IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT
[2022] EWHC 2623 (Admin)

No. CO/1696/2022

Royal Courts of Justice
Thursday, 6 October 2022

Before:

MR JUSTICE LANE

B E T W E E N :

THE KING
on the application of
SUFFOLK ENERGY ACTION SOLUTIONS SPV LIMITED — Claimant

- and -

THE SECRETARY OF STATE FOR
BUSINESS, ENERGY AND INDUSTRIAL STRATEGY — Defendant

- and -

(1) EAST ANGLIA ONE NORTH LIMITED
(2) EAST ANGLIA TWO LIMITED

Interested Parties

MR D WOLFE KC and MS C COLQUHON (instructed by Leigh Day) appeared on behalf of the Claimant.

MR M WESTMORELAND SMITH and MR J WELCH (instructed by the Government Legal Department) appeared on behalf of the Defendant.

MR H PHILLPOT KC and MR H FLANAGAN (instructed by Shepherd Wedderburn LLP) appeared on behalf of the Interested Parties.

J U D G M E N T

MR JUSTICE LANE:

1 This is a renewed application for permission to apply for judicial review of the defendant's two development consent orders of 31 March 2022, made in exercise of powers under the Planning Act 2008; namely the East Anglia ONE North Offshore Wind Farm Order 2022 and the East Anglia TWO Offshore Wind Farm Order 2022.

2 Permission was refused by Lang J on the papers on 1 July 2022.

3 The essence of the challenge brought by the claimant is that the interested parties created a so-called "chilling effect" by persuading landowners, whose properties were proposed to be purchased in connection with the onshore elements of the wind farm scheme, to enter into arrangements, in particular so-called "heads of terms", which prevented or, in the claimant's terminology, "gagged" the landowners from making submissions to the examining authority. The claimant says those submissions might have been relevant to the proper evaluation by the examining authority of the harmful consequences of the onshore development; in particular on ecology.

4 Regulation 4(2) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 prohibits the Secretary of State from making an order granting development consent unless an EIA has been carried out in respect of the application. This includes the preparation of an environment statement. The central part of the EIA process, therefore, is the duty on the applicant to properly assess environmental factors.

5 The claimant says that although it repeatedly complained to the examining authority about the alleged chilling effect, the examining authority said nothing about it in its report to the defendant, and the defendant "considered only four short paragraphs of a draft decision letter" and so "unlawfully failed to grapple with" obviously material issues that were raised by the claimant.

6 Mr Wolfe KC expanded upon these matters in his oral submissions. He drew attention to the claimant's submissions to the examining authority. These contended that the interested parties' policy of seeking to agree heads of terms with the relevant landowners, whereby the latter would "not object to the application for development consent nor any other planning applications associated with the project" had a chilling effect on the statutory scheme and "undermines the integrity of the planning process".

7 In their written submissions to the examining authority, the claimant said this about the relevant heads of terms:

> "The effect of these clauses has been profound. Virtually no landowner has turned up to give evidence to the Authority whether in relation to their own land or in relation to the application more broadly.
>
> This has meant that on a wide range of really important issues SPR [the interested parties] has managed to prevent relevant evidence coming forward. This covers matters such as offshore turbines, the landing of the cables on-shore on the fragile Suffolk coast, the impact of the many miles of corridor that will be built to bring the cable inland and the enormous and damaging impact on the ancient village of Friston where vast substations, each almost as big as Wembley Stadium, will be built. The suppressed evidence could cover such varied matters as tourism, harm to the

environment and to wildlife, noise and sound pollution, traffic, mental health and employment.

The landowners who are subject to compulsory purchase and to SPR's gagging system represent those who are most directly affected by this huge development. As a class they could have given vitally important evidence to the Authority. Their voices have been silenced."

8 Although the examining authority indicated that it would reach a view on the claimant's complaints, in the event it did not do so. In October 2021, the examining authority reported to the defendant. The matters covered in the report are set out in the defendant's decision of 31 March 2022. They are as follows:

"Initial Analysis
- Need

Planning Issues: Onshore
- Flooding and Drainage
- Landscapes and Visual Amenity
- Onshore Historic Environment
- Seascapes
- Onshore Ecology
- Coastal Processes
- Onshore Water Quality & Resources
- Noise, Nuisance and Health Effects
- Transport & Traffic
- Socio-economic Effects Onshore
- Land Use
- Other Onshore Matters

Planning Issues: Offshore
- Offshore Ornithology
- Marine Mammals
- Other Offshore Biodiversity Effects
- Marine Physical Effects and Water Quality
- Offshore Historic Environment
- Offshore Socio-economic and Other Effects.

