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UK UPDATES

“The judgment clarifies the impact of s29 notices and the extent of liabilities for sellers under the Petroleum Act.”

Apache UK Investment Limited v Esso Exploration and Production UK Limited [2021] EWHC 1283 (Comm)

The English High Court provided useful guidance on the extent that a seller can be held liable for decommissioning of offshore installations under the Petroleum Act 1998.

In 2011 Esso Exploration and Production UK Limited (**Esso**) sold a special purpose vehicle (the **SPV**) to Apache UK Investment Limited (**Apache**) under a LLC Sale and Purchase Agreement (the **SPA**). The SPV held licenses in several hydrocarbon producing fields in the North Sea. In connection with the sale, Esso and Apache agreed six Bilateral Decommissioning Security Agreements (**BDSAs**) under which Apache agreed to indemnify Esso for any decommissioning-related expenses.

Between 2000 and 2005 (many years before the sale), the Secretary of State had served several so-called “s29 notices” on Esso. Section 29 of the Petroleum Act requires the receiver of such a notice to submit an ‘abandonment programme’ that sets out the decommissioning plan for the relevant offshore installation.

One of the key issues in dispute was whether four subsea wells (the **Additional Wells**) that Apache had proposed to drill after it acquired the SPV from Esso were covered by Apache’s indemnity given under the BDSAs, and in turn whether Apache was therefore obliged to provide security to Esso for these wells. Esso argued that if the Additional Wells were not covered, Esso could be unsecured if the Secretary of State held it liable for the decommissioning of the Additional Wells under the s29 notices.

To determine whether the s29 notices were wide enough to cover the Additional Wells, the Court needed to consider the definition of “offshore installation” under section 44 of the Petroleum Act. In particular:

- section 44(1) states “...‘offshore installation’ means any installation which is or has been maintained, or is intended to be established, for the carrying on of any activity”
- section 44(5) states “‘installation’ includes ... any floating structure or device maintained on a station by whatever means”

Esso argued that there was nothing in the s29 notices themselves that would limit their scope only to offshore installations in existence at the time the notices were served. On this basis, Esso argued that the statutory definition of “offshore installation” was wide enough to apply to the Additional Wells.

The Court disagreed with Esso on two main points: (a) the natural meaning of section 44(5) limited “offshore installation” to equipment or structures within fields or subfields, and so “offshore installation” could not encompass the entire fields themselves; and (b) the s29 notices had been served many years prior to Apache’s decision to drill the Additional Wells. On this basis, there was no possible reason that they were offshore installations “*intended to be established*” at the time.¹ Therefore, the Court ruled that Apache was not required to provide security to Esso for the Additional Wells.

The judgment clarifies the impact of s29 notices and the extent of liabilities for sellers under the Petroleum Act. On the facts, the case appeared quite clear-cut and perhaps not surprising. However, offshore businesses should carefully consider the responsibilities and funding for decommissioning when acquiring or selling offshore installations.

For further comment on the High Court judgment, please see HFW’s article [here](#).

Footnote

¹ *Apache UK Investment Limited v Esso Exploration and Production UK Limited [2021] EWHC 1283 (Comm)* at paragraph 56.

“The energy transition and decarbonisation is expected to be a key topic for the coming years, with regulators and interest groups scrutinising the carbon efficiency of decommissioning. ”

OGA Decommissioning Strategy

In May 2021, the UK Oil and Gas Authority (the OGA) published its *Decommissioning Strategy (the OGA Strategy)*.¹ The OGA Strategy sets out the OGA's remit from 2021-2024 and identifies several priority actions moving forward.

We comment below on the four priorities identified in the OGA Strategy and their impact to date.

Planning for decommissioning

The OGA Strategy focuses on the need for clear and detailed decommissioning plans to ensure cost-efficiency. This is in line with costs reduction targets, with the OGA reporting in July 2021 that decommissioning costs had reduced by 6% over the past four years. According to the OGA Strategy, infrastructure owners should ensure that a decommissioning plan is in place three to six years prior to the end of production. The OGA also stresses that it will not normally grant well suspension consent for more than two years, so this timeframe must be considered in decommissioning plans to ensure decommissioning is carried out in a timely manner when wells become inactive. The two priority actions in this area call for (1) engagement with infrastructure owners to progress decommissioning plans and (2) promotion of learning and knowledge sharing.

