IN THE MATTER OF AN INTENDED ACTION **Claim No: 2CF30125**

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

TECHNOLOGY AND CONSTRUCTION COURT

CARDIFF DISTRICT REGISTRY

BETWEEN

ALYSON AUSTIN

Applicant

and

MILLER ARGENT (SOUTH WALES) LIMITED

Defendant

DEFENDANT'S SKELETON ARGUMENT

I. INTRODUCTION

1. There are two applications before the Court:

    a) An application for some form of costs protection order in respect of the Applicant's proposed private nuisance claim against the Defendant; and

    b) An application for some form of costs protection for the above application.

2. In both applications, the Applicant asks the court to order that her costs her exposure to the Defendant's costs should be limited to £nil.

3. The Defendant resists both applications in principle and in respect of the £nil limitation that is sought. It also requests that the applications be dealt with at an oral hearing given their obvious importance and complexity.[1]

[1] This request is made pursuant to paragraph 4 of the Order of 12 November 2012 of HHJ Seys Llewellyn QC, sitting as a Deputy High Court Judge.

II. ISSUES

4. The Applicant's Statement of Case gives rise to the following issues:

    1) Does the Aarhus Convention apply to the proposed claim?

    2) Is the Court's power to make a cost capping order engaged in this case?

    3) Is the Court's power to make a Protective Costs Order engaged in this case?

    4) Does the Court have power to make some form of cost protection order by reason of its general case management powers under the CPR?

    5) If some form of cost protection order is justified in principle, should the Applicant's liability be set at £nil?

III. FACTS

5. The Defendant relies upon the Witness Statement of Mr Paul Bromley Stone ("PS/WS"). It draws particular attention to the following features of the proposed claim:

    a) There is a long history of repeated unmeritorious, failed litigation brought by the Applicant and those associated with her who are opposed to the Defendant's land reclamation scheme. Such action has resulted in the Defendant incurring some £3million of unbudgeted and unrecovered fees. There is a very real prospect of the proposed claim following a similar course.

    b) The Applicant was the lead claimant in the failed GLO proceedings which were dismissed by the Court of Appeal on 29 July 2011. One of the concerns of the Court of Appeal was the lack of particulars to support the generalised allegations of nuisance set out in the draft claim form. The same concerns arise in the present case.

    c) The Applicant has previously sought costs protection in the course of her appeal in the GLO proceedings. Her protective costs order application was refused by the Court of Appeal on three separate occasions. On each occasion it was supported by sworn evidence to the effect that in the absence of a cost

protection order proceedings would be prohibitively expensive and the litigation would not proceed. Nevertheless, the litigation did proceed without any costs protection order being made. The evidence therefore proved to be unreliable.

d) The Applicant herself has campaigned against the Defendant's land reclamation scheme for many years, is an active member of a local pressure group against the scheme, and is evidenced as having an in-principle objection to the use of coal as a fuel. She has made very few complaints to the Defendant about its operations in recent years. The evidence she has produced in support of the current applications is generalised and provides the court with no basis for concluding that her allegations of private nuisance have any real prospect of success.

6. For the reasons set out in Mr Stone's Witness Statement, and those advanced in submissions, this is a case where the making of a costs protection order of some kind is not justified and would result in injustice to the Defendant.

IV. SUBMISSIONS

(1) Does the Aarhus Convention apply to the proposed claim?

7. Although it is given limited effect in the provisions of certain EU environmental directives, the Aarhus Convention has not been incorporated into domestic law. So far as is relevant to the present case, its provisions are not directly effective. The Court of Appeal (Carnwath LJ giving the judgment of the court) has recently considered the status of the Aarhus Convention in private nuisance proceedings and its effect on costs in proceedings before the domestic courts in particular (see *Morgan v Hinton Organics* [2009] EWCA Civ 107, [2009] CP Rep 26 at [19] to [23] and [41] to [46]) The court left open the question of whether the Aarhus Convention applied to private nuisance proceedings, though it proceeded on the basis that it did apply (at [44]). Carnwath LJ (at [44] and [47]) confirmed that in the absence of EU directives giving effect to Aarhus principles, the CPR and the costs rules under it remained effective, and:

> "The principles of the Convention are at the most something to be taken into account in resolving ambiguities or exercising discretions (along with other discretionary factors including fairness to the Defendant)."

8. The Aarhus Convention does not apply to the proposed claim, for the reasons set out below.

(a) The EIA Directive and Regulations do not apply

9. Article 11 of the EIA Directive 2011/92/EU gives effect to the Aarhus Convention in respect of legal proceedings falling within the scope of Article 11. The Applicant relies upon Article 11 and the EIA Directive in support of her contention that the costs protection regime of the Aarhus Convention applies (see the Applicant's statement of case at paras 24 to 26 (pages 15 and 16 of the Applicant's bundle), and para 34 (page 20)).

10. The Applicant's position is entirely misconceived for the following reasons:

a) The obligation under the EIA Directive and the relevant transposing regulations is to ensure that formal EIA is carried out before planning permission is granted, where projects are likely to have significant environmental effects. Neither the EIA Directive nor the Regulations regulate the implementation of development after the grant of planning permission (see *R* (*Prokopp) v London Underground Ltd* [2003] EWCA Civ 961, [2004] Env LR 8 at [39] to [42]; Article 2(1) of the EIA Directive; and Town and Country Planning (Environmental Impact Assessment) Regulations 2011, reg 3(4)). Accordingly the EIA Directive and Regulations are irrelevant to these applications. It is noted that the Court of Appeal in the GLO litigation also treated the Applicant's proposed private nuisance claim on the basis that the EIA Directive did not apply (*Austin v Miller Argent (South Wales) Ltd* [2011] EWCA Civ 928, [2011] Env LR 32 at [54]).

b) A private nuisance claim is not a "review procedure … to challenge the substantive or procedural legality" of any decision for the purposes of Article 11 of the EIA Directive.

c) In any event, in the present case a formal EIA was undertaken and taken into account before the planning permission for the land reclamation scheme was granted on 11 April 2005. A statutory challenge to the permission was made by a Mrs Condron and rejected by the Court of Appeal. Mrs Condron was represented by the Applicant's solicitors and specialist Leading and Junior Counsel, and the

Applicant appears to have been closely involved with Mrs Condron's case. No allegation that the permission was granted in breach of EIA requirements was made. Any allegation[2] that the permission was granted in breach of EIA requirements is unfounded and out of time.

d) In the light of all, or any, of the above points there is no EU law content to the proposed claim which would engage the court's obligation to interpret its procedural rules in the light of the objectives of the Aarhus Convention (see C-240/09 *Lesoochranarske Zoskupenie VLK v Ministerstvo Zivotneho Prostredia Slovenskej Republiky ("Slovakian Bears")* [2012] QB 606, [2012] 3 WLR 278 at [47] to [51]).

11. Accordingly the present case is not one where the Court is bound to give effect to the Aarhus Convention.

(b) The Aarhus Convention does not apply to private nuisance proceedings

12. The Applicant contends that the Aarhus Convention applies to private nuisance proceedings. The basis for its contention is a concession made by the UK Government in proceedings before the Aarhus Convention Compliance Committee (*Morgan and Baker*, ACCC/C/2008/23), and dicta in *Morgan v Hinton Organics* [2009] EWCA Civ 107, [2009] CP Rep 26, where the Court of Appeal, having summarised the arguments for and against the application of the Convention to private law nuisance claims, stated (at [44]):

> "These arguments raise potentially important and difficult issues which may need to be decided at the European level. For the present we are content to proceed on the basis that the Convention is capable of applying to private nuisance proceedings such as in this case."

13. The Court was able to proceed in that way because the question was not critical to the outcome of the case.

14. The Aarhus Convention does not apply to the present proposed claim. The costs protection provisions of the Convention only apply to proceedings "to challenge acts and omissions … which contravene provisions of … national law relating to the environment"

[2] And it is noted that the draft Particulars of Claim contain no such allegation.

(Article 9(3)). For the following reasons the proposed action in private law nuisance by Mrs Austin does not fall within Article 9(3):

a) Private nuisance is an action to protect private property rights (see *Hunter v Canary Wharf* [1996] 1 AC 655, at 687G to 688E, 692C, 694H to 695A (per Lord Goff), 696A to C (per Lord Loyd), 707C to E (per Lord Hoffman), 724D to F (per Lord Hope)). This is fundamentally different from an action to vindicate a general public right to a clean environment. The distinction between actions to protect private rights and actions to protect public rights is well established in domestic law (see *Gouriet v Union of Post Office Workers* [1978] 1 AC 435).

b) Mrs Austin is the sole claimant. The express purpose of her action is to prevent interference with the use and enjoyment of her home (AA/WS, para 2, p 351). The remedy she seeks is compensation and/or an injunction so that the scheme operates "in a manner that does not cause dust and noise emissions such that they materially affect my property and impact on my quality of life". It follows that the action is not concerned with the quality of the environment in general, nor with any remediation of any alleged environmental harm. It is solely concerned with Mrs Austin's personal benefit and her personal enjoyment of her private property. Her action therefore concerns an alleged contravention of private law founded upon her private property rights in contrast with any national laws relating to the environment. The Aarhus Convention does not apply to her claim.

c) Even if the Aarhus Convention is capable of applying to private law nuisance claims in principle, the Defendant relies upon the view of Lord Justice Jackson expressed in his Review of Civil Litigation Costs: Final Report (at para 1.4 on page 314):

> "Having considered the material cited in the previous paragraph as well as the UNECE Implementation Guide, I conclude that articles 9.3 and 9.4 of the Aarhus Convention apply to those private nuisance actions in which the alleged nuisance is an activity (a) damaging the environment and (b) adversely affecting the wider public, rather than the claimants alone."

The Applicant's evidence provides no basis to satisfy (a) and (b) in the above quotation.

15. In any event, even if the Convention were applicable it would only be a factor "to be taken into account in resolving ambiguities or exercising discretions (along with other discretionary factors including fairness to the Defendant)" (*Morgan v Hinton Organics* [2009] EWCA Civ 107, [2009] CP Rep 26 at [44]).

16. It is important to understand the limited status which this gives to the Convention. Its objectives must not be treated as matters which the court is obliged to give effect to. Giving effect to the Convention when parliament has not seen fit to incorporate it for the purposes of private nuisance proceedings would infringe parliamentary sovereignty and would amount to importing "the Convention into domestic law by the back door, when [parliament] has quite clearly refrained from doing so by the front door" (see the clear judicial warning given by Lord Bridge in *R v Secretary of State for the Home Department, ex p Brind* [1991] 1 AC 696 at 718).

17. If the court concludes that it does have some power to make a costs protection order, contrary to the submissions made under issues (2) to (4) below, then the Defendant's submissions on how this power should be approached are set out under issue (5).

(2) Is the Court's power to make a cost capping order engaged in this case?

18. The cost capping provisions are found in CPR 44.18. In this respect, CPR 44PD.18, para 23A.1 states that:

"The court will make a cost capping order only in exceptional circumstances."

19. This was recognised in *Peacock* v *MGN Ltd* [2009] EWHC 769, [2009] 4 Costs LR 584 where Eady J stated (at [9]) that "such orders will be rare".

20. Reflecting the exceptional nature of such orders, Toulson J stated in *Barr v Biffa* [2009] EWHC 2444, [2010] 3 Costs LR 317:[3]

[3] Note: this is Toulson J's judgment in relation to the application for a cost capping order; it is not his judgment on the substantive claim. The latter was appealed, but the former was not.

"49. As noted, a costs capping order will not be made if the risk of disproportionate costs being incurred (almost always by a claimant) can be contained by case management or a detailed assessment. This sub rule therefore makes clear beyond doubt that what the court is examining on a costs capping application is the claimants' own base costs, and the manner in which they can be controlled by the court, and not the wider considerations contended for by the Defendant in the present case.

50. I am unable to say, on the evidence before me, that case management directions and cost assessments could not, between them, control any risk that the claimants' base costs will be disproportionately incurred. There is, I think, no cogent evidence that would allow me to reach a different conclusion. Indeed, I venture to suggest – echoing Mann J in *Knight* [*Knight v Beyond Properties Pty Ltd* [2006] EWHC 1242, [2007] 1 WLR 625] and Eady J in *Peacock* – that it would be a very unusual case in which a High Court judge did not feel able to utilise one or both of these tools to control disproportionate costs. That is, after all, what they are there for.

51. Accordingly, I have concluded that the Defendant's application does not get over this second hurdle either. It will be apparent from my comments that, in truth, I find it difficult to conceive of any case which could get over this particular hurdle."

21. For the reasons given below, the present case does not justify the court's exercise of this wholly exceptional power:

    a) The threshold criteria in CPR 44.18(5)(a) to (c) are not met, so the Court's discretion to make a CCO is not engaged. There is absolutely no evidence at all to support the proposition that the Defendant will incur disproportionate costs, let alone disproportionate costs which cannot be "contained by case management or a detailed assessment" (see PS/WS, paras 51 to 55, 60 and 65 to 68).

    b) A cost capping order can only be made "at any stage of proceedings" (CPR 44.8(5)). Proceedings are started "when the court issues a claim form at the

request of the claimant" (CPR 7.2(1)). In the present case no stage of proceedings has yet arisen because no claim form has been issued. Accordingly the court has no jurisdiction to make the order sought.

c) Moreover, while the Applicant relies upon CPR 23.2(4) as a basis for submitting that a CCO can be applied for before proceedings have started, it is clear from the words of 23.2(4) that this provision is dealing with the procedures which apply "if an application is made before a claim has been started". It is not of itself providing a mechanism to make such applications. Whether or not such an application can be made depends upon the detailed rules applicable to the application in question. In the present case, those rules are found in CPR 44.18, to which the above submissions apply. This interpretation is also consistent with the guidance in the *White Book 2012* at 23.2.3 that "the circumstances in which applications may be made to the court before a claim has been started are quite limited". This guidance militates against a general rule in support of pre-claim applications for which the Applicant contends.

22. For all or any of the above reasons, neither of the two applications before the court engage the court's jurisdiction to make a CCO.

(3) Is the court's power to make a PCO engaged in the present case?

23. The principles applicable to Protective Cost Orders derive from the Court of Appeal's judgment in *R (Corner House Research) v Secretary of State* [2005] EWCA Civ 192, [2005] 1 WLR 2600. Guidance is found in the *White Book 2012* at 48.15.7. The core principles were set out by the Court of Appeal in *Corner House* at [74], namely:

"(1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:

i. the issues raised are of general public importance;
ii. the public interest requires that those issues should be resolved;
iii. the Applicant has no private interest in the outcome of the case;

iv. having regard to the financial resources of the Applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and

v. if the order is not made the Applicant will probably discontinue the proceedings and will be acting reasonably in so doing.

(2) If those acting for the Applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.

(3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above."

24. The Court of Appeal also made it clear that (in the context of judicial review proceedings) a PCO should not be granted "unless the judge considers that the application for judicial review has a real prospect of success and that it is in the public interest to make the order" (at [73]).

25. For the reasons set out below a PCO cannot be made in this case:

a) The High Court is bound by the Court of Appeal's judgment in *Eweida v British Airways Plc* [2009] EWCA Civ 1025, [2010] CP Rep 6 at [38] which decided that PCOs were not available in private law proceedings. Lord Justice Jackson, giving judgment in the Applicant's GLO appeal, expressly declined to reconsider this case (see *Austin v Miller Argent (South Wales) Ltd* [2011] EWCA Civ 928, [2011] Env LR 32 at [64]). This case is conclusively against the applications.

b) Moreover, the commentary in the *White Book 2012* states that PCOs may be made "at any stage of the proceedings" (see CPR 48.15(7)). PCOs cannot be granted prior to the commencement of proceedings. The Defendant repeats the submissions it made on this topic above under issue (2). The Defendant's approach is consistent with the guidance in *Corner House* which envisages an application for a PCO being made in the claim form.

c) On any view, *Corner House* criteria (1)(i), (ii) and (iii) above are not met in this case. The application of those criteria is again binding upon the High Court. Since

this case does not concern the EIA Directive, or any EU law, the Applicant cannot rely on any presumption that its proceedings are in the public interest.

d) The Applicant has failed to show that her private law claim in nuisance has a real prospect of success. Indeed, this is a case where the history of failed litigation by the Applicant and others associated with her give rise to a very real risk of the Defendant being exposed to an unmeritorious claim motivated by ulterior purposes (see PS/WS, paras 34 to 49, and 96 to 107). The lack of detail in the draft particulars of claim is of particular concern, and sits uneasily with the Court of Appeal's judgment in the failed GLO litigation (see PS/WS, paras 79 to 86).

e) The Applicant has failed to provide any adequate evidence of her means and funding arrangements, and previous evidence that litigation would be prohibitively expensive in the absence of a PCO has proven unreliable (see PS/WS, paras 56 to 64, and 72 to 74).

26. In all the circumstances, even if the court had jurisdiction to make a PCO – and it does not – it would not be just and reasonable to do so.

(4) Does the Court have power to make some form of cost protection order by reason of its general case management powers under the CPR?

27. The Applicant relies upon the court's general case management powers under CPR 3.1(2)(m). She appears to contend that this provision creates a free standing power to make a costs protection order of some kind, even if the court has no power, or declines, to make a CCO or a PCO.

28. The Applicant's position is misconceived. The terms of CPR 3.1(2)(m) are qualified by its opening words "except where these rules provide otherwise". Moreover, the commentary in the *White Book 2012* at 3.1.8 makes it clear that the rules in CPR 44.18 to 44.20 were introduced to codify into the CPR the court's practice on CCOs. In the Defendant's submission, the CCO regime under CPR 44.18 does "provide otherwise" such that it qualifies the general power under CPR 3.1(2)(m).

29. It is noted that the Applicant can provide no authority for the proposition that the High Court is able to fashion an entirely novel and unprecedented form of costs protection order in circumstances where an application for a CCO or PCO has failed.

(5) If some form of cost protection order is justified in principle, should the Applicant's liability be set at £nil?

30. The Defendant repeats the salutary words of Lord Justice Jackson when dismissing the Applicant's GLO appeal. The judge said (*Austin v Miller Argent (South Wales) Ltd* [2011] EWCA Civ 928, [2011] Env LR 32 at [63]):

> "I am fully alive to the need to control the costs of civil litigation and, indeed, have put forward a number of proposals to that end which are currently under consideration. The fact remains, however, that every uninsured person who embarks upon litigation, must accept some degree of cost risks. There are strong policy reasons why this should be so, not least to maintain proper discipline over litigation, to incentivise reasonable litigation behaviour and to reduce the financial burden upon those who are vindicated. The Aarhus Convention does not require that environmental litigation should be cost free, merely that it should be not prohibitively expensive."

31. It is also to be noted that the Court of Appeal in *Corner House* (at [81]) indicated that, as a general rule, a Defendant faced with a PCO application ought to be able to recover between £2,000 and £5,000 costs in the event that the application fails.

32. Accordingly, it would be contrary to principle and to authority for the court to limit the Applicant's cost exposure to £nil in relation to either of her two applications.

V. DISPOSAL

33. Both applications should be dismissed.

James Pereira
Francis Taylor Building
Inner Temple
14 December 2012

On behalf of: Proposed Defendant
By: P B Stone
No: First
Exhibit: "PBS 1"
Date: 13 December 2012

CLAIM NO: 2CF30125

IN THE MATTER OF AN INTENDED ACTION
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- and -

MILLER ARGENT (SOUTH WALES) LIMITED

Defendant

WITNESS STATEMENT OF
PAUL BROMLEY STONE

I, PAUL BROMLEY STONE, a partner of DLA Piper UK LLP of Princes Exchange, Princes Square, Leeds, LS1 4BY **WILL SAY** as follows:

INTRODUCTION

1. I act in the above matter for the Defendant, Miller Argent (South Wales) Limited (**"Miller Argent"**). I am duly authorised to make this statement on behalf of Miller Argent. Unless otherwise indicated I make this statement from facts within my own knowledge, and based upon my reading of the documents relating to this case and to the best of my knowledge, information and belief.

2. I refer to:

2.1 The letter from the Applicant's solicitors dated 30 October 2012;

2.2 The Application Notice of the Applicant dated 30 October 2012 (signed on 29 October 2012) relating to a pre-action application for a Protective Costs Order, a Costs Capping Order and/or some other costs protection order;

2.3 The Statement of Case in support of the Application; and

2.4 The witness statements of Paul Stookes, Alyson Austin and Robert Griffin, together with their exhibits, which include a draft Particulars of Claim.

3. The purpose of this witness statement is to provide the Court with the facts I consider relevant to the determination of the applications made by the Applicant. I have not set out matters of law in this witness statement save in so far as reference to those matters is necessary in order to give the context for the factual material.

OVERVIEW

4. The Applicant is seeking some form of costs protection for her proposed claim in private nuisance, the effect of which would be to limit her liability to the Defendant's costs to nil. She is also seeking costs protection for the application itself, again on a nil liability basis.

5. Both applications are strongly resisted by my client, for reasons which are set out in this witness statement and which will be given in legal submissions.

