Neutral Citation Number: [2023] EWHC 1796 (Admin)

Case No: CO/1696/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/07/2023

Before :

THE HON. MR JUSTICE HOLGATE

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Between :

THE KING

on the application of

SUFFOLK ENERGY ACTION SOLUTIONS SPV LIMITED	**Claimant**
- and –	
THE SECRETARY OF STATE FOR ENERGY SECURITY AND NET ZERO	**Defendant**
- and –	
(1) EAST ANGLIA ONE NORTH LIMITED **(2) EAST ANGLIA TWO LIMITED**	**Interested Parties**

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David Wolfe KC and **Celina Colquhoun** (instructed by **Leigh Day**) for the **Claimant**
Mark Westmoreland Smith and **Jonathan Welch** (instructed by **Government Legal Department**) for the **Defendant**
Hereward Phillpot KC and **Hugh Flanagan** (instructed by **Shepherd and Wedderburn LLP**) for the **Interested Parties**

Hearing dates: 23-24 May 2023

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APPROVED JUDGMENT

Mr Justice Holgate:

Introduction

1. The claimant, Suffolk Energy Action Solutions SPV Limited, brings this application for judicial review under s.118 of the Planning Act 2008 ("the 2008 Act") against the decision on 31 March 2022 by the Secretary of State for Business, Energy and Industrial Strategy ("SSBEIS") to make the East Anglia ONE North Offshore Wind Farm Order 2022 (SI 2022 No. 432) and the East Anglia TWO Offshore Wind Farm Order 2022 (SI 2022 No. 433) under s.114 of that Act. With effect from 3 May 2023 the relevant functions of SSBEIS have been transferred to the Secretary of State for Energy Security and Net Zero.

2. The Orders grant development consent to the interested parties ("the IPs"), East Anglia ONE North Limited and East Anglia TWO Limited, to construct and operate two wind farms off the Suffolk coast. The IPs are subsidiaries of ScottishPower Renewables ("SPR").

3. The central issue in this case is whether the SSBEIS acted unlawfully in dealing with a complaint by SEAS that the IPs "stifled" or "neutralised" the ability of landowners facing possible compulsory purchase to present objections to and information about the scheme.

4. The offshore works for East Anglia ONE North would comprise up to 67 wind turbine generators ("WTGs") with a maximum tip height of 282m and up to 4 electrical platforms, an operation and maintenance platform, cables linking the WTGs and the platforms, and two cables for exporting the electricity to a landfall north of Thorpeness, Suffolk. The onshore works include the laying of underground cables running from the landfall to a new substation at Grove Wood, Friston plus a new National Grid substation and overhead realignment. The offshore works for East Anglia TWO would comprise up to 78 WTGs, up to 4 electrical platforms, an operation and maintenance platform, cables linking the WTGs and the platforms, and two cables for exporting the electricity to the same landfall. The onshore works for East Anglia TWO are similar to those for East Anglia ONE North. The onshore cable route is approximately 9km in length and affects an Area of Outstanding Natural Beauty.

5. The Orders also authorise the compulsory acquisition of land, in particular land needed for the onshore works, from 55 different owners.

6. East Anglia ONE would deliver about 2.5TWh/year and East Anglia TWO 2.9TWh/year of zero carbon renewable electricity. Together they would deliver about 7.5% of the UK's cumulative deployment target for renewable energy in 2030.

7. Suffolk Energy Action Solutions ("SEAS") is an unincorporated body set up in 2019. Its members are drawn from Aldeburgh, Snape, Friston and neighbouring villages and towns. Their object is to protect areas of the coast and countryside said to be threatened by the scheme. SEAS supports renewable energy including the proposed offshore works in this case. But it contended that the defendant should refuse development consent for the onshore works because of their

impact on people, the countryside and the environment. SEAS submitted that better solutions could and should be found for bringing onshore the electricity generated by wind farms in the North Sea. On 4 February 2022 members of SEAS incorporated the claimant as a special purpose vehicle to bring this claim.

8. East Anglia ONE and East Anglia TWO are both Nationally Significant Infrastructure Projects ("NSIP") within Part 3 of the 2008 Act. They were therefore subject to Parts 4, 5 and 6 which impose planning control through the requirements for obtaining a development consent order ("DCO"). The two projects were the subject of individual applications dated 15 October 2019, which were then handled together by the Planning Inspectorate and the SSBEIS.

9. The SSBEIS appointed a panel of five Inspectors ("the Panel") to conduct the Examination of the applications under chapter 4 of Part 6 of the 2008 Act. The Examination began on 6 October 2020 and was completed on 6 July 2021.

10. SEAS participated in the Examination both by making written representations and by contributing to "issue specific hearings" ("ISH").

11. The proposals involved "EIA development" for the purposes of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (SI 2017 No. 572) ("the 2017 Regulations"). Accordingly, the proposals were subject to the process of environmental impact assessment ("EIA"). This included the preparation of Environmental Statements by the IPs, consultation with statutory consultees, public notification, requests by the Panel for further information and taking into account all the environmental information obtained in the decisions on whether or not to make the DCOs.

12. The Panel's Report on each application was submitted to the SSBEIS on 6 October 2021. Much of those reports was common to both. The court was taken mainly to relevant passages in the Report and the decision letter on East Anglia ONE North and only key paragraphs in the decision letter on East Anglia TWO.

13. Initially, the claimant said that if it were to succeed in its claim for judicial review, it would only ask the court to quash the parts of each DCO which relate to the onshore works. However, upon reflection it agreed with the defendant and the IPs that the court could not make an order severing the DCOs in that way. The claimant therefore asks the court to quash the whole of the DCOs.

14. This challenge arises from the need for the IPs to acquire areas of land. It is a longstanding policy of Government that compulsory purchase should be a last resort after the promoter of a scheme has sought to acquire the necessary land by agreement with the landowners affected. 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 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 pre-application 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."

15. The IPs therefore appointed Dalcour Maclaren Limited in April 2018 to act as their land agents *inter alia* to negotiate the grant of access rights and sales by 55 landowners (referred to in s.59 of the 2008 Act as "affected persons"). They prepared the Book of Reference which accompanied the application for the DCO and gave details of each of the relevant interests to be acquired. They also provided updates during the Examination on the progress being made with negotiations.

16. In his witness statement Mr. Henry Hyde, a director of Dalcour Maclaren, explains that the majority of landowners instructed independent land agents. In the second half of 2019 through to January 2020 negotiations took place on a generic draft Heads of Terms. An independent solicitor at Taylor Vinters reviewed those terms on behalf of the landowners and negotiated alterations. SPR was responsible for her fees. On 14 February 2020 the majority of the landowners signed a final version of the Heads of Terms.

17. By the end of the Examination statutory undertakers had reached agreements with the IPs and withdrawn their objections. But most of the property interests affected belong to private landowners. By the end of the Examination many had signed Heads of Terms with the IPs, but none had signed formal Option Agreements. By the time the decision letter was issued only two Option Agreements had been completed (on 2 March 2022).

18. The IPs' Statement of Reasons to justify the grant of powers of compulsory purchase (published on 9 October 2019) included information on the numbers of landowners who had appointed agents and had signed Heads of Terms and the progress made with negotiations. This was updated from time to time. The final version was issued on 7 June 2021. The IPs supplied more information on these matters for each landowner in a Schedule of Objections. This too was updated from time to time. The last version was dated 5 July 2021. The iterations of both documents were available to SEAS as an interested party entitled to see documents in the Examination (rule 21 of the Infrastructure Planning (Examination Procedure) Rules 2010 (SI 2010 No. 103) ("the 2010 Rules")).

19. This claim arises out of a complaint which SEAS made to the Panel in a letter dated 14 February 2021. The claimant said that the integrity of the planning process was being undermined by the inclusion of a clause in the IPs' agreements with landowners which required them not to oppose the applications for the DCOs and to withdraw any representations already made. It was also said that the clause had prevented landowners from talking to associations such as SEAS which opposed the application. The agreements were said to have had a "chilling effect". It was also contended that SPR had improperly offered substantial payments to induce landowners to enter into agreements which prevented them from supplying information and evidence to the Examination. The promoter had used the prospect of obtaining powers of compulsory purchase as a lever to secure the withdrawal of opposition to the project.

20. This complaint was the subject of both oral and written representations by SEAS and the IPs to the Panel, continuing until 5 July 2021. SEAS's key contention was that SPR's conduct had rendered the Examination process unfair and that unfairness could not be cured. The Panel briefly referred to these contentions when it summarised the cases for three of the objectors, including Dr. Alexander Gimson on behalf of his mother Mrs. Elspeth Gimson, the owner of an affected property. However, the Panel concluded at PR 29.5.125 that all affected persons had had opportunities to make representations and to be heard and there had been no interference with their rights to a fair and public hearing under Art. 6 of the European Convention on Human Rights ("ECHR").

21. On 7 October 2021, 3 months after the Examination had concluded, SEAS sent written representations to the SSBEIS which again alleged that SPR had neutralised opposition to the project and added that the Panel had failed to grapple with the issue. Further rounds of representations from both SEAS and the IPs followed. SEAS maintained its stance that the process was vitiated by unfairness which could not be cured in the process for handling the DCO applications.

22. The draft decision letter and the briefing provided by officials to SSBEIS addressed the fairness of the proceedings, in particular whether there had been an interference with the rights of affected persons to a fair hearing. The SSBEIS approved that draft. Like the Panel, he rejected the complaint of unfairness. The claimant does not challenge that conclusion but says that the SSBEIS failed to deal with the complaint in a different way. In a nutshell it is said that he failed to investigate or deal with an allegation that the IPs' conduct had had a "chilling effect" on the provision of information by those landowners.

23. The remainder of this judgment is set out under the following headings:

Heading	**Paragraph Number**
The grounds for judicial review	**24-39**

The grounds for judicial review

24. Following earlier refusals by Lang J on the papers and by Lane J at a renewal hearing, Warby LJ granted permission to apply for judicial review on 31 January 2023. In paras. 3 to 6 of his reasons Warby LJ said this:

> "3. The challenge is described as raising important points regarding the Secretary of State's response "when confronted with a report of an Examination Authority *where the evidence*

> *has been impacted by a systemic strategy* on the part of the applicant of making secret 'incentive' payments to landowners with the aim of preventing those landowners from giving any evidence to the Examination" and other objectionable aims. The strategy is said to have had "a *limiting effect* on those opposing SPR". (Statement of Facts and Grounds ¶¶4, 5). It was asserted in the supporting evidence and the written arguments alleged that SPR's conduct "had a *chilling effect*" on the evidence placed before the defendant (see, for instance, the Skeleton Argument for the renewal hearing at ¶41). The emphasis in these quotations is mine.
>
> 4. The 10 grounds of challenge are lengthy and overlapping. In particular, they intermingle two separate and distinct kinds of assertion: (1) that the conduct of the developer complained of had a material chilling effect or distorting impact on the evidence put before the ExA and hence the defendant, such that the decision to make the DCOs was unlawful; and (2) that the claimant put forward evidence that there had been a chilling or distorting effect which should have been but was not considered and assessed by the ExA or, critically, by the defendant when deciding to make the DCOs. The passages I have emphasised in paragraph 3 above are illustrations of the first proposition. Lang and Lane JJ are criticised for approaching the case at least primarily by reference to that proposition, and "missing the point" in several respects. If so, that is understandable given the way the case has been framed. The claimant appears at several points to be asserting threshold facts. This is implicit in the use of a slogan or headline term such as "chilling effect".
>
> 5. Having reviewed the ExA report, the DL, the reasons of Lang and Lane JJ and the competing arguments I have concluded that the main focus of the grounds of challenge is on the second of the above propositions, and that the grounds merit examination at a full judicial review hearing.
>
> 6. In my opinion it is arguable with a real prospect of success that (a) the ExA failed to address adequately or at all the claimant's complaints about the practical effect which the agreements had or might have had on the scope of the information provided, and (b) the Secretary of State unlawfully failed (i) to have proper regard to that omission or (ii) properly to consider the issue for himself and (iii) 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 DCOs."

25. The claimant did not amend its pleading to address the prolixity and lack of clarity in its grounds. Although the claimant abandoned ground 9, it still maintained grounds 1 to 8 and 10. It did so, despite accepting that para.6 of Warby LJ's reasons accurately summarised the main thrust of the claimant's

challenge (para. 76 of skeleton). The claimant failed to respect the need for procedural rigour in judicial review, the importance of which the courts have repeatedly emphasised in recent years, particularly with regard to the pleading of the grounds of challenge (*R (Dolan) v Secretary of State for Health and Social Care* [2021] 1 WLR 2326 at [116] to [120]; *R (Talpada v Secretary of State for the Home Department* [2018] EWCA Civ 841 at [67] to [69]).

