

INSIGHTS

## JOAs: “Good Faith” and the implied qualification of express contractual powers

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There have been a number of recent English Court decisions concerning implied obligations of good faith. In May 2019, we considered the potential impact of those decisions on joint operating agreements in the oil & gas industry (“JOAs”) (see our previous article [here](#)). We anticipated that arguments on implied obligations of good faith would become more of a focus in JOA disputes, but noted that the English Courts had not (at that time) considered the issue specifically in the JOA context.

The English High Court has recently provided further guidance on this issue in [TAQA Bratani Limited and others v Rockrose \[2020\] EWHC 58](#). Specifically, it has considered whether the exercise of certain express powers contained in the JOAs in question were impliedly qualified by an obligation of good faith and also an obligation not to act capriciously, arbitrarily or irrationally.

As with the majority of such cases, the decision turns on its facts and the wording of the JOAs in question. However, given the relatively small number of English Court decisions concerning JOAs, this judgment provides useful guidance to operators and non-operators alike on the English law approach to the interpretation of JOAs and the circumstances in which implied duties and obligations may arise.

The key points arising from the decision are:

1. JOA's have no special status that requires them to be treated differently. The usual rules of contractual interpretation apply.
2. Care must be exercised when considering implying terms into "*a sophisticated and professionally drawn and negotiated agreement between well-resourced parties*", such as a JOA. The parties' freedom to contract on the terms they choose is of paramount importance.
3. Although JOAs are "*at least arguably*" 'relational contracts', that does not automatically result in an implied duty of good faith arising. The usual test for implying terms into a contract applies.

## CASE SUMMARY

### Who were the parties?

The JOAs at the heart of this case concern the Brae Fields in the UK North Sea.<sup>[1]</sup> The parties to the JOA are TAQA, JX Nippon, Spirit Energy, and RockRose.

RockRose acquired Marathon Oil UK LLC (the Operator entity under the JOAs for the Brae Fields) in 2019, and renamed it RockRose UKCS8 LLC. By doing so, RockRose effectively acquired the role of Operator.

### What was the dispute about?

Following RockRose's acquisition of Marathon Oil UK LLC, the other parties voted to terminate its appointment as Operator. It was not disputed that they followed the correct contractual procedure. However, RockRose nevertheless claimed that the termination was invalid and of no effect.

Taking on the role of operator under a JOA comes with responsibility and obligations, but it can also be seen as valuable because operators usually have a higher level of influence and control than non-operators. This is one of the reasons that the acquisition of an incumbent operator (in particular by a company or group with little or no experience acting as an operator) frequently give rise to disputes. In fact, this is not the first time that the Brae field owners have objected to a new operator taking control following a disposal.<sup>[2]</sup>

### What were the key issues for the Court to decide?

The High Court had to decide whether the termination of RockRose's appointment as Operator was valid and effective.

RockRose argued that the power to terminate which was purportedly exercised by the non-operating parties was impliedly qualified by:

1. concepts of good faith, and genuineness and the absence of arbitrariness, capriciousness, perversity and irrationality (the "**Braganza Duty**"<sup>[3]</sup>); and

2. the mutual trust, confidence and loyalty said to arise in 'relational contracts', such as long term joint venture and similar agreements (the "**Implied Duty of Good Faith**").

The non-operating parties' position was that the power to terminate was an express and unqualified one. They argued that:

1. the exercise of the power to terminate involved no exercise of contractual discretion, with the result that no Braganza Duty arose; and
2. 'relational contracts' are no different to other contracts, meaning that the Implied Duty of Good Faith was subject to the usual test from the implication of terms under English law and was not applicable in this case.

#### **What was the result?**

The High Court found in favour of the non-operating parties, concluding that the power to terminate the Operator's appointment was an unqualified and absolute right. It concluded that no Braganza Duty nor Implied Duty of Good Faith applied.

In reaching its decision, the High Court confirmed:-

1. The general principles applicable to the construction of contracts governed by English law apply to the construction of JOAs. [\[4\]](#) It also highlighted the importance of the language used by the parties.
2. That care must be exercised when considering implying terms into "*a sophisticated and professionally drawn and negotiated agreement between well-resourced parties*", such as a JOA. It said that it is more likely that issues have been left unresolved out of choice rather than error.
3. That Braganza Duties were of no application to "*unqualified termination provisions within expertly drawn complex commercial agreements between sophisticated commercial parties*". Were that not the case, the High Court considered that there would be "*almost no contractual provision that would not attract them... [which] would have profound implications for English commercial contract law*" and "*would be an unwarranted interference in the freedom of parties to contract on the terms they choose*".
4. That the JOAs in question did not give rise to a fiduciary relationship between the parties as they had expressly agreed that their relationship would not be a partnership or quasi partnership.

5. Although JOAs are “*at least arguably*” ‘relational contracts’, that does not automatically result in an Implied Duty of Good Faith arising. The usual test for implying terms into a contract applies. Such a term will not be implied where the parties have legislated for the position in the express terms of the contract (properly construed).

## COMMENT

As anticipated in our earlier article, arguments based on implied duties (such as the Implied Duty of Good Faith and Braganza Duty) are increasingly being advanced in JOA disputes. This is not surprising, as they add to the number of weapons in a claimant’s armoury. However, whether they have any utility will ultimately depend on the proper interpretation of the JOA in question and, in particular, the express language used. The freedom of parties to contract on the terms they choose is paramount in English law. This is why arguments that terms should be implied are rigorously tested. For this reason, including express wording specifically addressing concepts such as good faith at the time the JOA is negotiated remains advisable.

The facts underlying the High Court’s decision should also act as a warning to those considering acquiring interests in oil & gas assets with the expectation of assuming the role of Operator. As demonstrated by this case, some JOAs permit the non-operating parties (acting unanimously or by majority) to remove and replace the Operator at will. If the assumption of the role of Operator is an important aspect of the acquisition, proper due diligence of such provisions should be undertaken and, if possible and practical, suitable assurances and protections sought.

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**[1]** This is the second recent English Court decision concerning these UKCS assets. Click [here](#) to access our previous briefing on the Court of Appeal’s decision in [\*\*\*Spirit Energy Resources Limited & Ors v Marathon Oil U.K. LLC\* \[2019\] EWCA Civ 11\*\*](#).

**[2]** See [\*\*\*Apache Beryl I Limited v Marathon Oil UK LLC and Ors\* \[2017\] EWHC 2258\*\*](#)

**[3]** Named after the leading case concerning such duties – [\*\*\*Braganza v BP Shipping Ltd & Another\* \[2015\] UKSC 17\*\*](#)

**[4]** A useful summary of the English law on the construction of contracts is provided at paragraph 26 of the [\*\*\*judgment\*\*\*](#).