6. By way of overview, the Defendant's position is that:

6.1 There is no basis for a costs protection order whether in relation to the application for costs protection or the proposed substantive claim.

6.2 In particular:

6.2.1 The evidence produced in support of the Application is inadequate and raises serious concerns about the proposed litigation;

6.2.2 There is a long running history of unmeritorious challenges relating to my client's land reclamation scheme. These have involved the Applicant and others. On the material I have seen the proposed action appears to be similarly unmeritorious. For these and other reasons it would be unjust to allow the Applicant to litigate without the discipline of the costs regime;

6.2.3 The facts of this case do not engage the Court's discretion to make a cost capping order under the CPR;

6.2.4 Neither the Environmental Impact Assessment Directive nor the Aarhus Convention nor any principle of European Law is relevant to the proposed private nuisance litigation;

6.2.5 The Court's jurisdiction to make a protective costs order is not engaged.

7. These and other matters will be set out in the Defendant's skeleton argument but I have referred to the points above by way of introduction. Having given that overview of the Defendant's position, I set out my factual evidence under the following main headings:

7.1 The Ffos-y-fran land reclamation scheme;

7.2 The history of unmeritorious claims against the scheme;

7.3 Particular matters raised by the evidence in support of the Application (this part of my evidence is set out under a number of other headings).

THE FFOS-Y-FRAN LAND RECLAMATION SCHEME

Location

8. The Ffos-y-fran Land Reclamation Scheme is located on the eastern edge of Merthyr Tydfil, about 2km east of the town centre. It is about ½ km south of Dowlais, 3km north of Bedlinog, 1 ½ -2km north west of Fochriw and ¾ km east of the Merthyr districts of Penydarren, Thomas Town and Twynyrodyn. The Ffos-y-fran site consists of two general sectors. The first section lies to the north of the unclassified common road (known as the Bogey Road). This contains the majority of the opencast and reclamation operations. It is bounded on the west

and north west side by the recently diverted A4060(T) trunk road, a dual carriageway which separates the site from residential areas. A landfill site operated by Biffa Waste, known as the Trecatti landfill site, lies immediately to the north east. The second sector lies to the south of the Bogey Road. This is where further reclamation works will be carried out following the use of this area primarily for the temporary storage of overburden. The Cwmbargoed Disposal Point (**"DP"**) (where coal from the Ffos-y-fran Land Reclamation Scheme is processed and loaded onto trains) lies to the east of the Ffos-y-fran Land Reclamation Scheme and operates under its own extant planning permissions dating from as far back as 1957.

9. Annotated plans, cross sections and aerial photographs of the site are included at pages 1 to 13 of **"PBS1"**. These show the layout of the site as it was before any reclamation, the position of the first two phases, the current status of the Ffos-y-fran Land Reclamation Scheme and the anticipated progression of this phase to its completion.

"PBS1"

Background to the scheme

10. The Ffos-y-fran Land Reclamation Scheme is the third and final phase of the East Merthyr Reclamation Scheme (**"EMRS"**) which was initially granted planning permission in 1988. The EMRS was the initiative of the then Minerals Planning Authority, Mid Glamorgan County Council (now Merthyr Tydfil County Borough Council and Caerphilly County Borough Council), in partnership with the Welsh Development Agency and was launched in the late 1980s by the Secretary of State for Wales following the grant of planning permission.

11. The EMRS was born out of the terrible Aberfan disaster in 1966, which resulted in Government policy that all areas of land identified as posing a similar threat to local communities of a disaster such as occurred at Aberfan should be the subject of reclamation to mitigate such risks. Much of the tip material from Aberfan was in fact moved onto the land at Ffos-y-fran and its removal/stabilisation now forms part of the reclamation works.

12. The inhibiting factor which has caused a significant delay to such works being undertaken sooner has always been the cost. The solution which has been identified for the EMRS (and followed in other schemes) has been to reclaim the derelict, unstable and dangerous land to the east of Merthyr Tydfil by way of opencast coal mining operations, so that the sale of the coal could be used to fund the expensive restoration works. The land can then be restored and used for safe and beneficial purposes at no cost to the public purse.

13. The EMRS has proceeded in three phases. Phases I and II of the EMRS have now been completed, and have brought about the restoration of some 106ha of derelict land, which today provides residential, light industrial and recreational uses. Phase I, known as Incline Top, was completed in June 1993 and ensured ground stabilisation, land reclamation, a new road (called the Incline Distributor Road) and the preparation of land for residential development.

14. I pause to note that Mrs Austin, the Applicant, resides in Bradley Gardens, which is built on land reclaimed by Phase I. In other words, she lives within an earlier phase of the development which she asserts is causing a nuisance.

15. The current, on-going phase is in essence the third phase. Planning consent for an earlier version of the third phase (Phase III) was originally granted in November 1988. However, Phase III did not progress because of land ownership issues and as it would not have dealt with the remaining dereliction in the area, and would effectively have sterilised as large a reserve of coal as it would actually have won from the ground.

16. In 1994 it was formally proposed that the scheme should be revised. The revised scheme (called Phase IIIA) was submitted by Merthyr Tydfil County Borough Council but was withdrawn in May 1999 whilst issues of land access remained unresolved. However, Miller Argent subsequently solved the land access issues and a fresh planning application supported by a full Environmental Impact Assessment was made. That application was "called-in" by the National Assembly for Wales (**"Assembly"**) for its own determination. As a result, a two week public inquiry (**"Inquiry"**) was held in 2004 to consider the planning application. There followed a lengthy report to the Assembly written by the planning inspector who presided over the Inquiry. His report considered the Ffos-y-fran Land Reclamation Scheme proposals and objections to them.

17. There were several individual and group objectors who spoke against the proposals at the Inquiry, including the Applicant, on grounds that included the assertion that the effects of the works would be unacceptable because of alleged adverse noise, dust and other impacts on air quality. Indeed, I understand that the Applicant is associated with a campaign group called "Residents Against Ffos-y-fran" (**"RAFF"**), of which I understand she is the treasurer (see an extract from the RAFF website at page 15 of **"PBS1"**). "PBS1"

18. As a result of the objections made by the Applicant and others, matters of noise and dust and other impacts were considered at length in the Inquiry and were the subject of detailed expert evidence. These objections were fully considered by the inspector and rejected in his detailed report. None of the alleged impacts were found to be unacceptable.

19. The inspector's report recommended that planning permission be granted. A committee of the Assembly considered the inspector's report and a report from the Assembly's own Head of Planning which also supported the grant of planning permission. The committee accepted the recommendations to grant planning permission and, accordingly, planning permission (**"the Permission"**) for the Ffos-y-fran Land Reclamation Scheme was granted on 11 April 2005 by the Assembly, subject to stringent conditions to control the operations on the site.

20. A court challenge to the grant of the Permission which alleged that the consideration of the planning merits of the scheme had been inadequate and therefore unlawful was later rejected. Richard Buxton solicitors acted for the claimant. I refer to this and other challenges in more detail, below.

21. I attach at pages 3 to 7 of **"PBS1"** annotated aerial photographs and at page 2 of **"PBS1"** a plan which show the relationship between the three phases of the EMRS and the Permission boundary for the Ffos-y-fran Land Reclamation Scheme. "PBS1" "PBS1"

The four stages of land reclamation

22. The current operations are being carried out in four stages with progressive operation and restoration of the land, working in a south-to-north direction. The first stage, the development of the 'box cut', involves the stripping of soils and soil-forming materials from the excavation and overburden storage areas, and

initial excavation of the void. This commenced in the south-west corner, working in a north-easterly direction, with overburden materials being transported for temporary storage in the Northern and Southern Overburden Mounds and coal being transported to the DP via a controlled crossing of the Bogey Road. The locations of these areas are shown on the plan at page 1 of **"PBS1"**.

23. Plans showing the different phases of the reclamation process are at pages 8 to 13 of **"PBS1"**. During the initial part of this stage of the operations the waste material from Tip 13 and the parts of the Merthyr and Hoover landfill tips within the excavation area were excavated, sorted, recycled and treated as necessary. Inert material (general construction waste) was used within the site for haul roads and other hard surfaces. Non-inert waste was transported off the site, non-hazardous waste going to the nearby Trecatti landfill site and hazardous waste to a suitably licensed tip elsewhere. The waste tip reclamation operations took approximately 9 months to complete.

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24. The second stage of the operations is on-going. It advances the working void in a north-easterly direction with progressive backfill of the area previously excavated and some overburden movements to the Southern and Eastern Overburden Mounds. As overburden mounds are completed they are progressively seeded to grass to improve their appearance and reduce dust generation. As the void itself is progressively backfilled to final profiles it is restored with soils and soil-forming material, cultivated, seeded and planted to complete the restoration scheme on a progressive basis. This stage continues until the maximum void is achieved.

25. The third stage is also on-going. It involves continued excavation to the north-eastern end of the site, with the size of the void gradually reducing, up to the end of coaling operations. Coal movements would continue throughout this phase but overburden movements would be entirely to the void backfill area; during the latter stages material would begin to be brought back from the Southern Overburden Storage Area. Progressive restoration would continue as the backfilled area advanced behind the working void.

26. The fourth stage is the final restoration. Overburden will be returned from all of the overburden storage areas, topsoil, subsoil and soil-forming materials would be spread to achieve the approved restoration profiles, and the land will be

cultivated, seeded and planted to complete the restoration scheme. The land used for the overburden and soil storage areas will be similarly restored. The restoration would be subject to an aftercare period of five years to ensure that it became well established.

27. The Ffos-y-fran Land Reclamation Scheme operations are designed in such a way that the advanced excavation moves progressively further away from Merthyr Tydfil with the restored land form following closely behind (see the plans at pages 8 to 13 of **"PBS1"**). This was an express condition of the Permission, which was imposed so that Merthyr Tydfil could enjoy the benefit of reclamation at the earliest stage possible, and any impact would progressively reduce with time.

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28. In my firms letter of 10 September 2012 in response to the letter before action I set out at pages 11 and 12 under the heading "*Strategic Importance*" (see pages 235 to 236 of the Applicant's Bundle) an analysis explaining the overall strategic and economic importance of the Ffos-y-fran Land Reclamation Scheme to Merthyr Tydfil. Miller Argent has invested a maximum of £140 million in the Ffos-y-fran Land Reclamation Scheme, creating around 260 full-time jobs as a maximum in an area of high unemployment. In excess of £200 million worth of external contracts are committed to these operations, which supports an estimated further 100-200 jobs in the local economy. At the time of the Inquiry, the inspector accepted evidence that the estimated total value of all benefits to the local community would be over £130 million. The successful completion of the scheme is immensely important to the future of Merthyr and in the interim the scheme is a major contributor to the local economy.

The location of the Applicant's home in relation to the scheme

29. Mrs Austin's house is jointly owned with her husband. The house is located at number 10 Llwyn Yr Eos, Incline Top, Merthyr Tydfil, CF47 0GD. This property is part of a new housing development called Bradley Gardens. Mr and Mrs Austin bought the house pursuant to a transfer dated 14 November 2003 from Redrow Homes (South Wales) Limited and Mr and Mrs Austin were the first owner occupiers of the house. As a result, the house is a modern house which was newly built when the Austins bought it.

30. Any competent searches carried out at that time would have identified that the house was adjacent to land identified and consented for reclamation and coal recovery.

31. It is alleged in paragraph 4 of the Application that the property is some 400 metres from the boundary of the Defendant's operations. I annex at page 14 of "PBS1" **"PBS1"** a plan which shows that the nearest boundary of the site to Mrs Austin's house is some 451 metres away, whilst the outer permitted limit for excavation works is about 470 metres away.

32. It is also important to understand the distance between Mrs Austin's house and the main working face from which coal is from time to time being extracted. In 2008 as the original void was being excavated, the work will have gone up to the permitted limit for excavation and so will have been within 470 metres of Mrs Austin's house. In the present day, however, the bulk of such works are more than 850 metres away and are consistently moving even further away because of the phasing and sequencing of the work programme which I have described above. As a result, at any one time, most of the current operational noise from digging and the majority of the activity on the site that might generate dust is a significant distance from the Applicant's home and is moving ever further away.

33. Other work does go on closer to the site boundary and hence to Mrs Austin's house. However, this work primarily relates to the back-filling of the original void and the making good the reclamation of the site. The machinery used for this work generally generates less noise than the coal excavation works and the process of back-filling, especially when down in the void, produces substantially smaller risk of dust emissions, especially when combined with consistent and effective dust suppression. Again, whilst a very small proportion of this work is currently approximately 500 m of Mrs Austin's home it is and will continue to move inexorably away from her.

THE BACKGROUND OF UNMERITORIOUS CHALLENGES TO THE SCHEME

34. At paragraph 27 of her witness statement the Applicant says *"It is correct to say that I have objected to the opencast mine for a considerable length of time."* In fact there has been a long history of resistance to the Land Reclamation Scheme from a minority of local residents, which has resulted in a catalogue of failed

proceedings whose purpose has been to curtail or stop the operation of the scheme. These proceedings have imposed a heavy cost burden on my client, with some £3 million being spent defending actual or proposed litigation over the years, none of which was budgeted for and none of which has been recovered.

35. I raise this background for three main reasons. First, they highlight a serious risk that the present litigation is simply the next chapter in the catalogue of unmeritorious, failed proceedings. Secondly, and related to this, there is an underlying theme of a general campaign against my client's operations, apparently motivated by a general objection to coal extraction. Thirdly, from my client's perspective, it is important that the Court is aware of its past litigation cost exposure. I consider that these matters are relevant to the Applicant's proposal that she should be allowed to litigate without risk of an adverse costs award.

36. It will be noted that several of the matters referred to below were progressed in the name of an Elizabeth Condron. I understand that Elizabeth Condron is also a member of RAFF, along with the Applicant. I refer to an extract from the RAFF website (at page 14 of **"PBS1"**) which refers to Elizabeth Condron as being the "*Claimant...on behalf of the people of Merthyr*" as part of "*The Legal Challenge*". It is apparent from the press articles at pages 16, 18 and 19 of **"PBS1"** that Mrs Austin has been involved to some degree, in her role as a member of RAFF, in several of the matters pursued in the name of Elizabeth Condron.

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37. The first set of proceedings brought by Elizabeth Condron in 2005 sought a quashing of the Permission. As I have already stated above when giving the background to the Ffos-y-fran Land Reclamation Scheme, this failed challenge included grounds that alleged that the Assembly, and the inspector, had not adequately addressed the planning merits of the proposals.

38. It is important to note that those proceedings did not allege that the Permission was granted in breach of the EIA Directive. The claimant in that case was represented by Richard Buxton Solicitors and respected, specialist Leading and Junior Counsel. I infer from that that there was no viable argument that the Permission was granted in breach of the EIA Directive.

39. The potential second set of proceedings – I say 'potential' because this time they were merely threatened – were notified on 1 June 2007 when Richard Buxton Solicitors, on behalf of Mrs Condron, wrote to the Assembly asking them to revoke the Permission. The effect of revocation would have been to remove the Permission preventing the Ffos-y-fran Land Reclamation Scheme from being implemented. The Assembly did not determine the request and on 29 October 2007 Richard Buxton Solicitors issued a pre-action letter threatening to bring judicial review proceedings against the Assembly for failing to determine the claimant's request. The Treasury Solicitor responded on behalf of the Assembly by letter dated 23 November 2007. On 6 December 2007 the Assembly gave detailed reasons for rejecting the claimant's request that the Permission should be revoked. On 4 January 2008 a further pre-action protocol letter was sent to the Assembly by Richard Buxton Solicitors, on behalf of Mrs Condron, threatening judicial review proceedings of this decision. In the event, no claim was pursued.

40. The third proceedings were started on 7 February 2008 when Richard Buxton Solicitors, on behalf of Mrs Condron, issued a claim for permission to seek a judicial review of the Council's decision on 18 December 2007 not to take enforcement action in respect of an allegation that Miller Argent had asserted that it intended to *"excavate land right up to the site boundary"* in contravention of the Permission. On 20 March 2008 Mr Justice Sullivan refused permission.

41. The fourth challenge, though not legal proceedings as such, came on 18 April 2008 when Richard Buxton Solicitors, on behalf of RAFF, petitioned the European Parliament for a declaration that the Permission had been granted unlawfully. To date the European Parliament's committee on Petitions has simply determined that the petition was admissible but has made no further ruling in this regard.

42. The next claim was a challenge to a related planning permission for the DP. On 29 September 2008, Richard Buxton Solicitors, on behalf of Mrs Condron, sent a pre-action letter to Merthyr Tydfil County Borough Council and to Caerphilly County Borough Council seeking to challenge their decisions to grant planning permission for the refurbishment and continued use of the DP. A claim was then issued which sought the quashing of the relevant planning permission. Permission to pursue the claim was refused by Mr Justice Collins on 9 March 2009, refused again by Mr Justice Beatson at a renewal hearing on 30 April and

1 May 2009, and refused again by the Court of Appeal following a hearing in January 2010.

43. It is clear that, far from seeking to prevent or mitigate pollution from the Ffos-y-fran Land Reclamation Scheme, the real objective of these various actual and threatened proceedings – save for the enforcement challenge - has been to bring a halt to the scheme by challenging the planning permissions which authorise its operation.

44. The fifth matter arose when, on 11 June 2009, Richard Buxton Solicitors, on behalf of Mrs Condron, wrote to the Secretary to the Aarhus Convention at the UN in Geneva with a Communication alleging a breach of Article 3(8) and 9(4) of the Aarhus Convention by the UK. At the twenty-seventh meeting of the Aarhus Convention Compliance Committee held between 16 - 19 March 2010 at the Palais des Nations in Geneva (attended by the UK Government, Merthyr Tydfil County Borough Council, Miller Argent, and Richard Buxton Solicitors) the Committee ruled that the Communication was inadmissible and explained that the claim was "manifestly unreasonable".

45. Finally, on 15 July 2010 the same solicitors acting for Mrs Austin as lead claimant sought a Group Litigation Order on behalf of some 500 plus members of the public, the underlying proposed claim being an action in private nuisance. Many of the proposed claimants were minors and some of them were not property owners. These proceedings are described in more detail later in my statement, but the upshot of them was that the application was dismissed by the High Court on 11 November 2010 and an appeal against the Judge's decision was dismissed by the Court of Appeal on 29 July 2011.

Other action against the operations

46. The history of legal challenges set out above ignores the parallel history of campaigners who have repeatedly sought to invade the site to carry out organised trespasses so as to disrupt work on the site and cause the maximum amount of inconvenience to its on going operation. This has happened repeatedly, forcing Miller Argent to go to court and to call on the police to help it clear the site so that it can safely re-start operations.

The motive for actions against the site

47. As I have said earlier, some of the objectors to the scheme, including Alyson Austin, are members of the RAFF. The group has been opposing the Ffos-y-fran Land Reclamation Scheme for the last five years. I understand that a main focus of RAFF is a politically and environmentally motivated anti-coal campaign whose focus may be very distinct from the issues of relevance to any claim for nuisance.

48. In this context, I note at paragraph 26 of her witness statement that Mrs Austin refers to her characterisation as an *"environmental activist"* and suggests that this is *"unfair criticism"* (there are some words missing from the relevant sentence in her statement but this appears to be the import of what has been said). Mrs Austin and her husband have been and remain committed environmental campaigners who have been opposed to the land reclamation scheme at Ffos-y-fran not primarily on grounds of any prospective nuisance the scheme might potentially cause but because of a clear and apparently implacable opposition on environmental grounds to the extraction and/or use of fossil fuels such as coal. There is ample evidence from local press articles and the internet (see extracts at pages 15 to 24 of **"PBS1")** of Mrs Austin and her husband participating in or encouraging various forms of protest. In each case, the focus is on an overall opposition to coal, as opposed to a genuine campaign in relation to any alleged noise or dust nuisance generated by particular aspects of the day to day operations at the site.

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49. I have also read the witness statement of Mr Griffin. Mrs Austin and Mr Griffin are political allies who were both liberal democrat candidates in last May's local elections (both failed to be elected). Like Mrs Austin, Mr Griffin has been and remains a longstanding opponent of the scheme. He campaigned against it while he was a local councillor and continued to do so after losing his position in the 2011 local elections. This provides a context for his statement.

PARTICULAR MATTERS RAISED BY THE EVIDENCE IN SUPPORT OF THE APPLICATION

50. Below I set out my evidence under the following headings:

50.1 The previous application for a Group Litigation Order and the costs arising in that litigation;

50.2 The Applicant's costs position;

50.3 The alleged risk of disproportionate costs and other factors;

50.4 The alleged relevance of the EIA Directive and the Aarhus Convention;

50.5 The draft Particulars of Claim and the absence of sufficient particulars of the alleged nuisance;

50.6 Allegations relating to pre-action conduct;

50.7 The lack of merit in the proposed action;

50.8 Conclusions.

The previous application for a Group Litigation Order ("GLO") and the costs arising in that litigation

51. In the covering letter to the Application and the Statement of Case in support of the Application, reliance is placed upon the previous, failed application for a GLO and the Defendant's costs incurred in those proceedings. These matters are relied upon by the Applicant to assert that other local residents are concerned about nuisance but cannot afford to bring a claim, that the costs of proceedings will be prohibitively expensive and that the Defendant's costs will be disproportionate (see paragraphs 9 to 11 and paragraph 49 of the Statement of Case in support of the Application at pages 6 to 8 and 24 of the Applicant's Bundle).

