In the matter of the Aarhus Convention Compliance Committee

ELIZABETH CONDRON

Communicant

- and -

UNITED KINGDOM

Party concerned

RESPONSE TO
SUBMISSIONS OF THE COMMUNICANT

Note: This document has been prepared by Miller Argent (South Wales) Limited to assist the UNECE Aarhus Convention Compliance Committee ("**Compliance Committee**") and the Party concerned following the communication received from Paul Stookes of Richard Buxton Environmental & Public Law dated 11 June 2009 ("**Communication**").

Additional documents referred to in this response are referenced by page numbers prefaced MA e.g. [MA1]

This response follows the order of the paragraph numbers and abbreviations used by the Communicant in her submission save that the expression "mining company" is substituted by "Miller Argent" as mining company does not accurately encompass the nature of the operations undertaken by Miller Argent (South Wales) Limited.

A INTRODUCTION

1.1 This response is submitted on behalf of Miller Argent (South Wales) Limited ("**Miller Argent**") in response to the Communication submitted on behalf of the Communicant.

1.2 It is not accepted that the UK is in breach of its obligations under Article 3(8) of the Aarhus Convention 1998. In particular it is denied that the Communicant has been penalised, persecuted or harassed in pursuing her right of access to justice. To the contrary the Communicant has been provided with significant assistance by the United Kingdom as she repeatedly asserted her right of access to justice to challenge decisions relating to the Ffos-y-fran land reclamation scheme[1].

[1] The Communicant persistently refers to the operations at Ffos-y-fran as an open cast mine scheme whereas the proper description and true nature of the works is a land reclamation scheme.

2.1 Pursuant to Article 15, the Compliance Committee has published a manual[2] ("**Manual**") setting out the procedure which it will follow in considering communications from members of the public such as the Communication. At several junctures in the Manual, the Compliance Committee emphasises the importance of prospective communicants ensuring that they have exhausted domestic remedies before making a communication under Article 15:

"In considering any communication from the public, the Compliance Committee will take into account the extent to which any domestic remedy (i.e. review or appeals process) was available to the person making the communication, except where such a remedy would have been unreasonably prolonged or inadequate. Before making a communication to the Committee, the member of the public should consider whether the problem could be resolved by using such appeals mechanisms."[3]

2.2 The logic behind this is that if the domestic courts are able to remedy the object of an individual's complaint, the State Party in question will not be in breach of the Convention[4]. The Communicant has been able to pursue her right of access to justice and has sought to rely on domestic remedies available.

2.3 It is not accepted that any proceedings taken by the Communicant are unfair and inequitable and there has therefore been no breach of Article 9(4) of the Convention.

2.4 Miller Argent would submit that if there is any inequality of arms in Environmental Justice it lies against "interested parties" such as itself who are unable to recover the costs of repeatedly defending unsuccessful legal challenges.

[2] This can be downloaded from the Compliance Committee's website at: http://www.unece.org/env/pp/compliance/manualv8.doc

[3] 'Key Points' section at p.29 of the Manual

[4] The need to exhaust domestic remedies before bringing a complaint under an international convention is a familiar doctrine in international law, and particularly under the European Convention on Human Rights (see Art. 26).

Factual background

3.1 The Ffos-y-fran land reclamation scheme ("**Scheme**") is in effect the third phase of the East Merthyr land reclamation scheme ("**EMRS**") which was granted planning permission in 1988 and was borne out of the terrible Aberfan disaster in 1966[5].

3.2 The land reclamation scheme has been considered by all relevant democratically elected authorities as essential in the public interest and can only be carried out by incorporating the winning of coal by opencast methods. The scheme has been promoted by the Council (a democratically elected body representing the community as a whole) and features in its past, current and draft local development plans for the area, adopted or to be adopted in accordance with statutory procedures or public consultation and involvement.

3.3 Miller Argent was granted planning permission ("**Permission**") for the Scheme at Ffos-y-fran on 11 April 2005 by the National Assembly for Wales ("**Assembly**"). The Scheme comprises the third and final phase of the EMRS, which has been included in development plan policies for the area since the 1980s. Before the Council was able to determine the application, it was 'called in' for determination by the Assembly. Following that call in, the Council resolved to grant planning permission for the Scheme. A two week public inquiry into the Scheme was subsequently held in 2004. At the public inquiry, numerous objectors, both individually and by way of informal associations, spoke against the development.

3.4 The Inspector who conducted the inquiry concluded that the Scheme was in accordance with the development plan for the area and recommended in his report to the Assembly that planning permission be granted. The Assembly's Head of Planning also submitted a report to the relevant committee of the Assembly recommending that the Permission be granted. These recommendations were followed by the Assembly and planning permission for the Scheme was granted.

[5] On the 21 October 1966, 144 people, 116 of them children, were killed when a tip of coal waste slid onto the village of Aberfan near to Merthyr Tydfil in South Wales. Much of the tip material was subsequently moved to the land at Ffos-y-fran and forms part of the works to be reclaimed.

3.5 Miller Argent's planning application was accompanied by a comprehensive Environmental Statement and the subsequent grant of the Permission was in full compliance with the requirements of Directive 85/337/EEC as transposed into English Law by the Town and Country Planning (Environmental Impact Assessment) (England) Regulations 1999.

3.6 The Scheme is now operational and Miller Argent has invested some £95 million in it, creating 200 full-time jobs in an area of high unemployment. Approximately £200 million worth of contracts are committed to the Scheme. The Scheme thus provides a vital contribution to the local economy. Any attempt to prevent or frustrate work on the site will threaten that contribution

3.7 The Scheme has been the subject of public inquiries in respect of both planning and compulsory purchase orders. The opportunities for the public to engage with the decision making process in relation to the Scheme have been considerable and no party has been deprived of their right to participate in the process.

3.8 The Communicant incorrectly summarises the written evidence to the Select Committee on Welsh Affairs 2007-2008 which actually stated:

"This scheme represents the largest authorised coal mining reserve in South Wales"[6].

3.9 The location map [1] was withdrawn by the Communicant's solicitor at a hearing in the High Court in April 2009 because it does not accurately reflect the position of the Communicant's home in relation to the scheme[7]. The Communicant has consistently misrepresented the proximity of her home to the scheme (it is actually 713m from the closest boundary of the scheme and 3.5km from the disposal point which has been the subject of the most recent proceedings).

[6] See item 1.2 page 80 and item 10.5 page 89 of the Official Report of the House of Commons Welsh Affairs Committee: Energy in Wales: First Report of Session 2007-08 *"This company (Miller Argent (South Wales) Limited) was specifically set up to carry out the Ffos-y-fran Land Reclamation Scheme in Merthyr Tydfil South Wales. This scheme represents the largest authorised coal mining reserve in South Wales."* [MA1]

[7] The Commincant's home is not situated 500m from the Scheme - at a hearing in the High Court the Communicant's solicitor accepted that the plan exhibited at page 1 of the Communicant's bundle incorrectly identified the Communicant's home which is actually more than 700m away from the land reclamation site

4.1 The Communicant's legal challenge CO/1272/2008 alleging a failure to take enforcement action for breach of condition was refused permission to proceed by the court as being premature because there had been no breach of condition. Miller Argent has no and never had an intention to excavate right up to the site boundary for the recovery of coal in breach of condition. It is for this reason that no operations have occurred in breach of condition, not because of the legal action brought by the Communicant, which was in any event rejected by the Court.

4.2 The allegation that the Council has failed to comply with the environmental impact assessment (EIA) regime by granting permission for the processing, washing and transportation of up to 1.5 million tonnes of coal at the Cwmbargoed Disposal Point was rejected by Mr Justice Collins on 9 March 2009. The Communicant renewed her application for judicial review and sought an oral hearing which took place on 30 April and 1 May 2009 at which Mr Justice Beatson also rejected the application for permission to bring judicial review.

4.3 Despite the decisions of two High Court judges with particular experience and standing in this area of administrative law, that there was no reasonable prospect of a claim succeeding, the Communicant has exercised her right to renew the permission application to the Court of Appeal, and a hearing to determine whether permission to bring judicial review proceedings should be granted took place on 18 January 2010 when judgment was reserved.

4.4 It can be seen that far from being deprived of access to environmental justice the Communicant has embarked on no less than five separate sets of proceedings[8] in the last four years, has pursued two of these cases to the Court of Appeal, sought leave to pursue one of the cases to the House of Lords, and is also petitioning the European Parliament about one of the cases.

5.1 The Communicant alleges that she and many other local residents are experiencing significant *"noise and dust pollution"* from the land reclamation scheme. In separate correspondence the Communicant's solicitors have alleged that a nuisance has been caused, but neither a claim in statutory or private nuisance has been received by Miller Argent or their solicitors.

[8] See history of legal challenges in the Appendix to these submissions

5.2 Miller Argent has procedures in place to respond to complaints made to the Council or to it in connection with the operations undertaken in connection with the scheme.

B DETAILS OF ARTICLE 3(8) BREACH

6.1 The Communicant asserts that one of her

"primary concerns was the potential for the processing operations to increase the annual coal extraction production from 0.75-1 million tonnes of coal per annum to 1.5 million tonnes per annum. Such an increase in production was likely to cause even greater pollution problems of noise and dust depositions in the localities".

6.2 The Communicant attempted to make a similar assertion in the High Court to which the judge, Mr Justice Beatson, having read the evidence of the Council, Caerphilly CBC and Miller Argent responded comprehensively at paragraphs 45 and 46 of his judgment[9] and said in relation to the Ffos-y-fran site and the disposal point:

".....there is no evidence whatsoever before the court that granting this or the earlier applications would increase output from Ffos-y-fran.

..the sites are distinct in function and purpose, and history, and there is no arguable logical connection between them. Although material extracted at Ffos-y-fran is taken to the disposal point, so is material from other mines in South Wales."

the Communicant's complaint is therefore brought on an erroneous basis.

1 Pressure on local residents to back down from proceedings

7.1 It is contrary to the principles of natural justice for a defendant not to know the identity of the party bringing proceedings against it. As a consequence it was entirely reasonable and proper for the Council to seek details of the claimants who were intending to bring proceedings against it.

[9] judgment dated 1 May 2009 [MA2]

7.2 The Council was perfectly justified in seeking the names of the individuals behind the residents' group which was originally intending to bring the EIA challenge. Article 3(8) of the Convention is specifically without prejudice to domestic courts' ability to make reasonable awards of costs. Had the residents' group brought the litigation, as an unincorporated association its members would be jointly and severally liable to pay the Council's costs in the event that the claim failed. The Council was therefore plainly entitled to inquiry of the identity of those members.

7.3. The Council were entirely correct to state that it was insufficient to write on behalf of a "*residents' group*" of indeterminate nature. A residents' group of uncertain constitution and membership cannot be said to be a natural legal person within the meaning of Article 2. Moreover for a member of the public to be "concerned" they have to demonstrate how they are affected or likely to be affected by the environmental decision making in question. A notional residents' group with no defined members cannot demonstrate how it is affected by the decision making.

8. Even if paragraph. 8 of the Communication is correct in asserting that the Council wrongly stated the law as to the standing of unincorporated associations in judicial review proceedings, this cannot on any reasonable view have amounted to the group being "penalised, persecuted or harassed" within the meaning of Article 3(8). Plainly the Convention does not prevent parties to a litigious dispute setting out what they genuinely believe the legal position to be; it is then open to either party to take legal advice to consider whether or not that assertion is correct. In any event, the Council's correspondence did not ultimately prevent a claim being brought by the Communicant so it is difficult to see how the Council's correspondence could be said to have prevented access to justice.

9. As well as its obligations under the Aarhus Convention the Council also has legal obligations to its constituents which require it to resist or defend unmeritorious legal proceedings brought against the Council. It is a basic principle of the English legal system that an unsuccessful claimant in legal proceedings will normally bear the successful party's legal costs. The English legal system does, however, make a concession in the case of claims brought by individuals who have obtained a certificate of public funding. In such cases a legally-aided claimant will not normally be required to pay the successful party's costs without an order from the Court. It is instructive that the Communicant is such an individual, and it is not understood why she can be said to have been deprived of environmental justice where her costs in bringing claims have been met by the UK Government and the costs of the successful parties in the various unsuccessful claims that she has brought cannot be enforced against her without an order of the court (which would normally only be made where the Communicant's financial circumstances had changed).

10. It is denied that the Council placed undue pressure on local residents not to proceed with a claim. Furthermore the rejection of the Communicant's claim by Mr Justice Collins and Mr Justice Beatson, who both held that the Communicant's assertions were unarguable, demonstrates that the Council had a robust defence to the allegations made against it.

2 Representations against public funding and no order for costs

11 - 14 Miller Argent has no detailed information as to the financial standing of the Communicant although, so far as it is aware, the fact that the Communicant is said to be disabled has not previously been raised by the Communicant or her solicitors in any previous proceedings.

15.1 As for the Council's application for costs following the refusal of permission in the EIA challenge, Article 3(8) of the Convention is specifically without prejudice to domestic courts' ability to make reasonable awards of costs. There can therefore be no objection to a public authority making a bona fide application for costs following its successful defence of a judicial review claim. It remains in the discretion of the Court to consider whether or not the amount claimed is unreasonable, and the unsuccessful claimant is of course entitled to make submissions on this. In the event, the Court ordered that the Communicant pay (a) the costs of the Council and Caerphilly CBC preparing the Acknowledgement of Service (b) the further costs incurred as a result of the Communicant's failure to file her supporting documents until after the Acknowledgement of Service was filed, and (c) the costs incurred in considering the Communicant's reply to the Acknowledgement of Service and a response to the subsequent argument that time had not expired for the challenge.

15.2 It is correct that the Council, Miller Argent and Caerphilly CBC made representations to the Legal Services Commission being the administrative body

regulating public funding. The public funding regime makes specific provision for such representations to be made.[10] Moreover the Communicant's solicitor expressly referred to the making of such representation in their letter to the Council dated 10 October 2008 (copied to Caerphilly CBC and Miller Argent's solicitors) stating:

"We confirm that we have applied for public funding in the event that the pre-action protocol responses do not satisfy us that the Councils have acted lawfully. We anticipate that you will wish to make representations on any application for legal aid and the contact details are: Mr Hugh Jarrett, Special Cases Unit, LSC, Cardiff"

15.3 The purpose of the Aarhus Convention is not to grant any party "carte blanche" to bring proceedings regardless of the merits of the claim: in the absence of representations by the Council, Caerphilly CBC and Miller Argent those responsible for allocating public funding would be unable to reach a balanced view as to the merits or otherwise of providing public funding.

15.4 The High Court direction that submissions on costs should be filed was an entirely normal order following the handing down of judgment.

15.5. The submissions by the Council on costs were entirely proper particularly bearing in mind the considerable expense to which the Council (and interested party) had been put in defending proceedings which had been pursued by the Communicant in a highly irregular manner that did not comply with the requirements of the Civil Procedure Rules (CPR) and which two High Court judges had determined were unmeritorious.

16.1 The only basis upon which the Council could have agreed to the disposal of the claim in a summary fashion would have been in circumstances where the Council agreed with the Communicant that its decision making process had been unlawful. As the Council did not accept that its decision had been made unlawfully it could not properly consent to the proceedings being disposed of on a summary basis.

[10] Funding Code Procedure C41 [MA3]

16.2. It is clearly no defence to a claim for costs to say that those costs would have been avoided if the successful party, instead of successfully defending the proceedings, had admitted liability at an earlier stage.

16.3 There is no basis in the Convention for the proposition that any environmental challenge, no matter how unmeritorious, by a person of limited means should be entitled to legal aid. The LSC therefore remains able to refuse public funding for unmeritorious challenges. It follows in principle that there can be no objection to a local planning authority against whom a claim is brought, which it genuinely believes is wholly unmeritorious, being able to challenge the grant of funding to the claimant by way of judicial review.

16.4 Given the circumstances stated above, that is to say that a senior High Court judge had already ruled that the proceedings had no reasonable prospect of success before the LSC granted funding for them, it was entirely proper for the Council to seek to understand the decision making process adopted by the LSC in agreeing to provide funding.

17 The evidence does not suggest that the Council's judicial review challenge was an attempt to penalise, persecute or harass here. It appears to have been genuinely motivated by the belief that the LSC was acting outside of its powers. However, it is understood that the Council's application for permission to apply for judicial review was unsuccessful and that the claim has subsequently been discontinued.

3 Direct attack on the Communicant to undermine legal challenge

18. The Communicant appears to be of the view that Miller Argent is in a position to influence or direct the press. To the contrary, the press in South Wales is a free press. Neither the Council nor the UK Government is in a position to control what is reported in the press. It can be seen from the examples of the coverage exhibited at [MA4] that the positions of all parties have been reflected in the press, and to suggest that the press is partisan or representative of a single interest is manifestly incorrect. There is no reason to conclude that the Council has used the press to penalise, persecute or harass the Communicant.

19. The Ffos-y-fran land reclamation scheme is of enormous financial and environmental importance to South Wales and it is wholly unreasonable to

suggest that the subject matter of legal proceedings cannot be discussed whilst they are continuing.

4 High Court approach to location of legal proceedings

20.1 The UK has devolved the Administrative Court to regional centres with the expectation that those regional courts will be responsible for dealing with proceedings relating to administrative decisions made within their region.

20.2 The Communicant has sought to argue, both in the current proceedings, and in earlier proceedings (see [MA5]) that her case would be prejudiced by being heard in the regional court for the area in which her claim arises.

20.3 Paras. 3.1-3.2 of Practice Direction 54 state, in relevant part:

> *"3.1 A claim for judicial review may be brought in the Administrative Court in Wales where the claim or any remedy sought involves...*
>
> *(2) an issue concerning the National Assembly for Wales, the Welsh executive, or any Welsh public body (including a Welsh local authority) (whether or not it involves a devolution issue).*
>
> *3.2 Such claims may also be brought in the Administrative Court at the Royal Courts of Justice."*

20.4 The Communicant chose to bring her claim in the Administrative Court at the Royal Court of Justice. However, in giving judgment on her previous judicial review challenge to the Permission, the Court of Appeal emphasised:

> "[T]*he present case cried out to be heard in Wales both at first instance and on appeal, and it is a matter of considerable regret that efforts were not made to have it listed for hearing accordingly*" (per Richards LJ at para. 110) **[MA5]**
>
> "*If ever there were a case to be heard in Wales, this was it*" (per Wall LJ at para. 131)

20.5 However, Mr Justice Beatson was very clear on the point of venue and was highly critical of the absence of any substantial evidence to support an argument that the Communicant was prejudiced by the venue[11].

20.6 The same judges are eligible to sit in the Administrative Court in Cardiff as are eligible to sit in the Administrative Court in London. The Communicant has always been happy for her case to be heard before a High Court judge in London, and so her view that actual or apparent bias arises as soon as the High Court judge allocated to the case crosses the border into Wales is irrational.

21. It is notable that there was no significant public or media interest in the High Court hearing that took place on 30 April and 1 May 2009. In Miller Argent's view the Communicant overstates matters in her assertion that there was "*a high level of tension in the local community*".

C CONCLUSIONS

22.1 The Communicant's submissions do not show how the Communicant's environmental rights have been restricted or fettered. To the contrary, the Communication confirms that the Communicant has been afforded every reasonable opportunity to secure access to environmental justice. In fact public funding provided in the UK has afforded her the opportunity to appoint solicitors highly experienced in the fields of environmental and public law and has enabled her to appoint one of the most senior and experienced Queen's Counsel from the planning and environmental bar to represent her in court.

22.2 In the circumstances it would appear that the Communicant's main complaint is that notwithstanding the grant of funding to give her access to justice her claims have been unsuccessful.

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[11] Extract from judgment **[MA2]** *"60 The high point of the evidence before me is what was said in 2005. Reliance is also placed on an article in a local paper which is said to be constructed from a press release issued by the interested party after Collins J refused permission. In effect this argument is that regional courts -- and I observe that in Wales there might be some sensitivity about being described as a region -- should not hear matters contentious in that region. I am surprised that Mr Stookes felt able to pursue this submission in the absence of evidence. The submission that cases should be heard at a location remote from the places and events with which they are concerned is to my mind an extraordinary one. It is inconsistent with the general approach favouring local justice."*
Extract from judgment **[MA2]** *"62 If a claimant wishes to proceed elsewhere there may be good reason for doing so but a generalised allegation of bias or unparticularised concern unbacked by any evidence is not enough and is not a proper basis for such an application."*

23. It is noted that the quote from the High Court proceedings (*R (Condron) v National Assembly for Wales* [2005] EWHC 3316 (Admin) is from the judge whose ruling was overturned by the Court of Appeal.

24. The argument about environmental justice in its broader sense (environmental equity) is unsubstantiated. The location of the Ffos-y-fran land reclamation scheme is not dictated by the wealth of the surrounding community but by the location of the land to be reclaimed. The essence of the scheme is to reclaim the land to productive use, removing the historic dangers and dereliction arising from the historic use of the site, all at no cost to the public purse, and for the benefit of the community as a whole. The scheme has been supported by the democratically elected local authority for the area in its statutory development plans and through resolving to support the application for planning permission throughout the public inquiry process into that application. The local authority continues to support the scheme.

25. In all the circumstances the committee is asked to conclude that:

    1) there was no breach of Article 3(8) (as alleged) in that no real financial or other pressure was brought to bear by the Council or Miller Argent;

    2) that there was no personal attack on the Communicant and that the local media presented a broadly balanced picture of the proceedings; and

    3) in the absence of any evidence from the Communicant that she had actually been intimidated, or would be intimidated, as a consequence of the transfer of proceedings from London to Cardiff the High Court was entirely proper to require the proceedings to be conducted in the region to which the complaint related.

26. The Communicant has not demonstrated that there is any issue of general public importance arising out of the matters complained of, to the contrary the Communicant has simply sought to use the committee as a further forum to ventilate arguments that were unsuccessful in the UK court system.

27. Miller Argent trusts that these submissions are of assistance but if further information or clarification is required please do not hesitate to contact their solicitors whose details are set out below.

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Ref: CGB/68560/120004

Appendix

History of Legal Challenges by the Communicant

a. In 2005 the Communicant brought a legal challenge to the Permission for the scheme alleging substantive deficiencies and procedural unfairness. The substantive challenge on planning grounds was dismissed by both the High Court and by the Court of Appeal: see ***Condron v. National Assembly for Wales*** [2005] EWHC Civ 1573. The narrow procedural unfairness point succeeded in the High Court but was rejected by the Court of Appeal, which upheld the permission. The House of Lords refused to grant the Communicant leave to appeal. The Communicant received public funding to bring this legal challenge.

b. On 29 October 2007 the Communicant wrote a pre-action letter threatening to bring judicial review proceedings against the Assembly for failing to determine the Claimant's request that the permission for the scheme should be revoked. The claim has not been pursued.

c. On 4 January 2008 a further pre-action protocol letter was sent to the Assembly again threatening judicial proceedings, this time in connection with the Assembly's letter of 6 December which set out in detail its reasons for rejecting the Claimant's request that the permission for the scheme should be revoked. An application for further public funding was made to the LSC to fund those proceedings. It is understood that the LSC rejected the Communicant's application on the basis that it was "technically deficient". So far as Miller Argent is aware, the application was not renewed, neither was a judicial review claim form issued in respect of the threatened proceedings against the Assembly.

d. On 26 February 2008 a claim was made for judicial review of the Council's decision on 18 December 2007 not to take enforcement action against Miller Argent *"in relation to its proposal to excavate land right up to the site boundary"*. The application which was made by the Communicant to LSC for public funding to pursue this further challenge was refused. Notwithstanding the absence of public funding the Communicant pursued her claim. On 20 March 2008 the claim for judicial review was put before Mr Justice Sullivan who refused permission.

e. On 29 September 2008 the Communicant sent a pre-action letter to the Council and to Caerphilly CBC seeking to challenge their decisions to grant planning permission for the refurbishment of the Cwmbargoed Disposal Point. On 9 March permission to pursue the claim was refused by Mr Justice Collins. At a renewal hearing on 30 April and 1 May permission to pursue the claim was also refused by Mr Justice Beatson. Permission to appeal the decision was refused by Mr Justice Beatson. The Communicant has now applied to the Court of Appeal for permission to appeal against the refusal of permission to appeal. A hearing took place to consider the question of permission in January 2010 at which judgment was reserved.

MA1

House of Commons
Welsh Affairs Committee

Energy in Wales: follow-up inquiry

First Report of Session 2007–08

Report, together with formal minutes, oral and written evidence

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The Welsh Affairs Committee

The Welsh Affairs Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Office of the Secretary of State for Wales (including relations with the National Assembly for Wales).

Current membership

Dr Hywel Francis MP (*Labour, Aberavon*) (Chairman)
Mr Stephen Crabb MP *(Conservative, Preseli Pembrokeshire)*
Mr David T.C. Davies MP *(Conservative, Monmouth)*
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Mr Hywel Williams MP (*Plaid Cymru, Caernarfon*)

Jessica Morden MP was a Member of the Committee during the inquiry.

Powers

The committee is one of the Departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the Internet via www.parliament.uk.

Publications

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Committee staff

The current staff of the Committee is Nick Wright (Clerk), Llinos Madeley (Committee Specialist), Christine Randall (Committee Assistant), Annabel Goddard (Secretary), Jim Lawford (Chief Office Clerk) and Rebecca Jones (Media Officer).

Contacts

All correspondence should be addressed to the Clerk of the Welsh Affairs Committee, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 6189 and the Committee's email address is welshcom@parliament.uk.

South Wales has a viable coal resource used by existing power and steel plants.

