

EXTRACTING IMPLIED OBLIGATIONS OF GOOD FAITH IN RELATIONAL CONTRACTS

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In the recent case of *TAQA Bratani Limited & others v Rockrose UKCS8 LLC*[1], the English High Court found that an unqualified right to remove the defendant from its position under a “relational” contract was not subject to an implied duty of good faith. In doing so, the Court provided clarity on the extent to which the implication of duties of good faith in relational contracts may be circumscribed.

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The decision will be of interest to parties entering into long-term arrangements which demonstrate commitment and imply mutual trust and confidence. Contrasting with recent High Court decisions concerning relational contracts such as *Bates v Post Office*[2], the judgment makes clear that such implication depends upon the individual obligation in question.

BACKGROUND

The claimants and defendant each held licences from the UK government to extract oil and gas from certain North Sea blocks. The claimants operated each block in unincorporated joint ventures with the defendant, with the defendant acting as “operator” pursuant to Joint Operating Agreements (“JOAs”).

Each of the JOAs provided for the removal of the defendant as operator by either (i) resignation, (ii) immediate termination in the event of certain specified events, or (iii) either a majority or unanimous vote by the non-operator participants under the relevant JOA.

In June 2019, the claimants voted unanimously to terminate the defendant’s appointment as operator under each of the JOAs. TAQA, the first claimant, argued that it and the other claimants, had serious concerns about the defendant’s operation of the fields and that the risks would be best mitigated by TAQA taking over the operation of the fields. The Court observed that TAQA consistently held the view that it would be in TAQA’s economic best interests to replace the defendant as operator, and that this was no doubt at least one of the reasons for its decision to remove the defendant.

The defendant argued that this was not a factor to which TAQA could properly have regard in deciding whether to remove the defendant as operator. It further alleged that, on a true construction, the claimants' termination right was not unqualified, or it was subject to implied terms which qualified the circumstances in which the claimants could exercise it. On this basis, it claimed that the decision to remove it was unenforceable.

RELATIONAL CONTRACTS

The Court considered whether the JOAs were "relational contracts", a term used by Leggatt J in *Yam Seng Pte v International Trade Corp*[3] to refer to a species of contract which implies duties of good faith, fair dealing, transparency, co-operation, and trust and confidence.

The Court observed that the key to understanding the circumstances in which duties of good faith may be implied into a relational contract was Leggatt J's statement that it:

"...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".

The Court was satisfied that the JOAs were at least arguably relational contracts but emphasised that this did not mean that it was necessary to imply a good faith obligation into the exercise of the power on which the claimants relied.

IMPLICATION OF TERMS

The Court considered the English authorities on implication of terms, observing the orthodoxy (as expressed in *Marks and Spencer*[4]) that, where there is a detailed commercial agreement:

- terms are to be implied only if it is necessary to give the contract business efficacy, or is so obvious as to go without saying;
- the term sought to be implied must be fair, or it must appear to the court that the parties would have agreed had it been suggested to them;
- implication of terms requires determination of the scope and meaning of the contract; and
- the "necessity" requirement at (a) can only be undertaken when the process of construing the contract's express terms is complete.

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The Court decided that categorising the JOAs as "relational" did not suffice to conclude that it was necessary to imply duties of good faith into the exercise of the contractual right on which the claimants relied, for the reason that:

- on its true construction, the right to remove the defendant was an absolute and unqualified power;
- in consequence, it was impermissible to imply a term that qualified what the parties had agreed between them; and

- it followed that the parties had "legislated" in the sense referred to by Leggatt J in *Yam Seng*. It was not necessary, and would indeed be wrong, to imply such a term to qualify the power on which the claimants relied, because it was not necessary in order to make the contract work as it was to be presumed that they intended to make it work (or to give effect to their presumed common intention).

The Court therefore concluded that the right exercised by the claimants to remove the defendant as operator was not qualified by a duty of good faith owed to the defendant.

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COMMENT

This decision stands as a reminder of the position long held by the English courts that there is no general duty of good faith between parties to commercial contracts, and that a duty of good faith may only be implied where (*inter alia*) it is necessary to do so on the true construction of the contract as a whole.

The decision also provides a counterpoint to recent decisions of the High Court concerning relational contracts, including the decision in *Bates v Post Office*. In that case, brought by 550 claimants, most of whom had been sub-postmasters with contracts to run branches of the Post Office, Fraser J considered the factors which would tend to indicate that a contract is relational, including: (i) the lack of any

express term excluding a duty of good faith; (ii) the length of the contract term; (iii) the venture, by its nature, not being capable of full expression in express contractual terms, and requiring high levels of communication, co-operation and predictable performance; and (iv) expectations that the parties collaborate, perform their obligations with integrity, and repose trust and confidence in each other.

Fraser J found that all of the above features were present in the relationship between the Post Office and the sub-postmasters. As a result, he concluded that the contracts were relational contracts, and that in relation to that species of contract "*there is implied an obligation of good faith*", meaning "*that the parties must refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people*".

This raises a question as to how *TAQA Bratani* and *Bates* may be reconciled, particularly as the Court in *TAQA Bratani* did not discuss *Bates*. However, what can be said is that, while good faith obligations traditionally would not exist in English law governed contractual relationships unless expressly provided for, a growing body of decisions treats relational contracts as potentially reversing that rule where the terms and commercial context appear to require it. Parties to arrangements which could be considered 'relational' will therefore need to take care to expressly exclude good faith duties in their contracts if they wish to avoid such implications.

Thomas Ross, a former partner in our London office, co-authored this article.

[1] [2020] EWHC 58 (Comm)

[2] [2019] EWHC 606 (QB)

[3] [2013] EWHC 111 (QB)

[4] Marks and Spencer Plc. V BNP Paribas Securities Services Trust Co (Jersey) Limited [2015] UKSC 72

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