Habitats, Overarching Analysis, Compulsory Acquisition, Temporary Possession and Development Consent Considerations.
- Habitats Regulations Assessment
- Alternative and Site Selection
- Good Design
- Compulsory Acquisition and Related Matters
- The Draft Development Consent Order and Related Matters."

9 As it had to, the defendant's decision addressed, both planning and related issues, and the issue of the compulsory purchase of land. In the section of the letter dealing with compulsory purchase there is the following:

"The Use of Non-Disclosure Agreements

26.29 This issue has been cited by the ExA in the objection of Dr Alexander Gimson and Tessa Wojtczak, but the ExA provides no further detail in its Report.

26.30 A submission was made to the Secretary of State by SEAS [the claimant] on 30 November 2021 setting out detailed concerns. The Applicant responded to these concerns on 31 January 2022 as part of its representation to the Secretary of State's second round of post-examination consultation.

26.31 In brief, concerns were raised that parties entering into an agreement with Scottish Power Renewables for the voluntary acquisition of land or rights in it were being required to sign Non-Disclosure Agreements that prevented these parties from participating in the examination and that consequently the ExA was not getting a clear picture of the strength of objection to the two Proposed Developments.

26.32 The Secretary of State has considered the representations of both SEAS and the Applicant carefully due to the important issues that they raise about the conduct of the Examination and the rights of all affected parties to have a fair hearing. Having also reviewed the totality of the ExA's Report the Secretary of State considers that all relevant issues were raised and explored in the Examination and that he has the necessary information to enable him to make a decision."

10 Mr Wolfe submits that these paragraphs are, at least arguably, legally defective. As well as failing properly to grapple with the "chilling effect" issue, the defendant did not personally consider the documentary information referred to in the passage I have just quoted.

11 The defendant's pre-action protocol response letter of 5 May 2022 represents, in Mr Wolfe's submission, an acknowledgement of this point:

"22. The Secretary of State will, of course, comply with the duty of candour which requires the Secretary of State to ensure that you and the Court are aware of how the decision was taken and why and ensure that all the cards are face up on the table. We set out below the facts relating to how the decision was taken, as instructed to us by our client.

23. Shortly after receiving ExA's Report, SEAS sent two lengthy submissions to the Secretary of State which set out their concerns in relation to the use of what it described as non-disclosure agreements.

24. The BEIS team dealing with the application at the Department identified that this issue had not been addressed in the ExA's Report and that it ought to be addressed by the Secretary of State.

25. The provision of information by Scottish Power Renewables at Appendix 1 in its response to the Secretary of State's Questions of 20th December 2021, provided the Department with a substantive response to the concerns raised by SEAS. This response highlighted that many landowners and Affected Persons submitted Relevant Representations and that none of these were withdrawn during the course of the Examination (paragraph 10), the explanation of how the Option Agreements would operate, the approach taken by the Applicants to Dr Gimson's concerns, that no Option Agreements had been entered to, the non-binding nature of the Heads of Terms (paragraph 13 to 16), and that the Applicant did not seek to have the SEAS evidence removed (paragraph 23).

> 26. The Department considered whether, in light of the concerns, further consultation would be helpful but concluded that given the number of Affected Persons that participated in the Examination, it would not be likely to elicit new information and, further, in any event, concluded that the information before the Secretary of State was adequate and there were no particular areas or issues on which further information was required.
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> 27. On this basis the Department was satisfied that it had sufficient information in order to determine the application and, in relation to the issue raised by SEAS, to be confident that no party was deprived of a fair hearing or that information existed that might have influenced the outcome of the decision but was not before the Secretary of State.
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> 28. The Secretary of State accepted that advice which was given through the provision of draft decision letters which addressed this issue in the same terms as the published decision letter."

12 Reference must be made to two witness statements filed by the claimant. The first is that of Fiona Gilmore, a director of the claimant. She refers to what she describes as secret payments to all the most affected landowners, with the apparent object of preventing them from participating in the public DCO examination being conducted by the ExA. She refers to landowners being in "fear of reprisals from SPR" and that "it goes without saying that we were not permitted to go onto land in order to conduct examinations." The heads of terms sent to the claimant was said by Ms Gilmore to have been "always intended to be strictly secret."

