Neutral Citation Number: [2020] EWHC 58 (Comm)

Case No: CL-2019-000471

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 17 January 2020

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

(1) TAQA BRATANI LIMITED
(2) TAQA BRATANI LNS LIMITED
(3) JX NIPPON EXPLORATION AND PRODUCTION (U.K.) LIMITED
(4) SPIRIT ENERGY RESOURCES LIMITED **Claimants**

- and –

ROCKROSE UKCS8 LLC **Defendant**

- -

Mr David Foxton QC, Ms Philippa Hopkins QC and Mr David Davies (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Claimants**
Mr Sa'ad Hossain QC and Mr Richard Eschwege (instructed by **Pinsent Masons LLP**) for the **Defendant**

Hearing dates: 2-5 December 2019

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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.

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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC :

Introduction

1. This is the expedited trial[1] of a claim by which the claimants seek declarations that notices by which they purported to terminate the appointment of the defendant as Operator under four Joint Operating Agreements and a Unitisation and Unit Operating Agreement (collectively "JOAs") between the claimants and the defendant concerning the operation of five oil and gas field blocks ("Blocks") on the UK Continental Shelf ("UKCS") in the North Sea known collectively as the Brae Fields are valid and take effect in accordance with their terms.

2. The claimants maintain that on a true construction of the JOAs they were collectively entitled to act as they have without being obliged to justify their decision to the defendant or to give any reasons for that decision. The defendant maintains that the express terms on which the claimants rely were impliedly qualified by obligations that required the claimants to not exercise the express powers they rely on capriciously or arbitrarily and only in good faith and, in consequence, only in the best interests of the operation of the Block or Blocks in question, that the claimants did not comply with the qualifications for which the defendant contends and in consequence the claimants' purported notices were invalid and of no effect.

3. The trial took place between 2-5 December 2019. I heard oral evidence adduced on behalf of the claimants from:

   (a) Mr. Alexander Hutchison, the Legal, Commercial and Business Services Director for the first claimant and a director of both the first and second claimants (hereafter collectively "TAQA"). He was one of three people that formed the first and second claimants' Leadership Team responsible for proposing and then voting for the removal of Marathon Oil UK LLC ("MOUK") as Operator;

   (b) Mr. Naoyoshi Kaneko, a director and the general manager of the third claimant ("JX"), who took the decision on behalf of JX to vote in favour of the removal of MOUK as Operator under the JOAs and in support of the resolution to appoint TAQA in its place; and

   (c) Mr. Gerald Harrison, a director of the fourth claimant ("Spirit") and its Executive Vice-President for Health Safety Environment & Security, Sub-Surface and Exploration and UK Non-Operated Production

   and on behalf of the defendant from:

   (a) Mr. Peter Mann, Managing Director of RockRose Energy Plc ("RR"); and

   (b) Mr. Graham Taylor, the Developments Manager employed by RockRose UKCS8 LLC ("RRUK").

[1] Ordered by paragraph 14 of the Order of Carr J made on 20 August 2019.

I also heard expert evidence given by Mr. David Robottom, appointed by the claimants and Mr. Paul Mason, appointed by the defendant. In the end this evidence was of no assistance in resolving the issues that arise because those witnesses did not establish the existence of any relevant market practice. I address this issue in detail later in this judgment.

Background

4. The first and second claimants are companies controlled ultimately by the Government of Abu Dhabi. TAQA is an experienced Operator of UKCS oil and gas fields other than those with which this claim is concerned as well as holding extensive non-operator participatory interests in UKCS fields other than those relevant to these proceedings. I explain the distinction between Operators and non-operator participants later in this judgment. The third claimant is a company controlled by a Japanese parent company and the fourth claimant is a company jointly ultimately controlled by Centrica Plc and Bayerngas Norge AS. Each of JX and Spirit carries on business in the exploration and exploitation of oil and gas fields including but not limited to the Brae Fields.

5. The defendant is a Delaware registered corporation that until 1 July 2019 was called Marathon Oil UK LLC and was wholly owned by Marathon Oil Corporation ("Marathon"), an Ohio registered corporation operating in the multinational hydrocarbons sector with very substantial worldwide experience of oil and gas exploration, extraction and commercial exploitation, both on and offshore. On 1 July 2019 RR completed the purchase of 100% of the share capital in MOUK, which was then renamed RockRose UKCS8 LLC. I refer to the defendant hereafter as MOUK in relation to events that occurred prior to 1 July 2019 and as RRUK for events that occurred thereafter.

6. The claimants and RRUK hold petroleum licences from the UK Government to extract oil and gas from the UKCS North Sea in Blocks 16/3a, 16/3b, 16/3c, 16/7a and the East Brae Field Block. TAQA has the largest interest in the Blocks; RRUK has the next largest interest and each of the other claimants have much smaller interests. The precise size of the interest that each holds differs from block to block and does not matter for present purposes.

7. The parties operate each Block as an unincorporated joint venture, which is governed by the JOA relevant to the Block concerned. The relationship between the parties in respect of Blocks 16/3b and 16/3c is governed by two JOAs in identical terms each dated 16 October 1979 ("P.313[2] JOAs"). The parties' relationship in relation to Blocks 16/3a and 16/7a is governed by JOAs each dated 25 January 1980 (respectively "Block 16/3a JOA" and "Block 16/7a JOA") and their relationship in relation to the East Brae field is governed by a Unitisation and Unit Operating Agreement ("UUOA") dated 19 September 1990 ("East Brae JOA"). There is no difference between a UUOA and a JOA that is relevant to this dispute.

[2] So called because the two Blocks are the subject of a single Production Licence designated Production Licence P.313.

8. It will be necessary for me to set out the typical terms of the relevant agreements later in this judgment. It is necessary to note at this stage that the JOAs proceed on the basis that one of the joint venturers will be the "*Operator*". The function of the Operator under the JOAs is to manage all operational and commercial activity in connection with the relevant field on a no gain no loss basis. The Operator and each non-operator participant is liable for the cost of carrying out such operations in proportion to their equity interest in the venture and the activities of the Operator are subject to the supervision of an Operating Committee ("OC") on which each participant is represented. From the outset, MOUK (and since 1 July 2019 RRUK) has been the Operator for the Brae Fields. Each of the JOAs provide for the removal of the Operator either by (a) resignation, (b) immediate termination in the event of one of a number of specified events occurring and (c) by votes of all (or, in some cases, a majority) of the non-operator participants on not less than 90 days' notice.

9. On 25 February 2019, RR agreed to acquire the issued share capital in what was then MOUK and on 28 February 2019 TAQA learned formally that RR had been successful in its bid. TAQA had also bid to acquire MOUK but its offer was rejected. As I have explained the acquisition was completed on 1 July 2019.

10. TAQA maintains that it and the other claimants had and have serious concerns about the performance of MOUK as Operator prior to its sale and the ability of what became RRUK to perform the role of Operator under the JOAs both from an operational and financial perspective. TAQA first raised these issues with their fellow non-operational joint venturers in a series of telephone discussions on 28 February 2019. It will be necessary for me to consider the factual material in some detail below but, by the end of April 2019, TAQA alleges that it had come to the view that the most satisfactory way of mitigating the risks it maintains were posed by the take over of MOUK by RR was to remove MOUK as Operator under the JOAs and for TAQA to be appointed in its place. As I have explained however, TAQA had formed the view that it should attempt to acquire MOUK (and thereby become Operator) much earlier than this and as I explain below TAQA's management have consistently held the view that it is in TAQA's economic best interests to become Operator of the Brae Fields. As I explain below, there is no doubt that this view was at least one of the reasons for it deciding to remove MOUK as Operator. RRUK's case is that this was not something that TAQA could properly have regard to when deciding whether to seek the discharge of MOUK as Operator and thus renders its decision unenforceable.

11. Both JX and Spirit agreed that it was in their best interests that TAQA should become Operator in place of MOUK from no later than the end of April 2019. Transferring the Operatorship comes at a cost that would usually be met by all the participants in proportion to their equity interests in the relevant Fields, applying the accounting procedures set out in the JOAs. The cost of a transition from MOUK/RRUK to TAQA is not known precisely but in the course of the trial was variously estimated by the claimants at between £5m and £10m. By a letter of 5 June 2019, signed by each of TAQA, JX and Spirit, TAQA agreed with JX and Spirit that

> "… Notwithstanding the terms of the Operating Agreements, Spirit and JX shall each bear their respective Participating Interest and Unit Interest share of Transition Costs up to their

> respective Participating Interest and Unit Interest share of five million pounds (£5,000,000) ("Cap")."

In effect therefore, TAQA agreed to indemnify JX and Spirit in respect of the costs of transferring the Operatorship of the Brae Fields from MOUK/RRUK to TAQA if and in so far as their liability for it exceeded the cap. RRUK maintains that each of JX and Spirit took into account the availability of the cap when arriving at their decision to support TAQA, that this was a consideration to which they should not have had regard and that in consequence (assuming RRUK is correct in its submission concerning the qualifications to the express terms relied on by the claimants) taking it into account rendered their decision to support TAQA by voting to discharge MOUK as Operator unenforceable.

12. On 6 June 2019, the claimants voted unanimously to terminate MOUK's appointment as Operator under each of the JOAs, relying on the last of the alternatives referred to in paragraph 8 above and on 20 June 2019 notices were served under each JOA giving MOUK 365 days' notice of termination of its role as Operator thereunder. It is common ground that the correct procedure was adopted for terminating MOUK's Operator role under the JOAs other than the P.313 JOAs but that the latter required any termination to be by votes taken at an OC meeting rather than as a paper exercise outside a formal meeting as was permitted by the other JOAs. For that reason a meeting of the P.313 JOAs OC was convened for 1 July 2019 and, at that meeting, the claimants voted to terminate RRUK's appointment as Operator under the P.313 JOAs. It is common ground that this was the correct procedure for terminating RRUK's role as Operator under the P.313 JOAs. On 3 July 2019, further notices of termination were served on RRUK.

13. RRUK does not dispute that the claimants have exercised the relevant contractual procedures correctly but nevertheless maintains that the purported termination of its role as Operator is invalid and of no effect because the apparently unqualified power to terminate relied on by the claimants is either on true construction not an unqualified right or is subject to various implied terms that qualify the circumstances in which the claimants can exercise the right to terminate on which they rely. RRUK asserts that throughout TAQA has been motivated solely or mainly by a desire to take over the Operator role for its own commercial and financial purposes, that it procured the support of JX and Spirit by the agreement to cap the transition costs to which they would otherwise be exposed by a change of Operator and that TAQA's allegedly true motivation coupled with the improper inducement of JX and Spirit rendered the termination decisions invalid when the power to terminate is construed as RRUK contends. The claimants maintain that the power to terminate that they rely on is unqualified, that the implied terms for which RRUK contend cannot be implied into the JOAs on established principles and in consequence it is not open to RRUK to object to the termination on any of the grounds that it relies on or at all. The claimants also maintain that even if RRUK is correct in its submission that the terms on which they rely are qualified as alleged, they were nonetheless entitled to terminate RRUK's role as Operator. Since that involves a factual investigation that will be entirely unnecessary if the claimants are correct in their primary submission, it is convenient to address that issue first before turning to the potentially relevant factual issues.

The Relevant JOA Provisions

14. The parties' submissions have been made primarily by reference to the express terms of the Block 16/7a JOA. It is common ground that in most respects there is no material difference between the clauses in this agreement and the other JOAs. Where there are differences that are material I refer to them below.

15. In so far as is material, the Block 16/7a JOA sets out the Operator's principal operating rights and obligations in clause 5. Clause 5.2 provides that subject to the qualifications imposed by the JOA, the Operator " … *shall have exclusive charge of and shall conduct all operations under this Agreement either by itself or by its duly authorized agents or by independent Contractors engaged by it"* and by clause 5.3 "…*the number of employees of Operator employed in connection with operations hereunder shall be determined by Operator. The Operator shall determine the selection of such employees, their hours of work and their remuneration, and all such employees shall be employees of Operator exclusively*". By clause 5.4(f), the Operator is required to "*keep the Joint Property and all Petroleum produced and saved under the Joint Operations free from liens, charges and encumbrances arising out of the conduct of the Joint Operations"*; by sub-clause (g) to " … *pay all costs and expenses incurred by it in its operations hereunder promptly and when due and payable"*, which includes all rental and other payments required to be paid under the relevant licence, all taxes other than income tax that pertain to the operations covered by the JOA and by sub-clause (j) to maintain and initially fund the cost of providing insurance as required under the relevant licence or as may be determined by the OC. Each of these obligations is material to the assessment by the claimants of the financial implications of MOUK remaining Operator after being acquired by RR.

16. As is the case with most JOAs the Block 16/7a JOA has an "*Accounting procedure*" the purpose of which is " … *to establish equitable methods for determining charges and credits applicable to Joint Operations under the Agreement and to provide that Operator neither gains nor loses by reason of the fact it acts as Operator. In the event of a conflict between the provisions of this Accounting Procedure and the provisions of the Agreement, the provisions of the Agreement shall control*." As is common with most JOAs the role of the Operator is a non-profit making one. Its revenues derive from its share of the petroleum won from the field as does that of the non-operator joint venturers. It collects contributions to its Operator costs from the other participants in proportion to their interest in the relevant Field, applying the accounting procedures.

17. As already mentioned the Operator carried out its function subject to supervision and direction of the OC – see clause 6.1, which emphasises that the Joint Venture is not a partnership or quasi partnership by providing that in "… *exercising such supervision and direction, each representative on the Operating Committee shall act solely on behalf of the Party whom he represents and not on behalf of the Participants as an entity*". While this provision does not provide expressly that the relationship is not a partnership, its inclusion emphasises in the clearest of terms that the relationship between the parties is not a partnership. This point is put beyond doubt by clause 18, which is entitled "*Covenant and Relationship Of The Parties*", clause 18.2 of which provides that:

> "The rights, duties, obligations and liabilities of the Parties shall be several and not joint or collective, and each Party shall be responsible only for its obligations as set out herein, it being the express purpose and intention of the Parties that this Agreement shall not be construed as creating any partnership or association or as (except as expressly stated) authorising any Party to act as agent, servant or employee for any other Party for any purpose whatsoever."

The first of these provisions makes it unambiguously clear that when voting on matters for which the OC is responsible, each OC participant is fully entitled to vote as its best interests dictate. The reason or one of the reasons for that being so is that the parties have expressly agreed that their relationship is not a partnership and thus does not give rise to the sort of fiduciary duties that would arise in such circumstances.

18. Although there is not a provision in the P.313 JOAs in similar terms to clause 6.1 of the Block 16/7a JOA, that is immaterial. The nature of the relationship between the parties is established by clause 18.2 and its equivalent in the other JOAs. There is a similar provision at clause 20.2.1 of the P.313 JOAs. Clause 6.1 in the Block 16/7a JOA and the equivalent in the other JOAs other than the P.313 JOAs is simply reflective of that relationship.

19. It was suggested on behalf of the claimants that the role of Operator was akin to that of an agent. I doubt whether that is a correct approach. The reason why the role of the Operator is explained at length in the JOAs is precisely to avoid the need for recourse to agency concepts in the general law. However, whether this is correct or not is ultimately irrelevant for the reasons set out below.

