ABERGELLI POWER LIMITED ("the Applicant")

WRITTEN SUMMARY OF THE APPLICANT'S ORAL CASE PUT AT THE DEVELOPMENT CONSENT ORDER ("DCO") ISSUE SPECIFIC HEARING

WEDNESDAY 10 OCTOBER 2018 at 14:00

1. BACKGROUND

1.1 The Issue Specific Hearing ("**ISH**") was held on 10 October 2018 at 14:00 at The Village Hotel, Langdon Road, Swansea, SA1 8QY. The ISH followed the agenda contained in Annex H to the Examining Authority's ("**ExA**") Rule 6 Letter dated 12 September 2018 ("**the Agenda**"). The format of this note follows that of the Agenda.

2. AGENDA ITEM 2 – INTRODUCTION OF THE PARTICIPATING PARTIES

2.1 The ExA: - Planning Inspector, Martin Broderick.

2.2 The Applicant:

2.2.1 Speaking on behalf of the Applicant: - Nick McDonald (Legal Director at Pinsent Masons LLP).

2.2.1 Present from the Applicant: - Chris McKerrow (Stag Energy, project managers for the Applicant)

2.2.2 The Applicant's consultants and legal advisors: - Kate Jones (Pinsent Masons LLP) and Richard Lowe (AECOM, consultant for the Applicant).

2.3 The following parties participated in the ISH:

2.3.1 City and County of Swansea ("**CCS**"): - Andrew Ferguson (Principal Planning Officer).

2.3.2 Natural Resources Wales ("**NRW**"): - Hannah Roberts and Louise Edwards.

2.3.3 Loxley Solicitors: - Richard Price representing Wynne Watkins, Rediplay Limited and Michael Edwards.

3. **AGENDA ITEM 4 – DEVELOPMENT CONSENT ORDER ARTICLES**

Ref	Issue raised by the ExA	Applicant's Response
1.	Article 2, definition of "maintain"	**CCS** raised concerns regarding the breadth of the definition and in particular the words "remove, reconstruct, replace". CCS was concerned that this could allow the Applicant to remove the majority of the generating station, leaving a small section and changing the rest. He was particularly concerned that the word "remove" could allow the decommissioning strategy secured in requirement 27 to be circumvented. **The Applicant** explained that it had discussed the definition and requirement 27 with CCS earlier that day, and that the Applicant was currently considering the need to include additional wording in requirement 27 to ensure that the decommissioning strategy requirement was triggered by the substantial removal of the generating station. The Applicant committed to include wording in the revised DCO submitted for Deadline 1. Beyond this, the definition of "maintain" is identical to the definition used in other DCOs granted to date and includes wording to address concerns raised by CCS, which expressly excludes from its scope the replacement of the whole of the generating station. The definition is also caveated, and any maintenance activities undertaken must be within the parameters of what has been assessed in the ES. Should the Applicant do anything outside of the scope of what was described and assessed as expected maintenance activities in the ES, it would be in breach of the DCO and enforcement powers would take effect. The Applicant also referred to the general principle in development control that a planning permission or consent only authorises construction of the development once – it does not permit re-building - a fresh consent (in this case a new DCO) would be required. This principle is outlined in the Encyclopaedia of Planning Law and Practice, at Volume 2, at P75.04, stating, "*The fact that permission may enure in perpetuity does not mean that the same development may be carried out more than once. The carrying out of operational development, or the making of a material change in the use of land, involves a sequence of events which has a beginning and an end."*

		In *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985]* A.C. 132 it was held that provided that the development is still capable of being implemented, it is not to be taken to have been abandoned merely because operations have been suspended, even for a lengthy period of time. However, in *James Hay Pension Trustees Ltd v First Secretary of State* [2006] J.P.L. 1004, WIlkie J. in his obiter dicta at [44]-[45] stated that the general principle in *Pioneer Aggregates* does not extend to the position where the development in question is completed or spent. Therefore, once the Applicant has completed the construction of the Project, it would not be able to rebuild it in reliance on the DCO, a new consent would be needed. Copies of the cases referred to and an extract from the Encyclopaedia of Planning Law and Practice are enclosed at Appendices 1 - 3 for the ExA's reference. **CCS** confirmed that CCS would look again at the definition of “maintain” and would liaise with the Applicant prior to Deadline 1. **NRW** had no comments on the definition. [*Post Hearing Note*: The ExA is referred to the updated draft DCO submitted by the Applicant for Deadline 1, which contains updated wording for Requirement 27. In addition, the ExA is referred to the Explanatory Notes to accompany the revised draft DCO which explain the changes made.]
2.	Article 2, definition of "commence"	**The Applicant** confirmed that it considers that the definition is appropriate. It allows a limited range of initial works to take place on site prior to the definition taking effect through the Requirements. The preliminary works that the definition permits were considered in the ES and the nature of the exclusions is similar to what the Secretary of State has included in previous DCOs. **CCS** and **NRW** had no comments on the definition.
3.	Article 6 (Benefit of this Order)	**The Applicant** explained that this is included in the DCO so that the benefit of the DCO rests solely with the Applicant, subject to the terms of Article 7. This ensures that section 156 of the Planning Act 2008 ("**PA 2008**") is disapplied so that the development consent does not ‘run with the land’. This is considered to be appropriate given the nature of this development, as a generating licence is required to operate a generating station of

		this size. It is therefore appropriate that the benefit of this DCO is specific to the Applicant. **CCS** and **NRW** had no comments on this article.
4.	Article 7 (Consent to transfer benefit of the Order)	**The Applicant** explained that this article sets out the ability for the Applicant to transfer the benefit of the DCO. The benefit of the order can be transferred only with the consent of the Secretary of State, unless specific circumstances apply, where the approval of the Secretary of State is not required. The exceptions are considered by the Applicant as appropriate and are present in a number of DCOs. They specifically relate to transfer without the Secretary of State's approval where either a) the person receiving the benefit is a gas or electricity undertaker; or b) where all matters relating to compulsory acquisition and compensation have been dealt with and there are no further potential claims and therefore there are no remaining potential compensation liabilities that can lie with Applicant. **The ExA** requested that precedents for the drafting of Article 7 be set out in the written summary of the Applicant. The Applicant notes that Article 39 of the Wrexham Gas Fired Generating Station Order 2017, Article 40 of the Hirwaun Generating Station Order 2015 and Article 43 of the Eggborough Gas Fired Generation Station Order 2018 are in similar terms to article 7 in the Applicant's draft DCO.
5.	Part 3	**The Applicant** explained that Part 3 of the DCO provides for appropriate powers in respect of streets, including public and private highways. It provides the Applicant with power to carry out works (which are relatively minor in nature), to ensure that the Project can be delivered. **CCS** commented on the scope of the powers included and questioned whether they will impact on ecology or drainage. The Applicant confirms that all the relevant highways works have been described in and assessed as part of the Environmental Statement accompanying the application.
6.	Part 4: Article 17 (Authority to survey and investigate the land)	**The ExA** asked the applicant to address the 14 day notice period in Article 17. **The Applicant** explained that the purpose of Article 17 is to allow the Applicant access to land to carry out surveys prior to works commencing. There have been other DCOs with similar 14 day

		notice periods (including Article 16 of the Silvertown Tunnel Order 2018 and Article 15 of the Eggborough Gas Fired Generating Station Order 2018), and this period ensures that the Applicant can expeditiously carry out activities to bring forward the project in a timely fashion. It is anticipated that in practice there would be considerably more informal engagement taking place between the Applicant and land owners prior to the formal notice being given. **Loxley Solicitors** raised the concern on behalf of landowners that 14 days' notice may be onerous where they may have to remove livestock to facilitate such access and surveys and therefore, additional time would be required. **Loxley Solicitors** suggested a preference of 28 days notice. **The Applicant** undertook that it would consider the request and revert with a response in the draft DCO at deadline 1. [*Post Hearing Note*: Article 17 has been updated in the draft DCO submitted at Deadline 1 to allow 28 days' notice]
7.	Part 5	**The Applicant** explained that it has adopted a position which is similar to other DCOs regarding the overall approach. The Applicant is seeking Compulsory Acquisition powers over the whole of the Order Land as shown on the land plans. The Applicant is not seeking to acquire the freehold of all of the land. New rights are sought instead of freehold acquisition where this would be sufficient to enable the Project to be constructed, operated and maintained, and is also seeking power to use land temporarily where appropriate. This approach has been designed to be a proportionate response and to minimise the interference with the rights of the existing landowners. In Wales, the Secretary of State cannot grant development consent for associated development for an energy generating station with a capacity of under 350MW, therefore including the Project. Planning applications for the gas connection and the electrical connection have therefore been prepared and submitted separately to CCS as the local planning authority under the Town and Country Planning Act 1990. The draft DCO seeks compulsory acquisition powers for land required for the gas and electrical connections. Section 122 of the Planning Act 2008 expressly permits land acquisition that "*is required to facilitate or is incidental to*" the development to which the development consent

		relates. This approach of a DCO providing for compulsory acquisition powers for development consented separately under a planning permission has been adopted in previous DCOs in Wales, including the Hirwaun Generating Station Order 2015 and the Wrexham Gas Fired Generating Station Order 2017 (see paragraph 4.4 of the Secretary of State's decision letter). Paragraph 3.26 of the Secretary of State's decision letter on the Hirwaun Generating Station Order 2015 states: "*Whilst the Secretary of State has decided that the gas connection (and related AGI) and the electrical connection should not be included in the Order… the Secretary of State considers tha the CA powers in relation to these elements may be included in the Order as on the basis that the requirements for the inclusion of CA powers in relation to these elements are met, in particular the requirement in the 2008 Act that the land is required to "facilitate" or is "incidental to" the Development."* **The ExA** asked the Applicant to explain the rationale for the width of the Order Land for the Gas Connection, which appears very wide in places. **The Applicant** explained that the route of the gas connection requires crossing of three high pressure gas pipelines in two locations, and that the Order Land includes sufficient working areas to ensure that construction can be accommodated with all necessary safety and protective measures during construction (including sufficient space to allow space for horizontal directional drilling or similar construction techniques, if required. **The ExA** asked the Applicant to explain the approach to seeking compulsory acquisition powers in light of the fact that there is an option agreement in place over part of the Order Land. **The Applicant** explained that there is an option agreement in place in relation to part of the Order Land, and that the expectation is that this will be used to provide the Applicant with the required interests in land. However, the Applicant is seeking Compulsory Acquisition powers to ensure that the Project can be delivered in the event of failure of the option agreement or the need to extinguish adverse rights over the land. Examples of how the option agreement could fail include the contract not being honoured or the owner lacking capacity to complete the lease. The compulsory acquisition powers ensure that the Applicant can deliver the Project in these circumstances, in a timely way. **Loxley Solicitors** noted that he intends to make separate representations to the compulsory

		acquisition hearing for his clients. In relation to the draft DCO, Loxley Solicitors requested that in light of the need for separate planning permissions to be granted for the gas connection and electrical connection, there should be provisions to limit the powers in the DCO from being exercised until the relevant permissions have been granted. **The ExA** commented that the planning applications for the gas connection and electrical connection had been submitted to CCS and validated on 25th September 2018. The ExA confirmed that the relationship between the Order Land and Order Limit is complicated and that it would be of assistance to the examination if the Applicant could explain the relationship between the Order Land and the Order Limits in written submissions and in the Compulsory Acquisition hearings. [*Post Hearing Note:* Please see the note at Appendix 4, which explains the relationship between the Order Land and the Order Limits]
8.	Part 6	**CCS** commented on Article 35(4), questioning whether any additional removal of hedgerows falls within the EIA limits. **The Applicant** explained that Article 35 is in the form of a power commonly included in DCOs to remove hedgerows. It is combined with Article 44, which disapplies the Hedgerow Regulations on the basis that there is no need for a separate control through those Regulations, in addition to the assessment of issues through the DCO process. The power in Article 35 takes effect subject to the Requirements in Schedule 2, and does not override the control in the requirements. For example, anything done pursuant to Article 35 is subject to the Landscape and Ecological Mitigation Strategy, secured by Requirements 3 and 9. **The Applicant** confirmed that there are two Important Hedgerows and one non-important hedgerow affected by the proposed development. The hedgerows are shown on the Hedgerow Plan (Document Reference APP-055]) and the Important Hedgerows are those listed in Schedule 10 of the draft DCO, B-B and C-C.
9.	Part 7 – Certification of Plans	**The Applicant** explained that the list of plans in Article 40 includes all of the plans referred to in the DCO and the draft Requirements, and that this provision is included as it is good practice to identify the plans approved by the Secretary of State and to ensure that it is clear to the Applicant, the relevant local planning authority and other interested parties which are the correct versions of

		the key documents. The Applicant notes that as drafted there appears to be some duplication, as some of the plans listed are appendices to the ES. The Applicant therefore will clarify this article in the draft DCO submitted at Deadline 1, to avoid duplication in the list. [*Post Hearing Note:* We refer the ExA to the updated drafting at Article 40 in the draft DCO submitted by the Applicant at Deadline 1]
10.	Article 42 (Procedure in relation to certain approvals)	**The ExA** invited CCS to explain their concerns in relation to Article 42. **CCS** stated CCS is more concerned with Schedule 12 than Article 42. CCS considers that there should be a right of appeal for the Applicant arising at the expiry of the time period in the article and in the Schedule, rather than a default position of deemed approval. **The Applicant** explained that Article 42 applies to all approvals under the DCO apart from the Requirements. The Article provides for an 8 week period for consideration of applications for approvals and if no decision has been made at the end of that period, then the application is deemed to be approved. The Article requires the Applicant, when submitting an application, to notify the approving body as part of the application of the time period for determination and to make the approving body aware of the consequences (deemed approval) if no decision is made within the 8 week period. The Applicant considers that the fixed time periods and deemed approval position are necessary to ensure the timely delivery of the project. Approving bodies who are not satisfied with the application submitted for approval have the ability to request further information and to refuse the application if they remain unsatisfied. In the event of a refusal, it is then for the Applicant to consider whether to submit an appeal or to revise the application and to resubmit. The risk and consequences of a refusal sit with the Applicant. The deemed approval provision ensures that if an approving body does not engage with an application (notwithstanding that they have been made aware of the consequences) or determine within 8 weeks, then the Project is not held up. **CCS** suggested that Article 42 should also require the Applicant to state on the face of an application for an approval which Article of the DCO is engaged. **The Applicant** confirmed that the Applicant had no objection to including wording to this effect in

		the draft DCO. [*Post Hearing Note:* We refer the ExA to the updated drafting at Article 42 in the draft DCO submitted by the Applicant at Deadline 1]

4. **AGENDA ITEM 5 – SCHEDULE 1 AUTHORISED DEVELOPMENT**

Ref	Issue raised by the ExA	Applicant's Response
11.	Work No. 3	**The ExA** questioned the status of the bridge in Work No. 3. **The Applicant** clarified that it believed this should refer to Work No. 2, where the new section of Access Road will need to cross over the water main, a disused oil pipeline and drain around the same area. This area will need a bridge to protect the existing infrastructure from damage during construction. The ES explained that the assessment had assumed a worst case scenario of a temporary bailey bridge structure up to 5m in height for construction, replaced eventually by a permanent structure forming part of the access road. The Applicant has considered the design of the crossing of the water main and oil pipeline further recently, and considers there may be a benefit in bringing forward a permanent solution earlier in the construction period. Whilst it is a matter of detailed design, the final form of the permanent structure is likely to be a structure which is far smaller than a 5m bailey bridge, and with correspondingly lower environmental impacts. This final structure will be a bridge in engineering terms, but it would appear largely as part of the Access Road. It would include protection along the sides as necessary. This is a matter of detailed design which has not yet been determined and there may be no need for the bailey bridge at all, or it may be needed for a shorter period than assessed in the ES. **CCS** queried whether parameters of the bridge should be included in the DCO. **The ExA** then questioned how quickly detailed design will develop. **NRW** stated detailed design must be in line with the LEMS in relation to allowing permeability for

		species underneath barriers etc. **The Applicant** indicated that it would be possible to include parameters for the permanent bridge in the draft DCO. [*Post Hearing Note:* discussions are ongoing and as such parameters are not yet available, but the Applicant will update the Examining Authority once it is in a position to do so.]
12.	Access Road being integral to the development	**The ExA** asked how the access road is integral to the development. **The Applicant** explained that the site chosen for the generating station is not immediately adjacent to the public highway. It would be impossible to construct, operate or maintain the generating station without a proper means of access. It is a required function of a generating station to be able to get to it safely and without restrictions at all times. Therefore the access road is integral to the project.

