

**WPD RESPONSE TO MOD REQUEST FOR RECONSIDERATION OF RULING
MADE 23 JULY 2008 (MOD/0/31)**

1. MOD/0/31 sets out an account of events which is not accepted by WPD (nor in places entirely consistent with X/25). Given that the Inspector has his own note of the proceedings it is anticipated that he will not wish a response to every point on which WPD's recollection of events differs from that set out in MOD/0/31 but a failure in this document to set out every difference should not be taken as acceptance of the account set out in MOD/0/31.
2. Whilst not seeking to address every point made by Mr Coppel it is important at the outset to address paragraph 5. When Mr Coppel raised the issue of whether he would proceed further with his re-examination following the Inspector's ruling Mr Fraser QC made it plain that his objection to Mr Coppel's re-examination related to the specific question asked by Mr Coppel to which the objection had been made and he understood the Inspector's ruling to apply only to that specific question and objection, and that it was a matter for Mr Coppel what further questions he sought to ask in re-examination. The Inspector likewise made it clear that his ruling applied to the specific question and objection and that it was open to Mr Coppel to seek to ask whatever other questions he wished to do. Mr Coppel then stated that he was not going to proceed with further questioning.
3. Whether a question or line of questioning is permissible in re-examination requires consideration of (i) the role and scope of re-examination and (ii) the nature and purpose of the question.
4. MOD/0/31 is made on the basis that submissions it attributes to Mr Fraser QC or Mr Norris QC were wrong and that the Inspector's ruling was influenced by those submissions (paragraphs 8-10). Nowhere does it clearly state what the MOD claims to be the scope of re-examination (or indeed whether they accept that there are limits to the scope of re-examination). Rather than argue over what

submissions were made to the Inspector, and to what extent he relied upon them, it would be more helpful to address the question of the proper scope of re-examination.

5. The various textbooks and authorities relied upon by Mr Coppel clearly establish that re-examination is limited to questions to *explain* evidence given by the witness in cross-examination as the following extracts demonstrate (with my own emphasis) -

- (i) *Halsbury's Laws of England Vol 17(1) para 1026* – “a witness may be re-examined ... for the purpose of *explaining* any part of his evidence given during cross-examination which is capable of being construed unfavourably to his own side”
- (ii) *Phipson on Evidence para 12-41* – “The right to re-examine ... must be confined to the *explanation* of matters arising from the cross-examination ... Matters not properly *explanatory*, or new facts, cannot be introduced in re-examination ... Re-examination does not enable a party to cross-examine his own witness.”
- (iii) *Keane The Modern Law of Evidence p216* - “re-examination must be confined to such matters as arose out of the cross-examination ... the witness may be asked to *clarify* or *explain* any matters ... which arose in cross-examination, questions on other matters may only be asked with the leave of the judge.”
- (iv) *The Queen's Case (1820) 129 ER 976 @ 981* – “counsel has a right, upon re-examination, to ask all questions, which may be proper to draw forth an *explanation* of the sense and meaning of the expressions used by the witness on cross-examination, *if they be in themselves doubtful*, and, also, of the motive, by which the witness was induced to use those expressions; but, I think, he has no right to go further, and to introduce matter new in itself, not suited to the purpose of *explaining* either the expressions or the motives of the witness.”

