

Michaelmas Term
[2026] UKPC 43
Privy Council Appeal No 0039 of 2025

JUDGMENT

Christopher J. Kelshall (in his capacity as the liquidator of ArcelorMittal Point Lisas Limited - in voluntary Liquidation) (Respondent) *v* The National Gas Company of Trinidad and Tobago Limited (Appellant) (Trinidad and Tobago)

From the Court of Appeal of the Republic of Trinidad and Tobago

before

Lord Briggs
Lord Stephens
Lady Rose
Lady Simler
Lord Doherty

JUDGMENT GIVEN ON
25 November 2026

Heard on 20 October 2026

Appellant
Tom Weisselberg KC
Daniel Cashman
(Instructed by Alexander, Jeremie & Co.)

Respondent
Martin Daly SC
Vanessa Gopaul
(Instructed by Charles Russell Speechlys LLP)

LADY ROSE:

1. Introduction

1. ArcelorMittal Point Lisas Ltd ("ArcelorMittal") formerly owned and operated two iron and steel plants at Point Lisas, Trinidad. The appellant ("National Gas") is a diversified, state-owned national gas company based in Trinidad and Tobago. ArcelorMittal has been in voluntary liquidation since 5 April 2016 and the respondent is the liquidator. On 17 March 2016, National Gas wrote to ArcelorMittal enclosing an invoice for US$12,635,661.06, which it said was a debt due and owing pursuant to obligations to which ArcelorMittal was subject under two contracts for the supply of natural gas to its smelting plants. National Gas asserted that both contracts contained a take or pay obligation according to which, broadly, ArcelorMittal had agreed to pay for at least 80% of a specified amount of natural gas in each year of supply; the Annual Contract Quantity or ACQ. National Gas had calculated that in the contract year 2015, ArcelorMittal had not taken sufficient gas, creating what the contract called "Deficiency Gas", that is the difference in the amount of gas actually taken (and paid for) by ArcelorMittal at both plants over the course of the year and the 80% that they were required to pay for, even though they had not in fact taken it.

2. On 14 September 2017, the respondent wrote to National Gas rejecting the proof of debt. On 9 October 2017, National Gas brought proceedings by way of originating summons under Rule 89 of the Companies Winding Up Rules which are set out in the Second Schedule to the Companies Act Chap 81:01 ("the Winding Up Rules").

3. In a judgment dated 1 November 2018, the High Court (Boodoosingh J) found that the respondent had been wrong to reject National Gas' proof of debt. On 4 October 2019 he handed down a short ruling in which he ordered that each party should bear its own costs of the proceedings. The respondent appealed and, in a judgment dated 26 July 2024, the Court of Appeal (Bereaux, Mohammed and Rajkumar JJA) allowed his appeal and held that he had been entitled to reject the debt. The Court of Appeal held that on the true construction of the relevant articles in the supply contracts, National Gas had to prove that the ACQ of gas had been made "available" by National Gas and tendered for delivery to ArcelorMittal before it could rely on the take or pay obligation to charge ArcelorMittal for gas it had not taken. National Gas had not, the Court of Appeal held, established that the gas had been available and tendered to supply at the steel plants and so was not in a position to insist on ArcelorMittal paying for the Deficiency Gas. The Court of Appeal held, further, that the evidence that National Gas had put forward to the respondent as proof of the debt was inadequate. As to costs, the Court of Appeal held that in circumstances where National Gas had lost, it was not necessary to determine whether Rule 79 of the Winding Up Rules applied.

4. Before the first instance court and the Court of Appeal there was a dispute between the parties about whether the take or pay obligation was incorporated in the contractual provisions operating between the parties at the relevant time. Boodoosingh J held that the take or pay obligation was so incorporated and that finding was upheld by the Court of Appeal. There is no appeal against that finding before the Board. The issues in the appeal before the Board are therefore:

(i) Issue 1: whether on their true construction, the contracts required National Gas to show that it had made gas available to ArcelorMittal before it could invoke the take or pay obligation in respect of 80% of the Annual Contract Quantity of gas.

(ii) Issue 2: if there is such an availability requirement, whether the respondent had been entitled to reject National Gas' proof in the liquidation because National Gas had failed to provide sufficient evidence to support the assertion that the gas had been available.

(iii) Issue 3: if National Gas was entitled to prove the debt in the liquidation so that the respondent had been wrong to reject the proof, whether National Gas was entitled to recover the costs of the proceedings.

