



HERBERT
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THE THIRD NLU DELHI AND HERBERT SMITH FREEHILLS

INTERNATIONAL NEGOTIATION COMPETITION

BREEZY BUSINESS FOR JUDGES ONLY

9-11 SEPTEMBER 2016

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GENERAL BACKGROUND INFORMATION

The parties

Fergus O'Reilly, 10th Duke of Londonferry ("**Fergus**"), is a landowner and political figure in Eireland, a country in Europe. Fergus has been the head of O'Reilly Family Estates Limited ("**OFE**"), a private company which manages the dukedom's property portfolio, since his father died in 2012. The majority of OFE's assets are centred on its 10,000 acre Drumbally Estate (the "**Estate**") on the west coast of Eireland. Upon taking over the Estate four years ago, Fergus discovered that its finances were in a poor state due to his father's deteriorating health and excessive expenditure. Fergus embarked on a cost-saving programme and is now seeking to bring in new revenue streams to the Estate in order to supplement its income from forestry, farming and tenants.

As part of his long term strategy to improve the financial prospects of OFE, Fergus has embarked upon a £3 million refurbishment of Drumbally Castle, renovating it as a five-star country hotel and spa retreat.

DanskWind ApS ("**DW**") is the renewable energy arm of DanskEnergy AS, one of Europe's leading energy companies. DW has considerable expertise in managing renewable energy projects and has successfully developed 17 wind farm sites across Europe. Its primary sites are located in Dimemark, though it has also developed wind farms in France and Germany. It has ambitious expansion targets and is keen to take advantage of the significant growth potential of Eireland's renewable energy market.

Background

Dimemark has led the way in the growth of the European renewables sector. In July 2015, Dimemark became one of the first countries in the world to meet 100% of its energy demands through wind power. As a result of the success of the country's renewables industry, the Dimemark government has gradually decreased the government subsidies available for new projects. This has hit DW's business model hard as it relies on subsidies in host government states. In comparison, Eireland's government has been increasing the amount of subsidies available for wind farm projects since 2010 as part of an incentive plan to tackle the country's poor reputation in the renewable energy sector. The best subsidy rates are currently offered to the most economically viable locations. However, the rates are set to be reduced for projects that receive planning approval after 31 January 2017 as the incentive plan comes to an end. This has led to competition between energy companies for the best locations for new developments.

Fergus has been considering the development of a wind farm to increase the revenue of OFE and also to bolster his political stance. Initial confidential conversations with planning experts went well, and representatives from DW approached OFE regarding a potential development in early 2016. DW commissioned a high-level feasibility study into a number of locations on the Estate and identified two possible sites that would attract the best subsidy rates:

- 1 Mcllroy Hill ("**Site A**") proved to have the highest wind speeds and is visible from Drumbally Castle. Road links to that part of the Estate are quite narrow, meaning a new access road would need to be built.
- 2 McDowell Ridge ("**Site B**") has lower average wind speeds compared to Site A but is located next to an existing road.

The company conducting the feasibility study produced the following table for DW summarising the merits of each site:

ASPECT OF THE PROJECT	SITE A	SITE B
Wind speed	Excellent	Very good
Accessibility	Poor	Good
Proximity to Drumbally Castle	Visible	Not visible
Maximum number of wind turbines	50	60

GENERAL BACKGROUND INFORMATION (CONTINUED)

During preliminary negotiations between OFE and DW, an informal agreement was reached for a wind farm of between 40-55 turbines. It is contemplated that OFE will lease the site chosen for the development to DW, but consideration options and payment mechanics have not been finalised.

A number of key players in the European renewable energy sector have realised the potential of Eireland's market and some of DW's competitors have made noises about entering the market. A draft two-year exclusivity agreement was produced by DW but has not yet been executed by the parties.

Fergus is a well-known figure in the Drumbally community and the Estate provides a large amount of local employment. Despite this, there is a high rate of unemployment locally and the workforce is largely unskilled.

