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Case No: CO/15591/2009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
CARDIFF CIVIL JUSTICE CENTRE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 February 2011

Before :

MR JUSTICE OUSELEY

- -

Between :

Western Power Distribution Investments Limited	**Claimant**
- And -	
Cardiff County Council	**Defendant**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr John Steel QC and Mr Robert Palmer (instructed by **Geldards Solicitors LLP**) for the **Claimant**
Mr Mark Lowe QC and Mrs Harriet Townsend (instructed by **Hugh James Solicitors**) for the **Defendant**

Hearing date: 18th November 2010

Judgment
As Approved by the Court

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Mr Justice Ouseley :

Introduction

1. On 1 October 2009, Cardiff County Council decided to designate land it owned as a nature reserve pursuant to section 21 of the National Parks and Access to the Countryside Act 1949. Such a nature reserve is a Local Nature Reserve. This particular LNR, known as the Nant Fawr LNR, comprised land between the Lisvane and Llanishen Reservoirs and the residential areas to their east and south east, land to the south of the Llanishen Reservoir including an area of the Nant Fawr River Corridor running further to the south, land wrapping around the south and west of the Llanishen reservoir, and other open space.

2. The Claimant, a major landowner in the Nant Fawr River Corridor, owns the two reservoirs and the land immediately around them, now encased to the west, south and east by the Nant Fawr LNR. It is engaged in a long running planning battle with the Council and Welsh Ministers over its plans to develop Llanishen Reservoir for uses including residential, sailing and areas of nature conservation.

3. All of the land within the LNR is held by the Council under section 164 of the Public Health Act 1875 which imposes a statutory trust over the land in favour of the public. The content of the trust is important.

4. The principal challenge raised by Mr Steel QC on behalf of the Claimant is that the designation of the LNR was unlawful: the statutory regimes in the 1875 and 1949 Acts are in inevitable conflict because of the primacy which the former accords to public access and recreation, and which the latter accords to nature conservation over public access and recreation. And, if not inevitable in principle, he submits that the conflict is evident in practice here from the way in which the Council envisages that the LNR will be managed. He says that the land should have been appropriated to nature conservation use which would have involved advertisement and an opportunity for public objection.

5. Mr Steel raised a number of subsidiary points:

   (i) the Council had ignored how the way in which the area should be managed for nature conservation, according to the Countryside Council for Wales, CCW, would harm public recreation;

   (ii) there had been no systematic analysis of what gave this area “special” interest or opportunities as required for designation;

   (iii) the inclusion of Rhyd-y-Penau Park in the LNR was unlawful as it had no special conservation interest and would not be managed for that purpose;

   (iv) the Council had ignored the costs of managing the LNR, because officers had wrongly informed members that there were no resource implications.

6. The Council, facing this judicial review, made a further decision to designate this LNR on 7 October 2010. I gave leave to the Claimant to challenge that decision as well: the

grounds of challenge effectively remain the same; the asserted vices of the former decision remain uncured by the consideration given to the latter.

The statutory framework

7. Section 164 of the Public Health Act 1875 provides:

> "Any urban authority may purchase or take on lease lay out plant improve and maintain lands for the purpose of being used as public walks or pleasure grounds, and may support or contribute to the support of public walks or pleasure grounds provided by any person whomsoever."

8. Byelaws may be made for its regulation and those infringing them may be removed.

9. Section 15(1) of the National Parks and Access to the Countryside Act 1949 defines a "*nature reserve*" as:

> "(a) land managed solely for a conservation purpose, or
>
> (b) land managed not only for a conservation purpose but also for a recreational purpose, if the management of the land for the recreational purpose does not compromise its management for the conservation purpose."

Subparagraph (b) was important to Mr Lowe QC's submission for the County Council. It was introduced by amendment through the National Environment and Rural Communities Act 2006.

10. Subsections (2) and (3) continue:

> "(2) Land is managed for a conservation purpose if it is managed for the purpose of-
>
> (a) providing, under suitable conditions and control, special opportunities for the study of, and research into, matters relating to the fauna and flora of Great Britain and the physical conditions in which they live, and for the study of geological and physiographical features of special interest in the area, or
>
> (b) preserving flora, fauna or geological or physiographical features of special interest in the area, or for both those purposes.
>
> (3) Land is managed for a recreational purpose if it is managed for the purpose of providing opportunities for the enjoyment of nature or for open-air recreation."

11. Section 21 of the 1949 Act empowers the County Council to provide or secure the provision of a nature reserve "*on any land*" in its area which it appears expedient should be managed as a nature reserve. It had to consult CCW; s21(4).

12. The significance of declaring a nature reserve appears to be that byelaws can be made under section 20; see also s21(3) and s19. Byelaws are made "*for the protection of the reserve*". An important byelaw-making power for the arguments in this case is s20(2)(a). A byelaw can prohibit or restrict the entry into or movement within nature reserves of persons, vehicles, boats and animals.

13. It is section 122 Local Government Act 1972 which deals with the appropriation of land from one use to another, and which Mr Steel says should have been used here to take the land out of the 1875 Act trust to permit its designation as a 1949 Act nature reserve. s122(1) provides:

    > "a principal council may appropriate for any purpose for which the council are authorised by this or any other enactment to acquire land by agreement any land which belongs to the council and is no longer required for the purpose for which it is held…"

14. Appropriating land held under s164 of the 1875 Act frees it from the trust; s122(2B). However, by s122(2A) such land can only be appropriated after the Council has publicised notification of its intention to do so, and has considered the ensuing objections. Mr Steel anticipates that were such a step taken in respect of the Nant Fawr LNR, local objections would indeed ensue. Mr Steel's contention is that by avoiding such a process, the real significance of what the Council has done to the public trust land has been obscured. Similar provisions apply to the disposal of public trust open space.

15. The nature of the trust created under s164 of the 1875 Act has been considered in a number of cases, usually in the context of rating where a Valuation Officer argued that a building or facility in recreational grounds breaches the public trust and so is rateable. This case law is relevant but not directed at the same target as this case involves.