26. Mr. Wolfe KC, who together with Ms Colquhoun appeared on behalf of the claimant, said that no allegations of procedural unfairness, let alone unfairness of an incurable kind, were being advanced. Instead the claimant says that the SSBEIS ought to have investigated the claimant's allegations to see whether there was further information to be obtained before issuing his decision (see e.g. para. 22 of the claimant's skeleton). This was a *volte face* from the way in which the claimant maintained its complaint throughout the Examination and in subsequent representations to the SSBEIS.

27. During the hearing Mr Wolfe said that the claimant was not asking the court to make any findings on "threshold facts" relating to the first issue identified by Warby LJ, or to ask the court to decide that the effect of SPR's conduct had had such an impact on the information before the Panel and the SSBEIS as to render the decisions to make the DCOs unlawful. But, as the defendant and IPs pointed out, parts of the claimant's grounds still do invite the court to decide whether its allegations are correct. Parts of the claimant's skeleton rely upon allegations of the alleged distortion as having occurred. The approach taken by the claimant was confused to say the least.

28. The court is faced with para.40 of the claimant's skeleton:

> "It is of course not the function of the Court to rule upon the allegations and evidence – as above - that the C put to the Ex A and addressed to the S of S. The Court merely needs to proceed upon the basis that a serious complaint was made about the evidence collection process which the decision maker needed properly (at least) to investigate."

In my judgment it is wrong as a matter of principle for the claimant to say that the court has to assume that a serious complaint was made, so as to place the decision maker under an obligation to investigate further. That assumption is strongly disputed by the defendant and IPs. It is very much a matter for the court to consider and determine whether a serious complaint was made which was legally capable of justifying the imposition of an obligation on the SSBEIS to investigate the matter.

29. Here the role of the court is similar to the task it performs when it has to determine whether a procedural error has occurred, such as a denial of, or interference with, the right to be heard, or whether a decision has been vitiated by actual or apparent bias. It is for the court to determine the facts relevant to the alleged legal flaw. Likewise where a claimant claims that there was a failure to give legally adequate reasons for the decision, it is for the court to decide whether the point upon which he relies in court was in fact raised as a "principal

important controversial issue" before the decision-maker (*South Bucks District Council v Porter* (No.2) [2004] 1 WLR 1953).

30. Mr Wolfe confused matters when he suggested that the court would be straying into "forbidden territory" if it were to determine whether SEAS made a "serious complaint" about the evidence collection process so as to oblige the SSBEIS to investigate further. I disagree. The correct principle regarding "forbidden territory" is that the court must not determine the *merits* of matters which were for the decision-maker to assess, including the application of planning judgment (*R (Lochailort Investments Limited) v Mendip District Council* (2021) 2 P. & C.R. 9 at [7]). But where a court has to decide, for example, whether or not a decision-maker's conclusion was in the legal sense irrational, in that it fell outside the range of possible rational responses to the material before him, the court is not, of course, straying into forbidden territory. The same is true where the court decides whether a relevant consideration was "obviously material", so that a failure to take it into account was irrational (see [67] to [69] below).

31. Mr. Wolfe stated that the claimant does not argue that the Heads of Terms or the Option Agreements were unlawful or contrary to public policy. I agree. For many years agreements with landowners to dispose of their interests voluntarily where powers of compulsory purchase are sought have provided for the agreed terms to be confidential and for the landowner not to oppose the scheme. Mr.Wolfe accepted that the subsequent introduction of legislation on EIA and assessment of impacts on European-protected sites and species has not rendered such agreements unlawful.

32. Mr. Wolfe also stated that the claimant does not allege that the matters of which it complains involve any breach of the ECHR, such as Article 8 (the right to respect for private and family life), or Article 10 (the right to freedom of expression), or Article 1 of the First Protocol to the Convention (the protection of property rights).

33. So what are the claimant's grounds of challenge? It remained necessary to clarify this at the hearing. For example, Mr. Wolfe accepted that none of the pleaded grounds 1 to 4, taken in isolation, amount to a basis for vitiating the decisions. They all form part of one ground.

34. Mr. Wolfe agreed that grounds 5 and 6 as pleaded (ground 2 below) essentially raised the same issue and, likewise, grounds 7 and 8 as pleaded (ground 3 below). The pleaded ground 8 also mentioned in passing the Aarhus Convention, but Mr. Wolfe did not make any freestanding submissions on that document going beyond the relevant EIA legislation.

35. As the result of discussion with Mr Wolfe, the grounds relied upon by the claimant are as follows:

Ground 1

The Secretary of State failed to consider:

a. The alleged practical impact of the IPs' conduct, namely the lack of environmental information in the Examination from landowners affected by compulsory purchase who had signed agreements with the IPs;

b. The fact that landowners who had not entered into agreements with the IPs did provide environmental information in support of objections to the DCOs;

c. The effect of that distortion in the provision of information by landowners to the Examination on the "paramount public interest" in the decision on whether to make the DCOs; and

d. The relevance of those matters to the assessment of the planning merits of the scheme and not simply the justification for authorising powers of compulsory purchase.

Ground 2

The SSBEIS failed to investigate and assess matters on the basis of full information, namely "all that could reasonably have come forward without the distorting practical effects of the agreements" (and IPs' conduct) and solely focused on the information which had in fact come forward.

Ground 3

The SSBEIS failed to proceed on the basis of a complete and lawful EIA process which included freely and properly available information from landowners without the distorting effect of the agreements and the IPs' conduct. He failed to make enquiries into the complaint relied upon by the claimant.

Ground 4

The SSBEIS failed to give reasons for rejecting the claimant's complaint. He simply focused on a different matter, namely whether he considered he had sufficient information before him to determine the application.

36. The pleaded grounds complain about the distorting effect of the IPs' conduct which discouraged landowners from making objections to the DCO applications for the projects. In fact, the claimant's skeleton refers interchangeably to both chilling effect and distorting effect. That is reflected in the summary by Warby LJ of the issues raised by the claimant's case. He went on to say that "chilling effect" may be used as a slogan or headline term. When I come to discuss the grounds of challenge, I will consider first how the notion of a "chilling effect" fits into the legal analysis. I think it will then be logical to deal with grounds 2, 3, 1 and 4 in that order.

37. Mr Wolfe did not develop his legal arguments at any length, preferring to rely more upon his analysis of the facts. For that reason it has been necessary for me to review the factual material in some detail.

38. It is unfortunate that the claimant has sometimes made some fairly wild allegations. For example, it suggested that a local authority had withdrawn its opposition to the grant of the DCOs after receiving a very large sum of money from SPR. That had nothing to do with the grounds of challenge in this case. It was no answer for counsel to say that this allegation was relevant as "background." Counsel's skeleton argument should not be used as a platform for such material. It was also inappropriate to use in a pejorative manner the word "secret" to describe the briefing provided to the SSBEIS by his officials. It is perfectly normal for a minister to receive such briefing on a *confidential* basis and there is nothing sinister or improper about that.

39. The court appreciates that members of SEAS and others have raised what they regard as strong objections and concerns about the proposed onshore works. But these are not matters for the court. As the Divisional Court said in *R (Rights: Community: Action) v Secretary of State for Housing, Communities and Local Government* [2021] PTSR at [6]:

> "6. It is important to emphasise at the outset what this case is and is not about. Judicial review is the means of ensuring that public bodies act within the limits of their legal powers and in accordance with the relevant procedures and legal principles governing the exercise of their decision-making functions. The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. Those decisions, and those choices, are ones that Parliament has entrusted to ministers and other public bodies. The choices may be matters of legitimate public debate, but they are not matters for the court to determine. The court is only concerned with the legal issues raised by the claimant as to whether the defendant has acted unlawfully. The claimant contends that the changes made by the SIs are radical and have been the subject of controversy. But it is not the role of the court to assess the underlying merits of the proposals. …."

Statutory framework and legal principles

Planning Act 2008

40. The 2008 Act provides a dedicated regime for applications for the grant of DCOs for NSIPs. The overall framework of the Act has been set out in a number of authorities (for example *R (Friends of the Earth Limited) v Secretary of State for Transport* [2021] PTSR 190 at [19] to [37]) and need not be repeated here.

41. Once a Secretary of State decides to accept an application for a DCO (s.55), the applicant must publicise the application in the prescribed manner, to include the deadline within which persons may give notice of their interests in, or objections to, the proposal (s.56(7) and (8)). A person who provides a representation within that deadline, referred to as a "relevant representation", is an "interested person" (s.102(1) and (4) and reg.3 of the 2010 Regulations), who may take part in the examination of the application. An "affected person" is also an "interested person".

42. Under s.74 a Panel has the function of examining an application for a DCO and making a report to the Secretary of State setting out their "findings and conclusions in respect of the application" and their "recommendations as to the decision to be made on the application." It is for the Panel to decide how to examine the application, but they must do so in accordance with Chapter 4 of Part 6 of the Act and the 2010 Rules.

43. The examination process is inquisitorial, not adversarial (*Halite Energy Group Limited v Secretary of State for Energy and Climate Change* [2014] EWHC 17 (Admin) at [79]).

44. The Panel must make an "initial assessment" of "the principal issues arising on the application" as they think appropriate (s.88(1)). They must then hold a preliminary meeting to enable invitees (e.g. the applicant and interested persons) to make representations on how the application should be examined and to discuss "any other matter that the Examining Authority wishes to discuss" (s.88(2) and (4)). The claimant was involved in that process as an interested person. In the light of the discussion at that meeting the Panel must make such procedural decisions about how the application is to be examined as they think appropriate (s.89(1) and (5)). In short, the process is led by the Panel.

45. The examination is to take the form of considering written representations about the application subject to any requirement under *inter alia* ss.91 and 92 (s.90(1)). Under s.91 the Panel may decide that it is necessary for the examination to hear oral representations about a particular issue in order to ensure adequate examination of the issue or that an interested party has a fair chance to put his case (s.91(1)). Hearings may also be required to deal with compulsory acquisition issues (s.92).

46. At a hearing the Panel (or member of the Panel) decides whether a person may be questioned and, if so, on what matters (s.94(4)). Section 94(7) lays down the principle that any questioning should be carried out by the Panel, except where it considers that oral questioning by another is necessary to ensure adequate testing of representations or fairness.

47. Rule 10(6) of the 2010 Rules gives the Panel power to require a person who submits a written representation to respond to questions from the Panel about that material or to provide further information. Rule 17(1) gives the Panel a broad power to require any interested party (including an "affected person" or landowner) to provide further information or written comments. An interested party includes an affected person (s.102(1)). Upon receipt of that material the Panel must consider whether to give all interested parties an opportunity to provide written comments.

48. The Panel may carry out accompanied or unaccompanied inspections of any site to which the application relates (rule 16).

49. Rule 21 enables all interested parties to inspect and copy written representations and documents received by the Panel.

50. In this case the Panel received a considerable amount of information. In addition to the extensive Environmental Statements and consultation responses thereon, the Panel received "relevant representations" from 832 interested parties, including statutory and non-statutory authorities, businesses, NGOs, individuals and representative bodies (DL 3.4). The Panel issued three rounds of questions amounting to some 300 pages and six rule 17 requests for information. The Panel held 17 issue specific hearings, 3 compulsory acquisition hearings and 3 "open floor hearings." They held site inspections over 16 days (PR 1.4.28). There were many opportunities for parties to make further written representations and to comment on the material submitted by others. There were a large number of Statements of Common Ground. On any view, this was a process of collecting and analysing information on a massive scale which fed into the very substantial Reports produced by the Panel for the SSBEIS and his department.

51. In *Bushell v Secretary of State for the Environment* [1981] AC 75 the House of Lords dealt with an analogous process, decision-making on a line order for a motorway. It was held that when a minister receives a report on a public inquiry from an Inspector and is deciding whether to confirm the order or scheme, he is not adjudicating on a *lis* between the participants at the inquiry. There is also the interest of the general public, which it is the minister's duty to treat as paramount. Accordingly, the minister is entitled to take advice from his officials on the strength of the objections and the merits of the project in the interests of the public as a whole, without communicating that advice to the promoter of the scheme or the objectors (p. 102A-F) (see also Lord Greene MR in *B. Johnson & Co (Builders) Limited v Minister of Health* [1947] 2 All ER 395, 398-399 and Lord Hoffman in *R (Alconbury Limited) v Secretary of State for the Environment* [2003] 2 AC 295 at [74] to [75]).

The Infrastructure Planning (Environmental Impact Assessment) Regulations 2017

52. Regulation 4 of the 2017 Regulations 2017 prohibits the Secretary of State from making an order granting development consent for "EIA development" under the 2008 Act unless EIA has been carried out. By reg.5(1) EIA is a process consisting of the preparation of an Environmental Statement ("ES"), the carrying out of consultation with statutory consultees under reg.16, publication of the ES and compliance with reg.21. Regulation 21(1) requires the Secretary of State to examine the "environmental information" (which includes not only the ES but any further information and any representations made by consultees or other persons about the environmental effects of the development – reg.3(1)), to reach a reasoned conclusion on the significant effects of the development on the environment, and to integrate that conclusion into the decision on whether the DCO is to be granted. Thus, EIA is based initially upon the ES but also includes the environmental information obtained subsequently in accordance with the 2017 Regulations.

