Neutral Citation Number: [2017] EWHC 1998 (Admin)

Case No: CO/4951/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/08/2017

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

BENJAMIN DEAN	**Claimant**
- and -	
THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY	**Defendant**
- and -	
DART ENERGY (WEST ENGLAND) PLC	**Interested Party**

- -
- -

David Wolfe QC (instructed by **Friends of the Earth Limited**) for the **Claimant**
Robert Palmer (instructed by **Government Legal Department**) for the **Defendant**
The **Interested Party** did not appear and was not represented at the hearing

Hearing dates: 22nd June 2017

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Approved Judgment

Mr Justice Holgate:

Introduction

1. The Claimant, Mr. Benjamin Dean, lives in the village of Tarvin, near Chester. He is a parish councillor. He applies by judicial review for an order quashing a deed dated 28 June 2016 which varied a Petroleum Exploration and Development Licence (referred to as "PEDL 189") granted under section 3 of the Petroleum Act 1998 ("the 1998 Act") on 3 September 2008. Alternatively, the Claimant seeks a declaration that the variation is of no legal effect.

2. The deed of variation was made between the Defendant, the Secretary of State for Business, Energy and Industrial Strategy, and three companies who together constitute the licensees. One of those companies, Dart Energy (West England) Limited ("Dart") has taken part in these proceedings as an Interested Party. The written submissions by Mr. James Maurici QC on behalf of that party prepared for the substantive hearing, explain that Dart holds PEDL 189 as the operator and licence administrator on behalf of itself and the two other licensees, Engie E&P UK Ltd and INEOS Upstream Limited.

3. The overall duration of the licence granted by PEDL 189 is divided into three periods. Originally the licence provided for an Initial Term of 6 years, beginning on 1 July 2008, followed by a Second Term of 5 years and then a Production Period of 20 years. On 4 December 2013 PEDL 189 was altered by a deed of variation so that the Initial Term was increased from 6 to 8 years (expiring on 30 June 2016) and the Second Term was reduced from 5 to 3 years. The Second Term would still expire on 30 June 2019 and the Production Period remained unaltered. Consequently, the overall duration of the licence remained the same.

4. The effect of the 2016 deed of variation challenged by the Claimant was to increase the Initial Term from 8 to 10 years and to reduce the Second Term from 3 years to 1 year. Once again, the Production Period and the overall duration of the licence remained unaltered.

5. The Claimant submits that in agreeing to enter into the 2016 deed of variation so as to alter the length of the Initial Term the Defendant acted *ultra vires.* The Claimant says that a licence granted under section 3 of the 1998 Act, such as PEDL 189, is a purely statutory licence. The 1998 Act is a complete statutory code governing such licences. It gives the Secretary of State an express discretion as to what terms or conditions to include in the initial licence, including provisions which may allow subsequent variations to be made to the licence. However, the 1998 Act does not confer on the Secretary of State any power to make a variation in the terms of a licence once it has been granted. The Claimant also submits that the conditions of PEDL 189 do not allow for the length of the Initial Term (or the Second Term) to be varied, unlike the duration of the Production Period. In that context, it is to be noted that the Claimant accepts that it would *not* have been unlawful in 2008 for the Defendant to have granted a licence with a term explicitly allowing for such a variation in the length of the Initial Term (or the Second Term) to be made. The Claimant contends that because no such term was included in PEDL 189, the length of the Initial Term cannot be varied.

6. On the other hand, the Defendant and the Interested Party submit that a licence granted under the 1998 Act to search for, bore and get petroleum is a contractual relationship involving the grant of property rights, and is therefore capable of being varied by agreement between the parties according to standard principles of the law of contract. Such a document is not a statutory licence governed exclusively by the statutory regime based on the 1998 Act.

7. Mr. David Wolfe QC, who appeared on behalf of the Claimant, stated that if the Court should decide that a licence granted under section 3 of the 1998 Act is contractual in nature, then the first and main part of the challenge falls away. But he then raises an alternative argument, namely that the Defendant was not empowered in any event to enter into the deed of variation on behalf of HM the Queen in whom the ownership of petroleum has been vested. As he accepted, the implication of his argument is that the document could only have been entered into by the Queen, rather than by the Secretary of State purporting to act on her behalf.

8. Even if the Court should decide that a licence granted under the 1998 Act is a statutory licence and not a contract, the question was posed during argument whether it nevertheless follows that a consensual variation of such a licence must be treated as *ultra vires.* In that event the Court would also need to consider whether the 1998 Act includes an incidental power to enter into an agreement with a licensee to vary the terms of a licence. Licences granted under the 1998 Act apply to the exploration and getting of petroleum not only on land but also at sea. The activities licensed are intrinsically risky. These risks include completely unforeseen, and sometimes unforeseeable, changes in circumstance. Such changes may necessitate a variation in the licence if the process of exploration and/or extraction is to continue in the interests of both licensee and the Crown as grantor. Indeed, if it were to be held that such variations are *ultra vires*, then perhaps commercial interest in taking on such risks could be affected, or the returns that operators would expect to earn would increase.

9. According to the witness statements of Mr. Mark Young, Technical Director of IGAS, the original Work Programme for PEDL 189 was based on exploration for and production of coal bed methane ("CBM"). Survey work and studies revealed that prospecting for CBM would not in itself be viable and so the focus shifted to evaluating PEDL 189 and other licensed areas for shale gas exploration. Studies were undertaken between October 2014 and May 2015 but the 2D seismic surveys carried out were insufficient. A much more detailed 3D seismic survey had to be undertaken over an area of 110km^2 between September and November 2015. The data obtained was analysed during the first half of 2016. Under the deed of variation entered into in 2013, the Initial Term was due to expire on 30 June 2016 and so the licensees sought a further variation to extend this period.

10. During the period relevant to these proceedings Mr. Simon Toole was the Director of Licensing and Legal at the Oil and Gas Authority ("OGA"), the executive agency responsible for taking decisions on behalf of the Defendant in relation to petroleum exploration and development licences (until 30 September 2016). He explains in his witness statement that in order to allow sufficient time for the licensees to apply for and obtain planning and environment permits for a "fracking" process for shale gas within the licensed area, the Defendant agreed to the licensee's proposal that PEDL 189 be varied, so that the Initial Term will end on 30 June 2018 instead of 30 June 2016.

11. Mr. Toole also states that the licensees had bought land and had received planning permission to be able to drill a well at Duttons Lane. Protestors occupied that site between 2014 and 2016, preventing the preparation of the site and the drilling of the well. This formed part of the explanation for the delay in the licensees carrying out the Work Programme and hence the need for the duration of the Initial Term to be extended.

12. I should emphasise that in these proceedings the Court has not been asked to address, and is not concerned with, the merits or demerits of the fracking proposal, or with the environmental concerns of objectors. In this case the Court is only concerned with the legal issues which I have summarised above.

13. This judgement is arranged under the following headings:-

    (i) The statutory framework;

    (ii) The licensing system;

    (iii) The terms of the licence PEDL 189 and the deeds of variation;

    (iv) Whether a licence granted under the 1998 Act is governed entirely by the statutory code relating to such licences;

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

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

    (vii) The Interested Party's submission that the Court should refuse to grant relief under section 31(6) of the Senior Courts Act 1981.

<u>(i) The statutory framework</u>

The Petroleum (Production) Act 1934

14. According to the long title the Petroleum (Production) Act 1934 ("the 1934 Act") was passed in order "to vest in the Crown the property in petroleum and natural gas within Great Britain and to make provision with respect to the searching and boring for and getting of petroleum and natural gas …".

15. Section 1 of the 1934 Act provided:-

> "(1) The property in petroleum existing in its natural condition in strata in Great Britain is hereby vested in His Majesty, and His Majesty shall have the exclusive right of searching and boring for and getting such petroleum …
>
> (2) For the purpose of this Act the expression "petroleum" includes any mineral oil or relative hydro-carbon and natural gas existing in its natural condition in strata, but does not

include coal or bituminous shales or other stratified deposits from which oil can be extracted by destructive distillation."

16. Section 2 provided for the Board of Trade, acting on behalf of the Crown to grant licences:-

> "(1) The Board of Trade, on behalf of His Majesty, shall have power to grant such persons as they think fit licences to search and bore for and get petroleum.
>
> (2) Any such licence shall be granted for such consideration (whether by way of royalty or otherwise) as the Board of Trade with the consent of the Treasury may determine, and upon such other terms and conditions as the Board of Trade think fit.
>
> (3) …"

17. Section 3 of the 1934 Act enabled a licensee to make applications under the Mines (Working Facilities and Support) Act 1923 to obtain as against third party owners of land and property interests, ancillary rights needed to enable "the rights granted by the licence" to be exercised. Such ancillary rights included a right to enter upon land and to sink bore holes for the purposes of searching for and getting petroleum. Section 10(3) declared that the 1934 Act did not enable the Board of Trade to confer on any person any right to enter upon or interfere with land.

18. Section 6 of the 1934 Act required the Board of Trade, before granting any licences, to make regulations prescribing the manner in which and by whom applications for licences could be made, the application fees payable, and "model clauses" for inclusion in a licence unless the Board of Trade decided to modify or exclude them in any particular case. The regulations had to be laid before Parliament and were subject to the negative resolution procedure.

19. The effect of the 1934 Act was discussed by the Supreme Court in Bocardo SA v Star Energy Onshore Limited [2011] 1 AC 380. The Court stated that section 1 vested in the Crown the ownership of petroleum existing in its natural condition in strata in Great Britain. From then on, owners of land in which petroleum exists ceased to own or possess, or have any right to possess, that petroleum. A licence granted under section 2, had the effect of passing those exclusive rights from the Crown to the licence holder (see paragraphs 6, 58 and 96-97). However, by virtue of sections 3(1) and 10(3) of the 1934 Act, a licence under the 1934 Act did not give to the licensee a right to enter the land of a third party containing petroleum bearing strata, whether to gain access to the petroleum from the surface or below ground (paragraphs 34 to 35). Accordingly, the licensee would need to buy the relevant land or acquire the necessary "access" rights, whether by agreement or by following the procedure under the 1923 Act for compelling the grant of such rights upon payment of compensation.[1] As from 1934 all new exploitation of petroleum was pursuant to "the new statutory licensing regime" (per Lord Brown of Eaton-under-Heywood JSC at paragraph 91).

[1] But see now sections 43 and 44 of the Infrastructure At 2015, which remove any need for the holder of a licence under the Petroleum Act 1998 to obtain the consent of the landowner to drill or get petroleum at depths great than 300m below the surface.

