IN THE COURT OF APPEAL

ON APPEAL FROM THE ADMINSTRATIVE COURT, HOLGATE J, [2017] EWHC 1998 (Admin)

BETWEEN:

BENJAMIN DEAN

Claimant/Appellant

-and-

THE SECTRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Defendant/Respondent

-and-

DART ENERGY (WEST ENGLAND) LIMITED

Interested Party

SKELETON ARGUMENT IN SUPPORT OF

APPLICATION FOR PERMISSION TO APPEAL

30 August 2017

INTRODUCTION

1. The Claimant seeks permission to appeal on the ground that the Judge was wrong in law to hold that the Secretary of State had power (*vires*) to vary the "Initial Term" of PEDL189 (a petroleum licence) as he purported to do on 28 June 2016.

2. The Claimant submits that he has real prospect of success in an appeal against the judge's dismissal of his judicial review application. The judge's detailed reasons for refusing permission are all directly addressed below.

3. In any event, there is a significant wider public interest in the issues raised, such that there is a compelling reason why permission should be granted. That is because the answer here also determines (or is likely to determine) whether the Office of the Oil and Gas Authority (OGA) - which is now the body which grants petroleum licences – has a general power to agree licence variations with licensees (as the judgement would have it), or only has the licence

variation powers specifically given to it by the Petroleum Act 1998 and linked regulations (as below).

OUTLINE

4. Answering that *vires* question requires identification of the legal nature of petroleum licences and the source/extent of the licence grantor's claimed general power to modify the terms of such licences once granted.

5. The Claimant's case is that the licences are statutory licences granted pursuant to a complete statutory scheme which does not give the Secretary of State (now the OGA) power later to vary licence conditions other than in specified circumstances (which did not arise here).

6. Tellingly, at no point did the Defendant or the judgment offer any analysis of, or explanation for why Parliament created such a statutory scheme (including specifying particular circumstances in which the Secretary of State can vary licence conditions including its overall duration) if – as their analysis would have it – the Secretary of State already and anyway had a completely general power to agree any licence variations at all and at any time.

7. The Defendant's case (which the Judge accepted) was that:

   a. The licences are contractual licences (entered into pursuant to a statutory power to contract),

   b. Like any contract, they can be varied by agreement of the parties to them, and

   c. The parties here included the Secretary of State (acting on behalf of Her Majesty in the way that Ministers of the Crown generally do).

8. In overall response to those points (as explained further below), the Claimant submits that it:

   a. The licences are statutory licences (with the only powers to vary them being those set out in the statutory scheme);

   b. But even if, contrary to that, they are contractual then the Secretary of State has no power to act on behalf of Her Majesty (who is the party to the contract) because his powers to act on behalf of Her Majesty in relation to her contract (if that is what it is) with the licensee are comprehensively defined by the Petroleum Act 1998 (the "1998 Act") and the Hydrocarbons Licensing Directive Regulations 1995 (the "1995 Regulations"), and do not include the claimed general power of variation, or other ability to extend the initial term in this licence.

      The judge's reliance (in relation to that latter) on Ministers generally acting on behalf of the Crown must be seen in the context of the fact that, since 1 October 2016 (as explained below) it is the OGA (a company whose functions are specifically not generally to be taken as being exercised on

behalf of the Crown) which exercises the statutory powers in question. At no point has it been suggested that the change of identity of grantor (from Secretary of State to OGA) had any substantive effect; and yet that would be the position (and dramatically so) if the judge's reasoning on this point were right.

9. The Judge held, in the alternative (on the basis of an analysis he had put forward rather than part of any case made by the Secretary of State or Interested Party), that, even if the licences were statutory not contractual, then there was an implied general statutory power for the Secretary of State to agree variations to licence conditions.

10. As to that, and as explained further below, the Claimant says that:

    a. Such a general power is not to be implied merely because it might be considered desirable (which is what the judge relied on here); and

    b. The implication of such a power is in any event inconsistent with (flouts) the complete statutory scheme in existence, so is not to be implied.

    c. The claimed unlimited power to vary conditions after licence grant would conflict with the requirements of Directive 94/22/EC.

11. While the challenge is of course concerned with the Secretary of State's power as at 28 June 2016, the licence scheme in question was first created by the Petroleum Act 1934, as later replaced by the Petroleum Act 1998, as then amended, including by the Energy Act 2016.

12. There is nothing in those provisions, or elsewhere, to suggest that any of those changes led to any fundamental change to:

    a. the underlying legal nature of the licences, or

    b. the legal position of the licence grantor from time to time (the Board of Trade, acting through the Minister, then the Secretary of State, now the Oil and Gas Authority (OGA) a company which[1] "in relation to any of its functions … is not to be regarded as acting on behalf of the Crown").

