CO/4951/2016

IN THE ADMINSTRATIVE COURT (PLANNING COURT)

BETWEEN:

BENJAMIN DEAN

Claimant

-and-

THE SECRETARY OF STATE FOR BUSINESS, ENERGY & INDUSTRIAL STRATEGY

Defendant

-and-

DART ENERGY (WEST ENGLAND) LIMITED

Interested Party

CLAIMANT'S SKELETON ARGUMENT

For substantive judicial review hearing 22 June 2017 (1½ days)

Core documents:

- *This skeleton argument (which brings together the material from the Claimant's earlier documents)*
- *PEDL189 [A250]*
- *Deed of Variation 2013 [A270]*
- *Deed of Variation 2016 [A284]*
- *OJEU notice [A247]*
- *Guidance to applicants [A317]*
- *Defendant's Detailed Grounds of Defence (DDGOD) [A203]*
- *Interested Party's Detailed Grounds of Resistance (IPDGOR) [A188]*

INTRODUCTION

1. As explained in his witness statement [A74 #6-7], the Claimant is a person who is concerned about "fracking". He lives within the area (as seen on the map at [A127]) covered by a licence (PEDL189 [A250]) which was granted by the Secretary of State.
2. The benefit of the licence is currently enjoyed by the Interested Party [A51-52].
3. The licence permits exploration for oil and gas which the Interested Party (having originally prospected for Coal Bed Methane - CBM) now intends to explore with a view to "frack" for shale gas in due course [A136 #11].
4. On 15 December 2016 [A186], Lang J granted permission for judicial review, having also concluded (the points being disputed before her):
    (1) That the Claimant has standing to bring the challenge, and
    (2) That the challenge was brought in time (alternatively, that she would if necessary, have extended time).

BACKGROUND

5. By section 3 of the **Petroleum Act 1998** ([LM??]) the Secretary of State[1] has the power to grant to such persons as he thinks fit licences to search and bore for, and get, petroleum.
6. One category of licences granted under the Act are known as Petroleum Exploration Development Licences (PEDLs).
7. Section 4 of that Act [LM??] provides for the making of regulations prescribing matters relating to PEDLs, including providing for model terms and conditions which, unless the Secretary of State thinks fit to modify or exclude them when using them at the time of granting a particular licence (as he is empowered to do by the statutory scheme), are to be included in each licence granted.
8. The **Petroleum Licensing (Exploration and Production) (Seaward and Landward Areas) Regulations 2004** [LM??] have been made under that power. They include model conditions.
9. The model conditions (contained in Schedule 6 of the 2004 regulations [LM??]) provided for the overall licence term to be divided into an initial term, a second term, and a production period.
10. Notably, those model conditions provided for the length of the second term and production period to be extended, but made no provision for extension of the initial term.
11. Insofar as is relevant here, those 2004 model conditions were the ones which were applied in relation to the licence in issue here (PEDL 189 [A250]).

[1] The 1998 Act is subject to amendment (as seen in the version at [LM??]) after the decision in issue here such that the Secretary of State is no longer the relevant person, but that does not affect the issues here

12. The primary issue here is whether the Secretary of State had the power (in 2016) to agree to variation of the conditions on the licence so as to bring about an extension of the "initial term" in PEDL189.

13. As it happens, later licences were based on different model conditions which included a provision specifically allowing for the initial term to be extended: see clause 6(2), Schedule 2, Petroleum Licensing (exploration and Production) (Landward Areas) Regulations 2014 [LM??].

14. The issue here is whether the Secretary of State has the power to vary licence conditions (or, for that matter, make other variations to the requirements of such licences) other than as specifically allowed for by the statutory scheme once the licence has been granted.

15. Consideration of that question needs to take into account the fact that the licences in question must be issued in accordance with an EU regime for hydrocarbons licensing. In particular, **EU Directive 94/22/EC** (known as the Hydrocarbons Licensing Directive) [LM??] provides conditions for authorisations for prospection, exploration and production of hydrocarbons across the EU. As its recitals explain, its purpose includes setting up of common rules for ensuring that the procedures for granting such authorisations are open to all entities possessing the necessary capabilities – a competitive process across the EU.

16. With that in mind, Article 5(2) of the Directive [LM??] requires that the conditions and requirements which would be imposed on any such authorisation must be published as part of that procedure, with Article 5(3) requiring that any changes to those things in the course of that procedure then being notified to all interested parties.

17. Article 4(b) provides the limits to be put on the duration of authorisations, allowing for their extension only in specified circumstances [LM??]