16. The earliest decision is the *Attorney-General v The Loughborough Local Board* 1881 Times 31 May in which, in a very short judgment as reported, the Vice Chancellor said that as the land had been acquired as a recreation ground for the people of Loughborough:

    > "it was not competent to them to exclude the general public therefrom, even for a single day."

    So it could not be used exclusively for the day by a local athletic and football club.

17. In *Hall v Beckenham Corporation* [1949] I KB 716, Finnemore J had to consider an action in nuisance brought against the Council by a neighbour who objected to the noisy flying of model aircraft at a recreation ground held under s164 of the 1875 Act. The true answer was the control of such activities by bye-law, because as the recreation ground was held under s164:

> "the corporation are the trustees and guardians of the park, and … they are bound to admit to it any citizen who wishes to enter it within the times when it is open. I do not think that they can interfere with any person in the park unless he breaks the general law or one of their by-laws."

18. The Court of Appeal in *Sheffield Corporation v Tranter (Valuation Officer)* [1957] 1WLR 843 held that it was not necessary that the public be free to go on every part of land held under s164 at all hours of day or night. Lord Evershed MR said, p852:

> "Now, I conclude from these authorities that the principle to be applied in the case of a public park such as this is that, prima facie, a public park – that is, a place dedicated to, and used as such, by the public – is to be treated as in the occupation of the public. Since, therefore, the public are not rateable, the park is itself free from rating liability, and that exemption is not removed by the circumstance that in certain respects and on certain parts of the park the public may, in the course of the ordinary necessities of proper management, be in fact subject to exclusion."

19. The Court of Appeal again considered the scope for restrictions on the public's use of land held under s164 of the 1875 Act in *Blake (Valuation Officer) v Hendon Corporation* [1962] 1QB 283. The public were to have:

> "free and unrestricted use of it (qualified, it may be, by a limited exclusion for ancillary purposes) for those purposes. That is sufficient material from which to infer that beneficial ownership has passed to the public and to negative occupation by the local authority. Of course, if the exclusion of the public from free use goes beyond what is justifiable as ancillary, the land, or the parts of it subject to the exclusion, will be rateable on the ground that they are no longer beneficially occupied by the public but are being occupied by the local authority for its own purposes.
>
> The correct way of dealing with a situation in which two or more powers given to a local authority overlap and may conflict is laid down in *British Transport Commission v Westmorland County Council.* You must ascertain first the object for which the land is held. All other powers are subordinate to the main power to carry out the statutory object and can be used only to the extent that their exercise is compatible with that object. The power to let [a facility] in section 164 of 1933 is subordinate or supplementary to the main power in section 164 of 1875 and can, therefore, be validly exercised only if it is compatible with the full use by the public of Stonegrove Park as public walks and pleasure grounds. As, for example, in *Sheffield Corporation v Tranter*, a part of the land might be let as a refreshment pavilion, provided that the use of the pavilion is ancillary to the use of the park and a necessary amenity."

20. The distinction between facilities which are ancillary to the public's enjoyment of the park and so are consistent with the implied trust even though preventing the public's free range over every single part, and facilities which while recreational and open to the public, often on payment, are not ancillary to the use of land held for exercise and recreation, can be seen in *North Riding of Yorkshire Country Valuation Committee v Redcar Corporation* [1943] 1KB 114 Div. Ct. Bowling greens, seats, conveniences,

shelters were part and parcel of a recreation ground; a large leisure complex including swimming pools and theatre were not.

21. Mr Lowe contended that restrictions on what the public could do in a recreation ground were commonplace: flower beds, ponds and kiosks could prevent the public wandering over every part of the ground. He relied on *R v Ellenborough Park* [1955] 3 ALL ER 667 CA. The conveyance of building plots gave the purchasers "*the full enjoyment of the pleasure ground…"* ie Ellenborough Park, a pleasure ground at their centre. The plot owners' contended that they had a right to go on and wander on every part of the park, and to enjoy its amenities without stint.

> "The enjoyment contemplated was the enjoyment of the vendors' ornamental garden in its physical state as such – the right, that is to say, of walking on or over those parts provided for such purpose, that is, path-ways and (subject to restrictions in the ordinary course in the interest of the grass) the lawns; to rest in or on the seats or other places provided and if certain parts were set apart for particular recreations such as tennis or bowls, to use those parts for those purposes, subject again, in the ordinary course, to the provisions made for their regulation; but not to trample at will all over the park, to cut or pluck the flowers or shrubs or to interfere in the laying out of upkeep of the park. Such use or enjoyment is, we think, a common and clearly understood conception, analogous to the use and enjoyment conferred on members of the public, when they are open to the public, of parks or gardens such as St. James' Park, Kew Gardens or the gardens of Lincoln's Inn Fields."

22. There are restrictions of such a nature in the bylaws made in 1964 which govern what may be done on all the section 164 lands held by the Council, and which apply to all of the Nant Fawr LNR except for a part known as the "*Meadows"*. They make it an offence to damage walls, fences, barriers, to bring any cattle or beast of burden on to the land, or any vehicles, subject to certain exceptions. Byelaw 10 makes it an offence to walk on grass where notified but the area notified could not exceed one sixth of the whole. It is an offence to walk on the flowerbeds or to pick the flowers, to bath in the waters, to fish, to disturb the water fowl, and for a dog owner to allow his dog to disturb people, animals or waterfowl. An area may be set aside for playing a game which requires the participants to have its exclusive use; but only the game which it is set aside for may be played there. Byelaw 17 prevents any structures being erected without permission. Byelaw 18 contains a general prohibition on the wilful obstruction, interruption, disturbance or annoyance of any other person properly using the pleasure ground.

23. There is considerable evidence about how the lands are currently used by the public as public walks and pleasure grounds. Mr Vivien Chapman QC held an Inquiry into an application to register Nant Fawr Meadows as a town or village green under the Commons Registration Act 1965. His report of July 2008 contains the descriptions given by a number of people of the use made of the lands: walking, dog walking, children's games, kite flying, cycling etc. There was some evidence from the activities

of the Friends of Nant Fawr that some who enjoyed the land did so for its nature conservation interest in part and tried to improve it.

