Easter Term
[2026] UKSC 12
On appeal from: [2025] EWCA Civ 279

JUDGMENT

Orsted West of Duddon Sands (UK) Limited (now named Orsted Schroders Greencoat WODS Holdco Limited) and others (Respondents) *v* Commissioners for His Majesty's Revenue and Customs (Appellant)

before

Lord Lloyd-Jones
Lord Hamblen
Lord Burrows
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
15 April 2026

Heard on 3 and 4 February 2026

Appellant
Elizabeth Wilson KC
Angharad Parry KC
Joshua Stevens
(Instructed by HMRC Legal Group)

Respondent
Michael Jones KC
(Instructed by Herbert Smith Freehills LLP)

LADY ROSE (with whom Lord Lloyd-Jones, Lord Hamblen, Lord Burrows and Lord Richards agree):

1. Introduction

1. The respondents are all members of a group of companies of which the ultimate parent is Orsted A/S, a Danish company. They own and operate windfarms off the coast of England, having successfully bid for leases of areas of the seabed from the Crown Estate in 2000 and 2003. I shall refer to them collectively as "Orsted" unless it is necessary to distinguish between them.

2. During the course of planning and designing their windfarms Orsted spent considerable sums on surveys and studies investigating many different aspects of the environment in which the windfarms would be constructed. The question raised by this appeal is whether those costs qualify for capital allowances under section 11(4) of the Capital Allowances Act 2001 ("CAA 2001") ("section 11(4)"). Capital expenditure will qualify under that section if certain conditions are met, the key one for this appeal being that "it is capital expenditure on the provision of plant". Each windfarm is made up of a large number of individual wind turbines and the necessary cabling connecting them to each other and to the equipment that transmits the electricity they generate to the grid. The windfarm comprises "generation assets" which are, broadly, the wind turbines and the array of cables that connect them in order to transport the electricity to an offshore substation and the "transmission assets" which are the onshore and offshore substations and the cables that take the electricity from them to the National Grid.

3. It is now common ground that the "plant" in each case comprises the generation assets of the windfarm treated as a single item, rather than each individual turbine. It is also common ground that the expenditure on the reports and studies was capital in nature and not revenue expenditure.

4. The process of creating an offshore windfarm begins with preparing a bid when the Crown Estate announces a forthcoming auction for areas of seabed and ends with the generation of electricity from the wind flowing over the turbines. It is a long, complicated and expensive process. Each turbine has to be individually designed and specified. It must take into account the characteristics of the seabed into which that turbine's foundations will be buried, of the sea in which it will stand with its particular waves, currents, flora and fauna and of the airspace in which not only birds but also telecoms and radar signals may be affected by the turbines. There is no doubt that Orsted needed to obtain the information set out in the reports and studies in order to be able to design and build the windfarms which were in fact built and are now in operation. The question, broadly, is whether that is enough for one to be able to say that the expenditure on those reports and studies was "on" the provision of the windfarm.

5. In the leading case on how to interpret the words "on the provision of plant", as they appeared in a predecessor statute, Lord Upjohn said: "I appreciate that when considering the meaning of simple English words it is impossible to give a prolonged exposition upon the matter; opinions may differ." His observation that opinions may differ is certainly borne out by this appeal. The First-tier Tribunal ("FTT") held that most of the expenditure on the studies and reports currently in dispute did qualify for capital allowances. The Upper Tribunal allowed HMRC's appeal and held that none of them qualified for the allowance. The Court of Appeal (Newey and Zacaroli LJJ and Sir Launcelot Henderson) allowed the taxpayers' appeal and held that all the expenditure qualified. HMRC now appeal to this court.

2. Background

(a) The respondents and the windfarms

6. The four respondents and the capital allowances (sometimes referred to as writing down allowances) they claimed are as follows.

7. Gunfleet Sands Ltd ("Gunfleet") was incorporated in June 2000 and owns a windfarm located approximately 7km south-east of Clacton on Sea, Essex called Gunfleet Sands Phase 1. The windfarm has a total of 30 wind turbines and a combined generating capacity of 108 megawatts. In Gunfleet's company tax return for the year ended 31 December 2009, the period in which its trade commenced, Gunfleet claimed it had incurred qualifying capital expenditure of £301,684,958 on the provision of plant and machinery and claimed writing down allowances of £8,265,341 on that expenditure.

8. Gunfleet Sands II Limited ("Gunfleet II") was incorporated in February 2007 and owns and operates the Gunfleet Sands Phase 2 windfarm located next to Gunfleet Sands Phase 1 off the coast of Essex. It comprises a total of 18 wind turbines and has a combined generating capacity of 64.8 megawatts. In Gunfleet II's company tax returns for the years ended 31 December 2009 and 31 December 2010 it said it had incurred a combined capital expenditure of £140,152,702 and claimed a writing down allowances of £35,965,476 on that expenditure.

9. Walney (UK) Offshore Windfarms Limited ("Walney") was incorporated in September 2004 and owns and operates two windfarms Walney 1 and Walney 2, which are located next to each other off Walney Island, Cumbria, with a total of 102 wind turbines and a combined generating capacity of 367 megawatts. In Walney's company tax return for year ended 31 December 2011, Walney claimed it had incurred capital expenditure on the provision of qualifying plant and machinery of £969,097,848 and claimed writing down allowances of £187,423,524.

10. Orsted West of Duddon Sands (UK) Limited ("WoDS") was incorporated in February 2008 and owns an offshore windfarm located next to the Walney windfarms. It has a total of 108 wind turbines and a combined generating capacity of 389 megawatts. In WoDS's company tax return for the year ended 31 December 2014, the period in which its trade commenced, WoDS claimed capital expenditure on the provision of plant and machinery qualifying for capital allowances of £612,779,922, but no writing down allowances were claimed for the period.

11. HMRC opened enquiries into the respondents' claims for capital allowances and closure notices were issued at the end of February 2018. After HMRC confirmed their position on review, the respondents appealed those notices to the FTT. The amendments made to the respondents' tax returns reflected the fact that HMRC did not accept that the expenditure on the disputed surveys and studies qualified. The amounts of the amendments were £22,588,081 for Gunfleet, £877,277 for Gunfleet II, £15,576,689 for Walney and £8,999,671 for WoDS.

12. The FTT (Judge Nigel Popplewell) allowed their appeals in part: [2022] UKFTT 35 (TC); [2022] STI 249 decision of 3 February 2022. In a comprehensive and helpful judgment, the FTT described the process of constructing a windfarm and the studies and surveys which were in dispute. His description is agreed by the parties and like them and like the courts below, I gratefully draw on it for the description that follows.

13. Each turbine is designed to convert kinetic energy in the wind into electrical energy. At the top is a rotor which normally consists of three blades approximately 50 to 60 metres in length. It is attached to a shaft and is controlled by a control system consisting of a computer and associated sensors. The main shaft is connected to a gearbox which drives a generator. The main shaft is in three parts. At the bottom of the wind turbine is the foundation. There are a variety of different kinds of foundation in use for offshore windfarms generally (four were described to the FTT) but in these windfarms each foundation was a monopile, that is a cylindrical steel tube approximately 5 metres in diameter which is driven or sometimes drilled into the seabed. Above the monopile is another steel structure called a transition piece, and both the monopile and the transition piece are below the surface of the water. Above the transition piece and above the water level is the tower ending at the top with the nacelle which houses the rotor and to which the blades are attached.

