Neutral Citation Number: [2025] EWCA Civ 279

Case Nos: CA-2024-000081
CA-2024-000082
CA-2024-000083
CA-2024-000084

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Judge Swami Raghavan and Judge Tracey Bowler
[2023] UKUT 00260 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/03/2025

Before:

LORD JUSTICE NEWEY
LORD JUSTICE ZACAROLI
and
SIR LAUNCELOT HENDERSON

- -

Between:

ORSTED WEST OF DUDDON SANDS (UK) LIMITED — **Appellants**
GUNFLEET SANDS II LIMITED
GUNFLEET SANDS LIMITED
WALNEY (UK) OFFSHORE WINDFARMS LIMITED
- and -
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS — **Respondents**

- -
- -

Michael Jones KC (instructed by **Herbert Smith Freehills LLP**) for the **Appellants**
Elizabeth Wilson KC and Angharad Parry (instructed by **The General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing dates: 4-6 February 2025

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 17 March 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

....

Lord Justice Newey:

1. The appellants (namely, Orsted West of Duddon Sands (UK) Limited ("Orsted West"), Gunfleet Sands II Limited ("Gunfleet II"), Gunfleet Sands Limited ("Gunfleet") and Walney (UK) Offshore Windfarms Limited ("Walney")) own and operate offshore windfarms. What is at issue in these appeals is how far, if at all, they can either claim capital allowances or make deductions from their taxable profits on the strength of certain expenditure. The expenditure in question was incurred on a variety of studies (including surveys) carried out in the years before the windfarms became operational.

2. The First-tier Tribunal ("the FTT") concluded that the appellants were entitled to capital allowances in relation to some of the costs of the studies. The Upper Tribunal disagreed, holding that the appellants could neither claim capital allowances nor make deductions from their profits. The appellants now challenge the Upper Tribunal's decision in this Court.

3. Questions such as are raised by this appeal may be becoming more acute as very large infrastructure projects require extensive and costly preparatory work.

Factual background

4. The appellants are all members of a group of companies of which the ultimate parent is Ørsted A/S, a Danish company. For the purposes of this judgment, it is not for the most part necessary to distinguish between the various companies in the group. For simplicity, therefore, I shall refer to both Ørsted A/S and the appellants as "Orsted" except where it is necessary to identify a specific company.

5. In 2000 and 2003, the Crown Estate invited tenders to develop certain areas of sea bed as windfarms. Orsted was successful in bids in respect of the sites of the windfarms relevant to these appeals: Gunfleet Sands Phase 1, Gunfleet Sands Phase 2, Walney Offshore Windfarm and West of Duddon Sands Offshore Windfarm. In each case, an agreement for lease was entered into and, eventually, Orsted made a "final investment decision" (or "FID") to proceed and, subsequently, a lease was executed. As the FTT explained in paragraph 22 of its decision, "[i]t takes approximately 5 to 6 years from being granted an agreement for lease to obtain the final investment decision and approximately 8 to 9 years from obtaining that agreement to lease to the commissioning of the windfarm".

6. In the meantime, Orsted has to obtain various statutory consents to achieve which it needs to carry out an environmental impact assessment ("EIA"). As a first step, "a scoping document which covers all aspects of the EIA at a very high level setting out what will and will not be carried out as part of the EIA" is produced (paragraph 24 of the FTT decision). That "typically takes between six months to a year" (paragraph 24). Various studies are then undertaken as part of the EIA. The FTT described those that are relevant as follows in paragraph 25 of its decision:

> "(1) Landscape, seascape and visual assessments; these involve determining the impact of the windfarm on the surrounding landscape and seascape, as well as the visual impact of the windfarm from various pre-selected onshore viewpoints (how

the windfarm can be seen from land). These are considered by reference to different layout options. They also review the potential mitigation measures to reduce those potential impacts.

(2) Benthos studies; these include describing the benthic species present at the site, identifying the potential impacts of the windfarm on those species and identifying potential mitigation measures to reduce those impacts. Benthic species are those organisms living in or on the seabed.

(3) Ornithology and collision risk studies; these involve an assessment of potential impacts arising from the construction operation and decommissioning of the windfarm and include: Identifying the type and population of birds likely to be affected; their migratory and other habits; whether they are protected species; their range of flight heights, and options for mitigating those impacts.

(4) Fish and shellfish studies; these involve providing information on the presence of fish and shellfish species in the vicinity of the windfarm and export cable routes, which are of conservation or commercial interest. They review the potential impacts to those species and potential mitigation measures to reduce those potential impacts and describe the likely impacts if mitigation options are used.

(5) Marine mammal studies; these involve: Determining the key species in the area of the windfarm and their populations; reviewing the potential impacts to those species and potential mitigation measures to reduce those potential impacts and describing the likely impacts if mitigation options are used.

(6) Archaeology, wrecks and cultural heritage site studies; these include: Determining the number of maritime sites and finds such as known wrecks, reported losses and recorded obstructions within the area of the windfarm; determining the number of known sites and finds of historic settlement and occupation; determining the level of archaeological potential of the sites and finds within the windfarm site; showing the location of wrecks, obstructions and finds; identifying the potential impact during construction operation and decommissioning on archaeological remains; and proposing mitigation to minimise those impacts.

(7) Noise assessment studies; these include: A determination of the level of underwater noise and airborne noise during the construction operation and decommissioning of the windfarm; determining the patterns of noise during those phases and proposing mitigation measures.

> (8) Telecoms and radar interference studies; these include: A determination of existing cable routes and the location of television and radio transmitters; determination of potential electromagnetic interference to signals by radiation emitted from generator equipment on the windfarm site; and determining potential disturbance to submarine telecommunication cables by electricity export cables from the windfarms.
>
> (9) Traffic, transport and access studies; these involve: A determination of the level and type of air and maritime traffic in the windfarm area and the risks of collision; determining any interference with aviation routes from nearby airfields; identifying navigational risks for commercial and recreational shipping and options to mitigate these risks; identifying the impact on tourism in the local area; identifying vessel anchoring and dredging spots and determining cumulative impacts with other planned windfarm developments nearby.
>
> (10) Socio-economic and tourism assessment; this involves the determination of the impact of the windfarm construction and operation on the human environment in the region, including any increase in employment and impact on tourism."

7. At the same time, "the first round of metocean studies and surveys take place as, too, do the initial geophysical and geotechnical investigations": paragraph 29 of the FTT decision. After certain consents have been granted, "[d]etailed geophysical and geotechnical studies are undertaken … which involve an examination of each proposed wind turbine location": paragraph 30. "Metocean studies" are "studies of sea depth, wind conditions, wave conditions, tidal conditions and current conditions": paragraph 63. "Geophysical studies" "provide data on sea floor bathymetry, seabed features, water depth and soil stratigraphy as well as identifying hazardous areas on the seafloor and man-made risks such as unexploded ordnance" (paragraph 69). "Geotechnical investigations" (which "are conducted following geophysical surveys and use the information obtained to target soil/rock strata boundaries and engineering properties or specific seabed features") "ascertain the characteristics of the soil and involve such techniques as core penetration testing, vibro coring and borehole drilling and laboratory tests" (paragraph 70).

8. There are "a number of rounds of geophysical and geotechnical studies" (paragraph 71 of the FTT decision). The purpose of the "reconnaissance campaigns" is "to determine whether the site is suitable for the installation in the first place" (paragraph 72). The detailed geophysical and geotechnical studies "involve an examination of each proposed wind turbine location" (paragraph 73), and Orsted also carries out "a further round of geophysical and geotechnical investigations, after FID and just before the construction phase" (paragraph 76).

9. The Gunfleet Sands windfarms are in the Thames Estuary. Phase 1 became operational on 12 November 2009 and comprises 30 wind turbines. Phase 2 became operational on 19 August 2009 and comprises 18 wind turbines.

10. Walney Offshore Windfarm, in the Irish Sea, was developed in two phases. Walney, which undertook the development, began trading on 13 January 2011. The windfarm comprises 102 wind turbines and is about 73 km² in extent.

11. West of Duddon Sands Offshore Windfarm, again in the Irish Sea, comprises 108 wind turbines. The relevant appellant, Orsted West, began trading on 16 January 2014.

12. Each windfarm includes an offshore substation as well as wind turbines. The turbines are linked to the substation by an array of cables. A turbine's blades are supported by a tower which, in turn, is connected to a "monopile" foundation by a "transition piece". The monopile and transition piece together make up the "substructure". The monopile is a cylindrical steel tube which is driven or drilled into the sea bed.

13. As the FTT noted in paragraph 51 of its decision, the evidence before it was that "[e]ach of the monopile foundations in the windfarms in these appeals was physically unique, save for one pair of foundations at Walney which were identical". In contrast, turbine manufacturers offer a limited number of designs of towers and blades, and none of those selected for the windfarms at issue in these proceedings was bespoke (paragraph 55).

14. The FTT termed the wind turbines and array cables in a windfarm the "generation assets": see paragraph 5 of the FTT's decision. I shall do the same.

<u>The proceedings</u>

15. In February 2018, HM Revenue and Customs ("HMRC") issued closure notices denying Orsted capital allowances in respect of expenditure on the various studies. HMRC having confirmed their stance on review, Orsted appealed to the FTT.

16. Amongst the issues which the FTT had to decide were these:

    i) Whether, on the one hand, the generation assets (i.e. wind turbines and array cabling collectively) constituted "plant" within the meaning of section 11 of the Capital Allowances Act 2001 ("CAA 2001") or, on the other hand, each wind turbine and set of array cables was, individually, "plant";

    ii) To what extent, if any, the cost of the studies had been "incurred on the provision of" the relevant plant within the meaning of section 11 of CAA 2001 and so qualified for capital allowances under that provision;

    iii) To what extent, if any, the cost of the studies was deductible as pre-trading revenue expenditure under section 61 of the Corporation Tax Act 2009 ("CTA 2009"); and

    iv) Whether amounts in the returns of three of the appellants (Gunfleet, Gunfleet II and Walney) had been conclusively determined for the purposes of paragraph 88 of schedule 18 to the Finance Act 1998 ("FA 1998").

17. In a decision released on 3 February 2022 ([2022] UKFTT 35 (TC)), the FTT (Judge Nigel Popplewell) concluded that:

i) "each windfarm, meaning in this context, the generation assets, comprises a single item of plant and machinery for the purposes of the capital allowances legislation" (paragraph 249(1) of the decision);

ii) Some, but by no means all, of the expenditure on the studies qualified for capital allowances under section 11 of CAA 2001 (paragraphs 218 and 249(2));

iii) None of the cost of the studies was deductible under section 61 of CTA 2009 (paragraph 249(3)); and

iv) The amounts in the returns of Gunfleet, Gunfleet II and Walney had not been conclusively determined for the purposes of paragraph 88 of schedule 18 to FA 1998 (paragraph 249(5)).

18. Both sides appealed to the Upper Tribunal. In a decision released on 27 October 2023 ([2023] UKUT 00260 (TCC)), the Upper Tribunal (Judge Swami Raghavan and Judge Tracey Bowler) held that:

i) The FTT had been entitled to conclude that the generation assets at each windfarm were "plant" (paragraph 70);

ii) The FTT had been right to reject Orsted's case on section 61 of CTA 2009 (paragraph 186); and

iii) The FTT had also been right to take the view that the amounts of qualifying expenditure stated in the tax returns of Gunfleet, Gunfleet II and Walney had not been conclusively determined (paragraph 244).

19. However, the Upper Tribunal considered that there had been "a number of errors of approach" in the FTT's decision as regards the question whether expenditure on the studies was "on the provision of" the relevant plant (paragraph 175 of the Upper Tribunal's decision). Remaking the decision on that issue, the Upper Tribunal concluded that none of the cost of the studies was "on the provision of" the plant and, accordingly, that none of it qualified for capital allowances (paragraphs 179-182).

20. With permission from the Upper Tribunal, Orsted now appeals to this Court. The issues that arise before us are these:

i) To what extent, if any, was expenditure on the studies "on the provision of" the generation assets within the meaning of section 11 of CAA 2001?

ii) To what extent, if any, was the expenditure deductible under section 61 of CTA 2009?

iii) Have amounts of qualifying expenditure stated in the tax returns of Gunfleet, Gunfleet II and Walney been conclusively determined for the purposes of paragraph 88 of schedule 18 to FA 1998?

Issue (i): "on the provision of"

The statutory framework

21. Section 1 of CAA 2001 explains that the Act provides for allowances in respect of capital expenditure. These include "plant and machinery allowances", for which Part 2 (comprising sections 11 to 270) provides. Section 11(1) states that allowances are available under Part 2 "if a person carries on a qualifying activity and incurs qualifying expenditure". By section 11(4):

> "The general rule is that expenditure is qualifying expenditure if—
>
> (a) it is capital expenditure on the provision of plant or machinery wholly or partly for the purposes of the qualifying activity carried on by the person incurring the expenditure, and
>
> (b) the person incurring the expenditure owns the plant or machinery as a result of incurring it."

Case law

22. The leading cases in relation to what is "qualifying expenditure" are the decisions of the House of Lords in *Inland Revenue Commissioners v Barclay, Curle & Co Ltd* [1969] 1 WLR 675, 45 TC 221 ("*Barclay, Curle*") and *Ben-Odeco Ltd v Powlson* [1978] 1 WLR 1093 ("*Ben-Odeco*").

