

## OUTER DOWSING OFFSHORE WINDFARM

### T.H. CLEMENTS (INTERESTED PARTY REFERENCE 20049059)

#### POST HEARING SUBMISSION – SUMMARY OF ORAL SUBMISSIONS MADE AT CAH1

#### INTRODUCTION

1. The following persons appeared on behalf of T.H. Clements at ISH1:
  - (i) Mark Westmoreland Smith KC, Francis Taylor Building;
  - (ii) Fiona Barker, Solicitor and a Principal Associate at Mills & Reeve LLP, T.H. Clements' lawyers;
  - (iii) Daniel Jobe, Partner at Brown & Co Property & Business Consultants LLP, Land Agents to THC; and
  - (iv) Sam Jeffery, Finance Director, THC.
2. T.H. Clements spoke to Agenda Item 3.2(1) on the tests of compulsory acquisition.

#### SUBMISSIONS

3. T.H. Clements began by referring to the description of its business, its relationships with retail customers, the high standards and service levels required by those retail customers set out in its written representation (see **[REP1-050, p.2-4, §§1.1-1.14]**).
4. It referred to **[REP2-096]** which T.H. Clements submitted prior to CAH1 as a list of the relevant Order land plots for the purposes of the hearing. It is subdivided into the ways in which T.H. Clements occupies and farms land under a range of agreements, both written and verbal. More detail on land which T.H. Clements' farms which is affected by the Order is set out in its written representation **[REP1-050, p.4-8, s.3]**.

#### Context

5. T.H. Clements began the substance of its submissions by making two points of context in relation to: (i) on-going negotiations between ODOW and T.H. Clements; and (ii) mitigation which has had to be put in place by T.H. Clements.

#### Negotiations

6. As to (i): there are on-going discussions outside of the Examination on Heads of Terms between T.H. Clements and ODOW. These have been constructive and will continue. It appears that both sides are working towards coming to an agreement. However, there are material issues to

resolve and the outcome of the talks will be critical to the final position of T.H. Clements in the Examination.

7. Without an agreement there will likely be material private loss without compensation. T.H. Clements does not regard this as having been properly accounted for by ODOW. Uncompensated private loss is material to both the overarching planning balance and in judging the proportionality of the interference with human rights as well as the question of compelling case in the context of compulsory acquisition.
8. During the hearing, it was suggested by ODOW that section 87 of the Planning Act 2008 could be applied to T.H. Clements submissions. Section 87(3)(c) allows an examining authority to disregard representations if it considers that the representations relate to compensation for compulsory acquisition of land or of an interest in or right over land. This is because it is for the Upper Tribunal to arbitrate compensation awards and, at the consent stage, the only issue is the principle as to whether or not compulsory acquisition powers should be awarded.
9. However, the principle of compulsory acquisition requires consideration as to whether or not compensation is available. Its availability or otherwise is directly relevant to the question of whether or not the award of compulsory acquisition powers is proportionate. The decision maker at the consent stage must have regard to this issue.
10. T.H. Clements' point is about *the absence of compensation*. This is a factor that is relevant to the compelling case test. The decision maker needs to have in mind that, without a deal between ODOW and T.H. Clements, there will be interference with T.H. Clements occupation of land with adverse consequences for its significant business. This is a negative material consideration both in the context of the general planning balance and the compelling case test. It is also a material consideration to which significant weight should be applied. The assumption that lies behind the Compensation Code is that interference with the occupation of land ought generally to be compensated, but here it will not be, absent an agreement. In short, there is a lacuna in the code, the cost of which is currently being borne not by the body causing the interference but by those who are interfered with. That is clearly the wrong way around.

#### Mitigation

11. As to (ii) mitigation: T.H. Clements' obligation to provide a continuous supply of quality products to meet service level agreements with retail customers (see [REP1-050, p.2-4, §§1.1-1.14]) gives rise to a need to put in place mitigation prior to any interference with its business.
12. T.H. Clements explained that the only viable option for the purposes of mitigation is to secure alternative land on which to grow the necessary crops. The only potential alternative to this is to go into the market and attempt to purchase crops to use to fulfill the supply agreements, but this is likely to be financially unviable, the crop quality may not be of a high enough standard, and there may be insufficient supply.
13. Land of the quality and in the quantity required to mitigate the impacts of the scheme is difficult to find. A rare opportunity has arisen in this case to take out a Farm Business Tenancy on a sizable property that has sufficient land to mitigate the impacts of the scheme (Gosberton Farm at approximately 1,000 acres).
14. Due to the infrequency of such land coming onto the market, Gosberton Farm was viewed as an opportunity that had to be taken, even though it was some time in advance of the scheme's

construction. T.H. Clements entered into a farm business tenancy for Gosberton Farm for 6 years from November 2023.