14. The construction of a windfarm involves a number of stages including design, procurement, manufacture (fabrication), supply and the installation of the wind turbines. Although the design of certain elements of the wind turbines was carried out by Orsted, it did not fabricate or install the wind turbines itself but used external manufacturers and contractors. Those contracts were not concluded until Orsted had taken the final investment decision to go ahead with the project. Once the decision to go ahead had been

taken, the technical drawings needed to start fabrication were subject to further refinements to which both Orsted and the manufacturer contributed.

15. The turbines are situated on the seabed to optimise the performance of the windfarm as a whole, and the windfarm can be controlled as a single entity just like a conventional power station. Specialised software is used to model the design taking into account all the data and any conditions set in the regulatory consents that have been granted. Although each wind turbine is separately identifiable and capable of independent operation, they are installed according to a predetermined and carefully designed layout.

16. Each foundation used is bespoke to each turbine across all four windfarms and each foundation is physically unique (save for two foundations in the Walney windfarm that are identical). Other elements in the windfarm are more standardised. For example, the turbine component of the wind turbine is not bespoke and turbine manufacturers provide a limited number of turbine designs from which Orsted can choose. Suitability depends on wind loads but also on the nature of the seabed into which the wind turbine will be installed, since each standard turbine design is subject to limits which are determined by the extent to which the wind turbine moves on its foundations. Other elements of the windfarm such as transition pieces which connect the tower of the wind turbine to the foundation and the array cables are highly dependent on the ground and soil conditions. They need to be buried more deeply in soft ground than in hard ground to protect them from exposure and damage, and the routes along which they are laid also have to avoid seabed hazards such as boulders.

17. So far as the sea conditions are concerned, the magnitude and frequencies of the wind, waves and currents affect the natural frequency of the wind turbine. If the frequencies of these external forces acting on the wind turbine coincide with the wind turbine's natural frequency, the vibrations within the wind turbine are amplified and this can cause structural fatigue. The towers must therefore be tuned specifically for the windfarm site. They are made from steel plates and the thickness of those plates will depend on how stiff and heavy they need to be to withstand the wind and wave loads to which they will be subject over their lifetime. The different studies commissioned by Orsted which are the subject of this appeal provided the information that was needed to determine how best to design all these different elements of the windfarm.

18. If a company makes a bid and that bid is accepted, it is granted an agreement for lease by the Crown Estate over the site or relevant polygon shaped area of seabed. The developer then needs to apply for a variety of regulatory approvals such as those under either section 36 of the Electricity Act 1989 which provides that consent must be obtained from the Secretary of State for the construction of an offshore windfarm. Consent may also be needed under the Transport and Works Act 1992 which requires consents in a range of circumstances, including for works which interfere with rights of navigation in waters in England and Wales. To obtain these consents, the developer must submit an

environmental statement, for which it must carry out an environmental impact assessment ("EIA"). Most of the surveys and studies that Orsted asserts generate qualifying capital expenditure were undertaken in the context of preparing that EIA to be submitted with the environmental statement.

(b) The studies and surveys in dispute

19. The first step in carrying out the EIA is to produce a scoping document. This covers all aspects of the EIA at a very high level, setting out what will or will not be done as part of the EIA. This takes between six months to a year to produce and is sent to several Government agencies such as the Department of Business and Trade, DEFRA, the Environment Agency, the MoD and local authorities. After that, a number of studies and surveys are carried out as part of the EIA, and it is those that are the subject of this dispute. They are as follows:

(a) **Landscape, seascape and visual assessments**. These studies determine the impact of different layout options of the windfarm on the surrounding landscape and seascape, as well as the visual impact of the windfarm from various viewpoints on land. They also review measures that could reduce those potential effects, for example they might suggest that three blades rather than four or two would look better or that the turbines should be pale grey.

(b) **Benthos studies**. Benthos are the flora and fauna that live on the seabed. The seabed or benthic zone can offer a wide range of physically diverse habitats, and there are more than a million different benthic species. Some are visible to the naked eye such as bivalves, sea squirts and larger crustaceans, others are between 0.1 mm and 1 mm in size such as nematodes and smaller crustaceans and some are very small such as bacteria, diatoms, amoebae and ciliates. They play a critical role in aquatic ecosystems and can be bioindicators of water pollution. They are adversely affected by litter, deep-sea mining, shipping and climate change. The benthos studies might suggest ways to mitigate the effect of the construction and operation of the windfarm, for example by avoiding construction at certain times of the year.

(c) **Ornithology and collision risk studies**. These identify the population of birds likely to be affected, their migratory habits, whether they are protected species, their range of flight heights and any options for mitigating the effect of the windfarm on the birds. Such studies may make recommendations as to the lighting to be used on the wind turbines during construction or that construction should be avoided during certain periods of the year.

(d) **Fish and shellfish studies**. These identify the fish and shellfish species in the vicinity of the windfarm and whether they are of conservation or commercial interest. They might recommend avoiding construction during spawning periods or advise on the use of the foundation type which is least harmful to the fish.

(e) **Marine mammal studies**. These determine the key species in the area of the windfarms and their population. Again, they review the potential impact and recommend mitigation options such as the use of deterrent devices or using observers to spot marine mammals so that work can stop if they are present.

(f) **Archaeology, wrecks and cultural heritage site studies**. These studies determine the number of maritime sites and finds such as wrecks, unexploded ordnance, reported losses such as downed military aircraft and other obstructions. They determine the archaeological potential of those sites and finds and recommend how to minimise any disturbance.

(g) **Noise assessment studies**. These studies determine the level of underwater and airborne noise that will be generated by the construction, operation and decommissioning of the windfarm. They can recommend measures such as using a particular piling technique, using acoustic "bubble curtains" round the work area and using deterrents to ensure that fish and mammals avoid the area.

(h) **Telecoms and radar interference studies**. These identify existing cable routes and the location of television and radio transmitters, determining potential electromagnetic interference to signals by radiation emitted by generator equipment on the windfarm site, and determining potential disturbance to submarine telecom cables by electricity export cables from the windfarm.

(i) **Traffic, transport and tourism**. These studies determine the level and type of air and maritime traffic in the windfarm area and the risks of collision, identifying any interference with aviation routes from nearby airfields or any navigational risks for commercial and recreational shipping and options to mitigate these risks. They might also identify the impact on tourism in the local area. They might suggest for example painting sections of the towers yellow and fitting reflective material on the turbines or installing navigational buoys in areas as required by Trinity House.

(j) **Socio-economic and tourism assessments**. These studies determine the potential impact of windfarm construction and operation on the human environment in the region, including on employment and tourism.

20. Other studies beyond those needed for the EIA or other regulatory consents were carried out by Orsted and are included in their capital allowance claim. These are:

(a) **Metocean studies**. These study the sea depth, wind conditions, wave conditions, and the tides and currents. Data are obtained from buoys, wave radars, meteorological masts in and around the windfarm site and also from previous studies and modelling carried out in a similar area. The information gathered is used for a number of purposes. For example, wind conditions affect the choice of turbine unit to accommodate the different design loads to which the turbine will be subject. Water depth affects the foundation dimensions and the platform levels for each turbine.

(b) **Geophysical studies**. Geophysical surveys provide data on sea floor bathymetry (that is, the depth of landforms below the water), seabed features, water depth and soil stratigraphy. They use non-intrusive sensing techniques such as seismic methods, echo sounding and magnetometry to identify hazardous areas including man-made risks such as unexploded ordnance.

(c) **Geotechnical studies**. These studies ascertain the characteristics of the soil by means of core penetration testing, borehole drilling and laboratory tests.

