Michaelmas Term
[2015] UKSC 74
On appeal from: [2015] CSIH 46

JUDGMENT

Trump International Golf Club Scotland Limited and another (Appellants) *v* The Scottish Ministers (Respondents) (Scotland)

before

Lord Neuberger, President
Lord Mance
Lord Reed
Lord Carnwath
Lord Hodge

JUDGMENT GIVEN ON

16 December 2015

Heard on 8 October 2015

Appellants
John Campbell QC
James Findlay QC
(Instructed by Balfour & Manson)

Respondents
James Mure QC
Kay Springham
(Instructed by Scottish Government Legal Directorate, Litigation Division)

LORD HODGE: (with whom Lord Neuberger, Lord Mance, Lord Reed and Lord Carnwath agree)

1. Trump International Golf Club Scotland Limited ("TIGC") has developed a golf club and resort at Menie Estate and Menie Links, Balmedie, Aberdeenshire. In 2011 Aberdeen Offshore Wind Farm Limited ("AOWFL") applied for consent under section 36 of the Electricity Act 1989 ("the 1989 Act") to construct and operate the European Offshore Wind Deployment Centre in Aberdeen Bay, off the coast of Blackdog, Aberdeenshire. The application concerned the construction of up to 11 wind turbines, which might be of different sizes, with a maximum power generation of 100MW. The proposed windfarm, if constructed, would be located about 3.5 kilometres from the golf resort and would be seen by people using the resort. TIGC, concerned that the proposed windfarm development would materially diminish the amenity of the golf resort, opposed the application. On 26 March 2013 the Scottish Ministers granted consent for the development and operation of the windfarm subject to conditions. TIGC has challenged that decision on various grounds in the courts in Scotland without success. Two grounds of challenge remain in this appeal.

2. The two grounds on which TIGC now seeks to have the consent quashed are:

> (i) because the Scottish Ministers had no power under the 1989 Act to grant consent to the windfarm application as only a licence holder or an exempt person may apply and be granted a construction consent under section 36 of that Act; and
>
> (ii) because condition 14 of the consent (which requires the submission and approval of a design statement) is void for uncertainty.

I shall refer to the first ground as "the section 36 challenge" and the second ground as "the condition 14 challenge".

The section 36 challenge

3. The section 36 challenge raises a question of statutory construction. In essence, TIGC relies on the wording of paragraph 3 of Schedule 9 to the 1989 Act in support of its contention that only the holder of a licence to generate, transmit,

or supply electricity, which is granted under section 6 of the 1989 Act, or a person exempted under section 5 of that Act from holding such a licence, may apply for a construction consent under section 36. Paragraph 3 of Schedule 9 (so far as relevant) provides:

> "(1) In formulating any relevant proposals, a licence holder or a person authorised by an exemption to generate, distribute, supply or participate in the transmission of electricity -
>
> > (a) shall have regard to the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archaeological interest; and
> >
> > (b) shall do what he reasonably can to mitigate any effect which the proposals would have on the natural beauty of the countryside or on such flora, fauna, features, sites, buildings or objects.
>
> (2) In considering any relevant proposals for which his consent is required under section 36 or 37 of this Act, the Secretary of State shall have regard to -
>
> > (a) the desirability of the matters mentioned in paragraph (a) of sub-paragraph (1) above; and
> >
> > (b) the extent to which the person by whom the proposals were formulated has complied with his duty under paragraph (b) of that sub-paragraph.
>
> (3) Without prejudice to sub-paragraphs (1) and (2) above, in exercising any relevant functions each of the following, namely, a licence holder, a person authorised by an exemption to generate or supply electricity and the Secretary of State shall avoid, so far as possible, causing injury to fisheries or to the stock of fish in any waters."

The references to the Secretary of State in relation to section 36 applications in Scotland should be treated as references to the Scottish Ministers: Scotland Act 1998, section 117.

4. Section 36 of the 1989 Act provides *inter alia* that a generating station shall not be constructed, extended or operated except in accordance with a consent which in England and Wales is granted by the Secretary of State and in Scotland by the Scottish Ministers.

5. Mr John Campbell QC for TIGC submits that paragraph 3 of Schedule 9 to the 1989 Act gives rise to a necessary implication that only licence holders or exempt persons may be granted a section 36 consent. Were it otherwise, there would be two classes of section 36 applicant, namely those with duties under paragraph 3(1) of Schedule 9 and those without such duties. There is, he submits, no reason for two such classes. Secondly, under paragraph 3(2) of Schedule 9, the Scottish Ministers when considering any relevant proposals which require a section 36 consent, are to have regard to the extent to which the applicant has complied with his duty under paragraph 3(1)(b) of Schedule 9. That presupposes that the applicant is under such a duty. Only licence holders and exempt persons are under those duties. If an applicant were able to obtain a section 36 consent and construct a generating station or other relevant proposal before he obtained a licence to generate, he could complete a significant development before he became subject to the environmental duties of paragraph 3 of Schedule 9.

6. Looking more generally at statutory policy, Mr Campbell submits that the statutory policy is to secure that only operators who are suitably qualified in the electricity generating industry will apply for consent to construct a generating station or other development which is a relevant proposal. There is, he submits, a logical progression by which, first, an applicant establishes his competence to generate electricity by obtaining a section 6 licence or a section 5 exemption, secondly, he formulates his proposals for the development in a section 36 application, thirdly, he prepares and publishes a statement (under Schedule 9, paragraph 4) setting out the manner in which he will perform the Schedule 9 paragraph 3(1) duties, before, finally, he implements the section 36 consent by constructing the relevant proposal.

7. Like Lord Doherty and the First Division of the Inner House of the Court of Session, I am satisfied that this challenge fails. I examine first the structure of and the language used in the 1989 Act and then discuss the wider policy background to the Act.

(i) The structure and language of the 1989 Act

8. The relevant starting point is section 4 of the 1989 Act, which makes it a criminal offence to generate electricity or to carry out other specified activities without authorisation by a licence. Section 5 empowers the Secretary of State to grant an exemption from the requirement of a licence. Section 6 empowers the Gas and Electricity Markets Authority to grant, among others, a licence to generate electricity. There is no express prohibition in section 4 from constructing a generating station without a licence, as one might have expected if only licence holders or exempt persons alone were to be given a section 36 consent.