2. The gas supply contracts and National Gas' claim under the take or pay obligation

5. The two contracts giving rise to this dispute have been referred to by the parties as the "Iron and Steel Complex Contract" or "ISCC" and the "Megamod Contract". Each contract was initially for a 15 year term with an option to extend and each provided for the supply of natural gas to a plant operated by ArcelorMittal at Point Lisas. The contracts referred to the "Daily Contract Quantity" of gas or DCQ and the Annual Contract Quantity or ACQ. In article 2.2 of the ISCC, the DCQ was defined as 37 MMSCF and the ACQ was defined as 12,500 MMSCF.[1] The volume of the DCQ in the Megamod Contract was defined in article 1.1.5 as the daily quantity of Gas that ArcelorMittal required from time to time during the Basic Supply Period (as defined) and the ACQ was a multiple of that.

6. Article 2.1 of both contracts is key to the consideration of this appeal. It provided:

> "Subject to the other provisions of this Contract, Seller agrees to deliver to Buyer at the Delivery Point established pursuant

[1] MMSCF stands for million standard cubic feet which is a standard unit of measurement used in the oil and gas industry to quantify a volume of natural gas.

> to Section 4.1 hereof, and Buyer, provided that Gas is available and tendered for delivery by Seller, agrees to take and purchase the ACQ during each Contract Year of the term hereof."

7. Article 3.1 of the ISCC, headed "Delivery and Receipt of Gas", provided:

> "Seller shall use its best efforts to acquire and maintain supplies of Gas adequate to supply Buyer's requirements under this Contract as well as other obligations to third parties so as not to adversely affect or detract from the adequacy of service to Buyer; provided however, that Seller shall not be obligated to purchase Gas for resale to Buyer at a price which Seller considers uneconomic unless Buyer is willing to pay the additional cost of such Gas."

8. Article 3.1 of the Megamod Contract appears rather more demanding so far as National Gas is concerned. It states that the Seller represents and warrants that it shall contract for the purchase, from producers of Gas, of supplies of gas adequate to supply the Buyer's requirements under the contract "so as not to adversely affect or detract from the adequacy of service to Buyer". Conversely, by article 3.3 of the Megamod Contract, ArcelorMittal acknowledged the importance to National Gas of steady, continuous gas usage once the Buyer's plant was in operation.

9. A take or pay obligation was included in both contracts and it is agreed that the applicable versions are as set out in amendments that were made to the contracts in January 2007. As Rix LJ said in his judgment in the Court of Appeal of England and Wales in *Port of Tilbury (London) Ltd v Stora Enso Transport & Distribution Ltd* [2009] EWCA Civ 16, [2009] 1 Lloyd's Rep 391, there is "nothing absurd" about a take or pay minimum obligation: para 28:

> "Such provisions are common, and they are particularly used where, as here, one party has to expend significant sums of money for the purposes of the contract and needs to look to the contract for a secure annual income stream which will pay the ongoing financial cost of its investment."

10. The relevant articles are article 2.4 of the ISCC and article 2.7 of the Megamod Contract. Article 2.4 of the ISCC provided:

> "… if by the end of any Contract Year, Buyer has purchased and received less than eighty percent (80%) of the total ACQ

> under the Iron and Steel Complex Contract and the Megamod Contract collectively, on an MMBTU[2] basis, then Buyer shall nevertheless pay Seller for the difference between the quantity of Gas actually purchased and received and eighty percent (80%) of the total ACQ under both the Iron and Steel Complex Contract and the Megamod Contract collectively, on an MMBTU basis (hereinafter called 'Deficiency Gas') less (i) Gas not taken or delivered due to reasons of force majeure and (ii) Gas not delivered by reason of any act or omission of Seller."

11. Article 2.7 of the Megamod Contract, as substituted by the amendment with effect from 1 January 2007, was in the same terms.

12. The effect of the take or pay obligation was mitigated by article 2.5 of the ISCC which allowed for the Buyer to receive "Make-up Gas". In any year in which the Buyer had taken all its ACQ, it could receive in addition a quantity of gas equivalent to the Deficiency Gas it had previously had to pay for under the take or pay obligation. If it took Make-up Gas, it only had to pay the difference between the price paid for the Deficiency Gas and the price in effect at the time the Make-up Gas was received. Make-up Gas had to be claimed, however, over the five years succeeding the payment for Deficiency Gas. Article 2.8 of the Megamod Contract was to the same effect, although ArcelorMittal could benefit from taking Make-up Gas once it had taken 90% of the ACQ in a given year. As Boodoosingh J commented in his judgment (para 89) this Make-up Gas arrangement allowed for ArcelorMittal not to be left out of pocket for the Deficiency Gas it did not receive since it could take the gas at a later stage.