23. In *Barclay, Curle*, the taxpayer had claimed an allowance under section 279(1) of the Income Tax Act 1952, which applied where a person carrying on a trade "incurs capital expenditure on the provision of machinery or plant for the purposes of the trade". The case concerned capital expenditure incurred in connection with the construction of a dry dock. The work involved excavation of a basin; lining the basin with concrete; and installing valves, pumps, electricity generators and other machinery. The Inland Revenue accepted that the machinery was "plant" in respect of which capital allowances could be claimed. What was at issue before the House of Lords was, first, whether the "plant" extended to the concrete and, secondly, whether the cost of the excavation was expenditure incurred "on the provision of machinery or plant".

24. The House of Lords by a majority (Lords Hodson and Upjohn dissenting) answered the first question in the affirmative. Lord Reid concluded at 679 that "every part of this dry dock plays an essential part in getting large vessels into a position where work on the outside of the hull can begin, and … it is wrong to regard either the concrete or any other part of the dock as a mere setting or part of the premises in which this operation takes place". In a similar vein, Lord Guest said at 685:

> "The function which the dry dock performs is that of a hydraulic lift taking ships from the water onto dry land, raising them and holding them in such a position that inspection and repairs can conveniently be effected to their bottoms and sides.

> It is unrealistic, in my view, to consider the concrete work in isolation from the rest of the dry dock. It is the level of the bottom of the basin in conjunction with the river level which enables the function of dry docking to be performed by the use of dock gates, valves and pumps. To effect this purpose excavation and concrete work were necessary."

The third member of the majority, Lord Donovan, said at 691:

> "But in the present case this dry dock, looked upon as a unit, accommodates ships, separates them from their element and thus exposes them for repair; holds them in position while repairs are effected, and when this is done returns them to the water. Thus the dry dock is, despite its size, in the nature of a tool of the respondents' trade and, therefore, in my view, 'plant.'"

25. The House of Lords also sided with the taxpayer on the second question. Lord Hodson did not express an opinion on the point, but the other Law Lords all considered that, if the concrete was plant, the cost of the excavation was incurred "on the provision of" plant.

26. As to that, Lord Reid, with whom Lord Upjohn expressed agreement in this respect at 690, said at 680:

> "So the question is whether, if the dock is plant, the cost of making room for it is expenditure on the provision of the plant for the purposes of the trade of the dock owner. In my view, this can include more than the cost of the plant itself because plant cannot be said to have been provided for the purposes of the trade until it is installed: until then it is of no use for the purposes of the trade. This plant, the dock, could not even be made until the necessary excavating had been done. All the commissioners say in refusing this part of the claim is that this expenditure was too remote from the provision of the dry dock. There, I think, they misdirected themselves. If the cost of the provision of plant can include more than the cost of the plant itself, I do not see how expenditure, which must be incurred before the plant can be provided, can be too remote."

27. Lord Reid continued:

> "The appellants [i.e. the Inland Revenue] rely on section 300 [of the Income Tax Act 1952] as showing that 'provision' cannot have the meaning which I have ascribed to it. That section is as follows:
>
> > 'Where a person carrying on a trade incurs capital expenditure on alterations to an existing building incidental to the installation of machinery or plant for the purposes of the trade, the provisions of this Chapter shall have effect as

> if the said expenditure were expenditure on the provision of that machinery or plant and as if the works representing that expenditure formed part of that machinery or plant.'
>
> Here the word used is 'incidental' to the installation of the plant. 'Incidental' is a wider word than 'necessary.' In my view, expenditure necessary for the installation of the plant is already covered by section 279. But it may be that the exigencies of the trade require that when new machinery or plant is installed in existing buildings more shall be done than mere installation in order that the new machinery or plant may serve its proper purpose. Where that is the case this section enables the cost of the additional alterations to be included. If this section meant that no preliminary expenditure is within the scope of section 279 there would be an anomalous and unreasonable difference between the provision of plant in a new building or in the open, and the provision of plant in an existing building. So I do not regard this section as supporting the appellants' argument."

28. Lord Guest said this at 686:

> "It only remains to deal with the second point raised by the appellants. This is that even if the concrete work were 'plant' the cost of excavation did not qualify under Chapter II. The commissioners upheld the contention of the revenue upon this point, their view being that the expenditure was 'too remote' from the provision of the dry dock. In my view, they were wrong in excluding this expenditure. The excavation was a necessary preliminary to the construction of the dry dock and, in my view, was covered by the provision of plant under section 279. 'Provision' must cover something more than the actual supply. In this case it includes the excavation of the hole in which the concrete is laid."

29. For his part, Lord Donovan said at 691-692:

> "As regards the cost of the necessary excavation, I think this comes within the words 'expenditure on the provision of machinery or plant' in section 279 (1), again regarding the dry dock as a whole. Similar expenditure incurred in relation to a building or structure is now regarded as 'expenditure on the construction' of such building or structure for the purposes of section 265 (1) without any further or more express provision, and I think rightly so. The appellants say that if a comparable construction be given to the relevant words in section 279 (1) relating to plant and machinery, then section 300 of the same Income Tax Act, 1952, would be unnecessary. But that section relates to 'alterations to an existing building incidental to the installation of machinery or plant'; and its wording suggests

> that it was enacted simply as an assurance to remove doubts about a particular kind of case."

30. In *Ben-Odeco*, the taxpayer had borrowed money in order to finance the construction of an oil rig. It claimed that commitment fees and interest which it had paid in respect of the loans had been incurred "on the provision of" the oil rig and so were eligible for capital allowances under section 41(1) of the Finance Act 1971, which had superseded section 279 of the Income Tax Act 1952 and to which section 11 of CAA 2001 corresponds. However, the House of Lords (Lord Salmon dissenting) decided that the expenditure did not qualify for the allowance.

31. Having cited a Canadian case concerned with whether "capital cost allowances" extended to commitment fees under legislation which referred to the "capital cost to the taxpayer of the property", Lord Wilberforce, with whom Lord Scarman expressed agreement at 1107, said at 1097:

> "I bear in mind that it arose under a different statute and one which not only uses a different expression, but whose policy as regards deductions seems to be more liberal than the U.K. statute. The expression 'capital cost to the taxpayer' makes it easier to include within deductible expenditure costs which the particular taxpayer incurs, whereas the U.K. words, more objectively, focus on expenditure directly related to the plant. The one draws a line round the taxpayer and the plant; the other confines the limiting curve to the plant itself."

32. Lord Wilberforce went on at 1098:

> "An important principle of the laws of taxation is that, in the absence of clear contrary direction, taxpayers in, objectively, similar situations should receive similar tax treatment. The taxpayer's argument in the present case does not bring this about. On the contrary a different result would follow according as he pays for the provision of plant out of his own resources, or borrows it. In the latter case he would get an allowance, in the former he would not — this may amount to treating an investor worse than a speculator. Moreover, on the same argument, a different allowance in respect of identical plant would result according as he (i) borrows from a bank, (ii) raises money by a public issue of debentures, (iii) obtains money from his shareholders. And, again, a different result would follow according as (i) he is able to capitalise the interest on the money borrowed or (ii) (because he is carrying on a profit-making trade or for other reasons) does not or cannot capitalise it. If the law is such that it offers the taxpayer these options, he is of course entitled to select that which suits him best, but an interpretation which introduces such a large element of subjectivity is to be avoided. The words 'expenditure on the provision of' do not appear to me to be designed for this purpose. They focus attention on the plant and the expenditure on the plant — not limiting it necessarily to the

> bare purchase price, but including such items as transport and installation, in any event not extending to expenditure more remote in purpose. In the end the issue remains whether it is correct to say that the interest and commitment fees were expenditure on the provision of money to be used on the provision of plant, but not expenditure on the provision of plant and so not within the subsection. This was the brief but clear opinion of the special commissioners and of the judge and little more is possible than after reflection to express agreement or disagreement. For me, only agreement is possible."

33. At 1099, Lord Hailsham identified "the only question in dispute" as "whether the fees and interest were items of 'expenditure on … machinery or plant'". In that connection, the taxpayer contended that "the words include all terms properly incurred in the provision of the *Ocean Tide* which would include the cost of financing the payment for it" whereas the Inland Revenue argued "that the only expenditure on the provision of the *Ocean Tide* was, in effect, its price, and that the commitment fees and interest were not expended on the provision of the Ocean Tide within the meaning of section 41 (1) but on the provision of the money to pay for it and that this for the purposes of the subsection is to be regarded as a distinct and separate operation".

34. Lord Hailsham came down "decisively in favour of the narrower meaning": see 1100. He summarised his reasoning as follows at 1100-1101:

> "In the first place I believe that the more accurate and the more natural answer to the question on what was the £5½ million spent, is that £5 million was spent on the provision of plant and machinery and £500,000 on the loan charges required in order to obtain the money to pay for the plant and machinery. In the second place I favour a meaning to the statute which will provide the same allowance for the taxpayer who meets the cost of an oil rig out of his own accumulated resources, the taxpayer who meets the same cost by a debenture issue or an issue of shares to the public, and the taxpayer who simply borrows the money from a bank, or some other source of liquid finance. In the third place I am not satisfied that the policy of the statute really conforms with the appellants' contention. Granted that its main purpose was to encourage investment in new machinery and plant, I am not convinced that to include interest charges and commitment fees would serve this purpose without giving rise to abuse. It was agreed in argument that if the constructing company borrowed money in order to finance the construction of the rig and added the interest and commitment fees into the price charged to the purchaser, the total price to the purchaser would rank for first-year allowance. But how if the purchaser in his turn borrowed the money to pay the price containing these components? It seems to me that, on the appellants' contention, he would be able to add the second tier of commitment fees and interest. By the time a complicated piece of machinery was ultimately delivered and paid for there might be more than one,

> indeed more than two, sets of commitment charges and interest payments included in the ultimate purchase price and several additional costs of financing the project by the trader to be included in the allowance the revenue might be compelled to make to the trader. It is true, of course, that, if the appellants' case were conceded what would emerge would be a coherent and superficially elegant system of taxation in which the interest charges before trading would be allowable as first-year capital allowance, and after the commencement of trading would be deductible as expenses in the computation of profits. But I am by no means certain that this was the intention of the legislature. To qualify for an allowance the taxpayer must bring himself within the conditions set by the benevolence of Parliament. I am not convinced that this taxpayer has done so in the present case."

35. Agreeing, Lord Russell of Killowen said at 1106:

> "In my view the question to be asked is, what is the effect of particular capital expenditure? Is it the provision of finance to the taxpayer, or is it the provision of plant to the taxpayer? In my opinion the effect of the expenditure was the provision of finance and not the provision of plant. I would add that I do not seek to confine qualifying capital expenditure to the price paid to the supplier of the plant. I should have thought, for example, that if the cost of transport from the supplier to the place of user is directly borne by the taxpayer it would be expenditure on the provision of plant for the purposes of the taxpayer's trade. And there may well be other examples of expenditure, additional to the price paid to the supplier, which would qualify on similar grounds. But such matters are not for decision in this appeal."

36. A little earlier, Lord Russell had said this:

> "I contrast the present case with that of a company with already available assets used to buy the plant: on the appellant's [i.e. taxpayer's] argument such a company using its already available assets would be relatively disadvantaged in respect of loss of any fruit of such available assets.
>
> The point was made for the appellant that if the provider of the plant borrowed for working capital and incurred as a result liability for interest and perhaps a commitment fee in respect of such borrowing, these liabilities would be reflected in the price paid, the whole of which would qualify as relevant capital expenditure by the company buying the plant. That is so: but I do not follow the conclusion from that fact. It does not appear to me to be an alternative to borrowing by the purchaser. The supplier's price would reflect the whole cost to him of supplying the plant, including overheads. interest on necessary borrowing, or on commitment of working capital, and a profit

> element, the whole price being subject to a perhaps competitive market. I am not able to see how the build-up of the supplier's price can have any relevance to the problem raised in this appeal."

37. *Barclay, Curle* and (albeit to a slightly lesser extent) *Ben-Odeco* have been cited in many subsequent cases, but these add relatively little of significance for the purposes of the present appeals. I should, however, mention the decisions of the FTT and Court of Appeal in *Samarkand Film Partnership No 3 v Revenue and Customs Commissioners* ([2011] UKFTT 610 (TC), [2012] SFTD 1 and [2017] EWCA Civ 77, [2017] STC 926) (respectively "*Samarkand* FTT" and "*Samarkand* CA"), that of the Upper Tribunal in *JD Wetherspoon plc v Revenue and Customs Commissioners* [2012] UKUT 42 (TCC), [2012] STC 1450 ("*JD Wetherspoon*") and that of this Court in *Urenco Chemplants Ltd v Revenue and Customs Commissioners* [2022] EWCA Civ 1587, [2023] STC 54 ("*Urenco*").

38. In *Samarkand* FTT, partners in certain partnerships claimed loss relief for losses arising from expenditure in relation to the acquisition of films. The FTT (Judge Hellier and Mr Robinson) concluded that the partnerships had not been trading, but it also considered whether, supposing that the partnerships had been carrying on a trade, sums paid under an agency agreement in relation to "the identification, negotiation and recommendation of films and / or Rights for acquisition and exploitation by the Partnership" represented "acquisition expenditure" for the purposes of section 134 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"). Section 130(3) of ITTOIA defined "acquisition expenditure" to refer to expenditure "incurred on the acquisition of the original master version of a film".