20. Change of Operator is governed by clause 19 of the Block 16/7a JOA. In view of its importance, I set out the relevant provision in full:

> "CHANGE OF OPERATOR
>
> 19.1 Operator may be discharged;
>
> (a) at the end of any calendar month by the Operating Committee giving not less than ninety (90) days notice to it, provided that in respect of any vote of the Operating Committee on any such discharge under this Article 19.1(a) the voting interest of the Participant which is the Operator and the voting interest of any Participant which is an Affiliate of the Operator shall be ignored and the required percentage figure shall be One hundred per cent (100%) of the total votes available to the remaining Parties; or
>
> (b) forthwith upon the Operating Committee giving notice to it if:-
>
> (1) a petition in bankruptcy is presented to, and agreed to be heard-by, a bankruptcy court or an order is made, or an

effective resolution is passed, for the dissolution, liquidation or winding up of the Operator, other than other than a winding up for the purpose of amalgamation or reconstruction;

(2) the Operator becomes insolvent;

(3) a receiver is appointed for, or an encumbrancer takes possession of, the whole or a major part of the assets or undertakings of the Operator;

(4) the Operator ceases or threatens to cease to carry on its business or a major part thereof or a distress or execution process is levied or enforced or sued out upon or against a major part of the chattels or property of the Operator and is not discharged within fourteen (14) days;

(5) it sells or otherwise disposes of a majority of its Interest in the Contract Area other than to any Affiliate; or

(6) having been deemed by the Operating Committee to be in default in the performance of any term or condition of this Agreement, it fails to commence to remedy such default within ten (10) days after receipt of written notice from or on behalf of the Operating Committee Hereto and thereafter fails to diligently proceed to remedy such default; or

(7) having been deemed by the Operating Committee to have failed to carry out its obligations under the Decommissioning Security Agreement in any material respect;

provided that in respect of any vote of the Operating Committee on any such discharge under this Article 19.1(b) the voting interest of the Participant which is the Operator and the voting interest of any Participant which is an Affiliate of the Operator shall be ignored, and the required percentage figure set out in Article 6.3 shall be applied to the total votes available to the remaining Parties.

…

19.3 Subject to Article 19.5, the Operator may resign from acting as Operator after giving to each of the other Parties six (6) months written notice of its intention to resign.

19.4 If Operator submits its resignation, is discharged, or ceases to be Operator for any other cause, the Operating Committee shall elect and designate as Operator any other Participant and

> failing that, any Party or third party, subject to the Secretary of State's approval. Any Participant that resigns or is removed as Operator and any Affiliate of such Participant shall not vote for such Participant as the successor Operator.
>
> 19.5 If a decision as to a successor Operator cannot be reached pursuant to Article 19.4, or if a decision is reached and such successor Operator does not desire to so act, then (failing selection by the Operating Committee of a successor Operator that will so act by the intended resignation date) the resigning or discharged Operator shall, prior to its resignation being effective, appoint an independent person, subject to the Secretary of State's approval, to operate the Contract Area on the terms and subject to the conditions as set forth in this Agreement and on such further terms and conditions as may, in the opinion of the Parties, be necessary for such operation. If the existing Operator is discharged because of an order or resolution for its winding up, then prior to such winding up, in the absence of a Party acting as successor Operator as provided in Article 19.4 the Operating Committee shall appoint an independent person as provided in Article 19.4.
>
> 19.6 If any Operator for any cause ceases to be Operator its rights and interests as a Participant shall be unaffected thereby. Any of the Parties that becomes a successor Operator shall, subject to any necessary consent or approval of the Secretary of State, thereupon succeed to all the duties, powers, obligations, rights and authorities given to the Operator by this Agreement with respect to all operations of every kind thereafter conducted in the Contract Area. In every case of a change of Operator, the proper adjustments in the accounts of the Participants shall be made as of the date of such change in order that no Participant shall suffer any penalty or loss as a result of such change, and the outgoing Operator shall be reimbursed its reasonable demobilization costs. The outgoing Operator shall surrender possession of the operating rights under this Agreement and the Joint Property, including all undistributed cash in hand together with copies of all pertinent books of account and records of the operations and all documents, agreements or other papers relating thereto. As soon as practicable after such change of Operator, the Participants except the outgoing Operator shall audit the Joint Account including the reimbursable demobilization costs of the outgoing Operator, and conduct an inventory of Joint Property. All costs and expenses incurred in connection with such audit and inventory shall be for the Joint Account."

21. As is apparent from this clause when read as a whole, an Operator may be discharged in one of three ways – that is (i) by not less than 90 days' notice under clause 19.1(a) – the provision relied on by the claimants in this case, (ii) forthwith upon notice if any

of the events specified in clause 19.1(b) occur or (iii) by resignation under clause 19.3.

22. In relation to notice under clause 19.1(a), that can occur only if 100% of the total votes available at the OC vote in favour of such a removal ignoring the voting interest of the then Operator. There is no such provision within clause 19.1(b), which requires an affirmative vote by the normal majority. Unlike clause 19.1(b), there is no express qualification on the right to terminate under clause 19.1(a) – a point in my view emphasised by the requirements that any vote by the incumbent be ignored and (in the case of Block 16/7a JOA) that removal requires 100% of the votes of the non-operator participants. As with clause 19.1(a), the right to resign is not subject to any express qualifications. This similarity of approach is relevant to the construction issues to which I turn later in this judgment.

23. Unlike the vote to remove, the decision on who should replace a discharged or resigning Operator under clause 19.4 does not have to be by 100% of the total votes available but the former Operator is not entitled to vote. Such a provision is an obvious necessity to avoid the risk of deadlock following a discharge caused by an aggrieved former Operator or disagreements amongst the other participants as to who should be appointed the new Operator. Thus although it will be necessary to appoint a successor if an Operator is removed, the decision to remove and the decision to appoint a successor are two different decisions with different voting structures. This technical separation is important to both the construction exercise and to the question of whether and if so what terms ought to be implied.

24. The same basic structure is to be found in the other JOAs although some require less than 100% of the non-operating participants' votes for the decision to remove to take effect. This is factually immaterial since in all cases 100% of the non-operator participants voted to discharge MOUK as Operator.

25. As is apparent from clause 19.6, the outgoing Operator is entitled to recover its reasonable demobilisation costs and those costs together with the costs of the post termination audit and inventory taking will be borne by the participants. It is to those costs that the cost cap agreement referred to earlier applies.

The Principles Applicable to Contractual Construction

26. It is common ground that the general principles applicable to the construction of contracts governed by English law apply to the construction of the JOAs. In summary:

> i) The court construes the relevant words of a contract in its documentary, factual and commercial context, assessed in the light of (a) the natural and ordinary meaning of the provision being construed, (b) any other relevant provisions of the contract being construed, (c) the overall purpose of the provision being construed and the contract in which it is contained, (d) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (e) commercial common sense, but (f) disregarding subjective evidence of any party's intentions – see Arnold v. Britton [2015] UKSC 36 [2015] AC 1619 per Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;

ii) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made - see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 21;

iii) In arriving at the true meaning and effect of a contract, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract; and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 17;

iv) Where the parties have used unambiguous language, the court must apply it – see Rainy Sky SA v. Kookmin Bank [2011] UKSC 50 [2011] 1 WLR 2900 per Lord Clarke JSC at paragraph 23;

v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 18;

vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see Rainy Sky SA v. Kookmin Bank (ibid.) per Lord Clarke JSC at paragraph 21 - but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 19;

vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see Wood v. Capita Insurance Services Limited [2017] UKSC 24 per Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent – see Wood v. Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 13 and National Bank of Kazakhstan v. Bank of New York Mellon [2018] EWCA Civ 1390 per Hamblen LJ at paragraphs 39-40; and

viii) A court should not reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain - see Arnold v. Britton (ibid.) per Lord Neuberger PSC at paragraph 20 and Wood v. Capita Insurance Services Limited (ibid.) per Lord Hodge JSC at paragraph 11.

The Principles Applicable To the Implication of Terms

27. The principles applicable to the implication of terms were comprehensively set out by the Supreme Court in Marks and Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Limited [2015] UKSC 72; [2016] AC 742 and applied in Ali v. Petroleum Company of Trinidad and Tobago [2017] UKPC 2; [2017] ICR 531. In summary where, as here, there is a detailed commercial agreement:

> (i) Terms are to be implied only if to do so is necessary in order to give the contract business efficacy or was so obvious that it goes without saying;
>
> (ii) It is a necessary but not a sufficient requirement that the term that a party seeks to have implied appears fair or is one that the court considered that the parties would have agreed if it had been suggested to them;
>
> (iii) Construing the words that the parties have used in their contract and implying terms into the contract both involve determining the scope and meaning of the contract;
>
> (iv) Construing the words used and implying additional words are different processes governed by different rules;
>
> (v) In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered because it is only after the construction exercise has been undertaken that the necessity question and the allied question whether the terms sought to be implied contradict the express terms of the contract concerned can be answered. This point is of particular importance in the specific context of a claim to imply terms of similar effect to those argued for by RRUK in this case – see the part of the judgment of Males LJ in Equitas Insurance Limited v. Municipal Insurance Limited [2019] EWCA Civ 718; [2019] 3 WLR 613, referred to in more detail below.

28. As was made clear by all the judgments in Marks and Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Limited (ibid.) and emphasised by Lord Hughes in Ali v. Petroleum Company of Trinidad and Tobago (ibid.) at paragraph 7, the " … *concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient precondition for inclusion*." As he also added:

> " … if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests[3], since the parties have demonstrated that it is not their agreement."

or as Fancourt J pithily put it in UTB LLC v. Sheffield United Limited [2019] 2322 (Ch) at paragraph 203: " … *the principle [is] that (as restated in the Marks and*

[3] i.e. those identified in para. 27(i) above.

Spencer case) no term may be implied into a contract if it would be inconsistent with an express term". It is for this reason that the principle set out in paragraph 27(v) above is fundamental.

29. Finally, particular care is required when considering implying terms into a sophisticated and professionally drawn and negotiated agreement between well-resourced parties. The reason for this is obvious. Where an issue has been left unresolved, it is much more likely to be the result of choice rather than error. This point was one emphasised in Marks and Spencer Plc v. BNP Paribas Securities Services Trust Co (Jersey) Limited (ibid.) and most recently by Fancourt J in UTB LLC v. Sheffield United Limited (ibid.) who summarised the applicable principle as being that where " … *detailed, professionally-drawn contracts exist, it is more difficult to imply terms because there is a strong inference that the parties have given careful consideration to all the terms by which they agree to be bound (though the test for implying terms remains the same)*".

The Qualification of Contractual Rights and Assessments

30. The defendant maintains that the termination provision within each of the JOAs relied on by the claimants is subject to either (i) an implied term that qualifies the manner in which it may be exercised by concepts of good faith, and genuineness and the absence of arbitrariness, capriciousness, perversity and irrationality, relying on Socimer International Bank v. Standard Bank London [2008] EWCA Civ 116; [2008] 1 Lloyds Rep. 558 and Braganza v. BP Shipping Limited [2015] UKSC 17;[2015] 1 WLR 1661; and/or (ii) qualifications to similar effect arising from the mutual trust, confidence and loyalty said to arise in long term joint venture and similar agreements, relying on authorities such as Yam Seng Pte v. International Trade Corp [2013] 1 All E.R (Comm) 132, Globe Traders v. TRW Lucas Varity Electric Steering [2017] 1 All E R (Comm) 601 and Al Nehayan v Kent [2018] EWHC 333 (Comm).

31. The claimants maintain that the clauses on which they rely created an express and unqualified power to terminate, not a contractual discretion in the sense being considered in Socimer and Braganza and in consequence those authorities (and those that followed them) are of no application. They submit that there are no special rules that apply to relational contracts, which are to be construed as all other contracts and terms can be implied into them only by applying conventional principles. They submit that adopting that approach no qualification to the clauses on which they rely is justified.

32. It will be necessary to consider both lines of authorities relied on by the defendant in due course. However, the application of those authorities depends on the implication of terms and whether terms are to be implied depends in the first instance on the effect of the express terms of the agreement between the parties construed in accordance with the principles identified earlier. It is therefore to that issue that I turn first.

The Meaning and Effect of the Express Terms of the JOAs

33. As the authorities referred to earlier show, the starting point in determining the meaning and effect of the JOAs is the language used by the parties because (a) the parties have control over the language they use in a contract; and (b) the parties must have been specifically focussing on the issue covered by the disputed clause or

clauses when agreeing the wording of that provision. This is of particular importance with contracts such as the JOAs because they are sophisticated and complex agreements drafted by skilled and specialist professionals. That being so, contracts such as the JOAs are to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent. In such a case therefore the starting point and in all probability the end point in the construction exercise will be (a) the natural and ordinary meaning of the provision being construed, (b) any other relevant provisions of the contract being construed and (c) the overall purpose of the provision being construed and the contract in which it is contained.

34. In my judgment, applying those principles, it is clear that the clauses relied on by the claimants are and were intended to confer an unqualified right to terminate the Operator role. My reasons for reaching that conclusion are as follows.

35. Firstly, the language used by the parties is clear and unambiguous – clause 19 in the JOA I referred to earlier provides that the " … *Operator may be discharged … at the end of any calendar month by the Operating Committee giving not less than ninety (90) days notice to it …*" There is no qualification within the clause other than that concerning qualified voting majorities. There is no express qualification to the right of the non-operating participants to exercise the right conferred by the clause. The clause on which the claimants rely creates an absolute right to discharge the Operator on giving a minimum period of notice and providing that the required numbers of non-operator participants support the decision. The decision is a binary one – either the non-operator participants decide to discharge or they don't. There is no evaluatory or adjudicatory exercise that they are required to undertake before they are entitled to take the decision. It is an unqualified right conferred on them by the bargain of the parties. In one sense that is the end of the construction exercise since the language used in my judgment is clear and unambiguous and where the parties have used unambiguous language, the court must apply it.

36. Secondly, if and to the extent I am wrong to conclude that the language used by the parties is clear and unambiguous, the language used elsewhere in the contract emphasises that the parties intended the provision to have the effect I conclude that it has. My reasons for that conclusion are as follows. First, the contrast between clauses 19.1(a) and (b) could not be clearer. As I have explained the operative words of sub-clause (a) are unqualified whereas those in sub-clause (b) are qualified by the critical word "*if*" so that the Operator can be discharged under sub-clause (b) upon the OC giving notice to it if but only if one of the conditions at sub-sub clauses (1) to (7) applies. Two points arise from this – first, had the parties intended that the right to terminate conferred by clause 19.1(a) be qualified in any way, then the terms of clause 19.1(b) show that the parties could and would have done so. Secondly, the contrast between the way the two clauses are drafted shows that the intention of the parties was to confer an unqualified right to terminate by clause 19.1(a) subject to it receiving support from the qualified majority identified within the relevant clause (100% of the non-operator participants in the case of the Block 16/7a JOA). That this is the correct interpretation derives some support from the terms in which the right of an Operator to resign is phrased. It is not suggested that the right to resign is qualified (even though the clause does not in terms say that the right is unqualified). This shows that where a right is intended to be unqualified it is simply described as a right without express words that emphasise that the right is an unqualified right. The drafting

convention used is only to qualify a right where it is intended that it should be qualified – as is the case with clause 19.1(b). Once this is understood to be the drafting convention adopted the true meaning and effect becomes entirely clear.

37. Thirdly, had the parties intended any qualification on the right to terminate under clause 19.1(a) of the Block 16/7a JOA by reference to the concept of good faith there is no doubt that they could and would have expressly so stated, as is apparent from other provisions within the JOA – see by way of example clause 1.41, clause 12.14 and clause 1.9 of the Accounting procedure. It is also even more obvious that had the parties intended the right to terminate on notice to be qualified as being available only if to terminate was reasonable or in the best interests of the joint venture or in the interests of the participants as a whole those drafting the agreement could with ease have said so. This is not merely because such drafting techniques are elementary but because the parties and their advisors were alive to such concepts as is apparent for example from clauses 6.1 and 18.2 of the Block 16/7a JOA. Further it is difficult to see how such wording would have assisted.

38. Finally, the inclusion of an unqualified right to discharge the Operator reflects and is consistent with the common understanding of the parties to the agreement as to the nature of the relationship. As is apparent from clauses 6 and 18.1 of the Block 16/7a JOA, the relationship was not and was not intended to be a partnership and the parties were fully entitled to vote at OC meetings in accordance with what they perceived to be their own best interests. The relationship was one that ultimately depended on the interests of the parties to it being aligned. Where that ceased to be so the parties were free to act what they perceived to be in their respective individual best interests. There is nothing within the JOAs that creates for MOUK a vested right to continue as Operator that it is entitled to maintain other than with the consent of the other parties to the relevant JOA.