21. Metocean, geophysical and geotechnical studies are carried out in phases. The first phase is a desktop assessment to assess the viability of the project and gives a general impression of the site. The second round is more detailed and involves an examination of each proposed wind turbine location. These feed into the design of the foundation of each turbine and may also affect the overall configuration of the site. A third round was carried out after the final investment decision and shortly before the construction phase commenced. This round is done to check whether there had been any changes since the first investigations and to obtain a detailed soil profile of each individual location where a foundation will be installed.

22. Once the studies had been carried out and the regulatory consents obtained, Orsted compiled the technical drawings which enabled the windfarm components to be fabricated.

3. The capital allowance regime

23. Section 1 of CAA 2001 states that the Act provides for allowances in respect of capital expenditure. It lists a wide range of different kinds of allowances provided for in Parts 2 to 10 of the Act, including mineral extraction allowances, patent allowances and assured tenancy allowances. Plant and machinery allowances are dealt with in Part 2

(comprising sections 11 to 270). Section 11(1) states that allowances are available under Part 2 "if a person carries on a qualifying activity and incurs qualifying expenditure". The term "qualifying activity" is defined in Chapter 2 of Part 2.

24. Section 11(4) provides:

> "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."

25. Subsection 11(5) provides that the general rule is affected by other provisions of the Act but neither party has drawn the court's attention to any other provision as affecting the outcome of this case.

26. In the present appeal it is accepted that section 11(4)(b) is satisfied and that the plant here is wholly or partly for the purposes of a qualifying activity carried on by the respondents. HMRC confirmed that if expenditure is incurred partly for the purposes of a qualifying activity and partly for some other purpose then there can be a just and reasonable apportionment.

27. What is plant? The classic description is that given by Lord Lindley in *Yarmouth v France* (1887) 19 QBD 647, 658: "in its ordinary sense, it includes whatever apparatus is used by a businessman in carrying on his business, not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business." It is not in dispute that the generation assets of the windfarm are plant for this purpose.

28. The way that the capital allowances regime operates was described recently by the Court of Appeal in *Altrad Services Ltd v Revenue and Customs Comrs* [2024] EWCA Civ 720; [2024] 1 WLR 4397. That case involved a marketed tax avoidance scheme aimed at increasing the amount of expenditure that a taxpayer with an existing entitlement under section 11 to relief in respect of various industrial plant and machinery it had previously bought and was already using in its business could claim to have incurred in respect of

those assets. The key point is that the capital allowance regime does not entitle the taxpayer to deduct the total cost of the plant in the year in which that cost is incurred. Instead, a set percentage of that cost, currently 14% for general plant and machinery, can be deducted from the income of the trade each year when computing the taxable profit until the whole cost has been used up. Rather than applying this percentage to each individual item of capital plant and then adding them up, all the qualifying capital expenditure on plant is aggregated into a "pool" and the percentage applied to that amount to arrive at the value of the relief granted in that particular year. The value of that relief is then deducted from the value of the pool so the pool is reduced year by year by the amount of relief granted but also increased if the taxpayer incurs additional qualifying expenditure which goes into the pool.

29. Section 61 of the CAA 2001 deals with disposal events which occur usually when the taxpayer sells or otherwise disposes of the item. At that point, the proceeds of sale are brought into account by reducing the eligible value in the pool by the amount of the proceeds. A balancing charge can be made if excessive allowances have been given—that is to say, if the actual proceeds on disposal are more than the amount left in the pool. In such a case the plant will be shown not to have depreciated in value as much as the allowance regime assumed it would. Conversely, if the proceeds of sale are less than the remaining value of the pool, capital allowances will continue to be available in respect of the pool of expenditure as so reduced; alternatively a balancing allowance arises (see sections 55 and 56).

4. The leading authorities on "on the provision of plant"

30. The leading authority on the meaning of this key phrase is the decision of the House of Lords in *Inland Revenue Comrs v Barclay, Curle & Co Ltd* [1969] 1 WLR 675 ("*Barclay, Curle*"). This classic case has been analysed and pored over for many years as lawyers and judges attempt to divine, from the application of the law by their Lordships to the very unusual fact pattern arising in that case, some principles to assist in deciding a dispute over some completely different kind of plant.

31. *Barclay, Curle* concerned the predecessor to section 11 in section 279(1) of the Income Tax Act 1952. That provided for an allowance where a person carrying on a trade incurs capital expenditure on the provision of machinery or plant for the purposes of the trade. The taxpayer had incurred expenditure in creating a dry dock for use in its trade of shipbuilding and ship repair. Lord Upjohn gave the fullest description of how the dry dock works: pp 687–688. At high tide the ship is nosed into the dock by tugs, by winches on the sides of the docks or even under its own power. The sea gate installed at the outer end of the dock is then closed to prevent the sea coming in, but valves in the gate allow the water to flow out of the dock when the tide recedes so that the ship settles onto the reinforcements down the centre of the dock and remains there. When the tide has receded, pumps remove the rest of the water and the ship is left on dry land with the hull exposed

ready for the work to begin. When the work of the repairer is completed, valves in the sea gate and in the sides of the walls allow the sea to re-enter. At high tide the sea gate is opened and the ship can sail out of the dock.

32. The Crown in *Barclay, Curle* accepted that the cost of installing the valves, pumps electricity generators and other machinery for operating the dock qualified for the allowance. The expenditure in dispute was the cost (£186,928) of excavating some 200,000 tons of earth and rock to create a specially shaped basin having direct access to the Clyde with its floor below the level of high tide. A further £500,380 was spent on lining that basin with concrete. The main issue between the parties was whether the costs of excavation and concrete lining were expenditure "on the provision of … plant" or whether it was on the construction of an industrial building in which case it was entitled to a less generous allowance under a different statutory provision. The taxpayer asserted that the dry dock as a whole was "plant" and that this expenditure qualified for the higher relief. The Crown argued that it was not plant but an industrial building so that none of the cost was recoverable as incurred on the provision of plant.

33. The Special Commissioners (who at that time performed the same role as the First-tier Tribunal tax chamber now) found that the dock could not be used to repair ships without the valves and pumps but, further, that the dock could not have fulfilled its purpose unless there had been excavated a depth sufficient to enable ships to enter and leave it. In the context of considering whether the dock was plant as well as being a "structure", the Special Commissioners had said, at p 678:

> "The dry dock was in our view not the mere setting or premises in which ships were repaired. It was different from a factory which housed machinery, for in the operation of the dock, the dock itself played a part in the control of water and enabled the valves, pumps and electricity generator, which were an integral part of its construction, to perform their functions. The dock was not a mere shelter or home but itself played an essential part in the operations which took place in getting a ship into the dock, holding it securely and then returning it to the river."

34. The Special Commissioners had, however, allowed relief for the concreting but not for the excavation. They said simply that they found that that expenditure was "too remote from the provision of the dry dock" because it was expenditure on the preparation of land to receive machinery or plant and so attracted only the lesser allowance. The Crown appealed against their conclusion arguing that the concrete lining was not plant and the taxpayer appealed arguing that the excavation costs were on the provision of plant. The Court of Session in Scotland held that all the expenditure was qualifying and the House of Lords by a majority upheld that conclusion. The Crown maintained its contention that neither the concreting nor the excavation qualified.

35. Two of their Lordships, Lord Upjohn and Lord Hodson, dissented concluding that the excavation and concreting expenditure was not on plant at all because the dry dock was an industrial building or structure. But the majority concluded that the excavated basin was plant as well as being a structure and so addressed whether the excavation works and the concrete lining were "on" plant or not. Each member of the majority, Lord Reid, Lord Guest and Lord Donovan, gave a speech.

