Neutral Citation Number: [2011] EWCA Civ 638

Case No: C1/2010/2166/QBACF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION ADMINISTRATIVE COURT
MS FRANCES PATTERSON QC sitting as a Deputy High Court Judge
[2010] EWHC 2386 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/05/2011

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE ELIAS
and
LORD JUSTICE PATTEN

- -

Between :

MICHAEL WILLIAM HULME	**Appellant**
- and -	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**First Respondent**
- and –	
RES DEVELOPMENTS LIMITED	**Second Respondent**

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- -

Mr Reuben Taylor (instructed by **Messrs Richard Buxton**) for the **Appellant**
Ms Lisa Busch (instructed by **Treasury Solicitor**) for the **First Respondent**
Mr Gordon Nardell QC (instructed by **Messrs Eversheds**) for the **Second Respondent**

Hearing date : 8 March 2011

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Approved Judgment

Lord Justice Elias :

1. This appeal concerns the grant of planning permission to the second respondent, RES Developments Ltd, for a nine-turbine wind farm at Den Brook near Tawton, Devon, to be operated for 25 years. More specifically, the development involves planning permission for nine three-bladed horizontal access wind turbines, electricity transformers, access tracks, train hardstandings, a control building, a sub-station, a meteorological mast, and a temporary construction compound.

2. There is a chequered history behind this appeal. The application for planning permission was made as long ago as November 2005. The Council refused permission but there was an appeal and following an inquiry, the inspector allowed the appeal and granted the permission.

3. The appellant owns land near the appeal site. He was a supporter of the Den Brook Judicial Review Group ("DBRJG") which had rule 6 status for the purposes of the inquiry. He lodged an application under section 288 of the Town and Country Planning Act 1990 for an order quashing the decision. He failed at first instance but Lord Justice Laws granted permission to appeal and thereafter the appeal was allowed by consent and the permission quashed.

4. This led to a fresh inquiry which sat for 13 days, beginning on 23 July 2009 and concluding on 13 October. Again, a different Inspector allowed the appeal and granted planning permission.

5. This caused the appellant to lodge a second section 288 application. There were originally ten grounds on which it was said that the inspector had erred in law. Nine of them were pursued before Ms Patterson QC, sitting as a Deputy High Court judge. In a careful and detailed judgment, to which I would pay tribute, she rejected them all and so dismissed the application.

6. The appellant sought to appeal to this court on six grounds, five of which were rejected by Lord Justice Sullivan, two after a renewed oral hearing. He did, however, consider that there was an arguable error of law with respect to one aspect of the Inspector's decision only. The alleged error relates to the imposition of two conditions, conditions 20 and 21, which were designed to deal with the potential impact of noise resulting from the rotation of the turbines. There are two main types of noise from a wind turbine, mechanical noise from the gearbox, generator, etc. and aerodynamic noise caused by passage of air over the wind turbine blades. The aerodynamic noise is amplitude modulated ("AM") i.e. its volume rises and falls as the turbine blades rotate. The noise is sometimes described as "blade swish". The evidence before the inquiry, accepted by the inspector, was that if this is excessive it can interfere with the amenity of local residents and in particular can disturb sleep. The principal question in this appeal is whether the conditions as drafted are capable of achieving the objective of preventing inappropriate aerodynamic noise levels which they were designed to secure.

The archaeology of the conditions.

7. There was a dispute between the parties as to whether it was necessary to impose any conditions at all relating to the blade swish noise. The developer submitted, inter

alia, that the problem was too rare to justify any condition. Furthermore, they noted that a particular form of turbine, namely Repower MM82, was allegedly associated with high noise levels, yet it was not proposed to use this type of turbine. However, as the inspector pointed out, there was no undertaking that it would not be used. The inspector concluded that whilst it is difficult to predict the relevant noise levels, there was a risk of unacceptably high levels (para DL117):

> "On the basis of the evidence I have received, I conclude that the possibility of greater than the expected impact from AM would be possible. In circumstances where the result of unforeseen consequences is sleep disturbance, I am in no doubt that in the event of the appeal succeeding, a condition to regulate the phenomenon is both necessary and reasonable."

