



**COSTS APPLICATION AGAINST THE MOD**

**On Behalf Of**

**VATTENFALL WIND POWER LTD**

**In Relation to The**

**RAY WIND FARM Public Local Inquiry**

**16 December 2008**

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## **1. The circumstances of this Application**

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- 1.1 We begin with the circumstances of this application because, as Counsel for the MOD observed in a note MOD/0/35 dated 11<sup>th</sup> November 2008 and sent to the Programme Officer, the application results from a change of understanding on the part of the applicants as regards the Minister's power to make an award of costs against a Crown body.
- 1.2 That note invited an explanation for the applicants' change in position (as regards the power of the Secretary of State to award costs against the MOD). The short answer is that this applicant (like the other developers and the Inspector, as we understand it) had previously been unaware of the existence of the power.
- 1.3 The Inquiry will recall that the issue of whether costs might be awarded against the MOD was canvassed in the course of submissions on 18<sup>th</sup> and 20<sup>th</sup> March 2008. At that stage, all developers were objecting to the introduction and development of the threat radar issue, introduced without any prior notification in cross examination on 11<sup>th</sup> March.
- 1.4 The objection was based on the fact that the issue was introduced very late, because of the way it was introduced, the fact that the MOD had previously expressly eschewed such an objection, and because this constituted yet more unreasonable behaviour from an organisation which (at least as regards the Ray and Green Rigg projects) had already changed from a position of no objection to one of objection only at the very last minute (just before the PIM). Further, the MOD had failed to acknowledge its error with candour, and had subsequently obstructed all the developers' legitimate attempts to investigate the issue constructively.
- 1.5 Our oral submissions made on March 18<sup>th</sup> and 20<sup>th</sup> was that the right course was to exclude the evidence or otherwise to make its introduction conditional on the MOD agreeing to pay the costs arising out of that introduction. We did indeed pray in aid the fact that there was (as we then understood it) no power to award costs after the event. But the Inspector was unmoved by the submission and allowed the evidence to be introduced without condition.
- 1.6 It was not until Week 16 of the Inquiry that Mr Fraser QC drew to our attention that there was a Circular (DCLG Circular 02/06) with which we were previously unfamiliar.

That (as can be seen in paragraphs 1 and 5) provided guidance to LPAs and was “*commended to all Crown bodies that undertake development*”. It advised that “*in particular, Crown bodies should note that in planning proceedings to which DoE Circular 8/93 applies... the statutory provisions for awards of costs to or against parties will apply to Crown bodies that are a party as well as local planning authorities and other parties*”.

- 1.7 Whilst we may be embarrassed by our previous ignorance of these provisions, we are not in the least inhibited from making the submission. Of course, it might have been different had the Inspector relied on the absence of such a power as a reason to disallow the introduction of evidence. But he did not and hence it causes absolutely no prejudice on any side that the application should be considered now.
- 1.8 It is to be noted that both the Inspector and Counsel for the MOD (from what he said on 6<sup>th</sup> November) appear to have been in the same position of being unaware of the 06 Circular and of the costs implications of applying the planning Acts to the Crown.
- 1.9 But all of the above serves only to introduce the application and to explain the circumstances in which it comes to be made. We turn to the power itself and to arguments as to the order that should be made.

## **2. The Power to award costs**

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- 2.1 The power to make an order for costs against a party to an Inquiry such as the present arises under section 250(5) of the Local Government Act 1972. It provides:

*The Minister causing an inquiry to be held under this section may make orders as to the costs of the parties at the inquiry and as to the parties by whom such costs are to be paid, and every such order may be made by a Rule of the High Court on the application of any party named in the order.*

- 2.2 Section 320 of the Town and Country Planning Act 1990 provides:

*(1) The Secretary of State may cause a local inquiry to be held for the purposes of the exercise of any of the functions under any of the provisions of this Act.*

(2) *Subsections (2) to (5) of section 250 of the Local Government Act 1972... apply to an inquiry held by virtue of this section.*

2.3 Section 62(2) of the Electricity Act 1989 provides that

*The provisions of subsections (2) to (5) of section 250 of the Local Government Act 1972...shall apply in relation to any inquiry held under this Part as they apply in relation to a local inquiry which a Minister causes to be held under subsection (1) of that section.*

2.4 Costs Circular 8/93 provided guidance on awards of costs in such proceedings as these. Within the text of the Circular is the familiar test of “unreasonable behaviour” and the eleven criteria for identifying such behaviour, derived from the policy statements in Annexes 1-4.

