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FAO Mr Christopher Potts
Savills UK Ltd for
The Applicants

Your Ref:

Our Ref: BC080001/ CAPP-006C
(Comb)

Date: 9 May 2022

By Email

Dear Mr Potts

Planning Act 2008 (as amended) – Section 95

Application by Dentons UK and Middle East LLP for Network Rail Infrastructure Ltd. for an award of costs against London Resort Company Holdings Limited for an Order Granting Development Consent for the London Resort

1. By a submission dated 22 April 2022, Dentons UK and Middle East LLP for Network Rail Infrastructure Ltd. has made an application for an award of costs ("the costs application") against London Resort Company Holdings Limited ("the respondent party") regarding its Application for an Order Granting Development Consent for the London Resort ("the Order"). The costs application has been published and can be seen in the Examination Library [CAPP-006].
2. The Examining Authority (ExA) appointed to examine the Order is empowered to make awards of costs against relevant parties in respect of the examination of a Nationally Significant Infrastructure Project (NSIP). The power to award costs under section (s) 250(5) of the Local Government Act 1972 is applied to an examination of an application for a DCO by s95(4) of the Planning Act 2008 (PA2008).
3. The Secretary of State has published guidance on costs applications in relation to development consent order examinations ("the Costs Guidance"). It can be accessed by following this link:
[Award of costs: examinations of applications for development consent orders - Guidance \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/guidance/award-of-costs-examinations-of-applications-for-development-consent-orders)
4. On 7 April 2022, the Planning Inspectorate provided advice under section 51 of the Planning Act 2008 in relation to previous costs decisions taken on the Atlantic Array application, which is available via the [National Infrastructure Planning Website landing page](#) for the London Resort.

5. Further to the statutory powers outlined above, to the Costs Guidance and having had regard to the approach taken to previous costs decisions identified in the section 51 advice, I am writing to inform you that the ExA has given preliminary consideration to the costs application in two parts and notes that it is based on:
- the status of Network Rail Infrastructure Ltd. as an Affected Person (**'the first part'**); and
 - an allegation of unreasonable behaviour by the respondent party (**'the second part'**).

This letter is to set out the process under which a decision will be taken on it.

6. In relation to the validity of **the first part** of the costs application, the ExA has considered the Costs Guidance, referring specifically to all paragraphs in Part D. The ExA notes the basis of this costs application as being that the applicant for costs considers that it is a 'successful objector' and that it is not necessary for unreasonable behaviour by the respondent to be demonstrated. On the basis that the applicant for costs appears to the ExA to be an Affected Person, that the application for the Order has been withdrawn and so the applicant for costs appears to be a 'successful objector' and that the costs application was made within 28 days of the withdrawal of the application for the Order and so is timely, the ExA has agreed to consider the first part of the costs application. In reaching this view, the ExA notes specifically that whilst the examination of the London Resort application had not commenced at the point where the application was withdrawn, previous costs decisions in relation to Planning Act 2008 casework by the ExA for the Atlantic Array demonstrate acceptance of the principle that costs may be applied for in circumstances where an application is withdrawn in the period between acceptance for Examination and the Preliminary Meeting. The ExA here sees the approach taken by the ExA for the Atlantic Array as being relevant and applicable to the circumstances of your application for costs.
7. In relation to the validity of **the second part** of the costs application, the ExA notes that it was made within 28 days of the withdrawal of the application for the Order and so is timely. However, the ExA has not reached a concluded position on the question of whether it has jurisdiction to consider the second part of the costs application. This part relies on an allegation of unreasonable behaviour. It is based on the applicant for costs' standing as an Interested Party. Whilst there are circumstances (including those in respect of which the section 51 advice referred to in paragraph 4 above was given) in which successful objector costs claims can arise in the time prior to a Preliminary Meeting, further to paragraph 12 of the Costs Guidance, it is not clear that costs for unreasonable behaviour can do so, but neither are such claims conclusively excluded. It follows that there is a question in relation to jurisdiction over the second part that must be decided before a decision is taken on the merits of this part of the costs application that you have made.
8. Nine Affected Persons have made submissions that rely on both the standing of the costs applicant as an Affected Person and on allegations of unreasonable behaviour [CAPP-006, 011, 013, 014, 015, 017, 018, 019 and 020]. To the extent that these applications for costs also argue that unreasonable behaviour claims can be made in relation to matters arising before a Preliminary Meeting, then they

