



Neutral Citation Number: [2021] EWHC 3170 (Admin)

Case No: CO/1638/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Swansea Civil and Family Justice Centre
Caravella House, Quay Parade, Swansea SA1 1SP

Date: 25/11/2021

Before :

HIS HONOUR JUDGE JARMAN QC

Sitting as a judge of the High Court

Between :

TIDAL LAGOON (SWANSEA BAY) PLC

- and -

**(1) SECRETARY OF STATE FOR BUSINESS
ENERGY AND INDUSTRIAL STRATEGY**

- and -

(2) WELSH MINISTERS

-and-

(3) COUNCIL OF THE CITY AND COUNTY OF SWANSEA

Claimant

Defendants

Mr Michael Humphries QC and Mr James Kon (instructed by **Asserson**) for the **claimant**
Mr Mark Westmoreland Smith (instructed by the **Government Legal Department**) for the
first defendant

Mr Emyr Jones (instructed by **Geldards LLP**) for the **second defendant**

Mr Douglas Edwards QC (instructed by the **Chief Legal Officer**) of the **third defendant**

Hearing dates: 3 November 2021

Approved Judgment

HH JUDGE JARMAN QC:

Introduction

1. In this Part 8 claim, I shall refer to the respective parties as the Company, the Secretary of State (in which I include the Secretary of State for Energy and Climate Change as formerly named), the Welsh Ministers and the Council. At the hearing before me, the Company was represented by Mr Humphries QC and Mr Kon. The Secretary of State, who granted to the Company The Swansea Bay Tidal Generating Station Order 2015 (the Order), the interpretation of which is in dispute in this case, was represented by Mr Westmoreland Smith. The Welsh Ministers, who since the Wales Act 2017 now have power to amend or revoke the Order, was represented by Mr Jones. The Council, in whose area land subject to the Order is situated and who is responsible for the discharge of requirements in the Order, was represented by Mr Edwards QC and (in writing) Mrs Graham Paul.
2. The Company seeks two declarations from the court:
 - i) That it has ‘begun’ the development for which the Order granted consent within the meaning of section 155 of the Planning Act 2008 during the period required by virtue of section 154 of the Planning Act 2008 (i.e. by 8 June 2020); and, if so
 - ii) The Order being a development consent order that has not ceased to have effect, the Company is entitled to apply to change the wording of Requirement 2 in Part 3 of Schedule 1 to that order to extend the period within which the authorised development must “commence” (as defined in Article 2 thereof).
3. There are no material disputes of fact between the parties, and they have very helpfully agreed a statement of facts pursuant to a direction dated 8 July 2021 by Holgate J. The outline of the facts below is taken from that statement. I shall refer to the Act mentioned in the first declaration as the 2008 Act (the sections set out below are sections of that act unless otherwise stated), and to the Town and County Planning Act 1990 as the 1990 Act. References to Regulations are those contained in the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015.
4. It is not in dispute that if the first declaration were granted, then the second must follow. However, each of the defendants say that the first declaration is not appropriate, as it is based upon an incorrect reading of the terms of the Order, which has the status of a statutory instrument. Its construction, therefore, is a matter of statutory interpretation and turns upon whether there is a material difference between the words ‘commence’ as used in the Order on the one hand, and ‘begun’ as used in section 154 or ‘begin’ as used in section 155 on the other. The Company says there is. Each of the defendants say there is none.

The making of the Order

5. In February 2014 the Company submitted an application to the Secretary of State for permission under section 37 of the 2008 Act to build a tidal lagoon electricity generating station across Swansea Bay. The proposal was to build a seawall from the sea bed adjacent to Swansea Docks over a length of 9.5km to form a lagoon extending some 3km into the Bay between the Rivers Tawe and Neath in order to harness tidal energy. This was to be achieved by controlling sea water going into and out of the lagoon during tidal cycles so as to power turbines which would produce up to 320MW of electricity.
6. The application was considered and examined by a panel of four inspectors of the Planning Inspectorate, on behalf of the Secretary of State, between June 2014 to March 2015. The panel, known as the examining authority, submitted a written report (the Report) to the Secretary of State in March 2015, recommending approval of the application.
7. The Report contained a draft order. That contained a definition of the word 'commence' and a requirement as to the commencement of the development, but it did not define the word 'begin.' There was no substantive discussion of these matters in the Report.
8. The recommendation of the Report was accepted, and the Order was made on 9 June 2015 to come into effect 21 days later on 30 June. Although probably nothing turns on this in the present case, it is not entirely clear why there was this gap, except that promoters of such orders usually desire a little leeway before the date when they can start the development, and hence acquire a little more time before the timescales for various requirements thereunder start running. The Order was the first of its type to grant consent for a tidal lagoon.

