IN THE HIGH COURT OF JUSTICE **CO/4951/2016**
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

BETWEEN:

The Queen
on the application of

BENJAMIN DEAN

Claimant

-and-

THE SECRETARY OF STATE
FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Defendant

-and-

DART ENERGY (WEST ENGLAND) LIMITED

Interested Party

DETAILED GROUNDS OF DEFENCE

A. Introduction and Summary

1. This is a challenge to the Secretary of State's decision to enter into a deed of variation dated 28 June 2016 ("**the Deed of Variation**") with the licensees to a Petroleum Exploration and Development Licence ("**PEDL**") known as PEDL 189 ("**the Licence**").

2. The Claimant alleges that the decision to vary the Licence was *ultra vires*. His case is based upon the following propositions:

(1) A licence granted under section 3 of the Petroleum Act 1998 is a "*statutory licence*", not a contract. The relevant legislation provides "*a complete statutory code and the complete legal framework in play here.*"[1]

(2) Since there is no express statutory power to vary a licence other than in specified circumstances which do not apply here, the Secretary of State had no power to enter into the Deed of Variation.[2]

(3) It would be inconsistent with the provisions and purpose of the Directive (as defined below at paragraph 13) to vary the conditions on such a licence, since the Directive is "*designed to ensure that conditions on authorisation 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)*". Variation by agreement between the parties would be "*entirely antithetical to those requirements*".[3]

3. The Claimant's submissions are incorrect. In summary:

(1) A PEDL is a contract. The Claimant confuses two different types of licence, namely a contractual licence (the need for which arises as a matter of private law, notwithstanding any statutory provision made for such a licence to be granted) and a purely regulatory licence (the need for which arises solely as a consequence of statute). A PEDL is a contractual licence.

(2) The contract is capable of being varied by agreement between the parties on the ordinary principles of contract law. No authorisation is required in statute for such a variation to be made. As a matter of *vires*, the Secretary of State may enter into a Deed of Variation under his common law powers to contract, provided that it would not be inconsistent with the statutory scheme or EU law to do so.

(3) The variation to the Licence is neither inconsistent with the statutory scheme nor with either the provisions or purpose of the Directive.

[1] Grounds of Claim §§18-22(7); Claimant's Summary Reply to the Summary Grounds of Resistance §§6-19; Claimant's skeleton argument for oral permission hearing §§5-8
[2] Grounds of Claim §§18-22(7); Claimant's Summary Reply to the Summary Grounds of Resistance §§6-19; Claimant's skeleton argument for oral permission hearing §§5-8
[3] Grounds of Claim §§22(8)-(9); Claimant's Summary Reply to the Summary Grounds of Resistance §§20-27

4. For those reasons, as set out in more detail below, the Claimant's application should be dismissed.

5. These detailed grounds of defence are accompanied by the first witness statement of Simon Toole (references to paragraph numbers of which appear below as **[ST/x]).**

B. The legislative framework

(a) The relevant domestic law

6. Ever since 1934, property in petroleum (including any mineral oil or relative hydrocarbon and natural gas) which exists in its natural condition in strata in Great Britain has vested in the Crown, and licences have been granted on behalf of the Crown to allow operators to search and bore for and get such petroleum: sections 1 and 2 of the Petroleum (Production) Act 1934 ("**the 1934 Act**").

7. The 1934 Act was repealed and replaced by the Petroleum Act 1998 ("**the 1998 Act**"), but sections 1 and 2 of the 1934 Act find their direct counterpart in sections 2 and 3 of the 1998 Act.

8. Section 2 of the Petroleum Act 1998 provides materially as follows:

> *(1) Her Majesty has the exclusive right of searching and boring for and getting petroleum to which this section applies.*
>
> *(2) This section applies to petroleum (including petroleum in Crown land) which for the time being exists in its natural condition in strata in Great Britain or beneath the territorial sea adjacent to the United Kingdom.*
>
> *(3) ...*

9. Section 3 of the 1998 Act further provides that:

> *(1) The Secretary of State, on behalf of Her Majesty, may grant to such persons as he thinks fit licences to search and bore for and get petroleum to which this section applies.*
>
> *(2) This section applies to—*

(a) petroleum to which section 2 applies; and

(b) petroleum with respect to which rights vested in Her Majesty by section 1(1) of the Continental Shelf Act 1964 (exploration and exploitation of continental shelf) are exercisable.