9. Section 36 places no restriction on who may apply for a consent to construct a generating station. Neither does Schedule 8, which section 36(8) relates to consents under section 36 and also consents to the installation of overhead lines under section 37. Schedule 8 sets out the procedures to be followed when seeking or objecting to applications for consent or challenging a decision whether to hold a public inquiry. Again, one might have expected an express restriction on the applicants for a section 36 consent in these provisions if one were intended.

10. Section 38 provides:

> "The provisions of Schedule 9 to this Act (which relate to the preservation of amenity and fisheries) shall have effect."

Paragraphs 1 and 2 of Schedule 9 relate to the preservation of amenity in England and Wales and paragraphs 3 and 4 contain similar provisions for the preservation of amenity in Scotland. Two considerations point away from Mr Campbell's interpretation. First, neither paragraph 1(1) or 3(1) contains any express restriction on who may apply for a section 36 consent for the construction of a generating station which is large enough to be a "relevant proposal". If there were to be such a restriction, I would have expected an express provision. Secondly, not all section 36 applications are affected by Schedule 9, but only "relevant proposals", which are defined in Schedule 9, paragraph 1(3) as the construction or extension of a generating station with a capacity of not less than 10MW. Offshore generating stations with a capacity of 1MW or more require a section 36 consent (the Electricity Act 1989 (Requirement of Consent for Offshore Generating Stations) (Scotland) Order 2002 ((SSI 2002/407), article 3). But they are not relevant proposals to which Schedule 9 applies if their capacity is below 10MW. As offshore installations with a capacity of under 10MW can have a significant impact on the environment and amenity, this limitation suggests that Schedule 9 was not intended to be a regime for controlling the environmental effects of constructing

generating stations but, as I suggest in para 20 below, is a survivor from prior legislation when the electricity generating market was organised differently.

11. In my view, Mr Campbell's strongest point is that sub-paragraph 3(2)(b) requires the Scottish Ministers, when considering any relevant proposals in a section 36 application, to have regard to the extent to which the licence holder or person authorised to generate by an exemption has complied with his sub-paragraph 3(1)(b) duties to mitigate adverse effects. But, in the absence of any indication in sub-paragraph 3(1), either express or arising by necessary implication, that only a licence holder or person authorised by exemption could apply under section 36 to construct a generating station which was a relevant proposal, I do not attach significance to this point. In my view sub-paragraph 3(2) requires the Scottish Ministers to have regard to the environmental matters in sub-paragraph 3(1)(a), whoever is the section 36 applicant. This is supported by the opening words of sub-paragraph 3(2): "In considering any relevant proposals for which [their] consent is required". Sub-paragraph 3(2)(b) makes sense in this context if one construes it as applying only to those applicants who are under a duty under sub-paragraph 3(1)(b) by reading in the words "(if any)" after "duty" so that the provision reads "the Scottish Ministers shall have regard to … the extent to which the person by whom the proposals were formulated has complied with his duty (if any) under paragraph (b)" of sub-paragraph 3(1) (emphasis added). Unless there were anything in the wider policy background to the 1989 Act which suggested an intention to restrict the persons who may apply under section 36, I think that the reading in of those words, which does no violence to the statutory language, makes sense of the provisions of Schedule 9.

12. Finally, in this part of the challenge, Mr Campbell points out that the section 36 permission allows the applicant to operate as well as construct the generating station. Because only a licensed person or a person authorised by exemption can lawfully generate electricity, he suggests that the permission to operate can only be given to a licensed or exempted person. I am not persuaded that that is so. A section 36 permission to operate is a necessary but not a sufficient precondition for generating electricity in a generating station. As the Scottish Ministers submit in their written case, section 4 makes it clear that no generating station may be operated without a licence or exemption, and it is customary in statutory development consents to include conditions governing the operations of the new building. By requiring a section 36 consent for operations, the 1989 Act enables the Scottish Ministers to impose conditions relating to the use of the generating station as well as its construction.

13. I am therefore of the view that the structure and language of the 1989 Act does not support TIGC's case, which depends upon the court's acceptance that Parliament sought to limit who may apply for a section 36 consent by using circumlocution and implication.

(ii) The policy background to the 1989 Act

14. I am also satisfied that there is nothing in the background to the 1989 Act which requires the court to take a different view of the relevant statutory provisions. I have five reasons for that conclusion.

15. First, the aim of the 1989 Act was to liberalise the market for the generation, transmission and supply of electricity in Great Britain by privatisation. The White Paper, "Privatisation of the Scottish Electricity Industry" (1988) (Cm 327) proposed the replacement of the two Scottish public sector electricity boards by two vertically integrated private companies and envisaged that, because Scotland then had surplus generating capacity and England and Wales were projected to need substantial new capacity by 2000, the electricity industry in Scotland could compete in the British market for electricity. It and the White Paper for England and Wales, "Privatising Electricity" (1988) (Cm 322), proposed a Britain-wide regulatory system in order to promote fair competition. In England and Wales the White Paper proposed competition in electricity generation by removing the effective monopoly on generation of the Central Electricity Generating Board and by transferring control and ownership of the National Grid to the distribution companies, with whom the generating companies would enter into contracts. The policy did not address who would construct generating stations. But it was not a necessary part of this model that the persons who sought to build the needed new generating stations were the same persons as those who later generated electricity at those stations.

16. Secondly, the 1989 Act contains two separate regulatory regimes, for the construction of electricity generation stations and overhead electric lines (sections 36 and 37) on the one hand, and for the licensing and other regulation of electricity supply, including generation and transmission (*inter alia* sections 4, 6 and 7) on the other. Since the devolution of power to Scotland there have been separate regulators for those activities: the former, involving a land use permission, is in Scotland the responsibility of the Scottish Ministers; the latter, involving the regulation of electricity generation, transmission, distribution and supply in the interests of consumers (viz the 1989 Act section 3A(1) and (5)) is a reserved matter (Scotland Act 1998, section 30 and Schedule 5, Part II, section D1) and is the responsibility of the Secretary of State and the Gas and Electricity Markets Authority.

