



OUTER HOUSE, COURT OF SESSION

[2013] CSOH 158

P698/12

OPINION OF LADY CLARK OF
CALTON

in Petition of

SUSTAINABLE SHETLAND

Petitioners:

for Judicial Review of a decision of the
Scottish Ministers dated 4 April 2012
granting consent for the construction and
operation of a 103 turbine Viking Wind
Farm in Central Mainland, Shetland, as
described in Annex 1 of said decision
letter

Petitioners: Sir Crispin Agnew of Lochnaw QC; Drummond Miller LLP

Respondent: Thomson QC, Sheldon; Scottish Ministers

Third Party: Carmichael QC, M McKay; Gillespie Macandrew LLP

24 September 2013

Overview

[1] The petitioners are described as Sustainable Shetland, an unincorporated association, with named officials their vice-chair and secretary. The constitution of Sustainable Shetland is to be found in 6/28 of process. Sustainable Shetland lodged objections, 6/7 of process, to an application by Viking Energy Partnership who are the interested party. The interested party sought consent and deemed planning permission for construction and operation of Viking Wind Farm, Shetland ("the proposed development"). The respondents are the Scottish Ministers. It is their decision, dated 4 April 2012, 6/4 of process, which is the subject of this judicial review.

[2] The decision set out in 6/4 of process granted consent, subject to conditions, to the interested party under section 36 of the Electricity Act 1989 for the construction and operation of Viking Wind Farm on central Shetland comprising *inter alia* not more than 103 turbines, with a maximum generating capacity of up to 457MW as a wind powered electricity generating station

more fully described in Annex 1 of 6/4 of process. The decision also gave a direction under section 57(2) of the Town and Country Planning (Scotland) Act 1997 that planning permission be deemed to be granted, subject to conditions, in respect of the proposed development. Further, said decision letter stated under reference to paragraph 3(2) of Schedule 8 of the Electricity Act 1989 that there was "no need" to hold a public inquiry.

[3] The petitioners in this action of judicial review seek reduction of 6/4 process the said consent, the deemed planning permission and the decision not to hold a public inquiry.

[4] The main statutory and regulatory provisions in domestic law which regulate the general framework for the decision making of the respondents in this case are the Electricity Act 1989 ("the 1989 Act"), the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2000 ("the EIA Regulations 2000"), and the Town and Country Planning (Scotland) Act 1997 ("the 1997 Act"). Regulations relating to applications for consent are set out in the Electricity (Applications for Consent) Regulations 1990 ("the 1990 Regulations").

[5] In relation to the issue of the decision not to hold a public inquiry, the main statutory provisions are section 62(1A) and Schedule 8, paragraphs 2(2) and 3(2) of the 1989 Act.

[6] The main focus of the dispute by the parties before me in relation to the judicial review related to the various grounds of challenge by the petitioners which were set out in the amended petition, 19 of process and competency issues which arose in the course of proceedings.

Procedural History

[7] This case had a difficult procedural history. The case called before me on 29 January 2013 for a four day hearing. I heard submissions from senior counsel for the petitioners on 29 and 30 January 2013. In the course of said submissions, senior counsel for the petitioners made a motion to continue the petition to consider amendment and the introduction of a devolution issue. On 1 February 2013, on the unopposed motion of senior counsel for the petitioners, I allowed the petition to be amended and the amended petition to be received as 19 of process. Answers on behalf of the first respondents and third party were lodged as 14 and 16 of process respectively. Notes of argument from the petitioners were marked as 15 of process and from the respondents and from the interested party as 17 and 18 of process respectively. Thereafter I allowed service to be made on the Advocate General for Scotland and allowed parties to adjust. I was later informed that there was to be no appearance on behalf of the Advocate General.

[8] Parties reconvened on 30 April 2013 to continue oral submissions. On that date, senior counsel for the petitioners continued his submissions which he completed on the morning of 1 May 2013.

[9] Thereafter senior council for the respondents commenced his submissions but competency issues appeared to arise. After substantial delay to allow parties to consider their positions, the hearing recommenced on 3 May 2013. None of the parties wished me to deal separately with the competency issues. The hearing continued but was not concluded in the allocated dates. I

permitted a further four days hearing to commence on 11 June with two further days allocated to competency. The hearing finally concluded on 21 June 2013 after a further eight days (not six days as allocated). The competency issues were addressed by counsel on 20 and 21 June I deal with the competency issues in paragraphs [37] to [115] of this opinion.

Summary of history of the proposed development

[10] The original application submitted on 19 May 2009 by the interested party (described in said letter as "a Scottish general partnership between Viking Energy Limited and SSE Viking Ltd") related to 150 turbines and associated works. This was accompanied by various documents including an environmental statement prepared on the instructions of the interested party. An addendum to the application and an addendum to the environmental statement was submitted to the respondents on 30 September 2010 and advertised by the interested party on 1 October 2010. This reduced the number of turbines to 127 with consequential changes to the proposed development. Further documents including four volumes of the Environmental Statement were provided to the respondents.

[11] The proposed development, as amended, in respect of which consent for construction and operation under section 36 of the 1989 Act and deemed planning permission was sought by the interested party for Viking Wind Farm, covered a site area on mainline Shetland of approximately 50 square miles. Said development consisted of 127 wind turbines some 90 metres in height and 145 metres to blade tip. Permission was also sought for some 104 kilometres of associated access tracks of up to 10 metres in width to be reduced in size after construction; quarries and borrow pits to extract 1,470,000 cubic metres of rock by drilling and

blasting; excavation of up to 919,310 cubic metres of peat with substantial peat reused; various associated works including electrical substations etc. The disturbance footprint was specified as up to approximately 232 hectares with a permanently affected area of approximately 104 hectares. The proposed development also specified substantial ancillary works during construction to be phased over a five year period. The application is summarised in paragraphs 1.1 to 1.10 of 6/2 of process. It should be noted that the proposed development area as amended consisted of three sectors called Delting (24 turbines) Kergord (46 turbines) and Nesting (57 turbines).

[12] There were many and varied objections to the proposed development and criticisms of the environmental statement both before and after the addendum. A summary of the position adopted by the various organisations and individuals both for and against the development is to be found in 6/2 and 6/4 of process as described by the authors of these documents.

[13] Sustainable Shetland maintained their objection to the proposed development after changes made by the interested party notified on 1 October 2010. They set out detailed responses and evidence about the environment, including the effect on wild birds and particularly whimbrel. Their environmental statement is to be found in 6/8 of process. Their addendum to the objection is 6/9 of process. Their landscape and visual impact addendum is 6/10 of process.

[14] The relevant planning authority is Shetland Islands Council who are a statutory consultee. A report, 6/2 of process, dated 14 December 2010 was prepared by the Director of Planning of

Shetland Islands Council for their consideration. The report dealt with various issues over 69 pages and concluded:

"9.1 The Shetland Structure Plan GDS1 (Sustainable Development) states that development will be planned to meet the economic and social needs of Shetland in a manner which does not compromise the ability of future generations to meet their own needs and to enjoy the area's high quality environment. All development must therefore protect environmental assets as defined in the Structure Plan and Local plan, use and conserve resources wisely, and minimise environmental impacts.

9.2 The balance that has to be considered is whether the resultant visual intrusion and potential environmental impacts are considered to be acceptable because of any perceived environmental, economic and social advantages that the development may bring.

9.3 Whilst the Planning Service believes that the development of a wind farm of significant scale could comply with the Development Plan, the applicant has not demonstrated that this development could be undertaken without unacceptable environmental impact. Therefore it is the Planning Service's conclusion that the proposal, as it stands, is contrary to the Development Plan.

9.4 It is recommended that Scottish Ministers take account of the precautionary principle as set out in paragraph 132 of SPP 210, which states: "Planning authorities should apply the precautionary principle where the impacts of a proposed development on nationally or internationally significant landscape or natural heritage resources are uncertain but there is sound evidence for believing that significant irreversible damages could occur. Where the precautionary principle is justified, modifications to the proposal which would eliminate the risk of irreversible damage should be considered. The precautionary principle should not be used to impede development unnecessarily. Where development is constrained on the grounds of uncertainty, the potential for research, surveys or assessments to remove or reduce uncertainty should be considered.

9.5 The planning Service has not assessed the economic impacts of this development as that is a political perspective and not within planning policy guidelines."

The recommendation by the head of planning was

"...that the council object to the proposed developments because it is contrary to policy GDS1 of the Shetland Structure Plan (2000)".

[15] A briefing note, 7/9 of process, was prepared by an official of the relevant planning authority, the head of economic development, relating to the economic importance of the proposed development and related transmission grid connection to Shetland. Having considered the potential economic benefits including land rental, community life, profit to Shetland Charitable Trust, profit to other shareholders, income to Shetland based suppliers, and direct annual wages, he was of the opinion that some £878 million of value would flow to Shetland from the proposed development. He also considered that there would be a substantial number of jobs created and that the proposed development would trigger an interconnector between Shetland and the wider UK electricity transmission grid. He advised that there would be various economic development policy advantages. He concluded:

"It is my view that the Viking Wind Farm project and related interconnector are of paramount economic importance to Shetland, the project will provide substantial intergenerational economic and social benefits which should be considered alongside the head of planning's report."

[16] Said reports and other information were considered at a meeting by Shetland Islands Council on the 14 December 2010. A report of that meeting is set out in 6/3 of process.

[17] The role of many members of Shetland Islands Council in their decision making was criticised at the time and before me for lack of independence and conflict of interest arising in particular from a dual role as Trustee of the Shetland Charitable Trust and/or in some cases as a director or employee of the interested party. Both the Trust and the interested party have a financial interest in the proposed development.

[18] It was not disputed in this case that if Shetland Islands Council had notified the respondents that they objected to the development, a public inquiry would have been mandatory in terms of the 1989 Act, Schedule 8 paragraph 2(2).

The decision letter, 6/4 of process

[19] The decision letter at pages 1 to 8 summarises the position of the statutory and non-statutory consultees.

[20] At page 9, reference is made to the 2000 Regulations and it is stated:

"The 2000 Regulations prohibit the Scottish Ministers from granting consent unless they have taken into consideration the environmental information, as defined in those regulations..."

[21] Reference is also made to Schedule 9 of the 1989 Act. It is stated that there is a duty on "the Partnership" to have regard to various "features" listed under reference to the matters set out in Schedule 9, paragraph 3(1). The decision letter states that Schedule 9 required "the Partnership" to do what it reasonably can to mitigate the effects that the development would have on these

features. There is also reference to the duty on Scottish Ministers under and in terms of Schedule 9, albeit "the Partnership" is then referred to as "the Company". The text of the decision letter further states that the Scottish Ministers are satisfied that "the Partnership" has had due regard to these features and have complied with the duty in Schedule 9.

[22] The decision letter then narrates that the Scottish Ministers have also considered the environmental information including the environmental statement and addendum and other information as set out at page 9 of said decision letter.

[23] The discussion by and the reasoning process of the respondents is set out on page 9, fourth paragraph to the fourth paragraph on page 13. As these pages were the subject of detailed consideration by counsel, I set them out in full.

"...

The Scottish Ministers Considerations

The Scottish Ministers have considered fully and carefully the Application and accompanying documents and all relevant responses from consultees and third party representations received. Ministers have taken into consideration the environmental information provided and their obligations under EU environmental legislation, and have had careful regard to the potential for impact on the environment, in particular on species of wild birds.

Scottish Ministers are mindful of the apparently insurmountable aviation issues associated with the 24 turbines of the Delting Parish area, and consider that it would not be appropriate to grant consent for a development which included these 24 turbines. However, Ministers are of the view that there remains the option of granting consent for the rest

of the development, i.e. a consent for the remaining 103 turbines of the Application which are not the subject of an objection from Scatsta Airport. After consideration of this option, and having requested the views of consultees, Ministers are of the view that a reduced development of this specification is still covered by the environmental information considered with the Application, and that the reduction of the development would not result in any new or unconsidered issues and in particular would not give rise to any environmental impacts other than those already identified.

The reduced, 103 turbine Development in central Shetland, will provide sufficient power for at least 175,112 homes, and probably considerably more, given that the load factor is expected to be much higher on Shetland than mainland Scotland, upwards of 40%. This increase in the amount of renewable energy produced in Scotland is entirely consistent with the Scottish Government's policy on the promotion of renewable energy and its target to meet 100% of demand for Scotland's electricity from renewable sources by 2020.

The development represents an excellent opportunity to help meet European Climate Change objectives, through the development of renewable energy and associated reduction in carbon emissions. The total annual CO₂ saving from the windfarm is estimated to be 1.13 million tonnes CO₂ per annum, based on a 127 turbine development. Based on the 103 turbine development, this might be revised downwards pro rata to approximately 0.93 million tonnes per annum.

The overall condition of the environment upon which wild bird species rely in Shetland is of concern. In particular, the peatland ecosystem is in serious decline and suffering extensive degradation. The windfarm's expansive Habitat Management Plan (HMP) will restore peatland and offers benefits to a whole range of species and habitats, a factor which has been recognised by SNH, and which Ministers have taken into account. In particular, the HMP will include habitat restoration and protection for red-throated diver, merlin, whimbrel (and by association arctic skua) and peatland management actions to restore, enhance and protect blanket bog and thereby benefit birds and other species that depend on this habitat. The HMP is far more ambitious and expansive than HMPs which have formed part of mitigation for previously consented windfarms, in total encompassing an area of some 12,800 hectares. SNH have welcomed the HMP and recognise that it offers the possibility of significant biodiversity benefits and is an excellent opportunity to explore various habitat management methods.

Whimbrel

Shetland has some 95% of the UK population of whimbrel, a species of wading bird, and it is estimated that there are some 290 breeding pairs in Shetland. Ministers recognise that it has been difficult for either SNH or Viking Energy to give precise estimates for the impact of the development on the whimbrel. It has been estimated that 5.5 pairs will be displaced by the windfarm itself. The collision mortality rate of birds is estimated at 2.1 or 4.2 birds per annum, according to Viking Energy and SNH respectively. A reduction in the scale of the development to 103 turbines results in a reduced estimate from SNH of a rate of approximately 3.7 birds per year. This number is a net loss figure and takes into account the effects of displacement, construction and habitat loss.

Ministers accept that the loss of 3.7 whimbrel per year as a result of the windfarm would be likely to have some impact on what is a small and declining subset of the species. However, in numerical terms, the estimated mortality rate of only 3.7 fatalities per year is very small and must be considered in the context of annual deaths estimated at between 72-108 (based on the two figures submitted in the Addendum to the Environmental statement) per year from other causes, including predation.

Ministers note that SNH are of the view that the reduction of the scale of the development is still likely to result in a significant impact of national interest on the conservation status of the national population of whimbrel, and that the RSPB have expressed related concerns. Ministers are not satisfied that the estimated impact of the development on whimbrel demonstrates such a level of significance. In addition, Ministers consider that the potential beneficial effects of the Habitat Management Plan (HMP) can reasonably be expected to provide some counterbalancing positive benefits.

SNH have expressed concerns that despite the extensive proposals within the HMP, it cannot be relied upon with certainty to adequately mitigate the estimated impacts. Ministers accept that the beneficial effects of the HMP cannot be predicted with certainty, given the lack of any precedent for an HMP for whimbrel in Shetland. SNH have, however recognised that the HMP has the potential to benefit birds, including the whimbrel. SNH's concern relates to the fact that the benefits of the HMP cannot be currently quantified. They are of the opinion, however, that the HMP does include habitat management and predator control measures that they accept should favour whimbrel and other breeding birds. Uncertainties over the factors influencing whimbrel numbers in Shetland, the habitats that

whimbrel prefer and hence the goals for habitat management, and the likelihood of reaching these habitat goals through practical land management remain. Despite this, over the course of the lifetime of the wind farm, SNH expect that habitat and predator management would provide some mitigation of the effects of the wind farm on whimbrel.

Ministers note that the HMP will take one third of the of the UK population of whimbrel under active management, and will target some 100 whimbrel "hotspots". Based on the detailed environmental information provided in the environmental statement and addendum, Ministers are satisfied that the measures proposed by the HMP are likely to have a positive value to the conservation status of the whimbrel. These measures include a variety of management techniques, including predator control, habitat restoration, protection and management. Ministers are satisfied that an HMP which includes significant predator control from the outset, as well as ongoing habitat restoration, protection and management, is likely to counteract the relatively small estimated rate of bird mortality. Further reassurance is gained from the commitment to ongoing development and improvement built into the HMP as understanding of its effect improves, and from the fact that this commitment will be required by condition.

In any case, if, despite the implementation of the HMP, the estimated negative impact on the species were to remain, Ministers consider that the level of impact on the conservation status of the whimbrel is outweighed by the benefits of the project, including the very substantial renewable energy generation the development would bring and the support this offers to tackling climate change and meeting EU Climate Change Targets.

The whimbrel is in decline on Shetland. Ministers consider that the HMP represents an opportunity - currently the sole opportunity - to try to improve the conservation status of the species. Without the Viking Windfarm HMP, there currently appears to be no prospect of any significant work being undertaken to reverse the decline of the whimbrel in the UK.

Conditions will require that comprehensive monitoring takes place, both of mortality against predicted levels, and of the success or otherwise of measures implemented for the HMP. This ongoing work will inform ongoing initiatives for the conservation of whimbrel, and will provide data on behaviour and conservation to improve knowledge of the species and to inform the necessary improvements to the HMP.

Landscape and Visual

Scottish Ministers are mindful of the various objections, including that of SNH, highlighting the landscape and visual impacts which would result from these proposals. They accept that the proposals would lead to significant change to the landscape character for a considerable area of Shetland and have detrimental visual impacts. Ministers consider that some of these impacts have been alleviated by the reduction from 150 turbines to 127 with the submission of the addendum, and can be further alleviated to a degree by the removal of the 24 turbines in the Delting Parish area. Ministers accept that significant impacts will remain, but consider that these are outweighed by the very considerable economic benefits which the development will bring to the Islands, and more widely, and by the benefits of generating at least 370.8MW of renewable electricity.

Economic and Renewable Energy Benefits

Scottish Ministers aim to achieve a thriving renewables industry in Scotland. The focus being to enhance Scotland's manufacturing capacity, to develop new indigenous industries, particularly in rural areas, and to provide significant export opportunities. A scheme of at least 370.8MW (pro rata) in Shetland is entirely consistent with these goals. Scottish Ministers have considered material details of how this proposal can contribute to local or national economic development priorities as stated in Scottish Planning Policy (SPP). For the proposed 127 turbine development, estimates were of capital expenditure of £707M, of income into the islands of £38.2M per year, and of 42 operational jobs with an additional 174 jobs during 5 years of construction. Shetland Island Council have estimated there would be a total of 435 FTE jobs created (including jobs created by the Shetland Charitable Trust). Furthermore, the Islands' aspiration to seek to benefit from the renewable energy revolution, including by embracing marine renewables, will rely upon the construction of an interconnector to the mainland to export electricity. It is very likely that the construction of such an interconnector is not viable without the Viking Windfarm development or at least one of a comparable scale.

Scottish Ministers welcome the islands aspirations regarding renewables and expect SSE to maximise the potential for local employment and use of local businesses wherever possible and will work with the Partnership to achieve this.

Other Considerations

Scottish Ministers have considered the Public Standards Commissioner of Scotland's decision and conclusions in response and to complaint no: LA/SI/1122 alleging a Breach of the Provisions in the Councillors Code of Conduct. The complaint stemmed from the participation of members of the Council, and subsequently the Shetland Charitable Trust, in Viking Energy Ltd, and the issues which arose from the respondents' individual roles as Councillors, trustees of Shetland Charitable Trust or Directors or employees of Viking Energy Ltd. Scottish Ministers note that following his investigations the Commissioner concluded that the named Councillors in the complaint had not in any way contravened the Councillors' Code of Conduct.

Given that the development is 45% owned by the Shetland Charitable Trust, it will represent a huge step towards the Scottish Government's target of 500 MW community and locally-owned renewable energy by 2020. Pro rata, the 103 turbine development would offer around 167MW towards that target.

Ministers have also considered the 3881 public representations received, of which 2772 were objections and 1109 were in support of the development. The objections raised concerns on a number of subjects including habitat, wildlife, visual impact and infrastructure. Ministers are of the view that these issues will be appropriately addressed by way of mitigation and, where impacts remain, these are outweighed by the economic benefits and renewable energy generation which the Development will bring.

The Scottish Ministers consider that environmental impacts will for the most part be satisfactorily addressed by way of mitigation and conditions, and that the residual impacts are outweighed by the benefits the development will bring. ..."

Some issues to be noted in the decision letter

[24] It may assist in understanding this case if I identify in the decision letter the main issues

discussed by the respondents and refer to some of the issues not discussed in the decision letter but raised before me. In the decision letter the respondents exclude the proposed 24 turbines in the Delting area, citing "apparently insurmountable aviation issues". There is a comment on the ability of the remaining 103 turbines in the development to provide generating capacity and the benefits of that, including the opportunity to help meet European climate change objectives. This reliance on climate change objectives is given some weight and prominence in parts of the decision letter.

[25] The decision letter acknowledges concern about the overall condition of the environment upon which wild bird species rely and concerns about the peatland ecosystem being in serious decline and suffering extensive degradation. It is stated (page 10) that the new habitat management plan ("HMP") proposed by the interested party "will restore peatland...and will include habitat restoration and protection" for a wide variety of birds including whimbrel. It is stated that Scottish National Heritage ("SNH") "have welcomed the HMP and recognise that it offers the possibility of significant biodiversity benefits and is an excellent opportunity to explore various habitat management methods". These passages were the subject of detailed criticism by counsel for the petitioners and he submitted that it gave inaccurate and misleading information about the position of SNH.

[26] Thereafter there is discussion in some detail about various matters and opinion in relation to whimbrel in pages 10 to 12. These passages were subject to the most detailed reading and analysis by all parties. It is important to note that the decision making of the respondents proceeded on the basis that whimbrel are in decline but it is not clear what they mean by that. It

is also stated that the HMP represents an opportunity - currently the sole opportunity to try to improve conservation status of the species. The respondents were of the opinion that without the Viking Wind Farm HMP, there currently appears to be no prospect of any significant work to reverse the decline of the whimbrel in the UK. There is no consideration given to whether the decline has any significance or whether the respondents should do anything to assist in redressing the decline or whether reversing the decline should be a precondition of the development commencing.

[27] There is a very short discussion at page 12 about landscape and visual aspects in which it is accepted that the proposals of the interested party would lead to significant change to the landscape character for a considerable area of Shetland and have detrimental visual impacts. The decision letter concludes that these disadvantages are outweighed by the very considerable economic benefits and by the benefits of generating renewable electricity.

