Neutral Citation Number: [2022] EWHC 75 (Admin)

Case No: CO/1624/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 January 2022

Before:

MRS JUSTICE COCKERILL

- -

Between :

THE QUEEN **Claimants**
On the application of
(1) JEREMY COX
(2) MIKAELA LOACH
(3) KAIRIN VAN SWEEDEN

- and -

(1) THE OIL AND GAS AUTHORITY **First Defendant**

(2) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY

Second Defendant

- -
- -

David Wolfe QC, Merrow Golden and Alex Shattock (instructed by **Leigh Day**) for the **Claimants)**
Kate Gallafent QC, Jane Collier and Rachel Jones (instructed by **Oil and Gas Authority Legal**) for the **First Defendant**
Richard Turner (instructed by **The Treasury Solicitor**) for the **Second Defendant**

Hearing dates: 8 and 9 December 2021

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii and The National Archives. The date and time for hand-down is deemed to be Tuesday 18 January 2022 at 10:30am.

Mrs. Justice Cockerill:

Introduction

1. The Oil and Gas Authority ("OGA") is a statutory company whose only shareholder is the Secretary of State. It regulates petroleum recovery and is responsible for licensing and approval decision-making. It administers an Oil and Gas Authority Strategy approved by Parliament. That strategy is statutorily required to be in place pursuant to Part IA of the Petroleum Act 1998 ("the Act").

2. On 16 December 2020 a revised Oil and Gas Authority Strategy ("the Strategy") was laid before Parliament. It was produced pursuant to Part IA of the Act as a revision to *"The Maximising Economic Recovery Strategy for the UK"* of 18 March 2016. It came into force on 11 February 2021.

3. By this judicial review, launched on 5 May 2021, that Strategy is challenged by three individuals who are concerned about the climate crisis and are active environmental campaigners.

4. Mr Cox is 65 years old and now retired, having previously worked in the downstream oil industry and then as a project management consultant. Ms Loach is 23 years old and a medical student at the University of Edinburgh. Ms van Sweeden is 54 years old, a member of the Scottish National Party, and founder of a green thinktank.

5. In their application for judicial review that challenge was put on two bases, namely:

   i) Ground 1: There was an error of law and/or frustration of statutory purpose in that the Strategy proceeds on the basis of an incorrect definition of the statutory principal objective set out in section 9A of the Petroleum Act 1998 and, thereby, frustrates the statutory purpose of Section 9A. Specifically, it is contended that a statutory phrase, *"maximising the economic recovery of UK petroleum"* in section 9A of the Act 1998 must be re-defined because the inclusion, in the Strategy's definition of "economically recoverable", of this wording: "*resources which could be recovered at an expected (pre-tax) market value greater than the expected (pre-tax) resource cost of their extraction*" is erroneous. In particular this pre-tax approach is said to have been erroneous;

   ii) Ground 2: The adoption of the Strategy, including the definition it contained of the term "economically recoverable" (and this same pre-tax approach) was irrational in light of the UK Government's action on climate change, which was the Second Defendant's duty under s.1 of the Climate Change Act 2008 (the "net zero" target).

6. The Claimants seek declarations to that effect.

7. The questions posed thus relate to the statutory objective of *"maximising the economic recovery of UK petroleum"*, which is known colloquially as "MER". I am, in essence, asked to resolve the dispute about its meaning.

8. Permission was granted by Thornton J on 23 July 2021 on the basis that the first of these issues was arguable. Although expressing scepticism about Ground 2, she

concluded that it was preferable for permission to be granted on that Ground also, given its links with Ground 1.

9. The judge also gave permission for the Claimants to rely on expert evidence in the form of reports by a Mr Boué and a Mr Muttitt, *"subject to their reports complying fully with the relevant requirements of the Civil Procedure Rules."* The judge considered that:

> "Evidence from the Claimants' experts, which seeks to explain the tax regime applicable to petroleum exploration and production activities will assist the Court in making an assessment in relation to statutory purpose; net zero and the irrationality challenge. This is a technical and complex field which a layperson, including the Judge, cannot fully understand without the benefit of expert evidence."

10. In a two-day substantive hearing before me the Claimants sought to extend the ambit of the argument somewhat. They also sought to argue that the OGA's method of assessing "economically recoverable" is unlawful because "*it does not distinguish between "UK" and "non-UK"-'based' "income (and profits)"* of petroleum companies operating in the UK Continental Shelf ("UKCS").

11. The Claimants served witness statements themselves. The Defendants served witness statements from Anthony Charles Moulds, Hedvig Ljungerud, Simon Toole, Helena Charlton and Ann Therese Farmer.

Background

12. The background to the dispute is in large measure not contentious.

13. The term MER has a long history. By the mid-1980s, the UK Government was already describing its policy in respect of the UK Continental Shelf ("UKCS") as one of "*maximum economic recovery of petroleum*".

14. By the early 1990s a pre-tax approach to MER had developed. Thus in 1993, an internal economic paper on maximum economic recovery was produced providing for economic assessment on a pre-tax basis, i.e. "*irrespective of the actual division of realised value between licensees and the Exchequer*".

15. That pre-tax approach to maximising economic recovery of UK petroleum was reflected in new published guidance produced in 1993/1994 by the then Department of Trade and Industry. The approach was repeated in 2001 Guidance, again published.

16. Meanwhile in 1998 came the Act, which did not at this stage contain section 9A.

17. In 2008, Parliament passed the Climate Change Act ("CCA"). Section 1, as enacted, provided for a target reduction in the UK's net carbon account of 80% lower than the 1990 baseline by the year 2050.

18. Section 1 of the CCA as now enacted provides for the "net zero" target by establishing a duty on the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline.

19. Section 15 of the CCA provides for a further duty on the Secretary of State:

> "Duty to have regard to need for UK domestic action on climate change
>
> (1) In exercising functions under this Part involving consideration of how to meet—
>
> (a)the target in section 1(1) (the target for 2050), or
>
> (b)the carbon budget for any period,
>
> the Secretary of State must have regard to the need for UK domestic action on climate change.
>
> (2) "UK domestic action on climate change" means reductions in UK emissions of targeted greenhouse gases or increases in UK removals of such gases (or both)."

20. In 2013, the then-Department of Energy and Climate Change published the Field Development Plans Guidance. Section 2.1 stated an *"overall aim to maximise the economic benefit to the UK of its oil and gas reserves*". Section 2.2. set out a pre-tax definition of "*economically recoverable*".

21. In June 2013, the then Secretary of State asked Sir Ian Wood to conduct an independent review of UKCS oil and gas recovery. This had the express purpose of taking *"a fresh look at the current arrangements for maximising economic recovery of the UK's offshore oil and gas resources"*. Sir Ian's final report, *"UKCS Maximising Recovery Review"* ("the Wood Review") was published on 24 February 2014.