2.5 Annex 4, paragraph 3 recites the previously applicable regime whereunder sovereign immunity meant that there could be no award of costs against the Crown:

*“The statutory provisions for awards of costs ... do not apply to the Crown...*

2.6 Part 7, Chapter 1, section 79 of the Town and Country Planning Act 1990 inserts section 292A into the 1990 Act. It provides, very simply, that:

*(1) This Act binds the Crown*

2.7 It was this provision which resulted in DCLG Circular 02/06, the text of paragraph 5 of which states:

*... Crown bodies should note that in planning proceedings to which DoE Circular 8/93 applies... the statutory provisions for awards of costs to or against parties will apply to Crown bodies that area a party as well as local planning authorities and any other parties*

2.8 Paragraph 6 of Circular 02/06 makes it plain that this Circular prevails over its predecessor.

2.9 In MOD/0/35, the MOD argues that no award of costs should be made because the Crown is “indivisible”. As is clearly explained in the *Town Investments* case, and more recently by Lord Woolf in *M v Home Office* [1994] 1 A.C 377 (at p 424 et seq) the

concept of “the Crown” as an indivisible legal entity is a fiction. The reality is that the Ministers of the Crown head different departments of government which carry out executive acts in the name of Her Majesty. Each of those departments has a clear and separate legal persona to the extent (per Lord Woolf at p 425 B) that “*In civil proceedings the court can now make orders...against authorised government departments or the attorney-General*”.

- 2.10 There is probably no better illustration of this than in Judicial Review proceedings. There the challenge is brought in the name of the Crown against a named Government department as Lord Woolf observed (at p 425 C) “*On applications for judicial review orders can be made against ministers. Such orders must be taken not to offend the theory that the Crown can supposedly do no wrong*”.
- 2.11 Nor can the concept of the Crown make it inappropriate for one Secretary of State to decide that costs should be paid by another government department headed by a different Secretary of State. It is very similar to the situation in which one Secretary of State has to decide for or against any matter affecting another Government department. Another parallel would be where the Crown itself is applying for planning permission or where (as in offshore wind farms, as an example close to home) the Crown (in the form of the Crown Estate) is the lessor of the seabed upon which the development will take place (and hence has an indirect interest in the project going ahead) and another Secretary of State has to adjudicate upon the section 36 application. As we learned from *R v Secretary of State for BERR* [2008] EWHC 1847 (Admin - the Teesside wind farm JR challenge), were it not already self-evident, there is nothing objectionable about a consenting process which involves the head of one Department of State taking a decision which may affect another Crown body.
- 2.12 MOD/0/35 also suggests that because this is a section 36 application under the Electricity Act 1989, then section 292A (which is expressly directed to the TCPA 1990) does not apply. There are two answers to that.
- 2.13 First, section 63 of the 1989 Act makes it clear that the Act itself does apply to the Crown and that provision, taken together with section 62(2) of the 1989 Act and the other statutory provisions set out above, provides the background to and rationale for approaching matters on the basis that an identical costs regime must exist for section

36 inquiries as it now does for TCPA inquiries. Only such an approach would be consistent with the general practice of treating Circular 8/93 (and SDD Circular 6/1990) as applying equally to planning appeals and section 36 Inquiries (see, for example, the Reports of Mr Croft IEC/3/73 on the claims for expenses arising out of the Kyle Inquiry).

- 2.14 Second, the point in MOD/O/35 is at best one of only academic interest since, in the case of Steadings and Ray, the Inquiry is not only concerned with applications seeking consent under section 36 of the 1989 Act. The developers also seek deemed planning permission under section 90(2) of TCPA 1990. Hence the costs provisions identified above apply directly for reasons already given.

### **3. Why costs should be awarded against the MOD in the present case**

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- 3.1 The answer is because the MOD has behaved unreasonably in the way in which it has made and pursued its objections both on the basis of the allegedly adverse impact of Ray on ATC systems at Spadeadam and in relation to the alleged impact on the threat radar systems deployed at or in relation to that site.
- 3.2 The objections on each of those two bases were made very late.
- 3.3 The first and general objection came 3 years after the MOD had previously taken a position of no objection at all to Ray. The MOD's change of position was announced with an entirely unsatisfactory explanation.
- 3.4 The second (threat radar) objection came even later, 3 months after the MOD had said expressly in December 2007 (in paragraph 16 of the draft Statement of Common Ground dated 21<sup>st</sup> December) that it could "accommodate" any impact on the threat radar systems at Spadeadam.
- 3.5 Again, the introduction of the threat radar objection in March 2008 was without any proper or satisfactory explanation.
- 3.6 Even after those objections had first been introduced in September 2007 and March 2008 respectively, the MOD behaved unreasonably in the way it has obstructed the legitimate efforts of the developers to investigate those objections once they have been raised.

