Neutral Citation Number: [2018] EWCA Civ 9

Case Nos: C1/2017/1252 and C1/2017/1283

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE DOVE
[2017] EWHC 808 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 January 2018

Before:

Lord Justice Simon
Lord Justice Lindblom
and
Lord Justice Henderson

- -

Between:

Case No: C1/2107/1252

Preston New Road Action Group
(Through Mrs Susan Holliday) **Appellant**

- and -

(1) Secretary of State for Communities and Local Government
(2) Cuadrilla Bowland Ltd. **Respondents**

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Dr David Wolfe Q.C. and Dr Ashley Bowes (instructed by **Leigh Day**) for the **Appellant**
Mr David Elvin Q.C. and Mr David Blundell (instructed by **the Government Legal Department**) for the **First Respondent**
Ms Nathalie Lieven Q.C. and Mr Yaaser Vanderman (instructed by **Herbert Smith Freehills LLP**) for the **Second Respondent**

And between:

Case No: C1/2017/1283

Gayzer Frackman **Appellant**

- and -

(1) Secretary of State for Communities and Local Government
(2) Lancashire County Council
(3) Cuadrilla Bowland Ltd.
(4) Cuadrilla Elswick Ltd. **Respondents**

- -
- -

Mr Marc Willers Q.C. and Ms Estelle Dehon (instructed by **Richard Buxton Environmental and Public Law**) for the **Appellant**
Mr David Elvin Q.C. and Mr David Blundell (instructed by **the Government Legal Department**) for the **First Respondent**
Ms Nathalie Lieven Q.C. and Mr Yaaser Vanderman (instructed by **Herbert Smith Freehills LLP**) for the **Third and Fourth Respondents**

Hearing dates: 30 and 31 August 2017

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Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. Did the Secretary of State for Communities and Local Government err in law in granting planning permission for exploration works to test the feasibility of extracting shale gas by the process of hydraulic fracturing – commonly known as "fracking" – at two sites in Lancashire? That is the basic question in these two appeals. It does not raise any novel or controversial issue of law.

2. Though they are concerned only with exploration for shale gas, and not with its commercial extraction, the proposals have attracted strong opposition in the local communities affected by them. Our task, however, is not to consider whether the Secretary of State's decision was right. Any view the court might hold about "fracking", or about the planning merits of these particular proposals, is entirely irrelevant. What we must do, and all we can do, is to decide whether the Secretary of State committed any error of law. To do this we must apply well established principles governing the review of planning decisions, recently confirmed by this court in *St Modwen Developments Ltd. v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643 (see my judgment, at paragraph 6).

3. In the first appeal the appellant is the Preston New Road Action Group; in the second, Mr Gayzer Frackman. The appeals are against the order of Dove J., dated 25 April 2017, by which he dismissed applications made under section 288 of the Town and Country Planning Act 1990 challenging the decisions of the Secretary of State, the first respondent in both appeals, to allow appeals by Cuadrilla Bowland Ltd. and Cuadrilla Elswick Ltd. against refusals of planning permission by Lancashire County Council as mineral planning authority. I shall refer to both companies simply as "Cuadrilla". Their proposals were for exploration works, including exploratory wells, and associated monitoring to test the feasibility of the commercial extraction of shale gas, on two sites – one at Plumpton Hall Farm, off Preston New Road, near Fylde, the other at Roseacre Wood, Roseacre Hall, Roseacre and Wharles, near Preston, and to restore the sites to agriculture once exploration has concluded.

4. In June 2015 the county council refused both applications for the Preston New Road site and the application for exploration works at Roseacre Wood, but granted planning permission for monitoring works at Roseacre Wood, subject to conditions. Cuadrilla appealed. An inspector appointed by the Secretary of State, Ms Wendy McKay, held an inquiry in February and March 2016. In a report dated 4 July 2016 she recommended that the appeals for the Preston New Road development and for the monitoring works at Roseacre Wood be allowed, and that for the exploration works at Roseacre Wood be dismissed. In his decision letter, dated 6 October 2016, the Secretary of State allowed the appeals for the Preston New Road development, and for the Roseacre Wood monitoring works. But instead of dismissing the appeal for the exploration works on that site, he decided to re-open the inquiry to enable Cuadrilla to submit further evidence on highway capacity and safety, and indicated that he was minded to allow the appeal if the new evidence was satisfactory. Both challenges came before Dove J. at a "rolled-up" hearing on 15 and 16 March 2017. He dismissed both applications. The action group's appeal is against the judge's order where it concerns the development proposed at Preston New Road. Mr Frackman's relates to the proposals on both sites.

5. A full account of the relevant facts is to be found in Dove J.'s judgment, in paragraphs 6 to 37. It is not necessary to repeat that narrative here. I gratefully adopt it.

The issues in the appeals

6. The two appeals raise quite different issues. In the first appeal there are four live grounds, which give rise to these main issues:

    (1) whether the Secretary of State misconstrued and misapplied Policy CS5 of the Joint Lancashire Minerals and Waste Development Framework Core Strategy ("the minerals core strategy") (ground 1 of the appeal);
    (2) whether the Secretary of State misconstrued and misapplied Policy DM2 of the Joint Lancashire Minerals and Waste Local Plan: Site Allocation and Development Management Policies – Part One ("the minerals local plan") (ground 5);
    (3) whether the Secretary of State misconstrued and misapplied the policy for "protecting and enhancing valued landscapes" in paragraph 109 of the National Planning Policy Framework ("the NPPF") (ground 3); and
    (4) whether the Secretary of State's decisions were vitiated by procedural unfairness – because he concluded that Policy EP11 of the Fylde Local Plan was not engaged by the proposals without giving the parties the opportunity to comment on that conclusion (ground 4).

    In the second appeal, the four main issues are these:

    (1) whether, for the purposes of Directive 2011/92/EU, as amended ("the EIA Directive"), the Secretary of State failed to heed the relevant principles on "cumulative effects" – in particular, for the direct impact of the extended flow testing phase of the proposed development, and for the indirect impact of the production stage of the project (ground 1);
    (2) whether he failed to act in accordance with the principle, under the regime for environmental impact assessment ("EIA"), that potentially significant effects on the environment ought to be taken into account at the earliest possible stage (ground 2);
    (3) whether his decisions are flawed by inconsistency because he took into account the benefits of shale gas production but left out of account the harmful effects it would have (ground 3); and
    (4) whether he failed to apply the "precautionary principle", in particular by discounting evidence of uncertainty over the possible effects of the development on human health and assuming that the regulatory regime would operate effectively (grounds 4 and 5).

Issue (1) in the first appeal – Policy CS5 of the minerals core strategy

7. The development plan at the time of the Secretary of State's decisions comprised the minerals core strategy (adopted in February 2009), the minerals local plan (adopted in September 2013) and the saved policies of the Fylde Local Plan (adopted in 2003 and altered in 2005). It seems sensible to set out the relevant policies together.

8. Policy CS5 of the minerals core strategy is in section 6.5, under the heading "Achieving Sustainable Minerals Production". The relevant part of it states:

> "…
> Criteria will be developed for the site identification process, and also for considering other proposals brought forward outside the plan-making process, to ensure that:
> …
> (ii) features and landscapes of historic and cultural importance and their settings are protected from harm and opportunities are taken to enhance them;
> …
> (iv) proposals for mineral workings incorporate measures to conserve, enhance and protect the character of Lancashire's landscapes;
> …
> (vii) sensitive environmental restoration and aftercare of sites takes place, appropriate to the landscape character of the locality and the delivery of national and local biodiversity action plans. Where appropriate, this will include improvements to public access to the former workings to realise their amenity value.
> …. ".

9. Policy DM2 of the minerals local plan, "Development Management", states:

> "Development for minerals or waste management operations will be supported where it can be demonstrated to the satisfaction of the mineral and waste planning authority, by the provision of appropriate information, that all material, social, economic or environmental impacts that would cause demonstrable harm can be eliminated or reduced to acceptable levels. In assessing proposals account will be taken of the proposal's setting, baseline environmental conditions and neighbouring land uses, together with the extent to which its impacts can be controlled in accordance with current best practice and recognised standards.
>
> In accordance with Policy CS5 and CS9 of the Core Strategy developments will be supported for minerals or waste developments where it can be demonstrated to the satisfaction of the mineral and waste planning authority, by the provision of appropriate information, that the proposals will, where appropriate, make a positive contribution to the:
>
> - Local and wider economy
> - Historic environment
> - Biodiversity, geodiversity and landscape character
> - Residential amenity of those living nearby
> - Reduction of carbon emissions
> - Reduction in the length and number of journeys made
>
> This will be achieved through for example:
>
> - The quality of design, layout, form, scale and appearance of buildings
> - The control of emissions from the proposal including dust, noise, light and water
> - Restoration within agreed time limits, to a beneficial afteruse and the management of landscaping and tree planting.

- The control of the numbers, frequency, timing and routing of transport related to the development".

The "Justification" for the policy states, in paragraph 2.2.1, that "[minerals] and waste developments … are essential for the nation's prosperity, infrastructure and quality of life", but acknowledges that "they have the potential to cause disruption to local communities and the environment due to the nature of their operations …". It says that "[these] impacts can often be addressed through the sensitive design and operation of the facility". Paragraph 2.2.3 says that "[a] balance needs to be struck between the social, economic and environmental impacts of, and the need for, the development", and "[thus], if the adverse impacts of the operations cannot be reduced to acceptable levels through careful working practices, planning conditions or legal agreements, then the operation will not be permitted"; and paragraph 2.2.4 that "[the] impact of a development can be positive or negative; short, medium or long term; reversible or irreversible; permanent or temporary". Under the heading "Visual", paragraph 2.2.8 says that "[careful] consideration of the siting of the development, the method of working and the layout and design of the site will be required to mitigate any visual impact". Paragraph 2.2.27 says that Policy DM2 "should be read within the context of [minerals core strategy] Policies CS5, CS9 and Appendix F".

10. In a section of the Fylde Local Plan headed "Building Design and Landscape Character", Policy EP11 states:

> "New development in rural areas should be sited in keeping with the distinct landscape character types identified in the Landscape Strategy for Lancashire and the characteristic landscape features defined in Policy EP10. Development must be of a high standard of design. Matters of scale, features and building materials should reflect the local vernacular style."

11. Paragraph 109 of the NPPF appears in section 11, "Conserving and enhancing the natural environment", in the part headed "Delivering sustainable development". So far as is relevant here, it states:

> "109. The planning system should contribute to and enhance the natural and local environment by:
>
> - protecting and enhancing valued landscapes, …
>
> … ."

12. In the final section of her report, under the heading "Overall Conclusions – Landscape and Visual Impact [Preston New Road Exploration Works]", the inspector drew together her main conclusions on the effect that the proposed development would be likely to have on the landscape:

> "12.149 I conclude that the development would not require the removal of any significant existing landscape features and any landscape change would not be of a permanent nature. However, having regard to aesthetic and perceptual considerations, there would be a significant impact upon the landscape during the first phase of the development that would last about two and a half years. These significant landscape effects would be limited to a distance of up to

around 1km from the site. There would be no material indirect adverse landscape effects on any neighbouring local landscape character areas.

12.150 The significant impact on the landscape would be short-term during the first phase of the development, although there would be some varying degree of impact for the duration of the temporary permission. This would be wholly reversible and the site would be fully restored after 75 months. The mitigation proposed is reasonable and would represent a positive contribution, as far as can be achieved, to the appearance of the site. The restoration proposals would reinstate the localised landscape characteristics, such that there would be no lasting change to landscape character."

