OUTER DOWSING OFFSHORE WINDFARM

T.H. CLEMENTS (INTERESTED PARTY REFERENCE 20049059)

POST HEARING SUBMISSION – SUMMARY OF ORAL SUBMISSIONS MADE AT ISH1: draft DCO

INTRODUCTION

1. The following persons appeared on behalf of T.H. Clements at ISH1:

   (i) Mark Westmoreland Smith KC, Francis Taylor Building; and

   (ii) Fiona Barker, Solicitor and a Principal Associate at Mills & Reeve LLP, T.H. Clements' lawyers.

2. T.H. Clements made three principal submissions summarised in this note and concerning:

   (i) Article 22 and Schedule 7 in relation to the scope and effect of restrictive covenants on landowners;

   (ii) The scope of temporary possession powers under Article 28; and

   (iii) The scope of consultation under Requirements 18 (Code of Construction Practice) and Requirement 31 (Soil Management Plan).

SUBMISSIONS

(i) Article 22 and Schedule 7 and the scope and effect of restrictive covenants

3. Article 22(1) **[REP2-008, p.26-27 (PDF)]** allows the undertaker to acquire compulsorily such rights or impose restrictive covenants over the Order land.

4. It is subject to Article 22(2). Under that provision, *in the case of Order land specified in column (1) Schedule 7 (land in which only new rights etc. may be acquired), the powers of compulsory acquisition are limited to the acquisition of restrictive covenants for the purposes specified in column (2) of Schedule 7*.

5. Article 22(1) is therefore a wide power, circumscribed by Article 22(2) such that for Order Land in Schedule 7 the restrictive covenant that can be imposed is limited to that set down in Schedule 7.

6. Outside of Schedule 7 land, there is no such limitation on the ability to impose restrictive covenants.

7. T.H. Clements *farmed* plots the subject of the wider Article 22(1) power are as follows: 26-015; 27-003; 27-004; 27-013; 27-014; 27-016; 27-017; 27-018; 27-022; 27-025; 27-026; 27-028; 27-

029; 29-012; 30-001;30-003; 30-004; 30-012; 32-012; 32-013; 32-020; 32-021; 32-022; 32-023; 32-024; 33-017; 33-018; 33-021; 33-022; 33-023; 33-024; 33-025; 33-030; 33-031; 33-030; 33-031; 34-017; 34-022; 34-024; 37-005; 37-006; and 38-009.

8. As to the restrictive covenants prescribed in Schedule 7, T.H. Clement's *farmed* land would be subject to the restrictive comment at **[REP2-008, p.103 (PDF) at B.]**.

9. It provides:

> "*B. A restrictive covenant over the land for the benefit of the remainder of the order land to prevent anything being done in or upon the land or any part thereof which interferes with or might interfere with the exercise of the rights or the use of the cables or in any way render the cables in breach of any statute or regulation for the time being in force and applicable thereto and without prejudice to the generality of the foregoing to prevent the construction of any buildings on, the surfacing of, the carrying out of any excavations or works to a depth greater than 0.75 metre on or in, or the planting of any trees or shrubs on, the land.*"

10. There are two key operative restrictions imposed on the relevant Order land by this restrictive covenant: (i) "*to prevent anything being done in or upon the land or any part thereof which interferes with or might interfere with the exercise of the rights or the use of the cables*"; and (ii) to prevent "*the carrying out of any excavations or works to a depth greater than 0.75 metre on or in…the land.*"

11. As to (i): this prohibition is widely drawn. T.H. Clements concern is that ordinary farming operations could be caught by it. T.H. Clements has explained how farm machinery can and does sink into the ground to levels at or close to and potentially below the proposed cable depth (see T.H. Clements' written representation **[REP1-050, p.58-60, §§4.3.8-4.3.15 and App.11 and 12]**). This is important as the restrictive covenant is one that binds the land and is not temporary to the construction period. It is not understood that ODOW intend to inhibit ordinary farming activities. Amended wording is suggested below.