39. The FTT took the view that some of the expenditure at issue fell within sections 130(3) and 134 of ITTOIA. Having quoted in paragraph 391 from Lord Russell's speech in *Ben-Odeco*, the FTT said this:

> "[393] We note that s 134 is not confined to expenditure 'on the asset' but applies to expenditure 'on the *acquisition*' of the asset. The natural meaning of that is to include costs directly related to the acquisition.
>
> [394] If we apply Lord Russell's test: 'what was the effect of the expenditure?', in relation to the cost of negotiating and preparing the agreements, it seems to us that the answer is not that the effect was the production of a piece of paper, but was the acquisition of an asset.
>
> [395] For this reason we find that expenditure on the negotiation and drafting of the agreement to acquire the films (but not their leasing) would be expenditure on the acquisition of films, and thus deemed to be a revenue nature by s 134.
>
> [396] For the same reasons, but on balance, that we find that expenditure on identifying the films was expenditure 'on the acquisition' of the films.

> [397] On the other hand, expenditure in arranging finance for the partners was not in our view expenditure on the acquisition of the film. Applying Lord Russell's test its effect was the provision of finance to the partners, not the provision of the film: in ordinary language expenditure on getting a mortgage would not be regarded as expenditure on acquiring a house. The exclusion in s 130(5) of interest and incidental costs of finance also makes this clear: we do not regard it as otherwise extending the ambit of s 130(3).
>
> [398] Nor, for the same reasons was expenditure related to the structuring of the partnerships (particularly in the case of Proteus) expenditure on the acquisition of the film.
>
> [399] Thus, to the extent that the relevant parts of the expenditure on Future's fees can be identified, some of those parts are to be taken as revenue as a result of s 134 and are thus capable of deduction …."

40. That point was not explored when the case reached the Court of Appeal, where the focus was again on whether the partnerships had been trading. There was also, however, an issue as to whether the FTT had been entitled to conclude that one of the partnerships ("Samarkand") had incurred no more than 1% of a certain sum on the acquisition of rights to exploit a particular film. In that respect, it had become common ground that the rights were worthless, or virtually so, but Samarkand maintained that the FTT had been "wrong to hold that Samarkand did not incur the amounts paid in acquiring the film in the absence of any finding that Samarkand knew that it was paying more than the asset was worth when it did so": see paragraph 102 of *Samarkand* CA. In that connection, Henderson LJ, with whom Arden and David Richards LJJ agreed, referred in paragraph 103 to the decision of the Court of Session in *IRC v George Guthrie & Son* (1952) 33 TC 327 ("*Guthrie*") and then, in paragraph 109, concluded that it had not been open to HMRC, in the absence of bad faith, to go behind the contractual position agreed between the parties. Henderson LJ went on in paragraph 110:

> "I also find *Guthrie* of assistance, because it shows that in answering the question what expenditure is incurred on, in a statutory context designed to provide relief for the expenditure, the focus should be on the fact and the object of the expenditure, rather than on whether the money was well spent. I agree with Nugee J … that no distinction can sensibly be drawn between the statutory language of the relevant provisions in ITTOIA, which refer to a person who has 'incurred acquisition expenditure', which itself means 'expenditure incurred on the acquisition of' the original master version of a film, and the wording in s 15(1) of the Income Tax Act 1945, which refers to a person who 'incurs capital expenditure on the provision of machinery or plant'."

41. *JD Wetherspoon* concerned the extent to which the taxpayer could claim capital allowances in respect of expenditure incurred when refurbishing and fitting out pubs.

In the course of its decision, the Upper Tribunal (Briggs J and Judge Nowlan) considered the relationship between sections 24 and 66 of the Capital Allowances Act 1990 ("CAA 1990"). Those provisions corresponded, respectively, to sections 11 and 25 of CAA 2001, the latter of which provides for capital expenditure incurred on "alterations to an existing building incidental to the installation of plant or machinery" to be treated as expenditure on the provision of the plant or machinery. In that connection, the Upper Tribunal said this in paragraph 43 about what HMRC, who were the respondents, had submitted:

> "In stark contrast, the respondents contended that the items for which allowances could be claimed under s 66 were for alteration works incidental to the pure physical installation of the plant in an existing building, and not to alterations geared to facilitating the better use of the installed items. Thus the respondents gave as an example of an allowable item the moving of a staircase in an existing building where the installation of plant might prevent people accessing other floors that they had previously been able to access. Similarly, if a large item of plant was installed in an existing building, and it blocked the windows so that old windows had to be bricked up and new window apertures created, that type of alteration to the building, consequent upon the installation of the plant, was all that the section provided for. It followed from the respondents' contentions that the section was providing for allowances for expenditure particularly occasioned by the installation of plant in an existing, rather than a new, building that of its very nature the expenditure would not have to be incurred, at least in a similar way, in the case of installations in a new building."

Explaining its conclusions on when section 66 of CAA 1990 applied, the Upper Tribunal said this:

> "[65] We accept the point made by the respondents, to the effect that if the installation of plant in an existing building means that certain alterations have to be made to the building, albeit that they may not affect the operation or use of the plant, then allowances can be claimed for those alterations. Thus, we agree with the example advanced by the respondents that if the installation of plant necessitates some alteration to a pre-existing staircase because the installation of the plant would otherwise prevent use of the staircase to get to other floors, then expenditure on that alteration would qualify for allowances under the section.
>
> [66] Whilst as a general rule we accept that it is s 24, rather than s 66 that covers the expenditure on installing plant or machinery, we do not rule out the application of s 66 to some items of expenditure that might well be directly related to the installation of plant. For instance if the existing staircase, referred to in the previous paragraph, had to be modified to facilitate access to the plant, it would be odd if that expenditure

> failed to qualify under s 66, when that conceded by the respondents in their example mentioned in paras 43 and 65 did qualify for allowances. The expenditure on moving the staircase to facilitate access to the installed plant might equally qualify for allowances under s 24, though allowances under that section might be denied by the case law in relation to 'premises' or by the provisions of Sch AA1. But we consider that the expenditure would still qualify under s 66."

42. Subject, therefore, to the impact of "the case law in relation to 'premises'" and schedule AA1 to CAA 1990, the Upper Tribunal considered that "expenditure on moving the staircase to facilitate access to the installed plant" could qualify for allowances under what is now section 11 of CAA 2001.

43. We were also taken to a part of the Upper Tribunal's decision in which it addressed "preliminaries". In that connection, it said this in paragraph 92:

> "Preliminaries are, by their nature, items of overhead expenditure which cannot be, or which have not been, attributed to any single item in the building project. Some, like insurance, are inherently incapable of being so attributed. Others, like scaffolding, may be capable of specific attribution, but the time and cost involved in the process of specific attribution is often disproportionate to the amount at stake. Thus, apportionment of preliminaries between items which do, or do not, qualify for capital allowances is the only solution in relation to unattributable preliminaries, and may be the sensible solution where attribution is uneconomic."

44. It was HMRC's position in *JD Wetherspoon* that "a trader seeking capital allowances must specifically attribute all expenditure which is capable of attribution, however time-consuming or uneconomic that process may be", but the FTT had taken the view that "a pro rata apportionment … of any preliminaries where a detailed item by item attribution would be disproportionately time consuming or expensive, was a legitimate basis for claiming capital allowances for preliminaries, because it was a reasonable, common-sense solution which accorded with generally accepted accounting practice": see paragraphs 94 and 96 of the Upper Tribunal's decision. The Upper Tribunal agreed with the FTT, explaining in paragraph 97:

> "To the extent that this sensible conclusion involved any issue of law at all, we unhesitatingly agree with it. It cannot have been the intention of the legislature that a trader should have to spend more on the minute attribution of preliminaries to underlying items of work than either their cost or the value of the capital allowance thereby to be obtained."

45. *Urenco* involved a dispute as to the extent to which the taxpayers were entitled to capital allowances in respect of expenditure incurred on the construction of a facility for the treatment and management of nuclear waste. One of the issues related to Item 22 in List C, found in section 23(3) of CAA 2001, which reads, "The alteration of land for the purposes only of installing plant or machinery". When discussing the

scope of Item 22, Sir Launcelot Henderson, with whom Thirlwall and Arnold LJJ agreed, said in paragraph 165 that he derived assistance from the reasoning of the Upper Tribunal in *Revenue and Customs Commissioners v SSE Generation Ltd* [2019] UKUT 332 (TCC), [2020] STC 107 ("*SSE* UT") (reversed in part: [2021] EWCA Civ 105, [2021] STC 369). The passages from *SSE* UT which Sir Launcelot Henderson quoted were these:

> "[127] The OED defines 'install' as 'place (an apparatus, system, etc.) in position for service or use.' We accept that the case law does not limit the term to simply taking a prefabricated asset and placing it in position … However, in the case law which we have reviewed, the common theme is the process which involves the integration, often with a degree of complexity of an article or articles which have already been made into another article, structure, building or even the land itself. In none of the cases that we have been referred to has a term been held to include the creation of an item of plant *in situ*.
>
> [128] … It seems to us that Item 22 in List C is confined to items which need to be installed separately from the process of manufacture or construction."

46. There was also extensive discussion before us of a case slightly pre-dating *Barclay, Curle*: *McVeigh v Arthur Sanderson & Sons Ltd* [1969] 1 WLR 1143, 45 TC 273 ("*McVeigh*"). In *McVeigh*, the taxpayer printed patterns on wallpaper and furnishing fabrics by means of wood blocks on which the patterns were cut, silk screens to which the patterns had been transferred or machines equipped with pattern-bearing rollers. The taxpayer claimed "investment allowances" in respect of the cost of producing and acquiring the designs from which the patterns it used were selected. Such allowances were available pursuant to section 16 of the Finance Act 1954 in respect of capital expenditure "on the provision of new machinery or plant".

47. Cross J concluded that, having regard to *Daphne v Shaw* (1926) 11 TC 256, he should "proceed on the basis that these designs are not 'plant'". He was evidently doubtful about whether that should be the case, saying at 285:

> "the designs, which are the tools of the trade of the styling committee and many of which are scrapped after a few years, might, I should have thought, qualify as 'plant' just as fully as the hand blocks, silk screens and rollers, many of which are periodically scrapped."

48. Cross J then turned to the question: "Can the cost of acquiring the designs be said to be expenditure on the provision of the blocks, screens and rollers on which some of them are patterned?". As to that, he said at 285-286:

> "If - to take a rather fanciful example - A commissions B to provide him with a patterned wood block so that A may experiment in printing wallpaper with a hand block, B would obviously be entitled to include in his bill the cost of acquiring

> a suitable design. But Counsel for the Crown pointed out that in that case if one asked B, 'What are you buying that design for?', he would answer, 'In order to provide A with the patterned wood block for which he has asked me'; whereas in this case, if you asked the Company's representative, 'Why are you buying these designs?', he would not answer, 'In order to provide the Company with wood blocks, screens or rollers patterned with them', but would answer, 'In order that the styling committee may have before it a wide variety of designs from which to select a few which they think are best adapted for reproduction on our papers and fabrics'. I feel the force of this argument, but the section itself isolates the provision of the patterned wood block and poses the question: What did the Company spend on it? To my mind, it cannot be right to include nothing for the cost of the design. I can well understand it being argued that, as so many of the designs are never actually put on any block, screen or roller, only some fraction of the total design costs should be allowed, and I do not think that *Commissioners of Inland Revenue v George Guthrie & Son* would be an authority against such an argument, for in that case the car would have been used if it had been delivered. But what was argued before me was that not one penny of the design costs should be allowed. To my mind, that cannot be right, and therefore I shall dismiss the appeal."

<u>*The Capital Allowances Manual*</u>

49. We were also referred to extracts from HMRC's Capital Allowances Manual ("the Manual"). The section of the Manual dealing with plant and machinery allowances states as follows at CA20070 as regards "professional fees and preliminaries":

> "Professional fees, such as survey fees, architects' fees, quantity surveyors' fees, structural engineers' fees, service engineers' fees or legal costs, only qualify for PMA [i.e. plant and machinery allowances] as expenditure on the provision of plant or machinery if they relate directly to the acquisition, transport and installation of the plant or machinery and as such are part of the expenditure incurred on the provision of the plant or machinery.
>
> The same rule of law applies to preliminaries. Preliminaries are indirect costs incurred over the duration of a project on items such as site management, insurance, general purpose labour, temporary accommodation and security.
>
> Where preliminaries and professional fees are paid in connection with a building project that includes the provision of plant or machinery, only the part, if any, which relates to services that can properly be regarded as on the provision of plant or machinery can be qualifying expenditure for PMA …."

50. A later section of the Manual addresses "structures and buildings allowance". The allowance in question is the subject of Part 2A of CAA 2001, which provides in section 270BB that capital expenditure is "qualifying capital expenditure" if, among other things, it is "incurred on the construction of a building or structure". The Manual states at CA93110:

> "Expenditure treated as incurred on the construction of a building includes:
>
> - professional fees relating to the design and construction of a building provided that the building is actually constructed …."