Deep and short sea port facilities allow companies to balance the supply equation.

Support of indigenous surface and underground coal production minimises the exposure to international factors restricting the supply of imported fuels.

Government and Assembly support has helped to maintain the coal mining sector with the potential to exploit indigenous coal reserves in South Wales.

Recommendations

Due to EU dictates it is difficult for the Welsh Assembly to get involved in any direct subsidy scheme but it is hoped this will continue from central government and the EU.

Over recent years mine closures have decimated communities where generations of families would work "down the pit". However the ageing population of the remaining workforce is creating a dearth of people with the required skills to immediately take up employment underground and on the surface even in the modern environment mining now operates.

Training for all type of skills which can also be used in alternate industries needs to be addressed in centres linked to the industry.

Detailed analysis of the logistics required to support the development of mining operations needs to be implemented with views on how this can be developed with minimal social disturbance.

Observations

On a broader note Wales can offer the environment for the development of alternate technologies due to geographical location and type of terrain.

Severn Barrage type developments are probably the ultimate but elevates debate to levels only seen by the nuclear lobby.

Wind power via the grid is expensive even without transmission losses taken into account but direct connection to a consumer synchronised with alternative power sources can be effective especially in outlying areas. Geothermal, solar and hydro parallel power sources could even result in carbon neutral generation zones.

Combined heat and power plants could be a reality alongside major industrial plants but would require heat transfer infrastructure which is not common to this country.

Lastly they all require financial incentive the same as main stream generation to secure a "lights on" guarantee for the future.

11 January 2007

Memorandum submitted by Miller Argent

1. Personal Introduction

1.1 My name is James Thomas Poyner; I am a director of a number of mining and associated companies within The Miller Group Limited.

1.2 I am also a director of "Miller Argent (South Wales) Limited" which is a Joint Venture Company between: The Miller Group Limited, Argent Group plc and Mr Bernard J Llewellyn. This company was specifically set up to carry out the Ffos-y-fran Land Reclamation Scheme in Merthyr Tydfil, South Wales. **This scheme represents the largest authorised coal mining reserve in South Wales.**

1.3 I have specific responsibility for all mining matters of The Miller Group Limited and together with my co-directors I have responsibility for the management of Miller Argent (South Wales) Limited.

1.4 I have over 40 years experience in the Building, Civil Engineering and Opencast Coal Mining Industries. My experience and expertise covers the planning, operation and management of large-scale building, civil engineering, opencast mining and land reclamation projects.

2. Company Introduction

2.1 Miller Argent (South Wales) Limited, (Miller Argent), is the General Partner company of the Ffos-y-fran Limited Partnership and is owned by the following three companies:

2.1.1 The Miller Group Limited; the UK's largest privately owned Housebuilding, Property Development and Construction business. The Miller Group has over 60 years experience in working large-scale land reclamation and opencast coal mining projects in the UK and overseas. The mining division of the Miller Group was the first company in the world to receive BSI Third Party accreditation to BS 5750 for the design, management and operation of opencast coal sites. The Miller Group has an annual turnover in excess of £1.2 billion and has net assets in excess of £250 million.

2.1.2 Argent Group PLC; a successful London based Property Development Company with unrivalled expertise in large-scale urban regeneration projects throughout the UK. Argent Group PLC has net assets in excess of £140 million and is a wholly owned subsidiary of British Telecom Pension Scheme, with net assets in excess of £25 billion; and

2.1.3 Cwmbargoed Mining Limited, a privately owned local company representing the interests of the Llewellyn family who have been involved in coal mining in South Wales for a hundred years.

2.2 The company Miller Argent has been specifically set up to work the Ffos-y-fran Land Reclamation Scheme. The partners of the company have been actively involved in this project since the time of the privatisation of British Coal and have already spent many millions of pounds in taking the project forward to where it is today.

2.3 The Ffos-y-fran Land Reclamation Scheme is in effect the finessing of the third phase of the East Merthyr Land Reclamation Scheme, which has been promoted by the local authority since its conception in 1983. The scheme provides for the reclamation of over 1,000 acres of acutely derelict and unsafe land. The reclamation scheme is paid for entirely by the recovery of the underlying coal, which is to be extracted by opencast methods. No monies will be used from the public purse.

2.4 Miller Argent (South Wales) Limited has BS EN ISO 9001:2000 accreditation for the design, management and operation of opencast mining sites.

3. Scope of Evidence

3.1 I have been requested to give evidence to the Welsh Affairs Select Committee on the subject of Energy in Wales in general and Opencast Coal in particular and I am pleased to have been given that opportunity.

3.2 The purpose of my evidence is to provide the Welsh Affairs Select Committee, and other interested parties, with a clear explanation of (i) the workings of the Opencast Coal Industry, (ii) the methodologies employed, and (iii) the industry view on the energy situation, in an attempt to assist in the general understanding of the contribution the Industry has and continues to make in terms of the UK plc's energy portfolio.

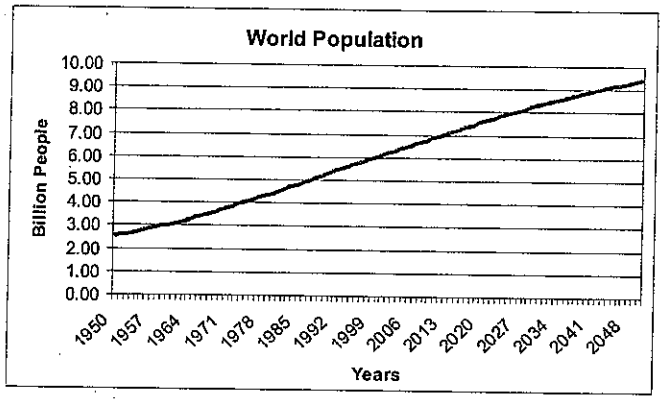
3.3 I have to stress from the outset that although I am obviously pro coal I am not against other sources of fuel from which electricity can be produced and industry can be serviced. In fact I wholeheartedly support a balanced, mixed energy portfolio.

3.4 I also do not deny the fact that global warming and climate change is a reality and that mankind must introduce new measures to combat the effects of the industrialised world.

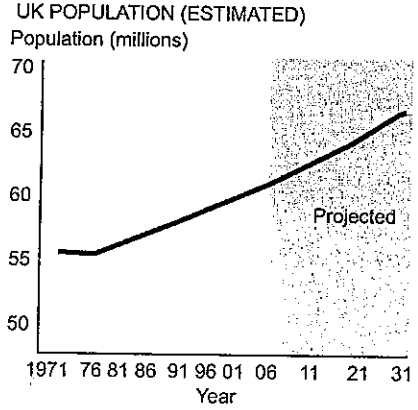
3.5 However, I am concerned that there is a great deal of misunderstanding in the public domain and that there is a danger that decisions germane to the production of electricity in the UK may be made that are not necessarily in the best interests of the people of the UK.

3.6 Climate change and global warming are linked and constitute a very complex and involved structure. It is far too easy to blame the burning of fossil fuels and to concentrate efforts on legislating against fossil fuels believing that that will solve the problem—it will not.

3.7 The prime reason for mankind's contribution to climate change is attributable to POPULTION INCREASE and consequential POVERTY. The world's population is expected to rise from the current 6.5 billion to 9.1 billion by 2050.



3.8 The population in the UK has broken the 60 million barrier and is expected to rise to c 68 million by 2030.



Source: Office for National Statistics

3.9 "Global economic growth, the primary driver of energy demand, is conservatively forecast to average 3.2% per annum between 2002 and 2030. Population growth will continue, with the world population expected to reach over 8 billion by 2030, from its current level of 6.4 billion.

Fossil fuels will continue to dominate energy consumption—accounting for around 85% of the increase in world primary energy demand over the next 30 years.

The forecast growth in demand will not alleviate the major concerns around energy poverty. In 2000 only one in six people worldwide had the access to energy required to provide the high living standards enjoyed in the developed world. These one billion people consumed over 50% of the world's energy supply, while the one billion poorest used only 4%.

Energy is essential to poverty alleviation. All fuel sources will be needed—but as the most abundant and affordable of all the fossil fuels, the role of coal will be vital.

The world currently relies on coal for 40% of its electricity and 66% of steel production is dependent on coal". [World Coal Institute]

3.10 According to the International Energy Agency (IEA), there are currently 1.6 billion people (25% of the global population) without any access to electricity. The IEA state that without global radical new policies, 1.4 billion people will still lack access to electricity in 30 years time.

4. The Opencast Coal Industry in the UK

4.1 Coal has been extracted by opencast methods as far back as the bronze age and many records exist of coal being recovered in early Roman times, when coal was extracted where it outcropped on hill sides.

4.2 The UK Opencast Coal Industry was formalized in 1942 when the then Ministry of Fuel and Power invited a select group of Civil Engineering Contractors to recover coal by opencast methods as a wartime expedient. In December 1942 responsibility for opencast work carried out by civil engineering contractors shifted to a newly formed Directorate of Opencast Coal Production (DOCP) within the Ministry of Works and Planning, acting as agent for the Ministry of Fuel and Power which purchased and disposed of output. The industry in the UK has continued ever since, making a very valuable and significant contribution to the UK economy.

4.3 The Coal Industry was nationalized in 1947 and the National Coal Board (NCB) was formed. The NCB was split into two working sections: Deep Mines and Opencast. The opencast was run by the NCB Opencast Executive.

4.4 A subtle and significant difference between Deep Mines and Opencast is that the NCB never mined a single ton of opencast coal themselves. The works were always put out to tender and were always mined by the successful Contractor to a site specific tender.

4.5 However the NCB, who later traded as British Coal (1987), retained the skills and responsibility for: (a) the national identification and assessment of coal reserves including exploration; (b) land management and acquisition; (c) planning applications; (d) project management of the extraction contracts; and (e) the sale and distribution of the coal.

4.6 Coals recovered by opencast were often blended with deep mined coal in order to improve the quality of the deep mined coal. It is possible to recover coal by opencast methods more cleanly than by deep mine methods.

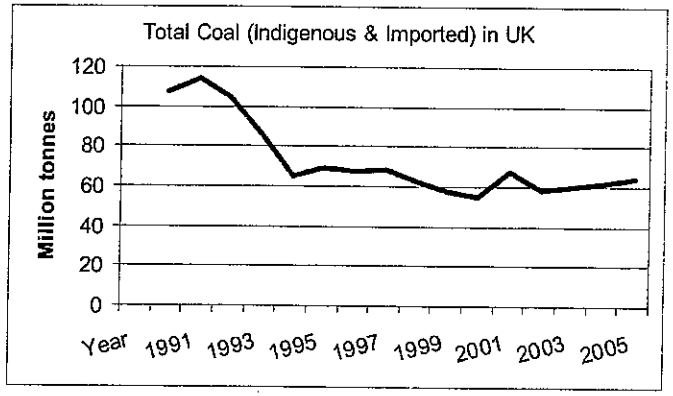
4.7 Opencast coal schemes were often used to bring about reclamation of brown field sites, often a legacy of previous deep mine or industrial activity.

4.8 British Coal was privatized at the end of 1994 and the industry became a number of smaller private entities. The three successor companies to British Coal acted independently and in fact in competition with each other. As a result the industry no longer had a national strategy and became fragmented and of reduced substance (in relative terms).

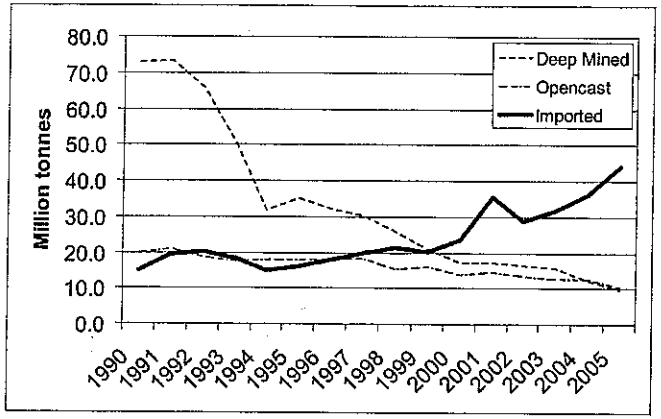
4.9 The successor companies to British Coal no longer let out opencast coaling contracts to other contractors, preferring to self mine. This has resulted in many firms exiting the industry as contractors, with only a few of them branching out into private opencast mining in their own right.

5. Graphs Relating to Coal Production and Supply in the UK

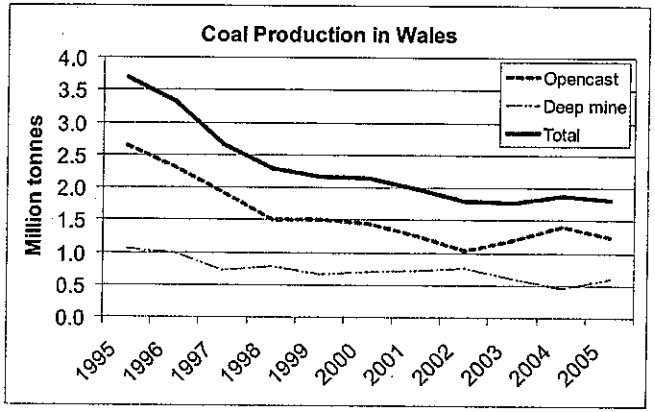
5.1 Total tonnage of coal consumed in the UK:



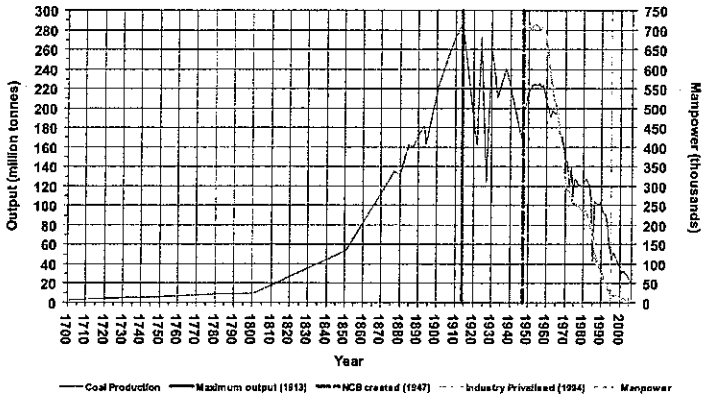
5.2 Graph showing relationship with UK deep mined, opencast and imported coal:



5.3 Graph showing coal production in Wales:



5.4 Coal Production in the UK from 1700 to 2006:



6. The Issues for the UK Opencast Coal Industry

6.1 In my opinion the issues facing the UK are actually very straight forward and are set around the Government's four long term goals:

6.1.1 to put the UK on a path to cut our carbon dioxide emissions by some 60% by about 2050, with real progress by 2020;

6.1.2 to maintain reliable energy supplies;

6.1.3 to promote competitive markets in the UK and beyond, helping to raise the rate of sustainable economic growth and to improve productivity; and

6.1.4 to ensure that every home is adequately and affordably heated.

6.2 I unequivocally support all of the above mentioned goals.

6.3 Whatever decisions are taken now by Government with regard to future electricity generation they will by necessity take time to deliver, eg it will take approximately 12 years to bring a nuclear power station into production from the day it is decided to go ahead with a scheme. In many ways there is valid criticism that the UK is far too late in addressing its energy problems.

6.4 Therefore the second goal of Government—"To maintain reliable energy supplies" [§ 5.1.2] is paramount. This is made even more sensitive having in mind the absolute need to replace the ageing fleet of our power stations and to provide for the increase in demand for electricity.

6.5 Whether we like it or not, the UK relies on coal for a third of its electricity, in fact over the winter months it relies on coal for half its electricity. This reliance will not change in the short to medium term.

6.6 "Coal is the fastest growing energy source in the world, with coal use increasing by 25% for the three year period ending in December 2004" [BP Statistical Energy Review, June 2005]. Coal is the preferred source of fuel for the generation of electricity throughout the world and its use is set to further increase dramatically. More coal is being consumed today than at any other time in history. Unless and until alternatives are in place coal will continue to be used in the UK otherwise the lights will go out and our economy will crash.

6.7 **The decision Government has to make is what proportion of the coal the UK consumes will be indigenous.**

6.8 It is already too late to argue that indigenous coal can provide our full needs—regrettably it cannot. However, the UK Coal Industry can make a significant contribution to our needs—somewhere between a third and a half of all coals consumed could be supplied by the UK Coal Industry. It **simply does not make sense not to do so.** If the UK Coal Industry was allowed to die then all we would be doing would be to import the coal from elsewhere in the world, which would result in exporting both the jobs and the environmental problems. The carbon footprint would be greater because by necessity we would be transporting coal unnecessarily around the world. This would be in direct contradiction to the statement included in "Minerals Policy Statement 1: Planning and Minerals" as published in November 2006 by the Department for Communities and Local Government, wherein at page 9, item 15, second bullet point, it states:

> "aim to source mineral supplies indigenously, to avoid exporting potential environmental damage, whilst recognising the primary role that market conditions play;"
>
> [My emphasis added]

6.9 In the November/December 2006 issue of "The Monitor—Blue Skies Supplement", it is stated:

> "There are however, two fundamental impediments that need to be addressed if the UK is to maintain its level of indigenous coal production. The country needs a commercial regime that attracts investment to access deep mine reserves, and an urgent need to change the present planning regime that discriminates against surface mining".
>
> "The presumption against opencast mining, contained within the guidance to planning authorities, has resulted in a significant slump in consents for replacement sites and the loss of outputs and jobs. As a consequence, coal imports have soared, often from surface-mine production in countries with far less exacting environmental constraints and health and safety considerations than those imposed on UK producers".
>
> "UK coal producers believe the annual production of around 20 million tonnes of coal is sustainable for the foreseeable future, and should become a cornerstone of the government's energy policy".
>
> I entirely agree with these statements.

6.10 "In 1996 it was estimated that there was around one exagram (1×10^{15} kg or 1 trillion tonnes) of total global coal reserves accessible using current mining technology. . . . In theory there is enough coal to last for 300 years . . ." based on present day consumption.

6.11 It is assessed that there is still 190 billion tonnes of coal within the UK. Of that quantity approximately 1 billion tonnes is accessible and economically extractable based on current prices and technology.

6.12 The UK cannot solve the world's problems but it can show initiative and leadership by example. Globally coal is here and is here to stay. The world's coal industries and governments should work together to continue to improve coal's environmental performance by ensuring that coal is produced and used efficiently and that the technological advancements are fully and vigorously pursued.

6.13 There are three essential core elements common to all users of coal throughout the world:

6.13.1 Reduction of pollutant emissions such as particulate matter and oxides of sulphur and nitrogen (SO_x and NO_x) to near zero levels. This has largely been achieved and is now "off the shelf technology".

6.13.2 Increasing thermal efficiency to reduce CO_2 and other emissions per unit of electricity generated. Major gains have already been achieved and further potential can be realised.

6.13.3 Reducing CO_2 emissions to near zero levels. The development of near zero emission technologies has commenced and is accelerating rapidly. The UK must play its part.

7. Coal in Wales

7.1 There are two coal fired power stations in Wales: Uskmouth and Aberthaw. Combined they have the ability to burn c 4 million tonnes of coal per year.

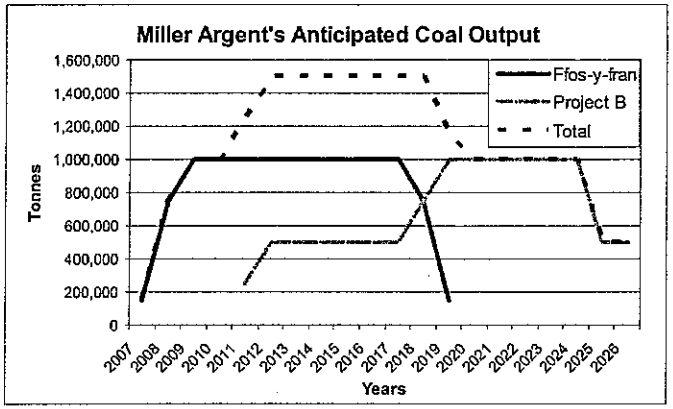
7.2 Aberthaw Power Station was specifically built to burn Welsh Dry Steam Coal. It is the ONLY coal fired power station in the UK designed to burn low to mid volatile coal. There is ONLY the South Wales Coal Field in the UK that can supply coal of the correct specification that can be burnt satisfactorily without considerable blending at Aberthaw Power Station. Compliant coal for Aberthaw power station is not readily available throughout the world and currently RWE (the owners of Aberthaw Power Station) obtain most of their imported coal for this power station from Russia. Mr Putin has already made his intentions known with regard to his aspirations for control of energy sources.

7.3 The South Wales Opencast Coal Industry has the ability to supply up to 50% of South Wales's requirement for coal for the foreseeable future, subject to planning.

7.4 The unanswered question is how much coal there is remaining in South Wales. Coal is an asset of the UK; it belongs to the country and it is regrettable that government has not quantified, with some commercial accuracy, the amount of coal that is economically viable and accessible.

7.5 In very general terms, based on current pricing and current technology, it is estimated that there is approximately 1 billion tonnes of economically viable and accessible coal reserves remaining in the UK. Of that tonnage approximately 400 million tonnes is deep mine coal and 600 million tonne is opencast. It is estimated that 20% of the potential for opencast is to be found in South Wales.

7.6 In terms of my company's contribution, the following graph details our anticipated coal production in South Wales as at today's date.



7.7 The planning policy for coal recovery in Wales is basically covered under the general Minerals Planning Policy. There is no specific guidance for coal other than a DRAFT Minerals Planning Policy Technical Advice Note on Coal that was issued as a consultation document in January 2006. Miller Argent (South Wales) Limited participated in that consultation process and a copy of its response is attached to this document, as is its response to the Energy Review consultation "Our Energy Challenge".

7.8 The National Assembly has yet to issue its findings on the Coal TAN despite enormous pressure from all sides.

8. European Commission To Back Development of Clean Coal Technologies . . . [Newsbrief issue 81—10 January 2007]

8.1 The European Commission wants to see up to 12 large-scale demonstrations of sustainable fossil fuel technologies in commercial power generation by member States by 2015.

8.2 In a communication issued in January 2007 as part of its Energy Policy for Europe, the EC said the new policy would enable coal to maintain its important contribution to "secure and competitive energy supplies for Europe".

8.3 The January 2007 policy communication states: "Coal and gas account for over 50% of the EU's electricity supply and will remain an important part of our energy mix. If the EU is to achieve its long term climate change objectives, much cleaner coal technologies and a significant reduction of CO_2 emission will be necessary. Furthermore, developing clean coal and carbon capture and storage technologies is crucial at the international level; it is expected that twice as much electricity as today will be produced world-wide from coal by 2030. This will in turn bring new opportunities for European export as well.

8.4 "In order to make sustainable fossil fuels a reality after 2020, the EU must establish a favourable regulatory framework for the development of these novel technologies, invest more, and more efficiently, into research, as well as take international action. The EU Emission Trading Scheme will also need to incorporate capture and storage in the future".

8.5 The communication states that in 2007, the Commission will start work to:

8.5.1 design a mechanism to stimulate the construction and operation by 2015 of up to 12 large-scale demonstrations of sustainable fossil fuel technologies in commercial power generation in the EU; and

8.5.2 provide a clear perspective when coal and gas fired power plants will need to install CO_2 capture and storage. Today, the Commission believes that by 2020 all new coal-fired plants should include CO_2 capture and storage technologies and existing plants should then progressively follow the same approach.

8.6 Adds the statement: "Fossil fuels represent an important element of the energy mix of the European Union as well as in many other economies. Coal is traditionally the key fossil fuel in power generation and by far the most carbon-intensive one. Coal can contribute to the security of energy supply and the economy of the EU and the world only with technologies allowing for a drastic reduction of its harmful environmental effects."

8.7 "Clean Coal technologies, which increase efficiency and reduce polluting emissions, are widely used in the power generation sector of the most advanced countries today. Further progress towards novel technological solutions, which also incorporate the concepts of CO2 capture and storage in coal-based power generation, is anticipated by 2020 so that after 2020, 'near zero emission' power generation can be systematically used in the EU and in the world".

8.8 It is essential that the UK plays it part in this initiative.

9. The Issues for the UK Energy Industry

9.1 The biggest problem the UK Energy Industry faces is that much of its electricity generating capacity is too old or is ageing fast. In very broad terms we have a generation capacity of c. 74 GW, of which:

9.1.1 23GW is coal fired.

9.1.2 3GW is oil fired.

9.1.3 5GW is mixed or dual fired.

9.1.4 26GW is gas.

9.1.5 1GW is gas turbines and oil engines.

9.1.6 12GW is nuclear.

9.1.7 4GW is Hydro and other renewables.

9.2 Over the next decade virtually all of the nuclear stations will be phased out, as will a number of the coal fired stations, either by age or by ability to meet new legislation.

9.3 The demand for electricity is set to rise year on year.

9.4 Plant margin (an excess of potential generating capacity over maximum demand) is crucial to the security of electricity supply, as generating units are not available 100% of the time due to breakdowns and the need for maintenance and repair. It is generally agreed that a minimum plant margin of 15% should be in place over the peak demand during the winter months in order to maintain a secure supply of electricity.

9.5 Security of supply of fuel source is now also a major parameter in determining the flavour of future generation plants. Diversification has got to be the order of the day and the three major reliable, proven, means of power generation are: gas; coal; and nuclear.

9.6 It appears now to be accepted that it would be folly to rely on gas for 80% of our future generation capacity (as was suggested earlier by Government). Given all the circumstances a dependence on gas would leave the UK vulnerable to interruptions to supply caused by: (a) political, (b) terrorist action, and/or (c) market dislocating price shocks.