52. In response there are a number of points that I need to make.

53. First, the figure of costs of £257,148.50 which is given in paragraph 9 of the Statement of Case is misleading. This figure includes VAT and no discount for assessment. Yet the Defendant accepted that VAT was not claimable and a discount would need to be made to reflect the likely outcome of any assessment of costs. The figure in fact advanced by the Defendant as being the approximate level of likely recoverable costs was £153, 646. This is recorded at paragraph 47 of the judgment of Lord Justice Jackson in the Court of Appeal.

54. Secondly, it is important to consider why the GLO application was a relatively expensive piece of litigation. The costs were materially higher than they otherwise might have been because of the failure by the applicants and their solicitors to properly particularise the basis of the application and the proposed

substantive action, and because of the procedural course which the application took. In particular I draw attention to the following:

54.1 As is reflected in the judgment of HHJ Jarman, which was upheld by the Court of Appeal, the applicants for the GLO had failed to particularize any specific allegations but had nevertheless recruited numerous prospective claimants. This was apparently done in the hope that the Court would conclude that the number of prospective claimants must of itself be indicative of a genuine case of public concern that warranted further judicial consideration. In fact the Court rejected this approach.

54.2 However, to address such tactics effectively, the Defendant was forced to undertake a far higher than normal level of forensic and other evidential analysis to demonstrate to the court that applying the threshold required by the CPR in the context of a pre-litigation GLO application, there was, properly analysed, insufficient evidence to support the bringing of a GLO in respect of any of the prospective claimants at that time.

54.3 This was a very costly and time consuming exercise that had to be undertaken within a relatively tight time frame. The position was exacerbated by the fact that originally the claimants had asserted to the Court that there would be no need for them to adduce any substantive evidence in reply to the Defendant. However, on receiving the Defendant's evidence they changed their position and made an application to the Court for leave to adduce further evidence. This led to the substantive hearing being adjourned, a day's hearing in Cardiff for further directions, and a further exchange of evidence and then the substantive hearing.

55. Thirdly and in any event, the judgment of Lord Justice Jackson in the Court of Appeal dealt with the issue of costs. A copy of the judgment is exhibited at "PBS1" **"PBS1"** pages 25 to 38. The court should note that the Court of Appeal was content with the Defendant's offer on costs in connection with the GLO. The current position is that the Defendant has not currently sought to tax its costs nor to otherwise enforce the costs award against Mrs Austin. There was and has been no finding that the Defendant's costs incurred in successfully defending the GLO application were disproportionate, and I strongly refute any such allegation.

The Applicant's costs position

56. In this section of my evidence I respond to the Applicant's costs position as set out in the evidence supporting the present application.

57. First, I have serious concerns about the information provided in relation to conditional fee arrangements. In this regard the Court will note that on page 27 of the Applicant's Bundle there is what purports to be a Notice of Funding. The Notice is dated 30 October 2012 but is said to relate to a conditional fee agreement (**"CFA"**) dated 19 July 2009. I cannot see how any CFA relating to the current proceedings could have been entered into at that time, and I am concerned that the Applicant is, in effect, seeking to bring costs incurred in respect of other proceedings within the ambit of these proceedings. I note in particular the following:

57.1 In the context of the original GLO application Mrs Austin's solicitors served a Notice of Funding dated 3 April 2010 which related to a CFA dated 1 July 2009. This CFA pre-dated the CFA Mrs Austin now refers to by some 18 days. Throughout the GLO proceedings there was on-going ambiguity as to the status of the CFA which was never satisfactorily resolved. In particular there were repeated assertions that all the prospective claimants were covered by a CFA even though the CFA referred to clearly pre-dated the dates on which a very large number of the prospective claimants were recruited.

57.2 What, nonetheless, seems to be clear was that Mrs Austin as the promoter of the GLO was presumably a party to the 1 July 2009 CFA. I cannot see how, at a time when Mrs Austin was actively involved in promoting a GLO and had entered into a CFA in that regard, she some 18 days later entered into a CFA in contemplation of wholly separate individual proceedings in nuisance which could only become relevant if the GLO did not proceed, and which have only been pursued some 3 years later.

57.3 In their letter of 22 October 2012, in the pre-penultimate paragraph, on page 239 of the Applicant's Bundle, the suggestion was made that my firm was aware that Mrs Austin instructed Richard Buxton Solicitors on a CFA basis. In the final paragraph of our reply on 30 October 2012 we

made it clear that we were not aware of any CFA in the context of these new proceedings and asked for details. The service of the Notice with the Application seems to have been a response to this.

57.4 The position is further confused by the costs schedule served with the Application. This appears at page 245 in the Applicant's Bundle. In the first paragraph there is the assertion that Mrs Austin instructed Richard Buxton Solicitors on 9 July 2009 in relation to this matter and subject to a CFA. We then have some six lines lower down the same page an assertion that on "*16 July 2009 RB instructed by way of CFA*". The result is that we appear to have four competing dates for this supposed CFA relating to a case to be brought some three years later: 1 July 2009; 9 July 2009; 16 July 2009; and 19 July 2009.

58. Secondly, I have concerns regarding the contents of the costs schedule itself. It itemises a range of undated disbursements and then refers to profit costs that have been incurred with respect to the current threatened proceedings from 1 August 2011 to 20 May 2012. These historic costs must be viewed in the context of an initial letter before action dated 15 June 2012. I believe the significance of the 1 August 2011 date is simply that that was the date that the Court of Appeal's order dismissing Mrs Austin's appeal in relation to the GLO was sealed. What costs relating to these new proceedings could genuinely be said to have been incurred immediately following 1 August 2011 is wholly unclear to me. However, the Applicant appears to be asserting that even before the pre-action correspondence phase began Mrs Austin had incurred costs of £23,892 plus VAT for solicitors costs and then a further £22,472 plus VAT during the pre-action phase. I am at a loss to explain how such a high level of costs was incurred before May 2012. The bulk of the work product relied on in terms of evidence is not new. The new expert's report appears to have cost £2,400 and as the expert was familiar with the issues the actual cost of instructing him must have been limited. Further, unless Mrs Austin was already intent on pursuing proceedings and had undertaken substantial pre-preparation, I would expect the bulk of the costs incurred in terms of preparing this application and the draft proceedings to have been incurred since May 2012.

59. Thirdly, the inference I draw from the suggestion that Mrs Austin entered into a CFA relating to these current proceedings on 19 July 2009, is that the Applicant's solicitors are attempting to back-date the Defendant's costs liability

in these proceedings to the earliest possible date. This is wholly inappropriate. Moreover, it illustrates that whilst the Applicant is seeking to be exposed to a nil costs liability, Richard Buxton Solicitors and Mrs Austin want to try to maximise the costs risk faced by the Defendant. The current applications by Mrs Austin need to be viewed in this context.

60. Fourthly, the Applicant's estimate of her own costs is notable. The Applicant's estimate of base costs for the litigation is £195,349.35 (see page 247 of the Applicant's Bundle). The Defendant accepts that the Defendant's costs are likely to be of a comparable level (paragraph 10 of the Statement of Case). However, the note on the Applicant's costs schedule states that its costs are subject to an uplift of up to 100%. So the Defendant's actual potential costs liability is estimated, by the Applicant, to be just short of £400,000.

61. The final matter I wish to comment on in the context of the Applicant's costs position is the availability of insurance. At paragraph 12 of the Application Notice Mrs Austin asserts that she needs costs protection in this case because, as a result of the introduction of section 46 of the Legal Aid Sentencing and Punishment of Offenders Act 2012 (**"LASPOA"**), she is now prevented from recovering from the Defendant any ATE premium that might be payable from the Defendant in the context of private nuisance proceedings. I do not consider that this is correct. Section 46 of LASPOA only comes into effect in April 2013 and will not be retrospective in effect. The result is that if Mrs Austin has entered into a valid ATE policy before that date, the premium will be recoverable if her case is successful.

62. I note that the Defendant was met by a similar lack of clarity in relation to the GLO proceedings. In those proceedings there were repeated assertions that the issuance of an ATE policy in favour of the prospective claimants was imminent, but it was only at the substantive hearing of the GLO application that Leading Counsel for Mrs Austin finally conceded that there was no prospect of an ATE policy being issued. No proper explanation was forthcoming for this failure.

63. In this case it is not clear whether no attempt to obtain ATE has been made because Mrs Austin and her lawyers know that it would be unsuccessful, or whether a further attempt has been made to obtain such cover and has failed because insurers could not identify any basis on which Mrs Austin could currently claim to have an arguable case on the merits. Whatever the position, I

do not consider that LASPOA is a tenable reason for the failure to obtain insurance.

64. I recall that in respect of the GLO proceedings it became clear as matters progressed that certain of the applicants had the benefit of household and other insurance policies which provided them with a level of before the event insurance cover (**"BTE"**). Mrs Austin's solicitors have allegedly been acting in respect of this particular claim since the end of the Court of Appeal proceedings in 2011. Over that time as their costs schedule shows, a substantial amount of legal costs have been incurred. If some or all of those costs have been funded by BTE then that is a very material factor and should be disclosed.

The alleged risk of disproportionate costs and other factors

65. Under CPR 44.18, I am aware that before it can consider exercising its discretion to make a costs capping order, the Court must be satisfied that without such an order costs will be disproportionately incurred and that the risks of incurring disproportionate costs cannot be adequately controlled by case management powers or detailed assessment. Although the matter is one for the Court to decide, I give the following evidence in the context of this part of the CPR.

66. First, I am an experienced litigation partner and I have specialised in litigation for over 27 years. I, and the firm I work for, are well aware of the relevant costs regime and the need to conduct litigation in a cost effective, proportionate manner. I have seen no evidence upon which to conclude that there is any risk of the Defendant incurring disproportionate costs in this case, let alone a risk that cannot be controlled by case management and detailed assessment.

67. Secondly, I cannot see how it can be suggested that there is a risk that the Defendant's costs will be disproportionate within the criteria set out under CPR 44.18, when the Applicant accepts that it is reasonable to assume that they will be in the same order as the Applicant's.

68. Thirdly, I note in this context that the solicitors' hourly rates of the relevant fee-earners working on this case (which include myself (whose hourly rate is discounted to £328), a solicitor (whose hourly rate is discounted to £192 and which is in line with the Solicitors' Guideline Hourly Rates) and a trainee (whose hourly rate is discounted to £104 which is below the Solicitors' Guideline Hourly Rates)) are reasonable and proportionate for regional commercial solicitors rates

for a for a matter which is of considerable significance and sensitivity to the Defendant, particularly in light of the injunction sought by the Applicant and the potential for further claims, or a further GLO application, to be made by other claimants who were previously party to the GLO application, should the Applicant succeed in obtaining some form of costs protection.

69. There are some additional points that I would make that may be relevant to cost capping orders more generally.

70. First, on the information currently provided I find it difficult to give an accurate forecast of what the Defendant's costs might be, and I am surprised that the Applicant's solicitors have been able to provide the estimate that they have provided of their own costs. The difficulty arises because the draft Particulars of Claim are extremely general and do not condescend to particulars, yet the nuisance is alleged to have arisen and continued from November 2007, apparently from all and any of the Defendant's operations. The particulars are so general that it is difficult to know at this stage what evidence will be needed to rebut the claim, save that it will apparently need to span in excess of five years of operations.

71. Secondly, as I have already said, it is the case that the Defendant has already incurred in excess of £3 million in unbudgeted and irrecoverable costs in its successful defence of the various actual and threatened proceedings that have been brought or threatened against the lawful operation of the Land Reclamation Scheme. The costs of this present round of litigation are most unwelcome, particularly at a time of rising operational and regulatory costs and falling revenues in relation to the scheme.

72. Thirdly, my own view is that the evidence provided by Mrs Austin as to her financial position at paragraphs 4 to 6 of her statement (at page 352 of the Applicant's Bundle) is wholly inadequate. The Court is none the wiser as to Mrs Austin's salary, Mr Austin's pension, the level of the Austin's joint savings or any equity they have in their home, nor of any outgoings which they may have. The information is insufficient to understand what the Applicant can afford in the context of this litigation. I am also concerned to understand whether Mrs Austin is truly acting as a sole and private agent or whether she has any external backing to bring this litigation which may be contributing to her costs. I raise that issue because of the background of organised opposition to the

scheme and Mrs Austin's membership of RAFF and Friends of the Earth. Furthermore, it is entirely reasonable in this context to want to understand clearly on what basis her solicitors and counsel are retained and hence her own liability to pay their costs. If she can genuinely fund on an on-going basis a proportion of her own costs to the level provided for in the schedule of costs she has produced then that is a relevant factor for the Court to consider. If, however, she has been on a 100% CFA and has no personal exposure to costs if she loses, this again must be relevant.

73. I note in this context that Mrs Austin says at paragraphs 1, 29 and 30 of her witness statement that the proposed proceedings would be prohibitively expensive if costs protection is not given. The same point is made by her solicitor, Mr Stookes, in the statement of case in support of her application (see paragraphs 3, 9 to 11, 38 and 54). I do not consider that this evidence is credible. The very same point was made in sworn evidence submitted to the Court of Appeal in support of Mrs Austin's application for a PCO for the appeal against the refusal of the Group Litigation Order. I attach at pages 39 to 44 of "**PBS1**" a copy of the Third Witness Statement of Mr Stookes in those proceedings, dated 4 March 2011. I draw the court's attention to paragraphs 9 to 12 and paragraph 14 in particular. These make the same points that are now made by and on behalf of Mrs Austin to the effect that proceedings would be prohibitively expensive and Mrs Austin would be unable to proceed without a PCO. However, in the event, the Court of Appeal refused her application for a PCO on 16 March 2011 yet Mrs Austin was still the lead Appellant at the oral permission hearing on 22 March 2011. Moreover, a further application for a PCO was made in advance of the substantive appeal, but dismissed by Pill LJ on 9 June 2011. Nevertheless, Mrs Austin appeared as the lead Appellant at the substantive appeal, where a further application for a PCO was refused.

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74. It follows from the above that evidence given in the past to the effect that Mrs Austin's means would result in proceedings being prohibitively expensive has been unreliable.

75. Fourthly, a nil costs order would in my view tend to encourage unmeritorious litigation – of which there is a substantial risk here - and would in effect deprive the Defendant of the normal means of protecting itself in costs, such as through the use of a Part 36 offer. It is hard to see what discipline will be brought to bear on the Applicant's conduct of the proposed litigation or how the Defendant can

avail itself of the means to protect itself in costs if the Applicant is effectively litigating without concern for any potential liability to the Defendant's costs. The value of the disciplining effect of the costs regime was emphasised by Lord Justice Jackson in his judgment dismissing the appeal against the refusal to make the GLO. The risk is increased where, as here, it is suggested by the Applicant that other potential claimants exist.

The alleged relevance of the EIA Directive and the Aarhus Convention

76. I acknowledge that this topic is largely a matter for legal submissions. There are however two points that I wish to make.

77. The first is that the Permission was subject to a formal Environmental Impact Assessment, and although proceedings were brought to challenge the grant of the Permission it was never alleged in those proceedings that there had been a breach of the requirements for EIA. Moreover, although as I say it is a matter that will be taken up in legal submissions, I do not understand how the EIA Directive can be relevant to the present application.

78. Secondly, the Aarhus Convention was a matter argued about in the Court of Appeal in relation to the failed appeal against the refusal of the GLO application. The Court expressly declined to make any finding on whether the Aarhus Convention applied to those proceedings. The point I make is that the arguments about the application of the Aarhus Convention in those proceedings were based largely upon the alleged wide-spread nature of the alleged nuisance, covering, it was asserted, many households over a wide area. The current proceedings are obviously different. The Applicant accepts that the proposed proceedings are private law nuisance proceedings to protect her private amenity of her own home. There are no other claimants and the only relevant evidence is evidence in relation to the Applicant's own amenity.

The draft Particulars of Claim and the absence of sufficient particulars of alleged nuisance

79. The draft Particulars of Claim fail to give any specific particularised details of nuisance. In this context the Court will note that a similar criticism was made of the Claimant and others in the context of the failed application for a GLO. From my perspective as an advisor to the proposed Defendant this is of great concern, given the relevance of the particular allegations to the assessment of on-going

costs, merits, proportionality and the general conduct of the proposed claim. When the lack of particulars is coupled with the desire of the Applicant to litigate without risk of adverse costs there is a real risk of injustice.

"PBS1" 80. In this regard I annex at pages 45 to 53 of exhibit **"PBS1"** a copy of the extempore judgment of HHJ Jarman in the Cardiff TCC in November 2010 dismissing Mrs Austin's application for a GLO plus a copy of the draft statement of case in support of that application. The GLO was dismissed, in part, because the learned judge was not persuaded that there was sufficient evidence to justify the making of a GLO. Part of the Court's concern was that the allegations of nuisance had not been sufficiently particularised. In this respect the draft Particulars of Claim accompanying the present application are no different. It is simply not possible to discern from that document any substance to Mrs Austin's case.

81. The same is true of the pre-action correspondence between the parties exhibited at pages 205 to 242 in the Applicant's Bundle. Even though Mrs Austin and her solicitors have exhibited a considerable amount of documentation (which I comment on below in more detail) including various expert reports they have failed to formally allege when, where or how any actual incidents of nuisance have arisen. This means that it is not clear which particular alleged events the Defendant needs to address.

82. As the correspondence shows, Mrs Austin's solicitors have tried to justify this failure to particularize her case on the basis that they cannot currently do so and that they are not currently obliged to do so by case law (see paragraph 5 of Richard Buxton Solicitors' letter dated 30 July 2012 at page 218 of the Applicant's Bundle). This is strongly disputed by the Defendant. The inference to be drawn from the current stance adopted by Mrs Austin and her solicitors is that they accept that the evidence that they have currently adduced in support of this application is insufficient to plead with particularity any substantive allegations of noise or dust nuisance from the Defendant's site. If they could do so then they should have presented their case with proper particularity in both the pre-action correspondence and their draft Particulars of Claim, but they have failed to do so.

83. Mrs Austin and her solicitors also appear to argue that the Defendant should be criticised for failing to disclose the Defendant's operational and other records

(see paragraph 16 of the Statement of Case). I do not consider this criticism is justified. It is for the Applicant to make her case, and the Defendant is entitled to decline requests for information which amount to a fishing exercise, particularly when the request comes in advance of any claim being made.

84. The reality of this case, as the available evidence shows, is that:

84.1 Mrs Austin is represented by solicitors who are extremely experienced in environmental litigation;

84.2 Mrs Austin has carried out noise and dust monitoring at her property over material periods of time using specialist equipment;

84.3 Mrs Austin has had the services of an expert to review and assess the available evidence including all the monitoring that has been undertaken; and

84.4 Mrs Austin and her husband have kept what purports to be a noise/dust log/diary for their property for the bulk of the period since operations began.

85. Nonetheless, both in correspondence and in the current Application and supporting evidence, Mrs Austin has failed to produce any substantive allegations, as was made clear in the Defendant's response to the letter before action at pages 225 to 237 of the Applicant's Bundle. The Defendant has dealt with the evidence advanced by Mrs Austin in considerable detail and as a result has more than satisfied its pre-action obligations. The Defendant's view is that the reason why Mrs Austin has not made any specific and particularised allegations is because she is unable to do so.

86. Finally I note in this context that the pre-action correspondence alleged that there had been breaches of various elements of the Permission and environmental permits relating to the site (see pages 218 and 219 of the Applicant's Bundle). No evidence to support this has ever been produced, and no such allegation is made in the draft Particulars of Claim.

Allegations relating to pre-action conduct

87. The Statement of Case, at paragraph 17, states that the Defendant has been unwilling to engage in any pre-action discussions or meetings or any other form

of ADR and the witness statement of Mrs Austin suggests that she has been forced into litigation because of an ongoing and generalised failure to engage with her by the Defendant. This is not a fair representation of the position.

88. In my firm's letter of 21 November 2011 (see pages 206 and 207 of the Applicant's Bundle) we made it clear that the Defendant was always open to a constructive dialogue and that the proper forum for this was the local liaison committee. This letter elicited no substantive response from either Richard Buxton Solicitors nor any attempt by Mrs Austin to engage in any form of constructive dialogue.

89. Instead, the next communication was Richard Buxton Solicitors' letter of 15 June 2012 which purported to be a formal letter before action pursuant to the CPR. This letter led the Defendant to conclude that whilst legal proceedings were being openly threatened, Mrs Austin's position as a community representative on the local liaison committee had become untenable. The formation of a local liaison committee by the Defendant was one of the conditions attached to the Permission. The function of the committee is to facilitate the exchange of information concerning the current and future operation of the Site and related activities between the Defendant, local politicians and representatives of the local community. Officers of the surrounding local authorities may also be invited to attend the committee. A key function of the Committee is to ensure that any on-going concerns about the operations at the site can be heard and discussed.