53. The contents of an ES are prescribed by reg.14:

> " (1) An application for an order granting development consent for EIA development must be accompanied by an environmental statement.

(2) An environmental statement is a statement which includes at least—

(a) a description of the proposed development comprising information on the site, design, size and other relevant features of the development;

(b) a description of the likely significant effects of the proposed development 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 the applicant, 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 in sub-paragraphs (a) to (d); and

(f) any additional information specified in Schedule 4 relevant to 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 the most 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 a reasoned 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 relevant UK 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 the environmental statement—

(a) the applicant must ensure that the environmental statement is prepared by competent experts; and

> (b) the environmental statement must be accompanied by a statement from the applicant outlining the relevant expertise or qualifications of such experts."

54. Regulation 5(2), (3) and (5) contains further requirements for the EIA process:

> "(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 habitats protected under Directive 92/43/EEC(1) and Directive 2009/147/EC(2);
>
> (c) land, soil, water, air and climate;
>
> (d) material assets, cultural heritage and the landscape;
>
> (e) the interaction between the factors referred to in sub-paragraphs (a) to (d).
>
> (3) The effects referred to in paragraph (2) on the factors set out in that paragraph must include the operational effects of the proposed development, where the proposed development will have operational effects.
>
> (4) …
>
> (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."

55. If, upon receipt of an application for a DCO, the Secretary of State considers that the ES should contain further information, he must issue a written statement to that effect explaining why and suspend consideration of the application until the information is provided (reg.15(7) and (8)). Similarly where during an Examination the Panel consider that the ES should contain further information, they must issue a written statement and suspend consideration of the application until the information is provided and notice of that material is given to consultees and the public, with an opportunity to make representations (reg.20).

56. Accordingly, if an interested party such as the claimant considers that an ES is inadequate, he can make representations to the Panel during the Examination requesting them to exercise their powers under reg.20.

57. The adequacy of the information provided in an ES is a matter of judgment for the decision-maker, in this case ultimately the SSBEIS, subject to any legal challenge on Wednesbury grounds (*R (Blewett) v Derbyshire County Council*

[2004] Env. L.R 29 at [32]-[33]). The same standard of review applies to the adequacy of information in the EIA process as a whole (*R v Rochdale Metropolitan Borough Council ex parte Milne* (2001) 81 P & CR 27). The same approach applies to the adequacy of a Habitats Assessment under the Conservation of Habitats and Species Regulations 2017 (SI 2017 No. 1012) (see *Smyth v Secretary of State for Communities and Local Government* [2015] PTSR 1417 at [78] to [80] and *R (Mynnyd y Gwynt Limited v Secretary of State for Business, Energy and Industrial Strategy* [2018] PTSR 1274 at [8]). This standard of review has been approved for strategic environmental assessment and more generally at the highest level (*Friends of the Earth* at [142] to [148]).

58. As the Divisional Court stated in *R (Spurrier) v Secretary of State for Transport* [2020] PTSR at [434], there is an analogy between the approach taken by the courts to the legal adequacy of an EIA and to judicial review of a decision-maker's "*Tameside* obligation" to take reasonable steps to obtain information relevant to his decision, or of his omission to take into account a relevant consideration (see below).

59. The purpose of the legislation is to ensure that planning decisions which may affect the environment are made on the basis of "full information" (Lord Hoffman in *R v North Yorkshire County Council ex parte Brown* [2000] 1 A.C. 397, 404D). In *Blewett* Sullivan J (as he then was) said at [41] that it would be unrealistic to expect that an applicant's ES will always contain full information about the environmental impact of a project. The 2017 Regulations recognise that an ES may be deficient and make provision for publicity and consultation to enable deficiencies to be identified, so that the resulting "environmental information" provides the decision-maker with as full a picture as possible. In *European Commission v Ireland* [2011] PTSR 1122 the CJEU stated at [40] that the process of environmental assessment involves the authority examining the substance of the information gathered and considering "the expediency of supplementing it, if appropriate, with additional data." The authority must "undertake both an investigation and an analysis to reach as complete an assessment as possible of the direct and indirect effects of the project."

60. What is meant by "full information"? In *Blewett* Sullivan J referred to his earlier decision in *ex parte Milne*, where he had addressed the first recital to Directive 97/11/EC. The legislation is aimed at providing authorities "with relevant information to enable them to take a decision on a specific project in full knowledge of the project's likely significant impact on the environment." At [94] he held that those words should not be regarded as imposing some abstract state or threshold of knowledge which must be attained. The legislation seeks to ensure that "as much knowledge *as can reasonably be obtained*, given the nature of the project, about its likely significant effect on the environment is available to the decision taker" (emphasis added). At [104] Sullivan J stated that information must be provided to describe a development which is sufficient to enable the main or the likely significant effects on the environment to be assessed. It is for the decision-maker to determine the issue of whether the environmental information is sufficient ([106]). I would merely add that the word "full" has a wide range of meanings depending upon the context in which it is used. "Full" is used in the sense of sufficient to meet the requirements of

the legislation and not, for example, full to capacity or exhaustive (Oxford English Dictionary).

61. In *An Taisce and Sweetman v An Bord Pleanala and others* [2020] IESC39 the Supreme Court of Ireland considered the importance of public participation in the EIA process. At [128] the court said:

> "It must be remembered that the underlying purpose of public participation in environmental matters is to facilitate good, fully informed decision making, it being acknowledged that the public as a whole is one of the greatest repositories of environmental information. The EIA Directive recognises that without the opportunity to participate, it will be more difficult for the competent authority to reach the kind of decision as is envisaged. Good decision-making can take place where the decision-maker has the relevant information before it. As the appellants have demonstrated, the matters which fall to be considered at the leave stage are matters in respect of which the public may have highly relevant information."

62. Likewise, the 2008 Act enables interested parties and landowners affected by a proposed compulsory acquisition to participate in the Examination process. In addition the requirements in the 2017 Regulations for notification of a proposal for EIA development enables members of the public to participate in the EIA process and to have their representations taken into account. The statutory scheme provides for public participation, not consultation springing from a duty to act fairly. An analogy may be drawn with a different type of consultation, namely that which is required by legislation so as to involve the public in the decision-making process and improve the quality of decision-making by the public authority (*R (Stirling) v Haringey London Borough Council* [2014] 1WLR 3947 at [24] and [37] to [38]).

63. However, in the present case there is no suggestion that the SSBEIS failed to comply with statutory requirements for public notification and participation, or for consultation with statutory consultees. Indeed, there clearly was extensive public involvement in the Examination and EIA process. Instead, the nub of the claimant's complaint is that the conduct of the IPs, by getting landowners facing proposed compulsory acquisition to sign up to the Heads of Terms, at the very least discouraged, or had a "chilling effect", on the provision of information by those landowners on harmful effects or disadvantages of the scheme. Mr. Wolfe suggests that the owners of land on which the onshore works are to be constructed were in a particularly good position to supply such information in relation to their own land, remedying any gaps in the information contained in the ES or, for example, provided by statutory consultees.

64. Because the claimant's complaint is essentially limited to the effects of the agreements on the landowners affected by compulsory purchase, it is necessary for the court to review carefully those documents and the representations which were made on the subject at the time.

The "Tameside" duty to make inquiries

65. In *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 Lord Diplock said this at p.1064H to 1065B:

> "It was for the Secretary of State to decide that. It is not for any court of law to substitute its own opinion for his; but it is for a court of law to determine whether it has been established that in reaching his decision unfavourable to the council he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider: see *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223, per Lord Greene M.R. at p.229. Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

66. In *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647 the Court of Appeal summarised a number of principles relating to the *Tameside* duty at [70]:

> "70. The general principles on the *Tameside* duty were summarised by Haddon-Cave J in *R (Plantagenet Alliance Ltd) v Secretary of State for Justice* [2015] 3 All ER 261, paras 99—100. In that passage, having referred to the speech of Lord Diplock in *Tameside*, Haddon-Cave J summarised the relevant principles which are to be derived from authorities since *Tameside* itself as follows. First, the obligation on the decision-maker is only to take such steps to inform himself as are reasonable. Secondly, subject to a Wednesbury challenge (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223), it is for the public body and not the court to decide upon the manner and intensity of inquiry to be undertaken: see *R (Khatun) v Newham London Borough Council* [2005] QB 37, para 35 (Laws LJ). Thirdly, the court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision. Fourthly, the court should establish what material was before the authority and should only strike down a decision not to make further inquiries if no reasonable authority possessed of that material could suppose that the inquiries they had made were sufficient. Fifthly, the principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the

> applicant but rather from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion. Sixthly, the wider the discretion conferred on the Secretary of State, the more important it must be that he has all the relevant material to enable him properly to exercise it."

Two further points from the judgment of the Divisional Court in the *Plantagenet Alliance* case should be noted. First, the *Tameside* duty should not be used as a proxy for what is in truth a process or procedural unfairness challenge ([138]). Second, the test for a *Tameside* duty is higher than the test for whether consultation (a matter of process) is required. "The *Tameside* information must be of such importance, or centrality, that its absence renders the decision irrational" ([139]).

67. As Lord Diplock held, the duty operates within the ambit of those matters which *on a true construction of the legislation* the decision-maker was obliged to consider. The correct approach to this subject has been explained by Lord Hodge DP and Lord Sales JSC in the *Friends of the Earth* case [2021] PTSR 190 at [116] to [121] (see also *Oxton Farm v Harrogate Borough Council* [2020] EWCA Civ 805 [8]). A challenge that the decision-maker failed to have regard to a relevant consideration may only be brought in relation to those matters which a statute expressly or impliedly mandates must be taken into account. In addition, there may be other considerations (referred to as the "third category") which are relevant and which a decision-maker may, in the exercise of his judgment, choose to take into account. But no complaint may be made about the fact that the decision-maker did not take such a matter into account unless the court considers that, in the circumstances of the case, it was so "obviously material" that it was irrational not to have done so. Such a failure is treated as not having been in accordance with the intention of the legislation.

68. It is important to note what the Supreme Court said at [120]:

> "120. It is possible to subdivide the third category of consideration into two types of case. First, a decision-maker may not advert at all to a particular consideration falling within that category. In such a case, unless the consideration is obviously material according to the Wednesbury irrationality test, the decision is not affected by any unlawfulness. Lord Bingham deals with such a case in Corner House Research at para [40]. There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion."

69. It follows from these authorities that no complaint can be made about a failure to investigate under the *Tameside* duty a matter which the relevant legislation does not treat as a mandatory consideration unless the court considers that the matter was an "obviously material consideration" in the sense explained above. If the court decides that in the circumstances of the case the matter was not an obviously material consideration, then it is of no legal significance that the

decision-maker did not consider whether to exercise his discretion to take it into account and/or to pursue lines of inquiry about it.

The Heads of Terms and Option Agreements

70. The Heads of Terms provided to the court as a specimen were dated 13 January 2020 and were signed by Dr. Gimson on behalf of his mother, Mrs. Elspeth Gimson. It is described as Heads of Terms "in respect of an option agreement and deeds of grant of easement at land at Ness House, Sizewell, Leiston." It is headed "confidential subject to planning and contract." The document records that the proposed grantee is ScottishPower Renewables (UK) Limited, and that Mrs. Gimson was represented by a Chartered Surveyor at Strutt and Parker and a Solicitor at Taylor Vinters, being the same Solicitor as had carried out the independent review for landowners (see [16] above).

71. The last page of the document 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."

72. The document summarised Heads of Terms that were proposed for inclusion in the eventual Option Agreements for easements (paras. 1 to 42) and the Deeds of Easement to which they would give rise, one for East Anglia ONE North and one for East Anglia TWO (paras. 13 to 61). The document also set out the proposed incentive payments or fees payable to Mrs. Gimson, the Heads of Terms for the Option Agreements and the Deeds of Easement, and the consideration for the proposed easements. But the incentive payments would only become payable if and when an Option Agreement is completed. A further Heads of Terms payment was available if that document was signed by 27 January 2020. The fees for the Option Agreement only become payable in full if the agreements were exchanged within 20 weeks of signing the Heads of Terms. Thereafter they were payable on a reducing basis (para. 7). SPR accepted responsibility for the grantor's agent and solicitor fees (paras. 8 and 9).

73. Paragraph 31 of the Heads of Terms proposed this term for inclusion 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."

74. Paragraph 38 of the Heads of Terms proposed that this term be included in the Option Agreement:

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

Paragraph 61 proposed a similar clause for inclusion in the Deeds of Easement. Despite the references to "Heads of Terms", paras. 38 and 61 plainly set out confidentiality obligations which were intended to be included in the Option Agreements and Deeds of Easement.