[28] At page 12 there is a discussion of economic and renewable energy benefits and the aim of achieving a thriving renewables industry in Scotland. The development by the interested party is considered by the respondents to be entirely consistent with these goals.

[29] Under reference at page 12 to "other considerations", reference is made to the Public Standards Commissioner of Scotland's decision and conclusions in response to a complaint alleging a breach of the provisions in the councillors' code of conduct. This is a reference to the complaint that some members of Shetland Council made the decision not to oppose the development at a time when they were also trustees of Shetland Charitable Trust and/ or

directors or employees of the interested party. It is noted that the Commissioner concluded "that the named Councillors in the complaint had not in any way contravened the Councillors' Code of Conduct".

[30] There is a reference at page 13 to the 3881 public representations, of which 2772 were objections and 1109 were in support of the development. It is noted that the "objections raised concerns on a number of subjects including habitat, wildlife, visual impact and infrastructure". It is stated that

"Ministers are of the view that these issues will be appropriately addressed by way of mitigation and, where impacts remain, these are outweighed by the economic benefits and renewal energy generation which the Development will bring."

In conclusion it is stated:

"The Scottish Ministers consider that environmental impacts will for the most part be satisfactorily addressed by way of mitigation and conditions, and that the residual impacts are outweighed by the benefits the development will bring."

[31] The decision letter makes no mention of any planning policies or the development plan.

[32] There is no reference in specific terms to the Directive 2009/147/EC of the European Parliament and of the Council on the conservation of wild birds ("the Wild Birds Directive 2009"). There is a general statement at page 7 that Scottish Ministers have taken into consideration "the obligations under EU environmental legislation, and have had careful regard to the potential for impact on the environment, in particular on the species of wild birds".

Conditions in the decision letter

[33] There are many and varied conditions set out in the decision letter. Conditions applying to the section 36 consent are set out in Annex 2. Condition 2 provides that the commencement of development will be no less than 5 years from the date of this consent. Condition 3 provides that:

"The partnership will not be permitted to assign the consent without the prior written authorisation of the Scottish Ministers. The Scottish Ministers may grant consent (with or without conditions) or refuse authorisation as they may, in their own discretion, see fit. The consent will not be capable of being assigned, alienated or transferred otherwise than in accordance with the foregoing procedure."

The reason given for this is to safeguard the obligations of the consent if transferred to another company.

[34] Other conditions relate, for example, to redundant wind turbines, decommissioning and ensuring compliance with health and safety legislation and the safety of flights.

[35] Annex 2, part 2 sets out conditions applying to deemed planning permission. The first condition provides that the development will be undertaken in accordance with the application and environmental statement and addendum approved by this consent except in so far as amended by the terms of this consent and direction. Condition 4 relates to an obligation to provide written details of the bond or other financial provisions proposed to be put in place to cover all decommissioning and site restoration costs on the expiry of this consent to be done

prior to the commencement of development. Various other provisions relate to the financial bond. The reason given is to ensure the financial security of the costs of the site reinstatement to the satisfaction of the planning authority. Various conditions relate to the reinstatement of the site and detailed conditions relate to construction and preservation of visual amenity.

Condition 26 makes detailed provision about the habitat management plan and provides that the construction of the development should not commence until various conditions have been complied with. Conditions 26 and 27 are both stated to be conditions to ensure minimal disruption to habitats.

Condition 29 states:

"Prior to the commencement of development, relevant preconstruction ornithological surveys shall have been completed, and the HMP and a Bird Protection Plan ... shall be submitted to and approved in writing by the planning authority in consultation with SNH. A revised Bird Protection Plan will be produced and submitted for approval to the planning authority for works beyond the anniversary of any current approved plan."

The reason for this is given as "in the interest of protection of breeding birds".

[36] It should be noted that there is no condition that development and/or operations should not commence until a generator licence under the 1989 Act has been obtained by the interested party.

The competency issue: How the issue arose

[37] The respondents in the decision letter, 6/4 of process, set out briefly at part of pages 9 to 10 the legal framework in which they state the section 36 decision was made to grant consent for the construction and operation of Viking Wind Farm. Specific reference is made to Schedule 9 of the 1989 Act.

[38] On 1 May 2013, in opening his submissions on behalf of the respondents, senior counsel for the respondents stated that he wished to explain the decision making of the respondents in the context of the relevant statutory provision. I was grateful for that as I considered this to be an obvious starting point for the consideration of the issues in the case. In this case it was not disputed that the references to the Secretary of State in the legislation in consequence of devolution arrangements apply to the respondents.

[39] This involved an analysis by senior counsel of the 1989 Act, in particular section 36. He made reference to the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2000 (SSI 2000/320) (the "EIA Regulations 2000"), in particular paragraph 1(2). He drew attention to paragraph 2, the interpretation provisions, and submitted that the present case involved an EIA case which is a Schedule 2 development which falls within regulation 3(2). Reference was also made to the definition "environmental information" and "environmental statement". He referred to the prohibition in paragraph 3 which prevents the Scottish Ministers granting a section 36 consent unless the requirements of regulation 4 of the EW 2000 Regulations have been satisfied. He drew attention to the wording of the regulations which refer to "applicant". He explained, under reference to paragraph 4 and Schedule 4, the detailed

information which required to be submitted in respect of any application for a section 36 consent.

[40] In the course of his submission, he directed me to the statutory provisions which he submitted regulated the exercise of the respondents' discretion in this case in deciding whether to grant section 36 consent. He directed me to Schedule 9, paragraph 3 of the 1989 Act which states:

"(1) In formulating any relevant proposals, a licence holder or a person authorised by an exemption to generate, distributed, supply or participate in the transmission of electricity transmit, distribute or supply electricity-

- (a) shall have regard to the desirability of preserving natural beauty, of conserving flora, fauna and geological or physiographical features of special interest and of protecting sites, buildings and objects of architectural, historic or archaeological interest; and
- (b) shall do what he reasonably can to mitigate any effect which the proposals would have on the natural beauty of the countryside or on any such flora, fauna, features, sites, buildings or objects.

(2) In considering any relevant proposals for which his consent is required under section 36 or 37 of this Act, the Secretary of State shall have regard to-

- (a) the desirability of the matters mentioned in paragraph (a) of sub-paragraph (1) above; and
- (b) the extent to which the person by whom the proposals were formulated has complied with his duty under paragraph (b) of that sub-paragraph."

A definition of "relevant proposals" is given in paragraph 4 which refers back to paragraph 1 of Schedule 9 which states:

"relevant proposals' means any proposal -

- (a) for the construction or extension of a generating station of a capacity not less than 10 megawatts ..."

Paragraph 4 states:

"(1) A licence holder shall within twelve months from the grant of his licence prepare, and from time to time modify, a statement setting out the manner in which he proposes to perform his duty under paragraph 31(1) above, including in particular the consultation procedures which he intends to follow.

(2) Before preparing or modifying a statement under this paragraph, a licence holder shall consult Scottish Natural Heritage

(3) As soon as practicable after preparing or modifying a statement under this paragraph, the licence holder shall publish the statement as so prepared or so modified in such manner as he considers appropriate."

[41] I asked a question as to the identity of the licence holder for the purposes of the section 36 application in the present case. Senior counsel stated that he thought that was the interested party but that senior counsel for the interested party would be best placed to address me on that issue. In order to clarify matters which had puzzled me up to this point in the case, I asked for clarification from senior counsel representing the interested party. She informed me that the interested party was a partnership and that one of its partners was an energy company which was a licence holder and that she would further clarify the matter in due course. After an adjournment for lunch she stated the matter was more complex. Senior counsel for the respondents and senior counsel for the interested party then sought an adjournment to clarify the facts and legal issues.

[42] Without wasting time to narrate the history of the various adjournments which I granted of consent, counsel for the respondents and interested party were not in a position to resume submissions until the morning of Friday 3 May 2013. Counsel for the petitioners explained that

he was not party to any of the discussions and was not aware of the current positions of the respondents and interested party.

[43] After some discussion, I understood that senior counsel for the respondent and interested party wished to continue their submissions and add further submissions about section 36 and relevant provisions including Schedule 9 of the 1989 Act. I was informed by senior counsel for the interested party that at the time of the application, the interested party comprised "a Scottish general partnership" between Viking Energy Limited and SSE Viking Limited. Senior counsel for the interested party said she had now clarified that neither of these companies have or ever had a licence under the 1989 Act. I was informed that SSE PLC had a licence at the time of the application and continues to have a licence. I was informed that SSE PLC, through a company structure of some complexity which was not explained to me, is the owner of SSE Viking Ltd.

[44] The outline structure of these companies and partnerships at application and currently was described to me in very rough diagrammatic form.

[45] This is a case in which there was an application to the respondents for section 36 consent to construct and operate a wind farm on the central mainland of Shetland. Section 36 consent for construction and operation of a wind farm of lesser size than the application was granted by the respondents. The issue of which company (or legal person), if any, was a licence holder or otherwise under the 1989 Act is not addressed in the decision letter. Indeed there appears to be some lack of clarity in the decision letter about the legal status of the legal person to whom consent was granted. The decision letter to an informed reader familiar with the terms of

Schedule 9 appears to be drafted on the basis that the decision making proceeded on the basis that there is a licence holder and that Schedule 9 provisions are engaged. That is certainly how I read the decision letter in a case where there was no suggestion that the applicant had obtained an exemption. It appears that all counsel instructed in the case also believed that this was a case involving an application from a licence holder and consent granted to a licence holder. Indeed that appears to be the reason senior counsel for the respondents directed me to consider Schedule 9.

[46] The facts and law in relation to this were not in issue in the case up to the point when I asked the question. I should make it clear that I have no criticism to make of any of the counsel for proceeding on the basis that this was a case involving an application by a licence holder and consent by Scottish Ministers granted to a licence holder.

[47] I considered that the competency of the respondents' decision to grant consent to a non-licence holder involved issues which required to be clarified and addressed. I invited parties to deal with this to enable me to deal with this point as a preliminary issue without delay. All parties were unwilling to do this. I understood that senior counsel for the petitioners took the view that even if there were competency problems, this could be cured by a new application so he was not attracted to this course.

[48] I did not find the attitude of any of the counsel particularly helpful in relation to this. I decided that, standing the attitude adopted by counsel, the only reasonable way forward was to

allow parties to complete their submissions as they wished in relation to the many and varied points raised in the petition. I invited parties to address me about competency thereafter.

[49] Prior to the competency submissions, I permitted of consent a further amendment by the petitioners, 35 of process, which added averments and plea-in-law 8 to focus the competency issues. Plea-in-law 8 is to the effect that the application by the interested party being incompetent and in consequence the respondents having no power to grant said application, the purported decision should be reduced.

[50] A further three (red) volumes were presented to me by parties prior to submissions.

Outline submissions by the respondents and interested party are to be found in 31 and 32 of process. Detailed written submissions on behalf of all parties are to be found in 30, 34 and 33 of process. I have had regard to the submissions.

Summary of submissions re competency

[51] All parties agreed that at the time of the application, the interested party was not a licence holder or a person authorised by an exemption and that the respondents had granted section 36 consent for the construction and operation of the Viking Wind Farm at a time when the interested party was neither a licence holder or a person authorised by an exemption. It was accepted that there was a dispute about the statutory interpretation of the relevant statutory provisions and that there was no case authority bearing directly on the disputed issues. It was also not disputed that the law in England and Wales had been changed by the Planning Act

2008 c. 29, s 33(1)(h). Section 36 of the 1989 Act is no longer in force in England and Wales but the provisions continue to apply to Scotland.

[52] The general interpretative approach taken by senior counsel for the petitioners and the respondents to the interpretation of Schedule 9 was the same, albeit they had different submissions to make in relation to the status of the legal person who could be granted consent under section 36. Senior counsel for the petitioners submitted that the proper interpretation of the 1989 Act was to conclude that the grant of section 36 consent to a non-licence holder who was not exempt was incompetent. Senior counsel for the respondents concluded that consent could be granted to any person. He accepted that the consequence of his interpretation was that some applicants escaped the duties placed on a licence holder and an exempt person, and the decision maker escaped the duties placed on him, leading to what was loosely referred to in submissions as a two-tier system.

[53] Senior counsel for the interested party adopted a very different approach to the interpretation of Schedule 9. She invited me to adopt a purposive interpretation and to conclude that, properly interpreted, the duties in Schedule 9 fell upon "any person formulating any relevant proposals" and that any person could apply under section 36 but all persons were subject to the Schedule 9 duties and the Ministers' discretion was constrained in respect of applications by all persons. As a secondary submission she invited me to conclude that the respondents' interpretation was absurd in the *Pepper v Hart* sense and that the clear ministerial statements in *Hansard* supported her interpretation.

[54] Both counsel for the respondents and the interested party invited me to reject the petitioners' submission, albeit on the basis of different submissions which conflicted with each other.

Submissions by senior counsel for the petitioners

[55] Senior counsel adopted his written submissions, 30 of process. He added little in oral submission to his written submissions.

[56] In summary, his main submission was to the effect that it is implicit in the statutory scheme of the 1989 Act that an application for a section 36 consent can only be made by the holder of a section 6 licence or a person exempt from holding a licence under section 5. He submitted that the respondents had no power under the 1989 Act to grant a section 36 licence to the interested party, who was neither a holder of a section 6 licence nor a person exempt from holding a licence under section 5.

[57] Counsel considered the general statutory background. Focussing on Schedule 9, he submitted that taking into account the whole statutory scheme, it is inconceivable that Parliament intended that the "environmental requirements" of Schedule 9 could be avoided by a person merely by not obtaining a licence and by not seeking an exemption. He accepted that a such a person might be subject to the EIA regulation provisions. But he submitted that these obligations were different from the Schedule 9 obligations which included positive obligations

in relation to the environment and included obligations on the licence holder or exempt person to mitigate the effects of the development proposal. The underlining is mine. Schedule 9 also imposed obligations on the decision maker and it was inconceivable that Parliament intended Ministers to have their discretion unconstrained if a person chose to avoid bringing themselves within section 5 or 6 of the 1989 Act. Counsel submitted that it was consistent with his interpretation to note that there were powers granted in Schedules 3, 4 and 5 which related to licence holders.

[58] Counsel rested on his main submission but submitted that if the language was considered to be ambiguous, he was entitled to pray in aid some of the passages in *Hansard* on a *Pepper v Hart* basis. In particular he referred to *Hansard*, (20 July 1989, Vol 157) and *Hansard*, (6 July 1989, Vol 509). He submitted that it was plain from the Ministerial Statements that Parliament had recognised that the EIA regulations were not themselves sufficient protection and Parliament intended to impose additional environment obligations on all applicants through the licencing or exemption system. It is plain that Parliament intended that the duties were to be brought into effect at a very early stage, not merely at the stage when generation commenced.

Submission by counsel for the interested party

[59] Of consent, senior counsel on behalf of the interested party presented her submissions out of order before the submissions by senior counsel for the respondents.

[60] Senior counsel referred to her note of argument, 34 of process as amended at the Bar and noted in the minute of proceedings.

[61] Senior counsel invited me to consider the overall statutory scheme in order to consider the proper interpretation to be given to Schedule 9. She emphasised that there is a clear distinction between the licensing system in the 1989 Act and what she referred to as the "development authorisation" under section 36. She submitted that the development authorisation does not depend on the licence system to regulate or to guard against adverse effects in the development and construction. The licensing system is not intended to "regulate" the development. The regulation of the development is done in the section 36 consent by attaching conditions. She referred to the various conditions in the present case as examples. She also noted that it was envisaged in the consent that the consented development project might be "sold" on as there was a specific condition about assignation.

[62] In relation to the licensing system, she referred in detail to the licensing conditions which were concerned with post-generation activity, reflecting the protection of consumer and the public interest and the nature of the duty on the regulator to ensure supply. She noted that there were two separate and distinguishable criminal offences. These were dealt with in section 36(6) and section 4 of the 1989 Act. She submitted that this illustrated the distinction to be seen in the 1989 Act which distinguished licensing issues from issues relating to land use. She further submitted that the history of the legislation indicated a consistency of approach in retaining powers at Ministerial level in relation to consent.

[63] In focussing on section 36, counsel submitted that what was being granted was consent to a development operation, that is to "construct and operate". Permission was not being granted to construct and "generate" as defined in the 1989 Act. She was unable to explain what "operate" meant in this case if it did not mean "generate" in terms of the Act. As I understood her submission, what was meant by "operate" in the permission granted in this case was operate by way of generation as defined in the Act. She accepted that the interested party with section 36 consent could not legally "operate" without first obtaining a licence under the 1989 Act. She submitted that the licensing system was designed to deal with generation and the implications of that. The system of development control and system of licensing were separate. She submitted that the respondents in addressing the issue of whether section 36 consent should be granted, required to consider whether there was an appropriate land use. If the issue was looked at in that way, the decision maker was required to consider the impact on the environment. In contrast, under section 4 of the 1989 Act, the licence authorised a person to generate electricity for the purpose of providing a supply. She submitted that the principal purpose of the licensing system is to protect consumers. It is not concerned with protecting the environment or dealing with land development. I was also invited to conclude that it was significant to the interpretation that section 36 is included in the section of the Act which dealt with public interest.

[64] Having concluded a detailed analysis of the licensing scheme under the 1989 Act, there was also some discussion about how the scheme worked in practice and the practical implications of the licensing scheme. According to the understanding of senior counsel, there have been many

developments in the renewables industry not contemplated in the 1989 Act. For example, it was her understanding that some developers had expertise in putting together schemes for development, albeit she understood the developer never intended to generate themselves and might, she speculated, for that reason never be granted a licence. The aim in such a case was to successfully organise the development and "sell on the scheme" after having obtained section 36 consent. The costs of developing such schemes for section 36 approval were very high. In contrast, licence costs were very modest in both cost and administrative time. She explained that even if such costs were modest, a section 36 applicant might not apply for a licence because she submitted some developers were not interested in generating electricity but were interested in "selling on" schemes. She did not explain what the public interest or Parliamentary intention might be if the respondents were correct in their interpretation of Schedule 9 in allowing such developers to escape the obligations of Schedule 9, paragraph 3. On her purposive interpretation such developers would not so escape. Counsel submitted that at the time the 1989 Act was passed, most developers were licence holders in relation to generation projects. She did not give any example of a developer who was not a licence holder in the early history of the legislation and was not able to date when a practice began of developers not interested in generation avoiding licence application. She submitted that developments in the industry had created many innovations, both in relation to the development of the renewables industry and also how developments were promoted.

[65] Senior counsel submitted that a proper understanding of the relevant statutory provisions highlights the differences between the licensing regime and the regime that applies to

authorisation of developments that require consent under sections 36 of 37 of the 1989 Act. She submitted that it is plain from the general purpose and nature of the licensing regime that development activities that are carried out for the purpose of constructing a generating station are not licensable activities. She concluded that there is therefore no statutory requirement to hold a generation licence, or be a person authorised by exemption to generate electricity, for the purpose of applying for consent under section 36. The 1989 Act does not place any restrictions on persons who can apply for section 36 consent. Such a restriction could only be placed by "reading in" restrictions to the wording of the legislation.

[66] Senior counsel for the interested party in paragraphs 20 to 30 of 34 of process sets out in detail her approach to statutory interpretation of section 36 and Schedule 9. As developed in submission, counsel accepted that on a strict or literal reading of Schedule 9, the duties including the duty to mitigate apply only to the licence holder or exempt person. She accepted that a similar restriction applied in relation to the duty of the Minister as decision maker. Up to this point her submissions echoed the submissions of counsel for the petitioners and the respondents. But at this point she developed her own submission. She submitted that such an interpretation gave too much significance to the wording in Schedule 9, paragraph 3(1) and (2) re licence holder and insufficient significance to the opening words "in formulating or considering any relevant proposals...". Counsel submitted that it was plain from the context that the focus of the provision related to those persons formulating relevant proposals. All such persons were to be subject to the duty to mitigate. One should read the words therefore as meaning that anyone (not merely licence holders or persons exempt) formulating such

proposals were subject to the duties in Schedule 9. It followed that there was no difference in the Ministerial duties in paragraph 3(2) and the respondents' discretion was constrained in respect of all persons formulating relevant proposals.

[67] By adopting what she described as this purposive interpretation all the difficulties of a two-tier system which flowed from the respondents' interpretation fell away. She appeared to give no significance to the fact that the difficulties did not apply to the petitioners' interpretation. The difficulties which she criticised that flowed from the respondents' interpretation only arose because the respondents insisted that "any person" (not restricted to a licence holder or exempt person) could obtain section 36 consent.

[68] In summary, senior counsel for the interested party submitted that when one properly analysed the meaning and purpose of the 1989 Act, it is plain that there is no significance for land development purpose in having the status of a licence holder. She submitted that the purposive interpretation adopted by her overcame the manifest difficulties which flow from the respondents' interpretation.

[69] As a secondary submission, counsel submitted that the respondents' interpretation led to absurdity in the *Pepper v Hart* sense because it frustrates the purpose of the 1989 Act. She submitted that the effect of the respondents' submission is that duties are only imposed on licence holders and exempt persons and that any other persons applying are free from duties under the 1989 Act and the Minister's discretion is not constrained in relation to them. I accept that is a correct understanding of the effect of the respondents' submission. Counsel prayed in

aid *Pepper (Inspector of Taxes) v Hart* 1993 AC 593 at page 640B-C and *A C Beckett and Sons v Midland Electricity Plc* [2001] WLR (CA) 281 at paragraphs 32 to 39.

[70] Counsel for the interested party sought to rely on *Hansard*, praying-in-aid the references in the Electricity Bill debate in the House of Lords in 25 April 1989 (Vol 506 cc 1151-243); 5 July 1989 (Vol 509 cc 1199-1229); 6 July 1989 (Vol 509 cc 1240-75) and (Vol 509 cc 1303-34) and in the House of Commons in 20 July 1989 (Vol 157 cc 593-612). She submitted that it is plain from the Ministerial Statements that it was not intended to create a two-tier system whereby some persons formulating proposals are not subject to the Schedule 9 duties compared with licence holders and exempt persons when they formulate proposals. She further submitted that the Ministerial decision making was constrained in respect of all persons formulating proposals and not only those proposed by licence holder or exempt persons. She stated that the *Hansard* references provided a clear statement from Ministers that the Schedule 9 obligations were intended to apply to all those participating in the generation industry and that it was intended that the environmental duties should be strengthened beyond the scope of the EIA regulations.

