IN THE HIGH COURT OF JUSTICE **Claim No:**
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

BETWEEN:-

THE KING (on the application of
COAL ACTION NETWORK)

Claimant

- v -

MERTHYR TYDFIL COUNTY BOROUGH COUNCIL

First Defendant

and

THE WELSH MINISTERS

Second Defendants

and

MERTHYR (SOUTH WALES) LIMITED

Interested Party

STATEMENT OF FACTS AND GROUNDS

In this document, references to the Claim Bundle are in the form [CB/x/y] where x is a document number and y is a page number.

List of essential reading:

- Witness statements of Daniel Therkelsen **[CB/6/343-420]**, [redacted] **[CB/6/421-441]**, and Matthew McFeeley **[CB/6/442-577]**
- Pre-action correspondence **[CB/7/732-809]**
- Wellbeing of Future Generations (Wales) Act 2015 ss 2 – 5 **[CB/9/885-888]**
- *An Application by Friends of the Earth Limited for Judicial Review* [2017] NICA 41 **[CB/10/980-988]**
- *Ardagh Glass Ltd v Chester City Council* [2009] EWHC 745 (Admin) **[CB/10/938-969]**

INTRODUCTION

1. The Welsh Government has enacted legislation that requires public bodies to act in a manner that seeks to protect the wellbeing of future generations, including

by taking action on climate change. It has declared a climate emergency. In the context of that legislation and that climate emergency, the Welsh Government applies a very strong presumption against planning permission for the extraction of coal because further extraction adds to the global supply of coal and has a significant effect on Wales' and the UK's legally binding carbon budgets as well as international efforts to limit the impact of climate change.

2. This claim relates to an egregious and brazen breach of planning control by Merthyr (South Wales) Limited ('**MSWL**') at the Ffos-y-Fran mine, East Of Merthyr Tydfil, CF48 4AE ('**the Mine**'). That breach of planning control commenced on 6 September 2022 and involves the extraction of hundreds of thousands of tonnes of coal without planning permission.

3. The witness statement of Daniel Therkelsen sets out in stark detail the quantities of coal extracted unlawfully by MSWL **[CB/6/355-358]**. On the best figures available, MSWL has unlawfully extracted, on average, 1002 tonnes of coal per day since planning permission expired. Over the 335 days since 6 September 2022, it has extracted an estimated 335,670 tonnes of coal. The operational and downstream emissions attributable to that extraction are around 1.38m tonnes CO2e. That is the equivalent of burning 580 million litres of petrol. Put another way, the daily operational and downstream emissions attributable to the unlawful activity at the Mine constitute around 5% of Wales's total greenhouse gas emissions. This case thus involves what must be one of the largest scale breaches of planning control in the history of the planning system in England and Wales.

4. The First Defendant ('**the Council**') is the local planning authority with enforcement responsibility for the Mine. The Second Defendants ('**the Welsh Ministers**') have reserve powers to take enforcement action in relation to the Mine. Throughout the 11 month period in which MSWL has been unlawfully extracting coal, the Council and the Welsh Ministers have failed to exercise enforcement powers effectively to bring the unlawful activity to an end. As a result, the Mine continues to extract coal which it sells for profit without planning permission and without consequence.

5. Despite widespread public disquiet and repeated requests, it took eight-and-a-half months for the Council to issue an enforcement notice ('**the EN**') in relation

to the clear and obvious breach of planning control. Predictably, MSWL appealed against the EN. A stop notice is now required to bring the breach of planning control to an end.

6. Eleven months after the breach of planning control commenced, two-and-half months after issuing the EN, and one-and-a-half months after the EN was due to take effect, neither the Council nor the Welsh Ministers have decided whether it is expedient to issue a stop notice.

7. Both authorities demonstrate a complete lack of urgency in addressing the current situation. The Council denies that it is under any duty to act with reasonable expedition in deciding whether to serve a stop notice. On its case, it can take a decision on expediency at its own leisure, regardless of the nature or scale of the planning harm caused by the breach of planning control. While indicating that it expects to make a decision on the expediency of a stop notice "in August", it has refused to commit to that timeframe, in part because its lead planning officer is on holiday and it sees no need to progress matters while he is away. The Welsh Ministers have indicated an intention to consider exercising their power to issue a stop notice but also show no urgency in doing so, having first asked for a week's extension to reply to pre-action correspondence (and then missing that timeframe by a further day) before eventually indicating they do not intend to take any decision before the Council does so.

8. The Council's and Welsh Ministers' inaction has undermined, and continues to undermine, public confidence and has brought the planning system into disrepute: see the witness statement of 11-year-old [redacted] **[CB/6/421-423]** and paragraphs 36 – 42 of the witness statement of Daniel Therkelsen **[CB/6/359-360]**.

9. The Claimant, Coal Action Network ("**the Claimant**"), is a small environmental campaign group whose aims include working for an end to coal extraction and coal use in power generation and steel production. By this claim, the Claimant challenges:

    a. the failure of the Council and the Welsh Ministers to act with reasonable expedition to decide whether to issue a stop notice to prevent the ongoing unlawful extraction of coal at the Mine; alternatively

b. the decision of the Council that it is not expedient to issue a stop notice to prevent the ongoing unlawful extraction of coal at the Mine.

10. Although enforcement authorities generally have a wide discretion in the exercise of their enforcement functions, the Claimant submits that – in the unique and exceptional circumstances of this case – these failures and/or decisions are unlawful because they:

    a. are inconsistent with the scheme of the Town and Country Planning Act 1990;

    b. are inconsistent with the Council's and/or Welsh Ministers' duties under section 3 of the Wellbeing of Future Generations (Wales) Act 2015; and

    c. are irrational in all the circumstances.

11. The Claimant applies to the Court only after extensive and patient engagement with both the Council and the Welsh Ministers: see all the correspondence at **[CB/Tab 7]**. Indeed, legal correspondence commenced with the Council on 3 March 2023 and with the Welsh Ministers on 13 March 2023. The first pre-action letter was sent to both authorities on 3 April 2023. Since then, the Claimant has allowed both authorities substantial time to exercise their enforcement functions without the need to seek the intervention of the Court. Both authorities have had ample time to engage with MSWL and understand the full facts relevant to the ongoing breach of planning control. In the absence of any commitment by the Council or the Welsh Ministers to decide whether it is expedient to issue a stop notice within any set period of time, and in the face of the Council's explicit denial that it is under any duty to act with reasonable expedition in taking that decision, the Claimant now applies to the Court.

12. On account of the daily, irremediable harm caused by the continued unlawful activity at the Mine, the Claimant applies for urgent interim relief as set out at paragraphs 147 et seq below.

THE FACTS

13. MSWL extracts coal from the Mine for use in industrial and non-industrial uses.

14. Planning permission for the extraction of coal in the Mine was first granted on 11 April 2005 by way of appeal decision APP 152-07-014. That permission was varied pursuant to a further appeal decision dated 6 May 2011 (**"the Planning Permission"**). Conditions 3 and 4 of the Planning Permission required extraction from the Mine to cease no later than 6 September 2022 and site restoration to be completed by 6 December 2024.

15. On 1 September 2022, five days short of the date by which all extraction was to cease, MSWL sought permission under section 73 of the Town and Country Planning Act to extend the date by which extraction from the Mine must cease to 6 June 2023 and the date by which site restoration must be completed to 6 September 2025 ("**the Planning Application**").

16. The Planning Application was accompanied by an addendum to the environmental statement prepared in 2005 ('**the ES Addendum**'), but not by a full environmental statement. The 2005 environmental statement did not address the climate change impacts of the development and nor did the ES Addendum: although Chapter 22 of the ES Addendum contains a heading entitled "climate and carbon balance" there is no assessment of the likely greenhouse gas emissions attributable to the proposed extension of the life of the development **[CB/4/143-146]**.

17. Extraction of coal from the Mine continued beyond 6 September 2022 in breach of planning control. As early as 12 September 2022, the Council began to receive reports of continued coaling in the Mine in breach of planning control.

18. On 18 October 2022, the Welsh Ministers issued a holding direction under Article 18(1) of the Town and Country Planning (Development Management Procedure) (Wales) Order 2012. The effect of the direction was to restrict the ability of the Council to grant planning permission until the Welsh Ministers had considered whether to exercise their call-in powers to determine the Planning Application themselves.

19. On 21 December 2022, the Council issued a screening opinion ('**the First Screening Opinion**'). On the basis that the proposal was to extend for nine

months development that had previously been assessed as acceptable (subject to mitigation), it concluded that the proposed extension was not EIA development. It said **[CB/4/147-154]**:

> In conclusion, the Authority is of the opinion that the proposed development, either alone or in combination, is unlikely to have a significant adverse effect on the environment. The extension of 9 months to complete the development previously approved will extend the impacts of the development. However, these impacts have previously been assessed as being at an acceptable level subject to mitigation and limitations provided by planning conditions. There is no proposed change to the method of working and therefore no environmental impacts are envisaged over and above those experienced as part of the 2005 planning permission. As such, the likely effect of the development is unlikely to be significant enough to warrant an EIA.

The First Screening Opinion did not address the climate change impacts of, or greenhouse gas emissions attributable to, the proposed extended life of the development.