15. ODOW has been supportive of T.H. Clements taking this land and, indeed, has suggested that T.H. Clements might wish to extend the lease in order that it comfortably covers the whole of the potential construction period.
16. It should be noted that the land at Gosberton Farm is of inferior quality to that currently farmed by T.H. Clements and affected by the scheme. It has a lower natural productive capacity which requires a higher acreage to maintain production levels and higher input costs to meet quality standards. The Tenancy agreement stipulates a sustainable crop rotation, with proportionally less land for vegetable use and more wheat. This results in the need for more acres than that that may be directly lost in order to deliver the same amount and quality supply. Further, Gosberton Farm is located some distance from T.H. Clements' main processing site and there will be additional costs in relation to transport and the requirement of on site management at Gosberton Farm.
17. T.H. Clements said that, for the purposes of CAH1, the key points were: (i) T.H. Clements is acting properly to mitigate its loss; (ii) in doing so, it is incurring significant rental and working capital commitments associated with taking on the mitigation land now, adding burden to the business in advance of the scheme's construction and, as such, the scheme is already impacting on the business; (iii) without agreement with ODOW there will be no right to compensation in relation to this with respect to material areas of T.H. Clements farmed land (i.e. that which is farmed, but not owned by THC); (iv) if the Gosberton Farm had not been acquired, the risks to the business would have been existential (e.g. loss of key contracts due to supply / supply quality issues and / or a risk that a competitor could approach key customers to win business on the basis of future supply due to scheme).

### **The Compulsory Acquisition Tests**

18. T.H. Clements addressed the following compulsory acquisition tests under section 122 of the Planning Act and the DCLG September 2013 Planning Act 2008 Guidance related to procedures for the compulsory acquisition of land ("the CPO Guidance"):
  - (i) Whether land is required for the development (or to facilitate or is incidental to that development) (section 122(2)(a) and (b)) and alternatives (paragraph 8 of the CPO Guidance);
  - (ii) Whether there have been attempts to acquire by agreement (as part of the need to approach compulsory acquisition as a last resort (paragraph 25 of the CPO Guidance);
  - (iii) Human rights (paragraphs 8 and 10 of the CPO Guidance); and
  - (iv) Compelling case (section 122(3) and paragraph 13 of the CPO Guidance);

(i) Whether land is required for the development (or to facilitate or is incidental to that development) (section 122(2)(a) and (b)) and alternatives (paragraph 8 of the CPO Guidance)

19. Paragraph 8 of the CPO Guidance provides: "*The applicant should be able to demonstrate to the satisfaction of the Secretary of State that all reasonable alternatives to compulsory acquisition (including modifications to the scheme) have been explored.*"

20. T.H. Clements explained that its case on alternatives has been set out in its Relevant Representation [RR-067, pp.5-11]. T.H. Clements questioned two aspects of the scheme in its Relevant Representation with regards alternatives: (i) alternative onshore cable corridor routes; and (ii) the justification for width of cable corridor.
21. T.H. Clements explained that, whilst these are vital questions because they go to the fundamental issue of justification of land take, it has had to marshal its resources in responding to ODOW's application and it has chosen to focus on the impacts of the scheme on its business, rather than trying to employ the necessary experts to look behind conclusions in the Environment Statement on alternative routes for the onshore export cable corridor or the construction expertise required to understand whether or not the cable corridor width is truly justified.
22. T.H. Clements notes the further justification with regards the cable corridor width provided in response to T.H. Clements' Relevant Representation (see [PD1-071, p.400]). In light of this T.H. Clements simply posed two remaining queries to ODOW: first, how the soil storage areas within the corridor have been calculated and whether those areas are justified by such calculations; and, secondly, whether the same width of soil storage can be justified alongside those (fairly numerous sections) that are proposed to be installed using trenchless techniques (which will produce less soil requiring storage), i.e. can 80m in fact be justified in areas where trenchless techniques are employed.