Essentially the same analysis applies to a licence granted under section 3 of the 1998 Act.

20. At this point it is useful to record a point of common ground between the parties. The use of labels such as "licence" or "consideration", whether in the legislation or in deeds of grant or variation, does not indicate whether the licence is to be treated as contractual or statutory. The dispute in this case must be resolved by reference to the substance and effect of the rights and obligations created by the licence, viewed objectively in the context of the legislation under which it was issued.

21. In the same vein, Mr. Wolfe QC rightly accepted that merely describing a licence for petroleum exploration and development as a "statutory licence" (or by the same token a mere reference to the statutory licensing regime) does not exclude the possibility that licences granted under the 1934 Act or the 1998 Act are contractual in nature and capable of consensual variation applying standard principles of contract and property law. Thus, a licence, or a tenancy, or a disposal, or a contract may be "statutory" in the sense that the transaction was entered into by one party acting under a statutory power (eg. Small Holdings and Allotments Act 1908, Agriculture Act 1970, sections 120 and 123 of the Local Government Act 1972 and Munton v GLC [1976] 1 WLR 649, 653 B). Such transactions need not be governed exclusively by legal principles contained entirely within the statutory regime under which they are created.

Petroleum Act 1998

22. The 1998 Act was a consolidating statute which repealed and replaced the 1934 Act. This judgment refers to the legislation as it was in force at the time when the deed of variation challenged in these proceedings was entered into. I note that the 1998 Act has since been amended in connection with devolution arrangements introduced by the Scotland Act 2016.

23. Section 2 provides:-

> "(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."

24. Section 3 provided:-

> "(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."

25. Section 4 made further provisions regarding licences:-

> "(1) The Secretary of State shall 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."

Regulations under subsection (1) are made by the Secretary of State by statutory instrument laid before Parliament and subject to the negative resolution procedure. The regulations under section 4(1)(e) set out what are in effect standard form clauses, each of which may, or may not, be incorporated in the grant of a licence. In so far as such clauses are incorporated in a licence the Minister may choose to use the same text as in the regulations or to depart therefrom. The clauses which are contained in those regulations are provisions upon which a licence may be "modelled". They are not mandatory provisions which a licence is required to contain.

26. Section 5 dealt with existing licences. Section 5(4) required the Secretary of State to make an order before the commencement of the 1998 Act (15 February 1999) reproducing the model clauses in earlier regulations listed in schedule 1, which would have been incorporated in licences granted at various stages under the 1934 Act (see paragraph 18 above). Accordingly, the Secretary of State made The Petroleum (Current Model Clauses) Order 1999 (SI 1999 No. 160). By section 5(5) each 1934 Act licence in force immediately before 15 February 1999, and which *at that point* incorporated earlier model clauses mentioned in schedule 1, was thereafter to be treated (subject to section 5(7)) as if it incorporated the relevant model clauses reproduced in the 1999 Order. But where "*immediately before the commencement of the [1998] Act"* any such licence incorporated model clauses subject to an "*amendment* or modification" or "omission" thereof, section 5(7) made the operation of section 5(5) subject to that same amendment, modification or omission. Thus,

section 5(7) preserved the effect of any model clause having been previously amended, modified, or omitted, whether at the date when the licence was originally granted or *subsequently at any stage prior to 15 February 1999*. Subsections 5(5) to 5(7) were enacted so as to apply to the licence as it existed immediately before the commencement of the 1998 Act, and not when it was originally granted. Section 5(9) also provided:-

> "It is hereby *declared* that any provision incorporated in a licence by virtue of subsection (5) may be altered or deleted by *deed executed by the Secretary of State and the licensee ...*" (emphasis added).

Plainly section 5(9) allows for the conditions of a licence to be not only amended but also deleted and for such changes to be made whether or not the licence contains a provision expressly allowing that to be done. Likewise, there is nothing in sections 5(5) to (7) to restrict their application to model clauses which had expressly allowed for such variations to be made.

27. Section 5A, which was inserted by section 76 of the Energy Act 2008, applies where a "right granted by a licence" under section 2 of the 1934 Act or under section 3 of the 1998 Act, or "derived from a right so granted", is transferred without obtaining any consent of the Secretary of State required for that transfer (subsection (1)) and continues:-

> "(2) The Secretary of State may, by notice given to the transferor and the transferee, direct that the right is to revert to the transferor from a date specified in the notice."

28. Section 7 provides for ancillary rights as follows:-

> "(1) Subject to the provisions of this section, the Mines (Working Facilities and Support) Act 1966 shall apply (in England and Wales and Scotland) for the purpose of enabling a person holding a licence under this Part of this Act to acquire such ancillary rights as may be required for the exercise of the rights granted by the licence.
>
> (2) In its application for the purposes of this section, the Mines (Working Facilities and Support) Act 1966 shall have effect as if –
>
> > (a) references to a person having a right to work minerals included references to a person holding a licence under this Part of this Act;
> >
> > (b) references to minerals included references to petroleum; and
> >
> > (c) references to the working of minerals included references to the getting, carrying away, storing, treating and converting of petroleum."

(3) Without prejudice to the generality of subsection (1) of section 2 of the Mines (Working Facilities and Support) Act 1996, that Act shall have effect for the purposes of this section as if the ancillary rights mentioned in that subsection included –

(a) a right to enter upon land and to sink boreholes in the land for the purpose of searching for and getting petroleum; and

(b) a right to use and occupy land for –

(i) the erection of such buildings;

(ii) the laying and maintenance of such pipes; and

(iii) the construction of such other works,

as may be required for the purpose of searching and boring for and getting, carrying away, storing, treating and converting petroleum.

(4) …".

29. Section 9(2) provides that:-

"(2) Nothing in this Part of this Act shall be construed as conferring, or as enabling the Secretary of State to confer, on any person, whether acting on behalf of Her Majesty or not, any right which he does not enjoy apart from this Part of this Act to enter on or interfere with land."

30. The 1998 Act does not contain any provisions giving an applicant for a licence a right of appeal against a refusal by the Secretary of State to grant a licence at all or against a decision to impose conditions on the grant of a licence, including conditions imposed in the form of model clauses. The Act does not provide for any form of public consultation or participation in the process by which licences are granted. The 1998 Act does not contain any statutory review procedure in relation to licensing decisions, such as that contained in, for example, the Town and Country Planning Act 1990.

Petroleum Licensing (Exploration and Production) (Seaward and Landward Areas) Regulations 2004 (SI No. 352) ("the 2004 Regulations")

31. For licence PEDL 189 the regulations setting out model clauses for the purposes of section 4(1)(e) of the 1998 Act were the 2004 Regulations. As their title suggests, these regulations covered a range of activities concerned with exploration for, or production of, petroleum both at sea and in terrestrial locations. By regulation 3(7) the relevant model clauses were those set out in schedule 6.

32. Model clause 1 provides definitions for (inter alia) the "Initial Term" (meaning a period of 6 years beginning on a specified date), the "Second Term" (meaning the

period of 5 years following the expiry of the Initial Term), and the "Production Period" (ordinarily meaning a period of 20 years following the expiry of the Second Term).

33. Model clause 2 provides for the Secretary of State to grant 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 the licence, in consideration of the payments stipulated in the licence and the performance and observance by the licensee of the terms and conditions therein contained.

34. Model clause 3 provides that the licence continues 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."

35. Model clause 4 provides for the licensee to give notice that the licence shall continue in force after the expiry of the Initial Term in relation to part only of the licensed area, subject to (inter alia) the licensee having performed the Work Programme (a bespoke programme for each licence) on or before the 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) to 4(7)). The Second Term is not linked to an explicit Work Programme, because its aim is to enable the licensee to move from a technically promising exploration well in the Initial Term towards a commercially viable oil or gas Field Development Plan (see below).

36. Model clause 5 enables the licensee to give notice that the licence shall continue beyond the end of the Second Term into the Production Period, subject to payment of the sums provided for and compliance with the terms and conditions of the licence.

37. Model clause 6 allows the Secretary of State and the licensee to agree to extend the Production Period of the licence (provided that the licence has continued in force for at least 20 years after the end of the Second Term), in order to "secure the maximum economic recovery of Petroleum from the Licensed Area" and subject to such modification of the terms and conditions of the licence (which may include provision for a further extension of the licence) as the parties may agree to be appropriate. The 2004 Regulations did not contain a model clause providing for the extension of either the Initial Term or the Second Term. However, a revised model clause 7 to that effect was introduced for offshore licences arising from the 25th and subsequent licensing rounds in the Petroleum Licensing (Production) (Seaward Areas) Regulations 2008 (SI 2008 No. 225) and for onshore licences by a revised model clause 6 in the Petroleum Licensing (Exploration and Production) (Landward Areas) Regulations 2014 (SI 2014 No. 1686). The Explanatory Note to the 2014 Regulations stated that, in line with the amendment made by the 2008 regulations for offshore licences, the revised model clause allowed for extensions to be agreed through use of a notice procedure rather than, as had previously been the practice, by a formal deed of variation.

Requirements of EU Law

38. Directive 94/22/EC "on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons" was adopted on 13 May 1994 ("the 1994 Directive"). The recitals referred (inter alia) to the greater integration of the internal energy market so as to improve security of supply, reduce costs and improve economic competitiveness and to steps required to 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 …" For that 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." (emphasis added)

39. Article 1(3) defined "authorization" to mean "any law, regulation, administrative or *contractual provision* or instrument issued thereunder by which the competent authorities of a Member State entitle an entity to exercise, on its own behalf and *at its own risk, the exclusive right* to prospect or explore for or produce hydrocarbons in a geographical area" (emphasis added). In this context article 2(2) provided that Member States "shall ensure that there is no discrimination between entities as regards access to and exercise of these activities". Article 3(2) required that the procedures leading to an authorization should be initiated by a notice published in the Official Journal of the European Communities.

40. Article 4 provided that:-

> "Member States shall take the necessary measures to ensure that:
>
> > (a) …
> >
> > (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;
> >
> > (c) …"

41. Article 5 provided that:-

> "Member States shall take the necessary measures to ensure that:

(1) … ;

(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 … ;

(3) any changes made to the conditions and requirements *in the course of the procedure* are notified to all interested entities;

(4) … ; (5) …" (emphasis added)

42. The United Kingdom transposed the 1994 Directive by the Hydrocarbons Licensing Directive Regulations 1995 (SI 1995 No. 1434) ("the 1995 Regulations"). The Claimant does not suggest that the Directive has been incorrectly or inadequately transposed. Regulation 5 provides:-

"**5 Advance notice of terms and conditions**

(1) Any notice which, in accordance with 1934 Act Regulations –

(a) invites applications for licences; and

(b) is published in the Official Journal

shall set out the criteria to be applied in determining those applications.