5. **AGENDA ITEM 6 – SCHEDULE 2 REQUIREMENTS**

Ref	Issue raised by the ExA	Applicant's Response
13.	Agenda Item 6.1 - Consideration of the Use of Management Plans	
14.	Requirement 8 (Pre–construction ecological constraints survey)	**CCS** expressed concern that as drafted, there were no timescales attached to the carrying out of the pre-construction surveys, which meant in theory there could be a lengthy period of time between completion of the surveys and works commencing. **NRW** commented that if any protected species were found during the surveys, a licence would be required from NRW, and that is not currently reflected in the wording of the requirement. NRW considered there was potential for Requirement 8 to be combined with Requirement 3. **The Applicant** thanked CCS and NRW for the helpful comments and clarified that Requirement 8 was not intended to have the effect of permitting pre-construction ecological surveys to be done with no link to when

		construction activities would in fact commence. The Applicant committed to review Requirement 8 and to consider whether the wording could be amended to address the concerns raised. The Applicant anticipated being in a position to provide an update to the wording in the revised DCO submitted for Deadline 1. Regarding the linkage between Requirement 3 and 8, it may as a matter of practice be the same submission required to discharge 3 and 8 if they are so closely related. However, Requirement 3 covers the long term maintenance and management of ecological areas, and it may be the case that whilst pre-construction surveys have been completed, all the information required for the approval of the LEMS might not be available, so the Applicant may want to keep them separate to ensure timing of discharge can operate separately. The Applicant anticipated providing updated Schedule 2 at Deadline 1. **NRW** stated if the Requirements have to be kept separate, needing an EPS license is missing from the Requirement itself. [*Post Hearing Note:* The Applicant's proposed revision to Articles 3 and 8 is set out in the draft DCO submitted by the Applicant at Deadline 1]
15.	Requirement 17 (Construction environment management plan ("**CEMP**"))	**The ExA** asked the Applicant to explain the status of the CEMP. **The Applicant** explained that the ES includes an outline CEMP at Appendix 3.1. It is not anticipated by the Applicant that this would change materially during the course of examination. It is there to provide a framework for the future approval of a detailed CEMP and provide clarity on the information that will need to be included in the detailed plan later on. The Applicant continues to discuss this requirement with CCS. **CCS** and **NRW** each confirmed that they were happy with the content. **The Applicant** explained that it does anticipate some minor updating as revised pollution prevention guidance has recently been published, and the outline CEMP was prepared prior to the publication of that. It will therefore be updated to refer as appropriate to the new guidance. [*Post Hearing Note*: The ExA is referred to the updated outline CEMP submitted by the Applicant at Deadline 1 which is at Appendix 5]

16.	Requirements 17, 18. 19 and 20	**The ExA** asked the Applicant to explain the purpose of these requirements and questioned the apparent overlap. **The Applicant** clarified that there is currently a drafting error in Requirement 17, 18, 19 and 20. Requirement 17 should refer to every work except for Work No. 5 (earthworks). Requirements 18, 19 and 20 should be drafted to refer only to Work No. 5. The Applicant has provided for the earthworks as a separate work to ensure that they can be progressed in advance of detailed design of the generation station building being finalised. These matters had been clarified to CCS earlier in the day. **CCS** commented that CCS would review the revised drafting, but has a residual concern that some of the topics listed in the CEMP in Requirement 17 would be required for Work No. 5 (earthworks), such as a complaints procedure. **NRW** would also like to review the revised wording and consider further. The CEMP covers construction lighting and this would still be of relevance to the earthworks. [*Post Hearing Note:* Please see the updated drafting of requirements 17 – 20 in the draft DCO submitted by the Applicant at Deadline 1]
17.	Requirement 23 (Construction hours)	**CCS** explained that the pollution control officer has noise concerns regarding the start and shut down period. **The Applicant** explained that during the start up and shut down period, normal construction works would not be taking place. This was intended to allow construction workers to arrive on site, attend toolbox talks and collect their PPE. This is considered to be reasonable and is considered in the ES. **The Applicant** explained that the Noise Assessment in the ES was on the basis of the normal working day (so represented a worst case) and had not considered the start up/shut down period as no noisy activities are anticipated to take place. Mr Lowe suggested that the DCO could include a definition in Article 2 of start up and shut down to make this clear. **Loxley Solicitors** commented that, given proximity of works to his clients' residential properties, any definition should explicitly preclude the operation of plant and machinery during the start up and shut down periods. [*Post Hearing Note:* Please see additional definitions added to Article 2 of the draft DCO submitted by the

		Applicant at Deadline 1]
18.	Requirement 27(2) (Decommissioning Strategy) – "relevant permissions"	**The ExA** highlighted that the wording of Requirement 27 is subject to the applicant obtaining necessary consents for decommissioning. There are no consents listed in the Other Consents and Licences document for the decommissioning period. Whilst there can be no guarantees of what will be required in the future, it would be helpful if the Applicant could produce for the Examination a list of what consents and licences would be required if decommissioning plant of this nature today. **The Applicant** agreed that the Applicant would do so at Deadline 1. [*Post Hearing Note:* Please see the attached list of consents and licences that would currently be required for decommissioning at Appendix 6.]
19.	Agenda Item 6.3 – Plant output of 299 MWe	**The ExA** questioned how the current draft DCO contains mechanisms to ensure that the 299 megawatts generating capacity is not exceeded. **The Applicant** explained that Schedule 1 of the draft DCO requires that the "rated electrical output" of the generating station does not exceed 299MWe. This wording has been carefully chosen because it exactly replicates the wording in the Carbon Capture Readiness (Electricity Generating Stations) Regulations 2013 (CCR Regulations). The CCR Regulations provide that the Secretary of State must not grant a DCO for the construction of a combustion plant with a "rated electrical output" of 300 megawatts or more (unless he has determined whether the "CCR conditions" are met in relation to that combustion plant). Using exactly the same language ensures that in granting the DCO as drafted, the Secretary of State will be fully in compliance with the CCR Regulations (and therefore does not need to determine whether the "CCR conditions" are met). Therefore, the Applicant proposes that this wording is retained unchanged in the DCO, if granted. The Applicant's view is that the words rated electrical output mean maximum output which the plant is "rated" to produce. The ISO 2314 sets out an industry standard methodology for rating gas fired generating stations. The output of a gas generating station will vary depending on the specific site and the ambient conditions, so ISO 2314 sets out reference ambient conditions (pressure, temperature and humidity) (by reference to ISO 2533). Therefore, a plant with a rated electrical output of 299MWe will always comply with the DCO and CCR Regulations because the rated electrical output will always be exactly that, 299MWe. The "rated" output of a plant is fixed by reference to these standard reference conditions. This ensures all plant can be clearly procured and fairly compared. Therefore a plant procured with a rated electrical output

		of 299MWe will always comply with Schedule 1 of revision 2.0 of the draft DCO (and the CCR Regulations) because the rated electrical output will always remain exactly 299MWe. **The ExA** requested for the ISO 2314 to be included in the application. Should the 299 megawatts be exceeded, the Applicant would be outside of the terms of the DCO and subject to enforcement action. [*Post Hearing Note:* For Copyright reasons, it has not been possible to supply a full copy of the ISO 2314 to the examination. It is available for download/purchase here (https://www.iso.org/standard/42989.html)]
20.	Agenda Item 6.4: Environmental Permit	**The ExA** asked NRW questions in relation to the Environmental Permit. **NRW** indicated that the NRW permitting team would need to provide the response. **The ExA** asked the Applicant if they could clarify what the worst case scenario was that was modelled for the Environmental Permit and the Environmental Statement **The Applicant** confirmed that 2250 hours was modelled, as the plant is to operate up to 2250 hours in any 1 year but subject to a 5 year rolling average of 1500 hours. 2250 represents the worst case scenario.
21.	Agenda Item 6.5 - Time limit for generating station operation	**CCS** explained that CCS seeks a time limit upon the operation of the generating station. CCS consider that a time limit is needed as the ES is written on the basis of an assumed operational lifetime of 25 years. CCS noted that some of the strategies have been based on a 25 year operational period and that if there is not a mechanism to force the plant to cease operation at 25 years, then there is a risk that some of the assessments being made would be inaccurate. **The Applicant** explained that the Applicant does not consider it necessary to impose a time limit for operation of the plant. The ES has considered the form and parameters of the development and taken a 25 year life as a reasonable worst case for assessment purposes, based upon the expected 25 year design life of the plant proposed. It is not uncommon for power station equipment to be capable of operating for longer than the design life if properly and regularly maintained. The selection of the 25 years operational period is a sensible and realistic period included in the ES to provide a basis in which the assessment can be done. It is necessary to make assumptions to allow the

		assessments to be carried out. The Applicant suggested that a sensitivity analysis could be done to demonstrate that in the event that the operational life of the project were to exceed 25 years, the conclusions in the ES would still remain the same. The Applicant will provide a document for Deadline 1 which considers this topic by topic. **NRW** confirmed that the Environmental Permit wouldn't have an end date for operation, but would be regularly reviewed as part of regulatory control. [*Post Hearing Note:* Please see Appendix 7 for the Applicant's sensitivity analysis document considering the effect of an operational life longer than 25 years].
22.	Agenda Item 6.6 – Bond for decommissioning Requirement	**CCS** explained that CCS is concerned that the estimated costs of decommissioning this plant are in the region of £2million. There are examples in the Swansea area of previous mining uses which have left a legacy of sites that have not been properly decommissioned. CCS considers that the enforcement provisions in section 161(b) of the PA 2008 are not sufficient if the plant is not decommissioned in accordance with Requirement 27. A financial penalty would not be adequate, and fines are capped at £50,000. In addition, it would take some time to decommission. **The Applicant** explained that it does not consider that it is necessary to provide a bond or other financial security for future decommissioning costs. The Applicant considers that Requirement 27 provides a clear and enforceable mechanism to secure the carrying out of the necessary decommissioning works within a fixed period from the plant ceasing to operate. The Applicant is considering amendments to the draft requirement to add in further detail requested by CCS as to the required content of the decommissioning strategy (which is intended to be similar in detail to the way the CEMP requirement is drafted). The Applicant considers that the enforcement mechanisms in the Planning Act 2008 are stringent. Criminal liability is an immediate consequence of a breach of Requirement 27. The obligation to decommission and the liability for it sits with the undertaker, and cannot pass to a third party without the consent of the Secretary of State (save to an already regulated gas or electricity licence holder). The Proceeds of Crime Act 2002 also allows local authorities to seek to recover the profits accruing to businesses and individuals who breach planning control, and part of the money recovered is retained by the relevant local planning authority. This has been used successfully by planning authorities recently to recover substantial sums via

		confiscation orders. A list of examples is set out in Appendix 8. Where the government has considered that it is necessary for future decommissioning costs to be secured, regimes have been put in place. Examples can be found in relation to decommissioning bonds in other industries, such as for nuclear generating stations, and for offshore renewable installations. There is no equivalent international treaty obligation or UK legislation in place to mandate the provision of financial security for decommissioning of onshore gas fired power stations. There is also no national policy requirement for decommissioning bonds to be offered by applicants. Neither NPS EN-1 nor NPS EN-2 requires an applicant to provide financial security for decommissioning costs for energy projects of this nature. The Applicant has fully complied with the NPS policy requirements that the likely impacts of decommissioning must be properly assessed as part of the application documentation. The Applicant has considered decommissioning impacts in depth in its Environmental Statement. There is no other UK Government or Welsh Government policy in relation to the provision of financial security for decommissioning gas fired generating stations. Planning Policy Wales (PPW) does not include any relevant policy on financial security for decommissioning and remediation. The adopted CCS local plan and the emerging development plan do not contain any policies which would require the Applicant to offer a decommissioning bond. The Applicant explained that it is not aware of any DCOs granted for gas generating stations or electricity transmission projects which have required financial security to be put in place for the costs of decommissioning the development. **CCS** confirmed that Planning Policy Wales contains no policies at all which refer to NSIPs, and the CCS adopted development plan is from 2008, prior to the Planning Act 2008 coming into force. CCS noted that PPW does consider mining and the legacy of disused mining sites. [*Post Hearing Note:* Please see the revised drafting of Requirement 27 in the updated draft DCO submitted by the Applicant at Deadline 1]
23.	Agenda Item 6.7 – Discharging, Monitoring and Enforcement payments	**The Applicant** confirmed that the Applicant is happy to include a fee for discharging each Requirement. [*Post Hearing Note:* Please see the new paragraph 3 inserted into Schedule 12 in the updated draft DCO

		submitted by the Applicant at Deadline 1]

6. **AGENDA ITEM 7 – SCHEDULE 11 PROTECTIVE PROVISIONS**

Ref	Issue raised by the ExA	Applicant's Response
24.	**The ExA** asked for an update in relation to the protective provisions contained in Schedule 11.	**The Applicant** provided an update. The Applicant is in discussions with National Grid Gas plc, National Grid Electricity Transmission Plc, Western Power Distributions, DCC/Welsh Water, Wales and West Utilities and Abergelli Solar Limited regarding the terms of the Protective Provisions to be included in the draft DCO and is also in discussions regarding commercial side agreements that may be necessary between the Applicant and the statutory undertakers to provide for any further terms to be agreed between them. In each case, the Applicant is aiming to have the protective provisions and side agreements agreed and submitted to the Examination before the end of the 6 month examination period.

7. **AGENDA ITEM 8 – SCHEDULE 12**

Ref	Issue raised by the ExA	Applicant's Response
25.	Applications made under requirements	**CCS** stated the default position for the approval/discharge of Requirements should not be 8 weeks as there could be various reasons why a decision cannot be made within the 8 weeks, leading to refusals that are unnecessary. CCS could be forced into refusing applications. CCS suggested that instead of a deemed approval, the Applicant should have the right to appeal against non-determination after 8 weeks, should a decision not be made. CCS consider that this is necessary to ensure that the decision making complies with the requirements of the EIA Regulations for proper consideration of environmental information. CCS further suggested that there could be a further 4 week period of 'dual jurisdiction' beyond the date when the right to appeal arises where CCS can still determine the application even if an appeal has been lodged to allow for time savings if CCS subsequently approves the details submitted. **The Applicant** explained that the Applicant does not consider it necessary to make changes to Schedule 12. A deemed approval process is considered appropriate when seen in the overall context of the DCO.

		The 8 week period starts when the application is received to discharge the requirement, but is deferred if further information is requested by CCS. There is further ability for CCS and the Applicant to agree an extension. Where an extension has been agreed between the parties, deemed approval will not be operate until the expiry of the agreed extension. This allowance for agreed extensions is similar to how the Town and Country Planning Act 1990 currently operates regarding discharging conditions. In relation to the concerns raised by CCS as to compliance with the EIA Regulations, the Applicant is obliged to include a report and a statement as to whether the details submitted for approval are likely to give rise to any new or materially different environmental effects to those reported in the ES. If the application does give rise to new effects, the deeming provisions do not apply. The Applicant explained that CCS as relevant planning authority also has the ability to decide at its discretion if there are potentially different environmental effects likely to arise than those reported by the Applicant. If CCS takes the view that there could be new or different environmental effects, the deemed approval procedure does not apply. To provide the Applicant with certainty of timescales, the 8 week period is considered reasonable. The NPS establishes that there is an urgent need for new gas generating stations. Timely delivery of the necessary discharges of requirements is therefore an important mechanism for the delivery of the project. In practice, the Applicant considers there are likely to be considerable pre-application discussions between the parties and relevant statutory consultees before applications to discharge requirements are submitted, which will provide a significant opportunity for discussion and resolution of issues prior to submission. If CCS feels driven to reject an application prior to the 8 week period to avoid deemed approval (as was indicated as a concern by CCS), this is a risk to the Applicant and its programme, not CCS, and it is open to the Applicant at that juncture to decide whether to lodge an appeal against refusal or whether to amend the application and resubmit. In the Applicant's view it is necessary for there to be a backstop position of deemed approval.
	Request for further information	**CCS** stated that from CCS' perspective, some requirements require CCS to consult with other bodies and therefore 14 days is insufficient. It was requested that paragraph 2(2) is amended to 28 days for CCS to respond. The Applicant has agreed this with CCS and will update paragraph 2(2) accordingly in the updated draft DCO to be submitted at Deadline 1. [*Post Hearing Note:* Please see the updated draft DCO submitted by the Applicant at Deadline 1].

8. AGENDA ITEM 9 – SECTION 106 AGREEMENTS

Ref	Issue raised by the ExA	Applicant's Response
26.	Status of the section 106 agreement	There is an advanced draft s106 agreement in circulation between the Applicant and CCS. The draft has already undergone more than one round of comments between the parties. There have been meetings held between the Applicant and CCS to discuss the heads of terms, and meetings are scheduled for this week to explore in more detail the topics to be covered by the development consent obligations. **CCS** outlined the heads of terms to the ExA: • Education Scheme – there is a meeting scheduled for 11 October to discuss the Education Scheme in more detail. • Employment Scheme – the Council has a scheme called "Beyond Bricks and Mortar" and the Applicant is engaging with the Council over the drafting. • The County Ecologist has requested items in the s106 by way of ecological mitigation. The Applicant and planning officers at CCS consider that the items requested do not meet the tests for planning obligations. Discussions are ongoing. • Public Rights of Way - CCS has requested contributions towards improvements to the PROW network. Discussion is ongoing. **The Applicant** stated its view that the parties are capable of reaching agreement on the principles of the s106 agreement in the coming weeks and that the agreement will be completed well before the end of the examination. [*Post Hearing Note:* a working draft of the s106 agreement is attached as Appendix 9]
27.	Living wage proposals	**The ExA** asked CCS whether the Council has any living wage proposals in its current or emerging Local Plan. **CCS** were not aware that there is a living wage policy but undertook to confirm the position.

9. APPENDICES

Appendix	Title
Appendix 1	Extract from the Encyclopaedia of Planning Law and Practice, at Volume 2, at P75.04
Appendix 2	*Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985]* A.C. 132
Appendix 3	*James Hay Pension Trustees Ltd v First Secretary of State* [2006]
Appendix 4	Note from the Applicant to explain the relationship between the Order Land and the Order Limits
Appendix 5	Updated outline Construction and Environmental Management Plan (Revision 1)
Appendix 6	Note from the Applicant to explain which consents and licences would currently be anticipated to be required for decommissioning
Appendix 7	Applicant's sensitivity analysis document considering the effect of an operational life longer than 25 years
Appendix 8	Examples of confiscation orders under the Proceeds of Crime Act 2002 for breaches of development control
Appendix 9	Working draft s106 agreement

Appendix 1

Extract from the Encyclopaedia of Planning Law and Practice, at Volume 2, at P75.04

Encyclopedia of Planning Law and Practice

Volume 2

Part 2B - Statutes: Town and Country Planning Act 1990

Part III – Control Over Development

Section 75

75.— Effect of planning permission [or permission in principle]

(1)

P75.01

Without prejudice to the provisions of this Part as to the duration, revocation or modification of planning permission [or permission in principle], any grant of planning permission [or permission in principle] to develop land shall (except in so far as the permission otherwise provides) enure for the benefit of the land and of all persons for the time being interested in it.

(2)

Where planning permission is granted for the erection of a building, the grant of permission may specify the purposes for which the building may be used.

(3)

If no purpose is so specified, the permission shall be construed as including permission to use the building for the purpose for which it is designed.