[71] In paragraphs 31 to 37 of 34 of process, criticisms are made on behalf of the interested party in relation to the submissions of the petitioners. Senior counsel submitted that the effect of the submission on behalf of the petitioners is that the court must "read in" to the 1989 Act a statutory requirement that to be a competent application for section 36 consent, the applicant must be the holder of a generation licence. She submitted that this was not supported by the case law and prayed-in-aid *Inco Europe Limited v First Choice Distribution* [2000] 1 WLR 586 at 592; *The City of Edinburgh Council v Scottish Council for Research and Education* [2013] CSIH 15;

Scottish Water v Clydecare Limited 2003 SC 330. She submitted that it was difficult to argue that the 1989 Act contains a lacuna, bearing in mind in particular the many amendments which have been made to it. In any event she submitted that even if there is an error in the legislation in the creation of a two tier system, judicial rectification is not a matter for the court but for Parliament.

[72] A further additional point made in oral submissions was that insofar as counsel for the petitioners sought to rely on *Hansard*, he was not able to point to any clear statement to the effect that it was a requirement that an applicant be a licence holder in order to make an application under section 36.

[73] Counsel concluded that the petitioners' submissions were in error as they were not based upon a proper understanding of the scheme of the 1989 Act.

Submissions by senior counsel for the respondents

[74] In opening his submissions, senior counsel made a number of points of general interest. He referred to the different perspectives of the respondents and the interested party. The respondents have direct experience of the section 36 scheme but not the licensing scheme. There was no representative in this case who had detailed knowledge about the licensing scheme. He accepted that the interested party has access to experience and expertise in the generation industry.

[75] He accepted that his interpretation differed from the interpretation put forward by the interested party in respect of Schedule 9 and also in relation to *Pepper v Hart*. Counsel submitted that *Pepper* and *Hart* properly understood required consideration of a two stage test. The first test focussed on ambiguity or obscurity or manifest absurdity. Under reference to *Beckett* he submitted that ambiguity or obscurity tended "to go hand in hand". In a case in which, properly analysed, there was manifest absurdity and it was obvious that something had gone wrong in the legislation, reference might be made to *Hansard* and "associated material" to find out what Parliament intended. Only if there was a clear statement of intention could the court use this to assist an interpretation. In the present case, he submitted that the submissions of the interested party were ill-founded in relation to manifest absurdity. He accepted that the results of his interpretation were "odd" but no more than that. He also submitted that there was no clarity to be found in *Hansard* in relation to the disputed issues. He also emphasised the dangers in taking "bits" from *Hansard* and second-guessing Parliamentary intention. This he submitted was an inherently difficult and dangerous task. Referring to *Beckett*, he submitted that the case concerned obscurity and not manifest absurdity. He invited me to conclude that the present case was not an appropriate case to apply *Pepper v Hart*.

[76] Thereafter senior counsel adopted the written argument on behalf of the respondents, 33 of process, which followed the outline argument 31 of process. He started his analysis with sections 5 and 6 and Schedule 9 of the 1989 Act followed by analysis of section 36 and Schedule 8. Reference was also made to section 37 of the 1989 Act. Having considered the terms of the Act, he submitted that there was no ambiguity in the statutory language. He submitted

that his analysis flowed from the plain and natural meaning of the language used. He submitted that neither section 36 nor section 37 contain any requirement that applicants for consent be licence holders under section 6. Neither section contains any prohibition on the acceptance or consideration of an application for consent by a non-licence holder. It would have been an easy matter for Parliament expressly to insert such a requirement or prohibition into the 1989 Act. The 1989 Act does not provide either in section 36 (or elsewhere) that a licence must be obtained before an application for consent under section 36 is made. There are sound practical reasons why a person applying for consent under section 36 might not wish to apply for a licence until a later stage. For example once granted, a licence may be revoked if the operations authorised by the licence are not commenced within a certain period. The 1989 Act does not link sections 36 and 37 with the duties set out in Schedule 9, paragraph 3(1). Section 36 refers only to Schedule 8. Schedule 8 is headed "Consents under Sections 36 and 37". Schedule 8 does not refer to "licence holders" but simply to "applicants".

[77] Counsel submitted that the terms of sections 36 and 37 and Schedule 8 are accordingly in "stark" contrast to those of Schedule 9, paragraph 3. That paragraph expressly envisages that a "licence holder" formulating "relevant proposals" must comply with certain duties. Schedule 9 accordingly stands separate from section 36 and the procedure for applications for consent set out in Schedule 8. The category of "relevant proposals" for the purposes of Schedule 9, paragraph 3 does not correspond with the category of proposals for which consent is required under section 36. Schedule 9 will apply to many proposals which do not require section 36 consent. Schedule 9, paragraph 3 distinguishes between relevant proposals formulated by a

licence holder (or person authorised by exemption to generate etc electricity), and relevant proposals for which consent is required under sections 36 or 37. It is only in the latter category of cases, where relevant proposals are formulated for which consent of the Ministers is required under sections 36 and 37 that the Ministers' duty under paragraph 3(2) arises. The reference to "relevant proposals" in that sub-paragraph is a reference to paragraph 3(1) and to relevant proposals formulated by a licence holder or a person authorised by an exemption to generate etc. electricity. The Ministers' duty under paragraph 3(2) accordingly arises only in relation to relevant proposals formulated by licence holders (or person authorised by exemption to generate etc electricity). Schedule 9, paragraph 4 imposes a duty on licence holders which arises after the grant of his licence. It is therefore clearly not a duty which arises in connection with an application for consent under section 36. It arises solely due to the grant of a licence. This further illustrates the absence of any necessary connection between section 36 and Schedule 9.

[78] Senior counsel submitted that the natural and ordinary meaning of these provisions is therefore that Schedule 8 applies to applications for section 36 consent generally, while Schedule 9 applies only to applications for such consent by licence holders (or by persons authorised by exemption to generate etc electricity). The duties imposed by Schedule 9, on those formulating relevant proposals, and on the Scottish Ministers, arise only where the person formulating the proposals is a licence holder (or a person authorised by exemption to generate electricity). They apply to all relevant proposals formulated by licence holders, not merely to those which may in the future be subject to applications for section 36 consent.

[79] Senior counsel criticised the petitioners' submissions in that the petitioners sought to place an artificial construction on the Act and further that construction rests on a number of incorrect assumptions about the purpose of the provisions in the 1989 Act.

[80] Senior counsel then turned to what he described as practical considerations. He submitted that the Schedule 9 obligations were not additional or onerous requirements because the substance of those obligations generally had to be met by applicants in any case as part of the EIA process under the EIA Regulations 2000. By regulation 4(2) Scottish Ministers are required to take the environmental information provided by an applicant into account and be satisfied that the applicant has complied with the obligation under regulation 4(1) which provides:

(1) An applicant shall submit in relation to any application for a section 36 consent or a section 37 consent which relates to EIA development an environmental statement which includes-

- (a) the information referred to in Part II of Schedule 4; and
- (b) such of the information referred to in Part I of Schedule 4 as is reasonably required to assess the environmental effects of the development and which having regard in particular to current knowledge and methods of assessment, the applicant can reasonably be required to compile taking into account the terms of any scoping opinion given.

(2) In relation to any application for a section 36 consent or a section 37 consent which relates to EIA development, the Scottish Ministers shall not grant the required consent unless-

- (a) they are satisfied that the applicant has complied with his obligations under paragraph (1);
- (b) they have taken into consideration the environmental information (including without limitation any views expressed by other EEA States under regulation 12) and state in their decision in relation to that consent that they have done so; and
- (c) the procedures laid down in regulations 9, 11, 12, 13 and 14 have been followed in so far as they are applicable."

He submitted that in practice compliance with duties under the 2000 Regulations would equate to compliance with duties under paragraphs 3(1) and (2) of Schedule 9. From this he concluded that a person in practice cannot avoid compliance with Schedule 9 regulations by applying for section 36 consent before applying for a licence. He submitted that in recent years many of the applicants for section 36 consent are not and have not been licence holders or persons authorised by an exemption. He also submitted that there is nothing to prevent a non-licence developer from seeking section 36 consent, for example for a generating station, and thereafter transferring at a later date the completed generator to an operator licensed to generate.

[81] In conclusion, senior counsel submitted that his construction was supported by the legislative history which he said demonstrated that there is nothing novel or unusual in the idea that the duties contained in paragraph 3 of Schedule 9 do not apply to all those involved in the design and construction of a generating station. He submitted that following nationalisation of the electricity industry in 1947 various power companies were merged into fourteen area boards, two of which were in Scotland. There were various reorganisations thereafter. The genesis of Schedule 9 is to be found in section 37 of the 1957 Act. When later legislation opened up industry to private hydroelectric generating stations, they were not subject to the environmental obligations which had been imposed on the electricity boards. Prior to the 1989 Act, there was further legislation facilitating the generation and supply of electricity by persons other than the electricity boards, in particular amendments made by section 4 of the Energy Act 1983. He submitted that the legislative history indicates that there was a policy trend towards widening the categories of persons who could be involved in the electricity industry and that

under that legislation only the boards were required to "have regard ... to the desirability of preserving the beauty of the scenery and any object of architectural or historic interest and of avoiding as far as possible injury to fisheries and to the stock of fish in any waters" (section 5(1) of the 1979 Act).

The statutory provisions

[82] The provisions of the 1989 Act as amended and (as agreed by counsel) currently in force and in force at the date of the decision, are to be found in red folder tab 80.

Discussion of the competency issues

[83] Senior counsel for the respondents set out an outline of the legislative history relating to the electricity supply industry from which he concluded that there was nothing novel or unusual in the idea that the duties contained in paragraph 3 of Schedule 9 do not apply to all those involved in the design and construction of a generating station. His focus was on construction and he did not seek to explain how his submission related to the fact that consent had been granted for construction and operation.

[84] I am of the opinion that it is plain from the legislative history referred to by counsel for the respondents that government policy on energy supply has been the subject of major and frequent change moving from private provision to nationalisation through various

reorganisations of mixed supply to the position in 1989 when the industry was privatised and a licensing system introduced for the first time. I accept the submission on behalf of the respondents that from 1979 and certainly in the 1989 Act, the policy trend reflected in the legislation was towards widening the categories of persons who could be involved in the energy industry and in particular generation. In my opinion however it is plain from the provisions of the 1989 Act that it was intended to bring to an end the model of mixed public and private supply with different statutory provisions. The Parliamentary intention was to privatise the industry, subject to a complicated structure of reorganisation and licensing. In the reorganisation in 1989, the existing property rights and liabilities of the electricity boards and the electricity councils were to be vested in companies nominated by the Secretary of State and thereafter dissolved. At the heart of this reorganisation was the introduction for the first time of a licensing system and a new officer known as the Director General of Electricity Supply who was to be appointed for the purpose of carrying out the functions assigned or transferred to him under the 1989 Act. As part of this legislative change, the Secretary of State along with the new Director each had a duty to exercise various functions in respect of the industry.

[85] Since the original enactment of the 1989 Act, there have been many legislative changes and the nature of the energy industry with technological and scientific advances has also changed significantly. The 1989 Act has been substantially amended and there are many significant changes.

[86] No party submitted however that any of the changes had any significant impact on the interpretation to be given to section 36 and Schedule 9. Let me look at some of the provisions of

the amended Act. The Director General of Electricity Supply has been abolished and a new body the Gas and Electricity Markets Authority is responsible with the Secretary of State for carrying out their respective functions under the Act. The dual model of control with Ministerial and Authority control continues to exist. The licensing scheme remains the method of control of the industry. The principal objective and general duties of the Secretary of State and the Authority are set out in section 3A. It is provided in section 3A(1B)

"the Secretary of State and the Authority shall carry out the respective functions under this part in the manner which the Secretary of State or the Authority (as the case may be) considers is best calculated to further the principal objective, wherever appropriate, by promoting effective competition between persons engaged in, or in commercial activities connected with, the generation, transmission, distribution or supply of electricity or the provision or use of electricity into connectors."

[87] Section 4 prohibits unlicensed generation for the purposes of supply. There is provision which makes it a criminal offence to generate electricity for the purpose of giving a supply to any premises or enabling a supply to be so given. This establishes a distinct offence from the criminal offence created under section 36 of the 1989 Act.

[88] In terms of section 5 of the 1989 Act, the Secretary of State may by order grant exemption from the requirement to have a licence either to a person or persons of a class. I note that the provisions regulating the exemption, like the provisions regulating the grant of a licence, are framed to refer to the person not the development. The licence does not transfer by virtue of a transfer of the land on which the development is sited. In terms of section 5(6) an exemption may be granted indefinitely or for a period specified in or determined by or under, the

exemption. The exemption may be varied, reduced or withdrawn. In specified circumstances in section 5(11) provision is made for consultation with the Authority. The Secretary of State has very wide powers to grant exemption.

[89] Section 6 makes it plain that it is the Authority not the Secretary of State who may grant any of the licences specified which includes "(a) a licence authorising a person to generate electricity for the purpose of giving a supply to any premises or enabling a supply to be so given ('a generation licence')." Such a licence, unless revoked, may continue in force for such a period as may be specified in or determined by or under the licence. Detailed provisions are made in relation to applications for licences and conditions. I accept the submissions of senior counsel for the interested party that the conditions are not designed to provide detailed land use development conditions. I do note however that there is wide discretion given to the Authority. I accept that a major focus of the licensing regime relates to the period after generation commences. But a system concerned with the interests of consumers and competition in my opinion is not independent of an interest in the development of generation capability. And the 1989 Act plainly envisages that related interest in section 36 of the 1989 Act which makes provision relating to obligations to take effect long before generation actually commences. Schedule 9 duties do not commence at the time of generation or post generation but at a much earlier stage.

[90] I accept that any person may apply for a generation licence but to succeed must satisfy the Authority as grantor that a licence should be granted. The underlining is mine. This involves disclosure of certain information by the person including financial information and a decision

by the Authority. It is for the Authority to decide whether or not to grant a licence and on what conditions. A licence may be refused. If a licence is granted, the licence holder will be subject to such conditions and any statutory provisions as may be relevant before generation commences. I have assumed that these are not onerous in line with the submission made to me by senior counsel for the interested party. But my conclusions would be no different if the conditions were onerous. Conditions may include, for example, providing up to date information about directors. If a person holding a licence wishes to transfer a licence, it is necessary to fulfil the statutory procedure and obtain the necessary consent under section 7A. This may have some significance as the Authority may have views, for example, about how such a transfer might affect competition. It was suggested to me that the existing Authority would find it burdensome to be involved at early stages of developments and/or that the conditions generally imposed by the Authority are not really relevant to such early development stages. That may or may not be so but it is the Parliamentary intention and construction of the 1989 Act which must determine the operating policy of the Authority.

[91] In my opinion it is plain from Part 1 of the 1989 Act that the licensing and exemption provisions are the means by which Parliament intended to regulate the industry.

[92] Within Part 1 of the 1989 Act there is provision in section 36 to the effect that a generating station shall not be constructed, extended or operated except in accordance with the consent granted by the Secretary of State. Within Part 1 there is provision, in section 38, that the provisions of Schedule 9 to this Act (which relate to the preservation of amenity and fisheries)

shall have effect. Section 38 is a stand-alone section directed to the preservation of amenity and fisheries and gives effect to Schedule 9.

[93] In my opinion the terms of Schedule 9(3) are very clear and not difficult to interpret. They oblige a licence holder or a person authorised by an exemption in formulating any relevant proposals for the construction or extension of a generation station of a capacity not less than 10MW to have regard to the various factors set out in paragraph 3(1)(a) and obliges said person to do what he reasonable can to mitigate any effect which the proposals would have on the various factors set out in paragraph 3(1)(b). In my opinion paragraph 3(2) is also important as it imposes obligations on the Secretary of State when he comes to exercise his discretion under sections 36 or 37. It does that by directing the Secretary of State to consider the desirability of the various factors specified in paragraph 3(1)(a) and also obliges him to consider the extent to which the person by whom the proposals were formulated has complied with the mitigation duty under paragraph 3(1)(b). As I understand the general submissions by counsel for the petitioners and the respondents, this interpretation is in line with the approach that they both adopted in relation to the interpretation Schedule 9.

[94] In my opinion the "purposive" interpretation put forward by counsel for the interested party completely distorts the plain language of the statutory provisions. In order to give effect to it, I think it would be necessary to rewrite the terms of the statutory provisions. I appreciate that counsel for the interested party is concerned about the results of the respondents' interpretation. I agree with the concerns. Her construction is an attempt, in my opinion, to try to avoid these results. I consider however it is only necessary for her to do this because of the

attempt to interpret section 36 in the context of Part 1 of this Act as permitting any person to apply for consent for construction and operation even if they are not a licence holder or a person authorised by an exemption to generate. On the construction put forward by the petitioners, there is nothing odd or absurd about the results of the interpretation of Schedule 9 and section 36 in the context of Part 1 of this Act.

[95] I am of the opinion that the 1989 Act set up a detailed licensing system for the regulation of the industry and provided that the amenity provisions shall have effect in a way which is tied into the licensing system and only the licensing system. I consider that the exemption system is part of the licensing system in the sense that the statutory provisions provide a system whereby a person may escape the licensing control but will not escape Schedule 9. I am of the opinion that the Act, as originally enacted, and in its amended terms, has implemented the amenity obligations by placing them on the only two categories of persons contemplated in the legislation, namely licence holders or exempt persons. The Act has also constrained the decision making of the Secretary of State in relation to these two categories of person which are the only two categories of persons contemplated.

[96] Section 36 says nothing about the status or qualification of a person who may apply for section 36 consent. Section 36 is directed to prohibiting certain activities without such consent. Section 36 defines the categories of generating station which do not require consent and gives powers to alter this by order. The only reference to an individual rather than a generating station is in section 36(6) which states "any person who without reasonable excuse contravenes the provisions of this section shall be liable on summary conviction to a defined penalty." And

in that subsection "any person" means what it says. A person who has a licence or a person who is exempt or indeed any person will be liable if he contravenes this section. Obtaining a licence is no defence under this section.

[97] Section 36 does not give any power to the person with consent to transfer that consent by assignation or otherwise. There is no such power given in any part of the Act. If an assignation system is consistent with the statutory provisions, it is entirely unregulated by statute.

[98] Schedule 4 gives a range of powers to licence holders to execute works connected with carrying on activities which the licence holder is authorised by his licence to carry on.

[99] Schedule 8 of the 1989 Act is completely silent and makes no provision about the status or qualification of the person who may apply for consent. It provides for the form and content of application and regulates procedure in respect of objections and any public inquiry. There is a reference in Schedule 8 paragraph 6 in relation to an application for consent under section 37. I was invited by senior counsel for the respondents to draw certain inferences from that in support of the interpretation of the respondents. In my opinion this does not support their submission. The only person who can apply for consent under paragraph 6 of Schedule 8 is a licence holder. In my opinion paragraph 6(1)(b) is to be interpreted as meaning that the work is not to proceed and is delayed until the Secretary of State has given his permission to the licence holder as envisaged in paragraph 6(1)(a) or until the Secretary of State has given his permission on the basis that the matter of wayleaves have been satisfactorily sorted out for example by voluntary agreement.

[100] The regulations about application for consent made under the Electricity (Applications for Consent) Regulations 1990 do not assist. The reference in the regulations is to applicant but these orders are subsidiary to the 1989 Act which regulates the scheme.

[101] The petitioners' submissions were criticised by counsel for the other parties because it was submitted the petitioners were asking a restriction be read into section 36. I consider however that the same criticism can be made about the submissions of the respondents and interested party. In effect they are asking the words "any person may apply" to be read into section 36. As I have explained section 36 is silent about this. It is silent in my opinion because it is plain from the structure and intent of the Act that the new system of licensing which is fundamental to the regulation of the industry is intended to predate an application for section 36 consent. That is the reason the amenity obligations are implemented in the way that they are. The amenity obligations are imposed at the earliest stage, at the stage that is of formulating any relevant proposals as defined in Schedule 9. That is at a time which is necessarily prior to any consideration and grant of section 36 consent. By the time section 36 consent comes to be considered, the proposals are formulated and ready for consideration. There may be a basis for criticism of some of the minor points made by senior counsel for the petitioners about the history and context of the legislative provision but I consider that his main submission is correct.

[102] Counsel for the respondents accepted that it a necessary conclusion from his interpretation that there are three categories of people who may obtain section 36 consent. The first two categories are licence holders and exempt persons. In the third category is any other person. He

also accepted that it is a necessary conclusion from his interpretation that merely by deciding not to apply for a licence or exemption, a person avoids the duties in Schedule 9. Senior counsel sought to persuade me that this was of no importance because the environmental regulations apply to all three categories of persons. I do not agree with this submission. At the time the 1989 Act was originally enacted, the predecessor EIA 2000 regulations effective in 1989 applied. In my opinion the terms of Schedule 9 and the duties imposed are not mirrored or copied or co-extensive with the regulations as they applied in 1989 or with the EIA regulations 2000 as they have been updated and which were current at the date of the section 36 decision made in this case. I accept that much information about many issues is required in terms of said regulations. But there is no obligation on the applicant to mitigate equivalent to the Schedule 9 obligation. I accept also that provision is made in regulation 3 to the effect that the respondents require to be satisfied that regulation 4 has been satisfied before they may grant section 36 consent. That provision is directed to being satisfied about the information provided and is not directed to the duty to mitigate.

[103] There is another "odd" result which flows from the submissions on behalf of the respondents. I accept that Schedule 9 is not restricted in its application to the proposals which may be the subject of an application under section 36. Section 36 applies to what might be regarded as more major projects. The precise definitions are given in Schedule 9, paragraph 1. One consequence of the respondents' interpretation is that licence holders and persons exempt who are formulating proposals about relatively minor schemes are all subject to the duties, including the duty to mitigate, as set out in Schedule 9 but the developers of the major project

such as the present project to which section 36 consent has been granted are not subject to any of that according to senior counsel for the respondents.

[104] Senior counsel for the respondents accepted the results of his interpretation were "odd". Having accepted it as "odd", he was unable to offer any explanation as to why such a result would be intended by Parliament except perhaps that it might be more convenient for some developers. I merely comment that the provisions with which we are concerned are amenity provisions in the public interest. I did not therefor find this helpful.

[105] I think it is important to note also that the decision in this case proceeds upon the basis that there were such Schedule 9, paragraph 3(1) duties on the applicant and that the respondents had regard to all these matters in terms of paragraph 3(2). That is what the decision letter 6/4 of process states. Having discovered however that the interested party is not a licence holder or a person authorised by an exemption, senior counsel for the respondents then submitted that neither the interested party nor the Scottish Ministers are bound by the provisions of Schedule 9, paragraph 3 or indeed paragraph 4 which imposes additional obligations on licence holders.

