A BARRISTER'S PERSPECTIVE ON THE CUADRILLA FRACKING CASES IN LANCASHIRE

1. While the fracking industry in this country continues to gather pace, it remains the case that the most detailed consideration of particular proposals by the planning system to date is that associated with Cuadrilla's fracking schemes in Lancashire. I represented Lancashire County Council ("LCC"), the relevant mineral planning authority, at the planning inquiry into these proposals which took place in February and March 2016. I have been asked to give a talk describing my experience of the process.

2. The inquiry was a major event which took place on 19 sitting days over a 6 week period. There were: 7 parties with formal standing who called some 26 witnesses; approaching 150 public speakers; hundreds of thousands of pages of documents; and the culmination of matters was a 498 page Inspector's report followed by a decision letter from the Secretary of State.

3. Essentially two proposals for exploration works fell for consideration and associated with each of these proposals was a further monitoring scheme.

4. The two sites for exploration works were each in the Fylde, the first being at Preston New Road ("PNR"), near Blackpool and the second at Roseacre Wood ("RW"). The sites are about 7.3km apart. The PNR site lies adjacent to a main road, the A583 and is not far from the end of the M55 motorway. The RW site lies in a much more remote rural area in the middle of the Fylde served only by country roads and lying between the villages of Roseacre and Wharles. The target for each proposal was the Bowland Shale formation, to be accessed by a combination of vertical and horizontal drilling.

5. The operations proposed which made up the exploration works were the same at each site. Each was to consist of 4 wells drilled to a depth of up to 3,500m below the surface and extending up to 2,000m from the well pad. The drilling and fracking phase would last about 30 months with drilling taking some 14 months and fracking some 8 months. After that there would be an initial flow testing

period of up to 3 months during which gas produced would be measured (in terms of its composition and flow rate) before being flared off and, if that phase was successful, there would then be an extended flow testing period of 18-24 months per well when production would be connected into the gas grid for use by home or industrial users. Following this, the sites would be decommissioned and restored. In each case, the overall life of the permission was limited to 6 years. Of course, if the flow testing was to be successful then a further planning application would be forthcoming for long term production.

6. Each site was over 1ha in size and would contain the necessary plant and equipment to undertake the operations with the most prominent component being a tall drilling rig in the initial phases.

7. Each of the proposals for exploration works was also accompanied by a monitoring scheme. In each case these consisted of some 80 sites within a 4km radius of the well pad in which monitoring equipment, which would test fracture propagation, was to be buried at a depth of some 100m. There would also be 8 (in the case of RW) or 9 (in the case of PNR) surface seismic monitoring stations to measure induced seismicity (and provide the necessary information for the "traffic light" monitoring process). The above ground manifestation of these schemes would consist of no more than a fenced area of 2m by 2m with merely an inspection cover in the case of the buried array and a small equipment cabinet (some 1.1m high) in the case of the surface array.

8. The applications were initially made in June 2014 and were eventually determined by LCC in June 2015. The timescale involved is not untypical. The applications had originally been scheduled for determination in January 2015 but consideration of them at this time was postponed to allow further information to be taken into account. LCC's officers finally recommended that permission be granted for the exploration works and the monitoring proposals at PNR. In respect of RW, the recommendation was that permission for the exploration works be refused on highway grounds but that it be granted in respect of the monitoring works. LCC's Development Control Committee went with its officers' recommendation in respect of RW and refused the exploration works on the basis of highway grounds

but granted permission for the monitoring works. However, contrary to the advice of its professional officers, LCC's Development Control Committee refused permission for both the exploration works and the monitoring works at PNR. The exploration works were refused on the basis of landscape/visual impact and noise impact. The monitoring works were refused on the basis that they would lead to an industrialisation of the countryside even though more or less identical proposals had been deemed acceptable at RW. It became something of a popular refrain at the inquiry that the Committee's decision was an example of "local democracy in action". Whether that it true or not, it is no less the case with fracking than any other area of planning that a refusal by members against officer recommendation can be a recipe for an award of costs against an authority on the basis of unreasonable conduct unless there are substantial planning grounds for declining to follow expert advice.

