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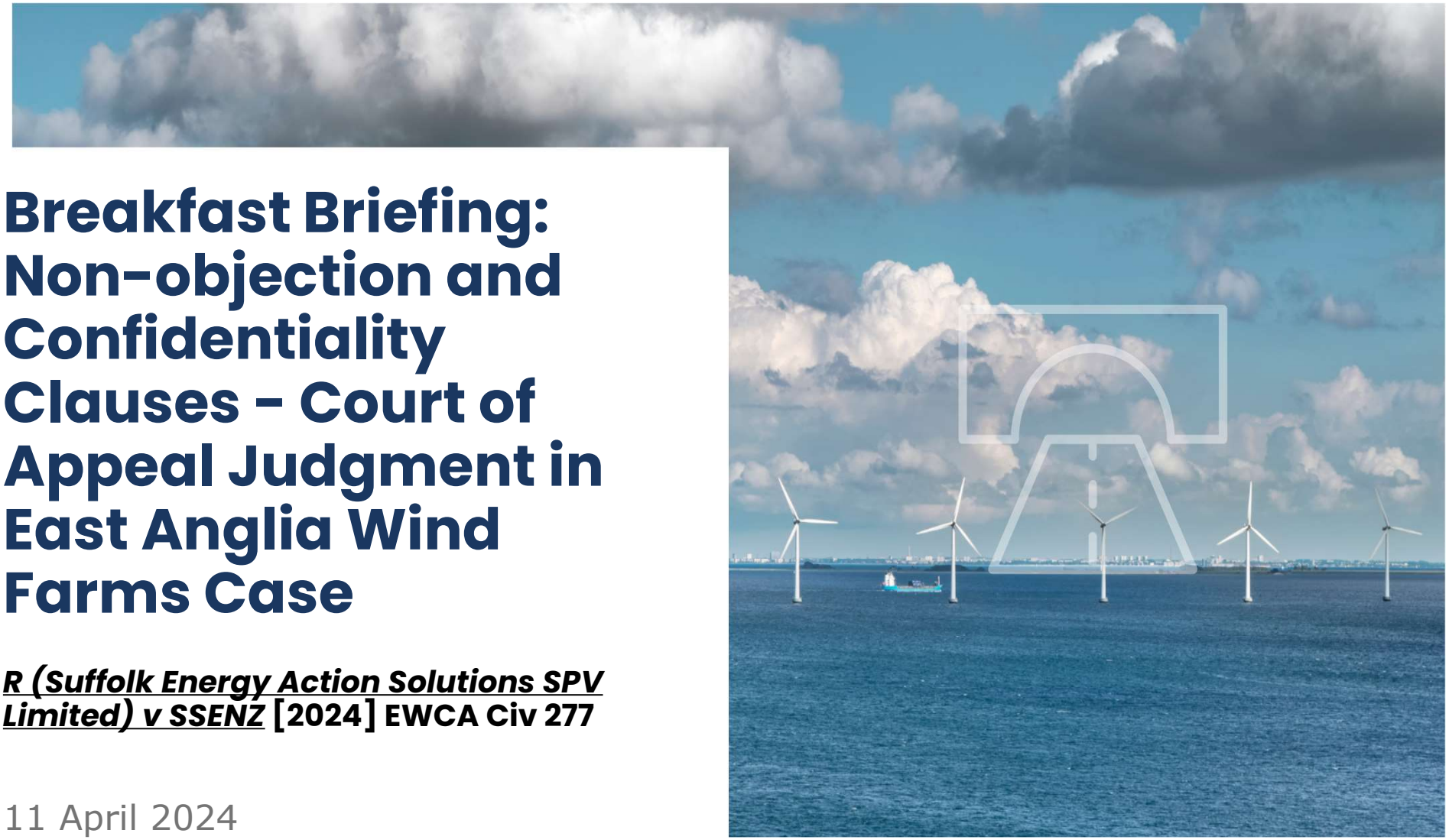

Breakfast Briefing: Non-objection and Confidentiality Clauses – Court of Appeal Judgment in East Anglia Wind Farms Case

R (Suffolk Energy Action Solutions SPV Limited) v SSENZ **[2024] EWCA Civ 277**

11 April 2024

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Meet the speakers

Mark Westmoreland Smith KC

Jonathan Welch

Agenda

1. Factual background
2. Case law relied upon
3. Main findings
4. Implications and appeal prospects

Factual background

- Two DCOs for offshore windfarms and onshore elements.
- Examination: October 2020 – July 2021. ExAR submitted: October 2021. Decision: March 2022.
- Land agents instructed to negotiate acquisition of land by agreement. All landowners independently represented by lawyers and land agents.
- Heads of Terms and Option Agreements. HoT not binding. No OAs signed during examination.
- HoT included non-objection clause that would be part of OA. Also included confidentiality clause for contents of HoT.
- Many landowners signed HoTs. Of 55 APs, 39 landowners had made objections and none withdrew these.
- In one case, Dr Gimson had asked for the non-objection clause to be modified to allow him to maintain specified objections. IPs agreed he be allowed to do so.
- SEAS complained about the clauses throughout the examination. Complaint was essentially one of unfairness: that the clauses had a chilling effect on the participation by landowners in the process.
- The ExAR found all involved in the examination had an opportunity to be heard.