20. On 12 January 2023, the Claimant wrote to the Council to seek confirmation of whether active coal mining had continued at the Mine beyond 6 September 2022. On 20 January 2023, [redacted] Principal Planning Officer at the Council, replied, confirming that the Council understood – apparently on the basis of information provided by MSWL – that coal mining had ceased in the Mine, pending the outcome of the Planning Application **[CB/7/579]**. That understanding was wrong. Active mining had taken place regularly since 6 September 2022. The Coal Authority's production data demonstrates that MSWL extracted 102,505 tonnes of coal from the Mine between 1 October and 31 December 2022, without planning permission, about 97% of all the coal that was extracted in the UK during that period **[CB/6/364]**.

21. On 30 January 2023, the Claimant drew the Council's attention to the Coal Authority evidence. On 2 February 2023, [redacted] replied to say that he would review the information provided and would consider whether to escalate the matter with the Council's enforcement team. Remarkably, [redacted] did not write to the Coal Authority for confirmation of the figures provided by the Claimant for a further 28 days.

22. On 3 March 2023, Richard Buxton Solicitors (**"RBS"**) wrote to the Town Planning Division of the Council on behalf of the Claimant to request urgent enforcement action in relation to the ongoing breach of planning control **[CB/7/583-588]**. The letter set out why planning policy demanded enforcement action in this case and

why any delay would render enforcement action nugatory. Noting that the Planning Application sought an extension of coaling to 6 June 2023, and noting that MSWL has already, by default, enjoyed six of those nine months of coaling, it said: "*the development will soon effectively have been carried out without permission and the harm identified in Welsh Policy irrevocably caused, regardless of the decision that may eventually be made on the extension application.*" The letter was copied to Welsh Ministers and noted that if the Council delayed in taking, or declined to take, enforcement action, Welsh Ministers would be asked to exercise their own enforcement powers.

23. On 9 March 2023, solicitor to the Council, [redacted], replied to RBS, informing them that **[CB/7/601-602]** "*the Council does not consider it would be a productive use of its officers' time to provide a detailed response at present to the matters raised in the [RBS] letter.*" It continued to note that the Council's planning committee would consider the section 73 application on 26 April 2023 and "*any issues pertinent to enforcement will be taken in light of the decision that is made by committee*".

24. On 13 March 2023, RBS wrote to the Welsh Ministers drawing their attention to the ongoing breach of planning control, copying the correspondence between RBS and the Council and seeking the exercise of enforcement powers by Welsh Ministers **[CB/7/603-4]**. No response was received to that letter.

25. On 28 March 2023, the Coal Authority confirmed to the Council that, since August 2022, the Mine had continued to operate and declare coal returns to the Coal Authority on a monthly basis. On 31 March 2023, [redacted] wrote to the Claimant confirming the following **[CB/7/607]**: "*Whilst we were under the impression that the majority of the works being undertaken on site sought to address the slippages, and in part, works associated with the restoration of the site, it now appears that coal extraction has also continued alongside these activities.*"

26. Indeed, the Coal Authority's production data shows that, in addition to the 102,505 tonnes of coal extracted from the Mine between 1 October and 31 December 2022, MSWL had extracted a further 66,357 tonnes of coal, without permission, between 1 January and 31 March 2023 **[CB/4/365]**. Notwithstanding this, [redacted] confirmed the position as set out in the Council's 9 March 2023 letter to RBS, namely that "*any issues pertinent to enforcement*" would only be

considered after 26 April 2023, once the Council had resolved whether it would grant the Planning Application.

27. On 3 April 2023, RBS wrote a pre-action letter to the Council and the Welsh Ministers alleging that the Council had acted unlawfully by: i) failing to consider enforcement action as a prior and separate question to whether to grant planning permission; and/or ii) failing to take enforcement action against the ongoing breach of planning control **[CB/7/608-622]**. The letter also alleged that the Welsh Ministers had acted unlawfully by failing to take any steps in relation to the ongoing breach of planning control.

28. On 11 April 2023 and 24 April 2023 respectively the Council **[CB/7/623-637]** and the Welsh Ministers **[CB/7/668-671]** provided responses to RBS's pre-action letter and denied they had acted unlawfully. The Welsh Ministers maintained it was reasonable to wait for the Council to take a decision on the Planning Application before consideration of enforcement and asserted that the scheme of the legislation "*makes it clear that the local planning authority is the principal decision maker in relation to [enforcement] functions*".

29. On 11 April 2023, the Council gave notification that MSWL had varied the Planning Application and now sought permission for an extension of coaling to 31 March 2024 **[CB/7/659-660]**. No update to the ES Addendum was provided, notwithstanding the additional nine months of coaling proposed. On 18 April 2023, the Council issued a further screening opinion ('**the Second Screening Opinion**') concluding that the further proposed extension was not EIA development **[CB/4/179-187]**. However, the Second Screening Opinion again did not address the carbon emissions associated with the proposed extended life of the development.

30. On 17 April 2023, the Council's Planning Officer, [redacted], prepared a report for the Planning Committee, recommending the Committee refuse permission for the Planning Application, as varied **[CB/4/155-178]**. On 26 April 2023, the Planning Committee unanimously voted to refuse permission for the Planning Application, as varied. The reasons for refusal were set out in a decision notice dated 27 April 2023, which stated **[CB/4/191]**:

> "1. The proposed development fails to clearly demonstrate that the extraction of coal is required to support industrial non-energy generating uses; that extraction is required in the context of

decarbonisation and climate change emission reduction; to ensure the safe winding-down of mining operations or site remediation; or that the extraction contributes to Welsh prosperity and a globally responsible Wales. The proposed development therefore, fails to meet the test of 'wholly exceptional circumstances,' contrary to Planning Policy Wales 11, the Coal Policy Statement and Policy EcW11 of the Merthyr Tydfil County Borough Council Replacement Local Development Plan 2016-2031.

2. The proposed development fails to provide an adequate contribution towards the restoration, aftercare and after-use of the site, to the detriment of the surrounding environment, contrary to the requirements of Policies EnW5 and EcW11 of the Merthyr Tydfil County Borough Council Replacement Local Development Plan 2016-2031. Therefore, no local or community benefits would be provided that clearly outweigh the disbenefits of the lasting environmental harm of the development."

31. On 27 April 2023, RBS wrote to the Council and Welsh Ministers seeking urgent enforcement action, involving the service of a temporary stop notice to ensure the unconsented activity was brought to an end immediately, followed by the service of an enforcement notice as soon as the expediency of such a course was determined **[CB/7/675-677]**.

32. On 28 April 2023, the Welsh Ministers indicated that it was for the Council to decide whether to take enforcement action and only once it had taken a decision would the Welsh Ministers consider enforcement action **[CB/7/678]**.

33. On 2 May 2023, the Council replied indicating that it had commenced an enforcement investigation and would not comment further until the conclusion of that investigation **[CB/7/679]**. There is no evidence that the Council had taken any steps to investigate enforcement prior to this date.

34. On 16 May 2023, MS Lesley Griffiths was asked in the Senedd about the unlawful extraction of coal at the Mine. Notwithstanding the fact that correspondence from RBS and evidence from the Coal Authority demonstrated that the Mine was continuing to extract coal unlawfully, MS Lesley Griffiths said on behalf of the Welsh Ministers that there did not appear to be any evidence of continued coal mining, just evidence of coal leaving the site. The answer suggests that the Welsh Ministers had taken no steps to consult with the Council or to investigate the allegations of unlawful coal mining activity **[CB/6/375]**.

35. On 19 May 2023, the Coal Authority inspected the Mine and found the operator continuing to work coal, without planning permission and beyond the agreed licence boundary.

36. On 23 May 2023, MS Lesley Griffiths made further comments in the Senedd, on behalf of the Welsh Ministers, which demonstrated a continued lack of understanding of i) the factual context at the Mine; and ii) the legal powers available to the Welsh Ministers. Failing to appreciate that unlawfully extracted coal could not be required to be put back in the ground, she said: "*Any developer risks having to undo and pay for work that hasn't been legally permitted*". Failing to appreciate the Welsh Ministers' independent enforcement powers, she said **[CB/6/376]**:

> *the role of Welsh Government is to determine any planning appeals against enforcement notices served by local planning authorities, so, to avoid prejudice to this role, we cannot comment on the merits of this case. But I do want to reassure the Member and everybody else that the Welsh Government does want to bring a managed end to the extraction and use of coal. We all know we're in the middle of climate and nature emergencies, and the response to these emergencies must be very swift and it must be serious so we can pass on a Wales to future generations that we can be proud of.*"

37. On 24 May 2023, the Council served the EN requiring MSWL and any other person with an interest in the Mine to cease the extraction of coal from the Mine and cease carrying out development at the Mine other than wholly in accordance with the approved restoration and management strategy **[CB/2/87-92]**. The EN, as drafted, was to take effect on 27 June 2023 with compliance required within a further 28 days. That meant that it would have been, unless an appeal was brought against the EN, a criminal offence to continue coaling beyond 25 July.