8. He returned to the issue at paragraphs DL182-184 in the following terms:

> "The appellant objects in principle to the inclusion of a condition designed to regulate AM on the grounds that excessive AM is rare; stable atmospheric conditions are rare at the appeal site; it is not recommended in ETSU-R-97; and there is insufficient knowledge to achieve the necessary balance between the preservation of amenity without causing profound damage to the UK wind industry.
>
> In my opinion these misgivings are either overstated or misleading. I do not see that the rarity of the circumstance constitutes a valid reason to object to such a condition. If it is unlikely, then it is equally unlikely that it would be necessary to enforce the condition. On the basis of the evidence I have heard I am satisfied that the phenomenon is not fully taken into account in ETSR-R-97 and the condition imposed is of a precautionary nature. … [I]n my opinion the imposition of conditions is both necessary and reasonable.
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> The appellant complains that the condition drafted by DBJRG contains subjective elements, but I cannot see this. I fear the psycho-acoustic approach suggested by the appellant would be likely to be significantly more subjective. The possibility of a penalty approach is suggested similar to that included in ETSU-R-97 for a tonal component and as cited in Note 3. However, I have received no details of an appropriate sliding scale. I do accept nevertheless that the proposed condition would benefit from redrafting in order to clarify its content and purpose. I have amended it to this effect."

9. The reference to ETSU-R-97 is a reference to a document which sets out a method of assessing and rating noise for wind farms. It was devised by a Noise Working Group of experts and interested parties set up in 1995 by the then Department of Trade and Industry through a body called the Energy Technology Support Unit

("ETSU"). It has been incorporated into PPS 22 which sets out the government's policies on renewable energy.

10. It is relevant to note that the basis of the AM conditions finally adopted by the inspector is the draft adopted by DBJRG; and that although the inspector had considered the possibility of accepting, as the developers were submitting, a penalty approach as envisaged in ETSU-R-97, he was not happy with that since no details of the scale were supplied.

11. Various conditions were attached to the permission. Quite apart from conditions 20 and 21, a number of other conditions also related to the mechanical noise. Conditions 16-19 identify the permissible general noise levels and require the development of schemes designed to measure them. The noise from blade swish is then the subject of conditions 20 and 21. The two sets of noise provisions are similarly but not identically drafted. It is helpful to set out them all so that the contrast can be drawn between them. The relevant provisions (save for condition 18 which is not material) are as follows:

> "16. The rating level (as defined in the Glossary of PPG24: *Planning and Noise*) of noise immissions from the combined effects of the wind turbines (including the application of any tonal penalty), when assessed in accordance with the attached Guidance Notes, shall not exceed the values set out in the attached Tables 1 and 2 below. Noise limits for dwellings which lawfully existed at the date of this permission but not listed in the Tables attached shall be those at the nearest location listed in the Tables.
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> 17. At the request of the local planning authority following a complaint the wind farm operator shall, at its expense, employ a consultant approved by the local planning authority, to assess the level of noise emissions from the wind farm at the complainant's property following the procedures described in the attached Guidance Notes. A report of the assessment shall be provided in writing to the local planning authority within 56 days of a request under this condition unless this period is extended by the local planning authority in writing.
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> 19. No wind turbine shall generate electricity to the grid until the local planning authority, as advised by a consultant approved by the local planning authority at the expense of the operator, has approved in writing a scheme submitted by the wind farm operator providing for the measurement of noise immissions from the wind turbines The objective of the scheme (which shall be implemented as approved) shall be to evaluate compliance with condition 16 in a range of wind speeds and directions and it shall terminate when compliance with condition 16 has been demonstrated to the satisfaction of and agreed in writing by the local planning authority.