(3) Any such licence shall be granted for such consideration (whether by way of royalty or otherwise) as the Secretary of State with the consent of the Treasury may determine, and upon such other terms and conditions as the Secretary of State thinks fit.

(4) ...

10. Section 4(1) requires the Secretary of State to make regulations prescribing:

(a) the manner in which and the persons by whom applications for licences under this Part of this Act may be made;

(b) the information to be included in or provided in connection with any such application;

(c) the fees to be paid on any such application;

(d) the conditions as to the size and shape of areas in respect of which licences may be granted;

(e) model clauses which shall, unless he thinks fit to modify or exclude them in any particular case, be incorporated in any such licence.

11. The relevant regulations applicable in the present case are the Petroleum Licensing (Exploration and Production) (Seaward and Landward Areas) Regulations 2004 (SI 2004/352) ("**the 2004 Regulations**"). Regulation 2 of the 2004 Regulations defines a PEDL as a licence to search and bore for, and get, petroleum in a defined landward area. Schedule 6 to the 2004 Regulations sets out the model clauses for PEDLs (as provided for by section 4(1)(e) of the Act). The model clauses include the following:

(1) Model clause 1 provides definitions for (among other things) the "*Initial Term"* (meaning a period of six years beginning on a specified date), the "*Second Term"*

(meaning the period of five years following expiry of the Initial Term), and the "*Production Period"* (ordinarily meaning a period of 20 years).

(2) Model clause 3 provides that the licence shall continue for the Initial Term (unless sooner determined), and upon expiry of the Initial Term the licence "*shall, provided always that its terms and conditions continue to be performed and observed be and continue in force as follows – (a) subject to clause 4, for the Second Term; and (b) subject to clause 5, for the Production Period*".

(3) Model clause 4(1) makes clear that before the expiry of the Initial Term the Licensee may give notice that he desires the licence to continue in force in relation to part of the Licensed Area, subject to the payment of the sums provided for by the licence and to performance of the licence's terms and conditions, and conditional upon due performance by the Licensee of the *Work Programme* (defined on a bespoke basis for each licence) on or before expiry of the Initial Term. At least half of the Licensed Area is surrendered at this time, and the licence then continues in respect of the remaining area for the Second Term: see model clauses 4(2)-4(7).

(4) Model clause 5 then provides for the licence to continue beyond the end of the Second Term into the Production Period, subject to payment of the sums provided for and performance of the terms and conditions.

12. The purpose and practical effect of these model clauses is explained by Mr Toole at ST/13-28.

(b) The requirements of EU law

13. Directive 94/22/EC on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons ("**the Directive**") is implemented in the United Kingdom by the Hydrocarbons Licensing Directive Regulations 1995 ("**the 1995 Regulations**").[4] The Claimant does not suggest that the Directive has been incorrectly transposed.

14. As to the substantive requirements of those regulations:

[4] The 1995 Regulations are applicable to licences granted under the 1998 Act by virtue of the provisions of Schedule 3 to the latter.

(1) Regulation 3 makes provision for the determination of applications for a licence to be made on the basis of certain criteria, which should not be applied in a discriminatory manner.

(2) Regulation 4 limits the imposition of terms and conditions on any licence to those which are justified exclusively for certain defined purposes, and requires that they be applied in a non-discriminatory manner.

(3) Regulation 5 requires that the Secretary of State publishes the criteria to be applied in determining any applications for licences which he invites, and to make available on request any additional or different terms or conditions from those appearing in the model clauses where it is intended that the licence should be granted upon such terms. This requirement expressly relates only to the period before a licence is granted. Regulation 5 imposes no requirements in relation to subsequent variation of the licence. This reflects Article 5(3) of the Directive, which refers only to changes made to the conditions and requirements "*in the course of the [application] procedure*".