22. The Wood Review *inter alia:*

    i) Recommended a new independent, "*greater resourced and more proactive*" regulator, i.e. the OGA, charged with "*exercising its functions with a view to securing the maximum amount of economically recoverable petroleum from UK waters*";

    ii) Called for a "tripartite" approach to MER between the regulator, industry, and Her Majesty's Treasury;

    iii) Recommended that "*operators focus on maximising economic recovery for the UK*" as well as individual commercial objectives, meaning that: "*license holders [should be] required to act in a manner best calculated to give rise to the maximum amount of petroleum from UK waters as a whole, not just that recoverable under their own licenses";*

    iv) Pointed to myriad significant benefits from MER UK;

> "To-date HM Treasury has received more than £310 billion in production taxes and the UK has benefited substantially from the employment, exports, and huge impact on balance of payments provided by these oil and gas resources, and the emergence of a

> world-class supply chain … The UK's oil and gas industry makes a substantial contribution to the UK's energy security, economy, and employment. It supports the employment of 450,000 people… and underpins the international export of related UK goods and services worth £7 billion... In addition to the economic importance, [MER UK] will help maintain security of supply as the UK transitions to a low-carbon future, with DECC's projections showing that in 2030 oil and gas will still be providing 70 per cent of the UK's primary energy requirements."

23. The Wood Review also yields a number of examples of the way in which the fiscal position is part of the picture which the Review is considering. The Claimants pointed in particular to:

    i) The identification of Fiscal Policy as a key issue behind the market trends highlighted in the Introduction;

    ii) The reiteration in the New Strategy section of the proposition that fiscal policy is key to company behaviour and decision-making.

    iii) The passage which says that:

    > "Core to the strategy is:
    >
    > The evolution of the present Regulator to an independent, stronger, more experienced body with broader disciplines and powers. It must have the capability to facilitate and influence greater collaboration between operators on exploration, field developments and infrastructure to provide more revenue for the UK and better returns for the licensee. (…)"

24. The Government accepted all of the Wood Review's recommendations in July 2014. Its Response explained that, consistently with the Wood Review:

> "The overarching principle of MER UK is to maximise economic recovery for the UKCS as a whole and not just the particular field for which the operator has a licence."

25. In November 2014 the Government made a Call for Views on how to respond to the Wood Review. In that document it defined MER UK as "*maximising the cost-effective recovery of oil and gas from the UKCS*". As with the Review, the benefits flowing from MER UK were said to include tax revenues, security of supply and jobs.

26. Again, the Claimants highlighted references in this document to tax revenues and tax benefits. For example, they pointed to the following passage emphasising that tax flows are part of the assessment of MER:

> "MER UK may be defined as maximising the cost-effective recovery of oil and gas from the UKCS, in order to maximise long-term added value to the UK as a whole.

> All companies [This includes holders of petroleum licences, operators under petroleum licences, owners of upstream petroleum infrastructure and persons planning and carrying out the commissioning of upstream petroleum infrastructure] within the industry will be motivated and/or required to work individually and in collaboration with others in such a way as to maximise the overall ultimate economic recovery of oil and gas from their own and other companies' licence areas, and so that the companies receive a reasonable economic return on their investment.
>
> The benefits of MER UK will accrue through enhanced public and commercial value, tax revenues, enhanced security of supply of primary fuels and key chemical feedstocks, import substitution and the direct and indirect benefits of hosting a substantial and in some regards, world-leading oil and gas industry and its supply chain in the UK.
>
> In delivering MER UK, the OGA will work with the UK Government and the Devolved Administrations to contribute to maximising the spill over opportunities and benefits for the UK economy (for example in jobs, growth, skills, R&D and innovation, and exports) that flow from hosting a substantial and strongly rooted oil and gas industry across the UK. The aim of all partners, working together will be to sustain and further grow this key industrial sector and anchor it more firmly in the UK for the long term.
>
> This MER UK strategy guides all parties to work to optimise these benefits for the good of the UK as a whole."

The Amended Act and the first MER Strategy

27. With effect from 12 April 2015 via the Infrastructure Act 2015, Parliament amended the Act to add a new Part 1A *"Maximising Economic Recovery of UK Petroleum"* to the Act.

28. By section 1 of the Act: "*petroleum ... (a) includes any mineral oil or relative hydrocarbon and natural gas existing in its natural condition in strata; but (b) does not include coal or bituminous shales or other stratified deposits from which oil can be extracted by destructive distillation*."

29. Section 9A provides "*the principal objective and strategy*", which provides the principal objective of maximising the economic recovery of UK petroleum, and required the Secretary of State to produce a strategy for enabling that principal objective to be met.

30. It provides:

> "(1) In this Part the "principal objective" is the objective of maximising the economic recovery of UK petroleum, in particular through—
>
> (a) development, construction, deployment and use of equipment used in the petroleum industry (including upstream petroleum infrastructure), and
>
> (b) collaboration among the following persons—
>
> (i) holders of petroleum licences;
>
> (ii) operators under petroleum licences;
>
> (iii) owners of upstream petroleum infrastructure;
>
> (iv) persons planning and carrying out the commissioning of upstream petroleum infrastructure;
>
> (v) owners of relevant offshore installations.
>
> (2) The OGA must produce one or more strategies for enabling the principal objective to be met.
>
> (3) A strategy may relate to matters other than those mentioned in subsection (1)(a) and (b).
>
> (4) For provision about producing and revising a strategy, see sections 9F and 9G."

31. Section 9F of the Act specifies that, after the first strategy has been produced, the OGA can either produce a new strategy or revise the current strategy (s. 9F(2)); but the OGA must review each current strategy within four years of when it was issued or (if later) last reviewed (s. 9F(3) and (5)).

32. By section 9B of the Act, the OGA must act in accordance with its current strategy (or strategies):

> "The OGA must act in accordance with the current strategy or strategies when—
>
> (a) exercising functions under the other Parts of this Act (except Part 4),
>
> (b) exercising functions under Part 4,
>
> (c) exercising functions under Chapter 3 of Part 2 of the Energy Act 2011 (upstream petroleum infrastructure),
>
> (ca) exercising functions under Part 2 of the Energy Act 2016,

> (d) exercising any function or using any power under a petroleum licence, and
>
> (e) exercising any other function or using any power—
>
> (i) to provide advice or assistance to another person, or
>
> (ii) to acquire, use or supply information,
>
> for the purpose of enabling the principal objective to be met."

33. By section 9I : "*UK petroleum*" is "*petroleum which for the time being exists in its natural condition in strata beneath relevant UK waters*" and that "*relevant UK waters*" are the territorial sea adjacent to the UK sea areas designated under section 1(7) Continental Shelf Act 1964.

34. The Explanatory Notes to the Infrastructure Act 2015, which amended the Act, state at [245]:

> "The strategy [produced under s.9A(3)] will set out what is meant by maximising the economic recovery of UK petroleum. This will provide the flexibility to take account of how the principle should apply in different circumstances along with the changing needs of the UK Continental Shelf."

35. On 18 March 2016, the first MER UK Strategy *"The Maximising Economic Recovery Strategy for the UK"* came into force. It defined "economically recoverable" petroleum as:

> "Economically recoverable in relation to petroleum means those resources which could be recovered at an expected (pre-tax) market value greater than the expected (pre-tax) resource cost of their extraction, where costs include both capital and operating costs but exclude sunk costs and costs (such as interest charges) which do not reflect current use of resources. In bringing costs and revenues to a common point for comparative purposes a 10% real discount rate will be used."

