obi's First Witness Statement, which in general terms I accept. A detailed chronology of the work carried out by EVP was also annexed to Mr Obi's First Witness Statement, which likewise - at least in broad terms - I accept. These accounts were supported by the extensive disclosure which EVP provided of communications between EVP and ENI/NAE and other potential investors and between EVP and the multiple sets of advisers that were instructed to assist in bringing the project to completion. I accept that a large amount of time and effort was spent on the transaction by EVP in the period from December 2009 to May 2011 and that the costs expended by EVP on the project, including the significant costs of retaining the professional advisory team, exceeded US$1.3 million. None of the work and none of the expenditure was challenged when Mr Obi himself gave evidence. However, when Dr Dharan gave evidence, Mr Graham sought to question the propriety of certain of the expenditure, on the grounds *inter alia* that some apparently related to money spent at nightclubs or at hotels. In the absence of the matter being expressly raised with Mr Obi in cross-examination, I am not prepared to assume that such expenditure was not properly incurred in connection with the project.

292. I find as a fact that the work carried out by EVP (in addition to the matters to which I have already referred to in earlier sections of this judgment) included (but was not limited to) the following:

i) Following the execution of the EVP Exclusivity Agreement, EVP assembled a team of professional advisers. The advisory team included i) Raiffeisen, contributing M&A expertise; ii) Dewey & LeBoeuf, Templars, and Shearman & Sterling (who replaced Dewey & LeBoeuf), providing legal services; and iii) Bayphase, providing valuation analysis and geological expertise. EVP funded or incurred liability for the ongoing costs of these advisers, including incurring liability to Raiffeisen in respect of a potential success fee of €5 million.

ii) In February 2010, EVP was engaged in negotiating, finalising and then later revising the terms of the Confidentiality Agreement between EVP and NAE which was executed on 24 February 2010.

iii) In February 2010, EVP was engaged in instructing a virtual data room provider. The provider selected was Merrill Corporation. The data room went live on 26 February 2010, but proved to be a substantial ongoing commitment, with the contents needing to be kept constantly under review.

iv) In March 2010, EVP was engaged in the preparation of a Process Letter to be provided to advise potential bidders and the bidding process and the scope for carrying out detailed investigations and analysis of OPL 245. A copy of the Process Letter was provided to ENI/NAE on 31 March 2010, after which EVP was engaged in preparing an Addendum and revised Process Letter. After initial offers were provided by ENI/NAE, work was required to produce "Process Letter II", which was eventually forwarded to ENI/NAE on 28 September 2010.

v) Following the receipt by EVP on 9 March 2010 of a draft term sheet sent by Chief Etete through Mr Teimour Agaev (Mr Agaev's son), EVP was engaged in drafting a revised term sheet to conform with international best practice. Substantial revisions were required when, on 6 July 2010, Malabu intimated that it was unlikely to find an offer for 40% of OPL 245 attractive, and instead the focus shifted to a sale of 100% of the asset.

vi) As the transaction appeared to Mr Obi to be approaching completion, EVP was required to source an escrow agent. This occupied a substantial amount of EVP / Mr Obi's time in November 2010 and afterwards, although the issue was later overtaken by events.

vii) EVP and its advisers worked extensively on the production of a draft SPA. Numerous drafts were produced and circulated among EVP's advisers during the second half of 2010. A draft was provided to ENI/NAE on 5 October 2010, which was followed by extensive negotiations.

viii) EVP also engaged in work during 2010 aimed at marketing OPL 245 to potential investors other than ENI/NAE, in case a deal with ENI/NAE fell through. A marketing document was prepared with the assistance of Raiffeisen. With certain investors, such as the Korea National Oil Company, discussions advanced as far as the negotiation of a Non-Disclosure Agreement.

ix) EVP engaged in negotiations both with Shell and ENI/NAE, in an attempt to maximize the purchase price payable to Malabu. EVP made direct attempts, and indirect attempts through advisers, to persuade ENI and Shell to maximise the purchase price, to Malabu's benefit, and to persuade ENI/ NAE to revise its low reserve estimates.

x) Throughout this period, EVP worked hard to maintain the relationship with, and interest of, ENI/NAE, and Mr Obi had numerous meetings or conversations, in particular with Mr Casula and Mr Descalzi. EVP's role included responding to the preliminary offers received from ENI/NAE for 40% of OPL 245 on 27 April 2010 and 16 June 2010, and the offer for 100% of OPL 245 received on 30 October 2010. At various points in early 2011, EVP was instructed by Chief Etete to resume negotiations with ENI/NAE, which continued until as late as May 2011.

xi) Mr Obi was also involved in managing the relationship with Shell. Although Mr Agaev was also involved in this role, Mr Obi used Mr Agaev to keep abreast of Shell's position and, as the transaction progressed, Mr Obi directed his attention to the question of how a resolution with Shell could be achieved;

Mr Obi's involvement in the Shell aspects of the transaction was supported by his extensive manuscript notes. Mr Obi was responsible for working on the structuring of Shell's participation in the transaction.

The expert evidence

293. I deal first with the expert evidence. EVP and Malabu each called an expert witness to support their case as to quantum.

294. EVP called Dr Bala Dharan Ph.D., CPA ("Dr Dharan"). He described himself in his first report as follows:

> "I am a vice president at Charles River Associates ("CRA"), a global business, economic and litigation consulting firm. I am a Certified Public Accountant, and have a Ph.D. in accounting. I also hold a certificate in financial forensics (CFF) and am accredited in business valuation (ABV). I have thirty years of teaching, research and consulting experience in accounting and finance generally and also with respect to transactions in the energy industry. I have extensive experience acting as an expert in matters concerning corporate finance and accounting, valuation and investment analysis, due diligence, energy and utility industry issues, transactional and forensic analysis and quantum analysis. I have acted over twenty times as a testifying expert in accounting and finance matters, including the Enron and Parmalat litigation. I have also provided expert testimony in various international arbitrations in London, Geneva, New York and Houston. I have served as a consultant on several dozen other litigation and business consulting engagements."

295. Malabu called Mr Christopher Moyes ("Mr Moyes"), who is the founder and principal partner in Moyes & Co, a professional advisory firm that provides evaluation, strategic planning, investment advice, and assistance in finding funding for the natural resource industries and the power and petrochemical sector. He had a BSc in geology from the University of Western Australia and an MSc from London University, Imperial College of Science & Technology, and had over 40 years of industry experience. According to his report, he formed the group comprising Moyes & Co. in 1983, and since then has provided a wide range of consulting services to a variety of clients from super-majors to small international startups. He described the firm as having wide experience in US and international energy projects. He described the role of Moyes & Co as follows:

> "3.3 The core of our professional advice is related to energy transactions, and to raising industry capital for small (less than $25million) and medium sized (less than $1billion) companies in the domestic and international oil and gas and mining industries, although we work for companies across the sector including the major international oil companies.
>
> 3.4 We provide a comprehensive range of professional advice covering most disciplines required for transaction management.

> These disciplines include geology, geophysics, reservoir, petroleum and surface facility engineering, economics and financial analysis including cross border tax analysis, and comparable transaction value.
>
> 3.5 We have extensive experience in international trade and regulations and are very familiar with the business climate in most oil and gas producing countries. Consequently, an important area of our business is advising corporations and investors on foreign legal and taxation regimes in connection with the oil and gas sector.
>
> 3.6 We maintain a proprietary database of energy projects, ownership, activity, business potential and risks, together with investment opportunities covering over 38,000 companies and more than 64,000 oil and gas related projects, integrating technical, geologic and engineering information, capital and operating cost data, and contract and foreign tax attributes, together with the details of 37,000 companies holding or providing services in those assets and over 72,000 professionals. Transaction analyses on 4,700 trades are also held in the database. This database provides a strong and deep understanding of industry activity."

296. Both experts gave their evidence in a helpful and objective way and I have no doubt that they were both doing their best to assist the court. The experience and expertise of the two men was somewhat different. In their joint memorandum both experts agreed that the factors which I have identified at sub-paragraphs 288 (i) – (v) above were relevant to a determination of a reasonable sum for EVP's services. In coming to my conclusion on the quantum issue, I have taken into account the evidence given by the experts not only in relation to these factors, but also more generally.

