MANCHESTER AND SALFORD
MAGISTRATES' COURT
CROWN SQUARE
MANCHESTER
M60 1PR

BETWEEN:–

THE CROWN

– and –

VARIOUS DEFENDANTS
(Conjoined hearings)

Before District Judge (Magistrates' Courts) James Prowse
on 7 September 2015

JUDGMENT

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1. Today's hearing concerns the determination of the question of the lawfulness of the activities of IGas in respect of exploratory drilling carried out to determine whether the site at Barton Moss is suitable for future fracking operations. All of the defendants in these conjoined matters are environmental protestors arrested at or near the site and charged with the offence of aggravated trespass pursuant to S.68 of the Criminal Justice and Public Order Act 1994. That section provides, so far as is material:

> (1) A person commits the offence of aggravated trespass if he trespasses on land and, in relation to any lawful activity which persons are engaging in or are about to engage in on that or adjoining land, does there anything which is intended by him to have the effect–
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> (a) of intimidating those persons or any of them so as to deter them or any of them from engaging in that activity,
>
> (b) of obstructing that activity, or
>
> (c) of disrupting that activity.
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> …

(2) Activity on any occasion on the part of a person or persons on land is "lawful" for the purposes of this section if he or they may engage in the activity on the land on that occasion without committing an offence or trespassing on the land.

2. It is the contention of all of the protesters who have been charged with aggravated trespass that the activity taking place on the site was unlawful in that it was causing damage to the environment. It is an essential part of this offence that the activity obstructed or disrupted was lawful, the burden of so proving being upon the Crown and to the criminal standard. The issue of unlawfulness has to be properly raised upon evidence. The leading authority is *Richardson and another (Appellants) v Director of Public Prosecutions (Respondent)* [2014] UKSC 8. Paragraph 9 of the judgment states:

(ii) In a prosecution under section 68 the Crown is not required to disprove the commission of every criminal offence which could conceivably be committed by the occupant(s) of the land. A specific offence or offences must be identified by the defendant and properly raised on the evidence. The Divisional Court so held in *Ayliffe v Director of Public Prosecutions* [2005] EWHC 684 (Admin), [2006] QB 227, see particularly para 50. Thus a bare assertion by trespassers at military bases that the Government may have aided and abetted a war crime did not raise the issue.

(iii) Where, however, the issue of a relevant specific criminal offence by the occupant(s) of the land is fairly raised by evidence, the onus lies upon the Crown to disprove it to the criminal standard of proof, in order for it to prove to that standard, that the defendant trespasser has committed the offence contrary to section 68. This follows from *Ayliffe* and from the language of the statute.

3. The defendants engaged the services of Dr Aiden Foley, an environmental scientist with considerable experience in this area of work. He produced a preliminary report dated 30 May 2014, provided a witness statement dated 8 September 2014, and gave evidence in a hearing before me on 2 October 2014. That report was preliminary in nature and in it he stated that before he could conclude whether or not the drilling operations at the site had caused contamination he required access to the site itself. IGas (the site operator) declined permission for him to do so as did Peel Holdings (the owner of the land), unable to provide permission not being in occupation. The principal application before me was that these prosecutions should be stayed as the defendants could not have a fair trial because Dr Foley was unable to complete his investigations and specifically that the defendants would therefore be unable to raise the question of unlawfulness.

4. In evidence Dr Foley enlarged upon the findings in his report and in his statement. He had not been able to gain access to the drilling site itself but he had been able to investigate the possibility of contamination in the fields surrounding it. The particular substances for which he tested were polycyclic aromatic hydrocarbons (PAHs) and he found evidence of PAH contamination. At the drilling site he found a pipe which was discharging liquid from within the site out onto the adjoining field. This liquid was ponding and it was his opinion that liquid on the surface of the field would drain away by percolating into the ground and would in time find its way into the aquifer beneath. This aquifer is a major source of drinking water and there is an extraction point some 3 km away from the site. The samples which he took at the point where the water was ponding contained a number of PAHs at concentrations such as to be a genuine cause for concern. He concluded that in all probability the contaminants which he had found had emanated from within the site as a result of the drilling

and would ultimately find their way into the aquifer. He also found mud which had arisen from within the site. While this was not contaminated he was aware that any drilling licence would have required that this mud, which he believed was used to carry debris away from the drill bit, be removed from the site to a licensed waste-disposal facility.

