Landmark CHAMBERS

Implying Conditions and the interpretation of planning permissions

The approach of the Courts post *Trump*

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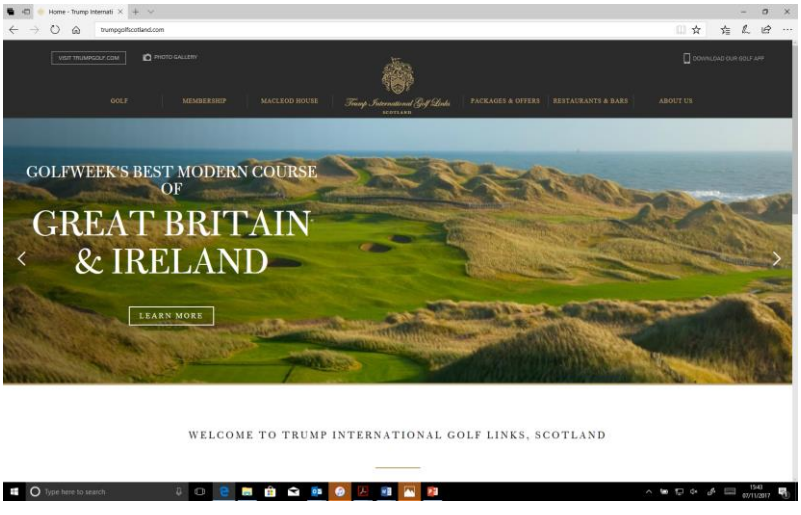
Trump Int'l Golf Club Scotland Ltd v Scottish Ministers [2015] UKSC 7



Trump Int'l Golf Club Scotland Ltd v Scottish Ministers [2015] UKSC 7

- Two separate, inter-related issues in ***Trump***:
  (i) how to *interpret* conditions imposed under EA 1989; and
  (ii) *implying* terms into conditions under the EA 1989

- Starting point is interpretation, not implication.
  (i) Lord Hodge in ***Trump*** at [33] : "*Whether words are to be implied into a document depends on the interpretation of the words which the author or authors have used. The first question therefore is how to interpret the express words….*"
  (ii) Lord Hodge in ***Trump at*** [35] "*Interpretation is not the same thing as the implication of terms. Interpretation of the words of a document is the precursor of implication….*"
  (iii) Caution however: Lord Mance "I *would not encourage advocates or courts to adopt a too rigid or sequential an approach to the processes of consideration of the express terms and of consideration of the possibility of an implication. Without derogating from the requirement to construe any contract as a whole, particular provisions of a contract may I think give rise to a necessary implication, which, once recognised, will itself throw light on the scope and meaning of other express provisions of the contract*.
  (iv) Court of Appeal considered in ***Dunnett***

Trump International

Key points from the Supreme Court in ***Trump*** on implication?

1. Lord Carnwarth: "*the court will, understandably, exercise **great restraint** in implying terms into public documents which have criminal sanctions, I see no principled reason for excluding implication altogether*"; and while planning cases not "*directly applicable*" Lord Hodge considers ***Sevenoaks*** and says "*In agreement with Lord Carnwath JSC, I am not persuaded that there is a complete bar on implying terms into the conditions in planning permissions …*" ([32]).
2. *Lord Hodge "… the basic endeavour is to ascertain the meaning which Condition 5 would convey to a reasonable person having all the background knowledge which would reasonably be available to the relevant audience or reader"* (judgment at [43]).
3. Easier to imply if *"[t]he intention of the authority was apparent, not from extrinsic evidence, but from the terms of the document itself."* (per Lord Carnwath at [64]).
4. Lord Hodge explains that he would have implied a new term if necessary because the consent read as a whole pointed inexorably to that conclusion (at [37]); Lord Carnwath: "*Although it does not in terms provide that development must be constructed in accordance with the design statement, such a requirement must as a matter of common sense be implicit, since otherwise the statement would have no practical purpose*" (per Lord Carnwath at [70]).
5. Cases within ***Trump*** were about incomplete conditions, but Court *interpreted* document rather than imply a new term.

