Neutral Citation Number: [2022] EWCA Civ 1579

Appeal No: CA-2021-003272
Claim No: CO/1638/2021

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
HH Judge Jarman KC sitting as a judge of the High Court

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

Date: 01/12/2022

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
SIR KEITH LINDBLOM, SENIOR PRESIDENT OF TRIBUNALS
and
LORD JUSTICE STUART-SMITH

BETWEEN:

TIDAL LAGOON (SWANSEA BAY) PLC

Claimant/Appellant

-and-

(1) SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY
(2) WELSH MINISTERS
(3) THE COUNCIL OF THE CITY AND COUNTY OF SWANSEA

Defendants/Respondents

Michael Humphries KC and James Kon (instructed by **Asserson**) for the **claimant/ appellant**

Mark Westmoreland Smith and Charles Streeten (instructed by the **Government Legal Department**) for the **1st defendant/ 1st respondent**

Emyr Jones (instructed by **Geldards LLP)** for the **2nd defendant/ 2nd respondent**

Douglas Edwards KC (instructed by the **Chief Legal Officer**) for the **3rd defendant/ 3rd respondent**

Hearing date: 26 October 2022

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JUDGMENT

This judgment was handed down remotely at 10.30am on 1 December 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Geoffrey Vos MR, Sir Keith Lindblom SPT and Lord Justice Stuart-Smith:

Introduction

1. The central issue in this case is as to the construction of The Swansea Bay Tidal Generating Station Order 2015 (the DCO), which was made on 9 June 2015 and came into force on 30 June 2015. The DCO was a development consent order made by the Secretary of State for Business, Energy and Industrial Strategy (the Secretary of State) under sections 114 and 120 of the Planning Act 2008 (the 2008 Act). We were told that the DCO was substantially drafted by Tidal Lagoon (Swansea Bay) PLC (the Company) but approved and laid before Parliament by the Secretary of State.

2. Article 3(1) of the DCO granted the Company development consent for the authorised development (of what is colloquially known as the Swansea Bay Tidal Lagoon) "[s]ubject to the provisions of [the DCO] and to the Requirements in Part 3 of Schedule 1".

3. The two vital provisions of the DCO are:

   i) The second of 42 requirements under the heading "Time limits, etc.", which provided that "[t]he authorised development must commence no later than the expiration of 5 years beginning with the date that [the DCO] comes into effect" (Requirement 2); and

   ii) Article 2(1), which included a definition of the word "commence" providing that in the DCO it meant "begin to carry out any material operation (as defined in section 56(4) of the [Town and Country Planning Act 1990 (the 1990 Act)] forming part of the authorised development other than operations consisting of site clearance, demolition work, investigations for the purpose of assessing ground conditions, the diversion and laying of services, the erection of any temporary means of enclosure and the temporary display of site notices or advertisements; and 'commencement' must be construed accordingly".

4. The definition of the word "commence" excluded significantly more pre-commencement preparatory works than the definition of the word "begin" in section 155 of the 2008 Act (section 155), which provided that development was "taken to begin on the earliest date on which any material operation comprised in, or carried out for the purposes of, the development begins to be carried out". In other words, the restricted definition in the DCO meant that many of the pre-commencement "material operations" would not, even if undertaken, qualify to "commence" the development within the time limit, whilst they would qualify to "begin" the development under section 155.

5. There were then two important provisions in the 2008 Act that allowed development consent orders (in broad brush terms) to amend the provisions or the application of that Act. First, section 154(1) provided that development "must be begun before the end of – (a) the prescribed period, or (b) such other period … as is specified in the development consent order" (section 154(1)). Secondly, section 120(5) provided that a development consent order "may – (a) apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the development consent order" (section 120(5)).

6. It was common ground that certain works undertaken pursuant to the DCO in 2016 meant that development (i) had been begun within the meaning of section 155 (if section 155 applied at all) within the relevant five-year period, but (ii) had not been commenced within the relevant (but different) five-year period.