[106] Senior counsel for the respondents submitted that none of this matters because, in any event, the respondents applied Schedule 9 even though they were not bound to do so. I find this submission very puzzling. If the respondents are correct in their interpretation, it follows that Parliament, for some reason which I cannot fathom, intended that there should be three categories of person, a licence holder, a person authorised by an exemption and any other

person. For some reason Parliament burdened the first two categories of persons with various amenity duties, including mitigation, and constrained the decision making of the Secretary of State accordingly. But, presumably for some reason, Parliament intended that there should be a third category of person, unconstrained by these obligations and liberating the Secretary of State from his duties in terms of paragraph 3(2). If that is correct, it must follow in my opinion that the intention of Parliament should be respected and implemented. It would not be open therefore for the respondents to say that we do not recognise the different duties and different criteria for decision making imposed by Parliament and instead we shall apply Schedule 9 to everyone, or at least to the applicant in this case.

[107] One of the difficulties for the respondents and interested party in this case is that the case has been treated by the respondents on the basis that the interested party is a licence holder. But it would appear if the respondents' interpretation is correct, that if he is not a licence holder and he is not authorised by an exemption, then it is not appropriate to apply the terms of Schedule 9 as the respondents purported to do in the present case. I do not understand on what basis the respondents claim to be able to operate the legislative provisions in the way that they have apparently done in this case. There appears to be a lack of clarity, a lack of legal analysis and perhaps a lack of appreciation about the importance of Schedule 9. I detected a hint of this in submission by counsel for the respondents. He seemed to suggest Schedule 9, paragraph 3 was not particularly important and not something that would affect the outcome of decision making. I disagree. I consider that Schedule 9, paragraph 3 is important and requires proper consideration and application by the decision maker.

[108] If the respondents' interpretation is correct, I consider that there is an important difference which ought to be recognised and reflected in the decision making as between the first and second category of persons compared with the third category. That important difference would also require to be respected in relation to the statutory criteria regulating the decision making of the respondents. As I have stated, I do not consider that the EIA Regulations 2000 alter the position. A licence holder and exempt person in a scheme such as the present may also be subject to said regulations in addition to Schedule 9 obligations. As I have observed the EIA 2000 Regulations do not seek to regulate the decision making of Scottish Ministers in the same way or to the same effect as Schedule 9, paragraph 3(2).

[109] As I consider the interpretation of the relevant statutory provisions is plain and intelligible, I do not consider that this is an appropriate case to apply *Pepper v Hart*.

[110] If, contrary to my opinion, it is considered that there is an ambiguity or obscurity or manifest absurdity, in the sense explained by the interested party, I am persuaded by her that this would be an appropriate case to refer to *Hansard* to try to find out what Parliament intended. Parties have given selective references to *Hansard* and I am not in a position to say whether there is other material which bears upon this. Certainly on the material put before me, I have no hesitation in saying that there is nothing in that material to support the interpretation put forward on behalf the respondents.

[111] I accept the submission by the interested party that there is no specific reference in the *Hansard* extracts about who can apply. In my opinion, however, the references on which she

relies are consistent with the petitioners' interpretation. The petitioners' interpretation which follows the natural meaning of the language used and looks to the purpose of the statute in creating licence holders and persons exempt, is consistent with the Ministerial statements to the effect that the amenity obligations fall upon the whole industry as submitted by counsel for the interested party.

[112] In my opinion there is nothing in the Ministerial statements which supports the unnatural interpretation of the language which the interested party seeks to place on the words used in order to avoid what she says in the manifest absurdity of the respondents' interpretation.

[113] It should also be noted that if one adopts an interpretation which permits section 36 consent for development and operation to be granted to a non-licence holder who has not applied for and been given an exemption, this means that the respondents have in effect granted permission to a person to carry out the operation of generation which is a criminal offence under and in terms of section 36(6) of the Act. In the context of a case such as this I consider that operation means generation in terms of the statutory definition. All parties accepted that this development could not be "operated" without a generation licence. I merely pause to comment that in itself may suggest that Parliament never intended the legislation to be construed and applied as submitted by the respondents.

[114] In conclusion, let me say that I agree with senior counsel for the respondents that it is important to understand the statutory context in which the decision making of the respondents was made in this case. This is a multimillion pound project which is controversial and which

has many and varied implications which are of concern to the parties and to the wider public. In my opinion the legislative structure is very important and provides the framework for the decision making as well as the starting point for consideration of this judicial review. I consider that a final decision is necessary about this aspect of the case because it also may affect the way in which the case for judicial review should be considered in relation to the merits of the case. For that reason I encouraged parties to consider and agree to the determination of this issue before the other issues in the case were determined by me. Unfortunately there was no agreement about this. Had there been such agreement, I would have considered it preferable to deal with this issue as a separate issue and thereafter allow any party, if they so wished, to appeal.

[115] For the reasons I have given I will sustain plea-in-law 8 of the petitioners.

[116] Let me now turn to the many and varied other issues raised in this petition. In order to do that I consider it necessary to give more background information about the case to help put the decision letter and submissions into context.

Further information about various issues

Legal issues re Wild Birds Directive 2009

[118] The specific legal issues in relation to the Wild Birds Directive 2009 which were canvassed before me were not raised as objections by the petitioners. The respondents' understanding of the issues raised is recorded in the decision letter:

"Sustainable Shetland objected to the proposal concluding that the objection by the Shetland Amenity Trust and the John Muir Trust are fully supported by the Sustainable Shetland Group and in terms of visual and landscape impacts, the ES methodology is flawed and the assessment of visual impact and cumulative impact cannot be relied upon. They claim the environmental statement also contradicts the recommendations of the council's recent landscape capacity study and the proposed development is premature pending the preparation of up-to-date policy guidance. They also claim the proposed development is contrary to the development plan and therefore there should be a presumption of refusal of consent and deemed planning permission and that there are no material considerations that would change this conclusion. They state Council members, and therefore the planning authority itself have a profound irreconcilable conflict of interest in relation to the proposed development. Sustainable Shetland requests that Ministers either reject this proposal now or immediately refer the proposal to a public local inquiry."

I understand that neither the John Muir Trust nor the Shetland Amenity Trust raised the detailed issues in relation to the Wild Birds Directive now founded upon by senior counsel for the petitioners. I do not know whether the petitioners had the benefit of legal advice at an earlier stage. Scottish National Heritage did raise issues in relation to said Directive. I do not know whether other parties raised issues in relation to said Directive.

Scottish Natural Heritage

[119] Scottish Natural Heritage (SNH) is a statutory body established by the Natural Heritage (Scotland) Act 1991. It has wide-ranging functions under and in terms of said Act. SNH was involved at an early stage in relation to the proposed development. It had a statutory role as consultee under and in terms of the EIA Regulations 2000. SNH has produced guidance, 7/12 of process, relating to assessing significant impacts outside designated areas.

[120] The submissions made by of SNH are set out in 6/14 to 6/17 of process. The earliest correspondence in the productions dates from 30 November 2010 when SNH commented on the amendment to the proposed development in relation to the addendum. Their ornithological objection was "due to the high likelihood of a significant adverse impact of national interest on the favourable conservation status of the national population of whimbrel, an EU Birds Directive Annex 2 species. They did not object but provided advice in relation to adverse impacts on the regional conservation status of seven other Annex 1 or 2 species, all of which they said were of conservation concern. They had other objections which are narrated in 6/14. It is plain from said letter that they had provided early advice and objections in relation to the 150 turbine proposal. They expressed concern *inter alia* about the Habitat Management Plan ("HMP"). They commented on the intent and ambition of the HMP but had significant concerns for the likely success or otherwise. They explained there had been no comparable peatland restoration projects on Shetland and, given the harsh environmental conditions, direct comparison with mainland restoration projects is not possible. They expressed concern about the poorly understood habitat associations and concluded that the proposals in the HMP may

not actually achieve the benefits predicted in the HMP for birds. They advised that the heavy reliance on the HMP as mitigation is not appropriate. Some detailed consideration is also given to a number of issues related to the placing of the turbines and ornithological concerns.

[121] In the letter of SNH dated 11 February 2011, 6/15 of process, SNH clarify their position and maintain their objections in relation to ornithology. They stated:

"We object to the proposal as submitted due to the high likelihood of a significant adverse impact of national interest in the favourable conservation status of the national population of whimbrel, considered under the EU Birds Directive as a regularly occurring migratory species and listed on Schedule 1 of the Wildlife and Countryside Act 1981 (as amended in Scotland)..."

They made specific reference to whimbrel and the Wild Birds Directive, in particular to Articles 2, 3(1), 3(2)(b) and the last sentence of Article 4(4). They stated "achieving and maintaining favourable conservation status of the national population is in line with these provisions and obligations." They advised:

"In this case our advice is that the proposed Viking Wind Farm is highly likely to result in a significant adverse impact on the conservation status of the national population of whimbrel."

They amended their letter, 6/14 of process, to make clear this position.

[122] By letter dated 18 November 2011, 6/16 of process, there is further discussion about whimbrel and in particular criticism of the collision risk as presented in the addendum. They point out there are no studies of collision rates in relation to whimbrel. They also request further

information in relation to collision rates. By letter dated 6 February 2012, 6/17 of process SNH stated:

"This is a complex case in a particularly distinctive environment and affecting whimbrel, which is a little studied species, with approximately 95% of the declining UK population occurring in Shetland. In combination these factors raised the level of uncertainty associated with the predicted impacts of the proposals on whimbrel, and about the likely success of the suggested habitat and predator management measures which aim to improve conditions for whimbrel. Because of the complexity of this case and level of uncertainty, we are unable to provide definitive answers for the level of comfort that we would normally like to achieve..."

They disagree with the prediction in the EIS and predict that the collision rate is double at 4.2

They advise again about the problems in the case about the EIA because very little is known

about the population dynamics and declining population. Having taken account of the removal

of the Delting turbines they conclude that there would be a reduction in the order of

approximately 10% of the collision risk impact (although it still leaves a significant residual

effect which at present is proposed to be addressed through the HMP). They advise again that

the benefits of the HMP cannot be quantified and suggest alternatives. At page 4 there is

detailed discussion about the HMP. There is an acceptance that the HMP contains measures to

alleviate impact on other species but because of all the uncertainties about whimbrel they

remain of the view that there is uncertainty re whimbrel. There is no data and the outcomes are

unpredictable. They reiterate their advice that the benefits of HMP re whimbrel cannot be

currently quantified and so should not be relied upon as mitigation. They emphasised the

uncertainty and unpredictability and unknown features in relation to whimbrel. In conclusion

they advise:

"We think that more could still be done to improve the quantification of the risk and to look at the mitigation measure...outlined, although without further changes to the proposal or experience of the HMP I do not think that this would result in significant changes to our advice."

[123] It appeared that a number of issues were left unresolved. In 7/22 of process, concern about unresolved issues was expressed in email correspondence by a civil servant from the Energy Unit. In particular he asked whether SNH considered that it would be straightforward for more to be done to quantify the likely effect on the whimbrel population and whether this would be worthwhile. SNH confirmed that there was sufficient information for EIA purposes to identify and assess the likely significant or main impacts. SNH advised that further information would not alter their consultation advice that there is a high likelihood of significant adverse effect on the favourable conservation status of whimbrel.

The environmental statement relating to birds prepared by the expert instructed by the interested party

[124] Parts of the environmental statement prepared by the expert instructed on behalf of the interested party were produced to me. Those parts focused on ornithological issues and the proposed habitat management plan. Bird surveys instructed by the interested party are to be found in 7/4 of process. In paragraph 71 it is recorded that there have been large declines in whimbrel outside the Viking site. Details are given (at the time of the survey) of the breeding pairs within the site. I was referred in particular to the environmental statement addendum of the interested party which is 6/32 of process Chapter A[11]. It was explained that this

superseded 7/3 of process. The environmental statement addendum considers whimbrel at A11.17. A11.17.2 of the report states there is clear evidence from the 2009 survey that the Shetland whimbrel population is currently not in favourable conservation status. The underlining is mine. It is accepted that the habitat requirements of whimbrel on mainland Shetland are relatively poorly understood (A11-122). Various potentially adverse effects of the proposed development on whimbrel are considered. These include direct loss of habitat, indirect loss of habitat due to the displacement of birds by construction works and operation of the wind farm and mortality due to collision impacts.

[125] The significance of the combined effects on whimbrel are contained in paragraph A11.17.8. There is a photograph of a whimbrel in 7/4 of process, photo 11. There is an acceptance in 6/32 of process that the population processes of Shetland whimbrel are poorly understood and that the population has had no spare capacity and fallen well short of that required to balance adult mortality. Various concerns are expressed about the difficulty of prediction. It is stated that:

"The unfavourable conservation status of whimbrel together with the fact that a relatively large proportion of the UK population breeds within or close to the proposed wind farm are reason why a cautious approach to judging the significance of effects on this species is justified. Therefore, the potential adverse effects identified, which are based on highly cautious assumptions, before mitigation, would be significant under the terms of the EIA regulations. Were the predicted effects realised there would potentially be detectable changes to the Shetland NHZ population and, to a small extent, they could hamper population recovery.

Adoption of less pessimistic (and arguably more realistic) assumptions (for example a higher collision avoidance rate, would have resulted in combined effects being judged not significant." The underlining is mine.

The environmental statement addendum then considers what is described as mitigation and enhancement proposed measures. At A11.17.10 the conclusion is stated:

"It is considered that the magnitude of the residual effects on whimbrel due to wind farm land take, construction and operational activities, including collision is most likely to be inevitable. Although whimbrel is a species of high nature conservation importance, the likely residual effect after mitigation are judged to be not significant under the terms of the EIA regulations, ie, there will be no detectable regional population level effect. Therefore, if the Viking Windfarm is built, the available information indicates that FCS will not be adversely affected..."

It is further narrated:

"The Viking HMP mitigation and enhancement measures for whimbrel could shift residual effects in a positive direction ie they could more than fully offset any (not significant) adverse effects indeed, due to the large geographic scale of the intended HMP measures, the net effect could be to reverse the existing decline and facilitate population recovery benefits accruing to the Shetland population..."

The summary of predicted effects after mitigation is given in table A11.23. The prediction is that effects combined with HMP mitigation on whimbrel are negligible.

The habitat management plan

[126] The habitat management plan is to be found in 7/7 of process. It was not disputed in this case by SNH that the proposed habitat management plan was wide ranging in area, ambition and scope and was phased in a way to enable trial research and adaptation in consultation with

various experts. The criticisms of the petitioners, reflecting SNH views, were focused on the fact that it was unproved and untested in relation to whimbrel in Shetland and there was no evidence from which to conclude that it would work as hoped and predicted by the interested party. I have referred above to the criticisms of SNH.

[127] I think it is helpful also to refer to the criticism made by the Director of Planning in his report 6/2 of process as these criticisms appeared to be echoed in some of the submissions made by counsel for the petitioners. The Director of Planning criticised the HMP at page 30 where he states:

"The proposals ... are presented in such a way that they are assumed to succeed. There is no clear cut scientific evidence to back this up, indeed there is every possibility that attempts at habitat restoration using untried and untested means will have the opposite effect ..."

This express view appears to underpin in part his conclusion 9.4 at page 65 where he recommended:

"... that Scottish Ministers take account of the precautionary principle set as out in paragraph 132 of SPP 2010, which states:

'Planning authorities should apply the precautionary principle where the impacts of a proposed development on nationally or internationally significant landscape or natural heritage resources are uncertain but there is sound evidence for believing that significant irreversible damage could occur. Where the precautionary principle is justified, modifications to the proposal which would eliminate the risk of irreversible damage should be considered. The precautionary principle should not be used to impede development unnecessarily. Where development is constrained on the grounds of uncertainty,

the potential for research, surveys or assessments to remove or reduce uncertainty should be considered."

Special protection area

[128] The proposed development site is not a special protection area within the meaning of paragraph 4 of the Wild Birds Directive 2009 or part of such area and the proposed development is not said to affect adversely such an area. A special protection area was created in Shetland, namely the Fetlar Special Protection Area, 13/10 of process. Some whimbrel are located on the Fetlar site.

Renewable energy, targets, climate change

[129] I was referred in detail by senior counsel for the respondents to the "2020 Route Map for Renewal Energy in Scotland", 7/23 of process. This document seeks to explain why Scottish Ministers set an ambitious target, namely that the equivalent of all Scotland's electricity needs should come from renewables by 2020. Onshore wind farms are said to contribute to that. In particular I was referred to various targets to which it was said the proposed development will make a material contribution. One of these targets is the equivalent of 100% of Scotland's own electricity demand from renewable resources by 2020. Reference was also made to targets to achieve community involvement in renewable energy. These submissions made on behalf of the respondents formed part of more general submissions about what was said to be the

importance of renewable energy to the economy, climate change and the substantial contribution made by wind farm developments to Scotland and to overall UK targets.

The precautionary principle

[130] Senior counsel for the petitioners made reference in various parts of his submissions to the precautionary principle in different contexts. This was never defined by him. Senior counsel for the respondents made reference to the *Waddenzee* case (2004) ECR I-07405, paragraph 100, which states:

"This rule gives concrete expression to the precautionary principle laid down in Article 174(2) EC in relation to a protection area covered by Natura 2000. The precautionary principle is not defined in Community law. It is examined in case-law primarily insofar as protective measures may be taken, where there is uncertainty as to the existence or extent of risks, without having to wait until the reality and seriousness of those risks become fully apparent. Therefore, the decisive factor is the element of scientific uncertainty as to the risks involved. However, in each particular case the action associated with the protective measures must be proportionate to the assumed risk. In that regard the Commission stated in its communication on the precautionary principle that judging what is an 'acceptable' level of risk for society is an eminently political responsibility. Such responsibility can be met only where the scientific uncertainty is minimised before a decision is taken by using the best available scientific means."

It is plain from the submissions that the term "precautionary principle" is used in different ways and different contexts. The term is to be found in various contexts in environmental law and policy papers. Senior counsel for the petitioners made no attempt to explain whether or how I could use the principle to conclude that a particular decision or part of decision making was

invalid for judicial review purposes. In the absence of such submissions, I do not even attempt to approach the matter in that way.

Restricted advice to Ministers

[131] A Freedom of Information request on behalf of the petitioners was made dated 28 June 2012, 6/21 of process. I was referred to restricted advice to Ministers dated 23 March 2012, 6/20 of process, produced in response to said request. The advice made specific reference in paragraph 12 to issues raised by SNH in relation to "European Wild Birds Directive". Some 20 lines of the advice are blanked out as confidential. I merely observe that it was never revealed to me what that advice was. Counsel for the respondents addressed me on what he said was the proper interpretation of the Directive. The advice prepared by officials in 6/20 of process provided advice and a draft in terms which was very similar to the decision letter.

[132] There was an issue raised in oral submission by counsel for the petitioners as to whether or not the information which was provided was adequate in terms of the Freedom of Information legislation and practice. I consider that this was not a matter for me to decide in this case.

[133] The restricted advice makes it plain that the section 36 decision is not a delegated decision but is one in which officials have advised the Scottish Ministers. The Scottish Ministers are responsible for their own decision making in respect of the application by the interested party.

[134] The restricted advice does not deal with the legal status of the interested party who is sometimes described as "the company" and sometimes "the partnership". There is no discussion as to whether the interested party is a licence holder.

Grounds of judicial review raised in the petition

[135] The grounds of challenge focussed in the pleas-in-law of the amended petition (19 of process) by the petitioners stated:

"1. In the circumstances condescended upon, the Scottish Ministers having acted unlawfully in failing to cause an inquiry to be held before granting their consent to the Viking project, the decision and consent should be reduced.

2. In the circumstances condescended upon, the Scottish Ministers having acted unreasonably in failing to cause an inquiry to be held before granting their consent to the Viking project, the decision and consent should be reduced.

3. In any event the Scottish Ministers having failed to give proper consideration as to whether or not they should have caused an inquiry to be held, the decision and consent should be reduced.

4. The Scottish Ministers having failed to give adequate reasons for deciding that they did not require to cause an inquiry to be held, the decision and consent should be reduced.

5. In the circumstances condescended upon, the Scottish Ministers having failed to take proper account of the obligations in relation to the whimbrel under the Birds Directive

and/or having acted unlawfully in respect thereof, the decision and consent should be reduced.

6. In the circumstances condescended upon, the Scottish Ministers having no power under section 57(2) of the Scotland Act to act in a manner that is incompatible with EU law in respect of their obligations in relation to the whimbrel under the Birds Directive and having purported to act contrary to those obligations, the decision and consent should be reduced.

7. The Scottish Ministers having failed to give adequate reasons for deciding that the developer had complied with their obligations under Schedule 9 of the 1989 Act, the decision and consent should be reduced."

[136] I have dealt in the competency section with plea-in-law 8. The first four pleas-in-law are directed to various challenged (including a reasons challenge) related to the failure of Scottish Ministers to hold a public inquiry. Plea-in-law 5 is directed to the merits of the substantive decision to grant consent. Plea-in-law 6 focussed the devolution issue. The issues in pleas-in-law 5 and 6 relating to the Wild Birds Directive 2009 were interconnected and were reflected in the petition before amendment and in oral submissions as presented to me in January 2013. The new plea-in-law 6 did not raise new issues but focussed on the devolution issue. Plea-in-law 7 is another reasons challenge but directed to the merits of the substantive decision making.

Submissions by senior counsel for the petitioner

[137] The oral submissions dealt with the issues raised in the amended petition. Senior counsel set out a detailed note of his argument in its final form in 23 of process. He also provided a supplementary note of argument in 28 of process. His oral submissions were based on his written submissions.

[138] The opening submissions on behalf of the petitioners dealt with the scope of the court's reviewing powers under reference to *Wordie Property Co Limited v Secretary of State for Scotland* 1984 SLT 345 and *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33. Counsel developed his submissions about the adequacy of reasons under reference to *Wordie Property Co Limited, South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953 and *Moray Council v Scottish Ministers* 2006 SC 691.

[139] The inadequacy of reasons was a theme which permeated the submissions of counsel and was an important part of the petitioners' case. There are two specific challenges based on the inadequacy of reasons. The first is directed to the reasons given for not holding a public inquiry. The second relates to the reasons given by the respondents for accepting that the interested party complied with Schedule 9 obligations under the 1989 Act.