Amendment

The words in square brackets in the heading and subs.(1) were inserted by the Housing and Planning Act 2016 (Permission in Principle etc) (Miscellaneous Amendments) (England) Regulations 2017 (SI 2017/276) reg.3(3), with effect from 27 March 2017.

Definitions

P75.02

"building": s.336(1).

"erection": s.336(1).

"land": s.336(1).

"planning permission": s.336(1).

"use": s.336(1).

General Note

Planning permission runs with the land

P75.03

Planning permission normally resembles a property right which attaches to the land rather than to the applicant personally. Conditions imposed on a permission are registrable as local land charges under the Local Land Charges Act 1975 (except for conditions or limitations imposed before the commencement of that Act, and those imposed on any deemed permission whenever granted: see s.2(e) of that Act).

But there are three exceptions to the general rule:

1. planning permission obtained by an "interested" planning authority for development by that authority under reg.4 of the Town and Country Planning General Regulations 1992 (SI 1992/1492) enures only for the benefit of that authority and not for the benefit of the land (reg.9). This rule formerly applied to all local planning authorities, but it was disapplied in 1998 to unitary councils in England and Wales (SI 1998/2800), and therefore now applies only to two-tier authorities (counties and districts in England). Where a joint developer was specified in the planning application, the permission will enure also for the benefit of that other person.

2. the former immunity from planning control in respect of development by the Crown was personal to the Crown, and does not extend to persons deriving title from or under the Crown. That immunity was, however, carried over to such persons by s.294(1) which prohibited the issuance of an enforcement notice in respect of any development carried out by or on behalf of the Crown, whether or not the Crown retained any interest in the land (see further *Newbury District Council v Secretary of State for the Environment [1977] J.P.L. 373* at 375–376, per Goff J Div Ct). Action may still be taken against war-time contraventions within five years of the disposal by the Crown of its interest, under s.302 (formerly the Building Restrictions (War-Time Contraventions) Act 1946). However, s 294 was subsequently repealed by the Planning and Compulsory Purchase Act 2004 Sch.9, para.1.

3. the general rule may be expressly excluded under subs.(1), thereby creating a personal permission. The Secretary of State has advised authorities (DOE Circular 11/95, The Use of Conditions in Planning Permissions, para.93) that it is seldom desirable to limit a per mission to the applicant or to any other named individual, but that there may be occasions:

> "… where it is proposed exceptionally to grant permission for the use of a building or land for some purpose which would not normally be allowed at the site, simply because there are strong compassionate or other personal grounds for doing so."

Circular 11/95 (WO 35/95) was cancelled and replaced on 6 March 2014 by the introduction of the Planning Practice Guidance (PPG). WO 35/95 was replaced in Wales by WGC 16/2014, The Use of Planning Conditions for Development Management, in October 2014. The PPG now confirms:

> "There may be exceptional occasions where granting planning permission for

development that would not normally be permitted on the site could be justified on planning grounds because of who would benefit from the permission. For example, conditions limiting benefits to a particular class of people, such as new residential accommodation in the open countryside for agricultural or forestry workers, may be justified on the grounds that an applicant has successfully demonstrated an exceptional need.

A condition used to grant planning permission solely on grounds of an individual's personal circumstances will scarcely ever be justified in the case of permission for the erection of a permanent building, but might, for example, result from enforcement action which would otherwise cause individual hardship.

A condition limiting the benefit of the permission to a company is inappropriate because its shares can be transferred to other persons without affecting the legal personality of the company."

The most effective way of imposing a personal restriction is through an express condition (a model condition appears in DOE Circular 11/95), and non-compliance with the condition may then be liable to enforcement action as a breach of planning control under s.171A(1)(b). The courts have been reluctant to imply a personal restriction from words of limitation not expressed as conditions: see, e.g. *Williamson and Stevens v Cambridgeshire County Council (1977) 34 P. & C.R. 117; [1977] J.P.L. 529* where the Lands Tribunal held that a permission for a gipsy caravan site "for the Huntingdon and Peterborough County Council" could not on a proper construction be regarded as a personal permission. Similarly, in *Carpet Decor (Guildford) Ltd v Secretary of State for the Environment [1981] J.P.L. 806*, Sir Douglas Frank, Q.C. (sitting as a deputy judge of the High Court) held that a permission which had been granted on an application for the construction of storage vaults for use by the applicant "but for no other type of store or for any other person or corporation" could nonetheless be relied on by persons deriving title under the applicant, notwithstanding a condition to the effect that no variations from the deposited plans and particulars would be permitted unless previously authorised by the local planning authority. A grant of consent under a tree preservation order, unless and to the extent that it otherwise provides, enures for the benefit of the land to which the order relates and of all persons for the time being interested in it (Town and Country Planning (Trees) Regulations 1999 (SI 1999/1892), Sch.2 to the Model Tree Preservation Order).

Planning permission and "second-bite"development

P75.04

One consequence of the provisions of subs.(1) that planning permission enures for the benefit of the land is that there can be no doctrine of abandonment of planning permission (on abandonment of uses see the commentary to s.57). In *Pioneer Aggregates Ltd v Secretary of State for the Environment [1985] A.C. 132*, the House of Lords held that the appellants were entitled to recommence the extraction in 1980 of minerals from a quarry by virtue of a planning permission granted in 1950, notwithstanding that the former owners of the site had in 1966 notified the local planning authority of their intention to cease quarrying and no extraction ad taken place since then. Lord Scarman, in whose speech the other members of the House of Lords concurred, was of the view that subs.(1) was of crucial importance, and that its clear implication was that only the statute or the terms of the planning permission itself can stop the permission enuring for the benefit of the land and of all persons for the time being interested therein. A commercial decision to terminate operations on land where there is a valid planning permission for such operations could not of itself extinguish the planning permission, unless the permission so stipulated.

But the fact that permission may enure in perpetuity does not mean that the same development may be carried out more than once. The carrying out of operational development, or the making of a

material change in the use of land, involves a sequence of events which has a beginning and an end. In the case of mineral extraction the end, as in the *Pioneer Aggregates* case, may not be reached until many years after the permission is first implemented. A mineral extraction permission may therefore remain extant, according to its terms, until there are no longer any minerals capable of extraction; and advanced technology and changes in market conditions mean that more may subsequently be extracted than might have been envisaged when permission was granted, or when extraction previously ceased.

But the implementation of a permission for straightforward material change of use is complete upon the change being made. The Court of Appeal, in *Cynon Valley Borough Council v Secretary of State for Wales [1986] J.P.L. 760*, held that the planning permission is thereupon spent, and cannot be relied on as authorising any subsequent use change. There had been an express grant of permission in 1958 for the change of use of premises to use as a fish and chip shop, and the use had subsequently been changed to use as an antique shop, in reliance upon what was then Class I of the Use Classes Order 1972. The use was subsequently changed back to use as a fish and chip shop, but that, as a use involving the sale of hot food, was not authorised by the Use Classes Order; and the Court of Appeal rejected the appellant's submission that it was authorised still by the 1958 permission. That permission had been "spent" upon implementation. Any right to revert to a former authorised use following a subsequent change is therefore limited to the situations prescribed by the Act in s.57, principally (1) where the superseding use is unlawful, and there is thus a right under s.57(4) to revert to the former lawful use if enforcement action is taken; and (2) where the superseding use is permitted by a development order, subject to limitations, and a right to revert is thus conferred by s.57(3).

Purposes for which a building may be used (subs.(2))

P75.05

Planning permission may specify the purposes for which a building authorised by the permission may be used. Such a specification may be by a condition, and in an appropriate case a condition may exclude the operation of the Use Classes Order 1987 (SI 1987/764) or otherwise restrict any future change of use even though not amounting to development requiring permission: *City of London Corporation v Secretary of State for the Environment (1971) 23 P. & C.R. 169*.

The use may also be specified otherwise than as a condition, and limiting words such as "an agricultural cottage" (*Wilson v West Sussex County Council [1963] 2 Q.B. 764*) or "detached bungalow or house for occupation by an agricultural worker" (*Trinder v Sevenoaks Rural District Council (1967) 204 E.G. 803*) or "erection of farm worker's dwelling" (*East Suffolk County Council v Secretary of State for the Environment (1972) 70 L.G.R. 595*) are of functional significance. The permission authorises change of use only to the use specified and change to any other use, such as occupation by a person not within the specified class, is not authorised by the permission. Once that authorised change of use has occurred, however (which requires something more than minimal dedication to the use: see, e.g. *Kwik Save Discount Group Ltd v Secretary of State for Wales [1981] J.P.L. 198, 201–202*), any subsequent change of use requires permission only if it constitutes development. Breach of a use-restricting specification under this section does not, unlike non-compliance with an express planning condition, constitute in itself a breach of planning control (*I'm Your Man Ltd v Secretary of State for the Environment [1998] 4 P.L.R. 107* (Robin Purchas, Q.C. sitting as Deputy Judge) note this was doubted by Jacob and Hughes L.JJ. in *Jeffery v First Secretary of State [2007] EWCA Civ 584*.

Where no purpose is specified by the permission, the building has permission for the purpose for which it is designed. "Designed" in this context means "intended," rather than "architecturally designed," if only because when outline planning permission is granted no architectural designs are normally before the authority: see *Wilson v West Sussex County Council [1963] 2 Q.B. 764* at 780,. per Danckwerts L.J., and 783, per Diplock L.J. (though cf. *Harding v Secretary of State for the Environment [1984] J.P.L. 503* where this decision was distinguished, and a different approach taken to the construction of "design" in the context of Pt 6 (agricultural development) of the General Development Order 1988). Thus, words of limitation on the permission may be construed alternatively

as indicating the purpose for which the building was intended, at least where they reflect the terms of the application: see, e.g., *Trinder v Sevenoaks Rural District Council (1976) 204 E.G. 803*.

In *Barnett v Secretary of State for Communities and Local Government [2010] 1 P. & C.R. 8*, Keene LJ held at [29] that the effect of s.75(3) is that planning permission to construct a new dwelling on non-residential land will carry with it permission to use the new building for residential purposes:. He explained that -

> "[t]hus there is in a sense a built-in application for a change of use of land in such cases, and the extent of the land covered by the implicit permission for a change of use will normally be ascertained by reference to the site as defined on the site plan. Thus that part of the site not built on can be used for purposes ancillary to the dwelling unless there is some obvious restriction shown on the permission itself. The site boundary shown on the plans defines the area of the new use."

In *Peel Land and Property Investments plc v Hyndburn Borough Council [2013] EWCA Civ 1680*, the appellant owned units on an out-of-town retail shopping park that were subject to restrictions contained in a s.106 agreement that only permitted the retail sale of bulky goods. Those restrictions were qualified by standard form provisos in which it was agreed that the restrictions would not prohibit or limit the appellant's "right to develop" any part of the park in accordance with planning permission subsequently granted. Grants of planning permission for operational building works to the units were obtained. The Court of Appeal held that s.75(3) did not grant "a right to develop" the retail units in the sense in which that expression was used in proviso in the s.106 agreement restricting the use of the units i.e. develop by making a change of use from the existing restricted use of the Units to an unrestricted use.

Appendix 2

Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment [1985] A.C. 132

[HOUSE OF LORDS]

PIONEER AGGREGATES (U.K.) LTD. . . . RESPONDENTS

AND

SECRETARY OF STATE FOR THE ENVIRONMENT AND OTHERS . . . . . APPELLANTS

1984 March 15, 19, 20; May 24

Lord Fraser of Tullybelton, Lord Scarman, Lord Roskill, Lord Bridge of Harwich and Lord Brandon of Oakbrook

Town Planning—Planning permission—Abandonment—Permission granted to work minerals on site—Commercial decision by occupiers to terminate operations—Restoration of site to satisfaction of planning authority—New occupiers wishing to resume working on site—Whether planning permission abandoned—Town and Country Planning Act 1971 (c. 78), s. 33(1)[1]

In 1950 the Minister of Town and Country Planning granted a mining company planning permission to win and work limestone from a quarry subject to conditions, inter alia, regarding the restoration of the site on completion of quarrying. The company extracted limestone from the site from 1950 to 1966, when they wrote to the local planning authority giving notice that they would cease quarrying at the end of that year. In January 1967 the planning authority wrote to the company informing them that the restoration conditions had been met to its satisfaction. In 1978 the new owner of the site wished to resume quarrying and inquired of the planning authority whether planning permission would be necessary. The planning authority replied that the 1950 permission had been abandoned or, alternatively, on a construction of the 1950 permission, the permitted development had been completed and could not be resumed without the grant of a fresh permission. After some token quarrying by the owner, the planning authority served an enforcement notice on the owner requiring it to cease excavating minerals. The owner appealed to the Secretary of State who, disagreeing with his inspector, held that the permission had been abandoned. The owner's appeal from the minister was allowed by Glidewell J. and the Court of Appeal dismissed the planning authority's appeal from his decision.

On appeal by the planning authority:—

Held, dismissing the appeal, that the Town and Country Planning Act 1971 as amended, provided a comprehensive code of planning control under which, by section 33(1), a grant of planning permission enured for the benefit of the land and all persons for the time being interested in it and it followed that a valid permission capable of implementation could not be abandoned by the conduct of an owner or occupier of land (post, pp. 140F, 141G–H, 142G, 145F–G); that, accordingly, the decision in 1966 to cease to win and work limestone could not amount to an abandonment of the 1950 permission nor, on the true construction of its terms, had the permitted development

[1] Town and Country Planning Act 1971, s. 33(1): see post, p. 141F–G.

A on the site been completed so as to require fresh permission before resumption of mineral workings (post, p. 146E–G).

Newbury District Council v. Secretary of State for the Environment [1981] A.C. 578, H.L.(E.) applied.

Pilkington v. Secretary of State for the Environment [1973] 1 W.L.R. 1527, D.C. approved.

Slough Estates Ltd. v. Slough Borough Council (No. 2) [1969] 2 Ch. 305, C.A. disapproved.

B Decision of the Court of Appeal (1983) 82 L.G.R. 112 affirmed.

The following cases are referred to in the opinion of Lord Scarman:

Ellis v. Worcestershire County Council (1961) 12 P. & C.R. 178

Hartley v. Minister of Housing and Local Government [1970] 1 Q.B. 413; C [1970] 2 W.L.R. 1; [1969] 3 All E.R. 1658, C.A.

Hoveringham Gravels Ltd. v. Chiltern District Council (1977) 76 L.G.R. 533, C.A.

Newbury District Council v. Secretary of State for the Environment [1978] 1 W.L.R. 1241; [1979] 1 All E.R. 243, C.A.; [1981] A.C. 578; [1980] 2 W.L.R. 379; [1980] 1 All E.R. 731, H.L.(E.)

Petticoat Lane Rentals Ltd. v. Secretary of State for the Environment [1971] 1 W.L.R. 1112; [1971] 2 All E.R. 793, D.C.

D

Pilkington v. Secretary of State for the Environment [1973] 1 W.L.R. 1527; [1974] 1 All E.R. 283, D.C.

Prossor v. Minister of Housing and Local Government (1968) 67 L.G.R. 109, D.C.

Slough Estates Ltd. v. Slough Borough Council (No. 2) (1967) 19 P. & C.R. 326; [1969] 2 Ch. 305; [1969] 2 W.L.R. 1157; [1969] 2 All E.R. 988, C.A.; [1971] A.C. 958; [1970] 2 W.L.R. 1187; [1970] 2 All E.R. 216, E H.L.(E.)

The following additional cases were cited in argument:

Hepworth v. Pickles [1900] 1 Ch. 108

LTSS Print and Supply Services Ltd. v. Hackney London Borough Council [1976] Q.B. 663; [1976] 2 W.L.R. 253; [1976] 1 All E.R. 311, C.A.

F *Mouson & Co. v. Boehm* (1884) 26 Ch.D. 398

Tehidy Minerals Ltd. v. Norman [1971] 2 Q.B. 528; [1971] 2 W.L.R. 711; [1971] 2 All E.R. 475, C.A.

APPEAL from the Court of Appeal.

This was an appeal by leave of the House of Lords (Lord Roskill, G Lord Brandon of Oakbrook and Lord Brightman) given on 20 October 1983 by the Peak Park Joint Planning Board against an order of the Court of Appeal (Eveleigh and O'Connor L.JJ. and Sir David Cairns) dated 15 June 1983, 82 L.G.R. 112 upholding Glidewell J. on 19 February 1982, 46 P. & C.R. 113 whereby he allowed the appeal of the respondent, Pioneer Aggregates (U.K.) Ltd., against the decision of the Secretary of State for the Environment notified by letter dated 15 April H 1981 dismissing their appeal and that of Edmund Harry Mollatt against an enforcement notice served on them on 25 February 1980 by the planning board in respect of land situated at Hartshead Quarry, Hartington, Derbyshire.

The facts are set out in the opinion of Lord Scarman. A

Michael Barnes Q.C. and *Harold Singer* for the planning board. The issue of law is whether the right to develop land by virtue of a planning permission can by the actions of the relevant parties be abandoned. If the answer is in the negative then no further issue arises; if it is in the affirmative then there is a question whether, on the facts of this case, B the right to work limestone on a site in Derbyshire has been abandoned. There is such a doctrine of abandonment. Rights which exist in relation to the use of property may be acquired by a variety of means including statute, contract and prescription and it is established that such rights may be lost by abandonment. For example, rights under easements or of ownership of property may be abandoned and there is no reason why rights under planning permissions created by the Town and Country C Planning Act 1971 should be in any special category, and no reason why those rights should be incapable of being abandoned. If there can be such abandonment, the test is to ask whether a reasonable person knowing all the facts would conclude that the right had been permanently given up.

[LORD ROSKILL: What direction would you give a jury as to the D meaning of abandonment?]