7. The Company submitted, in essence, to the judge and to us that Requirement 2 (which provided for a five-year period for commencement starting on the date that the DCO came into effect) should not be construed as replacing the time period in sections 154(1) and 155 (which provided for a five-year period for the development to be begun starting on the date that the DCO was made). That latter period is actually prescribed in regulation 6(1) (regulation 6) of the Infrastructure Planning (Interested Parties and Miscellaneous Prescribed Provisions) Regulations 2015 (the 2015 Regulations). Accordingly, the Company argued that the DCO and the 2008 Act together created two relevant time periods – one for beginning and the other for commencement of development. It argued that development had been begun within the relevant period, which meant that the DCO had not ceased to have effect as it would otherwise have done under section 154(2) of the 2008 Act (section 154(2)), even if it had not been commenced in time within Requirement 2. The importance of the Company's approach was that, if it were right, because the DCO would be still in force, the Company could still apply to the Secretary of State (whose responsibilities have now been transferred to the Welsh Ministers) to extend time for compliance with the pre-commencement requirements of the DCO.

8. The Secretary of State, the Welsh Ministers and the Council of the City and County of Swansea (the council) all submitted that such an approach was dysfunctional and contrary to the clear intention of the legislation. The model provisions for development consent orders (the model provisions) contained in Schedule 4 to the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 ("the Model Provisions Order") used the words "begin" and "commence" interchangeably. The DCO's own Explanatory Memorandum, drafted by the Company and issued in February 2014 to accompany the application for development consent, had said expressly at paragraph 2 that it "highlights and explains the purpose and effect of any departures from" the Model Provisions Order. On the Company's construction, the DCO had indeed departed from requirement 2 of Schedule 4 to the Model Provisions Order, which suggested that the DCO should provide that the development "must be begun" within a stated period. And yet the Explanatory Memorandum made no mention of that departure. On the Company's analysis, the DCO contained a quite different time limit requiring that the development should be "commenced" within a stated period, leaving the requirement that it be "begun" within the prescribed period in section 154(1) extant. It was submitted that the model provisions did not mention that the DCO should provide expressly for it to cease to have effect at the end of the stated time period, and planning practice did not either.

9. The judge decided, on the basis that there was no difference in the meaning of the words "begin" and "commence", and adopting a purposive construction of the legislation, that the Company was wrong. Requirement 2 and the definition of "commence" in the DCO should be construed "so as to modify and/or exclude section 154 or 155 or to exercise the power under section 120(5)", which was an outcome that involved "a clarification of, and no injustice to, the language used and gives effect to its purpose".

10. We have concluded in broad terms that the judge was right and the Company's appeal should be dismissed. We do not, however, condone the imprecise use of language in the DCO (and in the model provisions) where it does indeed appear that the words "begin" and "commence" are used interchangeably. We were initially attracted by the Company's argument that, when the DCO took the trouble to define what "commence" meant and set a time limit for commencement that was different from the time limit for the development to be "begun" under section 154(1), it must have been intended to create two different time periods: one to decide when the DCO lapsed under section 154(2) and the other to decide the time by which the development had been commenced. Ultimately, however, we concluded that this argument proves too much. It creates a dysfunctional planning situation that has never been intentionally created either in infrastructure development projects or in planning permissions more generally. No other development consent order that we have been shown had a similar effect. Even the National Infrastructure Planning Handbook 2015 (written, with others, by Mr Michael Humphries KC, counsel for the Company) did not go so far as to suggest that two time limits were appropriate. The consequences of the construction proposed by the Company would be undesirable. DCOs could be left on the stocks for years, inhibiting future development and placing landowners at potential risk of delayed compulsory purchases. The DCO used loose language, equiparating the words "begin" and "commence". It was, however, sufficiently clear that the terms of the DCO had been intended to make use of both section 154(1)(b) and section 120(5) to specify another time period within which development had to be begun before the DCO would lapse, and to modify the material operations that could be considered as triggering both the beginning and the commencement of development. There was no need for the use of these amending provisions to be signposted in the DCO itself. In the result, the Company's failure to undertake the necessary material operations to "commence" development within Requirement 2 meant that the DCO had, pursuant to section 154(2), ceased to have effect when the time limit, which Requirement 2 set, expired on 30 June 2020.

11. This judgment will now explain the essential factual background, set out the relevant statutory background, and expand briefly on the reasons for our decision, which we have already summarised.