(4) Regulation 6 makes specific provision as to the duration of the licence (as a whole) limiting it to the period necessary to carry out the activities authorised by the licence. However, in that context it makes clear (consistently with Article 4(b) of the Directive) that the fact that the term granted proves insufficient for the licensee to complete the authorised activities does not prevent the extension of the term of the licence. For the avoidance of doubt, the present case does not concern any extension of the term of the Licence, since (as set out above at paragraph 1 above) the duration of the Licence was unaffected by the 2 year extension to the Initial Term and corresponding 2 year reduction of the Second Term.

15. Notably, changes to the lengths of the Initial Term and Second Term which do not affect the overall duration of a licence are matters which are not regulated by the Directive at all. The division of the term of a PEDL into the three phases of Initial Term, Second Term and Production Period is a function of domestic arrangements alone: they are a national construct, which fall well within the ambit of the wide discretion left to Member States.

C. The relevant facts

16. On 3 September 2008, the Secretary of State awarded the Licence to BG International Limited and Composite Energy Limited. The Licence made provision for a six year Initial Term (expiring in 2014) followed by a five year Second Term (expiring in 2019) and a Production Period of twenty years (expiring in 2039) [ST/56].

17. By a deed of variation dated 4 December 2013, made between the Secretary of State and GDF Suez E&P UK Ltd ("**GDF Suez**") and Dart Energy (West England) Ltd ("**Dart**"), who had respectively succeeded the original Licensees, the Licence was varied so that the Initial Term was a reference to the period of eight years beginning with 1 July 2008 (expiring 30 June 2016), and the Second Term was a reference to the period of three years beginning immediately after the expiry of the Initial Term (expiring 30 June 2019). The Production Period and, therefore the overall term of the Licence, was unaffected. With effect from 6 May 2015, Ineos Upstream Limited ("**Ineos**") joined the licence by a Deed of Assignment; and GDF Suez has changed its name to Engie E&P UK Limited ("**Engie**") [ST/59].

18. On 1 June 2016, IGas Energy plc (incorporating Dart) wrote to the Secretary of State on behalf of the current licensees, Dart, Ineos and Engie. The licence group requested a two year extension to 30 June 2018 to the Initial Term, providing details of the work that they had completed and the need for an extension to allow time to prepare for applications for planning permission and environmental permits. The Secretary of State agreed to the request. By the Deed of Variation between the Secretary of State of the one part, and Engie, Dart and Ineos of the other part, the Licence was varied such that it would have effect as if the Initial Term was a reference to the period of ten years beginning with 1 July 2008 (expiring 30 June 2018), and as if the Second Term was a reference to the period of one year immediately after the expiry of the Initial Term (so still expiring on 30 June 2019). Again, the Production Period and, therefore the overall term of the licence, was unaffected [ST/62].

19. The Claimant filed a claim for judicial review on 29 September 2016.

20. Permission to apply for judicial review was initially refused by Dove J on 7 November 2016. He observed that "*[i]t is clear that the grant of the licence in this case was purely contractual, and that the Defendant was using the Crown's common law power to*

contract, and vary a contract, in acting as he did. In light of this there is no basis for this application for judicial review and it is unarguable."

21. Upon renewal to an oral hearing on 20 December 2016, permission to apply for judicial review was granted by Lang J.

D. The Secretary of State's response to the claim

(1) A PEDL is a contract

22. A PEDL is – both in substance and in form – a contract. That fact is in no way contradicted by the further fact that it is referred to as a "licence". A licence may be contractual, as it is in this case.

23. The starting point – ignored by the Claimant – is the fact that section 1 of the 1934 Act vested petroleum in the Crown (as it remains pursuant to section 2 of the 1998 Act). From that point, Her Majesty had the exclusive right to search and bore for and get petroleum. It follows that any person who wishes to search and bore for and get petroleum in the United Kingdom must, as a matter of private law, be permitted by Her Majesty to do so. That is why Parliament provided in section 3 of the 1998 Act (like section 2 of the 1934 Act before it) for the grant of licences by the Secretary of State "*on behalf of Her Majesty*".