5. Dr Foley thought at that hearing that the likely source of the PAH contamination was the drilling site, and the Crown therefore conceded that the defendants had properly raised an issue of specific unlawful activity arising from the drilling sufficient to meet the criteria in *Richardson* and that the burden had shifted to the Crown to show that the activity was lawful. That was a realistic concession and I agreed to make a pre-trial binding ruling pursuant to S.8A of the Magistrates' Courts Act 1980 to that effect in respect of all pending trials arising out of the Barton Moss protests where the defendants were seeking to rely upon this defence. That removed the basis for the application to stay these prosecutions as an abuse of process.

6. All matters were therefore adjourned for the Crown to serve its own expert scientific evidence, which comprised a statement from Sarah Scott, a scientist with the Environment Agency, other statements, and a large quantity of exhibits including the various applications which had been made in relation to drilling on the site and supporting data which included sampling for pollution on and around the drilling site before, during and after the actual drilling operations. That material also dealt with historical use of the land at Barton Moss as a disposal site for a range of industrial and other waste from Manchester. Time was then allowed to Dr Foley to produce a report responding to the prosecution evidence and as part of that process he returned to the fields surrounding the drilling site itself where he had taken his earlier measurements, and he did this jointly with Mrs Scott on two dates in May this year.

7. Dr Foley and Mrs Scott provided additional reports respectively in June and July of this year and a minute of their meeting on 28 July 2015 where they summarise a considerable degree of consensus. Both gave evidence before me on 4 August 2015. I have today heard the submissions of the parties.

8. When Dr Foley wrote his original report he was unaware of the historic use of Barton Moss as a disposal site for industrial waste from Manchester and, now that he knows of this, he no longer considers that the origin of the PAHs is from the drilling activity on the site. This is also true of the presence of heavy metals, for example cadmium, present in the field surrounding the site, something which he investigated in his later tests. The mud has been tested and he agrees with Mrs Scott that it is clay which had been extracted from the site during construction, probably of the well-head chambers or during the installation of an oil interceptor. This mud is not contaminated at all.

9. I will need to consider some of the scientific evidence in more detail but it is worthy of note at the outset that both scientific experts are in no doubt that any contaminating substances in the field surrounding the site or in adjacent watercourses, PAHs and heavy metals, originated from historic waste disposal and were already present. Further, Dr Foley no longer considers that there might have been PAH contamination from within the site caused by, for example, an oil spillage from plant or machinery used during construction. The experts agree that the drilling and extraction of samples of material for analysis was conducted in accordance with the licence, that no contamination has arisen from this, and that any increase in levels of contaminants was most probably caused by the mobilisation of the soil during the construction of the site, in simple terms from moving around what was already there.

10. The structure of S.68 of the 1994 Act is critical to the analysis of the issues which arise. The activity which is relevant is that which IGas was engaging in and which was being obstructed or disrupted by the defendants on the occasion of each protest leading to arrest and charge. The drilling site itself was protected by a perimeter fence but was "adjoining land" for the purposes of S.68(1). The nature of the obstruction or disruption on each occasion was to prevent or delay the passage to and from the site of lorries carrying plant and equipment necessary for the construction of the site or its operation. I do not therefore accept the Crown's contention that it is only the operation of the site, the drilling, that is the relevant activity. The construction of the site was integral to its operation and therefore part of the activity in question. The Crown has referred me to the judgment of Rafferty J in *Tilly v The Director of Public Prosecutions* [2001] EWHC 821 (Admin) which draws the distinction between carrying on, for example, the business of a farmer or seedsman, which would not be the relevant activity in this context, whereas the specific activity of ploughing or thinning out would. In the context of IGas the generality is that company's activities prospecting for and exploiting reserves of gas, whereas the construction and operation of an individual site is the specific activity.

11. *Richardson*, at paragraph 13, draws the distinction between the core activity carried on and incidental or collateral criminal offence. An example is in the facts of *Hibberd v Director of Public Prosecutions* (unreported) 27 November 1996. This concerned the clearing of land preparatory to the construction of a new by-pass and a protester who was trying to prevent it. He was unable to rely on the unlawfulness of tree-fellers who were not wearing gloves and thereby contravening health and safety regulations. Arguably in that situation, however, not only the construction of the road but also the preparatory clearance would have been part of the core activity so that the position might well have been quite different if trees the subject of preservation orders had been felled without lawful authority.

12. My earlier decision that the question of unlawfulness was properly raised by the defence was based upon evidence from Dr Foley which has turned out, through no fault of his, to have been erroneous. In relation to each specific area of unlawfulness contended for by the defence I will need to reconsider whether it formed part of the core activity or was incidental or collateral.