13. That matters here, because (as noted above) the judgment (and the judge's analysis of the Secretary of State's powers assuming that the licences are contractual – the Defendant's case) turns entirely on the particular position of the Secretary of State (and the fact that Ministers are taken generally to act on behalf of the Crown). Given that, as above, the OGA (which now exercises the powers) does not act in that capacity, the effect of the judge's reliance on the point is that the OGA could not do what the judge says the Secretary of State could do. That dramatic impact itself casts (at least) significant doubt on the judge's reliance on the point.

[1] Energy Act 2016 section 1(2)

14. With that in mind, it is helpful to summarise how the licence scheme has evolved over time.

Petroleum Act 1934 (the "1934 Act")

15. Section 1 Petroleum Act 1934 vested the property in petroleum in its natural condition in strata in Great Britain in His Majesty, and gave him the exclusive right of searching and boring for and getting such petroleum. This newly gave the Crown direct control over this natural resource.

16. Section 2 of the 1934 Act gave the Board of Trade, on behalf of His Majesty, the power to grant to such persons as they think fit, licences to search and bore for and get petroleum; the Board was required to publish notice of that fact (and specified details) in the London Gazette.

17. Section 3 of the 1934 Act enabled licensees to apply for compulsory orders giving them access to the petroleum in question.

18. Section 4 of the 1934 Act made it lawful for a licensee to supply to any premises gas gotten by him pursuant to a licence.

19. Section 6 of the 1934 Act required the Board to make (subject to a negative resolution process in Parliament) regulations prescribing the applications process, the application fee, the conditions as to the size and shape of licence areas, and model clauses which were to be incorporated into a licence unless the Board decided to modify or exclude them in any particular case.

    a. That power to depart from the model clauses would not have been needed if, as the judge has found, the Board of Trade (as it was then) anyway had a general power (whether contractual or implied statutory) to vary licence conditionsof the Mines (Working Facilities and Support) Act 1966 (such as a right to let down the surface, a right of shaft and a right to occupy the surface for various purposes) which can be applied for by a petroleum licensee by operation of section 7 of the 1998 Act. Plainly, there is no contract between the court (or anyone else) and the person to whom the rights are granted in that case.

    b. The Ofcom licenses considered by the court in **DBI** (as below) which Cranston held to be property rights (judgment #96) which were statutory and not contractual in form.

20. As for the second part of the judge's reason, the Claimant does not dispute what the judgment said about mining leases as such (not least because his case does not turn on it). As above the Claimant's point is that the comparison with them takes the underlying issue no further.

21. And the judge's point about the comparison not being "dispositive" is notable because (as noted further below) this is one of a small number of paragraphs he later identified as explaining his conclusion that licences are contractual.

22. In any event, when seeking permission from the Judge, the Claimant also submitted that:

> "The judge was also (at least arguably) wrong in law (judgment paragraph 101) in showing them to be contractual to rely on the fact that a PEDL would not come into existence without the agreement of the applicant and could not be appealed against by an applicant to say that made a PEDL contractual. As for the need for agreement, that is a difference of form rather than substance in that statutory licences generally, perhaps invariably, follow from applications: the licencee asks for something and the licensor agrees to give it to them or not; and there is no rule which says that a statutory licence scheme must not have agreement as a feature at some point, must allow for appeals, or indeed, any other particular regulatory feature that may be contemplated."

23. Refusing permission, the judge said this:

> "Paragraph 3 of the application criticises paragraph 101 of the judgment but fails to read it as a whole or to identify any legal principle by which it can be said to have been impermissible for the court to have regard to the matters there set out."

24. Again, the judge is notably <u>not</u> claiming that the points he made were dispositive – they were simply (as he put it) "relevant considerations".

25. While the Claimant does not say the judge could not take the points into account, he does (as above) say that the points in question say nothing about whether the licence is contractual or statutory, much less whether the Secretary of State has power to vary it after grant.

26. Moreover, the judge's characterisation of the points as "relevant considerations" illustrates the fact that neither the Defendant nor judge has identified any "killer point" or particular legal test which they would say shows that the licences were contractual. Rather, this is an assessment of a series of considerations. The Claimant submits he has a real prospect of success in persuading the Court of Appeal that consideration of those and other considerations shows that (as he submits) the Secretary of State has no general power of variation.

"Model Clauses as part of the statutory regime"

27. When seeking permission from the Judge, the Claimant submitted that:

> "In overall terms, the judge was at least arguably wrong (and with a real prospect of success) in his conclusion that PEDLs are contractual in form (with the consequence that the parties to that contract could vary them by agreement unless expressly precluded from doing so). Neither the Defendant's arguments on the point, nor the judge's reasoning, gave any explanation for why parliament would have legislated in such comprehensive terms (including in providing for comprehensive model

clauses and specifying the precise circumstances in which the overall term could be extended) if, in the end, any aspect of a PEDL could be varied by agreement. A result as contemplated by the Defendant and the judge's analysis could have been achieved far more simply. And yet parliament chose to put in place a detailed and complex regime which included provisions which would have served no purpose whatsoever if the arrangement was simply contractual and the Secretary of State had power to vary any aspect by agreement."

