Neutral Citation Number: [2024] EWCA Civ 277

Case No: CA-2023-001527

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
Mr Justice Holgate
[2023] EWHC 1796 (Admin)

Royal Courts of Justice Strand, London, WC2A 2LL

Date:
22/03/2024 **Before :**

SIR KEITH LINDBLOM
(Senior President of Tribunals)

LORD JUSTICE DINGEMANS and
LADY JUSTICE ANDREWS

- -

Between :	
THE KING	
(on the application of SUFFOLK ENERGY ACTION SOLUTIONS SPV LIMITED)	**Claimant/ Appellant**
- and -	
THE SECRETARY OF STATE FOR ENERGY SECURITY AND NET ZERO -	**Defendant/ Respondent**
and-	
(1) EAST ANGLIA ONE NORTH LIMITED	**Interested Parties**
(2) EAST ANGLIA TWO LIMITED	

- -
- -

Tim Buley KC (instructed by **Leigh Day**) for the **Appellant**
Mark Westmoreland Smith KC and **Jonathan Welch** (instructed by **Government Legal Department**) for the **Respondent**
Hereward Phillpot KC and **Hugh Flanagan** (instructed by **Shepherd and Wedderburn LLP**) for the **Interested Parties**

Hearing dates: 14 and 15 February 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 22nd March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Keith Lindblom (Senior President of Tribunals), Lord Justice Dingemans and Lady Justice Andrews:

Introduction

1. Did the Secretary of State for Business, Energy and Industrial Strategy act unlawfully in dealing with a complaint by the appellant, Suffolk Energy Action Solutions SPV Ltd. ("Suffolk Energy Action"), that the interested parties, East Anglia One North Ltd. and East Anglia Two Ltd. ("East Anglia"), had "stifled" or "neutralised" the ability of landowners facing possible compulsory purchase to present objections to and information about a scheme for which East Anglia were seeking development consent? That is the question at the heart of this appeal.

2. The appeal is against the order of Holgate J dismissing Suffolk Energy Action's claim for judicial review of the Secretary of State's decision to make two Development Consent Orders under section 114 of the Planning Act 2008 ("the 2008 Act"), granting development consent for the construction of two offshore windfarms off the Suffolk coast, and for their associated onshore development.

3. The relevant functions of the Secretary of State for Business, Energy and Industrial Strategy were transferred to the respondent, the Secretary of State for Energy Security and Net Zero, with effect from 3 May 2023. For ease of reference, we shall simply refer to the decision-maker in this judgment as "the Secretary of State".

4. East Anglia are subsidiaries of Scottish Power Renewables. The onshore works for each development are similar, and involve the laying of underground cables for exporting the electricity generated by the windfarms from a landfall north of Thorpeness to a new substation at Friston, and to a new National Grid substation. One of the onshore cable routes affects an Area of Outstanding Natural Beauty. Among other things, the Development Consent Orders authorise the compulsory purchase of land needed for the onshore works, potentially from 55 different landowners.

5. Suffolk Energy Action is a special purpose vehicle incorporated in 2022 by a local residents' group, Suffolk Energy Action Solutions ("SEAS"), which was set up in 2019. Its object is to protect the coast and countryside affected by the scheme. SEAS supports the offshore windfarms, but opposes the onshore works on the grounds that they will have a deleterious impact on people, the countryside and the environment. It considers that better solutions are available for bringing the electricity generated by the windfarms onshore.

6. The Secretary of State's decision to grant the Development Consent Orders was of a purely administrative character, taken in the overarching public interest. He was not adjudicating upon any issue between East Anglia or Scottish Power Renewables and SEAS or any other objectors to the development (see, for example, *Bushell v Secretary of State for the Environment* [1981] A.C. 75, per Lord Diplock at p.297GH, and *R. (on the application of Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 22; [2003] 2 A.C. 295 per Lord Hoffmann at [74] and [75]). The decision was made on 23 March 2022, following a statutory Examination of the two applications by a Panel of five Inspectors appointed by the Secretary of State under Chapter 4 of Part 6 of the 2008 Act.

7. The Examination began on 6 October 2020 and was completed on 6 July 2021. The extensive nature of that process is described at [50] of Holgate J's judgment. As he said, "this was a process of collecting and analysing information on a massive scale which fed into the very substantial Reports produced by the Panel". Because the proposals involved "EIA development" for the purposes of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017, SI 2017 No. 572 ("the EIA Regulations"), the Panel also carried out an Environmental Impact Assessment ("EIA") in respect of each development.

8. The Panel's Reports on the two applications were submitted to the Secretary of State on 6 October 2021, about three months after the completion of the Examination. Much of the content of those Reports was common to both applications.