9.7 Too much dependence on nuclear would present an unacceptable terrorist target and also exacerbate the so far unanswered problem of treatment and disposal of nuclear waste.

9.8 The technology does not exist to promote "Renewables" as being a major contributor. This does not mean to say that research and development should not be accelerated, but there is nothing currently out there that can be relied upon as a true alternative to what already exists.

9.9 Hydro and biomass co-firing make a worthwhile, but nevertheless small, contribution to the renewable element of the UK's total capability to generate electricity.

9.10 In environmental terms coal is now burnt in a way which reduces its acid rain potential to minimal levels, whilst the retrofitting of clean coal technologies to existing coal fired plant and the development of Carbon Capture and Sequestration (CCS) strategies can make coal increasingly Kyoto friendly. Coal is competitive on price, it is readily available from at least 70 different countries in the world (a wide variety of politically stable countries), there is a ready indigenous supply, it is easy and safe to transport, store and use.

9.11 Indigenous coal can provide the electricity needed for all our emergency services, hospitals, government etc. in times of a national emergency without the reliance on any other country, should such a situation ever exist.

10. Background and History Relating to the Ffos-y-fran Land Reclamation Scheme

10.1 In accordance with Government policy following the Aberfan disaster, local authorities were required to undertake surveys of derelict land within their areas and adopt programmes for the progressive reclamation of the identified derelict and/or unsafe land.

10.2 The former Merthyr Tydfil County Borough Council joined with 11 other local authorities under the auspices of the Monmouthshire Derelict Land Reclamation Joint Committee.

10.3 The committee identified a substantial area of derelict land that subsequently formed part of Phase III of the East Merthyr Land Reclamation Scheme (EMRS).

10.4 The Ffos-y-fran Land Reclamation Scheme encompasses the third Phase of the East Merthyr Land Reclamation Scheme. The essence of the Scheme is to reclaim approximately 400.6 hectares of land, 317 hectares of which are classed as derelict land (with inherent dangers) and to restore it to safe and beneficial use. The financial means and process of achieving this reclamation is by the incorporation of the extraction of the underlying strategic coal reserve by opencast methods.

10.5 The Ffos-y-fran Land Reclamation Scheme is the largest authorised coal reserve in South Wales. The scheme has been delayed by legal challenges which have cost many millions of pounds. Not only has the developer been subjected to excessive and unforeseen costs but so have the authorities who have had to defend their position and also the tax payer by way of publicly funded legal aid given to the objectors.

10.6 The scheme will provide direct employment for 200 people and will secure the employment for approximately a further 400 people in support occupations. Skills training will be available to all employees wishing to advance themselves. These are extremely important factors as Merthyr Tydfil has the highest rate of unemployment in the UK.

10.7 Over £80 million (at today's value) will be paid out in wages to those directly employed and statistically every pound earned in a community is spent and spent again many times within that community.

11. Opencast Site Safety, Legislation and Procedures

11.1 Land reclamation and opencast coal mining sites can be dangerous places to work and visit, particularly to the uninitiated. Therefore safety is of paramount importance specifically for the people employed and the general public affected by the operations.

11.2 The working areas are fenced to discourage trespass and warning signs are posted and maintained at regular intervals around the site boundary.

11.3 All employees undergo an induction course which addresses safety and environmental issues as well as company procedures. Safety awareness courses are held every year for the entire workforce and toolbox talks are given at more frequent intervals.

11.4 Risk assessments are carried out on all site operations and are effectively communicated to all those involved. All drivers are individually tested before being authorised to drive any item of plant on site. Site licences are issued authorising drivers to operate the items of plant for which they have been satisfactory tested.

11.5 Each operating company has: (i) a Safety Management Procedures Manual, (ii) a Plant Procedures Manual, and (iii) a General Management Procedures Manual, all of which will be effectively communicated, implemented, audited and controlled.

11.6 Under the Quarries Regulations 1999 it is the duty of the operator to be able to demonstrate that sufficient competent persons are employed to operate the opencast site and that everyone who works at the site is competent to do the job they do, unless it is someone undergoing training and under the direct supervision and control of a competent person.

11.7 The philosophy of continuous improvement and lifelong learning is encouraged within the industry and every opportunity is given to those employees wishing to develop new skills and advance themselves in the workplace.

11.8 There is considerable legislation governing the works to be carried out on site including but not limited to: Health and Safety at Work Act 1974, Regulations Made Under HSWA and Supply of Machinery Regulations, Management of Health and Safety at Work (MHSW) Regulations 1999,Provision and Use of Work Equipment Regulations 1998, Workplace (Health, Safety and Welfare) Regulations 1992, Manual Handling Operations Regulations 1992, Personal Protective Equipment at Work Regulations 1992, Health and Safety (Display Screen Equipment) Regulations 1992, The Supply of Machinery (Safety) Regulations 1992, Control of Substances Hazardous to Health (COSHH) Regulations 1999, Quarries Regulations 1999, The Noise at Work Regulations 1989, The Electricity at Work Regulations 1989, Confined Spaces regulations 1997, Borehole Sites and Operations Regulations 1995, Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 (RIDDOR), The Health and Safety (First Aid) Regulations 1981, The Health and Safety (Safety Signs and Signals) Regulations 1996, Safety Representatives and Safety Committees Regulations 1977, Construction (Design and Management) Regulations 1994, The Ammonium Nitrate Mixtures Exemption Order 1967, Pressure Systems Safety Regulations 2000, The Control of Explosives Regulations 1991 etc.

11.9 The UK Opencast Coal Industry has a proven track record of high health and safety standards.

James T Poyner

23 January 2007

MA2

Case No: C0/10241/2008

Neutral Citation Number: [2009] EWHC 1621 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Sitting at:
Cardiff Civil Justice Centre
2 Park Street
Cardiff
CF10 1ET

Date: Friday, 1st May 2009

Before:

THE HONOURABLE MR JUSTICE BEATSON, FBA

Between:

THE QUEEN ON THE APPLICATION OF ELIZABETH CONDRON	**Claimant**
- and -	
(1) MERTHYR TYDFIL COUNTY BOROUGH COUNCIL	**First Defendant**
and	
(2) CAERPHILLY COUNTY BOROUGH COUNCIL	**Second Defendant**
and	
(3) MILLER ARGENT (SOUTH WEST) LIMITED	**Interested Party**

(DAR Transcript of
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Tel No: 020 7404 1400 Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

Mr Paul Stookes (instructed by Richard Buxton Environmental & Public Law) appeared as Solicitor Advocate on behalf of the **Claimant**.

Mr Geoffrey Stephenson appeared on behalf of the **Defendants**.

Mr Rhodri Price-Lewis appeared on behalf of the **Interested Party**.

Judgment

(As Approved by the Court)

Mr Justice Beatson:

1. In this renewed application for permission to judicial review the claimant, Mrs Elizabeth Condron, seeks permission to challenge three planning permissions granted by Caerphilly County Borough, the second defendant, and one planning permission granted by Merthyr County Borough, the first defendant, to Miller Argent (South West) Limited, the developer and the interested party in these proceedings. The permission was granted in respect of the Cwmbargoed disposal point ("the disposal point"), a facility in Merthyr Tydfil, occupying a site of 23.4 hectares. The disposal point was granted planning permission in 1957 for the reception, storage, processing and onwards transportation of coal, extracted within the South Wales coalfield, and has been used since then. The site straddles the areas of the two planning authorities. 20% of the site that is 4.7 hectares is within the boundary of the first defendant, and the remaining 80% is within the area of the second defendant.

2. The main question before the court is whether the Environmental Impact Assessment Directive 85/337/EEC, ("the EIA Directive"), and the Environmental Impact Assessment Regulations 1999, as amended, SI1999 No 193 ("The EIA Regulations") arguably required the defendants to carry out a screening assessment in respect of the applications. The principal, but not the only, submission by Mr Stookes on behalf of the claimant is that the defendants were required to carry out such an assessment, and as they did not, they failed to comply with the Directive and the Regulations. Mr Stephenson and Mr Price-Lewis QC, on behalf of the defendants and the interested party, submitted that the defendants were not required to carry out the screening assessment because the applications did not fall within the provisions of the Directive or the Regulations which require such an assessment.

3. The disposal point is adjacent to, but separate from, the site at Ffos-y-fran, at which the interested party conducts opencast mining in relation to movement and reclamation operations. The operations at Ffos-y-fran "have generated a great deal of local opposition" (I quote from Richards LJ in previous proceedings).

4. At present the Land Reclamation Scheme, the third and last phase of the East Merthyr Land Reclamation Scheme, is being undertaken. The planning permission for the Ffos-y-fran Land Reclamation Scheme was granted by the National Assembly after a two-week public inquiry. The application for that permission was accompanied by an environmental statement. There have, as I have observed, been previous judicial review proceedings challenging the planning decisions about the Ffos-y-fran site. In the first, brought by this claimant, Condron v National Assembly for Wales [2006] EWCA Civ 1573, she unsuccessfully challenged the decision of the National Assembly for Wales in early 2005 to grant planning permission for the operations at that site. In the second, a challenge by her to a decision of Merthyr Tydfil County Borough Council in December 2007 not to take enforcement action against the interested party, permission was refused. Pre-action protocol letters were written on behalf of the claimant in respect of two other complaints concerning decisions of the National Assembly but proceedings were not instituted. The purpose of the applications for planning permission which led to the decision now challenged was to enable the interested party to continue to use a disposal point for the duration of operations at the Ffos-y-fran Land Reclamation Scheme.

5. The defendants and the interested parties have said that they are to review the site which had been operating for many years since 1957. The planning decisions now challenged are that by the first defendant, dated 3 September 2008, and those by the second defendant, two of which are dated 12 July 2007, and one of which is dated 18 June 2008.

6. The two permissions dated 12 July 2007 granted permission to extend and refurbish a existing minimum processing preparation plant and provide a water storage tank and coal haulage vehicle workshop and ancillary facilities, including office accommodation, staff welfare facilities and a visitor training centre. The lorry maintenance facilities, the offices and the new visitor centre have, see the interested party's evidence, been constructed. The decision by the second defendant dated 18 June 2008 extended the earlier consent from 1 December 2010 to 31 December 2024 so as to align it with the expected duration of the Ffos-y-fran Reclamation Scheme. The decision dated 3 September 2008 made by first defendant was in respect of a similar application for the 4.7 hectares within the first defendant's administrative area and also provided that the consent was to expire on 31 December 2024.

7. Proceedings were launched on 28 October 2008. Permission was refused on the papers by Collins J on 9 March this year and the claimant renewed her application on 11 March. It came before me at Cardiff Civil Justice Centre on 29 April. There was an issue between the parties as to venue. The claimant maintains she will not have a fair trial in Wales, that opencast mining in Wales is highly contentious, and that she is concerned that any regional court may not be impartial. The defendants and the interested parties wish the claim to be heard by the Administrative Court in Wales. I address the issue of venue after considering the arguability of the application on its merits.

8. The permissions are challenged on two grounds. The first is that the defendants failed to comply with the EIA Directive and the EIA Regulations by failing to carry out a screening assessment. The second ground of challenge is that the two most recent decisions did not take account of another application by the interested party to change the original planning permission of the Ffos-y-fran site to allow some coal to be removed from the site by truck, whereas the current condition 37 provides for the removal of coal by train only. That application was made on 24 July 2008.

9. Evidence in support of the application was filed in the form of three witness statements by Mr Stookes, a solicitor advocate and partner at Richard Buxton Environmental and Public Law, Cambridge, who appeared at the hearing before me. The first two of these statements are dated 4 December 2008. The first formally exhibits documents in the claim bundle,

documents which were filed on 17 November 2008, almost a month after the claim was launched. The second is an application for a protective costs order, which was not pursued because public funding has been obtained since then. The third, dated 27 April, the day before the hearing, puts before the court a supplementary bundle of some 43 pages of additional documents.

10. On behalf of the defendants, evidence is served by the first defendant's head of town and country planning, Mr Davis, and the second defendant's development control manager, Mr Stephenson. Though the statements in the court bundle are undated, they appear to have been filed together with the acknowledgements of service which are dated 17 November 2008.

The legislative framework

11. Counsel Directive 85/337/EEC of the EIA Directive concerns "the assessment of the effects of certain public and private projects on the environment". Article 2(1) requires member states provides that:

> "Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia of their nature, size or location are made subject to an assessment with regard to their effects. Those projects are defined in Article 4."

12. Article 4(1) and (2) require an assessment to be made in accordance with Articles 5 to 10 of the Directive. In the case of Article 4(1), "for projects listed in Annex I", and in the case of Article 4(2), "for projects listed in Annex II", in the latter case the Article 4(2) provides that member states shall determine through a case-by-case examination or thresholds or criteria set by the member state whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

13. Annexes 1 and 2 of the Directive are in the same terms as Schedule 1 and 2 to the UK's implementing Regulations, and I do not set those out.

14. The 1999 Regulations have been amended since then, most recently by the Town and Country Planning (Environmental Impact Assessment) Amendment England Regulations (SI 2008 No 2093). Regulation 5 provides that a person who is minded to carry out development may request a planning authority to adopt a screening opinion and makes provisions for what must accompany such a request. Regulations 5(4) and 5(5) provide that an authority shall undertake the screening opinion within three weeks of the receipt of a request, or such longer period as agreed, and send it to the first major request.

15. Regulation 7 provides that, for certain categories of cases, paragraphs 5(3) and 5(4) shall apply *as if* an application was a request under Regulation 5(1) and, in this indirect way, impose an obligation on planning authorities, even though a request is not made by a person who is minded to develop.

16. The obligation arises:

> "Where it appears to the relevant planning authority that --
>
> (a) an application which is before them for determination is a Schedule 1 application or schedule 2 application; and
>
> (b) the development in question --
>
> (i) has not been the subject of a screening opinion or screening direction; or
>
> (ii) in the case of a subsequent application, was the subject of a screening opinion or direction before planning permission was granted to the effect that it is not EIA development; and
>
> (c) the application is not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of the Regulations."

17. Schedule 1 and Schedule 2 applications are defined in Regulation 2, The Interpretation Provision. That states that a Schedule 1 development means development "of a description mentioned in Schedule 1"; and a Schedule 2 development means development "of a description mentioned in column 1 of the table in Schedule 2" where any part of the development is to be carried out in a sensitive area or any applicable threshold, or if criterion in the corresponding part of column 2 of that table is respectively exceeded or met in relation to that development. It is common ground that the area which is the subject of these permissions is not a sensitive area.

18. Schedule 2 to the Regulations describes the relevant developments and applicable thresholds and criteria in a tabular form. There are two columns to the table. The first column is under a general heading, "Description of Development". The second column lists the applicable thresholds and criteria. The main headings of the first twelve paragraphs in column 1, or first twelve sections in column 1, list broad areas of activity; thus, 1 is agriculture and aquaculture; 2 is extracted industry; 3 is energy industry; 4 is production and processing of metals; 5 is mineral industry; 6 is chemical industry, unless included in Schedule 1; 7 is food industry; 8 textile, leather, wood and paper industry; 9 rubber industry; and 10 infrastructure projects. 11 is headed "Other Projects" and 12 is headed "Tourism and Leisure". It is not suggested that they have any application in this case.

19. Paragraph 13 concerns any change to, or extension of, development of a description listed in Schedule 1, and the threshold criteria in column 2 refers to the relevant paragraph in Schedule 1, one of which is quarries and opencast mining.

20. The material sections of Schedule 2 in the current application are Schedule 2, "Extractive Industry"; section 10, Infrastructure Projects", and section 13. The claimant submits that the applications fell within those headings; in particular, that they fell within 2(e), "Surface industrial installations for the extraction of coal, petroleum, natural gas and ores, as well as bituminous shale", where the threshold is a development area exceeding 0.5 hectare. Secondly, it is submitted that they fell within section 10(b):

> "Urban development project, including the construction of shopping centres and car parks, sports stadiums, leisure centres and multiplex cinemas"

-- where the threshold is also an area exceeding half a hectare. Thirdly, it is submitted by Mr Stookes that they fell within section 13 as a change to, or an extension of, development listed in Schedule 1, and that is opencast mining at the Ffos-y-fran site.

21. The European Commission has given guidance on EIA screening, dated June 2001. Section B3 of the guidance concerns the steps in screening. The first step, set out in B3.1, is whether the project is an Annex I or an Annex II project. It is stated "the first step in screening is to determine whether the project is listed in either Annex I or Annex II" of the Directive or any equivalent member state lists. This paragraph also states, "In summary, if a project is not of a type listed in Annex I or II or any equivalent Member State lists, EIA is not required unless a Habitas Directive assessment is required", which, as I have said, is not the case in this case.

22. If a project is an Annex I or Annex II project, the next step is whether the project is of a mandatory list requiring EIA; the third step is whether the project is on an exclusion list exempting it from EIA; and the fourth step is a case by case consideration as to whether the project is likely to have significant effects on the environment.

23. The guidance has a tabular representation of the steps to be taken by those considering whether an EIA assessment is needed. There is a series of questions and arrows pointing down the "yes" or "no" columns. Broadly speaking, step 1 asks whether the project is in a category listed in Annex I or 2. If the answer is "no" the figure requires to consider the question whether the project is likely to have a significant effect on Natura 2000 site. If the answer to that is "no" the figure says EIA is not required.

24. In the way that is increasingly common in all sorts of documentation, as well as having it verbally and in a diagrammatic way, the process is summarised in the box before B3. Mr Stookes places some reliance on the wording of that; in particular that:

> "If an application for development consent for an Annex I project is made without the environmental information required by the Directive, the authority must require the EIA procedure to be completed"

If an Annex II application is required without the environmental information, the authority must consider the need for EIA, recall the screening decision and reasons for it, and make it available to the public.

The claimant's grounds

25. The claimant's case is that it is arguable that applications which are challenged fell within Regulation 7, and that, in failing to undertake a screening process or to carry out a screening assessment, the defendants erred in law. Although all that the claimants have to show at this stage is that it is arguable Mr Stookes in fact considered that this would be a strong case. He submitted there was a clear error. Indeed, when the claimants originally filed their claim, they did so without a detailed statement of the facts and grounds and invited the defendants to consent to judgment. Mr Stookes relied on statements of the European Court of Justice in a number of cases that the scope of the Directive is very wide, and on the obligation to give a broad interpretation to the provisions of the Directive. He relied in particular on the decision in Ecologistas en Accion v Madrid [2008] C-142/07 and on the statement of the court in Commission v Italy C-87/02. In paragraph 28 of its judgment in Ecologistas the court stated, citing a number of other cases, that the scope of Directive 85/337 is "very wide". That case concerned whether the Madrid ring road fell within the definitions which required an assessment. The court said that it would be:

> "contrary to the very purpose of the amended directive to allow any urban road project to fall outside its scope solely on the ground that the directive does not expressly mention among the projects listed in Annexes I and II those concerning that kind of road."

In Commission v Italy the statement that:

> "no project likely to have significant effects on the environment should be exempt from assessment "unless the specific project excluded could, on the basis of a comprehensive assessment, be regarded as not being likely to have such effects'"

was relied on. As I have observed, Mr Stookes also relied on the European Commission's guidance on screening to which I have referred.

26. Turning to the individual paragraphs, Mr Stookes submits that these applications fall within paragraphs 2(e), 10(b) and 13 of Schedule 2 and Annex II. As far as paragraph 2(e) of Schedule 2 is concerned, he submits that the word "for" clearly, or at least arguably, means "relating to", rather than the narrower "for the use of". He relies on the authorities stating that the provisions of the Directive, and thus of the implementing Regulations, should be construed broadly, and submits that 2(e) includes buildings used "in relation to" the extraction of coal.

27. Paragraph 12(a) of Mr Stookes' skeleton argument states:

> "Applying the wide scope and broad purpose required by the ECJ in Ecologistas it would be astonishing to exclude the Cwmbargoed project. Moreover, the narrow interpretation of para 2(e) alleged by the opposing parties would be unduly restrictive for a number of other projects. It would, for instance, exclude all underground aspects of deepshaft coal mining for which environmental impacts are likely to be significant"

28. Mr Stookes submits that the applications and the projects also fall within paragraph 10(b) of Schedule 2 and Annex II as "urban development projects". He relied on the decision of the Court of Appeal in R (Goodman) v London Borough of Lewisham and Big Yellow Property Company [2003] EWCA Civ 140 and other cases. He also relied on page 9 of the European Commission's guidance in the instruction section in which examples are given illustrating how to use the checklist in deciding whether EIA is required. He relied on the project description given in the example which is the development of 500,000 homes adjacent to an existing rural settlement because the answer to the questions in the checklist are that an EIA is required in such a case. As far as paragraph 13 of the Schedule is concerned, he submits that the project may be regarded as an extension to the main opencast operations. In the case of quarries and opencast mining Schedule 2 points to paragraph 2A of Schedule 1. That paragraph includes all development except the construction of building or other ancillary structures where the floor space does not exceed 1,000 square metres, a threshold exceeded in present applications by a considerable margin.

Arguability

29. Collins J only had the benefit of Mr Stookes' original submission and the evidence in his written statement. In paragraph 4 of the observations he gave when refusing permission he stated:

> "The attempt to rely on the wide purpose of the EIA Directive to show that the developments permitted were within Schedule 2 is without merit. The opencast mining was dealt with through an enquiry and a fall EIA as it fell within 2(e). The DP (which has been doing the same for previous coal mines in Wales as it now does for Ffos-y-fran) cannot by any stretch of the schedule be within 2(e). To regard it as within 10(b) is an unjustifiable extension of the purpose of that and, since it does not itself fall within Schedule 2, and extension or modification equally cannot fall within it."

30. The grounds for renewing the application essentially repeat what was in the claim form. Mr Stookes submitted that Collins J simply erred. Paragraph 6 of his skeleton argument describes the defendants' failure as stark. I have, however, concluded that Collins J's succinct observations did not err, and that the claimant has not shown an arguable case that the defendants' decisions were flawed in law because they did not undertake a screening assessment.

31. First, the requirement to carry out a screening assessment only arises under Article 4 of the Directive for the projects listed in annex 1 and annex 2, that is, the projects of a description mentioned in Schedule 1 and Schedule 2 of the UK Regulations. Secondly, the projects so listed should be construed in the broad way stated in the various decisions of the European Court of Justice, but the teleological or purpose of approach required, when construing Directives and indeed secondary national legislation implementing directives, does not require individual passages to be construed regardless of context.

32. Thirdly, the decision in R (Goodman v London Borough of Lewisham and Big Yellow Property Company does not support the submissions made on behalf of the claimant. In that case the Court of Appeal held that Lewisham misconstrued the 1999 Regulations. Buxton LJ, at paragraph 7 of his judgment, stated that the first question for a planning authority is to determine whether the application is a Schedule 2 application, that is "whether the development falls within the descriptions and limits set out in Schedule 2"

33. The position would be similar in respect of Schedule 1 but Buxton LJ was not concerned with that. Neither am I.

34. The defendants and the interested party accept that if the applications fall within the description or limits set out in Schedule 2, the failure of the defendants to take the preliminary decision to conduct a screening process, or alternatively their decision not to conduct such a process because they consider that it is not required, is susceptible to judicial review. At this stage both Mr Stephenson and Mr Price-Lewis accepted that the question is only whether that is arguably so. In other words the defendants take the risk of error if they decide not to conduct a screening process in respect of a matter falling within the Schedule. If, subject to one qualification, it is required as Buxton LJ stated in paragraph 8 of his judgment, that is wrong as a matter of law. The court must correct the error, and, "in determining the meaning of the statutory expressions, the concept of reasonable judgement as embodied in Wednesbury simply has no part to play."

35. The qualification, however, is that identified most clearly in the speech of Lord Mustill in R v Monopolies and Merger Commissions, ex parte South Yorkshire Transport [1993] 1 WLR 23 at 32. His Lordship recognised that where an authority misconstrued or misunderstood a statutory expression, the court must correct it because it is an error of law, and not a matter of discretion. But his Lordship Lord Mustill also recognised that where the statutory expression is imprecise, even in respect of what is formally an error of law, "the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational"

36. In the Big Yellow Property Company case (see paragraph 14) the conclusion by Lewisham that a "storage and distribution facility" was not an urban development project within section 10(b) of Schedule 2 because it didn't give rise to a significant impact on the environment was outside the range of reasonable responses. Buxton LJ said that was so in the light of the wide range of examples given in paragraph 10(b).

37. The cases relied on by the claimant are all cases in which, applying the broad approach that court lays down, the European Court of Justice concluded that the project was one of those listed in the annexes. In Ecologistas this was, as I have stated, the refurbishment and improvement of the Madrid Urban ring road. The relevant authority had argued that there was no express reference to an urban road in the annexes. They mentioned only "motorways, express roads and roads", they did not mention "urban roads". The court concluded that it was contrary to the purpose of the Directive to allow a project to fall outside it solely on the ground that the Directive did not expressly mention it. It accepted that the types of road mentioned were roads that were located in both urban built-up and outside built-up areas (see paragraph 29), and it concluded that the term "express roads" covered urban roads which had the characteristics set out in the annex, see paragraph 31. Those characteristics were access only for interchanges and prohibition on and parking on carriageways.

