Neutral Citation Number: [2020] EWHC 2615 (Admin)

Case No: CO/4222/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/10/2020

Before:

MR JUSTICE ROBIN KNOWLES CBE

- -

In the Matter of an Application for Judicial Review

R (on the application of) EDWARD THORNTON

Claimant

- and -

OIL AND GAS AUTHORITY

Defendant

-and-

(1)THIRD ENERGY UK GAS LIMITED
(2)THIRD ENERGY ONSHORE LIMITED
(3)THIRD ENERGY TRADING LIMITED
(4)NORTHWHARF NOMINEES LIMITED
(5)YORK ENERGY (UK) HOLDINGS LIMITED

Interested Parties

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- -

Mr Marc Willers QC and Ms Estelle Dehon (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Ms Kate Gallafent QC and Mr Tom Coates (instructed by **Oil and Gas Authority Legal**) for the **Defendant**
The Interested Parties did not appear and were not represented

Hearing dates: 14 and 15 July 2020

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Approved Judgment

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

MR JUSTICE ROBIN KNOWLES CBE

Robin Knowles J:

Introduction

1. Shale gas exploration and extraction is a subject in the public eye. The case before the Court is principally concerned with an aspect of regulatory consideration of the incidence of decommissioning costs of shale gas wells after extraction ceases. It is not concerned with wider questions of the merits of shale gas exploration and extraction.

2. The Claimant ("Mr Thornton") is a member of the public, living in North Yorkshire. The Defendant, the Oil and Gas Authority ("OGA") is a company with functions provided by statute. In form the hearing is a "rolled up" hearing, with the argument before the Court encompassing both the question whether permission should be granted to bring a judicial review and the judicial review itself.

The facts

3. On 13 January 1968 a license ("the Licence") was granted to BP Petroleum Ltd under the Petroleum (Production) Act 1934 ("the 1934 Act"), to search and bore for and get petroleum (defined to include natural gas) in the county of York.

4. A Deed of Variation of 26 November 2018 amended the Licence so as to incorporate Model Clauses 1-44 set out in Schedule 2 to regulations made under the Petroleum Act 1998 ("the 1998 Act"), The Petroleum Licensing (Exploration and Production) (Landward Areas) Regulations 2014 ("the 2014 Regulations").

5. By this time the Licence was held by a subsidiary of Third Energy Onshore ("Third Energy Onshore"), Third Energy UK Gas Limited ("Third Energy Gas"). Third Energy Onshore Limited and Third Energy Offshore Limited ("Third Energy Offshore") were both subsidiaries of Third Energy Holdings Limited ("Third Energy Holdings"). Subsidiaries of companies within Barclays, the banking group, were the primary investors in Third Energy Holdings.

6. On 31 December 2018 Third Energy Offshore was sold to Hague and London Oil plc ("HALO"). The consideration for this sale was a shareholding in HALO. The shareholding was to be made available to fund Third Energy Onshore's decommissioning liabilities, but would be released if Third Energy Onshore was sold to a third party. By July 2019, HALO's shares were suspended.

7. Barclays ran a sales process for Third Energy Onshore. In order to sell the business, Barclays elected to write off around £70 million of Third Energy Onshore's debt and to pay a negative consideration of £9 million, to remain with Third Energy Onshore at the point of completion.

8. On 25 April 2019, Third Energy Group announced that a sale and purchase agreement had been signed with York Energy (UK) Holdings Limited ("York Energy UK") for the entire share capital of Third Energy Onshore, "subject to satisfaction of agreed conditions precedent, including regulatory review." It was a condition precedent of the sale transaction ("the Transaction") that a letter of comfort be received from the OGA in respect of the change of control involved, to state that the OGA would not exercise its power to demand a further change of control or revoke the Licence.

9. York Energy UK had been incorporated on 26 February 2019, on the face of it for the purpose of the Transaction. It has a Cayman domiciled parent. It has been described by the Third Energy Group as "an affiliated company of Alpha Energy, a US based energy company focused on acquiring and operating oil and gas assets".

10. The OGA wrote to the Department for Business, Energy and Industrial Strategy ("the Department") on 14 June 2019 in these terms in particular:

> "… We are … aware that the probable alternative to the Transaction is an almost immediate insolvent liquidation of [Third Energy Gas] in which we believe [Third Energy Gas'] only material asset would be a charge over shares held by its ultimate parent, Third Energy Holdings … in [HALO]; an asset that our teams worked together to secure. While we believe that is a valuable asset, we recognise that its value is uncertain, unlikely to cover the full cost of decommissioning and that the shares are illiquid and therefore not freely tradeable.
> …
> There are … risks associated with allowing the Transaction to proceed and the OGA cannot provide any assurance that [Third Energy Gas] will ultimately be able to meet its licence commitments, including decommissioning. It is worth noting the following points:
>
> - York Energy UK and its Cayman domiciled parent company …, are newly incorporated companies…;
> - The OGA's review includes an assessment of the anticipated cash flows from re-development work proposed by York Energy UK, based on forecasts or production volumes, commodity prices and expenditure. We believe that the proposals put forward and associated cash flows are reasonable, and the proposed works are, in oil and gas terms at least, relatively low risk. However, it remains entirely possible that the work will be unsuccessful, either wholly or partially and, if so, [Third Energy Gas] may not be able to meet some or all its licence commitments.
>
> …."

11. The OGA undertook an internal review of the question whether it should or should not issue the letter of comfort required under the terms of the Transaction for it to proceed. It concluded this in writing an internal submission on 3 July 2019 ("the OGA Internal Submission"). This was submitted to the OGA's Director of Regulation, Mr Tom Wheeler. He agreed with the recommendation made in it, noting all of the risks identified in it, and decided that a letter of comfort should be sent, concluding "that this

is the course that provides the greatest probability of those commitments being discharged by the Licensee".