Dr Dharan's evidence

297. Dr Dharan accepted that he was not a broker or a dealer, with experience of working or deal making in the upstream oil and gas industry (i.e. exploration and production). However, notwithstanding that he was also an academic, he clearly had considerable experience in providing consultancy services to, and working with, companies operating in the upstream oil and gas industry. That experience included advising in relation to remuneration packages for executives and third parties. Contrary to the submissions of Mr Graham, I did not find Dr Dharan's evidence in any way "untrustworthy". His report addressed both the wider quantum issues relevant to the implied agreement analysis and those relevant to the restitutionary claim. Thus Dr Dharan said that he had been instructed to prepare a report:

> "on the quantum meruit/reasonable remuneration issues in the case, including (i) whether it is commercially plausible that the parties could have agreed to a fee of $200 million for EVP in this case, and (ii) if there is no agreement as to the quantum of EVP's remuneration, whether the remuneration claimed by

> EVP is reasonable in the circumstances, and if not what would be reasonable remuneration in these circumstances".

298. Dr Dharan concluded that a fee of $200 million could be regarded as a reasonable fee for the services provided by EVP. In his first report he said:

> "Overall, as the above discussion shows, the total compensation earned or expected to be earned by a participant in a deal would depend on the specific value-contributing factors that the dealmaker provides and brings to the table and the circumstances. In a particularly complex transaction, the dealmaker's fee could potentially be in the range of 15% to 20% of the deal value."

He did not consider that it was appropriate to characterise the services provided by EVP simply as "advisory services". In his first report he described EVP as a "dealmaker"; in his second report he elaborated this description by expressing the view that:

> "For my part, I do not think that "advisory services" is an accurate description of the role performed by EVP in the OPL 245 deal. ……. EVP was not merely "an adviser"; rather it was fundamentally engaged in an entrepreneurial venture in this transaction, more akin to that of a venture capitalist."

299. He did not agree with Mr Moyes' approach that there was a determinable market price for the services provided by EVP in relation to the OPL 245 deal based on the underlying premise that other parties, rather than EVP, could and would have provided the services which were provided by EVP. Based on his view of the evidence (which he accepted was a matter for the court), Dr Dharan pointed out that Malabu had not concluded arrangements with other dealmakers/advisers in relation to the transaction other than ILC, and that there were considerable difficulties facing Malabu in obtaining advisers prepared to act on the project, not least Malabu's lack of funds and reputational issues surrounding the circumstances in which the OPL Assets had been acquired and Chief Etete himself. In such circumstances Dr Dharan regarded Mr Moyes' view - that the situation was one where competitive market rates for advisory services would have applied, and that the parties would have agreed "Lehman formula rates" subject to a $7 million cap - as wholly unrealistic and inapplicable to this specific case. (The Lehman formula is a formula commonly used to describe a commission/success fee arrangement, for brokers, with a declining percentage commission rate applicable to higher tiers of value of the transaction asset. The total fee may sometimes be capped by agreement between the parties.) Dr Dharan expressed the view that, because of the high level of complexity, risk and difficulty attached to this transaction, the range and depth of challenge facing EVP and the nature of the services supplied by it, the transaction was highly unusual and completely unlike the example advisory mandates described in Mr Moyes' Report and that there was no likelihood that such fee arrangements would have been regarded as suitable in the present case. He pointed out that there was no fixed universal or common Lehman formula and that, ultimately, client companies and dealmakers or advisers agree to fee arrangements that fairly reflect the expected services provided. He also commented that EVP was not acting as an investment bank, and indeed had

hired Raiffeisen as its own investment bank; moreover the fees which EVP had agreed to pay Raiffeisen under the terms of its mandate showed that the $7 million, which Mr Moyes considered was the appropriate fee, might not have even covered EVP's maximum fee exposure to Raiffeisen which did not make economic sense. He commented that a low capped fee of $7 million would be counterproductive for Malabu as it would not incentivise EVP. On the formula proposed by Mr Moyes the fee would be earned for a deal value as low as $660 million.

300. In his second report he reiterated the view expressed in his earlier report that there was a wide spectrum in the range of appropriate fees, depending on specific risks and complexity. Thus he concluded that:

> "At the low end of the range of risks" the fee to the advisor might be as low as 0.1% to 1% of the transaction value. Continuing on the spectrum of deal complexity, the remuneration percentage for a plain-vanilla asset sale where multiple advisors compete to be the broker or investment banker to provide a commoditised investment banking services is likely to be based on the Lehman formula of the type discussed by Mr Moyes, and might range from 0.5% to 2.5% of the transaction value.
>
> As another data point further to the right of the above examples in terms of deal complexity, I noted in my Report that underwriter fees for initial public offerings of shares of a small or medium-sized firm can amount to as much as 11 to 14% of the transaction value.
>
> Finally, I noted in my Report that fees to the dealmaker in very complex/difficult deals with bespoke risks increasing complexity could potentially be in the 15-20% range.
>
> As discussed earlier here, venture capitalists' transaction fees typically are in the 20% range as well. EVP should, at a minimum, in my opinion, be substantially higher than the 6% agreed by ILC for its role in the venture."

301. Dr Dharan expressed the view that the complexity and difficulty of the OPL 245 transaction were at the very high end of the scales which he had discussed. In his view, that factor, taken together with the "dynamics of the situation between EVP and Malabu (i.e. the extent to which Malabu needed EVP and EVP's services)" meant that EVP's reasonable fee as dealmaker would be in the form of a "slice of the action" fee of a co-venturer of around 20% of the transaction value. He accepted that the question, of how complex and difficult the OPL 245 transaction in fact was, was a question for the Court and that if the court were to take the view "that the transaction was not as complex and difficult, as it appeared to him and that Malabu's need for EVP was less great than it appears to me to have been, then the fee for EVP could be correspondingly lower but still a substantial slice of the transaction value."

Mr Moyes' evidence

302. Mr Moyes has substantial experience of dealing with international oil companies in general, having spent 40 years in the oil and gas industry. His role, and that of his firm, was essentially as a provider of advisory services. Like Dr Dharan, neither he nor his firm had acted as a broker or dealmaker. His report primarily addressed the quantum issues on the basis of a restitutionary claim. Thus he said that he had been instructed;

> "to provide an independent expert report regarding the market value of the advisory services said to have been provided by Energy Venture Partners Limited (EVPL) in relation to the possible disposal of all or part of the oil prospecting license, OPL245, a Nigerian offshore oil asset.
>
> 2.2 In particular, I am asked to consider what a party in Malabu's position in 2010 would have had to pay in order to have an advisor provide services to it of the type that EVPL claims to have provided to Malabu."

303. Mr Moyes' evidence was based on his own firm's experience. He essentially approached the matter on the basis that the services provided by EVP should properly be characterised as advisory services. He described how, in his view, the upstream oil and gas transaction advisory market place in which Moyes & Co. operates was extremely competitive; although fees and fee structures were typically kept confidential, there was a well-developed market for sell site transactions involving emerging markets oil and gas assets; typical fee ranges were well-known and understood by participants in the industry, by reference to which participants would pitch and negotiate bids. Subject to that proviso, he described various fee structures adopted in the industry for sell side oil and gas transactions. Although he occasionally came across odd arrangements that did not reflect standard industry practice, in his experience those appeared to involve an adviser who was a related party, or involved with a related party or parties to one or both sides of the transaction. He described that success fees were the norm for the established advisers which were active in marketing upstream oil and gas projects, as such a structure put the onus on the adviser to get the deal closed. He explained that typically success fees were calculated on the amount paid to the client, usually net of transaction taxes and other deductions from sale proceeds; success fees for Moyes & Co.'s current mandates had a range of 1% to 7.0%; the highest percentage of 7.0% was for a small project with an expected transaction value of under $10 million. He expressed the view that, in his experience, with larger transactions the practice was for brokers' fees to be structured by reference to different "value tiers" that might be generated from the transaction; in such cases the lower "value tiers" attract relatively high percentages and the higher "value tiers" relatively low percentages. He explained that this "layered" structure where the percentage success fee decreases as disposal values increases was commonly referred to as "The Lehman Formula" and that, additionally, on the larger projects, fee caps were often agreed as a product of the competitive nature of the market. He said that, in his experience, fees of US$3 to US$7 million were substantial fees, even for large transactions, and that any advisory company seeking these in excess of such figure would lose projects to competitors willing to cap their fees. He

set out a table of typical retainer and success fees according to expected deal size and nature of the transaction.