Commercial transformation

Collaboration and knowledge sharing is also a key concern in the OGA Strategy's second priority area. To address the fragmentation of the decommissioning market, the OGA proposes to improve disclosure and publication of UK Continental Shelf (**UKCS**) data, produce benchmarks to support performance improvements and enhance the online Energy Pathfinder (which provides information on tenders, contracts and collaborations with dedicated options for decommissioning).²

In September 2021, North Sea operator Repsol Sinopec entered into a fully-inclusive well decommissioning contract with Well-Safe Solutions that covered all wells in Repsol Sinopec's Buchan and Hannay fields. In contrast to a traditional transactional deal, Well-Safe Solutions will deliver a 'campaign-based' approach to the work that allows flexibility in scheduling. The OGA recognised the deal as a leading example of *“what can be achieved when operators and suppliers adopt a collaborative, flexible and innovative approach”* to decommissioning.³ It may be too early to tell whether more operators and contractors will enter into this type of decommissioning contract but this could indicate a move towards the more collaborative culture that the OGA Strategy encourages.

Supporting energy transition from late life into decommissioning

The energy transition and decarbonisation is expected to be a key topic for the coming years, with regulators and interest groups scrutinising the carbon efficiency of decommissioning. The OGA Strategy highlights Stewardship Expectation 11 (published in March 2021), where the OGA *“expects the Upstream Oil and Gas Industry (Industry) to reduce, as far as reasonable in the circumstances, Greenhouse Gas (GHG) emissions from all aspects of their upstream operations. This includes ... the abandonment and decommissioning of fields...”*⁴ The UK Government's recently published Net Zero Strategy also highlights the role of decommissioning in the UK's transition to low carbon in the fuel supply industry as well as for the creation of 'green jobs'.⁵ The OGA Strategy does not provide much detail or guidance on how industry stakeholders can reduce emissions from decommissioning. However, the OGA has separately published a booklet of case studies illustrating how operators are adopting a net zero strategy in their work, including adopting new decommissioning techniques.⁶

The OGA Strategy also commits to working with stakeholders to consider options of reusing or re-purposing defunct infrastructure as an alternative to decommissioning. This aim ties into the need for decommissioning plans and knowledge sharing around the possible re-purposing opportunities. The OGA

does however acknowledge that the vast majority of UKCS infrastructure will immediately be decommissioned.

Technology, processes and guidance

The OGA Strategy promotes investment in new technologies as a way to reduce both costs and GHG emissions from decommissioning. The OGA's priority actions in this area focus on continuing to collaborate with infrastructure owners and stakeholders to (1) promote investment into new technologies; (2) ensure regulatory processes work for new approaches in decommissioning contracts such as campaigning and flexible schedules; and (3) ensure OGA guidance is fit for purpose. Similarly to the approach towards energy transition, the OGA does not provide detailed guidance but indicates that it will play an active role in encouraging the adoption of new technologies and processes.

In conclusion, the new OGA Strategy builds on the original 2017 strategy and identifies key concerns and potential growth areas in decommissioning for the next four years.

Footnotes

- 1 Oil and Gas Authority: Decommissioning Strategy - 2021 - Publications - News & publications (ogauthority.co.uk)
- 2 OGA Energy Pathfinder
- 3 OGA head of decommissioning Pauline Innes quoted in Upstream Online, 16 September 2021: <https://www.upstreamonline.com/environment/repsoil-sinopec-awards-groundbreaking-decom-deal-to-well-safe-solutions/2-1-1068911>
- 4 Oil and Gas Authority: Stewardship Expectation 11 – Net Zero - 2021 - Publications - News & publications (ogauthority.co.uk)
- 5 Net Zero Strategy: Build Back Greener - October 2021 (publishing.service.gov.uk)
- 6 Oil and Gas Authority: Decarbonising Oil & Gas Production in the UKCS - 2021 - Publications - News & publications (ogauthority.co.uk)

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Decommissioning and the move towards Net Zero

2021 has seen regulators and business interests alike recognise the reality of the energy transition toward renewables and the need to decrease greenhouse gas (GHG) emissions.

In March 2021, the UK Department for Business, Energy and Industrial Strategy published the North Sea Transition Deal (**NSTD**).¹ The NSTD is an ambitious collaboration between the UK Government and the offshore oil and gas industry to work towards meeting GHG emission targets. The UK Government announced that the “*NSTD will transform the sector in preparation for a net zero future and catalyse growth throughout the UK economy*”.² Under the NSTD, the oil and gas sector voluntarily commits to ensure that 50% of decommissioning projects and new energy transition projects are provided by UK content – including companies and capital investors. The commitment is aimed at retaining UK expertise and jobs as the demand for ‘conventional’ oil and gas services are expected to decline. The oil and gas sector will also apply cost reduction initiatives from decommissioning to carbon capture usage and storage (**CCUS**), which is expected to be a growth area in reducing GHG emissions.

At the Offshore Energy 2021 exhibit in Amsterdam in October, the DecomMissionBlue partnership was launched by members of Amsterdam IJmuiden Offshore Ports (**AYOP**). In its initial press release, DecomMissionBlue presents itself as a joint venture for the “*the efficient, fast and, crucially, sustainable decommissioning and recycling of offshore installations and large maritime objects*.”³ Marketing itself as a provider of custom time and cost-efficient decommissioning solutions with a single point of contact, it will be one to watch in the region.