Some of the farmers on the Estate have been tenants for many generations and are concerned about the visual impact of the farm, the potential uprooting of local farmers and the investment not benefitting the community. Flyers have been distributed and a website set up in protest against the development, and last week Fergus' Ferrari was spray-painted with 'DUKE FERG IS ALL HOT AIR – SAY NO TO WIND FARM'. A public meeting to start a public consultation process has been planned for six weeks from now.

Under Eireland law, a decommissioning fund will have to be set up for when the project comes to the end of its lifetime. 10% of all project revenue will need to be held in an escrow account for when the turbines are taken down.

Both parties are keen to come to an agreement which will allow for a lease agreement to be finalised and enable the parties to move forward and seek formal planning permission.

FERGUS/O'REILLY FAMILY ESTATES LIMITED

Confidential information

Building works on Drumbally Castle have begun, but due to some unexpected complications regarding the foundations of the moat which surrounds the castle the final cost is expected to be much higher. The hotel is due to open in three months' time with the grand opening due to attract many of Eireland's rich and famous, as well as the rest of the O'Reilly family whom Fergus is keen to impress. As a result, Fergus needs to generate funds quickly and would like an upfront payment to help OFE meet these added costs and avoid delaying the opening.

Fergus has been shocked by the level of local resistance to the proposed wind farm. Fergus is strongly in favour of renewable energy, and hopes to use the development to bolster his position within his political party. He would like to avoid any form of controversy which his political rivals may be able to use against him. Fergus feels that ensuring there is some kind of upside for the local farmers will retain goodwill in the community and prevent damage to his political reputation.

OFE would like to keep disruption to the existing estate business to a minimum. Fergus has previously promised the farmers leasing land on the Estate that they are able to construct any other buildings their farms require, such as barns and silos. Fergus and OFE are keen to keep

this promise, especially due to the negative reaction the wind farm has had from the local community and the importance of the farmers' rent payments to meeting the company's overheads, but are aware that some restrictions may need to be agreed.

Fergus sees the proposed wind farm as a key initiative in reviving the Estate and keeping OFE afloat. He is keen to have as many wind turbines as possible on the site. He would prefer to agree a fixed rental income per wind turbine erected on the site rather than participating in the overall turnover of the wind farm, so that on-going revenues are predictable. Fergus is aware that average lease payments range from £30,000 to £50,000 per turbine depending on site quality. Fergus favours Site B due to the proximity of Site A to Drumbally Castle. The construction of the wind farm so close to the hotel would ruin the views from the castle and cause noise pollution, undermining the key selling point of the hotel as a peaceful country retreat.

Fergus is aware of the 10% decommissioning fund required under Eireland law, but ideally he would like DW to contribute 20% of all project revenue to the required escrow account so as to ensure decommissioning costs are met when the project comes to the end of its lifetime.

Fergus has received a telephone call from Torsten Engelmann, Development Director at one of DW's key competitors, Bavaria Renewables GmbH. Torsten is extremely eager to meet with Fergus and has offered to come with his team to discuss development plans.

DANSKWIND APS

Confidential information

DW is very keen to enter the Eireland market due to domestic subsidies being withdrawn in Dimemark. However, DW are also aware that interest in the Eireland market is increasing across Europe and are worried that a competitor may take advantage of the research it has already commissioned into appropriate sites and undercut their offer or put in an offer for the site not chosen.

The feasibility study conducted by DW showed that annual revenues would be higher at Site A. An initial outlay of £2 million would be required to improve access but this would be easily outweighed by the benefits. In fact, the company which undertook the study identified Site A as potentially the most viable site they know of in Eireland for this kind of development. If Site B is selected, the project would still be viable but the financial reward would be lesser.

The project will be financed completely on balance sheet for DW. Therefore, DW has a strong preference to spread the costs over the course of the development and the life of the project. DW want to avoid making upfront payments, primarily due to initial start-up costs being very cash intensive for projects of this type.

Turnover for a 40 turbine wind farm is predicted to be in the region of £30 to 40 million depending on the quality of the site. Typically, DW pays landowners a percentage of

the annual turnover (ranging between 5-7%) in exchange for granting the lease; however, DW occasionally agrees fixed rental payments per turbine instead provided that the aggregate rental payments are less than 5% of predicted turnover per annum.

