Hornsea Project Four

Net Zero Teesside Development Consent Order

Response to the Applicant's Legal Opinion

Deadline: 9, Date: 06 October 2022

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1 Introduction

1.1 At Deadline 7, Orsted Hornsea Project Four Limited ("Hornsea Four") undertook to respond to the Legal Opinion of Jason Coppel KC (Annex 1 of the Applicants' Response to the ExA's Second Written Questions (REP6-121).

1.2 That response is set out in Appendix 1 to this document.

Appendix 1 - Legal Submissions of James Maurici KC

THE NET ZERO TEESIDE PROJECT DCO

REFERENCE: EN010103

LEGAL SUBMISSIONS ON BEHALF OF

ORSTED HORNSEA PROJECT FOUR LIMITED

Introduction

1. This note is provided to the Examining Authority on behalf of Orsted Hornsea Project Four Limited ("**Orsted**") which is registered as an interested party in relation to the Net Zero Teeside Project ("**the NZT Project").** The NZT project is being promoted by a consortium including BP Exploration Operating Company Limited's ("**BP**").

2. These submissions are provided in response to the Advice of Jason Coppel QC (as he then was) dated 15 August 2022 ("**the Coppel Advice**"). These submissions should be read alongside: (i) Orsted's note dated 9 June 2022 ("**the 9 June note**") and submitted to the NZT Project examination; and (ii) Orsted's legal submissions ("**the Orsted legal submissions**") dated 8 June 2022 in respect of the Hornsea Project Four Offshore Wind Farm ("**the Hornsea Project**") DCO application (EN010098) (these submissions were attached to the 9 June note). The Coppel Advice was submitted in the context of the Hornsea Project DCO examination but has also been submitted to the NZT Project examination.

Background

3. The background as matters then stood is set out in the 9 June note and the Orsted legal submissions.

4. BP initially sought an article (Article 49) in the NZT Project DCO which stated that the Interface Agreement ("IA") would no longer have effect, and that no claim could be made, nor award granted, for any damages as a result of any alleged antecedent breach of the Interface Agreement prior to the date of the NZT DCO.

5. Following the submission to the NZT Project examination of the 9 June note and the Orsted legal submissions as well as correspondence from the Crown Estate on the need for their consent, BP amended Article 49 so that it no longer disapplied the IA in its entirety. Instead, as amended, it seeks to: (i) remove BP's liability to Hornsea Four under the IA "*due to or arising from [BP's] proposed or actual activities in the exclusion area*" stating that no claim could be made by, nor award granted to Orsted for any damages as a result of any alleged antecedent breach of the IA prior to the date of the NZT DCO; (ii) instead provide for compensation to be payable by BP to Orsted in lieu of liability under the IA. There are two scenarios: one where the compensation amount is agreed as at the date the NZT DCO is granted, and one where the compensation amount is not agreed, in which case it must be determined by the Secretary of State within 2 months of the NZT DCO coming into force. These scenarios are split into two alternative articles of the DCO: Article 49 and Article 50.

6. In terms of determination by the Secretary of State Article 50 provides:

> "(3) Unless otherwise agreed between the entities and notified to the Secretary of State in writing, the Secretary of State shall within 2 months of this Order coming into force determine and notify the entities of the compensation to be paid by the carbon entity to the wind entity, such compensation to be paid by no later than 1 February 2029, provided that the provisions of this paragraph have not ceased to have effect in accordance with paragraph (8) by that date (in which case no payment shall be due).
> (4) In determining the compensation, the Secretary of State shall balance any impact on the business undertaking of the wind entity from the carbon entity's proposed or actual activities in the exclusion area (and the removal of the carbon entity's liability to the wind entity under the interface agreement) pursuant to this Order with the public interest in preserving the full developable area of the endurance store.
> (5) In making a determination of compensation under paragraph (3), the Secretary of State shall take into account relevant submissions made by the entities during the examination of the Hornsea Project Four DCO and such further information (if any) provided by the entities pursuant to paragraph (4) above"

7. The Crown Estate has written to the Examining Authority to advise that it still considers its consent would be required for such an interference with the IA.