36. This reflected the pre-tax approach to the assessment that had been followed in the earlier period.

The 2016 Act

37. With effect from 1 October 2016, the Energy Act 2016 ("the 2016 Act") came into force.

38. By section 2 of the 2016 Act, various functions under the Act were transferred from the Secretary of State to the OGA, including the duty to produce a strategy giving effect to the "principal objective" set out in section 9A of the Act.

39. Further section 8(1) of the 2016 Act sets out various matters to which the OGA must "have regard" when exercising its functions, "so far as relevant", e.g. :

> " "Security of supply
>
> the need for the United Kingdom to have a secure supply of energy
>
> Storage of carbon dioxide
>
> The development and use of facilities for the storage of carbon dioxide, and of anything else (including, in particular, pipelines) needed in connection with the development of such facilities, and how that may assist the Secretary of State to meet the target in section 1 of the Climate Change Act 2008."

The New Strategy

40. In 2020, the OGA consulted on a new Strategy to replace the 2016 Strategy. The key proposed amendments were changes relating to minimising emissions from recovery activities to assist the Second Defendant, the Secretary of State, in meeting the net zero target, consistently with MER.

41. The OGA stated in its consultation paper that it had considered the updated net zero target and that "*Maximising economic recovery of oil and gas does not need to be in conflict with the transition to net zero*"; the industry being well positioned to assist with e.g. the delivery of carbon capture and storage projects which are essential to tackling climate change. The "central obligation" in the draft Strategy was amended to provide that, in meeting the "principal objective", relevant persons must:

> "take appropriate steps to assist the Secretary of State in meeting the net zero target, including by reducing as far as reasonable in the circumstances greenhouse gas emissions from sources such as flaring and venting and power generation, and supporting carbon capture and storage projects".

42. On 11 February 2021, the Strategy came into force.

43. The Strategy set out (among other things) a "Central Obligation" and various "Supporting Obligations" and "Required Actions" intended to clarify how the Central Obligation is to be met, all of which are binding on "relevant persons". It provides that:

> "Relevant persons must, in the exercise of their relevant activities, take the steps necessary to:
>
> (i) secure that the maximum value of economically recoverable petroleum is recovered from the strata beneath relevant UK waters; and, in doing so,
>
> (ii) take appropriate steps to assist the Secretary of State in meeting the net zero target, including by reducing as far as reasonable in the circumstances greenhouse gas emissions from sources such as flaring and venting and power generation, and supporting carbon capture and storage projects."

44. It defines "economically recoverable" thus:

> "Economically recoverable" in relation to petroleum means those resources which could be recovered at an expected (pre-tax) market value greater than the expected (pre-tax) resource cost of their extraction, where costs include both capital and operating costs (including carbon costs) but exclude sunk costs and costs (such as interest charges) which do not reflect current use of resources. In bringing costs and revenues to a common point for comparative purposes a 10% real discount rate will be used. Where relevant, UK Government carbon appraisal values for all greenhouse gas emissions will be used combined with the associated real terms social discount rate."

45. That is the wording which is challenged in this judicial review.

The expert evidence

46. The Claimants, pursuant to their permission, relied on the statements of Mr Boué and Mr Muttitt. The Defendants urged me to pay this evidence little mind on the basis that it "*is not objective, is adversarial, and is not directed to the pleaded issues, focusing only on the UK's tax regime*."

47. I substantially accept the criticisms made of the evidence. As noted above, permission was expressly given by the Judge on the basis that permission was dependent upon the statements complying with the requirements of CPR Part 35.

48. The statements relied upon plainly did not so comply. In particular:

    i) Under CPR rule 35.10(3), an expert's report "*must state the substance of all material instructions, whether written or oral*". To similar effect the Guidance for the Instruction of Experts in Civil Claims (2014): "*The mandatory statement of the substance of all material instructions should not be incomplete … The imperative is transparency*." In this case Messrs Boué and Muttitt only provided a brief summary of their instructions. They do not summarise the email and telephone correspondence by which they were instructed. They do not set out the documents they received. They do not explain the core question: on what questions were they asked to opine, and on the basis of what factual assumptions or material. A request for disclosure of the substance of the expert instructions made to Leigh Day, the solicitors representing the Claimants, was strenuously resisted.

    ii) The statements fail to draw clear distinctions between facts and opinions, as required by the Guidance for the Instruction of Experts in Civil Claims (§57 35EG.14 CPR). They make no attempt to summarise and identify areas where there may be a range of opinions, as required by §3.2(6) PD35 CPR.

49. I was also not entirely persuaded that suitable expert discipline and topics had been defined in order to meet with the requirements of CPR 35.1 - or that the evidence of Messrs Boué and Muttitt was confined to topics on which they might be said to have a relevant expertise.

50. There was some suggestion in the skeletons that the Claimants took the view that Part 35 did not apply with full force to proceedings in the Administrative Court. That of course is not the case: *R (HK) v Secretary of State for the Home Department* [2016] EWHC 857 (Admin), where Garnham J (alluding to previous decisions by Sales J and Ouseley J) said, in response to just such a submission:

> "CPR 35 does apply to judicial reviews like the present. I see no possible grounds for disregarding it. …. The nature of JR challenges, and the need for them to be considered expeditiously, makes all the more important the consistent application of the discipline provided by the CPR. There is a real danger of injustice if the rules of court are disregarded. If expert evidence is to be adduced, it requires the leave of the court and it needs to be disclosed to the opposing side in sufficient time to make possible a considered response. If expert evidence is to be adduced, it is essential that the court controls the process to ensure the orderly management of the proceedings. … This Court will ordinarily only admit [expert] evidence adduced in accordance with CPR 35."

51. Nor was I attracted by the argument that because a similar approach had been taken in other proceedings that objectively rendered the summary of instructions in this case adequate.

52. The authors of the Administrative Court Guide 2021 make quite clear that the public interest involved in judicial review proceedings does not exempt participants or their legal advisers from compliance with the rules. They say this:

> "2.1.1 Judicial review proceedings are different from private law proceedings because the interests in play are typically not just those of the parties to the litigation. Depending on the context, the proceedings may affect third parties. It may also be necessary to consider the public interest.
>
> 2.1.2. However, this does not mean that the Court will overlook or tolerate breaches of directions made by the Court or of obligations imposed by the CPR or Practice Directions or this Guide. The appellate courts have identified an increasing concern about the need for appropriate procedural rigour in judicial review."

53. In the event this dispute is to some extent a side-show. Orally very little reference was made to these "expert" reports. The Claimants' own skeleton said that much of the detail of the expert reports did not matter. Doubtless this was in part because, aside from the points which I have already made, there was very little (if any) relevance of the so-called expert evidence to the issues before me. Much of the evidence of Messrs Boué and Muttitt was directed to the operation of the tax regime – which is not the subject of this challenge. There was a lot of focus on the decision to zero rate Petroleum Revenue Tax and on the reliefs available for decommissioning. To the extent the evidence was relied upon, it was relied upon in support of the secondary ground and would have made no difference to my conclusions.

54. However, the application to rely on expert evidence and the maintenance of reliance on that evidence right up to and at the hearing has undoubtedly increased the costs of all parties. This is highly undesirable and contrary to the overriding objective. Parties taking this course can expect to be visited with costs consequences.

