Case Name: *Lynn Ross v The Secretary of State for Housing, Communities and Local Government and Renewable Energy Systems LTD.*

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Commentary: Lynn Ross brought an unsuccessful challenge under section 288 of the Town and Country Planning Act 1990 of a decision by an inspector appointed by the first defendant, the Secretary of State for Housing, Communities and Local Government, which allowed an appeal brought by the second defendant, Renewable Energy Systems LTD, against the local planning authority's refusal to grant planning permission for a solar farm at Longhedge.

It was held that the Inspector was correct to conclude that "overplanting" (whereby more solar panels are installed than would be needed for a solar farm with a particular maximum AC capacity) which went beyond that necessary to address degradation was not inconsistent with the relevant National Policy Statement, EN-3.

The issues before the Inspector

The Inspector had to determine three principal issues. First, whether the solar farm was properly to be seen as a Nationally Significant Infrastructure Project ("NSIP") and therefore falling under the consent regime set out in the Planning Act 2008 rather than the Town and Country Planning Act 1990. Second, the approach to be taken to the issue of the solar farm's capacity and "overplanting", whereby more solar panels are installed than would be needed for a solar farm with a particular maximum AC capacity. Third, the acceptability of the solar farm as an exercise of planning judgment by reference to the harms and benefits that would result from it.

The grounds of challenge

Counsel for the claimant brought six grounds of challenge:

1. That the Inspector misinterpreted the relevant sections of National Policy Statement EN-3. Properly construed, EN-3 permits overplanting only for the purpose of module degradation, and not for other purposes as was the case here.
2. That the Inspector failed to consider whether the likely level of overplanting was reasonable and justified, as required. This requirement was separate and distinct from the overall assessment of the planning balance, and was additionally/alternatively a material consideration not adequately dealt with.
3. That the inspector failed to control the density of the placement of the solar panels, or did not assess the application on a proper worst-case basis. How closely together the panels were to be

4. That the Inspector failed to take into account a material consideration, that the practice known as "clipping," where the voltage applied to the panels at the times of greatest energy generation was reduced, caused energy which would otherwise have been generated to be foregone.
5. That as the Inspector proceeded on the basis of the EIA screening opinion obtained, he was not approaching the issue on the worst-case basis, which meant that he was not rationally able to be satisfied that the solar farm was not an EIA development.
6. That the Inspector should have addressed the impact of the proposed solar farm on skylarks and yellowhammers, as it was a principal controversial issue between the parties, or at least set out his reasons for not regarding this as a factor against the appeal.

Ground 1

The Court held that the Inspector had interpreted EN-3 as a whole, as well as the relevant sections, correctly and so rejected this ground of challenge. Neither overplanting to achieve site maximisation or to counter the effect of STC (the maximum laboratory determined) rating are expressly identified in EN-3, but this did not inevitably mean they are not acceptable. The relevant section of EN-3 does not purport to address all forms of overplanting, and there is nothing in the language of the document to imply that other forms of overplanting are impermissible. Furthermore, read as a whole, against its purpose and context, such a reading is not supported. Renewable energy generation is a rapidly developing field, and it would be surprising if a national policy document was intended to be comprehensive. Degradation of solar panels is inevitable, but other reasons to overplant, such as STC rating or site maximisation, are not, and so it was not surprising that they were not expressly mentioned.

Ground 2

The Court did not accept the submission of the claimant that the words "such reasonable overplanting should be considered acceptable" imposed a separate requirement that the extent of the overplanting has to be reasonable, and so it was not necessary for the Inspector to determine that question before addressing the overall planning balance, a conclusion that flowed from the natural and ordinary meaning of the words. "Reasonable" was used as an adjective describing overplanting to address module degradation, and not imposing a separate requirement. The Court observed that the sentence went on to say that such overplanting is acceptable "so long as" and then imposes three requirements: that the overplanting "can be justified"; that the NSIP installed capacity threshold is not exceeded; and that the impacts of the proposal are assessed by reference to their full extent. It followed that the sentence is characterising overplanting as reasonable, with particular requirements to be met. "Reasonableness" could have been added to that list, but was not.