The relevant terms of the Order

9. The Order contains 54 Articles divided into 7 Parts. Part 1 is headed "Preliminary" and contains only 2 Articles, the first of which deals with citation and commencement of the Order and second deals with its interpretation. Article 2 (1) provides "In this Order-" and then a number of words or phrases are set out alphabetically and defined. The word 'begin' or 'begun' is not amongst them, but the word 'commence' is as follows:

"“Commence” means begin to carry out any material operation (as defined in section 56(4) of the 1990 Act) forming part of the authorised development other than operations consisting of site clearance, demolition work, investigations for the purpose of assessing ground conditions, the diversion and laying of services, the erection of any temporary means of enclosure and the temporary display of site notices or advertisements; and commencement” must be construed accordingly.”
10. Part 2 then sets out the "Principal powers" in six Articles. Article 3(1) of the Order provides:

“Subject to the provisions of this Order and to the Requirements in Part 3 of Schedule 1 the undertaker is granted development consent for the authorised development.”

11. There are 42 such Requirements. Requirement 3 sets out the duration of the permission in a familiar way:

“The authorised development must commence no later than the expiration of 5 years beginning with the date that this Order comes into effect.”

12. Many of the Requirements provide that the authorised development must not commence until plans have been submitted and approved in relation to specified matters, such as environmental management (5 and 6), landscape (7), drainage (11), archaeology (16), retention of historic assets (17), waste management (20), construction traffic (21), construction lighting (24), impacts on fish and shellfish (27), avian species (28) and habitats (29), and employment (41).

13. Requirement 12 materially provides:

“(1) Prior to the commencement of each phase of the authorised development a scheme to assess the nature and extent of any contamination on the Order land, and confirmation of whether or not it originates on the Order land must be submitted to and approved by the relevant planning authority in consultation with Natural Resources Wales...”

14. Article 7(1) provides that the development must not be commenced and the powers in Articles 24 to 37 must not be exercised until a security of £10.5 million has been provided in respect of compensation liabilities. These Articles set out compulsory purchase powers in respect of land within the area covered by the Order.

15. Article 7(4) requires the undertaker to provide evidence of construction and procurement contracts and financial provision to deliver the works and procurement under those contracts prior to commencement.

16. Part 4 deals with “Supplemental powers” in four Articles, the last of which authorises the undertaker to enter and survey and investigate land within the Order limits or that may be affected by the authorised compensation for any damage caused. Article 15 (1) reads as follows:

“(1) The undertaker may for the purposes of this Order enter on any land within the Order limits or that may be affected by the authorised development and— (a) survey or investigate the land; (b) without limiting sub-paragraph (a), make trial holes in such positions on the land as the undertaker thinks fit to investigate the nature of the surface layer and subsoil and remove soil samples; (c) without limiting sub-paragraph (a), carry out ecological or archaeological investigations on the land; and (d) place on, leave on and remove from the land

apparatus for use in connection with the survey and investigation of land and making of trial holes.”

17. Part 6 deals with “Powers of acquisition” and is a large part containing some 13 Articles including Article 27(1) which states that after the end of the period of five years beginning on the day on which the Order comes into force no notice to treat can be served nor a general vesting declaration executed as follows:

“(1) After the end of the period of 5 years beginning on the day on which this Order comes into force—

(a) no notice to treat may be served under Part 1 of the 1965 Act; and

(b) no declaration may be executed under section 4 of the Compulsory Purchase (Vesting Declarations) Act 1981, as applied by article 29 (application of Compulsory Purchase (Vesting Declarations) Act 1981).”

Events since the Order

18. It was under Article 15(1) that the Company in 2016 carried out ground investigation and survey works (the Works) pursuant to the Order. These included boreholes, trial pits, ground water and ground gas monitoring. A report on the findings of these investigations was published in March 2017.
19. The Company also entered into negotiations with the Secretary of State seeking to agree a Contract for Difference funding for the electricity to be produced by the project. Such contracts are a means by which the funding for such projects can be subsidised with public money, by setting a flat rate for the electricity produced. The Welsh Government supported the project and in June 2018 offered £200 million towards its costs.
20. However, shortly afterwards, the Secretary of State announced in the UK Parliament that the project did not represent value for money and that UK Government funding should not be assumed. Following on from this, negotiations with the Company were discontinued and work on the project was paused.
21. In 2019 the UK Government committed to a target of net zero carbon emissions by 2050 and the Climate Change Act 2008 was amended to reflect this commitment. This prompted the Company to renew its determination to deliver the project. In 2019 and 2020, it carried out several pre-commencement requirements under the Order, but by 29 June 2020 some of these remained, and still remain, to be carried out. Accordingly the Company accepts that it did not ‘commence’ the development within 5 years as required by Requirement 2 of the Order.
22. In those circumstances the Company by letter dated 21 May 2020, signed by one of its directors, wrote to the Secretary of State to request that the duration of the Order should be extended. The letter stated that “The powers under the Order remain in place for five years beginning on 30 June 2015 and will consequently expire on 30 June 2020.” The history and the value of the project was then set out, and the letter

continued “In order to prevent the Order from lapsing, we propose that the Government should enact a one-provision bill that would result in the extension of powers under the Order by one year.”