Lambeth v SSCLG (1)

Facts:

- S.73 application to vary a condition to widen the sale of goods
- Lambeth did not impose a condition restricting the sale of food goods.
- *Question*: should such a condition be *implied or interpreted* into the consent

High Court:

- *Matter of principle*: ***Trump*** was not limited to completing "incomplete conditions". As a matter of principle, can imply a whole new condition.
- Lord Carnwath: "*There is no reason in my view to exclude implication as a technique of interpretation, where justified in accordance with the familiar, albeit restrictive, principles applied to other legal documents. In this respect planning permissions are not in a special category*".
- *Matter of application to this case:* no condition should be implied.

(1) High hurdle to imply a term; it was not necessary to give "business efficacy" to the agreement;

(2) A reasonable reader would not have understood such a condition to be part of the consent; "***I'm Your Man***" applied to the case.

Court of Appeal:

- Permission to appeal to the CA granted by High Court

Lambeth v SSCLG (2) – Due Diligence

Clearest case: incomplete conditions:

- The developer IP in ***Lambeth*** argued ***Trump*** only applies to incomplete conditions
- Relied on ***Trump*** [31], [32], [34], [45], [49]. [55], [57], [64] and [70] to argue the scope of the dicta were all restricted to incomplete conditions…

- **IF** you have a case with an incomplete condition lacking its implementation clause – caution!
- BUT NB even if you do: relationship between interpretation and implication
- Well illustrated by ***Skelmersdale***

Skelmersdale (1)

Background

- JR of PP granted for new TC shopping centre by owners of rival existing TC shopping centre which had local policy protection. Concerns condition 5:

  "(i) Otherwise than in the circumstances set out at (ii) below, for a period of five years from the date on which the development is first occupied, no retail floorspace hereby approved shall be occupied by any retailer who at the date of the grant of this permission, or within a period of 12 months immediately prior to the occupation of the development hereby approved, occupies retail floorspace which exceeds 250 sqm [Gross External Area] within The Concourse Shopping Centre Skelmersdale.

  (ii) Such Occupation shall only be permitted where such retailer as identified in (i) above submits a scheme ***which commits*** *to retaining their presence as a retailer within The Concourse Shopping Centre Skelmersdale for a minimum period of 5 years following the date of their proposed occupation of any retail floorspace hereby approved, and such scheme has been approved in writing by the Local Planning Authority."*

- One of grounds of challenge – Ground 1 - was that "*Condition 5 is unenforceable owing to the lack of an implementation clause"*

Skelmersdale (2)

2 arguments under Ground 1: interpretation and implication.

- **Interpretation:**
  - D argued: Condition 5 was *"a scheme which commits to retaining their presence*" required "*the giving of a legally binding commitment*" and on this approach, "*the absence of an express implementation clause in Condition 5, and its presence in numerous places elsewhere, is neither here nor there. There is no need for such a clause because retailers must offer legally binding commitments …"* .
  - Judge agreed: *"In my judgment, Condition 5 falls to be construed as a matter of law in line with the principles set out in decisions of the highest authority. I was expressly referred to* ***Belize****,* ***Arnold v Britton*** *[2015] AC 1619 and* ***Trump****, and there are of course many others (see, for example, paragraph 33 of the judgment of Lord Hodge JSC in* ***Trump****) … the basic endeavour is to ascertain the meaning which Condition 5 would convey to a reasonable person having all the background knowledge which would reasonably be available to the relevant audience or reader"* (judgment at [43]).

Skelmersdale (3)

Implication

- Following ***Trump*** D and I/P made alternative, additional submission "*namely that an implementation clause may be implied into Condition 5*"
- Given interpretation of "*commits*" this was *obiter* as Judge acknowledges (at [47]), but gave his view as the point had occupied nearly half of the hearing.
  - *"The fundamental issue for me is whether the inference or implication arises **inexorably** from a proper appreciation of the planning permission read as a whole."* (judgment at [59]).
  - Two reasons not to imply (a) implementation clauses elsewhere and (b) if "commits" means less than a legal obligation
- Court of Appeal (Lord Justice Briggs and Lord Justice Sales) sidestepped the issue, simply finding that: "*…In view of his ruling on ground (1) regarding the meaning of the word "commits"…, with which I agree, it is unnecessary and inappropriate to say anything about the issue whether, if the interpretation of "commits" were wrong, an implementation clause could be read into condition 5 by implication"*

Lambeth v SSCLG – new conditions (1)

Other cases: "whole new conditions":