9. Appeals by Cuadrilla inevitably followed. Each of the refusals was appealed as was an appeal against one of the conditions that was imposed in respect of the grant of permission for the monitoring works at RW. For the sake of completeness, I mention that the condition in question imposed a blanket restriction on development of all the monitoring sites to times of year outside the period when overwintering birds might use the land (31st October to 31st March). This became the least of the issues at the inquiry because LCC agreed in due course that not all the monitoring sites were in fact of value to overwintering birds and that the condition could be amended accordingly to refer to only those which were. In the fullness of time, the appeal was allowed on that basis.[1]

10. As to the more substantive aspects of the case, the Inspector recommended that the appeals at PNR be allowed in respect of both the exploration works and the monitoring works. So far as concerns the matters upon which LCC had relied, the Inspector concluded in respect of the exploration works that, while the proposals would give rise to some landscape/visual harm, particularly in the earlier phases of the development, it would not be unacceptable. As for noise, she concluded that conditions which provided that noise impacts at the nearest sensitive residential

[1] This appeal did not stand or fall with the exploration works appeal because it was always possible, if the latter failed, that Caudrilla could resubmit a planning application to try to overcome any such failure.

properties should not exceed certain specified limits would adequately protect against adverse effects. LCC's case on the impact of the monitoring works was (to no-one's great surprise) roundly rejected.

11. In respect of RW, the Inspector reached similar conclusions to those she had reached in respect of PNR in respect of landscape/visual impacts and noise impacts (issues which had been pursued at the inquiry by a local opposition group rather than LCC). However, she concluded that the route intended to serve the exploration works development site was unsuitable for its intended purpose and that satisfactory mitigation measures had not been put forward. There would be a serious and very significant adverse impact on the safety of people using the public highway which would not be eliminated or reduced to an acceptable level. The Inspector thus recommended to the Secretary of State that the appeal be dismissed.

12. A battery of other issues were explored at the inquiry. On the plus side of the equation the Inspector concluded that there was a need for shale gas exploration which commanded great weight in the planning balance. On the negative side of matters, none of the issues (not already referred to above) raised by way of objection to the proposals proved in any way decisive in the Inspector's reasoning. For example, Friends of Earth had appeared at the inquiry and had raised issues in respect of the treatment of flowback fluid, public health concerns and the compatibility of the proposals with the Government's climate change obligations. In respect of these matters, the Inspector concluded variously as follows. She found that the treatment of flowback fluid was a matter adequately dealt with by regulatory control apart from the planning system and that, in any event, it did not give rise to material adverse impacts whether in terms of the treatment proposed or the capacity of treatment facilities. Likewise, the Inspector gave public health and public concern fairly short shrift on the basis that it could be assumed that the regulatory regime would operate effectively to control potential pollutant emissions. As for climate change, the Inspector concluded that the projects would be consistent with the Government's policy aim to support the transition to a low carbon future in a changing climate. As a matter of policy, shale gas was to be seen as compatible with the aim of reducing greenhouse gas emissions by

assisting in the transition process over the longer term to a low carbon economy. The general question of the relationship of the exploitation of shale gas to the country's climate change obligations was a matter for future national policy, not for a planning inquiry.

13. Fears raised by local opposition in respect of the impact of the proposals on the farming and tourist industry in the Fylde were found to have no real basis. But, equally and oppositely, wider economic benefits that might flow from large scale commercial production of shale gas at some point in the future (as enthusiastically espoused by some supporters of the proposals) could only be given little weight in the light of the fact that exploration activity should be considered separately from production activity.

14. To complete the overall picture, I should add that Cuadrilla made an application for costs against LCC in respect of the PNR exploration and monitoring works appeal. Fortunately for the public purse of the county, the Inspector recommended that no award be made in respect of the exploration works appeal but only in respect of the monitoring works appeal (which had occupied very much less of the appeal process).

15. The Inspector reported on 4th July 2016. The Secretary of State issued his decision letter some three months later on 6th October 2016. The Secretary of State agreed with the Inspector's conclusions in all respects. He also accepted the recommendations she had made except for the RW exploration works. In what appeared to many as an unusual turn of events, the Secretary of State noted that the conclusions reached in respect of highway matters at RW (which he accepted) nevertheless largely rested on the failure of Cuadrilla to provide adequate evidence that they had properly considered and addressed the safety issues and to demonstrate that the mitigation they proposed was workable in practice. He stated that it might be that Cuadrilla were able to demonstrate that the safety concerns could be satisfactorily mitigated. The Secretary of State therefore wished to give Cuadrilla and other parties the opportunity to provide additional evidence on this point. As such, the Secretary of State proposed to re-open the inquiry to allow Caudrilla and other parties to put forward any further evidence on highway safety

and for parties to respond to any such evidence. Subject to being satisfied that the highway safety issues could be satisfactorily addressed, the Secretary of State was minded to grant permission for the appeal.

16. Turning to events after the decision letter, at PNR the development has proceeded and is well under way notwithstanding an enormous volume of sustained protest at the site which has had a great deal of press and media coverage. All this has been against the backdrop of a legal challenge brought by a local action group (who had appeared at the inquiry) and a disgruntled local opponent of the scheme (who spoke at the inquiry). I turn next to say a few words about this. LCC have not participated in the proceedings so my knowledge of them is derived from their reporting. In *Preston New Road Action Group v Secretary of State for Communities and Local Government*[2] the two separate claimants raised between themselves several different points. A number of these related to the interpretation of local planning policy and another concerned an issue of procedural fairness. I need not mention these aspects of the decision further as they are peculiarly specific to the circumstances of the case rather than raising issues with wider implications.