28. Refusing permission, the judge said this:

> "Paragraph 4 of the application then jumps to paragraphs 105 to 107 of the judgment. The application wholly fails to deal with paragraphs 26 and 102 – 104 of the judgment and the analysis of sections 5 and 5A of the 1998 Act. The Claimant does not criticise the analysis of sections 5(5) to (7) and (9) and its importance to the conclusion on whether the Claimant's main argument fails. Likewise, paragraphs 26 and 103 – 104 form an important part of the court's rejection of the Claimant's argument based upon the regulations prescribing model clauses (see paragraphs 105 and 107). The Claimant still fails to grapple with the Defendant's undisputed powers (i) to exclude or modify model clauses when granting a licence and (ii) to include in a licence a clause allowing for subsequent variations in the term of licence (whether or not there is a model clause to that effect). The Claimant also fails to deal with the simple point that the model clauses are in the nature of standard clauses which do not have the prohibitory effect necessary to the Claimant's argument."

29. Taking the elements of that in turn:

> "The application wholly fails to deal with paragraphs 26 and 102 – 104 of the judgment and the analysis of sections 5 and 5A of the 1998 Act."

30. In the first paragraph mentioned there, paragraph 26, the judge analysed sections 5(7) and 5(9) of the 1998 Act.

31. In relation to the former, he appears to have treated the reference in 5(7) to modification or omission of a model clause within a particular licence as if it was not just a reference to the express statutory power (section 4(1)(e)) to modify or omit model clauses <u>at the time of grant</u> (for which the statute provides), but also to some implied power to make such changes <u>after</u> the grant of the licence in question. But there is simply no basis for that: nothing in section 5(7) confirms, implies or requires the existence of an ability to amend licence clauses after grant other than in the circumstances specified in the statutory scheme; nor is there anything which requires that answer for section 5(7) to make sense. Indeed, the language of "omission" in section 5(7) (clearly referring to what happened when the licence was granted) precisely shows that what was in the draftsman's mind, namely omission of model clauses pursuant to the statutory power to omit at the time of grant, and not later.

The judge's version (this was not an argument put by the Defendant) would have required the word "deleted" (i.e. to refer to clauses which were deleted after grant rather than omitted at the time of grant), but that is not the word used.

32. As for section 5(9): the judge made the point that section 5(9) allowed for provisions which have been included by operation of section 5(5) (i.e. substituting a new model clause for an old one) to be altered or deleted by agreement of the licencee and Secretary of State. But, if the Defendant and judgment were correct in saying that the Secretary of State has general power to vary any provision of a licence at any time by agreement, then there would have been no need for section 5(9) in the first place.

33. As the Claimant argued, the very existence of section 5(9) shows that there is not a general power to vary – section 5(9) supports the Claimant's case. The judge did not deal with the point. The judgement offers no answer to the point, and no explanation for why Parliament would have (unnecessarily on the Defendant's case and the judge's reasoning) knowing of the general power which the Defendant already claimed have enacted section 5(9).

34. As for paragraphs 102-104 of the judgment, paragraph 103 opens with the words "For the reasons set out above, a licence under section 3 of the 198 Act is more than a contractual agreement ….". In other words, the judge was treating what was said in paragraphs 92-101 as his reasons for holding that the licences are contractual. In those paragraphs he (1) relied on the fact that petroleum licences are property transactions as implying they are contractual, and (2) took into account the need for the grantor and licencee to agree and the absence of an appeal. But, as above, those points do not anyway stand scrutiny, such that the judge's overall conclusion on the point cannot (at least arguably) stand.

35. As for the judge's next point:

> "The Claimant does not criticise the analysis of sections 5(5) to (7) and (9) and its importance to the conclusion on whether the Claimant's main argument fails."

36. That is dealt with above.

37. As for the judge's next point:

> "Likewise, paragraphs 26 and 103 – 104 form an important part of the court's rejection of the Claimant's argument based upon the regulations prescribing model clauses (see paragraphs 105 and 107)."

38. Paragraph 103 repeated points about section 5(5), 5(7) and 5(9) which were considered above, and restate the point that there is nothing in them inconsistent with the existence of a general power to vary. The Claimant submits that puts the analysis the wrong way round: what must be found here is a positive power to vary; such a power does not exist simply because there is

nothing expressly precluding it. Nor (as above) is there anything in those provisions (including section 5(9) in paragraph 103) which imply or acknowledge the existence of such a power.

39. In paragraph 104 the judge said that "The Claimant did not advance any logical rationale for attempting to draw any such distinction [i.e. allowing for agreed amendments to clauses which had been imposed by operation of section 5(5) when the 1998 Act took effect but not allowing for agreement to make other amendments], which would be arbitrary."