> "Member States shall take the necessary measures to ensure that:
> …
> (b) the duration of an authorization does not exceed the period necessary to carry out the activities for which the authorization is granted. However, the competent authorities may prolong the authorization where the stipulated duration is insufficient to complete the activity in question and where the activity has been performed in accordance with the authorization;
> …"

18. The **Hydrocarbons Licencing Directive Regulations 1995** [LM??] were made under section 2(2) of the **European Communities Act 1972** [LM??] to implement the Directive.

19. The 1995 Regulations give effect to the obligations in question including providing for the overall duration of an authorisation to be initially set, and (as allowed by Article 4(b)) later prolonged. The significance of all that is considered further below.

WHAT HAPPENED HERE

20. At [C27] is a copy of the departmental spreadsheet showing "1 July licence changes" to a number of PEDLs.

21. The Claimant lives within the area covered by PEDL number 189 as originally granted by the Secretary of State to BG International Ltd and Composite Energy Ltd [A74 #6-7], but now held by the Interested Party, Dart Energy (West England) Ltd [A51-A52].

22. PEDL 189 is one of a number of licences which are shown in that spreadsheet as having been changed by the Secretary of State in the form of a "Two year extension to Initial Term" [C27].

23. As the Claimant understands it, most of those PEDLs are in materially the same form as PEDL 189 and the extension identified in the spreadsheet has been brought about in the same way.

24. Condition 2 of PEDL 189 correctly explains that the licence was issued in exercise of the powers under the 1998 Act as above [A250 #2]:

> "In consideration of the payments hereinafter provided for and the performance and observance by the Licensee of the terms and conditions herein contained, the Minister, in exercise of the powers conferred upon him by the Act, hereby grants to the Licensee exclusive licence and liberty during the continuance of this licence and subject to the provisions hereof to search and bore for, and get, Petroleum in the area described in Schedule 1 to this licence …" [underlining added]

25. The "initial term" was defined as meaning "the period of six years beginning on 1 July 2008" [A250 #1].

26. That was changed in 2013 by adding two years to the initial term and varying "FIRM WORK PROGRAMME" (so as to remove the commitment to drill a well in the PEDL189 area) [A270].

27. It has now been changed again (as explained in the spreadsheet) so as to show the initial term as being a period of ten years from 1 July 2008 [A284].

28. As above, the legality of those changes (although of course the first is beyond challenge by virtue of the passage of time) is the point in issue here.

29. The Secretary of State purported to bring about the changes by a "Deed of Variation" (see [A229 #41], [A231 #47]). The deed in issue here is at [A284].

THE LEGAL POSITION

30. The Claimant submits that the Secretary of State had no power to vary the conditions of PED189 in that way. His decision to do so, and the resulting variation, was simply *ultra vires*, should be declared to have been such, and should be quashed.

31. That is because:

(1) The statute and regulations above provide the legal regime in which PEDL189 was granted, including giving the Secretary of State the power impose whatever conditions he wished at the time of grant (by applying model conditions, or not, in a varied form or not, to the licence in the first place) and the power later to vary the conditions imposed on the licence, but only in specified circumstances.

(2) As the Defendant and Interested Party accept, those statutory provisions do not allow for (or provide power to the Secretary of State to grant) the variation of the conditions (most particularly the length of the initial term) which the Secretary of State has purported to make here.

And

(3) Although the licence itself provides for variations to what is required by the conditions (as distinct from variations to the conditions or the selection of different conditions, as in (1) above), including as above allowing for variations to other time periods, it does not (as the Defendant and Interested Party accept) provide for the extension of the initial term, as here.

32. In short, the Secretary of State does not claim to have any statutory power to make this change, nor (as the Secretary of State also accepts) does the licence itself allow for it.

33. Instead, the Secretary of State argues that the licence is in law an ordinary contract, the terms of which can be varied by agreement between its parties "like any other contract".

34. But that is no answer.

35. In particular, in overall terms (with more detail below):

(1) The courts have already held that petroleum exploration licences are not contractual.

(2) The powers in play in relation to the making, operation and variation of PEDLs are entirely statutory.

(3) They provide for the making and variation of licences in specified circumstances (none of which apply here).

(4) They provide a complete statutory code and the complete legal framework in play here.

(5) As above, the licence here was granted pursuant to those powers.

(6) As a result it is a statutory licence, the provisions and operation of which are entirely governed by the statutory scheme.

(7) There is simply no basis in law for the suggestion that the resulting licence is a contract, the terms of which can be varied by agreement between its parties (although, as explained below, even if that were the case it would not help the Secretary of State here).