12. As to (ii): T.H. Clements has explained how it is necessary to manage water logging in heavy rains (see T.H. Clements' written representation **[REP1-050, p.58, §§4.3.8-4.3.11 and App.10]**). This is done by digging trenches. Trenches can need to be deeper than 0.75m. Without the ability to properly drain the soils in such conditions there would be impact on crop yields, ability to harvest, quality of vegetables and greater risk of farm machinery sinking (and potentially coming into contact with ODOW's cable). T.H. Clements' is proposing the inclusion of wording (see below) that would permit the landowner to request consent (not to be unreasonably withheld) to enable excavations to a greater depth in order to enable the continuation of ordinary farming practices.

13. T.H. Clements proposes revised wording for this restrictive covenant as follows:

> "*B. A restrictive covenant over the land for the benefit of the remainder of the order land to —*
>
> *(a) prevent anything being done in or upon the land or any part thereof for the purposes of —*
>
> *(i) the construction of any buildings; or*

(ii) the [hard] surfacing of the land;

(b) prevent the planting of any trees or shrubs on the land without the consent in writing of the undertaker (such consent not to be unreasonably withheld or delayed provided that the proposed trees, or shrubs would not cause damage to the relevant part of the authorised development nor make it materially more difficult to maintain or to access the relevant part of the authorised development);

(c) prevent the carrying out of any excavations or works or agricultural practices to a depth greater than 0.75 metre from the surface of the land, without the consent in writing of the undertaker (such consent not to be unreasonably withheld or delayed, with consent for trench digging requests relating to waterlogging to be determined within 24 hours if the proposed activity would not cause damage to the relevant part of the authorised development nor make it materially more difficult to access or maintain the authorised development, with such consent being subject to such reasonable conditions as the undertaker may require) provided that (for the avoidance of doubt)—

(i) ordinary agricultural practices including but not limited to acts of cultivation including soil preparation, ploughing and sub-soiling, not exceeding 0.75 metres in depth from the surface of the land, do not require the consent of the undertaker; and

(ii) flushing of land drainage systems, maintenance of outfalls and culverts of land drainage systems, clearance of vegetation (by use of machinery or by hand) and the operation of existing land drainage systems do not require the consent of the undertaker."

14. Outside of Schedule 7 Order land, there is no prescribed restrictive covenant. As such, there is no limitation on the undertaker and the undertaker could impose greater restrictions on land outside of Schedule 7 Order land. That could have a material detrimental effect on T.H. Clements' (and others) on-going ability to farm after the undertaker has completed construction.

15. In light of which, T.H. Clements proposes the following amendment (changes in italics) to Article 22(1):

"*22 (1) Subject to paragraph (2), the undertaker may acquire compulsorily such rights or impose restrictive covenants over the Order land as may be required for any purpose for which that land may be acquired under article 20 (compulsory acquisition of land), by creating them as well as by acquiring rights already in existence, provided that any new restrictive covenant(s) to be created shall not be more restrictive or onerous than the restrictive covenants set out in column (2) of Schedule 7.*"

(ii) Article 28

16. In the context of discussions on Works No.17 and the need for flexibility in CAH1, ODOW placed reliance on the fact that Articles 20 and 22 **[REP2-009, p.26-27 (PDF)]** in so far as those

provisions limit the *exercise* of CA powers to "*so much of the Order land as is required for the authorised project or to facilitate it or is incidental to it.*"

17. The short point is that Article 28 **[REP2-008, p.31-32 (PDF)]** does not have equivalent wording. It is accepted, of course, that there is a distinction between temporary possession powers and compulsory acquisition powers, not least their temporary nature. However, they amount to a material interference with land (and can, for example, lead to the removal of buildings over and above taking possession (Article 28(1)(b) **[REP2-008, p.31 (PDF)]**) and for that reason their exercise is subject to compensation.

18. Article 28(1)(a)(i) permits the undertaker to take specified land (as set out in Schedule 9 **[REP2-008, p.112-116 (PDF)]**) for temporary possession for the limited purposes set out in Schedule 9. As ODOW explained at the CAH1, the Order land captured in Schedule 9 does not include the plots required for the laying of the cable itself (i.e. the working corridor for the cable) but are in the nature of temporary work areas/ compounds, access tracks, bell-mouths and footpaths to facilitate the installation of the cable.