(2) In any case where the Secretary of State invites applications for a licence in accordance with 1934 Act Regulations and it is intended that the licence should be granted upon terms or conditions which differ from or are additional to those prescribed in those Regulations for incorporation in licences of the relevant kind, a statement of such terms and conditions shall be made available to any interested person at any time on request.

(3) If any change to the terms and conditions included in the statement provided for in paragraph (1) above is decided upon after the statement is first made available and *before the licence to which it relates is granted*, the change shall be notified as soon as practicable to every person who has requested the statement." (emphasis added)

The expression "1934 Act Regulations" referred to regulations made under section 6 of the 1934 Act (see regulation 2), now the power to make regulations under section 4 of the 1998 Act.

43. Regulation 6 provides that:-

> "**6 Duration of the licence**
>
> (1) Subject to paragraph (2) below, the Secretary of State shall ensure that—
>
> (a) a licence only grants an entity exclusive rights for the period which is necessary for the proper performance of the activities authorised by the licence; and
>
> (b) the duration of the licence does not exceed the period necessary to carry out the activities authorised by the licence.
>
> (2) The Secretary of State may extend the term of a licence if—
>
> (a) the terms and conditions of the licence permit an extension of the term;
>
> (b) the licensee has performed its obligations in accordance with the terms and conditions of the licence; and
>
> (c) the term of the licence has proved, or is likely to prove, insufficient for the licensee to complete the activities authorised by the licence."

The Claimant rightly did not suggest that regulation 6 would render unlawful a consensual variation which extends the length of the "Initial Term" or phase. Regulation 6 is only concerned with the *overall* duration of a licence.

(ii) The licensing system

44. In his witness statement Mr Toole gave a helpful and largely uncontroversial description of the way in which the UK Government has operated the petroleum licensing system over many years. Since petroleum in its natural condition belongs to the Crown and the right to search, bore for and get it is exclusively the right of the Crown, operators who wish to drill and extract petroleum must do so under a licence granted on the Crown's behalf. In granting such licences, the central aim of the Secretary of State, as pursued by OGA, has been and remains to maximise economic recovery of UK petroleum, with consequent benefits to security of energy supplies, employment, and to the Exchequer and the economy more generally, consistent with safety and environmental requirements.

Licensing rounds

45. PEDLs provide exclusive rights to licensees to search, bore for and get hydrocarbons in defined geographic areas or "blocks", in return for annual rental payments. The licences take the form of a deed executed by the Secretary of State (latterly, the OGA) and the licensee.

46. Since the 1960s, the Government has held a succession of competitive "licensing rounds" in which it has invited applications for licences covering specified blocks. Onshore licensing rounds were held in 2004, 2008 and 2014.

47. The decision by the Government to hold a licensing round involves the adoption of a "plan or programme" requiring strategic environmental assessment under Directive (2001/42/EC) ("the SEA Directive").

48. Applications are block specific and are assessed on their merits using objective criteria notified in advance, as required by the 1994 Directive. The criteria require each applicant to propose a Work Programme. A list of prospective licence awards is drawn up for each block in order of merit based on a marking scheme and licences awarded to each highest ranked application.

49. Following the grant of a landward or onshore licence, such as PEDL 189, the licensee is subject to a comprehensive system of regulation under other legislation to address potential environmental and safety matters. For example, in order to drill an exploration well, the licensee must obtain planning permission from the local minerals planning authority, various environmental authorisations from the Environment Agency and satisfy any requirements of the Health and Safety Executive. Obtaining the OGA's consent under the licence to proceed is subject to those regulatory approvals having been obtained.

The duration of a petroleum licence

50. While Article 4(b) of the 1994 Directive provides that the duration of a licence should not exceed the period necessary to carry out the activities for which the licence is granted, it does not set out for Member States how to manage what happens during the period of that licence. Since 1935 that aspect has been covered by model clauses, incorporated into a licence on a discretionary basis.

51. Since 1995, the UK's Landward model clauses have been drafted to provide for three "Terms" within all oil and gas licences to manage the work being done (as has been the model for the UK's Seaward (i.e. offshore) licences since 1964). These Terms are the:

    (i) Initial Term in which the licensee carries out an agreed "Work Programme," drawn from the licensee's application proposals, to explore and establish whether there is a hydrocarbon accumulation (a "field") beneath the block;

    (ii) Second Term in which the licensee seeks to obtain OGA approval of a Field Development Plan ("FDP"). Before applying for such approval the licensee will have to secure access to a site on which to construct facilities to drill for

and produce oil and gas, and obtain planning and other regulatory permissions for those activities and, in some cases, raise finance; and,

(iii) Production Period (Third Term) in which, subject to approval of the FDP, the licensee will drill wells, construct treatment facilities and produce the oil and gas.

52. The Work Programme for the Initial Term is set out in a schedule to the licence and, subject to (inter alia) its completion and the surrender of at least 50% of the initial licensed area, the licensee may progress to the Second Term. The object of the surrender is to ensure that, once hydrocarbons have been discovered, other areas of the block are made available for re-licensing.

53. In consideration of the grant of the licence, an annual payment, or rent, is payable on each anniversary of a PEDL. It is calculated by multiplying the licensed area at that date by an "Area Factor", set out in a Schedule to each licence. This approach incentivises early progress and the surrender of unwanted areas. The Area Factor is flat through the Initial Term but then escalates over time and reaches a plateau during the Production Period.

Initial Term

54. The Work Programme for the Initial Term may comprise:

(i) seismic or other surveys to find out the likelihood of any hydrocarbons being present and analysis of seismic data to provide an image of the strata;

(ii) geotechnical studies; and,

(iii) the drilling of one or more wells, the only conclusive means of establishing whether hydrocarbons are present and whether they will flow to the surface.

55. Depending on the licensee's confidence when making their application, the Work Programme may offer one of the following three drilling alternatives:

(i) firm commitment to drill – the licensee is obliged to drill a well in any event;

(ii) contingent commitment to drill – a technical risk is identified at the outset, but the licensee is nevertheless obliged to drill the well unless the OGA agrees that the risk has materialised;

(iii) drill or drop programme - where the licensee is under no obligation to undertake any drilling but the licence will automatically expire at the end of the Initial Term if the licensee chooses not to drill.

The licence will not continue beyond the Initial Term unless a well is drilled.

56. The Work Programme is a critical factor in deciding to whom a licence should be awarded. The OGA use a "marks scheme" to evaluate proposed Work Programmes, which forms part of the guidance published when a licensing round is announced. For

example, more marks are awarded for a firm well commitment than a contingent commitment.

The Second Term

57. The Second Term enables a licensee to move from a technically promising exploratory well to a commercially viable oil or gas FDP. There is no explicit Work Programme for this stage, but progression from the Second Term to the Production Period is conditional on the OGA's approval of an FDP. To secure such an approval licensees might first need to:

(i) raise additional funding;

(ii) drill further wells to increase their understanding of the field;

(iii) design the engineering facilities and further wells required for production;

(iv) acquire or lease land on which to place the development or across which to run pipelines to export the hydrocarbons; and,

(v) gain the necessary planning permission and other permits and permissions to construct and operate the development.

If upon the submission of an FDP towards the end of the Second Term, the OGA is satisfied with the information supplied under the above headings, it would normally "consent" to the construction of the development and production commencing. This consent, which is granted under the licence itself, enables the licence to enter its Production Period.

The Production Period

58. The length of the Production Period of an onshore licence is generally 20 years. During this stage a licensee implements the approved FDP by constructing the plant necessary to process and store the hydrocarbons, lay any pipelines to transport the products and progressively drill the wells needed to fully drain the strata in the field.

The need to vary PEDLs: the factual context

59. The splitting of the duration of an oil and gas licence into these three terms provides clearly defined hurdles for the licensee to overcome and allows the OGA to manage the process so that licensees cannot retain valuable exclusivity over a licensed area without proper justification. However, there is a risk that a licensee will be prevented from meeting such requirements by factors beyond their control, such as the vagaries of geology, drilling, oil prices and negotiations for access rights to land. The Defendant considers that the ability of both parties to alter the length and requirements of the Initial and Second Terms through an agreed variation of the licence provides a reasonable balance between clear objective hurdles and a need for flexibility. It is believed that this approach has been used since the current system of licensing rounds was introduced (the first offshore round was run in 1964 and the first onshore round in 1985).

60. Over the past five years, the potential to use new technology for horizontal well drilling and hydraulic fracturing (sometimes referred to as "fracking") has arisen, along with increased public concern about the impact of onshore oil and gas operations on the environment. In its policy statement in August 2015 the Government stated that there is a national need to explore and develop UK shale gas and oil resources in a safe, sustainable and timely way. However, concerns raised by the public and/or by regulatory bodies may mean that it takes longer to secure all the necessary consents and permissions to carry out activities under a PEDL than was anticipated when the licence was issued and before it can be given a consent under the licence to move to the next stage.

61. The process of oil and gas exploration under a PEDL during the Initial and Second Terms seeks progressively to build confidence that profitable development of a field can be undertaken. To obtain approval to an FDP, licensees have to invest a significant amount of money in studies, surveys, drilling, land negotiations and applications. The real test of commercial viability is only reached once the costs of exploration and development have been incurred and it is demonstrated that the field can produce oil or gas at the rates and durations predicted. Mr Toole states that an onshore exploration well typically costs between £0.5m and £7m and may take two years to plan. The overall investment required might cost tens of millions of pounds, it is not uniform or predictable in its path and there is no certainty that a viable FDP will be the outcome. Only about one in four onshore exploration wells result in a commercially successful development.

62. The structure and terms of the PEDL, including an escalating licence rental, seek to ensure that, once a licence is awarded, work proceeds in a manner most likely to establish whether a viable oil or gas field exists and can be developed. But without the flexibility to alter the terms of a licence, particularly the time allowed to plan for, gather supporting evidence, gain permission for and undertake activities, the industry could be reluctant to apply for new licences or to commit to further investment. Excessive rigidity in the terms of a licence could undermine the confidence of licensees that reasonable flexibility will be applied if circumstances change in future. That would make it difficult for the industry to mitigate risks and make initial investment unattractive or even impossible.