13 I shall set out para. 77 of Ms Gilmore's statement because this mentions an ecologist's report, cited by Mr Wolfe in his oral submissions and also the issue of the River Hundred, to which I shall return in due course:

> "77. SEAS commissioned a report from an expert ecologist, who was of the view that, notwithstanding the access issue, the unusual lack of input during the examination from landowners about species on their land may have prevented a true picture of the ecological impact of the development. In the ecologist's view:
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> > '*I start by expressing my surprise at the dearth of evidence that has been submitted and considered by the Authority in relation to biodiversity matters…If the applications are consented, it will adversely affect the land of a large number of landowners and have adverse ecological effects upon land owned by these parties. In an inquiry of this sort, it would be normal for affected landowners to have submitted evidence, and especially expert evidence, setting out the ecological harm that the SPR projects could cause. No such evidence has been submitted. One effect of this is that there is far less evidence available than I would have expected to be able to weigh against the position of SPR*'."

14 The other witness statement is from Dr Alexander Gimson. Dr Gimson's mother was an affected person; that is to say, her land is proposed to be acquired in connection with the development. Dr Gimson holds a power of attorney in respect of his mother. Dr Gimson is also chairman of the trustees of Wardens Trust, which is also an affected person. Despite

signing heads of terms, Dr Gimson took part in the proceedings of the examining authority. I quote from his statement:

> "12. I made a number of representations in writing and at hearings to the ExA on behalf of my mother beginning with written representations of 16 November 2020 and on behalf of the Trust on 28 October 2020 and later during January 2021. During the Examination, I explained to the ExA that SPR wished to have access to my mother, Mrs Gimson's, land to conduct certain tests and possibly lay trench cables. These submissions all included mention of the threat posed by the applications to the water supply and to the charity. It was my evidence, supported by that of my fellow trustees, that, if the applications were consented, they posed an '*existential*' threat to the Charity. One issue, amongst many, that I raised concerned the impact of SPR landing cables on the fragile cliffs very close to the Trust and the risks to the water aquifers through which SPR intended to undertake Horizontal Directional Drilling.
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> 13. The issue of the potential damage to the aquifer, through which the drilling would pass and which supplied water to five properties at Ness House including Wardens Trust, was first raised in detail in my submissions in October and November 2020. This is a demonstration of the impact that landowner's information might have made to the Examination, because it shows the fact that my submissions for the Trust and on behalf of my mother were the first to describe, in submissions in October and November 2020 and January and February 2021, the presence of the aquifer that the drilling would traverse. The fact that SPR were not aware of the aquifer and the well head at Ness House is demonstrated by an email from Mr Richard Morris to me on 15 February 2021, asking for technical details about the well, including the depth from ground to water level and to the bottom of the well. I supplied this information on 16 February 2021. The fact that the potential impact of the proposed development on the activities of the Trust was also not appreciated by SPR before it was raised in my submissions of October 2020 is demonstrated by the first email communication from Mr Richard Morris, Senior Project Manager at SPR, to the Trust on 26 January 2021.
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> 14. If I had been prevented from raising these issues consequent on a non-disclosure agreement, the potential development might have proceeded without considering the substance of those two crucial issues. I am aware that a couple who live at one of the cottages at Ness House gave evidence in 2020 which mentioned the Trust and the aquifer. However, that issue was not reacted to by SPR at the time, and the couple did not have the same specialist knowledge about the well head, such as the depth of the water, nor the same level of insight about the Trust as I did. Therefore, I was best placed to give the ExA the full picture."

15 Later in Dr Gimson's statement we find this:

> "**<u>Concluding remarks</u>**
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> 29. If I had been prevented from speaking out about the potential impact of the cable route on the integrity of the aquifer supplying water to 5 houses and a Charity, such information and all the data from subsequent boreholes

> would not have been available to the ExA in the detailed form I presented it. It is clear to me, therefore, that any similar agreements entered into with SPR by other landowners or APs would have had the same non-disclosure agreement clauses. This therefore means, as a consequence, that a similar risk that relevant information or issues, which might have had a material impact on SPR's case and the ExA's assessment of the development as well as that of the Secretary of State, would not have been made public and would not have been taken into account by the ExA and decision-maker."