90. This was a considered response. The Defendant therefore wrote to Mrs Austin on 4 July 2012 (see page 373 of the Applicant's Bundle). It referred to the meeting of the local liaison committee in November 2011 when it had been explained to all members that any actual or threatened litigation against the Defendant involving members of the committee would be considered to create a conflict of interest and would lead to the relevant committee member being asked to stand down. This letter made it clear that the Defendant would continue to deal with any complaints or concerns from Mrs Austin relating to its operations at the site whether raised directly or through other members of the committee in the ordinary course.

91. My firm provided a substantive response to the letter before action in a letter dated 10 September 2012 at pages 225 to 237 of the Applicant's Bundle. The

final paragraphs of this letter on pages 236 to 237 expressly referred to the possibility of some form of ADR. The letter invited Mrs Austin and Richard Buxton Solicitors to set out what matters they considered could usefully be addressed in an ADR meeting and to clarify what outcomes would result in Mrs Austin not pursuing her threatened litigation. These questions were aimed at ensuring that any proposal for ADR could proceed on a constructive and realistic basis. They were entirely fair and reasonable. The Defendant has had no response to either question either on an open or a without prejudice basis.

92. Returning to the liaison committee meetings (which Mrs Austin relies upon at paragraph 24 and 26 of her witness statement), I am concerned that Mrs Austin appears to have mischaracterised those meetings to suit her own ends. The committee is chaired by a local councillor,. I am instructed that the chair and the other local councillors and committee representatives present at meetings would never allow the Defendant's representatives to behave in the way alleged, and this is borne out by the notes of the meetings which I have examined Furthermore, past experience has taught the Defendant that the way in which they behave is always at risk of being mis-characterised and hence they are extremely cautious in terms of all their dealings with Mrs Austin.

93. In the Austin's diary included at exhibit **"AA2"** there are four entries that refer to liaison committee meetings and these are:

93.1 Thursday 24 January 2008 - *"Poyner ripped into Al! We've obviously rattled him"* - page 381 .

93.2 Thursday 27 November 2008 - *"Al in the liaison meeting tonight, she's bound to take some flak from Poyner as we really given him some trouble recently!"* - page 416 .

93.3 Thursday 26 November 2009 - *"Alyson received a hammering again at the Liaison Meeting"* - page 674 .

93.4 Thursday 27 May 2010 - *"Alison attending the Ffos-y-Fran liaison meeting tonight. She's very nervous about being attacked by M-A and their supporters again. It is getting to be a great strain on her and the pressure is now enormous"* - page 776.

94. The last of these above diary entries was almost two and half years ago. This entry was written in advance of the liaison committee meeting and there is no record of any problems at the meeting that evening. The next page of the diary simply records in manuscript the dates for Friday 28 May 2010 through to Monday 30 May 2010 but then any entry appears to have been redacted.

95. The first two above entries in the diary refer to Mr Poyner who is a director of the Defendant who has day to day responsibility for all operational matters at Ffos-y-Fran. These diary entries suggest a deliberate desire on the part of Mrs Austin to aggravate Mr Poyner. However, it is instructive to note that when other members of the committee who have no connection with the Defendant or other loyalty to the Defendant clearly disagree with Mrs Austin, they are characterised as "supporters" of the Defendant and are subject to the general allegation that they are party to "hammering" Mrs Austin. This is simply not credible.

The lack of merit in the proposed action

96. It is not my intention to undertake a detailed analysis of the assertions made by Mrs Austin relating to the merits of the claim. I simply make a few discrete observations by way of response to the assertions she makes.

97. First, it is clear that the Permission was lawfully granted in accordance with relevant policy contrary to what is asserted at paragraph 13 of the Statement of Case. These matters were all considered at the Inquiry and were the subject of scrutiny by the Court of Appeal to the extent that the objectors took issue with the reasons for granting the Permission by challenging it. The challenge failed.

98. Secondly, with the exception of Mrs Austin and her husband, the level of complaints from Bradley Gardens over the four years of active operations at the site has been extremely low. I annex at pages 54 to 59 of **"PBS1"** a schedule that shows there have been in total 179 complaints (which is an average of around 36 complaints per year) received by the Defendant from the Bradley Gardens area since it started operations up to 6 December 2012. The single most complaints, by a remarkable margin, came from Mrs Austin with a total of 83. These are split as to 79 for noise and 4 for dust over a period of over 5 years of operations. In 2012, Mrs Austin made just four complaints to the Defendant, and just three in 2011.

"PBS1"

99. Thirdly, there are clear discrepancies between the diary entries relied upon and more objective information leading to a clear inference that the entries are exaggerated. I give two examples.

100. The first example is from 5 January 2009 when local environmental health officers attended at Bradley Gardens due to complaints by Mrs Austin. The incident is evidenced by the entry in the Austins' diary on page 424 of the Applicant's Bundle and the report prepared by the Council for a liaison meeting on 23 January 2009 at page 48 of the Applicant's Bundle:

100.1 Mr Austin's diary entry states: " *.....Digger in direct line of sight at the top of the street...Very, very noisy tonight can't hear yourself think. Alyson called out environmental dept....*". The first point to note is that the digger was presumably not visible from the Austins' house given the reference is to it being visible from the "*top of the street*" (I would consider the Austin's house to be at the bottom of the street).

100.2 The point which puts everything into a proper context is that whilst the Council officers recorded that the digger, which must have been working at some height on the workface to be visible from Bradley Gardens, was audible outside, they were equally clear that it was inaudible inside (see page 48 of the Applicant's Bundle). The inference I draw is that Mr Austin's reference to *"can't hear yourself think*" is an exaggeration.

101. The second example is found at page 144 of the Applicant's Bundle, where there is the reference to a visit by officers to Bradley Gardens and other locations. This has been partially redacted but it appears the officers went into a property in Bradley Gardens:

> *"Went inside number [redacted] with TV on / window shut could not hear could not hear [sic] noise when talking. When TV off and listened for noise could hear low level drown [sic] . Considered not a Statutory Nuisance due to time of day (10.30 am) weather conditions and level of noise inside did not affect enjoyment of property . Lady did say was louder in bedroom but did not wake her up and didn't affect her when busy in day."*

102. This entry needs to be contrasted with the Austins' diary entry for the same day:

"Very noisy start to the day. They started spot on 07.00 and the droning of the diggers is very loud indeed in the bedroom . There is no chance of sleeping through it . Wind is from the East , fresh and dry at the moment.

17.00.

Very noisy indeed! Al has already been ringing them all afternoon . They say they are moving vehicles , but the noise is just the same so not effective at all .

Al rang again tonight (8.00 pm) , and they started shutting down the site at 20.30 (finished about 20.40-45) but they've run all at very high noise levels , and got away with it again !!"

103. I cannot reconcile the diary entry with the record kept by the Council officers when they visited Bradley Gardens and other locations during the day.

104. Fourthly, to the best of my knowledge, over the next three years and 10 months since the January 2009 incident, I am unaware of Mrs Austin and her husband calling Council officers to come out to their property to take readings or otherwise record for themselves the level of noise. Instead, in emails and other documents they have generally attempted to characterise the Council as being "allies" of the Defendant or otherwise biased against them.

105. Fifthly, so far as dust is concerned, the main additional evidence relied on by the Applicant in respect of any allegation of dust related nuisance are the two reports prepared by Dr David Dickerson. These are at pages 49 to 100 and 101 to 125 of the Applicant's bundle. We responded to these reports in some detail at section 3 of my firm's letter in reply to the letter before action at pages 232 to 235 of the Applicant's Bundle. I adopt the comments made in the letter and do not need to expand on them further in this statement. However, I should stress that reports which seek to combine dust readings from different locations in the way proposed are not considered by the Defendant to support any meaningful allegation of dust based nuisance at Mrs Austin's property.

106. Finally, I note that if one refers to page 42 of the Applicant's Bundle, Mr Stookes has listed, without more explanation, an index of the documents included in the

exhibit to his statement. I have considered items (e) - (g) in the index. I can find nothing that assists an allegation of nuisance in respect of Mrs Austin's home:

106.1 The documents at (e) cover some 27 pages and relate to a broad range of complaints to Merthyr Council. This documentation starts at page 126 of the Applicant's Bundle. I have found nothing that relates to Mrs Austin's property. The summary schedule on pages 138 to 141 shows that the preponderance of direct complaints related to noise not dust and were made in 2008. It is impossible to analyse the schedule further as the identity and location of the complainants is not disclosed.

106.2 Pages 142 to 152 appear to contain a log kept by Council officers of calls and related actions concerning the site. These show the Council's officers reacting to issues but also show that the Defendant responded promptly and pro-actively to issues to reduce any on-going risk of disturbance in specific weather conditions. In particular the entry at the top of page 143 relating to 15 April 2009 refers to a digger being audible outside but "*noise not a nuisance*" and could barely be heard inside (though there is a suggestion of a greater potential risk of nuisance come the summer). A related entry for the same date expressly referring to Bradley Gardens appears on page 144. Again the conclusion is that the noise inside the house could not constitute a statutory nuisance.

106.3 Further down on page 143 there is a reference to a site visit to "*Llyn-yr-Eos*" on 20 April 2009 and the fact that the weather was calm and that it was quiet at the site. This pattern is repeated on the following pages and even though redacted there are some references such as the reference to Mrs A in Bradley Gardens at the top of page 150 that may well relate to Mrs Austin.

106.4 The correspondence exhibited from page 154 to 177 in the Applicant's Bundle relates to exchanges with Caerphilly Council and relate to the villages of Fochriw and Rhymney both of which are located on the opposite side of the site to Mrs Austin's property on the Merthyr side. As I explain in paragraph 8 above Fochriw is more than 1.5 kilometres from the site boundary and even further from the active excavation works. Rhymney is even further away. Mrs Austin and Richard Buxton Solicitors did attempt to recruit residents in Fochriw to join the GLO

proceedings but this was always considered by the Defendant to be clear evidence that the approach being adopted to those proceedings was entirely indiscriminate so as to try to justify the GLO by sheer force of numbers rather than the merit of any individual claims. I cannot see in this context that this material can have any relevance to Mrs Austin's assertion of a nuisance claim in relation to her home.

106.5 Finally, the next 10 pages from 178 to 188 in the Applicant's Bundle all relate to a separate campaign in which I understand Mrs Austin played an active part opposing a planning application for the construction of an incinerator to burn waste to generate energy at a location called Brig Y Cwm. However, I can discern nothing in this material that has any relevance to Mrs Austin's potential claim.

106.6 The diary kept primarily by Mr Austin is exhibited as exhibit **"AA2"** in the second volume of the Applicant's Bundle. Mr Austin has not put in any evidence to support the diary in any way. Mrs Austin has chosen to refer to just 5 entries from the diary which she describes as a *"snapshot of persistent interference"* in paragraph 15 of her statement. I have commented on the diary in the letter in reply to the letter before action at page 232 of the Applicant's Bundle and adopt those comments here. I have already given examples of discrepancies that exist between the diary entries and independent material from Council officers.

Conclusions

107. Based on the evidence provided in this statement the Defendant does not accept that Mrs Austin has:

107.1 demonstrated that she has any legitimate claim for either noise or dust related nuisance against the Defendant in respect of any of its past, current , or indeed, future operations;

107.2 provided any or any adequate evidence of grounds on which the court could or should exercise a discretion to grant costs protection either for this application or for such a claim;

107.3 provided any or any adequate particulars by which to assess what the likely costs of any claim might be and hence what might be proportionate;

107.4 provided any or any adequate particulars as to how she has funded her legal action to date , the basis on which her solicitors and/or counsel are retained or other matters such as any third party financial support contingent or otherwise that might be relevant to an objective assessment of her position; and

107.5 provided any or any adequate evidence of her own or her family's financial position and hence her ability to fund her own legal costs or meet those of the Defendant

I believe that the facts stated in this witness statement are true.

Dated 13/12/2012

.....

PAUL BROMLEY STONE

JXH/JXH/68560/120008/UKM/47020554.1

On behalf of: Proposed Defendant
By: P B Stone
No: First
Exhibit: "PBS 1"
Date: 13 December 2012

CLAIM NO: 2CF30125

IN THE MATTER OF AN INTENDED ACTION
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
CARDIFF DISTRICT REGISTRY

BETWEEN:

ALYSON AUSTIN

Applicant

- and -

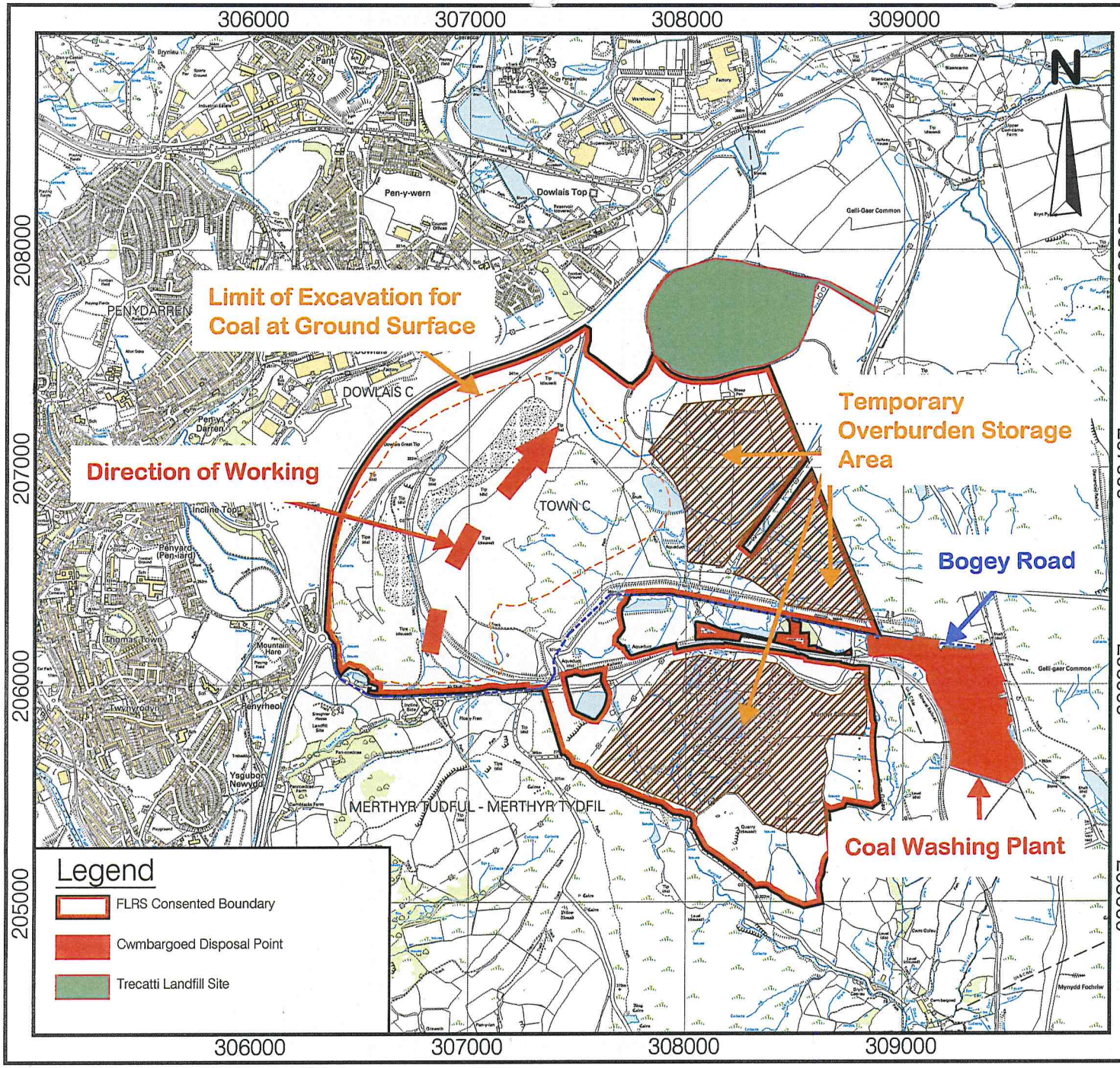
MILLER ARGENT (SOUTH WALES) LIMITED

Defendant

EXHIBIT OF
PAUL BROMLEY STONE

This is the exhibit marked **"PBS 1"** referred to in the witness statement of PAUL BROMLEY STONE dated this 13th day of December 2012

Signed .....



FFOS Y FRAN LAND RECLAMATION SCHEME

Incorporating Extraction of Coal by Opencast Methods
Final Phase of the East Merthyr Reclamation Scheme
&
CWMBARGOED DP
MERTHYR TYDFIL

FLRS/PA2a

LOCATION PLAN

miller argent
Miller Argent (South Wales) Limited,
5 Albany Courtyard,
Piccadilly,
London,
W1J 0HF

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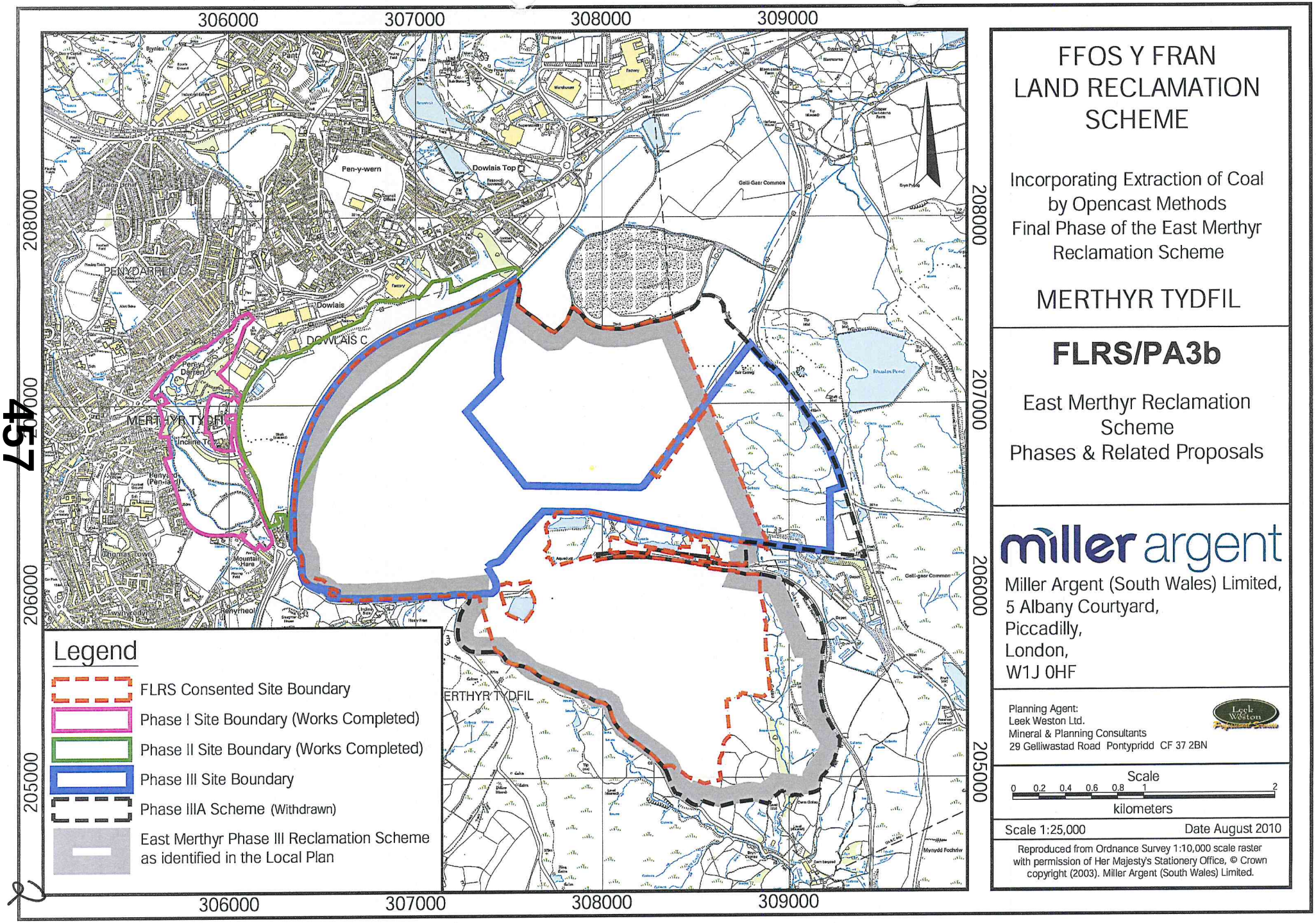
Scale 1:25,000 Date 28th April 2003



FFOS Y FRAN LAND RECLAMATION SCHEME

Incorporating Extraction of Coal by Opencast Methods
Final Phase of the East Merthyr Reclamation Scheme