13. The reference in the contracts to "reasons of force majeure" was elaborated upon by article 14 of the ISCC and article 16 of the Megamod Contract. Article 14.1 of the ISCC provided that no failure to comply with the terms and conditions of the contract would give rise to any claim against the other party if the failure arose from any cause or causes reasonably beyond the control of such party. Article 14.2 then contained a list of causes deemed to be reasonably beyond the control of the parties, including strikes, riots, Acts of God, earthquakes, accidents to machinery or pipeline and "shortages caused by the failure of the Seller's suppliers to deliver Gas to Seller". However, the force majeure event did not relieve the party from its obligations after the expiration of a reasonable period within which the use of due diligence could have remedied the situation: article 14.3. Article 16 of the Megamod Contract was in broadly the same terms.

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[2] MMBTU stands for Million British Thermal Unit. It is a unit of measurement of natural gas; one Btu is the amount of heat energy required to raise the temperature of one pound of water by 1°F.

14. National Gas' letter to ArcelorMittal of 17 March 2016 referred to the two contracts and to the fact that ArcelorMittal had ceased operations at the ISSC plant on 16 October 2015 and at its Megamod plant on 7 October 2015. It referred to ArcelorMittal's volume obligation under article 2 of both contracts to take 80% of the ACQ but recognised that due to force majeure events experienced by National Gas, the ACQ and hence the take or pay obligation should be reduced. The calculation of the debt of US$12,635,661.06 was set out in an attachment to National Gas' letter to ArcelorMittal of 17 March 2016:

(i) It set out first the DCQs for the ISCC and Megamod plants and the combined ACQs which, aggregated for both plants, was 26,331,455.067 MMBtu.

(ii) 80% of that amount, namely the take or pay volume, was 21,065,164.054 MMBtu.

(iii) The ACQ was then reduced by an amount described as "Cutback" which corresponded to the shortfall that National Gas accepted was attributable to its own failures of supply which had to be deducted as required by the take or pay obligation.

(iv) The adjusted ACQ was then calculated and the 80% take or pay obligation applied to that adjusted figure giving an adjusted take or pay volume of 19,033,010.544 MMBtu.

(v) The actual consumption of gas by ArcelorMittal in 2015 was stated to be 13,121,037.000 MMBtu leaving a deficiency of 5,911,973.544 MMBtu.

(vi) The 2015 gas price of US$2.1373 per MMBtu was applied to arrive at the amount due of US$12,635,661.06 for the contract year 2015.

15. The respondent replied on 14 September 2017 rejecting the debt in its entirety. He gave various reasons for his rejection of the proof. He disputed that the take or pay obligation had been incorporated into the ongoing contractual arrangements between the parties once the initial contracts had expired. He complained that when gas supply had been curtailed because of force majeure events, National Gas had not dealt in an equitable manner as between its various customers. He did not raise any particular issue with the amounts included in the calculation. He did cite article 2.1 and said "It is the buyer's obligation to take and purchase gas that is conditional on the availability of supply, and not the seller's obligation to supply."

3. Issue 1: the proper interpretation of the take or pay obligation

16. There was no dispute between the parties as to the principles which govern the interpretation of contracts. As the Board noted recently in *National Commercial Bank Jamaica Ltd v NCB Staff Association* [2024] UKPC 2, para 32:

> "… the court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement, having regard to the contract as a whole. Secondly, in so doing the court has regard to the factual background known to the parties at or before the date of the contract, but excluding evidence of prior negotiations. Thirdly, where there are rival meanings of the relevant contractual provision considered in its context, the court can give weight to the implications of the rival meanings, by considering which construction is more consistent with business common sense. But, fourthly, the court does not depart from an interpretation of the natural language of words just because the contractual arrangement has proven to be a bad bargain for one of the parties. Fifthly, the weight to be attached to the precise words used in the contract will vary depending upon the sophistication of the contractual drafting and whether skilled professionals have been involved in creating the contract. But, sixthly, even where there has been a process of sophisticated professional drafting, the court must be alive to the possibility that the text of a provision, which has been accepted to conclude a contract, is a compromise between parties with conflicting aims or the result of a failure of communication between the parties. Where that is so, the court may give more weight to the factual matrix or the purpose of similar provisions in contracts of the same type. Finally, events and the actions of the parties after the conclusion of the contract are not relevant to its interpretation. The court has regard to the facts and circumstances which existed at the time the contract was made and which were known or reasonably available to both parties."