12. The OGA Internal Submission is considered in detail below, but at this point it is useful to draw attention to Mr Thornton's focus that it identified a "foreseeable risk" that, after the Transaction, Third Energy Gas would "be unable to pay for decommissioning activity when it falls due". The OGA Internal Submission said that the OGA considered that it was "not responsible for securing that onshore oil and gas companies meet their oil and gas decommissioning liabilities and therefore when it determined that there was a risk that such liabilities would not be met by Third [Energy] Onshore and [Third Energy Gas] it sent [the] letter to [the Department] stating its concern."

13. The OGA provided the requested letter of comfort, dated 4 July 2019. In this it advised York Energy UK that the OGA was "not minded to exercise its powers under the relevant model clauses incorporated in any onshore production licences currently held by Third Energy… to revoke any of the relevant licences or seek further changes of control". The Transaction completed in due course.

14. In a letter to the OGA of 5 July 2019 the Claimant ("Mr Thornton") drew attention to the fact that "[t]he total share capital of [York Energy UK] appears to be £10, and no accounts have thus far been filed with Companies House, meaning that there is no publicly available information as to the ability of the new entity to cope with the liabilities and work commitments of Third Energy." Mr Thornton asked whether the OGA had been asked to make a decision in relation to the proposed acquisition, whether the OGA had been asked to supply a letter of comfort to York Energy UK, and whether the OGA considered it necessary to undertake a financial viability and financial capacity test of York Energy UK. Mr Thornton expressed a concern that, if the OGA were to agree to the Transaction without additional assurance that York Energy UK had sufficient financial resources, then decommissioning liabilities in the event of insolvency could become the liability of the taxpayer.

15. In a Pre-Action Protocol letter to the OGA of 6 August 2019 Mr Thornton said:

> "[E]nvironmental damage can and does occur where, for instance, wells are left idle for significant periods or are "orphaned" - i.e. the companies which operated them are insolvent or no longer exist and they have not been transferred to an active, solvent entity. One study estimated that 50 to 100 such wells already exist in the UK and noted that monitoring of such wells does not take place in the UK so pollution incidents may be missed."

16. On 15 August 2019, the OGA wrote to Mr Thornton's representatives. It said that it had considered Mr Thornton's requests. The OGA provided a copy of the letter of comfort. It also provided documents in relation to its assessment of the Transaction, including the OGA Internal Submission.

The OGA Internal Submission

17. The OGA Internal Submission noted (at 2.5) that the Transaction effectively released security in place for the decommissioning of Third Energy Onshore's installations and well bores.

18. The OGA reminded itself (at 2.6) that "[w]hen making this decision the OGA must have regard to the following: … [m]inimising future public expenditure – [t]he need to minimise public expenditure relating to, or arising from, relevant activities. …"

19. Within a "technical review" section, the OGA recorded that York Energy UK had presented the OGA with their plan to develop Third Energy Onshore's assets in an effort to make it into a profitable and successful company (3.1). The OGA said that York Energy UK had noted that Third Energy Onshore had cut operational staff "to the bare bones" and that York Energy UK, post Transaction, would look to increase the company's headcount "to ensure that they have the skill sets required to operate and develop the company" (3.2). At 3.6, the OGA advised that its "Onshore Team" did not object to the operational plans proposed by York Energy UK and considered "that there is a reasonable probability of the plans succeeding, however, they do acknowledge that there is developmental risk …".

20. Within a "financial review" section, the OGA observed (3.8) that Third Energy Onshore was currently not a profitable business and that a substantial proportion of the £9 million received by the company at completion would be used "to fund CAPEX for asset development, the success of which is essential to making the company profitable again." The OGA (at 3.11) advised that "… it appears that even in [a] Low Case scenario, that post Transaction, York [Energy UK] will, in all scenarios apart from that of a 30% reduction in the electricity price, be able to fund all its obligations and commitments under the licence", but added this qualification at 3.12:

> "However, this review considers this financial analysis alongside that of the OGA Onshore Team, who highlight the development risk … Should any of the small number of developments proposed in the Low Case fail to work, it is likely that the company would have difficulty funding their obligations and commitments under the licence including the plugging and abandonment of wells and decommissioning of infrastructure."

21. In a section addressing "risks" the OGA addressed well plugging and abandonment. It noted (3.13) that prior to the sale of Third Offshore Energy, Third Energy Holdings had provided the OGA with a third party estimate of the cost of plugging and abandonment of Third Energy Onshore's well bores on all sites at £19.4 million. The OGA recorded (at 3.13) that these estimates were not used by York Energy UK in their forecasts as York Energy UK believe the estimates to be far in excess of the cost of plugging and abandoning onshore well bores. The OGA wrote that it concurred that these estimates were far higher than those it has seen for the plugging and abandonment of similar onshore well bores. A third party with relevant experience and knowledge had provided York Energy UK and the OGA with "a far lower estimate" for the cost of plugging and abandonment "activity" (c. £5 million to plug and abandon all wells present on relevant licences).