(8) Indeed, the suggestion that conditions on such a licence can be varied in that way as if the licence was a contract is entirely inconsistent with the provisions and purpose of the Directive, as above, which are designed to ensure that conditions on authorisations are set and publicised as part of the open applications procedure (with specific provision being made to ensure that any changes during that procedure are also publicised).

(9) What is contemplated by the Secretary of State here is entirely antithetical to those requirements. It would completely undermine the operation of the Directive (including in particular its requirement that licences be granted through an open and competitive process) if a licence which had been advertised, applied for and granted on one basis could later be varied simply by private agreement between the parties.

(10) But even if, contrary to that (I.e. contrary to the Claimant's primary argument) the licence is indeed contractual and can be varied by the parties to that contract, then that still provides no answer here. That is because:

i. In granting the licence, the Secretary of State was acting (with the powers given to him by the 1998 Act and only those powers) on behalf of "Her Majesty" (see also, to that effect, Simon Toole [A219 #7].)

ii. If this is a contract, it is a contract between Her Majesty and (now) the Interested Party.

iii. The Secretary of State has no common law (i.e. contract) power to vary an agreement to which he is not a party – he has only the powers given to him by the 1998 Act; and, as above, they do not include the power to vary the initial term.

THE DEFENDANT'S ARGUMENT IN MORE DETAIL

Substance

36. The Defendant's argument (as set out in his Detailed Grounds of Defence (DDGOD [A203])) is that:

(1) The **Petroleum (Production) Act 1934** [LM??] (and now the 1998 Act) vested petroleum in the Crown such that anyone who wishes to search and bore for it needs, as a matter of private law, to be <u>contractually</u> permitted by Her Majesty to do so: Defendant's Detailed Grounds of Resistance (DDGOD) [A210 #23].

(2) That is achieved through PEDLs; and a PEDL is therefore a <u>contractual</u> licence (the need for which therefore arises as a matter of private law); such <u>contractual</u> licences can (as a matter of private law) always be varied by agreement between the parties to the contract: DDGOD [A204 #3(1)/(2)], [S210 #22].

(3) The fact that the licences are contractual is seen by the use in the 1998 Act of expressions such as “consideration”, “terms and conditions”, “clauses”, “model clauses”, “deed”: DDGOR #25/26 [??].

(4) The 1998 Act gives the Secretary of State the power to enter into such contracts (i.e. grant such contractual licences) “on behalf of Her Majesty”: DDGOD [A210 #23].

(5) “As a contract between the Secretary of State and the licensee, the Licence is capable of amendment at common law on the basis of agreement between the two parties”: DDGOD [A213 #30].

(6) “The Directive does not purport to require that conditions of a licence cannot subsequently be varied …” and so does not constrain that: DDGOD [A216 #36].

(7) Nor is that changed by the fact that Article 4(b) of the Directive (domestically implemented by Regulation 6(2) of the 1995 Regulations) expressly allows for the extension of the overall licence duration in specified circumstances: DDGOR [A216 #36].

(8) In any event, the court should do no more than make a declaration: DDGOR [A216 #39].

37. As for whether these licenses are contractual licences or statutory licenses, see **IRC v Mobil North Sea Ltd** [1986] 1 WLR 296, per Harman J, holding that a petroleum licence (then granted under section 2 of the predecessor **Petroleum (Production) Act 1934** [LM??]) was not a contract [300G]:

> “To this contention [i.e. that the licence was a contract] Mr. Clarke made two answers. First he submitted that in this legislation licences are well recognised and are referred to by that description. Nowhere was a licence described as a contract. Thus the words used, each having a clear concept, should be treated as referring to different subject matters. Second he submitted that it was a strained use of language to describe a grant by the Crown as a contract, even though obligations binding upon the grantee, less clearly upon the Secretary of State, could be spelt out of it. Thirdly he submitted that there was good authority for holding that not every document containing contractual obligations was properly described as “a contract.” He referred to **Saul v. Norfolk County Council** [1984] Q.B. 559 where the Court of Appeal held that a tenancy granted by a county council in [1986] 1 WLR 296 at 301 respect of a smallholding was not an “agreement” within the meaning of the relevant schedule to the Agriculture Act 1970. Yet it is obvious that a tenancy originates in an agreement between landlord and tenant; indeed, tenancy documents are often called “tenancy agreements.” I find the Court of Appeal's reasoning wholly convincing, and am satisfied that Mr. Clarke's analogy with the language in this case is apt. In my judgment the licence, with or without

> the programme, is not within the meaning of the term "a contract" as used in section 111(7) of the *Finance Act 1981*."