Essential factual background

12. In February 2014, the Company submitted an application to the Secretary of State under section 37 of the 2008 Act. It sought a development consent order authorising the construction of a tidal lagoon electricity generating station spanning Swansea Bay to form a lagoon between the River Tawe and the River Neath, which would harness tidal energy and would have a maximum installed electrical capacity of 320MW generated by 16 turbines. After consideration of the project by a panel of inspectors, their report recommending approval, and the Secretary of State's decision accepting that recommendation, the DCO was made and came into effect as we have said in June 2015.

13. In November 2016, the Company undertook ground investigation and survey works under article 15(1) of the DCO. It is accepted, as we have said, that those works constituted "material operations" under section 155 and were, therefore, enough under section 154(1)(a) for development to have been "begun" within five years of the DCO being made, but were insufficient for development to "commence" under the definition

in article 2(1). Requirement 2 for development to "commence" no later than five years beginning with the date on which it came into effect was not, therefore, complied with.

14. The Company subsequently entered into negotiations with the Secretary of State for a "Contract for Difference" to secure funding for the project. At that stage, the Welsh Government was supporting the development, and in June 2018 it offered £200 million towards its costs. But on 25 June 2018 the Secretary of State announced in Parliament that the project no longer represented value for money and that funding by the UK Government should not be assumed. Work on the development was then suspended. Later, in 2019 and 2020, after the Climate Change Act 2008 had been amended to reflect the commitment to a target of net zero carbon emissions by 2050, the Company proceeded to discharge several of the pre-commencement requirements under the DCO. Many of those requirements, however, remained undischarged by 30 June 2020. Thus, as the Company accepts, the development did not "commence" within the five-year period specified in Requirement 2.

15. On 21 May 2020 the Company wrote to the Secretary of State accepting that the powers under the DCO expired on 30 June 2020, and requesting that the Government enact a one-provision Bill to extend those powers by a year. On 9 July 2020 the Secretary of State wrote rejecting that request. In the meantime, on 29 June 2020, the Company had written to the council, contending that the ground investigation and survey works undertaken in 2016, and further works of investigation, demolition and site-clearance carried out thereafter, were material operations under section 155. The Company claimed that those works complied with the requirement under section 154(1)(a) that development be "begun" before the end of five years from the making of the DCO. The council did not accept that contention. These proceedings were issued on 11 March 2021 seeking two declarations: (i) that the Company had "begun" the development under the DCO within section 155 (during the period required by section 154(1)(a)), and (ii) that the DCO had not ceased to have effect and the Company was entitled to apply to extend the period within which the development must "commence".

16. It is not clear whether, if the DCO has ceased to have effect, a further development consent order would now be granted for the same or a similar development. It is, however, clear that the project no longer has the active support of the Welsh Government.

The 2008 Act

17. Under the regime of the 2008 Act, developers of nationally significant infrastructure projects must apply for a development consent order, which, under section 117(4) must be contained in a statutory instrument. Section 120 provides, under the heading "What may be included in order granting development consent":

> (1) An order granting development consent may impose requirements in connection with the development for which consent is granted.
>
> (2) The requirements may in particular include
>
> > (a) requirements corresponding to conditions which could have been imposed on the grant of any permission, consent or authorisation, or the giving of any notice …

> (b) requirements to obtain the approval of the Secretary of State or any other person, so far as not within paragraph (a).
>
> (3) An order granting development consent may make provision relating to, or to matters ancillary to, the development for which consent is granted.
>
> …
>
> (5) An order granting development consent may –
>
> > (a) apply, modify or exclude a statutory provision which relates to any matter for which provision may be made in the order …
>
> (6) In subsection (5) "statutory provision" means a provision of an Act or of an instrument made under an Act.

18. Various provisions of the 2008 Act deal with the requirements which a development consent order may impose on developers. Read in the light of section 120(5), they are to be understood as default provisions which a development consent order can vary for a particular project.

19. Section 153 provides that "Schedule 6 (changes to, and revocation of, orders granting development consent) has effect". Paragraph 3(1) of schedule 6 provides that the Secretary of State "may by order make a change to, or revoke, a development consent order"; and paragraph 3(4) provides that "[the] power may be exercised on an application made by or on behalf of … (a) the applicant, … (b) a person with an interest in the land, or … (c) any other person for whose benefit the development consent order has effect".