304. He disagreed with much of Dr Dharan's evidence; in particular, whilst he did not quarrel with most of the risks and issues that Dr Dharan had identified in relation to the sale of the OPL Assets, in Mr Moyes' view the reality was that the existence of such risks in relation to a transaction, such as the instant one, was not unusual and mainstream advisers were able to address them. In practice the risks were reflected in the low transaction prices applicable to such deals, but the consequence was that advisers did not receive larger fees, in absolute terms for such risky projects, even if the percentage success fees were higher.

305. Mr Moyes concluded by expressing the view that it was implausible that the parties would have agreed to a fee of $200 million "if they had reference to and were paying attention to market rates in the industry." He concluded that the market value of the services provided by EVP justified a fee of $9.7 million, reduced by application of a cap to $7 million. In this respect he said:

> “the market value of the services said to have been provided by EVPL” in relation to OPL245 (an asset that has been de-risked, with wells confirming the presence of potentially significant oil discoveries), can be sensibly assessed using the Lehman Formula applying the following percentages: 3.0% of the first $50 million, 1.0% of the next $450 million and 0.625% of the value over $500 million. In addition, I believe this fee structure would have been subject to a fee cap of $7 million. I believe this is what a company in Malabu’s position would have had to pay in order to have an advisor to provide services to it of the type that EVPL claims to have provided to Malabu."

My conclusions in relation to the expert evidence

306. In circumstances where I was attempting to ascertain objectively what would be a reasonable amount as contemplated by the parties to the contract for services provided by EVP pursuant to it, the views of the experts were ultimately of limited assistance. That was because, as was common ground, I was entitled to take into account all the circumstances including, in particular, the negotiations between the parties. Nonetheless the expert evidence provided a useful insight into the experts' respective views as to the various levels of appropriate fees. In one sense they provided two different reference points from two wholly different perspectives.

307. Mr Moyes’ conclusion that a fee in the region of $7 million to $9 million was appropriate was squarely premised on the approach which he had been instructed to take to the issues involved. As I have already set out, he was effectively instructed to give his views on the basis that he was addressing a restitutionary unjust enrichment claim, where what was relevant was the market value of the services provided to Malabu. But because the exercise which the court has to carry out requires consideration of a far broader spectrum of factors, I cannot accept the conclusion which he reached that $7 million was an appropriate fee in the circumstances of this case. The basis upon which Mr Moyes was instructed to approach the quantum issue meant that he was looking at the problem through far too narrow a prism. Second, I

found Dr Dharan's characterisation of the role played by EVP as a broker/dealmaker more accurate than Mr Moyes' characterisation of the role as merely advisory. However I did not accept Dr Dharan's yet more extensive characterisation of EVP's role as effectively one of venture capitalist. That appeared to me to exaggerate EVP's actual role.

308. Third, and perhaps more importantly, as Mr Howard submitted, Mr Moyes described a transparent and competitive market, in which competitive pressures (whether through lobbying and/or competitive bidding or general market knowledge, on the part of both service providers and service users, of market norms) operate to drive down fees. It was in that context that Mr Moyes expressed the view that the Lehman formula and fee cap should apply, because of the competitive pressures of the market place. But, as I have already held, in an earlier section of this judgment, because of the history of the acquisition of OPL 245, the disputes with Shell and the FGN, and the serious reputational issues surrounding Chief Etete, Malabu simply did not have easy access to the conventional market of brokers or potential purchasers to dispose of its only asset. Nor did it have the financial means with which to pay retainers or many of the other types of fee. Thus Mr Moyes' evidence did not really address the particular market context in which Malabu and EVP were operating. Mr Moyes fairly admitted as much in cross examination.

309. Fourth, as was also clear from his report and his oral evidence, Mr Moyes did not, or did not adequately, take into account the particular and unusual circumstances and risk factors surrounding the transaction and affecting Malabu. He took the view that such risk factors were not out of the ordinary and would not have affected the quantum of the fees for EVP's advisory services. Insofar as he did address these particular risks or factors in his report, I take the view that he under-emphasised them in coming to his conclusion as to the appropriate fee for EVP’s services. Of course it was a difficult path for an expert witness to tread, since the court is not assisted by an expert's comments on the factual matters which the court itself has to decide, but the basic premise of Mr Moyes' views were undermined by the narrowness of his approach.

310. For all the above reasons Mr Moyes' evidence was of very limited assistance in the task which the court had to perform.

311. Dr Dharan’s evidence was expressly directed at the extremely unusual circumstances of the case and in that sense provided more useful, but still limited, assistance to the court. Mr Graham subjected Dr Dharan's views, essentially, to two principal attacks in cross-examination: first, it was suggested that he did not have the relevant expertise to give an opinion on the subject; and second, it was put to him that the situation was not in fact as “risky, complex and difficult” as he considered it to be.

312. Whilst it was correct that Dr Dharan did not have direct experience as an adviser or broker or first-hand knowledge of the upstream oil and gas transaction advisory market, nonetheless his experience and expertise in the consulting field was sufficiently adequate and relevant to enable him to offer an expert opinion as to an appropriate remuneration structure and amount in the unusual circumstances of the case. Second, I considered that Dr Dharan's description of the transaction as one which "was at the extreme end of the range of complexity and difficulty’ was

justified, and provided support for his view that a very substantial success fee was reasonable.

313. Nonetheless, I could not accept Dr Dharan's view that, in all the circumstances of the case, a fee calculated at a rate of 15 to 20% would objectively be regarded as a reasonable amount as contemplated by the parties to the EVP Exclusivity Agreement, as varied. Perhaps not surprisingly, he did not provide any satisfactory concrete examples or comparators to support his view that, if there had been no agreement as to the quantum of EVP’s remuneration, the $200 million claimed by EVP was "reasonable in the circumstances".

314. But I accept Dr Dharan's general evidence that transactions in the oil and gas industry can involve a wide range of participants from oil majors and governments to individuals, together with a wide range of advisers; that there is no set formula or mechanism for remuneration; that many transactions in assets in the sector are large, high-value and bespoke transactions; that the nature of the remuneration is highly deal-specific and the subject of individual negotiation, and can include remuneration that in effect affords the broker/dealmaker "a slice of the action". I also accept his view that, in a transaction such as the present case, and given the nature of the broker/dealer role undertaken by EVP, there would not have been any application of the Lehman capped formula referred to by Mr Moyes. I agree with Dr Dharan that the application of a fee cap of $7 million (which in accordance with Mr Moyes' formula applied once the transaction consideration reached $660 million) would have been unlikely, not least because it would have eliminated any incentive to EVP to increase the purchase consideration, in circumstances where Malabu clearly took the view that even the final cash consideration it received was too low. It would also, as Dr Dharan pointed out, have been commercially inconsistent with EVP's contingent obligations to pay Raiffeisen’s maximum success fee of €5 million and EVP's own expenses in connection with the transaction which amounted to some $1.3 million.

315. I also accept Dr Dharan's view that in the present case there were clearly applicable risk and other factors that supported EVP's remuneration being a higher (rather than lower) amount. Both experts accepted that there were geological and technical risk factors applying to OPL 245 because it was located on the southern edge of the Niger Delta in water depths ranging from 1700 to 2000 metres. Indeed Mr Moyes referred in his report to the fact that several companies, which might have had the technical and financial capability to invest in deep water oilfields, actually banned their employees from travelling to Nigeria. Thus I accept Dr Dharan's analysis and expert view that, in addition to the technical factors, the factors applicable to a determination of EVP's remuneration would, if established on the evidence, include the following:

i) the reputation of Malabu, and the reputation of Chief Etete, not merely historically as someone who had been convicted of money laundering, linked to the Halliburton bribe scandal and regarded as connected to former President Abacha, but also as someone who had a personality which made him difficult to negotiate with;

ii) the geographical location of the OPL assets in Nigeria, which at the time had a historical reputation of weak corporate governance, corruption and potential political interference;

iii) ownership and operating rights; these included the past and ongoing proceedings as between variously Shell, Malabu and the FGN, the attempts by Shell to prevent any further investors from participating in the block, and the risk that Malabu might forfeit its rights to OPL 245 due to its inability to pay the signature bonus to the FGN;

iv) Malabu's lack of financial resources; these included its inability to obtain bank facilities (not least because of its reputation) and hire advisers, which meant that EVP itself had to provide bank facilities and hire professional advisers (incurring out-of-pocket expenses for geologists, lawyers and accountants etc and contingent liabilities for success fees); the general financial risk arising out of Malabu's lack of financial resources, which meant that EVP itself had to fund the progress of the bid and incur expenditure of approximately $1.3 million without the benefit of any initial or periodic retainer fees; and the credit risk of receiving its fees on the ultimate completion of the transaction;

v) time critical factors; this was the fact that Malabu had not paid the $207,960,000 million signature bonus to the Federal Government of Nigeria due in relation to OPL 245 as required, resulting in the risk that Malabu's licence would be revoked; it was therefore important that the deal was reached as quickly as possible to avert that risk.