16 I summarise the claimant's grounds as follows:

Ground 1: The defendant failed to consider the practical impact of the agreements on his evaluation of the wider planning merits as opposed to merely issues concerning compulsory acquisition. He also misdirected himself that the issues fall only on compulsory acquisition and not on the planning merits.

Ground 2: This argues that the defendant did not address his mind to the fact that the environmental information before him was, it is said, essentially devoid of information which might have come from the most obvious source, namely affected landowners and people that they might let onto their land in order to assess and report on its features. The claimant says that in this regard Lang J, in refusing permission, effectively reversed the burden of proof by saying that the claimant had not identified any specific issues material to the decision which were not assessed and considered.

Ground 3: asserts that the defendant particularly failed to address the fact that where landowners, who had refused to entertain the proposed agreements with the interested parties, had given evidence to the examining authority, relevant material had in fact come forward. In this regard, the claimant places particular emphasis on the witness statement of Dr Gimson.

Ground 4: states that the defendant failed to consider the potential effects of the distortion caused by the conduct of the interested parties on the paramount public interest within the decision-making process. The claimant says it was wrong for Lang J, in refusing permission, to conclude it was sufficient that the defendant had raised this issue. The defendant, the claimant says, could not conclude that he had the necessary information to make a lawful decision. The defendant failed to recognise the implications of the agreements and the resulting suppression of evidence relevant to the planning merits, such as environmental information. The defendant did not, in short, grapple with this issue.

Ground 5: argues that the defendant similarly failed to investigate, in the context of the examining authority's inquisitorial role, and assess matters based on full information; that is, all the information that could reasonably have come forward without the distorting effects of the agreements between the interested persons and the landowners.

Ground 6: asserts that the defendant needed to enquire into the potential distorting effects, including the possibility that evidence would not have come forward that otherwise might have done. Lang J, in refusing permission, said there was no evidence of distortion. Mr Wolfe says this is wrong. The claimant had put forward evidence of distortion.

Ground 7: argues that the defendant failed to proceed on the basis of a complete and lawful environmental impact assessment process, which must be taken to include freely and properly available information from the affected persons and community groups and NGOs.

Ground 8: also concerns an alleged failure concerned with the environmental impact assessment regime. Contrary to what Lang J said, in refusing permission, the claimant contends it is no answer to say that it is for the planning decision-maker to decide whether the requirements of the EIA regime have been met.

Ground 9: asserts that the defendant failed to consider whether the approach adopted by the interested parties went beyond the purpose of seeking negotiated settlements with landowners in the context of what the claimant describes as "normal CPO proceedings", as compared with such negotiations with affected persons, in the context of the Planning Act 2008, where the acceptability of the project in planning terms is still in issue and where any negotiations need to allow the affected person freely to object to the project.

Ground 10: argues that the defendant failed even to grapple with the issues raised by the claimant, let alone give reasons for rejecting their claim. Again, it is said that the defendant missed the point being made by the claimant when the defendant focused on whether he had sufficient information before him.

DISCUSSION

17 In considering the arguability of the claimant's challenge, it is necessary, in my view, to begin with some general observations. Regulation 4(2) of the 2017 Regulations prohibits the defendant from making an order granting development consent unless an EIA has been carried out in respect of the application. That includes the preparation of an environmental assessment, including certain prescribed information, as we see in regulation 5 of Schedule 4. As I have already said, a central part of the EIA process is, therefore, for the application properly to assess environmental effects.

18 The adequacy of the environmental assessment is, in my view, unarguably a matter of judgment for the decision-maker, subject to a review by the court only on a *Wednesbury* basis (for this, see *R (on the application of Friends of the Earth Ltd and others) v Heathrow Airport Ltd* [2021] UKSC 52). Where a public body has to conduct an inquiry pursuant to statutory powers and duties, it is entitled to decide upon the extent of the inquiry, again subject only to the court's supervisory jurisdiction (see *R (on the application of Khatun) v Newham London Borough Council* [2004] EWCA Civ 55). The extent and intensity of inquiry undertaken by a decision-maker can again only be challenged on a *Wednesbury* basis.