39. Subject to the qualifications mentioned above, it is next necessary to consider the factual and commercial context in order to consider whether there is anything within that context that ought to lead me to a different view from those I have so far expressed. RRUK maintained that it was necessary "*... to consider the evidence on collaboration within North Sea joint ventures ...*" – see RRUK's closing submissions at [11]. Although it was not entirely clear, RRUK appears to rely on this as relevant both to the construction exercise and also to the question of whether terms should be implied into the JOAs that qualified the right of the non-operator participants to discharge the Operator under the provisions on which they rely. In my judgment this material (which depended largely on written material issued pursuant to statutory powers by the current regulator of North Sea oil and gas activity, the Oil and Gas Authority ("OGA") and the expert evidence) does not assist on the issues that I have to resolve.

40. First, in relation to the construction exercise, it is critical to remember that it is only the facts and circumstances known or assumed by the parties at the time that the document was executed that are relevant – see paragraph 26(i) and (ii) above. Most of the expert evidence and the documentary material relied on by RRUK post-dated the dates when the contracts were entered into. To the extent that is so the material is irrelevant to the construction exercise.

41. It is common ground that at various dates model form JOAs were produced by the statutory regulator responsible for the regulation of operations in the North Sea. The only model form JOA that pre-dates the JOAs, however, was the British National Oil Corporation ("BNOC") 1977 Model Form. The JOAs differed from this model in that it does not provide for the immediate discharge of an Operator for an un-remedied breach, as do the JOAs and did not provide for discharge on notice by an enhanced majority but rather by the ordinary majority that applied to all other OC decisions. I accept that the variations from the 1977 model are relevant and significant for the reasons identified by the claimants – that is it emphasises what in my judgment was apparent in any event – that the parties intended the right to discharge on notice to be separate and independent from the right to discharge for cause and, therefore, did not require any justification as long as it was supported by the enhanced majority specified by the parties in their agreement.

42. Mr. Mason gave the only expert evidence as to alleged industry practice prior to the date when the JOAs were made. It did not establish any form of market practice that qualified the terms of the express agreement between the parties. He accepted that he could not speak to any practice earlier than 1988 because that was when he started in the industry – see T3/170/10-23. He was asked nonetheless about the termination on notice provision contained in the 1977 model. His evidence on this issue at T3/177-9 was as follows:

> "177: 1 Q. … Do you say that as a matter of practice a discharge on notice under a provision such as (a) requires there to be a breach on the part of the operator?
>
> A. I think here -- I'm reading the text here on the screen -- I think, you know, clearly if you are in breach, there's provision in here for you to say, "I am issuing you a notice under X, Y, Z".
>
> Q. Under (6), yes.
>
> A. Yes, well, it was (6), yes, that you're in breach. I think when you're looking at 9.1(a), they -- I think there is the culture and behaviours of the industry -- the standard and practice, if you want to call it that -- is that you should say, "We are discharging you because of our concerns of X, Y, Z or our issues with X, Y, Z". Personally, that's what I would have drafted the letter. But that's again my personal experience and behaviours and approach to the industry compared to others.
>
> Q. So is it your evidence that there would have to be a breach of contract --
>
> A. I'm not saying there would have -- sorry, would have to be a breach of contract...? Sorry, I interrupted.
>
> Q. -- by the operator for (a) to be exercisable or a provision like (a)?

A. Could I read this again?

Q. If it helps you, Mr Mason, there is nothing in the wording of (a) that says there has to be a reason.

A. No, I realise that. I'm just trying to get my -- what I'm trying to do is I'm listening to you saying about breach of contract, which is (6), is it?

Q. Yes, (b)(6).

A. I'm trying to link 9.1(a) with 9.1(b)(6), which I think is what you're trying to do.

Q. Well, I'm trying to suggest to you, Mr Mason, that it must mean something different or it wouldn't be there and that, if you were right and there has to be some sort of substantive reason, it would be a completely superfluous provision.

A. Can I try and also go back and explain – which I started to do earlier -- about my understanding having spoken to some people about the reasons why this clause was put in there. When BNOC --

Q. Sorry to interrupt. Yes, you can, Mr Mason, but who are the people to whom you spoke?

A. People in BP who were around at the time. Their understanding -- and some of them did work for Britoil which was BNOC -- became BNOC, so they weren't necessarily there in 1977, but they were there soon afterwards and working with it. I'm sorry, I'm telling you a tale and I'm sorry.

Q. Keep going.

A. That clause was put in there because BNOC was a state-run oil company just introduced to the industry. It was put in there so that it had the freedom – it couldn't have -- it had the choice of all its equities it wanted, it couldn't have a choice of always being able to operate everywhere. It hadn't got the human resources to do that. So it had this clause put in there so that, if a discovery was made, they could step in without reason.

Q. There's nothing in your report, Mr Mason, about the people to whom you've spoken.

A. Yes, I'm just giving you my understanding of that. So you're right, it doesn't say you have to do it, but I would say that my experience of a collaborative, open environment of

> which I have worked in, which I would encourage other people to work in and have seen lots of people work in, is that you have -- you explain why you make a decision." [Emphasis supplied]

This is not evidence of anything approaching an industry standard practice or understanding that the right to terminate on notice was regarded as qualified in any of the ways suggested by RRUK and thus is immaterial to the construction exercise. Indeed, this material suggests if anything the opposite of what RRUK contends since it was Mr. Mason's evidence that the right to terminate on notice was inserted in order to enable BNOC to step in "*without reason*" if a discovery was made. The highest he put his evidence was that he personally would have given reasons when exercising the power to discharge under clause 19.1(a). That is not evidence of an industry practice but more fundamentally it is not evidence at all that the industry regarded an apparently unqualified right to terminate as in some way qualified.

43. In those circumstances, there is nothing within the factual or commercial matrix that suggests the conclusions set out above that derive from the language used by the parties when viewed in the context of the wider provisions within their agreements and the nature of their relationship as set out in the JOAs might be wrong much less that so construed it is apparently illogical or incoherent.

Implied Terms

The Braganza issue

44. I have concluded that on their true construction clause 19.1(a) of the Block 16/7a JOA and the equivalent powers in the other JOAs create an unqualified or absolute right to discharge the Operator under the relevant JOA providing only that the requisite qualified majority of participants vote in favour of the discharge. In those circumstances, I reject the notion that the availability of a termination provision such as that relied on by the claimants in this case could be constrained by an implied term that qualifies the manner in which it may be exercised by reference to Socimer International Bank v. Standard Bank London and Braganza v. BP Shipping Limited (ibid.). My reasons for reaching that conclusion are as follows.

45. First, given my conclusions concerning the meaning and effect of the express terms of the JOAs, it is difficult to see how terms to that effect could be implied into the agreement. That is so because it is not necessary to imply any of the terms for which RRUK contends either in order to give business efficacy to the JOAs or in order to give effect to what was so obvious that it went without saying. The contract permits an Operator to continue as such only with the consent of the other parties to the JOAs. The terms RRUK seeks to imply are not necessary in order to deliver on that model and the express terms on which the claimants rely are inconsistent with the proposed implied terms.

46. Secondly, whilst I accept that the circumstances in which such terms can be implied into commercial agreements is an incrementally developing area of the law, I consider it clear that on the current state of the authorities, the Braganza doctrine has no application to unqualified termination provisions within expertly drawn complex commercial agreements between sophisticated commercial parties such as those in

this case. As Mr. Foxton QC submitted on behalf of the claimants, if a right of the sort being exercised by the claimants in this case was to attract a Braganza qualification, then there is almost no contractual provision that would not attract them. That would have profound implications for English commercial and contract law – not least because of the difficulties posed by attempting to exclude such terms referred to by Jackson LJ in Mid Essex Hospital Services NHS Trust v. Compass Group UK [2013] EWCA Civ 200, to which I refer in more detail later in this judgment - for which there is no support in the authorities, to which I now turn.

47. In a series of cases going back a number of years, the courts have consistently held that unqualified termination provisions take effect in accordance with their terms. So in Reda v. Flag Limited [2002] UKPC 38, where it was alleged that the exercise of a right to terminate contracts of employment was to deprive the relevant employees of what they would otherwise become entitled to under a stock option scheme. The Appellants' employment contracts entitled the respondent to terminate without cause. The Privy Council upheld the decision of the Court of Appeal of the Eastern Caribbean that this clause took effect in accordance with its terms. As Lord Millett put it at paragraph 42, " *Flag had an express contractual right, which it exercised, to bring the appellants' contracts of employment to an end at any time during the contract period without cause. Their Lordships agree with Flag that that is an end of the matter. As the Court of Appeal observed, "the very nature of such a power is that its exercise does not have to be justified*". As he added at paragraph 45:

> "Their Lordships accept that the appellants' contracts of employment contained an implied term that Flag would not without reasonable and proper cause destroy the relationship of trust and confidence which should exist between employer and employee. The existence of such a term is now well established on the authorities: see Imperial Group Pensions Trust Limited v. Imperial Tobacco Ltd. [1991] 1 WLR 589 at pp. 597−9; Malik v Bank of Credit and Commerce International S.A. [1998] AC 20; Johnson v Unisys [2001] 2 All ER 801. But in common with other implied terms, it must yield to the express provisions of the contract. As Lord Millett observed in Johnson v Unisys it cannot sensibly be used to extend the relationship beyond its agreed duration; and, their Lordships would add, it cannot sensibly be used to circumscribe an express power of dismissal without cause. This would run counter to the general principle that an express and unrestricted power cannot in the ordinary way be circumscribed by an implied qualification: see Nelson v British Broadcasting Corporation [1977] IRLR 148 (where it was sought to imply a restriction of location into a contract which contained an unqualified mobility clause). Roskill LJ said at p. 151:
>
> > '... it is a basic principle of contract law that if a contract makes express provision... in almost unrestricted language, it is impossible in the same breath to imply into that contract a restriction of the kind that the Industrial Tribunal sought to do.' "

As Beatson LJ said of this conclusion in IBRC v. Camden Market Holdings Corp, [2017] 2 All E R (Comm) 781 (a case concerning an unqualified right to use information for marketing purposes) at paragraph 42:

> "In the light of the requirement that an implied term must not contradict any express term of the contract, described by Lord Neuberger in the Marks & Spencer case, see [28], above, as 'a cardinal rule', in assessing whether there can be an implied term in fact such as the pleaded implied term in this case Reda's case has strong analogical relevance and that case cannot therefore be discounted for the reason given by Mr Gourgey. In my judgment, IBRC's express and unrestricted power to market the sale of loans by disclosing information to potential counterparties cannot, as a matter of law, be circumscribed by an implied qualification."

48. This approach has been followed in other cases concerning unqualified rights of termination. So, in Lomas v. IFB Firth Rixon [2012] EWCA Civ 419 the issue was whether a right to terminate an ISDA Master Agreement was qualified in Braganza terms by an implied term. The Court of Appeal rejected that submission. As Longmore LJ said when giving the judgment of the Court:

> "The administrators did not pursue this third suggested implied term on the appeal. Had they done so, we would have rejected it because it is even more hopeless than the others. The right to terminate is no more an exercise of discretion, which is not to be exercised in an arbitrary or capricious (or perhaps unreasonable) manner, than the right to accept repudiatory conduct as a repudiation of a contract. … no one would suggest that there could be any impediment to accepting repudiatory conduct as a termination of the contract based on the fact that the innocent party can elect between termination and leaving the contract on foot. The same applies to elective termination."

It was also adopted in TSG Building Services Plc v. South Anglia Housing Limited [2013] EWHC 1151 (TCC), where (as here) the contract provided for termination for insolvency, breach and also included an unqualified right to terminate. It was the latter provision that Akenhead J was concerned with. It was drafted in unqualified terms (see para. 4 of the Judgment) and the issue was whether that apparently unqualified right to terminate was impliedly qualified in ways that were similar to those contended for by RRUK in this case. Akenhead J rejected that submission, saying at paragraph 51:

> "Even if there was some implied term of good faith, it would not and could not circumscribe or restrict what the parties had expressly agreed in Clause 13.3, which was in effect that either of them for no, good or bad reason could terminate at any time before the term of four years was completed. That is the risk that each voluntarily undertook when it entered into the Contract, even though, doubtless, initially each may have

> thought, hoped and assumed that the Contract would run its full term".

49. In my judgment these authorities speak with a single voice – where the parties choose to include within their agreement a provision that entitles one or more of the parties to terminate the agreement between them, that clause takes effect in accordance with its terms.

50. Whilst it is true to say that the right to terminate in this case was a right to terminate one party's role as Operator, leaving the agreement in place and RRUK as a participant, RRUK has not demonstrated any principled difference between such a provision and any of the other termination provisions that have been considered over the years. There is no reason to treat a provision which brings the relationship of the parties to an end differently from one that entitles one party to terminate a particular role carried on by one of the parties under the agreement in question, at any rate whereas here the parties are expressly permitted to act on what they perceive to be their own best interests. Even if such a distinction does have a principled basis, in my judgment that does not lead to the conclusion that a term should be implied that qualifies an otherwise unqualified express term in Braganza terms because to imply such a term would be to depart from the cardinal rule that "… *if a contract makes express provision ... in almost unrestricted language, it is impossible in the same breath to imply into that contract a restriction* …"[4] that qualifies what the parties have agreed should be unqualified.

51. In my judgment the distinction between those cases potentially coming within the scope of authorities such as Socimer (ibid.) and Braganza (ibid.) and those that do not is that identified by Jackson LJ in Mid Essex Hospital Services NHS Trust v. Compass Group UK [2013] EWCA Civ 200 at paragraph 83. Having considered a number of previously decided cases including, importantly, Socimer, Jackson LJ summarised the position in these terms:

> "An important feature of the above line of authorities is that in each case the discretion did not involve a simple decision whether or not to exercise an absolute contractual right. The discretion involved making an assessment or choosing from a range of options, taking into account the interests of both parties. In any contract under which one party is permitted to exercise such a discretion, there is an implied term. The precise formulation of that term has been variously expressed in the authorities. In essence, however, it is that the relevant party will not exercise its discretion in an arbitrary, capricious or irrational manner. Such a term is extremely difficult to exclude, although I would not say it is utterly impossible to do so."

This distinction is to be read subject to the qualification by Males LJ in his judgment in Equitas Insurance Limited v. Municipal Insurance Limited [2019] EWCA Civ 718; [2019] 3 WLR 613 at para. 113 that:

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[4] Nelson v. BBC [1977] IRLR 148 *per* Roskill LJ (as he then was) at 151 quoted in Reda v. Flag Limited (ibid.)

> "Although the Mid Essex case uses the expression "absolute contractual right" that is the result of a process of construction which takes account of the characteristics of the parties, the terms of the contract as a whole and the contractual context, not a starting point intrinsic to the term itself. It is only possible to say whether a term conferring a contractual choice on one party represents an absolute contractual right after that process of construction has been undertaken. To say that a term provides for an absolute contractual right and therefore no term can be implied puts the matter the wrong way round."

It was for this reason that I carried out the construction exercise set out above before turning to RRUK's case based on Braganza. The significant point is that Males LJ did not suggest that the line between those cases where on proper construction the contractual right relied on was an absolute right and those that involve making an assessment or choosing from a range of options, taking into account the interests of both parties, required modification.

52. Although Braganza was decided some two years after Mid Essex (and Mid Essex was not cited or referred to in that case) there is nothing within the judgments of the Supreme Court that suggests Jackson LJ had drawn the line between the two categories of case incorrectly, nor is there anything in that case factually that suggests Jackson LJ's dividing line was incorrectly drawn. Indeed, Baroness Hale DPSC made it clear that the case was concerned with the activity of a "…*contractual decision maker* ..." – see paragraph 17 – and the nature of the contractual terms being considered was one " … *in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts* …" This is precisely the category of contractual provision that Jackson LJ considered was in principle likely to be qualified in Braganza terms. Lord Hodge JSC drew a distinction between employment contracts (which of course the contract I am concerned with is not) and commercial contracts (which the JOAs are) – see paragraphs 53-54. Even with that distinction in mind there is nothing that suggests that Reda v. Flag Limited (ibid.) would be decided differently following Braganza. There is nothing in Lord Hodge's judgment that qualifies or compromises the distinction drawn by Jackson LJ and supported in different language by Baroness Hale.