17. Thirdly, I am satisfied that Parliament did not create a regulatory gap by allowing persons, who are not subject to environmental duties under sub-paragraph 3(1) of Schedule 9, to apply for construction consents under section 36 of the 1989 Act. There is a theme in TIGC's written case which suggests that if an applicant for a section 36 consent is not under statutory environmental obligations in

Schedule 9, paragraph 3(1), it is not subject to environmental constraints when constructing a generating station. But this is not so. The Scottish Ministers have a duty under sub-paragraph 3(2)(a) of Schedule 9, when considering any application for consent under section 36 or 37 for a development which is a relevant proposal, to have regard to the desirability of the matters mentioned in sub-paragraph 3(1) of that Schedule. In addition, the Scottish Ministers have a wide power under section 36(5) to impose conditions in a section 36 consent and they are informed of the environmental impact of a proposed development by an environmental assessment which has been required since the commencement of the Environmental Assessment (Scotland) Regulations 1988 (SI 1988/1221) and their amendment in 1990 to take into account the 1989 Act. Now the Scottish Ministers are subject to the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2000 (SSI 2000/320), all as Lord Doherty narrated in paras 42 to 44 of his impressive opinion. As with an applicant for planning permission under the Town and Country Planning legislation, it is not necessary in order to protect the environment for an applicant for a section 36 consent to be subject to environmental duties in relation to the construction of a generating station because the authority granting the consent protects the environment by imposing conditions.

18. Fourthly, there was and is no need to require an applicant under section 36 to possess in advance a generating licence or an exemption in order to secure that only competent persons construct generating stations. Section 36(5) of the 1989 Act, which provides that the Scottish Ministers may include in a consent such conditions as appear to them to be appropriate, expressly refers to "conditions as to the ownership or operation of the station". Further, the skills required to construct a generating station, whether onshore or offshore, are not the same as those required for generating and supplying electricity, although the two skill sets may overlap.

19. Fifthly, as Mr James Mure QC explained, it has been the established practice in both of the British jurisdictions for commercial organisations to apply for and obtain section 36 consents before they seek a licence to generate electricity under section 6 of the 1989 Act or an exemption under section 5. No evidence was presented that this practice has resulted in unsuitable persons applying for and obtaining section 36 consents or in any failure to protect the environment.

20. A question remains as to why Parliament, when creating the new regulatory regime in the 1989 Act, should have imposed duties in Schedule 9 on licence holders and exempt persons in relation to the formulation of relevant proposals but not on other applicants for a section 36 consent for relevant proposals. The answer seems to be in the prior legislative history, in which earlier statutes imposed similar duties on publicly owned electricity boards which generated electricity. The 1989 Act preserved those duties by imposing them on persons authorised to

generate electricity. Lord Malcolm in the First Division discussed this in paras 52 to 57 of his opinion, which I need not repeat in this judgment.

21. Accordingly, neither the language of the 1989 Act nor its policy background supports the interpretation which TIGC advances. I therefore turn to the challenge to the validity of condition 14 of the section 36 consent.

The condition 14 challenge

22. Condition 14 of the section 36 consent, which the Scottish Ministers included after consulting Scottish Natural Heritage ("SNH"), states:

> "Prior to the Commencement of the Development, a detailed Design Statement must be submitted by the Company to the Scottish Ministers for their written approval, after consultation by the Scottish Ministers with SNH, Marine and Coastguard Agency, Northern Lighthouse Board, National Air Traffic Services and any such other advisors as may be required at the discretion of the Scottish Ministers. The Design Statement must provide guiding principles for the deployment of the wind turbines. This plan must detail:
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> (a) Layout location for each phase and each turbine; and
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> (b) Turbine height, finishes, blade diameter and rotation speed across each phase, rows and individual turbine locations; and
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> (c) Lighting requirements (navigation and aviation) for each turbine/row or, as the case may be, phase including any anemometer mast; and
>
> (d) Further detailed assessment of visual impacts to inform the detailed layout and design of each location and phase of the deployment centre from selected viewpoints to be agreed with the Scottish Ministers and any such other advisors as may be required at their discretion.

Reason: to set out design principles to mitigate, as far as possible, the visual impact of the turbines."

23. Mr Campbell submits that the section 36 consent is invalid because condition 14 is both unenforceable and also so uncertain that it is irrational. He advances three arguments in support of that contention. First, he submits that the condition is invalid because there is no mechanism by which the Scottish Ministers can force the developer to construct the windfarm in accordance with the design statement. He argues that, in contrast with conditions 18, 24 and 25, there is no express statement that the developer must construct and operate the development in accordance with its terms. Secondly, he submits that the condition is void for uncertainty because there is no indication of what compliance with it entails. Thirdly, even if (which he does not accept) the design statement could be enforced through the construction method statement in condition 13, which I set out in para 29 below, the power of the Scottish Ministers to agree a departure from the construction method statement means that the scope of the development is uncertain.

24. The short answer to this challenge is that if, contrary to my view, condition 14 were unenforceable, the section 36 consent would not be invalidated. Annex 1 of the consent confines the development to 11 turbines each with a maximum blade tip height of 198.5 metres and Figure 1 attached to the consent shows the approved location of the 11 turbines. TIGC does not dispute that (subject to an argument about the final words of the condition, which I discuss below) condition 7 requires that the development be constructed and operated in accordance with, among others, the environmental statement and the supplementary environmental information statement. The latter document contains design principles on the location and height of the turbines, on which the Scottish Ministers can insist by invoking condition 7.

25. Chapter 19 of the environmental statement contained a seascape, landscape and visual impact assessment which had been prepared after consultation with SNH, Aberdeen City Council and Aberdeenshire Council. It assumed that the wind turbines would have a tip height of up to 195 metres and a rotor radius of up to 75 metres. In order to take account of developing windfarm technology, in the supplementary environmental information statement AOWFL re-assessed the visual impact of the development on the assumption that the maximum tip height was 198.5 metres and the maximum rotor radius was 86 metres. AOWFL also took account of SNH's consultation response, in which it requested a condition requiring a design statement. AOWFL set out objectives or design principles which it formulated after having regard to, and adapting to the offshore environment, SNH's publication, "Siting and Designing Windfarms in the Landscape" (2009). AOWFL listed their objectives such as (a) that the closest shoreward row of turbines should be relatively consistent in tip height to maintain

design integrity in views from the immediate coastline and should be populated with the smallest tip heights and rotor diameter, and (b) that the largest turbines should be located further out to sea at specified locations to achieve a gradation to the lowest turbines located closest to the coastline. It used those objectives to formulate three zoning scenarios and appraised their visual impact from various locations. The Scottish Ministers accepted the visual impact of those scenarios.