38. On 15 June 2023, drone footage evidenced the continuation of active coaling at the Mine. On 21 June 2023, the Claimant shared with the Council and Welsh Ministers a legal opinion recording counsel's view that **[CB/7/695-727]**:

    a. it was arguable that the Council's and Welsh Ministers' eight-and-a-half month delay in taking enforcement action was unlawful.

    b. should MSWL appeal against the EN, it was strongly arguable that it would be unlawful for the Council and/or Welsh Ministers to fail to serve a stop notice to ensure the unlawful mining was brought to an end.

39. On 26 June 2023, MSWL appealed against the EN, with the effect that the EN would not now take effect until the final determination of the appeal. Unlawful coaling continues.

40. Coal Authority data published for Q2 2023 shows that, between 1 April and 30 June 2023, the Mine extracted 104,758 tonnes of coal **[CB/6/370]**, just short of the Q3 2022 total (the final period which included lawful mining) of 105,143 tonnes of coal **[CB/6/363]**. Cumulatively, MSWL has extracted more than 300,000 tonnes of coal unlawfully since September 2022, far exceeding the "remaining 240,000" it sought, and was refused, permission to extract **[CB/4/157]**.

41. On 4 July 2023, the Government Legal Department wrote to RBS on behalf of the Welsh Ministers to inform them that: i) an appeal had been lodged against the EN and ii) the Welsh Ministers were considering their powers to issue a stop notice and would decide how to proceed once the grounds of appeal were received on 17 July 2023 **[CB/7/730]**. The letter also noted that: *"Noting the complexity of this matter, any consultation which follows will be carried out within a reasonable time before any formal decision is made."*

42. On 6 July 2023, the Council wrote to RBS confirming that it was considering whether any further enforcement steps would be expedient in light of the appeal against the EN **[CB/7/731]**.

43. On 6 July 2023, activists associated with Extinction Rebellion blocked the entrance to the Mine in protest at the continuing unlawful extraction of coal and the failure of the enforcement authorities to take any effective action to bring it to an end **[CB/6/419-420]**. Four people were arrested on suspicion of aggravated trespass.

44. On 14 July 2023, the Coal Authority notified MSWL of their intention to serve a final enforcement order notice relating to a breach of operating licence arising from the removal of coal from beyond the licence area. The draft notice recorded that the contravention had occurred knowingly and was not of a trivial nature **[CB/3/93-98].**

45. On 17 July 2023, RBS sent a letter in accordance with the pre-action protocol for judicial review, indicating its intention to challenge the Council's and/or the Welsh Ministers': i) failure to proceed with reasonable expedition to decide whether it is expedient to serve a stop notice; or ii) decision that it is not expedient to serve a stop notice **[CB/7/732-742]**.

46. On 31 July 2023, the Council responded to the Claimant's pre-action letter **[CB/7/744-780]**. The Council's response crystallises the dispute by denying that it is under any duty to act with reasonable expedition in deciding whether to issue a stop notice. That denial appears to explain the Council's extensive delays throughout the consideration of this matter since September 2022. On the Council's case, a planning authority is entitled to take decisions on the expediency of enforcement action at its own leisure and on a timeframe that has no regard to the nature or seriousness of the harm caused by the breach of planning control. Indeed, the Council's pre-action response is characterised by a complete failure to identify or address the harm caused by the unlawful activity. The Council admits that i) it has not quantified the emissions resulting from the ongoing activity; and ii) it has not determined whether the activity is EIA development which is "currently a hypothetical question". That is plainly wrong because: i) the Council is under a duty under reg 35 of the Town and Country (Environmental Impact Assessment) Regulations 2017 to have regard to the need to secure compliance with the requirements and objectives of the EIA Directive when exercising their enforcement functions; and ii) pursuant to reg 37 of those Regulations, the Council ought to have adopted a screening opinion to determine if the unlawful activity amounted to EIA development before issuing the EN.

47. The Council maintains that, despite having conducted a full investigation prior to deciding it was expedient to issue an enforcement notice, it must take time to reconsider those matters in light of MSWL's appeal against that enforcement notice. The factors relied on by the Council to justify its delay include the economic and employment consequences of a stop notice and matters related to site stability. The former two issues have already been considered in the refusal of planning permission and in the decision that it was expedient to issue the EN. The latter issue can be managed by MSWL through the restoration activity permitted by the EN (i.e. a stop notice preventing the same activities as the EN would not prevent MSWL from carrying out works to alleviate site stability concerns).

48. The Council's pre-action response also highlights a curious misunderstanding of the law. The Council asserts that the breach of planning control "may be susceptible to enforcement action but is not in itself unlawful". That is wrong. Parliament has enacted legislation that requires planning permission for the

development of land. MSWL's development of land in breach of that statutory requirement is unlawful. Enforcement action is the means to ensure *compliance* with the law. The Council's misunderstanding of that arrangement is, perhaps, a further explanation for its failure to act with reasonable expedition to bring the breach of planning control to an end.

49. Notwithstanding the obvious urgency of this case, the Welsh Ministers failed to reply to the Claimants' pre-action correspondence within the prescribed 14 day period and only replied on 9 August 2023 **[CB/7/743,796-798]**. Their response indicates that they are considering whether to exercise their power to serve a stop notice and wrote to the Council on 3 August 2023 to commence the necessary consultations. However, their letter indicates a lack of urgency in doing so and defers to the Council's dilatory timetable for considering the range of issues arising for consideration. They deny that their duties under section 3 of the Wellbeing of Future Generations (Wales) Act 2015 have any bearing on the timetable for their decision making as enforcement authority.

50. The Welsh Ministers disclosed a redacted Ministerial briefing together with their pre-action response **[CB/7/799-809]**. [redacted]; iii) there is only £15 million set aside in an ESCROW account for the restoration of the site and it is estimated that £120 - £175 million is required.

THE LEGAL CONTEXT

Wellbeing of Future Generations (Wales) Act 2015 [CB/9/885-888]

51. Pursuant to section 3(1) of the Wellbeing of Future Generations (Wales) Act 2015 ("the 2015 Act") the Council and the Welsh Ministers are under a duty to carry out sustainable development.

52. Sustainable development is defined in section 2 of the 2015 Act as "*the process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle (see section 5), aimed at achieving the well-being goals (see section 4).*"

53. Section 5 of the Act provides that the sustainable development principle requires public bodies to "*act in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs*."

54. Section 4 of the Act lists the well-being goals, including:

Goal	**Description of the goal**
A prosperous Wales.	An innovative, productive and low carbon society which recognises the limits of the global environment and therefore uses resources efficiently and proportionately (including acting on climate change); and which develops a skilled and well-educated population in an economy which generates wealth and provides employment opportunities, allowing people to take advantage of the wealth generated through securing decent work.
…	…
A globally responsible Wales.	A nation which, when doing anything to improve the economic, social, environmental and cultural well-being of Wales, takes account of whether doing such a thing may make a positive contribution to global well-being.

55. Section 3(2) of the 2015 Act provides that in carrying out sustainable development, public bodies must set and publish objectives ("well-being objectives") that are designed to maximise their contribution to achieving each of the well-being goals, and must take all reasonable steps in exercising their functions to meet those objectives.

56. The Welsh Ministers have set well-being objectives **[CB/6/546-559]**, the seventh of which is to "*Build a stronger, greener economy as we make maximum progress towards decarbonisation.*" Well-being objective nine is to: "*Embed our response to the climate and nature emergency in everything we do*." These objectives have particular relevance in this context because they are referred to explicitly in the Coal Policy Statement (see below at para 90).

57. The Council has also set well-being objectives, including achieving *"A Clean and Green Merthyr Tidfil"* **[CB/x/514,539]**. That objective includes delivering a Council-approved net zero plan and *"using key enforcement rules to hold people to*

account". The Council maintains (erroneously) that the commitment to using key enforcement rules to hold people to account in the interests of achieving a clean and green Merthyr Tidfil applies only to "stubborn issues" such as fly tipping, but not to industrial scale coal mining without planning permission.

58. Statutory guidance has been issued to help public bodies implement their duties under the 2015 Act, including SPSF 1: Core Guidance and SPSF 2: Individual role (public bodies).

Planning permission and EIA

59. Planning permission is required for the carrying out of any development of land, including mining operations: section 57(1) Town and Country Planning Act 1990 ('**the 1990 Act**').

60. A planning authority must not grant planning permission or subsequent consent for EIA development unless an EIA has been carried out in respect of that development: Town and Country (Environmental Impact Assessment) Regulations 2017 ('**the 2017 Regulations**'). EIA development includes Schedule 1 development and Schedule 2 development that is likely to have significant effects on the environment. Schedule 1 development includes open-cast mining where the surface area of the site on which the Mine is located exceeds 25 hectares. Schedule 2 development includes any change to or extension of development of a description listed in Schedule 1.

61. Where it appears to a relevant planning authority that proposed development is Schedule 2 development, it must provide a written statement expressing the planning authority's opinion as to whether the development "*is likely to have significant effects on the environment*" and is thus EIA development: regs 2 and 8 of the 2017 Regulations. In reaching that opinion, the characteristics of the development must be considered with particular regard to certain factors set out in Schedule 3 of the 2017 Regulations, including pollution.