Ground 1: error of law and/or frustration of statutory purpose

The parties' cases

55. The essence of the Claimants' challenge was set out thus in their skeleton argument:

> ", the Central Obligation [within the Strategy] not only does not set out the correct statutory language (namely the section 9A objective of "maximising the economic recovery of UK petroleum"), it also then explains its own definition of "economically recoverable" as follows ….: Accordingly, the OGA has directed itself in law to apply the statutory objective of "*maximising the economic recovery of UK petroleum*" on a pre-tax basis."

56. The Claimants argue that:

i) The meaning of a statutory provision is a question of law for the court;

ii) There cannot be more than one permissible interpretation of a statutory provision;

iii) The OGA cannot choose its own definition;

iv) *"Economic recovery of UK petroleum"* means (on any ordinary reading of the term) recovery of UK petroleum that is economic to the "*UK as a whole"* including when it comes to the public purse;

v) In a situation where oil companies were only ever making tax payments, it might not matter (when it came to deciding whether recovery was economic or not) that the effect of the tax payments was being ignored - because the tax would simply represent the sharing between the operator and the taxpayer of the income from the extraction. But it plainly matters where they are actually recipients, not payers. The Claimants say that there were negative tax flows overall in 2015-16 and 2016-17 of £2 million and £359 million respectively;

vi) The OGA's definition of economically recoverable proceeds on the basis of an error of law and has frustrated the statutory purpose behind section 9A of the Act.

57. The essence of the case is that, by ignoring the effect of government-backed financial support, the Strategy has stretched the definition of "*economically recoverable*" too wide, such that activities that are not truly "*economic*" for the UK are nonetheless still sought to be maximised through the Strategy. Or, as Ms Ljungerud summarised the Claimants' point: "*making the MER assessment pre-tax, with what they claim is a preferential tax treatment, means the OGA can approve activities that are not economic for the UK as a whole and therefore lose society value*".

58. The Defendants' approach was to contend that:

i) The OGA as an expert sectoral regulator is entitled to adopt a working definition of the phrase in question, subject only to public law principles of rationality and reasonableness;

ii) The Court's role is not to impose its own definition but to adjudicate on whether the definition adopted is reasonable and rational and in accordance with the statutory purpose;

iii) The Claimants' failure to posit their own definition which coheres with their contentions illustrates the falsity of their point;

iv) By contrast the Defendants' approach is entirely consistent with the wording of the statutory provisions, and also to the extent necessary, with Green Book methods.

Discussion

59. I will deal with this ground by reference to the agreed issues.

Role of the Court

60. The main issue is whether the OGA's definition of "*economically recoverable*" in its Strategy is consistent with the statutory term "*maximising the economic recovery of UK petroleum*" in Section 9A of the Act or whether it frustrates the statutory purpose. However, that question is logically preceded by the question which concerns the role of the Court.

61. Is it for the Court to determine what "*maximising the economic recovery of UK petroleum*", means, or is it for the OGA to determine how to assess "*economic recovery*", subject only to a *Wednesbury* test of unreasonableness?

62. On this issue I am not persuaded by the Claimants' case. I do not consider that the meaning of a provision such as the one in question here necessarily is one for the court.

63. Reliance was placed by the Claimants on *R (Kingston upon Hull City Council) v SSBEIS* [2016] EWHC 1064 (Admin); [2016] PTSR 967 at [54]-[59]. The Claimants noted that in that case Kerr J rejected the Secretary of State's argument that there could be more than one permissible interpretation of section 20 of the Local Government (Miscellaneous Provisions) Act 1976, saying this at [54-5]:

> "First, the statutory definition cannot have more than one correct construction. Second, the correct construction is a matter for the court. Third, if the construction adopted is materially different from what the court decides is the law, the advice cannot be correct. The guidance documents are wrong to suggest otherwise…
>
> The notion of more than one correct construction, taken to its logical limit, would be subversive of the rule of law. It would make the executive and not the courts responsible for deciding

> what the law is. For that reason, at the very least crystal-clear words would be needed to confer on an executive body the function of deciding on the meaning of statutory provisions and giving the body a choice about which of more than one possible meaning it prefers. In the absence of such clear words, the term "correct" should be taken to mean what it says, i.e. "right" or, if you prefer, "not wrong"".

64. The Claimants say that the materials upon which the Defendants rely, in particular the Explanatory Notes to the 2015 Act, cannot change that basic principle.

65. However, I consider that this authority does not say – and does not purport to lay down a rule that – all statutory (and quasi-statutory) provisions can only have one answer. It simply says that the provision in focus there could only have one answer. It is a decision on its facts.

66. In that case what was in focus was the statutory definition of "*relevant place*" as (inter alia) a "*place which is normally used or is proposed to be normally used for … the sale of food or drink to members of the public for consumption at the place*" (under section 20(9) of the Local Government (Miscellaneous Provisions) Act 1976). Kerr J held that Newcastle had got the construction of that definition "wrong" by reading into it a non-existent numerical threshold of 10 seats, and a non-existent test of whether take-away custom or sit-down custom was the predominant part of the business; the "right" definition was that in the statute: "*if it is normal for customers to sit down and eat their food on the premises, the branch is a relevant place*." Plainly there are cases where what is in issue is simple statutory construction and where an answer may be determined by the Court to be right or wrong. *R(Kingston upon Hull)* was one of these.

67. However, it is also acknowledged in the authorities that there are cases where statutory wording is inherently imprecise or "open-textured". In *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport* [1993] 1 WLR 23, p.29C-D, Lord Mustill warned of "*the dangers of taking an inherently imprecise word, and by redefining it thrusting on it a spurious degree of precision*".

68. Here we have a provision which is effectively instructions to a specialist authority; which is couched in imprecise terms – certainly broad enough not simply to call of the exercise of judgment, but in all the circumstances hallmarking the exercise as one to be done by reference to the authority's specialist understanding and judgment. It is, to my mind, a very considerable distance from the kind of case where an exercise of statutory construction could determine a single right answer.

69. While I do not necessarily accept the Defendants' submission that it is always improper in a judicial review for a Court to substitute itself for the regulator on complex issues of economic assessment, it must be right that the Court will afford considerable deference to the regulator's expert view. This is an approach endorsed in *R v DG Telecommunications ex parte Cellcom* [1998] ECC 314, [26]:

> "It is appropriate to state briefly the relevant principles on which the court is to act in judicial review proceedings when a

> challenge is made to a decision by a person on whom decision-making powers are conferred by the legislature. Where the Act has conferred the decision-making function on the Director, it is for him, and him alone, to consider the economic arguments, weigh the compelling considerations and arrive at a judgment. The applicants have no right of appeal: in these judicial review proceedings so long as he directs himself correctly in law, his decision can only be challenged on *Wednesbury* grounds. The court must be astute to avoid the danger of substituting its views for the decision-maker and of contradicting (as in this case) a conscientious decision-maker acting in good faith with knowledge of all the facts. As Lord Brightman said in R. v. Hillingdon London Borough Council , Ex Parte Puhlhofer:
>
> Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, is acting perversely."

70. While in that case the question arose in a different context - there the question was one of manner, whereas here it is one of objective – the point remains a good one.

