

## STEADINGS WIND FARM

**OUTLINE SUBMISSIONS IN SUPPORT OF A**  
**COSTS APPLICATION AGAINST THE MOD**

*Background*

1. These submissions are made on behalf of SWFL in support of a costs application against the Ministry of Defence (“MoD”). They outline the basis underlying that application.
  
2. MoD/0/35 (“the MoD Costs Response”) sets out the MoD’s proposition that it would *be contrary to principle for one Secretary of State to order another Secretary of State to pay the costs in an inquiry*. SWFL assumes that MoD/0/35, as requested and in the interests of fairness and efficient use of inquiry time, fully summarises the basis upon which the MoD here denies the power to award costs against it. Additionally, although SWFL has recently received a copy of the MoD’s Closing Submissions, it (1) is still considering them (and matters concerning the MoD generally) and (2) has yet to hear what additional comments may be added when the submissions are delivered to the inquiry. Accordingly, these Outline Submissions may be subject to further addition and amendment.

*Preliminary*

3. Some preliminary points arise.
  
4. First, so far as concerns the statutory power of the Secretary of State (“the SoS”), Circular 8/93 (“the Costs Circular”) which deals with the question of awards of costs pursuant to statute in certain inquiries, originally explained that<sup>1</sup>:

*The statutory provisions for awards of costs (and the mechanisms under which they are made) do not apply to the Crown ... in planning proceedings. These provisions remain Crown exempt ... (“Paragraph 4”)*

DCLG Circular 02/2006 (“the 2006 Circular”) expressly cancelled Paragraph 4 and provided<sup>2</sup>:

*... 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 any other parties. (“Paragraph 5”)*

Paragraph 4 of the Costs Circular and Paragraph 5 of the 2006 Circular reflect the differing positions before and after the coming into force of the Planning and

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<sup>1</sup> Circ 8/93 Annex 4 para 3

<sup>2</sup> Circ 02/2006 paras 5 and 6 respectively

Compulsory Purchase Act 2004 (“the 2004 Act”). These paragraphs leave unaltered any non-statutory award or payment of costs.

5. Second, the MoD identifies and relies upon *the indivisibility of the Crown*; it cites **Town Investments v Dept of Environment**<sup>3</sup>. In that respect SWFL draws particular attention to the following part<sup>4</sup> of the passage from the speech of Lord Simon of Glaisdale upon which the MoD relies:

*It is this history and the resulting legal use of symbolic language that enables the authorities to be understood. I cite some only out of the many available.*

*“All the great officers of state are ... emanations from the Crown. They are delegations by the Crown of its own authority to particular individuals.” (Day J in **Gilbert v Trinity House Corpn (1886)** 17 QBD 795, 801)....*

*.... Before drawing a conclusion it only remains to note also the fundamental constitutional doctrine that the Crown in the United Kingdom is one and indivisible....*

*It follows that prima facie a minister or a Secretary of State is an aspect or member of the Crown. Except in application of the doctrine of precedent analogies are to be regarded warily in legal reasoning. But in view of all the foregoing the analogy of the human body and its members is, I think, an apt one in relation to the problem facing your Lordships. It is true to say: “My hand is holding this pen”. But it is equally true to say – it is another way of saying: “I am holding this pen”. What is nonsensical is to say: “My hand is holding this pen as my agent, or as trustee for me”.*

*The Minister of Works and the Secretary of State for the Environment are aspects or members of the Crown, incorporated and charged for administrative convenience with holding and administering property required by other Crown servants, who are also aspects or members of the Crown. A demise to the Minister of Works or to the Secretary of State for the Environment for and on behalf of Her Majesty is a demise to the Crown. Therefore the Crown was the tenant in the case of each of the premises with which your Lordships are concerned, and the Crown as tenant occupied them.”(emphasis added)*

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<sup>3</sup> [1978] AC at 399 to 400

<sup>4</sup> *ibid* at 399A and 400A to H

The way the MoD puts its case in this respect is important and a matter to which these Submissions return below.

### *Statutory background*

6. By virtue of section 299A<sup>5</sup>, the Town and Country Planning Act 1990 (“the 1990 Act”) *binds the Crown*. Whilst the Electricity Act 1989 contains no equivalently worked provision, section 63 makes clear the application of the 1989 Act subject to certain exceptions.
  
7. Section 250(5) of the Local Government Act 1972, as incorporated with both the 1990 and 1989 Acts<sup>6</sup>, provides a power for the SofS to *make orders as to the costs of the parties at the inquiry and as to the parties by whom the costs are to be paid*, where an inquiry is held by virtue of respectively section 320 of the 1990 Act or section 62 of the 1989 Act (it is common ground, as it must be, that both the MoD and SWFL are parties here). The latter two sections afford the Sof S a power to hold an inquiry in the exercise of his functions under the 1990 and 1989 Acts respectively.