In paragraphs 12.151 and 12.152 she turned to the part of Policy DM2 that concerns the effect of development on "landscape character", and then to Policy CS5:

"12.151 Policy DM2 supports development that makes a positive contribution to matters such as landscape character, "*where appropriate*". It also indicates that this might be achieved through the quality of design, layout, form, scale and appearance of buildings and restoration within agreed limits, to a beneficial after use and the management of landscaping and tree planting. Given the nature of the development, there are obvious limitations on what can be achieved in terms of design, layout and appearance.

12.152 Nevertheless, having regard to the limited direct landscape impacts, and the proposed mitigation, I consider that the scheme incorporates measures that would at least serve to conserve and protect Lancashire's Landscape Character. The impacts on positive landscape features would not be lasting changes. The restoration of the site at the end of the temporary period in a manner appropriate to the Landscape Character of the locality would be in accordance with Policy CS5. Although there are landscape impacts that would cause demonstrable harm which cannot be eliminated, I am satisfied that they have been reduced to an acceptable level. The development would therefore be in accordance with Policy DM2."

In paragraph 12.153 she addressed the action group's contention that the proposed development would conflict with Policy EP11 of the Fylde Local Plan:

"12.153 [The action group] submits that the siting of the development would not be in keeping with the distinct landscape character types identified in the landscape strategy for Lancashire and it is therefore in conflict with Policy EP11. However, it is hard to envisage any shale gas development that could be sited without a degree of conflict with that strategy. As indicated above, I do not consider that this policy can be sensibly applied to these schemes. … ."

In paragraph 12.154, she stated her conclusion on the likely effects of the development on a "valued" landscape, in the context of the policy in paragraph 109 of the NPPF:

"12.154 Although there would be an adverse impact upon a 'valued' landscape, this particular landscape is valued only at local level and does not have the highest

> status of protection. Given the temporary nature of the development, and the mitigation and restoration proposals, there would be no conflict in the long-term with the aim of the NPPF to conserve and enhance the natural environment."

As to "visual effects", she concluded in paragraph 12.155:

> "12.155 Whilst there would be some significant adverse visual effects, only a low number of residential receptors would experience effects of that magnitude. These significant effects would only arise during the drilling, fracturing and initial flow testing phase over a period of some 29 months. The mitigation proposed is reasonable and the limitations in what can be achieved in that respect are acknowledged. There would be additional adverse visual impacts, including upon users of transport corridors over and above what has been identified in the LVIA. However, these would not amount to significant impacts. There would be little scope for any cumulative visual issues between the Preston New Road and Roseacre Wood during this phase, or with any other developments within the area."

She returned to Policy DM2 in paragraph 12.156:

> "12.156 Policy DM2 supports minerals development where it can be demonstrated that the proposals would, where appropriate, make a positive contribution to the residential amenity of those living nearby. There are examples set out showing how this might be achieved. In terms of siting of the development, [the action group's] witness could not point to a better location for the developed part of the site. The development would be sited in a location where only a relatively small number of residential properties would experience a significant adverse impact. The reduction in height of the drill rig to 36m would serve to keep the development as low as practicable to minimise visual intrusion. A lighting scheme would be in place and other mitigation is proposed including the colour of the fencing and other structures. It seems to me that all appropriate measures to mitigate the impact on visual amenity have been included within the scheme. There would be harm arising from the visual impact associated with the development but this has been reduced to an acceptable level such that there would not be conflict with Policy DM2."

Finally, in paragraph 12.157, she stated her conclusions on landscape and visual impact, recalling the county council's relevant reasons for refusal:

> "12.157 Based on the evidence given above in relation to the reasons for refusal pertaining to both landscape and visual issues, and my inspections of the site and surroundings, I conclude that the development at Preston New Road would not 'cause an unacceptable adverse impact on the landscape' nor would it 'result in an adverse urbanising effect on the open and rural character of the landscape and visual amenity of local residents'. The landscape and visual impacts associated with the scheme would not be unacceptable."

Those conclusions were repeated, largely verbatim, in the inspector's "Overall Conclusions", in paragraphs 12.791 to 12.797, and, in substance, in paragraphs 12.821 to

12.828 – culminating in her conclusion, in paragraph 12.828, that "there are no other material considerations that indicate other than that the [Preston New Road exploration works] should be permitted in accordance with the Development Plan, subject to the imposition of appropriate planning conditions".

13. In his decision letter the Secretary of State said, in paragraph 4, that "except where stated" he agreed with his inspector's conclusions on all four appeals. In paragraph 24 he said he agreed with the inspector, in paragraph 12.18 of her report, that "Policy DM2 is consistent with the NPPF and should be given full weight, and … on its own it provides a sufficient basis to judge the acceptability of the appeal proposals in principle". He said in paragraph 50 that he had "given very careful consideration to the effect that the proposed development [at Preston New Road] would have on the character and appearance of the surrounding rural landscape and the visual amenities of local residents". In paragraph 51 he said he agreed with the inspector, in paragraph 12.85 of her report, that "the landscape does have some value at local level", that "the appeal site displays a number of positive characteristics identified by the Lancashire Landscape Strategy", and that it is therefore "a 'valued' landscape in NPPF terms". In paragraph 52 he also agreed with the inspector that "the combined effect of the changes would result in a significant impact on the immediate landscape that would be perceived from a wider area of about 1km", and that "the adverse landscape effects of greatest significance would be experienced during the first phase of the development and this would be a short-term impact". He said (ibid.) that he had "taken into account that the particular effects associated with the proposed development would be reversed at the end of the temporary six-year period, and that any localised changes to landscape components would be fully remediated …". In paragraph 54 he said:

> "54. For the reasons given at IR12.117-12.120, the Secretary of State agrees with the Inspector that the proposal would not affect the outlook of any residential property to such an extent that it would be so unpleasant, overwhelming and oppressive that it would become an unattractive place to live (IR12.118). He agrees that the significant effects would only arise during the earlier phases and would therefore be limited in their duration and would not be experienced throughout the temporary six-year period (IR12.120). …".

He also agreed, in paragraph 55, that "any cumulative landscape and visual effects would be very limited and would certainly not be of any significance", and, in paragraph 56, that the imposition of a condition limiting the height of the drilling rig to 36 metres was appropriate. And he went on, in paragraph 57, to say this:

> "57. The Secretary of State has considered the Inspector's overall conclusions on landscape and visual impact. For the reasons given at IR12.149-12.153, he agrees with the Inspector at IR12.152 that although there are landscape impacts that would cause demonstrable harm which cannot be eliminated, they have been reduced to an acceptable level and the development would therefore be in accordance with Policy DM2. … For the reasons given at IR12.70 and IR12.155-12.156, he agrees with the Inspector at IR12.156 that there would be harm arising from the visual impact associated with the development but this has been reduced to an acceptable level such that there would not be conflict with Policy DM2. Overall he agrees with the Inspector's assessment at IR12.157 that the landscape and visual impacts associated with the scheme would not be unacceptable."

Under the heading "Planning balance and overall conclusions", he concluded, in paragraph 66, that "the proposal would be in accordance with the development plan taken as a whole", and, in paragraph 70, "that there are no material considerations indicating other than that the [Preston New Road exploration works] development should be permitted in accordance with the development plan, subject to the imposition of appropriate planning conditions …".

14. The approach the court must take when dealing with an argument that a planning decision-maker has misinterpreted or misapplied a planning policy requires no explanation beyond what has recently been said by the Supreme Court in *Suffolk Coastal District Council v Hopkins Homes Ltd.* [2017] UKSC 37, [2017] 1 W.L.R. 1865 (see Lord Carnwath's judgment, at paragraphs 22 to 26), and by this court in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314 (see my judgment, at paragraph 41). The court must remember that planning policies should not be construed as if they were provisions in a statute or a contract (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] P.T.S.R. 983, at paragraphs 17 to 22). Its role here is limited (see the judgment of Lord Carnwath in *Suffolk Coastal District Council*, at paragraphs 21 to 25). It risks exceeding that role if it neglects the basic distinction between discerning the meaning of a planning policy – read in its "proper context" and with common sense – and bringing public law principles to bear on the application of that policy in a planning decision. It must not step too far in interpreting policies written for planning decision-makers, in language intended to inform their exercise of planning judgment, not for judges considering the lawfulness of a planning decision when challenged.

15. For the action group, Dr David Wolfe Q.C. submitted that both the inspector and the Secretary of State misinterpreted and misapplied Policy CS5, and that Dove J. was wrong not to accept that they did. The inspector had concluded that the policy would be complied with because the harm to the landscape would only be temporary. Dr Wolfe pointed out that the policy does not say that it only concerns harm likely to be lasting or permanent, but not harm that is likely to be only temporary. Nor, he submitted, can such a qualification be implied. Any likely harm within the scope of the second, fourth and seventh objectives stated in the policy, even if not harm to landscape of "historic [or] cultural importance", and whether it would be lasting or short-lived, would be a breach of the policy. In principle, there was no reason why the protection from harm afforded by the policy should be withheld if the harm, perhaps serious, would last only a short time and then be removed or repaired. The duration of harm to the landscape is one of the relevant factors in the Guidelines for Landscape and Visual Impact Assessment methodology. In this case, submitted Dr Wolfe, the harm would not be transient. It would last about two and a half years while the exploration works were in place, and the site would only be restored after that if the commercial production of shale gas did not go ahead. This was, inevitably, a conflict with Policy CS5. The duration of any harm to the landscape, whether long or short, is to be taken into account under section 38(6) of the Planning and Compulsory Purchase Act 2004 as a material consideration to be weighed against any conflict with Policy CS5. In failing to acknowledge this breach of development plan policy, submitted Dr Wolfe, the inspector and the Secretary of State neglected the statutory imperative in section 38(6) – that the decision "must be made in accordance with the development plan unless material considerations indicate otherwise". This was a clear error of law.

16. That argument was rejected by Dove J.. He could not accept an interpretation of Policy CS5 in which the policy is read as prohibiting any harm to the landscape, including temporary harm. This was "a strategic policy within a hierarchy of policies created by the development plan[,] … setting out the strategic objectives to enable more detailed criteria to be developed for land allocation and decision-taking". It was "not designed or expressed for the purpose of being applied in a literal manner in decision-taking without regard … to other policies prepared pursuant to it to give detailed effect to the objectives [it] sets out" (paragraph 84 of the judgment). Policy DM2 of the minerals local plan was "the articulation of [Policy] CS5 at the level of decision-taking … [,] obviously prepared, examined and adopted to give expression to [it] at [that] level" (paragraph 85). The language of Policy DM2, which contemplates "harm" being reduced to "acceptable levels" was "wholly inconsistent" with the action group's construction of Policy CS5. The Secretary of State had not failed to discharge the decision-maker's duty under section 38(6) (paragraph 86). Given that mineral development often entails the restoration of the land once extraction is finished, it would be "surprising", said Dove J., "if the duration of the development, and the duration of any harm, was irrelevant to the overall assessment of harm for the purpose of [Policy CS5]" (paragraph 87). The inspector had "correctly interpreted and applied" the policy in paragraphs 12.152 to 12.156 of her report, as had the Secretary of State in paragraphs 50 to 57 of his decision letter (paragraph 88).