40. As it happens, the point did not arise that way in argument so the Claimant indeed did not address it before. But the answer to the judge's challenge is an easy one: specifically, when a licence is first granted the licensee has the option of accepting (or not) the proposed conditions (whether from the model, or a variation of it) or walking away; section 5(5) has the effect of then imposing new conditions on that licensee (from the 1998 Act model); section 5(9) then contemplates the grantor and licensee potentially agreeing to vary those imposed clauses. The rationale for that is simply to mitigate the otherwise potentially harsh impact of new conditions being imposed on an existing licence when the licensee has incurred expenditure and may have ongoing obligations arising from its activities, or significant practical difficulties to address in the transition process. That is entirely different from the situation contemplated by the judge, namely that other variations might also have been agreed during the course of a licence period. If that is the case, then section 5(9) would not need to apply to that situation anyway and would not be needed; and there the question of mitigating the impact of something which had been imposed would not arise. The distinction is obvious; and the justification for section 5(9) applying to section 5(5) cases only (and not implying the existence of a general variation power) is obvious.

41. As for paragraphs 105-106, the judge has misunderstood (or mischaracterised) the Claimant's case. It was not his case that the particular provisions <u>in the model clauses</u> formed a complete statutory scheme. The Claimant's point was (and is) that the 1998 Act (including through the regime of model clauses, and as amended by the Infrastructure Act to impose public interest objectives) and the Hydrocarbon Licensing Directive Regulations 1995 (which supplement it to implement the Directive) provide a complete statutory scheme (particularly when it comes to the ability to vary license conditions) which, among other things expressly specifies the circumstances in which the grantor can depart from the model clauses (at the point of grant and then following imposition of 1998 Act clauses onto a 1934 licence) and the particular circumstance (as set out in regulation 6(2)) in which the <u>overall</u> licence term may be extended. If the judge is right then none of that was needed. Indeed, as considered further below, the existence of a general power to vary would be inconsistent with the existence and mechanics of those provisions.

42. As for the judge's next point:

> "The Claimant still fails to grapple with the Defendant's undisputed powers (i) to exclude or modify model clauses when granting a licence and (ii) to include in a licence a clause allowing for subsequent variations in the term of licence (whether or not there is a model clause to that effect)."

43. The Claimant does not understand the point the judge is there making.

44. In particular, the existence of an express power to modify at the point of grant itself points to there not being a general power to vary (since the former would not be needed if the latter existed and Parliament is not to be taken to have legislated unnecessarily).

45. But, since the whole notion of "Initial Term" (etc) arises only from the model clauses, that of course does not preclude the model clauses (or any particular variant in a particular licence) making "Initial Term" something which can itself be varied within its own terms (as has been the position with licences issued using new model clauses from 2014).

46. As for the judge's next point:

> "The Claimant also fails to deal with the simple point that the model clauses are in the nature of standard clauses which do not have the prohibitory effect necessary to the Claimant's argument."

47. Again, it has never been the Claimant's argument (nor does it need to be) that the model clauses as such have the effect the judge seems to contemplate. They are but part of the overall scheme which includes various carefully framed powers to vary licence conditions, none of which would be needed if the judge were right. In any event, the prohibitory effect is created through the Crown having exclusive ownership of all petroleum and asserting full control over it through the statutory scheme.

Compatibility with the 1994 Directive and the 1995 Regulations

48. As noted above, the Directive provides for an open, transparent and non-discriminatory process for petroleum exploitation authorisations across the EU.

49. Key elements of that are the requirement for authorisations to be awarded on the basis of published criteria following publication in the OJEU of a notification and details of the conditions which will apply to the authorisations in question. That is something which both ensures non-discriminatory access for would-be licensees, and also ensures that the concerned public (such as the Claimant) can see how licences are being awarded, and on what terms.

50. The OJEU materials for the particular application process here required applicants to specify how much they would do (in a "Work Programme") within the "Initial Term" of six years. The criteria for licence award gave more "marks" to (and thus increased the prospect of success of) applications which included more ambitious Work Programme; but also made clear that if they

did not in that Initial Term complete the Work Programme which they had committed to, their licence would expire. There was no mention of any potential ability to vary the initial term or the work programme [ref ??]:

> "The licence will expire at the end of the Initial Term … if the Work Programme has not been completed."

51. The Claimant submits that a general (and unpublished) power in the licence grantor (whether contractual or implied into the statutory scheme) to vary conditions (including, here, the "Initial Term" within which licence applicants needed to complete their "Work Programme" to prevent expiry of the licence) after the grant of the licence, and particularly in the face of the published statement to the effect that failure to complete the work programme in time would lead to licence expiry, is entirely inimical to the operation of the processes for which the Directive provides. In particular, it would allow an applicant to commit to an ambitious work programme to get more points in order to secure the licence in the competitive process, and then apply later to vary the programme or the permitted time set out in that licence in contradiction to what had been set out in the OJEU materials on the basis of which the competition operated – that cannot be right – even if generally known about (which is not accepted) it would cut across the purpose of the Directive and be absurd; it would also undermine the openness of the process to members of the public, such as the Claimant.