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<sup>5</sup> Although section 299A(2) makes this subject to any express provision in Part 13 of the 1990 Act, no relevant exception or qualification here applies.

<sup>6</sup> Section 320(2) of the 1990 Act and section 62(2) of the 1989 Act

8. In the case of Steadings there are two applications before the relevant SofS; namely (1) for a consent under section 36 of the 1989 Act and (2) that there be a direction that planning permission for the development be deemed to be granted pursuant to section 90(2) of the 1990 Act. He is thus called upon to exercise his functions under both Acts, not just the 1989 Act. In considering the issues in respect of the 1989 Act application, an inquiry was here triggered by the fact of an objection from Tynedale District Council<sup>7</sup>. But that inquiry had, without more, no power to consider the issues under the 1990 Act application; accordingly there was also a requirement to hold an inquiry under that latter Act. Clearly the substantive issues in respect of the two applications are, for the most part, substantially the same<sup>8</sup>; indeed, it is accepted that, in the case of the MoD's objection, to all intents and purposes the same issues arise in respect of each application<sup>9</sup>. But, in looking overall at the various issues before this inquiry, there is not complete congruence. It would not be open to the SofS to deny an inquiry to an objector wishing to raise matters in respect of any deemed planning permission whilst affording such an opportunity to an objector to the 1989 Act application; the same point arises in the case of an objector wishing to raise points which go to both applications.

9. There are thus here two inquiries (or one combined inquiry) in respect of the Steadings proposal, under both (1) the 1989 Act and (2) in respect of the SofS's

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<sup>7</sup> Para 2(2) of Sched 8 to the 1989 Act

<sup>8</sup> Though, for example, the consideration of conditions differs dependent upon the Act under which they are to be imposed

<sup>9</sup> eg any debate as to the application of section 38(6) of the 2004 Act; also paragraph 1 of Schedule 8 to the 1989 Act

exercise of his functions under the 1990 Act, namely the deemed planned permission aspect<sup>10</sup>.

10. Where an inquiry is to be caused to be held by the SofS in connection with any matter and, in the case of some other matter required/authorised (whether under the relevant part of the 1989 Act or by any other enactment) to be the subject of an inquiry, it appears to the SofS that the matters are so far cognate that they should be considered together, the SofS may, under section 62(3) of the 1989 Act, *...direct that the two inquiries be held concurrently or combined as one inquiry*. Thus, even if the two inquiries are combined under the 1989 Act, the relevant characteristics of any inquiry under the 1990 Act (including as to costs and the Crown) are retained.

#### *Policy matrix and guidance in Circular*

11. There are two relevant matters. First, there is that under the Costs Circular (as amended by the 2006 Circular). Second, there is the approach underlying the non-statutory complaints avenue to which the MoD alludes in MoD/0/35.

12. As to the first, the underlying policy imperative of the cost regime is the desire to *bring a greater sense of discipline to all parties involved in planning proceedings*<sup>11</sup>.

There has been no suggestion that the MoD disputes this as a general proposition,

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<sup>10</sup> Section 62(3) of the 1989 Act contains a power for the Secretary of State to hold either the two inquiries concurrently or to combine them as one inquiry

<sup>11</sup> Circ 8/93 Annex 1 paras 4 and 5

whether in the context of the inquiries to which Circular 8/93 applies or inquiries more generally; it might be thought surprising if they did. It thus follows that, subject to any issue as to the Crown aspect, if the normal preconditions to an award of costs are met, then an actual award of costs should follow. It would again be surprising were the MoD to be treated more leniently than private persons or non-Crown public bodies such as local planning authorities; indeed, one might submit with some force that higher standards ought to be expected from a Department of State.

13. Second, as regards the non-statutory complaints procedure and as SWFL understands it, the MoD, as with other Departments of State, is prepared to make payments of costs in appropriate cases, if only on an *ex gratia* basis. This again is proper and to be expected.

#### *The criteria for an award of costs under the Costs Circular*

14. The Circular applies<sup>12</sup>, *inter alia*, to the various proceedings identified in its paragraph 9; applications under the 1989 Act or under section 90(2) of the 1990 Act come within the general wording of that paragraph even though not expressly mentioned in the inclusive list which follows. In any event, the MoD is understood to accept that the Costs Circular applies here (subject to the Crown issue).

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<sup>12</sup> Circular 8/93 paras 5 and 9

15. The preconditions to the making of an award of costs are set out at paragraph 6 of Annex 1 to the Circular. (1) The costs application has here been notified in advance and is being made at the appropriate time; (2) the MoD has here behaved manifestly unreasonably, in terms both of procedure and the substance of its case; (3) that unreasonableness has caused SWFL to incur or waste expense unnecessarily.