The Tribunal decisions

51. The FTT thought it important to ask whether expenditure had been "necessary". It considered that "[e]xpenditure on design which is necessary or which must be incurred before plant can be provided, qualifies for allowances": see paragraph 123. In the context of the present case, "expenditure on design without which the windfarms or wind turbines could not carry out that function, and without which the windfarms or wind turbines would be operationally useless, falls into the 'must' or 'necessary' category of design", but, the FTT said, "expenditure on design without which the windfarms or the wind turbines would not be operationally useless, and without which they could continue to generate electricity (even if the amount of electricity is lower than might otherwise be the case if it were designed differently) falls outside the 'must' or 'necessary' criteria and is too remote": see paragraph 124. Likewise, the FTT took the view that "[e]xpenditure on installation is only allowable if it must have been incurred before the plant could have been provided": see paragraph 140. Expenditure on studies would thus be allowable if and to the extent that they directly related to the "essential elements of installation", which were that "it should be undertaken safely and effectively": see paragraph 140.

52. Applying those principles, the FTT held that certain of the studies which Orsted had undertaken qualified wholly or in part for capital allowances but that they otherwise did not.

53. The FTT's approach did not accord with either side's case and, on appeal to the Upper Tribunal, neither Orsted nor HMRC supported it. The Upper Tribunal agreed that "the FTT's test of necessity and 'directly-related' was wrong": see paragraph 175(1) of its decision.

54. For its part, the Upper Tribunal considered that the case law showed "a strict and narrow application of the statutory words": see paragraph 143. In the Upper Tribunal's view, "'on' does not mean 'in connection with' or 'directly related to' but signals a closer connection" (paragraph 137) and there is "a focus on 'doing' and 'making' rather than *advice* on doing and making" (paragraph 138). There is, the Upper Tribunal said, no reason to suppose that "the physical activity of integration of one thing into another" "encompassed the intellectual effort entailed in planning and advising on how and when the installation activity should be carried out" (paragraph 156) and "advice on how and when to install in the circumstances of a complex project might be necessary for the safe and effective installation of the plant but it is

advice which puts the taxpayer in the position of being able to install the plant, not expenditure on the provision of plant (in the form of installation of the plant)" (paragraph 157). Similarly, "it does not follow that expenditure on design costs (in the sense described above as the intellectual effort for the production of instructions by which the plant can be made), or the costs of inputs into such design will be 'on provision of plant' just because without such design or inputs the plant could not be fabricated" (paragraph 174). "It does not follow that something, such as design, which is required to put the taxpayer *in the position* to provide plant *is* the provision of the plant", the Upper Tribunal commented in paragraph 164. It went on in paragraph 165:

> "We also consider that the clear sense from the authorities is that plant, and the provision of it, appears at the centre of the basis for deduction. To provide plant assumes that there is already some notion of the plant in respect of which provision of it becomes relevant. As we have explained, provision is focussed on the cost of doing, making or constructing. The intellectual effort which goes into the design process may be instrumental to *conceiving of* what the plant, that is to be made or constructed is, but it appears odd to refer to the design of the plant (which is something which happens when the final form and shape of the plant is still to be determined) as the provision of the plant (which assumes the plant is final such that it can be provided)."

55. Re-making the decision, the Upper Tribunal concluded as follows:

> "179. In summary, the application of the strict and narrow principle encapsulated in the legislation, means that design of plant and the data inputs to that design, do not constitute provision of plant and that at (even at the level of generation assets – i.e. the level favourable to taxpayer and against HMRC's case) none of the disputed environmental impact or other technical studies qualify as 'on provision of plant'. None of the studies were provision of the plant (the generation assets), in that expenditure on them was not expenditure on the actual making or construction of the plant, its actual installation, or actual transport of it. Nor were they expenditure of a similar nature.
>
> 180. That is true even of the 'high water mark' of the taxpayers' case: the metocean detailed studies. The information from this fed into the design of the unique foundations. However, the studies were not provision of plant because they were inputs to design and even if the studies were design themselves that was not the provision of plant but provision of design which put the taxpayers in the position of providing plant. The expenditure on provision of the plant was the expenditure on making the foundations further to the design, and the costs in installation of them.

> 181. We have also considered whether any element of the studies meets the threshold for counting as 'installation' but conclude in summary that the studies, insofar as they concerned installation, constituted advice on where, how or when to install but were not the actual installation of the plant. There was some debate at the hearing about the nature of the work for establishing where unexploded bombs were and whether that work qualified. This was not simply generic advice that bomb locations should be avoided but included surveys undertaken which identified the precise geographic locations of ordinance. That was obviously necessary information to make sure the turbines and cables were installed safely. However even those studies and surveys were not in our view installation, they were preparatory work that needed to take place before installation could take place. The installation cost which fell under provision were the actual costs of installing the turbines and cables comprising the generation assets.
>
> 182. The result, that none of the environmental and technical studies qualify also reflects the answer given to the question per the approach in *Ben Odeco* whether the studies are on provision of plant or on something else."

The parties' cases in outline

56. Mr Michael Jones KC, who appeared for Orsted, submitted that the expenditure at issue was all incurred "on the provision of" the generation assets which have been held to constitute "plant". Some of the costs, he said, qualify as expenditure on installation. Those would include, for example, the costs of checking for unexploded ordnance in locations where turbines might be placed. Other costs, so Mr Jones argued, were "qualifying expenditure" because they had been incurred in the design of the generation assets. It is well-established that "expenditure on the provision of the plant or machinery" can include more than the bare purchase price of the plant or machinery. In *Barclay, Curle*, the excavation costs were held to have been incurred "on the provision of plant or machinery" because the plant "could not even be made" without the work, which was a "necessary preliminary", and expenditure "which must be incurred before the plant can be provided" could not be too remote. Similarly, the windfarms were bespoke items of plant which had to be designed before they could be constructed. Some of their component parts also had to be made from scratch from bespoke designs generated from data gathered from the various studies. Other parts could be bought on an off-the-shelf basis, but they were selected on the basis of information gleaned from the studies. Expenditure comparable to that at issue in *Barclay, Curle*, without which the plant could not have been created, is "qualifying", Mr Jones said, and he observed that design costs might be said to be more closely related to the relevant plant than costs of its transportation, which are known to qualify. Mr Jones sought support for his contentions in *McVeigh*, *Samarkand* FTT, *Samarkand* CA, *JD Wetherspoon* and the Manual as well as *Barclay, Curle* and *Ben-Odeco*.

57. In contrast, Ms Elizabeth Wilson KC, who appeared for HMRC with Ms Angharad Parry, supported the Upper Tribunal's decision. The Upper Tribunal, Ms Wilson said,

was correct that the words "on the provision of" are to be read strictly and narrowly. The focus is on the actual supply of a physical item. Costs of installation and transportation can qualify because the provision is incomplete or inchoate without them, but the "limiting curve" is confined to the plant itself and it is not enough that expenditure is "directly related to", "informs" or "feeds into" the provision of plant or was incurred "in connection with" or "with a view to" such provision. The process by which a taxpayer works out what plant it wants falls outside that "limiting curve". Intellectual planning and preparatory processes are to be distinguished from physical processes. Neither design costs nor costs of planning and preparing installation are, therefore, "on the provision of plant". In the present case, Ms Wilson argued, the disputed expenditure did no more than put Orsted in a position to decide what, if any, plant it required and how it might be installed.

Discussion

58. For section 11 of CAA 2001 to apply, plant must in fact have been provided. Expenditure on a transaction that is aborted will not qualify. Expenditure must result in the person incurring it becoming the owner of plant for capital allowances to be available.

59. Where an item of plant has been acquired, section 11 of CAA 2001 invites the question: what capital expenditure was incurred on its provision? To adapt the words of Cross J in *McVeigh*, section 11 "isolates the provision of the [plant] and poses the question: What did the [taxpayer] spend on it?" The answer will plainly include the purchase price, but *Barclay, Curle* established that other expenditure can potentially qualify as well. In that case, Lord Reid said that expenditure on the provision of plant "can include more than the cost of the plant itself because plant cannot be said to have been provided for the purposes of the trade until it is installed", commenting that the plant at issue (viz. the dry dock) "could not even be made until the necessary excavating had been done" and that he could "not see how expenditure, which must be incurred before the plant can be provided, can be too remote". He further expressed the view that "expenditure necessary for the installation of the plant" was covered by what is now section 11. Likewise, Lord Guest said that "provision" "must cover something more than the actual supply".

60. In *Ben-Odeco*, too, it was recognised that expenditure "on the provision of" plant can extend beyond its purchase price. Lord Wilberforce noted that such expenditure could include "such items as transport and installation". Similarly, Lord Russell explained that "if the cost of transport from the supplier to the place of user is directly borne by the taxpayer it would be expenditure on the provision of plant for the purposes of the taxpayer's trade" and that "there may well be other examples of expenditure, additional to the price paid to the supplier, which would qualify on similar grounds".

61. *Ben-Odeco* also shows that expenditure arising from the characteristics or circumstances of the particular taxpayer may not qualify. The focus is on the plant, not the taxpayer. Lord Wilberforce explained that "[a]n important principle of the laws of taxation is that, in the absence of clear contrary direction, taxpayers in, objectively, similar situations should receive similar tax treatment" and Lord Hailsham said that he favoured "a meaning to the statute which will provide the same allowance for the taxpayer who meets the cost of an oil rig out of his own accumulated resources, the taxpayer who meets the same cost by a debenture issue or

an issue of shares to the public, and the taxpayer who simply borrows the money from a bank, or some other source of liquid finance". Accordingly, Lord Hailsham distinguished between £5 million spent "on the provision of plant and machinery" and £500,000 spent "on the loan charges required in order to obtain the money to pay for the plant and machinery". For his part, Lord Russell said that the question to be asked of the effect of expenditure was: "Is it the provision of finance to the taxpayer, or is it the provision of plant to the taxpayer?"

62. While, however, it may be convenient to express a conclusion that expenditure does not qualify for allowances by saying that it was not on the provision of the plant but rather on something else, I agree with Mr Jones that asking questions along the lines of that posed by Lord Russell is, at most, of limited assistance when deciding whether expenditure qualifies. I also agree with Mr Jones that inquiring whether expenditure was "too remote" is not much help. Saying that expenditure was, or was not, "too remote" tells you whether it is considered to have been "on the provision of" the plant, but does not of itself explain why.

63. The guidance to be found in the case law has limitations, too. The expenditure at issue in *Ben-Odeco* was not such as would have had to be incurred by anyone acquiring the oil rig but was specific to the particular taxpayer. There is no comparable feature in the present case, and the reasons which Lord Hailsham gave for coming down in favour of the "narrower meaning" for which the Inland Revenue had contended (as to which, see paragraphs 33 and 34 above) do not apply here. Neither is *Barclay, Curle* by any means on all fours with this case. The nexus between the excavation and the dry dock in *Barclay, Curle* was particularly strong.

64. Turning to other cases, in common with the FTT and Upper Tribunal, I do not find *McVeigh* helpful. Commenting on *McVeigh*, the Upper Tribunal said in paragraph 171 of its decision:

> "The designs (patterns) were used to complete the plant (i.e. the wooden block) not to design the wooden block. The designs (i.e. the patterns drawn by the artists) were part of making the wooden block function as a wallpaper patterning block (the Revenue had conceded the blocks would be inchoate plant' without the patterns on them)."

Mr Jones took issue with this, arguing that the patterns were "not themselves used (in a physical sense) to complete the block but were used to design the relief that was to be carved into the block" and so "<u>were</u> used to design the wooden block". However, the designs were being *applied* to the blocks, screens and rollers, so that they could function; they were not being used to design the blocks, screens and rollers in the same manner that Orsted argues that the studies at issue in the present case were used to design the windfarms and their component parts. On top of that, *McVeigh* is a first instance decision pre-dating *Barclay, Curle* and the key paragraph in the judgment is both relatively short and hard to interpret. What, for instance, did Cross J have in mind when he said that he could "well understand it being argued that, as so many of the designs are never actually put on any block, screen or roller, only some fraction of the total design costs should be allowed"?

65. Nor do I consider *Urenco*, or the quotation from *SSE* UT which was endorsed in it, to be of real relevance. While Item 22 in List C in section 23 of CAA 2001 refers to "installing plant", section 11 of CAA 2001 does not include either "installing" or any variant of it. It speaks simply of "provision". Of course, the word "installation" is to be found in the speeches in *Barclay, Curle* and *Ben-Odeco*, but it does not follow that "provision" should be taken to encompass whatever "installation" might have meant had Parliament chosen to use that word. The key question is how "provision" is to be understood.

66. The *Samarkand* and *JD Wetherspoon* cases are perhaps of more significance, but still very far from determinative. In *Samarkand* FTT, the FTT found that expenditure on identifying films and the negotiation and drafting of agreements to acquire them was expenditure "on the acquisition of" the films. The relevant statutory provision used slightly different language to section 11 of CAA 2001 ("on the acquisition of" instead of "on the provision of"), but in *Samarkand* CA Henderson LJ said that no distinction could sensibly be drawn between the formulations. On the other hand, *Samarkand* FTT was a first instance decision dealing primarily with other issues.

67. In *JD Wetherspoon*, the Upper Tribunal expressed the view that expenditure on moving a staircase to facilitate access to plant could qualify for allowances. However, the Upper Tribunal was principally concerned with section 66 of CAA 1990 (corresponding to section 25 of CAA 2001), not section 24 of CAA 1990 (corresponding to section 11 of CAA 2001) and, anyway, the decision is not binding on us.