52. Of course, none of that would have prevented the OJEU advertisement offering licences which openly included conditions which, themselves, specifically allowed for variations to (say) the Initial Term or the Work Programme; and indeed later model clauses have specifically included the ability to vary the Initial Term. Had that been done then applicants in the competitive process would all have been clear about the potential for extensions when considering how ambitious to be in their proposed work programmes. But, as above, they were told exactly the opposite: they were told that the licence would expire.

53. When seeking permission from the Judge, the Claimant submitted that:

> "As for the impact of the Directive, the Defendant's argument, and the judge's reasoning, depend on an assertion (as per judgment paragraph 112) that it "should have been understood" that PEDLs (including in particular the term lengths and also presumably the work plan requirements within them) could be varied by agreement without that needing to be set out in the model terms. But that flies in the face of what the OJEU (and linked) guidance materials made clear. It also depends on the incorrect analysis that PEDLS are contractual, as explained above.
>
> The published materials provided full information and also repeatedly and expressly made clear that a failure to complete the work programme in the initial period would lead to the licence coming to an end – not only

with no possibility stated of the initial period being extended to accommodate failure or delay but also positively precluding that. Accordingly, even if there were a suggestion that other aspects might be varied by agreement, that could not be the case in relation to the aspects in issue here. Paragraphs 113-114 of the judgment mention, but do not deal with, the point. It is plainly arguable and with a real prospect of success that the transparency and competition requirements of the Directive preclude a general unconfirmed ability to vary core aspects of the scheme after the grant and, a particular ability to vary (at least) those aspects here given the way matters were explained in the OJEU and linked materials."

54. Refusing permission, the judge said this:

> "With regard to the effect of EU law and the 1995 Regulations, paragraphs 5 and 6 of the application make no criticism of paragraphs 108 to 111 or 115 of the judgment. On that basis the points made in paragraphs 5 and 6 do not arguably undermine the court's overall conclusion on the Claimant's main ground of challenge. "

55. Paragraph 108 of the judgment summarised the Claimant's arguments including to the effect that the Directive requires the establishment of an open and transparent (and non-discriminatory) applications process in all Member States (something which the judge does not contradict).

56. Paragraph 109-110 explained (which the Claimant did not ever dispute) that there is nothing in the Directive or 1995 Regulations which expressly precludes the existence of an ongoing general ability to vary conditions which formed part of that process. The Claimant never made that claim. His point is that a general ability to vary of that kind (which did not form part of the legal basis on which it was being said the competitive process was operating) would entirely undermine that transparent competitive process (as explained above); moreover it would be inconsistent with the terms of Article 4(b) of the Directive and Regulation 6 which provide for a limit on the overall duration of a licence but allow, in specified circumstances for the extension of that duration. A general power to vary licences would plainly cut entirely across that.

57. Paragraph 111 says that the Directive does not prevent an ability to vary in the way that clause 6 of the later model clauses allows for (i.e. including within the licence a provision which specifically allows for the variation of the Initial Term. But that (in one sense) is precisely the Claimant's case. There is nothing problematic about running a competition on the basis (as per the 2014 model clauses) that invites applicants to put forward work programmes (which will be scored) to be completed in an Initial Term (the length of which expressly might later be varied2). In that case, everyone would know where they stood at the

[2] See thus model clause 6(1) "This clause enables an extension to be made to the Initial Term …"

outset. The problem is where the competition materials say nothing about an ability to extend the period (and indeed, as here, expressly say that not completing the work programme in time will bring the licence to an end) such that applicants specify work programmes on that basis; but actually, the grantor will later agree variations. That completely undermines the competitive process.

58. The judge has simply not grappled with that point. Nor, including in his reasons for refusal of permission (let alone original judgment) has he grappled with the fact that the OJEU materials here said in terms that non-completion of the work programme in time would bring the licence to an end, which completely contradicts the basis on which the Defendant has in fact operated. As it turns out the OJEU notification materials were – on the Defendant's case and the judge's reasoning – fundamentally misleading. But the judgement is silent on all of that.

59. Indeed, if the judge is right (and there is an unstated general power to vary long after the licence has been awarded such that the clauses which were advertised in the OJEU process and on the basis of which applicants formulated their applications and had their applications scored were of no significance) then it is hard to see what role the Directive (and the transparent process) is performing at all; and certainly there would be no point to the Article 5(3) requirement that changes to the potential conditions which arise during the competition process require advertising. Tellingly, the judge has said nothing on the point, although it was a key part of the Claimant's case before him.