53. Absolute rights conferred by professionally drawn or standard form contracts including but not limited to absolute rights to terminate relationships and roles within relationships are an everyday feature of the contracts that govern commercial relationships and extending Braganza to such provisions would be an unwarranted interference in the freedom of parties to contract on the terms they choose, at any rate where there is no fiduciary relationship created by the agreement (as is the case with the JOAs because the parties have agreed that the JOAs " … *shall not be construed as creating any partnership or association* …" and the members of the decision making body are each required to " … *act solely on behalf of the Party whom he represents and not on behalf of the Participants as an entity* ...").

The Relational Contracts Issue

54. It is next necessary to consider the defendant's submission that the JOAs are "*relational*" contracts and that results in the implication of a term requiring the parties to deal with each other in good faith with the result that the otherwise unqualified right to discharge RRUK as Operator is impliedly qualified by a requirement to use the power only in "*good faith*" and in practice not in an arbitrary, capricious or irrational manner.

55. RRUK relies on Yam Seng Pte v. International Trade Corp [2013] EWHC 111 (QB); [2013] 1 All ER (Comm) 132. It is common ground that this authority does not suggest that wherever there is a "*relational*" contract there is an implied duty owed by each party to the other or others to act in good faith. I agree because Leggatt J (as he then was) says as much in his judgment. The context in which Leggatt J identified the possible need for an implied good faith obligation starts at paragraph 139 as arising because:

> "… contracts can never be complete in the sense of expressly providing for every event that may happen. To apply a contract to circumstances not specifically provided for, the language must accordingly be given a reasonable construction which promotes the values and purposes expressed or implicit in the contract."

Leggatt J defined relational contracts as being those governing long term relationships to which the parties make a substantial commitment and then stated:

> "Such 'relational' contracts … may require a high degree of communication, co-operation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long-term distributorship agreements." [Emphasis supplied]

The words that I have emphasised are in my judgment the key to understanding the circumstances in which a good faith obligation is to be implied into a relational contract as defined. Their importance was emphasised by Fancourt J at paragraph 200 of his judgment in UTB LLC v. Sheffield United Limited (ibid.).

56. It is unnecessary for me to attempt to define further what constitutes a "*relational*" contract. I am content to treat the JOAs as being at least arguably such contracts. However, that does not lead to the conclusion that it is necessary to imply a good faith obligation into the exercise of the power on which the claimants rely. That is so because: (a) on its true construction that power is an absolute and unqualified power for the reasons explained earlier; in consequence; (b) it is impermissible to imply a term that qualifies what the parties have agreed between them; and (c) it follows that the parties have legislated in the sense referred to by Leggatt J and it is not necessary, indeed it would be wrong, to imply such a term to qualify the power on which the

claimants rely because it is not necessary in order to make the contract the parties have chosen work as it is to be presumed they intended it to work, or, to the extent there is any difference, to give effect to their presumed common intention. As Beatson LJ observed in Globe Motors Inc v. TRW Lucas Varity Electric Steering Limited [2016] EWCA Civ 396; [2017] 1 All ER (Comm) 601 at paragraphs 67 when considering Yam Seng Pte v. International Trade Corp (ibid.):

> "Even in the case of such agreements, however, the position will depend on the terms of the particular contract."

and as he added at paragraph 68 that:

> "… an implication of a duty of good faith will only be possible where the language of the contract, viewed against its context, permits it. It is thus not a reflection of a special rule of interpretation for this category of contract."

57. Before leaving this topic it is necessary that I return albeit briefly to the expert evidence. Much of this evidence simply did not assist on the issue I have to decide. Thus Mr. Mason was keen to emphasise (as does RRUK in its closing submissions) that there has to be a level of collaboration for a joint venture to work effectively. There can be little doubt that at a high level of generality that is so. Equally, it is likely, again at a high level of generality, that there will in most cases be a good degree of "*alignment*" between joint venturers. However, that does not lead to the conclusion that an unqualified power to discharge an Operator should be treated by implication as qualified in the manner suggested by RRUK. Such a power is likely to be exercised only where the interests of the parties have ceased to be aligned and only then when there is a sufficient majority to support action being taken.

58. RRUK placed significant weight on a document issued by the OGA entitled "*The Maximising Economic Recovery Strategy for the UK*" ("MER"). As I have pointed out already, this material, which was published in 2016, post dates by many years the dates when the JOAs were entered into. The claimants submit and I accept that this document cannot result in terms being implied into an agreement entered into years earlier. Although RRUK relies on British Telecommunications Plc v. Telefonica O2UK Limited [2014] UKSC 42; [2014] 4 All ER 907, that is mistaken. That case was concerned with a pricing structure that had to be exercised in accordance with regulatory provisions that the parties contemplated at the time they entered into their agreement could change over time and hence the intention of the parties must have been to comply with the regulatory regime as it changed over time. That is an entirely different context to that which applies in this case. The provisions with which this case is concerned are not subject to alteration in that manner or to any requirement that the terms of the contracts or the exercise of such terms should be subject to the control of the statutory regulator. Indeed, to the extent that it is relevant, the evidence shows that the regulator (OGA) specifically did not want to become involved in the Operator issue when it arose – see the evidence referred to later in this judgment.

59. No authority has been cited that justifies an attempt to imply terms into the JOAs by reference to post contractual practice (assuming a relevant practice can be proved) or a post contractual statutory mechanism other than one expressed to apply to contracts

entered into prior to the enactment of the relevant statute. Such an approach is not justified on the basis that the JOAs are "*relational*" or long term agreements. There are no special rules of interpretation or implication that apply to such agreements – see Total Marketing Limited v. Arco British Limited [1998] CLC 1275, opening paragraph of the Opinion of Lord Steyn. Nothing in the other authorities concerning relational contracts referred to earlier suggests this principle is wrong. The remainder of this section of this judgment proceeds on the basis that this conclusion is wrong.

60. The point made by RRUK in summary is that at various places within MER, emphasis is placed on the need for collaboration between joint venturers for the purpose of maximising the economic recovery of UK petroleum. It is not necessary that I set out all the detailed examples within the document where this point is made. However, RRUK submit that the document when read as a whole demonstrates "*... the importance in the UKCS oil and gas industry of collaboration, cooperation and straight forward dealing between licence holders. Such features chime with and support each of the defendant's implied terms.*".

61. In my judgment none of this assists on the issues I have to decide. MER is not concerned with JOAs or decision-making under them or the removal of an Operator – see T3/128/6-22. As between participants, there is a duty to consider collaboration with others in order to reduce costs or increase recovery – see Required Actions and behaviours, para. 28 and Mr. Mason's evidence at T3/120/10-121/17. The information that has to be provided between parties to a JOA is dictated by the terms of the JOA as Mr. Mason accepted in his evidence:

> " 146:12 Q. … I would suggest that it's not that there is an independent practice that says that the operator has to put forward certain categories of information for particular decisions; it depends on the terms of the JOA.
>
> A. It depends on the terms of the JOA, but it also -- there is that piece in there which says "... as the joint operating committee may decide...", so you ask the joint operation committee, "What data do you require?" -- because not all parties want all that data. They can become drowned with data."

There is thus no industry practice that governs the supply of information, nor one that requires information to be supplied to a party concerning an issue on which it is not entitled to vote and there is no industry practice that requires a party to look to the interests of the joint venture when exercising unqualified contractual powers. There was no industry practice that required a party to give reasons for any decision it makes – see T3/162/12-23. No doubt this is so not least because the practice is that they will each look to their own commercial interests – as Mr. Mason accepted at T3/130-131, joint venturers are "*hard nosed commercial parties*"; that sometimes their interests will not be wholly aligned (T3/164/3-9); that there is nothing in the model form JOAs that require the parties to vote in the interests of the joint venture or in good faith (T3/164/17/23) and then, critically there came this exchange:

> "168:18 Q. You see, what I'm going to suggest, Mr Mason, is that there isn't a general practice of voting in the interests of the joint venture where there is disagreement. What the practice is, in the case of disagreement, is that the parties will look at the terms of the contract and see whether it allows them to do what they want to do or not.
>
> A. Generally speaking, yes, I would agree with you, yes.
>
> Q. And they'll get their lawyers in to advise them?
>
> A. Yes, I would get my lawyer in to advise me on what -- I felt they were breaking the law by doing this.
>
> Q. And whilst collaboration is no doubt desirable, at the end of the day parties in this industry will try to promote their own interests, won't they, and that is normal commercial behaviour?
>
> A. The parties will try and promote their commercial interests or support -- defend their commercial interests ultimately, yes." [Emphasis supplied]

I repeat what I said earlier in relation to commercial context – there was no practice at the time when the JOAs were entered into nor at any time thereafter that precluded a party from exercising an unqualified right to discharge an Operator on notice as that party perceived to be in its best interest. The terms of the 1977 model permitted such a termination as Mr. Mason accepted and by implication the 2002 model is to the same effect. It provided that:

> "5.2.2 The Operator may be removed:-
>
> (i) at the end of any Month by the Joint Operating Committee giving not less than ninety (90) days notice to it; [provided that for so long as [ ] and [ ] are the only Participants such notice may only be given if the Operator has, in the opinion of the Non-Operator, committed any material breach of or failed to observe or perform any material obligation on its part contained in this Agreement and such breach or failure has not been remedied to the satisfaction of the Non-Operator within twenty-eight (28) days of receipt by the Operator of a notice from the Non-Operator requiring the Operator to remedy the same or within such longer period as may be specified in the said notice]; …"

This plainly contemplates that the right to terminate is unqualified save and except where there is only the Operator and a single non-operating participant, when an un-remedied material breach is required. The terms of this provision are entirely inconsistent with there being any industry practice as at its date concerning the circumstances when a termination on notice provision could be exercised and in my judgment demonstrates by the contrast between the general position and the

qualification, that generally such clauses were intended to take effect in accordance with their terms.

62. In the end, Mr. Mason accepted that there was no industry practice that limited when a termination on notice provision could be exercised and maintained only that there was a non-obligatory expectation that reasons would be given:

> "175:24 Q. Your evidence, as I understand it, is that even though clauses like this don't say there has to be a reason, the right to discharge on notice can only in fact be exercised when there is a failure to perform by the operator?
>
> A. I don't like the words "in fact". I would expect the non-ops to explain why they are looking to discharge.
>
> Q. So is your evidence not that there has to be a reason but that they have to explain why they're doing it?
>
> A. I think it is -- I know you don't particularly like my words -- custom and practice that people explain their decisions and why they're doing what they're doing, and I think that is the custom and practice through the industry.
>
> Q. So does it --
>
> A. There's no obligation there to do it, I agree."

This demonstrates that there is no industry practice that qualifies what is otherwise not expressly qualified and does not even require a party exercising a right to discharge to explain why they have done so. In my judgment there was therefore no relevant industry practice demonstrated. In truth the relationship governed by the JOAs was of commercial parties who came together because they each considered it to be in their commercial best interests but acted throughout in their own interests and if necessary would resort to their legal rights as and when they perceived it to be appropriate to do so. As Mr. Mason accepted in the course of his final exchange in cross examination:

> "186:11 Q. Can I suggest to you that that being the case, it is not possible to identify any industry practice as to the basis on which an operator can be removed.
>
> A. I think the industry practice is what is in the – is what is in the standard form JOAs.
>
> Q. Isn't the industry practice, Mr Mason, that you follow what is in your contract?
>
> A. However, in 1977, the industry practice was different because the standard form was different, I would argue.

> Q. I suggest, Mr Mason, that when it comes to the removal of an operator, there is no industry practice over and above the terms of the contract that apply to the particular joint venture. Do you agree?
>
> A. I would agree with that statement. I think the additional piece I would add is that being open and transparent with the operator over why you're sacking them, removing them." [Emphasis supplied]

In my judgment the reality is that which Mr. Robottom expressed in the course of his cross-examination:

> "Q. Now, isn't it the case that, where there are circumstances where not all of the interests of the parties are aligned, nonetheless the industry expectation and practice is that they collaborate?
>
> A. I cannot comment on the industry expectation. The industry practice as to what I call in my report "non-aligned situations" is in my experience simply that the first course of action is to have recourse to one's JOA, the one that one has signed, and have recourse to one's legal support."

As he added a little later in his cross examination:

> "Q. No, but you're not -- well, maybe you are, but are you suggesting that it would be acceptable practice, where you have some wider commercial interest, but pursuing that wider commercial interest would cause positive harm to the assets that you're taking a decision in relation to, to pursue that wider commercial interest?
>
> A. In that case, the party concerned -- the participant concerned has a clear conflict of interest and in my experience the first thing they would do is to call up their lawyers and pull out from the drawer the JOA to which they're a signatory.
>
> JUDGE PELLING: So in other words you mean at that point they would simply resort to their legal right(s)?
>
> A. Yes, sir."

In the light of this evidence there is no practice within the industry that supports the implication of terms to the effect alleged by RRUK.

63. In those circumstances and for those reasons, I conclude that the clauses in each of the JOAs on which the claimants rely entitles them to terminate the role of RRUK as Operator subject only to there being a sufficient majority as required by the relevant clauses for the decision.

The Issues Concerning Breach of the Implied Terms alleged by RRUK

64. Given the conclusions that I have so far reached, it is unnecessary for me to attempt to decide whether the claimants were entitled to act as they did had the right they exercised been impliedly qualified as alleged by RRUK. However, the parties have asked me to decide those issues. The case law referred to above emphasises time and again the importance of context in deciding the scope of any term implied either under the Braganza doctrine or by reference to the Relational Contracts case law. It follows that if I am to attempt to decide the issues the parties would like me to decide, it would involve not merely deciding the various factual issues that are or may be material to the question of whether one or more of the implied terms relied on by RRUK have been breached but also reaching a conclusion as to the scope of implied terms that I have already decided cannot be implied because they are inconsistent with the terms of the agreements and the nature of the parties' relationship as set out in their agreements. Given these conclusions, I consider it would have been better for me not to venture into these issues at all. However, given the parties' position, I have decided the primary issues of fact that arise. If this case then goes further and the Court of Appeal decides that I was wrong to reach the conclusions set out earlier, it will be for that court to decide on the scope of any implied terms to be implied having regard to the express terms of the parties agreements and the nature of their relationship as set out in those agreements and then to decide whether those terms have been breached having regard to the facts.

General Framework Considerations

65. In relation to Braganza (ibid.) it is necessary at this stage to remember that where that authority applies and a term is implied into a contract that requires a decision maker not to act unreasonably in the exercise of a discretion, there are two question that arise – the first focuses on the decision making process and is concerned with whether the decision maker has either taken into account something that ought not to have been or failed to take into account something that ought to have been. The other focuses on the decision itself by asking whether the decision reached is one that no reasonable decision maker occupying the position of the maker of the decision under challenge could have reached – see Lady Hale (with whom Lord Kerr agreed) at paragraph 30, Lord Hodge at paragraph 53 and Lord Neuberger at paragraph 103.

66. It follows that assuming a Braganza type term is to be implied at all in relation to the decision to discharge, two different questions arise namely (a) whether the claimants decided to discharge MOUK as Operator by (i) taking into account facts and matters they were not entitled to take into account and/or (ii) failing to take into account all matters that should have been taken into account and (b) whether the claimants arrived at a conclusion that no reasonable decision maker in the position of the claimants could have arrived at (which by definition would be arbitrary, capricious or perverse) or could have arrived at if acting in good faith towards their counter party. It is an unfortunate feature of this case that the distinction between these two questions has not always been clearly maintained. The first of these issues depends at least in part on the scope of the term to be implied.