68. Mr Jones also relied on *JD Wetherspoon* for the acceptance in it that expenditure on "preliminaries" such as insurance and scaffolding can give rise to capital allowances even though they could neither constitute plant nor (at any rate in the case of insurance) amount to physical installation of plant. In this connection, Mr Jones further referred to the Manual. The Manual proceeds on the basis that professional fees "such as survey fees, architects' fees, quantity surveyors' fees [and] structural engineers' fees" can qualify for plant and machinery allowances. Further, when dealing with the "structures and buildings allowance" the Manual explains that "professional fees relating to the design and construction of a building provided that the building is actually constructed" will be "treated as incurred on the construction of a building".

69. Pointing out that the "plant and machinery" and "structures and buildings" allowances are dealt with separately in CAA 2001, Ms Wilson argued that comparisons between the two regimes must be approached with caution. It is also the case, of course, that the fact that something is said in an HMRC Manual does not make it law. That said, it is hard to see why "professional fees relating to the design and construction of a building" should represent expenditure "on the construction of" a building if professional fees relating to the design and construction of plant do not amount to expenditure "on the provision of" the plant.

70. The ultimate question, though, is whether expenditure such as Orsted claims to be qualifying is "on the provision of" plant within the meaning of section 11 of CAA 2001. The Upper Tribunal held, and Ms Wilson argued, that those words should be applied strictly and narrowly. I do not agree. *Barclay, Curle* and *Ben-Odeco* do not seem to me to justify that conclusion. Nor is it evident that Parliament would have

intended that approach. If, as a matter of ordinary language, a taxpayer incurs expenditure "on the provision of" plant from which, potentially, it will earn taxable profits, it is not obvious that Parliament should not have wished all such expenditure to be eligible for capital allowances.

71. It must commonly be the case that the expenditure incurred "on the provision of" plant will comprise no more than the purchase price of the goods and transport and installation costs. Very often, "the provision of plant" will doubtless involve buying something off-the-shelf. Where, however, plant is bespoke, it seems to me that the words "on the provision of", read naturally, would extend to costs incurred in designing the plant. When considering how much had been spent on providing such plant, it would, I think, be appropriate to take the costs of designing it into account. That conclusion chimes with the views expressed by HMRC in the Manual. It is also consistent with, and to some degree supported by, the case law. There are indications in *Samarkand* FTT, *Samarkand* CA and *JD Wetherspoon* that expenditure "on the provision of" plant can include more than just the purchase price and transport and installation costs. More importantly, perhaps, Lord Reid's references in *Barclay, Curle* to expenditure qualifying because the plant "could not even be made until the necessary excavating had been done", to expenditure which "must be incurred before the plant can be provided" not being too remote and to expenditure "necessary for the installation of the plant" qualifying tend to suggest that design costs can qualify, too. It can be said of them that the plant "could not even be made" without their having been incurred, that they had to "be incurred before the plant [could] be provided" and that expenditure on them was "necessary".

72. Of course, for the most part at least, the present appeals do not relate to the costs of drawings of the generation assets or their components, nor even to costs incurred in relation to the computer modelling which was evidently used in the design of the windfarms. It is Orsted's case that it is entitled to claim allowances in respect of studies which, while they may not themselves have contained designs, provided information which *informed* the design of the generation assets and the elements of them. In principle, it appears to me that such costs can also qualify for allowances. Supposing, to take a relatively straightforward case, that a windfarm operator proposing to construct an offshore windfarm in an area known to contain unexploded bombs carried out a survey for the sole purpose of finding the bombs so that the turbines could be located elsewhere, I should have thought that the costs of the survey could be said to have been incurred "on the provision of" the generation assets. If it had proved necessary to move a turbine, there would clearly have been an effect on the design of the generation assets, but it seems to me that the costs of the survey would qualify even if, in the event, there proved to be no bomb near the intended location of any turbine with the result that the design of the generation assets required no alteration. The costs would still have been incurred "on the provision of" the plant.

73. That is not to say that capital allowances can be claimed in respect of costs incurred in deciding, not how an item of plant should be designed, but whether to acquire the plant at all. In the course of her submissions, Ms Wilson drew an analogy with a restaurant. If, she said, someone proposing to open a restaurant sought advice on what kind of furniture to buy, the cost of doing so would not be "qualifying expenditure". I agree. The expenditure would have been incurred on deciding whether to buy plant, not on its provision. If, in contrast, the restaurateur, wishing to have tables made from

a particular material, commissioned someone to design them, the costs of design would in my view be "qualifying expenditure" if the tables were subsequently made. At the point at which the designer was instructed, the restaurateur may not have known precisely what he wanted, but that should not matter. It should be enough that he knew that he wanted tables along the lines of those subsequently designed and manufactured.

74. Comparable issues arise in relation to installation. It is clear from the authorities that costs of "installation" can qualify for "plant and machinery allowances". However, what is at issue in the present case is not expenditure incurred on the *physical process* of installing the generation assets, but the costs of studies which are said to have informed *how* installation should be effected. In my view, such costs can potentially also be said to have been incurred "on the provision of" the generation assets. Suppose, to adapt an earlier hypothesis, a windfarm operator intending to construct an onshore windfarm undertook a survey to find unexploded bombs so that any near the sites of turbines could be detonated before piling took place, it appears to me that the cost would have been incurred in deciding what installation should involve and, crucially, "on the provision of" the generation assets and, more specifically, the turbines. Nor should it make a difference if the survey revealed that there were no bombs close to where the turbines were to be placed. The expenditure would nonetheless have informed how installation should be carried out and so have been "on the provision" of the plant.

75. What if a study deals both with whether plant should be bought *and* with how any such plant should be designed if the project goes ahead. Perhaps there could sometimes be scope for apportionment in such cases. However, HMRC have not contended for any apportionment of that kind in the present case and, as Ms Wilson noted, section 11 of CAA 2001 does not impose any requirement that expenditure should have been incurred "wholly and exclusively" "on the provision of" plant or machinery.

76. Drawing some threads together, it is clear, I think, that expenditure will not qualify for capital allowances under section 11 of CAA 2001 unless it related to plant or machinery which was in fact acquired or constructed and did not arise from characteristics or circumstances particular to the specific taxpayer. On the other hand, it appears to me that section 11 encompasses costs of design as well as costs of installation, and that the eligible expenditure will extend to costs of studies which informed such installation or design. While, therefore, I am not going to attempt a provide an exhaustive account of when capital allowances are available, it seems to me that they can be claimed where (a) the taxpayer can demonstrate that, looking at matters objectively and with the benefit of hindsight, expenditure informed the design of plant or machinery or how it was to be installed, (b) the expenditure related to plant or machinery which was in fact acquired or constructed and (c) the expenditure did not arise from characteristics or circumstances particular to the specific taxpayer.

77. Turning to the specific items in dispute before us, the FTT made detailed findings in respect of the various studies in paragraphs 159 to 204 of its decision. I shall consider them in turn.

78. *Landscape, seascape and visual assessment*: The FTT noted in paragraph 164 that these studies "deal with the arrangements of the turbines within their respective

locations". It explained that the studies also favoured three-bladed turbines, advocated a grey and yellow colour scheme and, in one case, referred to the need for the turbines to have navigation lights. It seems to me that, in the circumstances, the studies influenced the design of the generation assets and that the expenditure on them was "on the provision of" those assets. The fact that the studies dealt with the arrangements of turbines of itself means that they related to the design of the generation assets in that they bore on how they should be laid out. The FTT observed as regards the choice of three-bladed turbines that "[t]he comment regarding three versus four bladed turbines simply equips the appellants to go into the marketplace and purchase the appropriate turbine". However, the relevant plant comprised the generation assets rather than each individual turbine and, where a study suggested three-bladed turbines, it was advising on how the generation assets should be designed rather than merely expressing a view on what plant should be bought.

79. *Benthos*: These studies considered whether, and if so how, mitigation measures should be taken during the construction of the wind farms (for example, by advising that construction should not be undertaken "from mid-January to May" or during "spawning periods for species which use the site or are especially sensitive to sediment in suspension" and by "minimis[ing] jetting during cable laying operations"). The FTT concluded as a result that all the studies related directly to the installation of the turbines. I agree that the costs of the studies represented expenditure "on the provision of" the generation assets in that they informed how the generation assets should be installed. I also agree with the FTT that the study in respect of the West of Duddon Sands Offshore Windfarm "relate[d] directly to the necessary design of the windfarm and of the wind turbines individually" and that its cost was "qualifying expenditure" on this basis. As the FTT explained in paragraph 169, "[a]t the time of the study it is clear that three development options were being considered and the studies indicate that the nature of the foundations would have a significant impact on the benthos".

80. *Ornithology and collision risk*: As the FTT observed in paragraph 174, the main mitigation factor identified in these studies was the windfarms' location, amongst other things because of low bird density in the relevant areas. The FTT further commented that it was "not able to find" that the mitigation measures mentioned in the studies "would have found their way into the computer modelling and thus have any direct or indirect relationship with the necessary design of the windfarm or its components". However, the fact that the studies did not *in the event* change the design of the generation assets does not mean that they did not *inform* their design. Further, the studies included recommendations as to lighting both during construction and afterwards. For instance, the West of Duddon Sands Offshore Windfarm study said that "at night, bright lighting during the construction phase and during the operational stage should be avoided": see paragraph 173(1). I therefore consider that the costs of these studies were incurred "on the provision of" the generation assets.

81. *Fish and shellfish studies*: The FTT held in paragraph 176 that these studies "inform and directly relate to the construction of the four windfarms". That conclusion is borne out by its findings in relation to the studies in paragraph 175, from which it can be seen that the studies proposed undertaking construction at particular times of year, "soft start" piling and avoiding jetting of cables. At least one of the studies can also, it seems to me, be seen to have related to design: that for West of Duddon Sands

Offshore Windfarm advised "the use of monopiles or suction caissons": see paragraph 175(1).

82. *Marine mammal studies*: The FTT found in paragraph 178 that these studies "have a direct relationship with the construction phase of each windfarm". Its account of the studies in paragraph 177 confirms that. The studies advised the use of deterrent devices, the appointment of observers to spot marine mammals, the cessation of work if seals are present and adoption of the "soft start" procedure.

83. *Archaeology, wrecks and cultural sites*: The FTT found in paragraph 180 that "the expenditure on the studies did have a direct relationship with the design of the windfarm as a whole, and on its construction and the installation of the wind turbines since the particular locations at which the wind turbines were to be installed was influenced by the location of the archaeological items". That being so, the expenditure was, in my view, "on the provision of" the generation assets. The FTT saw it as "unnecessary design", but it was mistaken in imposing its necessity test.

84. *Noise assessment*: These studies considered whether, and if so how, measures should be taken to mitigate noise. Those in respect of West of Duddon Sands Offshore Windfarm and Gunfleet Sands Phase I suggested, between them, an auger piling technique, acoustic shield bubble curtains, acoustic deterrents and "soft start" piling: see paragraph 181(1) and (2). The other studies do not appear to have proposed particular mitigation measures, but they, too, will have *informed* the approach to be taken to construction. The FTT declined to allow the costs of the studies on the basis that, if it did so, there would be "an element of double counting": see paragraph 182. To my mind, however, the studies all related to how installation should be carried out and their costs were incurred "on the provision of" the generation assets.

85. *Telecoms and radar interference studies*: The study in respect of West of Duddon Sands Offshore Windfarm made "a suggestion … to design out an issue relating to interference with microwave links to offshore infrastructure" and so this study "has a direct link with the design of the overall windfarm": see paragraph 184 of the FTT decision. The FTT commented that this was "a link to unnecessary design rather than to necessary design", but, as I have indicated, the FTT's necessity test was not well-founded. Further, while the studies in respect of the other windfarms did not in the event make design recommendations, they still informed their design.

86. *Traffic, transport and tourism*: The FTT said in paragraph 186:

> "It is clear from the discussion and imposition of safety zones during the construction phase which is identified in the studies for all four windfarms that these studies relate directly to the construction of the windfarms and the installation of the wind turbines. In order for the installation to be safe, there must be exclusion or safety zones. Furthermore, the fact that safety zones were also considered in the context of the operational phase, even if they were not adopted as in the two Gunfleet sites is an indication that they are relevant to the overall design and configuration of the sites. Permanent safety zones during the operational phase were adopted in the cases of Walney and WODS [i.e. West of Duddon Sands Offshore Windfarm] and I

> have no doubt that the necessity for those safety zones would have been fed into the computer model on which the design of the sites was based. Furthermore, it is clear from the foregoing evidence that the boundary at Walney was altered to take into account helicopter traffic, and it was Mr Mechali's evidence that at WODS the originally planned northern and southern boundaries of the windfarm were significantly altered to minimise impacts on shipping navigation."

87. In the circumstances, it seems to me that these studies related to both installation and design and that their costs were incurred "on the provision of" the generation assets.