- The Secretary of State in ***Lambeth*** argued that on the well established caselaw on implied terms, there was a high barrier, a high test, for applying a whole new condition – "*the facts would have to be exceptional"*
- There is no *"relaxation of the traditional, highly restrictive approach to implication of terms*" per Lord Carnwath

- Many cases in other areas of law indicating the high threshold to imply a new term
  - ***Marks & Spencer plc v BNP Parisbas Securities Services*** [[2015] UKSC 72, December 2015
  - ***Impact Funding Solutions Ltd v Barrington Services Ltd*** [2017] AC 85
  - ***Attorney General of Belize v Belize Telecom Ltd*** [2008] UKPC 10
  - ***Geys v Societe Generale, London Branch*** [2013] 1 AC 523,
  - Singapore Court of Appeal in ***Foo Jong Peng v Phua Kiah Mai*** [2012] 4 SLR 1267

Lambeth v SSCLG – new conditions (2)

1. "*…A term should not be implied into a detailed commercial contract merely because it appears fair or merely because one considers that the parties would have agreed it if it had been suggested to them. Those are necessary but not sufficient grounds for including a term*" *per* Lord Neuberger in ***Marks & Spencer*** at [21]
2. "*…It is also necessary to consider the established legal background against which the lease was entered into, and in particular the general attitude of the law to the [issue in the case]…"* per Lord Neuberger in ***Marks & Spencer*** at [42]
3. Lord Neuberger went on to consider that even if he had concluded that the clause in question was capricious in its operation, that "*could not have stood once one faced up to the clear and consistent line of judicial decisions which formed the backcloth against which the terms…. were agreed. Save in a very clear case indeed, it would be wrong to attribute…. An intention… when the non-apportionability of such rent has been so long and clearly established. Given that it is so clear that the effect of the case law is…. Express words would be needed before it would be right to imply a term to the contrary"* in ***Marks & Spencer*** at [49-50]
4. Lord Hodge in ***Impact Funding Solutions Ltd v Barrington Services*** Ltd [2017] AC 85, explained at [31-32] that (emphasis added) "*I see no basis for implying additional words into the exclusion in order to limit its scope. In* ***Marks and Spencer ….****this court confirmed that a term would be implied into a detailed contract only if, on an objective assessment of the terms of the contract, the term to be implied was necessary to give the contract business efficacy or was so obvious that it went without saying: paras 15–31, per Lord Neuberger PSC. This court also held that the express terms of the contract must be interpreted before one can consider any question of implication: para 28. In my view, it cannot be said that the policy would lack commercial or practical coherence if a term restricting the scope of the exclusion were not implied".*

Lambeth v SSCLG – new conditions (3)

5. Lord Toulson explained in ***Impact Funding Solutions*** at §35 (emphasis added) that "*The fact that a provision in a contract is expressed as an exception does not necessarily mean that it should be approached with a pre-disposition to construe it narrowly. Like any other provision in a contract, words of exception or exemption must be read in the context of the contract as a whole and with due regard for its purpose. As a matter of general principle, it is well established that if one party, otherwise liable, wishes to exclude or limit his liability to the other party, he must do so in clear words; and that the contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed: see, among many authorities,* ***Dairy Containers Ltd v Tasman Orient Line CV*** *[2005] 1 WLR 215 , para 12, per Lord Bingham of Cornhill. This applies not only where the words of exception remove a remedy for breach, but where they seek to prevent a liability from arising by removing, through a subsidiary provision, part of the benefit which it appears to have been the purpose of the contract to provide. The vice of a clause of that kind is that it can have a propensity to mislead, unless its language is sufficiently plain. All that said, words of exception may be simply a way of delineating the scope of the primary obligation*".

Lambeth v SSCLG – Lang J's judgment

- That is the important context in which Lang J held:

(1) The Claimant Council's intended purpose was not given legal effect because of flawed drafting.

(2) The reasoning in ***I'm Your Man***, upheld in other authorities, was such that as a matter of interpretation, a reasonable reader of the consent, aware of ***I'm Your Man***, would conclude that there were no restrictions on retail sale.

(3) It would be "*tempting but wrong*", applying Lord Bingham in ***Phillips Electronique v British Sky Broadcasting*** *(1985)* for the Court "*acting with the benefit of hindsight, to fashion a term which reflected the merits of the situation as they appeared at the hearing".*

(4) Terms should not be implied, pet Lord Neuberger in ***Marks and Spencer***, merely because it appears fair, or merely because one considers the parties would have agreed if it had been suggested to them.