36. Lord Reid considered that isolating the ship from the water so it could be inspected and repaired was as important a part of the operation as carrying out the repair once the hull was exposed: (p 679)

> "It seems to me 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 that 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. The whole dock is, I think, the means by which, or plant with which, the operation is performed."

37. Lord Guest also regarded the concreted basin as part of the dry dock itself: (p 685)

> "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."

38. Lord Guest later described the excavation as "a necessary preliminary to the construction of the dry dock" and so regarded it as qualifying because "provision" of plant must cover something more than the actual supply: "In this case it includes the excavation of the hole in which the concrete is laid."

39. Lord Donovan said that if one regarded the various components of the dry dock piecemeal then it was easy to regard the concreted basin itself as a structure and not as plant: "For then the basin is simply a large hole in the earth the bottom and three sides of which have been faced with concrete" (p 690G-H). But he said that that piecemeal approach was unreal and that the dry dock should be regarded as a whole. Looked upon as a unit, the dry dock accommodates ships, separates them from their element and thus exposes them for repair, holds them in position while repairs are effected and then returns them to the water. The dry dock despite its size was a tool of the respondent's trade and was therefore "plant". Again, regarding the dry dock as a whole, the cost of the necessary

excavation came within the statutory wording as being on the provision of the plant: p 691.

40. Lord Upjohn dissented because he did not think the walls of the dry dock were plant at all, any more than the walls of the factory in which machinery and plant were operated were plant: p 689H. But he said that if that was wrong, then there was no basis for excluding the excavation work as too remote if one allowed the concrete work. Lord Hodson also dissented concluding that the dry dock could be split up so as to divide the main structure from the plant contained in it—he could not regard the basin which formed the walls and bottom of the dry dock as plant: p 683.

41. The second more recent authority on this wording is *Ben-Odeco Ltd v Powlson* [1978] 1 WLR 1093 ("*Ben-Odeco*"). The taxpayer in that case was incorporated to acquire and hire out an oil drilling rig called Ocean Tide. Before it started to trade, it took out large loans essential for the financing of the construction of the oil rig. It incurred commitment fees and capitalised interest on the loans and it claimed an allowance for those fees and charges as being capital expenditure on the provision of machinery or plant. The statutory provision at issue was section 41(1)(a) of the Finance Act 1971 which was in similar terms to section 11 including the phrase "on the provision of". The House of Lords held by a majority of four to one that the expenditure did not qualify.

42. Lord Wilberforce (with whom Lord Scarman agreed) opened his speech by saying: (p 1095)

> "Are interest and commitment fees paid in respect of a loan contracted in order to finance the provision of machinery or plant capital expenditure incurred on the provision of machinery or plant? That is the whole of the question."

43. He recorded the revenue's argument as being that the interest and commitment fees were expended not in order to provide the plant, but in order to obtain, or on, the loans: "They represented money spent on providing the means to acquire the rig and not on the provision of the rig itself" (p 1096).

44. Lord Wilberforce distinguished a Canadian case *Sherritt Gordon Mines Ltd v Minister of National Revenue* [1968] 2 ExCR 459 in which the court had held that interest incurred during construction could be part of the capital cost of the property. He noted that the relevant statutory expression in the Canadian legislation was the "capital cost to the taxpayer of the property". This indicated a more liberal policy to deductions because the Canadian wording made it easier to include costs which the particular taxpayer incurs "whereas the UK words, more objectively, focus on expenditure directly related to the

plant." He said that the Canadian provision "draws a line round the taxpayer and the plant; the other confines the limiting curve to the plant itself".

45. Part of Lord Wilberforce's objection to the taxpayer's claim was that it failed to adhere to the important principle that taxpayers in objectively similar situations should receive similar tax treatment. The taxpayer before him would receive different treatment from a taxpayer who was able to pay for the plant out of its own resources (p 1098). The words, he said, focus attention on the plant and the expenditure on the plant, not limiting it necessarily to the bare purchase price and so including such items as transport and installation but not extending to expenditure "more remote in purpose". He then returned to what he had said was the whole question:

> "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."

46. Lord Hailsham agreed that the narrower meaning of the key phrase was correct so that in effect the only expenditure on the rig was its price. The commitment fees and interest were not expended on the provision of the rig but on the provision of money to pay for it—a distinct and separate operation. He agreed that the Canadian legislation was plainly more liberal in construction and intent though he did not explain in what way: p 1100E. He gave as the second of his reasons for disallowing the claim the fact that his reading would put the taxpayer in the same position as a taxpayer who met the cost of the rig out of its accumulated resources or out of a debenture or share issue.

47. Lord Russell also concluded that the true view was that the expenditure was incurred on the provision of finance and not on the provision of the plant: p 1105. Expenditure incidental to attaining a position in which the taxpayer can finance the provision of the plant was not within the language of the section: "Had it been otherwise intended quite different language would surely have been selected in order to embrace expenditure so commonly involved as a preliminary to the provision of plant of magnitude" (pp 1105–1106).

48. Lord Russell framed the question as follows: (p 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."

49. Lord Salmon dissented. He accepted that the words used in the statute were capable of bearing a narrower or wider meaning. As I discuss further below, he focused on the policy behind the introduction of the capital allowances scheme and the need to incentivise investment in plant and machinery. He thought that Parliament would have recognised that, if the appellant had been asked how much it had spent on providing itself with the rig, it would have replied "without hesitation, and correctly" a sum including the two disputed costs: p 1103.

50. Two other cases were relied on by Orsted in their submissions. An early case, decided shortly before the House of Lords' decision in *Barclay, Curle* was handed down, is *McVeigh v Arthur Sanderson & Sons* [1969] 1 WLR 1143 ("*McVeigh v Sanderson*"). That concerned a claim to capital allowances by the well-known interior design company for designs that they acquired to be used in making patterned wallpaper. The wallpaper was printed using hand blocks or silk screens or pattern bearing rollers. The blocks, screens and rollers were made in-house, the most intricate and expensive part of the work being impressing the pattern onto them. Some of the patterns used were acquired by Sandersons from outside free-lance artists in the UK and overseas. A range of designs so acquired were then presented to a styling committee who chose those to be used for the next collection and the colourways in which that patterns would be produced.

51. Cross J recorded that the Crown conceded that the blocks, silk screens and rollers themselves were "plant" and that the cost of the work involved in impressing the pattern onto them so that the wallpaper could be printed also qualified for an investment allowance under section 16 of the Finance Act 1954. The dispute was over whether the cost of design was "expenditure on the provision of new machinery or plant". The company claimed the allowance even for designs that were rejected by the styling committee. Cross J did not reach a conclusion on the first question whether the designs were themselves "plant" but proceeded on the basis that they were not: p 1154. However, he held that the statutory provision "isolate[d] the provision of the patterned wood block and poses the question: What did the Company spend on it?" He said it could not be right to include nothing for the costs of the design. Mr Jones submitted that this case supported the proposition that the costs of gathering materials and information that are required in

order to design and then fabricate a bespoke item of plant are part of the expenditure on the provision of that item.

52. Another case to which the court was referred was *Samarkand Film Partnership No 3 v Revenue and Customs Comrs* [2011] UKFTT 610 (TC); [2012] SFTD 1 ("*Samarkand*"). This case concerned a tax avoidance scheme involving the acquisition of interests in films, and their lease back in return for rental. The investors became members of the partnership that effected the numerous transactions required for the scheme supposedly to generate sideways loss relief for them. The principal issue before the FTT (Judge Hellier and Mr Robinson) was whether the partnerships were trading for the purposes of certain provisions of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"). The FTT held that they were not and that decision was ultimately upheld on appeal ([2017] STC 926).