It would have to be explained that a planning permission ran with the land and it had to be ascertained as a matter of fact if it had been abandoned, giving the word its ordinary English meaning. On the facts of the present case there was material whereby a finding of abandonment could be reached. The more limited principle, which derived from the Court of Appeal decision in *Slough Estates Ltd. v. Slough Borough* E *Council (No. 2)* [1969] 2 Ch. 305 to the effect that rights under a planning permission could be lost by an election between two inconsistent rights, is but an example of how abandonment may be inferred from the conduct of the parties. [Reference was made to the *Slough* case [1971] A.C. 958, 971, *per* Lord Pearson; [1969] 2 Ch. 305, 316–318, *per* Lord Denning M.R., 321–322, *per* Salmon L.J., and 323, *per* Karminski L.J.; (1967) 19 P. & C.R. 326, 356.] Examples of analogous cases can be F found in the law of easements: *Tehidy Minerals Ltd. v. Norman* [1971] 2 Q.B. 528, 553; restrictive covenants (*Hepworth v. Pickles* [1900] 1 Ch. 108, 110); trade marks (*Mouson & Co. v. Boehm* (1884) 26 Ch.D. 398) and planning law (*Hartley v. Minister of Housing and Local Government* [1970] 1 Q.B. 413, 419.)

Dealing with the reasons why abandonment is said not to apply: (1) G that the Act of 1971 is a complete code and it does not mention abandonment: unless the *Slough* case was wrongly decided, it is not necessary to introduce into the planning law some such doctrine; (2) that section 33 of the Act of 1971 is not consistent with abandonment, the purpose of the provision is to make it clear that planning permission is not personal to the applicant but runs with the land, section 33(1) is H entirely consistent with that argument; (3) that where land has a planning permission, more than one person may have an interest, the question remains whether the rights under the permission have been abandoned; (4) the difficult position for a purchaser, if rights in land can

be abandoned, this is always a problem which a purchaser has; (5) that termination of planning permission is limited to the situations provided for in the Act of 1971 and the Town and Country Planning (Minerals) Act 1981, the principle of abandonment nevertheless applies subject to the need for stringent proof by those claiming abandonment; (6) that *Newbury District Council v. Secretary of State for the Environment* [1978] 1 W.L.R. 1241 offers cogent reasons for keeping the *Slough* decision within narrow confines and not extending it, the *Newbury* decision is of no assistance one way or the other as to whether planning permission can be abandoned. The principle of abandonment of rights relating to property is not a principle of equity nor of private law. It can apply to rights regulated by statutes. [Counsel then addressed their Lordships on the question whether, on the facts of the instant case, the right to extract limestone from the area of land to the north of Heathcote Lane conferred by the planning permissions had been lost by virtue of the more limited principle of abandonment by an election between inconsistent rights.]

David Widdicombe Q.C. and *Charles George* for the occupiers. The Act of 1971, supplemented by the Town and Country Planning (Minerals) Act 1981, is a complete code that does not admit any superimposition of a doctrine of abandonment. It is indicative that Parliament had in mind the termination of planning permissions by time limits in certain circumstances: see sections 41, 42, and 43 of the Act of 1971. If the subject has been considered and dealt with by statute, there is no other method of termination. Planning permissions are to be dealt with by reference to the statutory code which spells out what can and cannot be done in considerable detail, and one is confined to those methods. It would be strange if such a complicated code had a common law principle imposed upon it. It follows further that a planning permission does not cease to have effect by the exercise of any doctrine of election: *Slough Estates Ltd. v. Slough Borough Council (No. 2)* [1969] 2 Ch. 305 was a similar situation to that in *Pilkington v. Secretary of State for the Environment* [1973] 1 W.L.R. 1527 and should have been decided the same way. Dealing with the analogous cases of common law abandonment of property rights, the test for abandonment of easements in *Tehidy Minerals Ltd. v. Norman* [1971] 2 Q.B. 528 is much stricter than the proposed "reasonable man" test for abandonment of a planning permission. No reliance can be placed on *Hartley v. Minister of Housing and Local Government* [1970] 1 Q.B. 413 which was not dealing with an existing use right but an immunity: see *LTSS Print and Supply Services Ltd. v. Hackney London Borough Council* [1976] Q.B. 663. *Hepworth v. Pickles* [1900] 1 Ch. 108 was dealt with as a case of presumed licence and no other interests were affected: it did not deal with the question of other persons. There is no example of a statutory right being abandoned, except perhaps in relation to trade marks; however, the Trade Marks Act 1938, section 26(3), specifically uses the word "abandon" and thus trade marks can be distinguished from planning permissions. A doctrine of abandonment would raise numerous problems. The abandonment of part of a planning permission would raise the question of severance. Nor would it be as simple to formulate a test for abandonment as was

suggested. On the assumption that there is no principle of abandonment, there is no room even for the narrower concept of abandonment by election as in *Slough Estates Ltd. v. Slough Borough Council (No. 2)* [1969] 2 Ch. 305. That decision is inconsistent with *Newbury District Council v. Secretary of State for the Environment* [1978] 1 W.L.R. 1241. The principle on which the Court of Appeal decision in *Slough* is based, election, should be overruled, though the decision on its facts can still be justified by reference to the principle in *Pilkington v. Secretary of State for the Environment* [1973] 1 W.L.R. 1527.

Barnes Q.C. in reply. Dealing with the point that the provisions of the Act of 1971 are to be regarded as a code, the courts over the last decade have created two principles relating to town planning whereby rights may end without looking at any register: see *Prossor v. Minister of Housing and Local Government* (1968) 67 L.G.R. 109 and *Pilkington v. Secretary of State for the Environment* [1973] 1 W.L.R. 1527. Therefore the Act of 1971 cannot be regarded as a complete code. *Hartley v. Minister of Housing and Local Government* [1970] 1 Q.B. 413 is also relied on. Although an "existing use" case where one must first ask whether a use has ended with an intention that it shall permanently cease, the end result in such a case, as in cases of abandonment of planning permission, is to ask whether the rights have been abandoned or given up.

The Secretary of State and Mr. Mollatt were not represented.

Their Lordships took time for consideration.

24 May. LORD FRASER OF TULLYBELTON. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Scarman. I agree with it and, for the reasons stated in it, I would dismiss this appeal.

LORD SCARMAN. My Lords, in this appeal two questions fall to be considered by the House. The first is a question of legal principle: whether a planning permission for the development of land can be abandoned by act of a party entitled to its benefit. Abandonment, it is said, has the effect that thereafter no person can lawfully resume the hitherto permitted development without obtaining a fresh planning permission. The local planning authority, appellant in this appeal, submits that abandonment effective to terminate a planning permission is recognised by law. The respondent, the owner of land to which the permission in dispute relates, submits that no such abandonment is recognised by law.

If the answer to the question of principle be in the affirmative, it will become necessary to consider whether upon the facts of the case the permission was abandoned. If it were, the appeal (on this premise) would succeed. But if the question of principle should be answered in the negative, the appeal must be dismissed unless the House is prepared to accept the appellant's alternative contention, which raises the second question: namely, has the development, which was permitted by the relevant planning permission, been completed? It is conceded, correctly,

A that, if what was then permitted has been completed, a resumption of the same type of operations would be not the resumption of the earlier development but a new development requiring a fresh planning permission. The first question is of importance in the planning law. If, however, the second question be answered in the affirmative, the appeal would have to be allowed irrespective of the answer to the first. The second question depends upon the proper construction of the terms of
B the relevant planning permission, and upon their application to the facts of the case.

My Lords, I propose first to outline such of the facts as are necessary to determine the two questions. The subsidiary issue as to whether the permission has been abandoned will not arise unless in law it is possible to abandon it.

C

The facts

For a full statement of the facts I would refer to the admirable judgment of Glidewell J. before whom the appeal came from the enforcement notice after being dismissed by the Secretary of State: see (1982) 46 P. & C.R. 113.

D The Peak Park Joint Planning Board, the appellant, is the local planning authority for the part of Derbyshire which includes the area of land with which the appeal is concerned. Pioneer Aggregates (U.K.) Ltd., the respondent, is the owner of the land. By an enforcement notice dated 25 February 1980 the board required Pioneer to remedy what in the notice was alleged to be a breach of planning control, namely development of the land by certain mining operations. Pioneer
E admits the operations but contends that they constituted no breach of planning control. The case is really a test case. Pioneer is not mining on the site. It knew that the local planning authority took the view that to resume mining on the site would be a breach of planning control. It fired one blast to remove some stone so as to bring the difference of opinion to a head. Pioneer has done nothing further save to exercise its
F rights of appeal against the enforcement notice.

The site to which the notice relates is an area of some 25 acres within the Peak District National Park. It is to the north of a lane leading to the hamlet of Heathcote. I shall refer to this area as the northern or the appeal site. There is on the appeal site an existing limestone quarry and attendant plant and buildings. But until the test firing of February 1980 there had been no quarrying or other mining
G operations since 1966.

The history of mining on the appeal site, so far as presently relevant, can be shortly stated. On 31 October 1950 the then Minister of Town and Country Planning (to whom at the time application for planning permission to work minerals had to be made) granted Hartshead Quarries Ltd. permission for the mining and working of limestone on an
H area of land which included the appeal site. This area included, additionally to the appeal site, a larger piece of land on the south side of Heathcote Lane and separated from the appeal site by the lane. The permission allowed for the construction of a tunnel under the lane. The reason for the tunnel (which, however, was never constructed, though a

detailed permission was granted in 1955) becomes clear from a study of the conditions imposed for the disposal of waste material. So long as mining was confined to the appeal site, waste material was to be tipped on to a spoil bank. If and when mining was extended to the area south of the lane, the waste material was to be brought across (or under) the lane and tipped in the quarry made by the excavations on the northern site. Since they bear on the second question, it will be convenient at this stage to quote in full two of the conditions subject to which permission was granted:

> "3. On the completion of quarrying in the area north of the highway tipping of waste material on the said spoil bank shall cease and all waste material shall be deposited within the excavations formed by quarrying in that area to a level surface. 4. On the conclusion of quarrying in the area north of the road all mineral stocks shall be stored in that area."

It is clear from these two conditions that quarrying on the land to the south of the lane was envisaged as (allowably) continuing after conclusion of quarrying to the north, but that, if it did, waste material should no longer be deposited on the spoil bank but in the northern quarry and mineral stocks were to be stored on the northern site.

On 9 November 1962 a further permission was granted extending the area of excavation and of tipping subject to conditions. Nothing turns on this permission, which is to be read merely as an extension of the 1950 permission subject to certain conditions.

Hartshead extracted limestone from the appeal site from 1950 to 1966. On 15 September 1966 they wrote to the board a letter in which they gave notice that they would cease quarrying not later than 31 December of that year. They had confined their operations to the appeal site, although they had acquired the land, or, at the very least, the mineral rights in the land to the south of the lane. Their letter dealt with all the land covered by the planning permission, i.e. the land both to the south and the north of the lane. It indicated clearly their intention to cease quarrying and to vacate all the land and to remove their plant and buildings. The board relies on this letter and the subsequent course of negotiations to establish their case that Hartshead, by electing to treat the 1950 permission (together with its 1962 extension) as at an end, abandoned it.

I pass over the negotiations which followed upon Hartshead's ceasing from mining operations save only to mention that they negotiated with the board a satisfactory solution to the restoration problem. On 6 January 1967 the board wrote to Hartshead informing them that the restoration conditions had been met to its satisfaction. The board did not insist on a full compliance—probably because it believed that Hartshead's departure marked the finish of mining operations on the land to which the permission related.

In 1978, Pioneer became interested in the area covered by the permission of 31 October 1950 as extended by that of 9 November 1962. It asked whether planning permission to quarry was needed. By letter

dated 29 January 1979 the board took the two points which now fall to be decided by the House. The board said:

> "In relation to the entire quarry (one planning unit) for which planning permission was granted by letter dated 31 October 1950, as extended by the permission of 9 November 1962, planning permission for the site has been abandoned."

The letter is ambiguous. It is not clear whether it refers to all the land covered by the 1950 permission or only to the land north of the lane (the appeal site). I read it as alleging that planning permission in relation to all the land to which the 1950 permission related had been abandoned. Whether that be right or wrong, the letter certainly did go on to deal explicitly with the appeal site and in relation to that site made the second, alternative point upon which the appellant relies in the appeal. The board said:

> "In addition and in the alternative, the north-west area having been completed to the written satisfaction of the planning authority pursuant to the third condition [of the 1950 permission], cannot now be opened up without a new express permission."

The first question—Abandonment

If the board is right, a valid planning permission can be abandoned by the conduct of a landowner or occupier of land; and the effect of the party's conduct will be to bind all persons interested in the land now or hereafter whether or not they have notice of the abandonment. The planning permission would be entered in a public register; but not so its abandonment. Nor would it be possible by inspection of the land to discover whether the permission had been abandoned, for the absence of implementation of a planning permission is no evidence that a valid permission does not exist. It is perhaps not surprising that no trace of any such rule can be found in the planning legislation. If there be such a rule, it has been imported into the planning law by judicial decision.

The case upon which the appellant relies for the existence of such a rule is *Slough Estates Ltd. v. Slough Borough Council (No. 2)*. The case is reported as follows: at first instance before Megarry J. (1967) 19 P. & C.R. 326; in the Court of Appeal [1969] 2 Ch. 305, and in the House of Lords [1971] A.C. 958. It is the only reported case in which a rule of abandonment has been recognised as applicable to a planning permission. The plaintiff owned a trading estate of some 500 acres. In January 1945, when about half the estate had been developed, the company sought permission to develop the remaining 240 acres. On 17 October 1945 the council wrote to the company permitting development for industrial purposes. But between 1945 and 1965 the company behaved as if the 1945 permission did not exist. The company sought and obtained fresh planning permissions for factory building covering about 150 of the 240 acres. In 1955, 90 acres remained undeveloped. The company, in accordance with their post-1945 practice, applied for permission to develop the 90 acres for industrial buildings; but this time it was refused. The company then applied for and obtained £178,545 compensation for loss of development value.

In 1966 the company made a startling change of course: it applied to the High Court for a declaration (inter alia) that the permission of 17 October 1945 was still in force. The trial judge, Megarry J., held that the terms of the letter of 17 October 1945 were so obscure that the planning permission was ineffective but embarked, obiter, on a lengthy discussion as to the possibility of abandonment, expressing the view that, if an owner or occupier of land evinced by his conduct an unequivocal intention to abandon planning permission, such permission would be extinguished by abandonment. The Court of Appeal ruled that the October 1945 letter upon its true construction was a valid outline planning permission but held that the company by claiming and obtaining compensation had elected to abandon its rights under the permission and could not now revive the permission. The company had made its election between inconsistent rights, the effect of which was to extinguish the permission. On appeal, this House held that the purported permission of 1945 was ineffective because it failed to identify the land to which it related. Lord Pearson, with whose speech the other members of the House agreed, expressly reserved the question whether a planning permission could be abandoned.

The decision of the Court of Appeal was, of course, binding on Glidewell J. and the Court of Appeal in the present case. Both courts refused, however, to accept that the *Slough* decision introduced into the planning law any general rule of abandonment, treating it as a limited exception to what they held was the general rule, namely that planning permission cannot be extinguished merely by conduct. They went on to find that the facts of the present case did not fall within the *Slough* exception of election. Accordingly, Glidewell J. allowed Pioneer's appeal from the Minister (who had held that planning permission could be abandoned), and the Court of Appeal dismissed the board's appeal from his decision. Neither court dealt expressly with the second question raised in the appeal, though it was, the House was informed, raised. Impliedly, they must be considered to have rejected the board's contention.

My Lords, on the question of abandonment I find myself in agreement with both courts below that there is no such general rule in the planning law. In certain exceptional situations not covered by legislation, to which I shall refer, the courts have held that a landowner by developing his land can play an important part in bringing to an end or making incapable of implementation a valid planning permission. But I am satisfied that the Court of Appeal in the *Slough* case erred in law in holding that the doctrine of election between inconsistent rights is to be incorporated into the planning law either as the basis of a general rule of abandonment or (which the courts below were constrained to accept) as an exception to the general rule that the duration of a valid planning permission is governed by the provisions of the planning legislation. I propose now to give my reasons for reaching this conclusion.

Planning control is the creature of statute. It is an imposition in the public interest of restrictions upon private rights of ownership of land. The public character of the law relating to planning control has been recognised by the House in *Newbury District Council v. Secretary of*

State for the Environment [1981] A.C. 578. It is a field of law in which the courts should not introduce principles or rules derived from private law unless it be expressly authorised by Parliament or necessary in order to give effect to the purpose of the legislation. The planning law, though a comprehensive code imposed in the public interest, is, of course, based on the land law. Where the code is silent or ambiguous, resort to the principles of the private law (especially property and contract law) may be necessary so that the courts may resolve difficulties by application of common law or equitable principles. But such cases will be exceptional. And, if the statute law covers the situation, it will be an impermissible exercise of the judicial function to go beyond the statutory provision by applying such principles merely because they may appear to achieve a fairer solution to the problem being considered. As ever in the field of statute law it is the duty of the courts to give effect to the intention of Parliament as evinced by the statute, or statutory code, considered as a whole.

Parliament has provided a comprehensive code of planning control. It is currently to be found in the Town and Country Planning Act 1971, as subsequently amended. Part II of the Act of 1971 imposes upon local planning authorities the duty of preparing and submitting to the Minister development plans formulating their policy and their general proposals for the development and use of land in their area. Widespread publicity has to be given to the preparation or alteration of such plans. There is provision for local public inquiries in certain specified circumstances. Part III imposes general planning control. Section 23(1) declares the rule: subject to the provisions of the section, planning permission is required for the development of land. There are certain exceptions, of which the most notable are rights in connection with the use of land existing prior to certain specified dates related to the introduction of planning control (commonly called "existing use rights"): sections 23 and 94 of the Act. Section 29 deals with the grant of planning permission: note that the local planning authority must have regard to the provisions of the development plan. In determining an application for permission the authority must take into account "any representations" made to them within the time specified in the section. And there are extensive provisions for giving publicity to applications: sections 26 to 28.

