

CO/4951/2016

Neutral Citation Number: [2016] EWHC 3775 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 15 December 2016

B e f o r e:

MRS JUSTICE LANG

Between:

THE QUEEN ON THE APPLICATION OF DEAN

Claimant

v

**SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL
STRATEGY**

Defendant

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(Official Shorthand Writers to the Court)

Mr D Wolfe (instructed by Friends of the Earth Rights and Justice Centre) appeared on behalf of the **Claimant**

Mr E Metcalfe (instructed by the Government Legal Department) appeared on behalf of the **Defendant**

Mr J Maurici QC (instructed by Eversheds) appeared on behalf of the **Interested Party**

J U D G M E N T
(Approved)
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1. MRS JUSTICE LANG: This is a renewed application for permission to apply for judicial review of the defendant's decision to enter into a deed, dated 28 June 2016, to vary the terms of a petroleum exploration and development licence previously granted to the interested party. Permission was refused on the papers by Dove J.
2. Some preliminary matters: I grant the application to substitute Dart Energy West England Limited as an interested party. I consider that the claimant does have standing to bring the claim, he is a resident of the area in which the licence has been granted and he is concerned about the environmental impact of potential fracking operations which could follow on from the exploration carried out under the licence. He is a parish counsellor who sits on the Neighbourhood Plan Steering Committee and these factors are sufficient to give him standing, in my view.
3. The defendant submits that the decision is not susceptible to judicial review because the licence and the deed of variation are governed by the private law of contract. In my judgment, the legislative framework under EU and Domestic Law which now regulates the Crown's grant of such licences means that it is arguable that the decision-making process is subject to challenge on public law grounds.
4. I therefore do not agree with Dove J on this issue, although I note he did not have the benefit of seeing the claimant's reply to the defendant's arguments which I have had.
5. The claimant's ground of challenge is that in the absence of any express power to vary the licence in the statutory scheme, the defendant had no power to vary and so acted *ultra vires*. The claimant points to model clauses incorporated in the licence which provide for other types of extensions but not for extensions of the initial term.
6. The claimant submits that the controls afforded by the statutory regime would be defeated if the defendant retained power to vary the claims of the licence after it came into force.
7. Against that, the defendant submits the statutory framework does not set out an exhaustive code for the exercise of the defendant's powers. The defendant has, on many occasions, exercised its contractual power to vary the licences and it would produce an unworkable and unduly restrictive regime if it could not do so.
8. In this case, the variation did not have the effect of altering the overall length of the licence, as while the initial term was extended, the second term was correspondingly shortened and the production period was left unaffected.
9. In my view, these competing arguments both have force, particularly the defendant's. However, I am not deciding the claim but only deciding whether or not it is arguable.
10. In my view, it is arguable and if the claimant is correct the outcome will be likely to be different. Subject, therefore, to the question of delay, I would grant permission.
11. So turning now to the question of delay, the application was made on 29 September. There was no pre-action protocol letter.