The inevitability of conflict

24. I am not prepared to hold that conflict is always inevitable between the two designations. There is an obvious potential for conflict in designations which have these two different priorities, but I am not so sure of how this would always and necessarily work out in practice, that I can come to the conclusion that conflict is inevitable from the designation of s164 land as a local nature reserve. I would have to have all the knowledge necessary of every parcel of s164 land which had been designated as a Local Nature Reserve in order to reach that conclusion. I was only told of the details of these particular s164 lands, and that this Council had designated canals and towpaths which it held under s164 as Local Nature Reserves. I would be unwilling to conclude that designations which have to all intents and purposes rubbed along in harmony are inevitably in conflict and cannot lawfully co-exist; yet Mr Steel's argument would have to be applicable to every dual designation, present and future.

25. Conflict is not inevitable in the case, say, of a geological nature reserve, where recreational use may be limited by its dangers, and confined to footpaths or climbing. I do not see that conflict is inevitable in the recreational use of canal towpaths for walking and mooring, and of the canal itself for boating, at speeds and numbers necessarily restricted for safe recreational use. Even if a conflict can theoretically be imagined, I see no reason to hold that dual designations are of themselves and inevitably unlawful, if there is no practical reality to the conflict.

26. Mr Lowe is right that the relationship between nature conservation and recreation is more subtle than the setting aside of one area for nature conservation and another for recreation. The amendment to the 1949 Act, which brings in recreation as a permissible aim of the management of a nature reserve, illustrates that. Conversely, the protection of what might now be called wildlife can be seen in the protection, through byelaws, of flowers and trees, of wildfowl and fish in the ponds of s164 land. Those restrictions were imposed in the interests of those who enjoy the grounds for public walks and as pleasure grounds. It is not of the essence of s164 land that anything goes anywhere without restriction of animals, ball games, exclusions from various areas, albeit that the restriction is ancillary to the recreational use of the grounds and the enjoyment of others. Drawing a stark and simple line between recreation and nature conservation would be to ignore the way in which, nowadays, people may find recreation through the peaceful enjoyment of nature. However, nature conservation is an interest in its own right under the 1949 Act, whether or not it is seen or enjoyed by the public at large.

27. Although recreational management is subordinate to nature conservation management in a Local Nature Reserve, the extent to which that is a legally significant constraint on what the s164 trust permitted in reality is for testing in each instance. If land was acquired for recreational purposes, with significant nature conservation interest present in its fields, woods and waters, to be enjoyed by people through walking along paths, the recreation and nature conservation interests would not necessarily be in conflict. The protected recreational interest may be in the enjoyment of nature conservation. The

nature conservation interest may be preserved by measures which involve no real compromise on public access or recreational enjoyment of the land. The nature conservation interest may be given priority by the banning of particular recreational activities which protects the recreational enjoyment of others in nature conservation. For example, banning ball games may protect plants and trees in Kew Gardens for the recreational enjoyment and interest of some, while still enabling those who had no recreational interest in nature to enjoy walking at large and running around in the open spaces.

28. Accordingly, though there is much force in it, I am not prepared to accede to Mr Steel's first submission.

The conflict in this case: the facts

29. Mr Steel submitted that conflict was inevitable in this case and that the LNR designation was not lawful. There was no need to wait and see how management might deal with any conflict; the Council had shown that what it intended to do was incompatible with the s164 designation, and to the extent that it tried to protect the rights of the public to continue using the lands as public walks and pleasure gardens, the Council would inevitably be compromising its statutory obligation to manage the lands in the interests of nature conservation, giving that priority over recreation. This submission is wholly bound up with the Claimant's contention that the Council had ignored what CCW had to say about how the site would need to be managed. Mr Lowe contended that there was no necessary conflict, and that the possibility of unlawful management decisions could be dealt with in the event that they were taken. I was taken to a number of documents dealing with how the Council intended to approach the management issues.

30. I shall focus on the later decision of the Council on 7 October 2010, since if that is a lawful decision, the lawfulness of the earlier one of 1 October 2009 is irrelevant; if the 2010 decision is unlawful, it is not suggested by either side that there is some feature of the earlier decision which could enable it to survive. So it would also fall to be quashed.

31. The Council accepted the recommendation of its officers, following consultation with CCW, that it should declare the area in question to be a Local Nature Reserve. The report of the Corporate Director of the Built Environment dated 1 October 2010 was written in part to respond to the grounds of challenge to the 2009 decision. Paragraph 10 set out the recommendation which was accepted:

> "It is recommended that the Council manages its land in the Nant Fawr Corridor for both a conservation purpose and a recreational purpose. In doing so it will be important to ensure that managing it for a recreational purpose does not compromise its management for a conservation purpose."

32. The proposal was based on both limbs of s15 (2) of the 1949 Act: study and preservation.

33. The nature conservation interest was described at some length: I need only cite a part, which deals with the role of the Reserve in the study of nature conservation.

> "LNR's can play an important role in urban and urban fringe areas such as Cardiff, in this instance the site is in close proximity to a large residential area containing at least 11 primary and secondary schools within easy walking distance. Its location gives easy access from these urban areas and schools, making it well suited to provide special opportunities for study. This is very much in line with the Welsh Assembly Governments aim to engage children's through education within the natural environment as part of the Foundation Phase of learning.[sic]
>
> It is considered that Nant Fawr Corridor offers particular opportunities for study in accordance with the requirements of the National Parks and Access to the Countryside Act 1949 because of the range of habitats contained in the area that include semi natural ancient woodland, semi improved grassland, wetland grassland, scrub, wetlands and the Nant Fawr watercourse. It is suggested that the combined effect of these habitats together with the relationship that exists with other adjacent sites such as the Lisvane Reservoir Site of Special Scientific Interest contribute to making this site of special interest."

34. The report identified the diverse flora and fauna.

35. It then turned to "Recreational Use- This refers to a statutory trust". This is an important section, and I set out most of it.