24. Such licences are therefore in the nature of a concession by the Crown of some of its rights to a private party. The effect of the licence is that the Crown transfers valuable and exclusive rights to the licensee, in respect of a defined area of land and over a defined period, in return for an annual payment. At root, it is a commercial transaction. It is true that many of the terms and conditions which are routinely included in a PEDL serve a regulatory purpose. That is unsurprising: the Secretary of State regulates the issue of such licences in the public interest. But that does not change the underlying nature of the licence itself: the fact that in exchange for the grant of an exclusive right to search and bore for and get petroleum, a licensee agrees to make a rental payment by way of consideration, and accepts various obligations (failing which the licence may be determined).

25. Unsurprisingly, the statute therefore uses explicitly contractual language to provide for the terms upon which such licences are to be granted. Thus, they are to be granted for such "*consideration*" as the Secretary of State with the consent of the Treasury may determine, and upon such other "*terms and conditions*" as the Secretary of State thinks fit (section 3(3) of the 1998 Act), incorporating model "*clauses*" prescribed in regulations made by the Secretary of State unless he thinks fit to modify or exclude them in a particular case (section 4(1)(e) of the 1998 Act). The model clauses prescribed by the 2004 Regulations are also replete with the language of contractual obligations.[5] The language reflects the contractual nature of the bargain. Accordingly, in practice (both before and after the 1998 Act), licences have been explicitly contractual in form, being executed as a deed by the Secretary of State on the one side and the licensee on the other. In common with all other PEDLs, that was the position in the present case **[Exhibit ST1/9-28].** When such rights are assigned to another party, the assignment is achieved by a "Deed of Assignment" – as it was in the present case on 6 May 2015 **[Exhibit ST1/32-36].** Both the 1998 Act (at section 5A) and the model clauses (at paragraph 35 of Schedule 6) plainly contemplate such assignment.

26. There is no indication in the 1998 Act that Parliament intended anything other than that the right to search and bore for and get petroleum should continue to be granted on behalf of the Crown by entering into contractual licences. To the contrary, when under the 1998 Act Parliament sought to extend new consolidated model clauses to pre-existing licences (see section 5(5) of the 1998 Act), it ensured that it made clear that even those changes (otherwise unilaterally imposed by Parliament) could be altered or deleted by deed executed by the Secretary of State and the licensee (see section 5(9) of the 1998 Act). The essential contractual model of the licence was unchanged.

27. The Claimant's denial that a PEDL is a contract appears to be based upon the assertion that it cannot be a contract because it is referred to in the statute as a "licence".[6] That is plainly incorrect. The Claimant's submissions ignore the distinction between two different types of "licence":

[5] For example, the 2004 Regulations refer to model clauses for licences with and without "*break clauses"* (regulations 2 and 3), and the model clauses for a PEDL set out in Schedule 6 refers to the "*performance*" of the Licensee's "*obligations*", which may be "*joint and several*" (paras 1(2), 4, 5), the circumstances in which the licence may be "*determined*" (paras 7, 8), and to the Secretary of State's rights to approve any "*assignment*" (para 35). There is also provision for "*arbitration*" in the event of a dispute between the Secretary of State and the Licensee including a dispute as to "*their respective rights and liabilities*" in respect of the license (para 37).
[6] See, in particular, the Claimant's Summary Reply to the Summary Grounds of Resistance at §§8-14

(1) There is the type of "licence" which is a public law regulatory consent and which authorises that which would otherwise be prohibited by statute. This type of licence is purely a creature of statute: they become necessary only because a statute prohibits the undertaking of a given activity in the absence of such a licence. Examples include licences to drive a car, to sell alcohol, to operate a gambling business. In such a case, one would expect the powers of a licensing authority to be entirely defined by statute (or secondary legislation), because there is simply no other basis for the existence of the power to grant a licence.

(2) There is also the type of "licence" which grants permission to a person to do something affecting or interfering with another person's property or rights, which – as a matter of private law – he would not otherwise have the right to do. Such a licence may be a bare licence or (as here) a contractual licence. They include the type of licence granted by a landowner to permit a person to do something on or over land, without creating any interest in it (in contrast to a lease): *IDC Group Ltd v Clark* [1992] 2 EGLR 184. They also include a copyright licence. They also include circumstances where (as in the present case) a person is licensed to exercise a right which is otherwise exclusively held by another (here, the Crown), in return for consideration. Such licences are not in themselves a creation of statute (even if a statute or statutes refer to the circumstances or terms upon which such licences may be granted): they reflect the fact that at common law the owner of a right (or of land) may permit another person to exercise that right (or enter upon that land).