Practical considerations

60. When seeking permission from the Judge, the Claimant submitted that:

> "In paragraphs 116-118 the judgment relies on "practical considerations". But the fact that lack of vires to do something may cause practical problems does not point to the existence of the vires, let alone create it."

61. Refusing permission, the judge said this:

> "The criticisms in paragraph 7 of the application do not justify granting permission to appeal. Paragraphs 116 to 118 dealt with practical considerations raised by both parties and were not central to the court's conclusion in any event. I also note that the Claimant does not deal with the internal contradiction in part of the Claimant's argument (see paragraph 118).
>
> The proposed grounds of appeal do not challenge paragraphs 119 to 131 of the judgment, which precede the court's conclusion on the main issue at paragraph 132."

62. As for paragraph 118 the judge said this:

> "Contrary to the suggestion made in paragraph 65 of the skeleton of Mr. Wolfe QC, an agreement by the Secretary of State to vary a Work Programme does not imply any relaxation of environmental controls or standards for the protection of the environment."

He then proceeded to explain how environmental protections secured by other regulatory regimes would not be compromised by a work programme variation since they would equally apply to the varied work programme.

63. But not only was that not a point made by the Defendant or raised in argument in the hearing, it was also a point based on an obvious mischaracterisation of the Claimant's argument (in the quoted sentence above). In particular, paragraph 65 of the Claimant's skeleton argument (to which the judge pointed) in fact said that:

> "if the Secretary of State is correct in saying that he can agree any amendments at all to the licence requirements, then it would also presumably allow him to relax other requirements <u>of the licence</u> such as those concerned with protecting the environment." [underlining added]

As above, the judge crucially missed the underlined words from his characterisation of the argument. The Claimant was not saying that varying the work programme would somehow bypass other regulatory regimes. He was simply saying that it would (if allowed) potentially by pass other requirements <u>of the licence itself</u>. The "internal contradiction" which the judge thought he had identified simply does not exist. The Claimant's point was a good one.

64. As for paragraphs 119-131, paragraphs 119-128 contain the judge's explanation of why he considered that two previous high court decisions did not assist the Claimant.

65. For now, at least, the Claimant says no more about the **Mobil** case (judgment paragraphs 119-124).

66. As for **DBI** (judgment paragraphs 125-128): the judge distinguished the decision (which concluded the Ofcom licences are statutory and not contractual) on the basis that:

    a. Broadcasting without an Ofcom licence is an offence whereas here the licenced activities would not be unlawful in that sense if undertaken without a licence (see paragraph 127);

    b. Also: "the statutory framework within which PEDL 189 was granted did not impose any statutory obligations on the Crown or Secretary of State with regard to either (a) the petroleum as an asset or (b) the licensing function … [and even the Infrastructure Act additions do] not create regulatory functions for the licensing authority, such as to regulate a market, or to protect or promote the interests of

consumers or parties affected by the activities of licensees under petroleum licence."

67. As for (a): the judge has not identified any rule or principle of law to the effect that a licence to do something is contractual unless doing it without such a licence is an offence. This is not a 'tick-box exercise' where some schemes qualify and others do not because of the existence or not of an offence (or other regulatory feature).

68. As for (b): there is no reason why a licensing scheme is contractual unless it regulates a market or promotes consumer interests, as the judge would have it; and anyway, section 9A if the 1998 Act (in force from 12 April 2015 and thus at the time of the amendment in issue here) created a public interest objective akin to those which the judge had in mind for Ofcom which was to be furthered by one more strategies (produced by the Secretary of State, now OGA) in accordance with which strategies the Secretary of State/OGA was to act when exercising the licensing functions and in accordance with which a licensee is to act when planning and carrying out activities under their licence (which would include them making further applications within the licence conditions, including permissions to move from the Initial Term to Second Term, and then undertake production). That is entirely consistent with a licence scheme operating under statute and points directly against some notion that this is merely a contractual licensing scheme dealing with private property which happens to be vested in Her Majesty.

69. On analysis, Cranston J's carefully considered characterisation of Ofcom licences as being statutory and not contractual assists the Claimant in characterising the scheme here.

Other matters

70. Paragraphs 129-131 dealt with material the judge referred the parties to after the hearing. That material took the debate no further, as the judgment recognises.

Conclusion

71. In paragraph 132, the judge then returned, by way of conclusion, to the theme of the early part of his analysis when he said this:

> "… [a petroleum licence] is a grant of exclusive rights to search for, bore and get petroleum, in other words a grant of exclusive property rights, which contains the normal incidents of property ownership, in so far as they are not excluded or modified by the terms of the legislation or the relevant licence. Those rights include the right to assign the interest created by the licence and the ability of the parties to the licence to agree to vary its terms."