In November 2021, the UK hosted the UN Climate Change Conference 2021 – commonly known as COP26. The agenda dedicated a full day to ‘Energy’ and the resulting Glasgow Climate Pact agrees, among other things, to phase out “inefficient fossil fuel subsidies” – which may be interpreted to include subsidies for decommissioning.⁴ Separately, if the push for transition away from oil and gas increases, the demand for decommissioning is also likely to increase. A key question for decommissioning service providers will therefore be what rate of transition they can expect moving forward from COP26.

Footnotes

- 1 North Sea Transition Deal - GOV.UK (www.gov.uk)
- 2 North Sea Transition Deal - GOV.UK (www.gov.uk)
- 3 Press release - Decommission Blue (decommissionblue.com)
- 4 Campaigners take aim at £13.6bn UK oil and gas ‘subsidies’ since Paris Agreement | Upstream Online

AUSTRALIA UPDATES

“Previous titleholders may find themselves in the firing line where a title expires prior to completion of decommissioning activities, a current titleholder goes into liquidation, or where decommissioning already completed fails to satisfy the regulator.”

Overhaul of Australia’s offshore decommissioning framework just in time for the arrival of the decommissioning boom

The Australian offshore oil and gas sector is set to enter a period of significant decommissioning activity. Australia has many offshore assets approaching end-of-life, but until recently, an underdeveloped legislative regime existed with respect to transfer of title holding and decommissioning liabilities.

Following calls to overhaul decommissioning regulations and tighten the government’s ability to force previous and current titleholders to decommission assets, a number of years of “industry consultation” have been undertaken. In mid-2021, Australia passed major and sweeping changes to its decommissioning laws.

Significant amendments to the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the **Act**), Australia’s key offshore legislation, include:

- a revised and expanded ‘trailing liability’ regime, that extends decommissioning liability to previous titleholders (and related parties) where the current or immediate former titleholder is unable to undertake decommissioning;
- enhanced regulatory oversight of all changes in control or ownership of a titleholder; and
- improved information-gathering powers for the regulator in assessing suitability of title holding participants.

The new and significant amendments to the ‘trailing liability’ regime bolster the government’s powers to ‘call back’ previous titleholders to remove assets, plug wells and remediate the environment, even in cases where the title has ceased to be in force. Previous titleholders may find themselves in the firing line where a title expires prior to completion of decommissioning activities, a current titleholder goes into liquidation, or where decommissioning already completed fails to satisfy the regulator.

Although couched as a measure of last resort, a broadly defined set of ‘related’ entities can now be called back to decommission offshore fields. Such parties include, but are not limited to, those who have (or could have) benefitted financially from the title, those who exerted power over others who had direct obligations under the Act, and those who acted jointly with the titleholder or a former titleholder.

As it is still very early days, the overall impact of Australia’s new decommissioning regime on the offshore sector – and future oil and gas developments and investment – is not yet clear. How and in what circumstances the offshore regulator may call back former titleholders to decommission fields, ultimately remains to be seen.

“Decommissioning liability survives the expiry of the licence and forces the OREI proponent to decommission any OREI in accordance with the plan contained in the licence.”

Offshore Electricity Infrastructure and Decommissioning

As calls to embrace and transition to greener technology gather pace, Australia has very recently passed legislation endorsing a package of new laws for the development, construction and decommissioning of offshore renewable energy generation and transmission infrastructure (OREI) (contained in the *Offshore Electricity Infrastructure Act 2021*).

The Act has immediate application to wind power, but might also be readily applied to other offshore renewables such as wave and solar power. With the exception of some proposed wind projects, Australia has no offshore renewable energy projects in existence or under construction. The new legislative framework may be the catalyst needed for future development and investment in OREI projects around Australia’s very long and windy coastline.

As part of the comprehensive and all-encompassing licensing regime for OREI, decommissioning liabilities for OREI borrow heavily from the concepts contained in new oil and gas regime. These include heightened regulatory oversight and checks for transfer of OREI licences or change in control to ownership structure, anti-tracing and anti-avoidance provisions to capture ownership changes up the chain, and the power of the regulator to issue directions to the OREI proponent to remedy damage done to the environment (including the power to bring previous licensees back to the site to clean up).

A final plank is that cancellation or surrender of licence is on the condition that decommissioning liabilities – including removal of OREI from the offshore site – has been met. Decommissioning liability survives the expiry of the licence and forces the OREI proponent to decommission any OREI in accordance with the plan contained in the licence.

In contrast to the oil and gas regime, Australia has included a requirement for the provision of financial security by the OREI participant for decommissioning liabilities, including removal of equipment and remediation of the offshore area.

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