316. Of course whether such factors existed was a matter for the court to determine on the evidence.

Consideration of the risk and other factors

317. There was a substantial amount of evidence relating to the risk and other factors. I accept Mr Howard's submissions that the evidence does indeed establish the following matters which are relevant for me to take into account in looking at the value to Malabu of the services provided by EVP and the figure that the Court should award as a reasonable fee, as objectively contemplated by the parties to the contract. The matters set out below are, for the most part, matters which I have already found established in earlier sections of this judgment. I set them out here by way of summary in the context of the court's determination of an objectively reasonable fee, as contemplated by the parties to the contract.

318. So far as Malabu itself is concerned, to the extent set out below I accept Mr Howard's submissions that the evidence showed as follows:

i) It would have been extremely difficult if not impossible for Malabu to have carried out the transaction itself, without the assistance of EVP or a similar broker/adviser. Neither Malabu nor the Chief had the wherewithal or the resources to get the transaction completed. Despite numerous efforts over the years, Malabu had failed to secure a genuine offer from any purchaser, or to make meaningful progress in negotiations with any purchaser. Malabu did not have access to the standard Western transactional advisers, brokers, law firms and technical advisers; such people were not pitching to Malabu and Malabu was not approaching them. Nor did Malabu have access to international banks, financial institutions or other capital providers.

ii) Malabu, Chief Etete and OPL 245 were widely regarded in the relevant market place as having a tainted reputation. This was because, amongst other things, of the manner in which OPL 245 had been obtained by Malabu, Malabu's connection with Chief Etete, Chief Etete's connection with the Abacha regime, Chief Etete's conviction for money laundering and his reputed involvement in the Halliburton bribery scandal. As Mr Moyes himself confirmed, this was why potential investors and potential advisers, brokers or dealmakers were not dealing with, and were not willing to deal with, Malabu, Chief Etete and OPL 245. In addition, as Mr Obi described, Chief Etete was known in the gas and oil industry to be an extremely difficult man with whom to negotiate.

iii) Malabu and Chief Etete were desperate to sell OPL 245. OPL 245 was Malabu's only asset. Malabu had been attempting to procure a sale of the asset for a number of years without success. As the revocation of the licence in 2001 revealed, Malabu's position was precarious. As at 2009, nearly $208 million was outstanding by way of signature bonus, and was long overdue. Malabu and Chief Etete were aware that they were at risk at any time of having their only asset taken from them, and that effecting a sale (and thereby realising the asset) was a time-critical task.

iv) Chief Etete was keen that any sale of the asset should take place as quietly and secretly as possible. Apart from the risk of executive intervention, Chief Etete also required the transaction to take place in secrecy in order to protect his own reputation, so as to avoid revealing that he was not in fact able to secure a sale of this asset himself, but rather required external assistance to do so.

v) Malabu had not itself invested any significant sums in the block at any time. The total of Malabu's investment was the $2.04 million initially paid by way of down payment of the signature bonus, along with the accompanying $10,000 and 40,000 Naira fees. As a result, any sums received upon a sale of OPL 245 would represent pure profit in Malabu's hands.

319. So far as Mr Obi and EVP were concerned, the evidence established that Mr Obi, and therefore EVP, had attributes which were valuable to Malabu. Mr Obi had both Nigerian and Western credentials and connections, as well as Government and private sector experience and connections. He had a good relationship with ENI, and in particular, with the senior ENI staff who were newly arrived in Nigeria (Mr Casula and Mr Armanna). He had experience of dealing and working with, and relationships with, relevant Western transactional and legal advisers. He had experience of developing, negotiating and closing transactions of the size of a sale of OPL 245. He thus had the relevant knowledge, access, experience and capabilities to effect a disposal of OPL 245.

320. So far as the transaction itself was concerned, the evidence showed that:

i) The transaction was an extremely difficult and complex one. Not only was the block located in Nigeria (perceived as a problematic country in which to operate, so far as western companies, and international oil companies in particular, were concerned), it was located in very deep water, which made it technically demanding. In addition, any sale of the block would require dealing with two very significant problems: namely the disputes arising as a

result of Shell's claimed interest in the block (and Shell had previously succeeded in seeing off the interest of a number of parties who had expressed an initial interest in the asset over the years) and the issues relating to Malabu.

ii) In order to be completed, the transaction required the dealmaker/broker/adviser to provide a complete service for Malabu; such person had to do a wide variety of tasks for Malabu; Malabu had no internal or external capability or resources of its own to complete or progress the transaction; indeed that explained why Chief Etete required both the services of Mr Agaev at ILC, effectively as a personal adviser, and EVP. Nor did Malabu have access to other provider of such resources.

321. All these factors informed my decision as to what objectively was a reasonable fee in the contractual context. They supported the proposition that a substantial fee would have been in the contemplation of the parties.

The contemporaneous exchanges between the parties and other relevant fees

322. I have already set out in the chronological section of this judgment, my detailed factual findings in relation to the negotiations between the parties. For the purposes of my determination as to what, objectively in all the circumstances, would be a reasonable amount for EVP 's fee as contemplated by the parties, it is relevant to note the following headline points in the negotiations:

i) Mr Obi was originally proposing a fee of $200 million;

ii) the EVP Exclusivity Agreement provided for a fee to EVP of either 100% or 50% of any non-refundable deposit procured in the event of an aborted sale; the evidence and position of Chief Etete and Malabu was that they were seeking a non-refundable deposit of at least $100 million; this indicates that Malabu had expressly contemplated and agreed a scenario in which EVP would in certain circumstances be entitled to a fee of at least $50 million or possibly $100 million in the event of an aborted transaction;

iii) during the course of the meeting between Mr Obi, Chief Etete and Mr Agaev in Paris on 1 November 2010, when EVP's fee was being negotiated, Chief Etete suggested that he had no problem with paying EVP a fee of US$85 million; this was at a time when Chief Etete already had it in mind to circumvent EVP;

iv) during the course of the Milan meetings in late November/early December 2010 figures of $150,000,000 and $100 million were discussed; the draft addendum prepared by Mr Obi on 1 December recorded a proposed agreement that “the fee payable to EVP will be 7⅔% of the total purchase consideration”; at the price of $1.3 billion then contemplated, that was equivalent to a fee of a minimum of approximately $100 million (which also allowed for Mr Obi to increase that fee if he could obtain a higher offer from ENI);

v) Mr Obi's evidence was to the effect that he was prepared at this stage to contemplate a "reduction" of his remuneration in light of his awareness that a

process was underway which either intended, or could well have the effect of, circumventing him, and his fee entitlement, altogether;

vi) at an earlier interlocutory stage in the proceedings, Malabu appeared to claim that this draft addendum (albeit, according to Malabu, allegedly concluded in July 2010) represented an agreed position, whereby the AMP had been fixed at $2.1 billion, albeit on the basis that Malabu was contending that in July 2010 the EVP Exclusivity Agreement had been terminated and not reinstated; see paragraphs 59-61 of Mr Maton's second witness statement; in cross-examination Chief Etete appeared to agree with this allegation; as I have found, that was not the agreed position and the 7⅔% proposal was put forward in late November/early December 2010 in the circumstances which I have already described; however the fact that Malabu was apparently prepared to put forward a positive case as to an allegedly agreed AMP, which necessarily involved the premise that a rate of 7⅔% was an acceptable figure for EVP's fee (subject to reinstatement of the agreement), is something which I am entitled to take into account;

vii) Chief Etete wrote a manuscript note on the reverse of the draft addendum to the EVP Exclusivity Agreement, in response to Mr Obi's proposal, that envisaged EVP being paid a fee of $150 million on a sale price of US$1.6 billion, upon completion of a transaction within three days (a rate of 9.4%) (or alternatively a 7% fee on a sales price of $2.1 billion);

viii) in December 2010 Malabu made an offer, through the Attorney General, to pay EVP a minimum of $55 million to settle the issue of EVP's fees, and agreed that EVP could take 100% of whatever further proceeds EVP was able to negotiate from ENI/NAE above the $1.3 billion that had been offered by Malabu.