The Coppel Advice – the Convention rights legal arguments

8. The main issues on which there would appear to be disagreement all concern the proper approach, as a matter of law, to the justification put forward by BP for the interference caused by the NZT DCO with Orsted's Article 1, Protocol 1 rights. In particular the Coppel Advice fails properly to acknowledge:

1) that a measure can pursue what is self-evidently a legitimate aim that is in the public/general interest but still be found to be disproportionate if it imposes *"an individual and excessive burden"*;
2) the key importance of compensation (or the lack thereof) in relation to the issue of justification and in particular the striking of a fair balance;
3) that there is not a mechanical rule that the judgment of public authority decision-makers will be respected unless it is manifestly without reasonable foundation.

9. These are matters, which in terms of the law, are dealt with in the Coppel Advice at paras. 13 – 14 and 17(6). These matters are explored in detail below.

10. It should be noted that despite these disagreements there appears to be a very large degree of agreement on the Convention rights issues. Thus, in terms of what is agreed (references to paragraph numbers are to the Coppel Advice unless the contrary is stated):
    1) Para. 9: "*Orsted also contends – in §47vi of JMQC's submissions - that s. 120(3) PA 2008 should be read down pursuant to s. 3 HRA so as to not to permit the modification of the IA, as such modification would contravene its rights under Article 1P. I agree that if the modification of the IA, or the exclusion of bp's liability under it, did contravene Orsted's Convention rights, it would not be open to the SoS to make such provision in the DCO.*"
    2) Para. 11: it is not disputed by BP that "*the clauses of the IA which make provision for bp to pay compensation to Orsted, in particular in the event of a "Material Adverse Effect", represent a "possession" of Orsted within Article 1P. I make that assumption, noting the dictum of Coulson LJ in* ***Solaria Energy v Department for Business, Energy and Industrial Strategy*** *[2021] 1 WLR 2349, §34 that "a signed and part-performed commercial contract is, prima facie, a possession*".
    3) Para. 12: In terms of "*whether the removal of bp's liability to pay compensation under the IA would deprive Orsted of any "possession" within the second sentence of Article 1P, or would merely interfere with the peaceful enjoyment of, or control the use of, any "possession" … As JMQC points out (in §40 of his submissions), citing* ***Mott v Environment Agency*** *[2018] 1 WLR 1022, the Courts do not deem it necessary to categorise a measure as a deprivation or a control of use. However, I would agree with the thrust of his argument, that the closer a measure is to a deprivation of possessions, the more seriously it is likely to be regarded by the Courts*".

4) Para. 14: "*The domestic courts have analysed the issue of proportionality of interference with Article 1P "possessions" as comprising four stages (see, recently,* ***Aviva Insurance Ltd & Anor v Secretary of State for Work and Pensions*** *[2022] 1 WLR 2753, §§77-85): (i) whether the objective of a measure is sufficiently important to justify the limitation of a fundamental right; (ii) whether the measure is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the commun*ity." This is often referred to as the ***Bank Mellat*** test: see ***Bank Mellat v HM Treasury (No 2)*** [2014] AC 700.

11. On the matters in dispute (see above) the legal position is as follows:
    1) The justification for any interference with Orsted's Article 1, Protocol 1 rights that is affected by the DCO is the key issue here;
    2) Under Article 1, Protocol 1 for an interference to be justified it must: (i) pursue a legitimate aim that is in the public/general interest; (ii) be proportionate and (iii) be lawful (see para. 13 of the Coppel Advice and see also ***Aviva*** at para. 76);
    3) A measure can pursue what is self-evidently a legitimate aim that is in the public/general interest but still be found to be disproportionate. Thus, in the ***Mott*** case (see above) the measures taken by the Environment Agency were for the protection of the environment and of nature conservation sites of the highest importance. Despite that the absence of compensation for Mr Mott for his loss of fishing rights was held to mean that the measure was disproportionate;
    4) There is a four-stage test to be applied in assessing proportionality but it is not accepted that the broad margin of discretion afforded to decision-makers means that a measure will be held to be proportionate unless it is *"manifestly without reasonable foundation"* (see the Coppel advice at paras. 13 and 14) and that this must be applied to all four stages of the ***Bank Mellat*** test. The correct position is more nuanced than that and is set out in ***Aviva*** (emphasis added):