67. It is also necessary to note three other obvious points. Firstly, the weight that a party gives to any particular factor is a matter for it as decision maker. Once it is established

that all relevant factors have been taken into account and no irrelevant ones have been taken into account, the outcome is capable of challenge only if it can be said that the conclusion reached is one that no reasonable decision maker in the position of the claimants could have arrived at. This is so because the decision maker is not the court and when faced with an allegation that a Braganza type implied term has been breached the court does not become the decision maker but is concerned only with the process. It is necessary to bear in mind at all times therefore the distinction between an assertion that an allegedly relevant fact or matter has not been taken into account and a submission that insufficient weight has been given to it. The first is a legitimate ground of challenge. The latter is not.

68. Secondly, the motivations of each claimant are likely to have consisted of a number of different factors some of which may be common to them all and others that were unique to a particular party and (though irrelevant) the weight given to each relevant factor by each party may be different. This means of necessity that each of the claimants needs to be looked at separately although some of the same issues may have to be considered in relation to each claimant.

69. Thirdly it is possible that one or more of the claimants may have relied on a mixture of material and immaterial factors. Where that situation arises in my judgment the correct solution lies in asking whether the party concerned would still have voted to discharge MOUK by reference to the material factors even if it had not relied on any immaterial ones – see No. 1 West India Quay (Residential) Limited v. East Tower Apartments Limited [2018] EWCA Civ 250 [2018] 1 WLR 5682 *per* Lewison LJ at paragraphs 34 and 42. Whilst that case was not concerned with the alleged breach of an implied term such as those alleged by RRUK in this claim, no principled or indeed any reason was identified by either party for not adopting Lewison LJ's reasoning by analogy. On the contrary both parties relied on it and in my judgment they were correct to do so because, as Lewison LJ observed at paragraph 36 of his judgment, where " … *a contracting party asserts that the other party is in breach; and gives a good reason and a bad reason for that assertion, he is permitted to rely on the good reason*." Similarly, where a party has failed to take account of a material factor, in my judgment that fact is only relevant if it leads to the conclusion that the party concerned would probably have arrived at a different conclusion had it taken that factor into account.

RRUK's Factual Case In Summary

70. RRUK's factual case as summarised in its written closing submissions is that in deciding to replace RRUK as Operator with TAQA, the claimants were motivated by improper and collateral reasons that included:

    i) A desire to disrupt the acquisition of MOUK by RR in order to achieve its aim of becoming Operator and wished to do so because TAQA perceived that outcome to be in its economic best interests; and/or

    ii) A desire to achieve costs savings or other financial benefits that would benefit TAQA by being able to operate the Brae fields at the same time as other fields in which TAQA was Operator; and/or

iii) In the case of JX and Spirit the effect of the side agreement on their exposure to transitional costs caused by the discharge of MOUK as Operator and its replacement by TAQA.

and that the existence of such reasons were evidenced by:

iv) TAQA wishing to take over as Operator from before RR was announced as the successful bidder for MOUK;

v) The reasons given by the claimants (in summary that they were motivated by concerns relating to the financial viability of RRUK and operational concerns driven by the removal of support previously provided by the Marathon Group) not being the real reasons but were reasons adopted capriciously and in bad faith and without any proper evidence to disguise TAQA's real reasons for wishing to take over as Operator being those referred to at (i) and/or (ii) above;

vi) The decision being taken before the OGA had considered the proposed acquisition of MOUK by RR or determined how it would respond to it;

vii) The decision being taken following a single meeting with RR and without asking any follow up questions or for further information relevant to the issues that purportedly concerned the claimants; and

viii) The claimants' failure to take account of the effect of such a decision on the payment by all participants of a pension deficit that had accumulated over time in respect of MOUK's employees engaged in the operation of the Fields and/or by the claimants' agreement to cap the contribution of JX and Spirit to the transition costs, without which JX and Spirit would not have provided support.

TAQA's Motivations

71. It is not in dispute that TAQA wished to take over MOUK and with it the role of Operator from at least the time when it became clear that MOUK was for sale. TAQA bid for the company but on terms that it was accepted by Mr. Hutchison were not competitive. In my judgment the desire by TAQA to take over the Operator role remained its dominant motivation from at least that stage. Once it became clear that its bid to acquire MOUK had failed, its focus switched to acquiring the Operator role by using the powers conferred by the JOAs on the non-operator participants. As I have explained already, the exercise of those powers required the support of both JX and Spirit.

72. There is no real doubt that TAQA considered it in its commercial and financial best interests to become Operator of the Brae fields in place of MOUK. That this is so is apparent from a number of the contemporaneous documents relied on by RRUK. So for example in an email dated 2 February 2019 from TAQA's finance director (Mr. Lewis) to Mr. Hutchison, Mr. Lewis remarked:

> "Sandy. Is this worth a reach out to jx on whether they are involved in the marathon sale process as a back to back deal? It's the kind of thing we should be raising as leverage to force

> operatorship transfer if jx and spirit would be willing. Huge future value lost otherwise."

Two points emerge from this email. First, it is clear that TAQA were concerned to force a change of Operator even before knowing that RR was the successful bidder. As I say below, that information came to the attention of TAQA no earlier than 25 February 2019. This demonstrates that a primary motivation for TAQA was the financial and commercial benefits its management judged would accrue to it if it became Operator. However, although RRUK submits it also shows that the other reasons were not the real reasons for its decision but were reasons adopted capriciously and in bad faith and without any proper evidence to disguise TAQA's real reasons for wishing to take over as Operator, for the reasons that I explain below, I reject that conclusion. This email does not support such a conclusion precisely because it was written before TAQA became aware who had succeeded in its bid to purchase MOUK and thus at a time when it could not assess the impact of that event on its commercial best interests.

73. What is meant by "*huge future value*" is not clear from the email but could be a reference only to one or a combination of more than one of three possibilities – enhanced revenues from the Brae Fields as a result of better operating management, a reduction in future costs to be incurred by the participants in the Brae Fields or benefits to TAQA in being Operator not only of the Brae Fields but various other fields in the North Sea enabling it to reduce costs and particularly the cost of decommissioning operations as the fields became economically exhausted.

74. As I explain below, it is likely that it was the last of these factors that was the primary consideration since one of the Brae Fields is currently in decommissioning, two others will follow in 2022 and 2027 and the total decommissioning costs for the Brae Fields were estimated in the course of the trial as being about $1.8 billion. As is perhaps obvious there will be broadly three stages in the life of an oil field – the exploration stage when wells are drilled and oil or gas discovered, when the participants will be incurring costs without any material revenues with the risk that oil or gas will not be discovered; the commercial extraction stage when revenues will in normal circumstances and subject to market prices be comfortably in excess of costs and the decommissioning stage when revenues will dwindle but very substantial costs will be incurred. It was the impact of this point that led Mr. Kaneko of JX to describe the value of JX's interest in the Brae Fields as negative so that in effect it was unsellable. It was suggested in the course of the trial that this was the or a reason why Marathon wished to dispose of MOUK, that is likely to be why TAQA framed its offer to purchase MOUK in the terms it did and probably why it was rejected. It also leads me to the conclusion that any indication by TAQA that it might consider purchasing JX's interest in the Brae Fields as one that was highly unlikely to materialise.

75. "*Project Vanguard*" was TAQA's internal project for acquiring the Operator role for the Brae Fields. It makes clear where TAQA saw the financial benefits of becoming Operator and what Mr. Lewis was alluding to in his email referred to above by his reference to "*huge future value*". It is clear from the graph entitled "*IMPACT OF VANGUARD ON TAQA 2P UK BUS PLAN - CUMULATIVE POST TAX CASHFLOW"* that very substantial negative cash flows were expected from 2023 onwards on the basis of TAQA's "2P" business plan, mainly as a result of

diminishing revenues as the wells in which it was interested reached the end of economic production and decommissioning costs increased and that TAQA's UK management considered those losses could be delayed and then reduced if Vanguard could be implemented – that is if TAQA could take over the role of Operator of the Brae Fields. Mr. Hutchison accepted the general thrust of this in his cross-examination by reference to this graph:

> "Q. Now, without going into the details, you can see that in each case the effect with Vanguard is to very significantly improve the cumulative cash flow position over the life of TAQA Bratani; correct?
>
> A. Yes, it improves the business plan.
>
> Q. By a very large amount?
>
> A. Yes, if these lines are right, which I can only assume Iain Lewis and his team are -- but, yes, based on the lines, the bold line is higher than the dotted line.
>
> Q. Yes, and so if we look at the green scenario, the difference is about half a billion in cumulative cash flow; correct?
>
> A. That appears to be the case based on this from 2032 onwards.
>
> Q. And you say that you only saw this last week, but this document dates from February 2019. What I suggest is that it's reasonable to suppose that at least Mr Lewis and others responsible for the company's financial planning were considering this at this time. Say if you don't know.
>
> A. I don't know. All I can tell you is that at the relevant time, which is I think early February, I did not see it.
>
> Q. But in your understanding of Project Vanguard, at this time and also in 2018, what I suggest is that you understood that Project Vanguard was hugely important from a financial and strategic perspective to TAQA.
>
> A. The Brae assets are very important. I think it's approximately 20% of the European revenues rely upon the Brae asset so it's a very important asset to TAQA.
>
> Q. Well, what I'm suggesting to you is that you -- in your assessment, you understood that Project Vanguard was very important to TAQA to improve its overall cash flow position. Do you agree with that?
>
> A. I mean, I don't think we would have made a bid for the Marathon companies if we didn't see it as an important asset."

76. I accept that this material suggests that TAQA wished to become Operator because it considered that doing so would be in its long-term financial best interests. It was in other words what it then perceived to be the advantage (and an enormous long term advantage) in becoming Operator. I accept too that it was broadly the sort of cash flow benefits that appear in the graph that Mr. Hutchison was being asked about that Mr. Lewis was referring to in his 2 February email. I consider it improbable that Mr. Hutchison was not aware of the broad effect of what is illustrated by the graph referred to above (although I accept he that he had not seen this particular plan as he says in his oral evidence). That much is apparent from the terms of the 2 February email (which in my judgment was phrased in terms that suggest that its recipients would understand what was being alluded to by the short hand reference to "*huge future value*") and from the position he occupied at the time in TAQA's organisation.

77. Mr. Hutchison did himself no favours by seeking to avoid the point as plainly he did in the section of his evidence quoted above. I regret to say that it was a recurring feature of Mr. Hutchison's evidence that he sought to avoid answering questions that he perceived it was not in TAQA's best interests to answer by deflecting answers of the sort shown in this extract. This was all of a part with his failure repeatedly to answer questions without first checking his statement and then either reading or reprising what he considered was the relevant part of his statement. Since all these events are in the very recent past and are of critical importance to TAQA, it is unlikely that this practice can be explained wholly by a lack of recollection. Whilst I acquit Mr. Hutchison of giving misleading or untruthful evidence, his failure to answer all the questions that he was asked frankly reflects poorly on him and makes the task of assessing what was happening more difficult than it might have been. It means that I have to be cautious before I accept his evidence other than when it is against TAQA's interests, is admitted or is corroborated by contemporaneous documentation or other oral evidence that I can accept. If the explanation is that Mr. Hutchison has only limited recollection of relevant events that leads to a similar conclusion as to how his evidence must be approached.

78. TAQA's wish to take over as Operator of the Brae Fields was motivated down to the date when it learned that RR was to acquire MOUK by the substantial financial and commercial advantages that would accrue to it as a result. Thereafter, as I explain below it was also motivated by a desire to avoid what it genuinely perceived to be the financial and operational risks to it of MOUK remaining Operator after it had been acquired by RR. However, even if that is wrong and TAQA remained motivated exclusively by a desire to achieve the advantages and was in truth unconcerned by what it maintains were the disadvantages of MOUK remaining Operator after being acquired by RR, that of itself is not evidence that it was acting arbitrarily or capriciously or otherwise than in good faith, given the contractual context to which I have referred earlier. As explained in more detail above, the contracts between the parties did not create a partnership or any other relationship that was subject to either express or implied fiduciary duties that required the parties to act in the interest of the joint venture rather than their own interests and the contracts between the parties permitted all parties to act in their own interests in relation to the management of the Fields through the various OCs.

79. In those circumstances, TAQA could only arguably be acting arbitrarily or capriciously or otherwise than in good faith by wishing to achieve the financial and

commercial advantages to which I have referred if it could be shown that by obtaining a transfer of the operatorship, TAQA would obtain its desired advantage at the expense of the other participants. Other than in certain self-contained respects referred to below, that is not even arguably so.

80. As explained earlier in this judgment, the role of the Operator under the JOAs is to manage all operational and commercial activity in connection with the relevant field on a no gain no loss basis. The Operator and each non-operator participant are liable for the cost of carrying out such operations in proportion to their equity interest in the venture. Thus there is no profit to be made from being Operator other than to the extent that an efficient and competent Operator will be able to enhance revenues made from and/or reduce costs incurred at the relevant field. However any such enhanced revenues or curbed costs accrue for the benefit of each participant in proportion to their equity interest in the field.

81. Similarly reducing costs by synergies achieved by reason of other UKCS North Sea operator activity would accrue to the benefit of the other Brae Fields participants if and to the extent that reduced costs. If TAQA was successful in reducing decommissioning costs, that would accrue to the benefit of all parties to the JOA as Mr. Hutchison said in the course of his oral evidence. So at T2/28-29 his evidence was:

> "28:24 Q … what I'm suggesting is that there were huge strategic benefits that you saw from becoming operator for the whole group. Do you agree with that?
>
> A. What I would agree with is operator -- the role of operator is no win/no loss. So the role of operator is not a -- I would describe a profit centre, but I would agree with you that the role of operator gives you more control.
>
> JUDGE PELLING: But weren't the savings -- because you were entering the decommissioning stage, you were going to incur quite a lot of cost.
>
> A. Yes.
>
> JUDGE PELLING: Isn't the huge benefit the fact that, if you're running decommissioning for three or four different licence areas, there would be substantial savings to be made over the group as a whole? Therefore it's not a case of upside in the traditional sense; it's reducing downside?
>
> A. I think that's fair. The cost synergy supply chain contracting synergies, absolutely. So if the northern sector of TAQA's assets were decommissioning at the same time and you could club that together, absolutely."

This is another example of Mr. Hutchison being reluctant to provide an answer he perceived as potentially damaging to TAQA's interests other than with encouragement. Given the material I have referred to earlier it is plain and it was plain

to Mr. Hutchison and the rest of TAQA's management that there were substantial benefits for TAQA in obtaining the operatorship of the Brae Fields. This was not because profit would be made from the role of Operator but because there would be substantial savings made across the whole of TAQA's UKCS business by being Operator of the Brae Fields as well as the other North Sea fields in which it was Operator. However, that does not mean that TAQA was obtaining a financial advantage at the expense of the other Brae Field participants. The cost savings relevant to the Brae Fields would benefit all the participants. TAQA's interest lay in keeping costs to a minimum and that interest was wholly in alignment with the interests of the other participants. As Mr. Hutchison added in his evidence in re-examination (T2/81) that:

> "Q. Now, you were asked about the cost savings that TAQA could make, including in relation to decommissioning by synergies if TAQA became the operator. If TAQA was able to reduce operating or decommissioning costs through synergies as operator, what effect would that have of the costs of the other participants to the Brae JOAs?
>
> A. That would be to their benefit. Clearly if TAQA as the operator saves costs, that would be shared amongst the participants."

I accept that evidence because it is close to obvious. That the synergistic savings would benefit TAQA in relation to its other operations is nothing to the point. Such savings, if made, are not alleged to be at the expense of any of the participants in the Brae Fields and it is difficult to see how such an allegation could be made good if made. Any cost savings that TAQA achieved would accrue proportionally to the benefit of TAQA's fellow participants in the Brae Fields including RRUK. Any additional benefits it achieved in respect of its other North Sea operations are not benefits in which any of its fellow participants could have any interest.