20. As with planning permissions, development consent orders expire if not lawfully implemented. Section 154 provides, under the heading "Duration of order granting development consent":

> (1) Development for which development consent is granted must be begun before the end of –
>
> > (a) the prescribed period, or
> >
> > (b) such other period (whether longer or shorter than that prescribed) as is specified in the order granting the consent.
>
> (2) If the development is not begun before the end of the period applicable under subsection (1), the order granting development consent ceases to have effect at the end of that period.
>
> (3) Where an order granting development consent authorises the compulsory acquisition of land, steps of a prescribed description must be taken before the end of –
>
> > (a) the prescribed period or

> (b) such other period (whether longer or shorter than that prescribed) as is specified in the order.
>
> (4) If the steps of the prescribed description are not taken before the end of the period applicable under subsection (3), the authority to compulsorily acquire the land under the order ceases to have effect.

21. Regulation 6 (of the 2015 Regulations), under the heading "Duration of order granting development consent", provides:

> (1) Development for which development consent is granted must be begun before the end of a period of five years beginning on the date on which the order granting development consent is made.
>
> (2) Where an order granting development consent authorises the compulsory acquisition of land, and a notice to treat is served under section 5 of the Compulsory Purchase Act 1965 … that notice must be served before the end of a period of five years beginning on the date on which the order granting development consent is made.

22. Section 155, under the heading "When development begins", provides:

> (1) For the purposes of this Act … development is taken to begin on the earliest date on which any material operation comprised in, or carried out for the purposes of, the development begins to be carried out.
>
> (2) "Material operation" means any operation except an operation of a prescribed description.

23. Regulation 7 of the 2015 Regulations provides that "[the] measuring or marking out of a proposed road shall not be included within the meaning of "material operation" for the purposes of section 155 …".

The DCO

24. We have already set out at [3] the critical provisions of Requirement 2 and the definition of "commence" in article 2(1).

25. The definition of "commence" includes a reference to the definition of a "material operation" in section 56(4) of the 1990 Act, which is as follows:

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

26. Several of the additional requirements in the DCO provide in various ways that the authorised development must not commence until plans, schemes, programmes, strategies or other details have been submitted and approved.

27. Article 15(1) provides that "… the undertaker may for the purposes of [the DCO] enter on any land within the [DCO] limits or that may be affected by the authorised development and – (a) survey or investigate the land; (b) … make trial holes in such positions on the land as the undertaker thinks fit to investigate the nature of the surface layer and subsoil … ; (c) … carry out ecological or archaeological investigations on the land …".

28. Article 27(1), under the heading "Time limit for exercise of authority to acquire land compulsorily", provides:

> (1) After the end of the period of 5 years beginning on the day on which [the DCO] comes into force –
>
> (a) no notice to treat may be served under Part 1 of the 1965 Act; and
>
> (b) no declaration may be executed under section 4 of the Compulsory Purchase (Vesting Declarations) Act 1981 …

Discussion

29. The Company appeals the judge's decision on a single ground of statutory construction. It contends that the judge was wrong to hold that the definition of "commence" in article 2(1) had the effect of excluding or modifying sections 154 and 155 such that ground investigation works and surveys undertaken pursuant to the DCO did not "begin" the development within those sections.

30. The applicable principles of statutory construction were not in dispute before us. The court's essential function is to ascertain the meaning of the statutory words having regard to the purpose of the provisions in question. It must interpret the statutory language, so far as it can, in a way that best gives effect to that purpose. To establish the intention of Parliament, regard must be had to the relevant context (*R v. Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349, per Lord Bingham at pages 384-8, and Lord Nicholls at pages 397-8; *Barclays Mercantile Finance Ltd v. Mawson* [2004] UKHL 51, [2005] 1 AC 684 at [28], *Williams v. Central Bank of Nigeria* [2014] UKSC 10, [2014] AC 1189 per Lord Neuberger at [72], and *Project Blue Ltd v. Commissioners for Her Majesty's Revenue and Customs* [2018] UKSC 30, [2018] 1 WLR 3169 per Lord Hodge at [110]).

