Case Name: *Suffolk Energy Action Solutions SPV Ltd, R (On the Application Of) v Secretary of State for Energy Security and Net Zero* [2023] EWHC 1796 (Admin) (14 July 2023)

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Commentary:
This was an unsuccessful claim by Suffolk Energy Action Solutions SPV Limited ("SEAS") challenging the decision of the Secretary of State for Business, Energy and Industrial Strategy ("SSBEIS") to grant two development consent orders under s.114 of the Planning Act 2008 for two proposals for offshore windfarm development by East Anglia One North Limited and East Anglia Two Limited ("the Interested Parties")

Background
In October 2019, the Interested Parties proposed the building of two offshore windfarms which involved onshore works including the laying of underground cables running from the landfall to new substations and overhead realignment ("the Projects"). The onshore works proposed would affect an Area of Outstanding Natural Beauty. Since the Projects were both Nationally Significant Infrastructure Projects ("NSIPS"), they required development consent orders ("DCOs") to be granted. Following the applications by the Interested Parties, in March 2022, SSBEIS made two development consent orders ("the Orders"). The Orders also authorised the compulsory acquisition of land needed for the onshore works from 55 different owners.
SSBEIS appointed a panel of five inspectors ("the Panel") to conduct the examination of the applications ("the Examination") and SEAS participated in the Examination. This claim arises out of a complaint made by SEAS to the Panel alleging that the inclusion of a particular clause in the Interested Parties' agreements with the landowners for the acquisition of land, which required them not to oppose the DCO applications and to withdraw any representations they have already made. The agreements were alleged by SEAS to have had a "chilling effect" on the landowners and "stifled" any objections they may have wished to raise at the Examination.

Grounds
Holgate J summarised the following as the four grounds of challenge by SEAS in this case.

Ground 1
The Secretary of State failed to consider:

a) The alleged practical impact of the Interested Parties' conduct, namely the lack of environmental information in the Examination from landowners affected by compulsory purchase who had signed agreements with the Interested Parties;
b) The fact that landowners who had not entered into agreements with the Interested Parties 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 Interested Parties' 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 Interested Parties' 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.

Judgement
Holgate J dealt with each of the grounds in the following order.

Ground 2
Throughout the judgement, Holgate J noted that it was normal for heads of terms and option agreements, such as those in the current case, to include a "non-opposition" clause. The amount of money paid to the landowners in consideration for signing such agreements were paid not for their silence, but for their interests in their respective plots of land. It was normal to treat such amounts paid as confidential, especially when negotiations were still ongoing with other landowners, as was the case here. In fact, at the hearing, SEAS accepted that such agreements were indeed lawful.

Additionally, Holgate J noted that, by January 2022, when the Examination was underway, 80% of the 55 landowners had already signed the heads of terms agreements ("the HT Agreements") and 39 of the 55 had also made objections to the DCO applications and maintained these throughout the Examination. These objections were also addresses in the Panel's report produced for the SSBEIS.

Taking all of the above into consideration, Holgate J held that the Panel and SSBEIS had

no reason to take the view that inquiries should be made to see whether the landowners were being discouraged from providing information to the Examination by the Interested Parties' conduct. Therefore, Holgate J concluded that this was not an "obviously material consideration" which obliged the Panel or the SSBEIS to have made inquiries into the matter.

Ground 3
This ground was based on the allegation that the HT Agreements had some distorting effect on the landowners which prevented a complete and lawful EIA process being undertaken. Therefore, the conclusions reached under Ground 2, led to the dismissal of Ground 3 as well by Holgate J.

Ground 1
In relation to a), Holgate J held that the practical impact of the Interested Parties' conduct (i.e. the alleged lack of environmental information from affected persons due to the HT Agreements) was not an obviously material consideration. Holgate J took three factors into account in arriving at this conclusion (see [194]), of which one was the fact that SEAS had only complained of "unfairness" at the Examination and not the "practical impact". This, Holgate J held, goes to show why there were no separate findings on the matter of "practical impact" by the Panel or the SSBEIS.

In relation to b), Holgate J held that, contrary to the allegation, SSBEIS was alert to the objections raised by those landowners who had not entered into agreements with the Interested Parties, since it was clear he had considered SEAS's written representations, which alluded to this very point.

In relation to c), Holgate J held that SSBEIS did take into account the allegation that the HT Agreements had a distorting effect, which was held to be evident from his decision letter.

In relation to d), Holgate J held that there was no merit in this allegation since the SSBEIS had clearly considered the above-mentioned matters, which was demonstrated in his decision letter.

Ground 4
Holgate J held that, given the reasons above, it was clear that the Panel and SSBEIS gave adequate reasons for rejecting SEAS's complaint. The matters raised under Grounds 1, 2 and 3 did not amount to either obviously material considerations or principal important controversial issues, which attracted a duty to give reasons.
As a result, this claim was dismissed.

Commentary
As was noted in the judgement, this was a case that depended heavily on its specific

facts rather than legal issues, therefore, the judgement goes into extensive detail on the material facts. However, the following are some key general points that can be made out from the judgement.

First, the Court has held that the inclusion of "non-opposition" clauses in heads of terms agreements and option agreements relating to the land on which the proposed development is to take place is lawful.

Second, a significant portion of the early part of the judgement dealt with determining what the actual grounds of challenge were (see [24-39]). The judgement indicates that counsel should take care to ensure that the grounds of challenge are succinct and do not overlap. Further, Holgate J notes that counsel should avoid including facts in their skeleton arguments which put forward allegations that do not relate to the actual grounds of challenge as relevant background (see [38]).

Third, Holgate J concluded that the principle of a "chilling effect" was one that was applicable in cases relating to interference with the rights to freedom of expression or assembly and association (i.e. Articles 10 and 11 of the ECHR) but he noted that he was not directed to any legal principle which indicated that it is equally applicable to a case relating to the right to a fair hearing (i.e. under Article 6 of the ECHR). He distinguishes Articles 10 and 11 to Article 6, in that the latter is an absolute right, whereas Articles 10 and 11 are qualified rights. Therefore, Holgate J states, that under Article 6 a hearing either meets the requirements of fairness in the circumstances of the case or it does not. It is well established in domestic law that a claimant can only complain about procedural unfairness which has caused them material prejudice. However, at the hearing, counsel for the Claimant made clear that they are not alleging "unfairness". Therefore, the "chilling effect" only applied in relation to the nature of the evidence available at the Examination from affected persons. This, Holgate J noted, had nothing to do with the protection of a fundamental right or freedom (see [146-153]).

Case summary prepared by Chatura Saravanan