23. That request was made to the Secretary of State as the person who granted the Order. By letter dated 9 June 2020 the request was refused. The letter in response included this paragraph:

“Developers of Nationally Significant Infrastructure Projects benefit from a significant period of development consent, 5 years in this case. We expect developers to have a clear understanding of the requirements of their projects and to be proactive in taking the relevant steps to ensure the consent can be implemented within the timescale specified in the DCO.”

24. The letter then went on to refer to established routes to apply to extend such orders. The request for a standalone bill to extend the duration of the Order was met with the following:

“The value for money analysis carried out by the Department determined that neither the proposed Swansea Bay Tidal Lagoon project nor the proposed follow on programme of lagoons met the Government’s value for money criteria. On that basis this proposal would not represent a justifiable use of parliamentary time.”

25. By letter dated 29 June 2020 to the Council, the Company’s project manager referred to the Works in 2016 and to the fact that further investigative, demolition and site-clearing works were then being carried out. It was claimed that each of these constituted material operations within section 155 so as to begin the development.
26. However, this was rejected in correspondence from the Council, and the other defendants, and so a Part 8 claim was filed on 11 March 2021. It was not in dispute before me that that another application could be made for consent under the 2008 Act to deliver this, or a similar, project. However, it is clearly important to determine whether or not the Order remains extant.

The statutory framework

27. The following sections of the 2008 are relevant. Section 15 stated at the time of the Order that applications for generating stations would be considered as nationally significant development projects (and therefore subject to the development consent regime) if the following thresholds were met: (a) it is in England or Wales, (b) it is not an offshore generating station, and (c) its capacity is more than 50 megawatts.
28. That provision has now been amended by section 39 of the Wales Act 2017 so that the capacity threshold, as far as relevant and as applied in Wales, is more than 350 megawatts. As the project does not meet the latter threshold, it is the Welsh Ministers who would now be responsible for such a project.
29. Section 31 provides:

“Consent under this Act (‘development consent’) is required for development to the extent that the development is or forms part of a nationally significant development project”.

30. Section 120 (1), (5) and (6) states as follows:

“(1) An order granting development consent may impose requirements in connection with the development for which consent is granted.

(5) An order granting development consent may— (a) apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order; (b) make such amendments, repeals or revocations of statutory provisions of local application as appear to the Secretary of State to be necessary or expedient in consequence of a provision of the order or in connection with the order; (c) include any provision that appears to the Secretary of State to be necessary or expedient for giving full effect to any other provision of the order; (d) include incidental, consequential, supplementary, transitional or transitory provisions and savings.

(6) In subsection (5) “statutory provision” means a provision of an Act or of an instrument made under an Act.”

31. Section 154(1) states:

“(1) Development for which development consent is granted must be begun before the end of— (a) the prescribed period, or (b) such other period (whether longer or shorter than that prescribed) as is specified in the order granting the consent”.
(2) If the development is not begun before the end of the period applicable under subsection (1), the order granting development consent ceases to have effect at the end of that period”.

32. Section 154(3) states that where an order granting development consent authorises the compulsory acquisition of land steps of a prescribed description must be taken before the end of the prescribed period or such other period (whether longer or shorter than that prescribed) as is specified in the order.

33. The prescribed period is set out in Regulation 6, which states that:

“(1) Development for which development consent is granted must be begun before the end of a period of five years beginning on the date on which the order granting development consent is made

(2) Where an order granting development consent authorises the compulsory acquisition of land, and a notice to treat is served under section 5 of the Compulsory Purchase Act

1965...that notice must be served before the end of a period of five years beginning on the date on which the order granting development is made.”

34. Section 155 provides:

“(1) For the purposes of this Act (except Part 11) development is taken to begin on the earliest date on which any material operation comprised in, or carried out for the purposes of, the development begins to be carried out.

(2) “Material operation” means any operation except an operation of a prescribed description”.

35. By Regulation 7 the “measuring or marking out of a proposed road shall not be included within the meaning of “material operation” for the purposes of section 155...” The measuring or making of a road is not relevant for the purposes of this case. Accordingly the definition of ‘material operation’ in section 155 is a wide one, and wider than that set out in Article 2. Hence the Works come within the definition ‘begin’ in section 155, but not within the definition ‘commence’ in Article 2.