63. By way of example, the industry might be unwilling to give a firm drilling commitment for an otherwise attractive onshore opportunity if there was no expectation that the OGA would give reasonable consideration to a request for an extension to the Initial Term if, despite considerable efforts, a site or planning permission for drilling was not secured soon enough to be able to drill within the timescale of the original programme. If a licence could not be varied, the licensee could lose all the money invested and it may be difficult to find another licensee. Even if that were possible, work would have to be repeated. If the process could not continue, maximising the economic recovery of the UK's petroleum could be compromised.

64. In 2015 and 2016 the following licence variations were agreed:-

2015

Onshore

a) 20 variations of the length of the Initial Term; and,

b) 10 other variations, including the Work Programme.
Offshore
a) 20 variations of the length of the Initial Term; and,
b) 27 other variations, including the Work Programme.

2016
Onshore
a) 24 variations of the length of the Initial Term; and,
b) 33 other variations including the Work Programme.
Offshore
a) 25 variations of the length of the Initial Term; and,
b) 96 other variations including the Work Programme.

However, the OGA has not agreed to all requests to vary the terms of a licence. 24 applications to vary the Initial Term have been refused since 2014.

65. The vast majority of extensions of Initial Terms and other variations are justified by licence-specific factors and are initiated by a request from the licensee. The OGA considers a request for a variation in the light of all relevant factors, including:-

(i) any benefits resulting from the Term extension or other variation;

(ii) the length of the extension considered necessary by OGA to secure those benefits;

(iii) whether the licensee has worked diligently to meet the relevant deadline or condition and whether it has been prevented from doing so by factors beyond its control;

(iv) whether there would be an early opportunity for fresh applications to be made for a licence if the OGA were to refuse an extension; and

(v) consistency with decisions in similar cases.

66. Very occasionally, the OGA might initiate general variations to licences in response to clearly established concerns across the industry. For example, in the case of the foot and mouth epidemic of 2001, the OGA offered to amend the timescales in a number of onshore licences because access to land had been prevented for a year.

The Mechanism for Variation

67. Mr Toole states that the mechanism used for varying the Initial Term in a onshore licence granted before 2014 has been by a deed of variation. Where an Initial Term is extended, the Second Term will be reduced by the same amount, so that the overall term of the licence is not prolonged.

68. Offshore licences granted since 2008 and onshore licences granted since 2014 have included a model clause enabling the Initial or Second Term to be varied by a notice served in response to a request from the licensee, rather than by a Deed of Variation (see paragraph 37 above). Mr Toole states that this change was simply introduced to save Government and licensees having to execute many deeds of variation, especially

as a licensee may comprise several companies (see the Explanatory Note to the 2014 Regulations). He says that it was not introduced into to overcome a lacuna in the Defendant's powers.

69. Mr Toole points out that other model clauses in the 2014 Regulations do not provide for the variation of the Work Programme or for other amendments, and so deeds of variation continue to be necessary for licences of all vintages.

Consequences of the Claimant's argument

70. If it should not be possible to alter the terms of a licence by an agreed deed of variation, Mr Toole says that there would be significant disruption to the operation of the regime. For onshore licences granted before the 2014 Regulations (of which there are 121, including PEDL 189), there is no other mechanism available to vary Work Programmes or the duration of the Initial or Second Term. For subsequent licences (of which there are 79) there is no other mechanism available to vary a Work Programme or other clause. In addition, as at 3 February 2017, there were 530 offshore licences extant. Mr Toole says that the problems for offshore licensees would be much greater, as their costs are typically an order of magnitude greater than those onshore.

71. Mr Wolfe QC says that the legal objection raised by the Claimant in the present case could be overcome, at least in relation to future licences, either by introducing new regulations which amend the terms of the model clauses, or by amending those clauses when granting new licences. By implication he accepts that, on the Claimant's argument, the problems identified by Mr Toole for existing licences could only be overcome by the introduction of new legislation to amend the terms of existing licences and to validate deeds of variation already entered into.

Background to the decision under challenge

72. On 7 November 2007 the 13th onshore licensing round was launched by the then Department for Business, Enterprise & Regulatory Reform publishing an invitation to apply in the European Journal. Interested persons were invited, in accordance with the Petroleum (Production) (Landward Areas) Regulations 1995 (S.I. 1995 No 1436) and the Hydrocarbons Licensing Directive Regulations 1995, to apply for a PEDL in respect of those onshore areas that had been subject to Strategic Environmental Assessment and were not subject to an existing petroleum production licence.

73. The application period closed on 6th February 2008. 60 applications were made for 182 blocks by 54 companies. Applicants were not obliged to accept the terms of an offer by the Secretary of State as circumstances might have changed since submitting the application. The Licence, if accepted, was made under the model clauses regime in the 2004 Regulations, subject to any variations set out in the deed eventually executed. The outcome was that 96 licences were offered and accepted by a range of oil and gas companies.

74. On 3 September 2008 the Secretary of State granted the Licence in question.

75. In paragraph 57 of his witness statement Mr Toole states:-

"At the time of acceptance the PEDL 189 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. I do not have statistics for the number of Deeds of Variation requested or agreed in the years running up to the 13th Round which would have formed the basis of the Licensee's view but I can confirm that this was an established feature of our approach [as described in earlier parts of the witness statement] and that, since those awards, some 54 of the licences have been so varied during their Initial Term."

(iii) The terms of licence PEDL 189 and the deeds of variation

Licence PEDL 189 granted on 3 September 2008

76. The licence was granted under section 3 of the 1998 Act. It was expressed to be a licence between the Secretary of State for Business, Enterprise and Regulatory Reform (referred to in the document as "the Minister") on behalf of Her Majesty as licensor and the then licensees, BG International Limited and Composite Energy Limited. The licence was executed as a deed under seal by the Secretary of State and by the licensees.

77. Clause 1 dealt with the interpretation of the licence. The "licensee" includes not only the person(s) to whom the licence was granted but also (inter alia) "any person or persons to whom the rights conferred by this licence may lawfully have been assigned". Thus, it was expressly acknowledged that the licence was assignable, as is generally the case with property interests or contractual rights. The "Initial Term" meant the period of six years beginning on 1 July 2008. The "Second Term" meant the period of five years following the expiry of the Initial Term. The "Production Period" was defined by reference to clause 5 of the licence.

78. Clause 2 granted to the licensees the exclusive right to search and bore for and get petroleum in the following terms:-

> "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 …"

79. Clause 3 defined the term of the licence as follows:-

> "(1) This licence unless sooner determined under any of the provisions hereof shall be and continue for the Initial Term
>
> (2) Upon expiry of the Initial Term this 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."

Thus, provided that the terms and conditions of the licence were observed, and subject to clause 4, the licence was to continue for the Second Term, and subject also to clause 5, for the Production Period.

80. Clause 4 gave the licensee an option to continue the licence but only in relation to part of the licensed area:-

> "(1) At any time not later than 1 month before the expiry of the Initial Term the Licensee may:
>
> (a) subject to payment of those sums hereinafter provided for and to performance of the terms and conditions herein contained including, without limitation, those set forth in paragraph (2) of this clause; and
>
> (b) conditional upon due performance by the Licensee of the Work Programme on or before expiry of the Initial Term
>
> give notice in writing to the Minister in the manner hereinafter provided that he desires this licence to continue in force in relation to part of the Licensed Area (hereinafter called "the Continuing Part")."

In summary, clause 4(2) to (7) provided a mechanism requiring the licensee to surrender at least half of the licensed area to the Minister at the end of the Initial Term, subject to the remaining area comprising at least twenty five square kilometres.

81. Clause 5 dealt with the continuance of the licence after the Second Term. In summary, clause 5(1) enabled the licensee to give a written notice to the Minister that he desired the licence to continue in force after the expiry of the Second Term. Clause 5(2) provided that:-

> "(2) If such notice is given this licence shall continue in force after the expiry of the Second Term as provided by the following paragraphs of this clause in the event that before such expiry –
>
> (a) the Minister has in pursuance of clause 13(4) of this licence approved a programme submitted to him in pursuance of clause 13(2) and such approval is still in force upon expiry of the Second Term;
>
> (b) the Minister has served a programme on the Licensee in pursuance of clause 13(6) of this licence and such programme is still in force upon expiry of the Second Term; or

> (c) the Minister has with a view to securing the maximum economic recovery of Petroleum so directed in writing."

The references to a "programme" relate to the FDP required to be approved (or served) by the Minister under clause 13. This programme needed to be in place for the Production Period.

82. Clause 6 of the licence contained a provision for extending the term of the Production Period:-

> "Where this licence has continued in force by virtue of clause 5 of this licence for a total period of twenty years after the expiry of the Second Term, the Minister, on application being made to him in writing not later than three months before the expiry of such period, may agree with the Licensee that this licence shall continue in force thereafter for such further period as the Minister and the Licensee may agree in order to secure the maximum economic recovery of Petroleum from the Licensed Area and subject to such modification of the terms and conditions of this licence (which modification may include making provision for any further extension of the term of this licence) as the Minister and the Licensee may then agree is appropriate."

83. Clause 9 required the licensee to pay a consideration to the Minister for the grant of the licence in accordance with the scheme set out in schedule 2, which defined the annual payments to be made. In summary, it employs a simple formula in which the "area factor", meaning the number of square kilometres comprised in the licence area at the date upon which the payment in question becomes due, is multiplied by an amount per square kilometre. The schedule provides for a rising scale of annual payments starting with £25 per square kilometre for the first five years and thereafter rising to a figure of £1,200 per square kilometre from the 20th anniversary of the licence. Schedule 2 also provides for the payments falling due from the 6th anniversary to be the subject of variation in accordance with an indexation formula. It can be seen that the size of the consideration payable for the licence is not affected by the volume of any petroleum extracted, as might be expected in a typical mining lease or licence. Mr Robert Palmer on behalf of the Defendant explained that by the time licence PEDL 189 came to be granted, the Crown relied instead upon the levying of a Petroleum Revenue Tax ("PRT"). The operation of this tax was described by Lord Templeman in Mobil North Sea Ltd v Inland Revenue Commissioners [1987] 1WLR 1065, at page 1067. For example, during the period 1975 to 1982 the rate of PRT charged on relevant profits accruing to the operator varied from 45% to 60% to 70% to 75%. "The changing rate reflects the general judgment of the Government as to a reasonable division of the profits from oil in the light of changing circumstances and the representations of the oil industry". The setting of the taxation rates had regard to volatilities in the price of petroleum as well as the costs of exploring for and getting the mineral. Clause 10(1) imposes an obligation on the licensee to measure, and clause 11 requires the licensee to keep accounts (in a form approved by the Minister), of the amount of petroleum won and saved from the licensed area. Clause 10(2)

plainly has in mind the operation of the taxation system under the Oil Taxation Act 1975.