raise considerations that are relevant to the question of jurisdiction. Five Interested Parties have made submissions that rely on allegations of unreasonable behaviour alone and argue that such claims can validly be made in relation to matters arising before a Preliminary Meeting [CAPP-003, 004, 007, 009 & 010]. Aspects of these submissions are also relevant to the jurisdiction question as to whether such claims can be made. All of the documents referred to above are available on the [National Infrastructure Planning Website documents tab](#).

9. In accordance with paragraph 34 of the Costs Guidance and for the reasons set out above, the ExA has decided to address the 'successful objector claim', the jurisdiction question and the question of whether your behaviour satisfies the necessary tests for unreasonable behaviour in a rolled-up procedure. The ExA has asked me to provide you with an opportunity to make any observations on the following matters:

- **Matter 1:** the 'successful objector' claim for costs, and specifically whether there are any arguments that, if successful, a part award should be made that would be different to or lesser in extent than any award that could possibly be made under matter 3;
- **Matter 2:** the jurisdiction to award costs for unreasonable behaviour in these circumstances, and without prejudice to this matter;
- **Matter 3:** the unreasonable behaviour alleged in the costs application and whether it meets the test for an award set out in the Costs Guidance.

Your responses are sought on all three matters within 14 calendar days (by **23 May 2022**).

10. In relation to each matter, the applicant for costs has been advised that the same costs cannot be claimed twice. So for example, if you were to concede on Matter 1, costs on Matter 3 can only be claimed to the extent that they are greater than or relate to a different part award than costs on Matter 1.

11. In considering your response to **Matter 2**, the ExA has asked me to advise you that it considers that the question of validity and jurisdiction is a general one, capable of being addressed and decided for a class of applicants who share common characteristics. The ExA views all five Interested Parties referred to in paragraph 7 above as being such a class. It therefore follows that the respondent party is asked to respond to this matter with a common argument addressing all reasoning relevant to validity and jurisdiction from the five applicants. To the extent that there is a separate class of nine Affected Persons referred to in paragraph 7 who have also raised unreasonable behaviour as relevant to their applications, you are also asked to address any arguments from those submissions that may also be relevant to the question of jurisdiction.

12. In considering your response to **Matter 3**, you are requested to direct your response to the instances of unreasonable behaviour individually argued in the costs application and the degree to which these do or do not satisfy the tests for unreasonable behaviour set out in the Costs Guidance. The ExA has asked me to advise you that in the interests of efficiency and expedition, your response on Matter 3 is sought in a rolled-up process at the same time as your response to Matter 2. However, your response to Matter 3 will be taken by the ExA as

expressed without prejudice to your response to Matter 2. The ExA will not consider Matter 3 until it has reached a decision on Matter 2 and for that reason, you should provide your response on these two matters in separate documents.

13. If you do respond on any of these matters, a copy of the response(s) will be provided to the applicant for costs shortly after it has been received by the ExA. I will provide the applicant for costs with an opportunity to make its final observations to the ExA in writing within a further 14 calendar days.
14. Following receipt of final observations from the applicant for costs (or the expiry of the deadline, if no such submission is received), the ExA would proceed to decide the validity and jurisdiction question first and, based on its determination on that point will, if required, proceed to decide the costs application. The outcome of these decisions will be communicated to you and to the applicant for costs in writing.
15. If you do not submit a response on any of these matters, the ExA will proceed to them as required on the basis of the submissions and documents already before it.
16. If you have any questions about this letter, please do not hesitate to contact me.

Yours sincerely

Edwin Mawdsley
Case Manager

Enc. A costs application against London Resort Company Holdings Limited made by Dentons UK and Middle East LLP for Network Rail Infrastructure Ltd. [CAPP-006].