The legal relationship between the Operator and the Non-Operators under a typical UK JOA

Introduction

Although no absolutely standard form of UKCS Joint Operating Agreements has ever emerged. Since the first UKCS licensing round in 1964 there have been various revisions to the UK model. This essay describes the provisions of the 2009 UK industry model form JOA as the basis of the legal relations of the operator and non-operator in the UKCS. The essay concludes that although in other JOA’s the operator may be in fiduciary position towards non-operators; it is unlikely for the operator under the 2009 UK model to be held as a fiduciary towards non-operators.

Under the model, there are basically two sets of parties to an oil and gas exploration Joint venture (JV); that is the operator and Non-operator. The JOA follows from a Joint Bidding Agreement (JBA) or an Area of Mutual Interest Agreement (AMI) containing the selected acreage in a particular licensing round or an ‘out of round bid’. The parties’ relationship in the JOA effectively begins with the granting of approval to the agreement by the secretary of State (SOS). Notwithstanding the need for this consent the JOA is essentially a private contract between the parties and serves to regulate it. The agreement represents the entire

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1 United Kingdom Continental Shelf.
2 JOA, also ‘the model’ in this essay.
4 ibid.
6 The parties may be more than two but they fall in these category.
7 Model 2009, cl 3.
8 Distinguished from regular joint ventures it exist under the notions of an ‘unincorporated JV’s’ as will be seen in this essay.
9 Model 2009, cl 5.
10 Model 2009, cl 5.
11 Styles (n 3) 362.
12 ibid.
13 Recital to the 2009 Model 2009.
14 Styles (n 3) 364.
understanding of (and) agreement between the participants\textsuperscript{16} and supersedes all other previous understandings\textsuperscript{17}

\textit{Legal relationship: Operator and Non-Operator}

Although the license is granted jointly and severally to the parties, it does not provide the sharing of the rights and obligations between them.\textsuperscript{18} Thus the legal relationship of the parties is described in the JOA\textsuperscript{19} in terms of their respective property interests\textsuperscript{20} and their contractual rights and duties.\textsuperscript{21} These include provisions that:

a. The JV is not a partnership and the liabilities of each participant are several and not joint.\textsuperscript{22} It has thus been referred to as a ‘non-integrated’ or ‘unincorporated JV’.\textsuperscript{23} This view is supported by the fact that parties share production and not profit and thus not meeting the point of what a partnership ordinarily is by s 2 of the Partnership Act 1890 which \textit{inter alia} refers to partnership as relations with a view to profit.\textsuperscript{24} It is noted however that the courts in the UK may not decide in favour of the mere label that ‘the contract is not a partnership’ and rather access the relationship for what it actually is.\textsuperscript{25} Parties may therefore want to pay particular attention to what the arrangement actually will be.

b. Each party indemnifies the other parties to the extent of their respective percentage interest share for claims or liabilities arising from or connected to the joint operation.\textsuperscript{26} Learned author explains that for being unremunerated he will not usually be liable for any loss of production or other consequential loss.\textsuperscript{27} Loss or injury\textsuperscript{28} to or arising out of the

\textsuperscript{16} Operator or non-Operator depending on the context of use.
\textsuperscript{17} Model 2009, cl 3.2.
\textsuperscript{18} GMD Bean, ‘Fiduciary Obligations and Joint ventures: the collaborative Fiduciary Relationship’ (Oxford 1995) 7 (Bean).
\textsuperscript{19} Model 2009, cl 22.
\textsuperscript{20} Model 2009, cl 4; Styles (n 3) 364.
\textsuperscript{21} ibid.
\textsuperscript{22} Model 2009, cl 22.2.1.
\textsuperscript{23} Styles (n 3) 369 citing \textit{Spree Engineering & Testing Limited v O’Rouke Civil & Structural Engineering Ltd} (unreported 18 May 1999 WL 33453546).
\textsuperscript{24} Partnership Act 1890 s 2 (2).
\textsuperscript{25} Styles (n 3) 368; \textit{Weiner v Harris} [1910] 1 KB 285 at 290.
\textsuperscript{26} Model 2009, cl 22.2.2.
\textsuperscript{27} Styles (n 3) 377.
\textsuperscript{28} Including death.
visit of representatives\textsuperscript{29} of the participants shall be treated as arising from or in connection with the joint operations;\textsuperscript{30}
c. If claims or liabilities arise out of the wilful misconduct of a participant, the participant shall indemnify and defend the other participants and hold them harmless against such.\textsuperscript{31} However in no event shall that liable participant be liable to the other participants for consequential loss.\textsuperscript{32} The model defines wilful misconduct\textsuperscript{33} for the avoidance of doubt and it has been suggested that the growing body of case law which defines the term may in addition to the model be useful.\textsuperscript{34}
d. Participants shall defend or hold harmless all other participants and their representatives against any loss or personal injury arising from that participant’s representatives’ while exercising their right of access under the JOA irrespective of negligence and/or breach on the part of any person in the indemnified group.\textsuperscript{35} The exception here is if the loss or injury is as a result of the wilful misconduct of any person in the indemnified group.
e. Even after the termination of the life of the JV\textsuperscript{36} the participants have obligations of confidentiality concerning the data of the JV towards one another for a defined period.\textsuperscript{37}