71. This view as to the correct approach is one to which I would come simply looking at the relevant statutory materials and the Explanatory Note. It is however only reinforced by the evidence which the Claimants have sought to rely upon. That evidence, which is complex, only goes to show the range of matters which may come into the equation in settling on an approach, and the extent to which they involve evaluating economic considerations (both current and future).

It is highly unlikely that Parliament intended the Court (rather than the expert regulator) to determine the best method of economic assessment, as is the Claimant's claim. I conclude, without hesitation that it did not so intend. If that is correct it is not in issue that the Claimants claim on Ground 1 fails. The question of irrationality is one which falls into the separate Ground 2.

Error of law: construction

72. Turning then to the second question, which I approach on the basis that I did not conclude (as I have) that the question is one for the OGA, subject to a rationality challenge, I would then conclude that the burden on the Claimants to show that the OGA's pre-tax wording is not the intended statutory approach is not discharged.

73. Indeed, were it necessary to do so I would conclude on the basis of the material before me that the OGA's wording represents the correct approach.

74. One problem with the Claimants' approach is that it lacks structure. There is a tendency simply to jump into sub-issues which the Claimants regard as favourable to them,

without looking at the points in a way which is appropriate to the issues before this court.

75. The starting point therefore is this: The Claimants seek to establish that an error of law has been perpetrated. As claimants, the burden of proof begins with them: *R (Talpada) v SSHD* [2018] EWCA Civ 84.

76. Secondly, the process of statutory construction, like the process of contractual construction, is not a "free for all". In both contexts the court must look closely at the wording against the relevant background. In the context of statutory construction this equates to:

    i) *"[T]he starting point must always be the language of the provision itself*", *Seal v CC of Wales Police* [2007] UKHL 31, [2007] 1 WLR 1910, per Lord Bingham [5];

    ii) The provision "s*hould be read in the historical context of the situation which led to [the statute's] enactment*." *R (Quintaville) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687 per Lord Bingham, [8].

77. This is a situation which has a rich relevant background, outlined above. That is a background to which I can and should have regard. That covers both the Explanatory Notes and the Wood Review (see, for example, *R (Westminster City Council) v National Asylum Support Service ('NASS')* [2002] UKHL 38, [2002] 4 All ER 654 per Lord Steyn at [5]):

> "The question is whether in aid of the interpretation of a statute the court may take into account the Explanatory Notes and, if so, to what extent. The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen…
>
> In so far as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like. After all, the connection of Explanatory Notes with the shape of the proposed legislation is closer than pre-parliamentary aids."

78. This principle extends also to any relevant technical background (though that is not necessarily relevant in this case). See for example *Mason v Bolton's Library Ltd* [1913] 1 KB 83 (CA), 90 per Farwell LJ.

79. As to the background, the Wood Review provides no support for the claim that Parliament intended to require a specific method of assessment which must include "*tax implications*". There is no suggestion of this in the Review. The references to fiscal aspects have nothing at all to do with this.

80. The point was plainly made live by the responses to the Call for Views, in respect of which there were responses which supported taking the tax position into account. Further it is clear from the Wood Review that Parliament can be taken to have been aware of fiscal changes. For example the Wood Review makes reference to "*fiscal allowances introduced by HM Treasury*", and to decommissioning tax relief driving new investment and giving the industry "*much greater certainty on decommissioning liability*".

81. But Parliament, to all appearances, chose not to go in this direction. Parliament could have used plain, specific language if it intended to require the OGA to assess "*revenue flows*" or the "*true tax position*" as the Claimants allege. It did not do so. That is a point which I can take into account: in *R (Forge Care Homes Ltd) v Cardiff and Vale University Health Board* [2017] UKSC 56, [36-37] Baroness Hale considered a legislative failure to say a thing in terms to be of significance.

82. Almost more significant, to my mind, is the fact that Parliament did not even point the way away from the prior practice of looking at the question on a pre-tax basis. Bearing in mind the "fresh look" remit given to Sir Ian Wood, and given the responses to the Call for Views calling for tax to be taken into account, if the outcome was to be a change it would be hugely surprising if that change in approach were not clearly signposted. Those points must in my judgment be taken, against the background, to be significant.

83. What is more, what can be seen at the heart of the system which was created is a structure which points away from a responsibility on the OGA to look at the fiscal position in terms of taxation. What is seen is an essentially tripartite relationship between the OGA, HMRC and the commercial interests. This can be seen in the Wood Review which (to take a few examples):

    i) In the Introduction talks of the "*importance of a new tripartite strategy for Maximising Economic Recovery from the UKCS (MER UK), involving HM Treasury, Industry, and a new independent Government Regulator with additional powers and resources"*. This is replicated in Recommendation 1 of Chapter 3;

    ii) Reiterates at Recommendation 1 in the Executive Summary: "*Government (HM Treasury and the Regulator) and Industry must adopt a cohesive tripartite approach to develop and commit to a new, shared MER UK strategy to maximise the huge economic and energy security opportunity that still lies off the UK's shore."*

    iii) At Recommendation 4, notes that the "*Report details a series of commitments Industry should be required to make as part of their participation in the tripartite strategy, including greater collaboration in key areas…"*

84. Given the involvement of HMRC as one part of this plainly critical tripartite structure it would make no sense for OGA to be dealing with taxation aspects.

85. Indications away from the Claimants' case can also be seen in the drafting of the very obligation placed on the OGA. That is an obligation to produce a strategy to enable the objective to be met. If the intention were for the OGA to take into account the taxation position, this would not make sense – the analytically correct approach would be to require OGA to ensure the objective was met.

86. Furthermore it would make no sense to impose on the OGA – which does not control taxation decisions – a responsibility which involves meeting an objective which (if it were to be considered other than on a pre-tax basis) is in part dependent upon an input which it cannot ever control. It is not in issue that control of the tax regime is not with OGA: the Claimants themselves stated in their skeleton: *"the design of the tax regime itself is a matter for HM Treasury and is not part of this claim."*

87. Ultimately the direction of and ramifications of the tax regime and fiscal policy is the work of the Treasury and HMRC; logically they have to have an input and a part to play. The Review makes clear that they do – and a significant one. A construction which effectively moved that responsibility to a statutory body unrelated to the Treasury is something which one would expect to find very clearly and carefully signposted in the drafting. Such signposting is however completely absent.

88. The next point is that the Claimants' case is considerably hampered by the absence of a positive case as to construction. While it may not be necessary, when challenging an approach to statutory construction on the basis that there is a "*right*" approach other than that which is being adopted, for the challenger to put forward that "*right*" approach, the absence of a developed case as to the "*right*" approach makes it more difficult to test the wrong approach to the point of destruction or to conclude that it is probably wrong. Otherwise there remains the possibility of concluding that an established (and functioning) approach is wrong, with it then later transpiring that no preferable or correct functioning rival approach can be established.

89. Much of the Claimants' argument was directed to the question of the meaning of the references to "*UK as a whole*". The Claimants contended that the assessment of what is "*economic*" needs to be carried out by reference to the UK as a whole. In a sense that was not controversial; the Defendants submit that the OGA's pre-tax methodology maximises economic welfare and is in the interests of the UK as a whole.