31. There is not a different or less rigorous approach to the interpretation of planning statutes and statutory instruments. It is not appropriate in this case, which concerns the construction of legislation, to rely on authorities that caution against excessive legalism in the interpretation of planning policies, planning officers' reports or inspectors' appeal decisions. We note, however, what Lord Hodge said in *Trump International Golf Club Scotland Ltd v. Scottish Ministers* [2015] UKSC 74, [2016] 1 WLR 85 at [34]: "When the court is concerned with the interpretation of words in a condition in a public

document such as a section 36 consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole", and that "[this] is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense".

32. The essential issue before the court is whether the judge was right to construe Requirement 2 and the definition of "commence" in article 2(1) as modifying or excluding sections 154 and 155 or as an exercise of the power under section 120(5).

33. If the judge is right, (i) Requirement 2 was to be construed as constituting an "other period" specified by the DCO within the meaning of section 154(1)(b), displacing the prescribed period in regulation 6, (ii) section 154(2) operated to mean that the DCO ceased to have effect at the end of the period specified in Requirement 2, because the works had not been "commenced" by that time, and (iii) the relevant "material operations" required to trigger the one and only applicable time period (that in Requirement 2) were limited by the definition of "commence" in article 2(1).

34. If the Company is right, (i) Requirement 2 is to be construed as setting a second and free-standing time period in addition to that set by section 154(1)(a) and regulation 6, (ii) neither the DCO nor the 2008 Act provides for the consequences of the expiration of the time limit in Requirement 2 without development having been "commenced", and (iii) there are two relevant meanings of "material operations", the first (in section 155(1)) to trigger the "beginning" of the section 154(1)(a) and regulation 6 time period, and the second (in article 2(1)) to trigger the "commencement" of the Requirement 2 time period.

35. We start with the language of the 2008 Act and the DCO. It is necessary first to consider whether the word "commence" as used in the DCO carries the same meaning as the word "begin" in sections 154 and 155. The two words "begin" and "commence" are often, even usually, deployed in ordinary English usage to mean much the same thing. They may even, in many circumstances, be used interchangeably. That does not, however, lead us to assume that they must be regarded as exact synonyms in the specific statutory context with which we are concerned. Our task is simply to establish whether or not the meaning of these two words, when viewed in the particular context in which each of them is used, is in substance different or the same.

36. In our view, the two words, properly construed in their respective contexts, do carry the same meaning in the relevant legislative provisions. First, the word "commence" in Requirement 2 is defined in the DCO itself as meaning "begin to carry out any material operation". That formulation corresponds to the concept in section 155(1) of the development being taken to "begin" when any material operation "begins to be carried out". This points towards the conclusion that the two concepts of beginning and commencement are substantially the same, even if distinct words with normally substantially similar meanings are used. The words are used in the same sense and to deal with the same thing, which is the time within which the consent conferred by the DCO may validly be implemented. There is nothing in the relevant provisions of the 2008 Act itself or in the DCO to warrant the conclusion that, despite the words being used to deal with the same thing, they should be regarded as carrying different meanings and starting different time limits.

37. Secondly, the difference between the respective definitions of a "material operation" in article 2(1) and section 155 reinforces the proposition that Requirement 2 was deliberately introduced as a departure from the default time limit under section 154(1)(a) and regulation 6. The heading to Requirement 2 is "[t]ime limits, etc.". Section 154(1)(b) expressly allows a different time limit. The period provided for in Requirement 2 has a different start and a different end from the default period under section 154(1)(a) and regulation 6.

38. Thirdly, if the drafters had intended the DCO to utilise the default time limit in section 154(1)(a) and regulation 6, it would not have been necessary to provide a different one in Requirement 2 and article 2(1). This is a common process in planning applications, where conditions are normally imposed setting the time for implementation in substitution for the provisions in section 91 of the 1990 Act. It does not matter that this was not expressly acknowledged in the DCO, when it was obviously the intended effect of Requirement 2. There was no statutory requirement for any such acknowledgment. It is plain on the face of the DCO that this is the only provision limiting the time within which implementation must occur, and that this is to be attained by carrying out a "material operation" within the scope of the definition of the word "commence" in article 2(1). The refinement is the exclusion of certain works such as ground investigations. It enables preliminary activity of that kind to happen before the development is formally commenced under the DCO. These changes were brought about by the use of the power to "apply, modify or exclude" in section 120(5)(a). There is no requirement in the 2008 Act to acknowledge that this power is being used.