The Defendant and Interested Party argue that Harman J's analysis was applicable only relation to the Finance Act 1981. But there is nothing in his analysis to support that submission. His reasoning is equally applicable here.

38. There is also nothing in the Defendant's contention that the statutory use of expressions (as above) such as "deed"[2] means that the licences are contractual – the expressions are also consistent with PEDLs being statutory licences.

39. The situation here is anyway akin to that considered by Cranston J in **DBI v Ofcom** [2010] EWHC 1243 (Admin) [LM??], rejecting a claim for contractual damages by the holder of an Ofcom broadcasting licence. Cranston J explained that, despite the licence containing terms which would be unnecessary or irrelevant if the licences were *not* a contract, and containing "conditions [that] may have been reminiscent of contract", and despite the fact that the terms of the licence were not entirely determined by the statutory scheme, the "key feature in my view is that they were issued pursuant to a comprehensive statutory scheme governing the relationship between the parties"[3]; and (applying what Mummery LJ said in **Floe Telecom v Ofcom** [2009] EWCA Civ 47 [103] [LM??]) "the issue of the renewed licence was an administrative act, and enabled [the licensees to do something] which would otherwise have been unlawful" [92]; "in the absence of any express provision to that effect there is no material which could justify the conclusion that in these circumstances it is necessary for a contract to ensue"; also [93]:

> "Finally I am troubled that if these licences should be treated as contracts, Ofcom would be exposed to unlimited liability for damages for breach of contract if it breaches their conditions. That seems to me to be inconsistent with the statutory scheme and role and responsibility of ITC/Ofcom as the statutory regulator. Potentially it would expose the public purse to enormous damages claims from telecommunication providers and broadcasters who are subject to conditions in licences fixed by Ofcom in the exercise of its statutory functions. I cannot detect that in enacting the Broadcasting Act 1990 there was any intention on Parliament's part that ITC/Ofcom should be liable to individual undertakings in damages for breach of statutory duty, or merely by issuing licenses in accordance with its statutory duties ITC/Ofcom was to incur liability as if it had entered into private contractual relations. It seems to me that the imposition of a private law contractual relationship with a licensee may well fetter Ofcom's statutory duties to act in the public

[2] As for the meaning of "deed" see **Halsbury's Laws 5th Edition, Vol 32** para 201ff [LM??]. "The term [deed] is clearly not confined to contracts": **R v Morton (1873) LR 2 CCR 22** [LM??] at 27, per Bovill CJ [??].

[3] Thus indicating a lack of free negotiation between the parties involved as a result of this and the imposition of model clauses.

interest, as required by the legislation, in particular to secure the optimal use of the spectrum."

40. Those same considerations apply in understanding the legal position here, including as to it being fundamentally unlikely that Parliament would have intended Her Majesty (as the contracting party) or the Secretary of State (acting on behalf of Her Majesty) to be exposed to claims for damages by virtue of these licenses being contractual (which would not be the case if they were statutory licences) without clear and express provision in the legislation to that effect; and including as to the undesirable fetter that could impose on the Defendant's ability to act in the public interest to secure the public objectives arising from the 1998 Act (such as those explained by Simon Toole).

41. Nor is that changed by the fact that the licence is given in exchange for "consideration". That term comes here from section 3(2) of the 1998 Act [LM??] which provides that:

> "Any such licence shall be granted for such consideration (whether by way of royalties or otherwise) as the Secretary of State with the consent of the Treasury may determine …" [underlining added]

42. The use of the term "consideration" simply allows for complete flexibility in what the Secretary of State may ask for in consideration of granting the licence. That does not make what is plainly a statutory licence into a contract.

43. That is not to say that there are not plenty of examples of a Secretary of State being given powers to enter into contracts or agreements, they take a very different form and this is just not one of them [4].

44. The context for all that is provided by the Directive [LM??] (which the Regulations implement [LM??]). It provides for (among other things) an open and transparent market (across Member States) allowing entities equal access to authorizations for prospection, exploration and production of hydrocarbons. That is explained in the recitals thus [LM??]:

> "Whereas steps must be taken to ensure the non-discriminatory access to and pursuit of activities relating to the prospection, exploration and production of hydrocarbons under conditions which encourage greater competition in this sector and thereby to favour the best prospection, exploration and production of resources in Member States and to reinforce the integration of the internal energy market;