> "81. It seems that the first use of the phrase "manifestly without reasonable foundation" for A1P1 purposes was by the European Court of Human Rights ("ECtHR") in ***James v United Kingdom*** (1986) 8 EHHR 123. The ECtHR held at paras 46 that "the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one" and that the court "will respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation". There were then a number of Supreme Court cases, including the ***Welsh Bill*** case [2015] AC 1016 , which applied the

manifestly without reasonable foundation test only to the first to third stages, and not the fourth stage of the ***Bank Mellat*** test.

82. In ***R (DA) v Secretary of State for Work and Pensions*** [2019] 1 WLR 3289 , the Supreme Court confirmed that the manifestly without reasonable foundation test applied to all parts of the four stage analysis. Lord Wilson JSC considered article 14 discrimination and A1P1 deprivation of property cases, including the ***Welsh Bill*** case, and held at para 65 that in relation to the Government's need to justify what would otherwise be a discriminatory effect of a rule governing entitlement to welfare benefits "the sole question is whether it is manifestly without reasonable foundation. Let there be no future doubt about it".

83. This conclusion was revisited in ***R (SC)*** [2022] AC 223 . R (SC) was decided in the Supreme Court after the judgment of the judge below. At para 115(2) of ***R (SC)*** Lord Reed PSC identified that "a wide margin is usually allowed to the state when it comes to general measures of economic or social strategy". There may be a wide variety of other factors which bear on the width of the margin of appreciation. The court must make a balanced overall assessment. At para 142 Lord Reed PSC emphasised that the ECtHR has generally adopted a nuanced approach, which enables account to be taken of a range of factors which may be relevant in particular circumstances so that a balanced overall assessment can be reached. As Lord Reed PSC said "there is not a mechanical rule that the judgment of the domestic authorities will be respected `unless it is manifestly without reasonable foundation'. The general principle that the national authorities enjoy a wide margin of appreciation in the field of welfare benefits and pensions forms an important element of the court's approach, but its application to particular facts can be greatly affected by other principles which may also be relevant, and of course by the facts of the particular case." Lord Reed PSC went on to show that this approach applied to many different types of cases.

84. When turning to the approach of the domestic courts Lord Reed PSC said at para 143 that a similar approach had been taken by domestic courts and that "where the European court would allow a wide margin of appreciation to the legislature's policy choice, the domestic courts allow a wide margin or 'discretionary area of judgment'". This was relevant to the intensity of review. Lord Reed PSC set out his conclusions from para 157 of the judgment. He recorded that "a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the legislature will generally be respected unless it is manifestly without foundation. Nevertheless, the intensity of the court's scrutiny can be influenced by a wide range of factors". This would depend on the circumstances of the case, and very weighty reasons would usually be required to be shown, and the intensity of view would be high, if a difference in treatment on a suspect ground was to be justified. Lord Reed PSC cautioned against taking a mechanical approach stating "a more flexible approach will give appropriate respect to the assessment of democratically accountable institutions, but will also take appropriate account of such other factors as may be relevant".

85. In these circumstances I do not accept Mr Brown's submission that the appeal should be allowed on the basis that the judge failed to apply, in a mechanistic fashion, the formula of "manifestly without reasonable foundation" to each stage of the four stage analysis. It is therefore necessary to return to the judge's assessment of the four stages of the ***Bank Mellat*** test applying the appropriate intensity of review."

5) It must also be recalled that the above case-law is largely concerned with the application of Article 1, Protocol 1 in *"the field of welfare benefits and pensions forms"*. That is a long way removed from the present case. The present case concerns the

interference with the contractual rights of one commercial party in order to benefit another.