90. However that apparent agreement masked the real distinction, which is that the Claimants focus very narrowly on the taxation revenue analysis, via a commercial benefits approach. I pause here to note that it is by no means clear why the reference to the UK "as a whole" justifies this focus on fiscal rather than wider economic benefits of MER UK. The impression which emerged, despite Mr Wolfe QC's skilful best efforts, was that it was alighted on as a "hook" on which to hang the contention that there were some negative tax flows. Those negative tax flows are the true core of this iteration of the argument.

91. I do accept the submission that one must be careful in two respects. The first is to view the phrase "as a whole" as being a master key which unlocks the meaning of the relevant wording. The wording "UK as a whole" is not part of the statutory definition. It is therefore not accurate to say, as the Claimants do, that the statutory purpose is to maximise the long-term added value to the UK as a whole.

92. The second point of caution is not to conflate economic recovery (including wider benefits) with commercial or cost-effective recovery (viewed through the prism of tax revenue).

93. I would agree with the Defendants that the falsity of the elision with commercial recovery, or with a narrow revenue-focussed approach is illustrated both by the genesis of the Strategy and the underlying materials outlined above. These demonstrate that behind the approach adopted (and explaining the decision to bring into place the OGA) can be discerned a dissatisfaction with a pure commercial focus and a move towards looking at value in a way which is conceptually distinct from the pure financial focus.

94. This dichotomy pointing towards a broader approach to economic recovery can be seen repeatedly. Examples include:

    i) The Wood Review discusses MER "*for the UK*" in contrast to pursuit of "*individual commercial objectives*".

    ii) Later passages make plain that what is being considered is the need for greater collaboration among licensees to facilitate efficient exploitation of the UKCS. E.g: "*licence holders required to act in a manner best calculated to give rise to the recovery of the maximum amount of petroleum from UK waters as a whole, not just that recoverable under their own licences*."

    iii) Again to the same effect: "*Lack of focus on [MER] for the UK … operators have pursued individual commercial objectives in isolation, with limited shared commitment or obligation to maximise economic recovery across fields or within regions of the UKCS*"; it further mentions "*a lack of cooperation and collaboration across industry has increased costs, caused delays, and led to poorer recovery*".

95. Similarly, the Explanatory Text to Infrastructure Act 2015 [241] emphasises *"[t]he need for operators to focus on maximising economic recovery for the UK as well as pursuing their individual commercial objectives"*.

96. Cost effective recovery is the concern of the operator, not the OGA. This is clear from the evidence, which explains how there is a concept of "*satisfactory expected commercial return"* (SECR) and how that is to be assessed. While the OGA does look at this aspect, it does so from the operator's perspective; the SECR Guidance explains that the SECR is part of a safeguard to be raised by "a company". As the Claimants accept: *"it allows an operator to say to the OGA "I cannot make this project work commercially, so please do not force me to undertake it""*.

97. The Wood Review also, in making this distinction, stresses the need for consideration of the wider benefits of MER which flow for the UK as a whole. Taxation (part of the narrow economic equation) is just one of the "*benefits of MER UK*" cited, along with e.g. "*import substitution*", "*enhanced security of supply of primary fuels"* and employment.

98. This is reflected in the evidence of the OGA which is that the OGA's pre-tax methodology maximises economic welfare and is in the interests of the UK as a whole:

> "economic welfare at UK level will therefore be highest when the pre-tax net economic value (NPV) is maximised. That condition holds irrespective of the subsequent impact of taxation on the division of realised economic value between private sector Licensees and the Exchequer…the 'pre-tax' basis of the definition and the related OGA economic appraisals of prospective oil and gas projects are aligned with the UK national interest".

99. All of this points in one direction: that there is no error in the approach of the OGA and that its approach in the Strategy is probably correct. Against this the Claimants have little to say. At no point do they identify any definition or measure of *"long-term added value to the UK as a whole"* beyond the simplistic commerciality approach which cannot be right, nor do they explain why this means that s.9A must prescribe a tax-related method of assessment.

The practical concern

100. Finally however it is of value to sense check that result against the actual complaint. The argument thus far proceeds on generalities; it may well be of service (in the way one tests a contractual construction against commerciality) to test the posited answer against the way it is said to operate wrongly in practice.

101. Although the Claimants emphasise that their complaint is about an error of law and is not about specific factual aspects, it has transpired through the pleadings and evidence that the complaint here is in practice about possible payments by HMRC to companies – negative tax flows. The evidence is ambivalent as to whether there is a practical issue at all. The Claimants point to clear evidence of negative taxation flows in particular years; specifically negative tax flows overall in 2015-16 and 2016-17 of £2 million and £359 million respectively. But that is to ignore the overall revenue flow of each concession, which will differ over its lifetime – low or negative at the start and end, high in the middle.

102. The Claimants point to the Sea Change Report which says that "*this period of negative taxes is only a foretaste for the much larger negative economic impact of UK oil and gas in the future, due to the decommissioning liabilities the government has accepted on behalf of the taxpayer*". But that is to ignore the inflows which have happened, and focus on only one period of the lifetime of each concession. That is plainly not a reasonable approach; and it was not at the forefront of the oral submissions.

103. Ultimately what is really the concern is that some individual companies (possibly foreign companies) may be net gainers from the taxation regime. It is not said that this has happened, but it is said that this is conceptually possible. That conceptual possibility has not been denied by the Defendants.

104. The dichotomy which is said to drive the conclusion of error is that of economic recovery versus those payments: how can that approach to economic recovery be right if this could happen?

105. However, it is accepted that while such payments may occur, the position in the long term is at worst tax neutral. Taxpayers are, in certain circumstances, entitled to rebates

on tax already paid, for instance, where a company makes a profit in one year on which it is taxed, but subsequently makes a loss in respect of which it is entitled to a rebate on tax paid. The taxpayer in those circumstances receives money from HMRC, but only on account of money already paid by the taxpayer by way of tax. Companies are not receiving tax revenues from the UK taxpayer but receiving a partial repayment of the tax that the company has paid in the past. Whilst in any given year a particular company may receive a rebate, it will never receive more by way of rebate than has been paid by way of tax.

106. The complaint is essentially this: that I should conclude that the approach to the Strategy is wrong because it is possible there may in individual cases be net payments to particular companies in particular years because of the way in which the taking over of particular concessions is organised. So, while the tax position over the life of the concession is at worst neutral, because A may be the incumbent in years 1-18 with net positive tax position but B is the incumbent in years 19-20 with net negative tax position, the whole strategy needs to be changed. This is, frankly, a strained and nonsensical approach.

The new points: transfer payments and foreign companies

107. These points were said not to be open to the Claimants to run since they did not form part of the Judicial Review Claim Form or Statement of Facts and Grounds, and no amendment was ever sought to be made to these documents.

108. The Claimants disputed this, saying that they were reply points – the route into the transfer payments argument arose by reference to the Defendants' own reliance on the methodology in the UK government's economic appraisal guidance, the Green Book and evidence from Mr Moulds that tax flows in the petroleum industry are "transfer payments" and should thus be ignored in the assessment of what is economic.

109. So far as the Green Book itself is concerned, I did not consider that it added to the arguments. The Green Book is clear that it is "*not a mechanical or deterministic decision-making device*" and merely "*provides guidance on how to appraise policies, programmes and projects…*". There are far better sources for the purposes of the arguments in this case. As Mr Wolfe put it, it is simply an interesting document which sits to one side of the arguments. My decision on Ground 1 does not rely in any sense on the Green Book argument and therefore neither of these points arise.