9. Suffolk Energy Action's case, in a nutshell, is that the process was unfairly distorted, and that this impeded the carrying out of a proper enquiry as to whether or not the proposed development was in the public interest. The complaint centres around certain provisions in the Heads of Terms and Option Agreements which were negotiated between East Anglia and most of the private landowners whose land was potentially subject to compulsory purchase. It is contended that these provisions ("the non-objection clauses") were unlawful because they precluded, or, if they were not legally binding, had a tendency to dissuade, the landowners from raising any objections to the proposed development, even those wholly unrelated to the impact on their own land. In addition, the Option Agreements expressly required the landowners to withdraw any objections they had already articulated. As Suffolk Energy Action's counsel, Mr Tim Buley KC, put it, "even if [an agreement of this nature] is now orthodox, it is not legitimate because it has a tendency to suppress evidence on something which affects the public interest".

10. Suffolk Energy Action contends that the problem caused by the non-objection clauses was compounded by the fact that the Heads of Terms/Option Agreements also contained confidentiality provisions. In consequence, it claims, any landowners who signed up to them would be precluded from telling the Panel or the Secretary of State, or, indeed, SEAS, what, if any, objections they might otherwise have raised. It followed that the Panel would not be in a position to ascertain whether those objections duplicated others, and if not, whether they would have made a difference to their recommendations.

11. Accordingly, the first matter of substance to be addressed is whether the use of the non-objection clauses in this context was legitimate. Suffolk Energy Action's case is that the Secretary of State failed to address that "in-principle" issue before making the decision under challenge. Despite the fact that the complaint was made by SEAS to the Panel and was the subject of written and oral representations before the Examination concluded, Suffolk Energy Action claimed it had not been properly taken into account by the Panel when preparing its Reports. The issue of inhibition on complaints was a serious one, and the Secretary of State failed to deal with that concern in a lawful manner, because he did not address the right question – namely, whether there was a real risk that the process had been unfairly distorted. He was therefore in no position to reach a lawful decision that the information before him was sufficient to enable him to decide whether to grant the applications.

12. When Mr Buley was asked whether, as a matter of logic, his submissions led inexorably to the conclusion that the Secretary of State had no choice but to refuse development consent, he demurred. He submitted it would have been open to the Secretary of State to have told East Anglia that he could not fairly make a decision, which could have led to them going back to the landowners and waiving or varying the non-objection clauses to enable the landowners to articulate any concerns they may have had about the wider development, or to provide further information. Alternatively, the Secretary of State might have required further investigations to be carried out. Mr Buley did not explain how those hypothetical investigations might have resolved the situation, if the confidentiality clauses truly operated to preclude the discovery of any further relevant evidence.

13. Before addressing these arguments, it is necessary to set out in more detail the legal framework in which they arise.

The legal framework

14. The 2008 Act establishes the statutory framework for deciding applications for development consent for "nationally significant infrastructure projects", as defined by section 14(1). A comprehensive description of this framework was given by Lord Hodge and Lord Sales JJSC in *R. (on the application of Friends of the Earth Ltd.) v Secretary of State for Transport* [2020] UKSC 52; [2021] PTSR 190, at [19] to [38].

15. Section 103 of the 2008 Act provides:

> "The Secretary of State has the function of deciding an application for an order granting development consent."

16. Section 104 applies to decisions, such as this one, where a "national policy statement has effect" (104(1)).[1] Section 104(2) provides that in deciding such an application the Secretary of State must have regard to –

> "(a) any national policy statement which has effect in relation to development of the description to which the application relates (a "relevant national policy statement"),
>
> (aa) the appropriate marine policy documents (if any), determined in accordance with section 59 of the Marine and Coastal Access Act 2009,
>
> (b) any local impact report (within the meaning given by section60(3)) submitted to the Secretary of State before the deadline specified in a notice under section 60(2),
>
> (c) any matters prescribed in relation to development of thedescription to which the application relates, and

[1] The relevant national policy statements ("NPS") here are the NPS for Energy (EN-1), the NPS for Renewable Energy Infrastructure (EN-3), and the NPS for Electricity Networks Infrastructure (EN-5).

(d) any other matters which the Secretary of State thinks are bothimportant and relevant to the Secretary of State's decision."

17. It is clear from sub-paragraph (d) that, apart from those matters which the Secretary of State is obliged by statute to consider, the decision about whether any other matter is (a) important and (b) relevant to the decision whether to grant or refuse development consent, and thus material, is solely one for the Secretary of State. As the Supreme Court confirmed in *Friends of the Earth*, at [116] to [119], that decision is only susceptible of challenge on *Wednesbury* principles.

18. Under section 61 of the 2008 Act, the Secretary of State must decide whether to appoint a "Panel" or a single person to "handle" the application, undertaking the role of "the Examining Authority" ("the ExA"). Where, as in this case, a Panel is appointed, section 74(2) provides:

"[The Panel] has the functions of –

(a) examining the application, and

(b) making a report to the Secretary of State on theapplication setting out—

(i) the Panel's findings and conclusions in respect of the application, and

(ii) the Panel's recommendation as to the decision to be made on the application."