323. It is also relevant to take into consideration the fee agreed by Chief Etete with ILC, which was 6% of the disposal consideration, plus expenses. Both Dr Dharan and Mr Moyes agreed that ILC's fees were a relevant factor. The services which ILC provided were, I accept, in one sense less valuable to Malabu than the services provided by EVP, not least because they did not include sourcing the buyer or negotiating with and procuring an offer from that buyer. For that reason it seems to me that there is every reason to conclude that EVP 's fees should not be less than ILC's fees. However, beyond that, it does not seem to me to be appropriate to assess the appropriate fee for EVP by reference to ILC's fees since it has not been relevant for this court to explore the basis for the fee structure in the ILC mandate, or the work or role played by Mr Agaev pursuant to its terms. On a deal value of $1.1 billion, ILC's fees were $66 million; on a deal value of $1.3 billion, they were $78 million.

324. I also take into account the fact that on 31 May 2010 NAE paid EVP €500,000 by way of participation fee, which was said to be a payment relating to access to the data room, which went some way to meeting EVP 's expenses in relation to the transaction.

Conclusion as to reasonable fee

325. Taking into account all the above factors, I conclude that a reasonable amount for Malabu to pay EVP for the services which the latter provided pursuant to the EVP

Exclusivity Agreement contract is 8.5% of the disposal consideration of $1.3 billion, which amounts to a sum of $110.5 million. My reasons for arriving at this figure are as follows:

i) One aspect of the difficulty in determining what would be a reasonable amount "as contemplated by the parties to the contract" is that, in this case, each of Mr Obi and Chief Etete had very different ideas as to what was a reasonable fee for EVP to be paid.

ii) I do not accept that a figure in the region of $200 million was ever a figure that could be said to have been in the contemplation of both parties as a reasonable fee for EVP to be paid for its services. In my judgment it was the figure that Mr Obi put forward from the beginning of negotiations in 2009, as an aggressive starting point, in the hope that he could ultimately arrive at a substantial (albeit considerably reduced) agreed figure with Chief Etete, after the conclusion of negotiations.

iii) Nor, in the light of the subsequent negotiations, the conduct of the parties, the work done by EVP and the fees purportedly payable to ILC under the ILC mandate, could a fee in the region of $7 million be said to have ever been in the contemplation of both parties as a reasonable fee for EVP's services. This was a situation in which both parties contemplated that any fee received by EVP would be substantial, and reflect a "slice of the action" element.

iv) By 1 November 2010, when EVP's fee was being negotiated, Chief Etete was indicating that he had no problem with paying EVP $85 million.

v) Likewise, by December 2010 Mr Obi was indicating that he was prepared to accept a fee calculated at a rate of 7⅔%. I accept that this was at a time when he appreciated that there was a real risk of him being circumvented, and that accordingly he felt he was negotiating from a vulnerable commercial position. This was a rate which, at least at an early stage in the proceedings, Malabu appeared to be suggesting it had been prepared to accept, subject to reinstatement of EVP's mandate.

vi) Also, by December 2010, Chief Etete was proposing an agreement that contemplated EVP being paid a fee of $150 million on a sale price of US$1.6 billion, (a rate of 9.4%), subject to the unrealistic condition that completion took place within three days (or alternatively a lesser 7% fee on a sale price of $2.1 billion).

vii) Thus it is apparent that figures for EVP's fees in the ballpark region of $100 million, and indeed upwards (if the transaction were completed in a short time frame or in a greater sum), were figures which the parties had in realistic contemplation during the course of their negotiations.

viii) Although Mr Obi's rationale for putting forward a figure of 7⅔% was no doubt to some extent informed by what he perceived to be the weakness, at that point of time, of EVP's negotiating position in the light of its commercial risk of circumvention, that figure nonetheless, in my judgment, reflected his realistic appraisal, subject to a very modest percentage discount for the

circumvention risk, of what, in all the circumstances, was a reasonable fee for EVP's services, given the work which it had done and the other relevant factors extensively set out above – and, critically, what Mr Obi no doubt thought Chief Etete would accept.

ix) But for the purposes of the court's determination as to the reasonable fee which EVP should receive, I consider that no discount should be made for the circumvention risk to which from November 2010 EVP was clearly subject. The other side of the coin was that, as these proceedings themselves demonstrate, Malabu itself was at all times subject to the real commercial risk that, if a reasonable fee was not agreed, EVP would take steps to enforce its rights under the EVP Exclusivity Agreement. Although I was not referred to any authority on the point, in my view the court should approach the calculation of a reasonable fee on the premise that both parties were complying with their contractual obligations and would do so in the future.

x) I conclude that, looked at objectively, and taking all relevant factors into consideration, the figure of 7⅔% (approximately $100 million on a disposal consideration of $1.3 billion) should be regarded as reflecting only a discount of slightly less than 1% from what would have been a reasonable fee in the contemplation of the parties, on the assumption that each respectively was approaching the matter in a commercially realistic and sensible manner, and in compliance with their contractual obligations.

xi) For those reasons I have concluded that a fee at a rate of 8.5%, which equates to a figure of $110.5 million on the disposal consideration of $1.3 billion, is objectively a reasonable amount for EVP's services under the terms of the EVP Exclusivity Agreement as varied by the implied agreement, or pursuant to its implied terms.

326. In the alternative, if I am wrong to apply any uplift to the figure of 7⅔% proposed by EVP in December 2010, then the appropriate fee is $100 million.

Malabu's defences relating to the alleged Secret Commission Agreement

327. Finally I turn to consider the issues which arise in relation to Malabu's defence that the Secret Commission Agreement barred any contractual or restitutionary claim by EVP for commission.

Issue 10: Did EVP conclude a contractually binding Secret Commission Agreement with ILC?

328. As I have already held, in an earlier paragraph of this judgment, I am not satisfied on the evidence before me in these proceedings that Malabu has established on the balance of probabilities that EVP ever reached any binding commission agreement with ILC to receive one third of the 6% commission to which ILC was apparently entitled under the terms of the ILC Agreement. But since it was EVP's case that it had done so, I propose to approach Issues 11 and 12 on the basis that there was such an agreement ("the Secret Commission Agreement").

Issue 11. If so, was it of such a nature (because of the potential for conflict of interest) that EVP's agreement thereto resulted: a) in EVP forfeiting its right to any remuneration, fee or commission to which it otherwise might be entitled under the EVP Exclusivity Agreement (or any variation thereof); and/or b) in Malabu having the right to rescind the EVP Exclusivity Agreement (and any alleged variation thereof); and/or c) EVP having an obligation to account to Malabu in respect of profits and/or to pay damages in respect of any sum which EVP might receive from ILC under the terms of the Secret Commission Agreement?

329. Given the length this judgment, and my views on the merits of Malabu's arguments in relation to this issue, I do not propose to address it in any detail. In my judgment, there was nothing in the express contractual duty of good faith (clause 2.4) or any of the other terms of the EVP Exclusivity Agreement, that imposed a fiduciary or contractual duty on EVP that would have rendered it a breach of such duties for EVP to have entered into the Secret Commission Agreement.

330. Moreover clause 3.3 of the EVP Exclusivity Agreement Clause 3.3 expressly entitled EVP to

> "fully retain (without accounting to you) any and all fees or remuneration agreed with any third parties or potential investors in or buyers of the OPL Assets...'.

331. I accept Mr Howard's submission that, on the true construction of this clause, EVP was fully entitled to obtain and retain fees or remuneration from any third party, including Mr Agaev/ILC. The "or" makes it clear that the "third parties" in question are not "potential investors or buyers"; they are other third parties. The use of the word "any" has the result that the provision is of wide application.