Section 33(1) is of crucial importance. It provides:

> "Without prejudice to the provisions of this Part of this Act as to the duration, revocation or modification of planning permission, any grant of planning permission to develop land shall (except in so far as the permission otherwise provides) enure for the benefit of the land and of all persons for the time being interested therein."

The clear implication is that only the statute or the terms of the planning permission itself can stop the permission enuring for the benefit of the land and of all persons for the time being interested therein. I would comment, in passing, that the provision in section 33(1) was in the law as section 21 of the Town and Country Planning Act 1962, when the *Slough* case [1969] 2 Ch. 305 was decided: but the Court of Appeal made no reference to it.

The provisions in the Town and Country Planning Act 1971 governing the duration, modification, revocation, and termination of planning permission are extensive; see sections 41 to 46. It is unnecessary to analyse them in detail. Perhaps the most significant common feature of the various procedures is the involvement of public authority, local and central, when questions as to duration, modification, revocation, or termination of planning permission arise. And, of course, the procedures involve notice to persons interested as well as to the applicant and/or landowner.

Orders can also be made by a local planning authority for the discontinuance of a use of land or for the removal of buildings under section 51. The Secretary of State must confirm any such order made, and again there is provision for publicity.

Section 52 enables a local planning authority to enter into an agreement with a landowner restricting or regulating the development or use of land. The agreement is registrable.

Indeed, the permissions and orders to which I have briefly referred are, with one exception, either registered in a register maintained under the planning legislation, or registrable as local land charges under the Local Land Charges Act 1975. The exception is a notice ("completion notice") under section 44 of the Act of 1971 setting a time limit after which, subject to confirmation by the Minister, a planning permission shall cease to have effect. Such notices are, however, the subject of a specific, though optional, inquiry of the local authority contained in the officially approved form of inquiry used in connection with searches of the local land charges register.

Finally, it is necessary to refer to the recent amendment to the Act of 1971, namely the Town and Country Planning (Minerals) Act 1981. Section 7 provides that there shall be introduced into the Act of 1971 a new section 44A setting a limit to the duration of a planning permission to work minerals. Section 10 is directly in point. It introduces into the Act of 1971 a new section 51A under which the mineral planning authority, if it appears that the working of minerals has permanently ceased on any land, may prohibit its resumption. If such a prohibition is contravened, a criminal offence is committed. These provisions are not yet in force. But they strongly reinforce the view of the law relating to planning control as being a comprehensive code, and they show clearly that the problem of the future of planning permission for the working of minerals where mining operations have permanently ceased is left to public authority, and that subject to the usual safeguards such permission can be effectively terminated by order under the new section 51A.

Viewed as a question of principle, therefore, the introduction into the planning law of a doctrine of abandonment by election of the landowner (or occupier) cannot, in my judgment, be justified. It would lead to uncertainty and confusion in the law, and there is no need for it. There is nothing in the legislation to encourage the view that the courts should import into the planning law such a rule—recognised though it is in many branches of the private law (e.g. the law of easements, the commercial law, and the law of trade marks) as Megarry J. in his

learned, though obiter, discussion of the principle has shown in *Slough Estates Ltd. v. Slough Borough Council (No. 2)*, 19 P. & C.R. 326.

There is, however, quite apart from the *Slough* case a number of reported judicial decisions which, upon first sight and before analysis, might seem to suggest that there is room in the planning law for a principle, or an exception, allowing the extinguishment of a planning permission by abandonment.

Three classes of case can be identified. The first class is concerned not with planning permission but with existing use. In *Hartley v. Minister of Housing and Local Government* [1970] 1 Q.B. 413 the Court of Appeal (Lord Denning M.R., Widgery and Cross L.JJ.) held that the Minister as the tribunal of fact was entitled to find on the evidence that the resumption of a car sales use on a site where previously there had been two uses, namely car sales and a petrol-filling station, was after a cessation of the car sales use for some four years a material change of use and so properly the subject of an enforcement notice. The Minister, the court held, was entitled to find as a fact that the previous use had ceased, having been abandoned by the owner or occupier of the land. This was not a case of abandoning a planning permission. There was in fact no existing use of the land for car sales because the use had ceased years ago. An existing use, which has been deliberately ended before a resumption arises, is not existing at the date of resumption: accordingly, the resumption was a material change of use, and so required planning permission. The issue was one of fact, as Widgery L.J. emphasised in his judgment. And it had nothing whatever to do with the extinguishment of a planning permission. Widgery L.J. in the course of his judgment made a significant comment, at p. 422:

> "When the car sales use ceased in 1961 there could be no question of a material change of use on which an enforcement notice could be founded in reliance on that fact alone."

The use no longer existing, the change back four years later was the material change of use on which the notice could be founded.

The second class of case has been described as that of the "new planning unit"—a term coined by Widgery L.J. in *Petticoat Lane Rentals Ltd. v. Secretary of State for the Environment* [1971] 1 W.L.R 1112. This line of cases was discussed in *Newbury District Council v. Secretary of State for the Environment* [1981] A.C. 578 (by Viscount Dilhorne, at pp. 598–599 and by myself, at pp. 616–617). I will not repeat what was then said. Two comments, however, should be made. First, the cases are, without exception, cases where existing use rights were lost by reason of a new development sanctioned by a planning permission. There is no case, so far as I am aware, in which a previous planning permission has been lost by reason of subsequent development save in circumstances giving rise to the third class of case, which I shall discuss in a moment. In the class of case now under discussion the existing use right disappears because the character of the planning unit has been altered by the physical fact of the new development. As Lord Parker C.J. remarked in the first of the cases, *Prossor v. Minister of Housing and Local Government* (1968) 67 L.G.R. 109, 113:

"The planning history of this site, as it were, seems to me to begin afresh . . . with the grant of this permission . . . *which was taken up and used* . . ." (Emphasis supplied).

Secondly, it is clear that where the evidence fails to establish the creation by development actually carried out on the land of a new planning unit the grant of planning permission does not preclude a landowner from relying on an existing use right. Indeed, as *Newbury's* case itself shows, existing use rights are hardy beasts with a great capacity for survival.

The third class of case comes nearer to the facts and law of the present appeal. These cases are concerned not with existing use rights but with two planning permissions in respect of the same land. It is, of course, trite law that any number of planning permissions can validly co-exist for the development of the same land, even though they be mutually inconsistent. In this respect planning permission reveals its true nature—a permission that certain rights of ownership may be exercised but not a requirement that they must be.

But, what happens where there are mutually inconsistent permissions (as there may well be) and one of them is taken up and developed? The answer is not to be found in the legislation. The first reported case appears to have been *Ellis v. Worcestershire County Council* (1961) 12 P. & C.R. 178, a decision of Mr. Erskine Simes Q.C. to which Lord Widgery C.J. referred with approval in what must now be regarded as the leading case on the point, *Pilkington v. Secretary of State for the Environment* [1973] 1 W.L.R. 1527.

Mr. Erskine Simes, in a passage which Lord Widgery C.J. was later to describe as exactly illustrating the principle, said, at p.183:

"If permission were granted for the erection of a dwelling house on a site showing one acre of land as that to be occupied with the dwelling house, and subsequently permission were applied for and granted for a dwelling house on a different part of the same acre which was again shown as the area to be occupied with the dwelling house, it would, in my judgment, be impossible to construe these two permissions so as to permit the erection of two dwelling houses on the same acre of land. The owner of the land has permission to build on either of the sites, but wherever he places his house it must be occupied with the whole acre."

Pilkington was a Divisional Court decision. It has been approved by the Court of Appeal in *Hoveringham Gravels Ltd. v. Chiltern District Council* (1977) 76 L.G.R. 533. Its facts were that the owner of land was granted planning permission to build a bungalow on part of the land, site "B." It was a condition of the permission that the bungalow should be the only house to be built on the land. He built the bungalow. Later the owner discovered the existence of an earlier permission to build a bungalow and garage on another part of the same land, site "A." That permission contemplated the use of the rest of the land as a smallholding. He began to build the second bungalow, when he was served with an enforcement notice alleging a breach of planning control. The Divisional Court held that the two permissions could not stand in respect of the

same land, once the development sanctioned by the second permission had been carried out. The effect of building on site "B" was to make the development authorised in the earlier permission incapable of implementation. The bungalow built on site "B" had destroyed the smallholding: and the erection of two bungalows on the site had never been sanctioned. This was certainly a common sense decision, and, in my judgment, correct in law. The *Pilkington* problem is not dealt with in the planning legislation. It was, therefore, necessary for the courts to formulate a rule which would strengthen and support the planning control imposed by the legislation. And this is exactly what the Divisional Court achieved. There is, or need be, no uncertainty arising from the application of the rule. Both planning permissions will be on a public register: examination of their terms combined with an inspection of the land will suffice to reveal whether development has been carried out which renders one or other of the planning permissions incapable of implementation.

My Lords, I find nothing in any of these cases to cast doubt on the view of principle to which a study of the legislation has led me. Indeed, *Pilkington's* case [1973] 1 W.L.R. 1527 may be contrasted with the *Slough* case [1971] A.C. 958 in that it reveals the proper exercise of the judicial function in a field of codified law. It is a decision supporting and strengthening the planning control imposed by Parliament in contrast with the Court of Appeal's decision in the *Slough* case [1969] 2 Ch. 305 which renders control uncertain, is likely to cause confusion, and which to that extent works to undermine the intention of Parliament.

Strangely and ironically, it would appear that the *Slough* case could have been decided along *Pilkington* lines. For, assuming the validity of the 1945 planning permission in the *Slough* case, several acres of the estate which in the 1944–45 plan had been included as a car park were covered with factory buildings constructed pursuant to a subsequent planning permission. Under the *Pilkington* rule the subsequent development would have sufficed to make the outline plan approved in 1945 incapable of implementation. Lastly, it will be observed that the *Pilkington* situation resembles the "new planning unit" class of case in that a permitted development which has been carried out has so altered the character of the land that its planning history now begins with the new development.

For these reasons I would answer the first question in the appeal in the negative. There is no principle in the planning law that a valid permission capable of being implemented according to its terms can be abandoned.

The second question—Completion of permitted development

I turn now to the second of the two main questions in the appeal. The board submits that upon the true construction of the terms of the 1950 permission as extended by the 1962 permission the permitted development to the north of Heathcote Lane has been completed and cannot be resumed without a fresh planning permission. It is recognised that the area of land to which the 1950 permission related comprised more than the appeal site in that the permission related to areas to the

north and south respectively of Heathcote Lane and was drafted so as to grant permission to work minerals in both areas. It is said, however, that it was a permission for two separate developments and that, upon the cesser by Hartshead of mining operations north of the lane together with the restoration of the land to the satisfaction of the board, the development was completed so that a resumption now in that area would be a new development requiring fresh planning permission. Particular reliance is placed on conditions 3 and 4 of the permission (the two conditions which I have earlier set out) whereby it was provided that on the completion of quarrying on the northern site waste material should be deposited in the quarry on the northern land and mineral stocks should be stored on the northern land. The suggestion is that these conditions indicate either a completion of the authorised development of the northern land before the commencement of a separate development south of the lane or, at the very least, two separate developments whether contemporaneous or successive.

My Lords, I do not so read the permission. In terms it relates to the whole area of land south and north of the lane. It is a permission to mine and work minerals in that area. It contains detailed conditions as to method of working and as to restoration work after quarrying. The permission plainly envisages the continued use of the northern land for mineral working even after quarrying in that area has ceased; for the northern land is to be used at all times both during and after quarrying north of the lane for the deposit of waste material and for the processing and storage of minerals, from whatever part of the land to which the permission relates they are won. The permission, as I read its terms, contemplated an authorised development of the land south and north of the lane treated as one planning unit.

I reject, therefore, the submission that the permission was for two separate developments and that one of them was complete when Hartshead ceased operations in 1966. I suspect that in 1966 the board confused the commercial termination of Hartshead's operations with the completion of the development permitted by the 1950 permission as extended in 1962. A commercial decision to terminate operations upon land where there is a valid planning permission for such operations cannot by itself extinguish the planning permission unless the terms of the permission provide that such shall be the effect of the termination. To give such effect to a commercial decision in the absence of terms to that effect in the planning permission would be to fly in the face of section 33(1) of the Town and Country Planning Act 1971 which lays down that, save where the permission so provides, the grant of planning permission enures for the benefit of the land and of all persons for the time being interested in the land.

For these reasons I would dismiss the appeal with costs.

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Scarman. For the reasons he gives I too would dismiss this appeal with costs.

LORD BRIDGE OF HARWICH. My Lords, for the reasons given in the speech of my noble and learned friend, Lord Scarman, with which I agree, I would dismiss this appeal.

LORD BRANDON OF OAKBROOK. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Scarman. I agree with it, and for the reasons which he gives I would dismiss the appeal.

Appeal dismissed with costs.

Solicitors: Theodore Goddard & Co.; Coward Chance.

C. T. B.

[PRIVY COUNCIL]

TAMAITIRUA KAITAMAKI . . . . . APPELLANT

AND

THE QUEEN . . . . . RESPONDENT

[APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND]

1984 March 28; May 1

Lord Scarman, Lord Elwyn-Jones, Lord Brandon of Oakbrook, Lord Brightman and Sir George Baker

New Zealand—Crime—Rape—Consent—Penetration with consent or in belief that woman consenting to sexual intercourse—Continuation after realisation that woman unwilling—Whether rape—Crimes Act 1961 (No. 43 of 1961), ss. 127, 128

New Zealand—Appeal to Privy Council—Legal aid—Whether Court of Appeal having jurisdiction to grant legal aid for appeal to Privy Council—Offenders Legal Aid Act 1954 (No. 62 of 1954), ss. 2(1), 3(1)

Section 127 of the Crimes Act 1961 provides: "For the purposes of this Part of this act, sexual intercourse is complete upon penetration; . . ." Section 128 provides: "(1) Rape is the act of a male person having sexual intercourse with a woman or girl—(*a*) Without her consent; . . ."

The defendant was charged on indictment with one offence of rape contrary to section 128 of the Crimes Act 1961 and one offence of burglary. The Crown's case was that he broke into a young woman's flat and twice raped her. There was no dispute that sexual intercourse had taken place on two occasions, but his defence was that the woman consented or he honestly

Appendix 3

James Hay Pension Trustees Ltd v First Secretary of State [2006]

JAMES HAY PENSION TRUSTEES LTD v FIRST SECRETARY OF STATE

COURT OF APPEAL

(Ward, Wall and Richards L.JJ.): October 26, 2006[1]

[2006] EWCA Civ 1387; [2007] 1 P. & C.R. 23

LT Certificates of lawful development; Change of use; Prescribed forms; Validity

H1 *Town and country planning—enforcement—Certificate of Lawful Use or Proposed Development—ss.191 and 192 of Town and Country Planning Act 1990—construction of document purporting to be a Certificate of Lawful Use—whether strict compliance with terms of s.192 and Town and Country Planning (General Development Procedure) Order 1995 necessary*

H2 In 1965, planning permission was granted to the Bristol Avon River Board for the change of use of a railway booking office and yard to garage and store for the Bristol Avon River Board subject to a condition which prevented the premises being used for any other purpose within Class X of the Town and Country Planning (Use Classes) Order 1963 except that permitted. Class X related to use as a wholesale warehouse or repository for any purpose. The site was then acquired by the Bristol Avon River Board.

H3 In 2000 the site began to be used to carry out repairs and service motor vehicles and a number of vehicles were parked in the yard. Part of the site was also used as a builder's yard. Following complaints, the Local Planning Authority served an enforcement notice in 2001 and that led to an application, dated June 2001, being made for a certificate of lawfulness for the use granted by the 1965 planning permission. In short, the agents wanted to know whether the use granted by that permission fell within Use Class B8 of the Town and Country Planning (Use Classes) Order 1987 and whether the planning permission was personal to the Bristol Avon River Board. There was much confusion surrounding the nature of the applications made including whether they were being made under s.191 or s.192 of the Town and Country Planning 1990 Act or both. Eventually, the council issued a document entitled "Permission for Development" dated November 2001 which permitted recited "details", described as "the 1964 planning permission is not a personal consent and the store and Class X is now covered by storage referred to in Use Class B8". Further planning applications were subsequently submitted and refused and an application for a certificate of lawfulness of a proposed use for B8 was also refused. In May 2004, the council issued an enforcement notice

[1] Paragraph numbers in this judgment are as assigned by the court.

alleging that there had been a breach of planning control in making a material change of use of the land to a mixed use for vehicle servicing, a builders yard and for the storage of caravans and vehicles. An appeal was held and the inspector considered the status of the November 2001 document. He concluded that it was not a Lawful Development Certificate under the terms of s.192(2) as it did not confirm that a proposed use would not require planning permission but merely responded to specific questions. He also decided that the storage use permitted in 1965 had been abandoned in law by 2000. His decision was appealed to the High Court where his finding that the Certificate was invalid was reversed. His finding of abandonment was upheld. The respondent appealed to the Court of Appeal.

H4 **Held,** allowing the appeal, that s.192 of the Town and Country Planning Act 1990 is couched in mandatory terms and must be complied with in order for a Certificate of Lawful Proposed Use to be valid. Similarly, the terms of art.24 and Sch.4 to the Town and Country Planning (General Development Procedure) Order 1995 should be complied with. The Certificate must be in the prescribed form or substantially to the prescribed effect. The November 2001 document was not a valid Certificate under s.192.

H5 **Cases referred to in the judgment:**
(1) *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] A.C. 749; [1997] 2 W.L.R. 945; [1997] 3 All E.R. 352
(2) *R. v Ashford BC Ex p. Shepway DC* [1999] P.L.C.R. 12; [1998] J.P.L. 1073
(3) *R. (on the application of Reprotech (Pebsham) Ltd) v East Sussex CC* [2002] UKHL 8; [2003] 1 W.L.R. 348; [2003] 1 P. & C.R. 5
(4) *Staffordshire Moorlands DC v Cartwright* (1992) 63 P. & C.R. 285; (1992) J.P.L. 138
(5) *York v Casey* (1999) 31 H.L.R. 209; [1998] 2 E.G.L.R. 25; [1998] 30 E.G. 110

H6 **Appeal** to the Court of Appeal by the First Secretary of State from a decision by Wilkie J. dated November 30, 2005 to quash a decision of the First Secretary of State, by his inspector, that a Certificate of Lawful Use relating to land at Winterbourne station yard was invalid. The respondent to the appeal was James Hay Pension Trustees Ltd who had recently sold the site and chose not to appear at the hearing. The local planning authority was South Gloucestershire Council. The facts are set out in detail in the judgment of Ward L.J. below.