> 20. At the request of the local planning authority following the receipt of a complaint the wind farm operator shall, at its expense, employ a consultant approved by the local planning authority, to assess whether noise immissions at the complainant's dwelling are characterised by greater than expected amplitude modulation. Amplitude modulation is the modulation of the level of broadband noise emitted by a turbine at blade passing frequency. These will be deemed greater than expected if the following characteristics apply:
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> a) A change in the measured L Aeq, 125 milliseconds turbine noise level of more than 3 dB (represented as a rise and fall in sound energy levels each of more than 3 dB) occurring within a 2 second period.
>
> b) The change identified in (a) above shall not occur less than 5 times in any one minute period provided the L Aeq, 1 minute turbine sound energy level for that minute is not below 28 dB.
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> c) The changes identified in (a) and (b) above shall not occur for fewer than 6 minutes in any hour.
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> Noise immissions at the complainant's dwelling shall be measured not further than 35m from the relevant building, and not closer than within 3.5m of any reflective building or surface, or within 1.2m of the ground.
>
> 21. No wind turbine shall generate electricity to the grid until the local planning authority, as advised by a consultant approved by the local planning authority at the expense of the operator, has approved in writing a scheme submitted by the wind farm operator providing for the measurement of greater than expected amplitude modulation immissions generated by the wind turbines. The objective of the scheme (which shall be implemented as approved) shall be to evaluate compliance with condition 20 in a range of wind speeds and directions and it shall terminate when compliance with condition 20 has been demonstrated to the satisfaction of and agreed in writing by the local planning authority."

12. There are a number of points to be made about the structure of these conditions. First, it will be seen that condition 20 is in many respects a combination of conditions 16 and 17. The potentially relevant distinction, however, is that in condition 20 there is no equivalent to the statement in condition 16 that the noise levels shall not exceed the specified limits; nothing in terms states that AM levels shall not infringe the relevant limits. Second, condition 21 then mirrors with respect to AM what condition 19 requires for other kinds of noise. In each case a scheme is to be approved whose objective is to evaluate compliance with the specified standard, and in each case the scheme will terminate if and when the developer satisfies the planning authority that compliance has been established.

The relevant legal principles.

13. Before considering the parties' submissions, I will summarise certain relevant legal principles which are not in dispute and which provide the context in which the arguments were advanced:-

    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 Limited 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 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 PMCR 411 at 497, in the following terms:

> "I have never heard of an implied condition in a planning permission and I believe no such creature exists. Planning permission (inaudible) 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 expressed, they should be clear, they should be in the document containing the permission."

14. Accordingly, whilst there must be a limit to the extent to which conditions should be rewritten to save them from invalidity, if they can be given a sensible and reasonable interpretation when read in context, they should be.

The decision of the judge.

15. The arguments addressed to the judge essentially mirrored the submissions advanced before us. In summary form, the appellant's submissions were as follows. First, it is plain from the terms of the decision letter that the inspector intended to impose a mechanism to ensure that the level of AM did not exceed acceptable levels. Second, it is equally clear that without these conditions, planning permission would have been refused; the conditions go to the root of the permission. Third,

conditions 20 and 21 do not achieve that objective. Although condition 20 lays down what constitutes an excessive - described as "greater than expected" - level of AM, and condition 21 requires a system to be adopted which can evaluate and monitor this, nowhere do the conditions state that the appropriate level should not be exceeded, nor do they provide any enforcement mechanism if it is. Accordingly, the permission was given on the false premise that compliance with AM levels could properly be enforced whereas in fact they can not, and since that goes to the root of the permission, it ought to be quashed. Furthermore, condition 21 provides that the scheme may terminate in circumstances where the AM levels could well exceed the condition 20 limits.

16. The respondents accept the first two steps in the argument but reject the third. They submit that properly understood in context, the conditions do envisage an effective enforcement of acceptable AM noise levels. Their primary case advanced below was that the clear intention is that the scheme adopted under condition 21 would provide the necessary system of enforcement. Any such scheme would not necessarily have to require absolute compliance with the standards enunciated in condition 20 as a condition of the turbines continuing to operate, but the scheme would need to specify how any departure from those standards would be taken into account and dealt with. Furthermore, the scheme would have to remain in place whilst there was any possibility that condition 20 might not be met. On its proper construction, condition 21 does not entitle the planning authority to terminate the scheme otherwise.