53. A subsidiary issue arose from the fact that one of the conditions to be satisfied before loss relief could be claimed was that the expenditure in question had to be "incurred on the acquisition" of the film: see section 130(3) of ITTOIA. One disputed item of costs were fees paid to an agency for a range of services which included identifying and sourcing films for acquisition. The FTT held that the fees were capital in nature and then applied Lord Russell's test in *Ben-Odeco*: para 394. They addressed first the legal costs of drafting and negotiating the agreements under which the films were acquired. They held those were covered because, answering Lord Russell's question, it would be wrong to say that fees paid for negotiating and preparing the agreements were incurred on the production of a piece of paper rather than on the asset acquired pursuant to the agreement. The FTT then went on at para 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."

54. It is not clear to me why the FTT thought in *Samarkand* that nothing was produced by the search agency other than a piece of paper so that it must have been spent "on" the acquisition of the film. It seems more accurate to say that what was produced was advice about what film to acquire rather than the film itself. Given that this was a minor issue, which was not relevant given that the FTT held there was no trade being carried on, this is a very slender thread on which to hang a proposition that money spent on advice about what to buy is spent "on" the item ultimately acquired (assuming the advice is followed). All that *Samarkand* shows, in my view, is that the question whether a certain item of expenditure is "on" something is very fact sensitive and turns on the nature of what is bought by spending that particular sum and the nature of what it is said to be spent on.

55. 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 at CA20070 that "Professional fees, such as survey fees, architects' fees, quantity surveyors' fees, structural engineers' fees, service engineers' fees or legal costs, only

qualify for PMA [ie 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."

56. I do not see why the Manual is said to be inconsistent with the stance HMRC take in this case. HMRC accept that some professional fees may be incurred on the actual provision of the plant. An example given at the hearing was if there is an expert on hand at the building site to check that the machinery which has been delivered and is being installed is of the required specification and is being installed correctly. There is nothing in the Manual that suggests that all professional fees incurred during the progress of the overall project qualify for relief as being on the provision of plant.

57. Further, this and other manuals published by HMRC are not normally taken into account in relation to statutory interpretation though they may be taken into account and be highly relevant if the taxpayer claims to have relied on a legitimate expectation created by something said in them. If HMRC sought to rely on what they had said in their own manual to support their proposed construction of the statutory provision, no doubt the taxpayer would cry "foul". The taxpayer cannot rely on the manuals to point to the construction of the statutory wording in a particular way either.

58. The Manual also refers to "preliminaries" which it describes as indirect costs incurred over the duration of a project on items such as site management, insurance, general purpose labour, temporary accommodation and security. These are treated in the same way as professional fees so that if they are paid in connection with a building project that includes the provision of plant or machinery then only the part, if any, which "relates to services that can properly be regarded as on the provision of plant or machinery" can qualify for allowance. HMRC say preliminaries were correctly dealt with by the FTT in the judgment at paras 205–211 and do not take the matter further.

5. The decisions below

59. There was a hearing lasting ten days before the FTT during which Judge Popplewell heard evidence from three senior executives from Orsted and two expert witnesses, one a geotechnical and engineering geology consultant and one who was a chartered engineer.

60. He turned to the question of whether the expenditure on the studies qualified for allowances under section 11 at para 113 of his judgment. He referred to *Barclay, Curle* and *Ben-Odeco.* He noted that both parties agreed that the expression "on the provision of" plant extended beyond the price actually paid for the plant but that they disagreed as

to the limits of that extension: para 119. He described design as a "weasel word" and held: (para 121)

> "there is a distinction between designs which go to the heart of the windfarm or the wind turbines, and without which … it would not be possible to fabricate, install, or construct the windfarm or the wind turbines to enable them to carry out their function of generating electricity; and those designs which do not go to the heart, but are merely peripheral and without them, the windfarm and the wind turbines would still be able to carry out their function of generating electricity."

61. As to how one identifies whether design is necessary and therefore qualifies for allowances, that needed to be tested against the function or purpose for which the plant is designed, in this case to generate electricity. Thus, expenditure on design without which the windfarms could not carry out that function and would be operationally useless fell within the category of necessary design and qualified for allowance. It followed that expenditure on studies which directly related to the necessary design of the wind turbines qualified for capital allowances: para 125.

62. He turned to the task of applying the test he had identified to the facts, starting at para 153. The studies and surveys in dispute were not themselves designs but they provided data for designs—some for necessary and some for unnecessary design. He confirmed the test as being whether the surveys and studies "directly relate to the necessary design, construction or installation" of the windfarm. That did not mean that the study had to have prompted a change to the necessary design when tested against an earlier design such as an increase in tower height as a result of a study showing a particular low flying bird migration. It could be that the data from the study confirmed the assumptions made in the model so that the model did not need to change: para 154. He went on:

> "Provided the appellant can show that the data was taken into account in that modelling which resulted in the necessary design of the windfarm and/or the wind turbines and/or their safe and effective installation, then it is to my mind directly related to that design and installation even if there was no obvious change to the evolving designs of the windfarm and/or the wind turbines as a result of the input of that data."

63. On the other hand, he considered that it was difficult to see how the data from any study which identified effects but then proposed no mitigation measures could have had any effect on the modelling and thus on the design and construction.

64. As regards the studies forming part of the EIA, he first rejected the contention that the scoping stage which he described as a prelude to the EIA was directly related to the necessary design: para 160. He then went through the other studies and examined, in relation to each of the four windfarms, whether the study directly related to the necessary design or not, that is to say whether or not adopting or rejecting what the study suggested would render the windfarm incapable of generating electricity. He summarised his conclusions at para 218 stating which studies he considered qualified for allowances. For some studies such as landscape, seascape and visual assessment and ornithology and collision risk he held that these did not directly relate to necessary design for any of the windfarms. For some, such as the geophysical and geotechnical studies he held that they did so relate and so qualified for allowance for all four windfarms. For some such as the benthos studies, he came to a different answer for the different windfarms.

65. Both Orsted and HMRC appealed the FTT's decision on whether the studies qualified or not. The Upper Tribunal judgment was handed down on 26 October 2023 ([2023] UKUT 260 (TCC); [2024] STC 177 (Judge Swami Raghavan and Judge Tracey Bowler). The Upper Tribunal recorded at para 107 that both parties agreed that the FTT identified the wrong test but disagreed on the appropriate test. Having analysed *Barclay, Curle* the Upper Tribunal held that the House of Lords was not in that case expressing any general requirement of necessity in the way the FTT had understood it (para 119). Rather the House of Lords was making the point that provision of plant may cover more than the cost of the plant itself or its actual supply—it can cover installation. *Barclay, Curle* was also not authority for the proposition that because plant cannot be made without design, the costs of design must qualify. As to *Ben-Odeco*, the Upper Tribunal saw two themes emerging; first the need to avoid an interpretation which treats different taxpayers in similar circumstances differently and secondly, "the importance of asking what the effect of the expenditure is. In other words, is it on the provision of plant or something else?": para 135. They also agreed with HMRC that the word "on" does not mean "in connection with" or "directly related to" but signals a closer connection: para 137. The significance of *Barclay, Curle* and *Ben-Odeco* was, the Upper Tribunal said, that although neither closed the door in principle to other kinds of expenditure being included beyond the purchase price, transport and installation, they indicated "the narrowness of the sorts of expenditure contemplated by the words" of the statutory provision. They rejected the taxpayers' submission that other cases cited to them were based on a wider test.

