

# To frack or not to frack?

As public awareness of fracking is rising, **James Noble** offers guidance to practitioners on identifying and advising on the potential risks for property owners



James Noble is a solicitor at Forsters @ForstersLLP www.forsters.co.uk

**F**racking has been the subject of extensive press coverage in the last few years, with early rumblings from the earthquakes in Blackpool, and more recently the public protests in Balcombe and Preston grabbing the headlines.

However, despite the apparent lack of grassroots enthusiasm, the Conservative government has put fracking firmly on the agenda, viewing it as (part of) the answer to securing 'home-grown energy supplies'.

Fracking (or hydraulic fracturing) is the process of drilling a well vertically down into the earth and injecting a high-pressure fluid into the rock to release the shale gas inside.

There are several layers of planning, regulatory, and operational requirements, which are repeated for each exploratory stage of a site's development and before production commences.

An application must be made to the Department of Energy

and Climate Change for a petroleum exploration and development licence (PEDL) allowing the search for, drilling, and extraction of hydrocarbons such as shale gas over 100 square kilometres.

Access is the next issue. The usual options of purchasing the site or negotiating leases or licences are available to obtain surface rights of access. Statutory powers also exist to allow a holder of a PEDL to acquire ancillary rights, but only where it is not reasonably practical to obtain the rights by private arrangement. This process can be cumbersome, slow, and expensive.

Consideration may also have to be given to third-party mineral rights, as the ownership of the subterranean level may have been severed from the surface owner.

Drilling horizontally into the adjoining land without the consent of that landowner will be a trespass, but where extraction occurs at depths of 300 metres or more, the Infrastructure Act 2015 grants underground access without having to obtain the permission of the adjoining owners. The Act does not deal with depths of less than 300 metres, however, so operators will again have to negotiate with surface owners or rely on the statutory powers.

The Environment Agency must be notified of any intention to start drilling and developers have to submit a detailed

environmental statement. The Health and Safety Executive must also give approval.

Planning permission is required for the exploration, appraisal, and production stages in fracking and must be applied for in the usual way. However, there have been recent indications that the process may be centralised if the government considers that local councils are delaying the grant of permission for fracking. The government has (further) alarmed anti-fracking campaigners with plans to expedite the process to give permitted development rights to drill boreholes at potential extraction sites before fracking has been approved.

Despite government assurances, there is substantial opposition to fracking. As well as environmental concerns over the contamination of water and impact on wildlife, there is growing anxiety that fracking will devalue homes and other properties (a report from the Department for Environment, Food, and Rural Affairs suggests house prices in affected areas could fall by up to 7 per cent).

In light of this, public awareness of fracking is rising. The published maps of licensed areas indicate over half the country could be affected in some way by energy exploration, and undoubtedly property owners will expect solicitors to identify and advise on the potential risks to their buildings.

## Points of practice

- Buyers (and any financing parties) will want to know if properties are sited in past, current, or potential future fracking areas. Without considering fracking in the due diligence process, firms could run the risk of negligence claims from clients arguing they should have identified, investigated, and reported on this issue;
- One way of dealing with this is to specifically carve it out of the retainer or make it express in the report on title that investigating fracking is outside the scope of the work undertaken;
- Currently, neither residential nor commercial property standard enquiries include enquiries about fracking, and a specialised standalone fracking search is not on offer from the search providers. However, products are starting to come into the marketplace; and
- In practice, solicitors will want to ensure they clearly set out the extent of their retainer. Where relevant, the published maps can be checked to see whether the property is located in a currently licensed area and additional enquiries raised, both of the seller and the local authority. Any information these investigations uncover should then be reported back to the client. **SJ**