19 A failure to take into account a material consideration will not give rise to an error of law unless statute expressly or impliedly requires the consideration to be taken into account, or if the consideration is so obviously material that it must be taken into account. Again, the test for whether the consideration is so obviously material is *Wednesbury* (see *Heathrow Airport Ltd*). In that case, the Supreme Court considered the duty of enquiry where a material consideration is taken into account. It is now well-established that where a decision-maker decides to take a consideration into account, it is generally for him or her to decide how far to go into the matter or the manner and intensity of enquiry into it, which judgment may be challenged only on grounds of irrationality. By the same token, it is for the decision-maker to decide how much, if any, weight to attach to a factor that he takes into account; again, a judgment which cannot be challenged unless irrational (see *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759).

20 To make out a legal error arising from unfairness, prejudice must be shown (see *R (on the application of Clientearth) v Secretary of State for Business, Energy & Industrial Strategy* [2020] EWHC 1303 (Admin)). Finally, the legal adequacy of reasons in a decision letter, in

this context at least, is governed by the principles in *South Bucks District Council v Porter (No.2)* [2004] 1 WLR 1953. It is plain that a decision letter is addressed to an informed audience and need not refer to every material consideration.

21 In assessing the arguability of the grounds, it is also necessary, in my view, to have regard to the requirements of the EIA regime and to the nature of the task entrusted by Parliament to the examining authority. This is particularly important in view of the claimant's allegation that some relevant information may have been left out of account due to the arrangements entered into by the interested parties and the landowners.

22 I have already referred in this regard to the 2017 Regulations. For present purposes, it is, however, necessary to emphasise the fact that the Regulations provide a comprehensive set of requirements to ensure that likely significant environmental effects are taken into account. This includes, amongst other things, requirements to ensure that the scope and level of detailed information contained in the environmental statement are appropriate and adequate and that this is prepared by competent experts. The regime also contains requirements on the examining authority and the Secretary of State to address their minds to whether the assessment is adequate, or whether it needs to be supplemented by further information. The regime contains requirements to consult relevant bodies on the environmental statement. It also contains a requirement to ensure that the environmental statement is examined and that the decision-maker reaches a reasoned conclusion on the significant effects.

23 Accordingly, if the claimant, or any other person, considered that the environmental assessment in the present case did not contain adequate information for these purposes then they have an opportunity, through the examination and afterwards, to make the examining authority and the defendant aware of those concerns. The claimant, indeed, made such submissions to the defendant in this case. The defendant, as we have seen, was, however unpersuaded by them.

24 It is also necessary to have regard to the functions and duties of the examining authority. As already observed, the examining authority's function is essentially inquisitorial in nature. It has a duty to obtain any information that it considers to be necessary in order to reach a properly informed conclusion. To this end, pursuant to the Infrastructure Planning (Examination Procedure) Rules 2010, an examining authority may request any interested party to submit a written representation in order to obtain further information on that party's case. The examining authority can, in fact ask written questions and can require additional information from anyone at any stage of the process and require a response to be made in writing within a period it specifies. At any hearings held by the examining authority, it will probe, test and assess the evidence through direct questioning of the persons making oral representations. It may allow another party to cross-examine those giving the evidence on behalf of the applicant, if it considers this necessary. The examining authority also has the power to inspect any land as it sees fit in order to obtain any relevant information.

25 Having seen with what powers the examining authority has been entrusted by Parliament, it is necessary to consider the nature and extent of the examining authority's actions in the present case. In response to the applications, the examining authority received 832 relevant representations. This included 42 from those whose land was potentially subject to acquisition. Further, five such persons, who did not submit relevant representations, made written representations and other submissions in the examination. It is of note that many of the landowners, in whose land the interested parties needed to acquire an interest, submitted relevant representations. Of those, none withdrew their relevant representations during the course of the examination.

26 During the course of its nine-month examination period, the examining authority held seventeen issue-specific hearings, including four on biodiversity and habitat issues. There were also seven open floor hearings and three compulsory acquisition hearings.

27 As I have said, the examining authority has wide statutory powers to inspect all and any land it sees fit in order to obtain any information considered by it to be important and relevant under clause 16. In the present case, the examining authority explained the purpose of its site inspections as being to ensure that it had an adequate understanding of the proposed development within the site and surroundings and its physical and spatial effects. The examining authority invited parties to nominate locations for inspection, something that the latter were able to do whether or not they controlled access to the land.