17. The judge accepted the respondents' submissions and concluded that the conditions could be enforced so as to achieve the objective. She said this (paras 43-45):

> "43. Conditions 20 and 21 have to be read in the context of the decision letter of which they are a part. From that it is evident that the inspector regarded a condition or conditions to regulate excessive AM as fundamental to the grant of planning permission. Without such a condition or conditions he retained real concerns about the preservation of sleep on the part of the local residents when the turbines were operational, and he retained reservations about the uncertainties inherent in the forecast of AM. He rejected the appellant's argument that it was not necessary to impose such a condition as being overstated or misleading. The inspector found that the condition to deal with AM would be of a precautionary nature and was necessary and reasonable. It is clear also, in my judgment, that the inspector intended through his re-drafting to clarify the content and purpose of both conditions. He clearly envisaged that his re-draft would assist the local planning authority with enforcement, should that become necessary.
>
> 44. Condition 21 is the first condition in time to be discharged. Until the wind farm operator has a scheme submitted under condition 21 and approved in writing

by the local planning authority, he is unable to operate his wind turbines so that they generate electricity. What is an acceptable content of such a scheme is for the judgment of the local planning authority, guided by the wording of conditions 21 and 20 in the context of the preceding decision letter. Condition 21 sets out in express terms that the objective of the scheme is to evaluate compliance with condition 20 in a range of wind speeds and directions. That much is uncontentious. There remain two issues however. First, is the submitted scheme to be confined solely with the objective of compliance with acceptable levels of AM; and second, does condition 21 "fall away" as described by Mr Taylor upon the approval in writing of such a scheme? In my judgment, the objective of the scheme is to provide a method of assessment and/or evaluation of AM so as to ensure that AM is contained within acceptable levels. However, when read in the context of the preceding decision letter it is also clear that the inspector intended the scheme to provide a basis for enforcement if required so that the levels of AM measured under condition 20 did not attain the characteristics set out in that condition at A to C inclusive. It follows that, if such characteristics were identified as a result of the measurement carried out, there is nothing in condition 21 that would prevent a scheme from identifying what should be done in that eventuality. Indeed, in the context of the decision letter any scheme should do so. The fact that the condition is worded that "it shall terminate when compliance with condition 20 is demonstrated" envisages that there may be steps within the scheme to provide for that compliance. Whether that compliance is tying the noise emission levels back to condition 16 or by some other means is a matter for the local planning authority to determine in approving any scheme. With such a scheme approved the local planning authority would then have a clear and precise basis for enforcement against a wind farm operator should that be required.

45. Second, although condition 21 refers to the objective of the scheme and says that "it shall terminate" when compliance with condition 20 has been demonstrated, the words are capable of applying to either the condition, or the scheme itself, or part of the scheme. In context it is clear that the scheme is not envisaged to provide for a single complaint but to endure for the life of the planning permission. The assessment methodology may change over time so that a complaint, for example made 5 years after the

> operation of the wind farm has commenced, may need to be evaluated in relation to the then current but possibly not now anticipated scientific knowledge. Given what the inspector recorded about uncertainties at present and possible future research, it cannot be the case that the condition falls away. The approved scheme is, in those circumstances, envisaged not just to deal with an initial complaint but also with others that may occur in the future during the life of the permitted development. Any approved scheme would have to provide for further submission of appropriate evaluation measures in relation to future complaints."

18. The heart of the analysis is in paragraph 44. The judge considered that since it was plain that the inspector intended an enforcement mechanism, it must have been the intention that the scheme would be framed so as to secure that objective. Accordingly, this was a necessary element in the scheme. However, the scheme did not have to ensure that the turbines must stop if the AM exceeded acceptable levels. It could do so, but equally the scheme could treat any non-compliance as triggering a penalty which could be taken into account when considering whether the noise levels exceeded the standard set by condition 16. That is in fact the basis of a scheme which the developers have proposed.

19. Finally, the judge makes it clear in paragraph 45 that the scheme will not cease once an initial complaint has been made and the scheme approved. I confess that I do not find that particular paragraph of an otherwise admirable judgment easy to understand, and I am not sure whether the judge is accepting that there may be any circumstances when the scheme may terminate. She seems to think that the need to do so may arise if techniques for measurement improve, but if that was all that was meant there would be no purpose in linking that with the planning authority having to be satisfied that condition 20 has been complied with. What is clear is that the judge was satisfied that there would at all times during the lifetime of the permission be an effective mechanism to ensure compliance with condition 20.

The grounds of appeal.