36. Section 56(4) of the 1990 Act defines a material operation as:

“(a) any work of construction in the course of the erection of a building; (aa) any work of demolition of a building; (b) the digging of a trench which is to contain the foundations, or part of the foundations, of a building; (c) the laying of any underground main or pipe to the foundations, or part of the foundations, of a building or to any such trench as is mentioned in paragraph (b); (d) any operation in the course of laying out or constructing a road or part of a road; (e) any change in the use of any land which constitutes material development”.

37. Section 153 and Schedule 6 give the power for material or non-material changes to be made to a development consent order, which power in respect of the Order is now vested in the Welsh Ministers. Schedule 6 sets out the limited circumstances in which an order may be modified or revoked. Revocation may be granted on an application by a local planning authority but only in very limited circumstances set out in paragraph 3(5) of Schedule 6, namely:

“(a) the development consent order grants development consent for development on land all or part of which is in the local planning authority's area,

(b) the development has begun but has been abandoned, and

(c) the amenity of other land in the local planning authority's area or an adjoining area is adversely affected by the condition of the land.”

38. It is not in dispute that the Works carried out in November 2016 were sufficient to meet the definition of ‘material operation’ within section 155 but were not sufficient to commence the development under Article 2 of the Order, so that the Order was not ‘commenced’ by 30 June 2020. Nor was it in dispute before me that in terms of ordinary usage there is no material difference in the words ‘begin’ and ‘commence’.
39. What is very much in dispute, and at the heart of this claim, is whether the Works begun the development within the meaning of section 155 so that the Order is still in effect as contended by the Company. Mr Humphries QC submits, that as a definition of the word ‘commence’ has been given in the Order, and that definition properly construed gives rise to such a difference, then as a matter of statutory interpretation, the words used in the definition must be given effect to.
40. In contrast, the defendants submit that the definition of ‘commence’ within the Order should be construed as a modification and/or exclusion of the default provisions under sections 154 and 155 (subject to a more nuanced approach of Mr Westmoreland Smith as to modification and/or exclusion as set out below). If the latter, then the Order needed to have commenced by 30 June 2020, and as no works capable of commencing the Order were carried out by that date, then the Order lapses.

Other orders

41. Both sides referred me to other development consent orders, of which there are about 100 or so, with several different approaches to defining the duration of the order. Most of these include a time limit by reference to the word ‘commence.’ Of these, some do not define that word. An example is The North Wales Wind Farms Connection Order 2016. That order is a rare example of where the duration runs from the date the order is made, whereas most run from the date it comes into effect.
42. Other orders do define the word ‘commence’ by reference to section 155 without amendment, for example, The National Grid (King’s Lynn B Power Station Connection) Order 2013. Yet others do contain such an amendment by excepting some forms of works from that definition, for example The Preesall Underground Gas Storage Facility Order 2015. A few of the earlier orders contain similar exceptions, but by reference to section 56 of the 1990 Act, such as The Rookery South (Resource Recovery Facility) Order 2011.
43. A minority of the orders do not include any specified time limit, and so the default prescribed period under section 154 applies. Only one order, The Able Marine Energy Park Development Consent Order 2014, includes a time limit by reference to the word ‘begun.’

The principles of statutory construction

44. The principles of statutory construction were not in dispute before me, and indeed were relied upon by each of the parties to show that its construction of the Order is the correct one. The proper approach was set out by the House of Lords in *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349. Lord Bingham gave the lead speech, with which all other members of the court agreed, save on the use of Hansard, which is not relevant in the present case

45. Lord Nicholas at pages 397 to 398 went back to first principles, and in doing so gave the following helpful summary of those principles which are particularly relevant in the present case:

“...Powers are conferred by Parliament for a purpose, and they may be lawfully exercised only in furtherance of that purpose...The purpose for which a power is conferred, and hence its ambit, may be stated expressly in the statute. Or it may be implicit. Then the purpose has to be inferred from the language used, read in its statutory context and having regard to any aid to interpretation which assists in the particular case. In either event, whether the purpose is stated expressly or has to be inferred, the exercise is one of statutory interpretation.

Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used...

In identifying the meaning of the words used, the courts employ accepted principles of interpretation as useful guides. For instance, an appropriate starting point is that language is to be taken to bear its ordinary meaning in the general context of the statute. Another recently enacted, principle is that so far as possible legislation must be read in a way which is compatible with human rights and individual freedoms: see section 3 of the Human Rights Act 1998.”

46. Lord Nicholls again emphasised the importance of giving effect to the purpose of the provision in question in *Barclays Mercantile Finance Ltd v Mawson* [2004] UKHL 51 at paragraph 28, where he said:

“...the modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, as far as possible, in a way which best gives effect to that purpose.”