17. Of more importance generally in relation to planning policy was the interpretation which the Planning Court gave to paragraph 109 of the National Planning Policy Framework ("the NPPF") which provides that the planning system should contribute to and enhance the natural and local environment by, inter alia, *"protecting and enhancing valued landscapes"*. Somewhat against (certainly my) expectation, the Inspector and the Secretary of State had found that the PNR site (as well as the RW site) formed part of a valued landscape but that there was no conflict with paragraph 109 of the NPPF. In the court proceedings it was argued that the Inspector and the Secretary of State had, in finding that there was no conflict with the NPPF, interpreted paragraph 109 as including the additional words "in the long term". The contention was that the correct interpretation of paragraph 109 of the NPPF was that valued landscapes were to be protected from harmful development even if it was temporary, as was the appeal scheme. The

[2] [2017] EWHC 808 (Admin).

judge rejected that submission. He found that the phrase *"protecting and enhancing valued landscapes"* was to be read and understood as a high-order strategic objective of the planning system as a whole, to be articulated in more detailed, specific policies. Paragraph 109 was not to be interpreted as providing that any harm, including that which was temporary, was a breach of this policy. On the contrary, the policy should be read as contemplating that valued landscapes could be protected and enhanced by temporary, short-term and reversible development which might, for example, leave the landscape restored and unharmed at the end of the development process.

18. The challenge also raised an issue in respect of the adequacy of the environmental statement, although this brought up a matter which no one had raised at the inquiry. It was argued that the environmental statement had been defective as it did not provide a comprehensive assessment of the cumulative impacts arising from: (i) the impact of greenhouse gas emissions during the extended flow testing period; and (ii) the potential for future continued use for gas extraction after the exploration phase if the site were to go into long term production. This ground of challenge was also rejected. The judge held that there were no further impacts which had to be assessed arising from the suggestion that there might be some continuation of the use of the site for gas extraction after the completion of the development for which permission was sought. The application was for permission for exploration and appraisal of the potential gas resource for a period of six years. It was therefore strictly limited in time and solely for the purpose of exploration of the potential gas resource. Any further gas extraction beyond that would have to be the subject of a new planning application and a new environmental statement would have to be prepared describing the likely significant effects of that further application. Thus, there were no further effects to be evaluated in the present environmental statement. Moreover, it was a perfectly sensible assumption that any gas provided to the grid during the extended flow phase would simply replace gas that would otherwise be consumed by residential and industrial users supplied by the grid. There was no evidence that there would actually be any increase in gas usage and/or greenhouse gas emissions. Accordingly, there was no further effect of the kind suggested arising from the exploration phase that required inclusion within the environmental statement.

19. The final ground which is worthy of mention here is the contention that it was irrational for the appeal to have been allowed on the basis that, applying the precautionary principle, it could not reasonably have been concluded that public health and associated impacts would be reduced to an acceptable level and effectively controlled by the regulatory regime. This aspect of the challenge received the most robust response with the judge concluding that it did not even reach the threshold of being arguable. It was a perfectly conventional approach for a planning decision-maker to rely on the assumption that controls operated by other regulatory regimes would operate effectively to safeguard human health and control the environmental effects of the proposal.

20. There has subsequently been an appeal to the Court of Appeal, which was argued at the end of August. At the time of writing, no judgment is yet available.

21. In respect of the RW case, an application was made to the court by a disaffected local resident on the basis that the Secretary of State's decision to re-open the inquiry, rather than to dismiss the appeal as the Inspector had recommended, was, irrational, conspicuously unfair and biased. Permission to proceed with the claim was, however, refused. I am not aware of the matter having been further pursued but I suspect that many in the Roseacre area will continue to regard the further opportunity generously extended to Cuadrilla to overcome their difficulties as a step too far by the Government along the (well-documented) path of encouragement it has set out for fracking. The re-opened inquiry is due to start in April 2018.

22. I conclude by making some personal observations in relation to regulation of fracking by the planning system. To begin with I touch on three matters of process. First, it seems to me that a prime lesson of the Cuadrilla schemes is that decision-making under the present regime is likely to be slow to produce a final outcome. The PNR consent arrived only after a period exceeding 2 years from the formal entry of the applications into the system. The RW application is yet to be concluded after a period (measured from the same start date) exceeding 3 years.

23. Secondly, it also seems to me, as the PNR experience bears out, that litigation is very likely to attend consents if and when they arrive and that, in consequence, extensive periods of uncertainty while legal proceedings are concluded may well be the norm as the fledgling industry emerges.