38. In Paul Abraham v Region Wallone [2008] C-2/07, a judgment dated 28 September 2008, the ECJ considered whether an extension of the Liège-Bierset Airport runway fell within the annex. The annex referred to construction of airports with specified runway lengths, and it was argued by the Region that no assessment was required because the annex did not include airports as such. The court held that what had occurred fell within the term "construction of airports". In this case no coal is extracted on the site of the disposal point. It is, as I have described earlier, just that: a disposal point. The disposal point was an existing facility for storing, processing and transporting coal elsewhere, anywhere in the South Wales minefield. Although, given the contraction of mining in South Wales, an increased proportion came from Ffos-y-fran, the coal taken to the disposal point does not exclusively come from there. The disposal point has existed and functioned for this purpose since 1957, that is, it has functioned for many years before the current operations at Ffos-y-Fran started in 2007.

39. The 0.5 hectare threshold is clearly exceeded, but it is not arguable that the activities fall within Section 2 as "extractive industry". This is because I accept the submission that the word "for" in 2(e) does not mean "in relation to". If it did it could apply to coal brought from far away and even, although the local conditions would not permit that, from abroad. In the context of Schedule 2, paragraph 2(e) relates to buildings and plants used for and an essential part of mining development referred to in previous sub-paragraphs. As far as section 10(b) is concerned, I do not consider it arguable that this applies. The disposal point is not in an urban area. The examples given in paragraph 10(b) are of projects -- shopping centres, car parks, sports stadiums, leisure centres and multiplex cinemas -- which attract large numbers of visitors. Although there is a visitor centre within the current permissions and thus there are some visitors to the disposal point, the project has not involved either an urban area or urbanising an area that was previously rural, as was the case in the example given in the European Commission's guidance.

40. As far as paragraph 13 is concerned, Mr Stookes correctly points out that Collins J's statement, that since the application does not itself fall within Schedule 2 any extension modification cannot fall within it, does not appear to attract the words of Section 13(a), which refers to a development of a description listed in Schedule 1. But the development relied on by the claimants is the Ffos-y-fran opencast coal mining project. That is on a separate site, albeit geographically close to the disposal point. The applications do not involve any change in that development. The disposal point operates in relation to other coal fields as well, and the effect of this application does not facilitate increased extraction from Ffos-y-fran. There is a link between Mr Stookes' submission on paragraph 13 and ground 2 to which I will return. This is because the claimant is relying on the fact that, in what is described as the planning application title (but in fact the page reference is a reference to the officer's report), there is a reference to "related" operations at Ffos-y-fran. I return to this aspect when considering ground 2. However, on ground I I do not consider that the defendants' decisions that the application did not require EIA are arguably flawed because the applications arguably fell within the three paragraphs which I have discussed.

41. I reach this conclusion without getting to what might be thought to be the second stage of the inquiry, that is, the approach of Lord Mustill in the South Yorkshire Transport case. However, lest I am wrong in my assessment of what is arguably within the three paragraphs, I have also considered whether the conclusion that the applications were outside the scope of the obligation to have an EIA was arguably so bad that it could not be classed as rational and concluded it was not.

42. There is a tension between the submissions of the defendants and the interested parties, that on the one hand the provisions of Schedule 2 are so clear that the court can conclude that the defendants made no error of law, and what might be a fall back position perhaps emphasised more by the interested party than by the defendants that insofar as the terms are precise, the court can safely conclude that the decisions were arguably out with the range of conclusions open to a rational decision maker.

43. I turn to the second ground. It is submitted on behalf of the claimant that the defendants have failed to consider the cumulative effect of the project and the proposed variation of condition 37 of the opencast permission in the application to transport up to 100,000 tons of coal by road instead of rail. Mr Stookes submits that it is artificial to consider the disposal point project in isolation. He relies on paragraph 44 of the ECJ's judgment in Ecologistas and paragraph 45 of its decision in Abraham v Region Wallone. His submission is that it is not open to a planning authority to slice up projects and consider them in isolation. The opencast operations at Ffos-y-far will extract between 750,000 and a million tons but the applications concerning the disposal point are for processing up to 1.5 million tons.

44. I referred to the reference to "related operations" in the officer's report in the description of the application. The applications themselves, so far as I can see, refer to "ancillary facilities for use in connection with mineral extraction operations at Ffos-y-Fran"; see for example the applications dated 22 February 2007.

45. Despite some concern about this I have concluded that this ground is also not arguable. First, the failure to take account of the application to vary condition 37 of the Ffos-y-fran permission cannot be a criticism of the first three permissions given on 12 July 2007 and 18 June 2008, because the application to vary condition 37 was only made on 24 July 2008. As for the last of the applications, that on 3 September 2008, there is no evidence whatsoever before the court that granting this or the earlier applications would increase output from Ffos-y-fran.

46. Secondly, the sites are distinct in function and purpose, and history, and there is no arguable logical connection between them. Although material extracted at Ffos-y-fran is taken to the disposal point, so is material from other mines in South Wales. The interested party's submission that if this is to be regarded as a link then the impact of the totality of all mines and on all other direct extraction in mines which comes to the disposal point would fall to be for consideration.

47. Thirdly, the figures relied on by Mr Stookes elide the Ffos-y-fran site with the disposal site. There is no limit on the tonnage that can be processed through the disposal site at present, and so if anything the proposed limit restricts operations on the site, albeit in theory (inaudible) the contraction of mining in South Wales. So thus, contrary to the claimant's submission, what these applications do is to place a limit on the activities of the disposal point. For these reasons I have concluded that those factors outweigh the use of the word "related" in the application.

48. I turn to the question of delay. In view of my conclusion on the substantive grounds it is not necessary to deal with delay, but the claimant has not adequately explained her delay. What was said on the claimant's behalf by Mr Stookes was she had no knowledge of these applications prior to 10 September 2008; that the Caerphilly applications were advertised in the Rhymney Valley Express; that there were no references to the application in the minutes of the liaison committee. Contrary to what is stated in paragraph 25(d) of the skeleton argument dated 29 April, in the oral argument Mr Stookes accepted that they may have been discussed then.

49. Mr Stookes also submitted that the court should take into account that there is a continuing failure. In these circumstances there is a continuing obligation to remedy the failure in European law: see C-201/02 Wells v Secretary of State, a decision of the Fifth Chamber of the ECJ on 7 January 2004. He also submitted there is no prejudice to the defendants or to the interested party. Finally, he submitted that, if there has been a delay, time should be extended because it is contrary to Article 10a of the Directive to preclude the claimant from access to a review process.

50. In respect of the two permissions granted in 2007 by the second defendant, the claim was brought one year and three months later. As Collins J said:

> "It is far too late to allow any claim to proceed against those."

51. Those permissions permitted works to extend facilities on the disposal point. Those works have been carried out. There would be substantial prejudice to the interested party if it would have to stop using the lorry maintenance facility, the offices, and the new visitor centre, constructed no doubt at considerable cost. There is no issue but that the defendants complied with their legal obligations as to advertise applications for planning permission and to post notices. The claimant did not see them. That is not a reason for extending time.

52. There is no arguable breach of Article 10a of the Directive for a delay of this sort. What Article 10a requires is access to a review procedure before a court of law. It is no part of the jurisprudence of the European Court of Justice, nor of any case put in front of me, that it is arguable that access to a review procedure subject to a time limit is not sufficient.

53. I also have regard to the fact that there was no explanation given for the delay in the form N461. Where there has been delay the court is, moreover, entitled to conclude that time should not be extended unless the claim is, to use Keene LJ's expression in Finn-Kelcey [2008] EWCA Civ 1067 at paragraph 29, clear cut. In other words it must be a strong claim. It must be one that in the public interest should be allowed to proceed despite the delay and absence of explanation.

54. Again I agree with Collins J who has put the matter much more briefly than I have. In paragraph 2 of his observations he says of the 2008 permissions:

> "...one is beyond the 3 month limit, one not, but both clearly stand or fall together and there has been a failure to act promptly. Delay in itself would justify a refusal of permission."

55. I have focussed on the strength of the substantive challenge and reached my decision on that basis. However, had I concluded that permission should have been given for a prompt challenge, I would, nevertheless, have agreed with Collins J that, in the circumstances of this case, the delay in itself justifies the refusal of permission.

Venue

56. The submissions on venue are in the light of my conclusions moot. Nevertheless, this is only the second case heard in this courtroom since the full operation of the Administrative Court in Wales. For this reason, in view of the submissions, I consider it appropriate to say something about venue.

57. Mr Stookes in his summary reply to the grounds of defence states (paragraph 17-19) that the claimant does not wish proceedings to be transferred to Wales:

> "She considers that she will not have a fair trial. Opencast coal mining in Wales is highly contentious and the Claimant is concerned that any regional court may not be impartial. Further, she has continuing concern for her own safety and tension is likely to increase if the matter is heard in Cardiff. This will not be conducive to a fair and impartial hearing."

58. Paragraphs 18 and 19 of the reply deal with the position in 2005 in connection with the earlier proceeding that ultimately came before the Court of Appeal in London and in which Richards and Ward LJJ commented that the case should be heard in Wales. Mr Stookes submits that they did not see the representations made to the Administrative Court office when making those statements.

59. This submission was advanced before me by a solicitor who is an officer of the court. The only evidence to support his generalised submission that any, and I emphasise any, regional court may not be impartial is the correspondence that was before the court in the earlier 2005 proceedings. That consists of the letters of 7 and 14 July, 15 September, and an undated letter from the then Master of the Administrative Court, now Deputy Master Knapman. At that stage, while the National Assembly wanted transfer to Wales, the interested party's position was that it wanted to maintain the trial date wherever it was.

60. The high point of the evidence before me is what was said in 2005. Reliance is also placed on an article in a local paper which is said to be constructed from a press release issued by the interested party after Collins J refused permission. In effect this argument is that regional courts -- and I observe that in Wales there might be some sensitivity about being described as a region -- should not hear matters contentious in that region. I am surprised that Mr Stookes felt able to pursue this submission in the absence of evidence. The submission that cases should be heard at a location remote from the places and events with which they are concerned is to my mind an extraordinary one. It is inconsistent with the general approach favouring local justice. In the context of criminal proceedings, the general approach is that defendants should, absent particular concern about the impact of local publicity on a jury, be tried in the relevant locality. This court sits without a jury. Accordingly, that point does not arise. Claimants in administrative court proceedings now have a choice as to where to go and where to issue their proceedings. But if they issue outside the region with which they have the closest connection they are asked to to give reasons for doing so in the new form N461.

61. The general expectation under Practice Direction 54D of the Administrative Court (Venue) is that proceedings will be administered and determined in the region in which the claimant has the closest connection. Paragraph 5.2 makes provision for a broad and flexible approach, taking account of a wide variety of factors. It will be possible for defendants to apply to have a case transferred and it will be possible for claimants to issue outside the region. Where the parties are content that a case be heard outside the region in which the claimant has the closest connection, it is unlikely that in the ordinary case a court will exercise the own motion power in paragraph 5.4 of the Practice Direction to direct that a claim be determined elsewhere. I do, however, observe that, in a case involving a Welsh public authority because of the legal instruments passed by the Assembly, in particular in the planning context, there may be justification for a more robust approach. In those cases the court may be more proactive in initiating the transfer. The Practice Direction implements the Justice Outside London report. That states in paragraph 65 that there is a "strong expectation" for Welsh judicial review cases against the decisions of devolved institutions and of Welsh local and public authorities will be heard in Wales, and if issued elsewhere transferred to Wales, absent good reason.

62. If a claimant wishes to proceed elsewhere there may be good reason for doing so but a generalised allegation of bias or unparticularised concern unbacked by any evidence is not enough and is not a proper basis for such an application.

63. Finally I note that the way this claim has proceeded has not been what one is used to in the Administrative Court in London. There the claimant has not complied with the CPR. The identities of the claimants were not revealed in the protocol letters. There was no detailed statement of facts and grounds in the N461. There was a statement in the N461 about the position regarding public funding which was inaccurate at the date the claimants filed. Finally, the day before the hearing an additional statement with 43 pages of documentary evidence was filed. That included material dated as early as 22 September 2006. No explanation or statement of why the material was submitted so late was given before the hearing. Mr Stookes suggested in the course of the hearing that this was due to late discovery by the defendant of the interested party.

64. None of that material was relied on before me. The court observes that this disregard of the rules is to be regretted. It is the sort of thing that may happen with litigants in person. However, as Collins J observed, the claimant and her

solicitor are well versed in judicial review in this sort of case. I respectfully agree with his Lordship that such a wholesale failure regarding the rules and the Practice Directions may of itself justify the refusal of permission.

65. For these reasons I reject this application for permission.

Order: Application refused

MR STEPHENSON: My Lord that leaves the question of costs and that is slightly complicated in this case. Before I deal with it, my , may I also thank your Lordship for that careful and detailed judgment and just make one other observation just on the last few points your Lordship made about the failure to comply with the CPR. One of the failures that your Lordship has mentioned in the course of your judgment has been the failure to include or even acknowledge the delay in form N461 (over a minute inaudible – drilling noise). ...that the Legal Services Commission were made aware of Collins J's decision in the case. He had said that they were. Now that raises a question over the soundness of the decision. It is extraordinary of my learned friend, if I may say so, to say that officers of the Legal Services Commission...

MR JUSTICE BEATSON: ... I am not going to get into satellite litigation. You knew, either the defendants or the interested party wrote directly to the Legal Services Commission about this and...

MR STEPHENSON: We didn't know at that stage that that had happened. I have accepted what my learned friend has said about it and the only thing I said is we may pursue it, but that doesn't matter. For the purposes of this case I have put in my schedule of costs my Lord and what we ...

MR JUSTICE BEATSON: May I ask what is the red, the difference between yesterday and today?

MR STEPHENSON: Yes that's right. The additions of today. If you look at the Caerphilly one first of all my Lord, which has been...

MR JUSTICE BEATSON: May I just ask, I want to know -- I was told two...I made enquiries about the timing of the hearing yesterday. I was told by the officer two counsel (inaudible)? Can I just confirm what the position as to discussions is in broad terms?

MR STEPHENSON: I made no representations at all ...

MR JUSTICE BEATSON: I don't think Mr Stookes did either.

MR PRICE-LEWIS (?): It's down to me, my Lord.

MR JUSTICE BEATSON: So it's down to you. All I am really going to say insofar as we have gone over to today...

MR PRICE-LEWIS: May I say what I think happened. I heard at the end of last week that we were listed for yesterday. I asked my clerk if it was possible to have a time listing. That is all. We didn't say I couldn't get here for 10 or anything of that sort. I practise in London but I actually live in Wales as it happens...

MR JUSTICE BEATSON: Well I thought you did.

MR PRICE-LEWIS: I always have practised in London and now welcome your Lordship's comments about (inaudible) even though I (inaudible). I practise and always have practised in London. I am pleased to hear (inaudible) if I may so. But, my Lord, all I asked my clerk to check was whether we could have the time listing. The next I was told it was listed for 2:00. We didn't know whether your Lordship had a morning list, whether that was the listing in any event

MR JUSTICE BEATSON: No, well, it was listed for 10.30 and it is fair to say that the bundles arrived together with...I had the original bundle and I had a bundle with the acknowledgement of services and these two arrived late on the evening. They arrived in accordance with what I had asked for...

MR PRICE-LEWIS: Your Lordship ordered 4 pm on the day before.

MR JUSTICE BEATSON: And so I though there was quite a lot to read in addition to what I had previously, so that it may be that the court is partly culpable in this. But given that the application appears to have been made, I just see the dramatic impact on Merthyr, on both of them.

MR PRICE-LEWIS: If I am at fault, I apologise. I certainly take any responsibility for whatever my clerk says. He's a long-standing clerk. I asked him to make an inquiry about the listing.

MR JUSTICE BEATSON: No, no I am very happy with what you say. Mr Stephenson, you were cut off.

MR STEPHENSON: My Lord, I am grateful. It needed clarifying. My Lord, so far as Caerphilly is concerned, therefore, since the legal aid certificate was dated 16 April the order for costs should be split into two parts my Lord, I would respectfully suggest and submit. The first is those costs up until 16 April, which we ask for against Mrs Condron, and the costs after 16 April which we also ask for against Mrs Condron but as I understand the usual practice is not to be enforced without (inaudible). That means that the total costs need to be split. Now can I deal with the Caerphilly one first of all because that is the more straightforward one. On the first page the Caerphilly solicitor has charged out at five hours at £87 per hour, £435. On the second page we have the counsel's fees for advice. That is advice for conference, documents and suchlike which subsumes the acknowledgement of service and the other documents (inaudible) advice related to that. And then the fee for the hearing and then a refresher for today. All of these fees, the fees are Caerphilly's fees, they are exactly the same for Merthyr's fees. Now my Lord I submit that we are entitled to

ignore the costs after the 16 April because all those fees up until that stage related to the dealing with the acknowledgement of service. They were not my fees.

MR JUSTICE BEATSON: These are all … so your fees as it were come in after (inaudible). Were you not involved in the acknowledgement of service?

MR STEPHENSON: Only the fees for the hearing. Yes, I was involved in the acknowledgment of service and all the advice etc that went with that. All I said was that this isn't a case where you can simply take out an acknowledgement of service and look at the solicitors' costs dealing with that plus my costs of drafting it because this is a case in which we have had to deal with a rolling case which has gone on. We have the original acknowledgement of service as your Lordship knows which was simply stating a summary acknowledgement but which we had to deal with …
MR JUSTICE BEATSON: (inaudible) the original claim …

MR STEPHENSON: The original claim had to be dealt with as if it were a proper claim. It had to be (inaudible) in 21 days and then at the end of that 21 days in came the detailed grounds of claim plus all the documents, a large amount of which are now before your Lordship and then after that we had to deal, as I said earlier, with the note on delay. And in all the correspondence which your Lordship has seen there have been suggestions that my learned friend has dealt with the claim as a sort of protocol matter inviting that resistance that the claim be acknowledged and submitted for judgment. For the reasons your Lordship set out all these matters are related to dealing with the claim in its earlier stages, all of which should have been put to bed if I can put it like (two minutes that are inaudible because of drilling noise)

MR JUSTICE BEATSON: It's only the hearing since then.

SPEAKER (?): (inaudible)

MR STEPHENSON: That's the point. If your Lordship wishes, we would wish you to deal with it that way, simply because it saves the costs of taxation. But if your Lordship feels unable to I would be very happy to have an assessment. It is rather complicated.

MR JUSTICE BEATSON: Well I want to hear (inaudible)

MR STEPHENSON: Yes.

MR JUSTICE BEATSON: So then Merthyr…

MR STEPHENSON: Yes. If I can go back, my Lord, because as I say I have put in red the extra costs in Caerphilly's case, our total costs there are £5,790.25 including VAT. If your Lordship does divide, then what your Lordship should do in my respectful submission is deduct the cost of the hearing and the costs of the refresher and that would…

MR JUSTICE BEATSON: It would be £3,790.

MR STEPHENSON: That's right, my Lord yes. So that would be the sum we would seek against Mrs Condron. (Inaudible) and then no restriction and then the balance of that after that with the restriction and then exactly the same, my Lord, for Merthyr. I would invite your Lordship to deduct £1500 for the fee of this hearing and £500 for the refresher. That makes a deduction of £2,000 from the total …

MR JUSTICE BEATSON: I am going to rise (inaudible)

(Court rises)

MR STEPHENSON (?): So far as deducting £2,000 in each case for the costs incurred since 16 April which would be essentially my costs of attendance and refresher.

(20 seconds inaudible – drilling noise)

MR JUSTICE BEATSON: It has been more expensive for Merthyr than Caerphilly. Caerphilly drives a harder bargain.

MR STEPHENSON: My Lord the only extra is that the solicitor for Merthyr charges a larger amount, a higher hourly rate, than the solicitor for Caerphilly.

MR JUSTICE BEATSON: This reflects my newness in this part of the world. There are guidelines for summary assessment and they don't allow for summary assessment (inaudible) crude, not just this process and we have standard

(30 seconds inaudible – drilling noise)

MR STEPHENSON: My Lord, I am sorry there is a very considerable (inaudible). I hadn't picked this up, I'm afraid. In the Merthyr one there are attendances on, five hours at £120 is £600 and then there are the attendances at hearing.

MR JUSTICE BEATSON: So the attendances at the hearing are all as it were attributable to Merthyr although …

MR STEPHENSON: That's right yes. Then there is the extra for the additional hourly rate plus the extra hours' work and those two together make up the difference between as your Lordship quite rightly says (inaudible)

MR STOOKES: My Lord I am just looking at the bottom line which…

MR JUSTICE BEATSON: Whoever wrote this in red it's not me.

MR STEPHENSON: I would say it's me, my Lord.

MR JUSTICE BEATSON: (inaudible) £7498 and £5790.

MR STEPHENSON: Yes.

MR JUSTICE BEATSON: So that's your bottom line and that's what I am looking at.

MR STEPHENSON: Doing it very roughly, that's right because the difference is only £1500, £1700 and the difference between the solicitor's rates ...

MR JUSTICE BEATSON: The difference between the solicitor's rates and the £600 for the attendance.

MR STEPHENSON: Plus the working out of VAT of course. So that ... I am grateful to your Lordship for pointing that out. So that's the order I ask for.

MR JUSTICE BEATSON: Right.

MR PRICE-LEWIS: My Lord I am conscious as I represent the interested party in the Mount Cook position that I am very limited in what I can say. I have a schedule which I fear may make your Lordship's eyes water.

MR JUSTICE BEATSON: Probably best I don't see it.

MR PRICE-LEWIS: I think that might be the case, my Lord, yes. But it is a significant amount of money obviously.

MR JUSTICE BEATSON: It is an interesting fact that when....I will just say this for the benefit of all advocates...that last year when I moved to the Administrative Court the commercial court used to the level of costs in the Administrative Court cases (inaudible). You are in the Mount Cook position. You have your written and oral submissions which of course have been helpful, but I don't think..

MR PRICE-LEWIS: I wouldn't press that on you. I simply refer your Lordship to that case (inaudible). May I just mention one matter.

MR JUSTICE BEATSON: Yes.

MR PRICE-LEWIS: My Lord in our original grounds of objection we do drawn attention to concern about funding. It is on page 30 of the supplementary bundle ... At page 5 of my grounds of objection which I drafted. It's a disclosure of the full position as to funding. It's paragraph 8(1), preliminary matters, and I refer to the claim form and the answer that was given.

MR JUSTICE BEATSON: Yes, I referred to that in my judgement

MR PRICE-LEWIS: Absolutely, my Lord, but I simply refer to this. We were invited by the Legal Services Commission to make representations. That is the position. We made those representations and then funding was refused. Collins J made his decision on the written permission application and we were frankly surprised that after that and given the initial refusal the only thing that seems to have changed was the refusal of permission, that funding was suddenly given. When I asked my learned friend today whether Collins J's order had gone before the Legal Services Commission and he tells me and I would like it on the public record that that is the case. We find that surprising if there are no other change of circumstances that an order of the High Court judge seems to produce as it were a decision the other way from the Legal Services Commission. We do express concern at that given the history.

MR JUSTICE BEATSON: Forgive me for interrupting. I can understand why you're concerned about this but I don't know what submissions were put before the Legal Services Commission. What practical...putting it bluntly, what is it that you want me to do?

MR PRICE-LEWIS: My Lord I want it on the public record, the concern because both counsel and I understand my clients will want to consider the matter and check the matter.

MR JUSTICE BEATSON: Well I have referred to the position in the judgment. It is normal actually, claimants are normally in quite a difficult position with respect to public funding. And it is true that this is the first time that I have seen a funding decision made after a quite full observation (inaudible) but I don't know what the claimant submitted to the Legal Services Commission and in these environmental decisions (inaudible) and I am not going to get out of the box that I am in deciding this renewed application. If there is an issue...I mean the other thing is, it's not very attractive...the Legal Services Commission (inaudible) for themselves. I appreciate that as you are in the Mount Cook position you could say I have got more of an interest in it because I am exposed without any help so it really is for the interested party to consider what to do. I can ask for a transcript (inaudible)

MR PRICE-LEWIS. That's exactly what I want, and that's all I want.

MR JUSTICE BEATSON: But as I say it does seem ...
(one minute 25 seconds inaudible – drilling noise)

MR STOOKES(?): ... completed a controlled work form which is the former legal help or before that the former green form scheme. If she does that and then receives later a funding certificate, then she is covered and it's backdated to the date of...

MR JUSTICE BEATSON: Is that the position here?

MR STOOKES: It is the position, yes

MR JUSTICE BEATSON: What is the date (inaudible)?

MR STOOKES: It would have been prior, in fact it would have been September 2008 my Lord, or a day or two after the date when she first became aware of permission, and that was the time when preliminary work started on this application.

MR JUSTICE BEATSON: So you become aware of the application. Is that because you get funding from that date once you have... the funding is going to support you effectively for the hearing.

MR STOOKES: The funding will, that's correct, and the funding itself is not backdated but the protection received from the controlled work 1 form does trigger or backdate the…

MR JUSTICE BEATSON: I haven't got a white book with me. Are you going to help me? I shall ask my clerk. (to clerk)Could you get a white book? (to counsel) I mean if that is so, I…

MR STOOKES: It is certainly our understanding and experience of that, but I have no…

MR JUSTICE BEATSON: I know but my problem is that you have got that understanding, Mr Stephenson made a submission based on a different understanding. Without discourtesy to either of you, I would like something firmer than understanding and if I can't deal with it now I am perfectly happy to say that in principle, unless you have something to say about it, I don't think you can resist an order for costs. The issue here is the restriction… Is there any other issue?

MR STOOKES: I would say yes, on the principle of an order of costs this case is an environmental case and in a public law case, where the claimant has no direct impact on her property, for example, it falls squarely in case that there should be under Davey the principle of no order for costs, albeit that we are dealing with a renewed permission.

