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FAO Mr Christopher Potts  
Savills UK Ltd for  
The Applicants

Your Ref:

Our Ref: BC080001/ CAPP- 007C (UB)

Date: 9 May 2022

## By Email

Dear Mr Potts

### Planning Act 2008 (as amended) – Section 95

#### Application by Merlin Entertainments Group 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 26 April 2022, DLA Piper UK LLP for Merlin Entertainments Group 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-007].
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 development consent order (‘DCO’) by s95(4) of the Planning Act 2008 (PA2008).
3. The Secretary of State has published guidance on costs applications in relation to DCO 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://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

[www.planningportal.gov.uk/infrastructure](http://www.planningportal.gov.uk/infrastructure)



section 51 advice, I am writing to inform you that the ExA has given preliminary consideration to the costs application. This letter is to set out the process under which a decision will be taken on it.

6. The costs application 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 its validity. This is because the costs application relies on an allegation of unreasonable behaviour. It is based on the standing of the costs applicant as an Interested Party and does not rely on any element of the compulsory acquisition process. Further to paragraph 12 of the Costs Guidance, it is not clear that costs applications for unreasonable behaviour that arise before a Preliminary Meeting can be considered, but for a range of reasons argued by a number of the applicants for costs, neither can such claims conclusively be excluded. It follows that there is a question in relation to validity and jurisdiction that must be decided before a decision is taken on the merits of the costs application.
7. Five Interested Parties have made submissions on the same basis as the costs application referred to in this letter. They rely on allegations of unreasonable behaviour and argue that such claims can validly be made in relation to matters arising before a Preliminary Meeting [CAPP-003, 004, 007, 009 & 010]. All such submissions are relevant to the validity and jurisdiction question as to whether such claims can be made. 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 too raise considerations that are relevant to the question. All of the documents associated with these applications are available on the [National Infrastructure Planning website documents tab](#).
8. In accordance with paragraph 34 (Part B) of the Costs Guidance and for the reasons set out above, the ExA has decided to address the validity and jurisdiction question and the question of whether the applicant's behaviour satisfies the necessary tests for unreasonable behaviour in a rolled-up procedure. The ExA has asked me to write enclosing the costs application, providing the respondent party with an opportunity to make any observations on two matters:
  - **Matter 1:** the in-principle validity of the costs application and the jurisdiction to award costs in these circumstances; and, without prejudice to this first matter
  - **Matter 2:** 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 both matters within 14 calendar days (by 23 May 2022).

9. In considering your response to **Matter 1**, 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.

10. In considering your response to **Matter 2**, 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 2 is sought in a rolled-up process at the same time as your response to Matter 1. However, your response to Matter 2 will be taken by the ExA as expressed without prejudice to your response to Matter 1. The ExA will not consider Matter 2 until it has reached a decision on Matter 1 and for that reason, you should provide your response on the two matters in two separate documents.
11. If you do respond on both or either 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 them with an opportunity to make final observations to the ExA in writing within a further 14 calendar days.
12. 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.
13. If you do not submit a response on both or either of these matters, the ExA will proceed to decide one or both of them as required on the basis of the submissions and documents already before it.
14. 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 DLA Piper UK LLP for Merlin Entertainments Group [CAPP-007].