17. I think those conclusions of the judge are sound, and I agree with them.

18. As was submitted to us by Mr David Elvin Q.C. for the Secretary of State and Ms Nathalie Lieven Q.C. for Cuadrilla, one must start with the purpose of Policy CS5 and the context in which it sits. There are three things to say about that. First, Policy CS5 is a policy specifically concerned, in part, with the working of minerals. It is a truism that minerals can only be worked where they are found, and, equally, that they can only be found where they lie (see the judgment of Ouseley J. in *Europa Oil and Gas Ltd. v Secretary of State for Communities and Local Government* [2013] EWHC 2643 (Admin), at paragraph 67, and the judgment of Stephen Richards L.J. in the appeal in that case ([2014] EWCA Civ 825, at paragraph 37)). The working of minerals will likely alter the landscape during the extraction phase, but such effects will often be reversed or repaired in the course of the site's restoration. The same may also be said of works required in the exploration for minerals. Secondly, the policy is, both in its status and in its terms, a strategic policy, whose aim is "Achieving Sustainable Minerals Production". It looks to a further policy to translate its objectives and requirements into "[criteria] … for considering … proposals brought forward outside the plan-making process …" – applications for planning permission for development on unallocated sites. That further policy is Policy DM2 of the minerals local plan. These two policies should be read together, taking the two elements of the development plan to which they belong as a coherent whole (see the judgment of Lewison L.J. *in R. (on the application of TW Logistics Ltd.) v Tendring District Council* [2013] EWCA Civ 9, at paragraph 18). Thirdly, therefore, to apply these two policies in such a way as to create unnecessary tension or conflict between them would be wrong. If a proposal is found to comply with Policy DM2 it is difficult to see how it could nevertheless be found to be in conflict with Policy CS5.

19. Even if one were to ignore Policy DM2 altogether – which, of course, one cannot – it would still not be possible to read Policy CS5 as standing in the way of every minerals development except those likely to cause no more than "de minimis" harm before

restoration is complete. That is not what the policy says, and not what it means. The expressions "protected from harm", "protect" and "protected" in the policy are not to be read as foreclosing the exercise of planning judgment. On the contrary, they require planning judgment to be exercised, having regard to the particular facts and circumstances of the case in hand. The broad concept of "harm" is not defined in Policy CS5. The policy allows a planning judgment, in a particular case, that temporary effects on the landscape – even if likely to last for several years before their remediation – do not offend its objectives and do not constitute a conflict with it. The duration of any such harm, and the likely effectiveness of the site's restoration, are not material considerations outside the policy. They are, as Mr Elvin and Ms Lieven submitted, embraced within the policy itself. They go to the exercise of planning judgment required under the policy.

20. The connection between the two policies is not only plain from their content. It is clear also from the reference to Policy CS5 in Policy DM2 itself, and from paragraph 2.2.27 of the supporting text. Upon the adoption of the minerals local plan, Policy CS5 did not become irrelevant for the purposes of development control decision-making. It contains concepts that bear on the determination of planning applications and appeals. But Policy DM2 refined those concepts into an approach to be adopted in decision-making, case by case, and specific considerations to be taken into account in deciding whether a particular proposal is acceptable or not. In describing that approach and in specifying those considerations, it is clearly intended to be relevant to all proposed "[developments] for minerals …", including – as is common ground between the parties here – exploration to establish whether a commercially worthwhile mineral resource exists in a particular location.

21. The county council did not specifically rely on Policy CS5 in refusing planning permission for the proposed development. It did rely, however, on Policy DM2. In paragraph 12.18 of her report the inspector said that she "[concurred] with [the county council] that Policy DM2, on its own, provides a sufficient basis to judge the acceptability of the appeal proposals, in principle", and that "[the] policy is consistent with the NPPF and should be given full weight" – conclusions explicitly endorsed by the Secretary of State in paragraph 24 of his decision letter. Nonetheless, the inspector did not put Policy CS5 to one side. She tested the proposals' acceptability against it, as well as against Policy DM2. Her relevant conclusions, in paragraph 12.152 of her report, were expressly endorsed by the Secretary of State in paragraph 57 of his decision letter.

22. The inspector's assessment in paragraphs 12.149 to 12.157 of her report, adopted by the Secretary of State in paragraph 57 of his decision letter, was faithful to the terms of both policies, properly construed in their context. She made the planning judgments required by the policies. In doing so, she had regard to the nature, extent and duration of the impacts the development would have on the landscape, on landscape character and on visual amenity. She took into account the mitigation and ultimate restoration proposed within the project. And she clearly gave significant weight to the fact that the adverse effects would largely be temporary. She concluded, in paragraph 12.152, that the proposals were in accordance with Policy CS5, and, in paragraph 12.156, that because the harmful landscape and visual impacts had been "reduced to an acceptable level" they were not in conflict with Policy DM2. Her relevant findings and conclusions are legally unassailable.

23. The judge was, in my view, right to conclude as he did on this ground of the action group's challenge. The inspector and the Secretary of State did not misdirect themselves in their

handling of Policy CS5. They did not misinterpret that policy, nor misapply it. In this respect, they discharged the section 38(6) duty lawfully. No relevant planning judgment was either neglected or exercised unreasonably. Nor were the relevant reasons inadequate or unclear – either in the inspector's report or in the Secretary of State's decision letter.

Issue (2) in the first appeal – Policy DM2 of the minerals local plan

24. The action group's argument here is, essentially, that the inspector and the Secretary of State misunderstood or simply ignored the second part, or "limb", of Policy DM2, and failed to grapple with the question of whether the proposed development would make a "positive contribution" of any relevant kind – including a "positive contribution" to the "[residential] amenity of those living nearby". Dr Wolfe submitted that this was required by the policy. Before Dove J. it was also argued that the inspector misapplied the policy when she said, in paragraph 12.118 of her report, that "even on the basis of around 11 residential receptors being affected in this way, the total number … that would experience a significant visual impact remains low", and that the development "would not affect the outlook of any residential property to such an extent that it would be so unpleasant, overwhelming and oppressive that it would become an unattractive place to live".

25. Dove J. did not find those submissions persuasive. He said it was "obvious from the way in which [Policy DM2] is set out that it is possible that compliance with either of the parts of the policy will lead to the development proposal being supported" (paragraph 96 of his judgment). The second part of the policy did "not establish a policy test for the acceptability of development which requires it to demonstrate a positive contribution to any or all of the socio-economic or environmental headings …". The language of the first part of the policy, said the judge, "clearly [called] for a planning judgment as to what level of demonstrable harm would be acceptable". The inspector reached a conclusion on that question in paragraph 12.156 of her report – that "the harm arising from visual impact associated with the development had been reduced to an acceptable level". In doing so, "she took account of … the number of residential properties affected, the extent of the impact and the duration of that impact". The "formulation" she adopted in paragraph 12.118 was "a rational approach to the question of the threshold of acceptability" (paragraph 97). Her planning judgment here was "entirely lawful" (paragraph 98).

26. Like the judge, I cannot accept that the inspector and the Secretary of State either misinterpreted Policy DM2 or failed to apply it lawfully, in accordance with section 38(6).

27. Policy DM2 does not withhold its support from proposals involving "… environmental impacts that would cause demonstrable harm" if such harm cannot be "eliminated". It supports proposals in which harm is minimized. That is the sense in which the first part of the policy countenances development whose harmful impacts on the environment can be either "eliminated" or "reduced to acceptable levels". This will always be a matter of planning judgment for the decision-maker. The policy also speaks of impacts being "controlled in accordance with current best practice and recognised standards", not of their having to be avoided or removed or repaired altogether. The text in the "Justification" for the policy – in particular, in paragraphs 2.2.3, 2.2.4 and 2.2.8 – is in similar terms. This approach clearly applies to all proposals to which the policy relates, and to the whole range of their potential impacts on the environment. As is implied by the words "account will be

taken of the proposal's setting …", those impacts include the effects a development is likely to have on the landscape and, indeed, all its visual impacts.

28. When Policy DM2 refers, in its second part, to Policy CS5, and says that "developments will be supported … where it can be demonstrated to the satisfaction of the mineral and waste planning authority … that the proposals will, where appropriate, make a positive contribution" to the interests referred to, it is again acknowledging the need for a decision-maker to exercise planning judgment. In an appeal, planning judgment will be exercised by an inspector and the Secretary of State. The concept of a "positive contribution" is distinctly protean. The policy does not say what that expression means. It provides examples of considerations relevant to the decision-maker's exercise of planning judgment when assessing whether a proposal does promise a relevant "positive contribution". But, crucially, it does not require the refusal of planning permission for proposals that do not hold in prospect a "positive contribution", let alone a "positive contribution" in the form of some specific planning benefit. That is not how the policy works. This part of it is deliberately qualified by the important words "where appropriate". If, for whatever reason, it is not "appropriate" for a particular proposal to make a "positive contribution" of some kind, the policy does not rule out, or presume against, the grant of planning permission for it. If the policy had purported to do that, it would have been contradicting itself, because it would then, in effect, have been withdrawing its explicit support for development whose "… environmental impacts that would cause demonstrable harm can be … reduced to acceptable levels". The policy must be read as a whole. Read as a whole, it does not make a "positive contribution" a prerequisite to compliance. The second part of it does not create an additional requirement to the first.

29. Dr Wolfe asked rhetorically what would be the purpose of the second part of Policy DM2 if only the lower threshold for the policy's support need be surmounted – namely "demonstrable harm … reduced to acceptable levels", in the first part of the policy – and not also the higher threshold – namely "a positive contribution", in the second. The answer is twofold. First, the policy explicitly qualifies the applicability of its second part, but not its first, with the words "where appropriate". It thus acknowledges that in some cases a "positive contribution" will not be "appropriate", and need not be sought or required. Secondly, however, the second part of the policy has the effect of encouraging a "positive contribution" to be made where that is "appropriate", and it assists developers and third parties by identifying the kinds of "positive contribution" the county council has in mind. Both the first and the second part of the policy have an obvious and different purpose. And the third explains, with examples, how its objectives will be "achieved".

30. Whether, in a particular case, harm has been "reduced to acceptable levels", whether or not it is also "appropriate" to seek or require a "positive contribution" from the developer, what that "positive contribution" may be – whether, in particular, it should take the form or some planning benefit, and whether the proposed development complies with Policy DM2 as a whole, are all, quintessentially, matters of planning judgment for the planning decision-maker.

31. There is nothing in the inspector's report or in the Secretary of State's decision letter to indicate, on their part, any misunderstanding or misapplication of Policy DM2. In paragraph 1.156 of her report, for example, the inspector said that "Policy DM2 sets out the principles that will govern the management of development, and that applications will be

supported where any material, social, economic or environmental impacts that would cause demonstrable harm can be eliminated or reduced to acceptable levels", and also that the policy "expresses support for applications which, for example, make a positive contribution to … landscape character; … and sets out some ways in which these goals can be achieved". In my view it cannot sensibly be suggested that she overlooked the second part of the policy or misdirected herself as to what it means. Her conclusions in paragraphs 12.151, 12.152 and 12.156 faithfully reflect the language and purpose of the policy. She did not ignore the second part of it. On the contrary, in paragraph 12.151, she stressed the critical words "where appropriate", which appear in that part of the policy. She went on, in the same paragraph, to acknowledge that in this particular case there were "obvious limitations on what can be achieved in terms of design, layout and appearance". But she then, in paragraph 12.152, concluded that the scheme incorporated measures that would "at least serve to conserve and protect Lancashire's Landscape Character". In the last two sentences of that paragraph she said that "[although] there are landscape impacts that would cause demonstrable harm which cannot be eliminated", she was "satisfied that they have been reduced to an acceptable level", and that "[the] development would therefore be in accordance with Policy DM2". And in the final sentence of paragraph 12.156 she said "[there] would be harm arising from the visual impact associated with the development but this has been reduced to an acceptable level such that there would not be conflict with Policy DM2".

32. Those conclusions must be read together with everything else the inspector said in paragraphs 12.149 to 12.157. When that is done, their meaning is unmistakeable: that in the inspector's planning judgment – with which the Secretary of State expressly agreed in paragraph 57 of his decision letter – the proposals did not conflict with Policy DM2 taken as a whole, and not merely that they complied only with the first part of the policy, disregarding the second. The inspector did not fail to exercise any relevant planning judgment called for by the policy, and the planning judgment she did exercise is legally faultless. There is no error of law here.