MERTHYR TYDFIL

FLRS/PA3b

East Merthyr Reclamation Scheme
Phases & Related Proposals

miller argent

Miller Argent (South Wales) Limited,
5 Albany Courtyard,
Piccadilly,
London,
W1J 0HF

Planning Agent:
Leek Weston Ltd.
Mineral & Planning Consultants
29 Gelliwastad Road Pontypridd CF 37 2BN

Scale
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kilometers

Scale 1:25,000 Date August 2010


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Phase II
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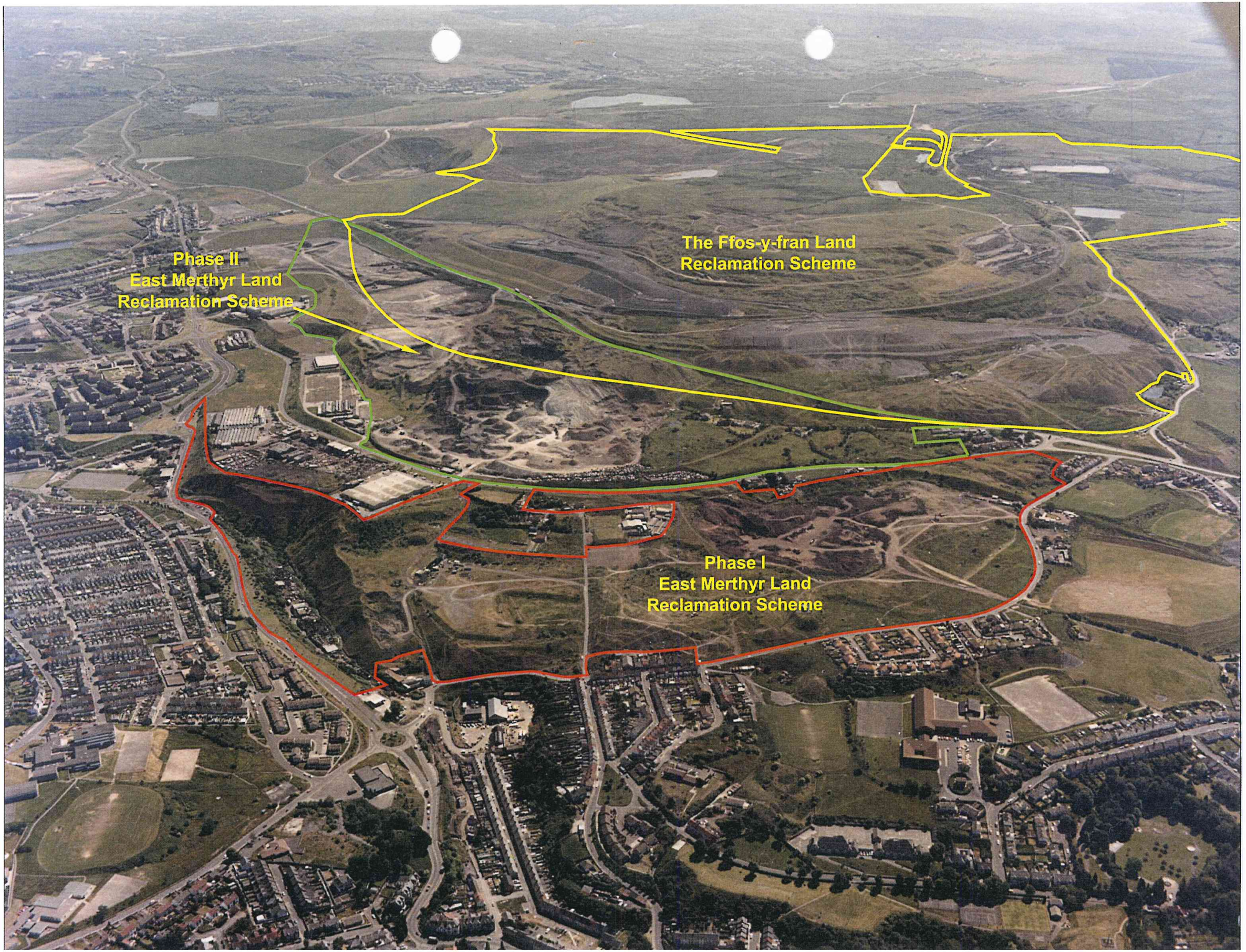
Phase I
East Merthyr Land
Reclamation Scheme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Phase I
East Merthyr Land
Reclamation Scheme

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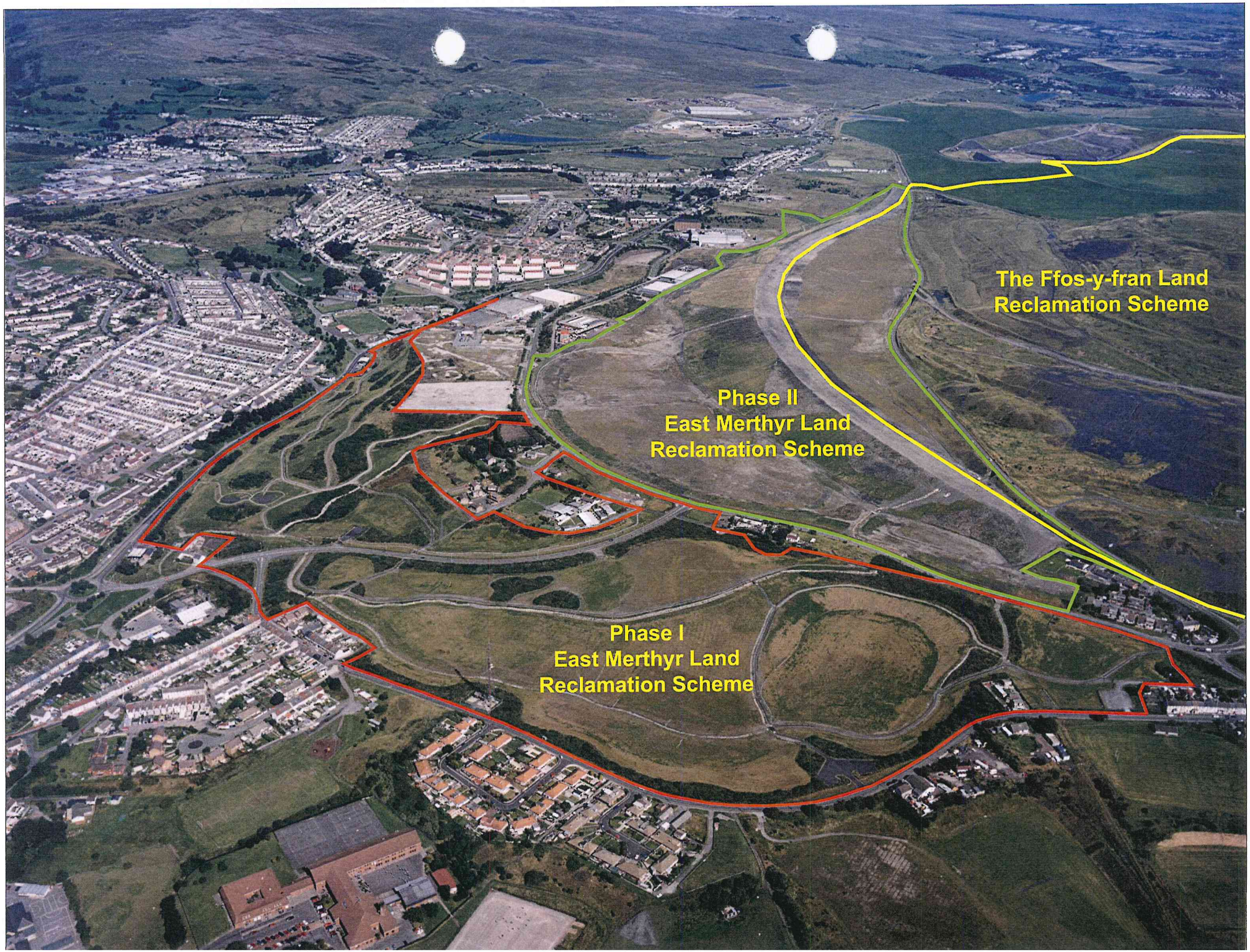
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East Merthyr Land
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Phase I
East Merthyr Land
Reclamation Scheme

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5


Phase I
East Merthyr Land
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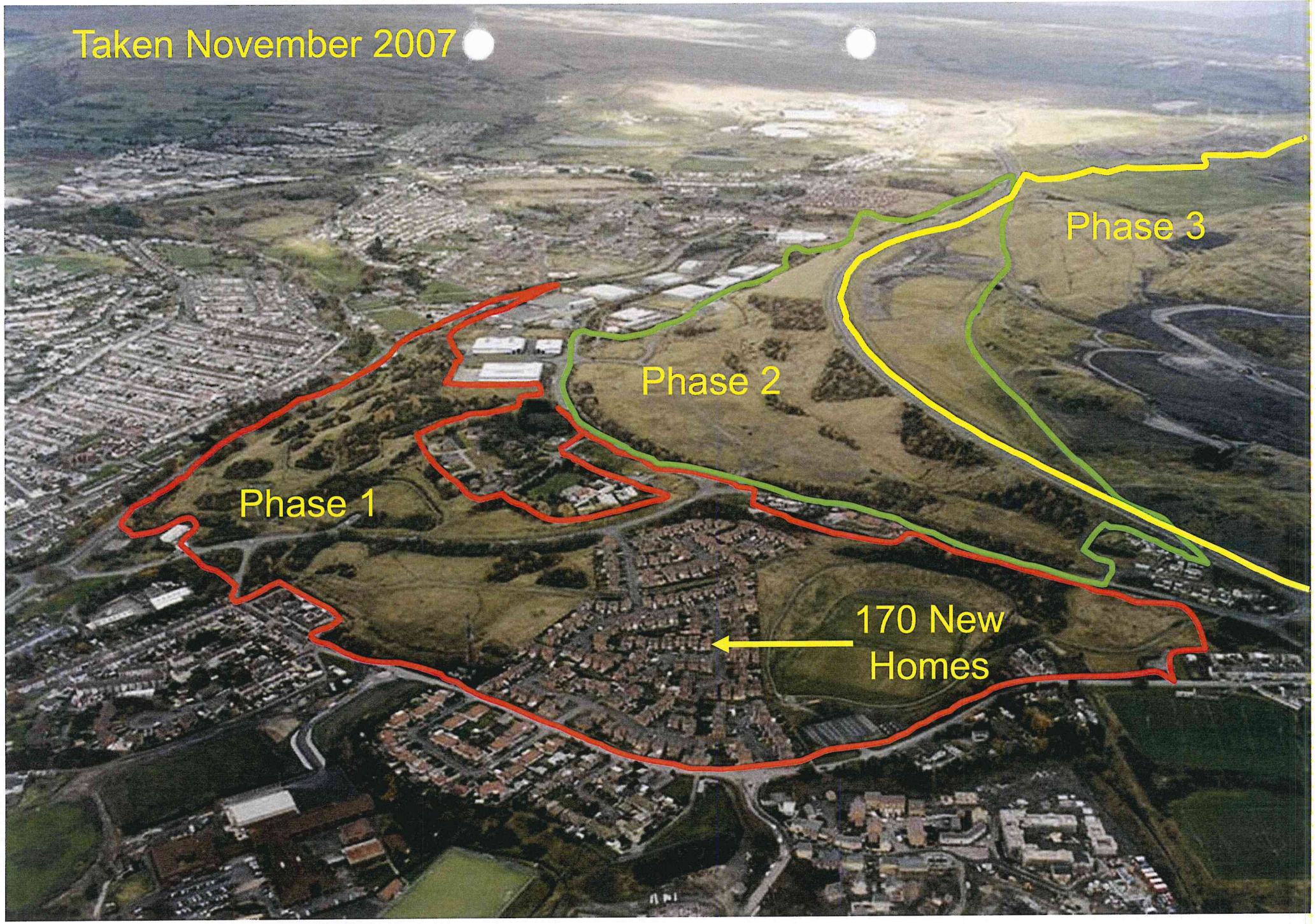
Reclamation Scheme



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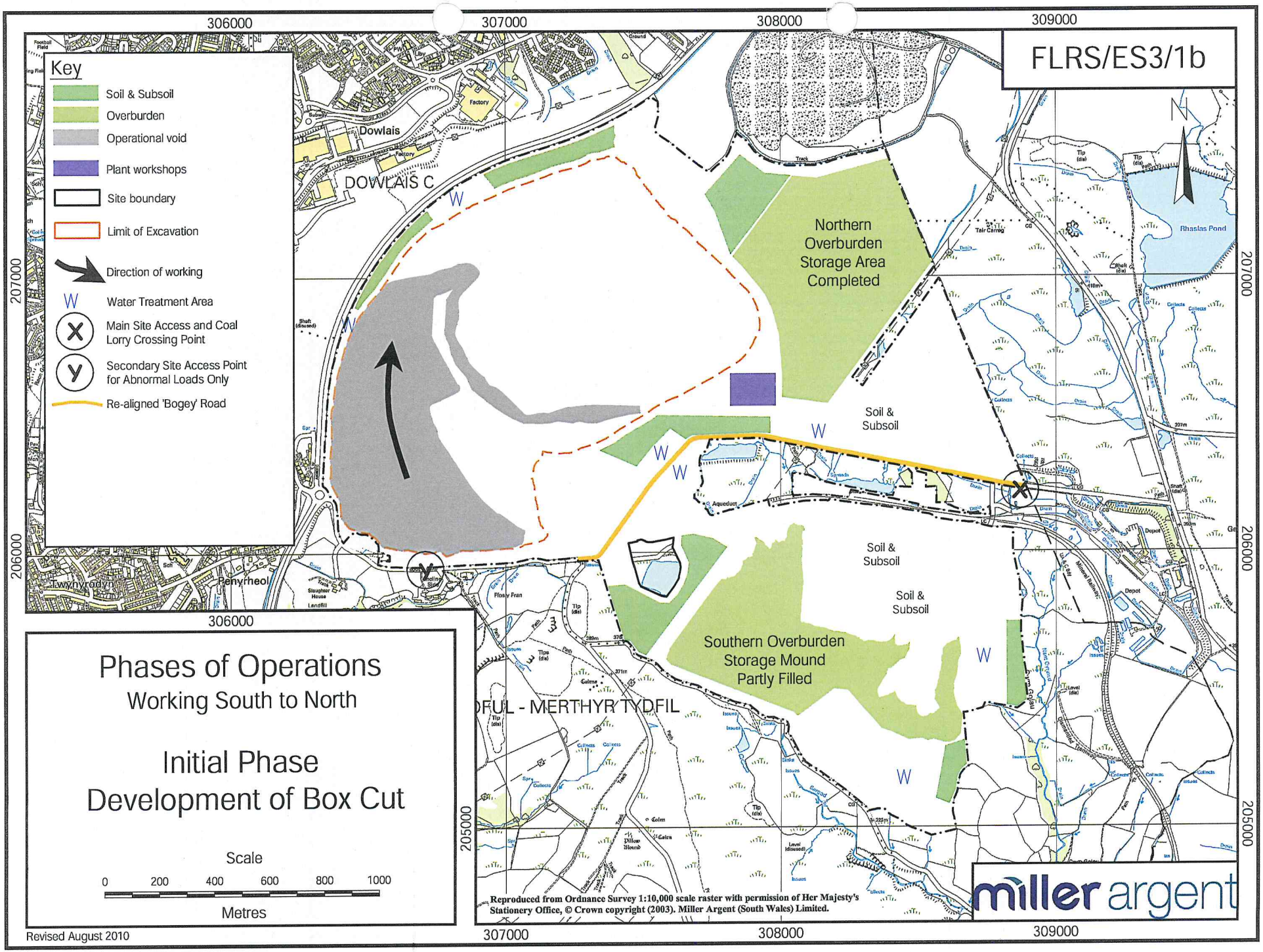
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Overburden
Operational void
Plant workshops
Site boundary
Limit of Excavation
Direction of working
Water Treatment Area
Main Site Access and Coal Lorry Crossing Point
Secondary Site Access Point for Abnormal Loads Only
Re-aligned 'Bogey' Road
306000
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308000
309000
207000
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205000
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DOWLAIS C
Northern Overburden Storage Area Completed
Rhaslas Pond
Soil & Subsoil
Soil & Subsoil
Soil & Subsoil
Southern Overburden Storage Mound Partly Filled
Twynyrodyn
Penyrheol
Aqueduct
Depot
Phases of Operations
Working South to North
Initial Phase
Development of Box Cut
Scale
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Revised August 2010
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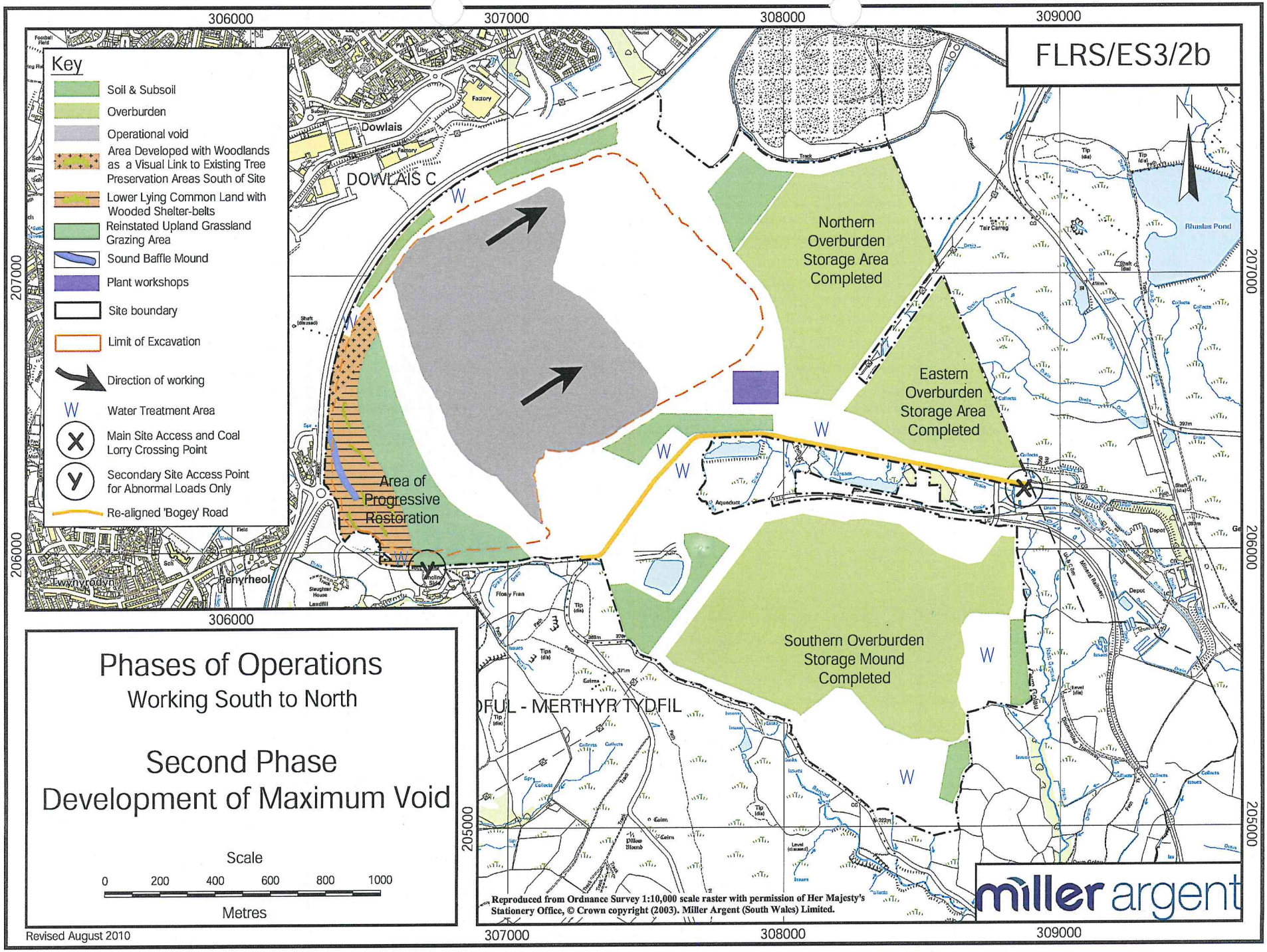
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Soil & Subsoil
Overburden
Operational void
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Lower Lying Common Land with Wooded Shelter-belts
Reinstated Upland Grassland Grazing Area
Sound Baffle Mound
Plant workshops
Site boundary
Limit of Excavation
Direction of working
Water Treatment Area
Main Site Access and Coal Lorry Crossing Point
Secondary Site Access Point for Abnormal Loads Only
Re-aligned 'Bogey' Road
Northern Overburden Storage Area Completed
Eastern Overburden Storage Area Completed
Southern Overburden Storage Mound Completed
Area of Progressive Restoration
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Rhaslas Pond
Twynyrodyn
Penyrheol
FUL - MERTHYR TYDFIL
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Phases of Operations
Working South to North
Second Phase
Development of Maximum Void
Scale
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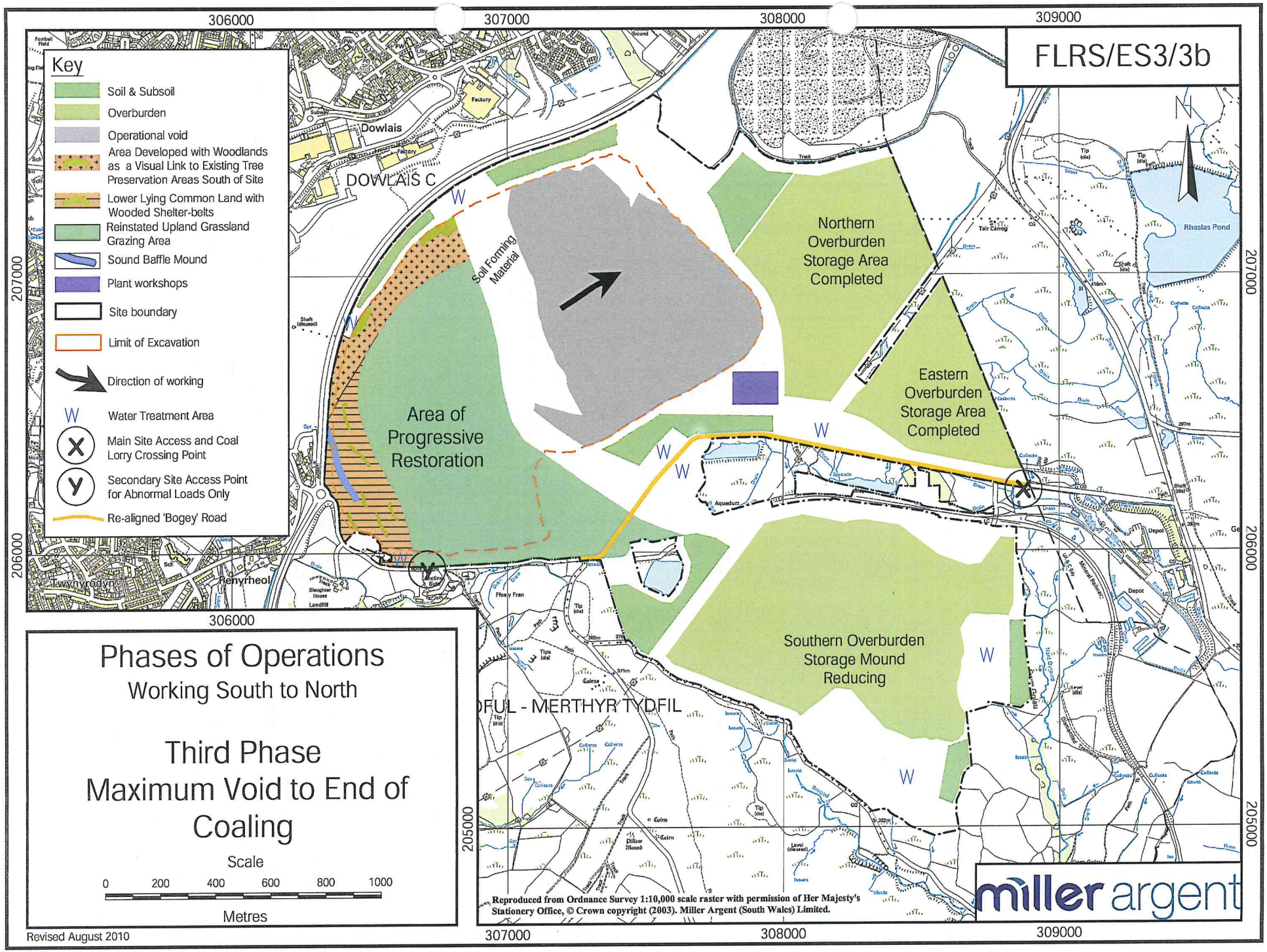
FLRS/ES3/3b
Key
Soil & Subsoil
Overburden
Operational void
Area Developed with Woodlands as a Visual Link to Existing Tree Preservation Areas South of Site
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Reinstated Upland Grassland Grazing Area
Sound Baffle Mound
Plant workshops
Site boundary
Limit of Excavation
Direction of working
Water Treatment Area
Main Site Access and Coal Lorry Crossing Point
Secondary Site Access Point for Abnormal Loads Only
Re-aligned 'Bogey' Road
Northern Overburden Storage Area Completed
Eastern Overburden Storage Area Completed
Area of Progressive Restoration
Southern Overburden Storage Mound Reducing
Soil Forming Material
Phases of Operations
Working South to North
Third Phase
Maximum Void to End of Coaling
Scale
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Metres
Revised August 2010
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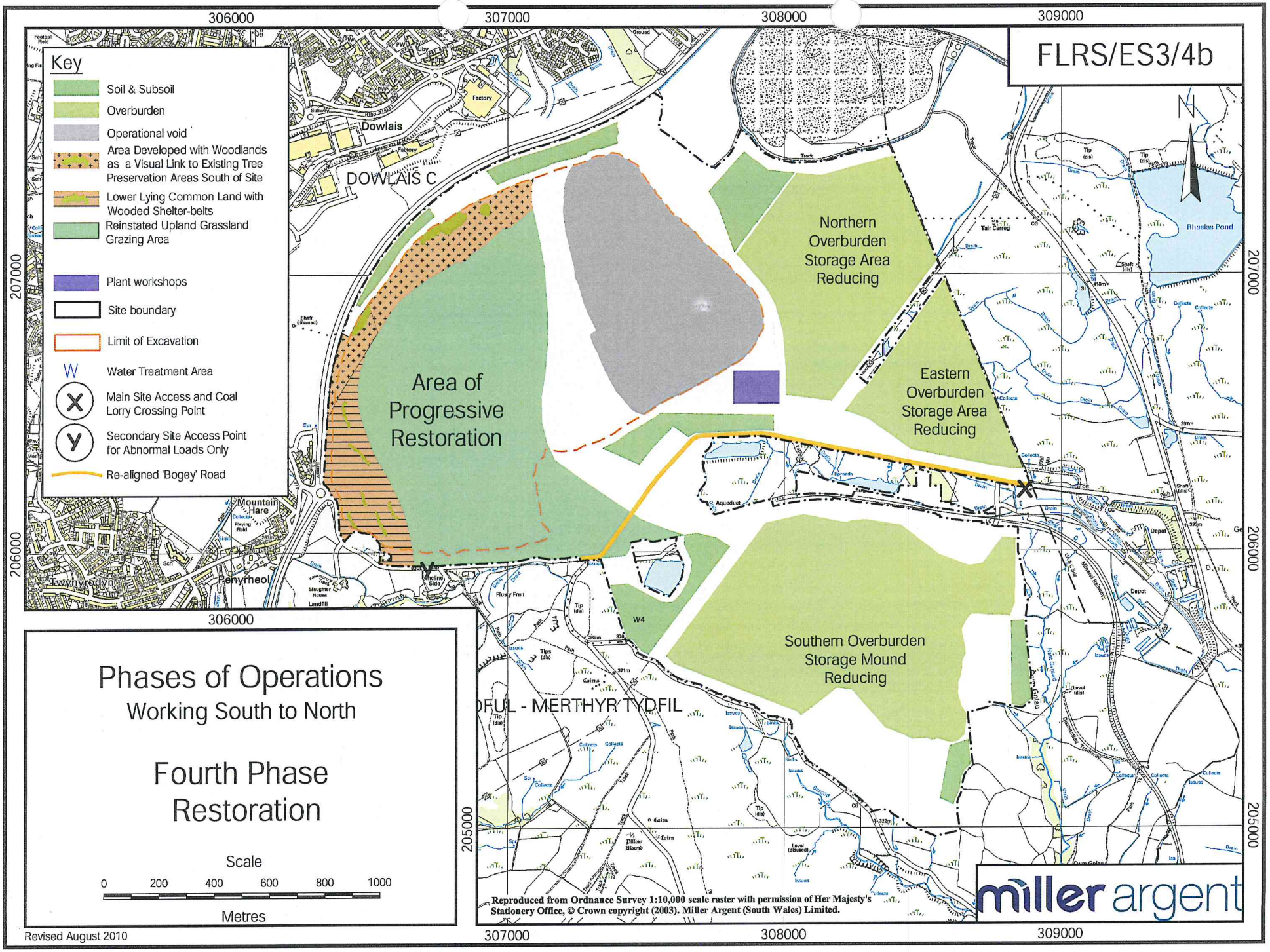
Dowlais
DOWLAIS C
Penyrheol
Rhaslas Pond
FUL - MERTHYR TYDFIL