(ii) Whether there have been attempts to acquire by agreement (as part of the need to approach compulsory acquisition as a last resort (paragraph 25 of the CPO Guidance));

23. Paragraph 25 of the CPO Guidance states that Applicants should seek to acquire land by negotiation wherever practicable. As already stated, there have been negotiations in this case and talks are on-going. T.H. Clements made it clear that it did not criticise ODOW for lack of engagement.
24. There is a single concern under this heading. As explained, T.H. Clements has already been put to expense in mitigating impacts from the scheme but ODOW has made clear that it has no funds available for advanced compensation prior to its financial close on the project which we were told would be 2026/2027.
25. Negotiations where one side is being impacted and the other side who is causing the impacts does not have funds available falls short of full and proper negotiations. It was said by ODOW that compensation can only be expected once compulsory powers are in place and exercised. Whilst true, this does not wholly reflect the fact that landowners are normally incentivised to agree a sale as opposed to leave the undertaker to rely on compulsory acquisition. As such monies are usually made available in the context of land negotiations. That should extend to the present circumstances.
26. In the absence of any up front funding, then parties such as T.H. Clements are acting properly to mitigate impacts and have already incurred material costs. Moreover, in doing so, T.H. Clements has prevented existential threats to the business caused by the scheme. This is without recompense and without assurance that there will be recompense.
27. The result of this is that whilst ODOW relies on the mitigated impacts on business in the context of the overall planning and compulsory acquisition balance (no threat to business), it does so

having placed material burden on others. This raises a basic point of fairness and amounts to a material interference with the T.H. Clements' business without compensation. This is a material negative factor in the planning and compulsory acquisition balances.

(iii) Human Rights

28. Paragraphs 8 and 10 of the CPO Guidance require an applicant for compulsory acquisition powers to demonstrate that any proposed interference with the rights of those with an interest in the land is for a legitimate purpose and that it is necessary and proportionate. Both paragraphs are expressed to be in relation to interests in land.
29. However, it is trite that companies enjoy protection under Article 1 of Protocol 1 ("A1P1") to the European Convention on Human Rights ("ECHR") (which protects the right to peacefully enjoy property) (see, for example, the European Court of Human Rights judgment in Sunday Times v. United Kingdom (Application no. 6538/74) dated 26 April 1979) and that a business amounts to property for the purposes of A1P1. As such, the obligations on the decision maker extend further than indicated in the CPO Guidance with regards human rights.
30. As previously explained in T.H. Clements' Written Representation (see [REP1-050, p.61, s.5]) a lot of large scale agriculture in the Lincolnshire Fens is farmed without proprietary interests. ODOW recognises this in its response to [Q1 CA 1.12] when it said: *"Due to the nature of farming practices in this part of Lincolnshire, which typically result in persons occupying the land without any formal tenancy in place, there are occupiers farming the land within the Order Limits who would not generally be entitled to claim compensation under the Compensation Code. In order to address this, the Applicant has actively sought to ensure those parties can be compensated and has voluntarily negotiated a mechanism to provide appropriate compensation with Affected Persons as part of its voluntary land agreement negotiations in the form of an Occupiers Consent"* [REP2-051,p.39].
31. ODOW recognise the importance of compensation to these landowners in the particular circumstances of this case. Without such compensation, there is the risk of expropriation and / or interference without compensation.
32. However, whilst ODOW intend to go further than compensation required under the Compensation Code, it is not at all clear that ODOW has accounted for this. ODOW's Property Costs Estimate ("PCE") [APP-030] appears to be based on ordinary principles under the Compensation Code and does not, in so far as can be ascertained, account for agreements in relation to informal farming arrangements (see Methodology [APP-030, p.9 (PDF)]).
33. ODOW said that the PCE was appropriate because ODOW would not allow double recovery (the informal occupier cannot recover compensation the underlying landowner is entitled to/ has been paid). However, this does not address the point. It is, of course, accepted that double recovery is inappropriate, but the losses incurred by an occupier in possession are not the same as those of a landowner not in occupation. The great majority of loss in the latter is land value. The loss for the former is in being disturbed from the land – for example, crop loss, the increased costs for T.H. Clements of farming the mitigation land. These losses are not co-extensive with the landowners and, as such, the issue of double recovery does not arise.

(iv) Compelling case

34. Paragraph 13 of the CPO Guidance makes clear the need for decision makers to take into account private loss. The following points have already been made above: (i) it is not clear that the extent of private loss for non-proprietary interests has been taken into account properly; (ii) private loss without the possibility of compensation (outside of a private deal) is a particularly weighty consideration that weighs against the development. The short point under this heading is that these issues are relevant in the context of assessing whether or not there is a compelling case for the compulsory acquisition powers.