19. Section 74 (3) provides:

"The Panel's functions under this section are to be carried out in accordance with Chapter 4."

Chapter 4 makes provision for, among other matters, "Written representations" (section 90); "Hearings about specific issues" (section 91), "Compulsory acquisition hearings" (section 92), and "Open-floor hearings" (section 93).

20. The Examination is also governed by the Infrastructure Planning (Examination Procedure) Rules 2010, which make provision for "Site inspections" (rule 16).

21. The manner and intensity of any inquiry into any matter which the Panel, or the Secretary of State, considers to be material is a matter for them, subject only to the supervisory jurisdiction of the court. So too is the weight they decide to attach to any particular factor. Any decision made by the Panel, or by the Secretary of State, about whether they have sufficient information on which to make a recommendation, or to make a decision to grant or refuse development consent (as the case may be), is only open to challenge on the basis that no reasonable authority could have been satisfied on the basis of the enquiries made that it possessed the information necessary for the making of the decision.

22. Holgate J accurately set out the law on the *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014 ("*Tameside")* duty to make enquiries, at

[65] to [69] of his judgment. He correctly concluded, on the basis of the authorities he cited, including *R. (on the application of Balajigari) v Secretary of State for the Home Department* [2019] 1 W.L.R. 4647 and *Friends of the Earth*, that a challenge based on a complaint that the decision-maker failed to take an allegedly relevant consideration into account will only succeed if the omitted matter was "so obviously material" that, in the circumstances of the case, it was irrational to leave it out of consideration.

23. As Holgate J acknowledged at [43], the examination process is inquisitorial, not adversarial. It does not involve cross-examination at hearings or on written submissions in response to the ExA's questions. Whilst the inquisitorial nature of the process means that objections and disagreement are not fundamental, it is incumbent on the ExA (here, the Panel) to ensure that a fair procedure is followed and that their report is "fully informed"**.** In this context "fully informed" means "sufficiently informed to make the recommendation" (see the discussion at [59] and [60] of the judgment below, which specifically concerns the EIA but articulates a principle that applies equally to other aspects of the Panel's Reports).

24. In *Halite Energy Group Limited v Secretary of State for Energy and Climate Change* [2014] EWHC 17 (Admin), Patterson J described the process in these terms, at [79]:

> "The … examination process is both inquisitorial, iterative and learning. The purpose of the examination process is to enable the ExA to be able to compile a fully informed report with a recommendation to the Secretary of State on the NSIP before it. The ExA decide on and lead the examination process to be followed. The Infrastructure Planning (Examination Procedure) Rules 2010 provide the legal framework whereby that can happen. Further information can be sought by the ExA at any time before the completion of its examination. It is critical, though, that the examination process is undertaken in a way that achieves the objective of the ExA but is fair to all parties throughout."

The EIA Regulations

25. The EIA Regulations establish the process by which the environmental impact of a proposed project which is "EIA development" should be treated by the Secretary of State when considering an application for development consent. The aim is to ensure that planning decisions which may affect the environment are made on the basis of "full information" (Lord Hoffmann in *R. v North Yorkshire County Council, ex parte Brown* [2000] 1 A.C. 397, at p.404D). Consequently, the EIA Regulations strictly prescribe both the process for how information should be gathered, and the standard of information required when conducting an EIA.

26. It is not in issue that each of the windfarms in this case constitutes an "EIA development" under regulation 3 and paragraph 3(i) of Schedule 2 to the EIA Regulations. Regulation 4 of the EIA Regulations prohibits the Secretary of State from granting development consent on an application for an EIA development unless "an EIA has been carried out in respect of that application".

27. Regulation 5(1) sets out the three stages of the EIA process. First, an environmental statement is prepared by the applicant. Next, the necessary consultations, publications, and notifications are carried out. Finally, the steps prescribed by regulation 21 are undertaken by the Secretary of State. Regulation 21(1) requires the Secretary of State to examine the environmental information (including information gathered after the environmental statement is prepared), to reach a reasoned conclusion on the likely significant effects of the proposed development, and to integrate that conclusion into the decision as to whether a Development Consent Order should be granted.

28. Regulations 12 and 13 of the EIA Regulations establish the applicant's duty, before their environmental statement is approved, to lay the groundwork for consulting the local community and affected individuals. Consultation with the local community on the environmental impact of the project is facilitated by the applicant's duty to prepare a consultation statement (under section 47 of the 2008 Act) which sets out whether the proposed development is EIA development, and, if so, "how the applicant intends to publicise and consult on" the information referred to in regulation 14(2) as qualified by regulation 12(2) (regulation 12).