> "30. The fact that the site is extensively used by ramblers, dog walkers and for nature study is a testament to its recreational value. The proposed Nant Fawr Trail running through the site is one of 4 major strategic walking routes in Cardiff providing links between the heavily populated areas and the wider countryside. Access to the site is generally excellent and an on site car park allows access for most users regardless of their physical ability.
>
> 32. To ensure that no inconsistency exists between the statutory trust in which the land is held and the management of the land for conservation purposes a number of measures will be undertaken that allow recreational activities and conservation to coexist in harmony, and as follows:
>
> (a) The footpath network will be developed further to provide easy access to recreational facilities

including those off site in the adjacent Rhyd y Penau Park but avoiding sensitive areas managed for biodiversity including protected species. This will be supported by further strategic planting and use of wetlands created to divert the visitor away from sensitive areas.

(b) By managing the land in a way that encourages retention and enhancement of the natural features such as infrequent mowing and grazing which require enclosure of certain areas which further reduces the impact of excessive trampling and disturbance of sensitive areas. It will also require the use of wetlands used for watering livestock which themselves become valuable habitats.

(c) By providing interpretative information and educational material designed to increase awareness and a responsive attitude including controlling of dogs and anti dog fouling measures.

(d) By improvements to way marking and directional signage that encourage avoidance of sensitive areas at particular times a year.

33. By these measures it is possible for the land to accommodate nature conservation features and comply with the statutory trust in which the land is held. Public access will be no different from access to other LNR's in the City which lie within public open space. Public access will be controlled by the criminal law and by existing byelaws."

36. The legal implications of the s164 trust were dealt with in this way at paragraph 38:

> "The Council owns the land proposed as a nature reserve. It was acquired under the Public Health Act 1875 s164 and this means it is subject to an implied public trust. Public access to the site will be no different in practice from other Local Nature Reserves in the City which form parts of public open spaces. Public access is controlled by the criminal law and by existing byelaws."

37. The draft management plan dated June 2010, which had been developed with input from CCW, was one of the Appendices to the October 2010 report. It is of significance to Mr Steel's argument that in reality priority would be given to nature conservation

interests at the expense of recreational interests, and that the two potentially competing priorities would actually conflict from the outset.

38. One cannot ignore the "Vision Statement" with which the plan begins:

> "Nant Fawr is a varied and well used area of open space to the North East of Cardiff adjacent to the Lisvane Reservoir Site of Special Scientific Interest (SSSI) and Llanishen and Lisvane Reservoir Embankments SSSI. It provides a unique opportunity for the local community to enjoy informal recreation and the countryside on their doorstep.
>
> The site follows the Nant Fawr corridor linking the built up suburbs of Cyncoed and Llanishen to the wider countryside beyond. These links are important both for access, health and recreation but also for the distribution of wildlife ensuring that populations do not become isolated. The extensive network of footpaths on the site forms part of the proposed Nant Fawr Trail."

39. It noted that the Council and the Friends of Nant Fawr had been managing the land since 1994 to encourage the retention of wildlife and its enjoyment by the public; this had been achieved by managing woodlands and wildflower meadows, and the provision of interpretive information. The plan continued:

> "For the urban dweller having contact with nature is very beneficial as it provides a sense of physical and mental wellbeing and because of this it is important that the management plan provides successful outcomes resulting from changes to the management regimes which this plan sets out to achieve. The approval of the management plan by other bodies and stake holders is vital part of this aim and also the creation of a local nature reserve provides a culmination of the policies that have been pursued.
>
> The management over the next five years will lay the foundations to the restoration of the grassland habitats and improved management of the rest of the site. Measurable improvements in species diversity not only for grassland plants but also for invertebrates, mammals, amphibians and reptiles should be achieved. These improvements will be ongoing over a longer period of time with the foundation put in place by the initial five years of management laid out in this plan."

40. In an important paragraph, the aim of the management plan was set out:

> "The future management of the site outlined in the management plan aims to meet the definition of the nature reserve being;

> Land managed not only for a conservation purpose but also for a recreational purpose if the management of the land for recreational purpose does not compromise its management for nature conservation. The management of the site will also promote the aspects of the act relating to the study of flora and fauna of Great Britain and the physical conditions they live, through the use of the site for educational purposes and also increasing the level of survey and monitoring to increase the knowledge of the site for future management. In addition the preservation of flora and fauna or geological and physiological feature of special interest in the area for both these purposes forms the basis of the management objectives and prescriptions that have been identified in the management plan."

41. The issues identified referred to conflict in these terms:

> "While there can be a conflict between recreational use and biodiversity, the site and its management has been designed and evolved to try and minimise any detrimental problems.
>
> The extensive use of the site for recreational and educational purposes is testament to the appeal and significance to the local community but can provide a conflict with biodiversity at times. Careful management has been undertaken in conjunction with the Friends of Nant Fawr over the years to improve the surface of the footpaths directing people along the main desire lines to reduce the pressure in more sensitive areas. New ponds have been fenced to allow for the natural establishment of flora and fauna without the pressure of dogs disturbing the habitat. This approach will be continued in the future to ensure that the pressures from people and the site's recreational use are minimised and the biodiversity is maintained or improved."

42. Mr Steel damned this as the language of compromise.

43. There were ten key objectives for the site, one of which was "to maintain and enhance the recreational facilities available to Park users". Another was to maintain and improve access and links to other trails and public rights of way. Those were the only two which could bear on recreational use, and public access. The others were clearly related to the study and preservation of nature.

44. Appendix 4 to the plan dealt with the effect of recreation and access on the habitats in the LNR. A potential problem for all habitats save ponds, that is woodland, grassland, wet grassland, hedgerow and riparian, was the use of the site by the public for informal recreation, and by dog walkers, and their dogs. Dogs but not their walkers were a potential problem for ponds. All presented high localised risks to habitat, and as walkers

spread out, the risks became medium or low but more widespread. The effects included trampling, compaction, litter, disturbance of ground nesting birds and reptiles and of habitats. (The other problems created by public access were anti-social uses which s164 byelaws would be apt to control in the interests of recreation anyway, in my view.) Measures to deal with the problems of proper recreational use included proper maintenance of footpaths to encourage people to keep to them in woodlands, and to divert them away from the more sensitive grassland areas, growth of woodland understorey, wetland areas and hedges to provide natural barriers, and on site staff and information. Ponds could be fenced against dogs.