75. The claimant maintains that the Heads of Terms documents were binding upon landowners from the moment they signed them. On that basis it says that landowners immediately become subject to a prohibition on objecting to the applications for the DCOs. This is one of the two routes by which the claimant has persisted in saying that information that might otherwise have come forward from landowners has been suppressed. Unfortunately, inaccurate representations by SEAS on this subject may well have influenced other members of the public to be concerned about the agreements.

76. Here again Mr Wolfe suggests that if the court interprets the agreements in these proceedings it strays into forbidden territory. I disagree. The interpretation of the agreements is an objective question of law ultimately for the courts, whatever view a Minister might form on the subject. That interpretation is relevant to the issue whether the claimant made a serious complaint to the Panel and to the SSBEIS so as to justify imposing an obligation on them to investigate.

77. The claimant's suggestion that any clause in the Heads of Terms prohibiting the making of an objection to the DCO immediately applied to a landowner upon signing the document is wrong-headed for a number of reasons.

78. First, the document is headed "subject to contract". The Heads of Terms made it plain that formal Option Agreements and Deeds of Easement would have to be completed. The Heads of Terms simply set out matters which SPR proposed for inclusion in the subsequent documents which would become legally binding. Solicitors ought to have advised their clients that there would be no binding agreement until agreed contractual terms were signed and exchanged.

79. Second, the Heads of Terms explicitly stated that the matters set out were not exhaustive and were subject to amendments or additions by both sides.

80. Third, the Heads of Terms stated that a landowner would not be entitled to any of the payments set out until the Option Agreement is exchanged. Mr. Wolfe was unable to point to any consideration being provided by SPR under the Heads of Terms which was capable of making those terms binding on a landowner, in particular the obligation not to object to the applications for a DCO. Consistent with this view, a number of the Heads of Terms documents stated that none of their contents formed part of any contract binding on any SPR company. It would follow as a matter of law that that also applied to a landowner who signed the document.

81. In addition, as I have noted above at [16], the Heads of Terms were independently reviewed by a Solicitor at Taylor Vinters and terms were negotiated with SPR before a generic template was agreed. The Solicitor raised no objection to the clause prohibiting objections to the DCO applications (Mr. Hyde's witness statement para. 56). There has been no evidence that that Solicitor ever suggested that the clause was binding upon a landowner when he signed the Heads of Terms.

82. In responding to the complaint the IPs repeatedly explained that they did not regard the Heads of Terms as a binding contract. But the claimant continued to maintain its contrary position without any evidence of having put the IPs' response to the test by contacting landowners who had not objected to the DCO applications.

83. It is right to say that the document was headed "confidential" and contained proposals for confidentiality clauses to be included in the Option Agreements and Deeds of Easement. SPR would probably have been able to bring a claim for breach of confidence in relation to disclosure of the contents of the Heads of Terms, (e.g. the amount of money payable to a landowner), but not the existence of signed Heads of Terms. Such a claim would not depend upon there being a contractual relationship between the parties (see e.g. *Clerk and Lindsell on Torts* (23rd edition) Chapter 26 and *Snell's Equity* (34th edition) Chapter 9). However, the important point is that any such duty of confidentiality owed by a landowner with regard to the contents of the document had nothing to do with whether there was a binding agreement not to object to the DCO applications. The IPs could not have relied upon any confidentiality regarding the contents of the Heads of Terms to prevent a landowner objecting to their project or supplying information adverse to the DCO application. SEAS appears to have confused or elided the two concepts.

84. The court has also been shown a specimen form for an Option Agreement, although it is necessary to recall that no such documents were executed until 2 March 2022, only shortly before the decision letter was issued. Clause 16.1 stated:

> "The Grantor shall not make a representation regarding the EA1N DCO Application nor the EA2 DCO Application (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 EA1N Development or the EA2 Development and shall take reasonable steps (Provided That any assistance is kept confidential) to assist the Grantee to obtain all permissions and consents for the EA1N Works and the EA2 Works on the Option Area (the Grantee paying the reasonable and proper professional fees incurred by the Grantor in connection with the preparation and completion of such permissions and consents)."

85. Clause 16.1 went further than the clause suggested in the Heads of Terms by requiring the landowner (a) to withdraw representations regarding the DCO applications which had already been made and (b) to take reasonable steps to

assist SPR to obtain permissions and consents for the works. But Mr Wolfe did not suggest that this clause would interfere with the obligation of an interested person (including an affected person) to answer any question raised by the Panel under rules 10(6) and (7) or 17(1) of the 2010 Rules. I do not think that it does.

86. Clause 26 of the Option Agreement dealt with 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 EA1N DCO or the EA2 DCO or any other planning application associated with the EA1N Development or the EA2 Development or any Permission."

87. As I have said, the claimant accepts that the Heads of Terms and the Option Agreements are not unlawful or contrary to public policy. That is not surprising in view of the decision of the Court of Appeal in *Fulham Football Club Limited v Cabra Estates plc* (1993) 65 P & CR 284. In that case the directors and shareholders of the club (the lessee of the ground) gave an undertaking to the freehold owner of the ground not to object to the latter's planning appeals proposing a residential redevelopment of the site and to provide a letter of support for that scheme. The undertakings were given in return for the payment of substantial sums of money, some of which were dependent upon the club vacating the ground. The club argued that the undertakings if enforced would prevent them from putting forward their true views to the public inquiry on the merits of the freeholder's current planning application, which had changed from when they had entered into the agreement. At that earlier stage the club had agreed to support the freeholder's original proposals and not to support a rival scheme promoted by the local planning authority, including a compulsory purchase order.

88. The court held that there was no valid public policy grounds to object 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 (p.296). The court described such covenants as commonplace and referred to evidence from Solicitors in the City of London that they were regarded as a necessary form of protection for those acquiring land for development. The court drew an analogy with an objector to a private Bill in Parliament making an agreement with the promoter of the Bill to withdraw his objection in return for compensation (*Taylor v Chichester and Midhurst Railway Company* (1870) L.R. 4 H.L.628), although in that situation the court often considers that Parliament, rather than the courts, should decide whether a remedy is to be granted (*Bilston Corporation v Wolverhampton Corporation* [1942] Ch 391).

89. As I have said, the claimant accepts that the introduction of legislation requiring various forms of environmental and ecological assessment, based upon a sufficiency of information, has not rendered undertakings to support, or not to object to, a proposal unlawful.

SEAS's complaint to the Panel and the SSBEIS

SEAS's complaint to the Panel

90. SEAS submitted its complaint to the Panel on 14 February 2021. By this stage the Examination had been under way for 4 months. The form for the Heads of Terms had been agreed and the majority of the landowners had signed the document one year earlier.

91. The nub of the complaint was said to be the inclusion of a term in agreements with landowners which required them to withdraw any representations to the Examination and not to make any such representations. It was said that this undermined the integrity of the planning process. It would mean that, for example, a landowner could not speak to an organisation opposing the IPs' applications. The letter quoted a clause similar to that contained in the Option Agreement. However, as we now know, the first two Option Agreements were not completed until 2 March 2022, long after the conclusion of the Examination.

92. In paras.15 and 16 of its complaint SEAS said:

> "15. The DCO procedure is one which, by its nature, supports applicants. The effect [of the non-opposition clause] has been to undermine the ability of legitimate objectors to put forward evidence and submissions, in particular by instructing and paying for legal and technical experts. This clause has had a chilling effect. Many individuals have stopped talking to our organisation. They do not reply to emails. They do not respond to calls.
>
> 16. The Examination Authority will know that those who are most affected by the proposed development, and accordingly in principle the most likely to wish to object, are also those most likely to be the subject of SPR compulsory purchase and other powers. By linking discussions over legitimate matters with payments to undermine the process, SPR maximises its ability to prevent opponents obtaining support and putting evidence before the Examination Authority"

93. SEAS said that the information upon which the complaint was based came from Dr. Gimson acting on behalf of his mother, Mrs. Elspeth Gimson in respect of her home. He was being asked to sign an Option Agreement with SPR on the basis that he would have to withdraw evidence objecting to the proposal. "Dr. Gimson is determined not to be silenced." It was said that SPR was improperly suppressing evidence in this way.

94. SEAS asked the Panel to convene a special hearing to enable all affected parties to address this issue and to "take immediate steps to investigate fully what has occurred." The letter also said that SEAS would refer the clause in question to the Solicitors' Regulatory Authority to investigate and to decide whether it was proper for Solicitors to promote the use of such clauses. SEAS subsequently did make a complaint to the SRA against lawyers advising the IPs, although they now accept that such clauses are lawful. The SRA rejected the complaint.

95. What the letter from SEAS did not say was that a year earlier, on 17 January 2020, Dr. Gimson had signed the Heads of Terms document on behalf of his mother, with the benefit of advice from the Solicitor at Taylor Vinters. In his witness statement to the court Dr. Gimson says that it did not occur to him at the time that the Heads of Terms precluded him from giving evidence to the Examination (para. 11). Indeed, he did provide information to the Panel on the risk of damage to aquifers in support of his objection to the proposal.

96. During ISH 9 on 19 February 2021 the Panel heard representations on the complaint by SEAS. According to the Panel's Procedural Decision issued on 22 February 2021, SEAS stated that if any of their concerns turned out not to be supported by the facts they would withdraw them. The decision noted:

> "The Applicants' submissions made clear that a substantial process of negotiations between themselves and a large number of Affected Persons was still ongoing. No concluded Option Agreements had been signed. Some draft agreements had been circulated that included provisions broadly seeking the withdrawal of representations (including to these Examinations) and agreement to non-disclosure. Such terms were seen as being within the range of normal terms offered in such agreements. Further, such Agreements were negotiable and relevant reservations could be agreed to provide for the preservation of an individual Affected Person's enduring rights of objection, where matters relevant to that person were still outstanding."

97. The Panel said that the IPs should have a reasonable opportunity to respond in writing to the issues raised and thereafter interested parties and affected persons should be able to respond. The Panel then said:

> "The ExAs will form a view on the importance and relevance of any submissions on this matter after Deadline 8. They may determine to issue further decisions during the Examinations or *reserve decisions to their Reports to the Secretary of State*." (emphasis added)

"Deadline 8" related to the time set for responses to submissions from the IPs.

98. For the benefit of all participants in the Examination the Panel said this:

> "The Applicants, all Interested Parties and Affected Persons are reminded of the need to ensure that normal and necessary dialogue between Applicants and Affected Persons, conducted

> to narrow matters in dispute and reach concluded settlements where possible, should not raise any reasonable apprehension in the minds of Affected Persons that they are to be prevented from enjoying their statutory rights of participation in these Examinations or that their related human rights are not being responded to. Allegations of misconduct should not be made unless they can be clearly substantiated."
>
> "It is not in the public interest that there should be any enduring apprehension on the part of an Affected Person that they might be prevented from participating in these Examinations to raise their outstanding planning merits objections."

99. The Panel said that SEAS had raised a "general point of public interest" but they may have done so without a full understanding of, or access to, relevant information.

100. On 24 February 2021 the IPs provided a written summary to the Examination of the oral submissions they had made at ISH 9. They referred to the Heads of Terms which Dr. Gimson had signed on 17 January 2020 and said that "the Heads of Terms are not legally binding and provide a basis on which both parties will proceed to seek to finalise binding terms through an Options Agreement." Dr. Gimson was being advised by Taylor Vinters who were negotiating the terms of the agreement on his behalf. That firm had previously acted on behalf of the landowners to negotiate the terms of a generic agreement. Dr. Gimson's land agent told Mr. Hyde that he wished to maintain his objection regarding impact upon aquifers, which affected the properties of both his mother and the Wardens Trust. On 10 February 2021 the IPs proposed a non-objection clause which would allow him to maintain his objection regarding impact on aquifers.

101. The IPs provided their written submissions on 4 March 2021. They relied upon the document they had already submitted on 24 February 2021. They expressed concern that the letter from SEAS dated 14 February 2021 had provoked other parties to write to the Examination without consideration of the full, appropriate facts. A number of letters had been submitted repeating claims about Option Agreements having been entered into, despite the fact that a Solicitor for the IPs had said at a hearing on 16 February 2021 that that was not the case. They referred to RICS guidance on Heads of Terms and Option Agreements. This states that Heads of Terms can usefully address at an early stage much of the detail which will need to be covered in an Option Agreement, whilst generally not being binding (para. 5.2). Where an option agreement is signed landowners may be prevented from objecting to any planning applications in relation to their land (para. 7.13). The IPs submitted that an obligation to assist the promoter (clause 16 of the Option Agreement) is a standard provision to cover information which the landowner may have which can enable the promoter to answer questions during the application process.