22. In a section headed "Asset Stripping" the OGA noted (3.15) that the directors of York Energy UK were not known to the OGA, and that the OGA had been keen to satisfy

itself that the £9 million left in Third Energy Onshore by Barclays at the point of the Transaction was unlikely to be "stripped out of the company by the directors". The OGA recorded (3.16) that to give the OGA some comfort on this issue, York Energy UK had provided a letter from their legal representatives stating clauses from the sale and purchase agreement. The OGA acknowledged (3.17) that the agreement included certain clauses that required York Energy UK (for an initial period of two years) to use the £9 million "for the working capital of Third [Energy] Onshore and/or its subsidiaries and/or any other arm's length costs, expenses or obligations of Third [Energy] Onshore or its subsidiaries" and restricted it "from using the funds to make any Buyer Payments (payments to or receipt of value by the directors of [York Energy UK or its parent])." It acknowledged (3.18) that these provisions were legally binding on York Energy UK, although observed that it was questionable whether Third Energy Holdings would be inclined to or able to enforce the sale and purchase agreement "given that it may fold very soon after the sale of Third [Energy] Onshore." It added that the agreement only covered the initial £9 million and "[o]nce £9 million working capital has been spent, the company will be under no restriction (aside from those under English law) as to any future 'Buyer Payments' …" (3.19).

23. The OGA devoted a section of its report to "Minimising Public Expenditure". Here (at 3.20) it noted that there was no capital being restricted for the purpose of decommissioning. It added that this was not uncommon for UK companies but went on:

> "… the OGA considers that in this case, with significant developmental and operational risk inherent in making the company profitable and Third [Energy] Onshore and York [Energy UK] having no known external source of capital to supplement capital in the company, there is a foreseeable risk that the company will be unable to pay for decommissioning activity when it falls due."

24. The OGA set out the following analysis (3.22-3.23):

> "Should Third [Energy] Onshore and its subsidiaries become insolvent, the OGA expects that the company's insolvency would be dealt with by the Official Receiver who would, following the sale of Third [Energy] Onshore's assets and use of any cash reserves to cover the company's liabilities, allow any further associated liabilities (including [plugging and abandonment] of well bores and decommissioning of infrastructure) to fall to Landowners. Only in the event of [Landowners'] insolvency would the decommissioning liabilities fall to the [C]rown and then foreseeably, the public purse.
>
> On the back of this, the OGA considers that there will be minimal impact on public expenditure in the event that Third [Energy] Onshore goes into insolvency. It is possible that if the Landowner becomes insolvent HMG may see a need to step [in to] resolve elements of the situation at public expense."

25. Reaching its conclusions, the OGA Internal Submission noted (7.1) that "this is a finely balanced decision for the OGA." It summarized the OGA's objective in reviewing a change of control as "to determine whether that change of control will prejudice the Licensees ability to meet its licence obligations and commitments". It stated:

"We acknowledge that there are risks associated with the change of control (summarised …) but it is considered that the risks are greater in the event that the Transaction does not occur and there are several advantages of allowing it to go ahead."

26. A list of "Advantages" and "Risks" followed, in these terms:

> *"Advantages*
> a. York [Energy UK] have stated they intend to produce the reserves.
> b. Barclays will be injecting £9M into the company and wiping out ~£70M debt. At this point York [Energy UK] will be one of the UK's best capitalised onshore oil and gas companies.
> c. The SPA binds York [Energy UK] for 2 years to only use the £9M for working capital purposes unless they secure replacement funding or value of services.
> d. The OGA's Onshore team believe York [Energy UK]'s developments and production projections are plausible.
> e. Stress tests of York [Energy UK]'s finances have shown that the company has the ability to fund its liabilities and obligations under the Licences if developments achieve only partial success.
>
> *Risks*
> a. York [Energy UK] is a newly formed company with no external financial backing and its directors are not using any of their own money, thereby limiting personal exposure.
> b. If initial developments are not particularly successful and further capex is committed in the pursuit of wider success before this is fully understood this could result in the business failing at an early stage (c. 12-18 months).
> c. The company is currently loss making and therefore is counting on a small number of its developments succeeding to cover its costs.
> d. York [Energy UK] is a new company and their directors do not have a track record in UK oil and gas although they do claim significant experience operating in the sector in the Former Soviet Union.
> e. No capital is restricted for Licence liabilities and commitments.
> f. Once the company has used the initial £9M there is then no guarantee that future or replacement funds will be used to support the company's licenses.
> g. When the change of control completes, Barclays is off the hook for Third [Energy] Onshore decommissioning."

27. The OGA summarised (7.2):

> "On balance, it is believed that the Transaction has a reasonable chance of allowing Third Energy to operate as a viable entity under York [Energy UK] where it will pay for its obligations and commitments under the [L]icence."

28. At 7.3, the OGA added:

> "Should the OGA decide not to give comfort for the change of control and Third [Energy] Onshore becomes insolvent due to Barclays being unwilling to continue funding the company in the event that the Transaction does not occur, the OGA cannot accurately value the share charge [over shares in HALO] … and therefore

does not know whether the value will be sufficient to allow Third [Energy] Onshore to fund its decommissioning liabilities."

29. It is convenient at this stage to set out three statements made by the OGA in the OGA Internal Submission as to its understanding of its obligations in relation to decommissioning:

    (a) "The OGA considers that securing the decommissioning of Onshore oil and gas installations and well bores is not within its remit" (2.5).

    (b) "The OGA is not responsible for securing that onshore oil and gas companies meet their oil and gas decommissioning liabilities and therefore when it determined that there was such a risk that such liabilities would not be met by Third [Energy] Onshore and the Licensee [the OGA] sent a letter to BEIS stating its concern …" (3.11).

    (c) "As it is not responsible for securing that onshore oil and gas decommissioning is completed, the OGA has done what it can to make its share holder [(the Department)] aware of all issues present in this submission." (7.4).

Legislation

30. Section 1 of the 1934 Act vested all rights to the UK's petroleum resources in the Crown and section 2 gave to the Secretary of State the "power to grant to such persons as he thinks fit licences to search and bore for and get petroleum". The 1934 Act was repealed and replaced by the 1998 Act, section 3 of which provides the OGA with the power to grant petroleum licences on behalf of the Crown.