MR JUSTICE BEATSON: Can you show me Davey?

MR STOOKES: I can't…

MR JUSTICE BEATSON: Is that *Fordham*?

MR STOOKES: This is *Fordham*, yes.

MR JUSTICE BEATSON: Well I think…I tell you what I am going to do, Mr Stookes, I have got the submissions. I will let you complete those submissions. I haven't got the material but I am going to say the following. I will let Mr Stephenson reply once you have finished. I am going to ask for written submissions on this point, well on two points, on whether you are publicly funded from day 10, but the stay on enforcement should apply from the date you filled out the form, because it seems to me just without deciding it at all but just as a matter of logic so you know what you have to address, Mr Stookes. It is illogical that if you have not got permission then you would have no protection at all, sorry if you have not got funding you have no protection at all, and if the Legal Services Commission decides to give funding from a date just before the hearing but has refused you beforehand, the notion that you are protected for the period in which your application has been refused, then it may that there is some justification for that. It just doesn't seem very logical. The claimant decides to go on despite the absence of funding. The Legal Services Commission could decide to give you funding backdated, they decided not to do so but I am concerned about that. I am not going to go against you without giving you a chance to make written submissions and Mr Stephenson to respond.

And then as for costs of environmental cases it's a double-edged thing because there is no personal interest. On the other hand you have got standing in this case and no court would deny that you have got standing. You have abandoned your protective costs application. You don't pursue it in relation to the period before the 16th, so I'll let you make written submissions about that. But I am…you can see that I am not, you will have to make a strong case. I am not ruling you out. If every environmental case was one at which the defendants proceed on the basis that they would bear the costs whatever, that's quite a sharp distinction, sharp difference. There are special cases in which costs are not (inaudible). That is what I propose to do.

MR STOOKES: My Lord, are you content for me to put my submissions on costs at the end of my submissions?

MR JUSTICE BEATSON: Well I would like to know the headings on them so that Mr Stephenson knows what he has to answer.

MR STOOKES: It would be the first point on the Legal Services Commission.

(one minute inaudible – drilling noise)

MR JUSTICE BEATSON: I am going to be in Birmingham for the rest of the month, but I will send my clerk in she can give you her email address and submissions can be emailed and I will get them (inaudible). Seven days (inaudible).

MR STEPHENSON: Seven days is difficult. What I was going to suggest if I may do so with respect is that the order should be that my learned friend Mr Stookes puts in his submission in seven days…

MR JUSTICE BEATSON: And you have another seven days to reply.

MR STEPHENSON: Yes

MR JUSTICE BEATSON: And then for me to determine and make a summary assessment on the papers…

MR STEPHENSON: Yes.

MR JUSTICE BEATSON: …without a further hearing. Are you content with that?

MR STEPHENSON: I am content with that my Lord.

MR JUSTICE BEATSON: Right, well that us do that. Can I ask that the order to reflect the outcome of today's hearing. Can you draft an order? I think that it wouldn't have to happen in London. It could happen in Cardiff as well.

MR STOOKES: My Lord, there are two other points. The first is I do take issue with the point. I appreciate what has been said about the approach to the CPR that this has not been simply the fault of the claimant, certainly not the fault of the claimant or their instructing solicitors on this, and we had sought to seek disclosure of a number of documents persistently throughout and I think there is equally

apportionment of blame for the way that the matter has proceeded. In terms of the supplementary bundle and the documents that were there, witness statements…

MR JUSTICE BEATSON: I referred in the judgment to the fact you (inaudible) disclosure.

MR STOOKES: No, my Lord following on from that, the point about the supplementary bundle. The reason the witness statement was in and the supplement, it was agreed by both parties that we put these in. We sent over and I said, well what documentation do we want, and they said could you list and put in to the document the various letters and we said ok but we are going to include in that list a number of others, and there was not objection to that. The reason for putting in a supplementary bundle is to assist the court (inaudible) than us (inaudible).

MR STEPHENSON: It is expressly not accepted that it is agreed. At the very outset yesterday, I wrote to object to them being in. My instructing solicitors emailed my learned friend to say that.

MR STOOKES: The final point, and the process and the procedure on where we have an order. The claimant does have a right to renew her permission application to the Court of Appeal. That is subject to strict time limits, at least seven days to put in (inaudible) get a new permission to apply for. We would ask that that or ask for an order now that that seven days does not start until the date of the order rather than the date of today.

MR JUSTICE BEATSON: The date of which order?

MR STOOKES: The date of refusal of permission.

MR JUSTICE BEATSON: The refusal of permission is today.

MR STOOKES: I would need to, if I can have it…

MR JUSTICE BEATSON: If you needed an extension of time in the matter…

MR STOOKES: Well…

MR JUSTICE BEATSON: With the bank holiday weekend coming up …

MR STOOKES: My Lord, I ask for an extension of time.

MR JUSTICE BEATSON: How much do you ask for?

MR STOOKES: Until seven days after the date of the order, the date after your note on the submissions.

MR JUSTICE BEATSON: Seven days after … I don't … which submissions?

MR STOOKES: Well seven days from the receipt of the order, submissions on costs my Lord.

MR JUSTICE BEATSON: No, no, no. You are not going to (inaudible). The issue about costs is completely… you are not going to get... are you applying for permission to appeal on my decision about costs? I have made my decision. I am refusing you permission and so the time runs from, as I understand it, from now. I am deferring consideration of costs as a separate issue and I am open to the suggestion because it is a bank holiday weekend that you should have more than seven days from today and I am willing to say fourteen days from today. I am not willing to say until I adjudicate on costs because that is seven days for you, seven days for Mr Stephenson, and then the issue is then it comes in, I don't know what I will be doing, how soon I can attend to it. So I am perfectly happy to give you fourteen days from today

MR STOOKES: My Lord, I am grateful. I have taken the point and it's a distinct term application and there will be a distinct matter on costs

MR JUSTICE BEATSON: Yes, so you will have to ask for a transcript and you will have to ask for it to be expedited and the learned clerk can assist you. I am not sure (inaudible). Get the court office to help. Good, I am grateful to all of you. I will keep the summary assessment documents. Well actually I am not going to keep them. What I am going to ask, Mr Stephenson, is that when you make your submissions you furnish another set of them.

MR STEPHENSON: I am grateful. Not included in my 15 pages, I hope.

MR JUSTICE BEATSON: No, no, no the 15 pages are submission. If you submit an authority, it doesn't count.

MR STEPHENSON: I am grateful my Lord.

MA3

3B-068 **C38. Effective Date of Amendment**

38.1. Subject to paragraphs 2 and 3 below, an amendment shall take effect from the date of the decision to amend by either the Director or an Authorised Solicitor.
38.2. Where a certificate is amended to impose a new costs limitation, the new limitation will supersede any earlier cost limitations on that certificate and will take effect from the date of grant of the certificate, unless the Director specifies otherwise.
38.3. Where the Director amends a certificate so as to:
(i) correct some mistake in the certificate; or
(ii) record a change of solicitor or any change of address on the certificate
the amendment shall take effect from such date as the Director may specify (which may be before or after the date of the decision to amend).

3B-069 **C39. Procedure on Amendment**

39.1. Where a Director amends a certificate (either under Rule 36 or following notification under Rule 37 or a review under Rule 40), he shall send the amended certificate to the solicitor and a copy to the client.
39.2. If the certificate covers proceedings which have commenced, the solicitor shall send a copy to the court.
39.3. Where a Director refuses an application to amend a certificate, he shall notify the client and the solicitor in writing, including a brief statement of the reasons for so doing.
39.4. Where the certificate covers proceedings which are in existence and the amendment to the certificate affects the description of proceedings, the level of service covered or whether the certificate extends to bring or defend any appeal, the solicitor shall forthwith notify all other parties to the proceedings that that is the case (save where the Director notifies the solicitor that it is not necessary or appropriate to do so).

3B-070 **C40. Review of Amendments**

40.1. Where a client is dissatisfied with a Director's decision to amend a certificate or to refuse an application on his or her behalf to amend a certificate, the client may, within fourteen days of receiving notice of the amendment or the decision not to amend the certificate, apply to the Director on a form approved by the Commission to have that decision reviewed by the Director and the Adjudicator, and may make written representations in support of that application.
40.2. The Director will consider any representations received under this Rule and may, if he or she thinks fit, amend the certificate accordingly.
40.3. Subject to paragraph 4 below, unless a review under this rule has been resolved to the satisfaction of the client by the Director, the Adjudicator shall review the decision.
40.4. The Adjudicator shall not review a decision to amend or not to amend an emergency certificate.

SECTION 11 – REPRESENTATIONS

3B-071 **C41. Procedure for Making Representations**

41.1. Any person, including an opponent or potential opponent of a client who has applied for or has received a certificate, may make representations to the appropriate Director and, subject to paragraph 8 below, such representations shall be considered by the Director.
41.2. On receiving an application the Director may, if he or she thinks fit, notify any other party or potential party to the proceedings that the application has been made.

41.3. The Director may at any stage invite an opponent, potential opponent or other person or body to make representations where he or she considers that it is appropriate to do so before deciding whether to provide or continue to provide public funds to support the case.

41.4. Where the Director considers that representations received are not material or are unlikely to affect any funding decisions, he or she shall inform the person making the representations that no further action will be taken on them.

41.5. Subject to paragraphs 4, 6 and 8, the Director shall ensure that the solicitor has a copy of representations received under this Section or, where the representations are not in writing, shall write to the solicitor setting out the gist of the representations.

41.6. If representations are received from a person who is not a legal representative and it appears to the Director that the person making the representations has neither sent them to the solicitor or client nor given permission for the Director to do so, the Director shall not copy them to the solicitor or the client unless he or she has obtained the consent of the person making the representations to do so.

41.7. On receipt of representations, the Director may, if appropriate, place limitations on any certificate, but shall not take steps to discharge or revoke a certificate on the basis of representations received unless the solicitor has been given an opportunity to respond to issues raised by the representations. If a certificate is in force it shall be deemed to cover reasonable work done in responding to representations, but such work must be carried out within the cost limitation.

41.8. The Director need not consider representations in detail if they relate to proceedings which are not currently being pursued, for example because the individual case is stayed pending the outcome of a test case or other Generic Issue.

41.9. The Director shall inform the person making representations of the outcome of his or her considerations, but is not obliged to do so until a final decision has been taken on them following any review by the Adjudicator or until the time for applying for such a review has expired.

Section 12 – Reporting Obligations

C42. Duties of the Client 3B-072

42.1. The client shall immediately ensure that the Director is informed of any change in his or her financial circumstances which has occurred since the client's financial resources were assessed and which the client has reason to believe might affect the terms or the continuation of the certificate.

42.2. The client shall immediately inform the solicitor of any other change in his or her circumstances or in the circumstances of the case which he or she has reason to believe might affect the terms or the continuation of the certificate.

42.3. The client shall comply with any request by or on behalf of the Director for such information as the Director may require for the purpose of carrying out functions under the Code or Regulations.

42.4. The client shall attend a meeting with the Director where requested to do so.

C43. Duties of the Solicitor 3B-073

43.1. The solicitor shall give a report to the Director whenever requested to do so, containing such details as the Director may specify for the purpose of carrying out functions under the Code or Regulations.

43.2. The solicitor shall also report to the Director where:

(i) the client gives the solicitor information under Rule 42 which the solicitor considers may be material to the terms or continuation of the certificate;

MA4

points of view

EXPRESS COMMENT

OK, admit it.

How many of you cried on Sunday night?

Who felt like they were being watched by 15 million people as they stood under a spotlight waiting to hear their fate delivered by a man with a crew cut wearing his trousers under his chin?

It's fair to say 16-year-old Lloyd Daniels has captured the hearts of those living in Merthyr Tydfil and the Rhymney Valley.

And while we have all enjoyed the highs of his climb through the audition process and his success at boot camp we also had to share in his disappointment at finding himself in the bottom two in this Sunday's live show.

After a difficult week, in which he battled against a sore throat, the talented youngster's rendition of 'I kissed a girl' did not go down well with the public but fortunately he was saved when Rachel lost out in Deadlock.

Lloyd has shown tremendous heart in this year's contest and we are sure he won't let this setback ruin his chances of becoming an X Factor winner.

He knows he has the support of everyone back home and undoubtedly this is what is carrying him through the emotional and physical strains that come with being a contestant on Britain's top talent show.

He has shown maturity that anyone would be proud of and we can't forget that he was only waiting for his GCSE results a few weeks ago.

We all witness the hot housing of young talent these days.

Wayne Rooney is barely in his 20s yet he seems to have been around carrying the dreams of Manchester United's fans for years.

Is it possible for any of us to imagine the pressure, the emotion, the dread that Lloyd must have felt when he was called upon to sing again, not for his supper but for his superstar life.

But he coped well and in the process he proved that he is a showbiz trooper, and more than that he has guts beyond his tender years.

Whatever happens he has done Merthyr, the Valleys and Wales proud.

Readers need to be aware of our park's problems

I REFER to the article, published both in the *South Wales Echo* and *Merthyr Express*, regarding the skate park.

While no-one can complain that the provision of the Park for young people is to be commended, your readers should be aware of the negative side.

Are parents aware that it is an open area 24 hours a day and totally unsupervised?

No guidance is available or given as to the wearing of protective clothing, or helmets.

No protection exists for young or vulnerable adults in any form. Notices are placed around but surely provision should be made for some form of supervision.

Contrary to your article the site is not next to or close to the Leisure Centre, it is on the doorstep of the Bowls Club.

Mountain bikes, electric scooters and even motor cycles have been on the Park terrifying anyone who wants to pass peaceably to use the bowls, leisure centre or cinema.

It is a challenge sometimes to run the gauntlet of even walking through.

As a member of the Indoor and Outdoor Bowling Club situated at Rhydycar, I can advise you that our members are being constantly abused by the younger element who congregate at Rhydycar not to use the Skateboard Park but to use it as a meeting place.

Fights are frequent on the site.

The police have been called on a number of occasions.

The door of the Club has been smashed, bottles, cans and used needles are thrown onto the bowling green.

Football is being played even on the roof of the Club.

The trees planted have been snapped.

Members are being abused and when I asked a group to disperse, as they were blocking the entrance I was spat on by a 12-year-old girl who was supported by a large number of cursing, swearing youths.

As no toilet facilities are provided on the site our foyer is often used by both sexes to urinate in, much to the disgust last week of visitors from another club.

The car parking area has become a 'no-go area' when racing cars use it.

Far from enjoying the chance to park nearby (we do have 80 and 90-year-old members) the area near the cinema is safer and a 400-yard walk with heavy equipment is endured.

I could go on endlessly, but...

The Bowls Club pays a yearly rental of more than £26,000 to use the Bowls Club and has enjoyed many years trouble-free, but it is now frustrated by the inability to influence any change to the supervision of the Park.

The young people who designed the Park and are genuine users must be equally as upset by the events as inevitably they will be tarred with the same brush.

The Merthyr Tydfil County Borough Council is aware of the problems and we wait with bated breath for a solution before someone is hurt or injured in an incident.

I know that I will be targeted for airing these views but someone must represent those who feel genuinely threatened by the siting of the skatepark on the doorstep of a Club used by, among others, retired people who use it as a community meeting place.

PETER BRILL
Vice President
Merthyr Tydfil Bowls Club

Skate park now attracts youngsters

DEAR sir, ref the article on the skateboard park in the Merthyr Express October 29.

All is not rosy in the garden I can assure you.

I and many others play bowls right next to the skatepark and the large crowds that hang about there are quite intimidating by sheer numbers alone.

Also the saplings adjacent to park have all been broken and the top half of glass door into the bowls hall has been broken.

They also gather at entrance and exit to bowls hall if raining.

I wrote opposing the positioning of the skatepark when it was announced to no avail, the mix of the two age groups so close together is like water and petrol, the skatepark should have been in the far corner of the area.

It is obviously not safe to park your car near the park in the nights. Let's hope it will be another white elephant after a while.

M. TOVEY
By e-mail

picture of the week

MERVYN Saunders took this lovely photograph of the River Taff below Pontygwaith bridge, Merthyr Vale.

Do you have a photograph you think we could use as our

Opencast mine should be closed

WE all have a right to live in a healthy environment, no-one has the right to pollute in such a manner that they profit from while others pay the price.

One of the biggest environmental problems of our age in our locality is opencast mining. What is objectionable is not only is it so environmentally harmful but a small minority are likely to be making a significant profit from that harm while much of the community, our children and grandchildren, are paying the price with noise, dust, air pollution and the devastating incongruous visual amenity.

It is important to protect the environment for the wider world, our government states that it is proud to be one of the first countries in the world to be committed to protecting the environment both in its communities and in the wider world.

Yet right now, thousands and thousands of people are dying because of extreme weather conditions never before experienced and, there is consensus among scientists, this is caused by global warming.

It is important that we recognise that it is our decisions and our government's decision that are directly causing or contributing to those thousands of people in Kenya, Ethiopia, Somalia that are dying.

Millions of people are experiencing drought. Millions of others are about to lose their homes. In Bangladesh, extreme flooding is also killing thousands of people.

It is this fact that people are dying right now that should be borne in mind when asking about the coal the steam trains on the Brecon railway use.

It is vital to continue to object to the opencast mine.

It should never have been granted permission.

It should stop operations straight away.

The Welsh Assembly Government has signed up to providing environmental rights to all, just as there are human rights we also have environmental rights. These are not rights that can be bought off, it is important to me to ensure that I and my neighbours and all other residents are entitled to assert our environmental rights.

Why should we suffer the pollution and waste of others?

Our council is obliged to protect our environmental rights, but time after time we see that it is failing to do so. We are simply given one excuse after the other This is why I carry on.

ELIZABETH CONDRON
Glasfor Road
Twynyrodyn

Health boss has failed with NHS

I REFER to the article in the *Western Mail* (Wednesday, October 28) that there are more than 700 patients waiting in the queue for orthopaedic treatment for more

more confidence as I'm delivering on my promises of better public communication.

COUN ADAM BROWN
Gurnos Ward

Fighting for what she believes in

THE article "Campaigner could face bill over opencast challenge", *Express* January 21, shows the tremendous resolve, courage and belief Mrs Condron has.

She is without doubt a woman of principle who is prepared to stand up and fight for the people and children who have to live with the blight of the Ffos-y-Fran opencast.

Mrs Condron and our group are members of the Environmental Law Foundation whose primary purpose is to secure environmental justice, and so contributing to social justice, for all.

It is a national charity which links communities and individuals to legal and technical expertise in order to help prevent damage to the environment.

Above all the Environmental Law Foundation supports the fundamental and urgent requirement that everyone, our children and our grandchildren, should live without harm to other living things, or damage to the ecological balance of our planet.

Not many, if anybody, would do what Mrs Condron has done.

Well done Elizabeth Condron, Merthyr Tydfil needs more people like you, perhaps then we would not be the dumping ground of Wales.

TERRY EVANS
Chairman, Residents Against Ffos-y-Fran

Town is right site for nuclear plant

IT was good to read Mr Joseph Profit's letter, *(Merthyr Express* January 7), he reminded all of us of the benefits and the legacy of opencast coal mining as "lush pastures and available commercial and housing estates".

I couldn't agree more!

Although I suspect that the "green mob" with their broken shoelace arguments will be jumping up and down stamping their carbon footprint on his valuable point of view.

Mr Profit also brought to our attention the Labour Government's policy to fast-track and construct more nuclear power stations, which leads me to suggest that once the coal is extracted from the proposed Merthyr Village site this 221-hectare site that the developers want to make safe and transform into commercial and housing estates could now be an ideal and possible site suitable for a new nuclear power station.

The safer nuclear fusion plants are already being built and we have plenty of water. Why not?

If our local MP and AM do really care about our borough, unemployment and the eradication of poverty, perhaps they should be lobbying the British Government for our borough to be considered to site one.

Mr Profit's thoughts of despair of the unemployed and the well-being of our borough's economy, which I share, would be vastly improved when our borough would enjoy the full benefits of more employment and a long-term investment which we desperately need.

ELWYN JONES
Eleventh Avenue
Galon Uchaf
Merthyr Tydfil

Will other drivers be facing action?

I WOULD like to comment on the article in the *Merthyr Express* a few weeks ago about the taxis of merthyr parking outside the Wetherspoon pub causing a hazard to other road users.

After the letter was printed, every taxi driver in the borough received a letter informing us that if we continue to park the police would issue us with a parking charge. So now there is no parking outside Wetherspoon's by taxis. We were just wondering if the same law-abiding driver

LOTTO WINNERS

£5: 599116, 146789, 209842, 408034, 584870, 221892, 895225, 131914, 287973, 408415, 526207, 707780, 798557, 692772, 555716, 654892, 197214, 114938, 313368, 865101, 487474, 235000, 702416, 387694, 828834, 751629, 293841, 253749, 189430, 285305, 149494, 948028, 473418, 111690, 827693, 872393, 433788, 788270, 203695, 456590, 894537, 393018, 237529, 671324, 796808, 106441, 178843, 781410, 875170, 341117, 692848, 484650, 542412, 857136, 684027, 800194, 381815, 604612, 373178, 300257.

Case No: C1/2006/0086

Neutral Citation Number: [2006] EWCA Civ 1573
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION,
ADMINISTRATIVE COURT
MR JUSTICE LINDSAY
[2005] EWHC 3007 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Monday 27th November 2006

Before :

LORD JUSTICE WARD
LORD JUSTICE WALL
and
LORD JUSTICE RICHARDS

Between :

National Assembly for Wales — Appellant
- and -
(1) Elizabeth Condron
- and -
(2) Miller Argent (South Wales) Limited — Respondents

(Transcript of the Handed Down Judgment of
WordWave International Ltd
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190 Fleet Street, London EC4A 2AG
Tel No: 020 7421 4040 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Timothy Corner QC and Philip Coppel (instructed by **the Treasury Solicitor**) for the **Appellant**
Charles George QC and Alexander Booth (instructed by **Richard Buxton Solicitors**) for the **First Respondent**
Keith Lindblom QC, Rhodri Price Lewis QC and James Pereira (instructed by DLA Piper Rudnick Gray Cary LLP) for the **Second Respondent**

Judgment
As Approved by the Court

Lord Justice Richards :

1. This is an appeal by the National Assembly for Wales ("the Assembly") from an order of Lindsay J quashing the Assembly's grant of planning permission for the carrying out of opencast mining and related removal and reclamation operations at a site of some 400 hectares at Ffos-y-fran, near Merthyr Tydfil. The proposed development generated a great deal of local opposition. The first respondent, Mrs Condron, was one of the objectors. The second respondent, Miller Argent (South Wales) Limited ("Miller Argent"), is the developer.

2. The detailed background is set out very clearly in Lindsay J's main judgment (see [2005] EWHC 3007 (Admin)). A brief summary will suffice at this stage. The planning application was submitted by Miller Argent in April 2003. It was "called in" under section 77 of the Town and Country Planning Act 1990 for determination by the Assembly. An inspector was appointed to conduct a public inquiry. In his report, submitted in November 2004, the inspector recommended that planning permission be granted subject to conditions. In accordance with its standing orders, the Assembly delegated its decision on the application to a Planning Decision Committee ("the PDC") consisting of four members of the Assembly. The Chair of the PDC was Mr Carwyn Jones AM, the Minister for Environment, Planning and Countryside in the Welsh Assembly Government. At a meeting on 3 February 2005 the PDC resolved that it was minded to allow the application subject to conditions and the completion of a section 106 agreement. A "minded to grant" letter to that effect was issued on 7 February 2005. The PDC authorised the details of the formal permission, including review of the section 106 agreement and the final formulation of the conditions, to be dealt with by officials on its behalf. The formal grant of planning permission followed on 11 April 2005.

3. Mrs Condron thereupon brought a challenge under section 288 of the 1990 Act to the grant of planning permission. The matter came before Lindsay J, who considered the grounds under five headings. He dismissed the challenge under four of those headings but found in Mrs Condron's favour under the fifth, by which it was contended that the PDC's decision was vitiated by the appearance of bias arising out of a remark made by Carwyn Jones to an objector the day before the PDC meeting. The Assembly now appeals against the judge's finding on that issue. The appeal is supported by Miller Argent and resisted by Mrs Condron.

4. In addition, by a respondent's notice Mrs Condron seeks to uphold the judge's order on the basis that he ought to have acceded to aspects of her challenge under three of the four headings on which he found against her. I shall defer any consideration of those issues until I have dealt with the issue of apparent bias.

Appearance of bias: introduction

5. The claim of apparent bias arose out a remark allegedly made by Carwyn Jones to Mrs Jennie Jones, a retired civil servant who lives in Merthyr Tydfil within sight of the

proposed development and was a member of a local protest group. Jennie Jones's evidence was that on 2 February 2005, the day before the PDC met to consider the planning application, she was involved in a demonstration outside the Assembly's office building in Cardiff. She was invited inside the building by an Assembly member in order to get out of the cold. As she entered the building she saw Carwyn Jones and approached him. What happened next was described in her witness statement as follows:

> "When I first approached him I spoke in English and I asked him whether I could have a word about the scheme. He asked me whether I was from Merthyr Tydfil and I replied that I was. He did not appear that interested in talking to me. I asked whether he would be willing to continue the conversation in Welsh and he then became more responsive.
>
> It was a reasonably brief conversation but during this I explained that he had two little boys and asked him whether he would be concerned about the proposal being developed close to their school. He agreed that it was a concern but concluded, in English, that he was '*going to go with the Inspector's Report*'.
>
> I was disheartened about the discussion and when I returned to our group I explained my conversation to them. I was not surprised to hear that the Planning Decision Committee had approved the Scheme, in my view Mr Jones had already made up his mind. He was also the chair of the group and may have had the opportunity of having the casting vote.
>
> ...
>
> From what Carwyn Jones told me it was absolutely clear that he was not bringing an unbiased properly directed and independent mind to the consideration of the matter. Since he was Chairman of the Planning Decision Committee this was particularly unfortunate" (my emphasis).