26. Thus, even if condition 14 were invalid, important elements of the benefits which it promoted are contained within the supplementary environmental information statement. The Scottish Ministers can insist on compliance with that document and those principles in the construction of the development. The scope of the development is defined by Annex 1 of the consent and the supplementary environmental information statement sets out the principles governing the size and location of the turbines. Condition 14 therefore cannot be seen as a fundamental condition which determines the scope and nature of a development and which, if invalid, would in turn invalidate the consent.

27. For completeness, I observe that even if condition 14 could not be enforced so as to require AOWFL to construct the windfarm in accordance with the design statement, the condition would not be void for uncertainty. It would have effect to the extent that the developer would have to produce a design statement and obtain its approval by the Scottish Ministers before it could start the development. In *Fawcett Properties Ltd v Buckingham County Council* [1961] AC 636, a case concerning a condition in a planning permission, Lord Denning stated (p 678):

> "a planning condition is only void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results. It is the daily task of the courts to resolve ambiguities of language and to choose between them; and to construe words so as to avoid absurdities or to put up with them. And this applies to conditions in planning permissions as well as to other documents."

It cannot be said that condition 14 has no ascertainable meaning. Indeed, TIGC accepts that it provides that the Scottish Ministers must approve the design statement before the development can commence.

28. Further, I do not accept the submission that the condition is invalid because of any uncertainty as to what amounts to compliance with its terms. What will amount to compliance with the design statement will depend on (a) its terms and (b) the way in which the Scottish Ministers incorporate its requirements into the

construction method statement, which is the subject of condition 13, to which I now turn.

29. When one construes the conditions as a whole, it is clear that the consent contains a mechanism that can enable the Scottish Ministers to enforce compliance with the condition 14 design statement in the construction of the development. First, condition 13 provides (so far as relevant):

> "Prior to the Commencement of Development a Construction Method Statement ('CMS') must be submitted by the Company to the Scottish Ministers and approved, in writing by the Scottish Ministers, following consultation [with specified advisors including SNH]. Unless otherwise agreed in writing by the Scottish Ministers, construction of the Development must proceed in accordance with the approved CMS. The CMS must include, but not be limited to, information on the following matters:
>
> (a) Commencement dates;
>
> (b) Working methods …; and
>
> (g) Design Statement.
>
> The CMS must be cross referenced with the Project Environmental Management Plan, the Vessel Management Plan and the Navigational Safety Plan.
>
> *Reason: To ensure the appropriate construction management of the Development, taking into account mitigation measures to protect the environment and other users of the marine area."*

It is thus open to the Scottish Ministers to require AOWFL to include in the CMS a statement as to how it would implement the design statement. The condition refers to information on the design statement. That can include information on how the method of construction will comply with it, which, once the CMS is approved, becomes obligatory. Further, the listed matters are not exclusive as the condition says that the CMS "must include, but not be limited to" the listed topics. The Scottish Ministers, after consulting SNH amongst others, can require other relevant matters which mitigate environmental impact to be included within the CMS

before they approve it. Thus condition 14 can be enforced by the use of the powers which the Scottish Ministers possess in condition 13.

30. Secondly, further support for the view that the conditions envisaged that the developer would be required to comply with the design statement can be found in condition 24, which requires AOWFL to submit for approval a vessel management plan to minimise disturbance to marine mammals and birds. As mentioned above, the condition requires that the development must be constructed and operated in accordance with the vessel management plan. It also provides that the vessel management plan must be cross-referenced with, amongst others, the CMS and the design statement. Thus, when one reads condition 14 in the context of conditions 13 and 24 it is clear that the conditions envisaged that the Scottish Ministers could use both the CMS and the design statement to regulate the detailed design of the windfarm in the interests of environmental protection and require those constructing the generating station to comply with those statements.

31. It is not therefore necessary to consider whether one can imply into condition 14 an obligation that the construction of the development must be in accordance with the design statement. But as it is an important point which Mr Campbell raises in his submissions, and as Lord Carnwath has discussed the matter more fully in his judgment, I will deal with it briefly.

32. Mr Campbell submits that the court should follow the approach which Sullivan J adopted to planning conditions in *Sevenoaks District Council v First Secretary of State* [2005] 1 P & CR 13 and hold that there is no room for implying into condition 14 a further obligation that the developer must construct the development in accordance with the design statement. In agreement with Lord Carnwath, I am not persuaded that there is a complete bar on implying terms into the conditions in planning permissions, and I do not see the case law on planning conditions under planning legislation as directly applicable to conditions under the 1989 Act because of the different wording of the 1989 Act.

33. Whether words are to be implied into a document depends on the interpretation of the words which the author or authors have used. The first question therefore is how to interpret the express words, in this case the section 36 consent. There is a modern tendency in the law to break down divisions in the rules on the interpretation of different kinds of document, both private and public, and to look for more general rules on how to ascertain the meaning of words. In particular, there has been a harmonisation of the interpretation of contracts, unilateral notices, patents and also testamentary documents. This can be seen, for example, in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 per Lord Clarke at paras 14 to 23 (contracts), *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 per Lord Steyn at pp 770C-771D and Lord Hoffmann at pp

779H-780F (unilateral notices), *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667, per Lord Hoffmann at paras 27 to 35 (patents), and *Marley v Rawlings* [2015] AC 129, per Lord Neuberger at paras 18-23 (testamentary documents). Differences in the nature of documents will influence the extent to which the court may look at the factual background to assist interpretation. Thus third parties may have an interest in a public document, such as a planning permission or a consent under section 36 of the 1989 Act, in contrast with many contracts. As a result, the shared knowledge of the applicant for permission and the drafter of the condition does not have the relevance to the process of interpretation that the shared knowledge of parties to a contract, in which there may be no third party interest, has. There is only limited scope for the use of extrinsic material in the interpretation of a public document, such as a planning permission or a section 36 consent: *R v Ashford Borough Council, Ex p Shepway District Council* [1999] PLCR 12, per Keene J at pp 19C-20B; *Carter Commercial Developments Ltd v Secretary of State for Transport, Local Government and the Regions* [2002] EWCA Civ 1994, [2003] JPL 1048, per Buxton LJ at para 13, at para 27 per Arden LJ. It is also relevant to the process of interpretation that a failure to comply with a condition in a public law consent may give rise to criminal liability. In section 36(6) of the 1989 Act the construction of a generating station otherwise than in accordance with the consent is a criminal offence. This calls for clarity and precision in the drafting of conditions.