45. The Nant Fawr Meadows were a particular example of the point: they were well-used by the public and were especially popular with dog walkers; but they also provided relatively easy access for field studies by local schools. Mr Steel instanced the sort of low level equipment used to assess species numbers, kept in place over time, which would impede the public's rights of access over the s164 lands.

46. The management objectives were set out for the various habitats and species: put simply, they were to maintain and increase diversity, and to provide specific areas of habitat for particular species, and to manage the grassland for habitat purposes. Grazing for grassland was an option to be considered, but that would require difficulties to be overcome, including the provision of fencing and the control of dogs.

47. CCW had been involved at earlier stages through a consultation process. Whatever may have been the position in relation to the 2009 decision, it is clear that CCW was consulted in relation to the 2010 decision. Indeed Mr Steel relies upon what it had to say to support his argument that the designations are incompatible. CCW, in its paper "A place for nature at your doorstep: the role of local nature reserves", saw LNRs as places of particular value for community enjoyment, involvement and education, but they had to be managed to protect their natural interest. Their true value came from making nature accessible to people. However, its list of the values of LNRs does not include in my view those which are compatible with general recreational use.

48. All potential LNRs must, among other requirements, be capable of being managed with nature conservation as the prime objective, according to CCW. This comment to my mind however simply reflects the statutory requirement of the 1949 Act. CCW then continues:

> "In CCW's view, if somewhere is close to where people live, and is used by local people for the quiet enjoyment of nature, then it fulfils the criterion of offering a place which is suitable to study nature. Where access or countryside recreation is the primary objective of a site, it may be better developed as a Country Park or similar. However, if part of a Country Park or a municipal park is managed for nature conservation, there is nothing to stop this part being declared as an LNR."

49. These last two sentences are important cautionary words.

50. In describing what makes a good LNR, CCW says that the site ideally should, among other matters, be capable of providing for public access, *"accepting that access to certain areas may need to be restricted in order to maintain the natural interest for people to experience. Sites which link into the public rights of way network will be especially valuable."*

51. During 2010, but before the October 2010 meeting, there had been discussion between CCW and officers of the Council about the designation of the LNR and its relationship to the s164 trust. The Council had sought to make the case to CCW that the designation of the LNR was valuable because of the particular opportunities for study it offered, in close proximity to schools. It tried to deal with the disadvantages of the site's ready public accessibility, saying:

> "It is recognised however that the openness of the site has increased pressure on the existing wild life and natural habitats. The management of the site undertaken by the Council and the Friends of Nant Fawr has been a two pronged approach of improving surfacing to ensure that persons are directed along certain desire lines while introducing new features such as enclosed wetlands which form natural barriers to prevent unnecessary disturbance and trampling. This approach will be further developed in the management plan that proposes some further restrictions on access on certain key habitats at particular times of the year to prevent disturbance and damage."

52. The June draft of the Council's report to Committee, on which CCW commented, had been more explicit about the conflict than the later report which actually went to the Committee, and which I have quoted above. It recognised that in the absence of a formal appropriation of the open space, the trust *"was a limit on its powers of management for such a conservation purpose. It is intended that the land will be managed in a way which ensures that the conservation purpose is not compromised by this right of access."*

53. CCW was concerned at the effect of the s164 trust, and in June 2010 asked the Council for confirmation that it permitted access to be managed in the manner described by the Council in its then version of the draft management plan. The Council needed to demonstrate that *" the constraints in the statutory trust do not prevent the land being managed for nature conservation – i.e. that access can be managed, or that the flora, fauna or geological or physiological features are sufficiently robust to withstand the expected level of recreational use"*. The Council's response of 25 June 2010 was that there was no incompatibility between allowing public access to Nant Fawr and managing the land for a conservation purpose. Byelaws could prevent, and already did prevent, the improper use of the land by the public. Byelaws and the criminal law would be a sufficient safeguard for the LNR, as had been found to be the case at other LNRs subject to rights of way.

54. The Council put great weight on the support it received from CCW during the consultation process. What it had to say is of value for what it tells of the potential for

conflict and how that should be resolved. Mr Maidment made the point, fair so far as it legitimately goes, that an LNR can be an important wildlife resource, and also provide recreation opportunities for the surrounding area; the CCW guidance highlights the importance of community enjoyment, involvement and education. CCW were however considering the dual statutory role which a LNR can serve, but in which the recreational role is clearly subordinate to the nature conservation role.

55. The Council concluded:

> "It is considered that access by the public can be managed under the current byelaws which apply to the site. We do not consider that public access will inhibit management for nature conservation since over the course of time the existing natural features have developed a natural robustness and species acclimatisation to human presence. A difficulty may arise if any increased intensity of recreational use starts to have a negative impact on the conservation features and in order to compensate for this additional measures are being introduced in the management plan to safeguard these features. This includes improved maintenance of desire lines, diverting of main footpath links to avoid sensitive zones and will be further supported by public information/interpretative material and also control measures such as anti dog fouling."

56. Mr Maidment, the Operational Manager of the Parks Services of the Council, gave evidence about the evolution of its thinking, and its approach to the way in which the two designations could co-exist. He would be in charge of the staff with day to day management of the LNR. The land already was largely composed of Sites of Importance for Nature Conservation; the non SINC areas were included in the LNR so that they could be managed in a way which had no adverse effect on the SINC's or on the two Sites of Special Scientific Interest, the Lisvane Reservoir SSSI and the Llanishen and Lisvane Reservoir Embankments SSSI, which the LNR surrounded. He summed up the basis for the designation in his Witness Statement in this way:

> "I confirm that I am fully satisfied as to the appropriateness of the selection of the site as a LNR and believe that the 2010 Report demonstrates the numerous factors which combine to make the site of "Special interest", including the existence of the 3 SINC sites; the accessibility of the site and the fact that it serves as a valuable conduit from urban areas to the countryside; its links to other important nature conservation areas in the Nant Fawr Corridor; the fact that LNR designation is wholly supported by Friends, an active group that cares very much for the area, and the sheer diversity for the site which contains ancient woodlands, wetlands, wildflower meadows, open areas used for informal recreation and is home to a number of notable species, such as hawfinch, glow-worms and otters.