33. Finally, it seems to me to be a misreading of what the inspector said in paragraph 12.118 of her report to take it as a softening of the requirement in the first part of Policy DM2 for harmful impacts to be "reduced to acceptable levels". This was, as Dove J. concluded (in paragraph 97 of his judgment), a legitimate and realistic application of that policy test, through the exercise of planning judgment in the particular circumstances of this case – nothing more and nothing less. Here too I agree.

34. In my view, therefore, there is no basis on which the court could hold that the Secretary of State erred in law in his conclusion that the proposed development was "in accordance with the development plan taken as a whole", including, in particular, both Policy CS5 of the minerals core strategy and Policy DM2 of the minerals local plan. That conclusion is not upset by any misinterpretation or misapplication of relevant development plan policy, nor by any unlawful planning judgment.

Issue (3) in the first appeal – paragraph 109 of the NPPF

35. In paragraph 12.81 of her report the inspector recorded the fact that the appeal site at Preston New Road was "not within an area formally designated for its natural scenic beauty

or landscape qualities", and that "[there] would be no impact upon any designated landscape to which the NPPF, para 115, requires great weight to be given". She went on to say that "[although] the site does not fall within an area to which the highest status of protection should be afforded, the NPPF, para 109, also seeks to protect and enhance 'valued' landscapes". In paragraph 12.85 she said that "the landscape does have some value at local level and the appeal site displays a number of positive characteristics identified by the Lancashire Landscape Strategy". For those reasons she "[considered] that it is a 'valued' landscape in NPPF terms". I have already quoted her relevant conclusion, in paragraph 12.154, that "[given] the temporary nature of the development, and the mitigation and restoration proposals, there would be no conflict in the long-term with the aim of the NPPF to conserve and enhance the natural environment". The Secretary of State agreed, in paragraph 57 of his decision letter.

36. Dr Wolfe's argument here was similar to his submissions on the previous issue. He submitted that the inspector and the Secretary of State adopted an incorrect interpretation of the policy in the first bullet point in paragraph 109 of the NPPF. The use of the concept of harm in "the long-term" to modify the simple and unqualified terms of the policy for the protection and enhancement of "valued landscapes" in paragraph 109 was, he said, unjustified. There was no such "temporal" restriction. Any harm to such a landscape, of whatever duration, was necessarily a breach of the policy. Having concluded in paragraph 12.154 of her report that there would be "an adverse impact" on a locally "valued" landscape, the inspector ought to have concluded that the proposals were in conflict with the policy. In not doing so, she erred in law.

37. Dove J. rejected that argument. Having in mind Lord Clyde's observations on the wide, strategic purpose of national planning policy in his speech in *R. (on the application of Alconbury Developments Ltd.) v Secretary of State for the Environment Transport and the Regions* [2001] UKHL 23, [2001] 2 A.C. 295 (at paragraph 140), he concluded that the policy for "protecting and enhancing valued landscapes" in paragraph 109 of the NPPF was "to be … understood as a high-order strategic objective of the planning system as a whole", to be achieved by means of "the planning policies which address the appraisal of landscape impact in the context of particular kinds of development". It was not to be interpreted "as providing that any harm, including temporary harm other than for a wholly insignificant or *de minimis* period, is a breach of [it]". It "calls for an overall assessment of harm to the landscape, including short-term and any longer-term resolution of that harm and beneficial effects, in order to reach a planning judgment … as to whether or not the valued landscape has been protected and enhanced" (paragraph 92). The inspector had "properly understood and interpreted" the policy in her conclusion in paragraph 12.154, and so had the Secretary of State in accepting that conclusion (paragraph 94).

38. Mr Elvin and Ms Lieven supported those conclusions of the judge; I think rightly. In my view the inspector and the Secretary of State interpreted the policy in paragraph 109 of the NPPF correctly, and applied it lawfully, as one of the "material considerations" under section 38(6).

39. Paragraph 109 of the NPPF is a broad statement of national planning policy for the "natural and local environment". The introductory words declare what the "planning system" should do – that it "should contribute to and enhance the natural and local environment". The objective with which we are concerned is also expressed in general terms – "protecting and

enhancing valued landscapes". The means by which the planning system is to achieve that objective are not stated. But the two ways in which it obviously might do so are plan-making and the determination of planning applications and appeals in accordance with the relevant provisions of the development plan (unless material considerations indicate otherwise). As Lord Clyde said in *Alconbury* (in paragraph 140 of his speech), "[national] planning guidance can be prepared and promulgated and that guidance will influence the local development plans and policies which the planning authorities will use in resolving their own local problems". This seems to me a good description of the policy in paragraph 109 of the NPPF. Dove J. recognized this.

40. In Lancashire, for minerals development, there are development plan policies that do what the "planning system" is encouraged to do by paragraph 109. They are Policy CS5 of the minerals core strategy and Policy DM2 of the minerals local plan. It is in those policies that the county council, as mineral planning authority, has provided for the protection and enhancement of the landscape in decision-making on proposals for minerals development, including a landscape that is locally "valued". If a scheme complies with those policies, as the inspector and the Secretary of State concluded here, it is difficult to see how it could be regarded as being in conflict with national policy in paragraph 109.

41. As Dove J. also recognized, the policy in paragraph 109 does not compel a decision-maker to find conflict with it when the harmful effects of minerals development on a "valued" landscape would, in the course of the project, be reversed or mitigated. The policy is not framed in terms of preventing any harm at all to such landscape. When applied in the making of a planning decision, it requires from the decision-maker a planning judgment on the question of whether, in the circumstances, the general policy objective of "protecting and enhancing" such landscapes would be offended or not. It is for the decision-maker to consider whether any temporary harm to the landscape would breach the policy. The nature of the damage to the landscape, its duration, the importance of the "valued" landscape, and the degree of formal protection it has been given, if any, are likely to be relevant factors.

42. In this case the relevant exercise of planning judgment is to be seen in paragraph 12.154 of the inspector's report. She acknowledged that "there would be an adverse impact upon a 'valued' landscape". But against this she weighed three considerations: first, that the landscape in question was "valued only at local level and does not have the highest status of protection"; second, "the temporary nature of the development"; and third, "the mitigation and restoration proposals". Taken together, those three considerations were enough, in her view, to justify the conclusion that "there would be no conflict in the long-term with the aim of the NPPF to conserve and enhance the natural environment". Her use of the phrase "in the long-term" was appropriate. It was not intended as a gloss on the policy in paragraph 109. It was simply to stress that, as the inspector said, the development would be "temporary" and that "mitigation" and "restoration" were part of the project. When tested against the policy in paragraph 109, the proposals were, in her view, acceptable. This was a planning judgment of the kind with which the court will rarely interfere. There is no basis on which it could do so in this case.

Issue (4) in the first appeal – Policy EP11 of the Fylde Local Plan

43. In a statement of common ground prepared by the county council and Cuadrilla before the inquiry, and published, under rule 14 of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000, Policy EP11 was included in the list of development plan policies that the parties agreed "should be taken into account in the determination of [the Preston New Road exploration works] appeal" (paragraphs 6.1 and 6.6.4(B) of the statement of common ground). At the inquiry, however, Cuadrilla's planning witness, Mr Mark Smith, maintained in his proof of evidence (at paragraph 8.24) that Policy EP11 was not relevant to the proposed development. He was cross-examined on that evidence by counsel for the county council, Mr Alan Evans, and by counsel for the action group, Dr Ashley Bowes. The county council's planning witness, Mrs Katie Atkinson, was also cross-examined on this point by Ms Lieven, for Cuadrilla. Submissions were made on it in closing, by Dr Bowes, by Mr Evans, and by Ms Lieven. Cuadrilla's position at that stage, as Ms Lieven explained in her closing submissions, was that Policy EP11 was not a relevant policy.

44. In paragraph 12.25 of her report, under the heading "The relevance of the Fylde Borough Local Plan", the inspector recorded Cuadrilla's argument that that the Fylde Local Plan "… does not purport to deal with minerals development and has no relevance to this form of development". She noted, however, that the statements of common ground produced by Cuadrilla and the county council "recognise the relevance to these appeals of policies in [the Fylde Local Plan]…". But she concluded, in paragraph 12.31:

> "12.31 In relation to Policy EP11, [Cuadrilla] claim that this is obviously a policy aimed at built development and not an engineering operation such as shale gas exploration. … [The county council] accepts that the requirement that ["building materials should reflect the local vernacular style"] could not apply to the proposed development. However, it seems to me that it is not only that aspect of the policy that is obviously inapplicable, but also the main thrust of the policy is aimed at the assimilation of new built development, rather than the type of development that is the subject of these appeals. This is an instance where the most appropriate policy against which to consider the landscape character impact and the design of the proposed development falls within [the minerals local plan]. Policy EP11 cannot sensibly be applied to these schemes. …".

That last conclusion – that "Policy EP 11 cannot sensibly be applied to these schemes" – was repeated by the inspector in paragraphs 12.153 and 12.823 of her report, which the Secretary of State incorporated in his own reasons, respectively, in paragraphs 57 and 66 of his decision letter.

45. The action group's grievance, essentially, is that Cuadrilla changed their position on the relevance of Policy EP11 during the inquiry, that this had not been made clear before Ms Lieven closed their case, and was never the subject of an appropriate amendment to the statement of common ground; that its own case before the inspector had been based on the contention that the policy was relevant and was breached; that its closing submissions had been presented on the understanding that Cuadrilla conceded the relevance of the policy; that it was never given an opportunity, either by the inspector or by the Secretary of State, to make representations in the light of Cuadrilla's alleged volte-face; and that this was unfair and prejudicial to it, and enough to vitiate the Secretary of State's decisions.

46. Dove J. rejected that argument. Dr Wolfe submitted to us that he was wrong to do so.

47. The judge reminded himself of relevant case law illustrating the principles of procedural fairness when applied in planning appeals – in particular, the decisions of this court in *Hopkins Developments Ltd. v Secretary of State for Communities and Local Government* [2014] EWCA Civ 470, [2014] P.T.S.R. 1145 and *Secretary of State for Communities and Local Government v Engbers* [2016] EWCA Civ 1183. He saw a distinction between cases in which an inspector differs from an agreed position reached between the parties and recorded in a statement of common ground, and a case such as this, in which one of the parties itself departs from a previously agreed position (paragraph 104 of his judgment). He concentrated on Beatson L.J.'s observations in *Hopkins Developments Ltd.* about the "right to be heard" as a principle of natural justice – in particular (at paragraph 87), that "what is required is an opportunity to be heard, an opportunity to participate in the procedure by which the decision is made", and (at paragraph 90) that, as the authorities referred to by Jackson L.J. had shown, "what is needed is knowledge of the issues in fact before the decision-maker … , and an opportunity to adduce evidence and make submissions on those issues". In Dove J.'s view, therefore, it was "necessary to examine whether, notwithstanding the terms of [the statement of common ground, the action group] was aware that there was an issue over the applicability of [Policy] EP11 and had an opportunity to present evidence and submissions on the point" (paragraph 109).

48. Dove J. focused on Mr Smith's cross-examination by Dr Bowes, which he had quoted earlier in his judgment (in paragraph 34). In the course of that cross-examination Mr Smith accepted that, on a "[strict] interpretation" of Policy EP11, "a development that was not in keeping with the landscape character types identified in the Landscape Strategy for Lancashire would conflict with [it]". But he then said that, "as [he had] explained in [cross-examination] from Mr Evans, that policy is principally directed toward new permanent build development not minerals …", and added that he "[did] not think this policy really gave any consideration to those temporary forms of development such as minerals". In answer to a further question from Dr Bowes, he acknowledged that Policy EP11 was "in the statement of common ground" as one of the "policies … relevant to consideration of the exploration application".