31. Section 4(1)(e) of the 1998 Act gives the Secretary of State power to make regulations prescribing "model clauses which shall, unless [the OGA] thinks fit to modify or exclude them in any particular case, be incorporated in any… licence …". The 2014 Regulations were made under powers conferred by section 4(1)(e) of the 1998 Act. Schedule 2 to those Regulations includes Model Clauses.

32. Section 8 of the Energy Act 2016 ("the 2016 Act") sets out matters to which the OGA must have regard when exercising its functions. The first of these is "[t]he need to minimise public expenditure relating to, or arising from, relevant activities," where relevant activities are defined as "any activity in relation to which the OGA has functions."

"Model Clauses"

33. Model Clause 20 imposes the following obligations, in particular, on licensees in respect of the plugging and abandonment of wells:

    "(5) The plugging of any Well shall be done in accordance with a specification approved by the OGA applicable to that Well or to Wells generally or to a class

of Wells to which that Well belongs and shall be carried out in an efficient and workmanlike manner.

(6) The OGA may at any time give the Licensee a notice requiring a well drilled pursuant to this licence to be plugged and abandoned in accordance with paragraph (5) within the period specified in the notice (but this paragraph is subject to paragraph (8)).

(7) The Licensee shall comply with any notice under paragraph (6).

(8) A notice under paragraph (6) may be given only in relation to a well from which the Licensee has not extracted any petroleum within the period of one month ending with the day on which the notice is given.

(9) Subject to paragraphs (6) to (8), (10) and (11) of this clause, any Well drilled by the Licensee pursuant to this licence shall be plugged and sealed in accordance with paragraphs (2), (3), (4) and (5) of this clause, not less than one month before the expiry or determination of the Licensee's rights in respect of the area or part thereof in which that Well is drilled."

34. Model Clause 20(13) now provides, in its current form (although previously, the reference to the OGA, here as in other provisions, was instead a reference to the Minister):

"All casings and fixtures forming part of a Well and left in position at the expiry or determination (whether by revocation or otherwise) of the Licensee's rights in respect of the area or part thereof in which that Well is drilled, or at the completion of any works required of the Licensee under paragraph (11) of this clause (whichever is the later), shall be the property of the OGA."

35. Model Clause 40 is in these terms:

"Restrictions on assignment, etc

40.—(1) The Licensee shall not, except with the consent in writing of the OGA 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.

(2) The Licensee shall not enter into any agreement providing for a person other than the Licensee to become entitled to, or to any proceeds of sale of, any Petroleum which, at the time when the agreement is made, has not been but may be won and saved from the Licensed Area unless the terms of the agreement have been approved in writing by the OGA either unconditionally or subject to conditions, but the preceding provisions of this paragraph do not apply to—

(a) an agreement for the sale of such Petroleum under which the price is payable after the Petroleum is won and saved; and

(b) an agreement in so far as it provides that, after any Petroleum has been won and saved from the Licensed Area, it shall be exchanged for other Petroleum.

(3) The Licensee shall not, without the consent of the OGA, dispose of any Petroleum won and saved in the Licensed Area or any proceeds of sale of such Petroleum in such a manner that the disposal does, to the knowledge of the Licensee or without his knowing it, fulfil or enable another person to fulfil obligations which a person who controls the Licensee, or a person who is controlled by a person who controls the Licensee, is required to fulfil by an agreement which, if the person required to fulfil the obligations were the Licensee, would be an agreement of which the terms require approval by virtue of paragraph (2) of this clause.

(4) For the purposes of paragraph (3) of this clause, whether a person has control of another person shall be determined as if sections 450(2) to (4) and 451(1) to (5) of the Corporation Tax Act 2010 apply subject to the following modifications ….

(5) Where the Licensee is two or more persons, then, without prejudice to the preceding provisions of this clause, none of those persons shall enter into an agreement with respect to the entitlement of any of them to—

(a) the benefit of any right granted by this licence;
(b) any Petroleum won and saved from the Licensed Area; or
(c) any proceeds of sale of such Petroleum,

unless the terms of the agreement have been approved in writing by the OGA, but the preceding provisions of this paragraph do not apply to an agreement for the sale of such Petroleum under which the price is payable after the Petroleum is won and saved and an agreement in so far as it provides that, after any Petroleum has been won and saved from the Licensed Area, it shall be exchanged for other Petroleum."

36. Model Clause 41 is in these terms:

"Power of revocation

41.—(1) If any of the events specified in the following paragraph shall occur then and in any such case the OGA may revoke this licence and thereupon the same and all the rights hereby granted shall cease and determine but subject nevertheless and without prejudice to any obligation or liability incurred by the Licensee or imposed upon him by or under the terms and conditions hereof.

(2) The events referred to in the foregoing paragraph are—

(a) any payments mentioned in clause 12(1) of this licence or any part thereof being in arrear or unpaid for two months next after any of the days whereon the same ought to have been paid;

(b) any breach or non-observance by the Licensee of any of the terms and conditions of this licence;

(c) in Great Britain, the bankruptcy or sequestration of the Licensee;

(d) in Great Britain, the making by the Licensee of any arrangement or composition with his creditors;

(e) in Great Britain, if the Licensee is a company, the appointment of a receiver or administrator or any liquidation whether compulsory or voluntary;

(f) in a jurisdiction other than Great Britain, the commencement of any procedure or the making of any arrangement or appointment substantially corresponding to any of those mentioned in sub-paragraphs (c) to (e) of this paragraph;

(g) any breach or non-observance by the Licensee of the terms and conditions of a Development Scheme;

(h) if the Licensee is a company, the Licensee's ceasing to direct and control either—
(i) its operations under the licence; or
(ii) any commercial activities in connection with those operations
from a fixed place within the United Kingdom;

(i) any breach of a condition subject to which the OGA gave its approval in pursuance of clause 40(2) of this licence;

(j) any breach of clause 40(5) of this licence;

and where two or more persons are the Licensee any reference to the Licensee in sub-paragraphs (c) to (h) of this paragraph is a reference to any of those persons.