> It should also be borne in mind that a site such as Nant Fawr has a much greater value in a built up urban area than it would have in a more rural one. There are comparatively few areas within a City where nature conservation can be enhanced as it can at Nant Fawr. It is exactly for this reason that the Council tries to identify and protect the green areas that it does have.
>
> Finally on this point, the Countryside Council for Wales has now fully supported the designation of the land as an LNR and clearly accepts that the site has the "special" interest and opportunities required by s15 of the 1949 Act…."

57. Mr Maidment pointed out that the Friends of Nant Fawr had carried out activities on the land related to nature conservation over a number of years, creating wetlands, and managing woodlands and grasslands, creating habitats and improving access.

58. In paragraph 65, he said that the land would be managed for the purposes of the 1949 Act for conservation and recreation purposes, but so that the latter did not compromise the former. He instanced other lands which were LNR's to which the public had access without that access compromising the interests of nature conservation. He did not say that these lands were held under s164 of the 1875 Act.

59. He dealt with the Rhyd-y-Penau Park area included in the LNR, which he said the Claimant had inaccurately described as playing fields. It was not used for any formal or specific recreational purpose; rather it was informal public open space, used for informal recreation, such as walking, dog walking and children's play. It had some nature conservation interest. The flora there might be less significant than in certain other areas of the LNR, but it offered the potential for movement of fauna. Its value lay in particular as a link between areas of greater interest. The area was managed for both nature conservation and recreation purpose and he saw no potential for conflict.

60. More generally, he saw the potential for conflict being resolved in this way:

> "It is true that there may be occasions when we will need to discourage the public from entering, or allowing their pets to enter, areas of the LNR in order to protect particular wildlife or plantlife in particular seasons or for a specific purpose, such as data collection or the protection of wetlands from dogs. For example, if newts are breeding on the banks of the pond we may rope it off to try and discourage animals from interfering. We have adopted this approach previously in the Howardian LNR. We put up signs discouraging people from entering a particular area where we were observing and recording data in respect of dormice, but the area was not fenced off.
>
> However the Plan does not envisage the need to prohibit access to any area nor does it envisage the need to appropriate any part of the site in order to allow us to manage it as an LNR. Any management of access which is required can be achieved on a

> "voluntary" and "co-operative" basis, by guiding the public to areas we would prefer them to use, and using indicative fencing (e.g. wooden fencing which will tend to discourage use rather than mesh fencing which would prevent use of certain areas)."

61. This strategy had been used in other LNRs. The farmer who was expected to use part of the land for grazing, was *"perfectly happy that the public will not be excluded from the area where the grazing is to take place"*. The power to make byelaws under the 1949 Act would not be used to prohibit access to any part of the LNR, but, if necessary, could be used *"to restrict the manner in which the public use the site to ensure recreational use and nature conservation can co-exist and in particular to ensure that members of the public could not run amok and uncontrolled in the area."* He saw the Management Plan as *"consistent with the public having access"* to the site. There was no incompatibility between *"the public having access and the requirement to manage the land for nature conservation purposes. In fact the Act specifically allows recreational use alongside nature conservation and this is what we are going to achieve. While there is potential for conflict between recreation and nature conservation, management techniques which fall short of exclusion of the public are expected to be sufficient."* I regard these statements as important illustrations of the Council's approach and expectations.

The conflict in this case: conclusions

62. In my judgement, Mr Steel's submissions are correct. For present purposes, I am prepared to assume, contrary to Mr Steel's later submissions, that the land was of sufficient special interest under both limbs of s15 of the 1949 Act for designation to be a lawful decision in the interests of nature conservation.

63. On the faces of the two statutes, there is self-evident potential for conflict. The public trust under s164 requires the Council to permit the public to use the land for public walks or pleasure grounds. There are limits which can be imposed on hours of use and to restrict anti-social behaviour. The public may not be able to wander everywhere since ancillary facilities are permitted where they are ancillary to the provision of the public walks and pleasure grounds. The restrictions on where someone may go to preserve grass, flower beds and ponds, reflect the way in which different forms of public walks or pleasure grounds can be provided. Where one person's pleasure hinders enjoyment by another, there is scope for control, but only for control exercised in the interest of the recreational use of the land. It is clear from the authorities that there should be no restrictions on public access to the grounds or parts of them, save where the restrictions, physical or legal, are imposed in the interests of the public enjoyment of the walks and pleasure grounds. Restrictions and prohibitions may be permitted but only in the recreational interest, and not for nature conservation. In so far as nature is protected, that is where doing so helps fulfil the purpose of public walks and pleasure grounds.

64. The 1949 Act is quite otherwise: recreational enjoyment of nature or of the LNR land is recognised as possible, but the Act is clear that it is the former and not the latter which has priority, and has it to the extent that it must not be compromised. In essence these are the reverse of the priorities under s164.

65. The question therefore is whether the management requirements of the LNR will restrict the public use of the walks and pleasure grounds for a purpose other than that of recreation. From the alternative perspective, the question is whether fulfilment of the duty under the 1949 Act to manage the LNR in the interests of nature conservation, while not allowing the management of the recreational use to compromise the former, can avoid the imposition of restrictions in the interest of nature conservation which do compromise the public recreational use.

66. The question is not whether there will still be public access to the LNR or to parts of it, or whether an LNR is consistent with public access as so often is the basis upon which the Council reconciled the conflicting interests. It is not enough to say that the restrictions fall short of exclusion. It is a fallacy in the Council's thinking that restrictions on access for nature conservation purposes are permitted under the s164 trust but not prohibitions. The question is not whether the Council has come up with a management plan which embodies a reasonable compromise between the two interests, a reasonable reconciliation of the two. The 1875 Act permits no restriction except for its own purposes, and the 1949 Act permits no compromise of the interest of nature conservation in the interests of recreation. The plan would therefore only be lawful if neither interest had to be compromised.