17. In the High Court, Boodoosingh J concluded first that the take or pay obligation had been incorporated into the agreements in force between the parties. He then said at para 102 that ArcelorMittal had submitted that National Gas had not demonstrated by evidence that it had the ability to supply the gas to meet 80% of the ACQ. Accordingly, it had been submitted that National Gas could not call on ArcelorMittal to comply with the take or pay obligation. He found, however, that the evidence did show that ArcelorMittal had not taken the ACQ for 2015 and Deficiency Gas was therefore owed. He reversed the respondent's rejection of this debt.

18. The Court of Appeal judgment was given on 26 July 2024 by Rajkumar JA with whom Mohammed and Bereaux JJA agreed. Rajkumar JA also concluded that the take or pay obligation was incorporated into the arrangements between the parties: para 49. He concluded that the proper construction of article 2.4 read with article 2.1 was that the buyer was only required to take and purchase the ACQ if the gas was available and tendered for delivery by the seller: para 53:

> "The Buyer's agreement to take and purchase the ACQ is expressly conditional upon the gas being available and tendered for delivery by the Seller. Even the term that the Buyer agrees to take ACQ contemplates that there is gas to take. It is only upon the gas being available and tendered for delivery by the Seller, that the Buyer is required to purchase the ACQ of the gas and if the gas is not available and tendered for delivery then the Buyer cannot take it. That in fact is the plain meaning of the clause. The language is clear and unambiguous. The Buyer agreement to take 80% of the ACQ (or pay for it if not taken) is conditional upon the ACQ of Gas being available and tendered for delivery."

19. He went on to decide that the burden of proving that the ACQ of gas was available and tendered for delivery was upon National Gas. However, National Gas had "simply tendered a calculation" and there was no evidence that the figure in its claim as distinct from any other figure, was available or tendered for delivery. ArcelorMittal's appeal was therefore allowed.

The Board's analysis of the take or pay obligation

20. The Board has concluded that the Court of Appeal was wrong to interpret article 2.1 as setting a condition precedent — namely that National Gas must prove that the ACQ of gas was "available" — before National Gas was entitled to impose the take or pay obligation on ArcelorMittal. The Court of Appeal placed too much weight on the proviso in article 2.1 that the Buyer agrees to take and purchase the ACQ "provided that Gas is available and tendered for delivery by the Seller". Article 2.1 opens with the statement that it is "subject to the other provisions of this Contract". This shows clearly what is in any event always the case, that the article must be interpreted having regard to the more detailed provisions that follow. Those provisions set out precisely what the parties' respective obligations are.

21. Article 2.1 states that Seller agrees to deliver to Buyer the ACQ during each Contract Year. That cannot have been intended to impose an absolute obligation on National Gas to deliver the ACQ because that would be inconsistent with article 3 of the

ISCC, set out earlier. The obligation on National Gas under that Contract was not absolute as might appear taking article 2.1 in isolation but was a "best efforts" obligation to acquire and maintain supplies. It was expressly tempered by National Gas being excused supply if the price was uneconomic, unless ArcelorMittal agreed to pay the additional cost. Although the obligation on National Gas to acquire enough gas to supply ArcelorMittal's requirements in article 3.1 of the Megamod Contract was different, it has not been suggested that the identical wording of article 2.1 can impose different obligations in the different contracts. In any event, in both contracts the effect of article 2.1 must be read consistently with the force majeure provisions in article 14 of the ISCC and article 16 of the Megamod Contract, as described earlier. Those provisions are also inconsistent with the supposedly absolute obligation identified by the Court of Appeal as imposed on National Gas to make the ACQ available.

22. Conversely, the apparently absolute obligation imposed by article 2.1 on ArcelorMittal to purchase the ACQ during each contract year was significantly diluted by the fact that the take or pay obligation in both contracts applied only to 80% not 100% of the ACQ. Even the reduced 80% obligation is further tempered by the adjustments referred to at the end of article 2.4, namely to make deductions from the ACQ to reflect gas not taken or delivered due to force majeure events (affecting either party) or by reason of any act or omission of National Gas. If ArcelorMittal only took, for example, 87% of the combined ACQ under the two contracts, it needed only to pay for that amount. National Gas has not, and could not have, relied on article 2.1 to override the take or pay obligation so as to require ArcelorMittal to pay for more gas than it wanted or needed, provided ArcelorMittal took or paid for 80% of the appropriately adjusted ACQ.