34. When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. Whether the court may also look at other documents that are connected with the application for the consent or are referred to in the consent will depend on the circumstances of the case, in particular the wording of the document that it is interpreting. Other documents may be relevant if they are incorporated into the consent by reference (as in condition 7 set out in para 38 below) or there is an ambiguity in the consent, which can be resolved, for example, by considering the application for consent.

35. Interpretation is not the same as the implication of terms. Interpretation of the words of a document is the precursor of implication. It forms the context in which the law may have to imply terms into a document, where the court concludes from its interpretation of the words used in the document that it must have been intended that the document would have a certain effect, although the words to give it that effect are absent. See the decision of the Privy Council in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 per Lord Hoffmann at paras 16 to 24 as explained by this court in *Marks & Spencer plc v*

BNP Paribas Securities Trust Company (Jersey) Ltd [2015] UKSC 71, per Lord Neuberger at paras 22 to 30. While the court will, understandably, exercise great restraint in implying terms into public documents which have criminal sanctions, I see no principled reason for excluding implication altogether.

36. In my view assertions, such as are found in *Trustees of the Walton-on-Thames Charities v Walton and Weybridge Urban District Council* (1970) 21 P & CR 411, Salmon LJ at p 418 and Widgery LJ at p 420, and in the *Sevenoaks District Council* case (above), Sullivan J at para 45, that there can never be an implied condition in a planning permission are too absolute. To say that is not to undervalue the importance of the advice of the Secretary of State and now the Scottish Ministers in Planning Circular 4/98 that planning conditions should be precise and clear. In paragraph 29 of Annex A to the circular it is stated:

> "The framing of conditions requires great care, not least to ensure that a condition is enforceable. A condition, for example, requiring only that 'a landscaping scheme shall be submitted for the approval of the planning authority' is incomplete since, if the applicant were to submit the scheme and even obtain approval for it, but neglect to carry it out, it is unlikely that the planning authority could actually require the scheme to be implemented. In such a case, a requirement should be imposed that landscaping shall be carried out in accordance with a scheme to be approved in writing by the planning authority; and the wording of the condition must clearly require this. …"

Subject to the observation that, in view of the decision in this case, the second sentence of the advice may overstate the difficulty which the planning authority might face in requiring the implementation of an approved scheme, this and the almost identical advice in the earlier Circular 11/95, paragraph 30 in respect of England and Wales remain good advice as a planning authority which follows the advice can avoid unnecessary and possibly difficult disputes about whether terms can be implied into a condition.

37. If condition 13 had not provided that the CMS was to contain information about the design statement but, like condition 24, had required only cross-references to it, I, on applying the approach to interpretation set out above, would have readily drawn the inference that the conditions of the consent read as a whole required the developer to conform to the design statement in the construction of the windfarm. The combination of the obligation in condition 14 to have the design statement approved by the Scottish Ministers and what would have been the obligation to cross-refer to the design statement in statements or plans under

conditions 13 and 24, with which the Scottish Ministers could enforce compliance, would point inexorably towards that conclusion. But, as I have said, it is not necessary to imply words into the consent as condition 13 gives the Scottish Ministers the vehicle to make the requirement explicit.

38. Finally, Mr Campbell argues that the power conferred on the Scottish Ministers to alter the terms of the CMS in condition 13 (ie "Unless otherwise agreed in writing by the Scottish Ministers …") invalidated the condition as it rendered the design and layout of the development uncertain. He argues also that condition 7 suffers from a similar defect. Condition 7 provides:

> "The Development must be constructed and operated in accordance with the terms of the Application and the accompanying Environmental Statement and the Supplementary Environmental Information Statement, except in so far as amended by the terms of the section 36 consent and any direction made by the Scottish Ministers." (Emphasis added)
>
> *Reason: To ensure that the Development is carried out in accordance with the application documentation.*"

In support of that contention he refers to two cases, *Midcounties Co-operative Ltd v Wyre Forest District Council* [2009] EWHC 964 (Admin) and *Hubert v Carmarthenshire County Council* [2015] EWHC 2327 (Admin).

39. I consider that his contention is unsound. The flexibility conferred on the Scottish Ministers in each of those conditions to modify the way in which the windfarm is constructed and operated does not enable them to alter the nature of the approved development. As I have said, the maximum size and the maximum number of the turbines and their locations are set out in Annex 1 and Figure 1 of the consent, which define the development. The two cases to which Mr Campbell refers can be distinguished on that basis. The parties agreed that the reference in condition 7 to a "direction" made by the Scottish Ministers was a reference to a lawful direction made under a statutory power, for example under section 96 of the 1989 Act. Such a direction likewise may affect the manner in which the windfarm is constructed or operated, but it cannot alter the definition of the development itself.

Conclusion

40. For these reasons, I would dismiss the appeal.

LORD MANCE:

41. I agree with the judgment prepared by Lord Hodge and agree therefore that the appeal should be dismissed. But I add some words with regard to the process of implication on which Lord Hodge touches in para 35 of his judgment by reference to the Privy Council's advice in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 per Lord Hoffmann at paras 16 to 24 as explained by this court in *Marks & Spencer plc v BNP Paribas Securities Trust Company (Jersey) Ltd* [2015] UKSC 72 per Lord Neuberger at paras 22 to 30.

42. As Lord Neuberger indicates in para 23 in *Marks & Spencer*, whether an implication is necessary to give business efficacy must be judged objectively, in the light of the provisions of the contract as a whole and the surrounding circumstances at the time when the contract is made. But I would not encourage advocates or courts to adopt too rigid or sequential an approach to the processes of consideration of the express terms and of consideration of the possibility of an implication. Without derogating from the requirement to construe any contract as a whole, particular provisions of a contract may I think give rise to a necessary implication, which, once recognised, will itself throw light on the scope and meaning of other express provisions of the contract.

43. This applies whether one is concerned, as in this case, with a public document in the interpretation of which there is, as Lord Hodge notes in para 33, limited scope for the use of extrinsic material or with, for example, a commercial contract, where the overall aim is to give effect to the parties' assumed intentions, objectively assessed by reference to the contractual language they used understood against the background of their wider relationship and the circumstances of which both must be taken to have been aware when contracting.