88. *Metocean studies*: There were both desktop and detailed metocean studies. The FTT concluded that the desktop studies did not qualify for allowances (see paragraph 199) and Orsted no longer contends otherwise. As regards the other metocean studies, however, the FTT said this:

> "195. It is clear to me from the foregoing evidence (and the facts that I have found from it) that the detailed metocean studies directly relate to the necessary design of both the windfarms as a whole and to the wind turbines located in each position on those sites. This windfarm specific evidence corroborates the more general evidence given by the oral witnesses which was that the data from the metocean studies was used for the computer models which generated the necessary designs both for the configuration of the windfarms and for the wind turbines.
>
> 196. Without these metocean studies the specific design of the wind turbines could not be undertaken and so they could not have been fabricated. They would have been useless for the purpose for which they were intended namely the generation of electricity. So, the expenditure on the studies directly relates to the necessary design of the wind turbines. It follows that they also directly relate to the necessary design of the windfarms, as a whole, (or rather to the generation assets as a whole) since the specific design of each wind turbine means that it must be positioned at a specific site at each windfarm. Without positioning it at that specific site, it would not be capable of carrying out its function of generating electricity."

89. These conclusions were amply borne out by the FTT's findings in paragraph 194 and, in the circumstances, the costs of the studies in question will, in my view, have been incurred "on the provision of" the generation assets.

90. *Geophysical and geotechnical studies*: The FTT said this in paragraph 201:

> "I have no doubt that the evidence, both oral and documentary, and the findings of fact I have made in respect of that evidence, clearly demonstrate that, as submitted by the appellants, the geophysical and geotechnical studies directly relate to the

> necessary design of both the windfarms as a whole, and to the design of the individual wind turbines. This is the case for both the detailed to geophysical and geotechnical studies and the reconnaissance studies …. The purpose or function of the wind turbines was to generate electricity. To fulfil that purpose or function, the wind turbines had to be specifically designed to take into account the metocean and geotechnical and geophysical conditions which applied at the specific positions at which those wind turbines were to be installed in the windfarms. Without that data, the wind turbines could not be specifically designed and this, in my opinion, would have rendered them useless and unable to fulfil their function of generating electricity. And once they had been so designed, each wind turbine had to be installed at a specific position in each windfarm. And so these studies directly related to the necessary design of the windfarms as a whole."

91. The FTT also said that "the information gleaned from [the reconnaissance studies] was factored into the computer models which ultimately formed the basis of the necessary design of the configuration of the windfarms and to the design of each particular wind turbine" (paragraph 203) and that "[t]he design of each wind turbine evolved as additional data was fed into the computer modelling, and the impact of the data relating to the seabed had, as the evidence shows, an impact on the structure of the wind turbine as a whole, and not just to the foundations and transition piece" (paragraph 204).

92. The significance of the studies is especially clear in relation to West of Duddon Sands Offshore Windfarm. There, investigations showed where to expect igneous rock and that "resulted in a revised layout where positions with less than 25 meters to the igneous rock were avoided" and "the number of wind turbines for the site was reduced from 118 to 108": see paragraph 200(10).

93. The studies thus related to both design and installation and the costs were incurred "on the provision of" the generation assets.

94. That leaves the *scoping* documents. It is not at present clear to me whether the costs of these should be regarded as having been incurred "on the provision of" the generation assets. I would therefore invite the parties to put in written submissions on that question.

<u>*Conclusion*</u>

95. Orsted no longer suggests that it is entitled to capital allowances in respect of the socio-economic and tourism studies or the desktop metocean studies. As I have said, I am also unclear as to whether the cost of the scoping documents was "qualifying expenditure". However, it seems to me that the expenditure on all the other studies was incurred "on the provision of" the generation assets and so attracts capital allowances. In my view, therefore, Orsted can claim capital allowances in respect of the various studies listed in paragraph 218(1) to (7) of the FTT's decision (which the FTT held to qualify for allowances), but also for those relating to landscape, seascape

and visual assessment; ornithology and collision risk; noise; and telecoms and radar interference studies (where the FTT did not consider allowances to be available).

Issue 2: Revenue deduction under section 61 of CTA 2009

96. My conclusions on Ground 1 mean that Ground 2 is of relatively little importance. I must still address it.

97. As Mr Jones explained, Orsted's primary case is that the expenditure at issue qualified for capital allowances under section 11 of CAA 2001. However, Orsted maintains that, if and in so far as the expenditure did not so qualify, it should be considered to be revenue expenditure deductible under section 61 of CTA 2009. So far as material, section 61 provides:

> "(1) This section applies if a company incurs expenses for the purposes of a trade before (but not more than 7 years before) the date on which the company starts to carry on the trade ('the start date').
>
> (2) If, in calculating the profits of the trade—
>
> (a) no deduction would otherwise be allowed for the expenses, but
>
> (b) a deduction would be allowed for them if they were incurred on the start date,
>
> the expenses are treated as if they were incurred on the start date (and therefore a deduction is allowed for them)."

98. The FTT and Upper Tribunal both rejected Orsted's contentions. The FTT said in paragraph 224:

> "I have found the expenditure on some of the studies not to have been on the provision of either the generation assets or the single item of plant, or the wind turbines and array cables as items of plant. But I have done so on the basis of the highly specific wording that appears in the capital allowances legislation. I have not done so on the basis that the foregoing assets are not capital assets. It is to clear to me that the expenditure on the studies is expenditure on or in respect of assets which are capital in nature …. So there are identifiable capital assets on which the expenditure has been incurred. The expenditure is therefore on items of a capital nature and so is not deductible under section 61 CTA 2009 as pre-trading revenue expenditure."

For its part, the Upper Tribunal said this in paragraph 186:

> "We consider the FTT was right to reject the taxpayers' case. It was open to find that the expenditure was not 'on the provision

> of plant or machinery' yet still conclude the expenditure was capital in nature. The House of Lords decision in *Tucker (HMIT) v Granada Motorway Services Ltd.* [1979] 1 WLR (Lord Wilberforce) explained how indicia to capital or revenue could point different ways and that previous authority had warned against applying formulae derived on one case to another. HMRC are right to point out that the division between revenue and capital expenditure turns on its own test which is different to the 'on the provision of plant or machinery' test in s11(4) CAA. While the term 'test' does not quite capture the approach by which an answer is reached to the capital vs revenue question, the key point is that the questions and ensuing analysis in respect of each are different. Items can, as Ms Wilson submitted, clearly be capital (for instance the interest costs on financing of the oil rig in *Ben Odeco*, which were capitalised), but still not meet the 'on the provision of' test."

99. One of the cases to which we were referred in this context was *ECC Quarries Ltd v Watkis* [1977] 1 WLR 1386, (1975) 51 TC 153. There, the question was whether the taxpayer had been right to treat sums spent in connection with unsuccessful planning applications as revenue expenditure. Brightman J held that the expenditure was not of a revenue nature. He said at 1397:

> "… the taxpayer company expended money for the purpose of securing a permanent alteration to the nature of the land it owned or occupied; that is to say, a change from land confined to its existing use and of little or no value to the taxpayer company for the purposes of its trade to land capable of being turned to account pursuant to the taxpayer company's subsequent trading activities. It was a lump sum for an enduring advantage static in nature in the sense that it was not the planning permission which would produce the profits but the subsequent operations of working and winning the minerals. It is, I think, unbusinesslike to say that if planning permission had been granted no new asset would have belonged to the taxpayer company. The asset in respect of which planning permission was granted would have been radically and enduringly changed, viewed as an asset of the taxpayer company's business. It could be written up in value in the balance sheet; it would become potentially profit-making; it would be something which it was not before - namely, land from which minerals could be won and worked.
>
> On common sense principles, and with the benefit of judicial guidance in the reported authorities, it seems to me that the expenditure was of a capital and not of an income nature. To use the words of Lord Wilberforce in *Inland Revenue Commissioners v. Carron Co.* (1968) 45 T.C. 65, 75, the planning permission, if obtained, would in some sense have

> been an intangible asset of a capital nature. If that is right, money expended in seeking to acquire such an asset must equally be expenditure of a capital nature."

100. We were also referred to *Tucker v Granada Motorway Services Ltd* [1979] 1 WLR 683. In that case, the taxpayer had made a payment in order to secure a variation in terms relating to rent in a lease it held. The House of Lords held (Lord Salmon dissenting) that the payment was capital expenditure and so was not deductible in computing the taxpayer's profits for corporation tax purposes. Lord Wilberforce (with whom Lords Edmund-Davies and Keith expressed agreement) said at 686:

> "I think that the key to the present case is to be found in those cases which have sought to identify an asset. In them it seems reasonably logical to start with the assumption that money spent on the acquisition of the asset should be regarded as capital expenditure. Extensions from this are, first, to regard money spent on getting rid of a disadvantageous asset as capital expenditure and, secondly, to regard money spent on improving the asset, or making it more advantageous, as capital expenditure. In the latter type of case it will have to be considered whether the expenditure has the result stated or whether it should be regarded as expenditure on maintenance or upkeep, and some cases may pose difficult problems."

101. With regard to the case which was before him, Lord Wilberforce said at 688:

> "So it remains to decide the present case. For myself I cannot doubt where it lies: it is a case of once for all expenditure on a capital asset designed to make it more advantageous. It is true that the lease was non-assignable, so it had no balance sheet value before or after the modification. But it was none the less an asset and a valuable one for the appellant's trade, and, if an asset, was a capital asset. It appears to me to be impossible to divorce the payment from the lease and to regard it as simply a payment intended to increase the appellant's share of the profits. That it may have done, but the parties chose to do it through the medium of a lease, just as in the petrol filling stations cases, the object of increasing gallonage sales was effected through a lease. Nor in my opinion can the payment be regarded as payment of rent — that would be to confuse the measure, or basis of calculation of the payment with its nature. I agree therefore with both courts below in regarding the payment as a capital nature."

102. We were taken, too, to the recent decision of the Supreme Court in *Centrica Overseas Holdings Ltd v Revenue and Customs Commissioners* [2024] UKSC 25, [2024] 1 WLR 3391. In a section of her judgment in which she explained the "established principles to be applied in determining whether expenditure is capital or income in nature", Lady Simler (with whom Lord Hodge, Lord Stephens, Lady Rose and Lord Richards agreed) said:

"62. It is well-established that the question whether expenditure is capital or revenue in nature is a question of law: see *Beauchamp v FW Woolworth plc* [1990] 1 AC 478, 491–492.

63. The many decided cases that deal with the problem of differentiating between revenue and capital expenditure reflect the fact that items of expenditure on the borderline can be difficult to assign between these two broad categories. They make clear that there is no single test or criterion which will be decisive in all factual circumstances.

64. Nonetheless the body of capital/revenue case law is useful in providing illustrations of the approach adopted in a particular set of circumstances, and of the kind of indicia or factors regarded as relevant in those circumstances. There are also certain principles that have been derived from the cases, albeit recognising that they were decided in relation to widely differing businesses and circumstances. As Lord Wilberforce explained in *Strick v Regent Oil Co Ltd* [1966] AC 295, 348, the principles to be derived from the cases are useful provided it is recognised that they cannot automatically be applied to a case involving a different business and different circumstances.

65. A good starting point in identifying the distinction between the two types of expenditure is the opinion of Viscount Cave LC in *British Insulated and Helsby Cables Ltd v Atherton* [1926] AC 205, 213–214, where he said:

> 'when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital.'

66. In *Strick* [1966] AC 295 (at p 348), Lord Wilberforce identified three questions, which he said were generally relevant to this question:

> 'What is the nature of the payment, and for what was the payment made? These, together with a third question, namely, how that, for which the payment was made, was to be used, were stated by Dixon J in his classic judgment in *Sun Newspapers Ltd v Federal Comr of Taxation* [(1938) 61 CLR 337, 363]. There are, he said:
>
> > "three matters to be considered, (a) the character of the advantage sought, and in this its lasting qualities may play a part, (b) the manner in which it is to be used,

> > relied upon or enjoyed, and in this and under the former head recurrence may play its part, and (c) the means adopted to obtain it; that is, by providing a periodical reward or outlay to cover its use or enjoyment for periods commensurate with the payment or by making a final provision or payment so as to secure future use or enjoyment."
>
> 'I may add to this another statement by the same learned judge in the later case of *Hallstroms Pty Ltd v Federal Comr of Taxation* [(1946) 72 CLR 634, 648]:
>
> > "What is an outgoing of capital and what is an outgoing on account of revenue depends on what the expenditure is calculated to effect from a practical and business point of view, rather than upon the juristic classification of the legal rights, if any, secured, employed or exhausted in the process."'
>
> In other words, what matters is the true nature of the payment, for what it was made, and the object or effect of the expenditure, together with the factors set out by Dixon J in the quotation from *Sun Newspapers Ltd v Federal Comr of Taxation* (1938) 61 CLR 337, 363, that might be relevant on the particular facts of the case."

103. Later in her judgment, in paragraph 70, Lady Simler said:

> "There are many cases, particularly those involving trading companies, where difficulties can arise in determining on which side of the revenue/capital line the expenditure in question falls. In these cases a helpful starting point is to identify whether some form of asset has been obtained: see *Tucker v Granada Motorway Services Ltd* [1979] 1 WLR 683, 686, where Lord Wilberforce recognised that this approach can produce arbitrary results but concluded that it provides a basis for distinguishing between capital and revenue expenditure and should be maintained."