Enforcement powers

62. Part VII of the 1990 Act **[CB/9/856-883]** addresses enforcement of planning control. Section 171A(1) provides that a "*breach of planning control*" is constituted by:

"(a) carrying out development without the required planning permission; or

(b) failing to comply with any condition or limitation subject to which planning permission has been granted…".

63. Section 171A(2) provides, amongst other things, that the issue of an enforcement notice and the service of a breach of condition notice constitute "*enforcement action*".

64. Section 172 provides:

"(1) The local planning authority may issue a notice (in this Act referred to as an "enforcement notice") where it appears to them
(a) that there has been a breach of planning control; and
(b) that it is expedient to issue the notice, having regard to the provisions of the development plan and any other material considerations."

65. Section 182 (as applied to the Welsh Ministers by article 2 and schedule 1 of the National Assembly for Wales (Transfer of Functions) Order 1999) provides:

"(1) If it appears to the Secretary of State to be expedient that an enforcement notice should be issued in respect of any land, he may issue such a notice.
(2)The Secretary of State shall not issue such a notice without consulting the local planning authority.
(3)An enforcement notice issued by the Secretary of State shall have the same effect as a notice issued by the local planning authority."

66. The Planning Encyclopaedia at 182.02 **[CB/10/992]** notes that:

"[s]trictly, and in contrast to s.172, there are no express tests of it having to appear to the Secretary of State that there has been a breach of planning control and having to have regard to the provisions of the development plan and to any other material considerations. However, there is no good reason to infer that the Secretary of State could lawfully issue an enforcement notice without first applying these tests. They are of course very likely to arise in consultation with the local planning authority in any event."

67. In *R. (Hammerton) v London Underground Ltd* [2003] J.P.L. 984 Ouseley J. said at [139]:

"[a] lawful positive decision to the effect that it would not be expedient for the purposes of section 172 to issue an enforcement notice would eventually lead to the development in breach becoming lawful with the passage of time but of itself would not stop the permission lapsing. A lawful positive decision by a local authority cannot without more preclude the exercise by the Secretary of State of his default powers under section 182".

68. The "default powers" in *Hammerton* are referred to as "reserve power[s]" in *R. v Hereford and Worcester CC Ex p. Smith (Tommy)* [1993] 4 WLUK 79 [1994] C.O.D. 129. These phrases ("default powers" and "reserve power") indicate that while it may be a lawful approach for the Welsh Ministers normally to defer to a local planning authority in the first instance on enforcement matters, the Welsh

Ministers must not close their mind to the possibility, in an appropriate case, of taking enforcement action where a local planning authority is failing to exercise its enforcement powers as required by law or policy.

69. An enforcement notice must give 28 days notice before it takes effect (section 172(3)) and must specify the period at the end of which activities are required to have ceased (section 173(9)). If an appeal is made against the enforcement notice, the notice has no effect until the final determination or withdrawal of the appeal (section 175(4)).

70. Where there is non-compliance with an enforcement notice, then: i) the owner of the land is guilty of an offence, as is any person who has control of or an interest in the land who carries on or permits an activity required by the notice to cease (section 179); and ii) the local planning authority may enter the land and take the steps required to be taken by the notice, and recover the reasonable costs of so doing from the person who is owner of the land (section 178(1)).

71. Section 171E of the 1990 Act provides for the issue of a temporary stop notice in circumstances where the local planning authority thinks (a) that there has been a breach of planning control in relation to any land, and (b) that it is expedient that the activity (or any part of the activity) which amounts to the breach is stopped immediately. As explained in the explanatory memorandum to the Planning and Compulsory Purchase Act 2004, temporary stop notices are intended to give local planning authorities the means to prevent unauthorised development at an early stage without first having had to issue an enforcement notice. It allows them up to 28 days to decide whether further enforcement action is appropriate and what that action should be, without the breach intensifying by being allowed to continue.

72. Section 183 of the 1990 Act provides a planning authority with power to serve a stop notice where it considers it expedient that any activity specified in an enforcement notice should cease before the expiry of the period for compliance with an enforcement notice. The effect of a stop notice is to prohibit the carrying out of the activity. Section 184 of the 1990 Act provides that the notice must specify the date on which it will take effect and that date must not be earlier than three days after the date when the notice is served unless the planning authority considers there are special reasons for specifying an earlier date.

73. Section 185 of the 1990 Act (as applied to the Welsh Ministers by article 2 and schedule 1 of the National Assembly for Wales (Transfer of Functions) Order 1999) provides that a stop notice may be served by the Welsh Ministers, after consultation with the local planning authority.

74. Section 186 provides that, in certain circumstances, compensation may be payable for loss and damage directly attributable to the prohibition in the notice. However, compensation is not payable, *inter alia*:

    a. solely because an appeal against the underlying enforcement notice succeeds on ground (a) in section 174(2) of the 1990 Act e.g. solely because on appeal planning permission is granted; or

    b. in respect of the prohibition in a stop notice of any activity which, at any time when the notice is in force, constitutes or contributes to a breach of planning control.

75. In *Huddlestone v Bassetlaw District Council* [2019] PTSR at [26] Lindblom LJ highlighted that this provision reflects the thinking of Robert Carnwath QC, in his report of February 1989 '*Enforcing Planning Control*' that:

> "if the Act made clear that compensation will not in any circumstances be payable for a use or operation which is in breach of planning control, there would be less concern at the risks of a notice failing on a technicality, and the use of stop notices in appropriate cases would be encouraged": para 9.5."

Relevant case law

Discretion over enforcement

76. As a general rule, enforcement authorities enjoy a wide discretion as to the use or non-use of enforcement powers: see *R (Easter) v Mid Suffolk DC* [2019] EWHC 1574. In *R (Community Against Dean Super Quarry Limited) v Cornwall Council* [2017] EWHC 74 (Admin), Hickinbottom J. summarised the position as follows:

> "25. Where a developer is acting in breach of planning control, the statutory scheme assigns the primary responsibility for deciding whether to take enforcement steps – and, if so, what steps should be taken and when – to the relevant local authority. The statutory language used makes it clear that the authority's discretion in relation to matters of enforcement – if, what and when – is wide. That is particularly the case in respect of enforcement notices, the power to issue a notice arising only "where it appears to them… that it is expedient to issue the notice". That is language denoting an especially wide margin of discretion. Any enforcement decision is only challengeable on public law grounds. Because of the wide margin of discretion afforded to authorities, where the assertion is that the decision made is unreasonable or disproportionate,

> the court will be particularly cautious about intervening. Intervention is likely to be rare. However, circumstances may make it appropriate. In Ardagh Glass, because the four-year period for enforcement was imminently to expire, a failure on the part of the planning authority to take prompt enforcement steps would have meant that the development would achieve immunity. In that case, the court ordered immediate enforcement action to be taken."

77. In *Ipswich BC v Fairview Hotels* [2022] EWHC 2868 (KB), Holgate J. endorsed the statement of HHJ Mole QC in *Ardagh Glass Ltd v Chester City Council* [2009] EWHC 745 (Admin) **[CB/10/938-969]** that "expedience" indicates the balancing of the advantages and disadvantages of taking a particular course of action and said the following:

> "So, even though the authority may be satisfied that a breach of planning control has occurred, they may consider it not expedient to issue an enforcement notice because on balance the use causes no planning harm at all, or is beneficial, or may cause insufficient harm to justify the taking of any enforcement action. Alternatively, the authority's conclusions on expediency may determine the nature and extent of any enforcement action they decide to take."

78. As such, a decision on the expediency of enforcement action requires an active weighing of the advantages and disadvantages of enforcement. While the enforcement authority will have a wide margin of discretion in that exercise, it must address its mind to the question properly, and must reach a decision that is reasoned and lawful in public law terms.

79. In determining whether it is expedient to take enforcement action, an enforcement authority must take into account the development plan and other material considerations. However, there may be circumstances in which it is not only expedient but necessary to take enforcement action prior to a final determination of the planning merits of the unauthorised development. In *Ardagh Glass*, HHJ David Mole QC quashed the defendant council's decision that it was not expedient to serve an enforcement notice prior to a decision on planning permission and made a mandatory order requiring the council to issue an enforcement notice requiring the removal of unauthorised buildings. In that case, the developer had built and operated a glass factory without planning permission and without having carried out an EIA. It subsequently made a retrospective application for planning permission accompanied by an EIA to the local planning authority. The claimant and the local planning authority disagreed about the relevant date on which the development would become immune from enforcement action. In any case, the local planning authority was unwilling to issue an enforcement notice while it was considering whether to

grant planning permission and said it was "*for them to decide whether and when it is expedient to take enforcement action*".

80. The judge held at [46] that "*it would be a betrayal by the planning authorities of their responsibilities and a disgrace upon the proper planning of this country*" for the development to become immune from enforcement action while the local planning authority was considering whether to grant planning permission. He found at [64] that the local planning authority had erred in concluding it was not expedient to issue an enforcement notice. Separately, the judge concluded at [110] that to permit the development to achieve immunity would amount to a breach of the UK's obligations under the EIA Directive.

81. On appeal in the Court of Appeal [2011] PTSR **[CB/10/970-979]**, Sullivan LJ at [22] rejected the submission that the Court should also have made a mandatory order for the service of a stop notice. An enforcement notice was, he concluded, sufficient to ensure the removal of the unauthorised EIA development if retrospective planning permission was not granted.