49. That exchange showed, said the judge, that there was "clearly an issue as to the relevance and applicability of [Policy] EP11". The action group had taken the "opportunity to provide evidence and submissions on that issue". It had done so "in pointing out to the [inspector] in [its] closing submissions that [Policy] EP11 was contained within the [statement of common ground], and also that Mr Smith had accepted a conflict with that policy". As Dove J. said, Dr Bowes "properly and effectively took up the points in this regard with [Cuadrilla's] witness, called evidence from his own expert on the issue, and then incisively set out the case for the [inspector] in his closing submissions" (paragraph 110 of the judgment). The relevant submissions made by Dr Bowes in closing, which the judge had also quoted (in paragraph 35), had referred to the fact that Policy EP11 had been included in the list of "policies … engaged by the appeal scheme" in the statement of common ground (paragraph 5 of Dr Bowes' closing submissions), reminded the inspector that "Mr Smith accepted in [cross-examination] that a conflict with [the Landscape Strategy for Lancashire] must … amount to a conflict with … [Policy] EP11" (paragraph 19), contended that "[the] proposal … , by definition, conflicts with the development plan policies adopted to promote that Strategy", and confirmed that "[accordingly], we say there [is] a clear and

inescapable conflict with policies EP11 Fylde Local Plan (2005), DM2 Lancashire Waste and Minerals Plan (2013) and CS5 Lancashire Waste and Minerals Core Strategy (2009)" (paragraph 29).

50. In these circumstances, the judge found himself "unable … to conclude that there was any procedural unfairness in what occurred during … the inquiry". The action group had "participated in [the] debate" on the applicability of Policy EP11. Cuadrilla's position, as put to the inspector in their closing submissions, had been "clearly foreshadowed in their evidence and indeed challenged in that respect by [the action group's] counsel". The inquiry had been attended by representatives of the action group throughout, and the proceedings transmitted live on a webcast. But in any event the judge was "satisfied that there was no unfairness to [the action group] in the respect alleged …" (paragraph 111). He was "unimpressed" by the suggestion that it could have sought to make further submissions to the Secretary of State after the inquiry had been closed, in response to those made for Cuadrilla. Whether or not the Secretary of State would have disregarded such submissions, as he had a discretion to do under rule 17(4) of the inquiries procedure rules, was "moot" (paragraph 112).

51. I am in no doubt that the judge's approach here was correct, and I do not think his conclusion could realistically have been any different.

52. At the inquiry there plainly was an issue between Cuadrilla, on one side, and the county council and the action group, on the other, as to the relevance and applicability of Policy EP11 to these proposals. The inspector grasped that issue. She dealt with it under a specific heading in her conclusions, and resolved it, in paragraphs 12.31 and 12.153 of her report, in favour of Cuadrilla. She accepted their contention that Policy EP11 was not relevant to proposals for hydrocarbon exploration, and that it "cannot sensibly be applied to these schemes". That conclusion was adopted by the Secretary of State. It has not been questioned in these proceedings. And it is legally secure.

53. The critical question, however, is not whether the relevance of Policy EP11 was a live issue at the inquiry. It is whether the action group had a fair opportunity, in the course of the inquiry, to address that issue. The judge concluded that the action group did have that opportunity, and that neither the inspector nor the Secretary of State breached any principle of procedural fairness in not inviting further submissions from it after the inquiry had closed. That conclusion was consistent with the relevant legal principles, illuminated by Beatson L.J. in *Hopkins Developments Ltd.* (at paragraphs 84 to 90).

54. The fact that Dr Bowes took the opportunity to cross-examine Mr Smith as he did on the relevance and effect of Policy EP11 shows that the action group saw this as a matter that it should tackle in this way. The questions put to Mr Smith on Policy EP11 were perfectly proper questions, designed to establish his position on the relevance and effect of the policy, and the submissions made by Dr Bowes in closing, in the light of Mr Smith's evidence on the point, were perfectly proper submissions. Mr Evans' submissions for the county council were to similar effect. He too recognized the need to address the relevance of Policy EP11 as a controversial matter. But Mr Smith's answers in cross-examination – including that he "[did] not think [Policy EP11] really gave any consideration to those temporary forms of development such as minerals" – did not constrain Ms Lieven in submitting as she did in closing on behalf of Cuadrilla. Nor was the inspector compelled to

accept Mr Smith's evidence, or the evidence of any other witness, on the relevance and effect of Policy EP11, or the submissions made on this issue by counsel for any of the parties. She had to make up her own mind on these matters, and so did the Secretary of State. Ultimately, the correct interpretation of Policy EP11, had it been controversial in these proceedings, would have been a matter for the court. But lest there be any doubt about that, I should say that in my view the policy was neither incorrectly understood nor unlawfully applied. The inspector's conclusions in paragraphs 12.31 and 12.153, on which the Secretary of State depended in his own conclusions in paragraph 57 of the decision letter, are, in my view, unimpeachable.

55. As the judge recognized, the question here was whether the action group had "an opportunity to participate in the procedure by which the decision [was] made". It manifestly did. It exercised its "opportunity to participate" in the inquiry process as it chose, with the benefit of advice and representation by experienced planning counsel. It was able to tackle the relevance of Policy EP11 as an issue before the inspector and Secretary of State, and to do so effectively in the course of the inquiry. A fair procedure did not require it to be given a different opportunity to do that, or a renewed opportunity after the inquiry was closed. The opportunity it had was ample. The procedure was, at every stage, fair. Dr Bowes was not present at the inquiry throughout, though it seems that members of the action group were there when he was not, and the proceedings were broadcast. He was able to cross-examine Cuadrilla's witnesses, including Mr Smith, and at the end of the inquiry to make closing submissions – though not to go last, which was Cuadrilla's right as appellant. The essential requirements of a fair procedure were, in the circumstances, wholly fulfilled.

56. In my view, therefore, the appeal must fail on this ground too.

Issues (1), (2) and (3) in the second appeal – the lawfulness of the assessment under the regime for EIA and alleged inconsistency in the Secretary of State's approach

57. These three issues relate closely to each other and are best dealt with together.

58. Recital (2) to the EIA Directive states that "[pursuant] to Article 191 of the Treaty on the Functioning of the European Union, Union policy on the environment is based on the precautionary principle …", and that "[effects] on the environment should be taken into account at the earliest possible stage …". Article 3(1) requires assessment of "the direct and indirect significant effects of a project …". Paragraph 5 of Annex IV states that "… [the] description of the likely significant effects on the factors specified in Article 3(1) should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the project …". The corresponding provision in paragraph 4 of Part 1 of Schedule 4 to the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the EIA regulations"), is in materially the same terms. The definition of an "environment statement" in regulation 2 of the EIA regulations is a statement "… that includes such of the information referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile".

59. For Mr Frackman, Mr Marc Willers Q.C. made three main submissions on these issues. The first was that the Secretary of State had neglected the relevant principles applied by the Court of Justice of the European Union in cases where, under the regime for EIA, a decision-maker has had to consider "indirect, secondary [or] cumulative effects" on the environment. In particular, he had failed to require an assessment that included both the direct impacts on the environment of the extended flow testing phase of the proposed development and the indirect impacts of the succeeding production stage if the exploration phase proved the existence of a viable resource of shale gas. Exploration was only being carried out "with a view to production". Production was "reasonably foreseeable", and was the "end product of exploration". That, in essence, is the argument on issue (1). Mr Willers sought to rely here on the decisions in *Abraham v Region Wallonne* (Case C-2/07) [2008] E.C.R. I-1197 and *Ecologistas v Ayuntamiento de Madrid* (Case C-142/07) [2009] P.T.S.R. 458 and decisions of the domestic courts to similar effect, among them the Court of Appeal's decision in *R. (on the application of Brown) v Carlisle City Council* [2011] Env. L.R. 5 and the first instance decision in *R. (on the application of Khan) v Sutton London Borough Council* [2014] EWHC 3663 (Admin). Secondly, he submitted, the judge erred in rejecting the argument that the Secretary of State had acted contrary to the EIA Directive and the EIA regulations by failing to ensure that environmental effects were taken into account and assessed "at the earliest possible stage" (see the decisions of the Court of Justice of the European Union in *R. (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions* (Case C-201/02) [2004] Env. L.R. 27, at paragraphs 51 to 53, and 62, and *Brussels Hoofdstedelijk Gewest v Vlaams Gewest* (Case C-275/09) [2011] Env. L.R. 26, at paragraph 33). That is the argument on issue (2). And thirdly, Mr Willers submitted, the Secretary of State's approach was inconsistent in that he had taken into account the benefits of the production of shale gas without weighing against those benefits the harmful environmental impacts of production. That is the argument on issue (3).

60. Dove J. rejected Mr Willers' argument on "indirect, secondary [and] cumulative" effects. He identified the legal principles in play and relevant European and domestic case law, including *Abraham*, *Ecologistas*, *Brown v Carlisle City Council* and *R. (on the application of Frack Free Ryedale) v North Yorkshire County Council and another* [2016] EWHC 3303 (Admin). In his view "there were no indirect, secondary or cumulative impacts which had to be assessed arising from the suggestion that there might be some continuation of the use of the site for gas extraction after the completion of the development for which permission was sought". The proposal before the Secretary of State "had to be addressed on its own terms". It was "strictly limited in time and solely for the purpose of exploration of the potential gas resource" (paragraph 126 of the judgment). And "any further gas extraction beyond that for which the application had been made would have to be the subject of a new planning application either … under section 70 of the 1990 Act, or alternatively … for a change of the conditions on the present consent under section 73 …". Either way, "a new [environmental statement] would have to be prepared describing the likely significant effects of that further application". There were "no indirect, secondary or cumulative effects to be evaluated in the present [environmental statement]", which was "therefore legally adequate" (paragraph 127).

61. In the judge's view there was a parallel between this case and *Frack Free Ryedale*. In that case the gas produced by the proposed works was to be burned at Knapton generating station under an existing planning permission, and within the existing limits permitted by

the Environment Agency. The proposal involved no net increase in capacity. An argument that it was an integral part of a more substantial project, including Knapton generating station, was held to have been rightly abandoned (see paragraph 39 of the judgment of Lang J. in that case). Here, as Dove J. said, "quite apart from the fact that this complaint was not raised either prior to or during the public inquiry, there is and was no evidence to support any suggestion that the provision of gas from the [appeal] site to the grid, and thereby to residential or industrial users, will lead to any increase in the consumption of gas and therefore the generation of greenhouse emissions in the UK". It was, he said, a "perfectly sensible assumption" on the evidence before the Secretary of State "that any gas provided to the grid during the extended flow phase [would] simply replace gas that would otherwise be consumed by residential and industrial users supplied by the grid …". There were thus "no indirect, secondary or cumulative [effects] of the kind suggested arising from the exploration phase which required inclusion within the [environmental statement]". A "clear distinction" was to be drawn between, on the one hand, the production of gas during the "extended flow phase when the wells would be connected to the grid" and, on the other, "the flaring which would occur during the initial flow testing phase". That flaring would "plainly [give] rise to the burning of gas and generation of greenhouse gases that would not otherwise arise" and was "therefore … properly the subject of assessment within the [environmental statement]" (paragraph 128).

62. The judge concluded, therefore, that the approach indicated by the Government's guidance in paragraph 27-120-20140306 of the Planning Practice Guidance: Minerals published by the Government in March 2014 ("the PPG") was correct and in accordance with the requirements of the EIA Directive and the EIA regulations. As that guidance makes plain, the judge said, proposals for exploration should be considered on their own merits "without speculation or hypothetical assumptions in relation to future activities which will require their own consenting and EIA processes" (paragraph 129).