The other rights and responsibilities that define the relationship between the operator and non-operator are specific provisions, which include:

\textit{Operator}

a. Shall act as disclosed agent of the participants\textsuperscript{38} unless directed otherwise by the joint operating Committee (JOC),\textsuperscript{39} and this is without prejudice to the non-operators’

\textsuperscript{29} Including directors, agents and affiliates.
\textsuperscript{30} Model 2009, cl 22.2.3 (b).
\textsuperscript{31} Model 2009, cl 22.2.2.
\textsuperscript{32} ibid.
\textsuperscript{33} Model 2009, cl 1.1.
\textsuperscript{34} Styles (n 3) 378.
\textsuperscript{35} Model 2009, cl 22.2.3 (a).
\textsuperscript{36} Model 2009, cl 2.
\textsuperscript{37} Model 2009, cl 19.
\textsuperscript{38} Model 2009, cl 6.5.8.
\textsuperscript{39} Model 2009, cl 6.6.
unfettered right to act for themselves or the JV. Thus the liability the operator can bring upon the JV is only as far as he acted within his capacity as an agent of the JV. 

b. To conduct joint operations by itself or through agents or contractors under the supervision of the JOC. The JOC must approve the programmes, budgets and authority for expenditure (AFE). The non-operator is a member of the JOC and therefore takes active part in overall supervision of all the operator’s activities. There are however specific exceptional circumstances under which the operator can act without prior permission in the interest of the JV.

c. Prompt provision to each participant of reports, data and information. Conduct of all operations in compliance with the License and applicable Legislation; not to personally gain profit or incur loss for joint operations; establish and maintain business standards and avoid any conflict of interest with the other participants.

d. All participants have the right of inspection and to make copies of books, records or inventory upon proper notice. Each participant also has access to all joint operations in accordance with any requirement of the agreement.

e. The operator has a right to resign and can also be removed by the JOC in accordance with the procedure laid down in the JOA.

Non-Operator

a. Is a member of the JOC playing supervisory role over the operator.

b. Pays pro rata for cash calls for all JOC approved expenses or joint operating liabilities failing which the party is in default. This payment is the most important duty of all the participants.

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40 ibid.
41 Styles (n 3) 384.
42 Model 2009, cl 6.2.1
43 Model 2009, cl 6.2.1 (a) and (b).
44 Model 2009, cl 9.2.
46 See for example the provisions relating to defending the JV under cl. 8.3.2 of the Model.
47 Model 2009, cl 6.2.1 (c).
48 Model 2009, cl 6.2.2 (b).
49 Model 2009, cl 6.2.2 (d)
50 Model 2009, cl 6.2.3
51 Model 2009, cl 7.2.
52 Model 2009, cl 7.3.
53 Model 2009, cls 3.2-5.4.
parties to the JV. More so that the JV is for the purpose of pooling resources and sharing of risk.

Is there a fiduciary duty?

The question is whether the JAO places the operator in a fiduciary position towards non-operators.

Arguments for the position that there is a fiduciary duty are that notwithstanding the JOC’s supervision, the operator manages the project from day to day with great amount of unfettered commercial judgment. It is also suggested that operators may also be in a fiduciary position in the course of managing the JV with regard to full disclosure of personal interest; or any dealings with third parties; or acting for benefit of himself or third parties without consent of his principals. More so that the operator holds a similar position as an agent; he may therefore be charged with fiduciary duties analogous to those applicable in Agency laws. These arguments are premised on the principle that:

A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which gives rise to a relationship of trust and confidence.

