16 December 2015

PRESS SUMMARY

Trump International Golf Club Scotland Limited and another (Appellants) v The Scottish Ministers (Respondents) (Scotland) [2015] UKSC 74
On appeal from [2015] CSIH 46

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Reed, Lord Carnwath and Lord Hodge

BACKGROUND TO THE APPEAL

Trump International Golf Club Scotland Ltd ("TIGC") has developed a golf resort at Menie Estate and Menie Links, Balmedie, Aberdeenshire. In 2011, Aberdeen Offshore Wind Farm Ltd applied for consent under s.36 of the Electricity Act 1989 ("the 1989 Act") to construct and operate the European Offshore Wind Deployment Centre in Aberdeen Bay. The application concerned the construction of up to 11 wind turbines, which might be of different sizes, with a maximum power generation of 100 MW. The proposed windfarm would be located about 3.5km from the golf resort and would be seen by people at the resort. TIGC opposed the application. In March 2013, the Scottish Ministers granted consent ("the Consent") for the development and operation of the windfarm subject to conditions. TIGC challenged the Consent on various grounds in the Scottish courts without success [**1**].

TIGC appealed to the Supreme Court on two remaining grounds, arguing that the Consent should be quashed: (a) because the Scottish Ministers had no power under the 1989 Act to grant consent to the windfarm application as only the holder of a licence to generate, transmit, or supply electricity granted under s.6, or a person exempted under s.5 from holding such a licence may apply under s.36 ("the Section 36 Challenge"); and (b) because condition 14 of the Consent, which requires the submission and approval of a design statement, is void for uncertainty ("the Condition 14 Challenge") [**2**].

JUDGMENT

The Supreme Court unanimously dismisses the appeal by TIGC. The leading judgment is given by Lord Hodge, with whom Lord Neuberger, Lord Mance, Lord Reed and Lord Carnwath agree. Lord Mance and Lord Carnwath each give concurring judgments.

REASONS FOR THE JUDGMENT

Section 36 Challenge

TIGC's Section 36 Challenge is rejected. It is not supported by the structure and language of the 1989 Act [**8**-**13**]. Further, there is nothing in the policy background to the 1989 Act which requires the Court to take a different view of the statutory provisions. There are five reasons for this [**14**]:

(1) The 1989 Act aimed to liberalise the British electricity market by privatisation. The policy did not address who would construct generating stations, and it was not a necessary part of the policy that the persons who built generating stations would also be the persons generating the electricity [**15**].
(2) The 1989 Act contains two separate regulatory regimes: (a) one for the construction of generation stations and overhead lines, and (b) one for the licensing of electricity supply, including generation. Since devolution, there have been separate regulators for those activities in Scotland [**16**].

(3) Parliament did not create a regulatory gap by allowing persons who are not subject to environmental duties under para 3(1) of Schedule 9 to apply for construction consents under s.36. The Scottish Ministers have a duty when considering a s.36 application to have regard to environmental matters, and wide powers to impose conditions to protect the environment [**17**].
(4) There is no need to require a s.36 applicant to hold in advance a generating licence or exemption, as the Scottish Ministers may (pursuant to s.36(5)) include appropriate conditions in a consent [**18**].
(5) It is established practice in both British jurisdictions for commercial organisations to apply for and obtain s.36 consents before they seek a licence to generate electricity, or an exemption [**19**].

Condition 14 Challenge

The short answer to this challenge is that, even if condition 14 were unenforceable, the Consent would not be invalidated. Condition 7 requires that the development be constructed in accordance with the supplemental environmental information statement ("SEIS") which covers important elements of the benefits promoted by condition 14, and the Scottish Ministers can insist on compliance with the SEIS. Further, the scope of the development is defined by Annex 1 of the Consent and the SEIS specifies the maximum size and location of the turbines. Condition 14 is not therefore a fundamental condition determining the scope and nature of the development which, if invalid, would invalidate the Consent [**24-26**].

Even if condition 14 could not be enforced, a planning condition is only void for uncertainty if it can be given no sensible or ascertainable meaning. This cannot be said for condition 14, which provides that the Scottish Ministers must approve the design statement before the development can begin [**27**]. Further, condition 14 is not invalid owing to any uncertainty as to what amounts to compliance with its terms. Construing the conditions as a whole (in particular conditions 13 and 24), it is clear that the Consent contains a mechanism enabling the Scottish Ministers to use both the construction method statement and the design statement to regulate the design of the windfarm in the interests of environmental protection, and to require compliance with those statements [**28-30**].

Given those conclusions, it is unnecessary to consider whether terms could be implied into the Consent [**31**]. Had it been necessary, however, an inference would have been drawn that the Consent read as a whole required the developer to conform to the design statement [**37**]. There is not a complete bar on implying terms into planning permissions, and the planning legislation cases relied on by TIGC which suggest otherwise are not directly applicable to conditions under the 1989 Act given the different statutory language [**32**]. Whether words are implied into a document depends on the interpretation of the express words and, while restraint is required when implying terms into public documents with criminal sanctions, there is no reason for excluding implication altogether [**33-36**].

Finally, the flexibility conferred on the Scottish Ministers in conditions 7 and 13 to modify the way in which the windfarm is constructed and operated does not invalidate those conditions, as the Scottish Ministers are not able to alter the nature of the approved development [**38-39**].

Lord Mance provides some comments on the process of implication of terms [**41-44**]. Lord Carnwath agrees that the planning cases do not assist in this appeal, given the differences between the statutory schemes [**67-70**], but he provides some guidance on the principles of interpretation derived from them [**45**]. He considers that the process of interpreting a planning permission does not differ materially from that appropriate to other legal documents and that there is no reason to exclude implication as a technique of interpretation where it is justified [**46-66**].

References in square brackets are to paragraphs in the judgment

NOTE
This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
http://supremecourt.uk/decided-cases/index.html