12. The Oil and Gas Authority announced the variation online on 30 June. The deed was not posted online but an unexecuted draft of the deed was provided to another individual, a Mr Roxburgh, upon an earlier request and he passed a copy to the claimant on, or very soon after, 30 June. The claimant made a formal request for the full deed on 15 September, and duly received it on 19 October.
13. The reason for the delay, I am told, is that the claimant only became aware of the possibility of bringing a claim late in the 3 month period, leaving no time for the pre-action protocol procedure; and he or his solicitors were aware from another pre-action letter on the same point but in relation to a different licence that the Secretary of State did not agree with the challenge that the claimant wished to raise.
14. Arguably, the Uniplex principles apply as EU directive 94/22/ EC implemented by the Hydrocarbons Licencing Directive Regulations are engaged, and so the court ought not to rely upon the requirement to act promptly as it offends EU principles of certainty and effectiveness.
15. Time runs from when the applicant knew or ought to have known of the decision according to Uniplex. Taking the 3 month period as running from the date the variation was published, which was 30 June, the application was issued just within the 3 month period.
16. But if I am wrong about that, and the Uniplex principles do not apply because the outcome of the claim does not ultimately turn on a point of EU law, then time would run from the date of the decision which is calculated under the CPR from the day after the decision, see *R (Berkey) v Newport CC*, [2012] EWCA Civ 378, per Lord Justice Moore-Bick at [48]. So, applying those principles here, the application was issued one day late.
17. If that is the correct analysis, I would exercise my discretion to extend time because the delay in issuing and the lack of promptness has not caused any significant prejudice to the defendant or interested party.
18. Clearly, there would be prejudice to the interested party if the claim succeeds but that has to be weighed against the public interest raised by the claim in ensuring that the licencing regime has been lawfully operated.
19. If the claim were to succeed the question of appropriate relief (declaratory, or a quashing order) could be considered then in the light of the implications for the interested party.
20. So I decide the issues of delay in favour of the claimant and grant permission.
21. As you know, there are standard directions.
22. **(To counsel):** Are you content for the standard directions to apply? That gives 35 days for the defendant and any other person served with a claim form to file evidence and detailed grounds, and then the 21 days for reply by the claimant.

23. MR WOLFE: My Lady, we are.
24. MRS JUSTICE LANG: I think I would like to first hear from Mr Metcalfe.
25. MR METCALFE: Thank you, my Lady. We are just very quickly doing the maths, but as I understand it, 35 days from today, and making allowance for the Christmas period would take us to approximately 20 January?
26. MRS JUSTICE LANG: Well, I am not so concerned with the actual dates now, but I just want to know whether that is enough time for you bearing in mind Christmas.
27. MR METCALFE: Well, it was necessary to do the calculation.
28. MRS JUSTICE LANG: To see if there was enough time, yes.
29. MR METCALFE: To see if there was enough time. I will take further instructions, but --
30. MRS JUSTICE LANG: I mean, you said something about making allowance for Christmas. I am open to that, but you would have to --- normally the 35 days just runs, so are you --
31. MR METCALFE: -- yes, I am just seeing.
32. MRS JUSTICE LANG: How much do they want off for Christmas?
33. MR METCALFE: Due to a loss of client availability over the Christmas period, we would ask for a term of 35 days. That would be 50 days.
34. MRS JUSTICE LANG: So you want 15 days off for Christmas?
35. MR METCALFE: We would ask for an additional 15 days to allow for the judicial review.
36. MRS JUSTICE LANG: That is going to be a very good Christmas
37. MR METCALFE: It is not unusual, of course, around the Christmas period for different individuals to take their leave at different times.
38. MRS JUSTICE LANG: Yes.
39. MR METCALFE: Some may be before Christmas, and some may be after.
40. MRS JUSTICE LANG: Yes.
41. MR METCALFE: It is making allowance for everyone to be in the same place at roughly the same time.
42. MRS JUSTICE LANG: Yes, Mr Maurici, do you have a --

43. MR MAURICI: -- I am not going to ask for more than that, my Lady, so I am content with that.
44. MRS JUSTICE LANG: But you do want more than 35 days?
45. MR MAURICI: My Lady, we would, yes, we would ask, for the same reasons to have the extra time off and 15 days is sufficient.
46. MRS JUSTICE LANG: All right.
47. MR WOLFE: My Lady, we are content with 35 days after that and we do not oppose their request for a number in the first phase.
48. MRS JUSTICE LANG: You are content with 50 days, are you?
49. MR WOLFE: We are content with their 50 day request, yes.
50. MRS JUSTICE LANG: All right. Time estimate: day and a half?
51. MR WOLFE: Yes.
52. MRS JUSTICE LANG: Two days?
53. MR METCALFE: Day and a half.
54. MR MAURICI: Day and a half, yes.
55. MR WOLFE: The question, my Lady, of the Aarhus?
56. MRS JUSTICE LANG: Yes, coming to that next. So, obviously, the costs order made by Dove J has to be set aside, but I need to determine for the future conduct of the claim whether the Aarhus Convention provisions apply.
57. MR WOLFE: Indeed.
58. MRS JUSTICE LANG: Do you want to go first on that that, it is resisted, is it not?
59. MR WOLFE: My Lady, the question under the CPR is whether it is within Aarhus Convention, I will not take you through the CPR, and you have the Aarhus Convention at the back of the legal material bundle.
60. MRS JUSTICE LANG: Really, at 5 to 1, I am not going to be able to read the Aarhus Convention.
61. MR WOLFE: All right. It is simply, it is simply a challenge which, something which contravenes the provision of the national law relating to the environment.
62. MRS JUSTICE LANG: Yes.