47. Leggatt J, as he then was, in *R (on the application of N) v Walsall Metropolitan Borough Council* [2014] EWHC 1918 at paragraph 65, said:

“When courts identify the intention of Parliament, they do so assuming Parliament to be a rational and informed body pursuing the identifiable purposes of the legislation it enacts in a coherent and principled manner. That assumption shows

appropriate respect for Parliament...In essence, the courts interpret the language of a statute or statutory instrument as having the meaning which best explains why a rational and informed legislature would have acted as Parliament has.”

48. In *Williams v Central Bank of Nigeria* [2014] UKSC 10, Lord Neuberger at paragraph 72 emphasised the function of the court in this exercise as follows:

“When interpreting a statute, the court’s function is to determine the meaning of the words used in the statute. The fact that context and mischief are factors which must be taken into account does not mean that, when performing its interpretive role, the court can take a free-wheeling view of the intention of Parliament looking at all admissible material, and treating the wording of the statute as merely one item. Context and mischief do not represent a licence to judges to ignore the plain meaning of the words that Parliament has used.”
49. Regard must also be had to the consequences of rival contentions as to the proper interpretation of a statutory provision. In *Project Blue Ltd v Commissions for Her Majesty’s Revenue and Customs* [2017] UKSC 70 at paragraph 110, Lord Hodge said:

“The hallmark of the modern contextual approach to the construction of a contract is that a choice which produces a result which the parties cannot have intended is to be rejected if there is a less unsatisfactory alternative. I can see no reason why the same approach is inapplicable to the construction of a statute. On the contrary it is frequently used: see *Bennion on Statutory Interpretation*, section 9.6, *In re British Concrete Pipe Association’s Agreement* [1983] 1 All ER 203, per Sir John Donaldson MR at p205 and, in the context of a taxing statute, *Fry v Inland Revenue Comrs* [1959] Ch 86, per Romer LJ at p105.”
50. In the context of interpreting planning permissions, 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, and any other conditions which cast light on the purpose of the relevant words, and common sense,” per Keene J, as he then was, in *R v Ashford BC ex. p. Shepway DC* [1999] PLCR 12 at pages 19-20.
51. In *Trump International Golf Club Scotland Limited v Scottish Ministers* [2015] UKSC 94 per Lord Hodge at paragraph 33 observed that particular caution should be applied in resorting to matters of factual background and the knowledge of the parties when interpreting a public document, such as a planning permission. Such recourse is limited to where a secondary document is incorporated by reference or where it is necessary to resolve ambiguity.
52. Lewison LJ giving the lead judgment in *DB Symmetry Ltd v Swindon BC & Anor* [2020] EWCA Civ 1331, said:

“Planning permission is granted under a statutory framework. If Parliament defines its terms in an Act (whether by enlarging or by restricting the ordinary meaning of a word or expression), it must intend that, in the absence of a clear indication to the contrary, those terms as defined will govern what is proposed, authorised or done under or by reference to that Act: *Wyre Forest DC v Secretary of State for the Environment* [1990] 2 AC 357.”

The Company’s case

53. The Company’s case in greater detail is as follows: The 2008 Act provides that development granted consent must be ‘begun’ at the end of the ‘prescribed period’ (5 years from the making of the Order) or such other period as is specified in the Order (section 154). If it is not so begun within this period, then the Order ceases to have effect. Development is taken to begin on the earliest date on which any material operation is carried out (section 155). The Works amounted to material operations and began the development for the purposes of section 154.
54. The definition in Article 2 of the Order defined the word ‘commence’ for the purposes of pre-commencement requirements in Schedule 1 Part 3. That definition referred to material operations as defined in the 1990 Act, but excluded ground investigation and similar works. Requirement 2 provided that the authorised development must commence within 5 years from the Order coming into effect. The Works were ground investigation works and so not within the definition of material operations that commenced the development for the purposes of that requirement. The Company accepts that it has not commenced the development within the meaning of that requirement, but says that the Works began the development for the purposes of section 154 and so the Order has not ceased to have effect, and so it can still apply to change any provision in the Order, including an extension of the period under that requirement.
55. The Company’s case on the first question is that within 5 years of the Order being made it carried out the Works which amounted to a material operation within the meaning of section 155. That began the development for which the Order granted development consent for the purposes of section 154(1). Accordingly, the Order has not ceased to have effect pursuant to section 154(2).
56. In his submissions as to why the defendants’ arguments to the contrary are not sound, Mr Humphries QC advances four propositions. First, the Order did not exercise the power in section 120(5) to modify or exclude the application of section 154. There is no indication in the articles or schedules to the Order or in the Report that such modification or exclusion was intended and if it had been, this would have been made clear in the Explanatory Memorandum to the Order. Schedule 5 thereof sets out statutory provisions that it does seek to modify or exclude under section 120(5) and these do not include section 154 or any other provision relating to when the development is begun.
57. Second, the Order did not modify or exclude the definition of ‘material operations’ in section 155 or the prescribed exceptions in the Regulations. The same points apply here as under the first proposition. In defining the word ‘commence’, some similar

orders do adopt the definition of ‘material operations’ in section 155 but then exclude certain works from that definition for the purposes of identifying what works are to be taken to ‘commence’ development for the purposes of the pre-commencement requirements. However, no such order has been identified which amends the definition of ‘material operations’ in section 155 for the purpose of when development is ‘begun’ in section 154. The purposes of the words ‘begin’ and ‘commence’ are separate and distinct.