23. The Court of Appeal's imposition of an obligation on National Gas to make the ACQ gas "available" therefore cuts across the other provisions of the contract as negotiated by the parties.

24. Further, the Board accepts National Gas' submission that if the parties had intended to impose a requirement on National Gas to prove that it had made gas "available" before ArcelorMittal was obliged to pay for 80% of the ACQ, they would have needed to spell out what precisely that requirement comprised. Without any such indication in the contract, it is very unclear what National Gas has to show, even assuming that National Gas has the technical apparatus to establish what volume of gas was "available" at which plant on any given day. Does National Gas have to show that it had 100% of the DCQ for both plants available on every day of the contract year before it can hold ArcelorMittal to the obligation to pay for 80% of the combined ACQ? That would appear to be very unlikely, particularly since the ACQ does not appear to be 365 times the volume of the DCQ. If the requirement is only to show that it had 80% of the gas available, it is difficult to see how that 80% figure can be read across from the take or pay obligation into article 2.1. Further, it is not at all clear whether the condition precedent identified by the Court of Appeal relates to 100% or 80% of the DCQ on each day or 80% of the DCQ averaged over the year. The difficulties are compounded by the fact that the

take or pay obligation is applied to an aggregation of the gas taken and paid for across the two plants. The contracts do not spell out whether additional gas shown to be available at one plant can count towards National Gas fulfilling the condition precedent so that it could then enforce the 80% take or pay obligation in respect of a deficiency arising in the gas in fact taken and paid for at the other plant.

25. The fact that such issues are not addressed anywhere in the two contracts and appear very difficult to resolve shows, in the Board's judgment, that the Court of Appeal's construction of the contract must be wrong. Once the wording of article 2.1 is construed in the context of the other relevant provisions of the contract rather than in isolation, that reading of the contract term cannot be what the parties intended.

26. The Board therefore holds that there is no obligation imposed on National Gas by article 2.1 to establish that it had gas available and tendered for delivery before it was entitled to insist on ArcelorMittal taking and paying for 80% of the combined ACQ. Of course, in accordance with the terms of article 2.4 and 2.7 themselves, if only limited gas is available either because of force majeure events or because of an act or omission by National Gas, ArcelorMittal's obligation to pay is reduced to that extent. That is accepted by National Gas and is reflected in the "Cutback" figure in the calculation provided to the respondent. That is how the non-availability of gas is dealt with by the terms agreed by the parties.

4. Issue 2: the standard of proof of the debt

27. Section 434(1) of the Companies Act provides for admissibility of proofs in a winding up. It states that all claims against the company "shall be admissible to proof against the company", a "just estimate" being made so far as possible of the value of debts which do not bear a certain value. Rule 74 of the Winding Up Rules provides that a debt may be proved in any winding up by delivering or sending through the post to the liquidator an affidavit verifying the debt. Rule 76 provides that an affidavit proving a debt "shall contain or refer to a statement of account showing the particulars of the debt". Rule 88 provides:

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

28. According to Rule 89, if a creditor is dissatisfied with the decision of the liquidator in respect of a proof, the court may, on the application of the creditor, reverse or vary the

decision. Further, the creditor must bring his notice of application within 21 days from the date of service of the notice of rejection.

29. Since the Board has concluded that National Gas did not have to establish that it had gas "available" to supply to ArcelorMittal before invoking the take or pay obligation, the question of what evidence would have been sufficient to establish that availability does not arise. The Board, however, considers that the Court of Appeal erred in what it said on this issue. Rajkumar JA stated in his judgment that a claim for debt "requires strict proof": para 56. He referred to the principles summarised in *Gordon Winter v NH International* Civil Appeal No P002/2018 at para 236 that a claim for special damage needs to be pleaded, particularised and strictly proved.

30. Rajkumar JA said, further, that if this had been a claim before the High Court, National Gas would have been required to plead and strictly prove that the claimed amount "which is akin to a claim for special damages, was actually due and owing to it". A claim of this size could not simply be based on a letter setting out a computed ACQ with no explanation or supporting documentation for the computed figure. In those circumstances, the judge said, the respondent could not be faulted for denying the demand. He went on: para 65:

> "The greater the quantum involved the greater the obligation upon the court to confirm that the amount claimed is actually owed. This is especially so in a case where the party making the claim would be expected to have records that could establish the availability of the ACQ and the fact that it was tendered for delivery."