6) The fourth stage of the ***Bank Mellat*** test - the "*fair balance test*" – involves a consideration of whether a fair balance has been struck between the public/general interest served by the measure and the protection of the affected party's fundamental rights: see ***Sporrong & Lonnroth v Sweden*** (1982) 5 EHRR 35 at para. 69.

7) The Strasbourg authorities have emphasised that even where a measure is in the public and general interest it will nonetheless be disproportionate if it imposes "*an individual and excessive burden*": see ***Lithgow v UK*** (1986) 8 EHRR 329 at para. 120 and ***Bank Mellat*** at para. 70. The absence of compensation can result in the measure being found to impose such a burden and hence to be disproportionate: see ***Chassagnou v France*** (1999) 29 EHRR 35.

8) The factors relevant to whether a fair balance has been struck include critically for these purposes compensation. So the payment of compensation is highly relevant to the "*fair balance*" test (see the Human Rights Practice (Sweet & Maxwell) para. 15.060. Where the interference amounts to a deprivation then in almost all cases compensation is required even where the general interest pursued by the state is particularly strong: see ***Lithgow*** para. 120, ***Holy Monasteries v Greece*** (1994) 20 EHRR 1 para. 71, ***Jahn v Germany*** (2006) 42 EHRR 49 paras. 93ff and ***Vistiņš v Latvia*** (2014) 58 EHRR 4 at paras. 112 and 119. The ***Duran Education Trust*** case cited in the Coppell Advice at para. 17(6) is an example of an exceptional or very exceptional case where a deprivation is justified despite the absence of compensation. On the facts it was a case that has no real connection to the present case. In ***Mott*** the absence of compensation was key to the finding of a breach of Article 1, Protocol 1.

Application to this case

12. It is clear that what was proposed initially by BP namely the complete abrogation of the IA and with no compensation payable would have been in breach of Article 1, Protocol 1. It is no doubt for that reason that BP has amended its approach. This leads Jason Coppel KC to suggest, see para. 17(7) that this is now a case where it can be said that what is in issue is "*the removal of Bp's potential liability to Orsted under the IA*" and its replacement with "*another compensation mechanism*".

13. There are a number of points that arise.

14. First, in terms of the position under the IA this is accurately recorded in the Coppel Advice at para. 3(3). It is said that *"If the HP4 project were to be precluded from installing infrastructure in the Overlap Zone in order to ensure the delivery of the ECC Plan this could in principle constitute a "Material Adverse Effect (Pre-Operational)", as defined in §1.3 IA, as giving rise to "Re-location costs" and/or "Re-programming costs". The IA, as currently framed, provides for bp (as the "Carbon Entity" under the IA) to compensate Orsted (the "Wind Entity") for such costs. In the case of Re-location costs, these would be calculated on the basis of "the diminution in the market value of the Wind Entity's project that will arise due to the loss of such infrastructure [from the Overlap Zone] or reduction in power output [as a result of infrastructure not being able to be located in the Overlap Zone] as the case may be" (§1.3 IA). If the parties cannot agree on the amount of compensation which is payable, there is provision in the IA for this to be decided by a single expert, whose determination "shall be final and binding upon the Entities except in the case of fraud or manifest error or failure by the Expert to disclose any interest or duty which conflicts with his functions under his appointment as Expert" (§6.4.10)."* Thus, it should be noted that:

    1) The compensation provisions are aimed at a situation – which was explicitly contemplated by the parties – namely what should happen if Orsted's Hornsea Project was excluded from the "Overlap Zone";
    2) In the Coppel Advice it is said at para. 17(4) that "*Orsted's legal submissions have placed much weight on the IA being a commercial agreement which bp freely entered into in the relatively recent past. That is of course true, but the full context is that bp was effectively required to succeed to the IA given the obligations assumed under §8 of the IA ("Succession") by the previous Carbon Entity and, as understand it, the IA was originally negotiated and entered into on the basis of an expectation that the two projects could co-exist within the Overlap Zone. Having done substantial further investigation, bp's technical conclusions are different, and rule out co-existence, and if the SoS were to accept them, that would go to undermining a key premise for the original IA, and for bp succeeding to it."* This is, with respect, a bad point given that:
        i. Whatever might have been the expectation in this regard the compensation provision was explicitly designed to deal with the very situation now in hand e.g., where the projects were incompatible and Orsted was excluded from the Overlap Zone;