58. Third, the Order did not substitute another period in place of the prescribed period pursuant to section 154(1)(b). That period is set out in Regulation 6(1) and it extends to a period of five years from the date on which the order granting development consent is made. The Infrastructure Planning (Model Provisions)(England and Wales) Order 2009 (the Model Provisions), which has now lapsed, provided a model requirement to specify another period as follows: “The authorised development must be begun within [insert number] years of the date of this Order.” The Order did not adopt such wording nor specify another period during which development must be begun. Even if it had, that would not have changed the requirement for development to be begun during that other period, or the material operations that are taken to begin that development pursuant to section 155. The word ‘commence’ in Article 2 and Requirement 2 was not directed at specifying another period for the purposes of section 154(1)(b), but introduced a new definition of material operations for the purposes of the pre-commencement requirements in Schedule 1 Part 3.
59. Fourth, the word ‘begin’ in section 154 relates to the duration of an order and when it ceases to have effect. The word ‘commence’ in Article 2 and Requirement 2 relates to the discharge of pre-commencement requirements in Schedule 1 Part 3 of the Order. The definition is based on the definition of a material operation within section 56(4) of the 1990 Act, but excludes some operations, including investigations for the purpose of assessing ground conditions. The concepts of ‘begin’ and ‘commence’ have long been recognized as being separate and distinct. The purpose of having a separate definition of what material operations ‘commence’ a development is intended to specify what operations may be carried out before the discharge of pre-commencement requirements and has nothing to do with the duration of an order but to the discharge of pre-commencement requirements. That gives a clear rationale for the use of the two words with distinct purposes. There is no rule of statutory interpretation that allows distinctly defined terms to be treated as the same. The court must not take a free-wheeling view of the intention behind these definitions.

The case for the Secretary of State

60. In response, Mr Westmoreland Smith submits that the starting point to the proper interpretation of the Order is upon its own terms and the language used. The ordinary meaning of the words ‘commence’ and ‘begin’ is the same. The former word is defined in Article 2 as meaning “...to begin to carry out any material operation...” and so equates the one with the other.
61. So far as the purpose of the relevant statutory provisions are concerned, that is to limit the duration of an order so that promoters must use or lose their consents. The provision expressly invites orders to specify a period, and in so far that the Order has done so, it is not a modification or exclusion under section 120(5). Those terms are not mutually exclusive. He draws an analogy with sections 91 and 92 of the 1990 Act

limiting the life of planning permission to avoid unnecessary accumulations of unimplemented permissions, to encourage early implementation and to enable the local planning authority to review the position if a fresh application is made after the permission has lapsed.

62. If anything, the purpose in limiting the duration of such an order is more important than planning permissions in general because of compulsory purchase powers which may be included in such an order, and which are included in Part 6 of the Order. Such powers are draconian and the purpose of section 154(3) and (4) is to protect individual landowners from indefinite powers of compulsory purchase affecting their land.
63. Dealing with the consequences of the Company's interpretation, Mr Westmoreland Smith submits that the point that a different meaning of 'commence' and 'begin' allows preliminary works prior to the discharge of pre-commencement requirements seeks to solve a problem that does not exist. The Order allows these works to be undertaken before such discharge. That is the purpose of the definition of 'commence'. A parallel period relating to the definition of 'begun' in section 155 is unnecessary.
64. The effect of the Company's contention is that the Order runs in perpetuity despite the fact that it has not been commenced. This goes against the Order in placing a time limit on the development proposed and against section 154 in imposing default time limits where none is specified in the Order. It allows the Company to apply to renew its compulsory purchase powers even where it has not commenced the development within the specified period. This is contrary to the statutory purpose behind section 154(3) and (4) and the purpose of Article 27 of the Order and puts undue stress on affected landowners.
65. Mr Westmoreland Smith also refers to section 3 of the Human Rights Act 1998, and submits that it is a principle of statutory construction that legislation should be interpreted so as to comply with human rights and fundamental freedoms. The time limits on compulsory purchase orders are part of the protections that go to whether or not interference in proprietary rights is proportionate. The court should be slow to adopt a construction that weakens such protections.
66. Mr Westmoreland Smith responds to the four points put forward by Mr Humphries QC as follows. First, Section 154(1)(b) permits the setting of a bespoke time period in individual orders. Requirement 2 of the Order sets a different period because it runs from the date that the Order came into effect as opposed to the date it was made as per the prescribed period under section 154(1)(a). There is no requirement to signpost any modification under section 120(5). The Explanatory Memorandum is drafted by the promotor and is required to accompany the application for development consent. It does not form part of the Order itself. Schedule 5 of the Order sets out modifications to other enactments which govern subsequent steps initiated by the Order. There is no such requirement where the modification is effected by the terms of the Order itself.
67. Second, the definition of 'commence' does modify section 155 to allow investigation works to take place prior to commencement that might otherwise have operated to begin the development and so avoid the need to discharge pre-commencement requirements before such works. Many such orders refine the definition of 'material operation'. There is no distinction between a refinement which excludes matters from