110. Had the point required to be decided I would have found that it took matters no further. The Claimants disputed that the payments could be transfer payments and contended that even if these payments might be "*transfer payments*" in theory, that could only assist the OGA if the company income (and profits) of the operators in question were confirmed as UK-based and in fact many of the major UKCS (UK Continental Shelf) oil and gas producers are foreign owned.

111. As to the first point I would have been minded to conclude as urged by the OGA that this led into a factual dispute on which the Court should *"generally accept the evidence of the public authority"*. The result here being that the OGA's evidence must be preferred to the Claimants unevidenced assertions: *Bell v Tavistock* [2021] EWCA Civ 1363, [22], [27], [62].

112. As to foreign ownership, this argument is doubly contingent: first on relevance of the Green Book and then on the argument as to transfer payments. Had it arisen I would have concluded that in essence it strays straight back in to the elision of commerciality and economic value.

113. Further, it seemed in any event to be misconceived because, as Mr Turney, for the Secretary of State, clearly explained:

    i) The evidence as to foreign ownership is incomplete and misleading: The OGA imposes residence criteria for prospective licensees and for those who wish to join a licence and take an interest in a producing field. To join a licence and take an interest in a producing field the person must be either registered at Companies House as a UK company, or carry on the business of being a licence holder through a fixed place of business in the UK. A "fixed place of business" normally means a staffed presence.

    ii) It also neglects the tax consequences: In light of these residence criteria any licence holder will be taxed in the UK on its production activity. Accordingly, whether or not companies have shareholders based abroad does not alter the fact that the activities in question will be subject to the UK tax regime. Any distribution of profits, whether to UK resident or non-UK resident shareholders, will be made from post-tax profits.

Conclusion on Ground 1

114. For these reasons, the Claimants' challenge on Ground 1 fails.

Ground 2: Irrationality

115. The Claimants' position is that:

    i) The Net Zero Target places a direct duty on the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline.

    ii) As explained in the OGA's consultation on proposals to revise MER UK Strategy (May 2020) (part 2 of which is entitled "*Proposed amendments to integrate the Net Zero Target"*), a key impetus behind reviewing the 2016 Strategy was to integrate into it the Net Zero Target. The OGA also made a number of public policy commitments to net zero prior to the Strategy coming into force.

    iii) The outcome of that can be seen in the addition of part (b) to the Central Obligation which specifically requires relevant persons to take appropriate steps to assist the Secretary of State in meeting the target "*including by reducing so far as reasonable in the circumstances greenhouse gas emissions from sources such as flaring and venting and power generation, and supporting carbon capture and storage projects*".

iv) The Secretary of State continues to emphasise that the Strategy's "*central obligations*" have been expressly framed so as to require relevant persons to assist in meeting the Net Zero Target.

v) However, the Strategy's approach to MER has the effect of increasing the amount of petroleum which will be sought and recovered such that the Strategy will: (a) increase the amount of greenhouse gases (GHGs) emitted through these (additional) recovery activities (as fossil fuels will be extracted that would not otherwise have been); and (b) will create stranded assets from the infrastructure required for such extraction, all of which is inconsistent with the Net Zero Target.

vi) That renders the OGA's chosen definition of "*economically recoverable*" (and the Secretary of State's consenting to it) irrational in that focussing "*on reduction of the climate change impact of the oil exploitation activities themselves… does nothing in relation to the much bigger climate change impact arising from the use of the resulting petroleum products*".

116. The Defendants submitted that:

i) An assessment of carbon costs is now required through the revised definition of "*economically recoverable*".

ii) The Claimants are wrongly focussed on the volume of petroleum being maximised and upon the ultimate end use over which the OGA has no remit.

iii) The irrationality argument elevates the "have regard" duty in the 2016 Act into one which overrides MER.

iv) The OGA has had proper regard to UK domestic action on climate change and its balancing of objectives is a matter for it.

v) The Claimants have *"offered no statistical evidence or methodology*" to demonstrate that the OGA's definition of "*economically recoverable*" will increase the amount of petroleum recovered.

Discussion

117. So far as this ground is concerned, although it was phrased in written argument by reference to the allegedly erroneous definition of "economically recoverable", it was made clear in oral argument that the issue was truly an alternative argument, arising if there is a discretion to define MER. The argument is said to go to the exercise of the discretion, with the central point being one which relates to non-consideration of the additional gases arising from additional extraction which it is said is inevitable by virtue of the pre-tax approach making extraction more attractive than it would otherwise be.

118. However, it must be borne in mind that the challenge is not one which directly pertains to any decision taken in relation to climate change. It is rather to the OGA Strategy itself. As the Statement of Facts and Grounds put it, the contention is that *"the adoption of the Strategy, including its definition of "economically recoverable" was irrational."*

119. The basic stumbling block for this argument is a combination of the starting point that the definition is otherwise not contrary to principle and the high test for irrationality. Consequently in order to succeed the Claimants must establish that the arguable knock-on effects of the definition render the decision to adopt that (otherwise correct) definition irrational. Or to put it another way: despite the fact that it is accepted for the purposes of this stage in the argument (i) that the OGA has a discretion and (ii) that the pre-tax method is not an incorrect construction to have arrived at, it is nonetheless irrational to have arrived at that conclusion.

120. That means, as Ms Gallafent QC, for the OGA, submitted, that despite the fact that (as is common ground) the OGA has already taken climate change into account in various ways in the Strategy, a consideration of climate change concerns can only rationally be accommodated by adopting a definition which is *ex hypothesi* not the natural reading of the term and which departs from a long-held method of economic assessment.

121. There is simply nothing which would justify this conclusion. It might be a different matter if it could be said that the OGA had paid no regard to climate change. But that regard can be seen clearly in numerous places.

122. On 16 January 2020, the OGA's Chair announced that:

> "The OGA intends to fully integrate net zero into [its] requirements. As part of this new approach, [the OGA] will review and update the [2016] Strategy. This review will not only ensure the UK's net zero ambitions are fully embedded, but will also reflect stewardship and other changes in the basin's operating environment over the last four years."

123. This was also reflected in the consultation paper:

> "The OGA is of the view that the oil and gas industry should go considerably faster and farther in reducing its own carbon footprint, or risk losing its social licence to operate. In addition, the OGA considers that the industry can play a critical role in delivering net zero for the UK as a whole. The OGA believes that, in particular, industry is well positioned to use its unique skills, expertise and infrastructure to deliver carbon capture and storage – which is essential to tackling climate changes – as well as supporting the development of the hydrogen economy.
>
> 4. Maximising economic recovery of oil and gas does not need to be in conflict with the transition to net zero. They can and should be fully integrated. The OGA is, therefore, integrating expressly into the Strategy relevant aspects where industry can assist the Secretary of State in meeting the Net Zero Target. This will enable the OGA to take a much greater role in supporting industry to drive the necessary changes.
>
> 5. It is proposed that, at each stage of their operations, relevant persons should reduce greenhouse gas emissions as far as reasonable in the circumstances and to co-operate with others to

> achieve this. In order to do so, relevant persons should consider all applicable options for existing and new developments – for example, options for electrification of platforms – and seek out and rigorously apply good oilfield practice and practices of equivalent standing from other industrial sectors. … In due time, the OGA intends to update its guidance, working with industry, to provide more context and detail.
>
> 6. As part of this review, the OGA has considered amongst other things, the updated net zero greenhouse gas emissions target ("Net Zero Target") in the Climate Change Act 2008, the UK Government's policy of complying with the Paris Agreement, the findings contained in the Committee on Climate Change's 2019 Net Zero Report, and the general need to maintain confidence in the oil and gas industry".