The logic of that analysis is entirely unclear. In particular, the judge treats the "normal incidents of property ownership" as including the ability of the parties

to the licence/Deed which led to the interest in question to vary its terms. But that simply assumes that the property interest in question has been created by a licence which may be varied by agreement of its parties, rather than leading to that conclusion. There is no basis for that assumption. In particular it ignores the situation in which a property interest has not been created by a legal mechanism which has that effect (such as those mentioned above), including a complete statutory process, the arrangements of which do not include such a power.

If the licence is governed entirely by the statutory code relating to such licences, whether there is an incidental power to vary it

72. When seeking permission from the Judge, the Claimant submitted that:

> "In paragraphs 133-138, the judge concluded (making another point not made by the Defendant, no doubt for good reason; and doing so on the basis of legal argument and authorities not part of the argument before the court) that, even if the framework was statutory, then there was still an implied power to vary the terms of a PEDL. The judge's conclusion to that effect was premised (judgment paragraph 137) on the potential benefits of the existence of such a power. But, that is not the test for an implied statutory power of this kind. As Lord Templemann put it in **Hazell v Hammersmith** (dealing with the power to enter into swop transactions) "The authorities also show that a power is not incidental merely because it is convenient or desirable or profitable." The same is true here: a power to vary is not incidental just because it might be desirable. And Lord Templemann's further point is also applicable here: "Schedule 13 establishes a comprehensive code which defines and limits the powers of a local authority with regard to its borrowing. The Schedule is in my view inconsistent with any incidental power to enter into swap transactions." The same is true here: the 1998 provides for a detailed and comprehensive code including specifying when and how the Minister can vary terms (i.e. generally at the point of grant, and specifically in relation to the overall term in precisely defined circumstances). That, arguably at least and with a real prospect of success, is inconsistent with an incidental power to vary anything (or at least the initial term) at will upon agreement, as the judge's conclusion would have it."

73. Refusing permission, the judge said this:

> "Paragraph 8 of the application deals with an alternative point (paragraphs 133 – 138 of the judgment) which only arises if the court's decision on the main issue (paragraphs 92 – 132) is incorrect. Otherwise, the court's decision does not depend upon the correctness of paragraphs 133 – 138 of the judgment. The essential legal analysis and key authorities (e.g. Hazell) were raised by the court with counsel during the hearing. The Defendant's counsel adopted it as an alternative submission. The Claimant did not suggest that he wished to make any further submissions on the subject,

whether before or after judgement was reserved. If the judgment is read as a whole, paragraph 137 did not adopt an inappropriate test as suggested by the Claimant (see e.g. paragraphs 134 and 138). The Claimant neglects to point out that in Hazell Lord Templeman was dealing with the reliance by Hammersmith LBC upon an incidental power to justify financial arrangements (interest rate swaps) which flouted a statutory regime for capping the borrowing powers of a local authority. The Claimant has failed to identify any incompatibility between the statutory scheme in this case and an ability to make a consensual variation to a petroleum licence."

74. Paragraph 134 simply cites the passage from AG v Great Eastern Railway Company which Lord Templemann went on to consider. Paragraph 138 set out the judge's conclusion.

75. As the judge said in paragraphs 136-137:

> "The Hillingdon case would suggest that there are circumstances in which a power to vary a licence must also be implicit in, or incidental to, a power to grant that licence. In the present case it is only necessary to consider an incidental power to authorise a consensual, rather than a unilateral, variation of a licence."

76. The point is that a power to vary can sometimes be implied (but, and this is the important point, is not necessarily implied).

77. The judge's explanation for why a general variation power should be implied here (the rest of his paragraph 137) then outlines the policy benefits which the Defendant saw in the potential to vary licences. But they were just that, benefits (and contentious claims at that), not requirements. No-where has the Defendant claimed that a power to vary is necessary. Indeed, as above, any such claim would completely fly in the face of what was said in the OJEU materials here (as above) including:

> "The licence will expire at the end of the Initial Term … if the Work Programme has not been completed."

78. As above, refusing permission, the judge said this:

> "The Claimant neglects to point out that in Hazell Lord Templeman was dealing with the reliance by Hammersmith LBC upon an incidental power to justify financial arrangements (interest rate swaps) which flouted a statutory regime for capping the borrowing powers of a local authority."

79. Lord Templemann's observation (pointed to by the Claimant, as above) that "The authorities also show that a power is not incidental merely because it is convenient or desirable or profitable" was not in any qualified by, or limited to, the particular circumstances of situation before the House of Lords – it was a statement of general principle, equally applicable here.

80. The simple point here is that, while the power to vary might be considered desirable (by the Defendant), that does not make it necessarily incidental here. The judge relied on the former and never tackled the latter.

81. As for what Lord Templemann said about the legislative scheme with which the case before the House of Lords was concerned:

> "Schedule 13 [Local Government Act 1972] establishes a comprehensive code which defines and limits the powers of a local authority with regard to its borrowing. The Schedule is in my view inconsistent with any incidental power to enter into swap transactions."