104. Lady Simler concluded in paragraph 75:

> "Drawing the threads together, although there is no single test to be applied in all circumstances, in most cases the objective purpose for which the payment is made is likely to be an important indicator. Where a capital asset (whether tangible or intangible) is obtained or can be identified, the starting point is to assume that money spent on the acquisition or disposal of the asset should be regarded as capital expenditure. There may be particular features of the payment or the circumstances … that displace that assumption. It may be helpful to consider the nature of what was obtained (the advantage) by the expenditure

> (including whether it is lasting or not), how it is used or viewed in the business and how the advantage was paid for (whether by a lump sum to acquire it or periodic payments for use for a particular period). Where money is spent on improving an asset, or making it more advantageous, that a payment is recurring may indicate that it is expenditure on maintenance or upkeep and therefore of a revenue nature, whereas a lump sum payment may indicate the opposite."

105. In the present case, Mr Jones argued that, if and to the extent that expenditure was not "on the provision of plant", the money will not, either, have been spent on the acquisition of an asset and so is not to be regarded as capital expenditure. Mr Jones acknowledged that it is not the case that expenditure which does not qualify for capital allowance is necessarily revenue in nature. However, he argued that on the facts of the present case expenditure will not have been capital in nature unless it was also "on the provision of plant".

106. In my view, however, the FTT and Upper Tribunal were correct that what is at issue is capital expenditure and, hence, that it is not deductible under section 61 of CTA 2009. It is plainly not the case (and Mr Jones did not suggest) that any expenditure to which section 11 of CAA 2001 does not apply must be revenue in nature. In fact, expenditure will qualify for capital allowances under the section only if it is "on the provision of plant or machinery wholly or partly for the purposes of the qualifying activity carried on by the person incurring the expenditure" *as well as* capital in nature. In the present case, the expenditure in respect of which Orsted is seeking to claim is, I think, properly to be regarded as capital expenditure regardless of whether it falls within section 11. To adapt words of Viscount Cave LC in *British Insulated and Helsby Cables Ltd v Atherton*, the expenditure was made "once and for all" and "with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade". Regardless of whether the expenditure was "on the provision of plant" within the meaning of section 11, it will have been made to enhance the value of the leases which Orsted was taking, of the windfarms which they were proposing to construct (including their generation assets) and of the businesses on which they were proposing to embark. These were lump sum payments with a view to enduring advantages.

Issue 3: Conclusive determination

107. This issue arises from the fact that, when making amendments to tax returns of Gunfleet, Gunfleet II and Walney, HMRC did not adjust the figures given in the returns for "qualifying expenditure" on plant and machinery.

108. The point can be explained by reference to one of the relevant returns: Walney's for 2011. That specified in box 107 that a writing down allowance of £187,423,524 was claimed in respect of "Machinery and plant – main pool" and, in box 121, gave a figure of £969,097,848 for "qualifying expenditure" in respect of "Other machinery and plant". The closure notice reduced the figure for "Allowances in trading profits of losses" as regards "Machinery and plant – main pool" to £171,846,835 (£15,576,689 lower than the £187,423,524 in the tax return) but left the £969,097,848 for "qualifying expenditure" unchanged.

109. It was stated in the closure notice that Walney's return was "Amended as per communication with … Graeme Seawright of the 3rd August 2017". That referred to an email from Mr Seawright of HMRC in which he explained HMRC's thinking. "Capital allowances", he said, "would flow from the final fixed design and not the studies around where to build the turbines". Expenditure on "site suitability surveys and related turbine placement research" would not qualify for capital allowances.

110. On the basis of the approach outlined by Mr Seawright, it would have been appropriate for HMRC to amend Walney's tax return so that the "qualifying expenditure" of £969,097,848 was reduced by £15,576,689 and the writing down allowance of £187,423,524 was cut, not by £15,576,689, but by £3,012,532.

111. Both here and with Gunfleet and Gunfleet II, HMRC made a mistake. The FTT said this in paragraph 235 of its decision:

> "HMRC then amended the writing down allowances rather than the qualifying expenditure in the tax returns for the three windfarms other than WODS. This was a simple transcriptional error … but as far as the reasonable recipient of the closure notices was concerned, in light of the foregoing correspondence, it is inconceivable that the reasonable recipient would have thought those amendments restricted the ambit of the closure notices in the way suggested by the appellants. In the same way that was a mix-up over the numbers for the two Gunfleet sites, the recipient would have concluded that HMRC had simply made a secretarial error."

112. Walney itself said this in its detailed grounds of appeal for its appeal to the FTT:

> "However, the Closure Notice was defective: it made no amendment to the amount of qualifying expenditure (£969,097,848) that was claimed by the Appellant in its return for the period ended 31 December 2011. In error, instead of adjusting the amount of qualifying expenditure by £15,576,689 and the amount of writing down allowances for the period by £3,012,532, the Closure Notice adjusted the writing down allowances by £15,576,689 and made no adjustment to the amount of qualifying expenditure."

113. The FTT concluded that the figures given for "qualifying expenditure" in the returns of Gunfleet, Gunfleet II and Walney could be revisited even though HMRC had not amended them in the closure notices. The Upper Tribunal agreed, but Orsted contends otherwise.

The statutory framework

114. Part II of schedule 18 to FA 1998, which now comprises paragraphs 3 to 20A, is concerned with company tax returns. Paragraph 7(1) stipulates that every such return for an accounting period:

> "must include an assessment (a 'self-assessment') of the amount of tax which is payable by the company for that period—
>
> (a) on the basis of the information contained in the return, and
>
> (b) taking into account any relief or allowance for which a claim is included in the return or which is required to be given in relation to that accounting period."

115. A comparable provision is to be found in the Taxes Management Act 1970 ("TMA 1970"). Sections 8 and 8A of that Act provide for individuals and trustees to be required to file tax returns for the purpose of calculating liability to income tax and capital gains tax. Section 9(1) states:

> "Subject to subsections (1A) and (2) below, every return under section 8 or 8A of this Act shall include a self-assessment, that is to say—
>
> (a) an assessment of the amounts in which, on the basis of the information contained in the return and taking into account any relief or allowance a claim for which is included in the return, the person making the return is chargeable to income tax and capital gains tax for the year of assessment; and
>
> (b) an assessment of the amount payable by him by way of income tax, that is to say, the difference between the amount in which he is assessed to income tax under paragraph (a) above and the aggregate amount of any income tax deducted at source ...
>
> but nothing in this subsection shall enable a self-assessment to show as repayable any income tax treated as deducted or paid by virtue of section ... 246D(1) ... of the principal Act, section 626 of ITEPA 2003 or section 399(2) ... or 530(1) of ITTOIA 2005."

116. Returning to schedule 18 to FA 1998, paragraph 24 empowers HMRC to "enquire into a company tax return". By paragraph 32, such an enquiry is completed by the issue of a "closure notice" informing the company that the enquiry has been completed. Until it was amended by the Finance (No. 2) Act 2017, paragraph 32 also provided for the closure notice to "state [HMRC's] conclusions". The requirement for a closure notice to contain HMRC's conclusions is now to be found in paragraph 34(2).

117. Paragraph 34 of schedule 18 further provides for HMRC to make amendments to the relevant tax return to give effect to their conclusions. The precise terms of paragraph 34 have changed over time. It was common ground before us that it suffices to refer to

the form which paragraph 34 took after it had been amended by the Finance Act 2008. Paragraph 34(2) then read:

> "The closure notice must—
>
> (a) state that, in the officer's opinion, no amendment is required of the return that was the subject of the enquiry, or
>
> (b) make the amendments of that return that are required—
>
> (i) to give effect to the conclusions stated in the notice, and
>
> (ii) in the case of a return for the wrong period, to make it a return appropriate to the designated period."

118. By paragraph 34(3) of schedule 18, an appeal may be brought against an "amendment of a company's return". By virtue of section 48 of TMA 1970, provisions of Part V of that Act apply in relation to such an appeal. Section 48(2) states that, in the case of an appeal "other than an appeal against an assessment", Part V (with certain immaterial exceptions) is applicable "subject to any necessary modifications". During her oral submissions, Ms Wilson floated the idea of an appeal pursuant to paragraph 34(3) of schedule 18 being regarded as one against "an assessment". However, the parties had hitherto proceeded on the basis that such an appeal was not "an appeal against an assessment" (and, hence, that section 48(2)(a) is in point) and Ms Wilson did not suggest that that assumption should be revisited.

119. Part V of TMA 1970 comprises sections 44 to 59. Sections 49D(3) and 49G(4) provide for the FTT to "decide the matter in question" where it has been notified of an appeal. By section 49I(1)(a), "matter in question" means "the matter to which an appeal relates".

120. Section 50 of TMA 1970 is central to the parties' cases on this aspect of the appeals before us. So far as material, section 50 provides:

> "(6) If, on an appeal notified to the tribunal, the tribunal decides—
>
> (a) that, ... , the appellant is overcharged by a self-assessment;
>
> (b) that, ... , any amounts contained in a partnership statement are excessive; or
>
> (c) that the appellant is overcharged by an assessment other than a self-assessment,

the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

(7) If, on an appeal notified to the tribunal, the tribunal decides—

(a) that the appellant is undercharged to tax by a self-assessment ... ;

(b) that any amounts contained in a partnership statement ... are insufficient; or

(c) that the appellant is undercharged by an assessment other than a self-assessment,

the assessment or amounts shall be increased accordingly."

121. Paragraph 88 of schedule 18 to FA 1998 is also relevant. So far as material, it provides:

"(1) This paragraph applies to an amount stated in a company tax return for an accounting period which is required to be included in the return and which affects or may affect—

(a) the tax payable by the company making the return for another accounting period, or

(b) the tax liability of another company for any accounting period.

(2) If such an amount can no longer be altered it is taken to be conclusively determined for the purposes of the Corporation Tax Acts in relation to that other period or other company.

Sub-paragraphs (3) to (5) explain what is meant by can no longer be altered.

(3) An amount is regarded as one that can no longer be altered if—

(a) the period specified in paragraph 15(4) (general period for amendment by company) has ended,

(b) any enquiry into the return has been completed ... ,

(c) if an officer of Revenue and Customs amends the return under paragraph 34, the period within which an appeal may be brought against that amendment has ended, and

(d) if an appeal is brought, the appeal has been finally determined."

122. Schedule 18 to FA 1998 was the subject of consideration in *Investec Asset Finance plc v Revenue and Customs Commissioners* [2020] EWCA Civ 579, [2020] STC 1293 ("*Investec*"), which involved a challenge to closure notices. One of the issues before the Court of Appeal in that case related to the scope of the appellant companies' appeals to the FTT. Rose LJ (with whom Peter Jackson LJ and Sir Timothy Lloyd agreed) explained in paragraph 25:

> "when HMRC issued the closure notices which are the subject of this appeal, they sent a covering letter which set out an alternative analysis of [the appellant companies'] tax affairs which would in fact lead to more tax being due than was asserted by the adjustment to the figures in the tax returns. The case law makes clear and the Appellants accept that HMRC can put forward different legal arguments which support the making of the adjustment contained in the closure notice and can rely before the tribunal on alternative ways of justifying a particular adjustment to the figures in the tax return. At issue here is whether HMRC can put forward alternative adjustments to the figures; one adjustment which is included in the closure notice but then also alerting the taxpayer to HMRC's possible future reliance on an alternative construction of the law which would lead to a figure being included in the taxpayer's return which is different both from the figure that the taxpayer included when it lodged the tax return and from the adjustment figure that HMRC included in the closure notice. The Appellants accept that they were given adequate notice of the alternative analysis and that there was no procedural unfairness to them in letting HMRC rely on the alternative point. But they say on the proper construction of the statutory provisions governing the issue of closure notices and the jurisdiction of the FTT on an appeal challenging a closure notice, it is not open to HMRC to argue for a different adjustment from the one made by the closure notice."

123. The Court of Appeal did not accept the appellants' contentions. Rose LJ said:

> "[70] I accept the point made by the Appellants that this case is different from the *Tower MCashback* and *Fidex* cases [i.e. *Tower MCashback LLP 1 v Revenue and Customs Commissioners* [2011] UKSC 19, [2011] 2 AC 457 and *Fidex Ltd v Revenue and Customs Commissioners* [2016] EWCA Civ 385, [2016] STC 1920] because Issue 4 is not a different argument in support of the adjustments made to their tax returns to implement the conclusion set out in the closure notices. I would also go part of the way with the Appellants in

accepting that the FTT does not have an unlimited discretion when determining what is 'the matter to which an appeal relates' for the purposes of s 49I(1)(a) TMA or 'the matter in question' for the purposes of s 49G(4) TMA. In their covering letter HMRC could have indicated that they might open up entirely different areas of the Appellants' tax returns if the closure notice were appealed to the tribunal. The fact that the Appellants had been warned about those potential challenges being raised would not, in my view, empower the FTT to treat those issues as within the scope of the appeal. According to para 34(3) of Sch 18 FA 1998, an appeal may be brought against an amendment of a company's return. It seems to me that 'the matter to which an appeal relates' for the purposes of s 49I(1)(a) must be that amendment and the amendment is therefore the 'matter in question' which the tribunal is required to determine by s 49G(4) TMA. That then restricts the ambit of the appeal at the conclusion of which the tribunal may decide that there has been an overcharge or an undercharge and so make a reduction or an increase in the assessment pursuant to s 50(6) or (7) as appropriate. There is a limit on the jurisdiction of the FTT which is not simply a matter of ensuring procedural fairness. Any purported exercise by the FTT of a broader power to consider matters beyond that would be an error of law.