44. In the light of the above at least, it appears to me helpful to recognise that, in a broad sense as Lord Neuberger and Lord Clarke recognise in *Marks & Spencer* at paras 26 and 76, the processes of consideration of express terms and of the possibility that an implication exists are all part of an overall, and potentially iterative, process of objective construction of the contract as a whole.

LORD CARNWATH:

45. I agree that the appeal should be dismissed for the reasons given by Lord Hodge. I add a comment on the planning cases which have been relied on in support of the appellants' strict interpretation of condition 14. These cases, in particular the first *Sevenoaks District Council v First Secretary of State* [2005] 1 P & CR 13), are said by Mr Campbell QC for the appellants to support the submission that it is not possible by implication to add to the condition a requirement that the development be completed in accordance with the approved design statement. For reasons I will explain at the end of this judgment, I do not regard the planning cases as of much assistance in relation to the issue before us, which is in a different statutory context. However, since they have been said to disclose a degree of "tension" between competing principles of interpretation, some guidance from this court may be of value.

The planning cases

46. The three cases are:

(i) *Sevenoaks District Council v First Secretary of State* [2005] 1 P & CR 13;

(ii) *Hulme v Secretary of State for Communities and Local Government* [2011] EWCA Civ 638;

(iii) *Telford and Wrekin Council v Secretary of State for Communities and Local Government* [2013] EWHC 79 (Admin).

47. All three were concerned with what might be termed "incomplete" conditions, in that they required approval of certain matters in relation to the development in question, without fully stating the consequences. A similar defect is said to affect condition 14 in the present case. It is convenient to start with a brief summary of each case, to explain how the "incompleteness" arose and how it was resolved, before discussing the principles of law which they are said to establish or illustrate.

48. In *Sevenoaks* the claimant had been granted outline planning permission for the construction of a 27-hole golf course. It was subject to a condition 12:

> "Prior to the commencement of the development hereby permitted details of all proposed engineering works associated with the laying out of golf courses including the creation of greens, bunkers, tees, ponds or lakes shall be submitted to and approved in writing by the district planning authority."

There was nothing in terms to require completion of those engineering works in accordance with the approved details. By contrast condition 8, dealing with details of means of access, expressly required completion in accordance with the approved details. Parts of the engineering works as constructed did not comply with the approved details under condition 12. The authority served an enforcement notice alleging breach of the condition. Sullivan J upheld the planning inspector's decision to allow an appeal against the notice, on the basis that the condition was unambiguously directed to submission of the details only, and not to their implementation. This authority is relied on by the appellants as providing a direct parallel with the present case, which has not been displaced by the later authorities.

49. In *Hulme* permission had been granted for a windfarm, subject to a complex group of conditions, designed to mitigate noise, including (as it was described) "blade swish". Condition 20 required the operator, in the event of a complaint from a local resident, to employ a consultant to assess whether the noise emissions at that dwelling exceeded the expected levels, by reference to levels specified in the condition. The condition was obscurely drafted, and failed to indicate clearly what was to happen next. However, having regard to its obvious purpose and to the scheme of the conditions as a whole, Elias LJ was able to interpret it as imposing an obligation, running for the duration of the permission, to comply with the specified levels, subject to enforcement by the planning authority in the normal way (para 38). He distinguished but did not overrule the decision in *Sevenoaks*.

50. In *Telford* permission had been granted for use of a building as a garden centre subject to a condition in these terms:

> "prior to the garden centre hereby approved opening, details of the proposed types of products to be sold should be submitted to and agreed in writing by the local planning authority."

51. It was accepted that use as a garden centre was a retail use within Use Class A1, and that apart from the condition it could have been used without permission for any other use within that class. On an application for a certificate of lawful use to that effect, it was held by the planning inspector that the condition was insufficiently clear to exclude the rights otherwise available under the Use Classes

Order. Beatson LJ, sitting in the Administrative Court, refused leave to appeal against that decision. He detected what he described, at para 32, as "a degree of tension" between the approaches in the two previous cases:

> "The *Sevenoaks* case involved a condition that was considered clear and without ambiguity. Sullivan J emphasised the need for clarity and certainty on the face of the condition, in particular because a planning permission is a public document which is likely to affect third party rights and the wider public and on which they are entitled to rely, and because breach of a condition may ultimately have criminal consequences. *Hulme's* case appears to take a less strict approach in the context of words in a condition Elias LJ (at para 31) described as 'particularly opaque'…."

The Hulme "principles"

52. In both *Hulme* and *Telford* the court attempted to enunciate lists of principles said to be derived from the relevant authorities. In the first, Elias LJ set out four principles, by reference to three decided cases, one at first instance, one in the Court of Appeal and one in the House of Lords. In *Telford*, Beatson LJ managed with the assistance of the very experienced counsel before him to extract no fewer than nine principles, derived from a dozen or so authorities at different levels of the judicial hierarchy.

53. With respect to them both I see dangers in an approach which may lead to the impression that there is a special set of rules applying to planning conditions, as compared to other legal documents, or that the process is one of great complexity. Beatson LJ was faced with an apparent conflict between the approaches in *Sevenoaks* and *Hulme* which needed to be resolved, and I have no difficulty with his conclusion on the facts of the case before him. However, most of the judgments cited in support of his nine principles, many at first instance, turned on their own facts, and cannot be relied on as establishing any more general rules.

54. It may be useful to comment in more detail on Elias LJ's summary of the "relevant legal principles", and their relationship to the decision in *Sevenoaks* which is most directly relevant to the present case. They were said by him to be not in dispute (para 13), from which I infer that he may have been reproducing a summary provided by counsel without further discussion or examination of the authorities referred to. The principles were stated by him, at para 13, as follows:

> "a) The conditions must be construed in the context of the decision letter as a whole.
>
> b) The conditions should be interpreted benevolently and not narrowly or strictly: see *Carter Commercial Development Ltd v Secretary of State for the Environment* [2002] EWHC 1200 (Admin), para 49 per Sullivan J, as he was.
>
> c) A condition will be void for uncertainty only 'if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results' per Lord Denning in *Fawcett Properties Ltd v Buckingham County Council* [1961] AC 636, 678. This seems to me to be an application of the benevolent construction principle.
>
> d) There is no room for an implied condition (although for reasons I discuss more fully below, the scope of this principle needs careful analysis). This principle was enunciated by Widgery LJ, as he then was, in *Trustees of Walton on Thames Charities v Walton and Weighbridge District Council* (1970) 21 P & CR 411, 420 in the following terms:
>
> > 'I have never heard of an implied condition in a planning permission, and I believe that no such creature exists. Planning permission enures for the benefit of the land. It is not simply a matter of contract between the parties. There is no place, in my judgment, within the law relating to planning permission for an implied condition. Conditions should be express; they should be clear; they should be in the document containing the permission.'"