102. The IPs also responded to a request which SEAS had made on 22 February 2021 for disclosure of all concluded agreements, draft agreements or other documents evidencing offers sent or received by SPR relevant to payments. The IPs said that the information was confidential and not relevant to the Examination.

103. ISH 15 took place on 19 March 2021. On 25 March 2021 the IPs produced a written summary of their oral case at that hearing, in which they repeated that no Option Agreements had been signed and that the Heads of Terms were non-binding.

104. SEAS made lengthy written representations to the Panel on 25 March 2021. They complained that SPR's use of the Heads of Terms had "sterilised" many, and possibly the vast majority, of landowners from becoming potential objectors to the DCO applications by the start of the Examination (para. 14). They insisted that "gagging and non-opposition" clauses were intended to be enforceable immediately upon the Heads of Terms being signed (para. 15(v)). The non-opposition clause was not limited to the land which might be compulsorily acquired from the owner, but extended to all of the land covered by the DCO application (para. 24(v)). Then SEAS alleged that the IPs were using incentive payments "to induce landowners to enter [into] gagging and non-opposition obligations." They suggested that up until November 2020 sums totalling about £24.4m had been paid out (para. 33). It was shown to the court that SEAS had in fact been referring to an estimate for expenditure in the future.

105. Section E of SEAS's representations addressed the effect of SPR's approach on the willingness of landowners to come forward in the Examination process and to assist SEAS. They said that gagging and non-opposition clauses are targeted at landowners, who, by definition include persons with directly relevant evidence to give to the Panel in relation to the coastline and cable route. SPR's gagging policy had succeeded in excluding potential objectors from the Panel's investigation from the very start. SPR had succeeded in undermining the planning process and it was impossible for that damage to be remedied. It was irreparable (see also para. 117).

106. SEAS continued to maintain that the non-objection and gagging clauses in the Heads of Terms were immediately binding, before any Option Agreement is signed. They suggested that two paragraphs providing for dispute resolution indicated that the terms were enforceable. As I have said, the Heads of Terms explicitly stated that the document was listing provisions (including those particular paragraphs) for inclusion in the Option Agreements and Deeds of Easement. Alternatively, SEAS said that even if the Heads of Terms were not binding, that was "immaterial" because they had "succeeded in creating a climate of concern and fear whereby landowners will not speak out and this has been confirmed by landowners' legal advisers" (para. 75(iii) and (iv)). SEAS also referred to the views of members of the public who objected to the principle of non-disclosure agreements in the context of a public inquiry (para. 103).

107. It is important to note that in para. 121 of its representations SEAS said this:

> "SEAS notes that in the procedural decision the ExA has indicated that an option open to it is to address these matters in its recommendations to the Secretaries of State. SEAS considers that this is the correct approach to adopt."

108. In para. 122 SEAS went on to submit that the Panel should find that SPR's use of gagging and non-opposition clauses had given rise to procedural unfairness

in the collection of evidence which both (a) supported refusal of the DCO applications on the merits and (b) provided an independent reason to refuse consent.

109. The very fact that SEAS said in para. 121 of those representations that the Panel should address their complaint solely through the recommendations in their Report to the SSBEIS is the clearest indication that SEAS were not interested in the matter being further investigated by the Panel. But now SEAS's claim in this court that the decisions of the SSBEIS are unlawful is founded on the failure by the Panel and/or SSBEIS to comply with a legal obligation to have investigated that complaint.

110. It is helpful at this stage to put SEAS's position as stated to the Panel into context:

(i) The so-called gagging clauses, even when binding and enforceable, do not prevent landowners from objecting to the application for the DCO. They simply relate to the confidentiality of the terms in the documents;

(ii) By February 2020 the majority of the landowners had signed Heads of Terms;

(iii) There were objections from 39 out of the 55 landowners *throughout* the examination process and those objections were addressed in the Panel's report (PR 29.5.4 to 29.5.11). None of the private landowners (i.e. landowners other than statutory undertakers) withdrew their objections by the end of the Examination;

(iv) From the Panel's formal Procedural Decision dated 22 February 2021 and the IPs' written representations to the Examination it would have been clear to any landowner who had wished to object to the application that the IPs were treating the Heads of Terms as not binding, and that even in relation to an Option Agreement, negotiations could still allow an outstanding objection to be presented ;

(v) SEAS, like the other participants in the Examination, was able to identify the 55 landowners and their plots of land from the Book of Reference. By looking at the Statement of Reasons and Schedule of Objections they were also able to see who amongst the landowners had objected and who had not. It was open to SEAS to approach the small number of landowners who had not objected, to let them know that the IPs had told the Panel that the Heads of Terms did not prevent the making of objections to the DCO application. That would have been a natural course of action to take, for example, in relation to any landowners who had contacted SEAS to express their concerns about the gagging and non-opposition clauses. Mr. Wolfe confirmed that SEAS did not do that;

(vi) Alternatively, SEAS could have asked the Panel to contact landowners to inform them of the IPs' position. Mr. Wolfe confirmed that SEAS did not do that;

(vii) Instead, SEAS submitted that the Panel should recommend refusal of the DCO applications because of the incurable unfairness and damage to the Examination process which they said had occurred. Thereafter, SEAS repeatedly stated that they would challenge in the courts any decision to grant a DCO on the grounds of that unfairness.

111. On 15 April 2021 the IPs responded to SEAS's representations dated 25 March 2021. The IPs described again the negotiating process which was being followed. In response to the allegation of aggressive or intimidating behaviour towards landowners, they relied upon the feedback from external parties to the effect that Dalcour Maclaren had provided "an extremely professional and appropriate channel of communication" (para. 3). The IPs reiterated why the Heads of Terms did not amount to a agreement. Moreover, there were landowners affected by compulsory purchase who had signed the document and yet made representations to the Examination without any suggestion from the IPs that they had acted in breach of the Heads of Terms (para. 7).

112. On 15 April 2021 SEAS also made further written representations to the Panel. In para.3 they said that they had been provided with copies of more agreements between landowners and the IPs and, subject to minor variations, these contained the same gagging and non-participation clauses. SEAS did not pursue their earlier application for disclosure or request the Panel to investigate matters (see [102] above). Instead, at paras. 10 to 12 their position remained that SPR had "neutralised" an entire category of participants, the landowners, which had rendered the Examination unfair. That could not be remedied and any decision to grant a DCO would be unlawful.

113. In brief representations dated 6 May 2021 the IPs repeated that on their interpretation the Heads of Terms were not binding. They added that two sets of solicitors acting for the "vast majority" of landowners agreed with that interpretation.

114. There then followed a gap of two months in the representations on SEAS's complaint. Then on 5 July 2021, the day before the Examination concluded, SEAS sent a written representation to the Panel in which they criticised them for having taken no steps to investigate or address their complaint or to verify the facts, notwithstanding para.121 of their representations dated 25 March 2021 (see [107] above). Even then, this last minute submission was put forward in a document in which SEAS continued to say that the process had been irredeemably unfair.

115. The Panel issued its report to the SSBEIS on 6 October 2021. In chapter 29 the Panel addressed the outstanding objections from landowners affected by compulsory purchase. Mrs. Gimson through her son had criticised the effect of the non-objection terms on the planning process. The Wardens Trust appears to have made a similar point. Ms. Wojtczak objected to the non-disclosure

agreements. The Panel concluded that those affected by the proposals had had various opportunities to be heard and to make representations and there had been no interference with their rights to a fair and public hearing under Article 6 of the ECHR (PR 29.5.125). We now know that SEAS accepts that conclusion.

SEAS's complaint to the SSBEIS

116. On 7 October 2021 SEAS sent representations to the SSBEIS repeating its complaint about "SPR's strategy of neutralising opposition." They criticised the Panel for failing to grapple with the issue, for example, by taking steps to investigate or to compel SPR to disclose relevant evidence and information. SEAS alleged that this had resulted in "the opposition having its arms tied behind its back" (paras. 25 to 26).

117. As we have seen ([102] above), the application by SEAS in February 2021 for disclosure related to all concluded agreements, draft agreements or other documents evidencing offers sent or received by SPR relevant to payments. The IPs had responded by saying that those individual documents were confidential as between the parties. In any event, generic terms had been negotiated with a lawyer representing the landowners. That same lawyer also acted for Dr. Gimson who had supplied copies of agreements to SEAS. I do not see why the Panel should have been criticised by SEAS for not pursuing the wide-ranging disclosure of confidential material that they had initially sought back in February 2021 but not pursued.

118. SEAS also claimed in para.25 that the Panel had said that they "would take a definitive decision on the matter" but had failed to do so. In fact what the Panel had said in its Procedural Decision was that they might issue further decisions on the matter, *or* they might *reserve* their decisions to their Reports to the SSBEIS (see [97] above). Having made their position clear to all participants, the Panel chose the latter course and no legal challenge is made to that decision. It is striking that:

> (a) In paras. 121 to 122 of their representations dated 25 March 2021 SEAS submitted that the Panel should indeed deal with its complaint in their recommendations to the SSBEIS, that is by recommending refusal of consent on the grounds of irreparable unfairness, and not by investigating any matter ([107] to [109] above);
>
> (b) SEAS did not change their mind about that point; and
>
> (c) They did not complain to the Panel about a failure by them to investigate the complaint or seek further evidence from the IPs until 5 July 2021, the very last day before the Examination closed in accordance with its published timetable [112] and ([114] above).

119. According to SEAS (para. 30), the Panel's failure to address the issue during the Examination had enabled SPR to tender evidence which was not subject to the level of adverse scrutiny that it should have been subjected to. At the same time opposition to SPR had been weakened by a denial of financial and other support and resources. Any recommendation by the Panel that DCOs be granted

would be "riven through by unlawful procedural unfairness" and likewise any decision by SSBEIS to the same effect (paras. 32 to 33). SEAS persisted in its contention that those Heads of Terms prohibiting landowners from participating in the Examination and imposing "absolute secrecy" were immediately binding, while at the same time recognising that the other terms in that document were to form part of a future agreement (para. 69).

120. SEAS's document essentially repeated the arguments they had run before the Panel. It firmly nailed their colours to the mast of procedural unfairness (paras 109 to 126). It continued to maintain that that unfairness could not now be cured. The alleged failure of the Panel to address the complaint could not be remedied. There was no scope in law for the SSBEIS "to seek to plug the gaps in the evidence". Any decision by the SSBEIS to approve the DCOs would be quashed by the courts (paras. 123 to 124, 146 and 155).

121. At paras. 127 to 136 SEAS then critiqued the Heads of Terms and Option Agreements. They recognised that a practice had developed over time of promoters offering enhanced payments and using the procedure for obtaining powers of compulsory purchase as a lever to place landowners under pressure to enter into agreements to sell. SEAS said they had no objection in principle to an agreement of that nature (para. 132). On that last point, we have seen that Government Guidance advises that promoters should make it clear during negotiations that powers of compulsory purchase will be sought if necessary (see [14] above). What SEAS said it objected to was the addition of non-objection clauses which subverted the planning process by increasing the chances of the promoter obtaining planning consent (paras. 134 to 135).

122. But, as I have said, the claimant accepts in these proceedings that the documents which the IPs asked landowners to agree to were lawful. Likewise, the contention that the process leading up to the grant of the DCOs was tainted by unfairness has been abandoned. The claimant's case is now completely different.

123. The defendant has relied upon a witness statement by Mr. James Dawkins, a Planning Case Manager in the Energy Infrastructure Planning Team of the Department, who was responsible for drafting advice to the SSBEIS and the decision letters on certain issues, including land acquisition and the use of non-disclosure agreements. In para. 7 he says that he read all the information supplied by SEAS on 7 October 2021 and identified issues that needed further consideration. Mr Wolfe placed much reliance upon this sentence: "I considered that the issues in relation to what the Claimant referred to as the use of Non-Disclosure Agreements could not be ignored during the determination of the applications." He sought to use this as a platform for suggesting that the defendant and his officials assumed a legal obligation to deal with the point now relied upon in the grounds of challenge (i.e. as an "obviously material consideration"). But read properly in context, Mr Dawkins was referring to SEAS's case before the Panel and the SSBEIS that the Examination has been tainted by irredeemable unfairness because of SPR's interference with the rights of affected persons to have a fair hearing in which they could present information adverse to the IPs' projects. As set out below, both officials and the SSBEIS's decision letters did address that issue head on.

124. On 8 November 2021 officials sent a "sighting submission" to the SSBEIS for information only. The submission referred to the letter from SEAS dated 7 October 2021 expressing concerns that the IPs had used their intended compulsory purchase powers to secure agreement from landowners and that non-disclosure provisions had prevented those parties from participating in the Examination. Officials merely said that they were considering the issue as it was not "recorded in detail in the Examining Authorities' Reports." They did not say that they agreed with the concerns raised.