- (v) *WOJCIC v Incorporated Nominal Defendant [1969] VR 323 @ 326* – “A party ... is entitled, in re-examination, to elicit from his witness fact which explain away or qualify facts which have been elicited from the witness in cross-examination ... Here, the re-examination was clearly justified upon the principles already stated. The facts elicited in cross-examination were capable, if unexplained, of founding an inference”.
- (vi) *The Queen v Lavery (no2) (1979) 20 SASR 430 @ 435 & 451* – “One of the objects of re-examination is to afford the witness an opportunity to explain the real character of the matter or transaction which has been brought out in cross-examination ... When the nature of the cross-examination and the effect of the suggestion it contains tends to damage the credit of a witness, I think counsel is entitled to elicit from the witness in re-examination an explanation of the whole of the matter or transaction to which an answer given in cross-examination relates” - “whenever an answer or answers given by a witness in cross-examination would, unless supplemented or explained in the manner proposed by the re-examiner, leave the Court with an impression of the facts, derived from the witness, that is capable of being construed unfavourably to the side responsible for calling the witness, and that represents a distortion, or an incomplete account, of the truth as the witness is able to present it.”
- (vii) *R v Nation [1954] SASR 189 @ 194* – “the nature of the cross-examination and the possibly damaging effect of the suggestions it contained against the police officer’s credit required some explanation of his conduct, if it was available.”
- (viii) *Wells An Introduction to the Law of Evidence (Cases and Material on Evidence @ p 340* – “In truth, re-examination is permissible in every case where the answers or account given in cross-examination would, if left unexplained or uncompleted, not constitute the whole truth”.

- (ix) The cases of *Dicas v Lord Brougham (1883) 6 C&P 249*, *R v St George (1840) 173 ER 921 @924* consider whether the particular question could properly be asked in re-examination and do not purport to set out principles but the decisions are entirely consistent with the principles set out.
6. Whilst Mr Coppel does not clearly state what he argues to be the scope of re-examination he appears to accept that it is limited to questions “for the purpose of explaining” evidence given in cross-examination (see the quotation relied upon by Mr Coppel in his text between the two extracts set out in paragraph 8 on page 4 of MOD/0/31).
7. To “*explain*” means to make plain or clear that which was otherwise unclear or incomplete. As re-examination is limited to questions for the purpose of explaining answers in cross-examination it cannot be used to seek to set aside or contradict answers that were clear and complete. A question which is asked for the purpose of getting a witness to resile from a clear concession is not asked for the purpose of explaining an answer.
8. Mr Coppel accepted at the Inquiry (and appears still to accept) that Sqn Ldr Coleman gave clear concessions as to the effect of the proposed wind farms on the SA-8 and SA-6 at the various relevant sites together with the other clear concessions identified in X/25. Whilst Mr Coppel does not set out the precise questions and/or line of re-examination he seeks to pursue it appears they concern the range of the SA-8 and SA-6 systems.
9. During cross-examination¹ Sqn Ldr Coleman gave clear answers that Mr Lennox’s figures as to the capability of the SA-8 and SA-6 were authoritative and were the figures to be used for the purposes of the inquiry. The questions which elicited these answers were put precisely because there were different figures before the inquiry of which Sqn Ldr Coleman was aware and because it was necessary to establish which figures the proposals should be tested against. Sqn Ldr Coleman was called by MOD because of his knowledge of the systems used

¹ By Mr Fraser QC

at Spadeadam (including the SA-8 and SA-6) and he made it clear during his evidence in chief and cross-examination that he knew the correct figures for the capability of the weapon systems. Sqn Ldr Coleman was free to choose any of the figures put before the inquiry or to provide his own figures. He clearly stated and agreed that Mr Lennox's figures were to be used and relied upon. These were clear and unequivocal answers. In so far as Mr Coppel now seeks to put other figures to Sqn Ldr Coleman it cannot be for the purpose of explaining which figures should be relied upon or the answers given, it is clearly for the purpose of persuading Sqn Ldr Coleman to resile from his clear answers.