55. Principle (a) is of course uncontroversial but not peculiar to planning permissions. Principle (b) requires a little more comment, as does the citation. "Benevolence" is not a very helpful concept, since benevolence to one party may have the opposite effect on his opponent. But it is equally uncontroversial, if it means no more than that, as with any other legal document, incompetent drafting should not prevent the court from giving the condition a sensible meaning if at all possible.

56. On the other hand, I suspect Sullivan J himself might have been surprised to find that principle supported by reference to his own judgment at first instance from 2002. The case went to the Court of Appeal ([2002] EWCA Civ 1994), which upheld his decision but did not refer to this aspect of the judgment (see further below). In fact that same principle is supported by one of the earliest Court of Appeal decisions under the Town and Country Planning Act 1947: *Crisp from the Fens Ltd v Rutland County Council* (1950) 1 P & CR 48, 59.

57. In that case a permission granted for a change of use of a building to use for making potato crisps was subject to a condition confining its use to that of "the manufacture of potato crisps or any use within class III of [the Use Classes Order]". The stated reason was "to ensure that the building shall not be used for general industrial purposes" which would be detrimental to the amenity of the locality. The relevant Use Classes Order distinguished between use as a light industrial building (class III) and as a general industrial building (class IV); the former being defined by reference to whether the processes could be carried on in any residential area without detriment to its amenity by reason of noise, smell, fumes or smoke. It was held that, notwithstanding the unqualified reference in the condition to use for manufacture of potato crisps, the word "other" should be read into the second part of the condition ("or any *other* use …"), with the effect that class III constraints should be read as applying to both parts of the condition. The court relied in particular on the clear intention, expressed in the reason, to protect the local amenities by excluding general industrial use: see p 54, per Bucknill LJ. As he put it, the court should "have regard to the common sense of the transaction, and to the real intention and meaning of the parties rather than criticise minutely the precise words used" (p 55). Denning LJ added: "It is a case where strict adherence to the letter would involve an error of substance" (p 59).

58. The same approach was reflected in the words, again of Lord Denning, from *Fawcett Properties Ltd v Buckingham County Council* [1961] AC 636, 678, cited in support of Elias LJ's third principle, again in itself uncontroversial. However, it is also clear from the context that Lord Denning was not enunciating some principle special to planning conditions, as compared to other forms of legal document - rather the contrary. In the previous paragraph he had been considering suggested comparisons with documents such as contracts or wills. Following the passage quoted by Elias LJ, he commented:

> "It is the daily task of the courts to resolve ambiguities of language and to choose between them; and to construe words so as to avoid absurdities or to put up with them. And this applies to conditions in planning permissions *as well as to other documents*." (p 678 emphasis added)

59. I have more difficulty with Elias LJ's fourth principle, not least because it reflects a strictness of approach apparently at odds with his two previous principles. The case cited in support (*Walton*) arose in a very esoteric and now obsolete legal context: that of so-called "third schedule development" (under Schedule 3 to the Town and Country Planning Act 1962, as applied by section 15(3) of the Land Compensation Act 1961). Elias LJ explained the issue later in his judgment in *Hulme* (paras 36-37):

> "That case concerned the assessment of compensation for the compulsory purchase of land under the Land Compensation Act 1961. The value of the compensation depended upon the value of the 'deemed' planning permission for the rebuilding of 50 'prefabs' on the land. The compensating authority contended that the value with the assumed planning permission would be nil since there was to be implied a condition that any prefabs would have to be removed within ten years. This was said to arise by virtue of a power under section 2 of the Housing (Temporary Accommodation) Act 1944 which enabled the Secretary of State to require the removal of prefabs after ten years unless housing conditions required that they should remain. The Court of Appeal unanimously held that there could be no implied condition to that effect, and Widgery LJ made the observations to which I have referred above, and on which the appellant relies."

Elias LJ contrasted the proposed implied term in that case, which "depended on reading into the planning permission an obligation which was said to arise from extrinsic circumstances", with that in the instant case which "arises as a necessary implication from the language of the express conditions when read in the context of the decision letter" (para 37).

60. I agree with that analysis, but I would go further. Widgery LJ had been a leading proponent of planning law in the early decades of the new system. However, with great respect to him, I regret the elevation of these *obiter* comments, made in a very unusual legal and factual context, to statements of general principle. He was not giving the leading judgment, and his comments went further than was necessary to decide the case. His general approach is apparent from the passage immediately preceding the words quoted:

> "The courts have said on many occasions that it is only fair to a landowner that conditions attaching to planning permissions should be clear and explicit. Their effect is to work a

> forfeiture, and they have to be judged by the court's strict rules, like any other forfeiture." (p 420)

That reflects a view, not uncommon at the time, of planning control as an interference with property rights requiring to be kept within narrow limits. It is not consistent with the modern approach, nor indeed with that of earlier cases such as *Crisp from the Fens* and *Fawcett.* There is no reason in my view to exclude implication as a technique of interpretation, where justified in accordance with the familiar, albeit restrictive, principles applied to other legal documents. In this respect planning permissions are not in a special category.

Sevenoaks

61. There are indications that such an exclusionary rule was the basis of Sullivan J's reasoning in *Sevenoaks*. To that extent, he was in my respectful view mistaken. The inspector had recorded the appellant's case as resting on the proposition that they did what the condition required of them and could not by implication be required to do more: "Words cannot be introduced later to give a condition efficacy. That is a contractual not a public law concept" (judgment, para 10). The substance of that submission seems to have been accepted by Sullivan J.