29. Regulation 13 sets out the content of the applicant's duty to publicise the proposed application (under section 48 of the 2008 Act). Under regulation 11(1)(c), the Secretary of State must provide an applicant with a list of particular persons who he considers are likely to be affected by or have an interest in the proposed development and are unlikely to otherwise be aware of the application, to whom regulation 13 mandates the applicant to send a copy of the notice of the proposed application. As well as the local community, consultation is also carried out with, among others, the relevant statutory bodies concerned with environmental protection.

30. Regulation 14(2) to (4) establishes a minimum standard which an environmental statement must meet:

> "(2) An environmental statement is a statement which includes at least—
>
> (a) a description of the proposed development comprisinginformation on the site, design, size and other relevant features of the development;
>
> (b) a description of the likely significant effects of the proposeddevelopment on the environment;
>
> (c) a description of any features of the proposed development,or measures envisaged in order to avoid, prevent or reduce and, if possible, offset likely significant adverse effects on the environment;
>
> (d) a description of the reasonable alternatives studied by theapplicant, which are relevant to the proposed development and its specific characteristics, and an indication of the main reasons for the option chosen, taking into account the effects of the development on the environment;

> (e) a non-technical summary of the information referred to insub-paragraphs (a) to (d); and
>
> (f) any additional information specified in Schedule 4 relevantto the specific characteristics of the particular development or type of development and to the environmental features likely to be significantly affected.
>
> (3) The environmental statement referred to in paragraph (1) must –
>
> (a) where a scoping opinion has been adopted, be based on themost recent scoping opinion adopted (so far as the proposed development remains materially the same as the proposed development which was subject to that opinion);
>
> (b) include the information reasonably required for reaching areasoned conclusion on the significant effects of the development on the environment, taking into account current knowledge and methods of assessment; and
>
> (c) be prepared, taking into account the results of any relevantUK environmental assessment, which is reasonably available to the applicant with a view to avoiding duplication of assessment.
>
> (4) In order to ensure the completeness and quality of theenvironmental statement –
>
> (a) the applicant must ensure that the environmental statementis prepared by competent experts; and
>
> (b) the environmental statement must be accompanied by astatement from the applicant outlining the relevant expertise or qualifications of such experts.

31. If the Secretary of State considers that it is necessary for an environmental statement submitted with an application to contain further information, the Secretary of State must issue a written statement giving reasons for that conclusion, send a copy to the applicant, and suspend consideration of the application until the applicant has provided the further information required (regulations 15(7) and (8)). The ExA has the same duty when conducting an Examination (regulations 20(1) and (2)).

32. As Holgate J explained at [59], the EIA Regulations recognise that an environmental statement may be deficient, and therefore make provision for publicity and consultation to enable such deficiencies to be identified and addressed. It is for the ExA to undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the proposed development. The information must be sufficient to enable the main or the likely significant effects on the environment to be

assessed. The adequacy of the information contained within the environmental statement is a matter of judgment for the Secretary of State or the ExA, subject to challenge on *Wednesbury* grounds (*R. (on the application of Blewett) v Derbyshire County Council* [2004] Env. L.R 29 at [32] and [33]).

33. The EIA process as a whole must itself comply with the standards established by regulations 5(2), (3), and (5):

> "(2) The EIA must identify, describe and assess in an appropriate manner, in light of each individual case, the direct and indirect significant effects of the proposed development on the following factors –
>
> (a) population and human health;
>
> (b) biodiversity, with particular attention to species and habitatsprotected under any law that implemented Directive 92/43/EEC2 and Directive 2009/147/EC3 ;
>
> (c) land, soil, water, air and climate;
>
> (d) material assets, cultural heritage and the landscape;
>
> (e) the interaction between the factors referred to in subparagraphs (a) to (d).
>
> (3) The effects referred to in paragraph (2) on the factors set out inthat paragraph must include the operational effects of the proposed development, where the proposed development will have operational effects.
>
> (5) The Secretary of State or relevant authority, as the case may be, must ensure that they have, or have access as necessary to, sufficient expertise to examine the environmental statement or updated environmental statement, as appropriate."

34. Although it appears to have been argued in the court below that the environmental information was insufficient, so as to involve a breach of the EIA Regulations (see [186] of the judgment), that submission, which Holgate J rejected, was not pursued in this appeal.

The Departmental guidance on the compulsory acquisition of land

35. In September 2013, the then Department for Communities and Local Government issued "Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land". Paragraphs 25 and 26 of that guidance state:

> 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. Where proposals would entail the compulsory acquisition of many separate plots of land (such as for long, linear schemes) it may not always be practicable to acquire by agreement each plot of land. Where this is the case it is reasonable to include provision authorising compulsory acquisition covering all the land required at the outset.
>
> 26. Applicants should consider at what point the land they are seeking to acquire will be needed and, as a contingency measure, should plan for compulsory acquisition at the same time as conducting negotiations. Making clear during preapplication consultation that compulsory acquisition will, if necessary, be sought in an order will help to make the seriousness of the applicant's intentions clear from the outset, which in turn might encourage those whose land is affected to enter more readily into meaningful negotiations."