82. Although TAQA's desire to take over as Operator of the Brae Fields never diminished, in my judgment once it became clear that RR had been the successful bidder to acquire MOUK, it became concerned not merely to obtain the advantages of becoming Operator, being those referred to already, but also to avoid what it perceived to be the real disadvantages of MOUK remaining Operator while controlled by RR. Although Mr. Hutchison maintained that the primary reason for the decision to discharge MOUK as Operator was one " … *driven by safety concerns and operational concerns and financial risk* … " (T2/38), for the reasons that I have set out earlier I consider this misstates the position. At least one of the primary reasons why TAQA wished to take over as Operator was because it perceived it to be in its commercial best interests to do so. However that does not mean that it was unconcerned by the risks posed by RR acquiring MOUK whilst it remained Operator or that its professed concerns about the financial and operational viability of RRUK were a "*convenient cover for its pre-determined and pre-existing course to become Operator come what may"*. I conclude that once TAQA became aware that it was RR that was to acquire MOUK it became genuinely and substantially concerned by the risks that such an outcome posed for it and the other non-operator participants and I conclude that even if TAQA had not concluded that it was in its commercial best

interests to take over as Operator of the Brae Fields it would nonetheless have done so in order to eliminate or mitigate those risks. I reach that conclusion for the following reasons.

83. The immediate reaction internally by TAQA's management when learning that MOUK was to be acquired by RR came in an email from Mr. Lewis to all TAQA's relevant managers dated 25 February 2019, in which Mr. Lewis said:

> "Subject: Marathon sells to Rockrose
>
> Morning all. See breaking news. Rockrose, with no operating experience, has signed with Marathon. They want to operate which is our worst fear position. Let's discuss later."

This was followed by an email from Mr. Aoun (the Business Development Director of Abu Dhabi National Energy Company PJSC, TAQA's parent company) to Mr. Lewis, which enquired "*Are they backed by a PE? What is their credit rating? Are they able to provide the right guarantees*?" to which Mr. Lewis replied:

> "LSE listed, 8% owned by Macquarie, 14% by Cavendish Asset Management presumably on behalf of clients and 28% held by the MD. The rest held widely. Only £50m market cap until August. £100m now. They are tiny and entirely inexperienced in upstream offshore operations. They cant have done proper DD in this timeframe. I.e. our worst fears."

This was followed on 5 March by an email from Mr. Lewis to Mr. Taylor, TAQA's managing director, in these terms:

> "Having just agreed the Brae deal they apparently have time for some other business..... Rockrose pulling the acquisition trigger again ... proves they have no idea what they have bought in Brae ..... and don't think they need to focus much on it ..... total wideboys!"

On 20 March 2019 Mr. Taylor requested a script of the issues as TAQA's management saw it for submission to OGA, which by then had requested a response in relation to the proposed acquisition of MOUK by RR – see Mr. Jones' email to Mr. Taylor of that date. This resulted in a list of concerns prepared by Mr. Hutchison that included:

> "1. The Rock Rose financial covenant is very concerning. We cannot understand (yet) their financial or operating capabilities to run the Brae Complex.
>
> 2. What protections are there in place to ensure the Marathon people and process will continue under new ownership
>
> 3. Section 29 notices appear to have not been served on Marathon Oil Corporation. We recommend that should be done

> to protect the JV and the regulator. A separate discussion with BEIS will take place.
>
> 4. We have no clarity about transition planning and ongoing support (if any) Marathon will provide to Rock Rose.
>
> 5. No confirmation yet on the operating model - will Rock Rose outsource duty holder ship or will they be a full operator with duty holder capabilities.
>
> 6. Critical drilling and Brae Bravo decommissioning spends will require efficient cash flow provision and management. Are Rock Rose committed (with ready funds) to all planned and approved budgets?
>
> 7. The Brae JV DSA requires a c.£90MM LOC - how will Rock Rose provide for that?
>
> 8. What are the Safety Case implications for the transaction. Will a change be made and is that likely to be accepted by the HSE?"

Mr. Fowler provided a list of additional issues by email on the same day:

> "Experience with Rockrose in NL indicates unwillingness or inability to provide security on much smaller DSA (details of what from Rene).
>
> Working capital provision appears to have been provided by Marathon due to Rockrose' inability to fund themselves.
>
> Brae planning to tender for Easy [*sic*] Brae removal layer this year - has Rockrose financial capability to honour this timeline and contractual commitment irrespective of not sharing business plan or financial security with Brae partners.
>
> Is rockrose's business plan aligned to already submitted and agreed decommissioning plans contracts and commitments?
>
> Brae pension scheme is in deficit, given recent court case result that went against Brae partners what commitments will Rockrose make to pension scheme members for making up this deficit?"

84. These exchanges are important because they represent the immediate reaction of the manager primarily responsible for TAQA's financial affairs and its other senior managers at a time when it could not be anticipated that there would be litigation in which the genuineness of their concerns would be in issue. It demonstrates an immediate and genuine concern about the financial stability of RR and thus of RRUK.

85. These issues had been communicated to JX and Spirit by an email of 29 March 2019 from Mr. Hutchison, which he described as being " … *a list of issues we see with the Rock Rose acquisition …"* I return to the reaction of JX and Spirit when considering how they reacted to the announcement that RR was to acquire MOUK.

86. The internal discussions about the financial implications of the acquisition by RR of MOUK continued with an email dated 15 April 2019 from Mr. Aoun to Mr. Lewis and his responses. Mr. Lewis gave his responses by insertion into the original email, which I have underlined to make them clear:

> "1- As part of the deal, do we know if Marathon put a clause ensuring that the payments they made (working capital) will be used solely for the decommissioning activities? No we don't and we wouldn't get line of sight of that, however there are two reasons to think not. Firstly if this was their base position they would have put clauses like that in the SPA draft they put into their sales process and they didn't. It is very unlikely that they would be able to start from the position the SPA outlined (no restriction) and row into a more conservative one. Secondly, there is no need for them. If RR go bust then TAQA, Spirit and JX Nippon are the firewall that Marathon have before they get charged with Brae decomm. No need to get into cash restrictions with that kind of firewall."

I do not suggest that TAQA had lost sight of the long-term advantages of becoming Operator. However, as this email exchange shows, in my judgment very clearly, it was also genuinely concerned about the risks posed by the acquisition of MOUK.

87. It had become clear to TAQA's management by early April 2019 that the sale of MOUK to RR would in all probability take place. This is apparent for example from Mr. Lewis' email of 3 April 2019, in which he described the chances of the acquisition not proceeding, as "… *Low likelihood the deal will fall though [because] Marathon and RR … will find a way to make it happen*". However, it is also clear that the financial and commercial benefits of becoming Operator was something that TAQA intended to pursue even if that acquisition did not materialise. This is apparent for example from an internal email of 30 April from Mr. Lewis to Mr. Hutchison for as Mr. Lewis said to Mr. Hutchison in his email of that date, " … *In terms of Spirit and JX interactions on this I think we should try and get them to recognise that even if the deal falls through with RR that an operatorship transfer should be pushed ahead with*". This is further evidence that taking over as Operator was seen by TAQA's management as a continuing important priority albeit one that they considered would benefit all the participants or at least all those other than MOUK.

88. On 9 April 2019, all three non-operating participants had written to MOUK seeking a response to the various concerns including in particular the issues concerning financial and operating capability – see paragraph 2 of the letter where the claimants asked:

> "We have limited information on RockRose Energy's financial and operating capabilities, and it is therefore difficult to assess

> its ability to run the Brae assets. We'd appreciate if RockRose can provide some assurance in relation to this including its ability to fund the venture as Operator prior to charging costs back through joint venture billings"

MOUK responded to each of the claimants in similar terms. In relation to paragraph 2 quoted above the response was:

> "Through the acquisition of MOUK, RockRose is acquiring the full range of MOUK's operating capabilities. MOUK has constructed and operated the Brae assets uninterrupted since inception. MOUK is almost completely self-sufficient, operating Brae with limited support from Marathon's Houston Headquarters. In the areas currently supported by Marathon's corporate functions, predominantly IT and some financial functions, RockRose Energy are working closely with MOUK to ensure robust processes and resources are in place to maintain efficient operations post closure.
>
> RockRose has also advised that RockRose Group currently produces 10,000-12,000 boepd from its UK and NL assets and as at the end of 2018 had a cash position of $121 million (Restricted (DSA's) - $53 million, Unrestricted - $68 million), the addition of Marathon will double the Groups production and 2P reserves and enlarge the Group's core assets and RockRose's 2018 audited financials will be available before the end of April 2019. RockRose will be meeting you shortly, and thus Rockrose can directly provide additional information."

89. A meeting between representatives of TAQA and RR followed on 16 April 2019. The most complete meeting note records that Mr. Hutchison identified the purpose of the meeting as being the opportunity " *... to hear specifics on the questions raised in TAQA's letter of 9 April"*. The Note records Mr. Austin, one of the representatives of RR at the meeting as apologising for the lack of information supplied in the written responses referred to above. The notes of the meeting with TAQA do not suggest that anything further that was material was provided. On 25 April 2019, separate meetings also took place between representatives of RR and JX and Spirit. In so far as the contents of those meetings took matters any further they were explored in cross-examination and I refer to them below.

90. By 30 April the claimants had met with the OGA. The minutes of that meeting prepared by Mr. Hutchison of TAQA record the claimants as having expressed very serious concerns about the operational experience and financial stability of RR to the OGA. This is consistent with the views expressed internally within TAQA and the views that by then JX and Spirit had arrived at, which I set out below when considering their respective positions.

91. The minutes of the meeting with OGA record that

> "TAQA, Spirit and JX Nippon explained detailed financial issues relating to the Rockrose financial position TAQA further

> explained several issues with the operational and safety issues on the Braes which have been apparent over the last 2-3 years under Marathon operatorship."

The minutes conclude with the following summary:

> "OGA confirmed issuing a Conditional Letter of Comfort (eg. splitting Brae equity and operatorship) in relation to a share transaction would be highly unusual and had only ever been done before when all parties had agreed with such conditionality.
>
> OGA commented that the Brae JOA's allowed removal of the Operator and asked if the JV had reviewed their rights. TAQA asked OGA if they would object to the removal of the Brae Operator. OGA confirmed that they would not given this is a JOA right and there were, on the face of it, very real and serious concerns with the Brae operatorship.
>
> Timing of end-June completion still seems workable from OGA perspective. They normally take 1 month to issue Letter of Comfort, but as this deal needs more analysis this may take longer
>
> Post meeting note - It appeared that the OGA did not want to prevent approvals of the Rockrose transaction however if the JV parties were to utilise their rights and agree TAQA to become Operator the OGA did not seem averse to that and would be able to support such an arrangement."

92. In his email circulating the draft minutes including the statements referred to above, Mr. Hutchison summarised his impression of the meeting to both JX and Spirit as being that the " … *more I reflect on the meeting the more it was clear the OGA want us to provide the solution they don't appear to have the ability to deliver*". In his response, Mr. Harrison confirmed that in " … *the absence of Marathon (and subject to a view on implementation and operating costs) Spirit Energy would generally prefer to see Taqa as Operator, rather than RockRose*" and Mr. Kaneko also confirmed JX's position in his response as being that " … *Like Spirit, we would also like to see TAQA as Operator rather than Rockrose, but await your proposal on timing, people and costs, operator history with respect to any change of operatorship*". There were no criticisms of the Minutes by any of those attending in the responsive emails and for that reason I accept their substantive accuracy even though Mr. Hutchison prepared them.

93. RRUK is critical of the fact that TAQA and the other claimants reached this conclusion before OGA had decided whether to issue a letter of comfort. I reject that as a valid criticism. Mr. Harrison's evidence on this issue in cross examination was:

> "Q. Now, you decided to support TAQA taking the operatorship before the OGA had completed that work.

> A. Correct.
>
> Q. Why didn't you wait to see what the OGA's view was before?
>
> A. I think there are two reasons. One is that we or at least I got the indication from the meeting with OGA that they were likely to approve the transaction in any event. They didn't say it specifically, but that was the direction that it appeared they were heading. And secondly I didn't expect the OGA to be able to model all of the liabilities and cash flow to the same kind of risk testing as we would, simply because they didn't know what RockRose transactions would happen any more than we did, but what we knew, because RockRose had told us, was that they would use some of the cash that Marathon had left in the bank and some of the cash from the Brae operations to fund other acquisitions. We would never be able to understand whether OGA knew that or not. And so we came to our own view, which was not going to be changed by the OGA issuing a comfort letter, and, therefore, there was no point in waiting until OGA had issued the letter."

I accept this evidence because it is consistent with the contents of the minutes referred to above and the tenor of the emails in response from Mr. Harrison and Mr. Kaneko referred to above.

94. More generally, this criticism is without merit because the claimants were each entitled to reach their own commercial judgment as to whom as between TAQA and RRUK they preferred to be the Brae Fields' Operator. Indeed, it would have been a probable breach of duty by the directors of the claimants not to do so. The OGA's financial assessment is for its purposes not those of third parties as its own guidance material makes clear and the OGA were aware of what Mr. Lewis called the "*firewall*" – that is the obligation of the remaining participants to bear the obligations of a failed participant. That might have been a comfort for the OGA but was the source of the concern about RR's financial stability so far as the claimants were concerned.

95. There was no requirement that the claimants should wait to see what the OGA would do given that they had all formed the view that a letter of comfort would be issued so as to allow RR to complete on its acquisition. It was clear from the draft minutes referred to earlier that the OGA was content to allow issues concerning who was to fulfil the role of Operator to be resolved by the participants in accordance with the terms of the JOA. The OGA had made clear that it would not issue a conditional letter of comfort, which made approval of the acquisition of MOUK by RR conditional on a change of Operator. In those circumstances, no useful purpose would be served by awaiting the issue of a document that the claimants knew was coming and would not address the concerns that both JX and Spirit had concerning the relative merits of TAQA and RRUK as Operator. In those circumstances, the claimants cannot be criticised for failing to wait until the OGA issued its response and thereby failing to take account of that response before deciding whether to discharge MOUK as

Operator. The claimants took that decision knowing what the OGA was likely to do and which in the end it did. There is no basis for saying that they failed to take that into account. The initial Notices of Termination were served by the claimants on 20 June 2019. The OGA issued its anticipated letter of Comfort on 26 June 2019.

96. To the extent relevant I address RRUK's submissions concerning the relevance of decommissioning costs, the failure to ask for further information and the transition cost capping agreement when considering the motivations of JX and Spirit below. I consider the impact of the pensions deficit issue as a freestanding issue below. On the material to which I have referred so far however, I find that TAQA was motivated both by a desire to achieve the benefits of becoming Operator, which it considered would benefit it in its role in other UKCS fields as well as all the participants in the Brae Fields and also because of genuine concerns as to the financial and operational implications of MOUK remaining Operator after it had been acquired by RR.

JX and Spirit

97. On 13 May 2019, all three non-operator participants wrote to the OGA in these terms:

> "As discussed at the recent meeting on 29th April. 2019 we have significant concerns regarding the Transaction, and thought it prudent to set these out in writing.
>
> The following appendices to this letter include detail around these. concerns:
>
> (i) Appendix A'. a summary of financial analysis, undertaken by TAQA, of RockRose Energy;
>
> (ii) Appendix B: a summary of recent operational: issues
>
> The concerns we have regards the financial and technical capability of RockRose Energy to properly carry out the role of operator and owner of the Brae assets, coupled with the issues we have been experiencing over the past years from an operational perspective from the current operator (which RockRose Energy would be inheriting) have raised concerns as to what the potential consequences of this Transaction could be for Brae assets.
>
> In addition to providing details of these operational issues to you as was requested at our recent meeting, we are reviewing the Brae joint venture agreements to thoroughly evaluate the contractual rights available to us.
>
> We, the non-operating partners, are aligned as to the concerns that the Transaction raises and hope that the OGA gives due consideration lo the matters set out in this letter."

It was submitted on behalf of the claimants that JX and Spirit would not have signed this letter unless they were each satisfied that it correctly represented their views. I

accept that submission. I reject the notion that responsible senior managers such as Mr. Kaneko and Mr. Harrison would countenance writing such a letter to their regulator unless it represented the genuine views of JX and Spirit. There was no reason for either to oppose the acquisition of MOUK by RR or to support a change of Operator at significant cost to each unless they each had the concerns to which the letter referred. That they had such concerns is supported by the oral evidence and internal documentation to which I refer below. As to cost, whilst the cost capping agreement limited the costs that each would incur it did not eliminate it.