63. MR WOLFE: And we say that this does, and I have already shown you how these licences allow activities and controls their environmental impacts and we say in terms of what is happening here is that further time is being given to continue those environmental impacts and we say that is *par excellence* a claim relating directly to national law-related environment.
64. MRS JUSTICE LANG: The points that I picked out of the documents that you relied upon was that the grant of licences under the Hydrocarbons Licensing Regulations is expressly subject to protection of the environment.
65. MR WOLFE: Yes.
66. MRS JUSTICE LANG: Considerations and protection of the environment, Regulation 4. The Claimant's objective in bringing the claim is to protect the environment, and he made his application for a copy of the deed under the environmental information regulations and it was duly provided under those regulations.
67. MR WOLFE: Indeed.
68. MRS JUSTICE LANG: Are those the points?
69. MR WOLFE: Indeed, and I remind you that it regulates the environmental activities by reference to the environment which is being a sort of manifestation of the first point.
70. MRS JUSTICE LANG: Sorry, can you say that again?
71. MR WOLFE: So the first point that you made back to me.
72. MRS JUSTICE LANG: Yes.
73. MR WOLFE: Is that the regulations allow for environmental consideration, if you take it into account.
74. MRS JUSTICE LANG: Yes.
75. MR WOLFE: And in fact, you see how that is done in the licence, I will not take you back to it. Clause 14 specifically requires them to do the work that they are required to do: "Avoiding harmful methods of working" and there is a list of environmental constraints there.
76. MRS JUSTICE LANG: But the environmental aspect is not really, as I understand it, raised. You are not saying that there is anything environmentally harmful about what they are doing at the moment, but it is just that depending on the outcome of the exploration that could lead to what your client thinks is a harmful activity.
77. MR WOLFE: No, even the extension they have got allows them to do the well drilling, and it is the well drilling which is controlled by Clause 19 with its environmental impact. So if the licence extension is found to be unlawful, they will

not be able to drill those wells and they will not therefore create those environmental impacts.

78. On the other hand, if the licence is lawfully extended they will be able to create that impact but it is not necessarily the subsequent fracking, or whatever, it is actually the activities under this licence that had environmental impact.
79. MRS JUSTICE LANG: All right.
80. MR METCALFE: My Lady, you may anticipate my arguments: you need planning permission to drill. You need planning to do anything, with effect, which would affect the environment.
81. The claimant's case rests on the idea that merely allowing a licensee more time within the internal terms of licence (which again, I should stress, is not a matter which is regulated by EU law) is itself a matter which affects the environment.
82. I urge you to resist that analysis. Any question of any impact on the environment is properly a matter to be determined through the planning permission process. It is not any part of the grant of a licence in this case to enable a licensee to affect the environment in any way (absent planning permission.)
83. You might say in an attenuating sense that having the licence is necessary condition of it but in that sense, it is a wee bit too remote: it is a bit like saying: 'The ultimate cause of every car crash is the invention of the internal combustion engine.' It is too far removed from the actual question.
84. If we were concerned with an application concerning planning permission then the claimant would certainly be right, but he is not right. The variation of the licence, the internal phases of the licence is something outside EU regulation entirely. It is not something which affects the environment in any activity which a licensee would undertake that might affect the environment such as drilling.
85. MRS JUSTICE LANG: But the Aarhus Convention would extend, would it not, to environmental issues arising under domestic law?
86. MR METCALFE: It does because we are concerned with the contravening provisions of this national law relating to the environment, that is correct, my Lady.
87. The difficulty here and that raises the second question, which is, of course, which provision domestic law prevents, variations of this kind, you have already had our submissions on that but that is obviously a matter for the substantive hearing.
88. MRS JUSTICE LANG: Yes.
89. MR METCALFE: In any event, you are, your Ladyship is entitled to determine the question does the derivation of the internal phases of the licence that not being admitted are regulated by EU Law itself affect the environment: absent planning permission, it does not affect the environment is the Secretary of State's submission.