the section 155 definition and the adoption of a narrower definition by reference to the section 56 of the 1990 Act.

68. Third, the Order lays down a time limit from the date the Order came into effect. The prescribed period runs from the date an order is made. The Company's point that Requirement 2 has nothing to do with the duration of the Order is a bold assertion where it is entitled "time limits" and where there is a separate time limit in Article 27 for compulsory purchase powers but which mirrors the period in Requirement 2.
69. Mr Westmoreland Smith relies upon those responses to answer the fourth point of Mr Humphries QC.

The case for the Welsh Ministers

70. Mr Jones adopts the submissions of Mr Westmoreland Smith, but makes some additional points and puts his own emphasis on others. He points out that the heading to Requirement 2 is "time limits, etc". Accordingly, it purports to articulate the time limits applicable to the Order. The absence of text articulating the second time limit suggests that there is no second time limit. This wording is taken from Model Provisions, which use the word 'commence' and 'begin' interchangeably. Useful guidance as to the Model Provisions is provided in the National Infrastructure Planning Handbook 2018 at Article 40. That makes clear that although the Model Provisions have lapsed, the Planning Inspectorate still wishes to be informed of any departures from them.
71. It is submitted that Model Provision Requirement 2 is intended to make express provision for the time limit set out in section 154. It is clear from that wording that orders are intended to have an express requirement regarding duration even if that provision is identical to the default provision under section 154(1)(a). Mr Jones points to similarities between the Model Provision Requirement 2 and the Order Requirement 2, and in particular that both have a heading 'time limits' in the plural but each provides for one time limit in the singular. The language of Requirement 2 does not conflict or clash with the wording of section 154(1) and the objective reader would construe Requirement 2 as being an articulation of the power to amend the time limit pursuant to section 154(1)(b).
72. Subsection (1) and (3) of section 154 expressly contemplate an order specifying a period which is different to the default or prescribed period. The period specified in Requirement 2 (5 years from the date of the Order taking effect and not from the date of the Order) is the same as in Article 27 in respect of the timing for compulsory purchase procedures. In each respect the power under section 154 (1)(b) and (3)(b) respectively is used in the same way. The Company's interpretation gives rise to an anomaly between the approach adopted in these two provisions of the Order.
73. In terms of context, Mr Jones submits that nationally significant projects are evaluated by reference to national policy statements which change as national needs and priorities change, and it is desirable for projects to be implemented expeditiously. On

the defendants' interpretation of the Order, it provides coherent timescales as between commencement and the initiation of compulsory purchase powers. The Company's interpretation, by contrast, gives rise to an inexplicable disconnect between the two periods. Moreover, it would be a fundamental departure from the Model Provisions and from established practice to say nothing about the section 154 time limit in the requirements.

74. As for purpose, the defendants' interpretation gives effect to early implementation, giving landowners a finite period of uncertainty as to whether they will be deprived of their land. That of the Company, however, defeats those aims, and give rise to the possibility that applications to revive extant but unimplementable orders decades after they were granted on the basis of the public interest as assessed at the time of grant. A rational and informed Parliament/executive would be aware of section 154, of the practice of making that requirement an express part of orders as suggested in the Model Provisions and should thus be imputed with the intention that Requirement 2 was an express articulation of the power under section 154(1)(b).

The case for the Council

75. Mr Edwards QC also adopts the arguments on behalf of the Secretary of State. The definitions of 'commence' and 'begin' do not draw a distinction between these words or rebut their common meaning. Requirement 2 expressly modifies and/or excludes the time period in which the development must be commenced or begun, compared to the default provision provided for by s.154(1)(a) and the Regulations. This does not have to be spelt out. The default provision in section 154 starts the relevant time period "with the date on which the order granting development consent is made". By contrast, Requirement 2 starts the time period "beginning with the date that this Order takes effect". The power for such an order to depart from the prescribed period is expressly provided for by section 154(1)(b).
76. In relation to the Company's point that the purpose of the definition in Article 2 is to define the word 'commence' for the purpose of the pre-commencement requirements, he points out that the definition is expressly said to be "In this Order" and not for any particular part of it.
77. He also emphasises the indefinite life of compulsory purchase powers under the Order if the Company is right. He says that the land effected is blighted in a non-technical sense, in that applications for planning permission could be made in respect of such land but to proceed whilst these powers are extant would be risky.
78. He accepts that the Council could apply to the Welsh Ministers to revoke the Order, but only in the very limited circumstances set out in Schedule 6.