82. In *An Application by Friends of the Earth Limited for Judicial Review* [2017] NICA 41 **[CB/10/980-988]**, the courts of Northern Ireland addressed a different situation where the service of a stop notice was arguably required. The case related to unauthorised extraction of sand from a freshwater lough which was considered likely to have significant effects on the environment. Under the applicable regime in Northern Ireland, the Department of the Environment served an enforcement notice on the landowner and those responsible for the extraction to cease the dredging of the lough. The enforcement notice identified specific concerns relating to compliance with the EIA Directive and the Habitats Directive. The landowner and those responsible for the extraction appealed against the enforcement notice, with the effect that it had no effect pending the final determination or withdrawal of the appeal, and the sand extraction continued. The Minister decided not to issue a stop notice because he considered it disproportionate "*where there is no evidence that dredging… is having any impact on the environmental features of the lough*". Friends of the Earth challenged that decision by way of judicial review, alleging that the failure to issue a stop notice was an unlawful exercise of the Minister's discretion.

83. At first instance, Maguire J. dismissed the claim, relying on the judgment of Sullivan LJ in *Ardagh Glass.* On appeal from the first instance judgment of Maguire J, the Court of Appeal in Northern Ireland distinguished *Ardagh Glass* as follows:

> "[30] Maguire J referred to paragraph [22] of Ardagh Glass Ltd as being in point in the present cases. There was an Enforcement Notice already in existence, the issue was whether a Stop Notice had to be served and there was also an appeal against the Enforcement Notice. It was stated that Sullivan LJ plainly viewed his conclusion on the point as not inconsistent with EU law and Maguire J stated that he was inclined to follow that view.
> [31] Maguire J rejected the proposed distinction of the decision in Ardagh Glass Ltd based on the possibility of rectifying the damage in Ardagh by requiring the building to be removed if planning permission was not granted, whereas in the present case it was not possible to return extracted sand.
> [32] This Court is of the opinion that there is a distinction to be made between Ardagh Glass Ltd and the present case and that it bears on the application of the principles to be applied. In Ardagh Glass Ltd it was found that the issue of an Enforcement Notice was sufficient to ensure the removal of the unauthorised development if retrospective planning permission was not granted. While the workings might continue in the meantime, it was recognised that ultimately, if necessary, the unauthorised development, in the form of the factory structure, could be removed. However the present case is different in character. There is no such structure to be removed in the event that planning permission is ultimately refused. The unauthorised development is the excavation which cannot be reinstated. Of course, as in Ardagh Glass Ltd, there will also be the ongoing operations at the site but the focus is on the structure rather than the workings. In the present case the issue of the Enforcement Notice will not be sufficient to ensure the removal of the unauthorised development in the form of the excavation between now and the refusal of planning permission. The material extracted is irreplaceable. Therefore the basis on which no Stop Notice was issued in Ardagh Glass Ltd does not apply in the present case."

84. The Court reasoned that the precautionary principle applied to the question of whether to issue the stop notice and operated on the basis that there should be no planning permission until it was established that there was no unacceptable impact on the environment: at [34] "*[t]he proper approach is to proceed on the basis that there is an absence of evidence that the operations are <u>not</u> having an unacceptable impact on the environment*" (emphasis in the original). Accordingly, the Court held that the decision to issue a stop notice was one over which the decision maker had discretion but – in the circumstances of that case – concluded that the discretion had been exercised unlawfully and quashed the decision.

EIA and enforcement

85. There are three further matters relevant in relation to EIA and enforcement.

86. First, decisions of the European Court of Justice in Case C-215/06 *Commission v Ireland* [2008] ECR I-4911 and the Court of Appeal in *R. (Ardagh Glass Ltd) v Chester City Council & Others* [2011] P.T.S.R. 1498 emphasise that it is only

exceptionally that retrospective planning permission can lawfully be granted for EIA development and crucially even then only if the developer does not obtain any improper advantage from having pre-emptively undertaken the development.

87. Secondly, the Council and the Welsh Ministers are under a duty to have regard to the need to secure compliance with the requirements and objective of the EIA Directive when exercising their enforcement functions: reg 35 of the 2017 Regulations.

Thirdly, the Welsh Ministers will in the context of the appeal that has been submitted against the EN need to undertake screening: see reg 40 of the 2017 Regulations.

THE POLICY CONTEXT

Development Management Policy [CB/8/810-815]

88. Paragraph 14.2.2 of the Development Management Manual provides that the carrying out of development without first obtaining permission should be discouraged, and that "*wilful disregard for the need for planning permission is not to be condoned.*" Paragraph 14.7.1 provides:

> "Where an LPA considers that an unauthorised development is causing unacceptable harm to public amenity, and there is little likelihood of the matter being resolved through negotiations or voluntarily, they should take vigorous enforcement action to remedy the breach urgently, or prevent further serious harm to public amenity."

89. In a letter dated 17 October 2018, the Chief Planner, Planning Directorate, Welsh Government emphasised the importance of timely use of enforcement powers ('**the Chief Planner's 2018 Letter**') **[CB/8/816-823]** and highlighted the serious risks posed to trust and confidence in the planning system of failures to take timely enforcement action. It notes:

> "An effective development management system requires proportionate and timely enforcement action to maintain public confidence in the planning system but also to prevent development that would undermine the delivery of development plan objectives.
>
> The Welsh Government enforcement review concluded, whilst the system is fundamentally sound, it can struggle to secure prompt, meaningful action against breaches of planning control. The system can also be confusing and frustrating for complainants, particularly as informed offenders can intentionally delay enforcement action by exploiting loopholes in the existing process…
>
> Section 3.6 of Planning Policy Wales is clear; enforcement action needs to be effective and timely. This means that Local Planning Authorities should look at all means available to them

to achieve the desired result. In all cases there should be dialogue with the owner or occupier of land, which could result in an accommodation which means enforcement action is unnecessary.

…Section 14.2 of the Development Management Manual… deals with how this policy should be implemented. Paragraph 14.2.5 is particularly useful in that it explains how the dialogue with the owner or occupier is one aspect of dealing with an enforcement case but it should not be a source of delay or indecision."

Coal policy in Wales

90. Welsh Government Policy on the extraction and use of coal is clear: "*the presumption will always be against coal extraction.*" This includes the extension of existing coaling operations. The Coal Policy Statement commences with a Ministerial Foreword which provides **[CB/8/844-853]**:

"The opening of new coal mines or the extension of existing coaling operations in Wales would add to the global supply of coal having a significant effect on Wales' and the UK's legally binding carbon budgets as well as international efforts to limit the impact of climate change. Therefore, Welsh Ministers do not intend to authorise new Coal Authority mining operation licences or variations to existing licences. Coal licences may be needed in wholly exceptional circumstances and each application will be decided on its own merits, but the presumption will always be against coal extraction.

Whilst coal will continue to be used in some industrial processes and non-energy uses in the short to medium term, adding to the global supply of coal will prolong our dependency on coal and make achieving our decarbonisation targets increasingly difficult. For this reason, there is no clear case for expanding the supply of coal from within the UK. In the context of the climate emergency, and in accordance with our Low Carbon Delivery Plan, our challenge to the industries reliant on coal is to work with the Welsh Government to reduce their reliance on fossil fuels and make a positive contribution to decarbonisation.

…

Planning Policy Wales (PPW 11) already provides a strong presumption against coaling, with the exception of wholly exceptional circumstances, and Local Planning Authorities are required to consider this policy in the decisions they make.

…

"The publication of this coal policy builds on our policies on petroleum, including hydraulic fracturing for petroleum extraction, and our marine plan – all of which underline the commitment of Welsh Government to oppose the extraction and use of fossil fuels and to support social justice in the economic transition away from their use. We will develop our policies further, reflecting the provisions of our Wellbeing of Future Generations Act and our Environment (Wales) Act. These Acts require the development of policy to reflect the need for our economy and society to live within environmental limits and to hand on the natural world in a better state than we found it to generations who will come after us."

91. It is then said later on in the Statement that the Welsh Ministers do not intend to authorise new Coal Authority mining operation licences or variations to existing licences save in exceptional circumstances and that "*Welsh Ministers will consider approval for individual licences in the context of the Well-being of Future Generations (Wales) Act 2015, our climate targets and energy policy*".

92. Planning Policy Wales (**"PPW"**) provides that proposals for opencast mines should not be permitted **[CB/8/834]**:

> "5.10.14 Proposals for opencast, deep-mine development or colliery spoil disposal should not be permitted. Should, in wholly exceptional circumstances, proposals be put forward they would clearly need to demonstrate why they are needed in the context of climate change emissions reductions targets and for reasons of national energy security."

93. PPW acknowledges that exceptionally proposals for industrial uses for coal might come forward and would need to be considered individually against, *inter alia*, the policies in the Minerals Technical Advice Note 2: Coal.

GROUNDS OF CLAIM

Context

94. Before addressing the specific grounds of claim, the Claimant sets out the context in which this claim arises.

MSWL has acted with a wilful disregard for the need for planning permission

95. Planning permission for the extraction of coal on the Mine expired on 6 September 2022. MSWL knew that any coaling beyond that date was in breach of planning control. The Council's refusal of the section 73 application on 26 April 2023 demonstrates, if there was any doubt, that the unauthorised development is unacceptable in planning terms.