(5) The term must be "*necessary*" to give "*business efficacy to the contract*". "*Necessary*" meant, applying Lord Simon and Lord Sumption and Lord Neuberger, "*without the term the contract would lack commercial or practical coherence".*

(6) The consent had business efficacy. The outcome did not lack commercial or practical coherence.

(7) That, applying Lord Hodge, the court "*will exercise great restraint in implying terms into public documents which have criminal sanctions";* noted that the Court of Appeal had applied restraint in ***Govt of France v Kensington and Chelsea*** *(2017).*

Govt of France v RBKC

Facts: basement extension in Kensington Palace Gardens. Adjacent building owned by Govt of France. History included two listed building consents, "LB/08" with 16 conditions and "LB/10" however with only 2 conditions.

> "In my view, Consent LB/10 is clear and unambiguous on its face, particularly in respect of the conditions that were applied. The mere fact that the consent referred to "Amendments to [Consent LB/08]" is clearly insufficient to incorporate the conditions… from that consent… particularly as that would directly conflict with the face of Consent LB/10 which states that the "*full conditions"* are conditions 1 and 2 as set out on the face of that consent.
>
> With regard to the submission that the Consent LB/08 conditions were necessarily implied into the later consent, Holgate J did not have the advantage of Supreme Court judgments in *Trump …* I accept that, following *Trump*, it is clear that he went too far in saying… that conditions cannot be implied into a planning permission… However, the Supreme Court judges made clear that the court should exercise "*great restraint*" in implying conditions into public planning documents (Lord Hodge.. at [35]), and there are "*good reasons for a relatively cautious approach*" in doing so (Lord Carnwath.. At [66]). In this case, there is no basis for the contention that the conditions from Consent LB/08 were necessarily implied into Consent LB/10, especially as such implication would be inconsistent with the face of the latter…"

Interpretation of conditions Trump (1)

1) Planning condition void for uncertainty only if *"no sensible or ascertainable meaning*" (Hodge [27]); Carnwath "…*incompetent drafting should not prevent the court from giving the condition a sensible meaning if at all possible*" (at [55])
2) "*There is a modern tendency in the law to break down divisions in the rules on the interpretation of different kinds of document, both private and public, and to look for more general rules on how to ascertain the meaning of words*" (Hodge [34]);
3) Nature of document relevant *"… third parties may have an interest in a public document, such as a planning permission …, in contrast with many contracts. As a result, the shared knowledge of the applicant …and the drafter of the condition does not have the relevance to … interpretation that the shared knowledge of parties to a contract, in which there may be no third party interest, has. There is only limited scope for the use of extrinsic material in the interpretation of a public document, such as a planning permission …"* (ibid)
4) *"When the court is concerned with the interpretation of words in a condition in a public document …, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense."* (Hodge [34])

Interpretation of conditions Trump (2)

5) Extrinsic material may be looked to where incorporated by reference or there is ambiguity (ibid)
6) Courts sought in earlier cases to enunciate list of principles on interpretation of conditions "… *I see dangers in an approach which may lead to the impression that there is a special set of rules applying to planning conditions, as compared to other legal documents, or that the process is one of great complexity … most of the judgments cited in support of his nine principles, many at first instance, turned on their own facts, and cannot be relied on as establishing any more general rules*" (Carnwath at [52] and [53]).
7) "… *I do not think it is right to regard the process of interpreting a planning permission as differing materially from that appropriate to other legal documents ... One aspect of that context is that a planning permission is a public document which may be relied on by parties unrelated to those originally involved*" (Carnwath at [66]).
8) *"It must… be borne in mind that planning conditions may be used to support criminal proceedings. Those are good reasons for a relatively cautious approach… But such considerations arise from the legal framework within which planning permissions are granted. They do not require the adoption of a completely different approach to their interpretation*" (ibid).