62. Having cited the statement by Widgery LJ in *Walton* he noted the authority's attempt to distinguish the case, on the basis that it involved the implication of an additional condition, rather than the implication of an additional obligation to a condition already in the permission. That he said, was "a distinction without a difference", adding:

> "If conditions are to be included in a public document such as a planning permission, they should be clearly and expressly imposed, so that they are plain for all to read. There is no room for implication." (para 45)

63. For the reasons I have given, I consider that was too widely stated, and he was wrong to find support in *Walton.* His approach to the issue of implication was in my view also inconsistent with the reasoning of the Court of Appeal in *Crisp from the Fens*, which he had cited earlier in the judgment (para 19). That decision had been relied on by counsel to support the proposition that it was possible to imply words into a condition "if it was necessary to do so in order to enable the condition to achieve its purpose" (para 23). Sullivan J distinguished it on the basis that the condition in that case had been found to be ambiguous, unlike his view of the condition before him. He also noted the Court of Appeal's references to the

"intention of the parties", made, he said, at a time when the 1947 Act was a "novel Act". He added:

> "We no longer consider it appropriate to examine the intentions of the applicant and the local planning authority. … The question is: what was permitted by the local planning authority? The answer to that question is to be found by construing in a common sense way the planning permission together with such other documentary evidence as may be admissible: see per Arden LJ in *Carter* paras 27 and 28." (para 38).

64. I have no difficulty with the approach stated in the second part of that passage, which is entirely consistent with that of the Court of Appeal in 1950. It is true that at the end of his judgment, Bucknill LJ noted that it was a "novel Act" (p 55), but, as I read it, rather by way of explanation of the authority's failure, than as a necessary part of his reasoning. Denning LJ himself emphasised the importance in general of such a condition being expressed "in plain language so that any layman can understand it …", but here the terms of "the condition and, particularly, the reasons for it" left no doubt as to its meaning (p 59). The intention of the authority was apparent, not from extrinsic evidence, but from the terms of the document itself. It was that which enabled words to be added by implication to the terms of the condition.

65. Before leaving this subject I should add one comment on the judgment of Arden LJ in *Carter Commercial* (cited by Sullivan J in the passage quoted above). At the outset of her concurring judgment she said:

> "27. I start from the position that this planning permission is not to be construed like a commercial document, but is to be given the meaning that a reasonable reader would give to it, having available to him only the permission, the variation, the application form and the Lewin Fryer report referred to in condition 4 in the planning permission itself. …
>
> 28. The reasonable reader for this purpose is to be contrasted with, for instance, the testator into whose armchair the court is enjoined to place itself in order to construe a will, or the position of parties to a commercial contract from whose standpoint the court will construe a commercial contract having regard to all the background information reasonably

> available to them. This is a public document, to which very different principles apply."

She cited the judgment of Keene J (as he then was) in *R v Ashford Borough Council, Ex p Shepway District Council* [1999] PLCR 12, as indicating the "very strict limitations on the extrinsic material that can be used in construing an application, including a permission …"

66. I do not question the decision of the court in that case, or the reasoning on which it was based. As will have become apparent, however, and in agreement also with Lord Hodge, I do not think it is right to regard the process of interpreting a planning permission as differing materially from that appropriate to other legal documents. As has been seen, that was not how it was regarded by Lord Denning in *Fawcett.* Any such document of course must be interpreted in its particular legal and factual context. One aspect of that context is that a planning permission is a public document which may be relied on by parties unrelated to those originally involved. (Similar considerations may apply to other forms of legal document, for example leases which may need to be interpreted many years, or decades, after the original parties have disappeared or ceased to have any interest.) It must also be borne in mind that planning conditions may be used to support criminal proceedings. Those are good reasons for a relatively cautious approach, for example in the well-established rules limiting the categories of documents which may be used in interpreting a planning permission (helpfully summarised in the judgment of Keene J in the *Shepway* case at pp 19-20). But such considerations arise from the legal framework within which planning permissions are granted. They do not require the adoption of a completely different approach to their interpretation.

The statutory contexts compared

67. As I have indicated I do not in any event regard the English planning cases as providing much assistance to the resolution of the issue before us. There are important differences between the two statutory schemes in respect of non-compliance and its consequences.

68. The scheme of the Town and Country Planning Act 1990 (as of the Town and Country Planning (Scotland) Act 1997, which in this respect follows the English statute), as respects enforcement, is relatively complex. Section 57 provides that "planning permission is required for the carrying out of any development of land". It says nothing of the consequences of non-compliance, nor is it made an offence. Enforcement is covered by a different group of sections (Part VII). "[B]reach of planning control" is defined as either (a) carrying out

development without the required planning permission; or (b) failing to comply with any condition or limitation subject to which planning permission has been granted (section 171A(1)). Enforcement may be by means of an enforcement notice, which is required to state "the paragraph of section 171A(1) within which, in the opinion of the authority, the breach falls": section 173(1)(b) (a requirement relied on by the inspector, and noted by Sullivan J, in the *Sevenoaks* case: para 18). An alternative, in the case of contravention of a condition, is a "breach of condition notice" (section 187A). An offence is committed by non-compliance with a confirmed enforcement notice (section 179), or a breach of condition notice (section 187A(9)). There is also specific provision for the planning authority to apply to the court for an injunction (or, in the Scottish Act, section 146, interdict) to restrain an apprehended breach of planning control as so defined (section 187B).

69. The scheme of the Electricity Act 1989 is much simpler. Section 36(1) provides that a generating station "shall not be constructed, extended or operated except in accordance with a consent granted by the Secretary of State". Such a consent may include such conditions "as appear to the Secretary of State to be appropriate" (section 36(5)). Contravention of the provisions of the section is an offence, for which proceedings can only be commenced by the Secretary of State (section 36(6)(7)). I do not read this as excluding the possibility of a civil remedy if necessary to restrain an apprehended breach, at least at the suit of the Secretary of State. It seems clear that that construction will not be "in accordance with" the consent if it does not comply with the conditions under which it was granted. By contrast with the planning scheme, no distinction is drawn for this purpose between the two forms of non-compliance.

70. The same approach would extend in my view to any matters requiring subsequent approval under the conditions, in so far as they are properly regarded as part of the consent. Thus, even disregarding condition 13 (on which I agree with Lord Hodge), I see no reason why the requirement to construct "in accordance with" the consent should not include compliance with the terms of the condition 14 "design statement". By condition 14 the design statement must be submitted to the Scottish Ministers "for their written approval", and it must "provide guiding principles for the deployment of the wind turbines", including such matters as layout location and detailed assessment of visual impacts. Although it does not in terms provide that development must be constructed in accordance with the design statement, such a requirement must as a matter of common sense be implicit, since otherwise the statement would have no practical purpose.

71. For these reasons, in addition to those given by Lord Hodge, I would dismiss the appeal.