66. The Upper Tribunal at para 165 then appeared to draw a distinction which HMRC do not support, namely that between the physical activity of doing, making or constructing, and the intellectual effort which goes into the design process. That intellectual effort was in essence advice on how to make the plant.

67. Having therefore identified various errors in the FTT's approach the Upper Tribunal went on to remake the decision. They held that applying the strict and narrow principle encapsulated in the legislation, none of the surveys and studies constituted expenditure qualifying as "on provision of plant": para 179. Nor did they qualify as being

part of the installation of the plant. The studies were advice on the type of plant to use or on how and when to install it.

68. Orsted appealed to the Court of Appeal and their appeal was in large part allowed: [2025] 1 WLR 3887. Newey LJ gave the judgment with which Zacaroli LJ and Sir Launcelot Henderson agreed. The Court noted at the outset that the questions raised by the appeal may be becoming more acute as very large infrastructure projects require extensive and costly preparatory work: para 3. Having discussed the main authorities and the decisions of the FTT and Upper Tribunal, the Court said that where an item of plant has been acquired, section 11 of the CAA 2001 invites the question what capital expenditure was incurred on its provision. The answer plainly includes the purchase price but *Barclay, Curle* shows that other expenditure can potentially qualify as well.

69. At para 70 Newey LJ disagreed with the Upper Tribunal's conclusion that the words "on the provision of" should be construed strictly and narrowly. He went on:

> "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."

70. Where plant is bespoke, the natural reading of the words would extend to costs incurred in designing the plant. That conclusion was consistent with the case law. Newey LJ highlighted Lord Reid's reference in *Barclay, Curle* to expenditure qualifying because the plant "could not even be made unless the necessary excavating had been done" and to expenditure which "must be incurred before the plant can be provided". He recognised that the studies and surveys in dispute may not themselves contain designs but held that as long as they provided information which *informed* the design of the generation assets and the elements in them, they qualified for allowances. He clarified that he was not saying that the data from the survey would qualify only if it resulted in a change to the design; a survey which showed there was no unexploded ordnance that needed to be avoided would qualify as much as one that revealed a bomb and so caused an adjustment to the placement of the turbines.

71. He drew the boundary therefore between costs incurred in deciding how an item of plant should be designed or installed and costs incurred in deciding whether to acquire the plant at all. In a key paragraph Newey LJ said:

> "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."

72. Applying that test to the studies, he concluded that almost all the studies which remained in dispute qualified for relief. For example, as regards the landscape, seascape and visual assessment he referred to the findings of the FTT which showed that they had influenced the design of the generation assets because they bore on how they should be laid out and did not merely express a view on what plant should be bought: para 78. Similarly, archaeology, wrecks and cultural sites surveys influenced the locations at which the wind turbines were to be installed and so qualified: para 83. In relation to scoping surveys, the Court asked the parties to make further submissions which they did. The Court of Appeal's order records that the Court concluded from those submissions that the scoping studies also qualified.

6. When is capital expenditure "on the provision of" plant?

73. The principles of statutory construction to be applied to arrive at the meaning of section 11(4) are not in dispute. They were summarised by Lord Hodge in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255 at paras 29 to 31. Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. Further, statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words being considered.

74. Looking first at the ordinary meaning of the words used in the context of section 11(4)(a), I agree with the Upper Tribunal that the requirement that the expenditure must be "on" the provision of plant indicates a narrow test, requiring a close connection between the expenditure and the plant provided. There are many statutory provisions in relation to tax and other topics that use other phrases to connote a much looser nexus such as "in connection with" or "relating to" or "with a view to". Those phrases do not mean the same as "on". Parliament has used a different test here and, in my judgment, it requires a close connection.

75. Mr Jones for Orsted contrasted the wording here with that used in section 336 of the Income Tax (Earnings and Pensions) Act 2003. That imposes a strict test for deductions by employees for expenses when computing income tax because the expense must be "wholly, exclusively and necessarily incurred" in the performance of the duties of the employment. He said that the link in section 11(4)(a) does not deploy any of those restraints and so a looser link is intended. I do not accept that that is a helpful comparison. It is accepted by HMRC that in order to qualify under section 11(4), the expenditure does not have to be the bare minimum that needs to be expended on providing the plant in order for it to qualify for an allowance. An item of plant acquired by the business can qualify even if it could be described as a "nice to have" rather than a "must have" for the business. That is why the Upper Tribunal disagreed with the FTT's necessity test which rejected studies which improved the windfarm but where the windfarm would have generated electricity even without that change.

76. The expansive construction of the phrase is not, in my judgment, consistent with *Barclay, Curle*. One starts with the fact that the House of Lords clearly found the question whether the excavation of the dry dock basin and the concreting of the basin was expenditure on plant to be a difficult question. The answer required a detailed analysis of the way in which the dry dock functioned and how the hollowed out basin was integral to that. If the test were really as broad as the Court of Appeal has held in this case, there would have been no difficulty in resolving the question of whether the expenditure on concreting and excavation was "on" the provision of the dry dock.

77. Mr Jones' case on necessity is nuanced. He rejects the FTT's insistence that each of the surveys or studies must be shown to have been necessary to the final design or installation of the windfarm. On the other hand, he relies on *Barclay, Curle* as authority that as long as one can say broadly that designing the windfarm was "necessary" before it could be provided, then all expenditure on surveys which inform or feed into the design qualifies. Mr Jones therefore points to statements in the speech of Lord Reid referring to the necessity of having to excavate and line the basin as support for the test Orsted proposes. Lord Reid described these as costs "necessary to make room for plant" or, as he put it "… 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." Mr Jones argued that Lord Reid here was not treating the excavated basin itself as plant but treating it as something necessary to the provision of the plant. Or perhaps

Lord Reid was treating it as part of the costs of installing the plant, because in the same passage (at p 680D), Lord Reid said that the cost of making room for the plant was expenditure on the provision of plant 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 trade."

78. That is not, in my view, a correct reading of Lord Reid's speech or the speeches of the other members of the majority. On the contrary, each member of the panel emphasised how integral the lined excavated basin was to the dry dock. Lord Donovan described the whole dry dock as a unit which, despite its size, was really a tool used in the shipbuilders' business. Lord Reid was not, in my view, drawing a distinction between the concreted excavated basin on the one hand and the valves and pumps which the Crown accepted were plant on the other so as to suggest that the former was not itself "plant" but just something required in order to provide the plant. Lord Reid's point rather was that the plant includes the excavated basin that enabled ships to enter and leave. The only way the taxpayer in *Barclay, Curle* could provide itself with a large hole in the ground was by digging out 200,000 tonnes of earth. You cannot buy a hole in the ground off the shelf or commission the manufacture in a factory of a bespoke hole in the ground which you can then install. The excavation works were expenditure on the provision of the plant because the plant included the lined basin and the lined basin was part of the overall dry dock.