[140] Senior counsel submitted that at the heart of the petition there was an issue which related to an error of law in that the respondents are in breach of their obligations under the Wild Birds Directive 2009. He submitted that the Wild Birds Directive 2009 was never specifically mentioned in the decision letter and that it is clear that the respondents failed to consider and

properly apply the terms of the Directive and give adequate reasons to explain that. Further the respondents wrongly took into account economic issues in reaching their decision.

[141] He set out the background to this legal submission by referring to the factual history. At pages 6-9 of 23 of process, counsel set out the objections by Scottish Natural Heritage ("SNH") to the proposed development based on SNH advice which he submitted was to the effect that there remains a high likelihood of a significant adverse effect on the favourable conservation status of whimbrel at a national level. He submitted this was contrary to the Wild Birds Directive. He referred to the concerns of SNH about the effects of the proposed development on whimbrel and their concerns about the proposed habitat management plan.

[142] At pages 10-22 of 23 of process counsel set out the petitioners' legal submissions about the Wild Birds Directive 2009. His oral submissions included a detailed analysis of *R v Secretary of State for the Environment exp RSPB* (1996) ECR I-3805 (the *Lappel Bank* case).

[143] Having completed his analysis of the law in relation to this issue, senior counsel for the petitioners considered the way in which the respondents had dealt with the SNH objection to the proposed. Senior counsel submitted that the objection by SNH ought to have been given "great" and "considerable" weight by the respondents and that a departure from SNH views in this case required "cogent and compelling reasons". Reference was made to *R (Hart DC) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin); *R (Akester) v Department for the Environment, Food and Rural Affairs* [2010] EWHC 232 (Admin) at 112 and *R (Jones) v Mansfield DC* [2003] EWCA Civ 1404.

[144] Senior counsel analysed the decision letter emphasising that there was no specific reference made to the Wild Birds Directive 2009. He concluded that in the decision letter there is no assessment of the evidence or the respondents' obligations in relation to the Directive or how these might or might not be fulfilled. He submitted that there ought to have been a clear assessment of the obligations under the Directive and how they were going to be met and in that context whether or not consent could be granted. It was submitted that in the absence of such an assessment the respondents failed in their obligations under the Wild Birds Directive 2009.

[145] There was further criticism about the respondents' approach to the habitat management plan. It was submitted that the respondents failed to address the criticisms and concerns of SNH and therefore failed to take into account material factors. No reasons were given by the respondents for rejecting the views of SNH.

[146] From pages 27 to 32 of 23 of process, there is a detailed analysis of the problems about whimbrel and the failure, as alleged by the petitioners, to properly take account of the advice of SNH. Counsel submitted that the disputed issues could not properly be assessed without a public inquiry. He concluded that the respondents erred in law and failed in their obligation under the Wild Birds Directive 2009 in respect of whimbrel.

[147] Senior counsel for the petitioners in the course of his submissions repeatedly stated that it was not open to the respondents to adduce new and additional reasons for the decision making. He submitted that the decision letter stands or falls on the reasons given. He prayed in aid *R (on*

the app of T) v The Chief Executive of Nottinghamshire Healthcare NHS Trust [2006] EWHC 800 (Admin).

[148] The devolution issue is addressed at pages 33 to 35. This is a reframing and refocusing of submissions made in relation to the Wild Birds Directive 2009.

[149] Senior counsel then made submissions relating to the respondents' failure to order a public inquiry. Having set out the statutory background, he submitted that a reason had been given by the respondents, ie "that there was no need to conduct a public inquiry". Counsel submitted that "reading the decision letter as a whole one cannot discern the reasons for not holding a public inquiry". In support of his submission, reliance was placed on *R v Secretary of State for the Environment ex parte Binney* [1984] JPL 871. The submission was to the effect that in circumstances where there is disputed material, the decision maker has to make appropriate findings-in-fact about the evidence which is or is not accepted. Counsel criticised the respondents' decision because there are no findings about which parts of the evidence is accepted and no proper explanation of the reasons why the SNH's reasoned objection in relation to whimbrel and the habitat management plan was rejected.

[150] Counsel then addressed a number of factors which he submitted ought to have been considered and I deal with these in later when I deal with the specific pleas-in-law.

[151] At the end of senior counsel's submissions I had no clear idea how the submissions connected with the pleas-in-law and there appeared to be substantial overlap in some of the submissions made. I invited clarification. Senior counsel submitted at the end of the case a

document, 35 of process. Objection was taken to further written submission insofar as they dealt with issues other than the pleas-in-law. Senior counsel conceded the objection. I have had regard to 35 of process only insofar as it purports to explain the pleas-in-law.

Submissions by senior counsel for the respondents

[152] Senior counsel formally adopted the note of argument for the respondents, 24 of process.

This is the note of argument as revised at 23 April 2013. He invited me to treat this as equivalent to "a first speech" to be taken as read. He stated he would address me about the wider context of the case and other issues. The document, 24 of process, runs to some 138 paragraphs, set out in 54 pages. I did not therefore regard this as a helpful approach as I had not agreed to take anything "as read". I advised that I wished to be addressed about 24 of process in due course. At the end of the general submissions, I was addressed briefly about 24 of process. I was advised how to approach 24 of process. As I understand 24 of process, the note of argument is divided up into chapters dealing with specific issues. At the end of the case, an index was provided. Senior counsel stated that he had covered these issues in his general submission in which he sought to explain the correct legal framework in which to consider the decision making and to put the petitioners' submissions in the wider legal and factual context in which they should be properly understood. Senior counsel submitted that the written note of argument did not differ from his general submissions but in some respects gave more detail to support the various issues addressed in his general submissions.

[153] Senior counsel did not provide any outline written submission in respect of his general submissions. I therefore give a summary of his general submissions which he made over the course of four days.

[154] His opening submission and first chapter attempted to put the case into its proper statutory context. Senior counsel turned his consideration to Schedule 9 of the 1989 Act. At that point, certain competency issues arose which I have addressed earlier in this opinion.

[155] In his second chapter, senior counsel spent some time putting into context the factual history relating to the attitude of the planning authority to the application by the interested party and the way in which the councillors reached their decision.

[156] He started his analysis with 6/2 of process, the report by the Director of Planning. He noted that the report stated at paragraph 9.5 that the planning service has not assessed the economic impacts of this development as that is a political perspective and not within planning policy guidelines. Counsel did accept that in 6/2 of process there was a detailed assessment of the planning policies which underpinned the recommendation by the Director of Planning leading to his recommendation that the planning authority object to the proposed development as contrary to policy GDS 1 of the Shetland Structure Plan (2000).

[157] Counsel then carried out an analysis of the minute of the respondents dated 14 December 2010, 6/3 of process. He looked in detail at the individual positions declared by the various councillors and the information recorded as being available to the councillors. This included a paper prepared by the head of economic development, 7/9 of process, supporting the grant of

planning permission. This information, which was additional to the report by the Director of Planning, was considered by the councillors. In analysing the basis of the various motions made at the meeting, counsel accepted that there was no express reference made in the minute to the planning issues raised by the Director of Planning, in particular his conclusion that the development was contrary to the development plan. Counsel referred to the specific consideration given by councillors to their views about an independent public enquiry reflected in an amendment which was outvoted. The Council resolved that:

"Shetland Islands Council reaffirms its support for the Viking Energy project on the basis that it has taken into account the views of the community, the socioeconomic issues, as well as environmental impact, and asserts that the benefit to the Shetland economy and community outweighs any negative impacts that the project may produce. Shetland Islands Council urges the Scottish Ministers and other relevant agencies and bodies to ensure that appropriate conditions are included in any consents issued to ensure that the project minimises any environmental and health impacts which might occur during its construction, operation and ultimate decommissioning phases."

[158] Senior counsel submitted that the criticisms of the councillors by the petitioners including alleged conflicts of interest were ill-founded. In any event, no action had been taken by way of judicial review to challenge the decision of Shetland Islands Council as planning authority. Properly understood, the decision of the planning authority involved a balancing exercise and Shetland Islands Council were entitled to reach the views they did. The respondents were entitled to proceed on the basis of that decision when considering whether to grant a public inquiry or other form of further inquiry.

[159] Senior counsel submitted that the case of *Portobello Park Action Group Association* relied on by the petitioners was distinguishable on its facts and did not assist the petitioners. He pointed

out that the decision making of the Shetland Islands Council, as planning authority, was entirely separate from the decision making of the respondents and related to different statutory functions.

[160] The next chapter of counsel's submissions focussed on the law regulating the grant of a public enquiry.

[161] Senior counsel submitted that the petitioners' reliance on *Binney* was misconceived. He submitted that not only was the statutory wording with which we are concerned in the present case, different but the whole statutory context was different. He referred in detail to the legislative framework in sections 10 and 302 and Schedule 1 of the Highways Act 1980 contrasting that with the relevant legislation in the present case. He prayed in aid *Bushell and another v Secretary of State for the Environment* (1981) AC 75, in particular Lord Diplock at pages 13 to 14 and Viscount Dilhorne at page 22. He submitted that the scope and purpose of a local enquiry into a scheme for a motorway under the relevant legislation was not comparable to the present case. In particular, under the Highways Act 1959, objectors maintaining objection are circumstance in which the Minister "shall cause a local enquiry to be held". Under the 1989 Act the wording is different. Under the Highways Act 1959 the Minister is given discretion "to dispense with an enquiry if he is satisfied that circumstances exist that make it unnecessary". That is to be contrasted with the legislative provisions which govern the present case. He also prayed in aid *Re Little* [2002] EWHC 3001 (Admin). The latter case was particularly relevant to the present case as it was concerned with section 36 of the Electricity Act 1989.

[162] The next chapter dealt with the case law bearing upon the circumstances in which it was appropriate to give reasons both in relation to a substantive decision and a decision about public inquiry in the context of a section 36 of the 1989 Act decision and a related planning decision. He referred to *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953, in particular paragraph 36 where he submitted there was a useful analysis of the law and also paragraph 34 in which there is discussion of *Bolton MDC v Secretary of State for the Environment* [1995] HL 309. Counsel referred in particular to the need for the petitioners to show prejudice. He submitted that it was not enough to persuade the court that no reasons to explain the decision about a determining issue had been given. Under reference to *Uprichard v Fife Council* 2013 UKSC 21 he submitted, under reference to paragraphs 41 to 43, that it was clear that the Supreme Court's approach was consistent with the approach adopted in *South Bucks*.

[163] Counsel criticised the submissions of the petitioners and their approach to the attack on the reasoning or what was described as lack of reasons in the decision letter. He submitted that the challenge by the petitioners, both in respect of the substance of the decision and the failure to order a public inquiry, was far too wide and went well beyond the principles recognised in the case law. In planning cases it was well recognised that the decision maker requires to deal with determining issues but the decision maker is not required to explain the reasoning in respect of every issue which may be material. In a judicial review it is for the petitioners to set out a case which brings the case within legally recognised grounds of challenge. It is not enough for the petitioners to make general submissions that the respondents ought to have done this or referred to that or given greater reasons.

[164] In relation to the decision not to grant a public inquiry, counsel referred to the extremely wide discretion, which he submitted was unrestrained, under the particular statutory provisions in this case. Counsel submitted that the petitioners' submissions were far too general. It was not the law that merely because there were differences in the facts or evidence about various issues that a public inquiry had to be provided to resolve these. Counsel prayed in aid *R (Redcar and Cleveland Borough Council) v The Secretary of State for Business, Enterprise and Another* [2008] WHC 1847, in particular paragraphs 28, 30, 36 and 48. He submitted that there was no obligation on the respondents to give reasons for what he submitted was an administrative decision that there would be no public inquiry. He prayed in aid *R (ex parte Hasan) v Secretary of State for Trade and Industry* [2008] EWCA Civ 1312; *Stefan v General Medical Council* [1999] 1 WLR 1293 and *Lawrie v Commissioner for Local Authority Accounts* 1994 SLT 1885.

[165] The European legal framework relevant to the present case was then addressed. Counsel made very lengthy and detailed submissions to put into context the relevant law, commencing with the Council Directive on the Conservation of Wild Birds (79/409/EEC) ("the Wild Birds Directive 1979"), Directive on the Conservation of Wilds Birds (Codified Version) 2009/147/EC ("the Wild Birds Directive 2009") and Directive on the assessment of the effects of certain plans and programmes on the environment 2001/42/EC ("the Habitats Directive 2001"). When pressed, senior counsel submitted that the relevant Directive applicable to the decision making of the respondents was the Wild Birds Directive 2009. I understood that his analysis of the Wild Birds Directive 1979 and the Habitats Directive 2001 was background information to help put in context the Wild Birds Directive 2009 which he accepted was engaged in the present case.

Counsel submitted that the obligations lay upon the UK as a Member State, but for practical purposes the Scottish Ministers, that is the respondents, are responsible for implementation in the present case.

[166] As background I was informed that in the UK for the purposes of Article 1 of the Wild Birds Directive 2009 there are some 596 different species of "wild" birds; some 47 species of Annex 1 birds, 13 of which are migratory; and that of the 596 species there are 70 migratory species, one of which is whimbrel. I was also informed that the Scottish Ministers, through various plans and strategies, were making substantial investment in various rural developments and peatland and biodiversity plans which *inter alia* will assist population and habitat of bird species. Counsel accepted that such initiatives would not directly improve or assist the site of the proposed development or the whimbrel on said site. Counsel accepted the factual statement in the decision letter to the effect that in respect of the proposed development site nothing had been done and nothing was planned by the respondents in relation to whimbrel.

[167] There then followed a line by line analysis, commentary and discussion, concentrating in particular on Articles 1 to 4 of the Wild Birds Directive 2009.

[168] Reference was made to the preamble, in particular paragraphs 3, 4, 7, 8 and 13. My attention was directed to Article 7(3) and it was pointed out that under the Directive whimbrel can be hunted in Denmark, France and the UK under certain restrictions. By domestic legislation the hunting of whimbrel is banned in the UK. Reference was made to the

encouragement of research in Article 10 and the overarching role of the Commission in Article 12.

[169] Counsel submitted that Articles 1 and 2 of the Wild Birds Directive 2009 have not been transposed in domestic legislation in the UK and it was conceded that they are directly effective. Article 3 has been so transposed but this occurred after 16 August 2012. It was conceded that at the date of the decision letter, Article 3 was directly effective. The position about Article 4 is more complicated. It was submitted that Article 4(1) and 4(2) were transposed by the Conservation (Natural Habitats etc) Regulations 1994 (SI 1994/2716) with effect from 6 April 2011. It was submitted that therefore these Articles were not directly effective. In contrast, Article 4(3) and 4(4) were directly effective as they had not been transposed. Counsel submitted the position might be more complex if I accepted the submission by counsel for the petitioners re Article 4(1) and 4(2). Counsel conceded that the effect of the transposition of Article 4(1) and 4(2) was transposition in relation to special conservation measures by way of special protection areas and similar measures for regularly occurring migratory species. Therefore, on the interpretation put forward in relation to this issue by counsel for the petitioners, there was an argument that there had not been full transposition because (according to the petitioners) special protection areas were only one of a number of ways by which the Article 4 obligation should be implemented.

[170] Turning to the details of interpretation, counsel submitted that there was a very wide scope in Article 1 and that the Directive applied to the conservation of all species of naturally occurring birds in the wild state including their eggs, nests and habitats. He submitted

596 species were covered. He did not accept the petitioners' interpretation of Article 2. Counsel was prepared to accept for the purposes of discussion that in ascertaining the level or standard required by Article 2, it was not appropriate to take account of economic and recreational requirements. He submitted however that in taking the requisite measures, the decision maker was entitled to take account of all the requirements as specified in Article 3. He seemed to suggest this was a sort of derogation or limitation on the obligation.

[171] Taking into account the opening words of Article 3, counsel submitted that the same interpretation applied to Article 3. In trying to give the flavour of his conclusions he used the description that "Articles 2 and 3 are both subject to economic escape routes". He submitted that this made sense bearing in mind the very wide obligations and diverse population of species which were covered by Articles 2 and 3. He contrasted that with the situation in Article 4. Article 4 protection was limited to Annex 1 species of birds who were in need of special protection. He submitted that the obligation in relation to Annex 1 birds, who were the subject of special conservation measures concerning their habitat, is defined for Member States who are required to classify "the most suitable territories in number and size as special protection areas ...". He submitted that having done that, Member States had exhausted their obligation in respect of Article 4(1). Contrary to the submissions of the petitioners, he submitted that there was no other obligation on Member States. He made a similar submission in relation to Article 4(2). He accepted that in carrying out the classification, the Member State was not entitled to take into account economic or recreational requirements. He drew attention to the obligations in Article 4(4). He contrasted the obligation which applied outwith protection areas.

In such areas the level of protection fell below the level of protection laid down for special protection areas In such circumstances Member States "shall also strive to avoid pollution or deterioration of habitats". There is no reference in Article 4(4) to any disturbance. The striving should be considered as an "aspiration" which falls short of the requirements in the earlier part of Article 4(4).

[172] There then followed an analysis of the Advocate General's opinion in *Lappel Bank*. Counsel submitted that, properly interpreted, the Advocate General's analysis was in general consistent with his submission. Counsel submitted that on a proper analysis of the Wild Birds Directive 2009, the submissions on behalf of the respondents should be upheld. In any event, he submitted the judgment of the court in *Lappel Bank* was concerned with Article 4 and the analysis of the Advocate General in relation to Articles 1 and 3 were not specifically adopted. These Articles were not the focus of the decision making with which the court was concerned.

[173] I was advised that no cases could be identified in which Article 2 had been founded upon and had been interpreted. The existing case law related mainly to Article 4. Whatever Article 2 meant I was informed there was no guidance about how the exercise referred to in Article 2 was carried out in practice. Ascertaining a level or standard was not considered to be part of general practice and no records were kept at European level about this.

[174] In relation to Article 5, counsel submitted that Article 5 was not directly applicable as it had been transposed in section 1(4) of the Wildlife and Countryside Act 1981.

[175] Having considered the applicable European law and its interpretation, counsel submitted that the application to a case such as this was straightforward. It was not disputed in this case that the proposed development site was not a special protection area in terms of Article 4(1) or (2). In these circumstances the only relevant requirement under Article 4 was an obligation in terms of Article 4(4) that the Member States "shall also strive to avoid pollution or deterioration of habitats". Counsel submitted that taking into account the interpretation of Article 2 and 3 that was entirely consistent with Article 4(4). Under Articles 2 and 3 the decision maker, in considering measures, was entitled to take account of various requirements as specified. If Articles 2 and 3 were absolute obligations, there would be no need for Article 4 as full protection would be afforded under Articles 2 and 3. That would be very burdensome as Articles 2 and 3 cover all wild birds. Counsel submitted that it was not necessary or appropriate to work out a level for the purposes of Article 2. In a case such as the present, all that was necessary once it was agreed that the species was in decline was to work out the nature of the impact on the species of the proposed development and consider how that impact can be addressed by mitigation. The decision maker requires to consider whether, after mitigation, the impact is acceptable when weighed against considerations in favour of granting consent to the development. It was a balancing exercise.

[176] Counsel submitted in this case the Wild Birds Directive 2009 was not a contentious issue prior to the decision. The legal issues now raised by the petitioners were not raised by anyone in the course of the objections. Counsel accepted that SNH drew attention to the obligations in Articles 2, 3 and 4(4). He submitted, however, that prior to the decision of the respondents no

party advanced the legal argument that there was an obligation on Scottish Ministers from which there could be no release based on economic or other requirements. In these circumstances one would not expect to find a detailed legal analysis of the Directive in the decision letter.

[177] Counsel submitted that the reference in Article 2 that "Member States shall take the requisite measures" should be interpreted in a wide sense. Measures may be positive and/or negative. In respect of a particular application a refusal may be a measure going towards maintaining the population of the species. A grant of consent may also be a measure in the same sense. He submitted that once one comes to consider "measures", Article 2 permits taking account, for example, the specified requirements in relation to the measures to be taken. For example, in considering the consent or refusal of an application for section 36 consent, Article 2 allows the decision maker to take account of the specified requirements in coming to its decision to grant or refuse consent. That is the exercise which the decision maker must carry out and that was carried out by the respondents in this case.

[178] Senior counsel described the submissions on behalf of the petitioners as ingenious but wrong. He submitted the decision in 6/4 of process is compliant with the Directive.

[179] The next chapter of the submissions dealt with the role of Scottish National Heritage generally and its role in the present case. In this case SNH was not a statutory consultee in relation to section 36 of the 1989 Act. I was also referred to various guidance documents, in

particular SNH Guidance Notice Applying SNH's Balancing Duties, December 2011, 7/19 of process and the SNH Wind Farm Guidance 7/12 of process.

[180] The general functions of Scottish National Heritage are defined in section 2 of the Natural Heritage (Scotland) Act 1991. There is also provision for a role by SNH if so requested by the Secretary of State or various planning authorities in relation to matters which affect the natural heritage of Scotland. No specific role is defined in relation to section 36 of the 1989 Act.

[181] Counsel submitted that it was important for an understanding of some of the case law to appreciate the different roles carried out by SNH at different times in relation to different matters. National Heritage in England had similar roles in England. In some circumstances legislation provides for a particular role but this is not such a case. Senior counsel then analysed the three cases relied on by the petitioners at page 23 of the petitioners' note of argument. Having analysed the cases of *R (Hart District Council)*; *R (Akester)* and *R (Jones)*. He submitted that the petitioners were not entitled to apply the comments made in these cases to the present case as the comments have been taken out of context and do not take into account the statutory role being performed. Counsel further submitted that these cases did not begin to support the proposition by the petitioners that either an inquiry was necessary in this case or that Ministers acted unreasonably in not following the views of SNH.

[182] The next major chapter of the submissions was an attempt by counsel to explain the content and background to the decision making by reference to particular aspects of the factual background known to the respondents as decision makers and also to individuals and

organisations who were involved in this case. I was referred in detail to 6/32 of process. This ornithological section of the environmental information deals in detail with whimbrel and the views of the expert instructed on behalf of the interested party about the effect on whimbrel. The whimbrel section is to be found at 11-119 to 113 with a summary of predicted effects on various birds as 11-167. Under reference to 7/20 of process I was information that the whimbrel is registered as a species of "least concern", not approaching vulnerable. That reflects its general status worldwide.

[183] I was also addressed at some length about the details and importance of various energy policy directives and guidance under reference to 6/22 of process and 6/23 of process. I was directed to what the Scottish Government refers to as a precautionary policy to be found in 7/21 of process at paragraph 132.

[184] A number of other issues were explored including the model of decision making, culminating in the decision letter. It was accepted that the decision letter was a decision of the respondents and that they were responsible for the decision. This was not a delegated decision. It was a decision however made within the framework of government in which the decision making of the respondents is supported by the department who carry out much of the work. Reference was made to *Re Little, Bushell and Carltona*. To properly understand the decision letter, it is necessary to understand the decision making model and the report given by officials.

