

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Claim No: /2010

BETWEEN:

- (1) MRS SARAH JANE DAVIS
(2) MR JULIAN TREVOR DAVIS

Claimants

- and -

- (1) RICHARD TINSLEY
(2) NICHOLAS WATTS
(3) FENLAND WINDFARMS LTD
(4) EDF ENERGY PLC
(5) FENLAND GREEN POWER CO-OPERATIVE LIMITED

Defendants

PARTICULARS OF CLAIM

1. The Claimants are the owners of a residential dwelling and grounds known as the Farmhouse, Grays Farm, North Drove Bank, Deeping St Nicholas, Spalding, Lincs, PE11 3JX ("the Farmhouse"), registered under title number LL132724. The Farmhouse and its grounds are identified on the Land Registry plan attached to these Particulars of Claim.
2. The Second Claimant, Julian Davis, purchased the Farmhouse and grounds totalling approximately 0.382 acres from Lincolnshire County Council in 1996, members of the Davis family having lived there since 1980. Julian Davis farms 154.418 acres around the Farmhouse and has a farm business tenancy for East Reach Farm (diagonally south of the wind farm) which is approximately 135 acres and is also part of the Lincolnshire County Farms Estate. Grays Farm remains the operational centre.

3. The First and Second Defendants are the freehold owners of land known as Worth's Farm and Vine House Farm respectively in the village of Deeping St Nicholas, on which are operated 8 REpower MM 82 – 2 MW turbines, collectively known as Deeping St Nicholas windcluster. The First Defendant lives some distance away at Mill Farm, Holywell, Nr Stamford, Lincs PE9 4DT and the Second Defendant lives at Vine House Farm, Deeping St Nicholas, Spalding, Lincs, PE11 3DG, which is the Farmhouse attached to Vine House Farm.
4. The Third and Fourth Defendants, Fenland Windfarms Ltd and EDF Energy Plc are the owners and operators of 6 of the wind turbines; the Fifth Defendant, Fenland Green Power Co-operative Limited, is the owner and operator of the remaining 2 turbines, which are the 2 nearest the road at Vine House Farm.
5. A plan of the Farmhouse in relation to the 8 wind turbines is attached to these Particulars. This shows 5 turbines in one straight line and 3 further away in a second line. Also shown on the plan is the land holdings of the First and Second Defendants in relation to the wind turbines as far as the Claimants can best determine and the ownership by the Third, Fourth and Fifth Defendants of the turbines themselves.
6. The Claimants are concerned about noise nuisance resulting from the operation of the 8 REpower MM 82 – 2 MW turbines (each with a hub height of 59 metres and a rotor diameter of 82 metres) on land close to the Farmhouse. The nearest turbine is about 930 metres from the Farmhouse, which is downwind of the predominant wind through the turbines; the turbines are about 500m from the Claimants' land boundary.

7. The Defendants, as land owners upon which the wind turbines operate, and as owners and operators of the wind turbines themselves, have caused or permitted and continue to cause or permit a nuisance to the Claimants by virtue of noise.

PARTICULARS

8. Wind Prospect Developments Ltd (“WPDL”) applied for planning permission for the erection of 8 wind turbines with associated tracks, underground cables, switchgear building and anemometer mast at Vine House Farm and Worth’s Farm and Porters Farm, Deeping St Nicholas, Spalding (165 hectares) under reference H03/0161/02 registered on 11 February 2002. A plan showing the Vestas V66 1.75 MW wind turbine was attached with rotor diameter of 66 m and tower height 67m. The proposal was deemed Environmental Impact Assessment (“EIA”) development and an Environmental Statement (“ES”) was provided by the developer. The ES shows the turbines in two rows, one with 5 turbines and the other with 3 turbines.
9. The noise chapter of the ES was prepared by Mr Ian F Bennett of ACIA Engineering Acoustics of Stockport (para 1.4.1 of the ES, Vol 1.) No background noise monitoring was undertaken at the Claimants’ property - table 12.1 of the ES (p.126). The developer states that where monitoring was not conducted, estimates of the existing background levels were made based on the average noise levels measured at a nearby location (para 12.5.1 of the ES).
10. The ES noise chapter assessed Vesta turbine V66 – 1.75 MW - with a hub height of 67 metres and a rotor diameter of 66 metres.
11. Table 12.2 of the ES shows predicted worst case noise levels at various properties including Grays Farm set against the estimated background noise level of 28.5 LA90dB at 4ms rising to 47 at 12ms and concluding that predicted

wind speed dependent noise levels at the properties nearest the proposed windcluster site are mostly significantly lower than the existing background levels at the same wind speed (para 12.6.1) and that noise from the wind turbines would not be detrimental to the amenity of local residents (para 12.6.4).