24. Thirdly, so far as concerns the public inquiry, while others may take a different view, mine is that it was a worthwhile and successful exercise. It allowed rigorous scrutiny not just of LCC's decision-making but also enabled a number of Cuadrilla's more ambitious claims to be robustly challenged (and, in a number of cases, disproved). I also think (notwithstanding the procedural unfairness challenge raised in the PNR action) that, overall, the inquiry gave a fair hearing to all sides of the argument and was an effective vehicle for public participation.

25. Finally, I deal with a number of more technical points which I consider will shape future decision-making on fracking in the planning sphere following the Cuadrilla cases.

26. The first relates to the issue of **need**. The Government's policy is very clearly that a need exists for shale gas. For example, the Planning Practice Guidance ("the PPG") states unambiguously that *"as an emerging form of energy supply, there is a pressing need to establish – through exploratory drilling – whether or not there are sufficient recoverable quantities of unconventional hydrocarbons such as shale gas … present to facilitate economically viable full scale production."*[3] Equally the Written Ministerial Statement "Shale Gas and Oil Policy" of 16th September 2015 states that *"there is a national need to explore and develop our shale gas and oil resources"* although this is, of course, to be done in *"a safe, and sustainable and timely way"*. More generally, paragraph 144 of the NPPF provides that *"great weight"* should be given to the benefits of mineral extraction, including to the economy. That was (as above) the weighting applied to the case for the exploration activity by both the Inspector and the Secretary of State in the Cuadrilla decisions and I think the same view will now be the view taken by any future decision-maker.

[3] Paragraph: 091 Reference ID: 27-091-20140306. The minerals section of the PPG has a sub-section devoted specifically to *"planning for hydrocarbon extraction"*.

27. The second point is the principle of **non-duplication**. A mineral planning authority is generally entitled to leave consideration of those issues which are the concern of other regulators to those other regulators on the assumption that the latter will do their jobs properly. The matter is put this way in the PPG: *"there exist a number of issues which are covered by other regulatory regimes and mineral planning authorities should assume that these regimes will operate effectively. Whilst these issues may be put before mineral planning authorities, they should not need to carry out their own assessment as they can rely on the assessment of other regulatory bodies. However, before granting planning permission they will need to be satisfied that these issues can or will be adequately addressed by taking the advice from the relevant regulatory body"*.[4] Such issues include, for example: the Oil and Gas Authority in relation to induced seismicity; the Environment Agency in relation to the protection of water resources, control of chemicals used in fracking, arrangements for waste and flow-back fluid and regulation of emissions to air; and the Health and Safety Executive in relation to well design and integrity. The observance of the non-duplication principle, which is long established and entirely conventional in law, was demonstrated in spades in the Cuadrilla cases in the both Inspector's report and the Secretary of State's decision letter. It also formed a significant plank in the Planning Court's decision in the PNR legal challenge.

28. The third point, following closely on from the first, relates to what are likely to be **typical determinative issues** in a planning application for shale gas fracking. Given that the focus of the planning system is on whether the development is an acceptable use of the land, and the impacts of those uses, rather than control processes, emissions, health and safety issues or the like where these are subject to approval under other regimes, typical issues which are likely to be determinative are those which might arise in any planning application. Thus, issues such as noise, landscape/visual considerations, ecology, heritage/archaeology and traffic may be to the fore.

[4] Paragraph: 112 Reference ID: 27-112-20140306.

29. The fourth point relates to the **separate consideration of phases of activity.** Paragraph 147 of the NPPF provides that mineral planning authorities should *"when planning for on-shore oil and gas development, including unconventional hydrocarbons, clearly distinguish between the three phases of development (exploration, appraisal and production)"*. The PPG carries this further. It poses the question *"should mineral planning authorities take account of the environmental effects of the production phase of hydrocarbon extraction at the exploration phase?"*[5] It then answers the question in the negative as follows: *"individual applications for the exploratory phase should be considered on their own merits. They should not take account of hypothetical future activities for which consent has not yet been sought, since the further appraisal and production phases will be the subject of separate planning applications and assessments."*[6] This approach was one which was closely observed in the Cuadrilla cases, not least in discounting the economic and other benefits which production might bring, notwithstanding the obvious point that production will never occur unless exploration takes place first. It seems to that to do otherwise would be double-counting because exploration already has the augmented weight flowing from a policy enshrined need. The Planning Court's judgment also specifically endorsed the approach of separate consideration being given to the different phases of activity in rejecting the challenge to the environmental statement, concluding that what the PPG had to say on this matter was consistent with relevant legal principles and the requirements of environmental impact assessment.

Kings Chambers
36 Young Street Alan
Evans
Manchester M3 3FT October
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[5] Paragraph: 120 Reference ID: 27-120-20140306.
[6] Ibid.