The point made in relation to Carwyn Jones's position as Chair of the PDC related not only to a concern that the Chair might have an influence over the debate but also to the fact that the PDC consisted of only four members and if there was an equality of votes the Chair had a casting vote.

6. Following the encounter on 2 February, Jennie Jones's group made a complaint to the Assembly on the ground that Carwyn Jones had breached the Code of Conduct for members of the PDC by discussing a case with an interested party. The complaint was passed on to the Assembly's independent Commissioner for Standards, Mr Richard Penn ("the Commissioner"), who investigated the matter and set out his findings in a letter of 13 May 2005. His conclusion was that the complaint was inadmissible since it did not meet one of the criteria laid down in the complaints procedure, namely that "it appears at first sight that, if all or part of the conduct complained about is established to have been committed by the Member, it might amount to a breach of any of the matters encompassed within Standing Order 16.1(i) or (ii)".

7. The Commissioner said that he had reached that conclusion after a preliminary investigation in the course of which he had interviewed Jennie Jones and other representatives of her group; the Clerk to the Environment, Countryside and Planning Committee (who also clerked the PDC meeting); an official of the Environment, Countryside and Planning Division who was the key adviser to the PDC; and Carwyn Jones himself. As to the relevant facts, the Commissioner stated:

> "There is a considerable consensus between Jennie Jones and Carwyn Jones AM about the conversation that took place between the two of them on 2 February 2005. Both said that they met entirely by chance ... and that the discussion was brief lasting no more than 90 seconds with no witnesses to what was said. Jennie Jones told me that she could see that Carwyn Jones AM was obviously uncomfortable at talking to her and was 'itching to get away'. Both agree that the conversation started in English but switched to Welsh soon after. Both agreed that the planning application in respect of Ffos-y-Fran was touched on and that Carwyn Jones AM referred to the Planning Inspector's Report. However there is disagreement about exactly what Carwyn Jones AM said to Jennie Jones. Jennie Jones claimed that Carwyn Jones AM told her that he was 'going with the Report of the Inspector' – she took this to mean that he was going to accept the recommendations in the Report – whereas Carwyn Jones AM said that as soon as he recognised that Jennie Jones was a part of the demonstration against the Ffos-y-Fran application that was taking place outside the building he reverted to English and told her that he could not discuss the matter and that he had not yet read the Inspector's Report. Both agree that the conversation then ended and he walked out of the Milling Area."

8. The Commissioner then referred to certain provisions of the Code of Conduct, to which I will need to return later in this judgment. He said that he had carefully considered all the evidence he had collected. He went on:

> "It is indisputable that Carwyn Jones AM neither sought nor agreed to a meeting with Jennie Jones as clearly demonstrated by the evidence of both Jennie Jones and Carwyn Jones AM. The meeting was wholly accidental and unplanned. There is disagreement about what was said in part of the conversation that resulted from this accidental meeting but Carwyn Jones AM is adamant that as soon as he realised there was a danger he would be discussing the planning application for the Ffos-y-Fran application he terminated the conversation as quickly as was politely possible. Jennie Jones herself said that Carwyn Jones AM was clearly uncomfortable and '*itching to get away*'.
>
> The evidence from the Committee Clerk and from the Environment, Countryside and Planning Division official

reinforces the claim by Carwyn Jones AM that he did not form a final view on the application until the conclusion of the Planning Decision Committee. The meeting of the Committee was unusually prolonged as Carwyn Jones AM (who chaired the meeting) and the other Assembly Members on the Committee fully explored the many issues and representations about the scheme before coming to a final decision. Carwyn Jones AM is also adamant that any views expressed by Jennie Jones in the brief conversation on 2 February 2005 did not affect his own consideration of the matter the following day" (original emphasis).

9. The Commissioner concluded:

> "I have considered whether the mere fact of a meeting and a conversation with someone protesting about an application, however brief and unplanned, could constitute a breach of the Code of Conduct for Members of the Planning Decision Panel by Carwyn Jones AM. I have concluded that it could not. In my view the key test is set out in paragraph 5 of the Code ... and I have found no evidence that Carwyn Jones AM failed '*to act, fairly and even handedly, by bringing an unbiased, properly directed and independent mind to ... consideration of the matter*'" (original emphasis).

10. It was very soon after the Commissioner's decision letter that the challenge under section 288 of the 1990 Act was brought against the Assembly's grant of planning permission. An allegation of bias was included in the grounds of application, though it was not expressed in the terms ultimately advanced before Lindsay J and the grounds made no reference to the conversation between Jennie Jones and Carwyn Jones on 2 February. That conversation was, however, the subject of a witness statement from Jennie Jones which was filed in early July 2005. The Assembly responded in November 2005 with a witness statement from Mr Gareth Rogers, the Deputy Clerk to the Assembly's Committee on Standards of Conduct, who explained the framework of the complaints procedure and exhibited the Commissioner's decision letter of 13 April 2005 (which the claimant had already put in evidence). There was no witness statement from Carwyn Jones himself.

11. That was the main evidence before Lindsay J relevant to this issue. At the start of the section of his judgment dealing with the issue, the judge recorded that there was no difference between the parties as to the legal test, which was to be found in *Porter v Magill* [2002] 2 AC 357 per Lord Hope of Craighead at para 103:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

The type of bias alleged was described by the judge as "possible predetermination". He adopted a passage in *Georgiou v Enfield LBC* [2004] LGR 497, where I myself applied *Porter v Magill* in a planning context and said at para 31 that it was necessary to consider –

> "whether, from the point of view of the fair-minded and informed observer, there was a real possibility that the planning committee or some of its members were biased in the sense of approaching the decision with a closed mind and without impartial consideration of all relevant planning issues."

12. As to how a possible predetermination was said to have manifested itself in this case, the judge referred to the evidence of Jennie Jones. He then referred to the Commissioner's decision letter. It will be necessary for me to come back in greater detail to the judge's treatment of that letter, but it is helpful to note a few points at this stage.

13. First, the judge did not find in the Commissioner's letter any evidence of a clear denial by Carwyn Jones of Jennie Jones's account of the words spoken by him during the conversation on 2 February. As the judge put it at paras 63-64:

> "I accept that the Commissioner did find that there was a 'disagreement' as to what was said but that, of itself, does not oblige the conclusion that Carwyn Jones A.M. had denied that the had said the words which Jennie Jones had attributed to him. So far as one can tell Carwyn Jones A.M. did not say words to the effect, for example, that he could not have said that he would go with the Inspector's Report because he did not at the time know what its conclusion was or that he did not then know what conclusion the Inspector had arrived at or that he had not received the officers' reports summarising the Inspector's Report but merely said that he could not discuss the matter and that he had not read the Report, a 70 page document. Nor did he say that he could not discuss the matter *as* he had not read the report.
>
> Merely to assert that he had not read the Inspector's Report cannot, in my view, be taken to be even an oblique denial of his saying the words which Jennie Jones had attributed to him, a denial which would have been so easy to make had it been open to him. Of course, if the import of the reference to his not having read the Report was that he was going to go with the Report even though he did not know what it contained, that would in no way weaken the allegation against him of pre-determination .... I reiterate that there has been no evidence from Carwyn Jones A.M. in opposition to Jennie Jones' witness statement of the 6th July, not even after the way the Claimant would put her case to me on 'bias' had become entirely clear, nor has there been an application for Jennie Jones' cross-examination" (original emphasis).

14. Secondly, the judge observed at para 60, by reference to the terms of the complaint, that the question before the Commissioner was whether there had been a discussion of the

case with an interested party; the Commissioner was not, strictly speaking, required to be concerned with whether there had been anything said or done that signified possible predetermination. In relation to the Commissioner's conclusion, which he described as going outside what was strictly necessary to deal with the particular complaint, he said at para 66 that it did not deal with the question with which the judge was concerned, namely the appearance of bias.

15. Having regard to those and other matters, the judge rejected an argument advanced on behalf of the Assembly that he should accept the Commissioner's conclusion as conclusive on the issue of bias. He said that he had to come to his own decision on the evidence before him. He examined various submissions by counsel for the Assembly and counsel for Miller Argent, before reaching a conclusion expressed as follows (para 75):

> "Having heard the argument I conclude that there was an unacceptable possible pre-determination in the Planning Decision Committee that authorised the grant of planning permission that finally emerged on the 11th April 2005. A fair-minded observer, hearing the words which Jennie Jones attributes to Carwyn Jones A.M., on learning that the Minister was to be Chair of the PDC dealing with the application the next day, and even recognising that the PDC could be expected to follow the Inspector's Report unless there were planning reasons not to, would, in my view, conclude that there was a real possibility that that member of the PDC was biased. He would think the member would be approaching the question of permission with a closed mind and hence also without impartial consideration of all relevant planning issues. His hearing that the Minister had not read the Inspector's Report would not serve to deny the possibility of bias that he would have concluded existed. That Miller Argent's application had excited a good deal of controversy and was far from being such that the balance of its merits and demerits could only possibly point one way made the absence of bias more than usually important."

16. The judge's judgment had been reserved at the conclusion of the hearing before him. It was listed to be handed down on Wednesday 21 December 2005. In accordance with the usual practice, the judge made a draft of his judgment available to the parties in advance of hand-down. It was sent to the parties on the afternoon of Friday 16 December. On the afternoon of Tuesday 20 December the Assembly's solicitors faxed to the judge a witness statement of Carwyn Jones responding to Jennie Jones's allegation as to the words he used during their conversation on 2 February. In that statement he said:

> "In relation to the allegation, as it is now phrased in paragraph 4 of Ms Jones' statement, I can categorically say that I did not say to her, either in English or in Welsh, that I was 'going to go with the Inspector's report' nor did I say anything of the sort which might have conveyed to Ms Jones the impression that I had already made up my mind either way in respect of the planning application which the Planning Decision Committee was due to consider the following day.
>
> In fact, at that stage I had not even read the Inspector's report, as I stated to the Commissioner for Standards when he interviewed me in relation to the complaint ... and as is recorded in the Commissioner's decision letter ...."

17. On 21 December the judge was faced with an application by counsel for the Assembly that he should admit Carwyn Jones's statement into evidence rather than proceeding to hand down judgment in the form of the existing draft. Unsurprisingly, the application was supported by Miller Argent but opposed by Mrs Condron. After hearing substantial argument, the judge delivered an *ex tempore* judgment refusing the Assembly's application: that judgment, which is conveniently referred to as his "supplementary judgment" even though it was given immediately before he handed down his main judgment on the section 288 challenge, is reported at [2006] JPL 1512. The judge thereupon handed down the main judgment in materially the same form as the draft that had been made available to the parties.

Appearance of bias: grounds of appeal

18. The Assembly's case on the appeal was presented by Mr Corner QC. Neither he nor his junior appeared in the proceedings before Lindsay J. Four grounds of appeal were advanced against the judge's decision on the bias issue. Three of them (grounds 1, 3 and 4) were directed at the main judgment as handed down; one of them (ground 2) at the supplementary judgment refusing to admit the late statement of Carwyn Jones into evidence.

19. In summary, it is contended by *ground 1* that the judge failed to make an express finding whether Carwyn Jones said to Jennie Jones on 2 February 2005 that he was "going to go with the Inspector's report"; by *ground 3* that the judge erred in concluding that the Commissioner's decision letter did not disclose evidence of a clear denial by Carwyn Jones that he had said the words attributed to him; and by *ground 4* that the judge adopted a flawed approach and reached the wrong conclusion in finding that those words, if said, would lead a fair-minded and informed observer to conclude that there was a real possibility that the PDC was biased.

20. It is contended by *ground 2* that, if the judge did find that Carwyn Jones said the words attributed to him, he erred in making such a finding without admitting Carwyn Jones's witness statement into evidence; alternatively, if the judge was entitled to not to admit that statement into evidence, the Court of Appeal should nonetheless admit it now as fresh evidence.

Ground 1: lack of express finding of fact

21. Mr Corner's submission is that the alleged utterance by Carwyn Jones was at the heart of the case of apparent bias as presented to the court and it was essential to make a finding on it. Although the judgment discusses over the course of several paragraphs whether it

is more likely than not that Carwyn Jones did utter the words, it does not lead to any clear finding on the issue. It is not clear that the judge confronted the necessity of making a decision as to whether the words were in fact uttered. In failing to make an express finding the judge fell into error.

22. In my judgment it is plain on a fair reading of the judgment that the judge did find on the balance of probabilities that Carwyn Jones spoke the words attributed to him by Jennie Jones. It is true that the judge did not spell out that finding in express terms, and it would have been better had he done so. But his reasoning led clearly to that finding and his conclusion on apparent bias would not make sense without it. Thus the finding is to be derived by necessary implication from the judgment.

23. I have referred already to the judge's repeated references to the absence of a clear denial by Carwyn Jones of the account given by Jennie Jones, including his rejection of a submission that such a denial was to be found in the Commissioner's decision letter. Having considered that letter, the judge stated at para 68 that he had to come to his own decision on the evidence before him and referred to "the exiguous facts" which a fair minded and informed observer would have to consider. At para 70 he rejected some extremely weak submissions by counsel for the Assembly that there was material inconsistency in Jennie Jones's account of what had been said and that there might have been a mistake in translation. At para 71, in response to a submission by the same counsel that Carwyn Jones's remark was no more than a "throw-away" remark, the judge observed that such a remark can be more revealing that a more prepared or studied one might be. At para 72 he recorded an acceptance by counsel for Miller Argent that there had been no denial by Carwyn Jones of his having said the words attributed to him, and proceeded to reject a submission that the words might amount to no more than an indication of a mere predisposition rather than a possible predetermination. Although the judge referred to the words "attributed to" Carwyn Jones rather than to the words "spoken by" him, it seems to me that the judge's reasoning throughout these passages involves an implicit acceptance that the words attributed to Carwyn Jones were in fact spoken by him.

24. The position is clearer still in the judge's conclusion at para 75, which I have already quoted. The judge concluded that a fair-minded observer, "*hearing the words which Jennie Jones attributes to Carwyn Jones A.M.*" (my emphasis), would conclude that there was a real possibility of bias. If the judge had not found that the words were spoken, his conclusion would simply not make sense. A further clear indication that such a finding had been made is to be seen in para 76, where the judge said that the grant of planning permission should be set aside even though "this is a very large consequence *for a very small remark*" (my emphasis). Again this would not make sense in the absence of a finding that the remark had been made.

25. Mr Corner referred us to *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA Civ 1117, in which Scott Baker LJ stated at para 33:

> "In my judgment it is an important exercise in an 'apparent bias' case to identify with some precision those facts on which the suggestion of bias can be based. The judge did not expressly carry out that exercise in this case. However, the basis for his finding of apparent bias appears by implication to be the material that he has set out in paragraphs 57 to 61 of his judgment."

26. In my view *Flaherty* gives no assistance to the Assembly's case on this issue. I am in full agreement as to the importance of identifying with some precision the facts on which the suggestion of bias is based. The problem in *Flaherty* was that the allegation was based on a number of matters and the judge did not identify clearly the matter or matters on which the finding of apparent bias was based. In the present case, by contrast, the allegation was based on only one matter, namely the words allegedly spoken by Carwyn Jones, and the finding of apparent bias could be based only on that matter. Moreover, nothing that was said in *Flaherty* casts any doubt on the legitimacy of identifying a relevant finding of fact by necessary implication from a judgment even if it has not been spelled out in express terms.

27. I would therefore reject the Assembly's case on ground 1.

Ground 3: misinterpretation of Commissioner's decision letter

28. As I have already said, the judge did not accept that the Commissioner's letter contained evidence of a clear denial by Carwyn Jones that he had spoken the words attributed to him by Jennie Jones. The judge acknowledged that the Commissioner recorded a disagreement about what was said, but he pointed to the absence of any specific words of denial by Carwyn Jones and observed that Carwyn Jones's assertion that he had not read the inspector's report did not amount even to an oblique denial of his saying that he was "going with the report of the inspector".

29. Mr Corner submitted that the judge's interpretation of the Commissioner's letter on this point was erroneous. I agree with that submission. As I read the letter, Carwyn Jones must have denied saying the words attributed to him by Jennie Jones. It is worth repeating the relevant passage:

> "However, there is *disagreement* about exactly what Carwyn Jones AM said to Jennie Jones. Jennie Jones claimed that Carwyn Jones AM told her that he was 'going with the Report of the Inspector' – she took this to mean that he was going to accept the recommendations in the Report – *whereas* Carwyn Jones AM said as soon as he recognised that Jennie Jones was a part of the demonstration against the Ffos-y-Fran application that was taking place outside the building he reverted to English and told her that he could not discuss the matter and that he had not yet read the Inspector's Report" (my emphasis).

30. The reference to a "disagreement", followed by two contrasting accounts linked by "whereas", indicates clearly to me that Carwyn Jones had denied Jennie Jones's account of what he said and had put forward an alternative account. This is reinforced by the further reference, on the next page of the Commissioner's letter, to "disagreement about

what was said in part of the conversation that resulted from this accidental meeting". In my view the Commissioner would have dealt with this very differently if the account given to him by Carwyn Jones had left room for the possibility of the middle position identified by the judge, in which Carwyn Jones said *not only* that he had not yet read the inspector's report *but also* that he was going with the inspector's report – a position that would be inherently very strange and is not supported even by the evidence of Jennie Jones herself.

31. It is of interest, though not strictly a matter of legal relevance, that Jennie Jones understood the Commissioner's letter in the same way as I do. In her witness statement she refers to the letter and states:

> "He noted that the Ffos-y-Fran scheme was discussed, although Mr Jones must have denied saying what he did to me and instead told the commissioner that his comment to me was that he had not yet read the Inspector's report."

32. One of the submissions made by Mr George QC was that, for the purposes of his decision on the admissibility of the complaint, it was not necessary for the Commissioner to establish precisely what was said in the encounter between Jennie Jones and Carwyn Jones: the complaint was that Carwyn Jones had discussed the case with an interested party, and given the accidental nature of the encounter it was evident that that complaint had to fail irrespective of what precisely was said during the encounter. In my view that is too limited an analysis and, in so far as it seeks to downplay the significance of the Commissioner's exposition of the facts, it is mistaken. Whilst this was a preliminary investigation into a complaint and the Commissioner did not have to resolve any area of factual disagreement that he identified, he evidently considered it necessary to explore in some detail the extent to which the facts put forward in support of the complaint were accepted by Carwyn Jones and, where they were not accepted, what alternative version of the facts was given. That he did so is entirely understandable, since it was relevant both for his assessment of the complaint as formulated, i.e. breach of the requirement not to discuss a case with an interested party, and because he took it upon himself to consider whether there could have been a breach of any other principles to which members were required to adhere under the Code of Conduct.

33. Although I take the view that the judge was wrong to read the Commissioner's letter as containing no evidence of a clear denial by Carwyn Jones of having spoken the words attributed to him, it does not follow that the judge was wrong to find on the balance of probabilities that those words were indeed spoken. Mr Corner submitted that if the judge had not erred in his interpretation of the Commissioner's letter he *might* have reached a different conclusion on whether the words were spoken, since it was a fundamental part of the judge's reasoning that Carwyn Jones had *at no time* made a plain denial of having spoken the words in question. In my judgment, however, it is unrealistic to suggest that the judge's conclusion might have been different if he had read the Commissioner's letter in the way that I do.

34. The point is straightforward – so straightforward that I find it very surprising that the Assembly's legal advisers allowed this situation to arise at all. The claimant's case that Carwyn Jones had spoken the words in question was supported by a witness statement from Jennie Jones herself, complete with statement of truth. There was no application to cross-examine her and no other direct challenge to her evidence. Against that evidence had to be placed the Commissioner's letter recording, as I have interpreted it, a denial by Carwyn Jones when questioned by the Commissioner on the subject. Self-evidently, such second-hand evidence of a denial could not carry anything like the same weight as the unchallenged witness statement of Jennie Jones. If there was to be a direct challenge to her evidence the obvious course, as the judge made clear, was to file a witness statement by Carwyn Jones, as was eventually sought to be done after receipt of the draft judgment. In the absence of such a statement it was inevitable, in my view, that a finding on the balance of probabilities had to be made in favour of the version given by Jennie Jones.

35. This is a convenient place in which to dispose of one small point concerning the version given by Jennie Jones. According to her witness statement, Carwyn Jones said that he was "going to go with the inspector's report". The Commissioner's letter recorded her as saying that he had told her that he was "going with the report of the inspector". Like the judge, I see no material difference between those formulations; but in the circumstances I shall use the formulation in her witness statement.

36. Accordingly, whilst respectfully disagreeing with that part of the judge's reasoning that was directed to the Commissioner's letter, I do not think that this provides a sufficient basis for interfering with his implicit finding that Carwyn Jones did say the words attributed to him. For that reason the Assembly's partial success on ground 3 is ultimately of no help to it. The judge's conclusion as to appearance of bias must be considered on the basis that Carwyn Jones did say to Jennie Jones that he was "going to go with the inspector's report".

Ground 4: whether the judge was right to find an appearance of bias

37. That brings me to what I regard as the central issue in this appeal, namely whether the judge was right to find an appearance of bias on the basis that Carwyn Jones did say the words attributed to him.

38. Neither before the judge nor before us was there any disagreement as to the correct legal test; and I have referred already to what the judge said about that test. Nevertheless I think it important to look in a little more detail at what the test involves. It is helpful to start with a passage from *Flaherty v National Greyhound Racing Club Ltd* (cited above). The court was concerned in that case with a tribunal hearing, but the principles applied were general ones. Having referred to the basic test stated by Lord Hope in *Porter v Magill* (cited above), Scott Baker LJ continued, at para 27:

> "The test for apparent bias involves a two stage process. First the Court must ascertain all the circumstances which have a bearing on the suggestion that the tribunal was biased. Secondly it must ask itself whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased .... An allegation of apparent bias must be decided on the facts and circumstances of the individual

> case .... The relevant circumstances are those apparent to the court upon investigation; they are not restricted to the circumstances available to the hypothetical observer at the original hearing ...."

39. That emphasis on the circumstances as they appear to the court after investigation finds expression in various ways in the judgment of Lord Hope in *Porter v Magill*. The claim of apparent bias in that case was based on a statement in which the district auditor, during the course of his investigation into alleged misconduct, announced his provisional findings at a press conference. It was contended that this suggested that he had a closed mind and would not act impartially in the rest of his investigation. In rejecting that contention, Lord Hope endorsed at para 105 what Schiemann LJ had said in the Court of Appeal, to the effect that whilst there was room for a casual observer to form the view after the press conference that the auditor might be biased, the conclusion to be drawn from an examination of the material before the court was that there was no real danger of bias. Similarly, Lord Hope referred in para 104 to strands in the Strasbourg jurisprudence, on the one hand giving some support for the proposition that the standpoint of the complainant was important and on the other hand emphasising that what is decisive is whether any fears expressed by the complainant are objectively justified. He said that the complainant's fears were clearly relevant at the initial stage when the court had to decide whether the complaint was one that should be investigated, but they lost their importance once the stage was reached of looking at the matter objectively.

40. Further guidance is to be found in the judgment of Lord Hope in *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2. The claim of apparent bias in that case was directed towards the medical member of a disability appeal tribunal, Dr Armstrong. Lord Hope stated at para 17:

> "The critical issue is whether the fair-minded and informed observer would conclude, having considered the facts, that there was a real possibility that Dr Armstrong would not evaluate reports by other doctors who acted as [examining medical practitioners] objectively and impartially against the other evidence. The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge or tribunal member who is under scrutiny. It is to be assumed ... that the observer is neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at. It is to be assumed too that he is able to distinguish between what is relevant and what is irrelevant, and that he is able when exercising his judgment to decide what weight should be given to the facts that are relevant."

41. What, then, are the relevant facts to be gleaned from the material available to the court in the present case?

42. I take as my starting-point the actual words found to have been spoken by Carwyn Jones to Jennie Jones, which were put by the judge into direct speech as "I'm going to go with the report of the inspector". It was argued before the judge, and repeated before us, that those words go no further than a *predisposition* on the part of Carwyn Jones to follow the inspector's report and that a predisposition is to be distinguished from a *predetermination* or closed mind. The judge rejected the argument, stating at para 72 that the words "suggest a mind made up" and "suggest that so far as the speaker was concerned a conclusion had been reached, and that, on her unchallenged evidence, is how Jennie Jones interpreted them". I respectfully take a different view. In the light of the guidance to which I have referred, I would not place any weight on how Jennie Jones reacted to the words spoken. And when they are viewed objectively and in their context, the words appear to me to be consistent with the speaker having a predisposition to follow the inspector's report without necessarily having a closed mind on the subject.

43. We were referred to various cases in which the distinction has been drawn between a legitimate predisposition towards a particular outcome (for example, as a result of a manifesto commitment by the ruling party or some other policy statement) and an illegitimate predetermination of the outcome (for example, because of a decision already reached or a determination to reach a particular decision). The former is consistent with a preparedness to consider and weigh relevant factors in reaching the final decision; the latter involves a mind that is closed to the consideration and weighing of relevant factors. The cases include *R v Secretary of State for the Environment, ex p Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304 at 320-321, *Bovis Homes Ltd v New Forest Plc* [2002] EWHC 483 (Admin) at paras 111-113, and *R (Island Farm Development Ltd) v Bridgend County Borough Council* [2006] EWHC 2189 (Admin) at paras 25-32. I do not propose to quote from them, since I regard the general nature of the distinction as being clear enough.