63. In my view the judge's approach and conclusions were correct. As Mr Elvin and Ms Lieven submitted, the court must focus on the nature of the consent procedure for the project under consideration. The crucial point here is that the scheme before the Secretary of State was a single, clearly defined project limited to exploration for shale gas on the two sites, and the associated monitoring. And the consent procedure for it was not a "multi-stage consent process" (see paragraphs 21 to 25 of Lord Hope's speech in *R. (on the application of Barker) v Bromley London Borough Council* [2007] 1 A.C. 470, which concerned an outline planning permission for major development at Crystal Palace and the subsequent reserved matters approvals required; and paragraphs 32 and 33 of the judgment in *Brussels Hoofdstedelijk Gewest*, which concerned successive works of development at Brussels Airport). The consent procedure here was confined to the approval or rejection of the present proposals for exploration and monitoring. The project did not include any subsequent commercial production. That would be the subject of a second, distinct and different project – if, but only if, the exploration project proved the existence of a viable resource of gas. The granting of planning permission for the exploration and monitoring works did not, and could not, pre-empt or pre-judge the determination of that future application, if it were ever to be made. That possible future proposal would have to be considered on its own planning merits when the time came, in the light of the assessment contained in its own environmental statement. The purpose, and sole purpose, of the present project was to establish whether or not shale gas existed in a sufficient quantity and was capable, both technically and viably, of being extracted should planning permission later be

granted for its extraction. If the appeals before the Secretary of State succeeded, and planning permission for the proposals before him were granted, there would not be any approval for the commercial extraction of gas. The effects of such an operation were, therefore, neither direct effects of the project under consideration nor "indirect, secondary [or] cumulative" effects of it.

64. As the Government has recognized in the written ministerial statement issued by the Secretary of State for Energy and Climate Change on 16 September 2015, "[we] do not yet know the full scale of the UK's shale resources nor how much can be extracted technically or economically". That, of course, is a statement of the national position. But, as Mr Elvin and Ms Lieven submitted, the scale of resources present in particular locations and the technical and economic feasibility of extraction in those locations are also uncertain. That was so here: hence the need for exploration. What any future extraction project might comprise was also, at this stage, a matter of conjecture. So it was not only unnecessary, and inappropriate, for the environmental effects of that unknown development to be included in the EIA for the present project. It was also impossible.

65. That logic is not disturbed by Mr Willers' submission that the purpose of the exploration project was not merely to establish the presence of a commercial resource of shale gas, but also to enable commercial extraction. The fact that commercial extraction would only be proposed if the exploration project proved the presence of a commercial resource does not mean that the two operations are necessarily and indivisibly parts of the same project. They are not. Extraction, if it is ever proposed, will only proceed after exploration and monitoring have been carried out. But this does not justify the concept that the two projects, if there are two, will have "cumulative" effects on the environment, or that the present project – for exploration – will have "indirect" or "secondary" effects that are, in truth, impacts associated only with a hypothetical future project – for extraction.

66. As the judge concluded, this straightforward analysis accords not only with common sense, but also with the Government's guidance in paragraph 27-120-20140306 of the PPG, under the heading "Should mineral planning authorities take account of the environmental effects of the production phase of hydrocarbon extraction at the exploration phase?". The guidance emphasizes that "[individual] applications for the exploratory phase should be considered on their own merits" and "should not take account of hypothetical future activities, for which planning consent has not yet been sought, since the further appraisal and production phases will be the subject of separate planning applications and assessments". It also acknowledges that "[when] determining applications for subsequent phases, the fact that exploratory drilling has taken place on a particular site is likely to be material in determining the suitability of continuing to use that site only insofar as it establishes the presence of hydrocarbon resources".

67. A principle well established in both European and domestic authority is that the existence and nature of "indirect", "secondary" or "cumulative" effects will always depend on the particular facts and circumstances of the project under consideration (see Sullivan L.J.'s judgment in *Brown v Carlisle City Council*, at paragraph 21, and Laws L.J.'s judgment in *Bowen-West v Secretary of State for Communities and Local Government* [2012] Env. L.R. 22, at paragraph 28). An equally robust principle is that an environmental statement is not expected to include more information than is reasonably required to assess the likely significant environmental effects of the development proposed, in the light of current

knowledge (see, for example, the judgment of Patterson J. in *Khan*, at paragraphs 121 to 134).

68. Dove J.'s conclusions on "indirect, secondary [and] cumulative" effects are entirely loyal to both of those principles. On the facts, in contrast with cases such as *Brown v Carlisle City Council*, the exploration and monitoring project under consideration here was a free-standing project of development, which did not depend on any other project, present or future, including any future proposals for the commercial extraction of shale gas. That is a material difference between this case and *Brown v Carlisle City Council*, where an environmental statement for the development of a freight distribution centre at an airport had not included an assessment of the effects of the associated improvements to the airport itself, which were part of the same project though the subject of a separate application for planning permission (see paragraphs 29 and 30 of Sullivan J.'s judgment). In this case, the environmental statement for the project under consideration was a comprehensive environmental statement for that whole project, undertaken on the basis of what was known at the time, and without speculation as to the content and timing of some other future project, which might never happen. However broad a construction is placed on the expression "the direct and indirect significant effects of a project …" in article 3(1) of the EIA Directive, and the expression "any indirect, secondary, cumulative … effects of the project" in paragraph 5 of Annex IV, these concepts cannot be stretched to include effects that are not effects of the project at all (see paragraph 31 of Advocate General Kokott's Opinion in *Abraham*).

69. I do not see how Mr Willers' argument can gain any strength from European or domestic authority on EIA flawed by the splitting of projects into their constituent phases or parts – sometimes referred to as "salami slicing". The two decisions of the Court of Justice of the European Union most familiar in this context are *Abraham* and *Ecologistas*. The defect of the EIA in *Abraham* was that only the works of improvement to the infrastructure of the airport had been assessed, and the increased numbers of flights that would be enabled by those improvements had not (see paragraphs 26 and 42 to 46 of the court's judgment). The defect in *Ecologistas* was that the works for improving the Madrid urban ring road had been assessed separately, as a number of individual projects, rather than overall, as a composite whole (see paragraphs 34 to 39 and 44 to 46 of the court's judgment). This case is quite different from those. In this case there is no question of the purpose of the EIA Directive being circumvented by splitting into separate parts or phases what is truly a single project. The assessment here was of the whole project, not merely parts of it.

70. The Non-Technical Summary of Cuadrilla's environmental statement explains, in subsection 3.4.5, "Extended Flow Testing", that "[if] the flow of gas from the wells is assessed as being sufficient a period of extended flow testing may be undertaken", which "could last for 18 to 24 months per well"; and that "[natural] gas produced during extended flow testing … would not be burned in the flare stacks", but "… the well would be connected to the gas grid for use in homes or by business or industrial users". The assessment in chapter 8 of the environmental statement, "Greenhouse Gas Emissions", embraces the full range of greenhouse gas emissions associated with the project. Paragraph 2 in that chapter states that "[both] direct and indirect GHG emissions have been assessed". Paragraph 3, in section 8.3, "Scoping and Consultation" confirms that "the assessment has taken into account the Scoping Opinion from [the county council] … and stakeholders", including Natural England, CPRE Lancashire, the Environment Agency and Public Health

England. The "GHG emissions by source (ranged result in tCO_2e)" are set out in Table 8.3, in section 8.7, "Assessment". Paragraph 36 refers to Figure 8.3, "Percentage GHG emissions by source for the entire Project", which "shows the range of GHG emissions by emission source for all of the activities associated with the Project". It states that "[approximately] 70% of the Project greenhouse gas emissions can be attributed to flaring [i.e. the burning of gas in the flare stacks during the initial flow testing stage], which will be captured under the EU ETS"; that "[with] the embedded mitigation measures … proposed[,] fugitive gas emissions from the Site are expected to consist of un-combusted methane as a result of incomplete combustion in the flare, accounting for 13% of the total emissions"; and that "[the] embedded mitigation measures proposed are known to achieve an estimated reduction in fugitive emissions of 97%-98%". Paragraph 37 refers to Figure 8.4, "GHG emissions by Project stage …". It confirms that "[initial] flow testing is the most significant contributor due to flaring, accounting for approximately 87% of the Project carbon footprint". In the pie chart in Figure 8.4 the percentage of greenhouse gas emissions attributable to the extended flow testing phase is only 0.1104%. The "Chapter Summary – Greenhouse Gas Emissions" states:

> "…
> The greatest source (73%) of the project GHG emissions come from burning the gas in the flare. The total Project GHG emissions could be between 118,418 (lower range) to 124,397 (higher range) tCO_2e. The higher range is the equivalent of 0.002% of the current UK Carbon Budget set by the government and as such the Project's potential contribution to national GHG emissions is negligible. Furthermore, due to the conservative nature of the assessment there is potential for the actual GHG emissions to be even smaller."

71. There is, it seems to me, no force in Mr Willers' submission that the environmental statement was inadequate because it lacked an assessment of the effects of greenhouse gas emissions arising from the extended flow testing phase of the project – a point not raised before the inspector, and which emerged only in these proceedings. Because the extended flow testing phase would last some three years, Mr Willers described it as "production by any other name". In my view, however, the judge's conclusions on this argument in paragraph 128 of the judgment are plainly correct. There was no defect in the assessment in the environmental statement. Greenhouse gas emissions associated with exploration, including the extended flow testing phase, were fully assessed.

72. Gas produced during that phase, when piped into the grid, would merge with existing supplies to consumers. It would be an indistinguishable part of the existing supply, not additional to that supply. It would not, therefore, lead to an increase in greenhouse gas emissions (see the analogous conclusions in Lang J.'s judgment in *Frack Free Ryedale*, at paragraphs 37 to 39). As Ms Lieven emphasized, there was no evidence before the inspector and the Secretary of State to support a different conclusion. The idea that, in a project of exploration for shale gas such as this, as opposed to the commercial production of shale gas, the substitution of new gas for existing gas in the grid will raise the total consumption of gas by increasing gas usage, that significant additional greenhouse gas emissions are thus likely, and that there might be some conflict with the objectives of the Climate Change Act 2008, gains no credence in the report of the Committee on Climate Change, "Onshore Petroleum: The compatibility of onshore petroleum with meeting the UK's carbon budgets", published in March 2016, or in the Government's response,

published in July 2016. As Mr Elvin and Ms Lieven submitted, the passages in the report on which Mr Willers relied do not serve to demonstrate that such consequences are likely. In Chapter 4, "Emissions relating to onshore petroleum extraction", the report states that "[exploration] emissions are generally small …", that "[small] volumes of gas may be generated during the development of the well, most of which is likely, at a minimum, to be burned in a flare", that "[it] should not be taken as a given that emissions from exploration will be low, especially for any extended well tests", and that "[appropriate] mitigation techniques should be employed where practical". Such statements do not undermine the integrity of the EIA undertaken for this project. They do not show that the burning of shale gas from the extended flow testing phase here would be likely to increase greenhouse gas emissions to any significant degree. The environmental statement effectively concludes to the contrary. It is not necessary to go as far as Mr Elvin said we could, and to accept, in the light of the Committee on Climate Change report, that domestically produced gas may in fact generate a lower level of greenhouse emissions than imported liquefied natural gas. It is enough for us to conclude, as in my view we can, that there is nothing before the court by way of evidence specific to this project of shale gas exploration to substantiate the shortcomings in the EIA asserted by Mr Willers.