20. Mr Taylor repeats his submission that the conditions fail to provide the proper enforcement mechanism. He identifies two independent reasons. The first is that conditions 20 and 21 provide no enforcement mechanism. Although condition 20 defines what constitutes excessive AM and identifies how and where it should be measured, it says nothing about what is to happen if the levels of noise are excessive. Condition 21 requires that a scheme is adopted to enable the measurement of the amplitude modulations so as to evaluate compliance with condition 20 and identify when they exceed the permissible level. The scheme must be approved by the LPA, and then applied as approved. But condition 21 does not envisage that the scheme should be designed to provide a mechanism for enforcement of the condition 20 standard; its purpose is simply to ensure that the relevant AMs can be properly measured to see whether they comply or not. If the measurement demonstrates AM levels exceeding that permitted by condition 20, there is nothing which can be done about it. There is no condition requiring compliance, and nothing which obliges the operator to cease its activities in those

circumstances. The scheme adopted under condition 21 could only include an enforcement mechanism by implying words into the condition, and that is contrary to the principle enunciated by Lord Justice Widgery (as he then was) in the *Trustees of Walton* case.

21. In short, the monitoring and evaluation obligation imposed by condition 21 is just that: the scheme will identify whether condition 20 is met, but if it is not, there is no sanction that can be employed against the developer. Mr Taylor relies heavily on the judgment of Sullivan J, as he then was, in *Sevenoaks District Council v The First Secretary of State* [2004] EWHC 771. In that case the claimant was granted outline planning permission for the construction of a 27-hole golf course. The planning permission was subject to a series of conditions, one of which was as follows:

> "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."

22. The reason for the imposition of the condition was stated to be:

> "in order that the council may be satisfied as to the details of the proposals in the interests of the visual amenities of the area."

23. What was striking about that particular condition, in contrast to condition 12 of the same permission which was concerned with means of access from a trunk road, was that it did not say that the engineering works had to be completed in accordance with the approved details. The engineering works subsequently carried out were not in accordance with the approved details because a number of bunds were created which were higher than the approved proposals indicated. Accordingly, two enforcement notices were issued. The question was whether the failure to comply with the approved details constituted a breach of any condition.

24. Mr Justice Sullivan held that it did not on the grounds that to impose an obligation to carry out the engineering works in accordance with the approved details would involve implying a condition, which was contrary to the principle enunciated in the *Trustees of Walton* case. In addition, the judge put some weight on the relevant circular then in force, 11/95, dealing with the use of conditions in planning permissions, which said in terms that a mere statement that a scheme requires approval does not mean that the local planning authority will be able to require the scheme to be implemented as approved unless there is a specific condition to that effect.

25. Mr Taylor says that that principle is entirely apposite here. It is not lawful to imply an obligation to keep the AM level below that enunciated in condition 20 as a condition of running the wind farm. The conditions needed to say this in terms, and the failure to do so renders condition 20 ineffective and invalidates the permission.

26. The second submission relates to the proper construction of condition 21. Mr Taylor submits that even if, contrary to his first argument, the scheme could incorporate an

enforcement mechanism, once the developer can demonstrate compliance with condition 20, as agreed in writing by the local planning authority, the scheme then ceases to operate altogether. Thereafter the principles imposed by condition 20 can be ignored without any effective remedy even if subsequently there is a complaint by a householder as envisaged by condition 20; there is no measuring or enforcement system still in place. The judge was not entitled to conclude that the scheme would remain in place throughout the lifetime of the development. That conclusion was unsustainable given the clear and unambiguous language of the condition.

27. Finally, Mr Taylor also submitted that even if the scheme could include an enforcement mechanism, it could only be on the premise that there was an obligation to secure compliance with condition 20. The scheme could not properly seek to tie the enforcement in some way to the noise levels identified in condition 16. If that were permitted it would mean that there could be a breach of condition 20 and yet no effective sanction because the penalty element might not lead to noise levels overall exceeding the level envisaged in condition 16. In other words the developer might be indifferent to the swish noise because the mechanical noise is very low.