[185] In this case, because of the freedom of information request, the restricted briefing to Scottish Ministers can be seen and examined in 6/21 of process. The legal framework is to be

supplemented by the case law which makes it plain that in cases such as planning cases, the decision maker does not have to deal in terms with all material matters and does not have to give full reasoning. Counsel accepted that the legal advice in relation to the Wild Birds Directive 2009 was deleted but submitted that it was plain that the said Directive was part of the consideration. It could not be said in this case that the Directive had not been considered.

[186] Against that general framework, senior counsel then looked in detail at the decision letter, 6/4 of process. In relation to the substantive decision, he submitted that the petitioners failed to establish any error of law and in relation to *Wednesbury* unreasonableness, their submissions were ill-founded for reasons he had given.

[187] In relation to the petitioners' submissions about a failure to give adequate reasons in relation to a public inquiry, he submitted that this was a case in which no reasons had been given. All the respondents had done was to state the decision that there was no need for a public inquiry. *R (Redcar and Cleveland Borough Council)*.

[188] *Esto* a reason had been given, it was perfectly plain, particularly if reference was made to the restricted briefing, 6/21 of process, that there was "no need" for a public inquiry because the respondents had more than enough information to decide the case. In any event, he submitted that the petitioners had failed to meet the high standard for judicial review and failed to demonstrate any prejudice in the *South Bucks* sense.

[189] In conclusion, I was invited by senior counsel to consider the case in the wider context of law and fact which he had set out. I was also invited to consider that it was necessary to analyse

with some care the general submissions made by the petitioners and consider them within the context of the petition and the particular pleas-in-law which underpinned the petition. I was invited to repel all the pleas-in-law of the petitioners.

[190] Senior counsel did not depart from the written submissions in 24 of process. It may be helpful if I make some reference to them in order to give a fuller context to the submissions of the respondents.

[191] I note in passing in paragraph 1 of 24 of process that the respondents refer to the grant of consent under section 36 of the Electricity Act 1989 for the "construction" of Viking Wind Farm without any reference to the fact that the consent specifically relates to "construction and operation". Further references which omit a reference to "operation" are to be found within the submissions.

[192] The respondents submit that the decision letter read fairly and in its proper context leaves an informed reader in no doubt as to the reasons for the decision. Having set out the background including the significance of the Renewable Energy Directive, the respondents set out some general submissions. The bold submission is made in paragraph 10 that "there's no need for the decision maker to have regard to the procedural or planning requirements of the 1997 Act or to the weight afforded to the development plan by section 25 of the 1997 Act. My understanding of the oral submissions by senior counsel was that he accepted that planning considerations may be a material consideration, albeit he submitted section 25 of the 1997 Act which gave importance to the development plan did not apply.

[193] Following an analysis of the statutory provisions and regulations it was submitted that the decision letter complies both with the requirements of the 1989 Act and the EW 2000 Regulations. Under reference to *Tesco Stores Limited v Secretary of State for the Environment* [1995] UKHL 22 and *Moray Council v Scottish Ministers* 2006 SC 691, it was submitted that in reaching a decision on whether to grant section 36 consent, the weight to be attached to the relevant statutory and other considerations arising in relation to the proposal is a matter for the decision maker, acting reasonably. The assessment and weighing of the evidence was a matter of judgement which was "within the exclusive province" of the respondents as the decision maker. Reference was made to *Tesco Stores v Environment Secretary* [2005] 1 WLR 759 at 780H. It was submitted that the main material considerations to be balanced in the present case were the environmental and economic benefits of the proposed development including its contribution towards the UK's obligations under the Renewable Energy Directive, the improvement to the local habitat which is likely to accrue from the implementation of the habitat management plan and the desirability of factors set out in Schedule 9 para 3(2) of the 1989 Act. It was submitted that the obligation under the 1989 Act to pay "due regard" *inter alia* to the interests of fauna is consistent with the respondents' obligations under the Wild Birds Directive and that in complying with their statutory obligation in that respect, the respondents also complied with their obligations under the Wild Birds Directive.

[194] Paragraphs 20 - 42 expands on the submission that the challenge to the respondents refusal to hold a public inquiry and the reasons given were ill founded. It was submitted that the respondents had no legal obligation under the statutory provisions to hold a public inquiry

and that it was a matter entirely for their discretion. The respondents may hold a public inquiry where they consider that it is "appropriate" to do so in all the circumstances of the case (Schedule 8, paragraph 3(2)). It was submitted that, for the reasons given there was no further information which could reasonably have been expected to arise from a public inquiry which would inform the respondents' deliberations. It was for the respondents to weigh the conflicting interests. It was clear from the decision letter that the respondents were satisfied that, notwithstanding the issues raised by objectors, any environmental impacts were likely to be satisfactorily addressed through mitigation measures and conditions, in particular the habitat management plan, and that any residual impacts were outweighed by the social, economic benefits (in relation to landscape and visual impacts), and renewable energy and environmental benefits (in relation to whimbrel) which the development would bring. In particular under reference to paragraph 33 of 24 of process, it was submitted that it was plain that the respondents took into account the complaints about the alleged conflict of interest. Having set out all the information considered by the respondents, it was submitted that the respondents had complied with their obligations under Schedule 8 of the 1989 Act. In any event the petitioners suffered no material prejudice as a result of any inadequate reasons.

[195] Paragraphs 42-45 deal with reasons in relation to the substantive decision making under section 36 of the 1989 Act. It was submitted that the respondents' task was to address the main issues in dispute. It was not necessary to make reference to legal duties incumbent upon the decision maker, provided that those duties were in substance complied with under reference to *Hulme v Secretary of State for Communities and Local Governments* [2010] EWHC 2386 (Admin).

[196] It is submitted that the respondents paid due regard to their obligations under the Directive and to the precautionary principle. The primary submission is that Article 4 of the Wild Birds Directive 2009 requires to be read in conjunction with the Habitats Directive. The obligations under that Article to classify the most suitable territories as a special protection area (SPA). SPAs may not be balanced against economic consideration. The respondents had clarified the Fetlar SPA in respect *inter alia* of whimbrel and legislated for protection under the Wildlife and Countryside Act 1981. The respondents had fulfilled their duties before the application by the interested party. In dealing with the application they took into account appropriate environmental information and paid due regard to the obligations under the Wild Birds Directive 2009. The more general requirements of the Wild Birds Directive, found in Articles 1 to 3, may be balanced against other considerations, including any environmental or economic benefits offered by a proposed development.

Submissions on behalf of the interested party

[197] Answers for the interested party as adjusted at 29 March 2013 are 16 of process. The detailed note of argument as revised at 26 April 2013 is to be found in 26 of process. I invited counsel for the respondents and interested party to have discussions to clarify to what extent their legal submission differ in substance. I understand this was reflected in the submissions by senior counsel for the interested party. Senior counsel for the interested party made it plain that

she did not differ in her conclusions from the conclusions advanced on behalf of the respondents.

[198] The submissions are set out in 26 of process and I summarise the main points canvassed.

[199] In addressing whether it is appropriate for the respondents to cause an inquiry to be held, counsel for the the interested party emphasised the importance of assessing this in relation to the relevant statutory context under reference to *Uprichard v Scottish Ministers &c* (2013) UKSC 21. *Binney* as noted in *R (on the application of Persimmon Homes (South East Coast) Limited) v Secretary of State for Transport* (2005) 2 P&CR 24 was decided in a different statutory context from the present case. In contrast *R (on the application of Pluto) v Secretary of State for Trade and Industry* (2002) EWHC 3001 (Admin) emphasised that within the context of Schedule 8 to the 1989 Act:

"In deciding whether to order a public enquiry, the focus of the Secretary of State's determination must be to consider whether a public enquiry is necessary in order to place before her the information necessary for her to carry out a balancing exercise ... and to make her decisions..."

[200] Senior counsel then made reference to the detailed information which was available to the respondents. She submitted that it is plain from the decision letter both that the respondents were in a position to weigh the conflicting issues without the need for a public enquiry, and further that the representations made by statutory consultees and third parties, such as the petitioners, had been properly taken into account under reference to *R v The Secretary of State for the Environment ex parte Greenpeace Limited* (1994) All ER 352 and *Little*.

[201] Having criticised the approach founded upon by the petitioners, senior counsel submitted that the decision of the respondents not to cause a public enquiry to be conducted cannot be characterised as unreasonable. To the extent that any reasons were required for that decision, the decision letter provides adequate explanation. In particular, the respondents were entitled to conclude that there was no need to convene a public inquiry to hear more detailed evidence as to matters about which they were already satisfied.

[202] Senior counsel addressed the issues in relation to the Wild Birds Directive 2009 at some length. Her starting point was that the respondents had fulfilled their responsibilities under said directive. I was addressed about the legal status of whimbrel, the information available to the respondents in respect of the impact on whimbrel and the nature of the respondents' obligations under the Birds Directive. It was submitted that whimbrel are an Annex II, Part B bird and the UK is a Member State in which whimbrel may be hunted. The UK had taken additional protective measures by prohibiting such hunting. It was emphasised that whimbrel are plentiful within Europe. There was reference to the special conservation measures which have been taken in respect of the habitat of whimbrel in relation to the Fetlar Special Protection Area on Shetland. The Fetlar SPA is not affected by the Viking Wind Farm. Senior counsel submitted that the respondents, in the exercise of their responsibilities under the Wild Birds Directive 2009, have not considered it necessary or appropriate to take special conservation measures under Article 4.2 of the Wild Birds Directive in respect of the whimbrel population on the Viking development site. This has not been challenged by the European Commission. Reference was made to the general system of protection in place under the Wildlife and

Countryside Act 1981 as amended, the Conservation (Natural Habitats etc) Regulations 1994 and the Conservation of Habitats and Species Regulations 2010. I was referred to the analysis of the protective legislation by Lord President Rodger in *Royal Society for the Protection of Birds v Secretary of State for Scotland* 2000 SLT 1272.

[203] Senior counsel then considered the information available about whimbrel which was available to the respondents. In her analysis, she criticised the submissions of the petitioners for persistently failing "to distinguish between predicted pre-mitigation impact on whimbrel and the residual effect on that species, taking account of mitigation measures such as the proposed habitat management plan." The petitioners' submissions were also criticised for inadequately describing the SNH position. It was submitted that, properly interpreted, the SNH advice was to the effect that qualitative benefits are recognised by SNH in relation to the habitat management plan, but as SNH were unable to quantify the predicted beneficial effects, their advice remained that there would be significant adverse effect on whimbrel.

[204] There is a detailed analysis summarised in paragraph 32 of 26 of process of the environmental information provided by the interested party's expert on ornithological matters and a reference in particular to chapter A11 of the addendum, 6/32 of process. That information was based, it was submitted, on the highly cautious (and therefore precautionary) assumptions and set out a potentially significant pre-mitigation impact. Thereafter there was set out the offsetting or mitigatory effects of the proposed HMP under various scenarios. The main conclusion was to the effect that the proposed HMP measures "are likely to be large enough to have a high likelihood of more than off-setting any adverse effects of the wind farm, and a

reasonable likelihood of causing the Shetland whimbrel population to partially and possibly fully recover over the life of the Viking wind farm". The conclusion reached was that after mitigation, there would be no significant residual effects on whimbrel. Indeed, there was a further conclusion that there would be a positive net effect which "could be to reverse the existing decline and facilitate population recovery benefits accruing to the Shetland population ... by facilitating species recovery over large scale areas of mainland Shetland". I was referred in detail to the habitat management plan (7/5 of process).

[205] In conclusion senior counsel submitted that, on the information available, the respondents were entitled to conclude that there would not be a significant impact on the conservation status of the national population of whimbrel. The respondents were not compelled to follow SNH's approach. She submitted that SNH accepted there were qualitative benefits, but disregarded any quantitative benefit because it could not be quantified in assessing whether the potentially significant effects of the development would be successfully mitigated. Counsel submitted this is not a case in which the starting point for consideration is that there would be an adverse effect on the national population of whimbrel as a result of the development. That may have been SNH's view, but it was not the conclusion of the respondents. She submitted therefore that in analysing the obligations of the respondents in relation to the Wild Birds Directive 2009, the respondents were entitled to proceed on the basis that the development would have non-significant residual effects bearing in mind the conservation measures which were an integral part of the project.

[206] Senior counsel then addressed the nature of the respondents' duties under the Wild Birds Directive 2009. She prayed in aid the recent consultation paper on wildlife law of the Law Commission in England and Wales. She adopted the view expressed that:

"The Directive does not determine an absolute level of protection. Rather, the Directive allows a balance to be struck. Ecological, scientific and cultural requirements for the protection of wild birds can be offset by economic and recreational requirements. However, this balancing process relates only to maintaining a population level. The Court of Justice has held that Article 2 does not constitute a separate derogation from later obligations in the Directive not to kill or take wild birds."

She prayed in aid the explanation provided by the European Commission when proposing the Directive, 12 of process. She submitted that the Commission's proposal was highly instructive when considering the relationship between Articles 2 and Articles 3 to 9. Article 2 sets a "general objective" for the Directive and the requisite measures specified in Articles 3 to 9, both general and specific are designed to achieve that general objective. She submitted that in achieving the general objective, economic and recreational requirements are relevant. She also prayed in aid the decision of the Court of Justice in *Commission v Belgium* Case 247/85 1987 ECR at p 3209 at paragraph 8. Senior counsel accepted that the advocate general in *Lappel Bank* had a different interpretation, but she submitted that his interpretation was not explicitly adopted by the Court of Justice in that case. In any event, she submitted that there is no reason in this case to seek to resolve any difference in approach between the advocate general and the Court of Justice as it makes no difference to the result. Counsel made reference to *Commission v Belgium* (Case 247/85 1987 ECR) and *European Commission v Austria* 535/07 (2006) Env LR 39, pages 16 to

22 of 26 of process. She then considered compliance with various European Commission guidance.

The general legal principles applicable to judicial review

[207] I did not understand it to be disputed that the general principles which regulated the court's task in this judicial review are set out by Lord President (Emslie) in *Wordie Property Co Limited v Secretary of State for Scotland* 1984 SLT 345 at 347-8 where he stated:

"A decision of the Secretary of State acting within his statutory remit is *ultra vires* if he has improperly exercised the discretion confided to him. In particular it will be *ultra vires* if it is based upon a material error of law going to the root of the question for determination. It will be *ultra vires*, too, if the Secretary of State has taken into account irrelevant considerations or has failed to take account of relevant and material considerations which ought to have been taken into account. Similarly it will fall to be quashed on that ground if, where it is one for which a factual basis is required, there is no proper basis in fact to support it. It will also fall to be quashed if it, or any condition imposed in relation to a grant of planning permission, is so unreasonable that no reasonable Secretary of State could have reached or imposed it ..."

It was undisputed that the task of the court in judicial review is a specific and limited task focussing on the legality of the decision making process and not the general merits of the decision making. There was no challenge to the approach approved by Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33 at page 44 in which he emphasised the primacy of the decision maker in the assessment of the facts and the weighing of the considerations. Lord Clyde recognised that it is for the decision maker to decide what weight should be given to the facts and to any relevant policy considerations. He quotes with

approval the observations by Lord Hoffman in *Tesco Stores v Secretary of State for the Environment* at page 780:

"If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State."

[208] In relation to the challenge based on the adequacy of reasons, I note that in relation to statutory provisions which provided that the Secretary of State notify his decision and his reasons therefor Lord Emslie in *Wordie Property Co Limited* stated at page 348:

"... in order to comply with the statutory duty imposed upon him the Secretary of State must give proper and adequate reasons for his decision which deal with the substantial question in issue in an intelligible way. The decision must, in short, leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it."

I am of the opinion, however, that these observations of Lord Emslie do not extend to circumstances where the statutory provisions do not expressly or by implication provide that reasons be given.

The decision not to cause a public inquiry to be held

The decision letter

[209] In relation to the issue whether a public enquiry should be allowed, it is stated in the decision letter, 6/4 of process, at page 14:

"As the relevant Planning Authority has not objected to the Application, the Scottish Ministers have considered all material considerations and have concluded that there is no need to conduct a public inquiry before reaching their decision. In reaching their decision they have had regard to all relevant considerations and, subject to the conditions of this consent and deemed planning permission, are satisfied that it is appropriate for the Partnership to construct and operate the generating station in the manner set out in the Application."

The statutory provisions

[210] Section 62 of the 1989 Act deals with public inquiries. Section 62(1A) provides:

"(1A) The Secretary of State may cause an inquiry to be held in any case where he considers it advisable to do so in connection with any matter relating to the exercise by him of a function under this Part."

One of the matters relating to the exercise by the Secretary of State of a function is his grant of consent under section 36 of the 1989 Act. Schedule 8, paragraph 2 of the 1989 Act states:

"2. Objections by relevant planning authority

(1) Where an application is made to the Secretary of State for his consent under section 36 or 37 of the Act, notice of the application shall be served on the relevant planning authority.

(2) Where the relevant planning authority notify the Secretary of State that they object to the application and their objection is not withdrawn, the Secretary of State -

(a) shall cause a public inquiry to be held; and

(b) before determining whether to give his consent, shall consider the objection and the report of the person who held the inquiry."

Schedule 8, paragraph 3(2) states:

"(2) Where in the case for an application for consent under section 37 or 27 of this Act -

(a) the Secretary of State is not required by virtue of paragraph 2(2) above to cause a public inquiry to be held; but

(b) objections or copies of objections have been sent to the Secretary of State in pursuance of regulations made under this paragraph,

the Secretary of State shall consider those objections, together with all other material considerations with a view to determining whether a public inquiry should be held with respect to the application and, if he thinks it appropriate to do so, shall cause a public inquiry to be held, either in addition to or instead of any other hearing or opportunity of stating objections to the application"

Discussion

[211] It is plain that the statutory provisions recognise the importance of the views of the relevant planning authority. Under and in terms of Schedule 8, paragraph 2(2), if the relevant

planning authority object to the application and their objection is not withdrawn, the respondents must cause a public inquiry to be held. In that event there is also provision about matters which the respondents must take into account before determining the issue. The situation is very different if there is no objection by the relevant planning authority. In that event there is no obligation on the respondents to cause a public inquiry to be held. The duties of the respondents are to consider objections, together with all material considerations. The statutory test for determination as to whether a public inquiry should be held is if the respondents think it appropriate to do so.

[212] Obviously there may be cases, for example, where a relevant planning authority considers that planning issues are dominant and for that reason alone may object to a particular application. In such a case the planning considerations may be relevant determining factors which require to be explored in detail and that may be done at the public inquiry. It is also obvious however that there may be many cases where the relevant planning authority does not wish to object and such cases may include circumstances in which the relevant planning authority has some other interest which they wish to promote. Depending on the circumstances, this may cause considerable annoyance and upset to the objectors to the proposed development who wish the issues to be considered in detail at a public inquiry. But no special statutory provision is made to deal with such cases or to grant some additional rights to objectors.

Parliament could have made provision, for example, to give a right to a public inquiry where a relevant planning authority had a conflict of interest or other interest such as property interests in a proposed development. The legislation which regulates this case does not include any such

provisions. The legislation also does not require the respondents to give any reasons for the decision not to cause a public inquiry to be held.

The grounds founded upon by the petitioners in relation to the decision not to cause a public inquiry to be held

[213] In order to understand the petitioners' case in relation to this issue, it is necessary to have regard to pleas-in-law 1 to 4. There was a very substantial overlap in the submissions on behalf of the petitioners in relation to these pleas. It is also important in my opinion to bear in mind that the petitioners' case in relation to the merits of the decision making (as distinct from the decision not to hold a public inquiry) is limited to pleas-in-law 5 and 7.

The petitioners' plea-in-law 1

[214] Plea-in-law 1 narrates that the respondents, having acted unlawfully in failing to cause an inquiry to be held before granting consent, the decision and consent should be reduced. It is impossible to determine from this plea in what respect it is alleged the respondents have acted unlawfully.

[215] According to 35 of process, this plea is based on the submissions that the respondents have failed to take into account relevant material issues as set out in paragraphs 34 to 37A and 39 and 40 and/or the law based on *Binney*.

[216] Let me deal with the factors relied on by the petitioners. It is plain that the respondents were aware of both the size of the proposed development and the number of objections. These are factors which are common to many developments and there is no case law to suggest that

these factors alone or combined must lead the decision maker to grant a public inquiry. The petitioners make no case intelligible to me to explain why these factors undermine the decision making.

[217] In relation to landscape issues, I accept that there was conflicting information and opinion. I do not accept however that a public inquiry was necessarily appropriate to enable the respondents to properly reach a view, bearing in mind that they concede that there is significant landscape impact. In relation to landscape, the respondents were entitled to make value judgments about landscape and come to a conclusion that however bad the landscape impact, in their opinion, other considerations and other values outweighed that. These are value judgments which lie at the heart of the respondents' decision making. If the respondents consider it is not appropriate in the circumstances of this case to have a public inquiry to resolve such issues, in my opinion, that is a matter entirely for them.

[218] Another factor relied on is that detailed consideration required to be given to mitigation in respect of the grouping of individual turbines or groups of turbines. I deal with mitigation issues in relation to plea-in-law 7.

[219] The petitioners also founded upon the alleged failures by Shetland Islands Council as planning authority and the alleged conflicts of interest. This is a matter which the respondents did have specific regard to in their decision making about a public inquiry to the extent that they noted that the complaints which had been made had not been upheld. In my opinion, the decision of the planning authority not to object remains valid. It was not the subject of judicial

review. It was open to those who felt aggrieved by the decision making of the planning authority to seek a judicial review of that decision. The Scottish Ministers in my opinion in the absence of a successful judicial review were entitled to treat the decision as a valid decision. Indeed, I find it difficult to understand how in this judicial review, I would be entitled to look behind the decision making of the planning authority and come to some conclusions about it, bearing in mind that the planning authority are not even party to this action. But that does not mean that I support the decision of the planning authority.