The average size of a DW wind farm is 40 turbines. If wind farms are any larger than this there tend to be issues surrounding planning permission and over-supply to the grid. While the Eireland market is relatively underinvested, DW is cautious about over-committing. Their preference is for an initial phase of development followed by a second phase if the development is a success.

It is important for DW that the lease contains restrictive covenants on surrounding landowners to prevent them from building anything that would affect the wind speed.

DW has experienced opposition from local communities in previous developments, particularly during the initial stages of its project in France. In this case, DW managed to quell the protests by offering financial compensation to local inhabitants who were affected by the wind farm. However, this had a substantial impact on the project's profit margins and vastly reduced its value to DW's business. DW is keen to avoid making the same mistake in Eireland.

DW is aware of the 10% decommissioning fund required under Eireland law, it believes that 10% is sufficient to ensure decommissioning costs are met when the project comes to the end of its lifetime.

SUGGESTED NEGOTIATION POINTS

Available to judges only

Points for Fergus/OFE

- 1 Fergus would like to secure as much money as possible as quickly as possible. This includes upfront fees and benefitting from any upshot if the wind farm is successful.
- 2 Fergus wants to retain his close ties with the community and avoid damage to his political reputation being caused by controversial protests. He would like to appease the local community by securing a compensation scheme for them.
- 3 Fergus is keen to avoid disruption to other farmers who occupy the Estate and wants the lease to be as unrestrictive as possible.
- 4 Fergus does not want the view from Drumbally Castle to be spoiled as this will reduce the value of its refurbishment. He would strongly prefer that Site A is not used.
- 5 Fergus would like as many wind turbines as possible on the wind farm to increase revenue, particularly as he favours a fixed rental income per turbine to participating in annual turnover for the site.
- 6 Fergus would like greater protection than is afforded by the minimum decommissioning fund should the project fail.

Points for DW

- 1 DW would like to avoid committing any lump sums at the start of the project and would prefer to spread the costs over the life of the project.
- 2 DW needs to ensure there is sufficient access to the chosen site and that there is protection for it in the lease agreement against structures being built around the wind farm that could reduce wind speed.
- 3 DW is extremely keen that Site A is the chosen location. While they could still operate a viable wind farm at Site B, the potential at Site A is considered too great an opportunity to miss.
- 4 DW is keen to limit decommissioning costs to the minimum 10% as required by Eireland law.
- 5 DW is keen to limit the number of turbines to roughly 40, as it is familiar with this figure from other farms it has developed.

SUGGESTED NEGOTIATION POINTS (CONTINUED)

Potential solutions (non-exhaustive)

- 1 If Site B is chosen for the current project, both parties should look to secure something from the other side in relation to Site A. Fergus could, in return for a lump sum, offer a right of first refusal over Site A so DW have the option to take up the site should Fergus decide to lease/sell it in the future. Additionally, or in the alternate, DW may seek a restrictive covenant that Site A will not be used as a wind farm or sold to a competitor.
- 2 Fergus and DW should discuss the manner in which the local population can be recompensed for the imposition that the wind farm would be. They may discuss a financial compensation package but due to DW's aversion to making up-front payments, non-financial compensation such as jobs and training may be considered instead. DW could seek to structure the payments as a deduction to OFE's rental income.
- 3 Fergus should avoid breaking his promise to the farmers giving them freedom to build on their land but should recognise DW's opposition to this. DW may persuade Fergus to impose a building height restriction on the farmers, and covenant not to make any such promises to future tenants of the Estate.
- 4 It is in the interest of both parties to agree to a short timetable. OFE needs the cash injection to help pay for the refurbishments at Drumbally Castle and DW needs to obtain planning permission by the end of 2016 in order to take advantage of Eireland's government subsidies.
- 5 DW should push for an exclusivity agreement. Fergus should be amenable to this, especially if he can extract a fee.
- 6 DW and Fergus should seek to agree payment terms for the lease, likely to fixed rental income in the region of £30,000 to £40,000 per turbine.