31. The Board disagrees with this analysis. A proof of debt is not akin to a claim for special damages. The value of the debt claimed whether large or small does not, as a matter of law or procedure, affect the standard to which it must be proved, though a liquidator may well choose to devote more time to examining the validity of larger claims. The letter from National Gas contained a readily comprehensible calculation showing how they had arrived at the sum claimed. The accompanying letter identified the relevant terms of the contract and explained how the relevant terms and conditions operated in the events which happened. National Gas said at the end of the letter that if the respondent needed further clarification or wished to discuss the matter, he should not hesitate to contact them. That was the point at which the respondent could have queried the computation of the different figures that made up the calculation, whether the query related to the Cutback figure, the dollar price or the amount of gas taken.

32. The information necessary to check the figures was not solely in the hands of National Gas since the respondent presumably has access to ArcelorMittal's records as to

its daily gas consumption and the notifications it received of force majeure events affecting supply. There was nothing inherently inadequate or implausible about the claim put forward by a key supplier to the ArcelorMittal business. In the Board's judgment, the particulars given in the March 2016 letter were sufficient to form the basis of a discussion or request for further clarification, if the respondent needed that in order properly to assess the claim.

5. Issue 3: the applicable rules as to costs

33. Ground 3 of National Gas' appeal concerned the appropriate regime for costs. Rule 79 of the Winding Up Rules provides that a creditor shall bear the cost of proving his debt unless the Court otherwise orders. Boodoosingh J made no order as to the costs of the proceedings before him. The Board was told that although the main issue now before the Board was decided by him in favour of National Gas, a number of issues that were not raised on further appeal were determined in favour of ArcelorMittal and the judge's decision may have reflected that. National Gas does not ask the Board to disturb that exercise of Boodoosingh J's discretion as to costs.

34. The Court of Appeal dealt with costs in a separate judgment on 14 October 2024. That judgment referred to submissions by the parties as to whether or not Rule 79 of the Winding Up Rules applied to the exclusion of the Civil Proceedings Rules costs regime based on CPR 2.2(3)(a). Given that the Court of Appeal allowed the respondent's appeal, there was no question of National Gas recovering its costs from the funds of ArcelorMittal or from the respondent. By order dated 14 October 2024 the Court of Appeal set aside the costs order of the High Court; National Gas was ordered to pay the respondent's costs in respect of the High Court proceedings and the respondent's costs of the appeal quantified at two-thirds of the costs below.

35. The Board has concluded that National Gas' appeal succeeds, so it is necessary to decide whether Rule 79 applies to all proceedings in which a creditor seeks to prove its debt or whether, once the matter is brought before the court, the force of Rule 79 is spent.

36. The Board agrees with National Gas' submission that once there is an appeal against a rejection of a proof of debt by a liquidator, a separate Chapter of the Winding Up Rules becomes relevant. At that point the parties are litigants engaged in adversarial proceedings and there is no reason why costs should not follow the event in the ordinary course. There are clear indications in the wider insolvency regime which indicate that Rule 79 has no application here. Section 432 of the Companies Act provides that all costs, charges and expenses incurred in the winding up are payable out of the assets of the company. Further, the Winding Up Rules are similar in this regard to the Insolvency Rules 1986 (SI 1986/1925) of England and Wales. Those rules were considered in *Fielding v Hunt* [2017] EWHC 406 (Ch) where the judge rejected the liquidator's submission that

the requirement that the creditor bear the costs of proof applied equally to costs of any appeal: see para 22. He ordered that 80% of the creditor's costs of the appeal should be regarded as expenses of the liquidation. That judgment referred to the earlier authority of *In re National Wholemeal Bread and Biscuit Company* [1892] 2 Ch 457 where the report records that "[f]ollowing the practice in bankruptcy" it was ordered that the applicant's costs of the application but not of the proof should be paid out of the assets of the company.

6. Disposal

37. National Gas submitted that if the Board found in its favour that there was no requirement under article 2.1 for it to show the gas had been available, then the judgment of the Court of Appeal should be set aside and there was no need to remit the matter to a lower court. The respondent submitted that in the event that the Court of Appeal's decision was overturned, the matter should be remitted to a lower court for him to have an opportunity to challenge elements of the calculation of the amount of Deficiency Gas.

38. In the Board's judgment, the moment for any such challenge by the respondent to the computation of the debt has long since passed. The Board therefore sets aside the Court of Appeal's order and orders that the liquidator's decision on the debt in dispute is reversed. The parties should liaise to finalise the terms of an appropriate order allowing the appeal and dealing with consequential matters on the basis that Rule 79 does not apply to the court proceedings culminating in this judgment.