28. Both respondents contend that the decision of the judge is correct on all these matters. The intention of the conditions was clear: it was to provide a system for dealing with the possibility that the wind farm would generate excessive levels of AM. Condition 21 was designed to ensure that the LPA would be in a position to know if the standards set in condition 20 were not met. The only proper construction of the condition, read in the context of the decision letter as a whole, is that it was intended to include an enforcement mechanism. Mr Nardell QC, counsel for the developers, contended that if that were not so, the whole exercise of defining the characteristics that amount to excessive AM and then specifying a mechanism for monitoring them would be otiose. He emphasised that the DBJRG itself envisaged that method for measuring AMs could not be precisely stated and that it would be a mistake to try and evaluate the method of assessment too precisely. Furthermore, the inspector did not find that excessive AM *would* be a problem, but merely that it *might* be, and in those circumstances he properly judged that the detail should be left to the good sense of the planning authority, rather than making the conditions too prescriptive. The judge was right to say that the scheme necessarily had to include an enforcement mechanism; that was entirely in accordance with the flexibility envisaged. If it did not do so, it would be open to legal challenge. This was not a matter of implication, but simple construction.

29. Mr Nardell also submitted that the contrast between the AM conditions 20 to 21, and the mechanical noise conditions in 16 to 19, indicated that the inspector had deliberately chosen a different mechanism for addressing the problems of the two kinds of noise. What form that mechanism would take was a matter for the local planning authority. It did not follow that the scheme had to provide that the turbines would have to cease operating if the AM levels envisaged by condition 20 were exceeded. The developers had proposed a scheme which adopted a penalty mechanism which would apply to increase the noise level under condition 16. That was wholly consistent with the purposes of the scheme.

30. As to the construction of condition 21, the respondents contended that the judge was right to conclude that it was never intended that the scheme would simply fall away once the levels of AM had been shown not to be excessive with respect to a particular complainant. The scheme would necessarily continue for the whole of the duration. In the alternative, the respondents submitted that the only circumstances where the scheme would terminate would be if the developer could show to the satisfaction of the authority that the turbines could not under any circumstances infringe the levels envisaged by condition 20. There was no obligation on the developer to take steps to satisfy the local planning authority that this was so but they were entitled to try to do so. If they did not do so then there would have to be a relevant assessment made on each occasion when a complaint had been lodged. In these circumstances no householder would be prejudiced by the cessation of the scheme. It would only cease in circumstances where it had been shown to be redundant.

Discussion.

31. I will first deal with the submission that as a matter of construction of condition 21, the scheme may be terminated in circumstances where no enforcement mechanism would thereafter be available to deal with complaints that the AM levels were too high. There is no doubt, as indeed all counsel agree, that condition 21 is not easy to interpret. The meaning of the last sentence which envisages that the scheme shall terminate when compliance with condition 20 is satisfied, is particularly opaque. I do not accept Mr Taylor's submission that it requires that the scheme has to be implemented before the turbines can operate and that if there is compliance the scheme then terminates. That would be implying a requirement which is not stated in the condition itself. Nor is it conceivable that it means that as soon as there is a particular complaint and compliance with condition 20 is satisfied, the scheme terminates there and then so that it is not available to deal with other complaints from other affected householders. That would be a bizarre and not a benevolent construction of the condition. Furthermore, if it were right then precisely the same complaint could be made about the scheme for measuring mechanical noise referred to in condition 19.

32. I have no doubt that it was never the intention that the scheme should terminate whilst there are still legitimate complaints to be assessed, and in my view condition 21 does not have to be so construed. It could mean that the scheme will terminate with respect to a particular complainant once the complaint is shown to be wrong, although I accept that the language is inapt to describe that situation. Alternatively, it could mean, as the respondents submit, that if the developers can satisfy the LPA that there could be no breach whatever the particular circumstances, then the scheme could end. I prefer that interpretation. It could in principle equally apply to the scheme adopted under condition 19.

33. That leaves the question whether it is possible to read into conditions 20 and 21 an obligation placed on the developers to comply with the requirements of condition 20. I agree that it plainly was the intention that the standard set in condition 20 could be enforced in some way. However, I do not find persuasive the respondents' submissions that the condition 21 scheme is the means of achieving that. Mr Nardell might be right to say that this would be a sensible way to deal with AM noise, but in my view it is stretching the language of condition 21 too far to construe it in that

way, even when read against the background of the decision letter as a whole. Condition 21 states in terms what the scheme is designed to do, namely to provide for the measurement of the AMs generated by the turbines and to evaluate compliance with condition 20. As Mr Taylor rightly says, nothing is said at all about what is to happen if the evaluation carried out pursuant to the scheme demonstrates non-compliance. Furthermore, the language of condition 21 is identical to that in condition 19, and I do not think that a scheme made under the latter condition could do more than provide for the method of assessing the relevant noise levels. It would not include the obligation not to contravene the standards in condition 16 since that obligation is specified in condition 16 itself.

