SHALE GAS

If the commercial exploitation of shale gas takes off in the UK, given the vast areas of land likely to be affected, property processionals will be engaged at every level. ***Jonathan Small QC*** *considers the issues.*

April 2013

On 13th December 2012, Ed Davey, the Secretary of State for Energy and Climate Change, announced that he would reconsider applications for shale gas exploration. This followed the suspension of fracking in the wake of earthquakes felt in the Blackpool area on 1st April and 27th May 2011 with respective magnitudes of 2.3 and 1.5. Now the Department for Energy and Climate Change (DECC) has lifted its suspension, while introducing further regulatory requirements. And so the industry is gearing up for a recommencement of exploration works. While commercial production remains some way off, the company behind the Blackpool explorations has cautiously suggested that "a low rate" of shale gas could be flowing through domestic pipes within 3 years.

What is shale gas?

Shale gas is a predominantly methane, found in shale rock. Typically commercial shale is about 100m in depth, lying beneath the surface of the land and spreading out horizontally over hundreds of square kilometres. The relevant part of the shale is owned by the owners of the corresponding part of the surface and so a large number of landowners can be expected to be affected by mining operations in a given area.

The gas is mined by boring a well down vertically until it hits the shale whereupon it will be deviated horizontally. Then, by virtue of a technique known as hydraulic fracturing or 'fracking', water, sand and other materials are pumped at high pressure down the well and into the rock (from perforations along the well) to create fractures to allow the gas to flow out of the shale and into the well.

Who owns shale gas?

Shale gas counts as "petroleum" within the meaning of the Petroleum Act 1998 and as such is owned by the Crown. By section 2(1) of that Act, the Crown has the exclusive right of searching for and getting petroleum in its natural condition within Great Britain or beneath UK territorial waters. The DECC issues licences to companies for exploration and for mining.

However, the legislation only abrogates the petroleum to the Crown; it does not abrogate the surrounding strata. Since shale gas is released by the fracking of the strata it is obvious that the exploration companies must have a sufficient property right in the strata to carry out this operation as well as rights of access.

In the straightforward case the gas exploration company will acquire the freehold or leasehold in land with no access problems and with no relevant restrictions, limitations or reservations restricting the ability to mine for gas. Certainly as far as vertical boring operations are concerned, this will often be the case: given the large areas under consideration, companies are likely to be able to entice at least one suitable landowner to part with the necessary land or rights.

Where the company owns neither the land nor the access rights for vertical or horizontal drilling, things become more complicated. In *Bocardo* the Supreme Court confirmed that a right granted by DECC to commence exploration works is not a right, as against any landowner, to go on to property to carry out those works. Section 9(2) of the Petroleum Act 1998 specifically provides that the Secretary of State does not have the right to confer on any person "*any right which he does not enjoy … to enter on or interfere with land*".

Section 7 of the 1998 Act applies for Mines (Working Facilities and Support) Act 1966 to oil and gas exploration, which enables compulsory acquisition of ancillary rights by the High Court. However this cannot be achieved in all cases and the court must, among other things, be satisfied that it is not reasonably practical to obtain the necessary rights by private arrangement. Accordingly it is necessary to consider private limitations to the right of exploration and drilling before any rights of compulsory acquisition.

"Mines and minerals"

In the less straightforward case the company will acquire land where relevant rights have been reserved to a former vendor or to the landlord. Transfers of land and leases of land will sometimes contain reservations in favour of the vendor or the lessor to "mines or minerals". Strictly speaking this does not get anyone any further since, as we have seen, the gas is owned by the Crown. However such a reservation may be construed more generally and comprise a restrictive covenant on mining or reserve to the vendor or the landlord the exclusive right of access for the purpose of exploiting mines and minerals.

In a long series of cases, the courts have proposed a three stage test for determining what materials are encompassed in the phrase "mines and minerals": (1) how commercial men and landowners at the time would have understood the phrase; (2) whether the substance in question is exceptional in use, value and character and not just the ordinary soil of the district; and (3) whether there are any express powers of working or limitations on powers of working (in the agreement) which shed light on whether the substance in question was intended to be included within "mines and minerals". In the case of shale gas the second test (exceptional substance) is likely to be satisfied. However, whether or not anyone would have understood "minerals" to refer to shale gas at the relevant time will all depend upon the context.