12. Appendix 11 of Vol 4 of the ES sets out the noise assessment criteria; Appendix 12 sets out the noise assessment figures.

13. The Claimants did not object to the construction of the wind turbines, believing this to be a beneficial development and they would not be affected; in this they were encouraged by the fact that no-one had contacted them about the development.

14. The officer's report ("OR") to the Development Control Committee reports the representation of Acoustic Associates advising Environmental Health upon noise and vibration:

I have predicted the noise levels at the reference locations and obtain similar values to those documented in the environmental statement and the acoustic consultant's report. Based on the data available it is concluded that the noise associated with the wind cluster should be acceptable. Vibration will not be an issue at any of the adjacent dwellings.

15. The planning application was considered by the Development Control Committee on 14 August 2002. The minutes show that the Council's noise consultant, Roy Pettitt, attended the meeting. The application was deferred to enable officers to report back upon appropriate reasons for refusal as the Committee was minded to refuse planning permission contrary to the officer's recommendation. A noise contour map was also submitted to the Council at that time which shows the Claimants' property either on the boundary of the maximum noise limit allowed under the planning condition as written, or just within it.

16. A further OR set out suggested reasons for refusal. The planning application was considered again by the Development Control Committee on 4 September 2002, at which the Committee refused permission.

17. South Holland District Council ("SHDC") refused planning permission by notice dated 13 September 2002. WPDL appealed pursuant to section 78 of the TCPA 1990.

18. Noise was not regarded by the Inspector as a major issue, but it was raised as an issue by local residents. The Inspector reports that the Council took professional advice and concluded that noise associated with the wind cluster would be acceptable. The professional advice was provided by R A Pettit of Acoustic Associates, Peterborough, who recommended the wording of a noise condition which did in fact become the noise condition.

19. The appeal was allowed and by decision letter dated 19 May 2003, planning permission was granted for 8 wind turbines with associated tracks, underground cables, switchgear building and anemometer mast at Vine House Farm and Worths Farm and Porters Farm, Deeping St Nicholas, Spalding in accordance with the terms of the planning application reference H03/0161/02, subject to conditions. The noise condition (which is the same as recommended in the OR) reads:

The noise emission (LA90, 10 minute) from the combined effects of all the wind turbines, as measured in free field conditions at any dwelling (in existence at the time of the permission), shall not exceed the greater of 35dB(A) or 5 dB(A) above background noise (LA90, 10 minute) at wind speeds within the site not exceeding 10 metres per second. The noise emission values for the wind turbines shall include the addition of any tonal penalty as recommended in ETSU R 97 report to the DTI. This condition shall apply for both day and night time periods.

20. This noise condition is essentially the same as was imposed by the Inspector at

the Shipdham inquiry in 2006:

The noise emission (LA90, 10 minute) from the combined effects of the two wind turbines, as measured in free field conditions at any dwelling (in existence at the time of permission), shall not exceed at the greater of 35dB(A) or 5dB(A) above the background noise (LA90, 10 minute) at wind speeds within the site not exceeding 10 metres per second during the period 0700 hrs to 2300 hrs and shall not exceed the greater of 43 dB(A) or 5dB(A) above the background noise during the period 2300 hrs to 0700 hrs. The noise emission values for the wind turbines shall include the addition of any tonal penalty as recommended in ETSU-R 97.

21. The Inspector's decision in Shipdham was appealed by local residents on the grounds (inter alia) that this condition (11) was unreasonable, imprecise and unenforceable. The Secretary of State consented to judgment on the ground noise condition 11 was unenforceable and imprecise and that there was no alternative but to quash the permission.

22. The Inspector's decision in this Deeping St Nicholas case does not specify the size or make of the turbines that he allowed. However, it is understood that the developer indicated in a letter dated 15 March 2004 [not seen] that it wanted to change the turbine from a V66 to either a V80 or MM82. In September 2004, the Council responded that the change of turbine would require a fresh 'application'. Following further correspondence, including a letter from the developer's solicitors Hammonds advising that as the appeal decision had not laid down any conditions about make or size of turbine, nothing further was required, the Council emailed the developer on 20 September 2004 advising that 'we will treat the proposal as a minor amendment to the approved scheme but I would be grateful if you could let me have plans of the revision'. There are no plans of the revision.

23. The developer changed the turbines to REpower MM 82 – 2 MW - with a hub height of 59 metres and a rotor diameter of 82 metres.