[4] See, for example, the **Academies Act 2010** section 1 [LM??]: *"(1) The Secretary of State may enter into Academy arrangements with any person ("the other party"). (2) "Academy arrangements" are arrangements that take the form of— (a) an Academy agreement, or (b) arrangements for Academy financial assistance. (3) An Academy agreement is an agreement between the Secretary of State and the other party under which— (a) the other party gives the undertakings in subsection (5), and (b) the Secretary of State agrees to make payments to the other party in consideration of those undertakings."*

> Whereas, for this purpose, it is necessary to set up common rules for ensuring that the procedures for granting authorizations for the prospection, exploration and production of hydrocarbons must be open to all entities possessing the necessary capabilities; whereas authorizations must be granted on the basis of objective, published criteria; whereas the conditions under which authorizations are granted must likewise be known in advance by all entities taking part in the procedure;
>
> …" [underlining added]

45. And see then Article 5(2)/(3) [LM??]:

> Member States shall take all necessary measures to ensure that:
>
> …
>
> 2. the conditions and requirements concerning the exercise or termination of the activity which apply to each type of authorizations by virtue of the laws, regulations and administrative provisions in force at the time of submission of the applications, whether contained in the authorization or being one of the conditions to be accepted prior to the grant of such authorization, are established and made available to interested entities at all times. In the case provided for in Article 3 (2) (a), they may be made available only from the date starting from which applications for authorization may be submitted;
>
> 3. any changes made to the conditions and requirements in the course of the procedure are notified to all interested entities;
>
> …"

46. That process (which is then domestically implemented in the regulations) is designed to ensure that the conditions on authorizations are transparent and known during the application process (and can only be changed, and then with more publicity, during that process); thus providing for the non-discriminatory and open applications process contemplated overall.

47. The exception to that requirement for certainty at the outset is only in the ability overall to extend licence terms under specified circumstances (provided for by Article 4(b) of the Directive, as implemented by Regulation 6(2), as above), which did not apply in relation to the variation in issue here.

48. All of that would be entirely undermined if (contrary to what is described in the words above) authorizations could be advertised on the basis of one set of conditions and those conditions could then simply be varied by agreement later between the Member State and successful entity later (as the Defendant and Interested Party would have it).

49. Of course, as above, none of that prevented flexibility being built into the licence conditions at the outset to deal with changing circumstances. That is the approach adopted, for example, in the 2014 Model Clauses regulations [LM??] in which Schedule 2(6) enables the parties to extend the Initial Term by giving

notice [LM??]. (No such provision is to be found in the 2004 Regulations [LM??] which were the basis for PEDL 189). Regulation 3(8) of the 2004 Regulations [LM??] sets out other changes which may be made by the Secretary of State in individual cases following grant in reliance on section 4(1)(e) of the 1998 Act [LM??]. Setting out the changes which may be made in individual cases through regulations also enables proper parliamentary scrutiny to take place in accordance with section 4(1) of the 1998 Act.

50. But the points set out above do preclude a licence being advertised and granted on one basis, then being amended in a way contemplated neither by the licence conditions themselves nor the statutory provisions (as the Defendant has purported to do here).

51. Overall, contrary to what the Secretary of State and Interested Party contend, PEDL is not a private law contract which can be varied by the parties to that contract. Rather it is a statutory licence the power to vary which is only in the statutory provisions which underpin it; and that does not include the power to vary the initial term[5].

What if the licences are indeed *contractual*?

52. However, even if the Secretary of State were somehow right in saying that PEDL are private law contracts (i.e. contractual licenses), then that still does not mean the Secretary of State has the power to vary PEDL189 by extending the Initial Term, as he has purported to do here.

53. That is because, even if PEDL189 is a contract, then it is a contract between Her Majesty and the licensee (i.e. Her Majesty and the Interested Party), not a contract between the Secretary of State and the licensee.

54. The Secretary of State has simply been given specific powers by the 1998 Act, including the power to enter into such contracts (if that is what they are) *on behalf of Her Majesty*[6], and to operate and vary them in specified ways; but the Secretary of State only has those powers that have been delegated to him by that Act (there is no other source here for the Secretary of State to do things in relation to what, on the Defendant's analysis, is Her Majesty's private law property); and that does not include the power (generally) to vary the contracts (if that is what they are), or (specifically) to extend the Initial Term.

55. It is therefore completely irrelevant that the Secretary of State has common law powers to vary common law contracts *to which he is a party*. The Secretary of State is not here a party to this contract (even if that is what it is).