Discussion

79. Dealing with those submissions, I accept that the task is to identify the meaning of the words used in the Order and that the common meaning of the word 'commence' is the same as the word 'begin.' The question is whether by defining the former word in the way set out in Article 2 a different meaning of that word was intended to deal with a different function.

80. The fact that the definition in Article 2 at the outset equates the word ‘commence’ with ‘begin’ does not in my judgment suggest that the definition was intended to make a distinction between the two words. However, the definition then goes on to set out the trigger for commencement which may be at a different point in time to the trigger for begin/begun in the legislation. That does, in my judgment, suggest such a distinction.
81. The next question is whether there is a sufficient indication of an intention to modify and/or exclude sections 154 or 155 or to exercise the power under section 120(5). In my judgment, the failure to say so expressly, either in the Order or in the Explanatory Memorandum, for example, is a factor which supports the Company’s case, as it would have been helpful to do so if that were the intention. Schedule 5 contains examples of where such an indication has been thought to be helpful. As Mr Humphries QC submits, it is a matter of good drafting, and, incidentally, would have avoided much if not all of the argument in the present case. However, given that there is no requirement in the legislation or Model Provisions to do so, it is not a strong factor.
82. As a matter of language, therefore, there is a lack of clarity as to whether or not there was such an intention.
83. Turning now to the purpose of Requirement 2, I accept the defendants’ submission that this is the same purpose which lies behind section 154, and that is to limit the life of the Order so as to encourage the early implementation of such projects and to avoid consents remaining extant indefinitely. Another possible purpose was, as submitted by Mr Humphries QC, to allow the commencement of investigatory works, before complying with all the requirements. The results of such works might be needed to inform what was to be done to comply with the requirements, such as those relating to mitigation works. The fact that the definitions in Article 2 apply to the whole of the Order and not just to part of it tends, in my judgment, to militate against this submission.
84. Moreover, I also accept that investigatory works may be carried out pursuant to Article 15, which makes express provision for such works to be carried out with necessary safeguards and compensation for any damage. Although there may be more than one statutory objective, it is unlikely in my judgment that a similar purpose was sought to be achieved by the definition of the word ‘commence’ in Article 2. Having regard to the size and nature of the project, it is unsurprising that the other specified matters are excepted from material operations which by virtue of Article 3 commence the development.
85. It is important to have regard to the consequences of the rival interpretations. In my judgment, the thrust of the defendant’s arguments are compelling in this regard. In particular, I accept that if the Order remains extant, then so too does the prospect of compulsory purchase, provided that the time limits set out in Article 27 for the service of notices to treat or the execution of general vesting orders are observed.
86. Although this was not dealt with in the evidence before me in any detail, Mr Humphries QC told me that the Company in the events which have happened since the making of the Order had entered into agreements with landowners, and have not served notices to treat. However, the Order gives the power for such notices to be

served, and I did not understand him to submit that powers of acquisition set out in the Order are no longer relevant to its proper interpretation. Even though notices to treat were required to have been served within 5 years from the date the order came into force, the Company's interpretation would mean that only investigatory works need be undertaken to begin the project for the purposes of section 155. Such an order would thus remain extant, giving rise to the potential for a promotor to apply to extend the time for commencement of the consented development.

Conclusion

87. In my judgment that is an unsatisfactory result, and one which cannot have been intended in granting the Order, even if no notices to treat were in the event served. It goes against the scheme set out in section 154 and 155, which reflects other well-established schemes in relation to planning permissions, for limiting the duration of consents. That interpretation must be rejected if there is a less unsatisfactory alternative. Such an alternative is interpreting Article 2 so as to modify and/or exclude section 154 or 155 or to exercise the power under section 120(5). Such an outcome involves a clarification of, and no injustice to, the language used and gives effect to its purpose.
88. In coming to that conclusion, I do not place any weight on the Company's letter dated 21 May 2020, which seems to accept that the Order expired on 30 June 2020. That was the view of one of its directors but was followed very quickly by its project manager's letter setting out the contrary view which it has expressed since.
89. It follows in my judgment that the Company is not entitled to the first declaration which it seeks. That being so, then the need for the second declaration falls away.
90. I am grateful to all counsel for their thorough yet focussed submissions. They helpfully agreed that any consequential matters which remain in dispute can be dealt with in written submissions and by a supplemental decision on the basis of those submissions. These, and a draft order agreed as far as possible, should be exchanged and filed within 14 days of hand down of this judgment.