FLRS/ES3/4b



Phases of Operations

Working South to North

Fourth Phase Restoration

Scale

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Metres

Revised August 2010

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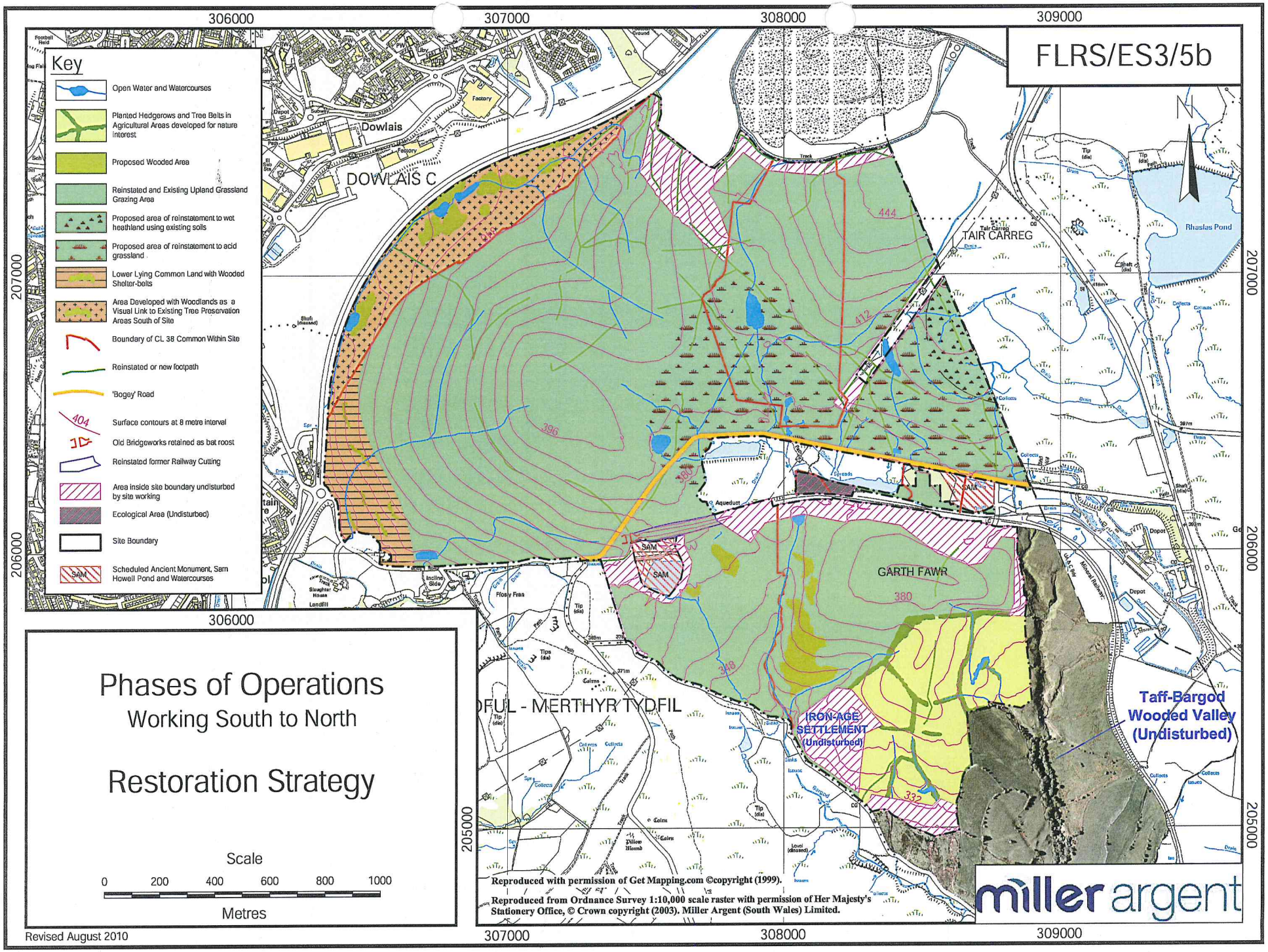
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Open Water and Watercourses
Planted Hedgerows and Tree Belts in Agricultural Areas developed for nature interest
Proposed Wooded Area
Reinstated and Existing Upland Grassland Grazing Area
Proposed area of reinstatement to wet heathland using existing soils
Proposed area of reinstatement to acid grassland
Lower Lying Common Land with Wooded Shelter-belts
Area Developed with Woodlands as a Visual Link to Existing Tree Preservation Areas South of Site
Boundary of CL 38 Common Within Site
Reinstated or new footpath
'Bogey' Road
Surface contours at 8 metre interval
Old Bridgeworks retained as bat roost
Reinstated former Railway Cutting
Area inside site boundary undisturbed by site working
Ecological Area (Undisturbed)
Site Boundary
Scheduled Ancient Monument, Sarn Howell Pond and Watercourses
SAM
306000
307000
308000
309000
207000
206000
205000
Dowlais
DOWLAIS C
TAIR CARREG
Rhaslas Pond
GARTH FAWR
SAM
Aqueduct
IRON-AGE SETTLEMENT (Undisturbed)
Taff-Bargod Wooded Valley (Undisturbed)
MERTHYR TYDFIL
Phases of Operations
Working South to North
Restoration Strategy
Scale
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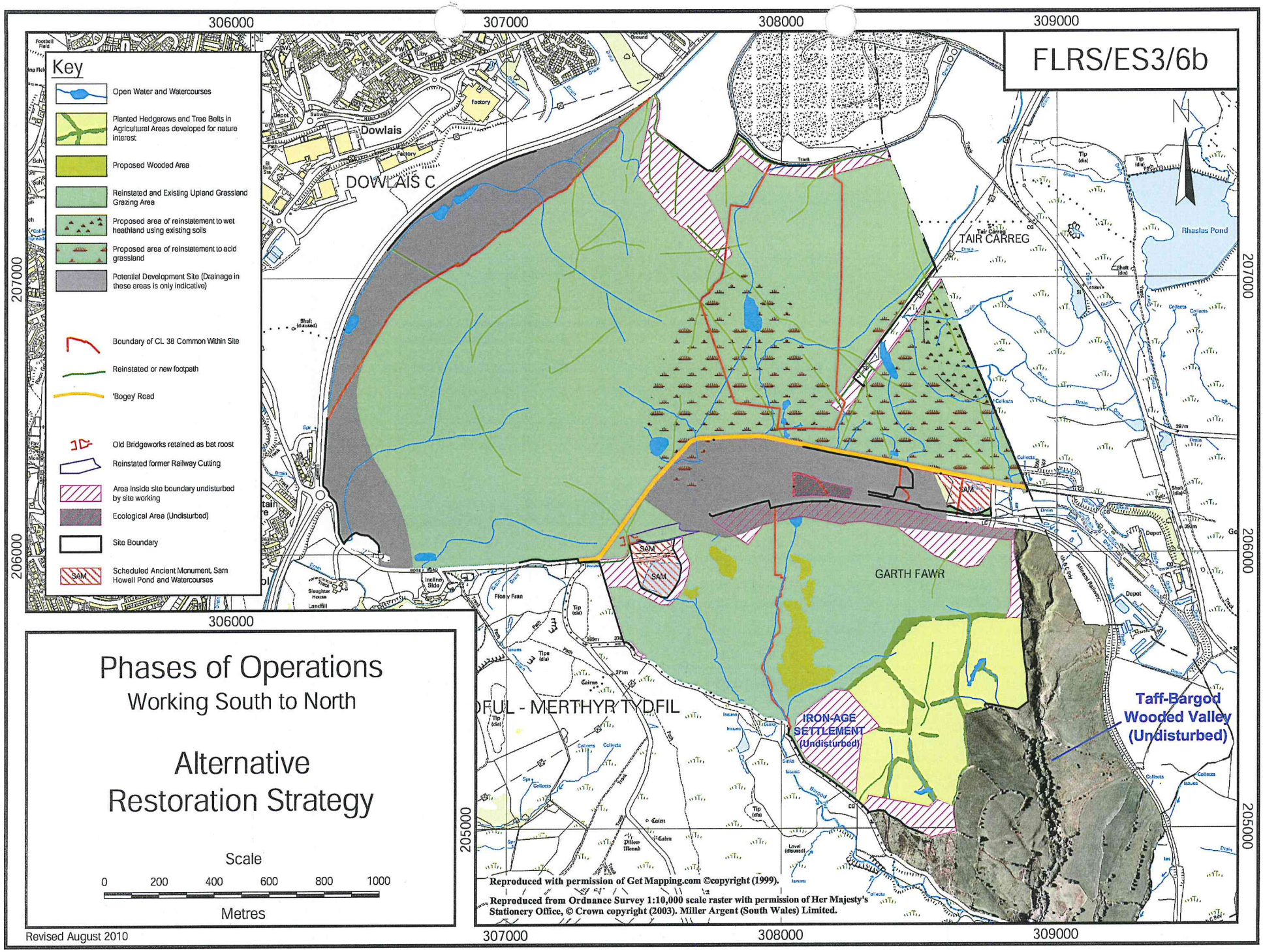
FLRS/ES3/6b
Key
Open Water and Watercourses
Planted Hedgerows and Tree Belts in Agricultural Areas developed for nature interest
Proposed Wooded Area
Reinstated and Existing Upland Grassland Grazing Area
Proposed area of reinstatement to wet heathland using existing soils
Proposed area of reinstatement to acid grassland
Potential Development Site (Drainage in these areas is only indicative)
Boundary of CL 38 Common Within Site
Reinstated or new footpath
'Bogey' Road
Old Bridgeworks retained as bat roost
Reinstated former Railway Cutting
Area inside site boundary undisturbed by site working
Ecological Area (Undisturbed)
Site Boundary
SAM
Scheduled Ancient Monument, Sam Howell Pond and Watercourses
306000
307000
308000
309000
207000
206000
205000
Dowlais
DOWLAIS C
TAIR CARREG
Rhaslas Pond
GARTH FAWR
SAM
IRON-AGE SETTLEMENT (Undisturbed)
Taff-Bargod Wooded Valley (Undisturbed)
MERTHYR TYDFIL
Phases of Operations
Working South to North
Alternative Restoration Strategy
Scale
0 200 400 600 800 1000
Metres
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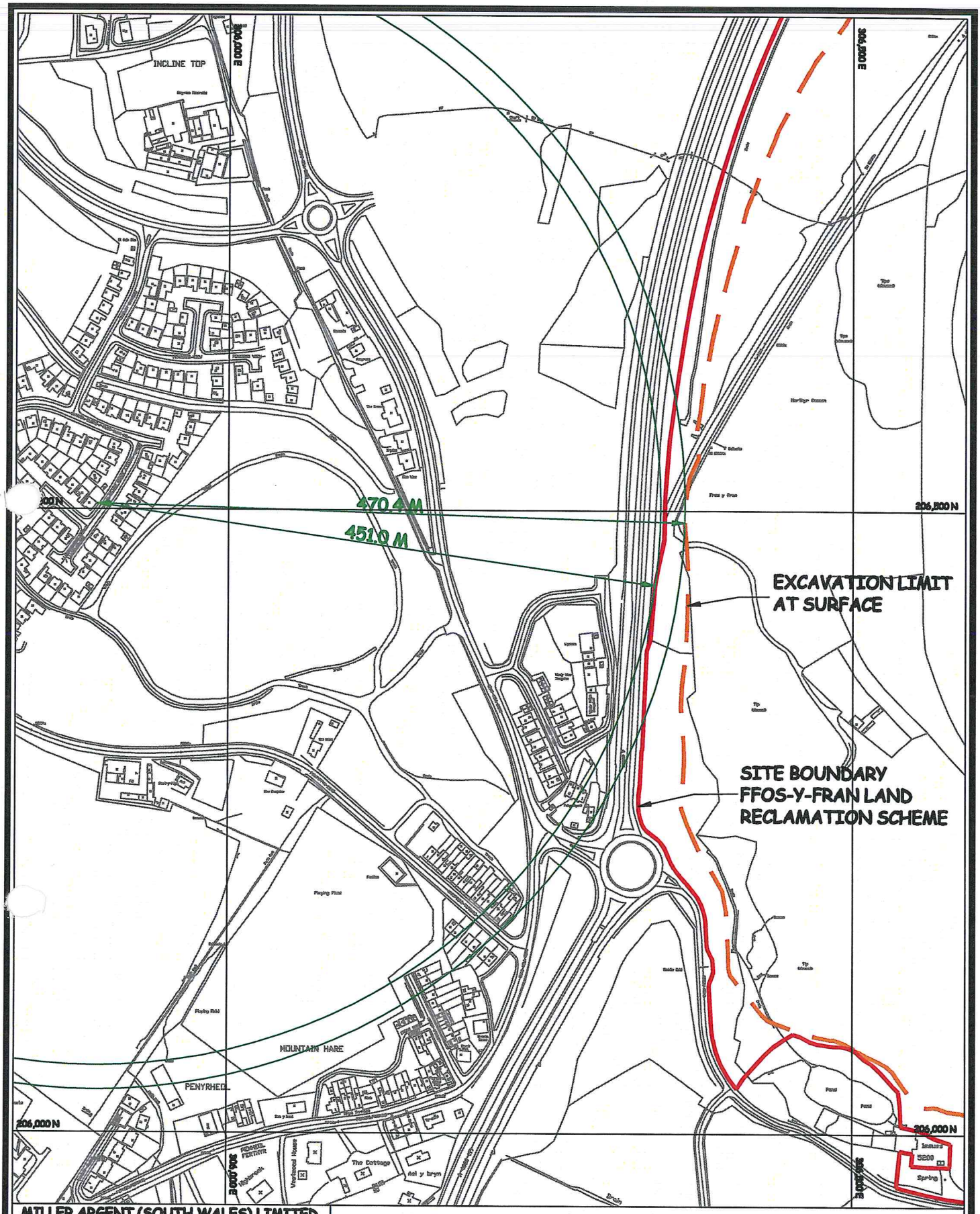
Revised August 2010



MILLER ARGENT (SOUTH WALES) LIMITED
CWMBARGOED DISPOSAL POINT
FOCHRIW ROAD
MERTHYR TYDFIL
CF48 4AE
Phone No. 0870 1115600
Fax No. 01685 845029

miller argent

PLAN SHOWING THE POSITION OF

MRS ALISON AUSTIN'S PROPERTY IN RELATION

TO THE FFOS-Y-FRAN LAND RECLAMATION SCHEME

Dwg. No. : MA/AA/01	Scale : 1:4000	Drawn By : DM

14

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» BLOG *(Do Please Leave a Comment)*
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» Guardian Reports - George Monbiot
» Picture Gallery
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Residents Against Ffos-y-Fran

(R.A.F.F. Group)

About Us:

As a group, and under various names, we have been fighting against opencast mining at Ffos-y-Fran for 5 years now, with several members of the group opposing opencast mining in Merthyr Tydfil for decades before us.