H7 *Natalie Lieven* and *Paul Greatorex* (Treasury Solicitor) for the appellant.
The respondent was not represented and did not attend.

JUDGMENT

1 **WARD L.J.:** At issue in this appeal is the validity of a document purporting to be a Certificate of Lawful Use or Development issued by the South Gloucestershire County Council under s.192 of the Town and Country Planning Act 1990 (the Act).

The background

2 The certificate relates to the use of a site of some 0.23 hectares which are part of the former Winterbourne railway booking office and station yard which was closed in 1955. The site has had a complicated planning history since the closure of the station. In January 1965 planning permission under the reference SG 7789 was granted to the Bristol Avon River Board for the change of use "of railway booking office and yard to garage and store for the Bristol Avon River Board", subject to two conditions namely:

> "(a) The building shall not be used for any purpose within class X of the Town and Country Planning (Use Classes) Order 1963 other than that now permitted without the prior consent of the local planning authority.
> (b) A scheme of screening . . ."

Class X related to use as a wholesale warehouse or repository for any purpose. From time to time this has erroneously been referred to as a 1964 planning permission and I shall not trouble to correct the mistake in citations which follow. The site was then acquired by the Bristol Avon River Board which in time became the Wessex Water Authority.

3 The property changed hands in 1999 and again in 2000 when it was acquired by James Hay Pension Trustees Ltd, the respondent to this appeal who, having very recently sold it, chose, understandably enough, not to appear at the hearing of the appeal. We have, however, had the benefit of seeing the skeleton argument prepared on its behalf for the appeal.

4 There was some evidence to suggest that the site was not used for most of the period from 1987 to 2000. It seems however that in 2000 the site began to be used to carry out repairs to and servicing of motor vehicles and a number of cars and vans awaiting repair or servicing were parked in the yard. Part of the site was also used as a builder's yard. Following complaints about the use of the site, the Council served an enforcement notice in March 2001. The respondent appealed and there were various discussions between its agent and the Council about the way forward. Exactly what was happening was rightly described by Wilkie J. as somewhat confusing. On June 12, 2001 the respondent's agent wrote:

> "As you know, my argument is that the present lawful use of the site by virtue of the historic planning permission granted on it falls within a Use Class B8 and is not a personal one to the Local Water Authority and in accordance with our discussions I now enclose an application for a Certificate of Lawfulness on this basis."

5 In fact the application dated June 11, 2001 accompanying that letter was an application under s.191 of the Act for a certificate of lawfulness for an existing use, although, confusingly, the application itself stated that the existing site uses were not relevant to the application. The ground of the application was that the site benefited from an extant grant of planning permission (the 1965 planning permission). The statement of justification recited that there was no personal condition restricting the planning permission to be for the purposes of the Bristol Avon River Board and so it was submitted that there was a valid planning consent

for the use of the station building and yard for a garage and storage yard within Use Class B8.

6 The Council may have dragged its feet in dealing with this until October 31, 2001 when there was a telephone conversation between the Council and the respondent's agent in which the Council seemed to have expressed its uncertainty as to the relief actually being sought. The respondent's agent replied in a letter dated November 1, 2001:

> "For the further avoidance of doubt whatsoever, the application is to seek clarification in regard to lawfulness in respect of the use granted planning consent on 1st January 1965 under SG 7789. The issues to be addressed are as follows:
>
> (a) does the use granted now fall within Use Class B8?
> (b) that the planning consent was not personal to the Bristol Avon River Board.
>
> This application does not seek lawfulness for the use that is currently being carried out at the site by Mr Mainstone, which is a B2 Use within the building and as I understand it, a sui generis use of storing vehicles, including those for hire, in the yard.
>
> It may be that confusion is caused by the application having been submitted on the basis of an existing use, I followed this course of action because Mr Mainstone's use is unauthorised at present and therefore the lawful use is the one granted permission in 1965. If you consider the application forms should be altered please let me know straight away.
>
> I very much hope, therefore, that you will now be able to issue the Certificate of Lawfulness on the basis described above and set out in the application forms and accompanying documents without delay."

7 Whether submitted with that letter or not is unclear but we know that a further application this time under s.192 being an application for a Certificate of Lawfulness for a Proposed Use or Development was made. This application bears the date June 11, 2001 although, to add to the confusion when explaining why the existing or last use of the land was lawful, it refers to the letter dated June 12. It makes no reference to the issues raised in the letter of November 1. The Council's stamp of receipt stamped is dated November 12, 2001.

8 A schedule and report were prepared and circulated on November 9 to deal with the Certificate of Lawful Use application (whatever may have constituted that application) which had been submitted under s.192 and art.24 of the Town and Country Planning (General Development Procedure) Order 1995 to establish the lawfulness of a proposed use relating to the site. The report stated that the two issues to be established were (1) whether the 1965 planning permission was personal to the Bristol Avon River Board and (2) whether the uses permitted by Use Class X referred to in the condition fell within Use Class B8.

The Report recommended that on a balance of probability a certificate should be issued answering both those questions in the affirmative.

9 Thus the Council issued the document, the validity of which is at the centre of this appeal. This document is described as "Permission for Development". The

reference is the reference given for the first application submitted in June. The document states:

> "South Gloucestershire Council in pursuance of powers under the above-mentioned Act hereby PERMIT the details included in the first schedule on 13th July 2001 in accordance with the application and accompanying plans.
> Area Planning Manager
> On behalf of South Gloucestershire Council
> Date: 19th November 2001
>
> **First Schedule**
>
> (1) That the 1964 planning permission (SG 7789) is not a personal consent to the Bristol Avon River Board; and
> (2) that the store and class X use referred to in the planning permission SG 7789 is now covered by the reference to storage in the Use Class B8.
>
> **Second Schedule**
>
> Land at Winterbourne Station Yard . . ."

10 To continue the sorry history, in November 2001 an application was submitted seeking planning permission for the change of use of the station building to a vehicle repair workshop and for the use of the yard to cover parking vehicles. This application was refused in April 2002.

11 In July 2002 a further application was made for a Certificate of Lawfulness for a proposed use of the premises for storage and distribution (class B8). This application was refused in April 2003. Then in September 2003 a further planning application was made for permission for the use of the station building as a vehicle repair workshop, for the use of the yard for parking vehicles and for stationing storage containers. This application was refused in December 2003.

12 Finally, in May 2004 the Council issued an enforcement notice alleging there had been a breach of planning control in making a material change in the use of the land to a mixed use for vehicle servicing, as a base for a motor vehicle business, as a builder's yard and for the storage of caravans, containers and vehicles. The notice required the cessation of that use and the removal of all vehicles, caravans and containers within two months.

13 The respondent appealed on grounds set out in s.174(2)(a), (c), (d) and (g) of the Act. The appeal was dismissed by Mr Denis Bradley, the Inspector appointed by the First Secretary of State. In the appeal on ground (c), namely that the matters (if they occurred) did not constitute a breach of planning control, there were essentially two issues before the Inspector: (a) what was the status of the document issued by the Council on November 19, 2001 and (b) had the planning permission granted on January 4, 1965 been abandoned?

14 By his decision dated April 4, 2005 he determined the first question as follows:

> "15. I consider this matter by looking at the purpose of seeking such an LDC [Lawful Development Certificate], i.e. to establish whether planning permission is required for a proposed use. It would not be appropriate to

> describe the document as an LDC if it failed to identify the nature of the proposed use. Paragraph 8.26 of Circular 10/97 makes clear that an applicant will have to describe the proposal with sufficient clarity and precision to enable to the LPA to understand exactly what is involved in the proposal. The appellant made clear to the Council in his agent's letter dated 12 June 2001 his view that the lawful use of the site was class B8, and this seems to have been the basis of the application. However, the document does not directly state whether this correct. The First Schedule responds to two questions which are related to that issue, but the nature of the proposed use does not appear on the documents. It must be possible that other factors will need to be established in determining whether a proposed use is lawful, such as the question of abandonment. . . . I therefore conclude that the document is not an LDC under the terms of section 192(2) since it does not confirm that a proposed use would not require planning permission but merely responds to specific questions."

15 As for the second issue before him he decided that the storage use permitted in 1965 had been abandoned by 2000.

16 The respondent appealed to the High Court and that appeal was allowed by Wilkie J. on November 30, 2005. He reversed the inspector's finding that the Certificate was invalid but upheld the finding of abandonment. The matter was remitted back to the inspector for reconsideration in the light of the judgment. With permission granted by Richards L.J. the First Secretary of State appeals to this Court.

Discussion

17 Wilkie J. was of the view that the planning history of the site was "of significance" to the determination of the appeal. He acknowledged that the history of the application made by the respondent was "somewhat confusing", as it certainly was. Nonetheless, he found that by the time the Council circulated the Schedule on November 9, to which was attached the officer's report, "it well knew that it was dealing with an application for a Certificate of Lawfulness pursuant to section 192 of the 1990 Act and that is why the report was couched in the terms in which it was". He rejected the contention of the First Secretary of State that the report made it clear that what the Council thought it was doing was not determining whether the use proposed in the application would be lawful but certifying the Council's view on two aspects of the wording of the 1965 document. In the judge's view it was perfectly clear from the circulated Schedule and the report which was annexed to it that the Council were aware that it was dealing with an application for a Certificate of Lawful Use. He held:

> "In my judgment [the report] is plainly a recommendation that a Certificate of Lawful Use be issued in respect of the proposed use of the site in the terms granted to, but not personal to, the Bristol Avon River Board in 1964. That concerns the use of the site for a garage and store but subject to the condition which prohibited the use of the site for other uses falling within Use Class X of the 1963 order unless consent was obtained from the Council. The second recommendation was that the Certificate of Lawful Use should clarify the

> condition referring to Use Class X now applied to storage in the Use Class B8. That is what the Council, in my judgment, intended to do."

18 I regret I cannot share the judge's confidence that the Council knew what it was doing. The way in which the application or more strictly the applications came before the Council, the lack of clarity in the letter of November 1 and the very language in which the certificate of November 19, 2001 is couched all suggest to me that confusion reigned from beginning to end. The Certificate itself simply cannot be read as a Certificate under s.192 certifying the lawfulness of some proposed use of the land. It is expressly stated to be a "permission for development". The Council was apparently acting "in pursuance of powers" under the 1990 Act to "permit the details included in the First Schedule". There is no express reference to their exercising the powers in s.192. Granting permission is an act quite different from certifying lawful use. The First Schedule does not specify that use.

19 Furthermore, if the matter was as clear as the judge held it to be, then it really is quite inexplicable how in July 2002 the respondent should make another—this time unambiguous—application under s.192 in relation to exactly the same use, which application was this time refused.

20 For my part, however, I do not consider that the Council's intention is at all material to the crucial issue in the appeal, namely the status of the November Certificate. Was this a valid Certificate under s.192 of the Act?

21 Sections 191 and 192 were introduced in response to the recommendations made by Robert Carnwath Q.C. in his report "Enforcing Planning Control" (HMSO February 1989). He endorsed the view that there should be a single procedure to enable the planning authorities to certify that a specified use or operation can be carried on without breach of planning control. As he said in para.7.2:

> "A corollary of a stronger system of enforcement is that land-owners should have a reasonably accessible means of establishing what can be done lawfully with their property."

So his recommendation (7) was that there should be:

> "single procedure whereby the authority could issue a certificate that any specified use or operation (whether or not instituted before the application) can be carried on without planning permission. Provision should be made to enable a use to be described by reference to a Class of Use in the Use Classes Order, and to enable to the GDO to regulate the form of application and the supporting evidence required."

22 Section 191, which was referred to in the first June application, provides for a Certificate of Lawfulness of *existing* use or development. Section 192 provides for a Certificate of Lawfulness of *proposed* use or development. Section 192 is in these terms:

> "(1) If any person wishes to ascertain whether—

(a) any proposed use of buildings or other land; or
(b) any operations proposed to be carried out in, on, over or under land,

would be lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use or operations in question.

(2) If, on an application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

(3) A certificate under this section shall—
(a) specify the land to which it relates;
(b) describe the use or operations in question (in the case of any use falling within one of the classes specified in an order under section 55(2)(f) identifying it by reference to that class);
(c) give the reasons for determining the use or operations to be lawful; and
(d) specify the date of the application for the certificate.

(4) The lawfulness of any use or operations for which a certificate is in force under this section shall be conclusively presumed unless there is a material change, before the use is instituted or the operations are begun, in any of the matters relevant to determining such lawfulness."

23 Article 24 of the General Development Procedure Order 1995 provides as follows:

"(11) A certificate under section 191 or 192 of the Act shall be in the form set out in Schedule 4, or in a form substantially to the like effect."

That form makes clear it deals with ss.191 and 192 and art.24. The form itself reads:

"Certificate of Lawful Use or Development

The . . . Council hereby certify that on . . . [the date of the application to the Council] the use*/operations*/matter* [*delete where inappropriate] described in the First Schedule to this certificate in respect of the land specified in the Second Schedule to this certificate and edged*/hatched*/coloured* [* delete where inappropriate] on the plan attached to this certificate, was*/were*/would have been* [*delete where inappropriate] lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended)" [although section 192 is not expressly referred to here, it is obvious that the certificate will identify section 192 if proposed use is being authorised] "for the following reason(s):

. . .
Signed
On behalf of . . .

Council
Date . . .

First Schedule

[Full description of use, operations or other matter if necessary by reference to details in the application or submitted plans including a reference to the Use Class if any, specified in an order under section 55(2) of the 1990 Act, within which the certificated use forms]

Second Schedule

[The address or location of the site]."

24 Wilkie J. held:

"32 . . . The next question is whether the document issued on 19th November constitutes a section 192 certificate. There can be no question but that the document issued on 19th November 2001 does not comply with the requirements of section 192(3) nor with the requirements of 24(11) of the General Development Procedure Order 1995. There is nothing on the face of the document which purports to make it a certificate issued under section 192. There is no doubt, however, that it is intended to be a significant planning document. It is intended to have legal effect by defining that which the applicant was permitted to do. Furthermore, it purports to set out what it is to be permitted to do in the First Schedule. The First Schedule refers specifically to the 1964 planning permission and, by implication, that the permission so referred to benefits those other than the Bristol Avon River Board and, in particular the applicants. It further clarifies by updating one of the matters contained within that 1964 document by reference to the current Use Classes. Thus, in my judgment, it does satisfy the requirements of sections 192(3)(a) and (d). It attempts obliquely to satisfy (b) but it fails entirely to satisfy (c). As to paragraph 24(11) it is certainly not in the form set out in Schedule 4. The question arises whether it is in any form substantially to the like effect.

. . .

35. In my judgment it is obvious and evident that the document as issued contains errors. Moreover, the terms of the first Schedule are opaque and require clarification. It is permissible to view such a document in its context which includes, for this purpose, the exchanges of correspondence and the terms of the officers' report. From those documents, in my judgment, the notice as read in that context becomes sufficiently clear to leave a reasonable recipient in no reasonable doubt as to the terms of the notice. It is, as I have found, plain that, by the time the notice had been issued and the report written, the application was for a certificate for lawful use in respect of proposed usages pursuant to section 192. The subject matter of the proposed usage was the change of use for which permission was granted to the BARB in 1965. The applicant proposed to use the premises in that way. The decision of the Council, as recommended by the officers, was that it should be able to do so because the 1965 permission was not personal to the BARB and, furthermore,

the use classes referred to in the 1965 permission were parallel to the current use class B8. Viewed in that context, it is clear both what was applied for, what was intended to be granted, and its terms. In my judgment, therefore, taking that approach, the certificate issued was in a form substantially to the like effect to that set out in Schedule 4 of the General Development Procedure Order 1995. Furthermore, the failures to comply strictly with the terms of section 192(3) did not prevent the statutory notice having an effect as such.

36. In my judgment, therefore, the Inspector was wrong in law to fail to characterise the document of 19 November 2001 as a Certificate of Lawful use. That being so and having regard to section 192(4) of the TCPA 1990 the lawfulness of any use for which that certificate is in force should be conclusively presumed.

37. In my judgment, therefore, this appeal must succeed . . ."

25 The judge was obviously correct in finding that there were failures to comply strictly with the terms of s.192(3) and also that the certificate was not in the form set out in Sch.4 to the GDPO. It does not on the face of it purport to certify that any and if so what use is lawful. It is a certificate granting permission for development. I am far from convinced that the local planning authority did satisfy themselves, as they had to be satisfied pursuant to s.192(2), that the use or operations described in the application would be lawful if instituted or begun at the time of the application. They had to certify that they were so satisfied but there is no such certification. As for their compliance with s.192(3) the land was specified as required by (a) but there was no clear description of the use or operations in question as required by (b) and they wholly failed to give reasons for their determining the use to be lawful as required by (c). As for (d), they did manage to specify the date of the application, or at least to specify the date upon which it was registered which may not quite be the same thing, but never mind that.

26 Furthermore, as the judge recognised, the certificate was not in the form prescribed by Sch.4 to the GDPO. The certificate speaks of permitting "the details included in the first schedule" and, looking at the certificate, one simply would not know that the Council were certifying some specified use to be lawful, something the prescribed form makes clear. The First Schedule was hardly a full description of the use "described if necessary by details in the application or the submitted plans". There was absolutely no statement of the reasons for the planning authority's decision. To be in substantially the same form the disputed certificate had at least to contain the essential information required by the GDPO even if it is laid out differently. Looking at the certificate, at what is says and what it does not say and comparing that form with the prescribed form, leads to only one conclusion and that is that they are in a form significantly different from each other. The certificate is not substantially to the like effect of the prescribed form. There was accordingly a failure to comply with art.24 of the GDPO.