79. Another way of making a large cavity was considered by the Court of Appeal in *Cheshire Cavity Storage 1 Ltd v Revenue and Customs Comrs* [2022] STC 622. That case concerned the creation of cavities in salt-bearing rock by the introduction of water which dissolved the rock to leave an impervious cavity. The cavity was used by the taxpayer to store gas at high pressure as part of its gas storage business. The issue was whether the cavity was plant so that the cost of creating it was capital expenditure on the provision of plant for the purposes of section 11(4). Lewison LJ with whom Baker and Whipple LJJ agreed discussed *Barclay, Curle* at para 30 onwards. He said that the key to Lord Reid's decision was that the dry dock was to be viewed as a whole and the whole dock was the means by which the operation of ship repair was performed. As to why Lord Reid accepted that the cost of excavation qualified, Lewison LJ read the speech as stating that the cost of excavating the dock if it stood alone would not have qualified as plant: "It was because the excavation was necessary before the plant was installed, that it was qualifying expenditure": para 37. He saw the emphasis as being on the excavation being part of creating the dock itself to be seen as an integral whole; the expenditure qualified only because it was part of the whole which included machinery necessary for its operation. Lewison LJ referred to the application of the principle he had identified in *Cooke v Beach Station Caravans Ltd* [1974] 1 WLR 1398. There the cost of excavating a hole into which a swimming pool was installed with filtration, heating and diving boards was held to be part of the cost of providing a single unit of plant. By contrast, in the case before him in *Cheshire Cavity Storage*, there was no equipment put into the salt rock cavity in order for it to function as a store for gas. The Court held that it was not plant.

80. I do not see Lewison LJ's judgment as inconsistent with my view of *Barclay, Curle*. It appears that the stumbling block for the taxpayer in *Cheshire Cavity* was not to do with the proximity or lack of it of the excavation costs to the provision of the plant or whether the excavation costs were necessary for, or a preliminary to, the provision of the plant but rather that the cavity was not plant and did not become an integral part of an item of plant—it was simply a hole in the rock.

81. *Ben-Odeco* also strongly supports HMRC's narrower construction of the phrase. Mr Jones argued that the House of Lords held that the costs of financing did not qualify because the borrowing was only necessary because of the particular characteristics of the taxpayer involved. Other taxpayers would not have had to incur those costs and that meant, he said, that they were not costs on the provision of the plant. I recognise that their Lordships in *Ben-Odeco* stressed the importance of applying the taxing provisions in the same way to taxpayers in the same economic circumstances. That was clearly one of the factors they considered. But the main point, and the only point described in the headnote in the law report of the case, was the point described by Lord Wilberforce as "the whole of the question" namely whether interest and commitment fees on a loan used to finance the provision of plant amounted to capital expenditure on the provision of that plant. Similarly, Lord Russell's framing of the question as to the effect of particular capital expenditure was not a point about the fact that some taxpayers but not all might need loans. It was about the lack of proximity of the expenditure to the provision of the plant itself.

82. Mr Jones submits that the same point about the need for equal tax treatment that was emphasised in *Ben-Odeco* arises in this case. He compared a taxpayer who pays for design work to be carried out before commissioning a bespoke piece of plant with a taxpayer who buys the same piece of plant off the shelf. This is a point which found favour with the FTT. The FTT noted at para 128 that some of the components for the windfarm were bought off the shelf. In those cases there could be no doubt that in developing the component, the manufacturer must have incurred both expense on designing it and expense on researching what design would work best. That design cost was built into the price of the item paid by Orsted and other windfarm operators. Yet HMRC did not suggest that that design element had to be stripped out of the purchase price because it did not qualify for relief under section 11. The FTT said at para 131 that there was no principled reason why if the whole of the purchase price qualified for an allowance, one should not allow the design costs which are necessary for the fabrication of the windfarm.

83. I reject Orsted's contention that this is a valid argument for a broad construction of section 11(4)(a). There are many costs incurred by a manufacturer that are wrapped up in the price at which the item is sold, including many revenue costs such as salaries for its employees or electricity to run its factory. HMRC has never dissected the purchase price to strip out those costs because the question to be addressed is whether the price is qualifying expenditure in the hands of the taxpayer who is claiming the allowance, not what the status of the costs was in the hands of the supplier. The fact that the price of a

capital item is set by the supplier to recoup an aggregation of its own capital and revenue costs says nothing, in my judgment, about whether the price is qualifying capital expenditure in the hands of the taxpayer who purchases the item.

84. Lord Russell said the same thing in *Ben-Odeco* at p 1106B. There the taxpayer had argued that if the provider of the plant had borrowed working capital and incurred interest and fees, these would be reflected in the price paid the whole of which would qualify for an allowance. He dismissed this saying:

> "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."

85. In my judgment therefore, the ordinary meaning of the requirement that the expenditure be "on the provision" of the plant connotes a close connection between the expenditure and the plant. The primary cost is the purchase price, whether that be for an off the shelf item or a commissioned bespoke item. The authorities have always made clear that other costs can be included and have referred to the costs of transporting the plant to the site and of installing it as being costs that can be so included. Those costs are inherent in the concept of the plant being "provided" as the House of Lords held in *Barclay, Curle*. The "limiting curve" as Lord Wilberforce put it in *Ben-Odeco* is around the plant and the provision of it. The costs, commonly incurred, of carrying out studies and surveys which provide the business with advice about how to choose or design plant fall, in my view, well outside the limiting curve.

86. Further, I do not see that anything arises from a consideration of the broader context or the purpose of section 11(4) that casts doubt on the narrowness of the wording or that indicates that there should be a wider construction than that contended for by HMRC.

87. The context of the provision is that it is one of a number of capital allowance provisions that apply in different circumstances. In their written submissions, HMRC argued that the expansive interpretation given by the Court of Appeal undercuts the allowances given by other provisions in Chapter 3 of Part 2 which deal with buildings, structures, assets and works (sections 21, 22 and 23) or building alterations connected with the installation of plant and machinery (section 25). I did not find the discussion of

the distinction between "plant" and "setting" helpful in this particular case. Given that the plant here comprises a large section of the whole windfarm, it is difficult to split the creation of the plant from its placement in its location, as it was perhaps also difficult for the dry dock in *Barclay, Curle*. But I accept HMRC's point that an expansive reading of section 11 risks scooping up expenditure which rightly falls within those sections and disturbing the careful balance between what is allowed and what is not allowed under the detailed terms of those different provisions.

88. A submission I found more useful was Ms Wilson's description of section 11 and those other capital allowance provisions as being needed in order to reflect the depreciation of capital assets used in the taxpayer's business, given the absence of any more general provision allowing for the immediate deduction of the total capital expenditure. As I described earlier, capital expenditure is pooled and an allowance can be claimed each year on the value of the pool. Lord Nicholls explained this in *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684, paras 3, 4 and 39 where he described the object of granting writing down allowances. Lord Nicholls said:

> "3. A trader computing his profits or losses will ordinarily make some deduction for depreciation in the value of the machinery or plant which he uses. Otherwise the computation will take no account of the need for the eventual replacement of wasting assets and the true profits will be overstated. But the computation required … has always excluded such a deduction. Parliament therefore makes separate provision for depreciation by means of capital allowances against what would otherwise be taxable income. In addition, generous initial or first-year allowances, exceeding actual depreciation, are sometimes provided as a positive incentive to investment in new plant."

89. The concept of the capital allowance therefore reflects the gradual deterioration of the asset through the wear and tear as it is used in the business and the ultimate need to replace it when it wears out. That also militates against the broad scope of section 11 to include these surveys and studies which have only the most tangential connection with the diminishing value of the physical asset comprised in the windfarm assets. Mr Jones fairly pointed out that installation and transport costs, or preliminaries such as site insurance and security, do not directly impact the value of the item of plant but everyone agrees that they can qualify. Further, he argued, there is no requirement that the taxpayer commits to replacing the plant when it wears out before it can claim the allowance. All that is true, but the inclusion of installation and transport costs can be regarded as the exception that proves the rule, rather than as indicating that there is no rule. I found the link between the annual allowance and the erosion the value of the plant through wear and tear to be a useful pointer to the narrowness of the concept.