On the other hand English Courts will not as a matter of course, impose any implied duty of good faith or fair dealings into arrangement agreed amongst commercial actors. More so looking at the provisions of the model described in this essay, the model has rather made the obligations which would have put the operator in a fiduciary position into express contractual obligations. For example the operator acts on the approval of the JOC and has less scope for

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54 Styles (n 3) 388.
55 Model 2009, cl 17.
56 Styles (n 3) 391.
57 Gounari (n 15) 1.
58 Marc Hammerson, ‘upstream oil and Gas Law: cases, materials and Commentary’ (Globe Law and Business 2011) 187 (Hammerson).
60 Gounari (n 15) 14.
61 Roberts (n 59) 4.
62 Gounari (n 15).
63 ibid.
64 Bristol and West Building Society v Mothew (1998) Ch 1 at 18.
65 Hammerson (n 58) 188.
independence.\textsuperscript{66} Also considering cl. 3.2 of the model, the JOA may be construed to represent the ‘entire understanding and agreement of the parties.\textsuperscript{67} This may indeed work against the argument in favour operators having fiduciary duties in the UKCS. A comprehensively termed JOA which identifies all the rights and responsibilities of the parties is most likely to obviate an equitable intervention in the shape of fiduciary duty.\textsuperscript{68}

The position in the UK model is unlike in the United States (US) AAPL Form 610\textsuperscript{69} where there is no JOC, thus giving the non-operator less say in the US and the operator greater scope for independent decision making.\textsuperscript{70} The AAPL also requires parties to deal with each other in good faith.\textsuperscript{71} Canadian JOA\textsuperscript{72} adopts an awkward compromise.\textsuperscript{73} In CAPL, although the section is titled ‘No partnership or fiduciary relationship’ it states there is no fiduciary relationship; it accepts that ‘provided the clause might not prevent trust, trust duty or fiduciary relationship being imposed by law or equity’.\textsuperscript{74} It also states that the provision does not intend to lessen the duty of good faith between parties.\textsuperscript{75} Thus whilst it may be concluded that the circumstance of the Canadian and S JOA’s creates a situation where fiduciary obligations may easily be imposed on the operator, the 2009 UK model sets the stage quite differently.

However, it is noted that certain provisions of the UK model give reasons to believe that under exceptional cases the operator may be in a fiduciary position towards non-operators; this is especially if it arises within the legal and commercial relationship of the parties\textsuperscript{76} and can be shown to arise out of and consistent with the terms of the agreement.\textsuperscript{77} For example the operator

\begin{itemize}
\item \textsuperscript{66} Styles (n 3) 387.
\item \textsuperscript{67} ibid.
\item \textsuperscript{68} Roberts (n 59) 6.
\item \textsuperscript{70} Styles (n3) 386.
\item \textsuperscript{71} AAPL form 610, para VIIA.
\item \textsuperscript{73} Roberts (n 59) 4.
\item \textsuperscript{74} CAPL, para 1.05 A.
\item \textsuperscript{75} ibid.
\item \textsuperscript{76} Roberts (n 59) 215.
\item \textsuperscript{77} Kelly v Cooper (1993) AC 205 at 215.
\end{itemize}
may without the prior approval of the JOC take steps to prosecute, defend or settle any claim, litigation, lien, demand or judgment to prevent judgment against the venture while full approval is being sought;\textsuperscript{78} and challenge the jurisdiction of the court provided the operator seeks legal advice.\textsuperscript{79} Also the operator is required to do or cause to be done with due diligence ‘all such acts and things within its control’ as may be necessary to maintain the license in force and effect.\textsuperscript{80} These two examples create circumstances where there is confidence and trust reposed in the operator and which may be argued as requiring the operator to act within fiduciary obligations of good faith, confidence and trust having been reposed on his discretion.

From the foregoing, it may be concluded that the 2009 UK model JOA makes an ambitious attempt at expressly providing for all matters required to define the rights and responsibilities of the parties.

\textsuperscript{1} Submitted to the University of Aberdeen, Scotland, UK in 2013 towards the award of an LLM (Oil and Gas Law) in 2013 under Oil and Gas Law: Contracting

\textsuperscript{78} Model 2009, cl 8.3.2 (a) (i).
\textsuperscript{79} Model 2009, cl 8.3.2 (a) (ii).
\textsuperscript{80} Model 2009, cl 6.2.2(c).