96. Notwithstanding the absence of planning permission and the service of the EN, active coaling has continued and continues in the Mine. MSWL has adopted a deliberate strategy to use the planning system to its advantage to ensure it can continue to extract coal for as long as possible, notwithstanding the breach of planning control. It appears not to have been candid with the Council about its intention and subsequent action to continue active coaling in breach of planning control.

97. [redacted]

The unauthorised development is likely to be EIA development

98. The unauthorised development is likely to be EIA development because it is Schedule 2 development which is likely to have significant effects on the environment. It has not, however, been subjected to proper scrutiny under the EIA Regulations.

99. Although the Council's First and Second Screening Opinions concluded the proposed nine- and 18-month extensions were not EIA development, those screening opinions were plainly flawed. Both concluded that all the impacts of the proposed extensions to the Planning Permission had been assessed in 2005 when it was first granted. That was wrong. In particular, none of the carbon emissions attributable to the proposed nine- or 18-month extension had ever been assessed.

100. As the law currently stands it is not mandatory, in all cases, to assess the climate change effects of development as part of a screening opinion. However, in the context of national planning policy that imposes a strong presumption against coal development *precisely because of* its contribution to climate change, local planning authorities in Wales are required to address the climate change effects of proposed coal development at the screening stage. Those effects would necessarily have included the ongoing operational emissions of the mine, including methane emissions. They may also have included the downstream emissions of burning around half a million tonnes of extracted coal. As the Court of Appeal confirmed in *Finch v Surrey County Council* [2022] EWCA Civ 187 at [63], whether the downstream impacts of greenhouse gas emissions were "*indirect effects*" of the development that needed to be assessed was a matter of fact and judgement for the local planning authority. In the context of national planning policy that includes a strong presumption against coal development *on account of its downstream effects* on climate change, it is arguable that, in Wales, those effects must be assessed in the EIA process as a matter of policy; but it is clear that a local planning authority must at least *consider* whether to include those downstream effects in its consideration of the likely significant effects of coal development. Moreover, the Claimant reserves the right to seek to amend the claim when the Supreme Court's decision in *Finch* is issued.

101. In this case, the Council failed to address the climate change effects of the development at all in its Screening Opinions because it erroneously thought that all the effects of development had been considered and approved prior to granting the Planning Permission. The Council now accepts that it has not considered the climate change effects of the unlawful development and has not assessed whether the unlawful development is EIA development. While the Council contends that the consideration of these matters is merely "hypothetical" that is wrong. The degree of harm caused by the emissions attributable to the unlawful activity, and whether or not the activity amounts to EIA development is directly relevant to: i) the expediency of enforcement action; and ii) the need to act with reasonable expedition: see *Friends of the Earth*.

102. As explained in the witness evidence of Daniel Therkelsen, the daily emissions attributable to the unlawful activity are equivalent to 5% of the daily emissions of Wales **[CB/6/357]**.

103. While significance for the purposes of EIA is a matter of judgement, and there is no strict algorithm for assessing the significance of greenhouse gas emissions,[1] it is highly likely that the Council would have concluded that that scale of greenhouse gas emissions was likely to have significant effects on the environment. Indeed, exceedingly few developments would have greenhouse gas emissions approaching this level.

104. In any case, the First and Second Screening Opinions were premised on the Council's 2005 conclusion that the impacts of development were acceptable "*subject to mitigation and limitations provided by planning conditions*". The *unauthorised* development that is currently taking place in the Mine is not subject to any mitigation or limitation provided by planning conditions or otherwise. It is wholly unauthorised and therefore wholly unconstrained. As a result, the First and Second Screening Opinions do not answer the question of whether the *unauthorised* development is EIA development.

[1] See the Institute of Environmental Management & Assessment (IEMA) Guide: *Assessing Greenhouse Gas Emissions and Evaluating their Significance*, Second Edition, February 2022.

105. For all these reasons, the unauthorised development is likely to be EIA development.

The harm caused by the unlawful activity is not capable of remedy.

106. If the breach in this case related to the erection of an unauthorised structure that could be removed at the conclusion of a prolonged enforcement process, that would be one thing. But this case relates to the ongoing extraction of coal. As in the *Friends of the Earth* case, the ongoing breach of planning control can never be remedied: the coal cannot be put back into the ground; the greenhouse gas emissions attributable to the unlawful activity can never be un-emitted.

107. On account of the fact the Council cannot, at a future date, reasonably require MSWL to "put back" the coal extracted without permission, there is no risk of significant future expenditure for MSWL in returning the land to its former state (beyond what is already required by the restoration plan which forms part of the Planning Permission). Without effective enforcement, MSWL can enjoy the profits of its unauthorised coaling without the risk of having the gross receipts confiscated under the Proceeds of Crime Act 2002 (see *R v Luigi del Basso* [2011] 1 Cr. App. R. (S.) 41).

The Council and Welsh Ministers delayed unreasonably in issuing an enforcement notice

108. Upon receiving reports of a breach of planning control in September 2022, the Council failed to conduct the investigations required to confirm that the unlawful extraction of coal, at an industrial scale, was continuing. As a result, it appears that the Council was not aware of the unlawful activity until January 2023. Since 30 January 2023 at the latest, the Council knew or ought to have known that:

    a. There had been a persistent breach of planning control at the Mine because active coaling had continued without any significant pause since 6 September 2022.

    b. That breach of planning control was serious because it involved an activity that is *prima facie* contrary to the Welsh Government's strong presumption against coal development.

c. That strong presumption: i) exists because of the significant effect of new or extended coal development on Wales's and the UK's legally binding carbon budgets as well as international efforts to limit the impact of climate change and ii) supports the achievement of the well-being goals.

109. Notwithstanding this knowledge, the Council did not conduct any investigation into the scale or nature of the unlawful activity and did not take any steps preparatory to enforcement until it had determined the Planning Application. It adopted the inflexible position that – because a planning application was pending for the activity – it would first consider whether it would grant planning permission before considering enforcement. It identified 26 April 2023 as the date on which the Planning Application would be considered and determined that enforcement action would only be considered after that date. That approach was arguably unlawful because it amounted to the fettering of a statutory discretion and/or because it amounted to a failure to discharge duties under s. 3 of the 2015 Act, and/or because was irrational in the circumstances.

110. In any case, whether it was unlawful or not, it had the *de facto* effect of granting (essentially) all the benefits of the Planning Application for the initial nine-month extension, with none of the mitigations that might ordinarily be imposed through planning conditions or obligations. Even if an enforcement notice were served on 27 April 2023, it could not take effect until 25 May 2023, some 12 days short of the end of the nine-month period for which planning permission was initially sought.

The Council's and Welsh Ministers' failures effectively to enforce against the breach of planning control has undermined public confidence and brought the planning system into disrepute.

111. The Welsh Government has declared a climate emergency. In the context of that climate emergency, it has adopted a policy that applies a strong presumption against any new coal extraction. That policy is intended to support the achievement of the statutory well-being goals and protect the rights of future generations.

112. MSWL has been extracting coal, with no planning permission, for 11 months. It has demonstrated a "*wilful disregard for the need for planning permission*" which the Development Management Manual says should not be condoned.

113. The factors in favour of urgent enforcement action in this case are therefore even more compelling than in *Friends of the Earth*. By contrast to that case, the planning harm of the unauthorised development is confirmed by the refusal of permission. The effect of the Council's and Welsh Ministers' current enforcement approach is to allow an extensive period of coaling, when the activity is contrary to national and local planning policy and causes demonstrable harm in planning terms, and demonstrable harm to the achievement of the national well-being goals and the Council's and Welsh Ministers' well-being objectives.

114. Astonishingly, despite having powers to do so, the Council and the Welsh Ministers have failed to take the steps necessary to bring the unlawful coal mining to an end. This is exactly the situation the Chief Planner sought to discourage through his 2018 letter and the exact opposite of the "*vigorous enforcement action to remedy the breach urgently*" encouraged by the Development Management Manual. In the 1989 Report that formed the basis for the enforcement regime introduced in Part VII of the 1990 Act, Robert Carnwath QC suggested three primary objectives for an effective enforcement system **[CB/6/563]**:

    a. bringing an offending activity within planning control;

    b. remedying or mitigating its undesirable effects; and

    c. punishment or deterrence.

115. The approach of the Council and Welsh Ministers in this case has failed to achieve any of those objectives. As a result, unlawful coaling continues while MSWL appeals against the EN. In the absence of a stop notice, MSWL will have enjoyed the full benefits of the 18 month extension to the Planning Permission it was refused, with none of the attendant mitigations or obligations that might have been imposed through a section 73 permission.[2] That is, MSWL is – through the Council's and Welsh Ministers' failure to enforce planning control – in a

[2] If the Council had concluded that "wholly exceptional circumstances" had been made out, it might reasonably have been expected to require the mitigation of the climate change effects of the extension by, for example, requiring the developer to offset its emissions.

better position than it would have been if it had been granted planning permission.