[71] The authorities do not support a narrow construction of those key phrases in ss 49I and 49G and they establish that the FTT is the appropriate stage at which the scope of the matter in question in the appeal is to be determined. The FTT is a specialist tribunal and an appellate court should not interfere with that decision unless it is clearly outside the scope of the statutory provisions. There are, as Moses LJ recognised, likely to be boundary issues whatever the test to be applied. Those issues are much more likely to be problematic and time-consuming if a narrow view is adopted. This became apparent during argument when trying to establish the limits of any appeal in this case. Mr Peacock [i.e. counsel for the appellants] had to accept that legal arguments can be deployed which were not referred to in the closure notice. He also had to accept that the outcome of any particular appeal may be that the tax liability is something different from the figure for which either side was contending if, as in the present case, the tribunal accepts some but not all of one party's arguments. He insisted however that the taxpayer should be able to challenge a closure notice without taking the risk that he would end up paying more tax than the adjustment made by the closure notice. That cannot be right, not least because as Mr Peacock was pushed to submit, it might lead to a situation where HMRC considered there were two possible constructions of the relevant legislation and were forced to adopt a closure notice based on the construction that resulted in the most tax being payable, even if

they thought the arguments in support of that construction were far weaker than the arguments in favour of the construction leading to a lower adjustment. Such a construction of the provisions would simply multiply the number of appeals.

[72] The possibility of HMRC putting forward a case on appeal seeking a greater tax liability than that set out in the closure notice does not create an unfair imbalance between the interests of the Revenue and the taxpayer. *Tower MCashback* and *D'Arcy* [i.e. *D'Arcy v Revenue and Customs Commissioners* [2006] STC (SCD) 543] show that despite the major change to tax law when the self-assessment regime was introduced and the importance of the finality of the self-assessment, the statutory provisions are not intended dramatically to narrow the scope of appeals. There are other checks and balances in the scheme here designed to protect the taxpayer. Those protections are the time limit imposed on HMRC in opening an enquiry, the fact that only one enquiry can be opened into any one tax return and the ability of the taxpayer to seek a direction for the issue of a closure notice. A narrow confinement of the subject matter of the appeal is not intended to be one of the protections conferred on the taxpayer. The 'venerable principle' [i.e. the principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax – see paragraph 60 of Rose LJ's judgment] is also an important underlying factor in any tax matter. I accept HMRC's submission that proceedings before the FTT are not simply a dispute between two private parties and the venerable principle has a role to play here as the courts have found in the three cases which were cited to us.

[73] I would conclude that the description of the scope of the matter in question in para [117] of the FTT's decision is a useful and practical one. It is for the First-tier Tribunal to decide what the subject matter of the closure notice is within the bounds I have described. They are best placed to determine whether the context of the closure notice and the surrounding circumstances demonstrate that the subject matter is broader than the particular conclusion and adjustments addressed in the closure notice. If that is the case, it should be open to HMRC to put forward arguments in any appeal even if they result in a larger amount of tax being due, provided that the different arguments all deal with the same matters in question identified in the closure notice. Although it is accepted that this case goes beyond the point decided in *Tower MCashback* and *Fidex*, I do not regard those cases as requiring a bright line to be drawn. I would therefore dismiss the Appellants' appeal on Issue 3."

The parties' cases in outline

124. Mr Jones argued that, HMRC not having amended them in the closure notices, the amounts given for "qualifying expenditure" in the relevant returns of Gunfleet, Gunfleet II and Walney are to be taken to have been "conclusively determined" pursuant to paragraph 88 of schedule 18 to FA 1998. Citing *Investec*, he said that the "matters in question" as regards the appeals to the FTT were limited to the amendments which HMRC had made in the closure notices. Nowhere, Mr Jones submitted, does the tax legislation confer on the FTT power to change a part of a tax return which HMRC had not amended. Section 50 of TMA 1970, read with section 48, allows the FTT to increase or reduce the amount of an amendment, but it does not enable the FTT to amend something different. That being so, paragraph 88 of schedule 18 applies and the "qualifying expenditure" figures are "conclusively determined".

125. Mr Jones explained that the proper construction of section 50 TMA 1970 is at the heart of this part of the appeals with which we are concerned. He accepted that, were it the case that the "qualifying expenditure" amounts could be revised under section 50, paragraph 88 of schedule 18 would not render them "conclusively determined". He maintained, however, that section 50 did not authorise changes to the "qualifying expenditure" figures.

126. For her part, Ms Wilson argued that, the FTT having determined that the "matter in question" on each appeal to it included whether the "qualifying expenditure" was overstated, it had power to make the adjustments necessary to give effect to its decision on that matter. The amendments which HMRC made to the companies' returns cannot be dissociated from the conclusions to which they were meant to give effect, Ms Wilson said. What was at issue before the FTT was not merely whether the amendments as regards writing down allowances were correct, but whether the approach taken in Mr Seawright's email of 3 August 2017, from which the amendments flowed, was well-founded. Nor is there any question of Orsted having misunderstood HMRC's intentions. Section 50 of TMA 1970 is essentially concerned with how a decision on the "matter in question" is carried into effect. Where appropriate, it can be used to change a figure given in a box in a tax return in respect of which HMRC had not themselves made an amendment. Where, Ms Wilson submitted, the FTT determines that "an appellant is undercharged to tax by a self-assessment", it must be permissible for the FTT to correct not just the self-assessment itself (i.e. the company's "assessment … of the amount of tax which is payable by the company" or, in the case of an individual or trustee, "an assessment of the amounts in which … the person … is chargeable to income tax and capital gains tax" and "an assessment of the amount payable by him by way of income tax") but the element(s) of the return giving rise to the undercharge, and, where an appeal is brought against an amendment, the FTT must similarly be able to adjust more than the bare amendment. That conclusion is, moreover, consistent with *Investec*, where it was held that the FTT could amend a return in a way that resulted in a higher tax liability than had flowed from any amendment which HMRC had made.

127. With regard to that last point, Mr Jones distinguished between, on the one hand, an alteration to a part of a return in respect of which HMRC had made an amendment and, on the other, an alteration to a part of a return which HMRC had left untouched.

The latter, he argued, is not permissible, the scope of an appeal being determined by the amendment(s) in fact made.

Discussion

128. In *Investec*, Rose LJ observed in paragraphs 70 and 71 that the authorities do not support a narrow construction of the "key phrases": "the matter to which an appeal relates" and "matter in question". As Rose LJ explained in paragraph 71, it was accepted in *Investec* that "legal arguments can be deployed which were not referred to in the closure notice" and that "the outcome of any particular appeal may be that the tax liability is something different from the figure for which either side was contending". Rose LJ also commented, in paragraph 72, that a "narrow confinement of the subject matter of the appeal is not intended to be one of the protections conferred on the taxpayer" and that the "venerable principle" that there is a public interest in taxpayers paying the correct amount of tax is an "important underlying factor in any tax matter". Further, in paragraph 73 Rose LJ contemplated that "the context of the closure notice and the surrounding circumstances" could "demonstrate that the subject matter is broader than the particular conclusion and adjustments addressed in the closure notice" and concluded that "it should be open to HMRC to put forward arguments in any appeal even if they result in a larger amount of tax being due, provided that the different arguments all deal with the same matters in question identified in the closure notice".

129. In the present case, the Upper Tribunal noted in paragraph 227 of its decision that the FTT had concluded the subject matter of each closure notice was: "is the expenditure related to the plant and machinery?". That conclusion reflected the reality. Not only would the reasonable recipient of each of the relevant closure notices have "concluded that HMRC had simply made a secretarial error" (as the FTT found in paragraph 235), but Orsted have not suggested that they misunderstood HMRC's intentions. That HMRC were seeking to make amendments to give effect to its view that items for which the companies had claimed capital allowances were not eligible for them was evident from the amendments specified in the closure notices (from which it was obvious that HMRC were making a mistake); from the conclusions explained in the email from Mr Seawright to which the closure notices cross-referred; and from the inherent relationship between writing down allowances and "qualifying expenditure". Writing down allowances are a function of "qualifying expenditure". It would therefore make no sense for a company's writing down allowance to be reduced while its total "qualifying expenditure" was not. This, therefore, was a case where "the context of [each] closure notice and the surrounding circumstances" demonstrated that "the subject matter is broader than the particular conclusion and adjustments addressed in the closure notice".

130. The "matter in question" as regards the appeals to the FTT of Gunfleet, Gunfleet II and Walney was not, therefore, circumscribed by the specific amendments to their returns which HMRC had erroneously made. Was, though, the FTT nonetheless unable to give full effect to its conclusions on that matter because of the terms of sections 48 and 50 of TMA 1970?

131. As to that, Mr Jones argued that, reading section 50 with "any necessary modifications" in accordance with section 48, the word "amendment" should be substituted wherever "assessment" appears in section 50. An "amendment" could thus

be reduced or increased pursuant to subsections (6) and (7), but (so Mr Jones contended) there is no power to alter an element of a return which has not been the subject of an amendment.

132. It would seem odd, however, if the FTT were unable to give full effect to its conclusions on the "matter in question" arising from an appeal against an amendment to a tax return. Further, it would appear to make little sense for the FTT to be able to determine that an amendment understated an appellant's liability but (as Mr Jones' submissions would mean) that what was entered in another box in the relevant return could not be revised even if the alteration flowed inevitably from the FTT's conclusions in relation to the amendment under appeal. The fact that neither TMA 1970 nor schedule 18 to FA 1998 specifies that a return should contain boxes makes it the less likely that Parliament intended that to be the position. The "venerable principle" also suggests that it should be possible to correct an entry in a return which HMRC have not amended if the taxpayer would otherwise pay the wrong amount of tax.

133. There is force, too, in the analogy which Ms Wilson drew with self-assessment. Section 50 of TMA 1970 provides for a self-assessment to be reduced or increased. Where, however, a self-assessment has proved erroneous, there should surely be scope for the FTT to correct not just the bare figure but the element(s) in calculations giving rise to it where that follows from the FTT's conclusions on the "matter to which an appeal relates". If that is right, it tends to indicate that in the case of an appeal against an amendment the FTT can similarly be expected to be able to do more than just correct the particular amendment should its conclusions on "the matter to which [the] appeal relates" make that appropriate.

134. In this connection, the Upper Tribunal said the following in paragraph 237 of its decision:

> "The words 'undercharged to tax by…' in s50 TMA suggest the consideration is not just about correctness of the amounts which HMRC have amended but the impact of those amounts on the tax charged. In the case of a self-assessment the tribunal can amend parts of the return to give effect to its view the self-assessment undercharged (provided those parts of the return are within the scope of the appeal under principles discussed above). As applied to appeals against amendments, similarly the concern is not necessarily restricted to adjusting the given amendment up or down but can extend to those parts of the return which are consequential to the subject matter of the closure notice conclusion. Importantly, the key part of the legislation providing the scope for the purposive construction we consider is required is contained in s48(2)(a) TMA. That section provides that where there is an appeal other than an appeal against an assessment, the TMA appeal provisions have effect 'subject to any necessary modifications'. In this case this means that one does not simply substitute the word self-assessment with 'amendment'. Instead, the statutory rules are modified to bring them into line with the position for appeals against self-assessments. In doing so the venerable principle is

> given effect: the Tribunal is given the power to make the consequential amendments required for the taxpayer to pay the right amount of tax. However, for the reasons we have explained above, the modification does not mean that the Tribunal can amend any part of the return; it must be a part of the return which was consequential to the closure notice conclusions as construed by the FTT within the limits discussed above."

135. I agree that, where an appeal is brought under paragraph 34(3) of schedule 18 to FA 1998, the FTT can do more than merely correct the specific amendment(s) if that is necessary to give effect to its conclusions on the "matter in question". The requirement to read section 50 of TMA 1970 "subject to any necessary modifications" does not, as it seems to me, limit the FTT to revising the amendment(s) in such a case. As I see it, section 50 is intended to empower the FTT to carry its conclusions on the "matter in question" into effect and so to ensure that the taxpayer pays the correct amount of tax. *Investec* shows that the provision is wide enough to allow the FTT to impose a liability greater than an amendment to a closure notice had provided for; and the FTT can also, as it appears to me, revisit entries in a return which HMRC have not amended if that is needed to give full effect to the FTT's conclusions. The better view is that the fact that section 50 envisages a "self-assessment" being increased or reduced does not preclude revision of other entries in the relevant tax return and, likewise, section 50 (as read with section 48) is not to be understood as barring the FTT from making adjustments to a return which flow its conclusions on the amendment(s) under appeal where an appeal has been brought pursuant to paragraph 34(3) of schedule 18: the FTT can work through the implications of its decision as regards both a self-assessment and an amendment provided that it does not stray beyond the "matter in question". In the present case, accordingly, it was open to the FTT to decide (as it did) that figures in the relevant tax returns of Gunfleet, Gunfleet II and Walney which underlay those that HMRC had amended (as well, presumably, as the companies' self-assessments) could be revised to reflect its conclusions even though the closure notices had not themselves amended those entries in the returns.

Overall conclusion

136. I would:

i) allow the appeal to the extent indicated in paragraph 95 above; and

ii) invite the parties to put in written submissions in relation to whether expenditure on the scoping documents should be regarded as having been incurred "on the provision of" the generation assets.

Lord Justice Zacaroli:

137. I agree.

Sir Launcelot Henderson:

138. I also agree.