67. This is not an issue of Wednesbury rationality. The Council's view may well be wholly reasonable if the question is how best to compromise the two competing priorities. But that is not the way in which the two Acts permit it to manage the land. Nor is it a question of the reasonableness of the Council's view that designation as an LNR is compatible with the s164 public trust. Of course, that assessment, if made with a proper appreciation of the law, would be valuable as a guide; but it is for the Court to decide whether the designation is compatible with the s164 trust and is lawful.

68. If conflict between the two designations could be and was intended to be managed in such a way that the apparent conflict was resolved in practice conformably with both duties, the designation would not be unlawful. It would be any later management plan or byelaws which failed to achieve that intended and practicable result which would be unlawful, rather than the designation itself. Mr Lowe suggests that there is no conflict at present, and that one should wait and see if conflict emerged. I would agree with that were I of the view that conflict could be resolved and was intended to be resolved in a way which left both statutory obligations intact. But that is not how I see the position.

69. The existence of conflict has to be tested by comparing the actual use made and reasonably likely to be made of the public walks and pleasure grounds with the nature of the conservation interest to be preserved and studied, and by examining the impact on the recreational use of avoiding any compromise of the nature conservation.

70. To my mind, the Council has made it perfectly clear that it intends to manage the s164 lands as an LNR, conforming to its duties under the 1949 Act, so that nature conservation has priority; management for recreational purposes is permitted only to the extent that it does not compromise the nature conservation interest.

71. That is clear from the fact of statutory designation, the Vision Statement, the expressed aims of the management plan, its objectives and techniques, the Council's responses to CCW and Mr Maidment's evidence. Recreation does not have priority; the site will be

managed for nature conservation; recreational use will be managed in the interest of nature conservation. Where they conflict, nature conservation has and will have priority. The management plan does not restrict access in the interests of the recreational enjoyment of nature conservation, but in the interests of nature conservation as a value in its own right, whether seen or heard or enjoyed by the public or not. Any recreational enjoyment of it is as a controlled incidental. The plan shows that it clearly intends to fulfil its obligations under the 1949 Act by imposing restrictions on the existing recreational use.

72. This land is used for general informal recreation, as a park: walking and dog walking, children's play, cycling, but not formal playing fields. It is a use not confined to a few selected areas, and its use is not obviously trammelled except by restrictions on anti-social behaviour. The LNR was not proposed on the basis that the public did not in fact have access to the areas of nature conservation interest, albeit that there had been some recreational enjoyment of the nature conservation interest. The habitats of interest however appear to cover all the grassland and woodland, and ponds on site. The grasslands are the main area on which the public go. The actual use made of woodland would be affected by the paths and undergrowth between the trees. The recreational use, excluding anti-social behaviour which s164 byelaws could properly prohibit, is clearly identified in the management plan as harmful in varying degrees to the interests of nature conservation. It is treated as a problem to be solved, not as the very purpose for which the Council holds the land, to which nature conservation, in its own right, is subordinate.

73. The solutions, dealt with in the management plan and in the report of 7 October, involve restrictions. The proposed restrictions on the recreational use are intended to be effective in limiting where people go and what they do. They cover barriers to access, use and movement albeit in the form of natural habitats such as enclosed wetlands, woodland and understorey, and in the form of "indicative" fencing or other restrictions in relation to particular areas. "Indicative" fencing may not be an insuperable barrier but it is intended to thwart recreational use.

74. These may be very sensible in the interests of nature conservation and allowing nature conservation and the subordinate recreation use to co-exist, but these measures are not compatible with the s164 trust. They would not be imposed for any purpose other than nature conservation, as an interest of value in its own right. If those solutions are not adopted, the land would not be managed as required by statute of an LNR.

75. While some of the measures of "encouragement" cannot be objectionable in the interests of recreation e.g. provision of information and anti-dog fouling measures, and the protection of areas such as ponds from interference by dogs is already a proper feature of s164 lands, the surfacing of some areas and infrequent mowing of others to encourage people to keep to certain areas and away from others is a restriction on s164 land. If these measures are effective, they are effective in reducing through discouragement the recreational enjoyment of all the lands, not in the interest of the recreational enjoyment of others, but in the interests of nature conservation as an end in its own right. It is still a restriction even though responsible people may "voluntarily co-operate" and not ignore the discouragement. This may be necessary to stop people trampling over particularly valuable parts of the habitats.

76. If the restrictions and inhibitions envisaged in the report and management plan proved ineffective to protect the interests of nature conservation, and the recreational harm continued, the Council would have no choice under s15 of the 1949 Act but to curtail further the recreational use by restricting, with barriers backed by byelaws, where the public could go. The Council makes it clear that is what it intends to do. There would be further conflict with the s164 trust. If dogs had to be restricted to protect the recreational enjoyment of others, that would be consistent with s164, but not if it were done for nature conservation purposes. Sub-optimal management for nature conservation is not permitted under the designation. The public might need to be prevented from going near rare species, but that would be incompatible with s164 unless ancillary to the recreational use of the land.

77. Whether byelaws were made at the outset or in response to a failure in its other measures, they could not be made under s164 since they would not be made for its statutory purpose but in the interests of nature conservation. If made under the 1949 Act, they would serve to emphasise the conflict with the implied public recreational trust. It is misconceived for the Council to imply that since public access to s164 land is controlled by byelaws, itself an over-simplification, those byelaws can be used to achieve restrictions in the interests of nature conservation. It is difficult to see how byelaws could lawfully enable the two interests to co-exist without each interest being compromised, and hence difficult to see what power exists to make them lawfully.

78. Grazing part of the land may be one management option for grassland. The farmer may be content that "public access" could continue. But that is not the point. The question is whether grazing animals would restrict the way in which dog walkers and others could enjoy the field and play in it. It is not a question of whether the public could pass through it as if on a public footpath. S164 land is not simply land through which rights of way run. I regard it as obvious that grazing would affect the public's recreational enjoyment of that land.