10. The simple analysis set out above is sufficient to establish that Mr Coppel's proposed questions are not proper questions for the purpose of re-examination, and that the Inspector's ruling was correct. However, there are a number of other considerations which further support that conclusion and the Inspector's direction-

- i) The questions as to which figures should be used were put precisely because there were figures from other witnesses before the inquiry – it cannot sensibly be suggested that this was not understood by Sqn Ldr Coleman or that, given the reason for the questions, he was not aware of those other figures.
- ii) In any event Sqn Ldr Coleman was advanced as, and claimed to be, an expert witness with personal knowledge of the correct figures.
- iii) Such a witness could have no need of figures advanced by other witnesses whom he and the MOD claimed did not have this knowledge.
- iv) Sqn Ldr Coleman's rebuttal proof MOD/4/2 (paragraphs 14-26) addressed the question of the radar range of the various weapons systems and the evidence given by the various witnesses about the range. In that evidence he disputes some

of the figures relied upon by Mr Spaven and Mr James² but he does not suggest that any of Mr Lennox's figures were incorrect.

- v) At paragraph 17 Sqn Ldr Coleman states that "Lennox bases his assessment on the maximum range of the tracking radar" and then sets out the figures for the range of the tracking radar. In that paragraph Sqn Ldr Coleman is clearly accepting Mr Lennox's figures for the tracking radar range. This is further confirmed in paragraph 23 where the criticism made of Mr Lennox is that he "has under-estimated the impact of the proposed developments on the real threat radars because he bases his analysis on the TTR only". This criticism was misplaced but again confirms that Sqn Ldr Coleman accepts Mr Lennox's figures for the tracking radar.
- vi) The tracking radar range for the SA-8 quoted by Mr Lennox comes from the RAF Spadeadam website (see WPD/7/2 para 25).
- vii) As already noted the only point taken by Sqn Ldr Coleman with respect to Mr Lennox's figures and analysis concerned the acquisition radar. Contrary to the suggestion in Sqn Ldr Coleman's evidence Mr Lennox did consider the acquisition radar and he adopted and relied upon Sqn Ldr Coleman's own figures for the range of the acquisition radars (see WPD/7/2 para 21³ and para 25⁴).
- viii) Mr Lennox's figures on radar range, and the range at which engagement would actually take place, were not challenged in his cross-examination and alternative figures were not put to him.

² See MOD/4/2 para 23

³ Mr Lennox adopts Sqn Ldr Coleman's figure for the SA-6 set out in para 7e of MOD/4/1

⁴ Mr Lennox adopts Sqn Ldr Coleman's figure for the SA-8 set out in para 7f of MOD/4/1

- ix) Sqn Ldr Coleman did not give evidence of ranges different to Mr Lennox's.
- x) The MOD had refused to provide details of the ranges of the various weapons systems but had referred the parties and the Inquiry to Jane's⁵. Mr Lennox writes the relevant parts of Jane's as he confirmed in chief and cross-examination. The MOD had directed everybody to Mr Lennox for the answer to these questions.
- xi) In a situation where (a) the MOD directed the parties and Inquiry to go to Mr Lennox for evidence as to weapons performance, (b) Mr Lennox's evidence as to range was not challenged by the MOD, (c) Mr Lennox's evidence was considered by Sqn Ldr Coleman in his rebuttal and was clearly accepted, and (d) Mr Lennox's evidence on the points in questions was based in large part on Sqn Ldr Coleman's own evidence, there is no basis for attempting to refer to other figures to "explain" Sqn Ldr Coleman's clear agreement that Mr Lennox's figures were correct and to be relied upon.
- xii) In such a situation to seek to put to Sqn Ldr Coleman a table or analysis based upon figures which his own rebuttal had said were wrong (SWFL 12 – see MOD/4/2 para 23) is absurd.

11. Mr Coppel's application goes further than he appears to suggest in paragraph 10 of his submissions. Mr Coppel not only seeks to persuade his witness to resile from the clear concessions he accepts the witness made, but to do so he seeks to persuade the witness to change the factual basis the witness accepted in cross-examination and advanced in his various proofs of evidence.