125. SEAS sent further representations on 30 November 2021. They repeated their allegations that by using "a system of secret payments", SPR had pressurised landowners into not participating in the Examination. SPR had succeeded in preventing the Panel from being able to collect full and fair evidence. After the Panel's Procedural Decision in February 2021 SPR "refused to provide any information and the position is thus left that the facts that SEAS have set out are unchallenged by SPR." I interpose to say that it is difficult to see how SEAS could possibly have believed that to be correct. It is plain that the IPs had challenged the analysis and certain factual assertions made by SEAS in so far as they thought it appropriate to do so. SEAS's application for disclosure had not been pursued.

126. In para. 9 SEAS asserted:

> "9. SPR has, to date, successfully gagged and stifled what would inevitably have been pressing, powerful and well-resourced opposition from the most directly affected persons. The present request will not be responded to by those landowners, for exactly the same reasons."

SEAS concluded:

> "11. The decision the Secretary of State must take is fact and evidence intensive. If the Secretary of State takes a decision in favour of SPR and grants consent it will inevitably be upon the basis of a procedure that has been unfair from the very outset.
>
> 12.There will be a challenge by way of judicial review in which it will be contended that the Secretary of State, fully aware of the unfairness and the unethical behaviour of the developer, has nonetheless acted to condone that unethical conduct.
>
> …… "

127. On 20 December 2021 the Department gave an opportunity for parties to respond to the representations it had received. In submissions sent on 31 January 2022 the IPs addressed the representations sent by SEAS on 30 November 2021. They largely covered points made previously. They made the point that *all* landowners had been represented by experienced solicitors and land agents in negotiations about the agreements. By that stage, over 80% of the landowners had signed "the non-binding heads of terms" and "in all cases negotiations on the Options Agreements are at an advanced stage" (para. 9). Many of the

landowners had submitted representations on the application, none of which had been withdrawn.

128. The IPs explained again why the Heads of Terms represented a starting point for the further negotiations required between the parties. They had not been legally binding. The submissions identified a number of allegations by SEAS which the IPs said had been shown to be incorrect or misleading. They said that there was no reasonable explanation for SEAS having deliberately distorted information in their submissions to the SSBEIS.

129. On 31 January 2022 SEAS sent a final response to the SSBEIS. They complained that he had only sought information from those who were participants during the examination and had ignored "all of those many landowners" who were "pressured into secret agreements which prohibited them from giving evidence to the inspectors" (para. 5). The response said that it would not repeat the case made on previous occasions. But SEAS now provided a report from a consultant on biodiversity issues, also dated 31 January 2022. This was said to have identified "a major gap in the evidence collected to date which must be completed." SEAS claimed that the report provided a "good illustration of the effects of SPR's strategy of paying-off landowners." Had landowners not been pressured into not participating in the public inquiry then it was very likely that they would have adduced expert evidence upon the biodiversity issue (para. 11).

130. The emergence of this biodiversity report at such a late stage is very odd. The Department's letter dated 20 December 2021 had announced that the decision letters would be issued by 31 March 2022. The claimant was incorporated on 4 February 2022 to bring a claim for judicial review. The report was commissioned by SEAS. From the contents it is unclear why this document could not have been produced during the Examination. It appears from the Panel's Report that SEAS had already made representations during the Examination contending that the ecology surveys for the IPs had been flawed and lacking in detail (PR 10.5.1). It is not clear whether this late document was raising any materially new points. The material sent by SEAS does not appear to have said so. Putting all that to one side, I will consider below whether the report lends any support to the grounds of challenge.

The Secretary of State's decision.

131. Officials provided the SSBEIS with briefing material on the decisions he had to take on the DCO applications, along with drafts of the decision letters (the relevant parts of which do not differ from the final published version). Officials advised that the onshore elements of the proposed developments had attracted a large number of objections from local residents and authorities and had been contentious:

> "12. The onshore elements of the Proposed Developments (the onshore cable corridor and the substation site at Friston) are highly contentious. A large number of local residents and the local planning authorities have expressed serious concerns about

> the impacts associated with the onshore infrastructure, these concerns have been widespread but notably have included:
>
> - the possibility of increased flood risk to the residents of Friston (a village that has suffered from frequent severe flood events, including a notable event in October 2019). Suffolk County Council has maintained concerns throughout the examination and recent consultation periods about the Applicant's construction surface water flood risk proposals;
>
> - the substantial landscape and visual impacts associated with the large substations;
>
> - the impact on local tourism, a key component of the local economy, from disruption caused by construction of the Proposed Developments. Particularly when considering the cumulative impacts with other developments in the area such as Sizewell C, or future proposed developments
>
> - a call for a 'split decision', supported by the local MP Rt Hon Thérèse Coffey MP, to consent only the offshore elements of the Proposed Developments until such time that the Offshore Transmission Network Review could present an alternative option to the onshore substation site.;"

132. Annex A to the ministerial submission contained a summary of the matters considered in the draft decision letters and gave further advice. One topic was entitled "Compulsory acquisition and related matters." Having addressed the issues and outstanding objections relating to compulsory purchase, para. 6.113 of Annex A said this:

> "A number of parties made representations to the Secretary of State expressing concern about the Applicant's use of Non-Disclosure Agreements when agreeing to acquire land for the construction: that upon entering the agreement for the voluntary acquisition they were prevented from taking part in the Examination and the suggestion that this prevented the Examining Authority from getting a proper understanding of the issues arising from the Proposed Developments. Officials have considered these points and the Applicant's response to them. We consider that although some landowners may have felt constrained from taking part in the Examination due to agreements entered into with the Applicant, that all relevant issues were fully considered in Examination and have sufficient information to enable us to make clear recommendations in relation to these applications [26.29-26.32]."

133. Under the heading "Conclusions" officials went on to advise at 6.115 to 6.116:

> "6.115. The Examining Authority was satisfied that all affected persons had had the opportunity to be heard [26.34].

> 6.116. The Examining Authority concluded that the Applicants had made a compelling case in the public interest, and that the acquisition of the powers sought would be proportionate and justified by the public interest of the development, and that the public benefit from it would outweigh the private loss. Officials agree with the Examining Authority's conclusions."

Again, "affected persons" referred to the owners of land the subject of the proposed powers of compulsory purchase.

134. Mr. Wolfe sought to emphasise the opening words of the last sentence of para. 6.113. He submitted that officials were agreeing with the suggestion that some landowners had not taken part in the Examination because of the agreements they had entered into with the IPs. He then went on to say that this supported the claimant's contention that its complaint regarding the non-opposition and confidentiality clauses was an obviously material consideration which the SSBEIS was obliged to take into account and a principal, important, controversial issue attracting a duty to give reasons.

135. Those contentions involve a plain misreading of the ministerial submission. The representations by SEAS were focused on procedural unfairness through the "stifling" of objections by landowners by the IPs' use of the agreements. It is clear from paras. 6.115 to 6.116 of Annex A that the Panel were satisfied that "*all* affected persons had had the opportunity to be heard in the examination" (emphasis added) and that officials agreed with that conclusion. Paragraph 26.34 of the decision letter (see below) was drafted on that basis. Paragraph 6.113 of Annex A must be read in context. When read together with the conclusions in paras. 6.115 to 6.116, the advice given by officials 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 that "all affected persons had had the opportunity to be heard" meant what it says.

136. Section 26 of each of the decision letters addressed "compulsory acquisition and related matters." After dealing with the land and rights to be acquired, the justification for the powers sought, statutory undertakings, funding and outstanding objections, the decision letter considered the use of non-disclosure agreements at DL 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 ExA 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 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."

137. The decision letters correctly recorded SEAS's complaint that landowners had been prevented from participating in the Examination and that this was raised in the context of the rights of all affected parties to have a fair hearing (DL 26.31 to 26.32). SEAS had repeatedly complained of irreparable procedural unfairness. The SSBEIS rejected that complaint in DL 26.34 (see also DL 3.4):

> "The ExA considered human rights throughout the examination, and considered those affected have had various opportunities to make representations and to be heard, including at Open Floor Hearings and Compulsory Acquisition Hearings. The ExA was satisfied there had been no interference with the right to a fair and public hearing (Article 6 of the European Convention on Human Rights). [ER 29.5.124 et seq.]"

138. Thus, the SSBEIS rejected SEAS's complaint as it was put to him on the basis of procedural unfairness. In the hearing before me Mr. Wolfe confirmed that the claimant no longer alleges that the decisions were vitiated by unfairness.

139. In my judgment, the SSBEIS's unchallenged conclusion that there had been no interference with the right of any affected person to have a fair hearing involved the rejection of SEAS's allegation that those landowners had been "stifled" or "neutralised" by the IPs' conduct so that they did not make representations that they would otherwise have wanted to make.

140. That is certainly the conclusion I reach. There is ample material to support it. No Option Agreements were completed during the Examination or during the period leading up to the decision, save for two agreements on 2 March 2022 which are not claimed to have made any material difference to the legal analysis. During the relevant period the only documents signed were the Heads of Terms and, for the reasons previously given, they had no binding effect. In February 2021 and repeatedly thereafter the IPs had made that position publicly clear. There was no evidence that any landowner had experienced any difficulties in advancing an objection despite that assurance. Indeed, the evidence was that a large majority of landowners had made representations and no such representation was withdrawn.

141. I also note what Mr. Dawkins says in para. 19 of his witness statement:

> "19. After having considered the issue thoroughly my conclusion was that there was no evidence that suggested that parties had not had the opportunity to comment if they wished, or that there was any suspicion on the part of officials or the Examining Authority that there was any information missing that would have been necessary to enable the proper conclusion of the application. In their 31 January 2021 response the Interested Party made it clear that their land agents had been willing to vary the contractual terms to allow Dr Gimson (who had complained about the NDAs) to continue to make his representations (paragraph 14). The Interested Party's statement made it clear that at the time of the SEAS complaint "no Option Agreements had been entered into and no option payments had been made to any landowner" (paragraph 15). Further, the Interested Party stated "The Applicants' (sic.) do not consider the Heads of Terms to be legally binding and that they represent the starting point of the further negotiations that requires to be held." (paragraph 16). On this basis I concluded that there was no evidence that any NDAs had in fact been signed, and that the likelihood that any potential arguments against the scheme had not been made as a result of the use of the contractual terms was remote."

142. Mr. Wolfe submitted that there is no evidence that the SSBEIS considered for himself the representations made by SEAS on its complaint regarding the agreements with landowners nor the responses from IPs. But para. 26.30 of the draft decision letter before the SSBEIS expressly drew his attention to the submission from SEAS dated 30 November 2021, which included its representations on 7 October 2021, and was said to set out its detailed concerns. He was also referred to the IPs' response dated 31 January 2022. Links were provided to both documents. Paragraph 26.32 of the draft decision letter said that the SSBEIS had carefully considered those representations due to the important issues they raised about the conduct of the Examination and the rights of all affected parties to have a fair hearing.

143. Mr. Wolfe submitted that in the light of *R (Hunt) v North Somerset Council* [2013] EWCA Civ 1320 this court could not infer that the SSBEIS had read the representations for himself. I disagree. That case was concerned with what material had been taken into account by members of a local authority for the purposes of deciding whether they had discharged the Public Sector Equality Duty. The court said that if councillors are provided with a set of materials for a meeting, they will be taken to have read all such material, together with any additional material to which they are expressly referred and told that they needed to have regard for the purposes of the meeting, absent positive evidence to the contrary (see [83]). The Court of Appeal indicated that it may suffice that members are told expressly *or impliedly* that they should consider the materials in question ([84]).

144. Assuming, without deciding, that the same approach applies to decision-making by a minister with assistance from his officials, I consider that the presumption in *Hunt* that materials were read by the decision-maker applies in the present case. There is nothing to rebut that presumption. Not only was the SSBEIS given links to the documents, he was also given a draft decision letter in which it was said that he had *considered* the material *carefully* because of the important issues it raised about the rights of the landowners to a fair hearing in the Examination. In para. 26.34 the SSBEIS was effectively being asked to endorse the conclusion that there had been no interference with a right to a fair hearing. These were sufficiently clear indicators to the SSBEIS that he was required to read the material. There is no legal basis for the court to infer that he did not.

145. In these circumstances, it is unnecessary for the court to consider the legal principles summarised in *R (Stonehenge World Heritage Site) v Secretary of State for Transport* [2022] PTSR 74 at [62] to [65] where a minister relies upon a summary by his officials of material they have appraised. Here the court should proceed on the basis that the relevant documents were considered by SSBEIS.

"Chilling Effect"

146. The claimant's contention underlying all the grounds of challenge is that the IPs put affected persons under pressure to enter into agreements which obliged them not to oppose the DCO applications or to withdraw any objections already made. Alternatively, SEAS says that even if the agreements were not binding, they had the effect of discouraging landowners from objecting to the proposals. Either way, the claimant submits that the IPs' conduct had a "chilling effect" or a "distorting effect" on the provision by landowners of information, including environmental information, adverse to the DCO applications.