19. Art.28(1)(a)(ii) provides a wider general power of temporary possession in relation to any other Order land, which has not at the time the power is sought to be exercised, been subject to the of compulsory acquisition powers.

20. In so far as it is said that Article 28(3) does provide a limitation on the power (it says that the undertaker is only allowed to remain in possession for as long as reasonably necessary), this is not clear. It applies to the undertaker *remaining* on the relevant land. That is distinct from the initial exercise of the power and going onto the land in the first place.

21. If it is meant to be a limitation on the power, then it does need to be more clearly expressed and ought to be located on the provision that permits the exercise and the taking of temporary possession of Order land, i.e. in Article 28(1) (as is the case in Articles 20 and 22).

22. The Examination heard from the Applicant in CAH1 that the intention is to use of temporary possession powers to install the onshore cable. No point is taken against this proposed use, save for the wider scope of the powers as compared to Articles 20 and 22 and what the wide spread proposed use does is indicate the importance of ensuring the scope of the powers is appropriate.

23. T.H. Clements' suggest that the powers under Article 28 are limited to Order Land *required* for or to facilitate the construction of the authorised development and propose the following wording. This can be achieved by a simple change to Article 28(1)(a)(ii) as follows:

> "*any other Order land as is required for the authorised project or to facilitate, or is incidental to it, and in respect of which no notice of entry has been served under section 11 (powers of entry) of the 1965 Act (other than in connection with the acquisition of rights only) and no declaration has been made under section 4 (execution of declaration) of the 1981 Act"*

24. It is acknowledged that in certain areas this may be of little practical importance (for example, where the entire width of the cable corridor is required) but it is important in principle and there will be areas within the Order land where it does have practical significance (for, example, Work No.17).

25. It is further acknowledged that Article 28 is in a form that has often been used in previous development consent orders. However, precedent does not provide a full answer to the issue and matters should be considered from first principles and, in particular, the overarching need to limit in so far as possible interference with landowner's and occupiers enjoyment of their land.

(iii) The scope of consultation under Requirements 18 (Code of Construction Practice) and Requirement 31 (Soil Management Plan)

26. Both Requirements 18 **[REP2-008, p.58]** (Code of Construction Practice (which contains the Air Quality Management Plan which is important from T.H. Clements' perspective in relation to dust dispersal) and 31 (Soil Management Plan) **[REP2-008, p.62]** prevent onshore transmission works from commencing unless and until the Code of Construction and Soil Management Plan (as appropriate) (both of which are to accord with the outline plans which are to be certified under Article 41 and Schedule 21) have been submitted to and approved by the relevant planning authority.

27. In both cases the relevant planning authority is required to consultation with various bodies prior to approving the document. Neither Requirement asks the relevant local planning authority to consult with landowners and / or occupying farmers.

28. These documents will be critical to the extent of actual impacts on T.H. Clements and it wishes to ensure that there is appropriate opportunity to comment on the final operative documents (which, of course, will govern the impacts on the ground (as opposed to the outline plans)).

29. T.H. Clements notes and is grateful for the indication given by ODOW that it will provide the Code of Construction Practice and Soil Management Plan to the Land Interest Group post consent when the detailed plans are being developed and prior to their submission to the relevant planning authority for approval (giving 10 working days to respond and undertaking to take the comments on board) (adding this to the commitments register) (in answer to Q1 LU 1.15 **[REP2-051, p.118-119]**).

30. T.H. Clements' principal point is that the relevant planning authority ought to be seized of the position of landowners/ occupying farmers on these plans when determining whether to approve the plans. This might (broadly) be achieved by ODOW's proposed commitment *if* the commitment includes an undertaking to provide the comments received from landowners/ occupiers to the relevant planning authority.

31. The alternative is a requirement in the Order itself for the relevant planning authority to consult the owners and occupiers of the land who rely on the efficacy of the Code of Construction Plan and Soil Management Plan.