28 The claimant, indeed, took up that opportunity and nominated various locations in its Deadline 1 submission. The examining authority inspected the requested locations. As far as I am aware, no suggestion has been made that the ability of the claimant to identify land containing important and relevant features which they felt the examining authority should see and inspect was limited as a result of landowners signing heads of terms.

29 By the close of the examination, further written submissions were made to the defendant. These included a response to two consultation letters issued to parties on 2 November 2021 and 2 December 2021. A substantial number of post-examination responses were received, including on behalf of the claimant.

30 After all this, the examining authority was satisfied that, following nine months of thorough examination, they had sufficient environmental and other information to reach a properly informed conclusion, that development consent should be granted. By the same token, the defendant, in the decision letter, expressly concluded that he had the necessary information to enable him to make a decision.

31 Next, it is necessary to examine the nature of the arrangements between the landowners concerned and the interested parties. No option agreements were entered into between the interested parties and the landowners during the examination period. Furthermore, no payments were made for any land or rights over land during that period, although some payments, I understand, have subsequently been made.

32 As a consequence, so far as this challenge is concerned, it is only the heads of terms that are material. Those heads of terms are non-binding. This is clear from the materials in the bundle. It is also clear from the examples in the bundle before me, that the heads of terms do not prevent the landowner from submitting relevant information to the examining authority, should they wish to do so. Nor do the heads of terms prevent members of the public accessing land in order to consider the environmental impacts. The heads of terms are said to be confidential to the parties; but reference to them may be made to the examining authority.

33 In addition to all this, as the examining authority itself made clear, no heads of terms or even option agreements can remove a landowner's statutory right to object: a right described by the examining authority as a "human right".

34 Agreements and arrangements of the kind with which we are concerned here are commonplace in the world of compulsory acquisition. In *Fulham Football Club v Cabra Estates Plc* [1993] 65 P & CR 284, the Court of Appeal rejected the argument that such provisions are unenforceable, as being contrary to public policy. The court said this:

> "… we can see no valid objection on grounds of public policy to a covenant whereby a party to a commercial transaction involving the disposition of land undertakes to support, and to refrain from opposing, planning applications by the other party for the development of the land. Such covenants are commonplace."

35 Where such agreements are in place, it will be for the decision-maker or, during the examination, the examining authority, to decide whether the examination is fair. Significantly in my view, no challenge has been made by the claimant to the examining authority's decision on the basis of any alleged procedural unfairness.

36 Mr Wolfe accepts that the use of heads of terms and option agreements are not contrary to public policy. He nevertheless says the way they were used in the present case created, a chilling effect which may have prevented relevant information, especially concerning the environmental effects of a project, from coming to light.

37 However, where a statutory scheme is (as here) inquisitorial and does not depend on objections; where (as here) the examining authority has been given extensive powers by Parliament, including of entry onto the land, where (as here) the examination process was, on any view, extensive and detailed; and where (as here) the heads of terms and option agreements are not only lawful but commonplace, then, in my view, there needs to be an arguably sound legal rationale for this court to find that the decision-making process was nevertheless arguably flawed, on the basis of an assertion that some relevant information might have been forthcoming but was not.

38 With this in mind, it is necessary to return to the witness statements of Dr Gimson and Ms Gilmore. Notwithstanding that Dr Gimson had signed heads of terms, it is plain from his evidence that he was able to make representations and to engage with the examination throughout. It is useful in this regard to note what the interested parties said to the defendant on 31 January 2022, as annexed to the defendant's skeleton argument for this oral renewal hearing:

> "13. In representations dated the 14th February 2021 …, SEAS made claims about a condition in the draft Option Agreement which required the party entering the Option Agreement to withdraw any objection that had already been submitted and not to submit further objections. This type of clause is standard in circumstances where the landowner's interests have been fully protected in terms of the relevant Option Agreement and that they have voluntarily agreed to enter that Option for a long-term contract with the counterparty. It is recognised in the RICS guidance that such terms are likely to be included in this type of Option Agreement.
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> 14. The SEAS complaint did not, however, disclose that Dr Gimson had instructed his agents to contact the Applicants' land agents to discuss the specifics of that clause. He had advised that he wished to continue making representations on behalf of the land interest that he represented in the Examinations. The Applicants' land agents took instructions from the Applicants and confirmed that the Applicants were happy to propose a variation of the particular contractual term to allow Dr Gimson to continue to make his representations. Against that background, the SEAS complaint did not contain the full details of the discussions with Dr Gimson and therefore did not put the full evidence before the Examinations.

