SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

5 November 2018

SUMMARY OF JUDGMENT

Mr Justice Holgate concluded that there was no need for a Strategic Environmental Assessment (SEA) of the 2018 WMS and he dismissed our application for permission to judicial review the WMS.

The Judge's reasons for reaching that conclusion were essentially as follows: he found that the reference in the 2018 Written Ministerial Statement (WMS) to an expectation that Mineral Planning Authorities 'recognise' the fact that Parliament has defined fracking in legislation (section 4B Petroleum Act 1998) was no more than that.

He made the point that once MPAs had noted the existence of that definition, they were perfectly entitled to apply the wider definition contained in paragraph 129 of Planning Practice Guidance - provided of course that they explain their reasons for so doing (as the Joint Authorities in North Yorks have done).

That being so, it seems that the North Yorks Minerals and Waste Joint Plan's adoption of the PPG definition ought to be safe from challenge by UKOOG (though the industry might still try and mount such a challenge) and that the National Park/Area of Outstanding Natural Beauty in North Yorks will be protected.

Hopefully, other MPAs will also take heart from the judgment and 'recognise', but not adopt, the statutory definition.

Marc Willers QC

Garden Court Chambers

JR – Judgement of Holgate J 5th November 2010 – from solicitor's contemporaneous notes

"The Claimant seeks to challenge the joint decision to issue a WMS…The WMS is concerned with shale gas resources. I adjourned the applications. The joint planning authorities have produced a draft MWJP which I will refer to as the "draft plan". It has been submitted for examination under the PCPA 2004. The Claimant has actively participated in the examination. He is in part concerned with impact of the statutory definition on the adoption of the plan, as regards the definition of "hydraulic fracturing", or "fracking". The draft plan was published in November 2017, including policies M16, M17 and M18. Amendments were submitted in July 2017. An explanatory memorandum contains a number of definitions…The explanatory memo also goes on to set out the reasons why the authorities propose to adopt a definition in the draft plan. For example, references are made to the definition of "associated

hydraulic fracturing", contained in section 4B of the PA as inserted by the IA 2015. The draft plan explains why it is considered by the authorities that that more limited definition is inappropriate for policies to be applied in authorities' area. That is giving rise to objection and is being considered by the inspector. The inspector has issued a report upholding the approach taken by the authorities. Shortly after that that Defendants published the WMS.

The proposed challenge relates to one passage only of the WMS. It is accepted by Mr Willers that in other respects the document essentially repeats pre-existing govt policy…No objection is taken by the Claimant to the cross-reference to the PPGM. The objection is to cross-referencing the 1998 Act, essentially because that definition is narrower in ambit than the definition that was proposed to be adopted by the joint planning authorities, in particular, there is no volumetric threshold.

Mr Willers accepts that the reference in the WMS to the statutory definition is not objectionable because it is referring to something which is irrelevant as a planning consideration. Before coming to the three grounds of challenge it is useful to dwell on the effect of the WMS.

Section 19 of the 2004 Act states that when development plan documents are prepared, planning authorities must have regard to national policy and guidance by the Secretary of State. It is well-established that national policy is a matter to which planning authorities are directed to have regard, but not mandatory in the sense that the contents must be adhered to in the formulation of local policies. National policies will not mandate planning authorities to have reference to any particular definition, in particular that contained in 1998 Act. Because authorities are not bound (for example see the West Berkshire case), it is legally permissible to justify taking a different approach, for example for reasons authorities consider applicable in their administrative area. If they take that stance, the opinions they have adhered to can be scrutinised by the planning inspector in examination. I do not read the WMS as mandating the plan-making authorities in North Yorkshire to apply for example the definition of associated hydraulic fracturing in the 1998 Act, or the definition in the PPG. All the document does is say is that those are matters which MPA are expected to have regard.

Nonetheless Mr Willers states that there are arguable grounds of challenge, because of the SEA directive. In his helpful submissions, he summarised by taking the court to decisions of Supreme Court in Buckinghamshire CC and in particular to paras 35 to 38 of Lord Carnwath's judgment and 122 to 126 of Lord Sumption's. He accepts that those judgments neatly encapsulate the legal position on when the SEA directive is engaged. Therefore it is unnecessary in this judgment to delve further into the case law.

In para 36 Lord Carnwath said: "…". The same approach was expressed by Lord Sumption…

As he accepted in his submissions, the litmus test is whether the policy statement sets the framework for development consents. In my judgment, the policy statement in question simply refers to two definitions of fracking-type development which should be considered by MPA in drawing up development plans without requiring

compliance with those definitions. Planning authorities are entitled to disagree with the guidance by Central Government. The question of which definition should apply is a matter to be considered on the merits. That being the position, I cannot see at all that it is arguable that the sentence to which it is objected engages the SEA directive. On that basis, ground 1 is unarguable.

Ground 2 as originally presented is based on Art 6 of the SEA directive. It is accepted that if ground 1 is unarguable then ground 2 also unarguable. As pleaded, the Claimant also contended that the common law around consultation also applied. But faced with the statement of Dove J in Richborough, Mr Willers did not pursue the point. I have no hesitation in concluding that there is no arguable basis in common law for concluding that there is an obligation to consult. There was no legitimate expectation created…

That leaves ground 3. As I understand it, the irrationality challenge really depends on the court being willing to interpret the WMS as if encouraged by MPA to adopt both definitions referred to. The complaint is that there is an internal inconsistency…Ground 3 is unarguable.

There is no basis for granting the application for a stay because permission has not been granted. However, I do not consider that the threshold of a realistic prospect of success would have been reached. Even if it had, I am satisfied that…the Claimant has not demonstrated that there is sufficient basis to outweigh the public interest. For all those reasons, permission refused and application for stay refused."