24. The Claimants applied for planning permission for a two-storey extension to the Farmhouse on 24 May 2005 and were granted permission on 11 July 2005. An amendment to the planning permission was applied for in early 2006 and granted on 4 August 2006.
25. Wind Prospect Ltd acted as planning supervisors and owners' technical consultant during the construction phase of the works which commenced in May 2005 under a 'turnkey' contract between turbine suppliers Repower UK and Fenland Windfarms Ltd, a project company owned by EDF Energie Nouvelles, part of the EDF Group. Standard Chartered Bank provided the funding. From 1 January 2009, Fenland Green Power Co-operative Limited owns two of the turbines at Deeping St Nicholas.
26. Eight of the REpower MM 82 2 MW wind turbines were constructed in 2005 / 2006 on land at Vine House Farm and Worth's Farm with those two farms being connected by an access track across Porter's Farm (see plan attached to the Particulars), and became operational and feeding the national grid in June 2006.
27. The nuisance started almost immediately the wind farm came on line, in June 2006. The Claimants complain of noise nuisance at various times of the day and night, including swishing, ripping/flushing, low frequency humming, mechanical turning, background roar, 'helicopter noise' (aerodynamic modulation) and enhanced 'helicopter noise' (amplitude modulation of aerodynamic modulation). Even with double glazing, house insulation and the wearing of ear plugs, the Claimants have been disturbed by low frequency noise and have complained of sleep disturbance. On 21 December 2006, the Claimants started to use rental accommodation in Spalding to sleep and rest from the impact of the noise; on 27 May 2007 they effectively moved out of the Farmhouse.

28. The Claimants' experiences are corroborated by the expert evidence of Mr. Mike Stigwood, who has provided a report on noise nuisance at their property, a copy of which is attached to these Particulars. Mr Stigwood considers that:

...the residents of Grays Farm suffer a clear nuisance in law i.e. a material interference with the use and enjoyment of their property due to emissions of noise from the Deeping St Nicholas wind farm. This is a serious case of noise impact and nuisance. The nuisance is rendered particularly serious as the noise impacts upon the use of the home and results in sleep disturbance. The impact occurs somewhat randomly over time but with certain patterns which emerge.

29. The Claimants first complained about the noise in mid June 2006 to Wind Prospect Developments Ltd. After a site visit and a short correspondence, the project manager said WPDL could not help and that the only route forward was to register a complaint with the EHO at SHDC. This was done and Mr Steve Branson EHO at SHDC installed manually activated noise monitoring equipment in the front bedroom of the Farmhouse. SHDC eventually contacted the wind farm, which agreed to instruct noise consultants Hayes McKenzie ("HMP"). In September 2006, the wind farm operator instructed HMP to carry out an investigation and to submit a report. On 26 October 2006, amplitude modulation was measured at the Claimants' property by HMP. The Claimants emailed the developer on 16 November 2006 asking them to arrange suitable alternative accommodation for 6 months so that a noise management programme could be worked out in the event that the HMP report confirmed noise issues. On 21 December 2006, the Claimants used rental accommodation in Spalding to sleep and rest from the impact of the noise; on 27 May 2007 they effectively moved out of the Farmhouse.

30. On 1 February 2007, the HMP report - the Noise Condition Compliance Measurement Report of October/November 2006 ("the HMP First Report") was received. This found potential exceedances and problems with enforcement of the noise condition.

31. An undated HMP 'Additional Noise Measurement Proposal' refers to modulated aerodynamic noise – AM – as being measurable within the dwelling with windows closed and was audible, occurring at the frequency range between 200-500 Hz. It proposes additional measurements to provide information on the existing background noise level at Grays Farm when it is downwind of the turbine site; to determine whether other locations within the dwelling experience a low frequency hum and to assess potential mitigation measures to reduce or eliminate AM which has been identified within the dwelling. It is proposed to undertake a number of night time attended measurements when the dwelling is forecast to be downwind of the nearest wind turbine. Turbine operation will be restricted at the relevant times.
32. The HMP 'Acoustic Features' report ("the HMP Second Report") was received by the Council in mid July 2007. It could not identify low frequency noise but did find amplitude modulation in certain conditions.
33. The Council met with the developer and their noise expert on 14 August 2007 to discuss the findings of the survey and report completed by HMP:
- ...there is evidence that AM does occur in limited circumstances...It should be noted that the site operator expressed a desire to attempt to ultimately abate all nuisance arising from the site, but all parties within the room recognised the practical difficulties in achieving this....*
34. It was agreed that HMP would carry out further work to narrow the source of the AM and implement the measures necessary to abate the problem. This has yet to take place.
35. Acoustic Associates carried out for the Council a review of the HMP Reports and reported by letter dated 7 November 2007. This states that the Claimants' property probably has lower background noise levels than those of the proxy locations and agrees with HMP that more knowledge of the background noise

level of Grays' Farm is required. It criticises some of the HMP assumptions and recommends that wind information be provided so that officers can determine whether monitoring has been undertaken under representative conditions and that background noise measurements are taken at Gray's Farm in representative wind conditions.