39. We turn now to consider the purpose of the statutory provisions in their proper context.

40. First, the underlying purpose of the time limits provided for by both sections 154 and 155 and by Requirement 2 is to prevent the life of an unimplemented development consent order from surviving for an unknown and possible lengthy period without a start being made on the ground. We agree with the judge's observation at [83] that the common purpose here is "to limit the life of [the DCO] so as to encourage the early implementation of such projects and to avoid consents remaining extant indefinitely". The provision for time limits on grants of planning permission in section 91 of the 1990 Act is for a similar purpose.

41. Secondly, looking at the DCO as a whole, its natural meaning is that the provisions for commencing the development and for initiating procedures for the compulsory acquisition of land are to take place within the same five-year period. This construction provides clarity and consistency. The provisions of sections 154(1) and (2) on the one hand and sections 154(3) and (4) on the other hand envisage that the authority to compulsorily purchase land will cease to have effect at the same time as the DCO ceases to have effect. Sections 154(1) and (2) and sections 154(3) and (4) use the same forms of words. Both allow the setting of a period different from the prescribed period, which operates if no other period is specified in the DCO. Moreover, a different period, identical to that set for implementation by Requirement 2, was established by article 5 for the initiation of compulsory purchase procedures – five years from the date of the DCO coming into effect, rather than five years from the DCO being made. That makes good sense. Requirement 2 represents the use of the statutory power under section 154(1)(b); article 27 represents, in consistent terms, the use of the parallel power in section 154(3)(b). It would have been illogical and dysfunctional to create inconsistent arrangements for the period of operation of the DCO on the one hand, and the draconian

power to acquire land compulsorily on the other. In our view, the DCO achieved consistency and functionality.

42. We turn now to consider the Company's construction. No convincing explanation for it has been given. It would produce an artificial and dysfunctional state of affairs, in which development could be "begun" but not "commenced" possibly for many years to come. This is not a plausible proposition. It entails two separate and divergent time limits, 21 days apart: one that relies on development being "begun" under section 154, the other on its being "commenced" under Requirement 2. If the development were "begun" but not "commenced", the DCO would remain in effect. At that stage, development could only be validly "commenced" if an amendment to the DCO were to be applied for and granted under section 153. The powers conferred by the DCO would continue in effect, though they would be incapable of being exercised until a further formal approval had been given.

43. These consequences seem to us to be at odds with the principle that time limits must be imposed on consents granted for development. That principle is, essential to the statutory scheme for development consent orders. It operates under section 154 by providing for a default time limit when none is inserted in the development consent order itself. The consequences are also at odds with the principle that where, as in the case of the DCO, powers of compulsory acquisition are conferred together with consent for a development project, those powers should not last indefinitely. The uncertainty created by indefinite powers of compulsory purchase is hard to reconcile with the statutory purpose evident from section 154, and the clear intent of article 27(1) and Requirement 2, to the effect that the time limits for the use of compulsory purchase powers should coincide with those for the implementation of the DCO.

44. In addition, there is no need for there to be two time limits in order to allow necessary preliminary works to be undertaken at the appropriate times. That objective is dealt with by the definition of the word "commence" in article 2(1). As is confirmed in the Explanatory Memorandum, "[a] definition of "commence" has … been inserted to clarify the preliminary works that may be carried out before the authorised development can be said to be commenced". Thus, the DCO deliberately provided for preliminary works to be carried out before the pre-commencement conditions were discharged. This did not generate the need for a separate or different period to be specified for implementation under section 155. No logical or practical reason has been suggested for that to be done, and we cannot see any such reason.

45. Had the Company needed, for any reason, to extend the period for commencing the development under Requirement 2, it could have applied for such an extension under section 153 and schedule 6 and the relevant regulations. But it chose not to do so.

46. Our conclusion finds additional support in the fact that the two words "begin" and "commence" were used with the same meanings in the model provisions, on which the drafting of the DCO was evidently based. The Explanatory Memorandum acknowledges at [2] that the model provisions are "intended as a guide for applicants in drafting orders, rather than a rigid structure, and have been treated as such". The DCO largely reproduces the layout and content of the model provisions, albeit with some differences of language. Although the Model Provisions Order did not itself subsist after April 2012, the Planning Inspectorate's Advice Note 13, current at the time of the examination into the DCO, still referred to the model provisions.