(3) The OGA may revoke this licence, with the like consequences as are mentioned in paragraph (1) of this clause, if—

(a) the Licensee is a company;

(b) there is a change in the control of the Licensee;

(c) the OGA serves notice in writing on the Licensee stating that the OGA proposes to revoke this licence in pursuance of this paragraph unless such a further change in the control of the Licensee as is specified in the notice takes place within the period of three months beginning with the date of service of the notice; and

(d) that further change does not take place within that period.

(4) There is a change in the control of the Licensee for the purposes of sub-paragraph (3)(b) of this clause whenever a person has control of the Licensee who did not have control of the Licensee when this licence was granted (or, if there has been an assignment or assignation of rights conferred by this licence, when those rights were assigned to the Licensee); and sections 450(2) to (4) and 451(1) to (5) of the Corporation Tax Act 2010 shall apply, for the purpose of determining whether for the purposes of this paragraph a person has or had control of the Licensee with the modifications specified in clause 40(4) of this licence.

(5) Where two or more persons are the Licensee and any of them is a company, paragraphs (3) and (4) of this clause shall have effect as if—

(a) sub-paragraph (a) of paragraph (3) were omitted;

(b) in sub-paragraph (b) of that paragraph, after the word "of" there were inserted the words "any company included among the persons who together constitute"; and

(c) for the word "Licensee" in any other provision of those paragraphs there were substituted the word "company"."

37. As appears above, "change of control" in Model Clause 40(4) and 41(4), is defined by reference to sections 450 and 451 of the Corporation Tax Act 2010.

Ground 1: Alleged continuing misinterpretation of Model Clause 40 and 41

38. Mr Thornton contends that the OGA has misinterpreted the terms of both Model Clauses 40 and 41, as well as the relationship between them. As a result, he contends, there is an ongoing failure by the OGA to act as required by those Model Clauses in relation to the change of control of Third Energy Gas.

39. Mr Marc Willers QC and Ms Estelle Dehon develop the argument to support Mr Thornton's contention as follows:

(1) Although Model Clause 40 is titled "Restrictions on assignment etc.", its ambit is not defined by reference to the formal transfer of a licence by one person to another, as by way of assignment. The word "assignment" is only found in the title to Model Clause 40.

(2) The word "etc" in the title of Model Clause 40 is reflected in the breadth of the wording contained in its subparagraph (1): consent of the OGA is not just required for the assignment of a licence, but for any act "whatsoever" which renders any right under a licence "exercisable by or for the benefit of or in accordance with the directions of another person."

(3) Model Clause 40 is wide enough to extend to a change of control. There is no reason for a narrow interpretation of Model Clause 40. That includes no reason of policy given that section 8 of the 2016 Act has as its objective "minimis[ing] public expenditure relating to, or arising from, relevant activities".

(4) Accordingly, on its face, a change of control of a licensee falls within the scope of Model Clause 40(1) as something for which the prior written consent of the OGA is required.

40. Applying the argument to the present case, Mr Willers QC submits that given that the licence-holder in this case, Third Energy Gas, has been (effectively) acquired by another person, York Energy UK, it is clear that the rights granted by the Licence have "become exercisable… for the benefit of or in accordance with the directions of another person", namely York Energy UK. In accordance with Model Clause 40, the OGA's written consent should have been obtained before Third Energy Gas was sold. No such consent was sought by Third Energy Gas and, when the OGA became aware of the proposed Transaction, it did not inform Third Energy Gas that consent was required. Instead, the OGA provided York Energy UK with a letter of comfort stating that it was not minded to exercise its powers to revoke the Licence. On the correct understanding of the Model Clauses, once it was aware of the Transaction, the OGA should have considered whether to revoke the Licence by reason of Third Energy Gas's failure to obtain the requisite consent. The OGA's ongoing failure to do so constitutes an error of law, submits Mr Willers QC.

41. The OGA's position, advanced by Ms Kate Gallafent QC and Mr Tom Coates is that Model Clause 40 has no application in the events that have happened.

42. Mr Willers QC responds that the fact that Model Clause 41 makes express reference to change of control does not mean that it is the only Model Clause relevant to change of control, and does not, in particular, narrow the broad scope of Model Clause 40(1) to exclude a change of control. Rather, Model Clauses 40 and 41 can and should be read together: the OGA's consent to a corporate takeover must be obtained in accordance with the obligations imposed on licensees by Model Clause 40(1), and, if such consent is not obtained, the OGA should consider whether to revoke the licence in accordance with its power under Model Clause 41(3) by reason of the failure to obtain consent. As such, Model Clause 41(2)(b) specifies one of the circumstances in which the OGA has power to revoke a licence, but does not deal with the prior question of whether a licensee has an obligation to obtain the OGA's consent for a particular course of action. The answer to that prior question is found in Model Clause 40(1).

43. In my judgment Mr Thornton's contention, as advanced in argument by Mr Willers QC, is not well founded.

44. Model Clause 40 is directed to what a licensee does or causes to happen with the rights the licensee has from the licence it has been granted (or derives from such rights), and (prospectively) the petroleum and proceeds of sale of petroleum to be achieved with that licence. Effectively, this is where it is dealing in the licence. Thus:

(1) Under subparagraph (1): "The Licensee shall not … do anything whatsoever whereby … 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".