> 15. After the SEAS complaint, some SEAS supporters lodged claims before the Examinations that they knew parties who had signed Option Agreements and taken payments, and now regretted it. This could not have been accurate as, at that time, no Option Agreements had been entered into and no option payments had been made to any landowner.
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> 16. Against that background, the SEAS complaints then moved on to attacking what is known as the Heads of Terms. This is a document which is generally negotiated between land agents before the negotiation of the Option Agreement and which set out the intended commercial terms of that Option Agreement. The Heads of Terms are then passed to Solicitors to negotiate the detailed drafting of the Option Agreement. Again, this is referenced in the RICS guidance on such contracts and the recommendation is that on the front page there should be a statement on them that "they are subject to contract". That is exactly what the various Heads of Terms that the Applicants have used state. The Applicants' do not consider the Heads of Terms to be legally binding and that they represent the starting point of the further negotiation that requires to be held. This is how they have been treated by the parties in the process. Again, SEAS have mischaracterised the nature and character of these documents.
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> 17. Furthermore, the specific Heads of Terms example used by SEAS in their Deadline 8 submission … was one which actually demonstrated the value of the process as the Heads of Terms were fully bespoke to one individual land-holding and, indeed, the Heads of Terms had been negotiated between agents over an extensive period of time. There had been no less than 4 drafts."

39 I turn now to the witness statement of Ms Gilmore and the issues of the River Hundred. Ms Gilmore contends that the River Hundred issue demonstrates the sort of evidence that the claimant might have been able to advance on a broader front had they had access to the affected land. She suggests that the practical effect of what she, incorrectly in my view, refers to as non-disclosure agreements was to prevent the claimant from accessing the land. There is, however, nothing to suggest that the claimant even requested permission to access any relevant land in this regard and that this was denied. It is also relevant, in my view, that the defendant, in his decision letter had specific regard to the concerns raised about the River Hundred.

40 In his oral reply, Mr Wolfe sought to rely on the comments of the ecologist, to which I have already made reference. There is, however, nothing in the ecologist's materials that comprises anything which could be described as evidence that the paucity of material emanating from landowners was directly brought about by the interested parties' dealings with the landowners, still less that there was specific evidence that could have been brought to the attention of the examining authority but which was not as a result of those dealings.

41 Mr Wolfe also made reference in his reply to p.599 of the bundle. This is part of the written submissions made by the claimant to the examining authority in respect of Deadline 8 of 25 March 2021. But, again, there is nothing here to show that any landowner, even speaking anonymously for this purpose, had been dissuaded from providing material evidence or information to the examining authority.

42 In the light of all this, I agree with the defendant and the interested parties that the claimant's so-called "chilling effect" case is founded on no more than speculation. In so saying, this is not to reverse any burden of proof. The claimant has to make out an arguable case for this court to intervene. Merely by unilaterally choosing to characterise the negotiations between the interested parties and landowners as having a "chilling effect", the claimant cannot, without more, turn its speculation into the sort of evidence that necessitated the defendant to go further than he did in his decision letter. The "chilling effect" argument is, in short, upon analysis, in the nature of a straw man.

43 In view of this finding, I can deal with the specific grounds relatively briefly. **Ground 1** fails for the reasons I have given. There is also the point in relation to this ground, and a number of others, that the decision letter needs to be read fairly and as a whole. Although the passages dealing with the claimant's submissions about the effect of arrangements between the interested parties and the landowners occurs in the part of the letter dealing with the compulsory purchase aspects, the overarching question whether a compelling case has been made out in the public interest for compulsory purchase powers necessarily involves consideration of the wider planning merits, including environmental aspects. The Guidance document "Planning Act 2008, Guidance related to Procedures for Compulsory Acquisition of Land" (September 2013), recognises this overlap.

44 **Grounds 2 and 3**: The defendant unarguably addressed his mind to whether he had sufficient information and concluded that he did, having noted the claimant's submissions that there may be deficiencies. The defendant's decision was plainly not irrational.

45 Since the claimant is alleging that material considerations were not taken into account then, to reiterate I just made, it bears the burden of making that claim good. For the reasons I have given, the claimant has unarguably failed to do so.