47. It seems clear that the model provisions envisaged the imposition of an explicit requirement for implementation to take place within a specified period even if that was the default time limit under section 154 and regulation 6. Requirements 2 and 3 in schedule 4 to the Model Provisions Order, headed "Model provisions in respect of requirements", whose provisions relate to time limits, seem to have employed the words "begin" and "commence" interchangeably. The former provided, under the heading "Time limits", provided that "[the] authorised development must be begun within *[insert number]* years of the date of this Order"; the latter provision, under the heading "Stages of authorised development", provided that "[no] authorised development shall commence until a written scheme setting out all the stages of the authorised development has, after consultation with the relevant planning authority and highway authority, been submitted to and approved by the Commission".

48. It is telling, we think, that [2] of the Explanatory Memorandum states unequivocally that the document "highlights and explains the purpose and effect of any departures from the Model Provisions Order … as recommended by Planning Inspectorate Advice Note 13 *Preparation of a draft order granting development consent and explanatory memorandum*", yet that there is no indication there, or anywhere else in the contemporaneous material, that Requirement 2 was intended to be such a departure. If the use of the expression "[the] authorised development must commence …" in Requirement 2, had been regarded as differing in substance from the use of the words "[the] authorised development must be begun …" in requirement 2 of schedule 4 to the Model Provisions Order, so as to be, in substance, a departure from it, one would have expected an explanation of the "purpose and effect" of that departure to have been set out in the Explanatory Memorandum. No such explanation is given.

49. None of that is surprising if one considers the usage of the words "begin" and "commence" elsewhere in the statutory code for town and country planning. The interchangeable use of these two words is a feature of the legislative regime for land use planning in England and Wales: for example, in section 72(3) of the 1990 Act, regulation 7 of the Community Infrastructure Levy Regulations 2010, and in schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015.

50. Finally, we mention for completeness that we were directed to the time prescribed for implementation in some 100 other development consent orders. Some do not specify any time limit, with the consequence that the default period provided in section 154 applies. In those that do specify a time limit, various formulations have been adopted. In the Able Marine Energy Park Development Consent Order 2014, the time limit is specified using the verb "begin". This seems to be the only one in which that word has been used. Most use the verb "commence": some containing no definition of that word; some defining it by reference to section 155 without adjustment; some defining it by reference to section 155 with adjustment; and some defining it by reference to section 56 of the 1990 Act. Many of those that do include a specific time limit set that time limit from the date on which the development consent order has effect, rather than the date on which it was made. Nothing in these other development consent orders supports either construction of the DCO in this case.

Conclusions

51. Accordingly, we have concluded that the judge was broadly right. First, Requirement 2 is to be construed as constituting an "other period" specified by the DCO within the meaning of section 154(1)(b), displacing the period prescribed by section 154(1)(a) and regulation 6. Secondly, section 154(2) means that the DCO ceased to have effect at the end of the period specified in Requirement 2, because the works had not been "commenced" by that time. Thirdly, the relevant "material operations" required to trigger the one and only applicable time period were limited by the definition of "commence" in article 2(1).

52. The Company was wrong to suggest that Requirement 2 set a second and free-standing time period in addition to that provided for in Requirement 2. There was only one relevant meaning of "material operations" to trigger the "commencement" of the Requirement 2 time period. That meaning was contained in article 2(1). It is sufficiently clear from the terms of the DCO that it (a) made use of both sections 154(1)(b) and 120(5) to specify another time period within which the development had to be begun before the DCO would lapse, and (b) modified the material operations that could be considered as triggering both the beginning and the commencement of development. The Company's failure to undertake the necessary material operations to commence development within the Requirement 2 time limit meant that the DCO ceased to have effect on 30 June 2020.

53. For those reasons we conclude that the Company's construction must be rejected, and the Company was not entitled to the declarations that it sought. The Company had neither begun nor commenced the development under the DCO within the only applicable time limit in Requirement 2, and the DCO has ceased to have effect so that the Company was not entitled to apply to extend the period set by Requirement 2.

54. For the reasons we have given, this appeal is dismissed.