(2) Under subparagraph (2): "The Licensee shall not enter into any agreement providing for a person other than the Licensee to become entitled to, or to any proceeds of sale of, any Petroleum which … has not been but may be won and saved from the Licensed Area".

(3) Under subparagraph (3): "The Licensee shall not … dispose of any Petroleum won and saved in the Licensed Area or any proceeds of sale of such Petroleum in such a manner that the disposal does … fulfil or enable another person to fulfil obligations which a person who controls the Licensee, or a person who is controlled by a person who controls the Licensee, is required to fulfil by an agreement which, if the person required to fulfil the obligations were the Licensee, would be an agreement of which the terms require approval by virtue of paragraph (2) of this clause".

45. Where there is an assignment of rights the licensee is an actor. But not only where there is an assignment, for the same is true where it enters into other forms of agreement with the effect described in subparagraph (1) of Model Clause 40 (a form of security arrangement not involving a legal or equitable assignment was instanced by Ms Gallafent QC). And the same is true when it undertakes other activity (see subparagraphs (2) and (3) of Model Clause 40. This is why the word "etc" is in the heading of that Model Clause.

46. In itself, a change of control of a licensee on acquisition of the licensee (or, here, the acquisition of its parent) does not involve the licensee doing anything. The licence, and the rights under it, remain intact and in the hands of the licensee. Where the licensee is acquired, the licensee is the subject of the acquisition rather than the actor.

47. A change of control of the licensee is regulated by Model Clause 41(3). There, it is addressed not by way of restriction (Model Clause 40), which would be possible where the licensee was the actor, but by the existence of a power of revocation of the licence, which would be possible where it was not. Thus, Model Clause 41(3) is directed to what happens to the licensee, rather than what is done by the licensee. Thus:

(1) "… there is a change of control of the licensee"

(2) "… whenever a person has control of the licensee who did not have control of the licensee when this licence was granted (or, if there has been an assignment or assignation of rights conferred by this licence, when those rights were assigned to the licensee)";

48. Certainly, there is a relationship between the two Model Clauses, but not one that is relevant to the present case. Thus, as noted above, Clause 41(2)(b) would be engaged where Clause 40(1) was broken.

49. As to Mr Willers QC's argument on interpretation and policy, this cannot overcome the point that the wording is clear. The commercial and transactional context favours the certainty provided by applying the wording of the Model Clauses. The argument that there is no reason for a narrow interpretation of Model Clause 40 is not the same as an

argument that there are reasons compelling a broad interpretation. Policy cannot write into Model Clause 40 what is not there on its existing wording, namely an application of the Model Clause to circumstances where the licensee has not acted and there is no action by the licensee to restrict. Section 8 of the 2016 Act, invoked by Mr Willers QC, is concerned with public expenditure; insofar as it does supply a policy context to the interpretation of the Model Clauses it is the wording of Model Clauses that provides the answer to the present question - the question of what provisions were chosen to that end?

50. The scheme described by the wording is a scheme that requires regulatory consent if a licensee is to deal in the licence, but responds to a change of control of the licensee with powers to require a further change of control and if necessary to revoke the licence. That is a coherent scheme, and does not put the interpretation based on the wording in doubt.

51. There was a further written argument on behalf of Mr Thornton based on lifting the corporate veil. It was submitted that "the broad language used clearly shows the intention to preclude a rigid distinction between the company and its shareholders". The point did not feature in opening oral argument, and in oral argument in reply Mr Willers QC said it was a "peep at most" that was urged rather than a full lifting of the veil; it was about the regulator "having a look".

52. The argument was again based on the words "any right granted by this licence … becomes exercisable by or for the benefit of … another person". This language simply does not suggest removal of the distinction between the company and its shareholders. The choice to cross reference the Corporation Tax Act in Model Clauses 40 and 41, rather than anything of wider compass and effect, suggests the opposite.

53. Model Clause 40 refers to "another person" (i.e. a person other than the licensee). In the case of a corporate licensee limited by shares, if a shareholder, simply by being a shareholder, could be "another person" (because of the words "for the benefit of") then the Model Clause would engage continually, to all shareholders at all times, of any size, and regardless of any change of control. It is unlikely that this result would be intended other than by language that made the result very clear indeed, and Model Clause 40 does not.

Ground 2: Alleged failure to assess financial capability of both parties to the sale and purchase agreement

54. In published Financial Guidance the OGA states (at paragraph 3.9):

> "In the case of a proposed licence assignment or licensee change of control, where an existing licensee intends to retain a Commitment or Commitments after the completion of the transaction, the OGA will consider the financial capability of both parties to the transaction. As such, both parties should consider themselves an 'Applicant' for the purposes of this guidance. The OGA's assessment processes will thereby seek to ensure the transaction is not detrimental to either the new and existing licensee's capacity to meet their Commitments in their post-completion portfolios."

55. Mr Thornton contends that the Financial Guidance is a published policy and that, contrary to that policy, the OGA assessed the financial capability of York Energy UK only and not of both parties to the sale and purchase agreement.

56. As developed in argument by Mr Willers QC it was clear that the focus of the contention was that the OGA should have examined the financial capability of Third Energy Gas absent the sale against the financial capability of Third Energy Gas once the sale was completed. A seller "backed" by Barclays was to be replaced with a purchaser, York Energy UK, that was a subsidiary of a Cayman Islands company "with no reputation to lose".

57. Ms Gallafent QC's starting point is to emphasise that "Commitments" refers to all commitments in the round, including commitments on searching for gas and not simply commitments on plugging and abandonment of wells. She also emphasised that in a change of control the licensee is unchanged and submitted that a change of control will not prejudice a licensee's ability to meet its commitments. In addition she argued (referring to evidence from Mr Wheeler) that in the case of a change of control paragraph 3.9 covers a situation in which a company owned various licensees and proposed to dispose of some but not others.