The point is that there was nothing in Schedule 13 which specifically precluded the swap transactions. Rather, the Schedule provided for what a local authority could do when it came to borrowing, and how. Lord Templemann's point was that that was inconsistent with the existence of a parallel (implied) power to enter into swop transactions.

82. The same is true here: the 1998 Act and the Regulations establish a comprehensive code which specify the extent and nature of the Secretary of State's powers with regards to varying from the model (or at all) the clauses in a petroleum licence (i.e. he may do so at the time of grant, he may do so where the 1998 Act has imposed new clauses, and he may do so in relation to the specific question of overall licence term where the circumstances of regulation 6(2) apply). That is inconsistent with the existence of an implied general power to vary. To use the judge's phraseology, a general power would "flout" the restrictions in place in the 1998 Act and 1995 Regulations.

83. That, of course, is another way of asking why Parliament would have chosen to provide for those specific variations if (as the judge would have it) there was anyway a general and wide power to agree any variations. As noted above, the judge never tackled that key question, let alone answer it.

If the licence can be varied, whether the Secretary of State lacked any power to enter into the 2016 deed of variation

84. When seeking permission from the Judge, the Claimant submitted that:

> "In paragraph 141 the judge explained his conclusion that, if the PEDL was indeed contractual (such that the parties to it could vary it), then the Secretary of State could vary it. The argument moved from observing that the Secretary of State would have the power to enforce obligations under a licence or act on breaches (indeed necessary incidentals to the Secretary of State's powers to grant a licence) to the conclusion (paragraph 141) that the Secretary of State could therefore act on behalf of Her Majesty in agreeing contract variations not contemplated expressly or implicitly by the Act. While the judge concluded (judgment paragraph 142) that such

an implied power was consistent with the specific power to vary from the model clauses *at the time of grant*, he said nothing about how such a conclusion would fit with the entirety of the statutory scheme in play here. In particular, if a PEDL is simply contractual and the Secretary of State can generally act on behalf of Her Majesty in exercising her contractual powers (as the judgment would have it), then why did parliament implement (and vary over time) primary legislation of this complexity and provide the making of detailed secondary legislation (encompassing comprehensive model clauses approved by Parliament) of the kind in play here? And why would parliament put in place that specific ability to make variations but not also an ability to vary terms later if in fact it intended both to be present (as the judgment and Defendant would have it)? The approach argued for by the Defendant and accepted by the judge would have needed none of that specified ability to vary at the outset. Arguably, and with a real prospect of success, the judge's analysis fatally fails to deal with that."

85. Refusing permission, the judge said this:

> "Paragraph 9 of the application criticises the court's decision on a subsidiary point raised by the Claimant (paragraphs 139 – 142 of the judgment). Essentially it involves once again the Claimant's reliance upon regulations prescribing model clauses. That point has already been addressed above."

86. It is unclear why the judge thought that the Claimant's point relied (let alone exclusively as the judge seeks to put it) on the model clauses regulations. It did not.

87. The simple point is that the judge's conclusion (to the effect that the Secretary of State had power to agree variations to the contract (which this part of the judgment assumed to exist) between Her Majesty and the licencee depended on the judge's clear and simple point (paragraph 141) that:

> > "Plainly, in acting under the terms of the licence the Secretary of State is acting on behalf of Her Majesty."

As he went on to explain, the judge was there relying on the special position of a Minister of the Crown – taken to be acting on behalf of her Majesty. But: (1) that does not deal with the point made by the Claimant above (namely, if the Secretary of State is to be here taken as having all the powers which Her Majesty would have under such a contract, why did parliament enact the detail of the 1998 Act in the first place?); and (2) it would completely collapse as an argument in relation to the position after 1 October 2017. From that date the OGA was given the power to grant licences (etc) under the 1998 Act, But the OGA specifically (and expressly) does <u>not</u> act on behalf of the Crown. So, if that was the basis for the power to vary prior to that date, it would not be available after it. And yet there is nothing to suggest that parliament intended the change of identify of the license grantor to have such a dramatic

effect. The simple point is that neither the Secretary of State before, nor the OGA since, have a general power to vary petroleum licences.

OVERALL

88. Overall, the Claimant submits that he has a real prospect of success in an appeal. In any event the wider public importance here means that there is a compelling reasons why permission should be granted. The court is asked to grant permission for an appeal.

AARHUS PCO

89. The claim is an Arhus Convention claim for the purposes of the CPR (as Lang J held when she granted permission to proceed). The court is referred to the Claimant's witness statement (served with this application) and asked to make an order covering this appeal that repeats or improves the protective order which (by automatic operation of the CPR at first instance) covered the position in the High Court, namely an order that the Appellant's costs liability in the appeal be capped at £5,000 and the Respondent's at £35,000.

David Wolfe QC

MATRIX

30 August 2017