Interpretation of conditions Dunnett (1)

Dunnett v SSCLG [2016] EWHC 534 (Admin) (also went on appeal [2017] EWCA Civ 192):

- Patterson J: "*In construing conditions on a planning permission, although the Supreme Court were clear that the situation before them in* ***Trump****… was dealing with a different statutory regime, the judgments of Lord Hodge and Lord Carnwath are of assistance in defining where the law on planning conditions is now. They have moved the law on in relation to implied conditions and may have reformulated some of the previously accepted principles, but otherwise, in my judgment, the situation in construing planning conditions is not dissimilar to how it was."*

Interpretation of conditions Dunnett (2)

The key case remains that of *Dunnett,* where in the High Court Patterson J set out a list of principles from ***Trump***:

(i) Planning conditions need to be construed in the context of the planning permission as a whole;
(ii) Planning conditions should be construed in a common sense way so that the court should give a condition a sensible meaning if at all possible;
(iii) Consistent with that approach a condition should not be construed narrowly or strictly;
(iv) There is no reason to exclude an implied condition but, in considering the principle of implication, it has to be remembered that a planning permission (and its conditions) is a "public document which may be relied upon by parties unrelated to those originally involved";
(v) The fact that breach of a planning conditions may be used to support criminal proceedings means that "a relatively cautious approach" should be taken;
(vi) A planning condition is to be construed objectively and not by what parties may or may not have intended at the time but by what a reasonable reader construing the condition in the context of the planning permission as a whole would understand;
(vii) A condition should be clearly and expressly imposed;
(viii) A planning condition is to be construed in conjunction with the reason for its imposition so that its purpose and meaning can be properly understood;
(ix) The process of interpreting a planning condition, as for a planning permission, does not differ materially from that appropriate to other legal documents.

Interpretation of conditions Dunnett (3)

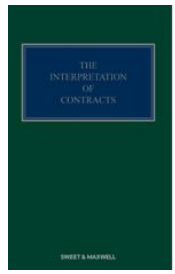
- Lord Carnwath criticised earlier judgments for setting out lists, warning of "*dangers in an approach which may lead to the impression that there is a special set of rules applying to planning conditions, as compared to other legal documents*".

  (1) Lists can be useful but must be applied with caution.

  (2) Planning practitioners need to be aware of how contractual terms are being interpreted.

  (3) "Dangers" in a special set of rules, but…. there is a specialised language, a public role and criminal liabilities.

  (4) Cases and conditions are going to turn on their own contexts.



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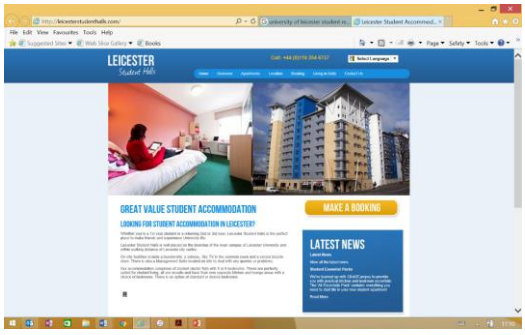
Practical example (1)
Eatherley v LB of Camden (Cranston J)

- Facts: LDC for basement; no lightwells, within footprint of 2 storey mid terrace dwelling house. Issue: proper interpretation of GPDO consent for "enlargement, improvement or other alteration of a dwellinghouse"

> "First, it was put to me that the question in interpreting a permission in the GPDO was how a reasonable reader would understand it, regard being had to any conditions and reasons for them. That was the approach to interpreting planning conditions adopted in *Trump Int'l….* And the authorities culminating in it, such as… *R v Ashford BC ex p Shepway DC….Carter Commercial Developments…"*
>
> Although in practice it may not matter, I do not accept this as the governing principle. These cases concerned permissions granted by planning authorities, not those laid down in a statutory instrument. It seems to me that in interpreting a permission in the GPDO one applies the ordinary rules of statutory interpretation. The words, their context and the statutory purpose are relevant to that task.."

Practical example (2)
Univ of Leicester

- Facts: whether an ambiguously worded consent permitted a University's halls of residence to also be used lawfully for conference guests.
- Extrinsic material beyond application (planning officer's report, minutes of committee meetings, correspondence, travel plan) made clear this was intention; could this be considered?