27 Miss Lieven submits that those failures are fatal to the respondent's case. I agree. Section 192 is couched in mandatory terms. It had to be complied with. It was not. The certificate was not in the prescribed form or anything substantially to the prescribed effect. The failures of the planning authority cannot be rescued by

their good intentions. Lord Hoffmann made the point sweetly in *Mannai Investment Co Ltd v Eagle Star Life Insurance Co Ltd* [1997] A.C. 749, 776 when he said:

> "If the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on pink paper, however clear it might have been that the tenant wanted to terminate the lease."

Here, as there, the Council used the wrong piece of paper. That, in my judgment, is an end to the matter. The appeal should be allowed on that basis.

28 The judge sought to salvage the muddle by a resort to a line of authority on the construction of documents. Thus he referred to the judgment of Keene J., as then was, in *R v Ashford BC Ex p. Shipway DC* [1999] P.L.C.R. 12, 20 where he said:

> "If there is an ambiguity in the wording of the permission, it is permissible to look at extrinsic evidence, including the application, to resolve that ambiguity: see *Staffordshire Moorlands DC v Cartwright* (1992) J.P.L. 138, at 139 . . ."

He also referred to *Mannai* and to *York v Casey* (1999) 31 H.L.R. 209, cases on the construction of contractual notices and a statutory notice required by the Housing Act 1988 respectively. In upholding the validity of such notices the court had to consider first whether the error in the notice was obvious or evident and secondly whether notwithstanding the error the notice read in its context was sufficiently clear to leave a reasonable recipient in no reasonable doubt as to the terms of the notice.

29 In my judgment those principles have no application here. This case is not concerned with the construction of the meaning of the words in the certificate but with a different question, namely whether the certificate has any legal status at all. That depends on whether the certificate complied with the statutory requirements for its validity. It did not.

30 There is a second reason why I would distinguish these cases. They relate to notices given by one party to another affecting the legal relationship of those parties. This certificate is not a private notice between the planning authority and the applicant. It is a public document in which the rights and interests of the public have to be taken into account. Again Lord Hoffmann makes the point. The predecessor of s.192 was s.64 of the 1990 Act as originally promulgated. In *R. (on the application of Reprotech (Pebsham) Ltd) v East Sussex CC* [2002] UKHL 8 [2003] 1 W.L.R. 348 Lord Hoffmann said at[27]:

> "Such a determination [under section 64] is a juridical act, giving rise to legal consequences by virtue of the provisions of the statute. The nature of the required act must therefore be ascertained from the terms of the statute, including any requirements prescribed by subordinate legislation such as the general development order. Whatever might be the meaning of the resolution, if it was not a determination with the meaning of the Act it did not have any statutory consequences. If I may quote what I said in the *Mannai* case [1997] A.C. 749, 776B..." [and he quotes the passage I have already cited]

31 Circular 10/97 (Enforcing Planning Control: Legislative Provisions and Procedural Requirements) sets out the policy in para.8.28, correctly relied upon by the inspector. That provides:

> "Subsection (3) of section 192 is the counterpart, for proposed uses or operations, of section 191(5). It provides that a LDC granted under section 192 shall specify the land to which it relates; describe the use or operations in question (where appropriate, identifying a use by reference to the relevant 'use class'); give the reason why carrying out the proposal would be lawful; and specifying the date of the application. Although this certificate would not be the equivalent, in law, to a grant of planning permission for proposed development, it will indicate that, unless any relevant factor has changed since the application date specified in the certificate, it would be lawful to proceed with that proposal. It is therefore vital to ensure that the terms of the certificate are precise and there is no room for doubt about what is lawful at a particular date."

As the Carnwath Report recommended land-owners should have a reasonably accessible means of establishing what can be done lawfully with their property. Looking at this certificate, one is totally at a loss to know whether it is a grant of permission or a Certificate of Lawfulness of proposed use. An interested party should not be expected to trawl through the file to discover what may have been intended. The Act specifies more precision. This certificate did not provide it.

Conclusion

32 For these reasons I would allow the appeal and restore the Inspector's decision.

33 **WALL L.J.:** I agree.

34 **RICHARDS L.J.:** I also agree.

Appeal allowed.

Reporter—Megan Thomas

Appendix 4

Note from the Applicant to explain the relationship between the Order Land and the Order Limits

ABERGELLI POWER LIMITED ("the Applicant")

WRITTEN SUMMARY OF THE APPLICANT'S ORAL CASE PUT AT THE DEVELOPMENT CONSENT ORDER ("DCO") ISSUE SPECIFIC HEARING

APPENDIX 4 - NOTE FROM THE APPLICANT TO EXPLAIN THE RELATIONSHIP BETWEEN THE ORDER LAND AND THE ORDER LIMITS

This note, prepared by the Applicant at the request of the Examining Authority, explains why the "Order Land" (which is shown on the Land Plans and over which powers of compulsory acquisition are sought in the draft DCO) is more extensive than the "Order Limits" (which are shown on the Works Plans), and why the Order Land includes land in which no authorised development is proposed in the draft DCO.

1. THE AUTHORISED DEVELOPMENT – NATIONALLY SIGNIFICANT INFRASTRUCTURE PROJECT AND MATTERS INTEGRAL TO IT OR ANCILLARY MATTERS

1.1 The application for development consent is in respect of the construction of a generating station that is in Wales and which will have a capacity of more than 50MW.

1.2 Pursuant to section 14(1)(a) of the Planning Act 2008, the construction of a generating station is classed as a nationally significant infrastructure project ("NSIP"). Section 31 of the Planning Act 2008 states that development consent "is required for development to the extent that the development is or forms part of a nationally significant infrastructure project."

1.3 An application and hence a DCO in Wales can include provision for the principal development (the NSIP) and matters that are genuinely integral to it, and for 'ancillary matters' (PA2008 s120(3)).

1.4 Those elements considered by the Applicant to be the NSIP and the matters genuinely integral to it and "ancillary matters" are described in Schedule 1 of the draft DCO and referred to (in the draft DCO) as the "authorised development" and (otherwise in the DCO application) as the "Power Generation Plant".

1.5 These elements include all of the plant required for the construction, operation, maintenance and protection of the Power Generation Plant to facilitate the generation of electricity, the construction of an access road from the public highway to the area where the Power Generation Plant is proposed to be constructed, a temporary construction compound (which is necessary to enable construction of the NSIP), a permanent maintenance compound (which is necessary to enable the ongoing maintenance and repair of the NSIP) and mitigation works (including the ecological mitigation area which is described as Work Number 4 in the draft DCO) which is necessary to ensure that the effects of the NSIP are acceptable in planning terms and that the likely significant effects of the NSIP are acceptable.

1.6 A number of applications have been decided in Wales which have considered the division between development that is integral to the principal development and development which is associated development. These applications include:

1.6.1 Clocaenog Forest Wind Farm

1.6.2 Port Talbot Internal Power Generation Enhancement

1.6.3 Swansea Tidal Lagoon

1.6.4 South Hook Combined Heat and Power Station

1.6.5 Mynydd y Gwynt Wind Farm

1.6.6 Hirwaun Power Station

1.6.7 Brechfa Forest West Wind Farm

1.6.8 Wrexham Gas Fired Generating Station

1.7 All of the development identified in Schedule 1 of the draft DCO is development that is or forms part of the construction of the NSIP or is integral to it, consistent with the decisions taken previously which have established that development can be considered to be “integral” to the NSIP development which is required for its construction, and including access roads and necessary mitigation. The authorised development must be situated within the Order Limits shown on the Works Plans (Document Reference 2.3).

2. SECTION 115 OF THE PLANNING ACT 2008 AND ASSOCIATED DEVELOPMENT IN WALES

2.1 Section 115 of the Planning Act 2008 provides that a DCO for development in Wales for a generating station below 350MW may not include ‘associated development’.

2.2 In addition to development that is, or forms part of, the NSIP, the Project contains development that is considered by the Applicant to be "associated development". associated development is development that supports the NSIP, but which is not part of the NSIP.

2.3 Sub-sections 115(2) to (4A) of the Planning Act 2008 set out requirements relating to associated development. Associated development may not include development in Wales, except for surface works, boreholes or pipes associated with underground gas storage by a gas transporter in natural porous strata (which is not applicable to the Project). Associated development related to a generating station may only be included in a DCO in Wales where it is for a generating station of more than 350MW.

2.4 The Abergelli Power Project is for a generating station of up to 299MW. It is not therefore development within the meaning of section 115(4A). The Gas Connection and the Electrical Connection are considered by the Applicant to be associated development and are therefore not part of the application for a development consent order. This is because the connections are not (as established in the previous decisions made by the Secretary of State) considered to be integral to the generating station itself and therefore do not fall within development covered by section 14(1)(a) of the Planning Act 2008. They are not development that is, or forms part of, the NSIP.

2.5 This approach is consistent with paragraph 3.23 of the decision letter for The Hirwaun Generating Station Order 2015 where the Secretary of State determined that the gas connection and the electrical connection were not part of the generating station and it was not therefore appropriate to include the gas connection and electrical connection in the DCO. The Secretary of State also considered that the grid connection was associated development (and therefore should be excluded from the DCO) in the Tidal Lagoon (Swansea Bay) Order 2015.

3. THE ORDER LAND: COMPULSORY ACQUISITION POWERS FOR THE GAS AND ELECTRICAL CONNECTIONS

3.1 The draft DCO contains Compulsory Acquisition (CA) powers for the Gas Connection and the Electrical Connection, both of which are acknowledged by the Applicant to be associated development. The physical works for the Gas Connection and for the Electrical Connection have been excluded from the draft DCO and are the subject of

separate applications to CCS under the Town and Country Planning Act 1990. The applications are currently expected to be determined by the end of 2018.

3.2 Paragraph 122(2)(b) of the Planning Act 2008 states that a DCO may include provision authorising the compulsory acquisition of land that "is required to facilitate or is incidental to" the NSIP.

3.3 Whilst the DCO Application does not apply for development consent in respect of the Gas Connection or the Electrical Connection, the draft DCO does include, pursuant to section 122(2)(b) of the PA 2008, powers for the acquisition of the necessary land rights required for the Gas Connection and the Electrical Connection.

3.4 This is consistent with the Secretary of State's decision for the Hirwaun Generating Station Order 2015. At paragraph 3.26 of the decision letter for the Hirwaun Generating Station, the Secretary of State confirmed that compulsory acquisition powers for associated development could be included if the land is required to "facilitate" or is "incidental to" the NSIP.

3.5 The Applicant considers that the land rights to construct, operate, maintain and protect the Gas Connection (which is necessary to supply fuel for the generating station so that it can generate electricity) are required to facilitate the Power Generation Plant, being the NSIP. The Applicant also considers that the land rights necessary to construct, operate, maintain and protect the Electrical Connection (so that it can export power from the Power Generation Plant to the National Grid), are also required to facilitate the Power Generating Plant, being a NSIP.

3.6 Therefore, the Applicant considers that the inclusion of the compulsory acquisition powers for the Gas Connection and Electrical Connection is necessary and the Secretary of State has the necessary vires to grant compulsory acquisition powers for development that is not being authorised in the development consent order, as has been demonstrated via The Hirwaun Generating Station Order 2015.

3.7 The land and rights required for the construction and operation of the Gas Connection and Electrical Connection have therefore been included in the Order Land that is shown on the Land Plans (Document Reference 2.2), even though there are no corresponding works shown on the Works Plans (Document Reference 2.3). The Order Limits for the authorised development are therefore smaller than the Order Land.

3.8 The Applicant is not aware of any impediment to the grant of planning permission for the Gas Connection or the Electrical Connection.

Appendix 5

Outline Construction and Environmental Management Plan (revision 1)

Appendix 3.1

Outline Construction Environmental Management Plan

Outline Construction Environment Management Plan

Abergelli Power Project
Abergelli Power Limited

November 2018

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Ref.	**Outstanding issue/info.**	**Section/Paragraph**	**Responsibility**	**Action**

CONTENTS

Abbreviations

APL	Abergelli Power Limited, the Applicant
BPM	Best Practicable Means
CCS	City and County of Swansea
CEMP	Construction Environment Management Plan
CLG	Community Liaison Group
COSHH	Control of Substances Hazardous to Health
DEFRA	Department for Environment, Food and Rural Affair's
DCO	Development Consent Order
ECoW	Ecological Clerk of Works
EHO	Environmental Health Officer
EIA	Environmental Impact Assessment
EMS	Environmental Management System
ES	Environmental Statement
HGV	Heavy Goods Vehicles
HSE	Health and Safety Executive
IAQM	Institute of Air Quality Management
M	Metre
MW	Megawatt
NETS	National Grid Electricity Transmission System
NRW	Natural Resource Wales
OGCT	Open Gas Cycle Turbine
PPE	Personal Protection Equipment
PRoW	Public Right of Way
RAMS	Risk Assessment / Method Statement
SINC	Site of Importance for Nature Conservation
SWCN	Special Waste Consignment Note
SWTRA	South Wales Trunk Road Agency
WFD	Waste Framework Directive
WTN	Waste Transfer Note

1. Introduction

1.1 Overview

1.1.1 This Outline Construction Environment Management Plan (CEMP) has been prepared as part of the Environmental Statement (ES) for Abergelli Power Station (hereafter referred to as the 'Project'). This Outline CEMP has been prepared by AECOM on behalf of the applicant, Abergelli Power Limited (APL).

1.1.2 The Project comprises of an Open Gas Cycle Turbine (OGCT) peaking power generating station and supporting infrastructure. The Project is described in detail in **Chapter 3: Project and Site Description** and its location provided in Figure 1.1 and Figure 1.2 of the ES.

1.2 Purpose of this Document

1.2.1 The purpose of this Outline CEMP is to set out the approach towards, and framework for, environmental management during the construction phase (including site preparation) and to provide mitigation against potentially adverse construction impacts on environmental resources, local residents and businesses. The Outline CEMP will provide assurance to the decision maker and stakeholders that appropriate measures for preventing and reducing environmental effects will be adopted during the construction of the Project and secured via this document. Both standard environmental good practice and project specific mitigation, as committed to within the ES are included within this Outline CEMP.

1.2.2 This Outline CEMP covers all elements of the Project as described in **Chapter 3: Project and Site Description** of the ES, although some measures will only be relevant to particular project elements or specific works, and this will be made clear in the text of the document. The principles of this Outline CEMP set out the standards, environmental management and good practice that will also be consistently applied to the construction of the Gas and Electrical Connections.

1.2.3 Post-consent, this CEMP will require updating in accordance with a Development Consent Order (DCO) Requirement and will be approved by CCS (in consultation with Natural Resources Wales) prior to any construction commencing on the Project Site. The approved CEMP will be used as an environmental management and monitoring tool for the duration of the construction phase. The CEMP will be kept on site as a live document, being updated as and when required (for example to recognise changes in regulations, good practice guidance, actions from on site audits or a change in situation onsite).

1.2.4 The approved CEMP will fall within the scope of the main contractor's externally certified environmental management systems, and as such will be subject to independent audits by the relevant certification bodies.

1.2.5 Measures set out in this document and the approved CEMP will have regard to the Welsh Government document '*Construction and Demolition Sector Plan*' (Ref. 1.1)

which seeks to move towards zero waste by detailing outcomes, policies and delivery actions for organisations, companies and individuals involved with the construction and demolition sector in Wales.

1.2.6 It is recognised that the Pollution Prevention Guidelines (PPGs) are currently being replaced with Guidance for Pollution Prevention (GPPs). Their primary aim is to provide environmental good practice guidance for the whole UK. Any relevant GPPs will be included in the finalised CEMP as appropriate.

a) Decommissioning

1.2.7 It is anticipated that the environmental effects of the decommissioning of the Project will be similar in size and nature to those associated with construction. A detailed decommissioning methodology cannot be finalised until immediately prior to decommissioning. However the measures and procedures are anticipated to be similar to those set out within this Outline CEMP and updated to align with industry good practice guidance at the time of writing.

1.3 Content and Structure

1.3.1 This Outline CEMP includes the following topics:

- Community liaison;
- Complaints procedures;
- Nuisance management including measures to avoid or minimise the impacts of construction activities (covering dust, noise, vibration and lighting);
- Dust management measures;
- Site waste and materials management measures;
- Pollution control measures;
- Security measures and use of artificial lighting;
- A protocol in the event that unexpected contaminated land is identified during ground investigation or construction; and
- Environmental training requirements.

1.3.2 In considering these environmental matters, information is provided on:

- A register of environmental aspects (Section 2.3);
- Roles and responsibilities (Section 2.1);
- Communication and co-ordination (Section 2.2);
- Training and awareness (Section 2.2);
- Checking, monitoring, auditing and corrective action (Sections 2.5 and 3);
- Good practice environmental control measures (Section 3); and
- Where embedded mitigation and additional mitigation has been incorporated and secured (Section 3).

1.3.3 This document should be read in conjunction to other mitigation places such at:

- ES Appendix 3.2: Surface Water Management Plan;

- ES Appendix 3.3a Contraction Traffic Management Plan;
- ES Appendix 3.3b Construction Staff Travel Plan; and
- ES Appendix 3.4: Landscape and Ecology Mitigation Strategy.

1.4 Construction Phase

1.4.1 The construction phase of the Project is anticipated to take approximately 22 months with an anticipated starting date in 2020. A detailed description of the site preparation and construction phase is available **in Chapter 3: Project and Site Description** of the ES.

1.4.2 Site preparation will entail:

- Creating temporary bridges over the Water Main and Oil Pipeline for the Access Road;
- Diverting watercourses and ditches around the Generating Equipment Site and Access Road:
- Creating attenuation ponds;
- Excavation of material of the new Access Road;
- Site clearance including vegetation clearance and topsoil stripping/ excavations;
- Establishing Laydown Area, site compounds and installing welfare facilities;
- Ecological mitigation works which may be required pre-construction; and
- Conducting geotechnical investigations and any other pre-construction surveys.