Factual background

In the Decision Letter, the Secretary of State said:

> "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."

Issues for the Court

SEAS complained that this did not lawfully deal with the complaint they had raised about the issue.

In the High Court, Holgate J dismissed SEAS's complaints, also disagreeing with much of the factual narrative presented by SEAS.

Whereas in the High Court the focus was on the effect of the IPs conduct, in the Court of Appeal the case was focused on the alleged unlawfulness of the clauses.

The Court of Appeal summarised the issues for its determination as follows:

> (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.

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Case law relied upon

Taylor v Chichester and Midhurst Railway Company **(1869-70) LR 4 HL 628**

SEAS judgment at [50]

- Railway company proposed to run a branch line over land owned by the claimant landowner.
- Parliamentary bill for the line.
- Claimant objected to construction of line. Railway company agreed to pay him £2,000 to induce him to withdraw his opposition and not oppose the Bill, and compensate him for inconvenience, disturbance, damage, and loss.
- Branch line was never constructed. Company refused to pay £2,000 for various reasons including an argument that the contract was unlawful as contrary to public policy.
- House of Lords held the contract was valid and enforceable even though it contained a provision that the claimant would withdraw his opposition to the Bill.
- Significantly, the Bill encompassed land that belonged to landowners besides the claimant.

Case law relied upon

Fulham Football Club v Cabra Estates **(1993) P&CR 284**

SEAS judgment at [51] – [57]

- Freehold owner of Fulham stadium site applied for planning permission to develop site for housing. A non-determination appeal followed.
- The club agreed that for seven years it would do nothing to prevent or discourage Cabra's redevelopment proposal and would support it if asked to do so. The first appeal was dismissed.
- Second application for permission led to a further appeal inquiry. By this time, the club had decided they would not support the proposal and refused to do so.
- The club applied to the court for declarations that the undertakings of support were unenforceable because they conflicted with their fiduciary duties to act in best interests of the club. High Court agreed the undertakings were contrary to public policy and unenforceable.
- Argument was essentially that: (i) the Witnesses (Public Inquiries) Act 1892 made it an offence to threaten, punish or injure a person for having given evidence to an inquiry; (ii) witnesses enjoyed absolute immunity from suit for evidence given before courts/inquiries and a contractual undertaking contravened that; and (iii) any contract inhibiting disclosure of relevant matters to a court was contrary to public policy because a planning inspector needs to understand the whole picture.
- The Court of Appeal reversed the High Court and discharged the declarations, holding that there was no valid public policy issue with the clauses:

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Case law relied upon

Fulham Football Club v Cabra Estates **(1993) P&CR 284**

"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."

The question was whether the conduct interfered with the administration of justice, and it was necessary to take a broad view of 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."

Main findings of Court of Appeal

Issue 1: legality of clauses – Paragraphs [58] – [66]

Court emphasised that just because practice is widespread doesn't necessarily mean it is lawful.

Court found the clauses were permissible:

- First, an applicant who owns land and seeks permission for that land is unlikely to object to their own application. This fact does not undermine the integrity of the planning process.
- Second, the planning process is inquisitorial in nature: it is for the decision maker to ensure they have sufficient information to make an informed and lawful decision. Fact specific.
- Further:
  - Secretary of State must have regard to matters set out in s 104(2) PA 2008, and is governed by EIA Regs.
  - No different approach where the non-objection clause applies to a scheme as a whole – including land beyond ownership of particular landowner's interest.
  - Here, the HoT were not legally binding.
  - 39 out of 55 landowners who had signed the HoT did object to the scheme and did not withdraw these objections.

Main findings of Court of Appeal

Issue 2: Secretary of State's approach to the complaint – Paragraphs [67] – [70]

Court of Appeal was satisfied the Secretary of State had dealt with this lawfully:

- First, the ExA found that landowners had not in fact been prevented from taking part in the examination. Relevant that no new matters have been identified to the court as being relevant to the scheme since the decision was taken.
- Secondly, Secretary of State considered the issue and came to conclusion that all relevant issues were raised and explored and he had sufficient information to enable him to reach a decision.
- Thirdly, 39 out of 55 landowners did object notwithstanding the presence of the non-objection and non-disclosure clauses in the HoT.

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Implications of judgment and prospects on appeal

- Approach to negotiation in shadow of DCO.
- Implications for other consenting and CPO regimes.
- Implications for industry if result had been different.
- Appeal to the Supreme Court.

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Thank you for listening

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