116. The Claimant understands the Council has received more than 7000 pieces of correspondence, and the Welsh Ministers more than 2000 pieces of correspondence, demanding they take effective enforcement action. Their failure to do so has fundamentally undermined public trust and confidence in the planning system, as highlighted in the witness statements of [redacted] and Daniel Therkelsen.

117. In particular, the Court's attention is drawn to the stark difference in treatment of: i) MSWL by the Council and the Welsh Ministers, who have permitted them to extract coal unlawfully for profit for 11 months without any consequence, and ii) climate activists arrested for aggravated trespass within a day of trying to prevent the continuation of the unlawful coaling at the Mine. The Claimant does not invite the Court to condone the trespass, but the circumstances illuminate a deep unfairness that undermines public confidence in the planning system, encourages protestors to act outside that system, and brings the entire system into disrepute.

118. Put simply, if national and local governments want to discourage climate protestors from taking the law into their own hands, they need to provide the public with confidence that they are capable of enforcing the law themselves. Climate friendly policies are meaningless without effective enforcement.

Ground 1(a): The failure of the Council to decide whether it is expedient to serve a stop notice is unlawful.

119. The Council's failure to proceed with reasonable expedition to decide whether it is expedient to serve a stop notice is unlawful in the circumstances of this case.

120. As set out above, the Council has had – or ought to have had – knowledge of the ongoing unlawful activity since 30 January 2023. It has had ample opportunity to conduct any investigations considered necessary and appropriate to understand the full facts of the unlawful activity in the Mine.

121. On 27 April 2023, the Council refused planning permission for the continued extraction of coal at the Mine. It did so on the grounds, *inter alia*, that MSWL had failed to demonstrate that further extraction was required: in the context of decarbonisation and climate change emission reduction; to ensure the safe winding-down of mining operations or site remediation; or that the extraction contributes to Welsh prosperity and a globally responsible Wales.

122. The EN was issued on 24 May 2023, some eight and a half months after the ongoing breach of planning control commenced. Before issuing the EN, the Council conducted an enforcement investigation which included engagement with MSWL. It decided it was expedient to issue the EN, notwithstanding the economic and employment consequences, and notwithstanding other negative impacts of enforcement. At the date of service of the EN, the Council and the Welsh Ministers were aware of a significant risk of an appeal by MSWL. Such an appeal would suspend the operation of the EN and enable the unlawful extraction of coal to continue pending the outcome of the appeal. In those circumstances, the Council was legally obliged to reach a decision on whether it was expedient to serve a stop notice by 24 May 2023, the date the EN was issued; alternatively, by 27 June 2023, the date when the EN was to take effect in the absence of an appeal by MSWL; alternatively by 25 July 2023, the date by which compliance with the EN was required in the absence of an appeal by MSWL, and one full week after receipt of MSWL's statement of case for its appeal against the EN.

123. The obligation (rather than mere discretion) to have taken a decision on expediency by these alternative dates arises from:

    a. the obligation to act with reasonable expedition when exercising the powers in section 183 of the 1990 Act in light of the highly unusual factual context as set out above at paras 95 – 118;

    b. the duty to discharge enforcement functions rationally and having regard to the need to secure compliance with the requirements and objectives of the EIA Directive; and

    c. the duties on the Council under s. 3 of the 2015 Act when exercising its functions as an enforcement authority under Part VII of the 1990 Act.

124. The duty to act with reasonable expedition in this case is implicit in the scheme of the 1990 Act and the 2017 Regulations:

    a. Parliament has decided that planning permission is required for the development of land;

    b. Parliament has decided that EIA and/or EIA screening is required for EIA development or potential EIA development;

    c. Parliament has conferred on the Council and the Welsh Ministers the power to take enforcement action against potential EIA development carried out without planning permission and without screening or EIA.

125. Within this scheme, the Council has a discretion as to whether to take enforcement action (subject to the constraints of public law). But it is implicit within the scheme that the *decision as to whether* to take enforcement action must be taken within a period when enforcement is still capable of effectively avoiding the planning harm. In the case of unauthorised building, that period may align with the period beyond which the unauthorised building is immune from enforcement: see *Ardagh Glass.* By contrast, in the case of extractive development that is likely EIA development, where the harm is ongoing and irremediable, that period is substantially shorter and requires the enforcement authority to act with reasonable expedition to determine the expediency of enforcement action to bring that ongoing irremediable harm to an end.

126. The Council's position that there is no duty to act with reasonable expedition in the circumstances of this case is unarguable. The Development Management Manual and the Chief Planner's 2018 Letter reflect Parliament's intent expressed through the scheme of the 1990 Act that enforcement authorities will take decisions on the expediency of enforcement action within a period that ensures any enforcement action can effectively avoid the planning harm. If enforcement authorities are entitled, as the Council claims, to take decisions on the expediency of enforcement action on whatever timeframe they chose, it would fundamentally undermine the planning and EIA systems. Indeed, the amendments made in the 1990 Act to the previous stop notice provisions which applied under the Town and Country Planning Act 1971 were introduced in

response to the Carnwath Report precisely to respond to the perceived problem of a lack of urgency in bringing breaches of planning control to an end: see **[CB/6/565-577]**. Moreover, the Council is under a duty under reg 35 of the 2017 Regulations to have regard to the need to secure compliance with the requirements and objectives of the EIA Directive when exercising its enforcement functions. In circumstances where an ongoing breach of planning control likely constitutes EIA development and causes demonstrable harm to the environment, it is plainly not lawful for an enforcement authority to fail to act with reasonable expedition to consider a) whether the development is EIA development and b) whether it is expedient to take enforcement action to secure compliance with the requirements and objectives of the EIA Directive.

127. The duty on the Council to act with reasonable expedition in the circumstances of this case also arises from the Council's duties under section 3 of the 2015 Act. Section 3 imposes substantive duties which impose an obligation on the Council:

    a. to carry out sustainable development, which includes taking action to achieve the wellbeing goals, including the goals set out at para 54 above. In its refusal of planning permission, the Council has already concluded that the continuation of coal extraction at the Mine in inconsistent with sustainable development and with those wellbeing goals.

    b. to take all reasonable steps in exercising their functions to meet the well-being objectives they have set for themselves. For the Council that means taking all reasonable steps to achieve a "*clean, green Merthyr Tidfil*" including by "*using key enforcement rules to hold people to account*". Although the Council contends that its commitment to using key enforcement rules to hold people to account applies only to "stubborn issues" like fly tipping, the wellbeing objective to which the commitment relates the objective to create a "clean green Merthyr Tidfil", an objective that acknowledges climate change as a central feature.

128. The relevance of the duties in s. 3 of the 2015 Act to the discharge of any statutory function will vary, as will the relevance or weight to be attached to the achievement of each well-being goal or objective. But, where relevant, the well-

being goals and objectives must not only be taken into account but must be given *special weight* in the exercise of the Council's functions.

129. In the context of the Council considering the expediency of serving a stop notice to prevent continued, unlawful coal mining that has been ongoing for more than 11 months, the section 3 duties point in one direction only. They demand the **prompt** exercise of planning enforcement functions to bring to an end activity which fundamentally undermines the achievement of sustainable development and the wellbeing goals and objectives set out above. This requires the Council to proceed with reasonable expedition in the exercise of their enforcement functions, consistently with the scheme of the 1990 Act, the Development Management Manual, and the Chief Planner's 2018 letter.

130. The Council claims that the issues now raised in MSWL's appeal against the enforcement notice require careful consideration before deciding on the expediency of serving a stop notice. In particular, they highlight: i) the economic and employment consequences of a stop notice; and ii) site stability issues.

131. As to the economic and employment consequences, the Council determined – when refusing planning permission and again when deciding it was expedient to issue the EN – that the employment and economic benefits of continued extraction did not justify the planning harm. It did so aware of the fact that refusal of permission could result in the end of employment for significant numbers of workers and could further hamper restoration efforts: see the Planning Statement for the s 73 application **[CB/4/125].** While MSWL is entitled to raise these issues again on appeal against the EN, these are not new matters for the Council to consider. The Council's reliance, in pre-action correspondence, on the *Friends of the Earth* case as supporting their claim to need time to consider the employment and economic impacts of a stop notice is misguided. In *Friends of the Earth,* there had been no decision on planning permission and these matters had not previously been considered by the planning authority.

132. As for site stability issues, it is surprising – to say the least – that MSWL appears to have raised these for the first time in their appeal against the EN and the Council appears to have been previously unaware of them. Nonetheless, all of the site stability concerns raised by MSWL in their Statements of Case can be addressed within the terms of the EN. The EN permits works necessary to

deliver the approved restoration and management strategy, provided it does not involve the extraction of coal from the land edged red on the EN. Groundworks necessary to ensure site stability, including groundworks involving the movement of coal around the site, are permitted by the EN: see paras 5-7 of the witness statement of Matthew McFeeley **[CB/6/442-443]**.

133. Further or alternatively, to the extent that there are new and real issues requiring consideration by the Council before deciding on the expediency of serving a stop notice, the Council has had ample time to consider those issues, to engage with MSWL and with the Welsh Ministers, and to reach a conclusion on expediency. Their failure to do so is inconsistent with the scheme of the 1990 Act, inconsistent with their duties under section 3 of the 2015 Act, and irrational.