[220] In addition to the petitioners' complaints about the planning authority there are also complaints about the failure of the respondents to address planning issues, in particular the issues raised by the Director of Planning in 6/2 of process. In relation to these submissions it was not clear to me whether the petitioners were seeking to rely on the provisions set out in sections 25 and 37(2) of the 1997 Act. I asked for clarification. Senior counsel made a concession in law (which he appeared to restrict to the proceedings before me) that the respondents were not required in considering planning permission to apply the criteria set out in sections 25 and 37(2) of the 1997 Act. Standing that concession, I am not persuaded that there is merit in the petitioner's submissions about the lack of consideration of planning policy issues in the decision letter. The general issues underpinning some of the planning policies in relation to environmental impact and landscape were addressed by the respondents. It is plain that the respondents considered that there were impacts but that other policy considerations outweighed these. It was in my opinion properly conceded by senior counsel for the respondents that in a decision such as this in which "deemed" planning permission is granted,

planning considerations may be relevant and material. It is conceivable that in some circumstances planning issues could not be properly outweighed by considerations such as employment or energy policies. But no such case is founded on by the petitioners in this action. I do not understand why, as in this case, if the decision of the respondents on the merits of the planning issues is not even the subject of a judicial review challenge, planning issues should be relevant to the decision not to hold a public inquiry.

[221] In considering the submissions on behalf of the petitioners, I accept the general point that there may be many advantages in a case such as this in holding a public inquiry. Witnesses would probably be entitled to give evidence. That evidence could be challenged in cross-examination. A detailed examination of some of the contentious issues would probably be considered useful by many of the objectors in allowing them to have their points considered and addressed in detail by an independent inspector. It may be considered unfortunate or unfair by the objectors that the law does not provide for a public inquiry as a matter of right. But that is the current state of the law. Indeed, the law, as I understand it, gives the respondents unlimited discretion (subject to *Wednesbury* unreasonableness) to come to a view as to whether or not a public inquiry is appropriate or not. (See *R (Redcar and Cleveland Borough Council) v The Secretary of State for Business, Enterprise and Regulatory Reform and Another* [2008] WHC 1847.

[222] All of the factors prayed-in-aid by the petitioners are matters on which the respondents had a great deal of information. In my opinion a public inquiry is not obviously appropriate as a method to assist the respondents in resolving the policy and/or legal issues about which they required to form a view. No amount of factual and/or opinion evidence will resolve policy

decisions reflecting major impact on landscape as compared, for example, with what is perceived to be major economic benefits or longer term environmental benefits or longer term environmental benefits in relation to climate change. A public inquiry is not designed to focus and resolve legal issues, although such issues may of course arise in any inquiry. In my opinion the submission on behalf of the petitioners goes too far by insisting that the only proper method of resolving disputed facts and/or disputed opinion evidence is by way of public inquiry. There is no such general principle of law. *Binney* and the other authorities prayed-in-aid in this chapter by senior counsel for the petitioners are to be read and understood in the context of the statutory schemes which applied in the cases. The principles relied on by senior counsel are not of general application to all cases. The present case has to be determined in the context of the particular statutory scheme which applied.

The petitioners' plea-in-law 2

[223] Senior counsel for the petitioners accepted that the first and second pleas were inter-related. He appeared to rely on the same factors as he relied on in relation to the first plea-in-law in advancing his submission that the respondents' decision was unreasonable. In my opinion this must be taken to mean unreasonable in the *Wednesbury* sense and this is a high test.

[224] Counsel submitted that the respondents could only decide not to hold a public inquiry if the objects that might have been achieved by the inquiry could be achieved without an inquiry. I have difficulty in following this submission. This is not a case in which there is any challenge

made to the merits of the decision making except in relation to pleas-in-law 5 and 7. In my opinion the other pleas-in-law provide a better focus for the challenge which the petitioners wish to make. Absent any attempt by senior counsel for the petitioners to explain in what way the merits of the decision making have been undermined by the failure to have a public inquiry, I find it difficult to understand this submission.

[225] I have expressed my views in relation to the respondents' attitude in treating the decision of the planning authority as a valid decision. This is a separate and distinct point not related to the merits of the decision making. For the avoidance of doubt, I do not consider that the respondents were unreasonable in the *Wednesbury* sense in their approach.

The petitioners' plea-in-law 3

[226] As I understand the submission, the petitioners found upon the same factual background and factors discussed above but this third plea is focussed on the weight the respondents have given to the issues. The submission is that it falls outwith the reasonable range of weight that ought to have been given in the circumstances.

[227] Weight is a matter for the decision maker, acting reasonably. As Lord Hoffman stated in *Tesco Stores Limited v Secretary of State for Environment* 1995 1 WLR 759 at 780:

"The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has

regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.

This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principal of British planning law, namely that the courts are concerned only with the legality of the decision making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matter of planning and judgment are within the exclusive province of the local planning authority or the Secretary of State."

I consider this submission to be verging on the unstateable. I specifically asked for clarification from senior counsel for the petitioners as to what he relied on in respect of this plea. I consider the response in 35 of process as vague and general. I can only assume that senior counsel is referring to the same material which I have addressed in relation to pleas-in-law 1 and 2.

Bearing in mind that I am not persuaded in relation to the first and second pleas-in-law for the reasons given, all I can say is that I would require submissions with far more focus in relation to some specific issues where weight was relevant before I might begin to be persuaded to uphold plea-in-law 3.

The petitioners' plea-in-law 4

[228] This relates to the alleged failure by the respondents to give adequate reasons for their decision not to cause an inquiry to be held. Some legal issues were not in dispute by counsel for

the parties. Firstly that in terms of the statutory provisions the respondents had discretion in this case to cause a public inquiry to be held. Secondly, senior counsel for the petitioners conceded that no Article 6 point arose and the pleadings were revised to reflect that.

[229] Counsel for the petitioners submitted that despite the terms of the relevant statutory provisions, the discretion of the respondents is constrained. He submitted that the Ministers could only decide not to hold a public inquiry if the objects that might have been achieved by the inquiry could be achieved without an inquiry. The main foundations for this submission relied on were *R v Secretary of State for the Environment ex p Binney*, *R v Secretary of State for the Environment ex p Greenpeace* (1994) Env LR 401 and *R v Secretary of State for Transport* (1995) 70 P&CR 161.

[230] I am not persuaded that these cases when properly analysed support the petitioners' submission. In my opinion all the cases relied on by the petitioners are to be understood and interpreted within the particular statutory and factual matrix which are specific to the cases. I consider that the criticisms made by senior counsel for the respondents of this part of the petitioners' submissions are well founded for the reasons he gives and which I record in paragraph [161] under reference to *Bushell* and *re Little*.

[231] I consider that it is plain from the statutory wording in Schedule 8 paragraphs 2(2) and 3(2) of the 1989 Act that the respondents are given very wide discretion in their decision making and that the statutory provisions do not require the respondents to give any reasons for their decision not to hold a public inquiry.

[232] The primary submission by counsel on behalf of the respondents was to the effect that this is a case in which no reason was given by the respondents about the decision not to cause a public inquiry to be held. I was initially inclined to reject that submission. The respondents in the decision letter stated there was "no need" to have a public inquiry. If they had said it was "not appropriate" to hold a public inquiry, I would have agreed without hesitation with senior counsel for the respondents as such a formulation would be a mere repetition of the statutory wording. In my opinion such a formulation would not be a reason.

[233] I interpret "no need" in the context of this case as meaning that the respondents considered it to be unnecessary for the determination of the application which was before them and therefore not appropriate. There are different shades of meaning attached to the words "need" and "appropriate". That led me initially to reject the submission. On reflection, however, I consider that such a rejection would involve applying too strict or high a test to the wording in this decision letter. I am asked to consider a decision letter drafted in the context of legislation which does not require reasons to be given for a decision not to hold a public inquiry. My task is not to construe a conveyancing document or other legal document. In my opinion, the language used in the decision letter is loosely, even badly expressed, standing the wording of the statutory provisions. But if I ask whether the respondents intended, by the wording used, to express and give reasons for their decision, I have no difficulty in concluding that they did not. They had no obligation to express any reason or reasons and I am persuaded that in this case there was a mere reference to the statutory formula. This is a case therefore where I consider

that no reasons were given. It is not in my opinion to be regarded as a case where reasons were given.

[234] The decision not to cause a public inquiry to be held does not affect any rights of the petitioners. There is no statutory requirement to give reasons and there is no statutory right of appeal. No case was cited to me in which, in the area of law with which we are concerned, the courts have decided that there is such a right. I was not clear whether the submission by senior counsel for the petitioners went so far as to say that there was such a right but, if he did, I reject that submission. It follows that I am of the opinion that the respondents were entitled to make the decision about the public inquiry and give no reasons if they so wished. I refer to the discussion by the President of the Queen's Bench Division in *R (ex parte Hasan) v Secretary of State for Trade and Industry* [2008] EWCA Civ 1312.

[235] If the respondents did express reasons, I am satisfied that these reasons were to the effect that they had sufficient necessary information to come to a decision and I am not persuaded they were not entitled to reach such a decision. In any event, it is for the petitioners to satisfy me that they have genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision in relation to the public inquiry. (See *Moray Council v Scottish Ministers* 2006 SC 691 at paragraph 31). I am not so satisfied. I consider that looking at the decision letter as a whole, it seems plain that the Scottish Ministers considered that they had sufficient information to come to a decision. The petitioners have not demonstrated to me why the respondents were not entitled to conclude they had sufficient information.

[236] As a residual submission, counsel for the petitioners submitted that as a matter of procedural fairness, in order to give an effective right to challenge the decision not to hold an inquiry, reasons ought to be given. I consider that submission is ill founded. The wording of the statutory provisions is clear. There is no article 6 challenge. There is no case law advanced by the petitioners to underpin this bold submission and I do not consider this to be the law.

The Wild Birds Directive 2009

The petitioners' plea-in-law 5

[237] One of the major difficulties about this case is that issues about which I was addressed at length are not addressed at all in the decision letter. That includes, for example, the respondents' engagement or otherwise with the Wild Birds Directive 2009 and how they applied it, if at all, in their decision making.

[238] In relation to the Wild Birds Directive 2009, submissions were made to me over some days. Senior counsel for the petitioners adopted what I considered to be an extreme position to the effect that as the Directive was not referred to in the decision letter, I was not permitted to consider legal submissions about the application of the Directive by the respondents in the circumstances of this case. I do not accept this submission. One of the consequences of a challenge by judicial review is to focus on the decision making. I consider that counsel are entitled to seek to explain the decision by explaining in legal submissions the applicable law

and by making reference to information which was properly before the respondents and considered by them. But in a decision in which the legal issues are not expressly addressed, the law is open to a number of different interpretations and there is a lack of clarity about what the decision maker appeared to conclude in respect of the volumes of material available to them, there may be serious problems for a party adopting such an approach before the court. In my opinion this is such a case. In other cases where the decision maker by explicit or obviously implied reference relies, for example, on a policy document or expert opinion or clear legal principles to support the reasoning there may be little difficulty for a court taking account of such matters.

[239] I am in no doubt that the complete failure of the respondents in the decision letter to address explicitly legal issues arising out of the Wild Birds Directive 2009 and explain their approach to the decision making in the case has caused great difficulty in understanding and dealing with their decision. I am of the opinion that there were plainly live issues in this case of a material and potentially determining nature about whimbrel and the Wild Birds Directive 2009 to which the respondents ought to have been alerted. The Wild Birds Directive 2009 is part of the essential legal framework in which the respondents required to determine the case. The respondents in consequence of devolutionary arrangements are also responsible for the implementation of obligations under the said Directive. That part of the decision which deals with the reasoning of the respondents gives no assistance as to how, if at all, conclusions were reached about the Directive and whimbrel. That absence of explanation in the decision letter may account for the volumes of information which were placed before me and the time taken in

submissions. Senior counsel for the respondents submitted that the respondents would not be expected to address explicitly Directive issues as the petitioners in their objections had not even raised these. I do not accept this. The responsibility for identifying the correct legal framework lies on the respondents regardless of the nature of objections. In any event, it is plain from the objections of SNH that issues relating to the Directive were plainly put in issue. These issues were not without difficulty and required in my opinion to be addressed in some rational way.

[240] It was part of the submission on behalf of the respondents that it is not necessary for the decision maker to make express reference to the legal duties incumbent upon him, provided that those duties have in substance been complied with. Reference was made to *Hulme v Secretary of State for Communities and Local Government* [2010] EWHC 2386.

[241] *Hulme* was a case in which planning permission had been granted in relation to a 200 hectare site for nine three-bladed wind turbines. The inspector had provided a detailed decision letter of some 55 pages in which he identified the main issues supported by detailed reasoning. The structure and detail of the inspector's decision letter bears little resemblance to the decision letter in this case. There was an issue about bats and habitats regulations. It was submitted that the Conservation (National Habitats) Regulations 1994, as amended, applied having transposed the Habitats Directive 92/43/EEC and that this raised certain questions to be answered by the inspector. It was submitted that the inspector did not engage with Article 12 issues and that therefore there was a fundamental error of law. From the facts found, the deputy High Court judge was able to conclude that the inspector had engaged with the Directive and regulations despite not being asked to do so by any party to the inquiry. The fact that the

inspector did not identify either the Directive or Regulations by reference was considered not surprising in the circumstances, but the deputy High Court judge was able to conclude that the inspector clearly had in mind the importance of the presence of a European protected species on the development site in reaching his planning decision. In paragraph 94 she quoted with approval the opinion of the judge in the High Court in *R (Woolley v Cheshire East Borough Council* [2009] EWHC 1227:

"In my view, that engagement involves a consideration by the authority of those provisions and considering whether the derogation requirement might be met ... but the point is that it is only by engaging in this kind of way that the authority can be said to have any meaningful regard for the directive."

On the facts before her, she concluded that the inspector did not expressly address the steps allowing for derogation under the appropriate regulation but he did not have to deal with them in the same degree of detail as he was not the appropriate authority considering whether to grant a licence under the regulation. The issue is whether he dealt with the substance of the requirement sufficiently to comply with his obligations under the regulations. She made reference to his express reference to the Habitats Regulations 1994 and various other matters which led her to conclude that the inspector had substantially complied with the requirements of the regulations (paragraphs 95-97).

[242] In this case I consider whether in the absence of any express consideration by the respondents of the Wild Birds Directive 2009 it is possible on a fair reading by an informed reader to determine from the decision letter, 6/4 of process, that there has been a proper

consideration and meaningful engagement and regard for the terms of the Wild Birds Directive 2009 as properly interpreted to enable me to conclude that the respondents have complied with the said Directive.

[243] The advice about the 2009 Directive which was given to Scottish Ministers was never revealed to me, therefore I am not in a position to gain any help from that advice. I am unable to infer from the title reference to Wild Birds Directive, which was the only part of the advice which was left unredacted, whether the advice was to the effect that the Directive must be applied or not. Obviously no assistance can be derived from redacted text.

[244] I am left therefore with the disputed submissions about the interpretation of the Wild Birds Directive 2009. I will now address these submissions and consider the interpretation of the Directive to see if that assists me.

The Wild Birds Directive 2009: Interpretation

[245] The interpretation of the Wild Birds Directive 2009 is a central issue in this case at least so far as the petitioners are concerned. I have attempted to interpret this Directive bearing in mind the various submissions put forward by counsel and which I have summarised above.

[246] Senior counsel for the interested party referred me to the European Commission proposal dated 20 December 1976, which predated the Wild Birds Directive 1979, 13/12 of process. I regard this as equivalent to draft legislation and the terms of the Directive as later implement

were changed. I do not regard this as an instrument on which I can rely for authoritative guidance in interpreting the Wild Birds Directive 2009.

[247] It was not disputed that at the date of the decision letter, Articles 1 to 3 and 4(3) and (4) were not transposed into domestic legislation and were directly effective.

[248] The Directive sets out in paragraphs (1) to (1)8 of the preamble the various reasons and purposes underlying the Directive. Paragraphs (3) to (8) should be noted in the context of the present case. Concerns include "... the decline in numbers ..." "a cross border problem", "... the repercussions of man's activities and in particular the destruction and pollution of their habitats", "the need for scientific research to assess the effectiveness of conservation measures".

Paragraph (8) states:

"The preservation, maintenance or restoration of a sufficient diversity and area of habitats is essential to the conservation of all species of birds. Certain species of birds should be the subject of special conservation measures concerning their habitats in order to ensure their survival and reproduction in their area of distribution. Such measures must also take account of migratory species and be coordinated with a view to setting up a coherent whole."

[249] Article 1 defines the scope and provides that the Directive "shall apply to all species of naturally occurring birds in the wild state ... their eggs, nests and habitats". In my opinion the scope of Article 1 extends beyond protection of habitats. The protected birds include all wild birds' species as defined. The Article is not limited to Annex 1 and 2 species but also does not exclude them. Annex 2 species includes whimbrel (*numenius phaeopus*) which is a regularly occurring migratory species.

[250] Article 2 provides:

"Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level."

[251] There was a significant dispute about the interpretation of Article 2. I was not entirely clear whether the respondents accepted that Article 2 involved an obligation to maintain the population of the species at a level as specified. If they did accept that, counsel for the respondents submitted that any obligation could be avoided or derogated from, as in this case, because it was "outweighed by the benefits of the development project including reasonable energy generation and the support this offers to tackling climate change and meeting EU climate change obligations". Counsel for the respondents made reference to a balancing exercise. In the course of that balancing exercise requisite measures to maintain the population might not be taken because some other factor such as energy production and climate change is given priority by the decision maker. In that situation counsel for the respondents submitted that the Member State would not be in breach of Article 2 because there were escape routes in Article 2 which entitled the decision maker to reach a decision which did not maintain the population of species as set out in Article 2. He submitted that all and any of the requirements ecological, scientific, cultural, economic and recreational could form part of this balancing exercise and result in a failure to maintain the population of the species to a level if those requirements were given more importance in the discretionary decision of the decision maker.

[252] Counsel for the interested party reached the same conclusion as counsel for the respondents, albeit she restricted the balancing exercise to economic and recreational requirements. She adopted the view expressed by the Law Commission in England and Wales to the effect that the Directive did not specify an absolute level of protection but allows a balance to be struck. Article 2 sets out a general objective which might not be achieved in a particular case because of economic and recreational requirements. She did not I think accept that ecological, scientific and cultural requirements related to the balancing exercise in deciding what, if any, measures are to be taken.

[253] The petitioners submitted that Article 2 was an obligation which required to be fulfilled, albeit the measures to fulfil the obligation involved discretionary choices as to how to fulfil Article 2 taking into account economic and recreational requirements.

[254] Let me comment firstly on the Law Commission Consultation Paper No 206 (13/15 of process), relied on by senior counsel for the interested party. The paper considers some of the circumstances where a specific level of protection is required by EU law.

[255] The Law Commission in chapter 2 of said paper gives a very useful overview of the international obligations placed on the domestic law of England and Wales as a result of either international agreements or EU law. These international law obligations are also applicable to Scotland and provide a context to the Wild Birds Directive as first promulgated, which is described by the Law Commission as the first piece of EU legislation specifically focussed on conservation following discussions and agreements at international level (paragraph 2.36).

[256] In paragraphs 2.40 - 2.90, there is a discussion of the Wild Birds Directive 2009 as consolidated and amended. The Law Commission recognises that habitats are relevant and included in the Wild Birds Directive but decided that was beyond the scope of their discussion paper. The Law Commission describe Article 2 as the "key obligation placed on Member States by the Directive". They state this allows a balance to be struck in the protection of wild birds, taking into account economic and recreational requirements in relation to the maintenance of a population level. There is no consideration given to issues which may arise such as whether a Member State is entitled to do nothing to maintain a particular species' population level because, for example, it is too expensive or allow a development project even if that results in a failure to maintain the population of the species to the required level because the project is considered to contribute to climate change targets.

[257] No reference is made by the Law Commission to *R v Secretary of State for Environment exp RSPB* [1996] ECR 1-3805, the *Lappel Bank* case. This case was the only case law to which I was directed by counsel which dealt with Articles 2 and 3. Senior counsel for the petitioners relied on the opinion of Advocate General Fennelly and the judgment of the Court of Justice in said case. He submitted that both supported his interpretation of the Wild Birds Directive 2009. There was detailed criticism of his approach by the respondents. Senior counsel for the respondents supported a different interpretation of the relevant provisions of the Directive. He submitted that the Advocate General's proposed distinction and interpretation cannot be maintained. His submissions on this point are summarised in paragraphs 46 to 53 of 26 of

process, albeit it is also necessary to consider the submissions in paragraph 53 to 66 to understand their full context.

[258] In summary, the fundamental dividing line between the interpretation put forward by the petitioners compared with that advanced on behalf of the respondents and interested party is that the petitioners maintain that Article 2 sets down a common standard which requires to be met that the population of the species, in this case whimbrel, are to be maintained at a level which corresponds in particular to ecological, scientific and cultural requirements and that obligation rests on the State. In the context of devolution the respondents are responsible for implementation of the Directive. The petitioners submit it is not a balancing exercise of the type described by the respondents' counsel, and that the reference to taking into account economic and recreational requirements relates not to the standard which must be maintained but relates to the measures to be adopted. No fixed measures are specified. There is discretion in how Article 2 is to be implemented but not discretion as to whether it is to be implemented or not.

[259] In contrast, the respondents submit that the reference to maintaining the population in Article 2 is subject to other considerations (about which counsel for the respondents and interested party disagreed) but at a minimum included economic and recreational requirements. It is a balancing exercise. Counsel for the respondents submitted that in the balance which could be weighed against maintenance of the population, ecological requirements could be taken into consideration. This was the explanation given by counsel to explain the way in which the respondents had approached the issues in the case. The final position of the respondents was to say in effect that wind farm energy production contributing

to climate change targets out-balanced or outweighed "the obligation" of maintaining the population of whimbrel to the level specified in Article 2. It should be noted that this is a reference to the reason given by the respondents at page 11 of the decision letter, 6/4 of process.

[260] I accept that in the *Lappel Bank* case, Advocate General Fennelly was not focussing directly on Article 2 but was seeking to interpret the obligations of Member States under Article 4. In considering that issue however, he adopted a purposive interpretation of the Directive and considered in detail the interrelationship of the various Articles in context. He is clearly of the view that the proper interpretation of Article 2, for the reasons he gives, is that the consideration of economic and recreational issues comes in at the stage of implementation measures and not at the stage of maintaining the standard set down in Article 2.

[261] I accept that the Court of Justice in the *Lappel Bank* case in considering the reference was also focussing on Article 4. But, as I read the judgment, particularly in paragraphs 24 and 25, the court accepted the analysis clearly set out by the Advocate General.

[262] Advocate General Fennelly at paragraph 15 describes Article 2 as one of the central provisions. At paragraph 29, he refers to the view expressed by the United Kingdom government that the Directive must be viewed within an economic and not a solely ornithological context. The said submissions put forward on behalf of the UK government were not upheld in that case. In dealing with the particular issue of the interpretation of Article 4, the Advocate General stated in paragraph 40 that "in order to answer the question in relation to Article 4, it will be necessary to interpret Article 2 of the Directive and examine its application to

the habitats provisions of the Directive, Articles 3 and 4. There then follows a detailed analysis of the United Kingdom government's position in the case.