We have restructered and re-formed with a new identity since the start of mining at Ffos-y-Fran to better meet the new challenges presented by this situation.

The commitee and principal officers for the group are:

The Commitee:

Chairman: Terry Evans

Vice Chairman: Dave Collins

Secretary: Muriel Dunn

Vice Secretary: Jane Flower

Treasurer: Alyson Austin

Political Advisor: Leon Stansfield

... supported by a cast of thousands !

The Legal Challenge:

(On behalf of the people of Merthyr) :

Claimant: Mrs Elizabeth Condron

Supported by :

Solicitor: Mr Paul Stookes (of Richard Buxton Solicitors}

Opencast battle goes to court

THE BATTLE against opencast mining at Ffos Y Fran is on its way to the High Court.

Pensioner Elizabeth Condron has been granted legal aid for her challenge against the Welsh Assembly's decision to allow the project near her home.

Mrs Condron, a member of Parents and Residents Against Opencast, believes the decision to allow Miller Argent to recover 10m tonnes of coal from the 998-acre site was unlawful, and is hoping the High Court will support her claim.

The company were given the go-ahead for the scheme in April, but the group refused to give up hope.

They have now been relieved of the pressure of tireless fundraising on top of a campaign they have been fighting since plans were announced by Miller Argent, and will now face a new fight when the case goes to court this November.

Mrs Condron, aged 61, a mother-of-four who lives in nearby Twynyrodyn, said: "I feel passionately about this.

" I'm breaking my heart.

"I'm worried about the health situation.

"The people haven't been taken into consideration.

"Nothing has been done to protect us.

"It's wealth before health."

Alyson Austin, secretary of the group, said: " We won't have to do any of the fundraising that we had planned and now we can concentrate on fighting the case.

"We aren't sure what we're going to be doing up until then, but we're likely to be trying to find out as much information as we can.

"The costs would have run into tens and tens of thousands of pounds if we'd gone ahead.

"We've got a strong case anyway and now we're all buzzing."

Mrs Condron's solicitor Paul Stookes said the grounds sited for appeal are that the public inquiry inspector failed to reasonably consider a 500-metre buffer zone, the National Assembly failed to consider the buffer zone, failure to take into account the neighbouring Trecatti landfill site and its cumulative impact and that there was uncertainty about the number of landfill sites at Ffos Y Fran.

He added he considered the group had a strong case and he would be willing to take it to the European Court of Justice.

Miller Argent director James Poyner said the company would be contesting the case and added: "We feel that the appeal grounds are misconceived and completely without merit.

"We are pressing ahead with the preparation work."

The Welsh Assembly did not respond in time for publication.

HIGH COURT BATTLE: Elizabeth Condron with Alyson Austen of Parents and Residents against Opencast who have been given legal aid to challenge the Welsh Assembly. **PICTURE: Simon Ridgway**

Monday October 16 2006

Assembly appealing over ruling which called halt to bid

Opencast fight back in High Court

Gavin O'Connor

A DISPUTE over plans to extract 10 million tonnes of coal from a Valleys site was going back to the High Court today.

The Welsh Assembly Government is appealing against a decision which halted plans for one of Europe's biggest opencast sites.

It won the right to a hearing at the Court of Appeal after a judge quashed a decision to allow the coal operation at Ffos y Fran in Merthyr Tydfil.

There has been a long-running dispute over plans to extract the coal there over a period of 10 years.

Opponents of the scheme claim they would suffer from noise, dust and vibration problems if opencast was allowed, with plans to extract 20,000 tonnes of coal each week.

The case in London is expected to last for four days.

Glyson Austin and other members of the Friends and Residents Against Opencast Group have travelled to London to follow the appeal.

Mrs Austin told the Echo: "We are just hoping the decision goes the same way as the last one.

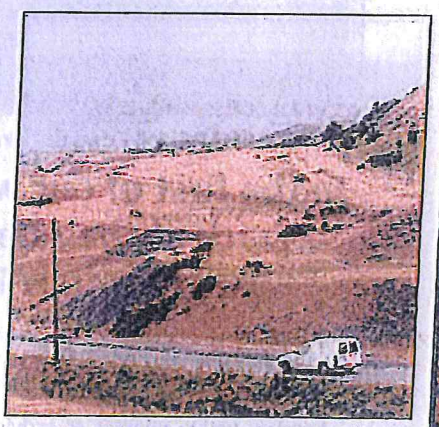
"We have full faith in our solicitor Paul Cooks."

The judgement in December 2005 followed claim that Welsh planning Minister Carwyn Jones had already decided to back the scheme before an assembly planning committee meeting was held.

Mr Jones denied the allegation and said at the time that he was "disappointed" at not being given the opportunity to state that in court.

He was also cleared of any misconduct by the independent commissioner for standards.

The proposals involve long-term reclamation of an old derelict site



The High Court judge, Mr Justice Lindsay, said it was possible Mr Jones had been "biased" in favour of the scheme and told the assembly to reconsider.

But the National Assembly claimed the judge had reached the wrong conclusion and were granted an appeal.

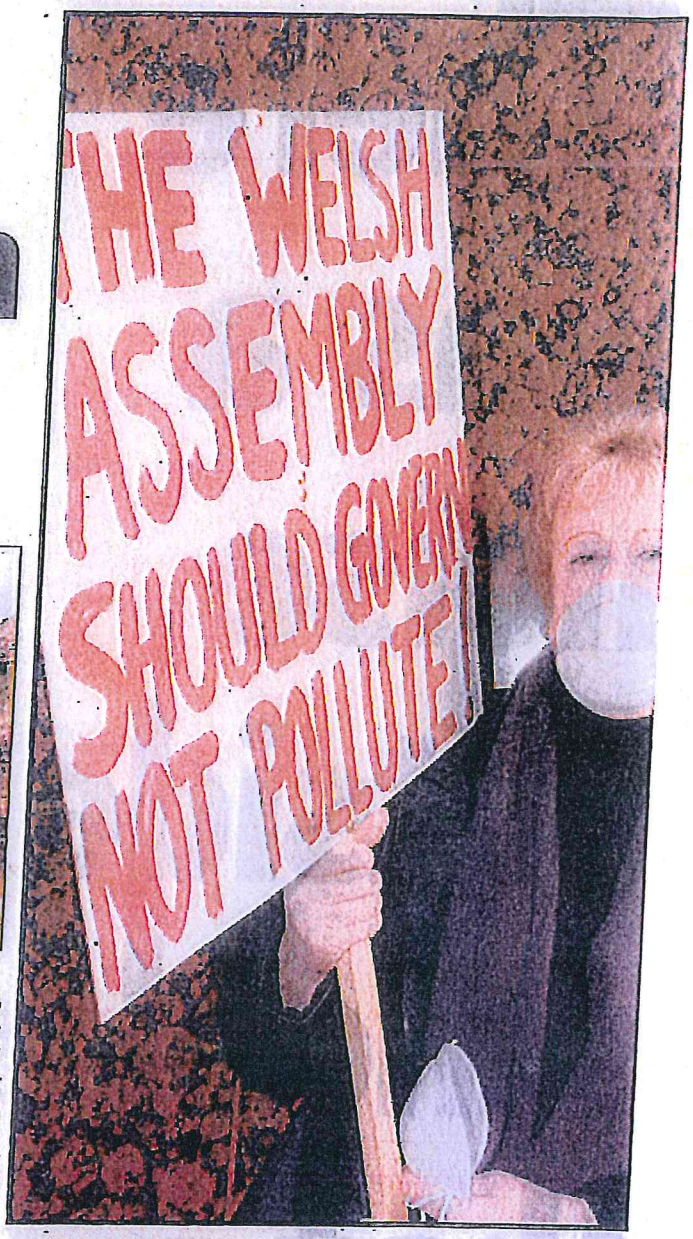
Miller Argent (South Wales) Ltd had earlier received permission from the Assembly planning committee.

It claimed it would create 200 jobs and transform 1,000 acres of a derelict industrial wasteland after reclamation.

The developer said the site had suffered from fly-tipping and burnt-out cars being dumped there.

A planning inspector concluded there was no evidence to back up "sincerely held" worries over health and the environment.

gavin.o'connor@wme.co.uk



LONG CAMPAIGN Protester Elizabeth Condron is one of the thousands of people who have expressed opposition to the Ffos y Fran scheme. Left, part of the land earmarked for the development.

Mining campaigner vows to fight on

GOING ALL THE WAY: Elizabeth Condron, left, and Alyson Austin, of Parents and Residents Against Opencast Mining, plan to take their appeal against the Ffos y Fran plans to the Law Lords

THE pensioner preparing to take her appeal against opencast mining to the House of Lords says she will take it to Europe if she fails.

Solicitor Paul Stokes said Elizabeth Condron, aged 62, is expecting to hear by the spring whether she is allowed to take up her next challenge against an approved scheme – which involves mining 10m tons of coal from Ffos-y-Fran over the next 17 years.

Campaigners in Merthyr have backed her legal aid-assisted battle since the Court of Appeal overturned a High Court ruling made more than a year ago.

Mrs Condron is challenging the Court of Appeal's ruling last November that an original decision on the scheme was not influenced by a comment made by Environment Minister Carwyn Jones about a proposed buffer zone.

It is expected that the House of Lords will make a decision in the next few months about whether they will consider the case.

Mr Stokes said: "If they don't, there is still the fundamental problem of this very polluting activity which stands to be on people's doorsteps for probably two generations.

"We will fight until justice prevails."

MINE FIELD Elizabeth Condron, left, and Alyson Austin, secretary of Parents and Residents Against Open Cast mining), with plans for the open cast mine at Ffos y Fran, Merthyr Tydfil
Picture: Simon Ridgway

Opponents of opencast pit say plans are misleading

PLANNING permission for the largest opencast scheme in Europe should be revoked because planning documents relating to it significantly underestimated the amount of coal to be extracted, campaigners are arguing.

Opponents of the Ffos-y-fran development near Merthyr Tydfil have been waiting for three months for the Assembly Government to respond to their concerns.

A submission made on behalf of residents, some of whose homes are just 36 metres from the site's edge, refers to a letter from Stephen Timms, the then UK Minister for Energy, to First Minister Rhodri Morgan in January 2004.

The letter said the Ffos-y-fran development would add 16 million tonnes of coal to opencast production in Wales. Yet the planning application, made by the Miller Argent consortium, referred to 10.8 million tonnes.

At a local liaison meeting held earlier this year the consortium did not rule out seeking permission to extract more coal later.

The campaigners' submission, which was sent to the Assembly Government in July but has yet to be responded to, states, "In summary, the developer, the council and the Welsh Assembly Government were well aware as early as 2004 that opencast coal extraction at Ffos-y-fran was intended to be much greater than set out in the proposed application.

"The potential further development is a significant aspect of the proposal and one that should have been taken account of in the decision-making process. Put simply, the proposal approved in April 2005 is only part of a proposal and the Welsh Assembly failed to consider that it was likely to be extended beyond the scope of the original application to provide for extraction of the reserves it had been informed were there by Stephen Timms in January 2004."

Martin Shipton
Chief Reporter
martin.shipton@mediawales.co.uk

Residents want U-turn over plans for Merthyr site

The submission refers to other factors, including the serious impact of the development on climate change, concluding that an Assembly committee's decision to grant planning permission was "grossly wrong".

The leaders of both opposition parties at the Assembly have questioned why the Assembly Government has failed to respond to the submission.

Conservative leader Nick Bourne said, "I find it extraordinary that the Assembly Government has failed to respond to the position set out by campaigners several months ago.

"This proposal is one of the largest opencast coal schemes in the UK, possibly Europe, and raises a range of serious issues both locally and nationally."

Liberal Democrat leader Mike German said, "Unfortunately for the people of Merthyr, Ffos-Y-Fran is yet another example of Labour in Wales bowing to pressure from Labour in Westminster to push through policy. Despite a 500 metre buffer zone being Plaid policy, there was no commitment to it in their coalition agreement. What they could fight for in opposition, they shy away from in Government."

An Assembly Government spokeswoman said, "We are currently considering requests made to revoke the decision to grant planning permission for the Ffos-y-Fran scheme issued on April 11, 2005. The information submitted with those requests, including a health impact study, is being assessed as part of that process."

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Mining campaigners are finding their voices

A PROTEST against an open cast mining scheme in the Valleys is expected to hit the right chord.

An event called Ffos-y-Fran Unplugged will see musicians and environmentalists heading to Merthyr Tydfil in support of campaigners against the scheme, for a rally and a free gig.

The rally on April 5 has been organised by campaign group Residents Against Ffos-y-Fran (RAFF) and environmentalists.

"We hope everyone who opposes this scheme and has an environmental conscience can come out and show their support," said RAFF campaigner Alyson Austin. "This day will be an opportunity for the people of Merthyr to have a good time and voice their opinions on Ffos-y-Fran, which we feel have so far been ignored."

There will be a march at 2pm from

Jackie Bow

Twynyrodyn Community Primary School into the town centre for the concert.

Guest speakers will talk about the campaign from the steps of the civic centre.

They will include Plaid Cymru MEP Jill Evans, Terry Evans, chairman of RAFF, journalist and environmental activist George Monbiot and Gordon James from Friends of the Earth.

The gig to follow in the evening will feature Welsh musicians and local acts, among them Gwilym Morus and folk singer Tracey Curtis. The organisers expect to confirm other acts soon. The concert will take place at 8pm at The Great Escape, Georgetown, after a public meeting from 4pm to 6pm at St David's Church Hall.

"This opencast mine will come within 36 metres of houses," said RAFF treasurer Alyson Austin. "In England and Scotland mines have to be at least 500 metres from the nearest residents. Wales deserves the same treatment.

"This event will show we are still determined to fight the scheme, which will be with us six days a week, 16 hours a day for at least the next 17 years if it is allowed to continue."

The mother of an asthmatic child, she said she shared grave concerns for the health and well-being of thousands of children in the area.

"This is without the devastating effect it will have on the quality of life for the local residents," she claimed.

The rally is the latest move in the campaign, which has recently seen a High Court claim being lodged against Merthyr council over the scheme.

Campaigners want assurances a planning condition will be enforced so there will be no excavation at the site closer than 70 metres from homes.

jackie.bow@mediawales.co.uk

STRONG FEELING One of those opposed to the scheme.

A75

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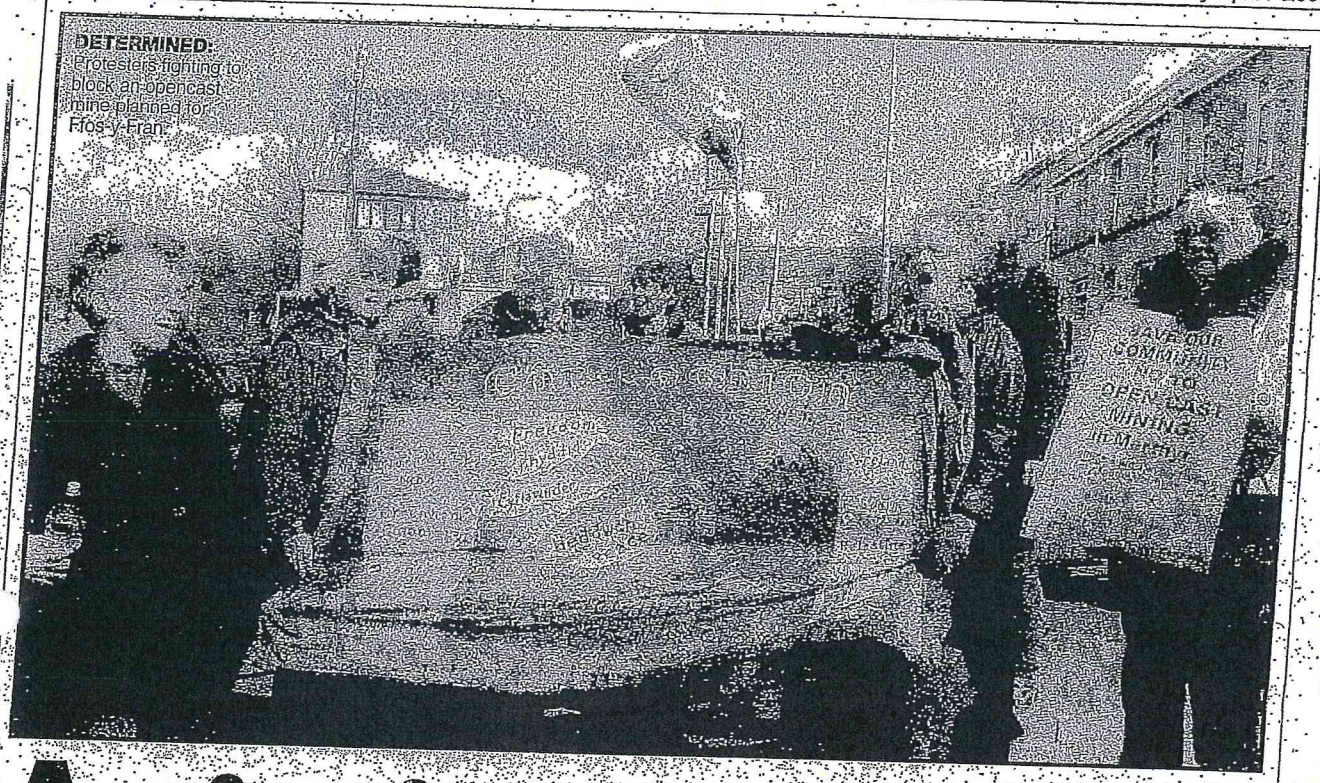

DETERMINED: Protesters fighting to block an opencast mine planned for Ffos-y-Fran

Anti-mine protesters: You haven't heard the last from us'

March attracts hundreds

David James

COAL protesters who marched against controversial plans for Wales' biggest opencast mining site today pledged: "Our protest is not going to stop."

Hundreds of campaigners battling plans for an opencast mine at Ffos-y-Fran, Merthyr Tydfil, which would be just 36 metres from homes, came from all over Britain to march in Merthyr on Saturday.

Among their number was climate change activist George Monbiot, Welsh Liberal Democrat leader Mike German and Gordon James, from Friends of the Earth Cymru.

The protest was aimed at raising awareness of climate change and calling for a buffer of at least 500 metres between Merthyr homes and the Ffos-y-Fran site.

It followed protests by groups from Mid Wales and Bristol last week which brought a halt to work at Ffos-y-Fran on Tuesday and Aberthaw power station on Thursday.

The campaigners in Merthyr on Saturday staged a mock wedding between mining firm Miller Argent and Merthyr council with a face-painted and fully costumed bride and groom on the steps of the town hall.