332. Accordingly none of the consequences for which Malabu contended arose, even if, contrary to my conclusion, the Secret Commission Agreement had indeed been concluded.

333. Accordingly I dismiss Malabu's counterclaim.

Issue 12. If so, was EVP's conflict of interest of such a nature as to bar EVP from receiving any sum by way of reasonable fee on the basis of a quantum merit claim under an implied agreement/implied term, or on the basis of an unjust enrichment restitutionary claim?

334. In the light of my conclusion in relation to Issue 11, the answer to this question is "no".

Disposition

335. It follows that:

  i) I dismiss EVP's claim for a contractually agreed fee of $200 million;

  ii) I find that, either under an implied agreement, or under an implied term, EVP had a contractual right to a reasonable fee;

iii) I determine that the reasonable fee for EVP's services is $110.5 million, based on a fee of 8.5% of the total disposal consideration of $1.3 billion;

iv) in the alternative, if I am wrong to apply any uplift to the figure of 7⅔% proposed by EVP in December 2010, then the appropriate fee is $100 million;

v) I dismiss Malabu's counterclaim.

Afterword

336. I express my gratitude to both parties' respective teams of counsel and solicitors for the quality and detail of the extensive oral and written submissions. They have been an invaluable aid to the completion of this judgment. The fact that not all the evidential and legal points, comprehensively analysed in the lengthy written submissions, feature in this judgment, does not mean that they have not been considered, and taken into account, in reaching my conclusions.

337. There were also a number of other features which significantly contributed to the smooth-running of the trial and its conclusion within a reasonably short timescale, given the amount of evidence which was relevant. Perhaps most importantly, the extensive documentation and case materials, the authorities and daily transcripts were presented in a highly organised and easily accessible electronic format, with the result that, apart from reliance on hardcopy versions of the written arguments, and, to a limited extent, the disputed versions of the EVP Exclusivity Agreement, I was able to conduct what, at least so far as I was concerned, was a paperless trial. There can be no doubt that this enabled the trial to be concluded within the allotted timetable, and with the maximum efficiency. It also provided the considerable advantage, from my perspective, of being able to access the trial bundles electronically. I am grateful to the parties' solicitors for the assistance which I received in this respect.

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Claim No: 2011 Folio 792

Before Lady Justice Gloster on 17 & 18 July 2013

BETWEEN:

ENERGY VENTURE PARTNERS LIMITED

Claimant

- and -

MALABU OIL AND GAS LIMITED

Defendant

JUDGMENT ORDER

UPON THE TRIAL of the above action on 27th – 29th November 2012 and 3rd – 5th, 10th – 14th, 17th and 20th December 2012, with additional written submissions having been served on 21st December 2012, 10th January 2013, 11th March 2013 and 14th March 2013

AND UPON the handing down of the Court's judgment on 17th July 2013 and the hearing of argument on consequential matters on 17th and 18th July 2013

AND UPON HEARING Leading Counsel for the Claimant and Leading Counsel for the Defendant

AND UPON McGuireWoods London LLP, solicitors to the Claimant, undertaking to the Court to hold the sum of money identified in paragraph 8.2.1 of this Judgment Order, and any interest accruing thereon, in a US dollar client account and not to transfer any monies from that account (except as permitted by the terms of paragraph 8.2.2 of this Judgment Order) without the written agreement of both parties or upon the order of the Court ("the McGuireWoods Undertaking")

IT IS ORDERED THAT:-

1. Judgment is hereby entered in favour of the Claimant against the Defendant in the sum of US$110,500,000, and pre-judgment interest in the sum of US$11,034,863.01 (being simple interest at a rate of 4.5% from 29 April 2011 to 17 July 2013). As from 17 July 2013 (being the date of this Judgment Order), interest on this composite sum, being US$121,534,863.01, shall run at the rate of 8% per annum (pursuant to section 17 of the Judgments Act 1838) until the date of payment.

2. The Defendant shall pay 90% of the Claimant's costs of the action on the indemnity basis, save for the costs already provided for in paragraph 9 of the Order of David Steel J dated 29 July 2011, which the Defendant shall pay on the standard basis, all of such costs to be the subject of detailed assessment if not agreed. For the avoidance of doubt, this paragraph does not apply to any costs already provided for by costs orders made during the course of the proceedings.

3. The Defendant shall pay to the Claimant interest on the Claimant's recoverable costs at the rate of 2.50% per annum (being 2% over the base rate of the Bank of England) from the date the Claimant paid each invoice to 17th July 2013 (being the date of this Judgment Order). As from 17th July 2013 (being the date of this Judgment Order), interest on these sums shall run at the rate of 8% per annum (pursuant to section 17 of the Judgments Act 1838) until the date of payment.

4. The Defendant shall make a payment on account of costs (and interest on costs) in the amount of £2,500,000.00.

5. As to the sum of $215 million paid into Court on 4 August 2011 pursuant to the Order of Griffith Williams J dated 3 July 2011 (as amended on 5 July 2011, 13 July 2011 and 18 & 19 July 2011) ("the July 2011 Order"):

    5.1. The sums payable to the Claimant under paragraphs 1 and 4 of this Judgment Order shall forthwith be paid to the Claimant out of the sum of $215 million paid into Court;

5.2. The sum of US$6,712,121.21 shall remain in Court pending the completion of the detailed assessment provided for in paragraph 2 of this Judgment Order, and the final quantification of the sum payable by the Defendant to the Claimant by way of costs pursuant to paragraphs 2 and 3 above, alternatively the conclusion of an agreement between the parties finally resolving all issues of costs between the parties;

5.3. The residue of the sum of $215 million paid into Court on 4 August 2011 pursuant to the July 2011 Order following the application of paragraphs 5.1 and 5.2 of this Judgment Order, along with accrued interest on such sum of $215 million, shall be paid out of Court to the Defendant; and

5.4. To the extent that the freezing injunction in the July 2011 Order was not already discharged by the payment into Court on 4 August 2011, it is hereby discharged. For the avoidance of doubt, the Claimant's cross-undertaking in damages pursuant to the July 2011 Order is not discharged.

6. The Defendant's application for permission to appeal is refused.

7. For the purposes of CPR r. 52.4(2)(a), the Defendant must file any Appellant's Notice (including any application for any further or continued stay of execution) in this case at the Court of Appeal by no later than 4.30 pm on Friday, 13th September 2013.

8. The following stays of execution are ordered on the following terms:

8.1. The obligations on the part of the Defendant to make payments to the Claimant pursuant to paragraphs 1 – 4 of this Judgment Order, and the order requiring payment out of Court to the Claimant in paragraph 5.1 of this Judgment Order, shall be stayed. This stay ("the EVP Stay") shall remain in place until (a) 13th September 2013, in the event that the Defendant fails to file an Appellant's Notice at the Court of Appeal by 4.30 pm on that date or (b) in the event that the Defendant does file an Appellant's Notice at the Court of Appeal by 4.30 pm on 13th September 2013, the final resolution by the Court of Appeal of the Defendant's application for permission to appeal and the determination of the

Court of Appeal as to whether to impose any further or continued stay of execution of paragraph 5.1 above (and if so on what terms).

8.2. During the currency of the EVP Stay (and any further or continued stay of paragraph 5.1 above granted by the Court of Appeal):

8.2.1. the sum of US$125,322,741.80 (being US$121,534,863.01 plus £2,500,000 converted to US dollars) shall be paid out of Court to McGuireWoods London LLP, solicitors to the Claimant, to be held by them until further order on the terms of the McGuireWoods Undertaking, such payment being made to the following client account of the Claimant's solicitors, McGuireWoods London LLP:

Account name:	McGuireWoods London LLP US Dollar Client Account
Bank:	The Royal Bank of Scotland
Address:	62/63 Threadneedle Street London, EC2R 8LA
Account no:	GMRCA-USDA
Sort code:	15-10-00
Swift/Bic code:	RBOSGB2L
IBAN:	GB53 RBOS 1663 0000 0864 64

8.2.2. upon giving at least seven days' notice to Edwards Wildman Palmer LLP containing the equivalent account details to those set out at paragraph 8.2.1, these monies may be transferred to another McGuireWoods US dollar client account to be held subject to the McGuireWoods Undertaking.