90. MRS JUSTICE LANG: All right. Mr Maurici?
91. MR MAURICI: My Lady, I support the submissions made by Mr Metcalfe. All that the licence does is deal with the property law side of it. We will not be permitting a trespass to the Crown by the carrying out of activities.
92. We cannot do a single thing anywhere in the licence area without permission and indeed, as you maybe know there are consents, both the Environment Agency and HSC[as heard].
93. There is no environmental law issue at all in this case. None is pleaded, none is raised. This is simply about the contractual position which sits well before one gets to the consents that deal with the environmental issues.
94. My Lady, you may have seen in the summary grounds, I did refer to (and I notice the time, I am not going to try and go through this) but the decision of the Aarhus Compliance Committee that I referred to, about waste contracts left by Local Authorities; and that said that was not covered by the convention, and that is about the contract and it is not about the actual permission for the waste activities.
95. My Lady, that just supports view that this is too remote, this is not a case that is covered by the convention.
96. MRS JUSTICE LANG: All right, thank you.
97. I consider this is an Aarhus Convention claim within the meaning of CPR 45.421 by Article 9(4) of the Aarhus Convention. Such a claim includes challenges to decisions by public bodies which contravene provisions of national law relating to the environment.
98. The grant of licences is expressly subject to considerations including protection of the environment, Regulation 4 of the Hydrocarbon Licensing Directive Regulations 1995, and this is reflected in clause 14 of the licence.
99. The claimant's objective in bringing the claim is to protect the environment by preventing an extension of the drilling rights and the protection of the environment extends not only to harm if the exploratory phase leads to fracking but also harm from the drilling itself.
100. The claimant made his application for a copy of the variation deed under the Environmental Information Regulations 2004 and the defendant duly supplied the information under the Environmental Information Regulations 2004 which also indicates the environmental element of this claim.
101. So the effect of the application of the CPR Aarhus Convention capping provisions is that the total amount of the costs recoverable from the claimant will be limited to £5,000 and the total amount of costs recoverable from the defendant will be limited to £35,000.

102. Is that right, those figures?

(A short pause)

103. MR METCALFE: My Lady, I apologise for rising at this point, it is simply to ask whether permission to appeal the Aarhus ruling is needed at this, or whether that is not really necessary.

104. MRS JUSTICE LANG: Do you need permission to appeal the Aarhus ruling? I am not sure. So, to save time, does anyone know the answer to this?

105. MR WOLFE: I do not, but --

106. MR METCALFE: -- if only to preserve our position, if permission is required, then we seek it now. It may, however, be that permission is required then it is probably a matter to be raised in a different set of proceedings.

107. MR MAURICI: My Lady, the only thing I say about that is a lot of this was substantive proceedings because if we get through these substantive proceedings and it is then dealt with in those proceedings as an appeal; it will be an appeal in the first instance the judge will be dealing with your decision your decision, which would be the wrong place to do it.

108. But also, if it were to go against us at that point, we would have incurred the risks up to that point.

109. So, if it is a point they are undertaking on appeal, in our submission, they need to go to the Court of Appeal now, in a side appeal from Your Ladyship's adjudication on it ahead of the substantive judicial review which will be brought before a High Court Judge.

110. MRS JUSTICE LANG: Yes

111. MR MAURICI: It affects what you do and it affects what they do.

112. MRS JUSTICE LANG: Yes, I think the point about any cost capping decision is that the parties need to know where they stand? Because it could affect whether they want to go on, and in the case of the claimant it could affect whether he wants to go on with the claim, because of the risks?