147. How is the court to approach this concept of a chilling effect in the present type of case? It is entirely novel in the context of an Examination or a public inquiry. The claimant provided no legal analysis to justify the use of the term in a process of this kind, or how it should be applied as a matter of law.

148. Typically the expression appears in arguments about whether conduct involves an interference with the rights to freedom of expression or assembly and association under Articles 10 and 11 of the ECHR. A chilling effect may be used to decide whether the circumstances of an alleged violation has had a sufficiently direct effect on the applicant that he has the status of a victim, rather than merely seeking to bring an *actio popularis*. It may also describe circumstances which satisfy the threshold for an interference with those rights (see *Kudrevicius v Lithuania* (2016) 62 EHRR 34 at [100]).

149. As *Kudrevicius* confirms, an interference does not depend upon there being an outright ban, legal or *de facto*, but can include other measures which have a dissuasive or chilling effect. On the other hand, it is insufficient if an applicant is only able to show that he faces a hypothetical risk of interference. There must be genuine and effective restrictions, or a "concrete situation" (see e.g. *Dilipak v Turkey* (2015) Case No. 29680/05 at [44] to [50]; *Schweizerische Radio v*

Switzerland (2019) Case No. 68995/13 at [72]; *Sirketi and Sokmen v Turkey* at [35] to [36]). These are issues for the court to determine.

150. Mr. Wolfe did not cite any authority to show that the concept of a chilling effect has been applied to the right to a fair hearing under Art. 6. That is hardly surprising. Whereas Arts. 10 and 11 are qualified rights, Article 6 confers an absolute right. Where Art. 6 is engaged, the procedure followed either meets the requirements of fairness in the circumstances of the case, or it does not.

151. It is a well-established general principle under our domestic law that a claimant can only complain about procedural unfairness which has caused him material prejudice (*Hopkins Developments Limited v Secretary of State for Communities and Local Government* [2014] PTSR 1145 at [49]). Such a person could be described as a "victim" of that unfairness.

152. The claimant has made it clear that, despite its protestations to the Panel and the SSBEIS that the whole process had been irredeemably unfair, it does not now allege that any unfairness has occurred. None of the affected persons suffered any interference with their right to be heard, whether they made representations on the DCO applications or not. SEAS does not say that the handling of its complaint about the agreements and the IPs' conduct, whether by the Panel or by the SSBEIS, resulted in a breach of the requirements of fairness for any of the landowners or any other party.

153. Instead, the allegation of a chilling effect simply relates to the nature of the evidence or information available to the Examination from affected persons. This has nothing to do with the protection of a fundamental right or freedom enjoyed by any individual or body. Instead, the argument is purely concerned with the allegation that the IPs' conduct discouraged the provision of information for the determination of the DCO applications in the wider public interest. The claimant provided little assistance to the court on the juridical basis for such a claim in a case where unfairness is not alleged.

154. I return to the thrust of the claimant's allegation: first the Panel, and then the SSBEIS, failed to investigate the allegations and obtain information which had not been submitted to the Examination because of the dissuasive effect of the agreements. In my judgment this leads to grounds 2 and 3, where the legal test is whether the Panel and SSBEIS acted irrationally by not taking those steps.

155. Before examining the grounds of challenge, I should refer to two of the claimant's answers to a request served by the IPs for clarification and information under CRP Part 18. The IPs asked the claimant to explain "the specific steps, if any, which the claimant says the defendant should have taken to 'ensure that he had access to full information'". The claimant answered:

> "8) The case of the Claimant is simply that the Secretary of State needed to undertake a legally sufficient investigation.
>
> 9) That would have included lawfully considering what steps (including any follow up steps) were needed and then taking

> those steps. The problem is that he failed to do so before taking the decision under challenge."

The claimant then suggested that it was not for the claimant or the court to "dictate the detail" of what might have been done. But that is to duck the issue. It is for the claimant to say what in essence ought to have been done. It did not do that.

156. The claimant was also asked to give particulars of the "material information" which it says was missing and unavailable to the Panel and to the SSBEIS. The claimant responded that it could not say what "potentially material environmental information might have come forward, but for … the chilling effect of the IPs' conduct and related matters".

Ground 2

157. This ground is said to involve a breach of the common law duty to make enquiries and obtain information (see [65] to [69] above). It is a matter for the court to decide whether SEAS made a serious complaint which justified as a matter of law the imposition of an obligation on the SSBEIS to investigate the matter ([28] to [30] above).

158. The test is whether it was irrational for the Panel and/or the SSBEIS not to have carried out an investigation or inquiry into the complaint by SEAS. However, both in its Part 18 response and in its submissions the claimant was silent on what ought to have been done. That is an important part of an allegation of this kind.

159. The claimant seeks to avoid the question by saying that the SSBEIS (and the Panel) failed to consider for themselves what steps should be taken. But that is insufficient to make out the ground of challenge. The court still has to decide whether the subject matter was an "obviously material consideration", otherwise it is of no legal significance whether the decision-maker did or did not consider making inquiries about it ([69] above).

160. An important part of the context is the issue which SEAS asked the Panel and the SSBEIS to address and how they said it should be handled. Although on 14 February 2021 the claimant asked for an investigation and on 22 February 2021 made a request for disclosure, it chose not to pursue those points. Instead, from 25 March 2021 SEAS said to the Panel that the IPs' conduct had rendered the whole process irredeemably unfair, so that they should treat it as a freestanding reason for recommending refusal of development consent. Even when on 5 July 2021 SEAS criticised the Panel for failing to investigate its complaint (without saying what should be done) it still maintained that the unfairness of the process could not be cured in any event. Although on 22 February 2021 SEAS had asked for disclosure of documents by the IPs, that was resisted in the submissions from the IPs dated 4 March 2021 ([102] above). On 15 April 2021 SEAS said that through their own efforts they had obtained a number of copies of agreements with the promoters, which contained only minor variations. They did not renew any application for disclosure of documents or information by the IPs. There was no reason for any Panel to think that that was a significant, live issue which

needed to be investigated. The eleventh hour letter from SEAS of 5 July 2021 does not alter the analysis.

161. In their representations to SSBEIS between October 2021 and January 2022, SEAS maintained that the process was tainted by unfairness which could not be cured. Their criticism of the Panel for failing to investigate the matter was made in that context. SEAS even criticised the Panel for not reaching a decision on SEAS's complaint during the Examination. But that was the course of action which SEAS had urged upon the Panel at the time (see [107] to [109] above).

162. The SSBEIS was not asked by SEAS to carry out any investigation until their representation dated 31 January 2022. That request related solely to the alleged gap in information on biodiversity issues based upon an expert report bearing the same date (see [129] above). I deal with that report below. SEAS asserted that the IPs chose not to adduce *any* evidence on biodiversity, on the assumption that that omission would not be challenged by any of the affected persons because of the strategy of paying them off. In fact, it is clear from the Panel's Report and from the decision letter that the IPs did produce information on biodiversity, a range of views were expressed about its adequacy, four ISHs were held, and both the Panel and SSBEIS were satisfied with the material provided (see e.g. PR 1.4.34, sections 10.4 and 10.5 and DL 8.1, 8.8 to 8.9, 8.1 to 8.42 and 25.10).

163. In any event, the submission of the biodiversity report did not lead SEAS to alter its entrenched stance that the application process was unlawful because of irredeemable unfairness. In these circumstances, it is wholly unsurprising that the Panel and the SSBEIS should have addressed SEAS's complaint as going to the fairness of the process. There is no challenge to their conclusions that the proceedings had been fair and that there had been no interference with the rights of landowners to a fair hearing.

164. I should deal in passing with the absurd suggestion made by SEAS in their representations dated 31 January 2022 that if the monies payable under the agreements were lawful it would follow that manufacturers could lawfully make payments to buy the silence of persons with relevant information for the Grenfell Towers Inquiry or the Covid Inquiry. The sums payable by IPs to landowners under the agreements are not to buy silence. They are for the grant of options and the purchase of property rights. If powers of compulsory purchase were to be granted and exercised, the landowners would be entitled to compensation in accordance with a statutory code. However, the amounts of such payments may be subject to uncertainty, even between experts, or the subject of disagreement. Negotiations would take place between land agents for both parties working to a professional code of conduct. A modest incentive fee was payable to encourage landowners to sign heads of terms sooner rather than later. Mr Hyde has given a full explanation of the arrangements put in place by the IPs. There was nothing improper about them. It is normal to treat the amounts payable as confidential, particularly whilst negotiations are ongoing with other landowners. It is also normal for concluded option agreements to contain a non-opposition clause. A landowner was able to seek variations to that clause and if dissatisfied could refuse to contract and maintain his opposition to

the project. The claimants now accept that the agreements, whether Heads of Terms or Option Agreements, were lawful in their entirety.

165. The key document for assessing whether there was a serious issue about a chilling effect during the relevant period was the Heads of Terms. For the reasons previously given, this was not a binding agreement, in particular as regards non-opposition to the project. The IPs repeatedly made it clear that that was their position from 19 February 2021 onwards. Even where a landowner was in the process of negotiating a binding Option Agreement, the IPs relied upon the negotiations with Dr. Gimson as an example of their willingness to agree that an objection which had already been advanced could be maintained.

166. All that should have come as good news both to SEAS *and to any affected person* who might have been concerned about their ability to object to the DCO applications or to provide to the Examination information adverse to the scheme. For example, SEAS could reasonably have been expected to let any such landowners know that they need have no misgivings about pursuing objections to the applications. Mr Wolfe confirmed that SEAS did not take that step. Likewise, there was no evidence of any landowner continuing to feel that they were unable to promote an objection in the Examination, despite the statements made by the IPs, which were readily available as Examination documents. Instead, SEAS continued to repeat its mantra that the process had been irreparably tainted by unfairness.

167. In February 2020 the majority of the affected persons signed the Heads of Terms negotiated by Taylor Vinters. By January 2022 over 80% of the landowners had signed that document (see [16] and [127] above). Those who had not signed any agreement were not inhibited from presenting an objection. Of the 55 affected persons, 39 private landowners made objections to the applications. All of those objections were maintained through to the end of the Examination and were addressed in the Panel's Report. Only six representations from affected persons were withdrawn and they were all statutory undertakers (see e.g. [110] above). By way of example, Dr. Gimson did not regard the Heads of Terms which he had signed on behalf of his mother in January 2020 as inhibiting the pursuit of the objection to the scheme (see [95] above).

168. Taking all these circumstances together, in my judgment the Panel had no reason to take the view during the Examination that inquiries should be made about the agreements, or to see whether affected persons were being discouraged from providing information to the Examination by the IPs' conduct, or to seek to discover whether there was any such information. In their representations dated 21 March 2021 SEAS made their stance clear to the Panel, namely that it should address their complaint as a recommendation to the SSBEIS to refuse the applications. The Panel was entitled to deal with the complaint by SEAS as an allegation of unfairness and to reject that allegation.

169. The Examination material was available to officials and there were, of course, the further letters sent by SEAS to the Department. The SSBEIS took into account the letters from SEAS dated 7 October and 30 November 2021 and the IPs' response dated 31 January 2022. None of that post-Examination material alters the legal analysis in any significant way. The conclusions which Mr.

Dawkins reached at the time when he was preparing his briefing to SSBEIS and the draft decision letter, which he has summarised in para. 19 of his witness statement (see [141] above) were entirely reasonable.

170. I now turn to deal with the three examples relied upon by SEAS to demonstrate the chilling effect of the IPs' "strategy", two of which are referred to in the witness statement of Ms. Fiona Gilmore, a director of the claimant company.

171. The first example is said to involve the position of Dr. Gimson. But as we have seen from Dr. Gimson himself, he did not regard the Heads of Terms which he signed on behalf of his mother in January 2020 as inhibiting his ability to present objections to the project. Indeed, he made the points that he wished to make. There is no evidence in Dr Gimson's witness statement of any attempt by the IPs or their agents to use that agreement to prevent or discourage him from making representations, for example, on matters which he says the IPs had not appraised in their assessments. Indeed, his evidence is to the contrary (see e.g. paras. 13 and 14 of his witness statement).

172. Dr. Gimson also made representations objecting to the proposal on behalf of the Wardens Trust in October and November 2020 and January and February 2021. Dr. Gimson says that on 26 January 2021, shortly after he gave evidence in the Examination, the IPs' agents contacted him for the first time. They sought to enter into negotiations with the Trust for a draft Option Agreement containing the generic non-opposition clause. Dr. Gimson was not prepared to withdraw the representations he had already made about the effect of proposed works on an aquifer. The IPs were willing to agree an exception to the non-opposition clause to cover that issue. But Dr. Gimson decided not to sign an Option Agreement because the IPs did not further amend the non-opposition clause so that he could widen his objection to raise additional issues.