98. In my judgment the reasons why JX and Spirit wished there to be a change of operatorship were reasonably clear from the evidence given at trial and which I accept. I summarise this in the findings set out below.

99. *JX's Motivation*

For JX, the concern was to ensure that the most experienced and substantial entity was Operator. Mr. Kaneko made clear in his oral evidence (which I accept) that he had real concerns about RR's financial position – see T2/103-4, where the following exchange in cross-examination took place:

> "Q. What I suggest is that you personally did not have any serious concerns about RockRose's financials at this time, but you were happy for the OGA to carry on looking at the matter; correct?
>
> A. That's not correct. I had a concern about RockRose financial capabilities because our concern – main concern is their liquidities – financial capabilities -- to meet their financial capabilities in future.
>
> Q. You never asked RockRose any questions about their financial capabilities after 10 April, did you? I'll say after the 25th. After 25 April you didn't ask them any questions, did you?
>
> A. I didn't.
>
> Q. No. Why didn't you?
>
> A. Because we raised -- as far as I can remember, we raised such concern or a question by a letter -- by way of a letter dated 9 April, I think, and I thought the answer from MOUK via -- by way of a letter dated 19 April was sufficient and I thought additional information would not make any change our views on such concern".

I accept this and in particular accept the answer concerning the need to ask further questions. MOUK had been given two opportunities to satisfy all three non-operator participants concerning in particular the financial stability of RR. It is entirely unreal in a commercial context to require someone in the position of JX to return again and again asking the same questions, or supplemental questions based on incomplete

information or generalised explanations. The most that can be expected is that the question is asked as it was by the initial letter to MOUK. It was then for RR to supply the best answer it could either in reply to the letter or at the meeting or both. To the extent that this criticism is advanced against all three claimants I reject it for these reasons. The obligation to take account of all material facts does not require the decision maker to make repeated attempts to obtain the information required at any rate in a fast moving commercial context, whatever the position might be in a public law context. If and to the extent there is an obligation to seek out information at all, it did not extend further than I have described at any rate in the circumstances of this case.

100. Mr. Kaneko was also concerned about deterioration in the health and safety element of operational activity at the Brae Fields as is apparent from his evidence in cross examination at T2/106:

> "Q. Just so that you can think about it, what I am suggesting is that you were not aware of any specific issues to do with worsening health and safety performance because, when these matters were relayed by TAQA to Ms Maharajah, it was news to her, and if it was news to her, it must have been news to you as well.
>
> A. That's not correct. I can recall, for example, say middle of last year, 2018, a large number of HSE incident in Brae asset drew strong attention in our head office in Tokyo. The number of HSE incidents in Brae assets were quite larger than our assets in other areas over the world."

101. There was a fundamental difference between MOUK operating with the backing and support of Marathon and RRUK supported by RR. As Mr. Kaneko said at T2/111-112:

> "Q. Well, what I suggest is that your weak spot was that you did not actually think there were very good reasons to remove RockRose as operator.
>
> A. Ah yes, that's not correct. After I came to know about TAQA's intention to assume operatorship of Brae asset, that matter for us, for me, became the matter of choice among the available option for operator for Brae asset, which is better or best operator for us among the options available."

and as he added at T2/114:

> "Q. So do you still say that this was a simple decision?
>
> A. Yes, I still say because --
>
> Q. What I suggest is that this was a very complex decision and you had made hardly any investigation in order to reach it.

> A. Because it was quite obvious for me TAQA be a better operator than RockRose because TAQA has a long experience in Brae and TAQA management has quite good experiences in -- as an operator in UKCS."

102. I accept that evidence not least because it is close to obvious. As Mr. Kaneko added (T2/124) " … *What's important for JX is to have a better operator or a best operator among the options available for us*". In financial terms it was clear that at the time there was a real concern about the balance of risk posed by the relatively weak financial strength of RRUK and its parent when compared to TAQA and its ultimate controllers – see T2/125/25-127/3 - as well as broader management issues that had arisen immediately prior to Marathon's acceptance of RR's bid for MOUK – see T2/127/4-128/1. I accept that the financial issues were of more importance in relative terms than the operational issues but that does not make the operational issues any less of a real or genuine cause for concern when viewed in the context of a choice between continuing with an Operator soon to be controlled by an entity with no Operator experience and replacing that entity with TAQA, an organisation with extensive UKCS Operator experience as well as extensive participator experience with the Brae Fields.

103. *Spirit's Motivations*

Turning to Spirit, its primary concern was to have the most stable operator available. As between MOUK controlled by RR and TAQA, it concluded that TAQA was clearly the better option. That was its genuine motivation and was a view it was fully entitled to come to. My reasons for reaching these conclusions are as follows.

104. Mr. Harrison's evidence was entirely clear that Spirit had real concerns about the financial stability of RRUK, particularly concerning the future decommissioning costs. This was a pressing issue for all the participants for the reasons that I explained earlier.

105. Mr. Harrison maintained that he was concerned about the ability of RRUK to meet its share of the costs and maintained that it was dissatisfied by the explanations that had been given by RR as to how those would be met. As he said (T2/141) in the context of some cross-examination concerning the importance of the transition costs capping agreement:

> "Q. So what I suggest to you is that it was the case that your support for removing TAQA as operator was always made subject to a written side agreement. That's correct, isn't it?
>
> A. It's not correct. That was a view of the legal and commercial department and I did not think they were giving enough consideration to the main issue, which was the liability that we would face under decommissioning costs if RockRose failed and could not pay their share, which ran into many hundreds of millions compared to less than £1 million here." [Emphasis supplied]

Mr. Harrison returned to this issue when being cross-examined about the pension issue (to which I return as a discrete issue later in this judgment), where he said:

> " Q. You never considered anything to do with section 75, potential section 75 liabilities, when you were considering the matter?
>
> A. Not in detail, but our CFO at the time did and his advice to me was that, "Our liabilities are unlikely to increase other than they may become accelerated and that is less important than the risk that we run on the decommissioning liability"."

And a little later he added:

> "A. … The main driver in us supporting TAQA becoming operator was the risk around decommissioning liability and whether RockRose at that time would be able to meet its liabilities because, if it didn't, then, because of the joint and several nature of the liabilities, our share of those would go up from approximately 8% to in excess of 20% and the liability immediately before decommissioning would be something close to $500 million, and that outweighed any of the considerations around pensions."

More broadly, Spirit's concerns were summarised by Mr. Harrison (T2/154) as being:

> "I think "financial matters" doesn't characterise it correctly. I think there were three or maybe four issues, the first of which and the one which was paramount was the ability in the future of RockRose to meet its decommissioning liabilities; the second, perhaps not in this order, was the acceleration of any pension liabilities; the third would have been if RockRose were going to bring in new management to improve upon the performance of the outgoing Marathon team; and fourth was the underlying business performance of the asset. And there were interconnections between several of those and we addressed those in the meeting that we had with RockRose and Marathon".

Spirit preferred the prospect of TAQA to RRUK owned and controlled by RR ultimately because " … *when it came to our three most important questions, which was how they would fund the DSA, whether they would bring in new management and how they would treat the pension fund difficulty, they had already answered those three questions. We didn't like the answers, but they were very clear on those answers …*" (T2/154) and "*TAQA had got both more experience and a better record necessarily than RockRose had, as RockRose had not been an operator, and that applied both to the HSE side of things and the production side, as we had not -- at that time we had not been meeting the budgeted production from the Brae assets*" (T2/181).

106. Spirit's internal contemporaneous documentation suggests that these views were ones it came to independently of the views of its co-participants. In its internal document setting out its position in relation to the discharge of MOUK and its replacement with TAQA, it sets out TAQA's proposals and then continues with its own internal evaluation in these terms:

> "**Spirit Energy Analysis**
>
> The consensus was that TAQA assuming operatorship appears to carry less risk and ultimately ought to provide Spirit Energy with greater confidence around personal and process safety and maximising production. That said it was noted that as well as protecting their interest TAQA have their own corporate agenda (details of which are unknown but likely to concern the prolongation of UK operations) and are seeking to leverage the MOUK/RockRose situation to support this agenda.
>
> …
>
> Reputational concerns
>
> We considered the potential impact a transfer of operatorship could have on the reputation of Spirit Energy but the key point is that we have legitimate concerns over the ability of RockRose to operate the Assets and we are simply protecting our position. The reputational risk has the potential to be greater if we wait until the acquisition has completed before we effect the change as by then OGA will have provided their letter of comfort to the acquisition. It also allows RockRose and Marathon to complete the acquisition in the knowledge of this transfer of operatorship rather than finding out after completion.
>
> Potential divestment
>
> If our preferred course of action is to sell our interest, we do have a degree of leverage at this time and we therefore considered withholding our vote until an SPA is signed. However, notwithstanding this, we agreed that the benefits of proceeding with the MOUK-TAQA transfer of operatorship in advance of the RockRose acquisition outweighed any potential leverage that would be lost by doing so. Particularly given the net value of this asset is negative we wouldn't lose leverage around consideration. Given we would also retain decommissioning liability, it would be a challenge to agree the protections we would require in relation to this in the timescale available. TAQA were positive about the potential of acquiring our interest but have informed us that would require further approvals internally for them and the timing would take longer than is available to us.

> Transition Costs
>
> It was noted that we are exposed to (i) the costs of operator-ship transfer from MOUK to TAQA; and (ii) additional OPEX spend whilst TAQA seek to gain an understanding of the Asset. Spirit Energy has no control over these transition costs and any incremental costs incurred as a result of TAQA assuming operatorship. TAQA's indication of the transition costs was £5 - £10mm (with an analogue given of SVT £11mm cost of transition) but TAQA admitted there wouldn't be certainty on these until the transfer of operatorship had taken place. TAQA have verbally agreed to limit Spirit Energy's exposure to transition costs at their net share of £5mm. At this time TAQA are considering whether to offer the same limit to JX and this is to be followed up in writing."

There are a number of points that arise from this document. First it is on its face and in fact Spirit's own independent analysis of what was being proposed. This is apparent not merely from the sub-heading at the start of the part quoted above but from the issues that are then considered, each of which is material only to Spirit's own commercial interests. Second it confirms that the value of the Brae Fields is negative – that is so because parts were in decommissioning and other would be entering the decommissioning phase in the relatively near future. As I have said already, it is that factor that explains why all the claimants were concerned to a less or greater extent with decommissioning costs and the impact those would have in the event that RR was unable to finance MOUK/RRUK's share of those costs. Finally, it shows that Spirit were concerned about the costs of a transfer of the operatorship and that attached importance to achieving certainty as to its costs exposure by the cost cap arrangement.

107. It was suggested in the course of cross-examination that the risk that RR would not ultimately be able to finance its share of the decommissioning costs would arise whether or not RRUK was Operator and thus was something that should not have been taken into account. In my judgment that submission is mistaken. My reasons for reaching that conclusion are as follows.

108. Mr. Harrison rejected that assertion in cross examination for reasons that he was invited to explain in re-examination and which he explained in these terms:

> "MR FOXTON: Mr Harrison, you were asked about a comparison of the consequences of RockRose being unable to meet its decommissioning liability, comparing a position where RockRose was both equity-holder and operator and where RockRose had equity but wasn't the operator, and you said the exposure would be completely different. Could you explain why?
>
> A. It's around -- if I look at the situation where a non-operator fails and is removed, it's in effect a legal/administrative process. Notice is served and effectively the non-operating

> partner has its equity forfeit and it's divided by the other partners, including the operator.
>
> In the case where the operator defaults, although the joint operating agreement is written to reflect the same process, in practice, because the operator employs the people and controls the bank accounts and controls the contracts under which we work, then it's a much more protracted arrangement and may -- well, will involve novating contracts, it might involve TUPE, and, therefore, it can't be a kind of relatively quick process; it's an extremely tortuous process, I would imagine."

I accept that evidence. It could not be said that the factor identified by Mr. Harrison was irrelevant and in reality this challenge was as to the weight that Spirit gave to this point. It is not suggested and could not sensibly be suggested that this conclusion was arrived at in bad faith or was capricious or arbitrary. It was a factor that Spirit considered and was fully entitled to consider should be given significant weight together with the other factors identified by Mr. Harrison.

109. *The Transition Costs Agreement Issue*

The one point that RRUK has never been able to answer with conviction is why JX and Spirit would go along with a change from RRUK to TAQA unless the concerns I have summarised above were genuinely held beliefs. The only point that has been identified is the impact of the costs capping agreement. This is said to demonstrate bad faith on the part of TAQA and the reason why JX and Spirit were willing to agree to what otherwise they would not have been willing to agree to. I am not able to accept either of these points.

110. There was nothing of any benefit in the change of operatorship for either JX or Spirit if the reasons they have each given for wanting the change are not genuine reasons. No alternative reasons have been identified as to why they would want a change if the reasons they have given were not genuine reasons. Thus the only alternative for both is that they had no reasons of any sort for wanting the change. That might have been a tenable argument if such a change would have no adverse impacts on either. Thus if it could have been demonstrated that the cost cap agreement was in fact an agreement to indemnify each in respect of any transition costs then it might have been arguable that they were content to go along with TAQA even though there was no benefit in so doing. However that is not the effect of the cost capping agreement. Although their exposure to transition costs was capped, they were still exposed to such costs beneath the cap when they would not have been had there been no change of Operator. There was no logic in them incurring such costs simply to enable TAQA to benefit. This difficulty led to the rather telling exchange at the end of Mr. Harrison's cross-examination:

> "Q. And in going along with what TAQA was suggesting, I suggest that you had no proper basis to take a decision or to support TAQA in deciding to remove Marathon as operator.
>
> A. I didn't go along with what TAQA were proposing. I think I proposed it first of all to TAQA and to Spirit."

The reality is that as between RRUK controlled by RR and TAQA, Spirit and JX considered that their respective commercial best interest lay in TAQA becoming Operator. That is the only reason why either would contemplate becoming exposed to transitional costs that were otherwise avoidable.

111. Although it was suggested that there was something improper in TAQA offering to cap the transition costs of both JX and Spirit, I reject that suggestion as well. There is no real dispute at any rate by the time of the trial that the impact of transition costs was an issue for each of JX and Spirit. Although it is submitted on behalf of RRUK that neither would have supported the discharge of MOUK as Operator but for the willingness of TAQA to offer the costs cap, the evidence does not justify such a binary view although I accept that the availability of the cost cap was a material consideration for each of JX and Spirit in deciding whether to support TAQA's proposals.

112. There is no real doubt that in offering the costs cap TAQA was motivated by the potential financial and commercial advantages in becoming Operator highlighted earlier. I have no doubt that gave JX and Spirit what their witnesses referred to as "leverage" in their discussions with TAQA. Spirit's internal assessment quoted earlier acknowledges that TAQA had its own individual reasons for wanting a transfer of the operatorship. However, it is impossible to be sure what would have been the outcome if TAQA had chosen not to offer a transition costs cap. JX would certainly have had to seek approval from its Japanese owners before supporting a change because of the costs implications and although the material available indicates that Spirit was willing to support TAQA only because of the cost cap offer, Mr. Harrison's evidence was that was a legal and accounting position that in his view was outweighed by the other risks to which he referred in his evidence. Whilst it cannot be certain what would have been the outcome if the costs cap had not been offered, I am satisfied that Mr. Harrison would have argued for a change. I accept that whether to support the change would have been more problematical for both JX and Spirit.

113. The basis on which it was suggested the offer of a costs cap was improper was put in cross examination of Mr. Hutchison was as follows:

> "Q. Now, under the JOAs the operator has an obligation to share all of the costs chargeable to the JV to the partners in proportion to their participatory interest; correct?
>
> A. Yes.
>
> Q. And under your plan you would be incurring transition costs and then, when you became operator, you would be charging those costs to the joint venture partners; correct?
>
> A. Yes.
>
> Q. But you would not be charging them in proportion to their participatory interests, would you?
>
> A. No, because of the side agreement.