58. I accept that the licensee is unchanged and that all commitments are involved. However, I can see that a licensee's ability to meet its commitments may be prejudiced by a change in the corporate group in which it sits. Its ability to borrow is an example, even before questions of whether the group would meet a licensee's commitments on insolvency for reputational reasons.

59. There is further the point that the Financial Guidance refers to consideration of "the financial capability of both parties to the transaction", and here the parties to the sale and purchase agreement included Third Energy Holdings. I do not find it possible to accept, on the actual wording of the first sentence of paragraph 3.9, that it is confined to the situation where a company owned various licensees and proposed to dispose of some but not others.

60. However, in my judgment the OGA Internal Submission shows that the financial capability of both parties was indeed considered, or (as put by Mr Willers QC) the financial capability of Third Energy Gas absent the sale was examined against the financial capability of Third Energy Gas once the sale was completed. The OGA Internal Submission recorded that Third Energy Onshore had cut operational staff "to the bare bones". It recognised that should the OGA decide not to give comfort for the change of control (with Barclays writing off £70 million of debt and providing £9 million) Barclays might be unwilling to continue funding and, without that funding, insolvency might follow. It therefore understandably focussed on Third Energy Onshore's ability to meet its commitments following the sale.

61. Mr Thornton served an expert report and an addendum report from Mr Patrice Muller, Senior Managing Partner of London Economics Ltd. Mr Willers QC draws attention (in particular) to these points derived from Mr Muller's reports: (a) that no documents provided by the OGA undertook a financial capability assessment of Third Energy Onshore in the absence of the sale; (b) that without information about Third Energy

Onshore in the absence of a sale it is not possible fully to consider the change in its ability to meet its commitments due to the sale; and (c) that the debt write-off and cash injection improved Third Energy Onshore's financial health such that other potential buyers might have been interested in acquiring control of Third Energy Onshore.

62. It is obvious that the consideration or assessment needed will depend on the case. In the present case it is questionable what a fuller financial capability assessment of Third Energy Onshore or Third Energy Holdings in the absence of the sale would have added to the fundamentals that were considered. Consideration of the change in Third Energy Onshore's ability to meet its commitments due to the sale is simply another reference to the comparison urged by Mr Thornton and which in my judgment was made. The question of other potential buyers is at best indirectly rather than directly in point, and, on the face of things in the present case, theoretical.

63. Ms Gallafent QC provides a further complete answer to this Ground when she points out that an argument that the OGA should have preferred a seller "backed" by Barclays to a purchaser that was a subsidiary of a Cayman Islands company "with no reputation to lose" is an argument that the OGA reached an irrational decision. That is not the challenge that Mr Thornton raises under this Ground, which is that the financial capability of both parties to the sale and purchase agreement was not assessed.

64. The "foreseeable risk" that, after the Transaction, Third Energy Gas would "be unable to pay for decommissioning activity when it falls due" was considered by the OGA (see paragraph 23 above). It reported the risk to the Minister. Mr Willers QC submitted that the decision to report to the Minister misunderstands the OGA's duty, which was to consider what the OGA itself should do. But in my judgment the OGA did not simply report the risk to the Minister. It also considered whether or not to issue the letter of comfort, which would determine whether the Transaction did or did not proceed.

Ground 3: Alleged failure to undertake all aspects of financial capability assessment

65. As with Ground 2, this Ground is based on the OGA's published Financial Guidance. Mr Willers QC summarises the relevant provisions in this way. The financial capability assessment should cover, for both parties to the Transaction, "two distinct financial criteria: financial viability and financial capacity" (paragraph 5.1). The former criterion is comprised of three "assessment areas" (paragraph 5.2), namely whether the Applicant has a demonstrable track record, based on historic financial information (paragraph 6.3), the Applicant's solvency, in terms of current ratio, interest cover, and net assets (paragraph 6.4), and the Applicant's capital structure, as to which a gearing ratio will be calculated (paragraph 6.5).

66. Mr Thornton contends that the OGA failed to give any consideration to the relevant parties' financial viability, and in particular, that of York Energy UK.

67. York Energy UK was of course a newly incorporated company, without a track record or historical financial information. The OGA was fully aware of the risk that it may not be able to meet its commitments. Mr Willers QC recognised that the Financial Guidance suggests that "more importance" might be placed on financial capacity (which, as Ms Gallafent QC emphasised the OGA did review) than financial viability in

the case of a newly-incorporated applicant, but centered his argument on the requirement that the OGA "consider in detail the identity and track record of the shareholders, directors and officers" of newly-incorporated Applicants (paragraph 6.6(a)).

68. Here he accepted that there were resumés, but submitted that the words "in detail" in paragraph 6.6(a) of the Financial Guidance required that the OGA go behind these and verify them; that investigation was required. In my judgment the submission does not follow. It will be a matter of judgment in each case whether resumés are sufficient without more or whether they require verification or investigation. Ground 3 is not based on facts that cast material doubt on the accuracy or completeness of the resumés. Mr Muller would have expected more. However, unless no reasonable decision-maker could have been satisfied of the sufficiency of inquiries made it is for the decision-maker "to decide upon the manner and intensity of the inquiry to be undertaken into any relevant factor": see R (Khatun and Others) v Newham LBC [2004] EWCA Civ 55; [2005] QB 37 at [35] per Laws LJ and cases there cited. Mr Thornton's case does not get near the point at which a challenge is sustainable.

69. The OGA identified the fact that the directors of York Energy UK claimed significant experience operating in the oil and gas sector in the former Soviet Union. For Mr Thornton Mr Willers QC placed emphasis on the fact that the directors did not have a track record in UK oil and gas, a fact that the OGA also identified. The point that is material for present purposes is that the matter was considered.