13. The defence raise three specific potential offences, arising from:

a. the depositing on the field adjacent to the site of the clay removed from within the site during its construction,

b. the increase in the concentration of PAHs and heavy metals in the field as a result of the movement of soil during the construction of the site, and

c. the pollution of water with contaminants arising during the construction of the site.

14. As I have concluded that the construction of the site is part of the relevant activity then I consider that the process of removing material in order to dig a hole which forms part of that construction must be part of the core activity. It is not how the hole was dug which is in issue here but the disposal of material arising, and that is dealt with in Regulations and so can hardly be collateral.

15. The relevant Regulations changed on 1 October 2013 and it is common ground that after that date IGas would have needed a permit, and did not have one. The defence contend that the depositing of the clay was in any event an offence. The legislation is somewhat opaque, deriving as it does from an EU directive. It is to be found in Article 2 of Directive 2006/21/EC (Regulation 3 of the Environmental Permitting (England and Wales) Regulations 2010) and relates to S.33 of the Environmental Protection Act 1933. The Crown submits, and I accept, that prior to the change in the Regulations IGas would have a due diligence defence to any charge as it was operating within the terms of the Environment Agency licence and planning consent, and the operation was monitored throughout. Mrs Scott was able to say that the Agency considered that this deposit of clay was within the terms of the licence, and even if she is wrong as to the law if that was the Agency's view it would afford a defence to IGas. She was also able to give factual (as opposed to expert) evidence that although there are no records as to when the clay was deposited there were discussions between the Agency and IGas about the construction on the site of a device known as a conductor, and it would have made no sense for that construction to be in contemplation unless the well head had been dug and therefore the clay extracted. I am satisfied on the basis of that evidence that the clay was deposited before the Regulations changed. In any event, in the absence of more conclusive evidence and given the evidence of Mrs Scott any prosecution based on an assertion that the clay was deposited after 1 October 2013 would be doomed from the outset.

16. For completeness I should add that I do not accept that leaving the clay where it was after it had been deposited constituted a potential continuing offence as the offence appears to be complete once the waste is disposed of.

17. I will deal with the allegations relating to mobilisation of contaminants in the soil and pollution of the watercourse together. There is evidence of an increase in levels of PAHs and heavy metals adjacent to the site, raising an inference that the construction of the site has had a part to play, however both experts agree that these contaminants came from historic waste disposal and not from the drilling. Mrs Scott's evidence, which I accept, is that these pollutants, in whatever concentration prior to and after site construction, have not permeated below the upper levels of the soil as the clay, which came from lower down but is above the aquifer, contained no pollutants. There is a water-extraction site about 3 km away, water for human consumption, and regular and stringent testing of the water quality is required, and any issues of concern relating to pollution are required to be reported to the Agency. No such reports have been received.

18. There is no clear evidence of background readings for pollution from prior to the construction of the site. The variations allow the drawing of an inference that material has been disturbed during the construction of the site, probably by bringing from lower down soil which is more contaminated than at the surface where the effects of weather and cultivation will have reduced those levels. I accept Mrs Scott's factual evidence that the Agency is only aware of the historical use of Barton Moss as a disposal site for industrial waste from research into transport infrastructure rather than the environment, and that it is impossible to say with any precision what was tipped where or whether levels of contamination are relatively consistent across the site or vary from location to location. Dr Foley, when being asked about the data relevant to soil and water contamination, added a caveat that the number of samples obtained was probably too few to be statistically significant. Whatever legislation is being considered relative to these two contented aspects of alleged illegality the evidence is far too nebulous for any prosecution to have any prospect of success.

19. More fundamental is the question of whether any potential pollution of the soil or water resulted from the core activity of the site. The only realistic assertion which could be made is that the construction of the site mobilised pollutants which were already present. The actual process of construction was wholly in accordance with the licence and planning consent. If the process of construction was the cause of small-scale increases in levels of pollutants this was, in my judgment, incidental to the construction process itself and the sort of collateral regulatory offence contemplated in *Richardson* as outside the scope of the defence of unlawfulness.

20. In the circumstances I do not find that any of the defendants in these conjoined proceedings are able to rely on the defence of unlawfulness and make a ruling to that effect pursuant to S.8A of the Magistrates' Courts Act 1980.

21. I have also been asked to consider the question of S.8C, which prevents media publication of rulings under S.8A. That provision was enacted to deal with the situation where the pre-trial ruling, if reported, might prejudice the trial itself. The issues which I have considered and determined in this judgment could create no prejudice in a trial to either defendants or the Crown. There is a permissive power in S.8C to disapply the restriction and I therefore do so so that the court proceedings and this judgment may be reported in full.