73. In short, there is no evidence, let alone clear evidence, of any likely material increase in greenhouse gas emissions, or any other likely significant effect on the environment, that ought to have been addressed in the EIA but was not. In the circumstances, I cannot see how the court, adopting the conventional public law approach well settled in the relevant authorities, could find itself satisfied that the Secretary of State committed an error of law in accepting the assessment presented in Cuadrilla's environmental statement (see Laws L.J.'s judgment in *Bowen-West*, at paragraphs 36 to 42, citing the judgment of Sullivan J., as he then was, in *R. (on the application of Blewett) v Derbyshire County Council* [2004] Env. L.R. 29, at paragraphs 32 and 33; and Lang J.'s judgment in *Frack Free Ryedale*, at paragraphs 21 to 23). Neither is there any demonstrable legal flaw within the assessment contained in the environmental statement, nor is the assessment demonstrably incomplete. The Secretary of State was entitled to regard the environmental statement as compliant with the definition in the EIA regulations, which looks to what an applicant may "reasonably" be required to provide. The judge's analysis was right.

74. It follows, in my view, that the second appeal cannot succeed on Mr Willers' main argument, on "indirect, secondary [or] cumulative" effects – issue (1). His submissions on the timing of assessment – issue (2), and on the alleged inconsistency in the Secretary of State's approach – issue (3), can be dealt with quite shortly.

75. The argument on the timing of assessment is, I think, misconceived. It fails on the same analysis as the argument on "indirect, secondary [or] cumulative" effects. The judge reminded himself of the European and domestic jurisprudence on EIA emphasizing the need for projects to be assessed in their entirety, rather than in partial or piecemeal fashion. It cannot sensibly be suggested that he overlooked a basic principle inherent in the need for a complete assessment: that such assessment must be timely – undertaken "at the earliest possible stage". These principles are not divorced from each other; they go together. Assessment must be complete. And to be complete, it must be timely. If a future project is truly separate from the project under consideration, the assessment of its likely significant effects in the environmental statement for the present project is both unnecessary and inappropriate. If it is also uncertain in its conception and content, an attempt to assess its

effects in the environmental statement for the present project would also be futile and potentially misleading. Such an exercise would not be timely; it would be premature and untimely. One comes back then to the same basic point. If, in the future, a project emerges for the commercial production of shale gas on these two sites, it can only properly be the subject of assessment under the regime for EIA when it comes to be promoted as a real, not merely hypothetical, proposal in an application for planning permission (see the conclusions to similar effect in the judgment of Sir Michael Harrison in *R. (on the application of Littlewood) v Bassetlaw District Council* [2009] Env. L.R. 21, at paragraph 32).

76. Mr Willers' argument alleging inconsistency in the Secretary of State's consideration of the possible future production of shale gas at the appeal sites is also, in my view, mistaken. Its premise is wrong. The proposition that the Secretary of State took into account the potential benefits of shale gas production, but not the harm it would cause to the environment, does not reflect his relevant conclusions.

77. In a section of the NPPF headed "Meeting the challenge of climate change, flooding and coastal change", paragraph 93 says that "[planning] plays a key role in helping shape places to secure radical reductions in greenhouse gas emissions, minimising vulnerability and providing resilience to the impacts of climate change, and supporting the delivery of renewable and low carbon energy and associated infrastructure". In a subsequent section headed "Facilitating the sustainable use of minerals", paragraph 147 says that, among other things, mineral planning authorities "should … when planning for on-shore oil and gas development, including unconventional hydrocarbons, clearly distinguish between the three phases of development (exploration, appraisal and production) …".

78. In paragraph 1.181 of her report, when summarizing relevant NPPF policy, the inspector noted the policies in paragraphs 142 to 148, including the requirement that "decision makers should recognise a distinction between exploration, appraisal and production in the extraction of gas, including unconventional hydrocarbons". In paragraph 12.686, under the heading "Conclusions on Climate Change", she concluded that "the projects would be consistent with the NPPF aim to support the transition to a low carbon future in a changing climate". She did "not consider that [paragraph 93 of the NPPF] should be read in isolation, or applied out of context". Taking an "overall view of national policy", she was in "no doubt that shale gas is seen as being compatible with the aim to reduce [greenhouse gases] by assisting in the transition process over the longer term to a low carbon economy". And she was "satisfied that [Cuadrilla] have demonstrated … that all material, social, economic or environmental impacts that would cause demonstrable harm would be reduced to an acceptable level and that the projects represent a positive contribution towards the reduction of carbon". The proposed development would be in accordance with Policy DM2 of the minerals local plan and "relevant national policy." In paragraph 12.757, under the heading "Economic benefits", she said:

> "12.757 I acknowledge that the [written ministerial statement of 16 September 2015] does make reference to the substantial benefits that exploring and developing our shale gas and oil resources could potentially bring. However, it seems to me that, in the light of the NPPF and [the PPG] guidance, the potential wider economic benefits of shale gas production at scale should be given very limited weight at this stage. … ."

In her "Overall conclusions", in paragraph 12.826, she said that "[any] future proposal for production would require a further application and assessment" and "… little weight is attributed to the wider economic benefits that might be derived from shale gas production on a large scale". And in paragraph 12.840, when dealing with the proposed monitoring works at Preston New Road, she acknowledged that "account should not be taken of hypothetical future activities relating to shale gas production over the wider area".

79. The Secretary of State concluded, in paragraph 28 of his decision letter that, in the light of the written ministerial statement of September 2015, "the need for shale gas exploration is a material consideration of great weight in these appeals …". In paragraphs 36 and 37, under the heading "Climate change", he said:

> "36. The Secretary of State considers that the need for shale gas exploration set out in the [written ministerial statement] reflects … the Government's objectives in the [written ministerial statement], in that it could help to achieve lower carbon emissions and help meet its climate change target. …
>
> 37. Overall, the Secretary of State agrees with the Inspector's conclusion at IR12.686 that the projects would be consistent with the NPPF aim to support the transition to a low carbon future in a changing climate. He further agrees that [Cuadrilla] have demonstrated, by the provision of appropriate information, that all material, social, economic or environmental impacts that would cause demonstrable harm would be reduced to an acceptable level and that the projects represent a positive contribution towards the reduction of carbon, and that the proposed development would be in accordance with [Policy DM2 of the minerals local plan] and relevant national policy."

and in paragraph 47, under the heading "Economic benefits":

> "47. For the reasons given in IR12.749-12.769 and IR12.818, the Secretary of State agrees with the Inspector at IR12.769 that the local economic benefits of the exploration stage would be modest. He attributes little positive weight to these benefits. The Secretary of State notes that the Inspector considers little weight should be attributed to the national economic benefits which could flow from commercial production at scale at some point in the future, in the context of the exploratory works development which is the subject of these appeals. As the NPPF makes clear that each stage should be considered separately, the Secretary of State considers that in the context of these appeals, no weight should be attributed to the national economic benefits which could flow from commercial production in relation to these sites at scale at some point in the future."

80. As always, one must read the relevant passages in the inspector's report, and the corresponding conclusions in the Secretary of State's decision letter, fairly and as a whole – and not with the aim to find fault (see my judgement in *St Modwen*, at paragraph 7). When that is done here, I cannot see how the Secretary of State's conclusions in paragraphs 28, 36, 37 and 47 of his decision letter can be criticized. Those conclusions are cogent, and entirely compatible. They do not betray an unlawful approach.

81. One should not read more into paragraphs 28, 36 and 37 than is actually there. The conclusion in paragraph 28, that the need for shale gas exploration should have "great weight", was one the Secretary of State was entitled to reach in the light of government policy. And it was consistent with his conclusions in paragraphs 36 and 37 that the written ministerial statement and the NPPF encourage shale gas exploration as an activity consistent with the Government's objectives "to achieve lower carbon emissions and help meet its climate change target", and "to support the transition to a low carbon future in a changing climate"; and that the proposed development would "represent a positive contribution towards the reduction of carbon". The Secretary of State was not saying – nor could he – that this development would itself bring about a reduction in carbon emissions, or that such a benefit should weigh for it in the planning balance. Contrary to Mr Willers' submission, he did not give "significant weight", or any weight, to that supposition. He was merely recognizing, quite properly, that the development would help to achieve the objective of reducing carbon by establishing whether or not a commercially viable resource of shale gas existed on these sites. That makes sense. Exploration for shale gas is necessary before a commercial decision can be taken on the viability of production, and a planning decision on the merits of such development, if ever proposed. The Secretary of State's conclusion in paragraph 37 did not anticipate those future decisions. Rather, it acknowledged that such decisions would only be possible if the present proposals for exploration went ahead.

82. The conclusion in paragraph 47 of the decision letter, that "no weight" should be given to the "national economic benefits" of possible future "commercial production" was not at odds with those earlier conclusions. It was, however, a different conclusion from the inspector's in paragraph 12.757 of her report, which was not that "no weight" should be given to such benefits, but that they should have "very limited weight". The difference here was not simply one of degree; it was a difference of principle. The Secretary of State meant to stress it. He said that he noted – not that he agreed with – the inspector's conclusion as to weight, and he deliberately distanced himself from it. He plainly had in mind here the policy in paragraph 147 of the NPPF, which is amplified in the guidance in paragraph 27-120-20140306 of the PPG – in effect, that decision-makers must be careful to distinguish between "exploration" for hydrocarbons, "appraisal", and subsequent commercial "production" if proposed. He also referred to "commercial production" of shale gas on the appeal sites and its potential benefits – carefully and correctly – in uncertain terms: "… benefits which <u>could</u> flow from commercial production … <u>at some point in the future</u>" (my emphasis).

83. There is nothing legally wrong with any of that. The Secretary of State was, in my view, entitled to conclude as he did in those passages of his decision letter. As Mr Elvin and Ms Lieven submitted, there was nothing inconsistent in his conclusions, and nothing inconsistent between them and the approach taken in the EIA, which made no attempt to assess some future and still unknown proposal for shale gas production.

84. On all three of these issues, therefore, I think the second appeal must fail.

Issue (4) in the second appeal – the "precautionary principle"

85. Mr Willers submitted that the Secretary of State fell into error in his treatment of evidence on the possible effects of the proposed development on human health, and in assuming that the relevant regulatory regime would operate as it should; that there was "a real doubt" as to the health effects of shale gas production, which the Secretary of State failed to heed, and that these errors amounted to a failure to apply the "precautionary principle".

86. I am unable to accept those submissions. They were rejected by Dove J., who concluded that "the approach taken by the Inspector to the relationship between the decision-taking process and the planning regime and other regulatory regimes in paragraphs 12.590-12.595 [was] entirely orthodox and unimpeachable" (paragraph 137 of the judgment), and found himself "wholly unpersuaded that it [was] arguable that, taking account of the precautionary principle, it was irrational for the Inspector to recommend approval, and … [the Secretary of State] to accept that recommendation" (paragraph 138). I agree.

87. The argument here, essentially, is that the Secretary of State could not reasonably reach the conclusions he did on the possible health effects of the development – that his conclusions were irrational. Such a contention is never easy to sustain in a challenge to a planning decision. It is especially difficult when – as in this case – it goes to the decision-maker's exercise of planning judgment. Where a planning decision-maker accords appropriate respect to the position of a statutory environmental regulator, whose own decision-making, within its own statutory remit, is guided by expert scientific opinion, it will, I think, be rare for the court to interfere (see the judgment of Beatson L.J. in *R. (on the application of Mott) v Environment Agency* [2016] EWCA Civ 564, at paragraphs 67 to 82, and the judgment of Carnwath L.J., as he then was, in *Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government* [2012] EWCA Civ 379, at paragraph 34).