Counsel for the claimant characterised the issue of whether the maximum export capacity could have been achieved either without any or with less overplanting as "an important and obviously material consideration" which should have been but which was not taken into account. However, the Court found that the Inspector had approached with necessary care and explored the extent of overplanting and the justification for it. There was no dispute that the maximum capacity could have been achieved for a period of time with less overplanting. The overplanting was intended to maximise the period of time for which the Solar Farm was operating at that capacity. The Inspector probed the Second Defendant's case to establish that the overplanting was aimed at that objective and to identify the extent to which it would achieve it. He was not required to do more given that he went on to consider the impact of the Solar Farm as a whole in his assessment of the planning balance.

Under the final limb of Ground 2, the Court was satisfied that the Inspector's treatment of whether the extent of overplanting was lawful. Although his treatment of the issue was somewhat "condensed" and combined with his explanation as to why he rejected the idea that only overplanting to address module degradation was permitted, the Inspector did address that question, and the conclusion he reached was well within the range of conclusions rationally open to him.

Ground 3

Ground 3 was also rejected. The Inspector was satisfied that the information provided allowed him to assess the proposal on a worst case basis. He did not refer there to the possibility of controlling the density of the solar panels by condition and nor did that possibility play any part in his assessment of the effects of the Solar Farm later in the Decision. It therefore was not necessary for the Court to determine the debate about the effect of condition 3, which would control the density of solar panel planting. The Court noted that both EN-1 and EN-3 expressly contemplate that not all the details of a renewable energy proposal will be available when a decision on approval is being made. This is, in part, a consequence of the developing nature of the ways of generating renewable energy. It followed that the Inspector's readiness to make an assessment without every detail having been finalised was in accord with the tenor of the NPSs. In addition, the Inspector had before him evidence as to the practicalities of operating the Solar Farm. This was highly relevant to the question of whether he was in a position to assess the reasonable worst-case scenario.

Ground 4

The Court concluded that it was not the case that the Inspector's treatment of the question of energy loss through clipping amounted to a failure to take account of an obviously material consideration. A number of factors indicated that this was the case:

first, the Inspector made an express mention of the issue; second, the potential energy foregone is an inherent consequence of clipping, so was not a distinct consideration from the merits of overplanting; and the issue of clipping was not advanced as a separate material consideration before the Inspector at the appeal.

Ground 5

This ground, which also failed, turned on whether the conclusion that the solar farm was not an EIA development was rationally open to the author of the EIA scoping opinion, which the Inspector relied upon at the appeal. The author was aware of the fence line and the indicative number of solar panels together with some elements of the structures which would be included in the solar farm. He was also aware of the views which others in positions of expertise had expressed on the proposed development, including the Local Planning Authority's landscape and conservation officers and the absence of objections from Natural England, the Environment Agency, and the Local Planning Authority's Ecology officers. Furthermore, the author's response was given in the required standard matrix format but also contained detailed information with many of the screening criteria questions being addressed at some length. In the Court's view, those factors combine to provide support for the assessment implicitly made by the author that he had sufficient information properly to form the screening opinion.

Ground 6

The Court was satisfied that at the appeal, the issue of the potential impact of the solar farm development on skylarks and yellowhammers had not been a principal controversial issue when the Inspector came to a decision. To the extent that it had been raised at an earlier stage, it had been a peripheral one. It followed that he was not to be criticised for failing to address it in the Decision. The submissions made by the claimant that the Inspector had observed those birds during a site visit, and so should have been aware of and addressed them in his decision, or should have addressed them by dint of their protected status, were also rejected by the Court. Accordingly, Ground 6 failed.

Conclusion

With all grounds of challenge being rejected by the Court, the claim was dismissed.

Case summary prepared by Gregor Donaldson