16. Relevant and extensive examples of the various manifestations of unreasonableness are identified in the SWFL Closing Submissions; there is neither time nor need to repeat those matters afresh in these Submissions. They go to the reasonableness of both the substance of the objection and to the procedure ie the way in which the MoD has approached this inquiry and dealt with the objectors. On any analysis, the MoD's unreasonableness has here been egregious and been manifested to an exceptional extent.

17. Whilst it offers no comfort to SWFL (or the other developers here) it is devoutly to be hoped that this is a 'one-off' on the part of the MoD; for that reason, if for no other, the MoD's conduct falls properly to be viewed as exceptional. SWFL refers to this because of paragraphs 1 and 2 of Annex 4 to the Costs Circular dealing with Cost Policy for awards against third parties. Various other points are relevant. First, on a proper interpretation of paragraph 2 thereof, any requirement to show exceptional circumstances either does not apply in relation to procedural unreasonableness (the better view) or any resulting test is materially less demanding than in respect of substantive unreasonableness; on any analysis, and by whatever test, the MoD's conduct here qualifies in terms of procedural unreasonableness. Second,

notwithstanding the distinction in paragraph 1 thereof between principal parties and third parties, the MoD's role here has been, on its own approach, as a principal party *de facto*, irrespective of any debate *de jure*; this of itself is a sufficient exceptional circumstance to found a full award of costs. Third, the present circumstances, taken as a whole, are sufficient in any event to satisfy any test of exceptional circumstances however formulated and applied.

*Summary of the routes to claiming costs against the MoD*

18. The MoD is here subject to the costs regime under the Planning Acts. If the inquiry into SWFL's application under the 1990 Act is to be viewed as being held concurrently with that into the 1989 Act, the position is clear. The position is equally clear if that inquiry is viewed as having been combined with that under the 1989 Act; this is because the relevant characteristics (including as to costs) have necessarily been incorporated by that combining process. Since the issues so far as concerns the MoD's case are effectively identical, this alone is enough to afford a sufficient route for the costs application.

19. Second, even were it necessary to consider the position under the 1989 Act, the result is no different. Section 63 of the 1989 Act identifies, the extent to which, subject to exceptions, the Crown is bound. In any event even were that not the case, there would be a necessary implication<sup>13</sup> that an inquiry under the 1989 Act, save in so far

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<sup>13</sup> See Bennion on Statutory Interpretation (Fifth Edition – December 2007) at section 34

as expressly provided otherwise, will afford no different and no less fair a regime than under an inquiry held in respect of an application under section 90(2); it must be remembered that the latter type of application is expressly linked to one under section 36 of the 1989 Act<sup>14</sup>. The effect of the 2004 Act thus extends by necessary implication to the 1989 Act in this respect. The result would be the same whether a 1990 Act inquiry were held concurrently or combined with one under the 1989 Act. Nor is the matter of ‘necessary implication’ a question of whether the 1989 Act would operate smoothly and efficiently were the Crown not bound; it is rather that there would be an absurd and unfair result were it otherwise. The implication is indeed a necessary one.

20. Third, the MoD has already referred to and relied upon the indivisibility of the Crown. That does not, of course, affect the arguments in the preceding two paragraphs. It does, however, (if correct) open up a further avenue to the costs application, wholly independent of any considerations of Crown immunity. On the basis of the MoD’s analysis of an indivisible Crown, there is no distinction to be drawn between either of the relevant SofS – whether for Defence (as objector) or as the determining authority for the purposes of these applications – and the Crown itself. If one follows that analysis, as the MoD does, then any costs application here made is also being directed at that indivisible Crown to make (and pay) an award of costs in respect of what is, effectively its own unreasonableness. Notwithstanding any element of necessary schizophrenia, it is to be assumed that the Crown (through that SofS who is to determine the consent applications) is wholly capable of considering

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<sup>14</sup> Section 90(2) provides that *On granting a consent under section 36 ... in respect of any operation or change of use that constitutes development, the Secretary of State may direct that planning permission for that development and any ancillary development shall be deemed to be granted, subject to such conditions (if any) as may be specified in the direction*

and determining such an application objectively and fairly; the manifestation of the Crown which would determine such a costs application would be the same SofS who will consider and determine the 1989 and 1990 Act applications. In such circumstances, no issue of Crown immunity arises because the application is made direct to the Crown; equally, there is no need to rely upon section 250 of the Local Government Act 1972 (as incorporated with the 1989 and 1990 Acts) nor on any other statutory power.

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17<sup>th</sup>December 2008