SQUIRE SANDERS

PROPERTY RIGHTS AND FRACKING

Fracking and Property Rights: Could companies involved in the extraction of shale gas be held to ransom by landowners or do they just need to play by the rules?

Property rights are emerging as the hottest topic in the shale gas debate. In the UK, shale gas belongs to the Crown and a licence, under the Petroleum Act 1988, is needed to extract it. However, the sub-surface strata surrounding shale gas belongs to the owner of the surface land above the area being fracked and extraction companies will need to obtain rights to drill under the land in order to extract it. Fracking for shale gas is performed in both vertical and horizontal wells and horizontal wells can be over a mile long. Therefore, a single fracking operation may require rights to drill under multiple landholdings.

Licences permitting the extraction of shale gas do not grant the ancillary rights necessary to facilitate that extraction. Instead, extraction companies must either reach agreement with the affected landowners or make an application to the Secretary of State for compulsory acquisition of the rights. If satisfied that a prima facie case for acquisition of the rights has been made out, the Secretary of State will then refer the matter to the high court under a procedure set out in the Mines (Facilities and Support) Act 1966.

Some recent press coverage on fracking and property rights has suggested that those groups opposed to fracking could put a halt to the drilling process by buying up strips of land in a fracking area and then refusing to grant the necessary property rights underneath that land. The idea that extraction companies could be held to ransom in this manner is linked to the principle that horizontal drilling without consent amounts to an actionable trespass, as established in the leading case of *Star Energy v Bocardo* [2010]. The Bocardo case involved the drilling of diagonal wells for the extraction of petroleum without the express consent of the landowner or the compulsory acquisition of the necessary rights. The affected landowner, Mohammned al Fayed, applied for an injunction to stop the drilling, but the court refused to grant an injunction and damages were awarded instead. However, the principle that horizontal drilling, without land owner consent or compulsory acquisition of property rights, amounts to an actionable trespass opens the way for landowners to apply for injunctions to stop drilling in the future. It will be up to the courts to decide whether the circumstances of a particular case merit the grant of an injunction.

Although each case will turn on its own merits, it seems likely that where an extraction company demonstrates that every effort had been made to negotiate with landowners to secure the necessary rights, a court would be less likely to grant an injunction in favour of the land owner. Equally, where it was apparent that so called "ransom strips" had been acquired by those groups opposed to fracking in a deliberate attempt to paralyse drilling, a court may be less likely to grant an injunction in their favour. However, the fact remains that when an extraction company has tried and failed to acquire property rights through private negotiations the procedure for compulsory acquisition set out in the Mines (Facilities and Support) Act 1966 should be the automatic fall-back position. Historically, however, this has not been the case.

The Mines (Facilities and Support) Act has been on the statute books for over forty five years, but, according to the Department of Energy and Climate Change, only one court order has ever been made under this procedure in relation to oil and gas. The reasons for this may be twofold. Firstly, those in the industry may generally have been able to reach agreement with landowners and secondly, on failing to reach such agreement, they may have taken the view, (as was the case in Bocardo), that landowners affected by horizontal drilling beneath their properties would be unaware that the drilling was taking place. Given the volatile and divisive nature of the shale gas debate and the large areas of land which are likely to be affected, extraction companies can no longer afford to ignore the statutory procedure for the acquisition of property rights.

When making an application to the Secretary of State, the extraction company will need to make out a prima facie case by establishing that it has not been possible to obtain the necessary rights by private negotiation for any of the following reasons:

1. The landowners are numerous or have conflicting interests; or
2. The landowners or persons with the power to grant the rights cannot be found; or
3. The landowners from whom the rights must be obtained do not have the necessary powers of disposition; or
4. The landowners have unreasonably refused to grant the rights on terms which are reasonable.

Before the Secretary of State refers a matter to the high court, he will contact the affected landowners in order to establish that attempts to negotiate with them for the acquisition of the necessary rights have been made. Although the acquisition of property rights in such circumstances falls outside the mainstream rules on compulsory purchase, extraction companies could learn a great deal from those who have experience of promoting compulsory purchase orders. The need to commence negotiations early, keep the affected landowners informed as to the progress of the project generally and to continue negotiations alongside the compulsory acquisition process are just some examples of lessons to be learned.

There has been some suggestion in the press that the fear of being held to ransom by groups acquiring strips of land around drilling sites has led extraction companies to press the government for primary legislation which would exempt them from obtaining landowner consent to drill under land. However, given the recent backlash against the Government's consultation on removing the requirement for extraction companies to notify individual landowners when a planning application is made, the industry has been at pains to reaffirm its commitment to negotiating with landowners to obtain the necessary rights. As the law currently stands, drilling without landowner consent will amount to trespass and open extraction companies to the risk of landowners obtaining injunctions to halt the drilling process. Rather than seeking to abolish the need to obtain landowner consent, a better course of action may be to promote legislative changes to ensure that ancillary property rights were acquired at an early stage in the fracking process, perhaps as a component of the licence which authorises the extraction of the shale gas.

Companies who have failed to secure the necessary property rights by private negotiation and do not go on to acquire them under the statutory procedure leave themselves open to claims of trespass and the risk of injunctive relief being granted. Therefore, even if extraction companies accept that the deliberate acquisition of ransom strips by those opposed to fracking does not pose as great a threat to their operations as is currently being suggested, they cannot afford to ignore the acquisition of ancillary property rights and the statutory procedures designed to facilitate that acquisition.

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