70. Mr Thornton also contends under Ground 3 that the OGA may wrongly have taken into account an irrelevant consideration, namely the financial position of Alpha Energy. Mr Willers QC developed the arguments as follows. Alpha Energy is not an "Applicant", as defined in the Financial Guidance. Its ability to fund commitments under the Licence could only be taken into account if an application had been made for Alpha Energy to provide a guarantee. There is no sign that there was such an application.

71. The premise of the contention ("may … have") is a possibility rather than an established fact. That is not sufficient. In any event I do not accept that the OGA was not entitled to take into account Alpha Energy's position as part of an overall assessment. Where Alpha Energy did not have obligations, whether under a guarantee or otherwise, that would be part of what was taken into account.

Ground 4: Alleged failure to take into account the serious risk that the change of control would lead to Third Energy Gas being "unable to pay for decommissioning activity when it falls due".

72. On behalf of Mr Thornton, Mr Willers QC acknowledged that there was a link between Grounds 2 and 4. Ms Gallafent QC characterised Ground 4 as largely a duplication.

73. It is common ground that the OGA is under a statutory duty to have regard to "[t]he need to minimise public expenditure relating to, or arising from, relevant activities" when discharging its functions. Section 8 of the 2016 Act imposes this duty.

74. Mr Thornton contends that the OGA has failed, and continues to fail, to comply with this duty. He further contends that the OGA has duties to assess whether Third Energy Gas has financial capacity to discharge decommissioning obligations imposed by Model Clause 20 and to take into account any risk of decommissioning being carried out at public expense. He contends that the OGA has failed, and continues to fail, to comply with these duties too.

75. There was, argues Mr Willers QC for Mr Thornton, clear potential for the Transaction to result in an increased risk of decommissioning liabilities being paid for by the taxpayer. The OGA identified a "foreseeable risk" that, after the Transaction, Third Energy Gas "will be unable to pay for decommissioning activity when it falls due", and informed the Department that "[t]here are… risks associated with allowing the Transaction… and the OGA cannot provide any assurance that Third [Energy] Onshore will ultimately be able to meet its licence commitments, including decommissioning".

76. The OGA identified the risk that "[n]o capital is restricted for Licence liabilities and commitments" but Mr Willers QC focused on what he termed the "specific risk" that, after the Transaction, Third Energy Gas would be unable to pay for decommissioning activity when it fell due and the risk that the taxpayer would have to cover the company's decommissioning costs. He argued that the OGA's response having identified the risk was to state that it "is not responsible for securing that onshore oil and gas companies meet their oil and gas decommissioning liabilities" and send a letter to the Department. Mr Willers QC argued that given its duty it could not abdicate that duty by notifying the Minister of the risk, or treat the duty as requiring no more than notification to the Minister of the risk.

77. I start with the fact that the OGA expressly identified a "foreseeable risk" that, after the Transaction, Third Energy Gas "will be unable to pay for decommissioning activity when it falls due". An obvious relevance of this point was that decommissioning might have to be carried out at public expense.

78. The letter to the Department was an obviously appropriate step in these circumstances. But it was not the only use the OGA made of the point; it also included it, as the OGA Internal Submission shows, in its own consideration of a decision whether to provide the letter of comfort. There is nothing in this that amounts to a failure to fulfil the duty under section 8, which is to "have regard to" the need to minimise public expenditure relating to, or arising from, any activity in relation to which the OGA has functions.

79. Further, Mr Thornton has not shown the OGA to be incorrect when it wrote in the OGA Internal Submission that its duty did not extend to "securing" the decommissioning of onshore oil and gas installations and well bores, that onshore oil and gas companies meet their oil and gas decommissioning liabilities, and that onshore oil and gas decommissioning is completed. Mr Thornton, through Mr Willers QC, has not identified the foundation for a duty in these terms. But whether the OGA does or does not have a duty in the terms just stated does not mean that decommissioning is not its concern.

80. In making his decision that the letter of comfort should be sent Mr Wheeler added after noting that in the event of a financial failure of the Licensee "liability falls to landowners in the first instance", the phrase "(hence our duty to have regard to impacts

on the public purse is not directly engaged)". Leaving aside the question whether enforceable liability does fall to landowners, and the landowners' ability to pay, it is fair to observe that this is not ideal language. The duty is always engaged. However the language is to be construed with some latitude. When the context, the word "directly" and Mr Wheeler's agreement with the review as a whole, are all taken into account it is sufficiently clear that he did not fail to have regard to the need to minimise public expenditure as section 8 required.

81. For Mr Thornton, Mr Willers QC also highlighted that Barclays was willing to take a significant loss to dispose of Third Energy Onshore. This gave rise, he suggested, to a strong implication that Barclays, presumed to act commercially in the interests of its shareholders, was either legally responsible for liabilities, including decommissioning liabilities, or considered that it faced significant reputational risk if it did not cover these liabilities. Mr Willers QC suggested the OGA appears not to have turned its mind to this, including in considering whether decommissioning liabilities would as a result be more likely to fall on the taxpayer after the sale.

82. As to this, I have seen no evidence of the suggested legal responsibility for liabilities and do not consider the suggested implication is made out. I accept that reputational risk may explain why Barclays was prepared to provide a further £9 million, but it does not support an implication that it would cover liabilities whatever their amount. But the important point is that the OGA did turn its mind to an assessment of what Barclays might do, and the consequences for liabilities overall, as the OGA Internal Assessment shows.

Conclusion

83. In my judgment Mr Thornton's proposed Grounds are not made out. In the present case I consider the appropriate course is to refuse permission to bring a judicial review.