34. I am also unpersuaded that the scheme could in any event provide for a system of enforcement which would simply allow a breach of condition 20 to be reflected by means of a penalty to be taken into account when assessing noise levels under condition 16. As Mr Taylor points out, that would permit AM levels to exceed the permitted amount without any remedy. The possibility that the obligation might be enforced in that way was raised with the inspector, but he did not adopt it nor indeed did he suggest that it was something that could be dealt with in the scheme made under condition 21. In my judgment, the clear intention was that the standard laid down in condition 20 should be met. Swish noise was seen as creating its own particular problem and in my opinion it should not be treated as an adjunct to the noise levels permitted by condition 16. Accordingly, I would construe conditions 20 and 21 as imposing an obligation on the developers to comply with condition 20.

35. A potential difficulty with this analysis, relied on by Mr Taylor, is the *Sevenoaks* case. If it is correct to treat the obligation to comply with condition 20 as an implied obligation of the kind envisaged in the *Trustees of Walton* case, then that would be impermissible. That decision is binding on this court. Without that obligation, the condition could not be enforced and the planning consent could not be sustained.

36. However, in my judgment, the construction I am adopting here does not fall foul of the *Trustees of Walton* principle. 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 fifty "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 10 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 10 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 Lord Justice Widgery made the observations to which I have referred above, and on which the appellant relies.

37. In my judgment, that is far removed from this case. The implied term relied on in *Walton* depended on reading into the planning permission an obligation which was said to arise from extrinsic circumstances. Here, in my judgment, the obligation not to contravene the standards set out in condition 20 arises as a necessary implication from the language of the express conditions when read in the context of the decision letter. Indeed, I think it is more accurate to describe it as a matter of construction

rather than implication. But even if it can be described as an implied condition, it is very different in nature from that envisaged in the *Trustees of Walton* case. I accept that this is not easy to reconcile this analysis with the *Sevenoaks* case, but that seems to have involved conditions in a planning permission which were not to be read against the background of a decision letter. In any event I am satisfied that it ought not to dictate the outcome in this case.

38. It follows that in my judgment there is an obligation on the developers to comply with the AM levels specified in condition 20 and that obligation will run for the duration of the planning permission. That obligation can be enforced by the planning authority in the normal way.

39. Accordingly, the principal ground of appeal fails, although I would accept that the enforcement mechanism does not operate through the scheme adopted under condition 21.

Lord Justice Patten:

40. I agree that the appeal should be dismissed for the reasons given by Elias LJ. There is no doubt that the relevant conditions could and should have been drafted with greater precision but, read in the context of the planning permission as a whole and against the background of the objectives set out in the inspector's report, it is clear that the intention was that the condition 20 limits should be complied with.

41. The omission of any such requirement is, I think, inconsistent with the reference in condition 21 to the purpose of the scheme being to evaluate compliance with the condition 20 standards. That pre-supposes the existence of a prior duty to comply with those standards as a term of the planning permission rather than as an obligation imposed through the medium of a condition 21 scheme.

42. There is an undoubted need for the terms of any planning conditions to be set out clearly in the permission so that the developer and the local planning authority know exactly where they stand. But that does not mean that a lack of verbal or grammatical completeness should defeat the purpose of a condition when its meaning and effect is readily comprehensible by any reasonable person reading it with knowledge of all the relevant background material. At the risk of trespassing into the very field which Widgery LJ in the *Trustees of Walton* case said was forbidden territory in this branch of the law, a limited analogy with recent developments in the law relating to the construction of contracts is helpful. I have in mind particularly what Lord Hoffmann said in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988 at paragraphs 17-18:

> "17. The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.

> 18. In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means."

43. This case seems to me to fall very much into the second of these two categories. As Elias LJ has indicated, our construction of the conditions does not really involve the addition of a new term at all. It merely recognises what the informed reader of the condition would always have understood it to mean.

Lord Justice Mummery:

44. I agree that the appeal should be dismissed for the reasons given by Elias LJ.