84. Clause 12 deals with the licensee's "working obligations". Clause 12(1) requires the licensee during the Initial Term to carry out with due diligence the Work Programme defined in schedule 3 (see clause (1)). In the case of PEDL 189 the Work Programme required the licensee to obtain twenty kilometres of 2D seismic data, reprocess ten kilometres of 2D seismic data and drill one well to a depth of 750m. Clause 12(2) requires the licensee to give the Minister at least 21 days' written notice of any proposed seismic survey during the term of the licence, to include evidence that any appropriate planning permission has been granted. Clause 12(4) entitles the Minister to serve a written notice on the licensee at any time requiring him to submit to the Minister an appropriate programme for exploring for petroleum in the licensed area. An "appropriate programme" is one which any person could reasonably be expected to carry out during the period specified in the notice if he has the competence and resources needed and is entitled to exploit the rights granted by the licence "to the best commercial advantage" and is seeking to do so. In the event of a dispute between the Minister and the licensee, clause 12 provides for the issue to be determined by arbitration. Once the Minister approves such a programme, or it is determined in an arbitration that the programme satisfies the "relevant requirements", the licensee is obliged to carry the programme out. Similarly, under clause 13(4) the Minister is entitled to approve a development and production programme submitted to him for the purposes of the Production Period, subject to conditions specified in his notice which are considered "necessary to secure the maximum economic recovery of Petroleum from the licensed area".

85. Clause 15(1) prohibits the licensee from commencing or re-commencing the drilling of any well without the written consent of the Minister. Clause 15(2) prohibits the licensee from abandoning any well without the written consent of the Minister. Clause 15(3) requires the licensee to comply with any conditions imposed by the Minister on any consent given under clause 15(1) or (2). These and other controls in clause 15 enable the Minister to protect the Crown's interest as the owner of the petroleum (the subject of the licence) and to protect its resource both in physical and economic terms. Likewise, clause 19(1) requires the licensee to "execute all operations in or in connection with the licensed area in a proper and workman like manner in accordance with methods and practice customarily used in good oil field practice…". That obligation includes specific requirements to take all steps practicable in order to (inter alia) control the flow and prevent the escape or waste of petroleum discovered in or obtained from the licensed area and to prevent the escape of petroleum into any waters in or in the vicinity of the licensed area.

86. Clause 21 prohibits the licensee from carrying out any operations authorised by the licence in such a manner as to interfere unjustifiably with navigation in any navigable waters or fishing in any waters in or in the vicinity of the licensed area.

87. Clause 35 deals with restrictions on assignment. Clause 35(1) acknowledges that the licensee has an entitlement to assign the rights granted by the licence:-

> "(1) The Licensee shall not, except with the consent in writing of the Minister and in accordance with the conditions (if any) of the consent do anything whatsoever whereby, under the law

> (including the rules of equity) of any part of the European Union or of any other place, any right granted by this licence or derived from a right so granted becomes exercisable by or for the benefit of or in accordance with the directions of another person."

88. Clause 36 gives the Minister a power to revoke the licence if any of the events specified in clause 36(2) should occur, including the non-payment of any consideration due under clause 9(1) or any breach or non-observance by the licensee of any of the terms of the licence. Clause 36 is analogous to a forfeiture clause in a lease or a licence.

The deed of variation dated 4 December 2013

89. This deed was executed as a deed under seal by the then Secretary of State for Energy and Climate Change and by the licensees who at that stage were GDF Suez E&P UK Limited and Dart. This deed of variation altered the Initial Term and the Second Term as set out in paragraph 3 above. In addition, the deed substituted a new Work Programme for that contained in schedule 3 of the initial licence. The new programme required the licensee to drill ten wells to a depth of 800 metres and three wells to a depth of 3000 metres within the areas of any of thirteen licences, of which PEDL 189 was one.

Deed of assignment dated 6 May 2015

90. This deed was executed under seal by the then licensees, the Secretary of State and INEOS Upstream Limited. The Secretary of State had given his consent to the execution of the deed in a letter dated 28 April 2015. The deed provided for the assignment by the then licensees of all their interests and rights under the 2008 licence PEDL 189 to the assignees, which comprised the same two companies and also INEOS Upstream Limited. By clause 2 the assignees jointly and separately covenanted with the Secretary of State that they would perform and observe the terms and conditions of the licence.

Deed of variation dated 28 June 2016

91. By this stage GDF Suez E&P UK Limited had changed its name to Engie E&P UK Limited. That company together with INEOS Upstream Limited and the Interested Party entered into a deed of variation with the Secretary of State by which the duration of the Initial Term and Second Term was varied as set out in paragraph 3 above. This was executed by the parties as a deed under seal.

(iv) Whether a licence granted under the 1998 Act is governed entirely by the statutory code relating to such licences

A petroleum licence as the grant of an interest in land

92. By section 1 of the 1934 Act the ownership of "petroleum" in Great Britain was vested in the Crown along with the exclusive right to search and bore for and get that mineral. That continues to be the position under the 1998 Act. The effect of a licence under section 3 of the 1998 Act is that the exclusive right to explore for and get the

petroleum in a licensed area and thus to possess and then sell the petroleum which is won is granted to the licensee (see Bocardo). A licence under section 3 is essential for a licensee not only to be able to search for and extract oil and gas, but also to obtain the right to own the product so as to be able to sell it to third parties. These are private law rights which are essential to an operator for the conduct of its business. There is no other provision, whether under the 1998 Act or otherwise, enabling a licensee to conduct such activities. In my judgment, the grant of a licence under section 3 is essentially a property transaction, akin to a mining licence or a mining lease.

93. The nature of a mining lease is described in Halsbury's Laws (5th ed) Vol. 76 at paragraph 321:-

> "**Nature of mining lease.** A lease may be granted of land or any part of land, and since minerals are a part of the land it follows that a lease can be granted of the surface of the land and the minerals below, or of the surface alone, or of the minerals alone. It has been said that a contract for the working and getting of minerals, although for convenience called a mining lease, is not in reality a lease at all in the sense in which one speaks of an agricultural lease, and that such a contract, properly considered, is really a sale of a portion of the land at a price payable by instalments, that is, by way of rent or royalty, spread over a number of years."

94. The nature of a licence to win and carry away minerals is described at paragraph 349:-

> "**Licence coupled with grant.** A right to work mines and carry away the minerals won is more than a mere licence. It is a profit à prendre lying in grant, which may be limited either for freehold or chattel interests, and the estates so created may be devised, inherited or assigned. It does not convey any estate in the land or in the mines except the parts severed which become the property of the grantee. Such a licence is irrevocable.
>
> A licensee who has entered into possession is liable in a claim for use and occupation, and he may if ousted, at any rate where the licence is exclusive, bring a claim to recover possession."

95. By contrast a bare licence simply to search for minerals, confers upon the licensee no property in the minerals obtained (Halsbury's Laws Vol 76 at paragraph 350).

96. The general principle is that a mining licence coupled with a grant, must be created by a deed and can only legally be transferred by deed (Halsbury's Laws Vol 76 at paragraph 351; Megarry & Wade: The Law of Real Property (8th ed) paragraphs 34-005 to 006; Watson v Spratley (1854) 10 Exch 222, 235; Doe d Morgan v Powell (1844) 7 Man & G 980, 990, 992 and subsequently sections 51 and 52 of the Law of Property Act 1925).

97. Section 3(1) of the 1998 Act enables the Secretary of Sate to "grant" a licence for the exploration and obtaining of petroleum. The first meaning of "grant" given by Jowitt's Dictionary of Law is "a common law conveyance". The second, is "the term

commonly applied to rights created or transferred by the Crown". Both are relevant here. The creation of a section 3 licence by deed was not accidental, but reflected the need for that formality when creating an interest in land.

98. The clauses of the 2008 licence are entirely consistent with a normal grant of property rights in a mining lease or a mining licence. Clause 2 grants exclusive property rights to the licensee and is the means by which the licensee obtains ownership of the petroleum when won from the ground. Clause 3 defines the term for which the right to search for and get petroleum is to subsist. Of course, the finite duration of the licence for those purposes does not detract from the absolute nature of the right to the ownership of petroleum which is "got" or "won" from the ground during the licence period. A number of clauses (eg. 4 to 6, 12 and 13) are aimed at maximising the economic recovery of petroleum in the interests of the owner of that asset, which happens to be in public ownership. This objective would be shared by most mining leases or licences. The mineral asset belonging to the owner of the land, or in this case the Crown, can only be exploited once. Similarly, the focus of clauses 19 and 21 is to avoid both the wastage of the petroleum resource and pollution of the neighbouring environment. Both objectives are in the interests of the licensor, the Crown, so as to maximise the economic recovery of petroleum and reduce the risk of becoming liable to pay the costs of remedying any damage to the environment. Clauses 19 and 21 are not intended to operate as substitutes for, or additions to, the dedicated regulatory regimes for protecting the environment.

99. Clause 9 provides for the payment of increasing licence fees which are geared so as to incentivise the licensee to find developable petroleum resources and to extract the mineral as soon as practicable. Clauses 10 and 11 require the licensee to measure the petroleum won and to keep amounts which will facilitate the levying of PRT, provisions which would also be necessary if instead the licence had provided for contractual royalty payments. Clause 35 allows for the rights granted by the licence to be assigned, subject to the Defendant's consent, a provision typically found in the grant of an interest in land, such as a mining lease or licence. A right to assign is an incident of a property interest (or a contractual right). The right is recognised by section 5A of the 1998 Act.

100. The revocation provisions in clause 36 provide the licensor with essentially the same type of remedy for a licensee's breach of obligation, to protect the Crown's interest in the petroleum strata, as is conferred by a forfeiture clause in a lease or licence.

101. Just as there is nothing accidental about the fact that licences under the 1934 and 1998 Acts have been granted by deeds, there is nothing accidental about the fact that these deeds are entered into by both the licensor and the licensee. As Mr. Toole has pointed out, during the gap between on the one hand the submission of applications for a licensing round and on the other the selection of licensees and the preparation of a licence, circumstances may have changed. An applicant is not obliged to accept the Secretary of State's offer of a licence. The offer of a licence is not equivalent to a decision to grant a planning permission or an environmental permit. In the latter case, the grant of that permission or permit completes the process of determining the application. The grant is not dependant upon any assent by the licensee. The applicant may be aggrieved by that decision on the application, but if so he may generally exercise a right of appeal to a different authority. In the case of an application for a section 3 licence, the licence does not come into existence unless the applicant accepts

the terms of an offer and enters into a deed with the grantor. There is no right of appeal regarding the terms of a licence (or an unsuccessful application). The entering into of the deed of licence, by both licensor and licensee, is essential to the grant of rights (including ownership of the petroleum produced) to the licensee. The execution of the deed creates an interest in land which is assignable and which is subject to covenants by the licensee which are binding upon its successors or assignees.