The essential facts

36. It appears from the judgment that there were a number of contentious factual issues which Holgate J was required to, and did, resolve after reviewing the evidence in detail. For the purposes of this appeal it is only necessary to set out the matters relevant to Suffolk Energy Action's complaint that the Examination process was unfairly distorted.

37. In April 2018 East Anglia and Scottish Power Renewables appointed land agents to negotiate the grant of access rights and sales by the 55 landowners whose land would be affected by the onshore works. Most of the landowners instructed independent land agents to act on their behalf. From mid-2019 to January 2020 negotiations took place on a generic draft of the Heads of Terms. All of the relevant landowners were legally represented. An independent solicitor reviewed the draft on their behalf, and negotiated alterations.

38. The evidence included one example of the Heads of Terms, signed by Dr Alexander Gimson on behalf of his mother, who was the relevant landowner. That document, which is dated 13 January 2020, is headed "Without Prejudice, Confidential subject to Planning & Contract." If that were not clear enough, the last page states:

> "None of the contents of this document are intended to form part of any contract that is binding on any Scottish Power Group Company.
>
> The above Heads of Terms represent the main terms for Options/Deeds of Grant of Easement, but are not supposed to be fully inclusive and are subject to additions to or amendments by the Grantor, the Grantee and their respective solicitors."

39. Holgate J found, correctly, that the Heads of Terms were of no binding effect, and that the affected landowners, who were all legally represented, should have been so advised by their solicitors: [78]. Those findings have not been challenged in this appeal. The judge also found that in February 2021, when SEAS first expressed their concerns to

the Panel about the non-objection clauses, and repeatedly thereafter, East Anglia made that position publicly clear: [82], [100], [110](iv), [111], [113], [128], [140]. SEAS did nothing to put this to the test by contacting the 16 private landowners who had not raised objections to the applications for development consent, or by asking the Panel to do so: [82], [110](v) and (vi).

40. The Heads of Terms envisaged that in due course an Option Agreement would be entered into which would enable the Grantee, Scottish Power Renewables, to call for up to two easements, one for each of the two interested parties, to be granted over all or part of the option land. The proposed terms of the Option Agreement and the Deeds of Easement were set out in numbered paragraphs. Paragraph 7 of the proposed terms of the Option Agreement provided for an "incentive payment" to be made by Scottish Power Renewables to the landowner for signing the Heads of Terms by 27 January 2020, but this sum would only be payable on completion of the Option Agreement. It also provided for additional financial incentives to be made to encourage the landowner to agree to the Option Agreement within 20 weeks. Again, none of these payments would fall due until the contractual terms for the Option Agreement were agreed, signed and exchanged.

41. Paragraph 31 of the Heads of Terms envisaged the following term being included in the Option Agreement:

> "The Granter will not object to the Developer's application for Development Consent nor any other planning application(s) associated with the Projects."

Paragraph 61 proposed that a similar clause be included in the Deeds of Easement.

42. Paragraph 38 of the Heads of Terms states:

> "These Heads of Terms are confidential to the parties named whether or not this matter proceeds to completion save that reference to them having been entered into may be referred to with the Planning Inspectorate."

As Holgate J found at [83], even though there was no binding contract, Scottish Power Renewables would probably have been able to bring a claim for breach of confidence for the disclosure of the content of the Heads of Terms (for example, revealing the amount of any incentive payment). However, the interested parties could not have relied on that provision to prevent a landowner objecting to their project or supplying information to SEAS or the Panel which was adverse to the Development Consent Order applications [83] and [110](i). Again, those findings are not challenged in this appeal.

43. By January 2022, 80% of the private landowners had signed a final version of the Heads of Terms. None had signed formal Option Agreements, but negotiations on the Option Agreements were at an advanced stage [127]. Of the 55 affected persons, 39 private landowners or their representatives, including Dr Gimson, had made objections. All of those objections, which were recorded in writing, were maintained to the end of the Examination and were addressed in the Panel's Report ([110](iii)), [140]). By the time

the Secretary of State issued the decision letter, only two Option Agreements had been completed, on 2 March 2022, three weeks earlier.

44. The Option Agreements contained the following clauses:

> "16. **Permissions**
>
> The Grantor shall not make a representation regarding the [two DCO applications] (and shall forthwith withdraw any representation made prior to the date of this Agreement and forthwith provide the Grantee with a copy of its withdrawal) nor any other Permission associated with [the developments] and shall take reasonable steps … to assist the Grantee to obtain all permissions and consents for the EA1N Works and the EA2 Works on the Option Area …
>
> 26. **Confidentiality**
>
> The terms of this Agreement shall be confidential to the parties both before and after completion of the Deed(s) of Grant and neither party shall make or permit or suffer the making of any announcement or publication of such terms (either in whole or in part) nor any comment or statement relating thereto without the prior consent of the other or unless such disclosure is required by the rules of any recognised Stock Exchange on which shares of that party or any parent company are quoted or pursuant to any duty imposed by law on that party or disclosure is required by the Grantee in connection with or in order to obtain the [DCOs] or any other planning application associated with the EA1N Development or the EA2 Development or any Permission."