113. So it seems to me that Mr Wolfe is right that it needs to be dealt with straight away, well, within reason.

114. MR METCALFE: -- at an interlocutory matter, so --

115. MRS JUSTICE LANG: I think so, because there would be real difficulties, would there not, in trying to remove a cost limit retrospectively in terms of fairness and so on. So I think it could be dealt with first?

116. MR METCALFE: Well, but then the question to which my friend is still not able to assist is, to the extent that the Secretary of State does need your permission.
117. MRS JUSTICE LANG: Yes.
118. MR METCALFE: And your point, if you wish to refuse permission and then we have the scope to ask him for permission in front of the Court of Appeal.
119. MRS JUSTICE LANG: Yes. Well, to assist you with that dilemma, I will refuse permission for the reasons which I gave that I consider it is an Aarhus Convention claim, and then you can decide whether or not you want to renew the application for permission before the Court of Appeal.
120. MR WOLFE: I am very grateful.
121. MR MAURICI: If they do that, that may derail the timetable for substantive judicial review.
122. MRS JUSTICE LANG: It certainly will.
123. MR MAURICI: I don't know how they want to deal with it, or whether you want to deal with it -- **[over-talking]** --
124. MR METCALFE: -- of because their Christmas **[indistinct]** -- **(laughter)** --
125. MRS JUSTICE LANG: You may, but the Court of Appeal will be eating their turkey.
126. But seriously, there is a problem, is there not, if I make a standard directions order where the clock starts to tick straightaway, are you content with that?
127. I mean, it doesn't really affect your position so much as the claimant's because you have deep pockets, whereas the claimant does not?
128. MR METCALFE: Perhaps not as deep as your Ladyship thinks.
129. MRS JUSTICE LANG: I know what you mean.
130. MR WOLFE: -- I would propose to deal with it this way: if the Secretary of State took the decision to seek interlocutory applications she will of course, at her earliest convenience, make a corresponding application for variation of the directions to allow for an extension of time.
131. MRS JUSTICE LANG: It would really be for a stay, would it not? Because if you make the application, if you appeal my ruling on the Aarhus convention you have no control, really, over how long it takes for the Court of Appeal to deal with that and so you are not really in a position to apply to vary the directions for the preparation of the judicial review-
132. MR METCALFE: -- or then ask it to be stayed.

133. MRS JUSTICE LANG: I think the directions just have to be stayed, that would be probably the appropriate way forward. Do you have any views about that, Mr --
134. MR MAURICI: No, we do not have any views about that, other than that I think the stay is right, but I will just say that that then be done during their 50 day period, they do not want to come with a sort of 'bleeding heart claimant's case' later and say: "We didn't have that 50 days" because they are putting themselves at risk by what they are contemplating.
135. MRS JUSTICE LANG: Well, you are obviously constrained by making any application to appeal and obviously you will keep the claimant informed of any steps you take.
136. MR WOLFE: Yes.
137. MRS JUSTICE LANG: Is the answer, then, that if you do make the application to the Court of Appeal you would include within the application a request for a stay of the directions, and I just go ahead and make the directions as I have already indicated, following the standard template with the extension of 50 days.
138. MR METCALFE: Yes.
139. MRS JUSTICE LANG: And if there is no appeal, or if the appeal is ultimately unsuccessful, or successful and the parties decide to go on, then at least you have some directions in place.
140. MR METCALFE: Yes, I apologise if I was not clear, that was not in fact what I was, what I was proposing is that when the application did give that indication and on application is made to the Court of Appeal, in relation to the Aarhus point and at the same time, the Secretary of State will apply for a stay --
141. MRS JUSTICE LANG: -- of the directions, yes. Well, I think that is probably the most convenient way of dealing with it, all right. Anything else?
142. MR WOLFE: No, we are grateful.
143. MRS JUSTICE LANG: Thank you very much.