Interpretation of conditions Univ of Leicester (2)

- SSCLG argued for a two part test:
  - Stage 1: extrinsic evidence may only be referred to when is an ambiguity;
  - Stage 2: that evidence is then limited by necessity to prevent floodgates/public purse in planning consents.
  - Also: an implicit hierarchy. In this case, the application form resolved the limited ambiguity, so not necessary to go beyond application, which resolved the "*lack of clarity".*
- Court noted was no express reference to the test of necessity in ***Trump.***

Interpretation of conditions Univ of Leicester (3)

- Court rejected argument both on the facts (holding it was necessary to go further than the application form in this case in any event) and on law:

  "*I am not in fact persuaded that the authorities, in particular* ***Trump*** *and* ***Wood****… support his formulation of the second stage of the test. The authorities suggest that when there is an ambiguity, it is permissible to look at the extrinsic evidence, including but not limited to the application form, and indeed including but not limited to documentary evidence. All relevant extrinsic material may be referred to, depending on the circumstances of the individual case"*

Practical example (3)
Menston Action Group v Bradford

- Mr Justice Dove considered two inter-linked JRs, which concerned (in part) the proper interpretation of (primarily) Condition 5:

"*The development permitted by this planning permission shall be carried out in accordance with the approved Flood Risk Assessment (FRA) dated 28th March 2014 revision C and associated drawing Schematic for External Works (no.6984 Fig 5 RevA with the following mitigation measures detailed within the FRA:*

a) Limiting the surface water run-off generated by the up to and including 1 in 100 year critical storm so that it will not exceed the run0off from the undeveloped site or increase the risk of flooding off-site. Run off rates should be finalised with the lead local flood authority;

b) Finished floor levels of new dwellings are set no lower than 148.3 metres AOD; and

c) Provision of Flood Storage Areas and swales

The mitigation measures shall be fully implemented prior to occupation of any dwelling comprised in the development hereby approved and shall be maintained for the life time of the development.

Reason: To prevent flooding by ensuring the satisfactory storage/disposal of surface water from the site; and to reduce the risk of flooding to the proposed development and future occupants; and to provide maintenance access to the culvert and prevent compromise of the culvert structure.

Interpretation of conditions
Menston Action Group v Bradford (2)

- Dove J: held he would "*start*" the process of interpreting the condition "*on the basis of what a reasonable reader would understand them to mean, reading the condition in context and bearing in mind that it is a public document*"
- Read "*the condition as a whole*"
- Rejected C's case that "*shall be carried out… in accordance with the Flood Risk Assessment… and Schematic for External Works drawing*" = identical measures
- Held, construed as a whole, condition was clear that runoff rates were to be agreed; meant there may be alterations to those values in the FDA. Held the *"words of the condition…contemplate the alteration of specific values within the FDA, albeit in the context of the framework of the drainage principles set out within that document"*
- This was supported by other conditions, which required further details and calculations in relation to the proposals for surface water drainage; those fine details would impact the detailed design
- Held that a "*schematic*" drawing contemplated further details to be provided. it was *"a drawing which indicates the principles of how… satisfactory surface water drainage… is to be accomplished, but it is not intended to be a detailed engineering drawing for the purpose of actually implementing the consent"*

Practical example (4)
R(XPL Ltd) v Harlow Council

- Facts: Enforcement notice served on bus company for substantial noise caused by the companying running the buses' engines for c.4-10 minutes before the vehicles moved to make them safe
- Condition: "*No repairs or maintenance of vehicles or other industrial or commercial activities (other than the parking of coaches and other vehicles associated with the Coach Park/Depot hereby permitted) shall take place at the site except between the hours of 8.00am and 6.00pm on Mondays to Fridays, 8.00am to 1.00pm on Saturdays, and not at any time on Sundays or public holidays, unless otherwise agreed in writing with the Local Planning Authority*"

Interpretation of conditions
R(XPL Ltd) v Harlow Council (2)

  - Was running the engines "parking and de-parking" and permitted?
  - Was construing the condition restrictively so that the bus depot could not function "frustrating the use" approved by the planning permission?

- Court of Appeal upheld the Deputy Judge (Mr Rhodri Price Lewis QC's) view that condition prohibited the running of the engines (a "*commercial activity*") outside of the permitted hours:

  "*it is not the Court's task to assist XPL in overcoming the commercial predicament it says it faces…*"

The implications of *Trump*

- There are changes:

1) On interpretation, ***Trump*** had not had a strong influence.
2) On implication, opened up possibility of implication of terms into conditions, but:

- There have not been a flood of cases.
- Court is taking a restrictive approach – consistent with other caselaw on implication of terms.

Landmark CHAMBERS