45. Dr Gimson had not understood the Heads of Terms to preclude him from giving evidence to the Examination. He did provide information to the Panel on the risk of damage to aquifers on his mother's land and on property belonging to the Wardens Trust, in support of his objection to the proposal. When his land agent informed the interested parties' land agent that Dr Gimson wished to maintain that objection, the interested parties proposed that the non-objection clause in the draft Option Agreement be modified to allow him to do so [100]. The interested parties and Scottish Power Renewables made no suggestion to the Panel that landowners who had signed the Heads of Terms and who had made representations to the Examination opposing the Development Consent Order applications were in breach of the Heads of Terms [111].

46. The Panel found that all those affected by the proposals had had various opportunities to be heard and to make representations in the Examination, and that there had been no interference with their rights to a fair and public hearing under Article 6 of the European Convention on Human Rights [115] and [135]. The advice given by officials to the Secretary of State was that even if some landowners may have felt constrained from taking part in the Examination, they had not in fact been prevented from doing so. The conclusion in paragraph 6.115 of the ministerial submission was that "the ExA was satisfied that all affected persons had had the opportunity to be heard." [133], [135].

The decision

47. Section 26 of each of the decision letters addressed "compulsory acquisition and related matters". This section considered the use of non-disclosure agreements in paragraphs 26.29 to 26.32:

> "26.29. This issue has been cited by the ExA in the objection of Dr Alexander Gimson and Tessa Wojtczak, but the E**x**A provides no further detail in its Report [ER 29.5.11].
>
> 26.30. A submission was made to the Secretary of State by SEAS 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 postexamination 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 NonDisclosure 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."

48. Holgate J found, at [139], that this conclusion involved the rejection of SEAS's allegation that affected landowners had been "stifled" or "neutralised" by the interested parties' conduct so that they did not make representations that they would otherwise have wanted to make. He added at [140] that this was the conclusion that he had reached, and that there was ample material to support it. Mr Buley took issue with those findings. He submitted that this was not a matter for the judge to decide, and therefore he should not have made the findings of fact that he did.

Issues

49. We are very grateful to Mr Buley, to Mr Mark Westmoreland Smith KC, who appeared with Mr Jonathan Welch for the Secretary of State, and to Mr Hereward Phillpot KC, who appeared with Mr Hugh Flanagan for the interested parties, for their helpful written and oral submissions. By the conclusion of the hearing, it was apparent that the following matters were in issue: (1) whether the use of non-objection clauses by Scottish Power Renewables was legitimate; and (2) whether the Secretary of State failed to address the complaints about the use of non-objection clauses by Scottish Power Renewables.

Non-objection clauses in a planning context

50. The first consideration of non-objection clauses in a planning context appears to have been in *Taylor v Chichester and Midhurst Railway Company* (1869-70) LR 4 HL 628. In that case the railway company proposed to run a branch line over land owned by the claimant landowner, and sought an Act of Parliament to authorise the construction

of that branch line. The claimant proposed to object to the construction of the branch line, but the railway company agreed to pay him £2,000 to induce him to withdraw his opposition and not oppose the Bill, and to compensate him for the inconvenience, disturbance, damage and loss that he would suffer. In the event the branch line was not constructed, and the railway company attempted to avoid payment of the £2,000, raising a number of objections. The House of Lords held that the contract was valid and enforceable, even though it contained a provision that the claimant would withdraw his opposition to the Bill. As Mr Westmoreland Smith pointed out, the Bill encompassed land that belonged to other landowners besides the claimant.

51. Both parties referred to, and relied on, the decision of the Court of Appeal in *Fulham Football Club v Cabra Estates* (1993) 65 P&CR 284 ("*Fulham*"). Given the focus of the parties' submissions on the decision in that case, it is necessary to set out some of the factual background. Vicenza, a subsidiary of Cabra, the freehold owner of Craven Cottage, which was leased to Fulham Football Club, applied for planning permission to develop the site for housing. Hammersmith and Fulham London Borough Council applied for planning permission for an alternative development and then made a compulsory purchase order. It did not determine the application made by Vicenza. Vicenza appealed against the refusal to determine the application for planning permission and the making of the compulsory purchase order. A public inquiry was held.

52. In the interim the club, and its shareholders and directors, entered into an agreement with Cabra and its subsidiary by which the club and the shareholders and directors covenanted that, for seven years, the club would do nothing to prevent or discourage the withdrawal of the compulsory purchase order, and would not support compulsory acquisition. The agreement also provided that, if called upon to do so, the club would support Cabra's (i.e. Vicenza's) proposal.