102. For the reasons set out above, a licence under section 3 of the 1998 Act is more than simply a contractual agreement between two parties, it is a grant of an interest in land. Mr. Wolfe QC accepts that it is an incident of a contract between two parties that they may agree to vary that agreement (see eg. Chitty on Contracts (22nd edition) paragraph 22-032). The same applies to the grant of an interest in land. I do not see how the mere fact that a petroleum exploration and development licence is granted under a statutory provision alters this analysis, so that a consensual variation of such a licence may not take place unless authorised by an express provision for that purpose. There is no more need to identify such a power than there is to find a power to *allow* the assignment of rights under the licence (as opposed to a provision such as section 5A which assumes that that right exists). These are simply normal dealings within a commercial relationship created by a contractual deed of licence, which has been brought into existence by one party to the transaction exercising a statutory power to enter into that transaction. If that were not the case, it would be necessary to point to an express statutory power to allow for variations (or waivers) of terms contained in *any* contractual agreement entered into by a public authority in reliance upon a statutory power.

103. In my judgment, there is nothing in the 1998 Act to indicate that a licence granted under section 3 may *not* be varied subsequently by an agreement between the parties. Indeed, section 5(9) declares, for the avoidance of doubt, that any provision incorporated in a licence under section 5(5) may be altered or deleted by a deed executed by the Secretary of State and the licensee. This is consistent with section 5(7) which qualifies the effect of section 5(5) so as to preserve any "amendment or modification" of a model clause, or any omission, which has been made *at any time* prior to 15 February 1999 (see paragraph 26 above). Section 4(1)(e) of the 1998 Act enables the Secretary of State to *modify* or *exclude* a clause when deciding whether to incorporate model clauses in a new licence. Section 5(7) proceeds on the basis that there is a continuing power to *alter* a model clause incorporated into a licence following the grant of that licence. The ambit of section 5(7) is not limited to alterations of model clauses made at the time when the licence is offered or granted. Section 5(5) to (7) and (9) are not restricted to clauses containing an expression provision for variation.

104. It is impossible to understand how logically Parliament could have declared in section 5(9) that model clauses incorporated by section 5(5) on 15 February 1999 into licences previously granted under the 1934 Act could be altered or deleted at any time thereafter whilst the licence remained in force, if it thought that it had been impossible to vary licences granted under that Act up until that date, or that licences to be granted from then on under the 1998 Act should be incapable of being varied once granted. The Claimant did not advance any logical rationale for attempting to draw any such distinction, which would be arbitrary.

Model clauses as part of the statutory regime

105. Mr. Wolfe QC sought to rely upon the model clauses contained in the 2004 Regulations which, unlike those contained in the replacement 2014 Regulations, did not expressly provide for the Initial Term or the Second Term to be varied. He suggested that the model clauses formed part of a complete statutory code which excluded variations of any kind other than the extension of the Production Period. But, with respect, that argument is misconceived. First, the 2004 Regulations do not expressly prohibit or exclude the type of variation which was made in the present case (and in many others). They simply do not set out any positive provision for such variations to be made. Mr Wolfe QC was unable to point to any provision in the Regulations with which a contractual ability to agree a variation to the terms of the licence would be inconsistent. Second, the Claimant's argument disregards the fact that in the same "legislative breath" section 4(1)(e) confers not only a power to make regulations prescribing model clauses but also a power to omit or modify any of those model clauses when granting a licence. The Regulations have the purpose of setting out what are in effect standard form clauses, each of which may, or may not, be incorporated in the grant of a licence. In so far as such clauses are incorporated in a licence the Minister may choose to use the same text as in the Regulations or to depart therefrom. Third, it is inconsistent with the clear contra-indication in section 5(5) to (7) and (9) of the 1998 Act (see paragraphs 26 and 103 to 104 above).

106. Consequently, the Defendant's case does not render the statutory provision of standard form clauses nugatory, especially as the Claimant accepts that before granting a licence the Secretary of State could have modified the wording of model clauses dealing with the length of the Initial and the Second Terms so as expressly to allow the length of either to be varied (see paragraph 5 above). Likewise, he could at that stage have modified the wording of any other model clause so as to allow subsequent variations to be made. Accordingly, it cannot be said that the legislative policy underlying the 1934 or 1998 Acts was to exclude variations of the kind entered into in the present case. One of the main reasons for the Secretary of State's willingness to enter into variations which he judges to be appropriate, is to cater for unforeseen changes in circumstance at the point when they occur. It makes no sense to insist that such an alteration can only be made where a general power of alteration is inserted into the licence at the point where the licence is granted. In both scenarios it is likely to be the case that (i) the change of circumstance was unforeseen (or even unforeseeable) at the time of grant and (ii) the merits of allowing the variation to be made are the same.

107. I reject the Claimant's submission that the introduction in the 2014 Regulations of model clause 6, which expressly enables an extension to be made to the Initial Term or Second Term, indicates that no such variation was (or remains) possible in earlier licences lacking a similar provision for variation. Model clause 6 allows a licensee to give a written notice to the OGA that it wishes the term to be extended. If it agrees with the proposal, the OGA may give a written direction that the relevant term is extended, and if so the licence is treated as being amended in accordance with that direction, without the need to execute a formal deed of variation. The introduction of Model Clause 6 for post July 2014 licences is entirely compatible with the analysis of the legislation set out above. As previously explained, without a provision allowing the licence terms to be varied by means of a direction by the OGA responding to a

notice from the licensee, a variation of a licence would have needed to be expressed in a formal deed in every case. I agree with the explanation for clause 6 given in the Explanatory Notice to the 2014 Regulations. Moreover, the Claimant's reliance upon the 2014 Regulations to support its argument is, once again, inconsistent with the analysis of the legislation set out above, not least the operation of sections 5(5) to (7) and (9).

Compatibility with the 1994 Directive and the 1995 Regulations

108. I also reject the Claimant's submission that an ability to vary a petroleum licence after it has been granted would be incompatible with the 1994 Directive and the 1995 Regulations. The Claimant emphasises the objectives in the recitals to the Directive of encouraging competition and requiring authorizations (including a contractual provision or instrument) to be granted on the basis of published objective criteria, so that the conditions under which authorizations are granted are known in advance by all participants in the procedure for granting such authorizations. Mr. Wolfe QC submits that the process required by the 1994 Directive and 1995 Regulations is designed to ensure that the conditions to be attached to an authorization "are transparent and known during the application process, and can only be changed … with more publicity during that process". Mr. Wolfe QC relied on Article 4(b) of the Directive and Regulation 6(2) of the 1995 Regulations.

109. I agree with Mr. Palmer that regulation 5 of the 1995 Regulations imposes no requirements or restrictions in relation to the subsequent variation of a licence once it has been granted. Regulation 5(2) deals with cases where the Secretary of State *intends to grant* a licence on terms differing from (inter alia) those set out in the Model Clauses Regulation. Regulation 5(3) deals with changes to the terms set out in the notice published under regulation 5(1) (eg. the OJEU notice) "*before the licence to which it relates is granted"*. These provisions reflect Articles 5(2) and (3) of the 1994 Directive that the conditions as to the exercise or termination of the activity "in force at the time of submission of the applications" "are established and made available to interested entities…" and that those entities are notified of "any changes made to the conditions and requirements in the *course of the procedure*…". The procedure referred to is the one leading to the grant of a licence under section 3 of the 1998 Act, as regulation 5 of the 1995 Regulations makes clear.

110. I also agree with Mr. Palmer that Article 4(b) of the 1994 Directive and regulation 6(2) of the 1995 Regulations deal with the *overall* term of the licence and not with any constituent part of that term referred to in the licence. In any event, these provisions allow the Secretary of State to prolong (in accordance with the conditions of a licence) the duration of the *overall* term where that has proved to be insufficient for the licensee to complete activities authorised by the licence.

111. The 1994 Directive does not seek to control a decision by a Member State to subdivide the overall duration of a licence into constituent phases, or to allow phases to be increased or shortened, a fortiori where the overall length of the licence period is not affected, as in the present case. Indeed, the Claimant does not suggest that model clause 6, introduced by the 2014 Regulations, offends the terms or spirit of the Directive. By their very nature, such provisions are intended to deal with unforeseen circumstances and so they do not define the circumstances in which a variation to the length of a phase would be allowed nor do they oblige the Secretary of State to agree

to a proposed variation. That uncertainty remains for all applicants competing for a licence.

112. In substance, the position is no different where the licence offered and granted does *not* contain an explicit clause allowing the licensee to propose an extension to a phase of the licence. Applying the analysis of the legal nature of a petroleum licence set out above, it should have been understood by all competing applicants that (i) the licence granted under section 3 is a deed of licence between the licensor and licensee granting exclusive property rights in relation to the licensed area and (ii) it is an intrinsic quality of such a legal relationship that, applying well-established principles of English law, it is capable of being varied by agreement between the parties. In my judgment, there was no need to spell out this elementary concept in the objective criteria published to commercial entities engaged in the oil and gas business. It is reasonable to assume that such operators would receive proper legal advice before entering into a licence, quite apart from any awareness within the industry of the long-standing practice described by Mr Toole.

113. Mr. Wolfe QC sought to bolster his argument by relying upon the Guidance issued by OGA to persons submitting applications in the 13th licensing round. Applicants were told that they had to propose a work programme representing the minimum amount of work which they would carry out during the Initial Term and that the licence would expire at the end of the Initial Term if the defined work programme had not been completed by then. A work programme had to include the drilling of at least one well. The document stated that the licence would also expire at the end of the Initial Term if no well had been drilled by that date.

114. In effect, the Claimant's complaint remains the same. The Guidance document did not refer to the possibility of the Initial Term being extended. But in view of the legal analysis set out above, this is not a ground for quashing the 2016 deed of variation. Mr. Wolfe QC went on to criticise the possibility of the work programme for the Initial Term being varied because of subsequent changes in circumstance. Although the 2013 deed of variation did make an alteration of this kind to PEDL 189, the 2016 variation did not. Mr. Wolfe QC accepts that it is now far too late for any legal challenge to be made to the 2013 deed of variation.