46 Finally on these two grounds, I dealt earlier with the significance of Dr Gimson's witness statement.

47 **Grounds 4 to 6** founder for the overarching reason I have given. I should also say that there is no arguable merit in the contention that the defendant somehow erred by failing to give personal consideration to the material submitted by the claimant rather than relying on his officials to investigate these and give advice as to what the defendant should do as per the draft decision letter. The case of *R (Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport* [2021] EWHC 2161 (Admin) is plainly distinguishable in this regard.

48 **Grounds 7 and 8** can be addressed as follows: The defendant's conclusion that he had the necessary information to make a decision in accordance with the EIA regime is, as I have said, challengeable only on a *Wednesbury* basis and, in view of my overarching finding, there is no arguable case for saying that his decision concerning that regime was unlawful on that basis.

49 **Ground 9** seeks to draw a distinction between so-called "normal" compulsory acquisition proceedings and the way in which compulsory acquisition is dealt with under the Planning Act 2008. Under the 2008 Act, a development consent order may grant consent for the development, as well as powers of compulsory acquisition. That is not the case in certain other regimes. In his skeleton argument, Mr Wolfe puts the claimant's case as follows:

> "58. Planning permission for development under the TCPA 1990 is not sought by acquiring authorities … but by developers (or sometimes local

> authorities as developers) and is a separate process to that of any CPO which can only be sought by an AA with statutory powers.
>
> 59. In addition, an essential part of justifying a CPO (not DCO …) is showing there is no planning impediment. Land ownership is not a pre-requisite to planning permission. To that end, whilst negotiations for land purchase by a developer can take place at any time, the 'threat' of compulsory purchase as part of that process is only forceful once planning permission has been separately obtained.
>
> 60. In contrast, under the PA2008 regime, the developer applicant and the AA are the same person, so threat of CA can be made immediately under the Order powers. That matters, because a landowner who wants to object to a DCO coming forward in planning terms in the first place (as opposed to objecting on CA reasons) may 'lose' that opportunity on the basis that he is asked to accept in effect that that decision has already been made (when it has not) and forego a right to object. That flows from the 'one stop shop' of the DCO process, but does not render such practice lawful, where it has the effect as identified in this claim. The PA2008 grants considerable powers to a private developer, whereas in the CPO process the developer is not the same person in fact or in law as the AA. The potential, therefore, for land purchase agreements, such as the ones the IPs sought, has clear potential under the DCO regime to suppress evidence that is relevant to the 'planning permission' part of the DCO as happened here."

50 Lang J was not persuaded by this submission and neither am I. Under both regimes, negotiations regarding land acquisition may proceed in parallel to the application to consent or to development. The relevant Guidance under the 2008 Act on acquisition by agreement is notably similar to that for compulsory acquisition under other regimes:

> "25. Applicants should seek to acquire land by negotiation wherever practicable. As a general rule, authority to acquire land compulsorily should only be sought as part of an order granting development consent if attempts to acquire by agreement fail."

51 In the non-2008 compulsory acquisition process, it is also relevant to note that the developer may well be the same person as the acquiring authority.

52 For those reasons, I do not consider that there is for this purpose any material distinction, such as is sought to be drawn by the claimant under Ground 9.

53 Finally, **Ground 10** fails for the reasons I have given earlier.

54 In view of my findings, it is unnecessary to deal with the submissions made to me on s.31 of the Senior Courts Act 1981. The grounds of claim are unarguable and the application is, accordingly, dismissed.

MR WESTMORELAND SMITH: I am grateful, my Lord. Lang J made an order in relation to costs.

MR JUSTICE LANE: Yes.

MR WESTMORELAND SMITH: (Inaudible) it was an Aarhus claim and awarded £10,000 to the defendant.

MR JUSTICE LANE: But nothing to the interested party.

MR WESTMORELAND SMITH: Nothing to the interested party. And I would just ask you to affirm that order and make the same order.

MR JUSTICE LANE: Do I need to affirm it?

MR WESTMORELAND SMITH: Well, there is no-- there is nothing in the Lang J order that says it is a final order unless submissions are made, so-- which it usually does, so----

MR JUSTICE LANE: Well, you will no doubt formally draw up an order for my approval and if you wish to say in it that Lang J's order is to stand, then you may. We could have a debate about whether that is necessary but I do not think there is anything that turns on that.

MR WESTMORELAND SMITH: My Lord, I am grateful.

MR JUSTICE LANE: Thank you.

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CERTIFICATE

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