53. The first public inquiry neither supported the compulsory purchase order nor allowed the original application for planning permission. Vicenza made a further application for planning permission which was refused, and another public inquiry was held. By this time the club, its shareholders and directors decided that they would not support Vicenza's application and refused to provide a letter of support.

54. The club applied to the court for declarations that the undertakings were unenforceable because they conflicted with their fiduciary duties to act in the best interests of the club. The trial judge granted the declarations sought by the club, holding that to enforce the undertakings would be contrary to public policy. The Court of Appeal set aside the declarations, finding that there was no valid objection on the grounds of public policy.

55. The Court of Appeal identified three ways in which the argument on public policy was put on behalf of the club. First, it was common ground that section 2 of the Witnesses

(Public Inquiries) Act 1892 applied to inquiries before planning inspectors. This made it an offence to threaten, punish or injure a person for having given evidence to an inquiry. Secondly, it was noted that witnesses enjoyed absolute immunity from suit for evidence given before courts or authorised inquiries, and that an enforceable contractual undertaking contravened that immunity. Thirdly, it was submitted that any contract inhibiting disclosure of relevant matters to a court was contrary to public policy and that "in a planning inquiry full disclosure is particularly important because the recommendations of the inspector will affect the community as a whole …".

56. The court (Neill, Balcombe and Steyn L.JJ.) rejected those three submissions. Giving the judgment of the court, Neill L.J. confirmed that no undertaking could lawfully require someone to give false evidence, but went on to say:

> "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. In the course of the argument we were referred to precedents in the Encyclopaedia of Forms and Precedents which include clauses designed to secure the support of, for example, the vendor of land. Such clauses have been in use at least since the fourth edition of the encyclopaedia was published in 1969. In addition, evidence was put before the court in the form of information supplied by firms of solicitors in the City of London and elsewhere which showed that covenants of the kind set out in paragraph (r)(ii)(d) were regarded as a necessary form of protection for those acquiring land for development."

57. The Court of Appeal confirmed that any court would prevent and, if necessary, punish conduct interfering with the administration of justice. The question was whether the conduct complained of had interfered with or would interfere with the administration of justice. The court stated that it was necessary to take a broad view of the public interest, and where necessary seek to achieve a balance between countervailing public policy considerations. In that case, the court held, "there [was] the public interest in allowing business to be transacted freely and in holding commercial men to their bargains." The court said it would "consider the facts of each case". It went on to say that:

> "where, as here, a commercial agreement relating to land has been entered into between parties at arm's length and one party agrees in return for a very substantial payment to support the other party's applications for planning permission we can see no rule of public policy which renders such an agreement illegal or unenforceable".

Issue 1: Was the use of non-objection clauses by the interested parties and Scottish Power Renewables legitimate?

58. As we have said in paragraph 35 above, Departmental guidance from the then Department for Communities and Local Government confirmed that applicants seeking to acquire land should do so by negotiation wherever practicable. Such guidance is sensible and reasonable, because it serves to reduce disputes over the use of compulsory powers. However, the guidance does not deal with the issue of nonobjection clauses.

59. It is also common ground that no one can be required to give false evidence to a planning inspector or examiner. But the question in issue is whether a party who has sold or is proposing to sell an interest in land may agree contractual obligations not to object to the grant of planning permission. It is apparent from the precedents in the Encyclopaedia of Forms and Precedents referred to in *Fulham*, that it has been the practice for many years to use non-objection clauses in cases where an applicant for planning permission might use compulsory powers to acquire land or an interest in land. However, Mr Buley is right to point out that just because the use of nonobjection clauses has become standard practice, it does not mean that their use is lawful.

60. Mr Buley referred to guidance issued by the Royal Institute of Chartered Surveyors (RICS) on "Negotiating options and leases for renewable energy schemes" (2nd edition June 2018). The RICS guidance states that "land owners may be prevented from objecting to any planning applications in relation to their land but should not be obligated to overtly support the scheme as political issues may make this difficult". As an alternative to his submission that all non-objection clauses were unlawful, Mr Buley drew a distinction between non-objection clauses that related to the land in which an interest was being acquired, and those that related to other land which might be involved in the scheme. Mr Buley submitted that the RICS guidance was either restricted to non-objection clauses relating to the specific land in which an interest was being acquired, or that it should be interpreted as being so restricted.

61. In our judgment, the use of non-objection clauses when a party has obtained an interest in land, or an interest in land conditional on the grant of planning permission, is permissible for two main reasons. First, an applicant who owns land and seeks planning permission for a relevant use of that land is unlikely to object to that application. That fact has not of itself been considered to undermine the integrity of the process for the granting of planning permission.