- 3.7 Paragraph 5 of Annex 1 of Circular 8/93 reminds us that the discipline of the costs regime exists so as to ensure that parties to an inquiry “... *are not put to unnecessary expense as a result...*” of unreasonable behaviour. That is written in the context of unmeritorious appeals but is equally applicable to an objection.
- 3.8 We acknowledge that awards of costs against a Third Party such as the MOD will be made only in exceptional circumstances – see Annex 4 of Circular 8/93. That is no obstacle whatsoever to the award we seek: one can only hope that the unreasonable conduct on the part of the MOD of which we complain is indeed exceptional.
- 3.9 The test to be applied, we submit, is simply whether the unreasonable behaviour complained of has caused unnecessary and/or avoidable expense. Hence paragraph 2 of Annex 4 states: “...*where unreasonable conduct relating to procedural matters ..... causes unnecessary expense, third parties may be awarded costs, or have costs awarded against them...*”
- 3.10 In the case of APIL, had the MOD maintained or renewed the 2002 objection (well documented in **AMEC/8/2/A**) before the application was submitted in December 2005 then, as Mr Ormston explained the application would probably never have been submitted (see paragraph 6.5 of Mr Ormston’s proof **AMEC 7/1** and paragraphs 7-8 of **AMEC 8/1** and letter of 18<sup>th</sup> September 2007 in **AMEC 8/2/C**). The Inquiry will also remember Mr Ormston’s evidence on 12<sup>th</sup> March (in answer to Miss Dehon and to the Inspector’s own question and in re-examination) about the importance he attached to the absence of an MOD objection and the reassurance he gained from Mr Chafer telling him that the MOD would not change its position on an existing project where there was no objection. Mr Ormston later told the Inquiry (in cross-examination by Mr Coppel on 7<sup>th</sup> November) that the removal of the MOD objection had given the Ray project the “green light”.
- 3.11 That – as we have explained ourselves on previous occasions - is because APIL had always regarded such an objection as a “show-stopper”. That was not because such an objection would necessarily have been soundly based in evidence but because the existence of an objection would be likely to have significantly altered the odds for or against proceeding with the application, and hence the commercial risk.

- 3.12 In summary, then, in the face of a sensible, rational and properly explained objection, APIL and now Vattenfall would have been saved *all* the expense of pursuing the application with consultants, experts and lawyers from December 2005 onwards.
- 3.13 Alternatively, the sooner an objection in those terms had been intimated, the more money could have been saved.
- 3.14 Given when and how the objection did emerge only at the time of the PIM, this developer faced a difficult choice. Either it abandoned the application and regarded the money spent just as wasted investment, or (having failed to obtain an adjournment properly to investigate the issue) it could remain in the Inquiry as a way of mitigating its losses.
- 3.15 APIL chose the latter course, which was a reasonable option, particularly since the circumstances in which the objection was introduced (including the smokescreen thrown up around the real reason for the change of position) gave real reason to doubt the force, substance and bona fides of the objection.
- 3.16 Putting it another way, when the objection was introduced it was in such obviously misleading terms and so insubstantial in terms of evidential analysis that it was entirely reasonable for any developer (and APIL in particular) to decide that it was an objection which could and should be challenged at Inquiry misleading.
- 3.17 Even had a properly explained and adequately substantiated MOD objection been introduced earlier and the developer had nevertheless chosen to go ahead, there could at the very least have been a considerable saving of time and effort if **all** MOD issues (ATC and threat radar) could have been analysed by the witnesses and then heard in a single session.
- 3.18 Equally, had the MOD provided the material requested by the developers when they asked for it, again much time and effort could have been saved.
- 3.19 In summary, the unreasonable behaviour, which we have summarised in some detail in sections 6.19. 6.20 and 6.21 of our closing submissions, of the MOD is in:
- 3.19.1 The lateness of its objection in relation to ATC operations at Spadeadam, despite the previous history between APIL and MOD (see **AMEC 8/2/A, C**);

- 3.19.2 The failure to explain openly and candidly the real reason for that objection in the Outline Statement of Case, Statement of Case and Opening at the Inquiry itself;
- 3.19.3 The failure to co-operate with the developers between September 2007 and the start of the Inquiry and to answer their legitimate and reasonable request for information;
- 3.19.4 The late introduction of the threat radar objection, despite the previous history between APIL and MOD;
- 3.19.5 The circumstances in which that objection was introduced, surreptitiously and without any notice;
- 3.19.6 The failure to co-operate with the developers by providing the information sought (e.g as to co-ordinates) in an accurate and competent manner.

#### **4. What award should be made?**

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- 4.1 The Secretary of State and Planning Inspectors determine the *extent* of costs payable, not the amount (see paragraph 6 of Annex 1, paragraph 5 of Annex 5). Paragraph 5 of Annex 5 refers back to section 250(2) of the 1972 Act empowering the Secretary of State to make “orders as to the costs of the parties at the inquiry”.
- 4.2 We can identify the following categories of expense which would have been avoided/rendered unnecessary had the MOD conducted its affairs properly and reasonably.
- 4.3 One approach would be to say that the ‘extent’ of those costs should cover the whole of this Applicant’s costs associated with preparing for and presenting its case at the Inquiry from the moment an Inquiry was inevitable after the local planning authority resolved to object in March 2007. In that context, it should also be borne in mind that had the MOD notified its objection at the proper time (December 2005) then, as Mr Ormston explained in evidence, APIL would simply not have pursued its application, as it had not pursued it whilst an objection was extant. In fact, therefore, all expenses incurred since then in pursuing the application since December 2005 would have been avoided if the MOD had not behaved unreasonably.

4.4 Alternatively, one could consider the legal and professional costs of the Inquiry alone from the PIM in September 2007 or, in the further alternative, the costs related to one or both of the discrete issues of the two MOD objections, that is one in relation to an adverse impact on ATC operations at RAF Spadeadam, and the other in relation to threat radar.

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