44. Mr George submitted that in some of the cases the court has been influenced in its approach by a recognition that allowance needs to be made in order to reconcile the responsibilities of public authorities as decision-makers with the workings of the democratic process and the fact that declarations of policy are frequently made in the course of that process. That may be so, but in my view it does not affect the validity of the distinction between predisposition and predetermination.

45. In addition to the words themselves, it is necessary to bear in mind the context in which they were spoken. As regards immediate context, these were a few words spoken towards the end of a short and rather tense conversation, following a chance encounter and without preparation or warning. The judge observed that a "throw-away" remark can be more revealing than might have been a more prepared or studied one. For my part, I think that a remark made in circumstances such as these needs to be treated with a considerable degree of caution. It is a case where the wider picture is particularly important in assessing the significance of the words used.

46. As for that wider picture, reference should be made first to the inspector's report, which came down with a clear conclusion in favour of the proposed development. At paragraph 356 of the report, the inspector stated:

> "Overall, I conclude that the scheme would be in accordance with

> [the] development plan and national policy and that the benefits would far outweigh the objections. Suitable planning conditions would minimise and mitigate any detrimental impacts. For the above reasons and having regard to all matters raised, I conclude that planning permission should be granted for the proposed development."

47. In the light of that report, which Carwyn Jones had received as the responsible Minister, there would be nothing surprising about his having a predisposition in favour of the grant of planning permission as recommended by the inspector.

48. More important, however, is the evidence found in the Commissioner's decision letter as to what happened at the PDC meeting the day after Carwyn Jones had his conversation with Jennie Jones. In a passage that I have already quoted in full, and based on the evidence given to him by the clerk to the PDC and the official who acted as key adviser to the PDC, the Commissioner stated that the meeting was "unusually prolonged" as Carwyn Jones and the other members "fully explored the many issues and representations about the scheme before coming to a final decision". That tells against any predetermination on the part of Carwyn Jones or the PDC as a whole.

49. Lindsay J appears to have considered that evidence to be irrelevant on the ground that it would not have been available to the fair-minded and informed observer. He stated:

> "66. ... Thirdly, it is clear that in his having recourse to representations from Carwyn Jones A.M., from the Committee Clerk and from the official the Commissioner was having access to information quite outside what one could fairly postulate to be available to and to come to the mind of the hypothetical fair-minded and informed observer. Fourthly, the evidence to the Commissioner seems to have included a detailed account of what had occurred at the PDC's meeting, a thing not only likely to have been in breach of the strict confidentiality provisions of SO 17.14 but which would not have been open to the hypothetical observer and which has been denied to the objectors ....
>
> 67. ... [The Commissioner] had, as I have mentioned, evidence which would not have been open to the hypothetical fair-minded and informed observer. The evidence before him would seem to have included matters which should not have been before him and which not only would have been denied to the hypothetical observer but, as I have mentioned, were denied to the objectors."

50. In my judgment the judge was wrong to adopt that approach. The court must look at all the circumstances as they appear from the material before it, not just at the facts known to the objectors or available to the hypothetical observer at the time of the decision. In treating the Commissioner's account of the PDC meeting as irrelevant, the judge left out of consideration an important part of the overall circumstances.

51. Standing Order 17.4, to which the judge referred, provides that a PDC shall meet in private and its members shall be under an obligation to observe the confidentiality of any discussion by the committee. Given the nature of the Commissioner's responsibilities I would be surprised if that was to be read as precluding investigation by him of what happened at a PDC meeting; but whatever the legal position in that regard, the fact is that he did carry out such an investigation and he set out the results of it in his letter, which was sent to the very group of objectors which had made the complaint. It seems to me that the information obtained by the Commissioner about the course of the PDC meeting is not only a relevant matter but also one to which substantial weight can properly be attached even though the information is provided second-hand through the Commissioner's letter rather than at first-hand from those present at the meeting.

52. A further relevant matter, though one that may not have been advanced in this way before the judge and was therefore not addressed in this context by him, concerns the qualifications for membership of the PDC. By Standing Order 17, the members of the panel from which the PDC was drawn were those "(a) who are members of the Assembly committee having responsibility for planning matters; (b) who have completed a course of relevant training approved by the Chair of the Assembly committee having responsibility for planning matters; and (c) who have agreed to be bound by the current Code of Conduct for members of Planning Decision Committees issued by the Presiding Officer". Even the most basic course of training in planning matters would bring home the importance of approaching decisions with an open mind and having regard to all relevant considerations. This would be reinforced by the requirements of the Code of Conduct, to which the Commissioner gave detailed consideration in his letter and which include the following:

> "2. The objective is to ensure that every decision is properly taken and to avoid the risk of a successful legal challenge. *Our aim is to ensure that the parties involved in planning cases are dealt with fairly, justly and openly; that all the evidence is fully considered and that decisions are based only on material planning considerations to which all the parties have access.* The law protects these principles and decisions can be challenged in the Courts if they are not followed.
>
> ...
>
> 5. Members of a Planning Decision Committee must: *act, and be seen to act, fairly and even handedly, by bringing an unbiased, properly directed and independent mind to their consideration of the matter ...*
>
> 7. *Members of the Planning Decision Panel should avoid commenting on any planning application, or matter that might become the subject of a planning application, in case they might be considered to have pre-judged the matter if it subsequently came before the Assembly. If that were the case, the member could not take part in making the decision ...*"
> (original emphasis).

53. In the context of allegations of apparent bias against members of courts or tribunals, weight has been placed on the judicial oath of office and the fact that professional judges are trained to judge and to judge objectively and dispassionately: see, for example, per Ward LJ in *Jones v DAS Legal Expenses Insurance Co Ltd* [2003] EWCA Civ 1071, at para 28(vi), citing from a judgment of the Constitutional Court of South Africa. Whilst the position of members of a planning committee, even at the level of the Assembly, is of course very different from that of judicial office-holders, the fact that they have received relevant training and have agreed to be bound by a code of conduct is a consideration to which some weight can properly be attached when determining an issue of apparent bias.

54. Those are the various circumstances that seem to me to be of particular significance for the overall assessment. I was not persuaded by Mr Lindblom QC's submission that significance should also be attached to certain additional documents, in particular the officers' report to the PDC, the "minded to grant" letter of 7 February 2005 and the letter of 11 April 2005 by which planning permission was actually granted; save perhaps to the extent that the documents post-dating the PDC meeting are *consistent* in their terms with there having been prolonged discussion of the issues at the meeting as stated in the Commissioner's letter.

55. I have referred to a number of respects in which, in my view, the judge fell into error by disregarding relevant circumstances or in his assessment of their significance. He appears to have concentrated unduly on the encounter between Jennie Jones and Carwyn Jones on 2 February 2005 and how it would have appeared to an observer at the time, rather than taking into account the totality of circumstances apparent to the court upon investigation. That view is supported by two further passages in his judgment. At para 68 he stated:

> "... I have to come to my own decision on the evidence before me ... as to whether a fair-minded and informed observer, having considered the exiguous facts, *would have concluded on the 2nd February* that there was a real possibility that the PDC, meeting for the first and only time the next day, had, amongst its members, one who had appeared to have pre-determined the issue with which it had to deal" (my emphasis).

A similar focus on 2 February is apparent from the way in which he expressed his conclusion at para 75:

> "... A fair-minded observer, *hearing the words which Jennie Jones attributes to Carwyn Jones A.M.*, on learning that the Minister was to be Chair of the PDC dealing with the application the next day ... would, in my view, conclude that there was a real possibility that the member of the PDC was biased ...."

56. The question whether the PDC's decision was vitiated by an appearance of bias is essentially a question of law, requiring a correct application of the legal test to the decided facts; and to answer the question incorrectly is itself an error of law (see *Gillies v Secretary of State for Work and Pensions*, cited above, at para 6).

57. In the circumstances I feel entitled, indeed required, to reach a decision on the issue as raised in this appeal by forming a fresh assessment of my own by reference to the various circumstances that I have mentioned. The conclusion I have reached is that a fair-minded and informed observer, having considered all the facts as they are now known, would *not* conclude that there was a real possibility that Carwyn Jones himself or the PDC as a whole was biased when reaching the decision to grant planning permission. Viewed in its wider context, the brief remark by Carwyn Jones that is at the centre of the case provides an insufficient basis for the suggestion that the decision was approached with a closed mind and without impartial consideration of all relevant planning issues.

58. I would therefore accept the Assembly's case on ground 4.

Ground 2: the new evidence

59. The conclusion I have reached on ground 4 is based on the material that was before the judge and was considered by him in his main judgment. Since that conclusion is sufficient for the purposes of the Assembly's appeal, it is strictly unnecessary for me to deal with the Assembly's challenge to the judge's supplementary judgment refusing to admit the late witness statement of Carwyn Jones. I think it right, however, to cover the point.

60. It will be recalled that a witness statement by Carwyn Jones, containing a categoric denial that he had spoken the words attributed to him by Jennie Jones, was filed on the afternoon before the main judgment was due to be handed down (and four days after the draft of that judgment had been made available to the parties).

61. Carwyn Jones's witness statement did not contain any explanation of why it had not been filed earlier. In fairness to him, however, I should set out the explanation that he gave later, in a second witness statement, which was not available to Lindsay J but is sought to be adduced in support of the present appeal:

> "5. The fifth ground of challenge did not refer to my conversation with Jennie Jones. Accordingly, I saw no need to produce a statement dealing with that conversation.
>
> 6. Sometime in July 2005, the Appellant's solicitors were served with a number of statements on behalf of the Claimant. One of these was a short Witness Statement from Jennie Jones, dated 6 July 2005. I was not supplied with a copy of the Witness Statements at the time and, in the ordinary course of events, I was not expecting to be provided with a copy of them. That said, having now seen the content of Jennie Jones's Witness Statement, I can see that I should have been supplied with a copy of it at the time of its service and that I should have been given the opportunity to give my account of what took place. Had that occurred, I would have stated (and I would have wanted to state) that I did not utter the words that I was 'going to go with the Inspector's report' or any words to that effect.

> 7. The first time I was advised that I might need to make a statement was on 19th December 2005. At this time I was returning to the United Kingdom from Dubai.
>
> 8. Upon my return to Cardiff on 20th December 2005, I met with a lawyer from the office of the Directorate of Legal Services of the National Assembly for Wales and provided my Witness Statement immediately. This was also the first time that I saw a copy of Jennie Jones's Witness Statement."

62. Whilst that statement provides an explanation from Carwyn Jones's personal viewpoint, it does not touch on the reasons why the Assembly's legal advisers and officials did not supply a copy of Jennie Jones's witness statement to Carwyn Jones, or ask him to make a witness statement in response to it, at an earlier stage of the proceedings. It must have been either a deliberate and in my view seriously ill-judged tactical decision or a serious oversight. It would be wrong to speculate further. In any event, as I have said, Lindsay J did not have before him even the explanation given in Carwyn Jones's second witness statement.

63. In his ruling the judge referred to a number of authorities, including *Royal Brompton Hospital National Health Trust Service v Frederick Alexander Hammond & Others* [2001] EWCA Civ 778 and *Robinson v Fernsby & Another* [2003] EWCA Civ 1820. Those authorities are discussed at some length in Vol 1 of the 2006 White Book at para 40.2.1. In summary, and at the risk of over-simplification, they indicate *inter alia* that there is jurisdiction to re-open a case and to alter a judgment that has been made available in draft to the parties (or even a judgment that has been handed down, provided the order has not been perfected), but that the power should be exercised only where there are exceptional circumstances or there are at least strong reasons for doing so.

64. Mr Corner conceded that the judge directed himself correctly as to the relevant principles, but he submitted that the judge's reasoning was unsatisfactory and that his conclusion was wrong. The justice of the case demanded that the witness statement be admitted into evidence. It went directly to the issue of fact at the root of the ground on which alone the judge allowed the claim. The judge had reached his conclusion on the basis that there had been no clear denial by Carwyn Jones, yet the witness statement contained just such a denial; and to proceed to a substantive judgment on a basis contradicted by the witness statement was at the least highly artificial. Moreover this was an important matter not only for the private parties involved but also for the public, both because of the importance of the development and because the issue went to public confidence in government and in the Minister personally. Admission of the statement would have been in accordance with the overriding objective. If the statement had been admitted, the resulting issue could have been dealt with relatively shortly (there would have had to be a further hearing for cross-examination of Carwyn Jones and probably of Jennie Jones as well). There could have been an appropriate costs order and there would have been no prejudice to the claimant. The judge himself acknowledged that there was "a powerful case for admission of the evidence" (para 16 of the supplementary judgment). His analysis of factors telling in the other direction was defective in various respects and did not establish reasons of sufficient cogency to outweigh the case for admission of the evidence.

65. I do not propose to set out the judge's detailed reasoning or to engage in a detailed analysis of the various criticisms that Mr Corner made of it. I note that this was an *ex tempore* judgment and that the focus should be on the substance of the points addressed by the judge rather than on the precise mode of their expression. The essence of the matter was captured in the penultimate paragraph of the judgment:

> "There are, therefore, a number of issues that I need to balance. Doing the best I can to take into account the factors that have been laid before me, and bearing in mind that the court normally does have a strong wish to allow evidence in if it is material, as this evidence would undoubtedly be, nonetheless it seems to me right that using the mechanism now employed for handing down judgments is not intended to give an opportunity for issues otherwise lost to be sought to be recovered and, going back to the passages that I have cited from the *Royal Brompton* case and the *Robinson* case, it seems to me right here that one must have regard to the need for finality. Here again I note that no witness statement has been given as to exactly how this deficiency came about, but were applicants generally to feel, after seeing the draft judgment in their cases, that there is evidence that could perhaps have turned the balance one way or another and that without even a witness statement to explain its absence they could then adduce that evidence, there would be a very great demerit and finality would be put even further away."

66. I am satisfied that the judge gave proper consideration to the various issues canvassed before him and that there is no basis for interfering with his exercise of discretion. Indeed, I would go further and express agreement with the conclusion he reached.

67. Mr Corner submitted that, even if Lindsay J was right not to admit the witness statement in evidence, this court should now admit it. He conceded that he could not satisfy the test in *Ladd v Marshall* [1954] 1 WLR 1489 for the admission of fresh evidence, since it was impossible to say that the evidence could not have been obtained with reasonable diligence at the trial; but he argued that the *Ladd v Marshall* test is not applied as a strict rule in judicial review and similar proceedings. In my judgment it is unnecessary to spend any time on the scope or detailed application of the *Ladd v Marshall* test. Once it is found that the judge was entitled, for the reasons he gave, to refuse to admit Carwyn Jones's witness statement into evidence before him, it seems to me to be self-evidently inappropriate for this court to admit that same witness statement into evidence on the appeal. Carwyn Jones's second witness statement does not materially affect the position and there has been no other change in circumstances. I would dismiss out of hand the application to adduce fresh evidence.

68. It follows that in my judgment the issue of apparent bias has to be determined by reference only to the evidence that was before Lindsay J. If it is considered unsatisfactory that an issue of this kind should be resolved on a factual basis that the Minister disputes but has not been able to address in evidence to the court, the blame for that lies squarely with the Assembly for the way in which it has chosen to conduct the litigation. It may, however, be of some consolation to the Minister that even on the factual basis that he disputes I am satisfied, for the reasons I have given under ground 4,

that the claim of apparent bias is not made out.

Appearance of bias: conclusion

69. For the reasons given under ground 4, I would allow the Assembly's appeal on the issue of apparent bias. That makes it necessary for me to consider Mrs Condron's respondent's notice and the alternative bases on which she seeks to uphold the judge's order.

The issues raised by the respondent's notice

70. The issues raised by Mrs Condron's respondent's notice relate to (1) an alleged failure to take proper account of certain policy guidance concerning buffer zones around mineral workings, (2) the implications of proceedings in the Assembly on 16 March 2005 concerning proposals for primary legislation that would empower the Assembly to impose buffer zones, and (3) an alleged failure to have regard to certain post-inquiry submissions.

71. Underlying all those legal issues is a matter of intense practical concern to local residents, namely the proximity of the development to some of their homes. The issue is particularly acute for the settlement of Mountain Hare on the western edge of the site and for a group of residences called Incline Side on the south western side of the site. The judge described the position as follows:

> "4. The residents of Mountain Hare, as they turn their eyes towards the site, see first, a little higher than they are, the A4060(T) trunk road (two lanes width in each direction) and then, running parallel to the road, the boundary of the site, and then, almost immediately inside that boundary, a steep man-made bank to a height of about 15-17 metres above the level of the road. There is no constant distance between the edge of the site and the proposed edge of workings; that distance varies greatly from one part of the site to the other. So far as concerns Mountain Hare, the proposed workings, partly consisting of the shifting of the earth and overburden currently in place and partly, then, of opencast mining, will take place a little short of the top of that steep bank, then moving further away as works progress. At Mountain Hare the closest limit to the proposed working lies at a distance of some 40 metres or so, give or take a few metres, further back from the boundary of the site. One objector, Mr W.T. Evans, at Mountain Hare, whose house faces the trunk road, has the front wall of his house about 37 metres from the site boundary and at perhaps 60-70 metres from the nearest point of the proposed workings. Certainly there will be proposed workings which will lie well within 100 metres of the front wall of his house.
>
> 5. 14 dwellings lie in the band of being between 0-100 metres from the proposed workings on the site (12 at Mountain Hare, 2 at Incline Side), some 27 dwellings in the band between 100-200 metres, thus making 41 dwellings within 200 metres of the proposed workings on the site. The Inspector notes there to be 61 dwellings within 200 metres of the site boundary. To judge somewhat crudely from the scale on the plans, no house of the 15 or so at the Mountain Hare cluster north of the roundabout is more than about 150 metres from the proposed workings."

72. The concerns of those living so close to the site are entirely understandable and it is clear from his judgment that the judge had them well in mind. At the same time, however, it is right to stress that the role of the court is to examine the legality, rather than the factual merits, of the decision to grant planning permission.

Buffer zones: Minerals Planning Policy Wales

73. The first of the grounds raised by the first respondent's notice is an alleged failure of the Assembly properly to interpret and take into account existing policy in Minerals Planning Policy Wales ("MPPW"), published in December 2000. That issue is not considered in terms by the judge when dealing with the numerous submissions addressed to him under the heading of buffer zones. Mr Corner suggested that that was because it was in fact a new point. We were assured by Mr George, however, that the point was among those taken by him before the judge, and I am prepared to consider it on that basis.

74. MPPW para 40 states:

> "... Buffer zones have been used by mineral planning authorities for some time to provide areas of protection around permitted and proposed mineral workings where new development which would be sensitive to adverse impact, including residential areas, ... should be resisted .... The maximum extent of the buffer zone would depend on a number of factors: the size, type and location of workings; the topography of the surrounding area; existing and anticipated levels of noise and dust; current and predicted vibration from blasting operations and availability of mitigation measures. Buffer zones will of necessity vary in size depending on the mineral being extracted and the nature of the operation, but must be clearly defined and indicated in Unitary Development Plans .... Further guidance on the factors that should be taken into account when defining buffer zones for particular minerals will be provided in Technical Advice Notes."

75. There are really two steps in Mr George's submissions. The first is that MPPW laid down a policy that a minimum buffer zone should be provided between mineral workings and residential areas. No relevant unitary development plan and no Technical Advice Note for coal mining had been issued since the publication of MPPW, but the principle was established by MPPW itself. A letter written by Carwyn Jones as Minister for Environment, Planning and the Countryside had acknowledged that MPPW set out

"[c]urrent national policy ... for buffer zones around all types of mineral development, their extent to be defined in development plans".

76. The second step in Mr George's submissions is that the Assembly, in reaching the decision to grant planning permission without imposing a buffer zone, failed to appreciate that this involved a *departure* from the policy. The inspector's report did not make that clear and failed to highlight to members of the PDC that they could impose a buffer zone. Neither the officers' report to the PDC nor the "minded to grant" letter nor the actual grant of planning permission contained any recognition of the fact that MPPW supported the principle of buffer zones or of the fact that the decision involved a departure from national policy on that issue.

77. I see no great difficulty about the first step in those submissions, provided that the effect of MPPW is not overstated. MPPW can certainly be said to favour buffer zones and even to advocate their adoption. To that extent it contains relevant policy guidance, even though, as Mr Corner submitted, its focus is on the identification of buffer zones in unitary development plans and it also envisages the adoption of more specific guidance by way of a Technical Advice Note for coal mining.

78. I cannot, however, accept the second step in Mr George's submissions. In my view the relevant policy was both properly understood and taken properly into account in the decision-making process.

79. The inspector's report contains a factual section on MPPW. One of the parts of MPPW to which reference is made is para 40, which in the inspector's words "advocates the use of buffer zones to provide areas of protection around mineral workings and says these should depend on the nature of the operation". He reverts to this in his conclusions, stating at para 319:

> "Some objectors have drawn attention to the inclusion of a 500 metre buffer zone around opencast sites proposed in the latest draft of Scottish Planning Policy 16, Opencast Coal, and suggest that Wales should follow suit. In fact, MPPW already advocates the use of buffer zones around mineral workings to avoid conflict with residential areas but advises that their size will depend on the nature of the particular operation. In the circumstances at Ffos-y-fran, where reclamation objectives for that particular area of land are also involved, the assessment of the possible impacts themselves is an acceptable approach, as relying on broad-brush guideline distances would take no account of the particular local circumstances."

80. In that passage the inspector acknowledges the MPPW policy in favour of buffer zones but gives reasons why he does not consider a buffer zone to be appropriate in this particular case. Those reasons have to be read in the light of the rest of the report and can be seen to have two elements to them. First, this was not simply a scheme for coal extraction but also one for land reclamation which, as explained elsewhere in his report, was in accordance with the aims and policies of the local plan; and if the development was to achieve the restoration of the land, the land had to be worked upon. Secondly, as also explained elsewhere in his report, the inspector looked carefully at the possible impacts that the workings would have on the health and living conditions of local residents, in particular as regards dust, noise and blasting, and felt able to conclude that the proposed mitigation measures, which would be subject to detailed control by planning conditions, would ensure that the effects were not significant or unacceptable. His reasons, though briefly stated, are adequate, intelligible and rational. They disclose no misinterpretation of MPPW or failure to take it into account or failure to make clear that the inspector was departing from what was advocated in MPPW. Accordingly I see no error of law in the inspector's approach to this issue.

81. Nothing that happened thereafter generated any error of law on the issue by the PDC. The officers' report to the PDC agreed generally with the inspector's report and recommended acceptance of his conclusion. It also drew specific attention at para 35 to the issue of buffer zones, referring to MPPW and summarising the inspector's view. The "minded to grant" letter of 7 February 2005 stated expressly in para 5 that "[s]ubject to the comments below the Planning Decision Committee agree with the Inspector's conclusions and accept his recommendation"; in para 7, that the PDC "see no reason to disagree with the Inspector's conclusion that the general effect on the health of the community would not be significant and that, with the imposition of appropriate conditions, the effect on living conditions of nearby residents from dust, noise and blasting would not be unacceptable"; and in para 12, that subject to certain amendments the PDC "agree with the Inspector that the conditions listed in the Annex to his report would provide adequate and necessary controls over working methods aimed at minimising and mitigating impacts on the environment and local amenity and should be imposed". The letter of 11 April 2005 containing the actual grant of planning permission added nothing material. What one sees throughout is an adoption by the PDC of the inspector's approach. If, as I would hold, the inspector's approach was lawful, then so too was that of the PDC.

82. In the context of this and the next issue, Mr George made much of what was said by Alun Ffred Jones, one of the members of the PDC, in the course of an Assembly debate on 16 March 2005:

> "On the buffer zone, with reference to Ffos-y-fran, which has raised the temperature this afternoon, let us make one thing clear: there is currently no guidance on this matter. However, the local authority, as the planning authority ... could have indicated that it wanted a buffer zone, but it was impossible, as far as I know, according to official guidance, for the planning decision committee to impose such a condition as it was not mentioned in the inspector's report. That is the situation as I understand it."

83. Alun Ffred Jones had also stated in a letter dated 14 February 2005 to Mr W.T. Evans that "[t]he other problem for those opposing the scheme [at Ffos-y-fran] is that the Government of Wales does not have a policy on buffer zones between open cast sites and residential areas".

84. The remarks made by Alun Ffred Jones in the course of the debate and in his letter display a regrettable degree of ignorance or confusion on his part, both as to the existence of guidance on buffer zones and as to the power to impose a condition concerning buffer zones. But in my view they do not provide a basis for challenging the PDC's decision. What the PDC did and the reasons for it are to be derived from the inspector's report and the committee's own documents accepting and giving effect to that report. All those documents, as I have indicated, display a correct understanding of the guidance and the legal position concerning buffer zones. It is that material, rather than statements made by one of the PDC members outside the PDC meeting and some time after it, which constitutes the proper basis for determining the lawfulness of the PDC's decision.

Buffer zones: the Assembly debate of 16 March 2005

85. The next ground raised in the first respondent's notice is based on a debate in the Assembly on 16 March 2005 on the issue of buffer zones. It is said that in the light of that debate the PDC ought to have reconsidered its resolution of 3 February 2005 that it was minded to grant planning permission for the development.