> Q. No. You would be charging Marathon its proportion, but you would be undercharging the others; correct?
>
> A. It depends on the overall costs, but if it was above £5 million, then, yes, because there was a cap.
>
> Q. Yes, and you expected it would be above £5 million, didn't you?
>
> …
>
> Q. Mr Hutchison, would you agree that it would be inappropriate to offer JX and Spirit £1 million each if they would vote off Marathon as operator and install you?
>
> A. Yes, without understanding any of the context, yes, that would be unusual.
>
> Q. What I suggest to you is that agreeing to cap their transition costs at their share of 5 million is equally an inappropriate matter to offer to get them to vote Marathon off as operator. That's right, isn't it?
>
> A. I wouldn't agree with that. The concept of transition costs is often vague in the JOAs and having clarity is important."

114. There is no reason why, as between two or more participants, there should not be a local agreement between them for the sharing between them of some or all of the costs otherwise due under the terms of the JOA from one or both of them. Such an agreement could have no impact on the primary obligations of each of the parties under the JOA, which could only be altered by variation or novation of the relevant JOA. The effect of the agreement was not to increase to any extent the financial burden on MOUK/RRUK. There is no basis for suggesting that any such agreement would be improper unless the same terms were offered to each of the other joint venturers. Their respective rights and obligations are governed by the JOA. What each agrees with the other outside the JOA is immaterial at least where as here it has been agreed that the JOA does not constitute a partnership or similar relationship. I do not accept as valid the criticism in cross examination concerning what TAQA stated in its pre OC meeting note concerning transition costs. There, TAQA had said that if a question arose from RR concerning the transition costs the response would be "*To the extent that the costs are properly charged to the JV, the costs will be dealt with under the JOAs in the usual way*". It was said this was deliberately misleading given the terms of the cost capping agreement. I do not agree. As between RRUK and the other participants that was entirely accurate. More to the point, I do not see how disclosing the existence of the cost capping agreement at that meeting could have had any impact on the outcome which had long been decided as between those who were entitled to vote on the issue.

115. In my judgment for both JX and Spirit de-risking their continued involvement in the Brae Fields was what concerned them and for them that meant replacing an Operator that they perceived to create increased risk with one that posed less risk was the sole consideration. For TAQA the financial benefits for its UKCS business as a whole of becoming Operator of the Brae Fields was a primary factor but it also had genuine fears for the future based on the issues highlighted in the letter to the OGA referred to above and discussed at some length in the internal emails from which I have quoted. This material satisfies me that independently of the financial benefits that it believed would accrue to it in the future from becoming Operator, it was also concerned to avoid what it considered to be the real risk posed by RR becoming the controller of MOUK while it remained Operator.

The Pension Deficit issue

116. This issue is pleaded by RRUK at paragraphs 20-24 of its amended Defence and Counterclaim in these terms:

> "The Scheme
>
> 20. Marathon Service (G.B.) Limited ("MSGB") (which is now known as RockRose UKCS 9 Limited) is a service company which supports the Defendant in its role as Operator. MSGB employs individuals (the "employees") whom the Defendant uses to work on the Joint Operations. Those employees (and individuals who were previous employees) are beneficiaries of a defined benefit pension scheme, the Marathon Service (G.B.) Limited Pension and Life Assurance Scheme (the "Scheme"), in which MSGB is the sole employer, and which is administered by independent trustees (the "Trustees"). The Scheme operates with a significant pension deficit.
>
> 21. Because of the pension deficit, the Scheme has an on going deficit recovery charge ("DRC"). The Participants are liable, under the proper construction of the JOAs, for a percentage of the DRC as billed to them by the Defendant as Operator. TAQA, TAQA LNS and Spirit previously (wrongly) disputed such liabilities. The Defendant relies on the judgments of Robin Knowles J [2018] EWHC 322 (Comm.) and of the Court of Appeal for their full meaning and effect.
>
> 22. Upon the transfer of Operatorship and/or the discharge of the Defendant from its duties as Operator, MSGB, the current employer of the Joint Operations employees, has no further trading activity and so will cease to carry on business. In that event, the Trustees have the power to terminate and/or wind up the Scheme such that the employer becomes liable for the full debt of the Scheme pursuant to section 75 of the Pensions Act 1995. That section 75 debt was estimated at £219.5 million in 2016, for which the Participants would be liable for approximately 54.74%. A section 75 debt represents the costs

> of purchasing annuities with an insurer for all benefits in the Scheme such that the Scheme no longer needs to rely on its employer for funding.
>
> 23. It is averred that if the Operatorship is transferred from the Defendant, such that MSGB ceases to carry on business and so ceases to generate income from which to fund the Scheme's liabilities, then the Trustees (who are under a strict fiduciary duty to act in the best interests of the Scheme's beneficiaries) are likely to exercise their power to terminate and/or wind up the Scheme and/or seek immediate payment of the debt due under section 75 of the Pensions Act 1995 in accordance with their duties and in order to protect the best interests of the Scheme's beneficiaries. In such an eventuality, all Participants would be liable for their share of any section 75 debt that thereby arose."

An allegation made in paragraph 52(3) of the original Defence and Counterclaim to the effect that "… the Claimants made the Purported Decisions without considering the potential pension liabilities under the Scheme, in particular the potential triggering of the section 75 debt, which could arise upon the transfer of the Operatorship from the Defendant" was deleted when the Defence was amended. As amended the allegations made by reference to the pension scheme deficit issue were that the decision to discharge MOUK was taken " … on the erroneous basis that they would not be liable for any potential pension liabilities under the Scheme, in particular the potential triggering of the section 75 debt, which could arise upon the transfer of the Operatorship from the Defendant" and, to the extent that was the basis of the decision to discharge, that the claimants decided to discharge MOUK as Operator " … for a collateral purpose, namely to attempt to circumvent the effect of the Judgment of the Court of Appeal in paragraph 21 … of the amended Defence". It is asserted that by acting as alleged, the claimants failed to act in good faith towards the defendant in the performance of the JOAs and/or exercised their powers for an improper and/or collateral purpose; and/or did not exercise their powers in good faith; and/or exercised their powers capriciously, irrationally, and/or arbitrarily.

117. What is set out in paragraph 20 is not disputed as a matter of generality although the details are not known to the claimants nor is it alleged the claimants know them. It is common ground that the trustees have a discretion though there is some dispute on the pleadings as to what the nature of that discretion is and how it is to be exercised. The claimants deny that it is likely that the trustees will decide to wind up the scheme on a change of operatorship and in any event maintain that if RRUK continues in the Operator role, its intention is to arrange a sale of the scheme to an insurer, which would trigger the need for each participant to contribute to the cost of making good the deficit.

118. The effect of the deletion is that it is not, or is no longer, alleged that the implied terms on which RRUK relies were breached simply by failing to take into account the possible effect on the pension deficit of a change of operatorship. Thus although it is submitted by the defendant at paragraph 79 of its closing submissions that the decision to discharge was not taken for a proper purpose because "… they failed to

take account of [an]obvious relevant consideration namely the s.75 pension liabilities …", that is not an allegation that remains open to the defendant on the pleadings. It follows that whilst two of the claimants took no account of the pension issue when deciding to discharge MOUK as Operator – see Mr. Hutchison's evidence at T2/57 and following and Mr. Kaneko at T2/121 - and one had considered the effect would be to potentially accelerate liability – see Mr. Harrison's evidence at T2/121 and following - that of itself is immaterial.

119. At the outset of the trial the claimants were willing to accept for the purposes of this litigation but not otherwise that it was possible that in the future the trustees would seek to wind up the Scheme and that if they did RRUK would be able to recover some of any s. 75 debt that arises under the JOAs. However the much more pertinent point is that the error alleged is that the claimants acted on the mistaken basis that they would not be liable for any potential pension liabilities under the Scheme if they decided to discharge MOUK as Operator whereas in fact they will be. However there is no evidence that this was the basis on which the decision was taken because two of the three decision makers took no account of it at all and the third thought (correctly) that any effect would be limited to the possibility that the parties would have to make a payment they would have to make in any event sooner than would otherwise be the case. This was what Mr. Mann described in his oral evidence a "*time value of money*" point – see T3/53. However there is no evidence from which I can find this was likely to be a material consideration and there is some evidence that suggests it would not have been. First, it was accepted by Mr. Mann that in the event that it became Operator it was planning in the near term to arrange a buyout of the pension scheme by an insurance company and charge the costs of that exercise to the participants as an expense to which they were liable to contribute under the JOAs. This was necessary because Marathon had provided a parent company guarantee in respect of the pension liability that lapsed on the sale of MOUK to RR. As Mr. Mann accepted in his evidence (T3/24) this was what triggered "*… the prudent thing …"*, which was to arrange a buyout of the pension scheme by an insurance company. If that is so then any assessment of the impact of acceleration would have to take into account the costs and timing of such a change in the event that there was no change in the Operatorship. There is no material that enables such an assessment to be carried out.

120. The other material from which it can be inferred that the practical effect of acceleration would not be material is the absence of any mention of it in the Stock Exchange prospectus that RR issued on 19 July 2019, after the completion on 1 July of its acquisition of MOUK. As is well known and as Mr. Mann accepted, such documents are prepared on a highly cautious basis so as to eliminate any suggestion that investors have been misled by their contents. Mr. Mann accepted that he was involved in preparing the prospectus. Although (as Mr. Mann accepted in cross examination) there is mention in the prospectus of the dispute with TAQA concerning the operatorship, there is nothing anywhere within it that alludes to the acceleration risk on which RRUK focussed at trial. Mr. Mann was cross-examined about this. At T3/40-41 This exchange took place:

> "Q … Presumably RockRose had collated and considered materials on any potential section 75 liability for the purposes of preparing and publishing the RockRose prospectus?

> A. Yes. I mean, we'd obviously looked at the pension as a whole all the way through this, which then we used to base the -- in the prospectus."

There was no mention of the acceleration risk on which RRUK now rely. This led to the inevitable question as to why that was so. Mr. Mann sought initially to avoid the impact of this point as for example in the following exchange:

> "Q. But for the purposes of publishing a prospectus with risks to the Stock Exchange, a liability which is inevitable from a change of operatorship on 18 July is not going to become one that is so sufficiently unlikely to result that it doesn't require mention in a prospectus published on 19 July, does it, Mr Mann?
>
> A. By this time it's already been through five or – three or four reads with the London Stock Exchange, it's also been through all the aspects and it's already published by this point, even though it's released on the day after, and also at the same time, as I said, we are still working with the partners to amicably sort this out because ultimately we don't feel that is the right way forward.
>
> Q. This isn't going to do, I'm afraid, Mr Mann. You have told us that the pensions liability section 75 is one that you have raised with the partners from 1 July onwards, you've told us that information on it was collected and considered for the purpose of prospectus, and there was both ample time and a legal duty fairly to reflect that risk in the prospectus published to the London Stock Exchange on 19 July, wasn't there?
>
> A. Yes, and, as I said, we were still in negotiations with the partners to try and sort this out and actually we have always been all the way through this process because ultimately it is of no benefit to have to do this and go through this process.
>
> Q. But you're not suggesting this inevitable risk on the 18th is one that you don't need to alert potential acquirers of RockRose shares to in a prospectus because of your hope you may be able to sort it all out by negotiation?
>
> A. I believe that ultimately we were working to sort it out, as I've said, and ultimately, if we had to deal with the section 75 liability, then those responsible would have to step up and deal with it, but we still have the liability of the pension. We recognise that in the prospectus."

121. Ultimately, having accepted that he understood the "*... heavy responsibilities that attach to those who publish Stock Exchange prospectuses ...*" (T3/43-4), and having acknowledged that it was he who approved the Defence in which it was asserted that

it was likely that the trustees would wind up the scheme if there was a change of operatorship, there was this exchange:

> "Q. Isn't the fact that by 19 July RockRose had satisfied itself that there was no material risk of a section 75 liability crystallising on the transfer of the operatorship?
>
> A. The transfer of operatorship is something that may cause the trustees still to cause section 75."

before Mr. Mann was driven to accept that the risk on which RRUK now relies was not sufficiently material for it even to require mention in the prospectus:

> "Q. But is it seriously your evidence, Mr Mann -- because if it is, I'm sure there will be many very interested in it -- that an inevitable risk of the transfer of operatorship leading to an acceleration and a section 75 liability, including for Marathon its 40% share of Brae and its share of non-Brae assets, would not be a matter that you'd be required to identify in this prospectus?
>
> A. Obviously, as I said, this has been through many iterations with lawyers, etc. As I said, the company could cover the section 75 from its perspective in relation to its share, it has a letter of credit in place, which is from -- in the beneficiary of the trustees. So, from its perspective, I would suggest the risk is not as high as you're suggesting it might be, and obviously based on the fact that it's been through many lawyers, etc, before and their professional opinion have written these on many occasions, it was not deemed to be.
>
> Q. I missed the end of that sentence, Mr Mann.
>
> A. It was not deemed to be -- obviously it's not here"

The result of this evidence therefore is that Mr. Mann understood that the pension issue did not pose any material risk for RRUK because it had provided for its liability and because there would in all probability have to be an insurance company buy out of the pension scheme in any event. From this it can be inferred that there was no material risk for the claimants because it was not inevitable that a transfer of the operatorship would trigger payment of the deficit although that might occur but also because in reality the liability would crystallise in any event even if RRUK remained Operator because of RR's intention to arrange a buyout of the scheme by an insurer.

122. It is possible that there might have been some acceleration that had a material effect notwithstanding this, although it was submitted by the claimants that the time cost would be a tiny fraction of the sum that in any event will have to be paid. If RRUK was going to allege that in all the circumstances acceleration would have been a material consideration, it had the evidential burden of proving that was so and the obligation of disclosing the documents that supported such an assertion. No attempt had been made by RRUK to calculate the impact of that acceleration for any of the

parties nor did it disclose the documentation that might have enabled such a calculation to be carried out and no one has carried out any calculations in order to demonstrate that is so.

123. In any event there is no evidence whatsoever that supports the conclusion that the, or one of the, reasons why the decision to discharge was taken was to circumvent the effect of the decision of the Court of Appeal. The ultimate point is however that there is no evidence from which it can be concluded that it is likely that the change of operatorship will result in acceleration. There is no direct evidence from the trustees as to what their decision will be if the discharge of RRUK as Operator takes effect.

Conclusions

124. For the reasons set out in paragraphs 26 and 34-43 above, I conclude that the express terms within the JOAs on which the claimant relies were provisions that on their true construction conferred an absolute right on the non-operator participants in the joint ventures to which they applied to discharge the Operator on the minimum notice specified in the JOAs subject only to there being a majority in support as provided by the terms concerned. That being so and for the reasons set out in paragraphs 27-29 and 44-62 above, I conclude that the terms on which the claimants rely are not subject to any implied constraint as alleged by RRUK.

125. In those circumstances my remaining findings are not necessary for this decision and are not intended to set out any conclusions of any relevance other than to the facts of this case. They have been made at the request of the parties in case my conclusions at paragraphs 26-62 should be wrong. Even assuming that there are terms to be implied into the contract as alleged by RRUK, I do not accept that the claimants are in breach of them in the light of those findings. Even assuming that TAQA was not entitled to have regard to its wider commercial best interests, it was entitled to have regard to and in my judgment had regard to the financial and operational risks that it subjectively but genuinely perceived were posed by MOUK continuing as Operator after it had been acquired by RR in arriving at the conclusion that MOUK should be discharged as Operator. Likewise both JX and Spirit supported TAQA because they both considered it was in their best interests to do so as a means of avoiding or mitigating the risks posed by MOUK continuing as Operator after it had been acquired by RR. On the material that is available to me, I consider that each would have decided to proceed as they did even if they had known everything that is now known about the impact that decision might have on the pension deficit issue. I do not consider that there was a breach by any of the claimants of any of the implied terms relied on by RRUK in offering or proceeding on the basis of the offer of the transitional costs cap. As I have said that did not eliminate all JX and Spirit's costs liability, it merely capped it. Given the terms of the JOAs, there was no reason why JX, Spirit and TAQA should not enter into such an agreement.