36. The Council reported to the Claimants that they had undertaken further noise investigations between 1 and 31 October 2007 to establish whether the noise amounted to a statutory nuisance and/or breach of condition. The opinion of the EHOs was that there was no statutory nuisance. On breach of the condition, although there were 3 occasions when the noise levels exceeded 35dB(A), this was due to a combination of the turbines and wind noise and it was not possible to say that the turbines alone were responsible.

37. Mike Stigwood in his report advises that October 2007 was a period when there was the least energy production by the turbines since they were first operated, is not a representative period and no reliance should be put on any analysis during this period. Energy output data for October 2007 published by the industry regulator shows that output was down during that period; in September 2007 turbines producing 27.54% installed capacity; 11.53% in October 2007; 30.89% in November 2007.

38. By notice of decision dated 17 July 2008, the Claimants were advised by the Lincolnshire Valuation Tribunal that their appeal against Council Tax banding had been allowed and that the Farmhouse had been taken out of Band B and placed in Band A as of 21 June 2006. The decision and reasons for this are set out in the Tribunal's decision, including:

It was apparent from the evidence submitted that the construction of the wind farm 930 metres away from the appeal dwellings had had a significant detrimental effect on the Appellants' quiet enjoyment of their properties. The tribunal therefore found that the nuisance caused by the wind farm was real

and not imagined and it would have had some effect upon the potential sale price of the appeal dwellings...

39. At the Shipdham inquiry on 10 December 2008, Dr McKenzie of HMP in cross-examination stated that there was an 'acknowledged problem' with noise from the wind turbines at Deeping St Nicholas.
40. The above activities by the Defendants give rise to an inconvenience materially interfering with the ordinary comfort and enjoyment by the Claimants of their home and garden, amounting to a nuisance.
41. Furthermore, the Claimants have suffered and continue to suffer loss and damage to their amenity.
42. Unless restrained by injunction the Defendants will continue or permit to be continued the said nuisance.
43. The Claimants have unsuccessfully attempted to resolve the noise problem by complaining to the developer and to the Council. They have also complained to the Ombudsman about the Council's failure to take appropriate action against the wind farm; also to the Parliamentary Ombudsman. The Claimants will set out in their witness statements the long history in relation to these complaints.
44. The Claimants' solicitors have sent the Defendants a pre-action protocol letter together with Mr Stigwood's expert report, and have suggested that the nuisance could potentially be cured by (1) the removal of turbines 4 & 5 on the First Defendant's land and turbine 2 on the Second Defendant's land, and (2) limiting the operation of the turbines to 0800 – 1700 (except on Sundays and Bank Holidays when the hours of operation would be limited to 1000 - 1700). There has been no substantive response from the First, Second and Fifth

Defendants. The Third and Fourth Defendants have rejected this solution on the basis that there is no nuisance and that they will need a raft of information – some privileged, some irrelevant - before they will consider the solution. It is clear to the Claimants therefore that there is no prospect of settling this matter without commencing proceedings; information will of course be provided to the Defendants under the normal disclosure rules.

45. The Claimants therefore claim:

- a) an injunction to restrain the Defendants by themselves or their servants or agents or otherwise from using the land in a manner that causes a nuisance to the Claimants or either of them or their family or other occupiers of the Claimants' land.
- b) general damages to be assessed by the Court for loss of amenity suffered by the Claimants as a result of the nuisance including diminution in value together with the consequential damage of the cost of renting alternative accommodation.
- c) interest upon any damages which may be awarded pursuant to s.35A of the Supreme Court Act 1981 at such rate and for such period as the Court deems appropriate;
- d) costs.

Statement of Truth

I am duly authorised by the Claimants to sign this statement and I believe that the facts stated in these Particulars of Claim are true to the best of my knowledge and belief:

Signed:

Dated:

SUSAN RING

Solicitor in the firm of Richard Buxton solicitors

The Claimants' address for service is the Claimants' solicitors' address:
Richard Buxton Solicitors, 19B Victoria Street, Cambridge CB1 1JP