56. The Defendant's suggestion that a PEDL is simply a contract between the Secretary of State and the licensee in relation to which the Secretary of State can

[5] Or, for that matter, the Work Programme, as was also done for PEDL189 in 2013 [A270]

[6] See also the opening words of PEDL189 itself "*This licence made …. Between the Secretary of State …. on behalf of Her Majesty on the one part and the companies listed in Schedule 4 of the other party*"; contrast the purported variation "*This Deed of Variation … made between the Secretary of State … of the one part and [the licensee] … of the other part …*" [A250]

exercise common law powers to do anything not specifically prohibited by the 1998 Act would in any event beg the question (to which the Defendant offers no answer) as to what function is then performed by the elaborate and tightly drawn regime (in the powers given to the Secretary of State, including powers to make regulations, and so on) created by the 1998 Act and the regulations made under it. On the Defendant's case, none of that was necessary and it serves no purpose.

Overall on the power to vary the terms of the licence

57. Overall, whether the licence is contractual (with specific powers in relation to it delegated to the Secretary of State by the 1998 Act) or statutory (with specific licensing powers given to the Secretary of State by the 1998 Act), the Secretary of State still has only the powers delegated/given (as the case may be) by the statute.

58. That does not (on either analysis) prevent the framing (and use when initially granting the licence) of model clauses which divide the overall licence period into sub-periods (as the model clauses which informed PEDL189 did here) and allow for those sub-periods to be varied by agreement later. Indeed that is what was implemented through the model clauses used for seaward licences after 2008, and landward licences after 2014 (as described by Simon Toole [?? #46][7]). But where (as here) a licence was not granted on the basis of clauses which themselves provided for later flexibility then the Secretary of State has no power to make such changes later.

The impact on that of the directive

59. As for the relationship with the Directive, the Claimant's overall submission is that:

    (1) The statutory scheme must be construed and applied to give effect to the Directive which it implements: **Marleasing [1990] ECR I-4135** [8] [LM??].

    (2) That precludes a legal analysis of that scheme which allows for changes to be made to requirements of a PEDL (here in extending the Initial Term, but the point is not limited to that, it could also apply to the changing the Work Programme, for example) outside that as may be advertised as part of the application framework, required by the Directive. That is because, if changes can be made outside that framework (and of which some would-be applicants would be ignorant) that could distort the open and transparent application process which the Directive requires.

[7] Mr O'Toole suggests that the provisions in question were simply intended to change the method by which variations were made and "was not intended to introduce a new power that was not there before":[A231 #46]. But the relevant clause provides that "This clause enables an extension to be made to the Initial Term or as the case may be to the Second Term…" [underlining added] the language of which plainly points to the model clause (when then used in a licence) being the source of the power to extend the Initial or Second Term, and not merely being a specification of the means by which an extension using some other source of power is to be agreed.

60. Mr Toole, for the Secretary of State, explains the process [A233 #53-56] and exhibits the OJEU notification (as required by the Directive) for the licensing round in question [A247]. It specified where would-be applicants could find "Full details of the offer, including … guidance about licences, the terms which those licences will include, …." [A247 #2].

61. At the Claimant's request, the Defendant has provided copies of what would-be applicants received [A317]. This Guidance told would-be license applicants that (among other things):

    (1) The licence is divided into three periods or terms, the Initial Term *"during which an agreed Work Programme of exploration must be carried out (to prevent expiry)"* [underlining added] [A319 #10, first and fourth bullets];

    (2) The Applicant must propose a Work Programme, which should be the minimum amount of work the Applicant will carry out [??page 6 header] (and see, in that regard, condition 11 on PEDL189 [A253 #12(1)]

    (3) That proposed Work Programme is one of the main factors used to judge competing applications [A322 header]; (PEDL189 Work Programme is at [A266], later changed [A270])

    (4) *"The licence will expire at the end of the Initial Term … if the Work Programme has not been completed)*" [underlining added] [A322 #32]

    (5) *"Without any drilling commitment, whether it be firm, contingent, or drill-or-drop, the licence will expire at the end of the Initial Term if the well has not been drilled"* [underlining added] [A322 #37]; also [A223 #20].

    (6) *"A Work Programme must include at least one drilling commitment …"* [A322 #37].

    (7) Where there is competition for the same acreage the decision will be based on the marks awarded to the applications [A328 header]

    (8) Each application should include *"a detailed description of the Work Programme proposed for the licensee's six-year initial term"* [A340 #143 last bullet]

    (9) The marks scheme (at [A349]] gave marks for each of the wells etc. to which the Applicant committed in its Work Programme [A350].

62. As Simon Toole puts it [A224 #21]:

> "It follows from the above that the Work Programme is a critical factor in deciding to whom to award a licence."