8.3. The order requiring payment out of Court to the Defendant in paragraph 5.3 of this Judgment Order shall be stayed. The terms of this stay ("the Malabu Stay") are as follows:

8.3.1. The Malabu Stay shall stay in place until:

(a) 13th September 2013, in the event that the Defendant fails to file an Appellant's Notice at the Court of Appeal by 4.30 pm on that date; or,

(b) In the event that the Defendant does file an Appellant's Notice at the Court of Appeal by 4.30 pm on 13th September 2013 and in the event that the Court of Appeal refuses the Defendant permission to appeal, that final refusal of permission to appeal; or,

(c) In the event that the Defendant does file an Appellant's Notice at the Court of Appeal by 4.30 pm on 13th September 2013 and in the event that the Court of Appeal grants the Defendant permission to appeal:

(i) The final determination by the Court of Appeal of any application by the Claimant for permission to cross-appeal and the determination of the Court of Appeal as to whether to impose any further stay of execution (and if so on what terms); or,

(ii) The failure by the Claimant to make an application for permission to cross-appeal in its Respondent's Notice, in accordance with the provisions of CPR r. 52.5.

8.3.2. During the currency of the Malabu Stay (and any further or continued stay of paragraph 5.3 granted by the Court of Appeal):

(a) the sum of US$82,965,136.99, being that part of the sum of $215 million paid into Court on 4 August 2011 pursuant to the July 2011 Order not referred to in paragraph 8.2.1, along with accrued interest on such sum of $215 million, shall remain in Court unless it is paid out in accordance with sub-paragraph (b) immediately below;

(b) upon the Defendant's solicitors, Edwards Wildman Palmer UK LLP, (i) giving at least seven days' notice to the Claimant's solicitors, McGuireWoods London LLP, containing the equivalent account details to those set out in paragraph 8.2.1 above and (ii),

giving an undertaking to the Court that is equivalent in terms to the McGuireWoods Undertaking and which is recorded in a further order of the Court ("the Edwards Wildman Palmer Undertaking"), then upon the making of that further order the monies referred to in sub-paragraph (a) immediately above may be paid out of Court to Edwards Wildman Palmer UK LLP, solicitors to the Defendant, to be held by them until further order on the terms of the Edwards Wildman Palmer Undertaking, such payment being made to the Edwards Wildman Palmer UK LLP client account identified in the notice;

(c) If monies have been paid out of Court to Edwards Wildman Palmer UK LLP pursuant to sub-paragraph (b) immediately above, then, upon giving at least 7 days' notice to McGuireWoods London LLP containing the equivalent account details to those set out at paragraph 8.2.1, those monies may be transferred to another Edwards Wildman Palmer US dollar client account to be held subject to the Edwards Wildman Palmer Undertaking.

8.3.3. Upon the Malabu Stay (or any further or continued stay of paragraph 5.3 granted by the Court of Appeal) ceasing to have effect, such monies as the Court shall by further order direct shall be paid out to the Defendant, and in this regard it is recorded (for the avoidance of doubt) that the sum of US$6,712,121.21 shall remain in Court, even after the EVP Stay or any further or continued stay ordered by the Court of Appeal ceases to have effect, pending final completion of the detailed assessment provided for in paragraph 2 above or the conclusion of an agreement between the parties finally resolving all issues of costs between the parties.

8.4. There be liberty to apply.

9. The sum of £422,000 paid into Court by the Claimant by way of security for costs on 24 May 2012 pursuant to the Order of Hamblen J dated 13th January 2012, along with any accrued interest thereon, shall be paid out of Court forthwith to the Claimant, such

payment being made to the following client account of the Claimant's solicitors, McGuireWoods London LLP:

Account name:	McGuireWoods London LLP Client Account
Bank:	Allied Irish Bank (GB)
Address:	100 Gray's Inn Road London, WC1X 8AL
Account no:	01531629
Sort code:	23-83-98
Swift/Bic code:	AIBKGB2L
IBAN:	GB74AIBK23839801531629

Dated this 18th day of July 2013

Claim No: 2011 Folio 792

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Before Lady Justice Gloster on 17 & 18 July 2013

B E T W E E N:

ENERGY VENTURE PARTNERS LIMITED

Claimant

- and -

MALABU OIL AND GAS LIMITED

Defendant

JUDGMENT ORDER

McGuireWoods London LLP
11 Pilgrim Street
London
EC4V 6RN

Tel: 020 7632 1600
Fax: 020 7632 1638

Solicitors for the Claimant

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Claim No: 2011 Folio 792

Before Mr Justice Eder on 7th March 2014

B E T W E E N:

ENERGY VENTURE PARTNERS LIMITED

Claimant

- and -

MALABU OIL AND GAS LIMITED

Defendant

ORDER

UPON the application of the Claimant made by Application Notice dated 19th December 2013, and the two applications of the Defendant each made by Application Notices dated 7th January 2014 coming on for hearing

AND UPON HEARING Leading Counsel for the Claimant and Leading Counsel for the Defendant

AND UPON reading the documents recorded on the Court file as having been read

IT IS ORDERED THAT:-

The application to vary the Judgment Order

1. The Defendant's application, made by application notice dated 7th January 2014, for variation of paragraph 1 of the Judgment Order of Lady Justice Gloster dated 18th July 2013 ("the Judgment Order") be dismissed.

The application in relation to detailed assessment

2. The Defendant's application, made by application notice dated 7th January 2014, seeking an order requiring the Claimant to commence detailed assessment proceedings, be adjourned.

3. Each party has liberty to apply, following the notification to the parties of the outcome of the applications for permission to appeal to the Court of Appeal listed to be heard on 26th March 2014, to re-list the application on seven days' notice.

The application for payment out of Court of accrued Judgment Act interest

4. The sum of US$6,273,004.09, being the sum that has accrued by way of post-judgment interest at 8% in the period 17th July 2013 to 7th March 2014 (US$6,400,043.58), less a credit of US$127,039.49 representing the sum that has been earned as interest on the sums already paid into the client account of McGuireWoods London LLP pursuant to paragraph 8.2.1 of the Judgment Order in the period 3rd September 2013 to 7th March 2014, shall be paid out of Court to the Claimant's solicitors, McGuireWoods London LLP, to be held by them on the terms of the McGuireWoods Undertaking (as given in the Judgment Order). Such payment out of Court shall be made from the sum of money referred to in paragraph 8.3.2(a) of the Judgment Order. Paragraphs 8.2.1 and 8.3.2(a) of the Judgment Order are varied accordingly.

5. On 7th April 2014, and on the 7th of every month thereafter, until such time as the EVP Stay is lifted, McGuireWoods London LLP shall provide Edwards Wildman Palmer UK LLP with evidence of the interest in fact earned on the sums already held in the client account of McGuireWoods London LLP in the preceding month, and the parties shall then agree in writing (or, in default of agreement, the Court shall determine) the net additional amount of post-judgment interest due to the Claimant under the terms of the Judgment Order for the preceding month (once credit has been given for the interest earned in that month on the sums already held in the client account of McGuireWoods London LLP), and this sum shall be paid out of Court to the Claimant's solicitors, McGuireWoods London LLP, to be held by them on the terms of the McGuireWoods Undertaking (as given in the Judgment Order). Such payment out of Court shall be made from the sum of

money referred to in paragraph 8.3.2(a) of the Judgment Order. Paragraphs 8.2.1 and 8.3.2(a) of the Judgment Order are varied accordingly.

6. The sums paid out of Court pursuant to paragraphs 4 and 5 above shall be paid to the following client account of the Claimant's solicitors, McGuireWoods London LLP:

Account name:	McGuireWoods London LLP US Dollar Client Account
Bank:	The Royal Bank of Scotland
Address:	P O Box 412, 62/63 Threadneedle Street, London EC2R 8LA
Account no:	GMRCA-USDA
Sort code:	15-10-00
Swift/Bic code:	RBOSGB2L
IBAN:	GB53 RBOS 1663 0000 0864 64

7. Each party has liberty to apply in respect of paragraphs 4 to 6 of this Order.

8. For the avoidance of doubt, upon the lifting of the EVP Stay, the McGuireWoods Undertaking (as given in the Judgment Order) automatically ceases, with the result that McGuireWoods London LLP is entitled, without more, to pay the sums that had until the lifting of the EVP Stay been held subject to the McGuireWoods Undertaking out of the McGuireWoods account at their client's direction.