Secretary Alyson Austin said: "The turnout was brilliant. We had groups from all over the country.

"I don't know how many were there but the line was so long you couldn't see the back. There were definitely hundreds. It was well into three figures.

"We are trying to raise awareness of what climate change is doing and how the Government can act to stop it.

"They cannot say they are against climate change and put in proposals for opencast mines all across Wales. Our protest is not going to stop."

Mining firm Miller Argent said although there were objectors, the scheme had local support.

Director Stephen Tillman said: "All the [illegible]s, conditions and consents which are required for Ffos-y-Fran to operate are being rigorously enforced and we pride ourselves on a safe and well run site.

"We have always taken account of residents' views to improve mitigation measures.

"We are aware there are some residents with long-held objections but we have also had and continue to receive strong expressions of local support."

Ffos-y-Fran will mine 10 million tonnes of coal over 17 years, including two years to restore the area.

A spokesman for Miller Argent said the boundary had been set because the scheme was land reclamation and began where the site was derelict. He said: "In returning the landscape to its natural state, the restoration will include care for some important industrial heritage landmarks, the preservation of an Iron Age settlement and other archaeological finds and the preservation and care for Cwm Golau wooded valley."

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Merthyr Express 18/9/08

Green protest aimed at coal bosses

by DAVID WILLIAMS

david.williams@mediawales.co.uk

CAMPAIGNERS against proposed opencast coal-mining in Merthyr Tydfil took their protests to Cardiff by disrupting the AGM of the UK Coal Authority.

Three campaigners scaled the main entrance of the luxury Hilton Hotel and hung a banner reading "Coal = Climate Disaster", while others inside the conference challenged coal industry delegates on their industry's record of damage to the environment.

During the industry body's awards presentation, Merthyr residents affected by the Ffos-y-Fran opencast mining scheme interrupted proceedings to try to present developers Miller Argent with their own award – the Community Award for Global Climate Crimes.

"I wanted to make clear to James Poyner of Miller Argent the misery he is bringing to our community," said Merthyr resident Alyson Austin, who was among the protestors.

"The Ffos-y-Fran mine is a 200m-deep hole, only 35m from our houses, and the coal they are digging out is causing dangerous climate change.

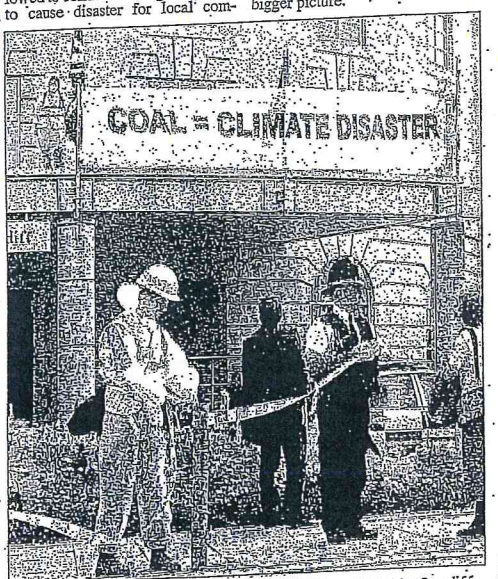
"We are disgusted local democracy has been ignored and Miller Argent has not been challenged by the Welsh Assembly, despite their promises to us to take environmental issues seriously."

The UK Coal Authority is a Government-funded body tasked with promoting and supporting the UK coal industry.

Their AGM featured sessions on expanding opencast mining, lengthening the lifespan of aging power stations and a range of other controversial activities by the industry, which has faced widespread opposition over the past year to its plans for a new generation of coal-fired power stations and ongoing expansion of opencast mining across the country.

"Taxpayer-funded bodies like the Coal Authority should not be allowed to collude with big companies to cause disaster for local communities across the country and disaster for the planet," said Swansea resident and environmental campaigner James Bryant, speaking outside the Hilton.

"At a time when climate change and rising fossil fuel prices are top of the political agenda, it seems amazing that the coal industry can still have cosy meetings about how great business is, with no mention of the bigger picture."



PROTEST: Campaigners outside the Hilton Hotel in Cardiff

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Current year

Making a stand against incineration

11 November 2010

Merthyr Tydfil Friends of the Earth and other local groups in Wales are challenging a proposal for a massive waste incinerator.

The group helped organise a public meeting on the **health impacts and alternatives to incineration**, with guest speaker Dr Paul Connett, a world-renowned toxicology professor and incineration consultant (pictured).

60 local people went along to the meeting, with 30 signing up for the campaign.

> We have a massive proposal in the pipeline.We don't even think that there's sufficient waste to feed this size incinerator.
>
> Alyson Austin, Coordinator of Merthyr Tydfil Friends of the Earth

The figures

The proposed incinerator requires **750,000 tonnes of waste per year**
The local council produces only **23,110 tonnes of suitable waste each year**
Welsh recycling was **below 40%** in 2009-2010

> In 10 years we should be looking at 95% recycling and reusing
>
> Alyson Austin

More details about the proposal and the campaign

More about Merthyr Tydfil Friends of the Earth

Alyson Austin has been a local activist for 7 years. She opposed a planning application for an open cast mine with Residents Against Ffos-y-Fran (RAFF). Unfortunately, the mine was approved, and it's being proposed to build the incinerator next to it.

In 2009, she started the local group with her husband to strengthen the community's response to incineration.

> We thought it would be most feasible and credible if we had Friends of the Earth do it rather than myself as a lone activist
>
> Alyson Austin

Alyson was a finalist in the **"Environment Campaigner of the year"** category of the 2010 Sheila McKechnie Foundation Awards.

Get involved

Find your nearest Friends of the Earth group and get involved in your own community.

CLEAN COAL
FRAUD
Rt Coal
Refuse
Lock for
Brooklyn
Floods

Neutral Citation Number: [2011] EWCA Civ 928

Case No: A2/2010/2841

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CARDIFF DISTRICT REGISTRY
HIS HONOUR JUDGE JARMAN QC
OCF90274

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2011

Before :

LORD JUSTICE PILL
LORD JUSTICE JACKSON
and
LORD JUSTICE GROSS

Between :

ALYSON AUSTIN and others	**Appellants**
- and -	
MILLER ARGENT (SOUTH WALES) LIMITED	**Respondent**

Mr. David Hart QC and Mr. Jeremy Hyam (instructed by **Richard Buxton Environmental & Public Law**) for the **Appellant**
Mr. Geraint Webb and **Mr James Pereira** (instructed by **DLA Piper LLP**) for the **Respondent**

Hearing date : 28 July 2011

Approved Judgment

25

[pgs 26-38 of PBS1]

The case report in *Austin & ors v Miller Argent Ltd [2011]* Env LR 32 EWCA Civ has been included at **Annex 4 [4.76-89]** and has therefore been extracted from Mr Stone's witness statement in order to avoid duplication.

The handwritten pagination used in Mr Stone's exhibit has been preserved on the document now in Annex 4.

(1) Appellant
(2) P A Stookes
(3) 3rd witness statement
(4) nil exhibit
(5) Dated: 4.3.11

IN THE COURT OF APPEAL (CIVIL DIVISION)
On appeal from the Queens Bench Division
HHJ Milwyn Jarman QC, No. 0CF90274

A2/2010/2841

Between

ALYSON AUSTIN & OTHERS

Claimants

and

MILLER ARGENT (SOUTH WALES) LTD

Defendant

THIRD WITNESS STATEMENT OF PAUL ANTHONY STOOKES

I, Paul Anthony Stookes of Richard Buxton Environmental & Public Law, 19B Victoria Street, Cambridge CB1 1JP, STATE THAT:

1. I am a solicitor-advocate and partner in the above firm. I have general conduct of this matter on behalf of the Appellant who is appealing against the decision of HHJ Jarman QC of 12 November 2010 dismissing the Claimants application for a Group Litigation Order (GLO) and ordering that they pay the Defendant's costs in the application. This statement is in support of an application for a Protective Costs Order (PCO) to ensure that the application for permission to appeal the order is not prohibitively expensive.

2. The terms of the PCO sought are that the Appellant has no liability for the Defendant's costs at the forthcoming permission hearing listed for 29 March 2011. There is usually no adverse costs risk on a renewed permission application. However, in the present case the Appellant is at risk of being liable for the Respondent's costs at the due to the nature of the order refusing permission to appeal of 13

January 2011. In particular that Lord Justice Elias directed that if the application for permission is renewed in open court then notification should be given to the defendant and that a date be fixed when counsel for both parties can be present.

3. The details of the appeal are set out in the Appellant's skeleton argument of 30 December 2010. In summary, over 500 local residents are claiming an injunction to stop the continuing dust and noise nuisance pollution arising from the Defendant's opencast coal mining operations in Merthyr Tydfil, South Wales. The residents wish to pursue their claim by way of a GLO. The grounds of appeal are: (1) that the Judge erred in refusing the GLO on the grounds of prematurity in circumstances where he had found sufficient evidence to justify a GLO but then concluded that the Claimants' costs position in terms of the Defendant's costs were not finalised; and (2) that the Judge was wrong to order that the Claimants pay the costs of the Defendant. Both grounds are in breach of Article 9(4) of the Aarhus Convention 1998 that legal proceedings must be fair, equitable, timely and not prohibitively expensive.

The application for a PCO

4. I respectfully submit that the Appellant satisfies the principles for the award of a PCO set by the Court of Appeal in *R (Corner House Research) v Sec of State for Trade & Industry* [2005] EWCA Civ 192 (§74) and that it would be fair, just and in the public interest for a PCO in favour of the Appellant to be granted in these proceedings. Further, the claim is one relating to the environment and to which the Aarhus Convention 1998 and/or the EIA Directive 85/337/EC apply.

5. I have assessed the Appellant's financial eligibility for public funding and she falls outside the financial limits set by the LSC to justify an application for legal aid. In the absence of public funding, the Appellant applies for a PCO to limit any adverse costs risks of the

appeal. In terms of the PCO principles in *Corner House,* I make the following submissions on behalf of the Appellant.

The issues raised are of general public importance

6. The appeal raises a matter of general public importance which is whether the Appellant and 500 other proposed claimants can be precluded from being granted a GLO simply because they cannot demonstrate at the time of granting that they have funding in place to cover the Defendant's costs of proceedings. The Appellant's position at the date of the GLO application and the hearing is that any uncertainty as to liability for the Defendant's costs in these proceedings will be met by either after-the-event insurance or application to the Court for a protective costs order. In short, the claimants have been precluded from progressing the proceedings, which include injunctive relief, stop continuing pollution problems, because they are too poor. The Aarhus Convention 1998 requires member states to ensure that proceedings are (i) fair, (ii) equitable, (iiii) timely, and (iv) not prohibitively expensive. The order of 12 November 2010 breaches all four criteria.

7. Moreover, when applying for a PCO in an appeal involving the application of the Aarhus Convention 1998 the public interest test is assumed to apply. In *Garner v Elmbridge BC* [2010] EWCA Civ 1006, Lord Justice Sullivan at §39 noted:

> ... I accept the appellant's submission that in an Article 10a case there is no justification for the application of the issues of "general public importance" / "public interest requiring resolution of those issues" in the Corner House conditions. Both Aarhus and the directive are based on the premise that it is in the public interest that there should be effective public participation in the decision-making process in significant environmental cases (those cases that are covered by the EIA and IPPC directives); and an important component of that public participation is that the public should be able to ensure, through an effective review procedure that is not prohibitively expensive, that such important environmental decisions are lawfully taken. In summary, under community law it is a matter of general public importance that those environmental decisions subject to the directive are taken in

a lawful manner, and, if there is an issue as to that, the general public interest does require that that issue be resolved in an effective review process. The Corner House principles are judge-made law and in accordance with the Marleasing principle those judge-made rules for PCOs must be interpreted and applied in such a way as to secure conformity with the directive.

A private interest in the outcome of the case

8. The Applicant does have a private interest in the proceedings. Her family, along with other local residents, are being adversely affected by the Defendant's operations. The purpose of the proceedings is to stop that adverse dust and noise pollution arising and from the operations from interfering with the use and enjoyment of her home. However, that interest is not a commercial or conventional proprietary interest. Rather, she simply wants peace and quiet and a clean environment. The Applicant has no greater interest than any other resident concerned about the continuing pollution problems and, as such, the private interest test should not prohibit a PCO. This is particularly so, in the light of *Morgan & Baker v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107 at para 47(iv) and that the application of the *Comer House* principles must be applied flexibly.

The financial resources of the applicant

9. In *R (Edwards) v Environment Agency* [2010] UKSC 57, the Supreme Court approved the approach in *Garner* that the assessment of an applicant's financial resources for the purpose of granting a PCO should be on the basis of whether an 'ordinary member of the public' would consider the costs of proceedings as being prohibitively expensive (§29-33 of the *Edwards*). It is uncertain what the Defendant's costs of the appeal may be. However, in view of the Defendant's claim for costs of over £1/4 million for the preliminary application for a GLO before the High Court and that such costs included charging over 200 hours for one partner's fee at the 'discounted rate' of £308 per hour plus VAT, it is almost certain that any costs liability to the Defendant for the appeal will be prohibitively expensive.

10. I am instructed that the Appellant works part-time as a book keeper earning £100 a week. Her husband, Christopher Austin, was made redundant in November 2010 and is currently in receipt of job seekers allowance. The Appellant and her husband own their home which they estimate to be valued at around £150,000. They have a mortgage on that home. The Appellant and her husband have two children; Thomas aged 14 years and Emily aged 12 year. I am instructed that the Appellant and her husband have managed to accrue modest savings to cover university fees for their children. However, their present financial position is such that they are now having to rely upon their saving to live from day to day.

11. My firm has been instructed under a conditional fee agreement (CFA) since 16 July 2009 to help ensure that the Appellant can afford to bring legal proceedings. Apart from expenses arising out of this appeal (e.g. the court fee of £200), the Appellant has no further costs liability for her own legal fees. The total of the Defendant's costs that the Appellant can reasonably afford to incur in this appeal are nil. In summary, the Appellant is just the person that the Sullivan Report (2008), the Court of Appeal in *Garner* and the Supreme Court in *Edwards* refer to as an 'ordinary' member of the public and who, but for a PCO, would be prevented from taking legal proceedings because of prohibitive expense.

If the order is not made the Appellant is likely to discontinue

12. If the application for a PCO is refused the Appellant is likely to discontinue her appeal, and she will be acting reasonably in so doing. The Appellant does not have the resources to pursue this litigation in the absence of assistance from the Court.

The Applicant's own legal fees

13. At §74(2) of *Corner House* the Court of Appeal observed that "if those acting for the applicant are doing so *pro bono* this will be likely to enhance the merits of an application for a PCO". As stated above, my firm is being instructed on a CFA to ensure that the

Appellant may proceed with her claim and this appeal and that she is not prohibited from doing so by being unable to afford legal representation. Similarly, Leading and Junior Counsel are instructed under a CFA.

Other relevant matters

14. The Court will be aware that there are other many other residents experiencing pollution problems and who wish to pursue proceedings. The Defendant's costs of the appeal are almost certain to be prohibitively expensive for the other proposed claimants either individually or collectively. Merthyr Tydfil is an area of very high social deprivation and poverty having ranking the highest in Wales in overall deprivation, income deprivation, employment deprivation and health deprivation in the Welsh Index of Multiple Deprivation Summary Report 2008 (rev. 13.7.10, Welsh Assembly Government).[1]

Conclusion

15. In the light of the above, I invite the Court to grant a PCO in terms that, should the appeal be unsuccessful, any costs liability to the Defendant will be nil.

Statement of Truth

I believe that the facts stated in this witness statement are true.

Signed:

Dated: 4 March 2011

[1] The Index of Multiple Deprivation has not been exhibited to this statement. It can be provided upon request. Its findings referred to above are on pages 16, 22, 28, and 31.

Case No: 0CF90274

IN THE CARDIFF COUNTY COURT

2 Park Street
Cardiff South Wales
Wales
CF10 1ET

Thursday, 11 November 2010

BEFORE:

HIS HONOUR JUDGE JARMAN QC

BETWEEN:

ALYSON AUSTIN & ORS

Claimant/Respondent

- and -

MILLER ARGENT (SOUTH WALES) LTD

Defendant/Appellant

MR D HART QC (instructed by Richard Buxton Environmental & Public Law) appeared on behalf of the Claimant

MR D GIBSON QC (instructed by DLA Piper UK LLP) appeared on behalf of the Defendant

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Approved Judgment

Digital Transcript of Wordwave International, a Merrill Communications Company
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(Official Shorthand Writers to the Court)

No of words: 2,211
No of folios: 31

[pgs 46-49 of PBS1]

The approved judgment in *Austin & ors v Miller Argent (Sth Wales) Ltd* case number OCF90274 [unreported] has been included at **Annex 4 [4.71-75]** and has therefore been extracted from Mr Stone's witness statement in order to avoid duplication.

The handwritten pagination used in Mr Stone's exhibit has been preserved on the document now in Annex 4.

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
CARDIFF CIVIL JUSTICE CENTRE

No.

FFOS-Y-FRAN OPENCAST GROUP LITIGATION

Before

BETWEEN:

ALYSON AUSTIN & OTHERS

Claimants

and

MILLER ARGENT (SOUTH WALES) LTD

Defendant

PARTICULARS OF CLAIM

Parties

1. The Claimants are those residents listed in the Register prepared under the Group Litigation Order of and who live in Merthyr Tydfil, South Wales. They have at all material times lived at the addresses set out in the Register, save where the Register states otherwise. The Claimants in Schedule 1A have a proprietary interest in their homes whether as owners or tenants of the property. The Claimants in Schedule 1B of the Register do not have a proprietary interest in their home but make their claim in addition on the basis that they have also suffered a material interference with the use and enjoyment of their home, and, to the extent it is necessary to rely on it, an interference with their Article 8 ECHR rights to private and family life.

2. The Defendant carries on opencast mining operations at Ffos-y-Fran opencast mine. The mine covers an area of over 400 hectares immediately to the east of Merthyr Tydfil. These activities are

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carried on following the grant of planning permission dated 11 April 2005 t.

3. Mining operations commenced on the site on or about November 2007. Mining operations continue. The site is outlined in red on the plan attached to these Particulars of Claim. The distance between the opencast site boundary and the Claimants' properties ranges between 36 metres to over a kilometre.

4. The hours of mining operations are Monday to Friday between 07:00 to 23:00 hours, and on Saturday between 07:00 to 17:00 hours. Certain activities have specific operating hours such as:

   (i) coal haulage (Mon-Fri 07:00 to 19:00, Sat 07:00 to 13:00); and

   (ii) blasting (Mon-Fri 10:00-13:00 and 14:00 to 16:00, Sat 10:00 to 13:00).

5. The Claimants' case is that since November 2007, the Defendant has carried on its opencast operations (including mining, coal haulage, blasting, waste removal, stripping, formation etc.) in such a manner as to cause or permit both noise and dust to be emitted from the site in such a way as to cause detriment to the use and enjoyment of the Claimants' homes.

6. The same amounts to a material interference with the Claimants' use and enjoyment of their homes and is, and has been a nuisance. To the extent it is necessary to rely on it, it is also an interference with Claimants' Article 8 right to private and family life.

PARTICULARS OF NOISE AND DUST NUISANCE AND OTHER AIR POLLUTION

7. The Defendant has carried out its operations above with sufficient regularity, frequency, duration and at a level of intensity to cause a nuisance to the Claimants, in particular by way of:

(i) noise emitted from the site by its various operations including mining, blasting, coal haulage, waste removal, stripping and replacement of soils, and the formation and removal of baffle mounds;

(ii) dust to be emitted from aforesaid mining operations such as to fall on the homes, in the gardens, on cars and on other property of the Claimants; and

(iii) fumes, odours and other air pollution to be emitted as a result of its operations, in the gardens, on cars and on other property of the Claimants.

8. While certain dust suppression and noise mitigation measures are required by the planning permission and s.106 agreement, such measures, to the extent that they have been employed, have been ineffective to prevent both noise and dust nuisance to the Claimants' homes on a regular basis.

Injunction

9. Unless restrained by order of this Court, the Defendant threatens and intends to continue to cause or permit the said nuisance to continue thereby causing an unlawful interference with the Claimants' use of their land, loss of amenity and damage. The Claimants therefore seek an injunction against the Defendant to prevent such nuisance and/or damages for past and present nuisance and loss of amenity; or, by way of alternative to the claim for an injunction, damages in lieu.

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10. Further, the Claimants are entitled to and claim interest pursuant to section 35A of the Supreme Court Act 1981 on the amount found to be due to the Claimants at such rate and for such period as the Court thinks fit.

AND the Claimants claim:

1) an injunction to restrain the Defendant by its servants or agents or otherwise howsoever from continuing the nuisance;
2) damages as aforesaid; and
3) interest pursuant to section 35A of the Supreme Court Act 1981 to be assessed.

DAVID HART QC

JEREMY HYAM

Statement of Truth

The Claimants believes that the facts stated in these Particulars of Claim are true.

Position or office held if signing on behalf of the Claimants

Served this day of 2010

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