173. In other words, Dr. Gimson chose to retain his right to object to the scheme and was not discouraged from expressing his objections. There was no chilling effect in his case at all.

174. Moreover, no Option Agreements were entered into until 2 March 2022, only a short while before the decision letter was issued. There is no reason to infer that any other affected person wishing to make representations was discouraged from doing so. The evidence relating to Dr. Gimson does not assist the claimant's case at all.

175. The second example is said to relate to the River Hundred, which Ms. Gilmore describes as a wetland area running west from the coast at Thorpeness in a series of interlocking streams, small lakes and ponds (witness statement at para. 87). It is said that the most sensitive sections from an ecological perspective belonged to landowners who had agreed Heads of Terms with the IPs. The promoters had presented evidence that there were no rare species in the area and that it was not even wet. Ms. Gilmore says that SEAS could not gain access to the land in order to challenge that evidence because of the "practical effect of the non-disclosure agreements." But it is not said that a request was made to go onto the land which was refused.

176. In any event, SEAS relied upon reports from a biodiversity expert, Dr. Horrocks, the contents of which indicate that she had access to the land. She raised no concern about the ability of SEAS to access the land (see para. 47.2 of the Detailed Grounds of Resistance of the IPs).

177. Ms. Gilmore's suggestion at para.86 of her witness statement that the issues on the River Hundred illustrate "the sort of evidence that SEAS might have been able to advance on a far broader front had SEAS had access to the affected land" does not accord with the evidence before the court. Furthermore, when SEAS was asked in the CPR Part 18 Request for Information to identify any land to which it or its members were denied access by the owner, it appears that no such request was made. The claimant suggests that that would have been futile in view of non-specific responses from landowners on "general" inquiries. But it does not appear that any attempt was made to pursue the matter after SEAS became aware that the IPs were not treating the Heads of Terms as binding or preventing opposition to the project. The point which SEAS seeks to make is therefore hollow.

178. The Panel dealt with the issues concerning the Hundred River in some detail (PR 10.4.3, 10.4.5 and 10.4.25 to 10.4.38). They noted the criticisms made by SEAS of the survey work carried out by the IPs. They referred to the further surveys which the IPs had subsequently undertaken. They addressed at some length the arguments about whether the area qualified as a wetland and whether certain species were likely to be present. Ultimately the SSBEIS dealt with the matter at DL 8.16 to DL 8.17.

> "8.16 The Applicant proposed [ER 10.4.27] an open cut methodology for the cable route to cross the Hundred River, subject to being finalised post-consent. During examination, SEAS [ER 10.4.30] contended that the area of woodland adjacent to the Hundred River crossing comprised of wet woodland, a Priority Habitat. In response, the Applicant conducted [ER 10.4.31 et seq.] a further walkover survey in May 2021 and recorded no wet woodland species. Ecological Officers from ESC and SCC confirmed [ER 10.4.33] the habitat was not wet woodland, as defined by the Joint Nature Conservation Committee. Natural England had previously stated [ER 10.4.34] that the area was unlikely to support wet woodland, but at the close of examination considered that there remained uncertainty about the ecological importance of the woodland. Natural England and SEAS maintained concerns [ER 10.4.36] that the habitat may support the nationally scarce hairy dragonfly, which is a qualifying species of the LASSSI. The Applicant conducted further surveys of land adjacent to the Hundred River [ER 10.4.37 et seq.] and concluded that the riparian habitats of this part of the Hundred River did not provide suitable habitat for hairy dragonfly.
>
> 8.17 At the close of examination, ESC / SCC agreed [ER 10.5.22] that the ES adequately assessed the impacts on watercourses, and that embedded mitigation and monitoring was

> appropriate and sufficient. The ExA was satisfied [ER 10.5.24] with the ecological surveys and agrees that the area adjacent to the Hundred River crossing is not wet woodland. The ExA notes [ER 10.5.25] that pre-construction surveys of invertebrates including hairy dragonfly are secured through the OLEMS, and that these surveys will inform species - specific mitigation measures. The ExA concludes [ER 10.5.26 et seq.] that the Proposed Development is unlikely to give rise to any adverse impact on wet woodland and hairy dragonfly, and would give rise to no significant adverse impacts on habitat either side of the Hundred River, both alone and cumulatively. "

179. Having considered all the material, including that relied upon by SEAS, the Panel was satisfied with the surveys undertaken overall. They concluded that the site was not wetland and that the project would cause no significant adverse effects. The SSBEIS agreed with the Panel's conclusions (DL 3.4 and DL 8.42).

180. Plainly the Panel (and the SSBEIS in agreement) assessed the adequacy of the information regarding the Hundred River area and the presence of species there. They rejected the suggestion from SEAS that the information was deficient in any way. Those judgments are not open to legal challenge and yet significant parts of Ms. Gilmore's witness statement are simply an impermissible attempt to reargue the merits. She even seeks to criticise the extent of the site inspections carried out by the Panel, but that was a matter of judgment for them.

181. The third example is the biodiversity report sent by SEAS to the SSBEIS on 31 January 2022 (see [129] to [130] above). The author of the report, Mr. Samuel Durham, expressed his surprise at the "dearth of evidence" submitted to the Examination on biodiversity (para. 1.6). Section 3 of the report summarised legislation and policy and makes merely generalised assertions of non-compliance. Section 4 summarised the scoping report in 2017 and the ecological information submitted with the applications, and a list of those parts of the ES which Mr. Durham had reviewed. Section 5 of the report referred in brief terms to the IPs' surveys which the author considered to be inadequate and to criticisms of surveys to be carried out after the determination of the DCO applications. He also made other criticisms.

182. The claimant's reliance upon this document in support of its grounds of challenge is hopeless. The adequacy of past and future surveys was obviously considered during the consultations on the ES and in the examination. Both the Panel and the SSBEIS were satisfied with the sufficiency of the information they had, which would have included all the material presented to them in addition to the ES. There is no legal challenge to those conclusions.

183. No attempt was made by Mr. Durham or the claimant to explain how his report shows that affected persons, or even the relatively small number who did not make representations to the Panel, were subject to the alleged chilling effect or how the report was a "good illustration of the effect of paying-off landowners."

184. Having reviewed all the material before the court, I am left in no doubt that the allegation by SEAS that the IPs' conduct discouraged affected persons from

making representations to the Examination was not an obviously material consideration. There was nothing put forward by SEAS which could have obliged the Panel and/or the SSBEIS to have made inquiries into that matter. Seen properly in context, it did not assume such importance or centrality that the decision to grant the DCOs could be struck down on the grounds of irrationality. The thrust of SEAS's criticism was concerned with irreparable unfairness. That was rejected by the Panel and by the SSBEIS and there is no legal challenge to that conclusion. SEAS did not suggest to them that if the allegation of unfairness was rejected, they had some other "serious complaint" which had to be addressed.

185. For these reasons, ground 2 must be rejected.

Ground 3

186. The Panel and the SSBEIS both concluded that all relevant issues were raised and explored in the Examination and that they had all the information needed to make recommendations or to determine the application, as the case may be. That included environmental information. There is no legal challenge to those conclusions as such. The argument that the environmental information was insufficient so as to involve a breach of the 2017 Regulations depends entirely upon the assertion that the SSBEIS failed to make enquiries into the complaint by SEAS, in effect to ascertain whether there was any more environmental information to be obtained for the determination of the DCO application.

187. That issue depends upon the irrationality test (see [57] above). Mr. Wolfe did not suggest that the factual material to be considered under ground 3 was any different from that relied upon in relation to ground 2. On the basis of the legal principles governing EIA set out above, I am satisfied that, for the reasons given under ground 2, the SSBEIS did not act irrationally by not carrying out an investigation or making inquiries as requested by the claimant.

188. For these reasons ground 3 must be rejected.

Ground 1

189. The allegation that the SSBEIS failed to take into account the considerations set out in ground 1 depends upon the claimant showing that those matters were obviously material such that any failure to have regard to them was irrational. This allegation is based solely upon the handling of SEAS's complaint about the chilling effect of the IPs' conduct.

190. The claimant has been granted permission to argue that the SSBEIS failed to consider the alleged practical impact of the IPs' conduct, namely the lack of environmental information in the Examination from affected persons who had signed agreements with the IPs, thereby distorting the information available to determine the DCO applications in the public interest ("the practical impact" factor). This is not a factor which the 2008 Act expressly or impliedly required the SSBEIS to take into account. Mr Wolfe does not say otherwise. He therefore has to persuade the court that it was an obviously material consideration, such

that it would have been irrational for the decision-maker not to have taken it into account (see [65] to [66] above).

191. But SEAS's complaint alleged unfairness. They never suggested to the Panel or the SSBEIS that if the Secretary of State were to reject the allegation of unfairness and decide that there had been no interference with the rights of landowners to a fair hearing, he should nonetheless consider the "practical impact" factor. Likewise, SEAS did not explain whether there was a difference between the two lines of argument and, if so, what it was.

192. Of course, there is no absolute bar on the raising of a point in the High Court which has not been made before an Inspector or the Secretary of State (see e.g. *Trustees of the Barker Mill Estates v Test Valley Borough Council, Secretary of State for Communities and Local Government* [2017] PTSR 408 at [77]). Neither the Defendant nor the Interested Parties asked the court to reject ground 1 simply on the basis that the "practical impact" factor was not raised before the Panel or the SSBEIS, and I do not do so.

193. But because SEAS did not raise this fallback argument in the Examination, it is unsurprising that there were no separate findings by the Panel or the SSBEIS on the matter. However, for the reasons given in [68] above, mere silence on the part of the SSBEIS is insufficient to make good this ground of challenge.

194. Instead, the question is whether the court should treat the "practical impact" factor as an obviously material consideration, taking into account:

    (i) The SSBEIS's unimpeachable findings that there was no interference with the rights of landowners to a fair hearing;

    (ii) The court's decisions under grounds 2 and 3 that the matters advanced by SEAS were not obviously material considerations which the SSBEIS had been obliged to investigate;

    (iii) The absence of any representation from SEAS raising the "practical impact" factor as a separate consideration which the SSBEIS should take into account.

195. Mr Wolfe did not advance any argument as to why ground 1 should succeed if grounds 2 and 3 fail. He did not identify any additional piece of evidence or argument which would make the "practical impact" factor an obviously material consideration. Taking into account my earlier analysis of the materials and the arguments before the Panel and the SSBEIS, I do not consider that this factor was an obviously material consideration.

196. The Defendant and Interested Parties made some additional submissions with which I agree. It is plain from DL 26.31 and 26.32 that the SSBEIS did take into account the written representations made to him by SEAS, as well as the IPs' reply. He was therefore aware of SEAS's point that landowners (e.g. Dr. Gimson) who had not entered into agreements with the IPs had provided environmental information to the Examination. Of course, other landowners who entered into the Heads of Terms also made representations to the Panel. In

addition it is clear from DL 26.32 that the SSBEIS did have regard to the allegation that the agreements signed by landowners and the IPs were preventing the former from participating in the Examination, which in essence was the alleged distorting effect relied upon by SEAS. The SSBEIS dealt with the allegation as it was put to him.

197. There is no merit in the allegation that the SSBEIS failed to take into account the relevance of the allegations by SEAS to the planning merits of the scheme (i.e. whether development consent should be granted). Although DL 26.30 to 26.32 appear in the section of the decision letter dealing with compulsory acquisition, that section also deals with other related matters. For example, consideration was given to relevant human rights and whether there had been any interference with the right of every affected person to a fair hearing. The SSBEIS appreciated that the complaint made by SEAS was concerned with whether he was "getting a clear picture of the strength of the objection to the two proposed developments" (DL 26.32). The SSBEIS considered this on the basis of his review of "the totality" of the Panel's Report. Furthermore, when deciding whether to approve the proposed compulsory purchase, the SSBEIS applied the standard test of whether the IPs had demonstrated a "compelling case in the public interest" for the land to be acquired. That necessarily involves a consideration of the wider planning merits of the project as a whole, including environmental effects.

198. For these reasons ground 1 must be rejected.

Ground 4

199. For the reasons set out above, it is plain that both the Panel and the SSBEIS gave adequate reasons for rejecting SEAS's complaint as it has been put to them, namely as an allegation of incurable unfairness relating to the entitlement of landowners to make representations in the Examination and to be heard. The claimant does not challenge the rejection of the allegations of unfairness.

200. For the reasons set out previously in this judgment, I conclude that the matters raised by the claimant under grounds 1, 2 and 3 did not amount to obviously material considerations which the SSBEIS (or the Panel) were obliged to take into account, or principal important controversial issues attracting a duty to give reasons. It cannot be said that the reasons given by the SSBEIS raise any doubt as to whether his decision was tainted by an error of public law (*South Bucks District Council v Porter (No. 2)* [2004] 1 WLR 1953 at [31]).

Conclusion

201. The claimant's application for judicial review is dismissed.