88. The inspector devoted a lengthy passage of her report – in paragraphs 12.636 to 12.662 – to the issue of "Public Health and Public Concern". She concluded in paragraph 12.655 that "[as] regards the hazards associated with potential exposure to air and water pollutants, [Cuadrilla] point out that such matters would be strictly controlled by [the Environment Agency] through the permitting system", and that "[this] would ensure that no levels which could have an impact on human health would be reached". She noted that the Annex to the written ministerial statement "provides support for that position". In the light of paragraph 122 of the NPPF, and the court's decision in *R. (on the application of Frack Free Balcombe Residents Association) v West Sussex County Council* [2014] EWHC 4108 (Admin), she was "content that it could be assumed that the regulatory system would operate effectively to control such emissions", and that "[there] would be no health impacts resulting from these matters". In paragraph 12.656 she said:

> "12.656 … [Dr David McCoy, an expert medical witness called at the inquiry on behalf of Friends of the Earth] identified noise and other nuisances as being the most likely causes of negative direct impacts on human health. I have given consideration to noise, visual amenity, and other potential impacts upon health and wellbeing elsewhere in this report. I do not believe that there will be additional negative health and wellbeing impacts on nearby communities associated with the matters raised by Dr McCoy. …".

In paragraph 12.658 she said that the evidence of interested parties did "not lead [her] to find that the regulatory regime could not be relied upon to operate effectively in these

cases". In paragraph 12.659 she said Cuadrilla had accepted that "public concern is capable of being a material planning consideration", citing *West Midlands Probation Committee v Secretary of State for the Environment and Walsall Metropolitan Council* (1998) 76 P. & C.R. 589. Here, however, "the processes would be regulated and all pathways that could potentially impact upon human health would be monitored and appropriately controlled". She therefore agreed with Cuadrilla that "little weight should be given to these concerns". She did "not consider the expressed fear and anxiety can be regarded as being reasonably engendered or a justifiable emotional response to the projects in the light of the level of monitoring and controls that would be imposed upon the proposed activities". In paragraph 12.661 she concluded that "[the] health impacts associated with these exploratory works appeals should be distinguished from those which might be associated with production at scale", and that "[the] available evidence does not support the view that there would be profound socio-economic impacts or the climate change impacts on health envisaged by Dr McCoy associated with these exploratory works". In paragraph 12.662 she said:

> "12.662 I am satisfied that [Cuadrilla] have demonstrated, by the provision of appropriate information, that all potential impacts on health and wellbeing associated with the projects would be reduced to an acceptable level. The proposed development would be in accordance with [Policy DM2 of the minerals local plan, Policy CS5 and Policy CS9 of the minerals core strategy] and relevant national policy."

Those conclusions were repeated in her "Overall Conclusions", in paragraphs 12.805 to 12.808 of her report.

89. The policy in paragraph 122 of the NPPF, to which the inspector referred in paragraph 12.655 of her report, states:

> "122. … [Local] planning authorities should focus on whether the development itself is an acceptable use of the land, and the impact of the use, rather than the control of processes or emissions themselves where these are subject to approval under pollution control regimes. Local planning authorities should assume that these regimes will operate effectively. …".

The guidance in paragraph 27-012-20140306 of the PPG is to the same effect.

90. In paragraph 34 of his decision letter, under the heading "Public health and Public concern", the Secretary of State said:

> "34. The Secretary of State has considered carefully the evidence and the representations that were put forward in respect of public health and public concern (IR12.636-12.662). He agrees with the Inspector for the reasons given at IR12.655 and IR12.658 that it could be assumed that the regulatory regime system would operate effectively to control emissions and agrees that there would be no health impacts arising from potential exposure to air and water pollutants. He has considered the potential health impacts of public concern. He agrees with the Inspector at IR12.659 that the processes would be regulated and all pathways that could potentially impact upon human health would be monitored and appropriately controlled, and therefore considers these concerns carry little weight in the planning balance. He agrees with the Inspector at IR12.661 that the

> available evidence does not support the view that there would be profound socio-economic impacts or climate change impacts on health associated with these exploratory works. He notes that there is no outstanding objection raised by Public Health England to the proposed development on public health impact grounds (IR12.644). Overall he agrees with the Inspector that [Cuadrilla] have demonstrated by the provision of appropriate information that all potential impacts on health and wellbeing associated with the projects would be reduced to an acceptable level, and further agrees that the proposed development would be in accordance with [Policy DM2 of the minerals local plan, Policy CS5 and Policy CS9 of the minerals core strategy] and relevant national policy (IR12.662)."

91. In attacking those conclusions, Mr Willers pointed to the evidence of Dr McCoy and various material that was before the inspector relating to health impacts, including a report written by Dr McCoy and Dr Patrick Saunders, entitled "Health & Fracking – The impacts & opportunity costs", published by Medact in 2015, a subsequent report written by Dr McCoy and Dr Alice Munro, entitled "Shale Gas Production in England – An Updated Public Health Assessment", published by Medact in 2016, and a document published in October 2015 by the Concerned Health Professionals of New York, entitled "Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking (Unconventional Gas and Oil Extraction)". That last document adopted the opinion of the New York State Health Commissioner that "[the] overall weight of the evidence from the cumulative body of information contained in [the] Public Health Review demonstrates that there are significant uncertainties about the kinds of adverse health outcomes that may be associated with [high volume hydraulic fracturing], the likelihood of the occurrence of adverse health outcomes, and the effectiveness of some of the mitigation measures in reducing or preventing environmental impacts which could adversely affect public health" (p.2).

92. It is not the court's task to review Dr McCoy's evidence or the content of the documents relating to human health relied on by objectors to the proposed development, or the evidence given by Mr Smith in his rebuttal proof of evidence. The question for the court is whether, as a matter of planning judgment, the inspector could reasonably reach the conclusions she did in the light of the evidence before her. In my view she undoubtedly could, not least because Dr McCoy himself expressed his conclusions in appropriately measured terms. In paragraph 7.4 of his proof of evidence he said that "[from] the specific perspective of only shale gas exploration in two sites, my view is that while both projects *will* produce some health and environmental hazards, any negative direct impacts on human health will be concentrated in people living in the immediate surroundings of the two proposed sites and be most likely caused by the effects of noise and other nuisances"; and that "[depending] on the extent to which noise and other nuisances are effectively mitigated or tolerated, the level of negative impact may range from being negligible to being significant". As for "other hazards (notably water and air borne pollutants)", he said that "a negligible to low risk is due to the specific combination of the temporary and limited nature of shale gas exploration; and assumes that measures will be effectively applied to mitigate risk and harm".

93. Mr Willers did not point to any evidence before the inspector to negate the principle expressed in paragraph 122 of the NPPF, that "[local] planning authorities should assume that [pollution control] regimes will operate effectively". That principle in national

planning policy is not easy to reconcile with an argument that the Secretary of State has acted irrationally in making a planning decision on the assumption that other regulatory regimes, including those concerned with public health, will operate as they should. But even if the NPPF had not said so, that assumption would surely be a reasonable one for a planning decision-maker, unless there was clear evidence to cast doubt upon it. There was no such evidence here. Similar conclusions were reached by Gilbart J. in *Frack Free Balcombe* (at paragraphs 100 to 102) and Patterson J. in *R. (on the application of An Taisce (the National Trust for Ireland)) v Secretary of State for Energy and Climate Change* [2013] EWHC 4161 (Admin) (at paragraphs 177 to 193), in an analysis endorsed by the Court of Appeal ([2014] EWCA Civ 1111: see Sullivan L.J.'s judgment at paragraphs 46 to 51). As Mr Elvin and Ms Lieven submitted, the opposite conclusion is not supported by the decision of the Court of Justice of the European Union in *Afton Chemical Ltd. v Secretary of State for Transport* (Case C-343/09) [2011] 1 C.M.L.R. 16 – because in the United Kingdom a relevant regulatory regime, derived from the law of the European Union, already existed. In the circumstances, there was no "gap" in the relevant environmental controls. Nor is it possible for Mr Willers to argue, in effect, that statutory regulatory authorities with responsibilities relevant to human health were themselves unreasonable in failing to object to the proposals. There was, in fact, no objection from those authorities. And it was not for the inspector and the Secretary of State, in performing their responsibilities under the statutory planning code, to duplicate controls for which statutory responsibility lay elsewhere. On the evidence before them, they were able to conclude as they did: that there would be no adverse effects on health justifying the refusal of planning permission. Legally, that was an impeccable conclusion.

94. I therefore reject Mr Willers' argument that the conclusions of the inspector and the Secretary of State on health impacts are at odds with the "precautionary approach" or the "precautionary principle". The existence of "uncertainty in [relevant] scientific knowledge" – as Mr Willers put it – does not render unlawful the approach adopted by the inspector and the Secretary of State. Both were satisfied that the relevant regulatory controls would operate effectively to prevent harm to the environment and to human health arising from the proposed development, where such harm lay beyond the reach of the statutory planning regime. Not only was this conclusion properly open to them on the evidence; it was also entirely consistent with the "precautionary approach". For the purposes of a planning decision, it was a perfectly rational conclusion. And it was not undermined by the existence of scientific doubt or dispute. In my view the judge was right to reject the argument put to him on this ground.

95. This analysis is not disturbed by observations on the potential effects of fracking in the "Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes on his mission to the United Kingdom …" to the United Nations Human Rights Council for its meeting between 11 and 29 September 2017, first published on 5 September 2017 (see in particular paragraphs 32 to 44). That document could not have been taken into account by the Secretary of State, because it came into existence only after his decision. But in any event it does not undermine any of the conclusions he reached on "Public Health and Public concern" for the purposes of making his decision on this particular project of shale gas exploration, on the evidence as it was before him. The observations made by the Special Rapporteur, whilst they refer to the Secretary of State's decisions in the present case, do not suggest that the Secretary of State failed to address concerns relating to human health, or

environmental effects, with sufficient thoroughness and care, or that the "precautionary approach" or "precautionary principle" was not applied (see, in particular, paragraphs 35, 40 and 42 of the report).

96. I should add, finally, that the conclusions to which I have come on this issue, and on the previous three issues where they impinge on EIA, are not, in my view, inconsistent in any way with the analysis in the recent decision of the Court of Appeal in Northern Ireland in *An Application by Friends of the Earth Ltd. for Judicial Review* [2017] NICA 41. That case concerned the extraction of sand by dredging from the bed of Lough Neagh, an activity that had been proceeding for many years without planning permission, whose environmental effects had been acknowledged by the Department of the Environment as likely to be significant. Further assessment under the EIA Directive, and under Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, was required and was yet to be carried out. What the likely significant effects would actually be was still unknown at the time of the minister's decision not to issue a stop notice (see paragraphs 2 to 13 of the judgment of the court, delivered by Weatherup L.J.). It was in this specific context that Weatherup L.J. observed that "[the] proper approach is to proceed on the basis that there is an absence of evidence that the operations are not having an unacceptable impact on the environment" (paragraph 34), that the minister, in making his decision, had failed to put into the balance "the absence of evidence that there is no harm", and that, in the circumstances, this was "the negation of the precautionary principle" (paragraph 37). The facts and circumstances in this case are materially different. Here, as I have said, no identified likely significant effect on the environment, or specifically on human health, was ignored or went unassessed before the Secretary of State made his decisions. There was, in the circumstances here, no breach of the "precautionary principle".

A reference for a preliminary ruling?

97. I see no justification for a reference to the Court of Justice of the European Union in this case. The contentious matters are "acte clair", and there is no scope for reasonable doubt as to the answers to be given (see the judgment of the court in *CILFIT v Ministry of Health* (Case C-283/81) [1982] E.C.R. 3415, at paragraph 16).

Conclusion

98. For the reasons I have given, I would dismiss both appeals.

Lord Justice Henderson

99. I agree.

Lord Justice Simon

100. I also agree.