ii. The suggestion that investigations have shown that there cannot be co-existence does not frustrate the contract. Indeed, the compensation provisions are there precisely to deal with that situation. Frustration applies where an unforeseen event makes performance of a contract impossible. The possibility that there would not be co-existence was contemplated and provided for in the IA. BP now seek to escape from its freely entered into commercial contractual obligations.

3) The compensation provisions in the IA set a clear and well-established basis for assessing damages, namely on the basis of the diminution in the market value of the Hornsea Project that will arise due to the loss of such infrastructure from the Overlap Zone or reduction in power output as a result of infrastructure not being able to be located in the Overlap Zone as the case may be.

15. Second, in contrast the replacement compensation mechanism that is now proposed to try and overcome the Article 1, Protocol 1 issues that arise is wholly uncertain in its operation. Thus, absent agreement the task of assessing compensation is handed to the Secretary of State. The basis for assessing compensation is not stated. What is provided is that the Secretary of State "*shall balance any impact on the business undertaking of the wind entity from the carbon entity's proposed or actual activities in the exclusion area (and the removal of the carbon entity's liability to the wind entity under the interface agreement) pursuant to this Order with the public interest in preserving the full developable area of the endurance store*." So, all that is known is that the compensation will by definition be less than would have been awarded under the IA. That is after all the whole purpose of the BP proposed Articles in the DCO. This provides no certainty whatever for Orsted as to what, if any, compensation it might receive. The potential for further legal challenge of any determination would be very great. These uncertainties and difficulties are highly relevant to whether the fair balance has been struck by what is proposed.

The Coppel Advice – one further matter

16. The Coppel Advice at para. 2 sets out details related to Jason Coppel KC's experience and expertise. This is highly unusual. Moreover, it is clear that this Advice was always intended to be provided to the Examining Authority. It is noted in this regard that on 7 March 2022 the Planning and Environmental Bar Association e-mailed its members saying:

> "As you will know, PEBA has regular meetings with PINS to discuss issues of concern to either side about the running of appeals and local plan examinations. At our most recent meeting, PINS have raised with us a matter which has been drawn to their attention by a number of Inspectors, relating to the way in which some advocates behave at events, in particular by repeatedly emphasising how experienced they (the advocates) are …
>
> • Inspectors approach members of the planning bar on the same basis – namely that it is assumed that all are properly qualified and able to present a case efficiently and properly. Accordingly, it is also not considered helpful for barristers to "talk up" their own experience when presenting submissions.
>
> PEBA recognises that it is for individual barristers to decide how best to represent their clients. It is, therefore, a matter for members how they respond to the above message. However, it is obviously not in the interests of any party either to undermine confidence in the tribunal (especially at inquiries where the public are often present) or to risk alienating the Inspector. "Talking up" one's own experience is not a practice which we apprehend would be welcomed when appearing before other tribunals and it is difficult to see how it might advance a party's case at a planning appeal."

17. Given the above it is not considered appropriate to include a similar paragraph in this document setting out the author's experience and expertise. If the Examining Authority did wish to have this then it could be provided this information.

Conclusions

18. For all these reasons the Secretary of State is asked to reject the proposed Articles disapplying the IA and to leave the IA in place. Even proceeding on the basis that there is vires for the Secretary of State to do what BP proposes it is submitted that a DCO should not be used to allow a highly sophisticated and well-advised commercial party to escape from obligations it freely entered into because it now regards this as a bad bargain. Moreover, for the above reasons what is proposed continues to constitute an unjustified interference with Orsted's Article 1, Protocol 1 rights notwithstanding the changes made to what is proposed in response to Orsted's earlier submissions.

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4, October 2022