124. There were then reflections of this consideration in the Strategy itself. For example:

i) In Introductory point (b), one of the Strategy's "*high-level principles*":

> "In drawing up the obligations imposed by this Strategy, regard has been had to …b. to assist the Secretary of State with meeting the net zero target, and support investment in relevant activities, the OGA encourages and supports industry to be proactive in identifying and taking the steps necessary to reduce their greenhouse gas emissions as far as reasonable in the circumstances".

ii) In the Central Obligation a new sub-paragraph b. was added:

> "Relevant persons must, in the exercise of their relevant ~~functions~~ activities, take the steps necessary to:
>
> a. secure that the maximum value of economically recoverable petroleum is recovered from the strata beneath relevant UK waters; and, in doing so,
>
> b. take appropriate steps to assist the Secretary of State in meeting the net zero target, including by reducing as far as reasonable in the circumstances greenhouse gas emissions from sources such as flaring and venting and power generation, and supporting carbon capture and storage projects."

iii) And amendments were also made to the definition of Economically Recoverable to:

a) Add "(including carbon costs)" in the definition of pre-tax resource costs;

b) Add the following final sentence: "*Where relevant, UK Government carbon appraisal values for all greenhouse gas emissions will be used combined with the associated real terms social discount rate."*

125. Absent any possible argument on failure to have proper regard, the Claimants are thrown back on an approach that what is, under the primary ground, entirely permissible, is nonetheless irrational.

126. The route to this argument is a contention that more extraction must result and therefore this must be contrary to achieving net zero. To the extent that it is said that there is evidence that the consequence of the definition adopted is extra emissions or extra stranded assets, it might just be, that if the answer to this was very clear, and that answer was patent, this would offer some basis for an irrationality argument. However having posited that distant possibility, given the fact that the objective of MER remains in place, and the argument appears to be a fundamental disagreement with maximisation in any form, even that seems unlikely. This argument is in reality an argument with the very existence of MER.

127. But in any event, and even assuming that distant possibility did remain, it is far from being the case that it is patent that the consequence of the definition is extra emissions.

128. In the first place, it is not even argued that there is definitely an increased effect. The underlying case run in relation to Ground 1 is that the definition "quite possibly" increases the amount of petroleum recovered. On this basis there can only logically be "quite possibly" increases in emissions, and increases in clear up. That is manifestly not enough for the irrationality challenge.

129. As the OGA pointed out, the Claimants' argument oversimplifies the Strategy and the OGA's economic assessment to the point of misunderstanding it. The assessment to be performed does not necessarily result in maximised extraction: *"relevant persons are obliged to maximise the expected net value of economically recoverable petroleum not the volume expected to be produced."* Value is a different thing from amount.

130. The Claimants' approach also entirely fails to grapple with the changes to reflect the move to net zero. Carbon costs have now been brought within the assessment of economic recovery – with reference particularly to carbon appraisal values for greenhouse gas emissions and the associated social discount rate.

131. Some evidence from Messrs Boué and Muttitt was relied on by the Claimants in this regard. Mr Boué avers that the UK's tax regime incentivises production which is "economically unviable", and Mr Muttitt that the UK's tax regime: "*increases UK oil and gas production beyond what would be the case with a more normal tax regime."*

132. However, it was exactly in relation to these sorts of points that the deficiencies in the Claimants' expert evidence were most manifest. The passages identified (i) do not address the point as to extra emissions and stranded assets – or if they are read that way are at odds with the Claimants' primary case (ii) appear to stray outside the ambit both of expertise and compliance with CPR 35 and (iii) in any event are broad assertion and not the kind of evidence which inspires confidence. I am accordingly not minded to place any weight on them.

133. Orally the argument indeed seemed to stray further away from an irrationality challenge and into a misdirection argument by reference to the evidence of Ms Ljungerud's that *"downstream oil and gas scope 3 emissions throughout the economy are not an area which can be regulated in a Strategy for offshore production. The OGA has no role, remit or powers in respect of them."*

134. Scope 3 emissions are commonly understood to mean those not directly produced by an economic activity, but from its value chain, both upstream in the supply chain and downstream from the use of the product. So in the case of oil and gas production, upstream scope 3 emissions may include for example emissions from helicopters or shipping of material. Downstream scope 3 emissions in the case of oil and gas include the emission from the use of oil and gas required in, for example, transport, electricity generation and heating.

135. The argument that this is wrong and evidences a misdirection on the part of the OGA is not sustainable however. In the first place it is predicated on the validity of the "extra extraction" argument, which is itself dependent on evidence which is either inadmissible or to which no weight can sensibly be given. But even if it were not;

    i) It is not arguable in the light of the materials that one could say that the decision was "based on" this marginal point, first raised in the Claimants' reply;

    ii) There is nothing legally erroneous when OGA says it does not regulate the sector as regards transport and electricity and that it could not stop scope 3 emissions.

    iii) Further there is authority to suggest that there would be no duty on the OGA to take into account the ultimate consumption of the refined product: *Greenpeace Limited v the Advocate General et ors* [2021] CSIH 53 at [64-65]:
    "The question is whether the consumption of oil and gas by the end user … are "direct or indirect significant effects of the relevant project". The answer is that it is not … The ultimate use of a finished product is not a direct or indirect significant effect of the project … It is the effect of the project, and its operation, that is to be considered and not that of the consumption of any retailed product ultimately emerging as a result of a refinement of the raw material."

136. The bottom line is that the "*have regard*" duty under s.8 of the Energy Act 2016 which is the foundation of the Claimants' irrationality argument is a process duty. The question of how to balance various objectives is a matter for the regulator, not the Court. The OGA, in consulting on and adopting the Strategy, manifestly had considerable regard to UK domestic action on climate change. It is common ground that it has taken steps to reduce the industry's carbon footprint and it is patent that the driving reason for the review was to integrate net zero. The OGA's aim of assisting with the "*net zero*" target within the bounds of its remit is apparent from reading the Strategy.

137. All that is left to the Claimants is, in effect, to say that the OGA is legally required to take steps, through its Strategy, to "*undermine (or limit) the maximisation of "economically recoverable" petroleum*".

138. The essential problem with this argument is that it finds no basis in the statute – and indeed contradicts the whole concept of MER, and not merely the iteration of MER which the Claimants are seeking to challenge. Were the Claimants' argument in this respect right it would effectively override s.9A of the Act. That cannot be right – not least when the principal objective of MER was put on a statutory footing seven years after the CCA 2008 was enacted.

Conclusion on Ground 2

139. In the premises I reject the contention that the Strategy is unlawful because the definition of "economically recoverable" was irrational.

Final conclusion

140. It follows that the Claimants' claim fails and is dismissed.