28. The Claimant's submission that a PEDL "*is what it says it is, namely a licence (Petroleum Exploration and Development Licence) like any other, the operation of which is determined by the statutory powers in play"*[7] obfuscates that distinction. This is not a licence which is "*like any other*", insofar as it is suggested that it is like a driving licence, or a licence to sell alcohol, or a gambling licence. It is a contractual licence.

29. The Claimant additionally relies on *IRC v Mobil North Sea Ltd* [1986] 1 WLR 296 at 300G, but this case does not assist him either.

[7] Claimant's Summary Reply the Summary Grounds of Resistance, §8

(1) Contrary to the Claimant's submission, Harman J did not hold that a petroleum licence (then granted under section 2 of the predecessor Petroleum (Production) Act 1934) was not a contract: he held that it was not within the meaning of the term "a contract" as used in section 111(7) of the Finance Act 1981.

(2) That conclusion was obviously correct, given that it concerned the preservation of advantageous treatment for Petroleum Revenue Tax purposes for development incurred "*in pursuance of a contract entered into before January 1, 1981*": it would have been contrary to the intention of Parliament to read that provision as exempting all development which had been licensed before that date, as made clear by the judge. (It would also have been inconsistent with the House of Lords' decision on appeal, reported at [1987] 1 WLR 1065, that the purpose of section 111(7) was to preserve that advantageous treatment for expenditure to which an operator had been contractually committed before January 1, 1981; but by that stage, the taxpayer was – correctly – no longer relying on the suggestion that the licence had the effect of creating such a contractual commitment.)

(3) However, the case is not authority for the proposition that a contractual licence such as a PEDL is not a contract. Any such contention would be plainly wrong. (Similarly, it would be obviously incorrect to suggest that a tenancy agreement was not an "agreement", even though it was right that it was not an "agreement" within the meaning of a schedule of the Agriculture Act 1970, as held in *Saul v Norfolk County Council* [1984] QB 559, to which Harman J referred.) The *ratio decidendi* of the decision in the *Mobil* case is confined to the proposition that the petroleum licences in question were not contracts within the meaning of section 111(7).

(***2***) ***The contract is capable of being varied by agreement between the parties***

30. 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. The Secretary of State has no power to amend it unilaterally.

31. No express statutory power is required for such amendment by consent. The Crown possesses a common law power to contract: see e.g. Wade & Forsyth, Administrative Law (11th ed) at p. 673: "*The Crown is free to make contracts (though not to spend*

public money) without statutory authority since it enjoys the powers of a natural person" and the observations of Lord Hoffmann in *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681 at para 46: "*[a]s a corporation sole, the Crown has the same right to deal with its property as any other legal person. It needs no statutory authority to do so".* See also *R v Secretary of State for Health, ex p C* [2000] 1 FLR 627.

32. Further, the industry has long operated (both before and after the 1998 Act) on the basis that such deeds of variation can be entered into, and is fully aware of the potential for such deeds of variation when applying for a PEDL. There would be considerable uncertainty and unjustified risk to licensees, and disruption to the regime as a whole, were that not the position: see the evidence of Mr Toole at ST/29-52.

33. As a matter of *vires*, the Secretary of State may therefore enter into a deed of variation under his common law powers to contract, provided that it would not be inconsistent with the statutory scheme or EU law to do so.

(3) The variation to the Licence is neither inconsistent with the statutory scheme nor with either the provisions or purpose of the Directive

34. There is nothing in either the domestic legislation or in EU law which precludes such a variation.

35. While such common law powers must give way to statute where Parliament has acted to exclude them, Parliament has not done so here. In particular, the Claimant is incorrect to contend that the Petroleum Act 1998 provides a complete statutory code:

    (1) There is no provision in the Petroleum Act 1998 requiring the Secretary of State only to agree to grant a licence on specific prescribed terms: to the contrary, he has a discretion to grant them on such terms and conditions as he thinks fit, and to modify or exclude the model clauses in any particular case if he thinks fit. Nor, importantly, is there any provision preventing such a variation or exclusion from being made following the grant of the licence.