9. The Defendant's application for permission to appeal paragraph 8 of this Order is refused. Any further application for permission to appeal paragraph 8 of this Order, which is final, will be to the Court of Appeal.

Costs

10. The Claimant's costs of the Claimant's application made by application notice dated 19th December 2013 and of the Defendant's application made by application notice dated 7th January 2014, for variation of paragraph 1 of the Judgment Order, are summarily assessed in the amount of £65,000. Such sum shall be paid out of Court from the sum of money referred to in paragraph 8.3.2(a) of the Judgment Order (and paragraph 8.3.2(a) of the Judgment Order is varied accordingly). The parties shall, within 7 days, make a joint request to the Court Funds Office for the payment out of a US Dollar sum equivalent to £65,000, identifying the account to which such sum should be paid.

11. The costs of the Defendant's application, made by application notice dated 7th January 2014, seeking an order requiring the Claimant to commence detailed assessment proceedings, are reserved.

Dated this 7th day of March 2014

Claim No: 2011 Folio 792

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Before Mr Justice Eder on 7th March 2014

B E T W E E N:

ENERGY VENTURE PARTNERS LIMITED

Claimant

- and -

MALABU OIL AND GAS LIMITED

Defendant

ORDER

McGuireWoods London LLP
11 Pilgrim Street
London
EC4V 6RN

Tel: 020 7632 1600
Fax: 020 7632 1638

Solicitors for the Claimant

FORM 269C1

IN THE COURT OF APPEAL, CIVIL DIVISION

REF: (1) A3/2013/2477 + A
(2) A3/2013/2634

(1) ENERGY VENTURES PARTNERS LIMITED –v– MALABU OIL & GAS LIMITED
(2) MALABU OIL & GAS LIMITED ENERGY VENTURES PARTNERS LIMITED

ORDER made by the Rt. Hon. Lord Justice Aikens

On consideration of the appellant's notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal

Decision: granted, refused, adjourned. An order granting permission may limit the issues to be heard or be made subject to conditions.

(1) Application of EVP for an extension of time and PTA. The extension of time is granted. PTA is refused.
(2) Application of Malabu Oil and Gas for PTA. PTA refused.
(3) Stay of execution granted.

Reasons

(1) The judge had, ultimately, to make an assessment of what was a "reasonable sum" for the court to award on the footing that there was an implied agreement. The judge took all relevant factors into account but the applicants disagree with her assessment of their weight and value. It is not arguable that the assessment was so unreasoned or irrational as to be wrong.

(2) The judge made extensive findings of fact in reaching her conclusion that there was an implied contract that EVP would, as a provider of services, receive a reasonable fee in the event that it produced an offer in relation to which it would have been entitled to commission under the terms of the EVP Exclusivity Agreement as varied. It is not arguable that the judge's conclusions of fact, which were, to a very large extent, the result of her assessment of the two key witnesses, Dr Obi and Chief Etete, Were ones that she was not entitled to reach on the facts. The proposed grounds of appeal are all couched as if they are points of law, but they are all issues of fact, in relation to both the first two grounds and the third ground – which expressly accepts it is challenging factual findings. Grounds 4 and 5 are also challenges on the facts, despite the way they are phrased in the Skeleton argument as are the remaining grounds. I am not satisfied that it is arguable that the judge was unreasonable or irrational to arrive at her conclusions of fact and so her conclusions of law on the evidence before her. I reject the application in relation to ground 9 for the same reason as I have rejected the application for PTA of EPV. As for the proposed additional ground concerning the rate of interest on the judgment debt, it is by no means certain that the judge would have ordered the same rate of interest as the contractual rate of 4.5% to apply. As the point was not argued below and as the judge had no evidence on what might be appropriate, it is not just that this point should now be taken for the first time on appeal.

(3) There will be a general stay of execution in case either side wishes to make a renewed application for PTA. If an application is made by either side in time the stay will continue until the renewed application is dealt with. If no application is made in time the stay will lapse.

Information for or directions to the parties

This case falls within the Court of Appeal Mediation Scheme automatic pilot categories*. Yes ☐ No ☐

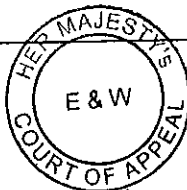
Recommended for mediation Yes ☐ No ☐

If not, please give reason:

Where permission has been granted, or the application adjourned

a) time estimate (excluding judgment) 4~~5 minutes for one side or 1 hour for both~~.

b) any expedition



Signed: [signature]

Date: 09/12/2013

By the Court

Notes

(1) Rule 52.3(6) provides that permission to appeal may be given only where –
  a) the Court considers that the appeal would have a real prospect of success; or
  b) there is some other compelling reason why the appeal should be heard.

(2) Rule 52.3(4) and (5) provide that where the appeal court, without a hearing, refuses permission to appeal that decision may be reconsidered at a hearing, provided that the request for such a hearing is filed in writing within 7 days after service of the notice that permission has been refused. Note the requirement imposed on advocates by paragraph 16(1) of CPR PD 52C.

(3) Where permission to appeal has been granted you must serve the proposed bundle index on every respondent within 7 days of the date of the listing window notification letter and seek to agree the bundle within 21 days of the date of the listing window notification letter (see paragraph 21 of CPR PD 52C).

Case Number: **(1) A3/2013/2477 + A**
(2) A3/2013/2634

DATED 9TH DECEMBER 2013
IN THE COURT OF APPEAL

MALABU OIL AND GAS LIMITED

- and -

ENERGY VENTURE PARTNERS LIMITED

ORDER

Copies to:

Edwards Wildman Palmer Uk Llp
Dx 744
London City
Ref: HM/CB/310771.0001

Mcguire Woods London Llp
Dx 249
London/Chancery Lane
Ref: 5610147-0001

Lower Court Ref: 2011FOLIO792

Her Majesty's
Court of Appeal
2 6 MAR 2014

WEDNESDAY 26TH MARCH 2014

IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

2011FOLIO792

BEFORE LORD JUSTICE LONGMORE

COURT 67
Application No.

A3/2013/2477
A3/2013/2634

B E T W E E N

ENERGY VENTURE PARTNERS LIMITED

CLAIMANT

- and -

MALABU OIL AND GAS LIMITED

DEFENDANT

- and -

B E T W E E N

MALABU OIL AND GAS LIMITED

DEFENDANT

- and -

ENERGY VENTURE PARTNERS LIMITED

CLAIMANT

UPON the Claimant's Appellant's Notice dated 29th August 2013 and the Defendant's Appellant's Notice dated 13th September 2013

AND UPON the parties' renewed oral applications for permission to appeal coming on for hearing

AND UPON HEARING Leading Counsel for the Claimant and Leading Counsel for the Defendant

AND UPON reading the documents recorded on the Court file as having been read

IT IS ORDERED THAT:-

1. The applications for permission to appeal of the Claimant and the Defendant are both refused.

2. The EVP Stay and the Malabu Stay (each as provided for by paragraph 8 of the Judgment Order of Lady Justice Gloster dated 18th July 2013), and (for the avoidance of doubt) the continued stay imposed by paragraph (3) of the Order of Lord Justice Aikens dated 9th December 2013 and sealed by the Court of Appeal on 17th December 2013, are hereby lifted.

[The Court sat from 9:45 to 11.08]

NOTE: Your applications for permission to appeal to this Court have both been refused.

No appeals may be made against this decision to the Supreme Court of the United Kingdom: see *section 54(4) of the Access to Justice Act 1999*

WEDNESDAY 26TH MARCH 2014
IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

ORDER

Copies to:

Queen's Bench Division - Admiralty & Commercial Court
DX 160040
Strand 4

Edwards Wildman Palmer Llp
Dx 744
London City
Ref: JM/LS/310771/0001

Mcguirewoods London Llp
Dx 249
Chancery Lane
Ref: 5610147-0001

*

* This order was drawn by Mr P Wilkins (Associate) to whom all enquiries regarding this order should be made. When communicating with the Court please address correspondence to Mr P Wilkins, Civil Appeals Office, Room E307, Royal Courts of Justice, Strand, London WC2A 2LL (DX 44450 Strand) and quote the Court of Appeal reference number. The Associate's telephone number is 020 7947 7381