There are many, potentially large, sites for boring from Sandbanks to Blackpool and vendors or landlords of agricultural and other land in likely areas may want to reserve to themselves everything to do with gas exploitation. In this case the phrase "mines and minerals" should be avoided. Instead agreements should refer specifically to the sort of materials and operations in mind.

Access

If the exploration site does not give directly onto a public highway then it will be necessary to obtain access over a third party's land. Express rights of way which are limited to particular purposes which do not include gas exploration will need to be renegotiated so as to encompass these new requirements.

Even where rights of way are granted and not expressed to be with any limitation the courts will construe them in the context. As far as rights of way by implication or long-user are concerned, the courts have held that if there is (a) a radical change in the use of the land which results in (b) a substantial increase in the burden on the right of way, then the right of way cannot be used for this new purpose. Thus, the right of way to a field which then turns into a major vertical boring site may not survive the transition. However, where the well-boring is more contained or is surrounded by other buildings there may be less of a problem.

Compulsory purchase

Section 7 of the Petroleum Act 1998 applies elements of the Mines (Working Facilities and Support) Act 1966 to enable persons holding a licence to carry out fracking operations to acquire "ancillary rights". These include *"a right to enter upon land and to sink boreholes in the land for the purpose of searching for and getting petroleum"*.

As suggested above, in many cases the parties are likely to be able to reach agreements to acquire land or ancillary rights outside the compulsory purchase regime. In this respect, the acquisition of rights might turn out to mirror the practice in the telecoms industry where, generally speaking, operators have not had to have recourse to the Telecommunications Code to acquire necessary sites.

However there may be occasions where the acquisition of a particular site is crucial and the landlowner unwilling to deal. In this case applications are first made to the Minister to ascertain that there is a prima facie case. If so the matter is referred to the High Court, rather than the Lands Tribunal. The

court takes into account various things including whether the granting of such rights is in "the national interest" and its effects upon "the amenities of the locality" and the occupation of the land. Where the company is seeking permission to bore horizontally into the shale, hundreds of metres beneath the surface, it is unlikely that this will pose much difficulty. Vertical boring operations and access with heavy machinery along private ways will give rise to more nuanced considerations.

Following *Bocardo*, the award of compensation for such rights (under section 8 of the 1966 Act) must follow the *Pointe Gourde* principles i.e. compensation must be assessed on the basis of value to the owner rather than the value to the purchaser: one ignores increases in value which are entirely due to the scheme underlying the acquisition. Accordingly where boring is taking place well beneath the surface the payments to the landowner are likely to be small (assessed at £82.50 in *Bocardo*). Road access and vertical boring rights will give rise to larger awards having regard to the potential for real disturbance – but still not entitling the landowner to any 'cut of the action'.

Contamination and other nuisances

By its very nature hydraulic fracturing for shale gas is not a contained operation and so, unsurprisingly, is a highly controversial activity in some quarters. Various concerns have led to temporary moratoria at various times in the US, on the Continent as well as in the UK. Not all the risks are known or accepted but concerns include the uncontrolled release of methane gas, the quality of the fracturing waters which return to the surface and now, seismic activity.

Exploration companies will be well aware of their potential liabilities under both Part 2A of the Environmental Protection Act 1990 and in tort. However, certain landowners need to watch out too. Whereas it is practically inconceivable that the Environment Agency would mount remedial action against a home owner in Blackpool who has a pipe running hundreds of meters under his or her house, significant landlords hosting major operational activity might find themselves liable as having "knowingly permitted" relevant activity. Similarly such landlords might find themselves liable to other owners and occupiers in private nuisance. In either case much will depend upon the terms of any given lease. Potentially vulnerable landowners should take advice not only on the substantive terms of their agreements but also to ensure that appropriate insurance-backed indemnities are in place.