134. To the extent the Council relies on such "new" issues as justifying their delay, they are required to disclose all relevant material indicating: i) the dates on which those new issues were first brought to their attention; ii) if they were not aware of those issues before the issue of the EN, why not; and iii) the steps taken to conduct, and the relevant dates for, investigations into those new issues. Further, if the Council contends that it is engaging with MSWL to explore options [redacted] and leaving the site before the site is substantially restored, it is required to disclose: i) the options being explored; and ii) why service of a stop notice to prevent the demonstrable planning harm would prevent the delivery of those options.

Ground 1(b): The failure of the Welsh Ministers to decide whether it is expedient to serve a stop notice is unlawful

135. The Welsh Ministers' failure to proceed with reasonable expedition to decide whether it is expedient to serve a stop notice is unlawful in the circumstances of this case.

136. As set out above, the Welsh Minsters have had – or ought to have had – knowledge of the ongoing unlawful activity since March 2023. It has had ample opportunity to consult with the Council and conduct any investigations considered necessary and appropriate to understand the full facts of the unlawful activity in the Mine.

137. The EN was issued on 24 May 2023, some eight and a half months after the ongoing breach of planning control commenced. The Welsh Ministers were aware that no stop notice had been issued and the time for compliance in the EN allowed a further two-month period of unlawful coaling. At that stage, the Welsh Ministers were legally obliged to consult with the Council with a view to ensuring the Council served a stop notice, or considering the expediency of serving a stop notice itself. Alternatively, that duty arose on 26 June 2023, when MSWL's appeal was submitted. In breach of that obligation, the Welsh Ministers took no steps to consult the Council until 3 August 2023 and have since unlawfully deferred to the Council's dilatory timetable for considering the expediency of further enforcement action.

138. The obligation (rather than mere discretion) to consult with the Council and consider the expediency of serving a stop notice by the alternative dates set out above arises from:

    a. the obligation to consider exercising the "reserve" or "default" powers in section 185 of the 1990 Act with reasonable expedition, after having identified that the Council was failing to discharge its enforcement functions effectively in the highly unusual factual context as set out above at paras 95 – 118;

    b. the duty to discharge enforcement functions rationally having regard to the need to secure compliance with the requirements and objectives of the EIA Directive; and

    c. the duties on the Council under s. 3 of the 2015 Act when exercising its functions as an enforcement authority under Part VII of the 1990 Act.

139. As confirmed in *Hammerton* and *ex p Smith (Tommy),* the Welsh Ministers hold "reserve" or "default" powers of enforcement under the 1990 Act. The primary enforcement authority is the relevant local planning authority but the Welsh Ministers have independent and self-standing powers to take enforcement action when the local planning authority decides not to do so, or fails to take any decision within a reasonable period of time. That arrangement is prescribed by Parliament to ensure a backstop where local planning authorities fail to discharge their enforcement functions effectively in cases of serious breaches of

planning control, including where a failure to enforce might bring the planning system into disrepute.

140. In the highly unusual factual context set out above at paras 95-118, the Welsh Ministers obligation to consider exercising the "reserve" or "default" powers in section 185 of the 1990 Act was triggered by the Council's failure to issue a stop notice together with the EN and/or upon MSWL's appeal.

141. The duty on the Welsh Ministers to do so was reinforced in the circumstances of this case by the Welsh Ministers' duty to have regard to the need to secure compliance with the requirements and objectives of the EIA Directive when exercising their enforcement functions, and the Welsh Ministers' duties under section 3 of the 2015 Act. Section 3 imposes substantive duties which impose an obligation on the Welsh Ministers:

    a. to carry out sustainable development, which includes taking action to achieve the wellbeing goals, including the goals set out at para 54 above.

    b. to take all reasonable steps in exercising their functions to meet the well-being objectives they have set for themselves. For the Welsh Ministers that means taking all reasonable steps to "*Build a stronger, greener economy as we make maximum progress towards decarbonisation.*" And to: "*Embed our response to the climate and nature emergency in everything we do*." These objectives have particular relevance in this context because they are referred to explicitly in the Coal Policy Statement.

142. Where the Welsh Ministers were fully aware of MSWL's lengthy, brazen and ongoing breach of planning control, and where that breach fundamentally undermined the achievement of sustainable development and the wellbeing goals and objectives set out above, the duty to "embed [their] response to the climate and nature emergency in everything [they] do" required prompt consideration of the expediency of serving a stop notice, consistent with the scheme of the 1990 Act, the duty to exercise enforcement functions having regard to the need to secure compliance with the requirements and objectives of the EIA Directive, the Development Management Manual, and the Chief Planner's 2018 letter. The Welsh Ministers' contention that the section 3 duties might bite on the exercise of *whether* it is expedient to serve a stop notice but not on the timing of

when to consider whether it is expedient to serve a stop notice is unarguable. Both questions are constituent parts of the exercise of the Welsh Ministers' enforcement functions, in relation to which the section 3 duties apply.

143. The Welsh Ministers' contention that the "*complexity of this matter*" required delay beyond the dates set out at paragraph 137 above is without merit. This matter is not complex; it is straight-forward and one of the clearest examples imaginable where "*prompt, meaningful action against breaches of planning control*" is required. Moreover, the Welsh Ministers and the Council have had many months to conduct any investigations considered necessary and appropriate to understand the full facts of the unlawful activity at the Mine. Ignoring the results and judgements reached after those investigations (refusal of planning permission; issue of the EN) and treating the question of expediency of serving a stop notice as a matter to be considered from scratch is irrational.

144. Further or alternatively, notwithstanding the Welsh Ministers' belated decision to exercise their functions under section 185 of the 1990 Act and to consult the Council, the Welsh Ministers' pre-action response appears to indicate an unlawful deference to the Council's dilatory timeframe. Having decided to consider the exercise functions under section 185 of the 1990 Act, the Welsh Ministers were and are obliged to act with reasonable expedition. Should the Welsh Ministers claim they have done so, they are required, as part of their duty of candour, to disclose all relevant material, created since March 2022, evidencing engagements with the Council and MSWL on this matter, and all steps taken to conduct, and the relevant dates for, investigations into the relevant issues.

Ground 2: the decision of the Council to decide it was not expedient to serve a stop notice is unlawful.

145. In the alternative, to the extent the Council has decided that it is not expedient to serve a stop notice, such a decision is unlawful. Although the Council denies that such a decision has been taken, paragraph 33 of the Ministerial briefing disclosed by the Welsh Ministers [redacted]

146. If such a decision has been taken, the Claimant contends it is unlawful. The Claimants submit that the only lawful decision on expediency in the circumstances of this case is that it was necessary and expedient to serve a stop notice together with the EN, and it has remained necessary and expedient to do so since that date. The Claimants may apply to amend this ground upon disclosure of further material.

INTERIM RELIEF

147. On account of the irremediable daily harm caused by the ongoing breach of planning control, the effect on public confidence of the Council's and Welsh Ministers' enforcement inaction, and the refusal of the Council and the Welsh Minister to commit to any fixed timeframe within which they will take a decision on expediency, the Claimant seeks urgent interim relief in the form of a mandatory order:

    a. Requiring the Council to consider whether it is expedient to serve a stop notice in relation to the ongoing breach of planning control and to inform the Court and the Parties of its decision within seven days;

    b. If the Council informs the Court and the Parties that it considers it expedient to serve a stop notice, requiring the Council to serve such a notice within a further period of seven days;

    c. If the Council informs the Court and the Parties that it considers it not to be expedient to serve a stop notice, requiring the Welsh Ministers to consider whether it is expedient to serve a stop notice and to inform the Court and the Parties of its decision within seven days;

    d. If the Welsh Ministers inform the Court and the Parties that it considers it expedient to serve a stop notice, requiring the Welsh Ministers to serve such a notice within a further period of seven days.

148. The Claimants attach draft directions with a view to a hearing on the first available date after 20 August 2023. The interim relief hearing will, of course, be unnecessary if, in their responses to the application for interim relief:

a. the Council commits to take a decision on the expediency of serving a stop notice by 28 August 2023 and, if it decides it is expedient to do so, to serve the notice by 31 August 2023; and

b. the Welsh Ministers commit, in the event the Council fails to take a decision in accordance with paragraph (a) above or decides not to serve a stop notice, to take a decision on the expediency of serving a stop notice by 4 September 2023 and, if it decides it is expedient to do so, to serve the notice by 8 September 2023.

FINAL REMEDY

149. The Claimant seeks:

a. A declaration that

i. the Council and Welsh Ministers acted unlawfully by failing to proceed with reasonable expedition in deciding whether it was expedient to serve a stop notice to bring the ongoing unlawful activity at the Mine to an end; alternatively

ii. The Council acted unlawfully by deciding it was not expedient to serve a stop notice to bring the ongoing unlawful activity at the Mine to an end; alternatively

iii. The Council and Welsh Ministers acted unlawfully by failing to serve a stop notice to bring the ongoing unlawful activity at the Mine to an end.

b. An Aarhus Costs Order;

c. Costs.

9 August 2023

JAMES MAURICI KC
Landmark Chambers

TOBY FISHER
Matrix Chambers