⁵ See SWFL/0/33 p5 answers to question 13

12. There is no unfairness to the MOD or Sqn Ldr Coleman as claimed or suggested by Mr Coppel –

- i) It is not accepted that Sqn Ldr Coleman bore physical signs of exhaustion and MOD provide no particulars of those physical signs or when they are said to have been manifested.
- ii) If Sqn Ldr Coleman bore physical signs of exhaustion it is surprising that this was not raised at the time by Mr Coppel and that both Mr Coppel and Sqn Ldr Coleman were content to proceed when the Inspector and other parties asked from time to time if Sqn Ldr Coleman was happy to continue.
- iii) It must be noted that this suggestion was not made at the time Sqn Ldr Coleman was giving evidence nor at the inquiry as any part of any submissions made by Mr Coppel.
- iv) The agreement as to the use of Mr Lennox's figures was reached early in Mr Fraser QC's cross-examination of Sqn Ldr Coleman. Whilst it is correct that that this was the third day on which he gave evidence it was not the evening of that day, nor did it occur on the morning of the fourth day.
- v) The third day Sqn Ldr Coleman gave evidence was Tuesday 22nd July and there had been a break of three days - the second day was Friday 18th July. In the circumstances Sqn Ldr Coleman had had a considerable period of time to recover from the evidence given on the first and second days and the additional work said to have been required following the first and second days.
- vi) Sqn Ldr Coleman's evidence on 22nd July did not start until approximately 11.55 am because evidence from another party was heard first.

- vii) In the circumstances the agreement about the use of Mr Lennox's figures was given within a comparatively short time of Sqn Ldr Coleman resuming giving evidence after a three day break.
- viii) The last day of Sqn Ldr Coleman's evidence is said to have been particularly long – however, this was not the day upon which Sqn Ldr Coleman gave evidence as to the figures to be used for the purpose of the inquiry. Furthermore Sqn Ldr Coleman's cross-examination on that day only extended from 9.20 am to 10.40 am the remainder of the day was occupied by Mr Coppel's unusually long re-examination, which would presumably have been further prolonged had he not elected to cease re-examination following the Inspector's ruling.
- ix) Mr Coppel's concerns about the exhaustion and stress of the witness can be assessed in the context of the length of re-examination and the lack of any concern raised by Mr Coppel at the time.
- x) The documents were ones with which the witness was familiar having given evidence upon them in his rebuttal and having been cross-examined upon them. As already stated the cross-examination with respect to which figures to use arose precisely because there were other figures before the inquiry and it is therefore difficult to accept any suggestion that Sqn Ldr Coleman would have "forgotten" about these documents. In any event, the critical question was whether Mr Lennox's figures were correct and for the reasons already set out Sqn Ldr Coleman clearly had the knowledge to answer this question and analysis of the evidence given by Sqn Ldr Coleman clearly demonstrates that his answer that Mr

Lennox's figures were to be relied upon was entirely to be expected.

13. The likely length of the re-examination is not relevant to the issue of whether Mr Coppel should be permitted to re-open his re-examination. If the proposed re-examination were proper WPD would not seek to exclude it on the basis of the time it might take. However, the Inspector will note Mr Coppel's suggestion that further re-examination will not take more than an hour and can consider it in the light of Mr Coppel's other time estimates to the inquiry and the length of the re-examination to date.
14. Had Sqn Ldr Coleman said that figures other than Mr Lennox's figures were to be relied upon, Mr Fraser QC would have cross-examined as to the effect of using those figures. If Sqn Ldr Coleman is now to be allowed to change his clear evidence WPD will be prejudiced unless they are given a further opportunity to cross-examine upon Sqn Ldr Coleman's new evidence.
15. At the end of proceedings on 23rd July Mr Coppel asked if Sqn Ldr Coleman could be released from "purdah" and it was agreed that he could on the basis that Mr Coppel had completed his re-examination. Sqn Ldr Coleman was observed and heard in discussion with Sgt Edmonds after his re-examination was completed and whilst it is stated that he has now been asked not to discuss his evidence until the outcome of this application is known there is no information as to when that instruction was given or what discussions Sqn Ldr Coleman had prior to the issue of that instruction.

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