[263] From paragraph 45 onwards, the Advocate General deals with the history and context of the Wild Birds Directive. He concludes that the context of the Directive is predominantly ecological, even if it takes account of economic considerations in certain circumstances. At paragraph 51 he states:

"The general scheme of the Directive is based on a series of carefully graduated obligations and prohibitions which are phrased in sweeping terms, but which are accompanied, where appropriate, by express exceptions and derogations to which the Member States may resort, only under the conditions specified in each case."

At paragraph 54 he considers that the Directive has itself established the requisite balance between economic and ecology issues. He refers to the view of the United Kingdom to the effect that the fixing of the balance as regards habitats protection for all species of wild birds is left to the Member State. He comments that in support of this view the United Kingdom relies primarily on the text of Article 2 as interpreted by the court, and on the extent of the discretion enjoyed by Member States, respectively under Article 3. This submission of the UK is rejected by the Advocate General. He concludes that the Directive itself fixes the population level which Member States must maintain or achieve. He emphasises in paragraph 57 that Member States are to take account of economic and recreational requirements in the measures they adopt in accordance with the Directive to attain these levels. He discounts a literal construction of

Article 2 in paragraph 58. He deals with the interpretation of Article 2 and the case law in paragraph 59. He rejects the United Kingdom's interpretation of the case law in paragraph 60.

[264] In my opinion the interpretation and analysis put forward to me on behalf of the respondents and interested party do not give sufficient weight to the significance and reasoning in the opinion of the Advocate General and more generally to the purpose of said Directive. I do not accept that the court departed from the opinion of the Advocate General. The judgment followed the reasoning of the Advocate General, albeit the focus of the court was on Article 4.

[265] So adopting a purposive interpretation, what does Article 2 mean? In my opinion it imposes an obligation "to maintain the population of the species" at a level as specified in Article 2. The alternative obligation in Article 2 is to adapt the population of the species to said level. Article 2 is directed to numbers in the sense of population of the species and not at habitats, albeit one of the many concerns re population levels may be habitats. I merely comment in passing that what that level is supposed to mean in terms of Article 2 may cause some difficulty of interpretation and may be the subject of factual dispute. To maintain the population of species or to adapt to the level is the obligation. Bearing in mind the preamble, I consider that this is to be interpreted as a reference to a conservation level where the particular wild birds species has sufficient numbers to be capable of survival and reproduction in the Member State or more particularly in their area of distribution in the Member State. In this particular case it does not matter which interpretation is adopted as 95% of the population of whimbrel in the Member State are in Shetland. In my opinion it is no answer to Article 2 to say that the particular species of bird is in very large numbers elsewhere outwith a Member State. I

also observe that the wording "to maintain" is, in my opinion, directed to the present situation not the distant future. It may be that reducing the effects of climate change may have a long-term beneficial effect on population numbers. That was the hypothesis put to me by the respondents. But in my opinion pursuing that objective does not in my opinion fulfil Article 2 if nothing is done to maintain the population of the species in the present. In my opinion Article 2 is intended to oblige Member States to take requisite measures to achieve the population level of the species as intended in the Directive. There is a recognition in Article 2 that Member States may differ in how they achieve the level. That explains why discretion is given to Member States to take into account economic and recreational requirements which may vary. As I interpret Article 2, there is a level enshrined in an obligation. It does not mean that Member States have a "let out clause" or some form of derogation so that an individual Member State, citing economic or recreational requirements or something else, can avoid taking the requisite measures to achieve the level. The measures taken to achieve that may vary as Members States are given discretion as to how to achieve the level. In my opinion Article 2 is more than an aspiration. It is not merely a general provision to be fulfilled by a Member State by carrying out obligations in other Articles in the Directive. It is not an obligation which can be avoided or circumvented because a Member State gives greater weight or importance to other considerations.

[266] In the course of their submissions, the respondents emphasised that Article 2 is not restricted to Annex 1 and Annex 2 birds but applies to all naturally occurring birds in the wild state in the European territory of the Member States. Counsel submitted that because of the very

wide scope of the birds covered, this would place great difficulties on Member States in fulfilling the terms of Article 2 if it was not interpreted in the way which he put forward. Without detailed factual information, I cannot comment on this submission. I merely observe that many of the species which are common may be in such large numbers that nothing requires to be done to maintain the population in the sense envisaged by Article 2. Many types of adverse development may not affect that. In my opinion the scope of Article 2 covers both Annex 1 and Annex 2 birds, as well as more common species. If the interpretation of the respondents and interested party is correct, that means that Annex 1 and Annex 2 birds also have no effective protection under Article 2. Their protection would be dependent only on Article 4 in relation to special protection areas even if at the time they needed protection they were not located in whole or in part in the special protection area and the special protection area for some reason was not in fact effective for their protection.

[267] Article 3 relates to the species of birds referred to in Article 1, ie all wild birds' species as defined:

"In the light of the requirements referred to in Article 2, Member States shall take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all species of birds referred to in Article 1...."

In terms of Article 3(2)(b) this includes "upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones". The interpretation to be given to Article 3 is related to the interpretation given to Article 2. I refer to the opening words of Article 3 which refers back to Article 2. The focus of discussion before me related to Articles 2

and 4. As I understand the position of the respondents and interested party however, the submissions which they made in relation to Article 2 apply also to Article 3. For the reasons which I discussed above, I do not accept that this is another Article which can be avoided by a balancing exercise or treated as an aspiration. This may be relevant as the starting point of the respondents' consideration is that they would not be doing anything to assist whimbrel by habitat management on the proposed development site.

[268] Article 4(1) makes provisions in respect of Annex 1 birds (not whimbrel) directed to special conservation measures relating to their habitat in order to ensure their survival and reproduction in their area of distribution. One of the matters to be taken into account in terms of Article 4(1)(c) are species considered rare because of small populations or restricted local distribution. It is provided that

"Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species in the geographical sea and land area where this Directive applies".

This is a specific obligation which specifies the measures to be taken by the Member State. The Member State does not have any discretion about the measures to be taken based on economic or other considerations. This is in contrast to Article 2. The obligation cannot be fulfilled by some other measure as an alternative. This contention was rejected by the Court of Justice in *Commission of the European Communities v Kingdom of the Netherlands* ECR 1998 page 1-03081, paragraph 55. Because Article 4 was regarded as such an onerous obligation, some relief was

introduced by provisions in the Habitats Directive (92/43/EEC) imported into the Wild Birds Directive 2009.

[269] Article 4(2) states:

"Member states shall take similar measures for regularly occurring migratory species not listed in Annex 1, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance." The underlining is mine.

I consider that the "similar measures" specified refer back to Article 4(1) and refer to "special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution".

[270] As I interpret Article 4(2) in the present case, the general obligation which falls upon Member States is to take similar measures for special conservation of whimbrel concerning their habitat in order to ensure their survival and reproduction in their area of distribution. The Court of Justice in *Commission of the European Community v French Republic* ECR 1999 page 1-01719 considered in paragraph 21 that Article 4(1) and (2) of the said Directive requires the Member States to provide SPA's with a legal protection regime that is capable in particular of ensuring both the survival and reproduction of the birds species listed in Annex 1 and the breeding, moulting and wintering of migratory species not listed in Annex 1 which are, nevertheless, regular visitors. There was no consideration in that case of the meaning and effect of Articles 2 and 3.

[271] In this case it was not disputed that whimbrel are located both on the Fetlar SPA site and on the proposed development site. Both SNH and the expert instructed by the interested party seemed to accept that whimbrel (despite the existence of the Fetlar Special Protection Area) at the time of the decision and before any development were not in favourable conservation status either in the UK or in Shetland. That appears to me to raise an issue as to whether the designation of the Fetlar Special Protection Area was fulfilling the duty on the respondents under Article 4(2).

[272] It was not disputed by any of the parties that the obligation in Article 4(2) required to be fulfilled by the respondents. The respondents and interested party submitted that this obligation had been fulfilled as there had been designation of the Fetlar site as a special protected area for certain species including whimbrel. In my opinion the respondents required to address the issue of whether the Fetlar Special Protection Area had fulfilled that duty under Article 4(2) in respect of whimbrel and, if not, what the implications of that were for the decision making in this case. I do not consider that mere designation of the site exhausts the obligation if the designation does not achieve the objective in respect of whimbrel. Theoretically there might require to be consideration of whether, under domestic legislation, the Fetlar site requires to be extended or re-designated for whimbrel. If not, how in the circumstances is Article 4(4) to be fulfilled? In my opinion the decision maker responsible for implementing obligations under the Directive must give some indication that they have addressed the issues as envisaged in the Directive. In cases in which the objectives of the Directive are fulfilled, it may be a complete answer that the Annex 1 or Annex 2 birds are sufficiently protected in terms

of the Directive by virtue of the SPA site. But taking into account the problems with the existing conservation status of whimbrel, this does not appear to be such a case. If it is such a case, there is no reasoning given by the respondents to explain why the Fetlar SPA site in this case provides sufficient protection and exhausts their obligation under Article 4(2) of the Directive, according to them.

[273] Article 4(4) provides that Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds as far as these would be significant having regard to the objectives of Article 4 and outwith these protection areas "shall also strive to avoid pollution or deterioration of habitats". It should be noted there is no reference in Article 4(4) to any of the requirements in Articles 2 or 3. It follows that there can be no argument about a balancing exercise in relation to Article 4(4). In my opinion Article 4(4) places additional obligations on Member States in relation to pollution or deterioration of habitats in or outwith protection areas, albeit this is described as "striving to avoid pollution or deterioration of habitats" outwith protection areas. In Article 4(4) there are no specified measures. It may be somewhat difficult to assess and enforce a remedy for breach of Article 4(4) but I consider this more than an "aspiration" as interpreted by the respondents.

[274] Article 5 is not directly applicable.

[275] Article 6 is not relevant to the present case.

[276] Article 7 is also not relevant. It is the case that whimbrel as an Annex 2 bird may be hunted under national legislation under certain circumstances. The low numbers of whimbrel

in the UK might prevent reliance on Article 7 but in any event, under UK legislation, whimbrel may not be hunted in the UK.

[277] Article 8 is not relevant.

[278] Article 9 permits Member States to derogate from the provisions of Articles 5 to 9 where there is no other satisfactory solution and sets out specified reasons. I regard the grounds for derogation as limited. There is no submission made in this case that derogation under Article 9 is relevant to the present case. Derogation is not relied on in the decision letter.

[279] Article 10 provides that Member States should encourage research and any work required as a basis for the protection, management and use of the population of all species of bird referred to in Article 1.

[280] The remaining Articles are not directly relevant but Articles 12 and 13 should be noted.

Article 12 relates to the reporting obligations of Member States and Article 13 provides:

"Applications of the measures taken pursuant to this Directive may not lead to deterioration in the present situation as regards the conservation of the birds referred to in Article 1."

I was not addressed about Article 13 so I merely observe in relation to this, that there is an issue as to whether longer term measures such as reducing the effects of climate change may be implemented if that causes deterioration in the present situation as regards the conservation of the species of birds.

Relevance of the Wild Birds Directive 2009 in this case

[281] In this case senior counsel for the respondents and the interested party submitted that it does not make any difference or is irrelevant if their analysis of the Wild Birds Directive 2009 is wrong as I have concluded above.

[282] The primary position of the respondents and interested party was that in view of the conclusions of fact made by the respondents, the said Directive is irrelevant to the present case. This makes me question whether the respondents did engage with the Directive or whether they assumed it was irrelevant or not necessary for them to engage with the Directive. Both counsel for the respondents and the interested party found upon the conclusion of the respondents at pages 10-11 that "Ministers are not satisfied that the estimated impact of the development on whimbrel demonstrates such a level of significance". That is a reference to a significant impact of national interest on the conservation status of the national population of whimbrel.

[283] The section of the decision letter dealing with whimbrel at pages 10 to 11 was the subject of detailed criticism from the petitioners' counsel and detailed attempts to support the reasoning of the respondents from the other counsel. If one strips all the detail away, it is plain that this is a case in which it appears not to be disputed by anyone that whimbrel are a declining species in the UK with approximately 95% of 290 breeding pairs in Shetland. The expert instructed by the interested party considers that pre-development the whimbrel are

below conservation level. The information in the environmental statement provided by the interested party to the respondents is to the effect that pre mitigation by the HMP there is a potentially significant impact of the proposed development (A11-128). That impact according to the respondents' expert will exist but for the mitigation which the habitat management plan is said to provide.

[284] I cannot understand what the respondents conclude about the pre-development status of whimbrel. No reasons are given for disagreeing with the SNH view. It is also impossible to determine from the words used by the respondents what they mean. In particular it is impossible to determine what conclusion, if any, they reach about whether the population of the whimbrel species is or is not at a level consistent with Article 2 pre-development. It is not clear whether the opinion of the expert instructed by the interested party is being accepted by the respondents. He appears to accept that pre-development the population is below conservation level. His opinion proceeds (even on lesser figures, ie 3.7 bird kill, than those which are ultimately adopted by the respondents) that there is an adverse impact described as significant pre mitigation. I am left therefore unclear what the respondents mean when they say they are not satisfied about the level of significance. What level of significance do they conclude that the impact of the development will have and on what evidence do they proceed? And how have they addressed, if at all, the Wild Birds Directive 2009 in reaching their conclusions?

[285] A major disputed issue as between SNH and the interested party is whether the HMP can be taken into account at all as mitigation because of all the unknown factors. In my opinion SNH make it plain that it is the unknown factors which make it inappropriate to take into

account HMP. The respondents plainly disagree with that and do take it into account. They seem to consider that the overall effect over the lifespan of the wind farm, ie 25 years, would provide some mitigation. There is no explanation as to why the respondents conclude in a situation where it is not disputed that the reasons for the whimbrel decline are not known and the habitat management plan is untried and untested in Shetland in relation to whimbrel, that the HMP would provide some unspecified level of mitigation. I consider that SNH make it perfectly plain that so far as whimbrel are concerned, the HMP cannot amount to mitigation.

[286] Apart from these problems, in my opinion the fundamental difficulty for the respondents is that any assessment of the facts requires to be undertaken taking account of the Wild Birds Directive 2009. In my opinion that should be the starting point for consideration of the facts by the decision maker and there is no suggestion in this decision that was done. The assessment which requires to be done is not a pure question of fact in the abstract.

[287] As I interpret Article 2, there is an obligation to take requisite measures to maintain or to adapt the population of whimbrel to an appropriate level as set out in Article 2. This would in my opinion involve addressing the issue of what is required by Article 2 in respect of whimbrel in this case. There are obligations to be addressed also under Articles 3 and 4

[288] I do not therefore accept that the issues for the respondents to consider are solely factual issues. It appears to me the issues involve matters of mixed fact and law which have not been addressed by the respondents. If the issues have been addressed by the respondents, I am unable to understand how the proper legal interpretation has been applied. It appears to me

that the respondents have not properly engaged with the Directive in any meaningful way that I can understand in order to reach a conclusion about the facts in the context of the Directive.

[289] To the extent that the respondents address the matter, if at all, at a later stage, it is in the context of a balancing exercise where the respondents consider that the level of impact on the conservation status of whimbrel "is outweighed by the benefits of the project, including the very substantial renewable energy generation the development would bring and the support this offers to tackling climate change and meeting EU climate change targets" (page 11 of the decision letter). For the reasons I have given I do not consider that Articles 2, 3 or 4 authorise this kind of balancing exercise which enable the obligation to be defeated. Even if I was wrong about that, I do not accept that the factors specified in Article 2, which refer to "taking account of economic and recreational requirements", include renewable energy generation and the support this offers to tackling climate change as specified by the respondents in this case. As I understand Article 2, the reference to ecological, scientific and cultural requirements relates to the level referred to in Article 2. The factors to be taken into account, if there is a balancing exercise, are economic and recreational requirements in relation to measures.

Conclusions re plea-in-law 5

[290] I am unable to identify any meaningful engagement by the respondents with Articles 2, 3 and 4. Further, I do not accept the legal submissions of the respondents and interested party to

the extent which I have explained. I am not satisfied that the respondents have complied with their obligations under the Wild Birds Directive 2009.

[291] I consider that the interpretation of the Wild Birds Directive is not without its difficulties.

But in circumstances where the Directive applies and is relevant to a determining issue, I am of the opinion that it is necessary for a decision maker in a case such as this to engage with the Directive and make it plain, at least in general terms without giving a legal treatise in what way the Directive was or was not applied and that it was properly applied. I do not consider that is a high or unreasonable standard to expect. As I have observed earlier in this opinion, this case involves a very large, multimillion pound development with important consequences. I was advised on a number of occasions by senior counsel for the respondents that the respondents had the assistance of a specialist team of civil servants with access to specialist legal advice. In my opinion the legal framework of the decision making and the approach adopted by the decision maker in relation to a determining issue in a case such as this requires to have some transparency. Despite the efforts on the part of counsel for the respondents and interested party, I have come to the conclusion for the reasons expressed above that there is merit in the submissions of the petitioners in so far as they are directed to a failure by the respondents to take proper account of their obligations under the Wild Birds Directive 2009.

[292] Insofar as some of this material bears upon the petitioners' submissions in relation to pleas-in-law 1 to 3, I consider that a public inquiry is not a necessary or useful way to resolve these issues.

The devolution issue

The petitioners' plea-in-law 6

[293] In my opinion there is nothing new to be addressed by me in relation to plea-in-law 6. The petitioners adopt the submission in paragraph 8(g) of the petition in support of plea-in-law 6. The petitioners' submissions in relation to plea-in-law 6 are dependent on issues which I have considered above, mainly a consideration of the Wild Birds Directive 2009. In relation to paragraph 8(g)(i), (iii) and (iv) I consider that it is not for me to anticipate or speculate about what decision the respondents might properly reach if they applied the law correctly to the facts found by them, asked the correct legal questions and applied the correct legal principles. I therefore consider that it would be premature to reach any conclusion about the devolution issue raised by the petitioners. I consider that at this stage the appropriate remedies for the petitioners are available in respect of pleas-in-law 8 and 5.

The reasons challenge in relation to the merits of the case

The petitioners' plea-in-law 7

[294] Plea-in-law 7, like plea-in-law 4, focussed on a challenge to the reasons given. I consider that there is an important distinction to be made in respect of plea-in-law 7 which relates to the merits. I consider that reasons do require to be given by the respondents if the issue is properly

regarded as a determining issue. That is in contrast to the situation relating to the decision in this case not to hold a public inquiry.

[295] There is a consideration of the law in *South Bucks District Council &c v Porter (No 2)* [2004] 1

WLR 1953. At paragraph 36 Lord Brown of Eaton-under-Heywood stated:

"36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

That is plainly a useful if not exhaustive summary of the law and I am happy to adopt it in relation to this chapter of the case.

[296] In considering the written submissions by senior counsel for the petitioners in 35 of process explaining plea-in-law 7, he submits that plea-in-law 7 is self-explanatory. This is not helpful. In the course of his submissions, counsel made some general submissions about the difficulties of considering mitigation proposals, for example, in relation to individual

householders and groups of turbines. He made many detailed submissions about the habitat management plan which the interested party put forward as a form of mitigation. There were also references made to the SNH correspondence where SNH were concerned about further mitigation which might be considered and developed. There may be other aspects of mitigation which were referred to briefly.

[297] There was dispute between the parties as to what reliance I should place on the cases of *R (Hart District Council)*; *R (Akester)* and *R (Jones)*. I consider that senior counsel for the respondents is correct to emphasise that the comments in these cases about the role of a statutory body such as SNH require to be understood in the context of the particular statutory scheme which is being applied and the particular statutory role at the time of the relevant body. Nevertheless, I consider that the role and expertise of SNH in the present case is important and one might reasonably expect to find some reasons for rejecting facts and opinion evidence given by SNH if related to a determining issue in the case.

[298] I think it is plain from my opinion in relation to the competency issue that I consider the statutory framework of Schedule 9 to be very important. That includes the obligation to mitigate with an obligation to consider mitigation placed on the respondents. The decision letter refers in terms to Schedule 9. It is difficult to read the decision letter as engaging explicitly with the Schedule 9 mitigation duties. I accept that there is discussion by the respondents in relation to the habitat management plan and engagement may be implied in respect of that. I note also, for example, the concern expressed by the official in 7/22 of process about the need for more information when SNH were raising issues about specific mitigation measures. The response

from SNH confirms that there is sufficient information for the purposes of the EIA 2000 regulations. On that basis it appears the development of specific mitigation measures proceeded no further. Mitigation appears to fade out of consideration. In the context of the specific statutory structure of Schedule 9, one might expect the respondents to address specific issues about mitigation in applying Schedule 9. That is not done.

[299] One of the reasons I consider it would have been of advantage to have a final determination about the competency issue before considering the merits in relation to this petition is the confusion which I consider surrounds the legal framework. The respondents' position put forward by senior counsel was that addressing the case under and in terms of the EIA Regulations 2000, was equivalent to addressing issues in the case under the statutory framework of Schedule 9. For the reasons discussed above, I do not accept that. The further submission by senior counsel for the respondents was that if his legal submissions about competency were correct, there was therefore no duty on the respondents to consider the case under reference to Schedule 9. He submitted that nevertheless the respondents did so. In my opinion there is some confusion as to what the respondents were doing in this case and the legal framework which they ought to have applied. I refer to my discussion in the competency chapter.

[300] I am not prepared however to uphold plea-in-law 7 on the basis of the unfocussed submissions on behalf of the petitioners about mitigation and Schedule 9. I can understand the general complaint on behalf of the petitioners that there might be discussion and dispute about how mitigation might be achieved in a particular case in relation to a particular turbine or

groups of turbines, but that is far too vague to enable some remedy to be achieved by judicial review.

Reference to the Court of Justice

[301] In the course of his submissions, senior counsel for the petitioners made what I regarded as a somewhat tentative proposal that I should refer the disputed issues about the Wild Birds Directive 2009 to the Court of Justice of the European Union. Any reference was opposed by the other parties.

[302] As my opinion is not final, I have discretion whether to make a reference. I declined to make a reference. This is a case in which the respondents, in my opinion, have not meaningfully engaged with the Wild Birds Directive 2009. There are disputes about interpretation but these may be resolved in the course of these proceedings or an appeal. There was no agreement or clarity about the questions to be referred.

Disposal

[303] I hereby appoint the case to the By Order roll to allow parties to address me about the terms of the interlocutor and expenses.