115. In any event, I see no merit in his legal argument. Once again, Mr. Wolfe QC accepts that if the terms offered to the market allowed for the possibility of the licensor and licensee *agreeing* to alter the content of the work programme, then no public law challenge could be made to a subsequent alteration to the licence of that kind. Once again, the point which the Claimant seeks to advance is very narrow. There is no objection to the legality of altering a work programme after the grant of a petroleum licence as such, even though that alteration may be very extensive in nature and (by definition) it will not have been publicised when the granting of the licence was still under consideration. The Claimant's objection is simply to the absence of a provision (inevitably of a generalised nature) in the offer to the market and in the licence granted to the effect that the Secretary will consider agreeing to changes in the work programme, but not, of course, committing himself to agreeing any such changes.

Practical considerations

116. Both parties referred to practical implications of their competing arguments. The Defendant pointed out that situations of this kind are likely to arise where unforeseen circumstances make it desirable or necessary to amend a work programme, which may include abandoning some part of an approved programme which has turned out to be fruitless, and substituting a more promising alternative. The petroleum resource in Great Britain, both onshore and offshore, is a national asset which has been and remains of great importance. It must be in the national interest for the Secretary of State to be able to react to such changes of circumstance by agreeing to a variation, even a substantial variation, in a work programme.

117. The alternative would be to allow a licence to expire and then to carry out a fresh licensing round. However, in some cases it might not be sensible to re-licence the area in question. The national interest might be better served by allowing an existing licensee to continue to deploy the knowledge and experience he has already gained but with a variation in the work programme. In other cases it might be sensible for the Government to allow prospecting to continue in that area in a revised form but alongside exploratory works being conducted by the same operator in other licensed areas where no variation of a work programme, and hence no relicensing, is needed. Mr Toole has also referred to the adverse effect on market confidence and interest in such opportunities for exploration if the parties to a licence could not legally agree a variation of that document. These are all matters of judgment which the Secretary of State is entitled to consider in the national interest, which includes the maximisation of economic petroleum recovery.

118. 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. Such concerns are dealt with under separate regimes dedicated to maintaining appropriate levels of environmental protection. They would apply to a different scheme of works. The licensing regime under the 1998 Act does not purport to act as a substitute for, or even to duplicate, these other regimes. In any event, this part of the Claimant's argument lacks coherence, because he accepts that a variation of the Work Programme approved in the licence would be lawful under the 1998 Act, irrespective of the implications it may have for environmental issues, if that original licence expressly allowed for such a variation to be agreed between the parties at some point in the future. In the final analysis, there is no legal justification for drawing this distinction, when the true nature of a petroleum licence is properly understood.

The decision of the High Court in the Mobil case

119. Mr. Wolfe QC placed heavily reliance upon the decision in Inland Revenue Commissioners v Mobil North Sea Ltd [1986] 1 WLR 296 in which Harman J held that a petroleum licence granted under the 1934 Act did not fall within the meaning of a "contract" as used in section 111(7) of the Finance Act 1981 (page 301B). In their subsequent appeals to the Court of Appeal and House of Lords, Mobil did not challenge that conclusion and their appeal eventually succeeded on a wholly different point. In accordance with well-established principles, I should follow the decision of Harman J, if it is in point, unless satisfied that there is a powerful reason for not doing

so (Willers v Joyce (No 2) [2016] 3 WLR 534). I have reached the clear conclusion that the decision is not in point.

120. The Mobil case was concerned with the construction and application of the legislation dealing with PRT, as it affected the taxpayers' profits from an oil field in the North Sea. Lord Templeman summarised how this complex tax scheme operated ([1987] 1 WLR 1065 at 1067-8). From time to time Government had decided on how the profits should be divided between operators and itself (with the Government receiving its share in the form of royalties, premiums and taxes), having regard to the need to encourage exploration and development, the uncertainties and risks involved, the large costs involved in oil operations and the fluctuating market price of oil. The Oil Taxation Act 1975, enacted after a five-fold increase in oil prices, imposed PRT on an operator's profits, the amount of that tax being deductible from the operator's assessment to corporation tax. In calculating profits or losses for PRT purposes under the 1975 Act, allowances were deductible for expenditure on the exploration and development of an oil field. Certain types of expenditure qualified for an *additional* deductible allowance, referred to as a "supplement", originally equal to 75% of the relevant expenditure. Over time not only the rate of PRT, but also the allowances for expenditure and the rates for the supplement were altered according to the Government's view on the extent to which such allowances were justified in the light of changing economic circumstances.

121. Amending legislation which reduced either the allowances or the supplement rate was accompanied by transitional provisions designed to mitigate that effect for the benefit of an operator who had incurred or contracted to incur expenditure before the announcement of such a change. Thus, in 1979 the supplement rate was reduced from 75% to 35%, but only in relation to expenditure incurred in pursuance of a contract entered into on or after 1 January 1979. Then section 111(1) of the Finance Act 1981 withdrew the supplement altogether, but (by virtue of section 111(7)) not in relation to expenditure incurred before 1 January 1981 or *which is incurred before 1 January 1983 in pursuance of contract entered into before 1 January 1981*.

122. Harman J had to decide whether, in relation to those provisions dealing with the supplement, expenditure on the engineering of a production platform had been incurred pursuant either to certain commercial agreements or the petroleum licence under the 1934 Act granted in February 1972 (together with a work programme approved thereunder in May 1980). One freestanding reason why the judge held that the 1934 Act licence was not a "contract" for the purposes of section 111(7), was that it led to "absurd results" in the context of the PRT scheme ([1976] 1 WLR 301 B-D). These points are of no relevance to the present issue.

123. Instead, Mr. Wolfe QC relied upon the discussion at ([1976] 1 WLR 300E-301B). The tax payer had argued that the petroleum licence was a contract, which together with the work programme, required the construction work to be carried out. The first answer by the Commissioners to that argument was that both the 1975 Act and the 1981 Acts contained many references to petroleum licences under the 1934 Act using the term "licence", and not "contract". Therefore, when the term "contract" appeared in this legislation it should be treated as a different concept, referring to a different subject-matter, and not to a petroleum licence. Secondly, the Commissioners argued that "it was a strained use of language to describe a *grant* by the Crown as a contract, even though the obligations binding upon the grantee, less clearly upon the Secretary

of State, could be spelt out of it" ([1976] 1 WLR 300H with emphasis added). It emerged during argument that it was this second proposition, contained in a single sentence, that Mr. Wolfe QC relied upon. However, by the end of the hearing, he was constrained to accept that its meaning was unclear. Third, the Commissioners argued that not every document containing contractual obligations could properly be described as a "contract" for the purposes of a particular statutory scheme. Harman J appears to have been particularly attracted to this third submission, which related back to the first of the Commissioners' three submissions. He drew support from the Court of Appeal's decision in Saul v Norfolk County Council [1984] QB 559 in which it was held that a tenancy of a smallholding granted by a County Council was not a contract "in pursuance of" the Agriculture Act 1970, albeit that it was otherwise a contract. It appears to have been the combined effect of these three arguments which led Harman J to conclude that a petroleum licence did not fall within the meaning of *the term* "a contract" *as used* in section 111(7) of the Finance Act 1981.

124. Although a good deal of time was spent on the judgment of Harman J, it can be seen that the discussion in that case had nothing to do with the question whether a petroleum licence can properly be described under the general law as a contract and thus capable of consensual variation. Indeed, at page 301 Harman J accepted the uncontroversial proposition that under the general law a tenancy, although a grant of property rights, can be described as a contractual agreement. Read properly in context, the Commissioners' second submission (at p 300H), does not support the Claimant's argument here, outside the highly specialised legislation dealing with PRT, that a petroleum licence under the 1934 Act or the 1998 Act should not be regarded as a contract, or an instrument, capable of variation by the agreement of the parties. Moreover, the thrust of the submission made for the Commissioners was, as I have explained above, that a petroleum licence is more than a contract, it involves the grant (by the Crown) of exclusive property rights, or, in effect, rights in rem. A "grant" in that sense is just as much capable of consensual variation as a simple contract which does not involve any grant or transfer of rights to real property. The Mobil case was not concerned with that issue at all, or with the contention that the law governing such a licence is contained exclusively within the statutory code under which it is issued. For all these reasons I have reached the clear conclusion that the reasoning in the judgment of Harman J lends no support at all to the Claimant's argument in this case.

Data Broadcasting International Ltd v Ofcom

125. Both parties referred to the decision of Cranston J in Data Broadcasting International Ltd v The Office of Communications [2010] EWHC 1243 (Admin) in which the holders of broadcasting licences under the Broadcasting Act 1990 argued that Ofcom had not been entitled to exercise the power to vary their licences under section 3(4) of the 1990 Act. The judge held that that provision, which required the consent of the licensee to be obtained, had not been engaged and therefore Ofcom had been entitled to exercise a unilateral power of variation contained in the statute. In that case it was not therefore necessary to determine whether the licence was contractual in order to decide whether it was capable of being varied by *agreement between the parties*. Instead, it was contended by the claimant that the licences were contractual in nature merely so that a breach thereof could give rise to a contractual claim in damages (see paragraph 81).

126. Cranston J held that the licences were public law instruments because they constituted statutory authorisations permitting licensees to undertake activities which would otherwise be unlawful, or imposed obligations on the licensees the breach of which could result in the imposition of statutory financial penalties. There was no express agreement between the parties in the contractual sense. In the main the conditions in the licences were derived directly from statutory provisions (paragraph 88). Whatever freedom parties had to negotiate the terms of the licences, the key feature was that they were issued pursuant to a comprehensive statutory scheme governing the relationship between the parties. Applying Floe Telecom v Ofcom [2009] EWCA Civ 47, the judge held that the issue of a licence was an administrative act to authorise the licensee to do things which would otherwise be unlawful (paragraph 92). In that context it is an offence under section 13 of the 1990 Act to offer regulated broadcasting services without a licence (paragraph 45). Furthermore, the licences were granted by Ofcom pursuant to its statutory duties and functions as the licensing authority. The Communications Act 2003 set out Ofcom's principal duties as being to further the interests of citizens in relation to "communication matters, and to further the interests of consumers (inter alia) by promoting competition". In addition, Ofcom is required to have regard to the principles under which regulatory activities should be transparent, etc and any other principles appearing to represent best regulatory practice (paragraphs 6 -12).