79. Mr Steel is also right that study of nature by local schools may involve restrictions on what the public can do by way of recreation, should there be fixtures such as quadrats to enable ecological changes in square metre areas to be studied over time, or areas fenced off for such purposes.

80. The nature and extent of restrictions which management for nature conservation would have to impose are not fairly to be compared with those restrictions in pleasure grounds which prevent dogs annoying wildfowl and other users, or which might stop someone walking on the flower beds or newly seeded grass. The very purpose is different. The extent to which people would be prevented or hindered from enjoying the whole of the area and in the manner they do at present without objection would also be different. Keeping parts clear of dogs so that other users may enjoy the recreational opportunities they afford to look at flora and fauna of interest, is very different from managing a habitat, not necessarily for the benefit of human recreation at all, but for the benefit of plant, animal or insect species of interest which may never be seen. However valuable the recreational interest in nature, nature conservation is an interest of value in its own right. Restricting human recreation is clearly necessary in the interests of nature conservation, and goes far beyond any contemplation of recreational interest in nature.

81. The Rhyd-y Penau Park appears to have less nature conservation interest than the rest of the LNR, and the informal recreational use seems to be fairly unrestricted by physical features. But it would have to be managed for the purposes of nature conservation with the recreational interest subordinate to it now. It is difficult to see why it has been included in the LNR unless to achieve a different management regime, and that is what Mr Maidment's justification for its inclusion contemplates.

82. Indeed, given what has been achieved so far for the nature conservation interest of the land as land subject to the s164 trust, and without interference with the trust, it is difficult to see what purpose the LNR designation has but to put nature conservation as the priority interest where it clashed with recreational use of the trust land. That is very much how I read the purpose of the designation in the report. The clash is resolved by continuing to allow public access, which by itself is not enough to comply with the trust, and by making it subject to new restrictions, necessary only in the interests of nature conservation.

83. The existing recreational use, in so far as it encompasses the enjoyment of nature conservation, does not permit nature conservation to be the purpose for which the s164 land is managed. The present pre-designation management arrangements appear to permit the enhancement of nature conservation without impairing recreational use of the trust land. The Council suggested to CCW that the existing nature conservation interest had developed a robustness through habituation to public recreational use. The management plan recognises that some controlled recreational activity will not compromise the nature conservation interest, but that rather highlights the point. The designation is intended to reverse the existing order of priorities and through management to protect and enhance nature conservation. It is not being left as it is. The problem of inevitable conflict arises here because an area of general recreational use is being turned into a nature conservation reserve, with changed priorities.

84. Mr Lowe submitted that there was no incompatibility with the s164 trust even if the manner in which the public enjoyed the s164 land changed from one in which the emphasis was on informal recreation, walking and dog walking and children's play, to the quiet and studious enjoyment of nature. I doubt that is right: the essence of the public walks and pleasure grounds for which s164 land are held, and certainly these s164 lands are their use for walking or running around and playing, which means often with children and dogs, and both of which may be noisy and energetic; it means informal recreation. But even if the use of s164 trust land for those purposes could lawfully be changed by a council's s164 byelaws so that its recreational use became the quiet enjoyment of nature, the control of that recreational use would still have to be in the interests of recreational enjoyment and not in the interests of nature conservation. Whatever the theoretical possibilities of this argument, that is not the basis upon which the Council took the view that designation and the restrictions were required. It intends nature conservation now to be the priority interest. It claims to resolve the incompatibility with s164 by pointing out that public access will continue, but it simply failed to appreciate the significance of the restrictions it envisages for the full duties in the trust upon which it holds the land.

85. Accordingly I have come to the view that, even if there is no inevitable conflict in all cases between s164 and designation under the 1949 Act, the potential for conflict which is obviously high anyway has clearly actually arisen here, and cannot lawfully be

resolved. The Council's intentions, however laudable, show that it cannot square the circle and in reality does not intend to, however much it might wish and hope that it could. The designation is therefore unlawful. I quash both the decisions of 1 October 2009 and 7 October 2010 to designate the land as a Local Nature Reserve.

The remaining submissions

86. I shall take these briefly. Mr Steel submitted that the Council had given legally inadequate consideration to the designation of the land since, in order to decide that it was of "special interest" for nature conservation, it had to carry out a comparative study of other sites against objective criteria. This was what CCW recommended. When the Council had eventually done a form of study, there was only one criterion, which dealt with the special interest of the site and that was simply in general terms. The other criteria under the general topic of special interest were either irrelevant to the existence of nature conservation interest, eg whether the site was in an area lacking in nature conservation sites, or not of real significance, eg whether there were SINCs on the site, since there were a very large number of them in the Council's area and very few LNRs.

87. I accept Mr Lowe's submission that there is no statutory framework which requires decisions to be made in any particular way, and save in so far as the word "special " involves some notion of difference from others, there was no obligation to have a structured comparison, even though recommended by CCW. I do not need to set out further passages from the report, and the agreement by CCW that the site should be designated. The Council was in my judgment entitled to take the view for the reasons which it gave in the report and in its appendices that the site met the statutory test. On the other hand, that view does support my earlier conclusion, and it is reinforced by the satisfaction of CCW that the recreational use could be adequately controlled, that the recreational use would be subordinate to the nature conservation use as s15 envisages but not as s 164 envisages.

88. Rhyd-y-Penau: I have dealt with the reasons for its inclusion in the LNR above. It may be a marginal case for inclusion but I am not prepared to say that it is unlawful. Again, the greater significance to my mind is the obvious potential for conflict between s164 and s15. As I have said the purpose of its inclusion within the LNR can only be to give it a different management regime from the one it currently enjoys in which recreational use is clearly to the fore.

89. Resources: I accept that the Council was told that there were resource implications of the management plan. But the report did not contradict that. It merely expressed the view that it would seek external funding so that there would be no resource cost to itself. This was not a ground of challenge as such, but I do not regard the Council as having ignored the cost implications. It may be optimistic. But that is not unlawful, hopefully.

90. However, for the reasons given, the designations are quashed.