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The 'Top 5' on the 'Caselaw Jukebox' at the OGUK Conference

For those of you who didn't manage to attend the recent OGUK Annual Conference, here are summaries of the 'Top 5' cases selected by conference delegates to be discussed by the panel during the 'Case Law Jukebox':

Apache UK Investment Ltd v Esso Exploration and Production UK Ltd [2021] 4 WLR 85

The case centred around the extent of the contractual decommissioning obligations which Esso owed to Apache, arising from a sale and purchase agreement and obligations under Bilateral Decommissioning Security Agreements (BDSAs).

The Court decided that (1) "Relevant Year" meant the following year, as was apparent from the wording (and consistent with the practice with which most O&G projects lawyers are familiar) (2) the existing s.29 Notices served by the Secretary of State under the Petroleum Act 1998 did not cover "offshore installations" that didn't yet exist or were not in contemplation at the time they were issued.

Had the decision gone the other way, there could have been some very serious ramifications for the sector. The case related to securities under BDSAs, but when talking about field wide DSAs (which are more the norm these days), then everything will be in play because the security holders will often be a mixture of second tier participants and licensees, not necessarily all holding identical s29 notices. So they need carefully scrutinised when SPAs are being considered.

Apache North Sea Ltd v Ineos FPS Limited [2020] EWHC 2081 (Comm)

This case related to a TPA (Transportation and Processing Agreement) for hydrocarbons through the Forties Pipeline System (FPS) and the question of what constituted acting unreasonably in withholding consent. In this case, the Court concluded that Apache acted unreasonably and on a "non-contractual basis" in essentially demanding payment at an increased base tariff; and the terms (including the price) by which Ineos acquired the FPS from BPEOC and its knowledge at that time were irrelevant to their decision-making.

The Court was clear that the contractual provisions should be interpreted applying a narrow construction based on the wording of the contracts themselves, considered in the context of the contract as a whole, (applying the well-known line of authorities including Wood –v- Capita and Arnold –v- Britten); and guidance could be found from landlord and tenant cases on unreasonable withholding of consent, with emphasis being on the grounds of refusal not being extraneous or disassociated from the purpose of the contract, this being a matter of fact for the Court to determine in each case; and what is reasonable "should be given a broad, common sense meaning in this context" and the Court should not be prescriptive in what is or is not reasonable; and it will construe contracts in a way which avoids unexpected commercial consequences.

Seadrill Ghana Operations Limited V Tullow Ghana Limited [2018] EWHC 1640 (Comm)

This was a claim by a drilling rig owner (Seadrill) for payment of sums due under a contract for hire of a rig by Tullow. The case centred on interpretation and application of the force majeure provisions; two potential causes of force majeure; and whether Tullow used their reasonable endeavours to avoid or mitigate force majeure.

The Court found in favour of Seadrill, with the starting point being the wording of the contract; the Court determined one of the causes (the drilling moratorium enforced upon them by the Government of Ghana, in implementation of a Provisional Measures Order (PMO) from an arbitration) was a force majeure event, as such events were specified in a list within the contract; but the Government's refusal to approve a further Plan of Development for the Greater Jubilee field, was not. The Court also concluded Tullow failed to exercise reasonable endeavours to avoid or mitigate force majeure; not assisted by evidence which came out that Tullow did not change its approach as a result of the PMO; and there was an internal project (or "understanding") within senior management called "Project Voldemort" (with all relevant negative connotations) to use the force majeure provisions to terminate the drilling contract and mitigate their costs; and acting in its own interests did not meet its obligations to Seadrill.

R v OGA [2020] EWHC 2615 (Admin)

This was an application to the Court by a member of the public for judicial review against the Oil & Gas Authority for its decision to provide a letter of comfort that it was not minded to exercise its powers to any production licenses or seek further changes of control relating to the sale of the share capital in Third Energy Onshore to a newly incorporated company, Third Energy Gas (TEG), whose directors were said to have significant experience operating in the sector in the former Soviet Union.

Refusing the Application, the Court considered 4 grounds of review:

(1) The OGA had not misinterpreted the application of model clause 40 (which was inapplicable, as a change of control of the licensee – in this case an acquisition of the parent – did not involve the licensee doing anything) and model clause 41 (a power to require a further change of control or to revoke the license, in certain circumstances – in this case not exercised, as the OGA carried out a detailed Internal Submission, including detailed lists of "advantages" and "risks"). In doing so, it said the wording of the clauses was clear, there was no doubt of the wording, and it refused to "write in" wording which was not there. Nor was it willing to lift or even "take a peek at most" behind the corporate veil.

(2) The OGA had indeed assessed the financial capability of both parties, in particular, the risk that TEG would be unable to pay for decommissioning activity when it fell due.

(3) The OGA had considered all aspects of the financial capability assessment, including the fact that TEG was a newly incorporated applicant (with only £10 share capital), but its directors claimed significant experience operating in the sector in the former Soviet Union.

(4) The fact that the OGA considered there was a foreseeable risk TEG would not be able to pay for decommissioning activity when it fell due, did not amount to a failure to take account of the OGA's responsibility under s.8 of the Energy Act 2016 to minimise public expenditure.

A key conclusion from this case is the difference between offshore and onshore. There are no equivalents of Section 29 in onshore, so exiting licensees can get a clean break on assignment, which makes the system more desirable. Because the OGA considered all of the relevant matters, the application for Judicial Review failed.

Taqa Bratani Ltd & Others v Rockrose [2020] EWHC 58 (Comm)

TAQA and others, parties to a Joint Operating Agreement (JOA), sought to argue that they had an express, unqualified right to terminate Rockrose as Operator. Rockrose sought to argue implied terms.

The Court decided that the wording of the provisions of the JOA was clear and unambiguous, providing clarity and reassurance that parties can act in their own interests where there are absolute unqualified rights (as was the case here). In doing so, the Court indicated it was clear the parties would have added in wording, if they had intended there to be qualifications; there was no need to imply terms for business efficacy; and therefore refused to qualify the manner in which the non-operator parties could exercise their rights by concepts of good faith and the absence of arbitrariness, capriciousness, perversity and irrationality (as previously applied in Braganza v BP Shipping); or similar qualifications relating to mutual trust and loyalty which were said to exist in long term "relational contracts" such as the JOA. The Court also refused attempts to argue that the MER (Maximum Economic Recovery) UK Strategy was applicable, as the JOA preceded that coming into being in 2016 and the parties could not be said to have agreed to have their rights qualified in that respect.

Thank you

If you would like to discuss any issues arising, please contact Iain Clark or Calum Crighton as follows:

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