127. In my judgment, the licensing regime under the 1934 and 1998 Acts is plainly different and the decision in the Data Broadcasting case is not applicable here. It is not an offence to explore for or to extract the petroleum which has been vested in the Crown without having a petroleum licence. Such activities are not unlawful in that sense. Instead, they could be restrained by the Court in an application for an injunction made by the Crown, or the Secretary of State on behalf of the Crown. A claim for damages in trespass (or perhaps conversion – see Clerk & Lindsell on Torts (21st edition) paragraph 17-40) could be made. The need for a petroleum licence simply arises from the fact that the 1934 Act vested in the Crown exclusive rights of ownership of petroleum in the ground and, without obtaining a grant of exclusive property rights from the Crown, an operator or landowner has no right to search for and get that petroleum and no rights of ownership in the petroleum which he obtains from the ground so as to be able to sell the product to purchasers.

128. Mr. Palmer also pointed out that 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. It was not until the insertion of sections 9A to 9HA into the 1998 Act (by the Infrastructure Act 2015) that the OGA came under any obligations to produce (and to act in accordance with) strategies for maximising the economic recovery of UK petroleum. Even so, the legislation does 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. Such licences do not authorise, for example, the provision of a service to either the general public or a section of the public. Instead, petroleum licences are grants of property rights, analogous to private law property transactions authorised under other statutory regimes. Essentially the 1998 Act provides a mechanism by which the Crown may divest itself of the exclusive rights to search for and get petroleum to third parties.

Other matters

129. After the conclusion of the hearing, I drew the attention of Counsel to the commentary on the petroleum licensing regime in Halsbury's Laws (5th ed) Vol 44 paragraphs 1046-1050 and 1054 et seq. I am grateful for the additional written submissions made by Counsel. Paragraphs 1054 to 1067 deal with the operation of the Offshore Petroleum Production and Pipelines (Assessment of Environmental Effects) Regulations 1999 (SI 1999 No 360). As the title indicates, these regulations only apply to offshore locations, where the planning regime does not apply. As Mr. Palmer explains, regulation 4 provides a hook to which the Environmental Impact Assessment regime is attached by requiring that the conditions of a licence granted under the 1998 Act must contain a requirement to obtain the prior consent of the OGA before drilling, erecting a structure, or extracting petroleum, or the carrying on of a storage or unloading activity. Regulation 5 then restricts the circumstances in which such a consent may be granted where EIA is required. Mr. Wolfe QC did not seek to rely upon these regulations in the hearing before the Court. He now briefly asserts in his recent submissions that the 1999 Regulations are "consistent with the Claimant's characterisation of the licences (offshore and onshore) as being statutory and regulatory in character, rather than being merely contractual and private law…" That point has not been developed any further.

130. The 1999 Regulations do not affect PEDL 189 which licences the exploration and development of an onshore area. In any event, I agree with Mr. Palmer that the 1999 Regulations do not alter the essential nature of a petroleum licence, the need for which has been explained in Bocardo. The most that perhaps could be said in the case of an offshore licence is that there are consent stages for certain aspects of the activities authorised by the licence which act as a trigger for the application of the EIA regime and the public law controls applicable thereto. However, that does not alter the legal nature of the *grant* by the Crown of exclusive property rights through a petroleum licence under the 1998 Act. Nor does the superimposition of the EIA regime remove the intrinsic ability of the parties to such a grant to agree to alter its terms, so long as any such variation does not purport to override the provisions of the 1999 Regulations in the case of offshore operations.

131. I also note that section 4A of the 1998 Act (inserted by section 50 of the Infrastructure Act 2015) imposes restrictions on the issuing of a consent under a licence to start the drilling of a well (a "well consent") in an onshore area without the safeguards contained in that provision for dealing with "hydraulic fracturing". Such a consent must prohibit fracturing at depths of less than 1000m, and at greater depths fracturing may not take place unless the licensee obtains from the Secretary of State a "hydraulic fracturing consent", the grant of which is dependent upon compliance with the requirements of sections 4A(3) to (7). Mr. Wolfe QC did not rely upon sections 4A and 4B of the 1998 Act in order to support his argument. I do not consider that they affect the issue as to what is the essential nature of a petroleum licence and whether, as a grant of exclusive property rights, such a licence is capable of consensual variation, even in the absence of an express statutory power (or express condition in the licence) authorising such a variation.

Conclusion

132. I conclude that a licence granted under either the 1934 Act or the 1998 Act is not governed entirely by the statutory code relating to such licences. Rather it 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. Neither the legislation to which the Court has been referred, nor the terms of PEDL 189, prohibited the variation which was made by the deed dated 28 June 2016. For all these reasons, that variation was lawful.

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

133. Even if a petroleum licence such as PEDL 189 were to be regarded as a statutory licence governed entirely by the legislation relating to such licences (and public law principles), it is necessary to consider whether, as the Court suggested during the hearing, the variation entered into on 28 June 2016 fell within the incidental powers of the Crown, and of the Secretary of State acting on its behalf, under that legislation.

134. In Attorney General v Great Eastern Railway (1880) 5 App Cas 473) Lord Selborne LC said at p. 478 that the doctrine of *ultra vires*:-

> "… ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorised, ought not (unless expressly prohibited) to be held, by judicial construction, to be ultra vires."

(see also Hazell v Hammersmith LBC [1992] 2 AC 1; R v Richmond LBC ex parte McCarthy & Stone (Developments) Ltd [1992] 2 AC 48; R (New London College Ltd) v Home Secretary [2013] 1 WLR 2358).

135. The power to bring legal proceedings to enforce the terms of the licence, the statutory code and the Crown's interest in petroleum is a typical example of an incidental power which is not expressly set out in the legislation (see Broadmoor Special Hospital Authority v Robinson [2000] QB 775, 787).

136. In R v Hillingdon LBC ex parte London Regional Transport (Court of Appeal 29 July 1999) it was accepted that a power to grant a consent or licence might carry with it an incidental power to revoke that consent for good reasons which are relevant to the purposes for which the licensing power had been conferred (see also Lord Carnwath JSC in New London College at paragraph 38). Relevant factors in the implication of a power to revoke would include the object of the licensing provisions, the legal character and use of the subject matter and the legal personality of the parties.

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. The licensing regime under the 1998 Act has the objective of encouraging applications for licences by enterprises prepared to take on the substantial risks involved in exploring for and getting petroleum, so as to promote, and indeed maximise, the economic recovery of the UK's recourse and the revenue that generates. Unforeseen changes of circumstance are likely to arise during the lifetime of a licence, particularly in a difficult working environment such as the North Sea. It may well be in the public interest for the existing licensee to be encouraged to pursue an existing Work Programme, or a variation to that programme, with any necessary alteration in the duration of a licence period, so that the licensee's investment in, and experience of developing, a particular field is not wasted. As Mr. Toole's evidence indicates an inability to agree such variations would substantially reduce market interest in bidding for such licences.

138. For these reasons, I conclude that, even if, contrary to the view I have reached, petroleum licences are regarded as being governed entirely by legislation and public law principles, there is implicit in, or incidental to, the power under section 3 of the 1998 to grant such a licence, a power to vary that licence subsequently by agreement with the licensee, provided, of course, that any such variation is not prohibited by an express provision of the legislation. No such prohibition has been identified in the present case and on this alternative basis, I conclude that the variation contained in the deed dated 28 June 2016 was lawful.

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

139. The only argument advanced by the Claimant in this part of the case, is that the Secretary of State was only authorised by section 3 of the 1998 Act to act on behalf of Her Majesty by *granting* a petroleum licence. PEDL 189 had been entered into as a licence between Her Majesty and the licensee, and the Secretary of State had not been given any powers under the 1998 Act to enter into a deed in order to vary the terms of a licence.

140. I see no merit in this argument. The 1998 Act expressly empowers the Secretary of State to make a number of decisions, other than simply to sign the licence document on behalf of the Crown. These include determining the consideration payable, the terms of the licence, departures from model clauses, and the giving of notices under section 5A. In addition, the terms of the licence itself require that consents be given by the Secretary of State. Plainly, in acting under the terms of the licence the Secretary of State is acting on behalf of Her Majesty. If proceedings had to be taken in order to enforce the terms of a licence, for example by requiring a licensee to take positive steps to comply with a clause, or to prohibit a licensee from acting in breach of a licence, or requiring payment of the sums due under a licence, I see no reason why they could not be brought in the name of the Secretary of State. When dealing with a lease or similar property-related transactions, a distinction does not fall to be made between the Crown, or Her Majesty acting in her public capacity (or as a "corporation aggregate"), or the Secretary of State responsible for exercising governmental functions in relation to the property asset in question (Town Investments Limited v Secretary of State for the Environment [1978] AC 359).

141. The position is no different where a variation in the terms of the licence is agreed with the licensee. The variation is agreed and executed as a deed by the Secretary of State acting on behalf of Her Majesty or the Crown. There is no legal requirement for a deed of variation to state expressly that the Secretary of State is acting on behalf of the Crown (see Town Investments).

142. I accept the submission by Mr Palmer that this analysis does not render nugatory the statutory scheme by which model clauses are authorised by regulations made under the 1998 Act. The legislation gives the Secretary of State the power to depart from those standard form provisions when deciding the terms upon which a licence is to be *granted*. It is entirely consistent with that statutory scheme that, whilst continuing to act on behalf of the Crown, the Secretary of State should be able subsequently to agree to a variation in the terms of such a licence.

(vii) The Interested Party's submission that the Court should refuse to grant relief under section 31(6) of the Senior Courts Act 1981

143. Mr Maurici QC submitted that there had been "undue delay" in the making of the application for judicial review and that even if any ground of challenge were to be made out, the court should refuse to grant relief because of the substantial harm or prejudice which that relief would cause to the Interested Party (section 31(6) of the Senior Courts Act 1981). I have rejected the Claimant's contention that the deed of variation was *ultra vires* and it would be inappropriate for me to prolong this judgment by dealing with the lengthy and detailed arguments by the Claimant and the Interested Party on delay in this case. I therefore decline to express any formal decision on this aspect of the case. However, I do acknowledge that there is much force in the submission of Mr Wolfe QC that the Interested Party has not succeeded in demonstrating substantial prejudice. The letter from their Solicitors dated 26 April 2017 states that the work programme for the Initial Term is not anticipated to be completed before mid-2019 to mid-2021 and so an application for a further variation of the licence to extend the duration of the Initial Term would need to be made in any event. Of course, arguments about the exercise of discretion under section 31(6) must be considered on the basis that the invalidity of the 2016 deed of variation is established. If the reason for that invalidity were to be that there is no power of variation, the material provided by the Interested Party makes it very difficult to see how they could be prejudiced by the grant of the relief sought by the Claimant.

Conclusion

144. For all these reasons I reject the various grounds upon which the Claimant has contended that the deed of variation executed on 28 June 2016 was *ultra vires* and so the application for judicial review is dismissed.