63. Accordingly, applicants would need to make a judgment in framing their application: the more they committed to in their Work Programme, the more marks they would get in the competition and therefore the more likely they would be to succeed. But they needed to take care not to promise more than they realistically could deliver in the 6 year period because if they did not complete the Work Programme in time then the licence would expire.

64. Plainly, that carefully calibrated (and clearly published, as required by the Directive) mechanism would be entirely undermined (and not be consistent with the Directive) if, in practice, the Secretary of State could and might extend the Initial Term despite the license holder failing to complete their Work Programme in that period.

65. Indeed, on the Secretary of State's case, variation of the requirements which had been set out it in the advertised materials might not just be in an extension of the Initial Term (as in play here) – it could also include other things. Indeed, that is what happened here with the 2013 variation of PEDL189 as seen at [?? C21-23]. In particular, on 4 December 2013, the Secretary of State purported not only to increase the Initial Term (then from 6 years to 8 years) but also to completely change the PEDL189 Work Programme (on the basis of which the Interested Party had applied in the first place). As it happens, that changed Work Programme does not actually require the Interested Party to drill any well at all in the PEDL189 area[8] which is a stark change from the position explained to licence applicants in the Guidance on applications which specified that "A Work Programme must contain at least one drilling commitment" [??page 6; paragraph 37]. That shows 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 of the licence such as those concerned with protecting the environment.

66. Rightly, Mr Toole does not claim that the published materials provided to Applicants told them that variations to licence conditions, such as that in play here, would be possible (or others besides). Indeed, quite the contrary, as seen above, the materials made it absolutely clear that not completing the Work Programme within the six year Initial Term would lead to licence expiry.

67. But what Mr Toole then says is very telling [A234 #57]:

> "the PEDL licensee and others would have been well aware of the potential for variation of the Licence by Deed and I am certain that this potential for risk mitigation would have been seen as an important part of the system that attracted companies and persuaded them to accept a licence".

Accordingly:

(1) On behalf of the Defendant he relies on some applicants being "well aware" that the Defendant would operate a practice entirely inconsistent with the terms on which licences were initially advertised (as above); and

(2) He candidly acknowledges the commercial advantage that would give those particular applicants.

That, of course, is entirely antithetical to the framework required by the Directive. The court must construe the provisions which give effect to the

[8] The obligation now is to drill 13 wells in "any of" 13 specified PEDL areas with no obligation to drill any at all on any of them [??]. The signed 2016 Deed of Variation [??] only further extends the Initial Term.

Directive to avoid that effect. That means construing the provisions in a way which ensures that terms of the licence (such as the Initial Term period of 6 years) could not be varied later unless provided for by the statute or the licence itself, and published in advance to all potential applicants.

Relief

68. Finally, the Secretary of State asks the court to make only a declaration (and not quash PEDL189).

69. His concern (DDGOD [A217 #39]) is the potential prejudice to this particular licensee, the Interested Party.

70. But, of course, if the Claimant is correct in saying that there was no power to grant this extension of the Initial Term then there was also no power to extend the Initial Term in 2013; and so the Interested Party has already benefitted from a windfall in the form of two more years (8 rather than the 6 which the advertised licences allowed for) and in which to complete a varied version of the Work Programme which it had itself specified in its original licence application it could and would complete in 6 years (not doing which would lead to the expiry of the licence).

INTERESTED PARTY'S DETAILED GROUNDS OF RESISTANCE (IPDGOR)

On the substance of the argument

71. The Interested Party's Detailed Grounds of Resistance (IPDGOR [A188]) add nothing material on the substance of the challenge.

72. Indeed, even to succeed in the contention that PEDL189 is a contractual licence which can be varied by private agreement between it and the Secretary of State, the Interested Party is forced (like the Secretary of State) to treat the Secretary of State as being a party to the contract, when he is not; and thereby to collapse the very distinction between the Crown (and Her Majesty) and the Secretary of State which the 1998 Act specifically recognises and avoids.

73. It would also create the undesirable effects identified by Cranston J. in **DBI v Ofcom** [2010] EWHC 1243 (Admin) [LM??], including potentially claims for damages despite any provision in the statutory scheme suggesting that is what Parliament intended.

On the timing of the claim and relief

74. As for Interested Party's points about the timing of the claim:

    (1) the Interested Party correctly notes (IPDGOR [A197 #21(iv)]) that, in granting judicial review permission, Lang J made clear that she was prepared to grant an extension of time such that the claim was in time from both a purely domestic perspective (time running from the decision) and an EU perspective (time running from the date of knowledge).

