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Decommissioning Oil and Gas Wells in the UK – High Court Delivers Important Judgment with Ramifications for M&A Deals and the Provision of Decommissioning Security

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In the recent case of *Apache UK Investments Limited v Esso Exploration and Production UK Limited* [2021] EWHC 1283 (Comm), the English High Court has delivered an important ruling which addresses the extent to which a prior owner of an oil and gas field in the UK's continental shelf could be made liable by the UK Government to decommission wells which were drilled after the field was sold.

In this short article, we summarise the Court's decision and the statutory basis upon which upstream oil and gas license holders and their affiliates can be made liable to fund and carry out the decommissioning of offshore oil and gas installations and pipelines in the UK. We also briefly set out potential consequences of the Court's decision for industry participants.

Brief Summary of Statutory Decommissioning Liability

Part IV (Abandonment of Offshore Installations) of the Petroleum Act 1998 (the "**Act**") sets out the statutory basis upon which upstream oil and gas exploration and production industry participants can be made liable to fund and carry out the technically challenging exercise of decommissioning offshore oil and gas installations and pipelines at the end of their productive lives.

Section 44 of the Act defines "offshore installations" to mean any installation which is or has been maintained, or is intend to be established, for oil and gas exploration and production purposes.

The UK Government has the power to issue a notice on certain persons under section 29 of the Act (a "**Section 29 Notice**") requiring them to submit a decommissioning programme to the UK Government for approval, and if they don't, the UK Government can prepare its own programme under section 33 of the Act. Once the program is approved by Government, such

persons can be required to carry out the decommissioning programme under section 36 of the Act.

Persons liable to receive a Section 29 Notice include the current licence holders, current managers (or operators) or current owners of the instillations or pipelines, and their associated persons (such as affiliates and entities in which 50% or more of shares are held).

Former owners (and their associated persons) can be made liable to carry out decommissioning programmes, including within the confines of section 34 of the Act. They can only be made liable for decommissioning offshore installations or pipelines under section 34 if they fall within the category of persons to whom a Section 29 Notice in relation to the relevant installations or pipelines could have been given at some time since the giving of the first Section 29 Notice in relation to that installation or pipeline.

The basic public policy rationale seems to be that former owners can be made liable for decommissioning offshore installations or pipelines in which they had an economic interest at the time they sold their interest in the field, but that they shouldn't be made liable for installations and pipelines put in place after they have left the field and from which they derived no economic interest.

Apache v Esso Case Summary

ExxonMobil (via its subsidiary Esso Exploration and Production UK Limited) sold a package of high value UK North Sea oil and gas assets to Apache in 2011. As part of that transaction, Apache agreed (as was customary at the time) to provide security in the form of guarantees and bank letters of credit to ExxonMobil in respect of decommissioning liability for installation and pipelines in existence at the time of the sale.

Critically, Apache's obligation to provide guarantees and letters of credit did not extend to "new field facilities" for which ExxonMobil "is not required to submit or carry out a [decommissioning] programme…under the [Act]".

A dispute arose between the parties as to whether or not relevant Section 29 Notices (which referred generally to "wells") covered four new wells drilled after the sale of the assets to Apache and many years after issuance of the Section 29 Notices.

ExxonMobil argued that they did, and that it could therefore potentially be liable for the corresponding decommissioning costs under section 34 of the Act and Apache would therefore be required to provide security to ExxonMobil for such costs. Had ExxonMobil been successful in that argument, presumably it could have had significantly farther reaching consequences in respect of ExxonMobil's residual liabilities in the UK.

Apache argued that no such security was required because ExxonMobil did not have potential liability under section 34 of the Act to decommission those new wells, and that such wells were

not “offshore installations” at the time that the notices were issued because they had not been maintained, or intend to be established, at the time that the notices were issued.

The Court’s Decision

The High Court found in favour of Apache, concluding that the four additional wells fell outside of the scope of the existing Section 29 Notices and that Apache was not required to provide security to ExxonMobil in relation to those wells.

In reaching its judgment, the Court determined that:

1. The question of whether the existing Section 29 Notices could be construed as applicable to the additional wells depended on what was meant by the expression “*offshore installation*”.

2. “O*ffshore installation*” referred to equipment or structures within the field or sub-field such as a rig, rather than the entire field itself (particularly given that, under section 44 of the Act, the expression is stated to include floating structures or devices maintained on a station).

3. Additional wells, constructed many years after the Section 29 Notices were issued, were not included in the Section 29 Notices, because at the time such notices were issued they were not “*being maintained*” or “*intended to be established*” and therefore were not “*offshore installations*” at the time that the notices were issued.

Comments and Consequences of this Decision

The Court’s decision will be welcomed by sellers (such as ExxonMobil) to the extent that it clarifies that wells which had not been drilled, or were not intended to be drilled, at the time of the sale are not installations for which they can be made liable under the Act.

Similarly, for those (like Apache) who have agreed, or may agree in the future, to provide security for decommissioning costs, this decision reinforces the limits of the amounts of necessary security.