62. Secondly (and part of the reason why the integrity of the process for planning permission is not undermined by the fact that applicants owning land are unlikely to object to their own scheme), the planning process is inquisitorial in nature. The inquisitorial nature of the process means that it is for the decision-maker to ensure that there is sufficient information to enable an informed and lawful decision to be made on the application for planning permission. As was emphasised by this court in *Fulham*, whether the effect of a non-objection clause has in fact meant that there is insufficient information to enable a planning decision to be made, or "impermissibly distorted the picture" as Mr Buley put it, must always be a fact-specific inquiry.

63. In addition to the inquisitorial nature of the process leading to the grant of development consent for nationally significant infrastructure projects the Secretary of State must have regard to the matters set out in section 104(2) of the 2008 Act (see paragraph 16 above). Furthermore, the environmental impact of a scheme which is an EIA

development is addressed by the EIA Regulations. The inquisitorial nature of the process, and the relevant statutory provisions, mean that in general, the non-objection and confidentiality clauses should not prevent the decision-maker from becoming aware of all the relevant planning and environmental considerations. Of course, whether this is so in an individual case will always depend on the particular facts.

64. We do not consider that the answer is altered in circumstances where a developer is acquiring an interest in land, and that land, together with other land, forms part of the scheme and the non-objection clause applies to the scheme as a whole. There is only one scheme, and the developer is entitled to require a person whose land is being acquired not to object to the scheme, even if the scheme involves other land. This is for the two main reasons set out in paragraphs 61 and 62 above, though – as we have said – the fact-specific nature of the decision must always be kept in mind. This conclusion makes it unnecessary to determine exactly what is meant by the RICS guidance.

65. In this case the Heads of Terms, which contained the non-objection clause and confidentiality clause, were not contractually binding, for the reasons we have given in paragraphs 39 and 40 above. It was only when the Option Agreements were exercised that the non-objection clause became legally binding. The phrase "subject to planning & contract" in the Heads of Terms is not to be ignored. It should be remembered that the landowners had the benefit of legal advice, and it could reasonably be assumed that their legal advisers would have made it clear to them that the Heads of Terms were not legally binding. In any event, Scottish Power Renewables also made it clear that the Heads of Terms were not legally binding when SEAS raised issues about the non-objection and confidentiality clauses in the Heads of Terms. No Option Agreements had been signed before the completion of the Examination by the five inspectors, and only two Option Agreements had been completed before the Secretary of State issued the decision letters.

66. The fact that 39 out of 55 landowners who had signed the Heads of Terms did object to the scheme (see paragraph 43 above) shows that landowners were not, in practice, "stifled" or "neutralised" when it came to objecting to the scheme. This is so notwithstanding the fact that only two of those landowners gave evidence to the ExA. In these circumstances there was, in our view, no conduct interfering with the administration of justice.

Issue 2: Did the Secretary of State properly address the use of non-objection clauses by Scottish Power Renewables?

67. Even though we have concluded for the reasons given above that the use of nonobjection and non-disclosure clauses in this case was not itself unlawful, it is necessary to consider the separate complaint that the Secretary of State failed to address the complaints about the use of the non-objection clauses by Scottish Power Renewables. Mr Buley complained that the judge created a false dichotomy between unfairness and practical impact. There are, in our judgment, several cogent answers to this complaint.

68. First, the ExA found that even if some landowners might have felt constrained from taking part in the Examination, they had not in fact been prevented from doing so. The ExA "was satisfied that all affected persons had the opportunity to be heard" (see paragraph 46 above). That was a permissible finding made on all the material before the ExA, which was affirmed by the judge. This is an answer both as a matter of fairness and as a matter of practical impact. Although it is right to acknowledge that a decision-maker cannot know what it does not know if persons have been "neutralised" by non-objection clauses, it is also fair to point out that no new matters have been identified to the court as being relevant to the scheme since the Secretary of State's decision.

69. Secondly, the Secretary of State considered the issue and concluded in terms "that all relevant issues were raised and explored in the Examination and that he has the necessary information to enable him to reach a decision" (see paragraph 47 above). We consider that this was a reasonable and permissible conclusion for the Secretary of State to reach on the relevant material.

70. Thirdly, as we have said, 39 out of 55 landowners did object, notwithstanding the presence of the non-objection and non-disclosure clauses in the Heads of Terms. This supports the findings made by the ExA and Secretary of State that all the necessary information to make a proper decision was before the Secretary of State. In these circumstances, we consider that the Secretary of State properly addressed the complaint about the use of non-objection clauses by Scottish Power Renewables, and that Holgate J was right to dismiss this ground of challenge.

Conclusion

71. For the reasons we have given, we conclude that the appeal must be dismissed. In summary, Holgate J was right to dismiss the claim for judicial review. The use of non-objection clauses in the Heads of Terms and Option Agreements was legitimate in the circumstances of this particular scheme, and the Secretary of State properly addressed the complaint about the use of non-objection clauses by Scottish Power Renewables.