(2) While (as set out above) section 5A of the 1998 Act clearly contemplates that the licences may be assigned, there is no express power in the statute for such assignment. That is because it may happen in any event as an ordinary consequence of contract law (subject to any terms and conditions of the contract itself, as where the model clause set out at paragraph 35 of Schedule 6 is included).

(3) Moreover, section 5(9) of the 1998 Act reflects the fact that variations to the terms and conditions of the licence may be given effect by deed[8] executed by the Secretary of State and the licensee. Section 5(9) does not create such a power: it simply *declares* that such variations may be made even in respect of any provision incorporated in a licence under section 5(5) (which had the effect of automatically varying the terms of certain licences in force immediately before the commencement of the Act). Again, it operates on the basis that the underlying agreement is contractual, and that the parties are entitled to vary the terms of the contract by deed of variation.

(4) Seaward Licences issued since 2008 and Landward Licences issued since 2014 have included a clause (respectively derived from model clause 7 in the Petroleum Licensing (Production) (Seaward Areas) Regulations 2008, and model clause 6 in the Petroleum Licensing (Exploration and Production) (Landward Areas) Regulations 2014) which enable variation of the terms concerning the length of the Initial Term and Second Term to be implemented by a notice served in response to a licensee request, rather than by deed of variation. As explained by Mr Toole at ST/46, this change did not introduce a new ability to amend the term of the Initial Term or Second Term: it was introduced simply to ease that process and reduce the burden on the Government and licensee alike of making so many deeds of variation. As the Explanatory Note to the 2014 Regulations made clear, it simply replaced the previous procedure of effecting such change by deed of variation.

[8] Or "instrument under seal" as originally enacted. Those words were substituted for "deed" by the Energy Act 2008, Schedule 5, para 8

36. Nor is the Claimant correct to suggest that the ability to vary the Licence is "*entirely inconsistent with the provisions and purpose of the Directive".*[9] The Directive requires that the terms upon which a licence is to be granted be available on a non-discriminatory basis to all potential applicants. However, it does not purport to require that not a single condition of any licence granted cannot subsequently be varied to reflect developments since the time of its grant, where justified by the particular circumstances of the case. Were it so, any unforeseen circumstance would have the consequence that a licensee's investment in a licence area would be wholly jeopardised, with a requirement to re-advertise the licence on every single occasion. Such an unrealistic result would be wholly inconsistent with the Directive's purposes of allowing the "*best possible prospection, exploration and production of the resources located in the Community*" (see the seventh Recital), within the context of efficient and competitive operation of the internal market (see the fifth, sixth and tenth Recitals): see further Mr Toole's evidence at ST/51.

37. The fact that Article 4(b) expressly allows the extension of the duration of a licence (as a whole) where necessary does not undermine the Secretary of State's position. The Directive is not concerned with regulating the terms of the licence relating to the Initial Term and the Second Term (which are a function of the UK's policy approach alone). Indeed, the fact that the extension of a licence may be permitted, consistently with the aims of the Directive, simply confirms that the lesser step of adjustment of the relative lengths of the Initial and Second Terms does not conflict with the Directive's purposes either.

Conclusion

38. It follows that there is no basis upon which to assert that the Deed of Variation was *ultra vires.* The claim should be dismissed.

39. In the event that the court were minded to allow the claim, relief should be restricted to the grant of a declaration. There is no basis upon which the particular PEDL which has been the subject of challenge should (uniquely) be quashed; to do so would be to the significant prejudice of the Interested Party, Dart. The Secretary of State notes that in its grounds of resistance, Dart submits that relief should in any event be denied on the

[9] Grounds of Claim §§22(8)

grounds of the Claimant's delay in bringing the claim. The Secretary of State supports (but does not repeat) that submission.

ROBERT PALMER

Monckton Chambers

3 February 2017