86. It is common ground that it was still open to the PDC to reconsider its resolution up to the time when planning permission was actually granted by the letter of 11 April 2005. The approach to be adopted where a new consideration arises between the date of the resolution and the date of grant was discussed by the Court of Appeal in *R (Kides) v South Cambridgeshire District Council* [2002] EWCA Civ 1370, [2003] 1 P&CR 19. On its facts that was a very different case, involving a five year gap between the planning committee's resolution in principle to approve a planning application and the issue of a decision notice by the delegated officer granting planning permission; and in the interim there had been major changes in terms of national policy guidance and other circumstances. The case is nevertheless important for the principles laid down in it.

87. Jonathan Parker LJ, giving the leading judgment, referred first to the duty of an authority under section 70(2) of the 1990 Act to have regard to all material considerations when dealing with a planning application. He held that this duty extends up to the issue of the decision notice granting planning permission. He continued:

> "121. In my judgment a consideration is 'material', in this context, if it is relevant to the question whether the application should be granted or refused; that is to say if it is a factor which, when placed in the decision-maker's scales, would tip the balance to some extent, one way or the other. In other words, it must be a factor which has some weight in the decision-making process, although plainly it may not be determinative. The test must, of course, be an objective one in the sense that the choice of material considerations must be a rational one, and the considerations chosen must be rationally related to land use issues.
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> 122. In my judgment, an authority's duty to 'have regard to' material considerations is not to be elevated into a formal requirement that in every case where a new material consideration arises after the passing of a resolution (in principle) to grant planning permission but before the issue of the decision notice there has to be a specific referral of the application back to committee. In my judgment the duty is discharged if, as at the date at which the decision notice is issued, the authority has considered all material considerations affecting the application, and has done so with the application in mind – albeit that the application was not specifically placed before it for reconsideration.
>
> ...
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> 126. In practical terms, therefore, where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a 'material consideration' for the purposes of s.70(2), it must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied that (a) the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority *would* reach (not *might* reach) the same decision" (original emphasis).

88. The question in the present case is whether the Assembly debate on 16 March 2005 amounted to a new factor which might rationally be regarded as a "material consideration" and which ought to have caused the delegated officers to refer the application back to the PDC rather than proceed with the issue of the letter of 11 April 2005 granting planning permission. (In fact the PDC would have had to be formally reconstituted for the purpose, since it ceased to exist on issue of the "minded to grant" letter. But nothing turns on the procedural technicalities. Had officers considered it necessary to refer the matter back to the PDC, such a result could no doubt have been achieved.)

89. The context of the debate was that the Assembly was considering proposals to be submitted by the Welsh Assembly Government for the enactment of primary legislation by the Westminster Parliament. An amendment called for a bill enabling the Assembly "to set a 500 metre separation distance between proposed sites and residential settlements". As Carwyn Jones, the relevant Minister, observed at the outset of the debate on that amendment, the Assembly already had the power to impose such a buffer zone, and the legislation sought by the amendment would therefore require or commit the Welsh Assembly Government to seek legislation to obtain a power that the Assembly already had. Nonetheless the amendment was passed, by a bare majority.

90. Mr George told us that the reason for the debate was that a number of members wanted to highlight the case for extensive buffer zones around opencast workings. He submitted that the outcome of the debate was the clearest possible indication that the majority view in the Assembly was that buffer zones were appropriate for opencast mining, including at

sites such as Ffos-y-fran, to which specific attention was drawn in the course of the debate. There were also suggestions in the debate that, even if the powers already existed, the existence of the legislation sought by the amendment would ensure that buffer zones were applied. One of the members, Janet Davies, asked the Minister for an assurance that, if powers already existed, he would implement a 500 metre buffer zone at Ffos-y-fran. Another, Alun Ffred Jones, made the mistaken comment which I have already quoted to the effect that it was impossible for the PDC to impose a buffer zone at Ffos-y-fran as it was not mentioned in the inspector's report. The First Minister, in replying to the debate, showed a misunderstanding of the legal position concerning the Ffos-y-fran application when he informed members that planning permission had been confirmed by the PDC and could not be reversed. It is fair to note that he also referred to the difficulty he faced in talking about the Ffos-y-fran decision itself, evidently because of the requirement to respect the confidentiality of the PDC proceedings, but he felt able to say "I do not believe that the issue of the buffer zone and the role of the planning decision committee was as it is now being painted, namely that it was not considered". He went on to express general agreement with buffer zones but indicated that their width should depend on the circumstances of the case.

91. Mr George submitted that the Ffos-y-fran application ought to have been referred back to the PDC for reconsideration in the light of that debate, especially given the majority view in favour of buffer zones, the First Minister's own support for the principle of buffer zones, and the fact that one of the members of the PDC had shown a misunderstanding of the existing power of the PDC to impose a buffer zone. In the real world this was a call for the Ffos-y-fran decision to be reconsidered. It was a new material consideration and indeed an important one, and there might have been a different outcome had the matter been reconsidered.

92. The judge rejected Mr George's submissions on this issue for two main reasons. First, he said that buffer zones formed only a relatively minor part of the totality of the arguments and evidence before the inspector. Secondly, he said that the new factor was one which would "very probably" have made no difference to the PDC's decision. Mr George submitted that the first reason was irrelevant because the whole point was that the importance of the issue had now become plain in the light of the Assembly debate; and that the judge had adopted the wrong test in his second reason, the correct question being whether the decision would *inevitably* have been the same (see e.g. *Smith v North East Derbyshire Primary Care Trust* [2006] EWCA Civ 1291, para 10).

93. Whilst agreeing with the judge's conclusion on the issue, I do so for somewhat different reasons. In my judgment the Assembly debate was not a new factor capable of amounting to a material consideration in relation to the Ffos-y-fran application. It was a political debate about a request for primary legislation for the conferment of powers which the Assembly already had. It touched on issues already considered by the PDC and included some strong expressions of view about those issues, but it did not lay down any new planning policy and did not give rise to any new planning considerations. As I have held in rejecting the previous ground, the PDC had already given lawful consideration to the question of buffer zones and had accepted the inspector's approach to the issue. That approach was premised on the existence of a power to impose a buffer zone and recognised the policy in MPPW in favour of buffer zones, but also had regard to the individual circumstances of Ffos-y-fran in reaching a decision that a buffer zone was not appropriate in the particular case. In relation to none of those matters did the debate change anything.

94. It is of course unfortunate that the First Minister advanced the legally erroneous argument that the Ffos-y-fran planning permission had been confirmed and could not be reversed. That error was not, however, material since responsibility for initiating a referral back to the PDC lay with the planning officers and there is nothing to show that they were under the same misapprehension as the First Minister; and in any event, as I have indicated, there was no good reason why the matter should be referred back to the PDC.

95. As to the remarks made by Alun Ffred Jones, I have explained in the context of the previous ground why in my view they do not provide a basis for challenging the PDC's decision. To apply that reasoning to the present context, it seems to me that, where the inspector's report and the PDC's own documents accepting and giving effect to that report all display a correct understanding of the guidance and the legal position concerning buffer zones, it cannot be said that erroneous statements made by one of the members of the PDC outside the PDC meeting and some time after it amounted to a new material consideration requiring the matter to be referred back to the PDC.

96. I should mention finally that Lindsay J dealt at some length in his judgment with *Bolton Metropolitan Borough Council v Secretary of State for the Environment* (1990) 61 P&CR 343, on which Mr George had placed substantial reliance in his submissions before the judge. *Bolton* was also referred to in Mr George's skeleton argument before us, but was touched on only briefly in his oral submissions. I think it unnecessary to set out the detail of the case, for which I can rely on para 24 of the judgment below. It suffices to say that the Green Paper proposals that were at the centre of that case involved a fundamental change in the relevant powers of public authorities and therefore in the circumstances affecting the compulsory purchase order with which the case was concerned. That situation is readily distinguishable on its facts from the present case where, for the reasons I have given, the Assembly debate did not in my view give rise to any material change of circumstances.

Post-inquiry submissions

97. The third and last ground in the first respondent's notice is that the PDC failed to have regard to post-inquiry submissions made by objectors regarding (i) the existence of previously undisclosed former landfill sites on the application site and (ii) the relevance to the proposals of an epidemiological study called "the Newcastle Study".

98. These matters were dealt with at some length by Lindsay J in his judgment and it will be unnecessary for me to repeat much of the detail. Part of the argument before the judge has fallen away, in that Mr George made clear before us that he was no longer contending that there was a breach of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999. His remaining contention was simply that there was a failure to take the post-inquiry submissions into account as a material consideration. That contention faces formidable obstacles.

99. First, there was no duty to take account of post-inquiry submissions at all. Rule 17(4) of the Town and Country Planning (Inquiries Procedure) (Wales) Rules 2003 provides that "[w]hen making its decision, the National Assembly may disregard any written representations, evidence or any other document received after the close of the inquiry".

100. Secondly, the documents make clear on the face of it that, despite the absence of any duty to do so, the PDC did in fact take account of all post-inquiry submissions. A letter dated 12 January 2005 from Carwyn Jones to the Department of Trade and Industry stated that the PDC would take them into account. The officers' report to the PDC stated at para 64 that numerous letters of objection had been submitted since the inquiry, mainly on grounds of health, pollution and residential amenity, and that "[t]he matters raised were mostly dealt with at the inquiry and in our view would not materially affect the decision". The submissions relevant to this ground were listed in a schedule of post-inquiry correspondence; and whilst there is no evidence that the schedule and copies of the correspondence referred to in it were shown to, or made available for inspection by, members of the PDC, there is equally no evidence that they were not. Finally, the "minded to grant" letter of 7 February 2005 stated in terms, at para 11:

> "The Planning Decision Committee have reached their decision taking account of all correspondence received after the inquiry had closed and they are satisfied that the correspondence raised no new evidence or new matter of fact which would materially affect their decision."

101. Despite that documentary material, Mr George invited the court to infer that the PDC cannot in fact have had regard to the relevant post-inquiry submissions. In my judgment it is impossible to draw such an inference in this case. In order to explain why that is so, I turn to consider briefly the relevant post-inquiry submissions and the way the judge dealt with the issues.

102. The issue of former landfill sites is examined at paras 37-45 of Lindsay J's judgment. At the public inquiry and in the inspector's report a lot of attention had been directed towards the existence of former waste tips on the application site, the removal of which was part of the reclamation objective of the proposed development. Following the inquiry, Mr W.T. Evans wrote a letter dated 30 January 2005 to Carwyn Jones, drawing attention to evidence that waste had been deposited over 40 years ago at a tip that had not previously been identified. The judge rejected the contention that there had been a failure to take that letter into consideration. He pointed to the fact that the "minded to grant" letter of 7 February 2005 stated clearly that the PDC had taken into consideration correspondence received after the inquiry. He went on (at para 45):

> "They thus were stating that Mr Evans' letter had been taken into account. There is no proof that that was not so. Whereas, on a subject of real significance, it can often be right to assume that a body's failure to mention it indicates a failure by that body to have considered it, for the reasons I have given I cannot see that the existence of a small hitherto undisclosed former tip close to a larger known one and consisting of the same type of tipped material as being so significant that it entitles one to jump from its not being *expressly* mentioned to a conclusion that it had not been taken into account at all."

103. I agree. The inspector had heard a lot of evidence about the presence of former waste tips on the application site, the removal of which was part of the reclamation objective, and he had covered the issue in considerable detail in his report. He was satisfied that the proposed development would not give rise to significant health risks and that surface and groundwater resources would be adequately safeguarded. One of the conditions recommended by him and accepted by the PDC was a condition designed to ensure the protection of groundwater resources in the event that any contamination of a nature not previously identified was encountered during the development. In all the circumstances there was nothing about the additional material that required the PDC to deal with it expressly, and it was perfectly rational to take the view that it would not materially affect the decision.

104. The issue concerning the Newcastle Study is examined at paras 46-52 of the judgment below. This was a study carried out in north east England to examine the effects of dust on communities close to opencast coal workings. It was the subject of detailed consideration at the inquiry and in the inspector's report. Professor Harrison, one of the expert witnesses called by Miller Argent at the inquiry, relied extensively on the study and referred in his main proof of evidence to a number of published papers describing it, including one in 2000 and another in 2003. Dr Holman, another expert witness called by Miller Argent, also referred to the 2000 paper. A copy of the 2000 paper was provided as an appendix to the proof of evidence of Dr Holman, but no copy of the 2003 paper was placed before the inquiry, and it seems that the objectors, who were not legally represented, did not think of asking for a copy at the time.

105. Following the inquiry, however, Mr W.T. Evans engaged in correspondence with one of the authors of the 2003 paper and was sent a copy of the paper. In a letter dated 25 January 2005 to the Planning Inspectorate he made further submissions based on that correspondence and the 2003 paper. First, as regards the health effects of the proposed development, it was submitted by reference to the further material that reliance on the Newcastle Study had been flawed, since the study related only to children and related to sites that were considerably further away from residential communities than at Ffos-y-fran and where the workings were of much shorter duration than was proposed for Ffos-y-fran. Secondly, reliance was placed on passages in the 2003 paper detailing complaints by residents about the environmental impact of workings, in particular as regards dust deposition.

106. In his conclusions on this issue, Lindsay J stated (at para 52):

> "Mr Lindblom says, rightly in my view, that Professor Harrison had in mind the distances between workings and residences both as described in the Newcastle papers and as they would be at Ffos-y-fran. He came to a rational and informed professional conclusion which was not successfully questioned at the Inquiry and the Inspector was entitled to accept his evidence. It is not for me, says Mr Lindblom, now to question Professor Harrison's

professional judgment. I accept that argument. The Newcastle Studies were not new material and had been sufficiently taken into account by Professor Harrison on whose conclusions and those of Dr Holman the Inspector was entitled to rely."

107. Again I agree. I would add that in my view there was sufficient in the material actually available at the inquiry to make clear that the Newcastle Study related to children and to indicate the distances of the sites from the residential communities concerned, if not also the duration of the workings at those sites. Moreover the 2003 paper can hardly be described as new, given that it was referred to expressly by Professor Harrison not just in his list of references but in the body of his proof of evidence. In any event, the Newcastle Study was taken into account in the detailed consideration given by the expert witnesses at the inquiry, and by the inspector in his report, with regard to the effects of dust on health and amenity. In all the circumstances I am satisfied here too that there was nothing in the additional material that required the PDC to deal with it expressly, and that it was perfectly rational for the PDC to take the view that it would not materially affect the decision.

108. Neither in relation to former landfill sites nor in relation to the Newcastle Study, therefore, is there in my view any basis for going behind the clear indications in the PDC's documents, in particular in the "minded to grant" letter of 7 February 2005, that the post-inquiry submissions had been taken into account. Accordingly, this final ground of challenge to the PDC's decision must also fail.

Conclusion

109. I would allow the Assembly's appeal on the issue of apparent bias and would also find in the Assembly's favour in relation to all the matters raised in the first respondent's notice. In my judgment Mrs Condron's challenge to the decision to grant planning permission for the Ffos-y-fran development must fail and the order of Lindsay J quashing the decision must be reversed.

Postscript: venue

110. A final point I should mention concerns the venue for the hearing of this case both at first instance and on appeal. Both hearings took place in London. Yet there are procedures in place to enable Welsh judicial review cases and similar statutory challenges to be heard in the Administrative Court in Wales (see Supperstone, Goudie & Walker, *Judicial Review*, 3rd ed., paras 20.19.1-20.19.2 for the relevant references); and there are sittings of the Civil Division of the Court of Appeal from time to time in Wales. In my view the present case cried out to be heard in Wales both at first instance and on appeal, and it is a matter of considerable regret that efforts were not made to have it listed for hearing accordingly. Practitioners and listing officers alike need to be alert to this issue.

Lord Justice Wall :

111. I have had the great advantage of reading in draft the judgment of Richards LJ. I find myself in complete agreement with it. I add a short judgment of my own out of courtesy to Lindsay J and to explain why, like Richards LJ, I part company with the judge on the question of apparent bias.

112. I have to acknowledge that, when I first read the papers in preparation for this appeal, I was attracted by ground 1 in the appellant's notice. It had clearly been open to the judge to say in terms that he was making a finding of fact on the balance of probabilities that Mr. Carwyn Jones had spoken the words attributed to him by Mrs. Jennie Jones. He had not done so. At first blush it seemed to me at least arguable that a critical element in the determination that there had been apparent bias was, accordingly, missing.

113. Having heard full argument, however, and having read Richards LJ's judgment, I am satisfied that it is in fact plain on a fair reading of the judgment that the judge did make such a finding, and that his conclusion on apparent bias would simply not made sense without it. Equally, I respectfully agree with Richards LJ firstly, that the proper conclusion to draw from the Commissioner's report is that Mr. Carwyn Jones had denied uttering the words attributed to him; and, secondly, that a finding that there was a denial (which the judge should have made) is in no sense inconsistent with his finding of fact that the words were spoken.

114. I respectfully agree with Richards LJ that the key to this case is to be found in ground 4 of the appellant's notice, and with respect to the judge it is clear to me that in the passages from paragraphs 66, 67, 68 and 75 of his judgment, which Richards LJ has cited in paragraphs 49 and 55 above and which I will not set out in full again, the judge applied the wrong test. The extracts which Richards LJ has cited from *Porter v Magill, Flaherty v Greyhound Racing Club Ltd* and *Gillies v Secretary of State for Work and Pensions* all make it quite clear, in my judgment, that the test to be applied on the facts of this case is not what the fair-minded and informed observer would have concluded on 2 February 2005, but what the same observer would conclude having considered all the facts as they are now known.

115. In this particular instance, as it happens, and whatever the propriety of the disclosure of the material contained in the Commissioner's letter, the key facts are (1) that the material was disclosed; and (2) that it was disclosed to the protesters themselves. In my judgment, therefore, the judge was plainly wrong in paragraph 67 of his judgment when he dismissed the evidence contained in the Commissioner's letter of 13 May 2005 to Mrs. Austin with the words: -

> .... He (the Commissioner) had, as I have mentioned, evidence which would not have been open to the hypothetical fair-minded and informed observer. The evidence before him would seem to have included matters which should not have been before him, and which would not only have been denied to the hypothetical observer but, as I have mentioned, were denied to the objectors.

116. If the correct test was, as the judge appears to suggest in paragraph 75 of his judgment,

limited to the effect on the fair-minded observer who heard the words spoken by Mr. Carwyn Jones on 2 February and who learned that the Mr. Jones was to be the chair of the PDC dealing with the planning application on the following day, the judge's conclusions in paragraphs 67 and 68 would be correct. But plainly that is not the correct test, and even though the judge, in paragraph 68 of his judgment, imports into his consideration his own knowledge of the contents of the letter of 13 May 2005 from the Commissioner, he nonetheless appears to exclude it as relevant to the test, contained in the same sentence, that the "fair-minded and informed observer, having considered the exiguous facts, would have concluded on 2 February" that there was a real possibility of bias on the part of the Chair of the PDC.

117. I am therefore satisfied that the judge's misapprehension as to the correct test vitiates his conclusion on the apparent bias issue. It is thus open to us to reach our own conclusion on the issue, and for the reasons given by Richards LJ, I too would find that the allegation of apparent bias is not made out. Accordingly, I would allow the Assembly's appeal on this one ground.

118. That said, I would like to emphasise my particular agreement with everything Richards LJ says about ground 2 of the appellant's notice. In my judgment, it is manifestly unacceptable for a party to use the opportunity provided by the court for editorial and typographical corrections to be suggested in a draft judgment prior to hand-down as a means of re-opening an issue on which that party has lost, and which it had ample opportunity to address during the trial. I regard Lindsay's "supplemental" judgment as a tour de force. I find myself in complete agreement with it, and equally wholly out of sympathy with the predicament in which the Assembly found itself. Whatever the real reason for that predicament, the Assembly plainly had only itself to blame for it.

119. There is nothing I can add to Richards LJ's exemplary judgment on the cross-notice, save to say that I agree with it. Like him, therefore, I would allow the appeal on ground 4 only.

Lord Justice Ward :

120. I agree with my Lords that we should allow this appeal and restore the decision of the National Assembly's Planning Decision Committee granting planning permission, subject to conditions, for the carrying out of open cast mining and related removal and reclamation operations at Fos-y-fran. In deference to Lindsay J., I will state shortly my reasons for disagreeing with his finding that the PDC's decision was tainted with apparent bias.

121. This was not a case where actual bias was alleged, still less established. It was and is a case of apparent bias. The test is well settled and was indeed common ground here and below. It was stated in paragraph 103 of the speech of Lord Hope of Craighead in *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 259, and explained by Scott Baker L.J. in *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA Civ 1117 at paragraph 27 as Richards L.J. has already set out in paragraphs 11 and 38 above. The question is, therefore, whether the reasonable, fair-minded and informed observer would conclude that there was a real risk that Carwyn Jones AM was biased because his mind was closed by his predetermination to endorse the Inspector's Report. That judgment must be made looking at the matter objectively balancing his comments to Mrs Jennie Jones against any contrary evidence.

122. The starting point must be his remark that he was "going with the Inspector's Report". The meaning of those words are not certain. They are capable of meaning either that he had made up his mind with the implication that it was closed to any argument or merely that his preliminary view was in favour of the Report but that his mind was still open to argument. It does not seem to me, construing the words in the context in which they were said, that the latter meaning is so clear that the possibility of his having predetermined the issue can be described as fanciful. The words themselves must, therefore, give rise to the real possibility of bias and the judge was right so to find. That, however, is not the end of the matter and therein lay the judge's error. The informed observer would not make up his mind having regard solely to what he heard, but to all the relevant facts and circumstances of the case and as Scott Baker L.J. has said:

> "The relevant circumstances are those apparent to the court upon investigation; they are not restricted to the circumstances available to the hypothetical observer at the original hearing. ...".

123. The question then is: "What are the relevant circumstances?". Whatever my reservations expressed during the course of the argument, I am now fully satisfied that it is permissible to take account of what actually happened when the PDC made its decision. In *Porter* the Court did not confine itself to what occurred at the press conference when the provisional views of the auditor were expressed: the way he took his final decision was also relevant. As Lord Hope said in paragraph 105:

> "He [the auditor] was at pains to point out to the press that his findings were provisional. There is no reason to doubt his word on this point, *as his subsequent conduct demonstrates*." (Emphasis added by me).

124. So too in *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, [2006] 1 WLR 781 where the possible bias of the medical member of the Disability Appeal Tribunal was in issue, the facts taken into account by the House of Lords included an analysis of the actual decision of the Tribunal.

125. Thus I am now fully satisfied that it is permissible to have regard to the unchallenged report of the Commissioner for Standards that the deliberation of the PDC was:

> "... unusually prolonged as Carwyn Jones AM (who chaired the meeting) and the other Assembly Members on the Committee fully explored the many issues and representations about the scheme before coming to a final decision."

126. One cannot read too much into that. True it is that if the meeting of the PDC had been all over in a matter of minutes, then the inference that minds had been made up in advance would be the stronger. That the deliberations lasted so long smacks much more of open minded debate than of blind, pig-headed adherence to pre-cast, set views. It militates against the possibility of bias.

127. The nature of the issue to be resolved is another relevant factor. Here there had been a full inquiry held before the Inspector. The Merthyr Tydfil County Borough Council supported the application for planning permission. No substantive objection was offered by any of the statutory consultees. The opposition case was fully presented at the inquiry. The conclusion of the Inspector's thorough Report was to recommend the planning permission being granted. The officers of the Assembly's Planning Division accepted that conclusion subject to conditions. Of course it was open to the members of the PDC to come to a concluded view that the recommendation should not be accepted but they would need good planning grounds to do so and it would not come as a surprise to the fair-minded informed observer that a provisional view was in favour of endorsing the recommendation. It would perhaps be surprising if it were otherwise. In those circumstances, "I am going with the Inspector" is much more likely to mean, "On all I have read and all I know at the moment, but subject to further argument, I am going with the Inspector".

128. The observer who is neither complacent nor unduly sensitive or suspicious can, however, be taken to appreciate that, even though the members of the PDC are not judicial officers who have taken their judicial oath, nonetheless they had by the Standing Orders of the Assembly completed a course of relevant training, they had agreed to be bound by the current Code of Conduct and that required their "bringing an unbiased, properly directed and independent mind to their consideration of the matter." It would be a total abnegation of those duties to enter the Committee Room with a mind immovably made up. This was a highly sensitive decision to take and the fair-minded observer would assume that it would be taken fairly and justly.

129. It would have been obvious to all that the developers' proposals would arouse passion in the local community. Indeed, in the conversation with which we are concerned, reference was made to its impact on the children in the locality. Lord Hope defined impartiality in *Gilles* in this way at paragraph 23:

> "Impartiality consists in the absence of a predisposition to favour the interests of either side in the dispute."

Yet there was nothing anywhere to suggest that Carwyn Jones had taken side one way or the other.

130. Carwyn Jones' words were unwise, even injudicious, and hearing them might well have caused eyebrows to rise. But the informed observer would pause and stand back, then look at all the facts objectively. He would know that professional detachment and the trained ability to exercise independent judgment lie at the heart of the exercise of his function as a decision-maker especially in a case of such importance and sensitivity for the local community that it required the PDC to decide it. Bearing all matters in mind, the fair and informed observer would not, in my judgment, find that there was a real possibility that the Chairman of this Committee had predetermined the issue. The facts do not give rise to a real possibility of bias.

131. For those short reasons and for the reasons much more fully set out by Richards L.J., with which I agree, I would allow this appeal. I wish to express particular agreement with the postscript to his judgment. If ever there were a case to be heard in Wales, this was it and I repeat my apologies expressed at the conclusion of the hearing to all of those who had needlessly to travel to London.