    (2) The Interested Party's attempt now to re-open that latter point on the basis that the Lang J "plainly overlooked the judgment of Cranston J in

Mulvenna [9]" [A197 #vi] must be seen in the context of the Interested Party itself not drawing that judgment to her attention (see skeleton argument at [A165-166]).

(3) Anyway, even if relevant, **Mulvenna** [LM??] only applies to what Lang J said about timing *from an EU perspective*. So it gets the Interested Party no-where given that the judge was clear in saying she would anyway have extended time on a purely domestic basis (such that this claim is to be taken as in time and prompt regardless of the EU point).

(4) But in any event, the reference to **Mulvenna** [LM??] would not help the Interested Party even on the EU point. In particular, in **Mulvenna** [LM??], Cranston J made no mention of what the Court of Appeal said in **Berky v Newport [2012] Env LR 35 (CA)** [LM??] (which *was* considered by Lang J when granting permission here); and anyway he decided simply [?? #55] that "the EU principle of effectiveness [which he took to be the operative principle in play and which he then analysed and applied to the facts of the case] does not have any purchase in this case" [underlined]. But, as below, that limited conclusion misses the point of what was said in **Berky**, itself applying **Uniplex** [LM??].

(5) Undeterred, the Interested Party makes submissions directly on **Berky**: IPDGOR #21(viii) [??], but again confining the point to concerns about "effectiveness" (which misses the point in that case). In particular, **Berky**, (and **Uniplex** which it applied domestically), was concerned with the EU principles of "certainty and effectiveness", and not just "effectiveness" (see thus, for example, [48], [50] and [52]), such that Cranston J's focus on the latter was in any event incomplete.

(6) As for the applicability of the EU point (and date of knowledge being the point from which time runs for a fixed 3 month period), as Sir Richard Buxton put it in **Berky [LM??]** [69] "any assertion of a Community point that is not plainly unarguable will attract the jurisprudence contended for by the applicants".

(7) And as for its implications for relief here, as Moore-Bick LJ (with whom Sir Richard Buxton agreed on this point) explained [52], the application of section 31(6) of the **Senior Courts Act 1981** [LM??] so as to withhold relief on the basis of delay in commencing the proceedings (which is what the Interested Party seeks here to do) when the proceedings were in time, would "infringe the Community law principles of certainty and effectiveness just as much as a rule which requires proceedings to be brought promptly".

[9] **Mulvenna v Secretary of State for Communities and Local Government** [2016] JPL 487 (QBD) [LM??]

75. It follows that, if the court agrees with the Claimant that there was no power to vary the licence by extending the Initial Term, then there is no basis not to quash that licence.

76. But even if, somehow, concern about a possible impact on the Interested Party becomes an issue in that consideration, then – as noted above – the Interested Party will in any event have gained a windfall here, namely in having had 8 years rather than 6 to complete what it said it could do (and on its case it contracted to do) within 6 years.

77. Moreover, the Claimant wrote to the Interested Party on 8 March 2017 [B90] seeking clarification as to how it was in any event going to complete the expanded work programme by the 30th of June 2018 (being the end of the Initial Term as specified in PEDL189 as varied by the decision under challenge). The Interested Party's solicitors responded on 26 April 2017 [B96]:

> "Our client anticipates that the work programme could be completed be completed by mid-2019 to mid-2021, dependent on various matters outside the control of IGas group. While this falls outside the current expiration of the Initial Terms, our client would apply to the Oil and Gas Authority, as it has in the past, for an extension of the Initial Term and commensurate reduction of the Second Term and/or Production Period, to enable our client to complete the Work Programme within a timeframe that enables our client to retain PEDL189. As with previous extensions, any extension of the Initial Term would be coupled with a commensurate reduction in the Second Term and/or Production Period to ensure that the overall term of the PEDL189 remains the same." [underlining added]

78. In other words, the Interested Party is in any event reliant on the Secretary of State granting a further variation to the Initial Term. It follows that, if the court agrees with the Claimant that the Secretary of State had no power to extend the Initial Term (by private agreement) in 2016 (and makes a declaration to that effect), then there is, in practice no prejudice to the Interested Party in quashing that 2016 variation (because the Interested Party will not in any event be able to obtain the further extension of the Initial Term which is accepts it requires).

OVERALL

79. The Court is asked to:

    (1) Declare that the Secretary of State had no power to vary PEDL189 to extend the Initial Term.

    (2) Quash the decision/deed which purported to give effect to that variation.

David Wolfe QC

MATRIX

?? 2017