90. Mr Jones stressed that the purpose of capital allowances was to incentivise businesses to invest in plant and machinery. This was best achieved by allowing a broader range of capital expenditure to be treated as qualifying. In putting forward this argument, he had an ally in Lord Salmon (dissenting) in *Ben-Odeco*. Lord Salmon referred to the policy or objective of the statute as being a most important factor when deciding between two possible meanings (p 1102G). He described the dire state of British industry for many years prior to 1971 when the new system for allowances for machinery and plant was introduced. The overall level of industrial productivity was deplorable in part because of the large proportion of obsolescent machinery used for industrial purposes. The purpose of the new system of capital allowances was to afford "a really effective incentive to industrial undertakings to provide themselves with new and efficient plant and machinery". Parliament must have recognised that many businesses would need to borrow money and it would be a great incentive for any such business if it knew it could claim an allowance for the costs of that borrowing.

91. However, the answer to Mr Jones' point is the same as the answer that Lord Russell gave at p 1106 of *Ben-Odeco*:

> "The point is made that the purpose of these provisions for capital allowance is to encourage investment in new plant and machinery. So it is. But the question remains how extensive, and how expensive to the fiscus, is that encouragement: and in this connection I note the extent of encouragement in terms of percentages allowed has varied through the years."

92. The breadth or narrowness of the phrase "on the provision of" is a very blunt instrument with which to provide incentives to business to invest in plant—particularly the kinds of plant that Parliament wants to encourage. This case is concerned with renewable energy and that is certainly a business which the Government has tried to incentivise over the years by a variety of more targeted subsidies, increased first year percentage allowances for particular items of plant and other special provisions. A wide interpretation of section 11 would greatly increase the kinds of expenditure that can qualify for all kinds of plant and machinery whether the Government wishes to encourage that investment or not. One cannot rely on the broad purpose of a provision to define where the precise boundary lies between what is caught and what is not caught.

93. Mr Jones also argued that the purpose of the capital allowance regime is to ensure that a business is only taxed on its true profits. Those profits should reflect the fact that a great deal of money had been spent by Orsted on these surveys and studies in order to build the windfarm which then produces the trading income on which profits are earned. I do not accept that point since the way in which profits are calculated is different for accounting purposes from how they are calculated for tax purposes. The fact that Generally Accepted Accounting Principles lead to a greater deduction from trading

income when arriving at profits reported in the company's accounts has never determined how the taxable profits are calculated. This was clear in *Ben-Odeco*. Lord Wilberforce recorded the taxpayer's argument that because the interest and commitment fees incurred were treated as capital expenditure according to accepted methods of commercial accounting, that was enough to bring them within the statutory provision: p 1095H. He rejected this firmly saying that accounting methods cannot determine the construction of statutory words: p 1096E.

94. As to what one can say about where the boundary lies between what is "on" and what is not "on" the provision of plant or machinery, there was much discussion in the judgments below and at the hearing before the court about design and whether any money spent on the design of the plant can qualify as expenditure on the provision of the plant. At para 121, the FTT described design as a "weasel" word and it certainly has a wide spectrum of meanings. As a noun it can refer to anything from the initial "artist's impression" sketch of what the windfarm might ultimately look like to the final technical drawings showing the precise dimensions and materials specifications which the manufacturer can follow to fabricate the plant. As a verb it can refer to the process of producing either of those things. It is not helpful, therefore, to say that any study or survey that "informs" or "feeds into" the design of the plant must be regarded as being spent "on the provision of" the plant. This is much too broad, especially if one then goes further to say that the data produced by the study do not have to actually lead to a change in the design proposed up to that point in order for the cost of gathering it to be covered. To maintain, as Orsted does, that the cost of a survey which shows that there is no unexploded ordnance on the seabed at the proposed site is just as much qualifying expenditure as that spent on a survey that discloses something that prompts the developer to reconfigure the placement of the turbines shows how broad the test they propose would be.

95. As to design in this case, Ms Wilson made clear that HMRC wished to reserve their position on whether the cost of producing the final technical drawings and specifications which are then "made real" by the manufacturer could be recoverable. That is, she said, a fact-sensitive question and there are no findings of fact in the present case about such drawings because that kind of expenditure is not the subject of this dispute. Since the issue of whether that kind of design would qualify does not arise in this appeal, I express no view on it. Ms Wilson was also prepared to accept that if further surveys and studies were carried out during the final stages of fabrication or during the course of the installation of the windfarm, they may qualify as being "on provision" either because they are part and parcel of the production process or because they are part of installing the windfarm. But none of the studies here met that description.

96. I agree with the courts below that *McVeigh v Sanderson* is of limited assistance. The Upper Tribunal in the present appeal discussed that earlier authority at paras 170 and 171 and held that it did not lay down a general proposition that design costs of plant are "on the provision" of it. Rather, they pointed out that the designs in question there were not the designs showing the dimensions and construction of the blocks or silkscreens or

rollers used in the business. The designs were the patterns that would be impressed onto those existing blocks, screens and rollers in order to complete items which were clearly plant so that those blocks, screens and rollers could be used for printing the wallpaper. That is a very different situation from the reports and surveys in the current case which are not incorporated into the components making up the windfarm in the same way.

97. As well as discussing designs of different kinds, there were submissions about the timing of the disputed expenditure relative to the plant becoming operational. Ms Wilson said that the wording of section 11(4)(a) indicates that the plant must be "in your sights" at the time that the expenditure is incurred. She could not say that the plant had physically to exist before the expenditure was incurred. That would create difficulties with advance payments of part of the purchase price paid on conclusion of the contract but before any fabrication of a bespoke item of plant had commenced. I note that section 5(1) of the CAA 2001 provides that for the purposes of the Act, the general rule is that an amount of capital expenditure is to be treated as incurred as soon as there is an unconditional obligation to pay it. On the other hand, she criticised the element of hindsight that the Court of Appeal had introduced by blurring subparagraphs (a) and (b) of section 11(4) by positing a test that looks at the plant of which the taxpayer has become the owner, thereby satisfying section 11(4)(b) and asking what it had spent on providing itself with that plant.

98. Neither side favoured relying on the date of the final investment decision taken by Orsted in respect of each windfarm as being the border line so that surveys carried out before that date were not sufficiently close to be "on the provision" of plant and surveys carried out did qualify. That boundary was not attractive to Orsted because many of the surveys for which they seek to claim an allowance were carried out before the final investment decision was taken. It was not attractive to HMRC because it is still too remote from the actual plant to qualify on their interpretation and the timing of the final investment decision and the commissioning of the surveys are to some extent within the control of the taxpayer and so liable to manipulation to bring more costs within the pool.

7. Conclusion

99. This case has already amply demonstrated that although Lord Upjohn was right in *Barclay, Curle* to say that opinions may differ on the meaning of the simple English words used in section 11(4)(a), he was over-optimistic in saying that it was impossible to give a prolonged exposition on the matter.

100. As is often the case with taxing provisions, in the vast majority of instances they are applied to the satisfaction of HMRC and taxpayers without any difficulty. It is almost always clear that something either is or is not expenditure on the provision of plant or machinery. But even the simplest and most commonly used word—"on" in the present case—has a penumbra of meaning that generates disputes in unusual fact patterns. I do

not regard these studies and surveys as close to the boundary between what should be regarded as “on” plant and what is too far away from the plant itself to be so regarded. They do not fall within the statutory wording and I would therefore allow the appeal.