1.4.3 The main activities associated with the construction phase will be:

- Excavation and site levelling for new foundations and piling if required. The need for piling will be determined through pre-construction ground investigations;
- Access Road paving;
- Creation of drainage features (not including the attenuation pond);
- Heavy Goods Vehicles (HGVs) Deliveries of materials and equipment;
- Erection and fitting out of buildings;
- Installation of the generating plant on completed foundations including auxiliary equipment such as electrical switchgear and fuel handling equipment;
- Excavation and laying of the Electrical Connection, which will include going under the Oil Pipeline and Water Main and reinstating the excavated material once the Electrical Connection has been laid;
- Excavation and laying of the Gas Connection; and
- The construction of cable ducts alongside the Access Road.

1.5 References

Ref. 1.1 Welsh Government. (2012). Construction and Demolition Sector Plan. Towards Zero Waste One Wales: One Planet. [Online]. Available: *http://gov.wales/docs/desh/publications/130301construction-demolition-waste-plan-en.pdf* [Accessed: 25/10/17].

Ref. 1.2 Guidance for Pollution Prevention (GPP) [Online]. https://www.gov.uk/guidance/pollution-prevention-for-businesses [Accessed: 29/10/18].

2. Environmental Management Framework

2.1 Roles and Responsibilities

2.1.1 The following sections outline the responsibilities for those parties involved in the construction phase of the Project. These roles and responsibilities are indicative and may interchange between APL and the main contractor(s), and are not exhaustive.

a) APL

2.1.2 In terms of environmental management, APL is responsible for the overall delivery of the Project in compliance with relevant environmental legislation, the mitigation set out in this Outline CEMP and any Requirements to be implemented as part of the DCO.

2.1.3 APL will ensure that there is a dedicated Environmental Manager who will either be employed by APL or a nominated member of the main contractor's staff. The proposed role and responsibilities of the Environmental Manager are described below, starting in paragraph 2.1.8.

2.1.4 APL's role will include (but is not limited to):

- Ensuring the CEMP is finalised, implemented and monitored by the main contractor(s);
- Ensuring all the following factors are considered and appropriately actioned;
  - The most appropriate order and method of working;
  - Allocation of responsibilities between personnel, and other organisations on the Project Site; and
  - The approved CEMP is prepared and issued in a controlled way.
- Communications and Training (Section 2.2):
  - Ensuring that environmental meetings are held regularly and that environmental issues are covered as appropriate;
  - Regular liaison between all parties on the Project Site to ensure adequate precautions are taken to minimise the impact on the environment;
- Monitoring and Auditing (Section 2.5):
  - Ensuring that the main contractor(s) comply with the good practice, mitigation measures, set out in the CEMP and DCO Requirements through review of an Audit Close-Out Schedule;
  - Ensuring that all environmental incidents are reported and investigated where appropriate; and
  - Ensuring environmental inspections of the Project Site are performed and all issues raised are addressed promptly.

b) Main Contractor(s)

2.1.5 The main contractor(s) will be appointed by APL to undertake the construction of the Project. The main contractor(s) are required to comply with the mitigation and provisions within the Outline CEMP along with any Requirements imposed in the

DCO and/or licences and secondary consents associated with the Project. This also applies to any sub-contractors engaged on the Project. The main contractor(s) would also be a member of the Considerate Constructors Scheme.

2.1.6 If not already implemented by APL, the main contractor(s) will have a nominated environmental contact to perform the role of Environmental Manager, a description and list of responsibilities for the role are set out in the section below starting in paragraph 2.1.8.

2.1.7 The responsibilities of the main contractor(s) will also include (but are not limited to):

- Ensuring employees and sub-contractors implement the controls outlined in the finalised and approved CEMP;
- Communications and Training (Section 2.2):
  - Liaising with statutory authorities and APL as required and ensuring records of communication (including verbal communication) are kept;
  - Ensuring employees and sub-contractors receive Site Inductions (that include environmental issues) and toolbox talks, as appropriate;
  - Ensuring environmental management and emergency response training is provided and recorded.
- Monitoring and Auditing (Section 2.5):
  - Ensuring personnel needed for audits are available when required;
  - Verifying actions resulting from Corrective Action Requests (procedure used to originate a corrective action), Non-Conformance notices (notice issued to the main contractor(s) for conflicts with the contract documents) and Observations raised during audits are completed by the deadlines;
  - Verifying actions resulting from Corrective Action Requests, Non-Conformance notices and Observations raised during audits are completed by the deadlines and recorded appropriately.

c) Environmental Manager

2.1.8 APL or the main contractor(s) will appoint a suitably qualified Environmental Manager for the duration of the construction of the Project and during any restoration works. The purpose of this appointment is to ensure that the environmental interests of the Project Site are safeguarded. The Environmental Manager will have the authority to review method statements, oversee works and recommend action as appropriate. This includes having the authority to temporarily stop works if required, for example, where poor practices are being applied or mitigation is not being appropriately implemented or adhered to.

2.1.9 The Environmental Manager will work with the main contractor(s) to ensure the implementation of, and compliance with, the provisions of the approved CEMP and licences, consents or other conditions imposed on the Project.

2.1.10 A detailed description of the Environmental Manager's responsibilities will be included in the finalised version of the CEMP however, in summary the Environmental Manager will be responsible for:

- Ensuring any pre-construction environmental surveys are scheduled into the construction programme and conducted prior to works commencing;
- Inspections of works to ensure that environmental mitigation measures and other commitments have been and/or are being implemented;
- Implementation of additional mitigation other than those committed to where unforeseen circumstances arise that could result in a breach of environmental legislation;
- Monitoring and Auditing (Section 2.5):
  - Conducting weekly site inspections and record keeping of environmental sensitivities and requirements;
  - Conducting or coordinating monthly routine audits of the main contractor's compliance with the approved CEMP including construction activities and record keeping;
  - Coordinating and organising any regular monitoring requirement or commitment;
  - Regular reporting to CCS summarising the works undertaken on the Project; and
  - Monitoring or inspection of onsite activities in response to incidents, breaches of the approved CEMP or complaints received from a third party.

d) ECoW

2.1.11 The Environmental Manager may be assisted by an Environmental Clerk of Works (ECoW). The ECoW will perform specific specialist tasks that require expert knowledge, such as observations and watching briefs. The ECoW role may be performed by a suitably qualified individual or a team of individuals with differing expertise.

2.1.12 The responsibilities of the ECoW will be finalised in the approved CEMP, but may include:

- Any pre-construction surveys requiring specialised skills;
- Watching briefs or observations of specific construction activities i.e. vegetation clearance;
- Any auditing or monitoring requiring specialised skills; and
- Input into topic specific toolbox talks and training.

e) All Site Personnel

2.1.13 All site personnel have a responsibility to the environment, which includes, but is not limited to:

- In the case of an incident, stopping work, implementing control procedures and reporting it to the appropriate personnel as identified by the main contractor(s) in the finalised CEMP;
- Reporting when waste needs collecting;
- Passing any queries or correspondence on environmental issues to the appropriate personnel as identified by the main contractor(s) in the finalised CEMP; and
- Working in accordance with the finalised and approved CEMP and associated management plans. Protocol to support adherence is set out in the Communication and Training section (starting paragraph 2.2.2) of this Outline CEMP.

2.2 Communications and Training

a) Community Liaison

2.2.1 The following steps will be taken by APL/the main contactor to make the public aware of the activities onsite and the available lines of communication with the Project:

- Neighbouring residents and occupiers will be notified of the start of construction activities, the likely duration of the construction phase, of any changes to the working hours as agreed with CCS and of periods when higher levels of noise may be expected;
- There will be a community liaison group (CLG) established for facilitation two-way communication between the public and the Project, which will meet on a regular basis.
- A telephone number for environmental complaints will be published local to the Project Site. There will be a dedicated person responsible for dealing with any complaints, which could be the Environmental Manager. This person will have the appropriate authority to resolve complaints. An 'out of hours' telephone number will be made available if required. A Welsh speaker can be available at request;
- Liaison will be maintained with CCS's Environmental Health Officer (EHO) for the duration of the construction phase;
- Should any complaints regarding dust or noise be received the details will be passed to the EHO for verification purposes; and
- Should any unforeseen event occur on the Project Site that has the potential to cause pollution then the relevant regulatory bodies will be notified immediately. As far as possible, notice will be issued to the EHO for dealing with an unforeseen activity that may give rise to a particular nuisance problem.

b) Environmental Site Meetings

2.2.2 To ensure dissemination of environmental information, environmental meetings will be held throughout the duration of the Project construction. The frequency of meetings will be determined by the main contractor(s), but will not be less than

once per month. These meetings will be held for all site personnel and will be attended by the ECoW or similar environmental expert (if required).

2.2.3 Any environmental issues or lessons learnt will be reported at these meetings along with any updates or changes to environmental management plans. A “Look Ahead” at relevant environmental management or special requirements linked to specific upcoming tasks or seasonality will also be provided.

c) Site Signage and Notice Boards

2.2.4 Working areas will be clearly marked with appropriate signage and warnings to ensure that they are avoided by members of the public.

2.2.5 Site notice boards for disseminating information to Site personnel will be positioned either within individual work stations or in a centralised location. Site notice boards will display method statements, emergency contacts, and relevant statutory and non-statutory advice and guidance.

d) Site Inductions

2.2.6 The main contractor(s) will ensure all employees, sub-contractors, suppliers, and other visitors to the Project Site receive induction training. The Site Induction will include a summary of environmental risks associated with the Project and the onsite environmental methods and standards. Any environmental methods and standards specifically relevant to the inductee’s role or task will be highlighted.

2.2.7 Topics that will be covered in the Site Induction include, but are not limited to;

- Pertinent areas of environmental sensitivity, such as ecological, archaeological, hydrological or geological sensitive areas;
- Pollution prevention and protection of the water environment (including concrete washout);
- Waste management; and
- Environmental incident and near miss reporting.

e) Training in Environmental Requirements

2.2.8 The main contractor(s) will ensure all personnel are suitably trained in general site good practice and environmental emergency response procedures, including the use of spill kits, silt mitigation and concrete washing out. Good practice and emergency response training will be provided by a suitably qualified person on a regular basis. The main contractor(s) will keep a record of this training.

2.2.9 Toolbox talks will be provided as part of briefings on specific tasks, based on method statements and environmental standards. The will provide on-going reinforcement and awareness of environmental sensitivities and issues on the Project Site. Toolbox talks will be task specific and will identify the sensitive receptors and provide advice on any specific procedures that need to be followed and the mitigation measures that should be implemented. For specialist topics,

toolbox talks may be presented by an ECoW (or equivalent suitably trained specialist).

2.2.10 A programme of relevant toolbox talks will be drawn up by the Environmental Manager or main contractor(s) based on upcoming construction activities. Additional toolbox talks may be required outside of this based on circumstances such as unforeseen risks, repeated observation of bad practices, perceived lack of awareness, or a pollution event. A record of all toolbox talks reporting highlights of the meeting and attendees will be maintained.

2.3 Register of Mitigation

2.3.1 A register of embedded and additional mitigation measures committed to within the ES has been attached in Appendix A: Mitigation Register to this Outline CEMP. The Register has been updated in response to consultee comments and updated EIA technical assessments. This Register will be used to inform the onsite environmental management and provide a tool for aiding the preparation of method statements or environmental standards. The register covers several environmental topic areas and will be regularly updated to reflect any additional risks resulting from the main contractors selected methods of working, changing site conditions etc. Mitigation measures have been identified under the following general headings:

- General;
- Air Quality;
- Noise and Vibration;
- Ecology;
- Water Quality and Resources;
- Geology, Ground Conditions and Hydrogeology;
- Landscape and Visual;
- Traffic, Transport and Access; and
- Historic Environment.

2.4 Method Statements and Site Environmental Standards

2.4.1 The main contractor(s) will prepare Method Statements for specific construction activities and Site Environmental Standards for day-to-day Project Site operations such as housekeeping, material storage and waste management. These will be based on standard good practice measures (as set out within relevant management plans in Section 3 of this Outline CEMP), statutory requirements, environmental sensitivities and any Requirements of the DCO.

2.4.2 Site Environmental Standards will be printed on A3 posters, placed on site notice boards and used as a briefing tool onsite. They will also form the basis of toolbox talks on the relevant Project Site operations.

2.4.3 The method statement will be communicated to all or task specific personnel ahead of the commencement of the relevant activities using an agreed instruction format (e.g. toolbox talks).

2.5 Monitoring and Auditing

a) Inspections

2.5.1 The Project Site will be inspected at regular intervals to ensure implementation of good practice and compliance with measures set out within the approved CEMP. The inspection and auditing schedule for the Project will be agreed by the main contractor(s) in consultation with the Environmental Manager and ECoW if required prior to commencement of construction. It is anticipated that there will be a programme of:

- Daily inspections;
- Weekly inspections;
- Monthly Audits;
- Monthly Complaint Reporting; and
- Ongoing Environmental Monitoring.

2.5.2 Particular notice will be taken during and following extreme weather events (high rainfall, high winds, snowfall etc.), when working in areas of known contamination, and when particularly hazardous activities are being carried out. Additional Method Statements or Site Environmental Standards will be produced where significant risk to the environment is identified.

2.5.3 An Audit Close-out Schedule will be maintained by the main contractor(s). This is a document to record any observations, corrective action requests or non-compliance notices identified through inspections. Progress against corrective and preventative actions logged in the Schedule will be reported to APL on a regular basis.

i. Daily Inspections

2.5.4 The nominated site personnel or the Environmental Manager will conduct daily checks against environmental requirements. This could be done against a pro forma or similar, based on the measures outlined within method statements and Environmental Standards relevant to activities being conducted on that day.

2.5.5 Daily inspections will include visual inspections of dust emissions as described in Section 4.3.

ii. Weekly Inspections

2.5.6 Weekly Project Site inspections will be carried out by the Environmental Manager, which will assess the effectiveness of the implemented mitigation on the Project Site.

iii. Monthly Audits

2.5.7 Compliance with the approved CEMP, environmental legislation and good practice will be audited on a monthly basis by the Environmental Manager or ECoW. The audit will include details on who is responsible for implementing any action required and the associated timescales.

iv. Monthly Complaints Reporting

2.5.8 The main contractor(s) will report to APL regarding any nuisance complaints from the general public and actions on how these have been addressed. The process for receiving and taking action on complaints is set out in the Community Liaison (paragraph 2.2.1).

v. Environmental Monitoring

2.5.9 Any requirements for specific monitoring programmes as determined through the DCO or pre-construction surveys (i.e. ground investigations) will be conducted at appropriate intervals by a suitably qualified individual.

b) Incidents and Near Misses

2.5.10 An indicative environmental Emergency Response Plan is detailed in Section 4.2.7 of this Outline CEMP. This will be finalised by the main contractor(s). The plan in the approved CEMP will follow the stop – contain – notify protocol and will detail responsible personnel and contacts for reporting. All personnel will be briefed on the notification protocol for alerting the main contractor(s) and Environmental Manager of an environmental emergency as part of their Site Induction. Environmental emergency response training and toolbox talks will also be conducted at regular intervals by a suitably qualified person.

2.5.11 The main contractor(s) will maintain a register of all environmental incidents, dangerous occurrences and/or near misses, each supported by an Environmental Incident Report Form. This will document the nature, date and time of the incident, corrective action(s) taken, and details of any contact with regulatory agencies. All incidents will be reported to the appropriate regulatory body and APL on the day that they occur or within 24 hours.

2.5.12 All environmental incidents, dangerous occurrences and near misses will be reviewed by the Environmental Manager and where necessary changes to working practices/procedures will be implemented. Lessons learnt, along with any updates to method statements, sections of the approved CEMP and toolbox talk will be communicated to all personnel at Environmental Site Meetings.

3. General Environmental Management Measures during Construction Phase

3.1 Safety

3.1.1 The main contractor(s) will have the day to day responsibility for maintaining Health and Safety throughout the construction phase. A risk assessment and method statement (RAMS) will be produced and detail how risk will be minimised through an approved procedure, which will:

- Identify the significant Health and Safety impacts that can be anticipated;
- Assess the risks from these impacts;
- Identify the control measures to be taken and re-calculate the risk; and
- Report where an inappropriate level of residual risk is identified so that action can be taken.

3.1.2 There will be no access to construction areas by the general public. The Project Site will be secured to avoid unauthorised access including where permissive routes cross the construction areas.

3.1.3 Traffic safety should be promoted by all project personnel to prevention and control traffic related injuries. Speed restrictions will be imposed onsite. This will also minimise disturbance of bare surfaces.

3.1.4 The following good practice measures will be implemented by the main contractor(s) to ensure the safety of site personnel:

- The provision of appropriate Personal Protective Equipment (PPE), including footwear, masks, protective clothing and goggles where required;
- Eating, drinking and smoking will be limited to a designated ‘clean’ area of the Project Site;
- Welfare facilities will be made available;
- All site personnel will be required to wash their hands and remove overalls/boots when moving from ‘dirty’ to ‘clean’ areas of the Project Site;
- Any soils excavated that are considered by the main contractor(s) to be potentially contaminated will be reported, left in situ and fenced off until their appropriate treatment (in line with Section 4.2.7: Emergency Response Plan); and
- Water inflows to excavated areas will be minimised by the use of lining materials, good housekeeping techniques and by the control of drainage and construction materials in order to prevent the contamination of ground water.

3.1.5 The main contractor(s) will ensure that qualified first-aid can be provided at all times. Appropriately equipped first-aid stations will be easily accessible throughout the Project Site.

3.2 Security

3.2.1 During site preparation the perimeter of the Generating Equipment Site will be cleared of undergrowth and a permanent or temporary security fence placed with

locked gates for main and emergency exits (capable of being opened in an emergency).

3.3 Construction Site Housekeeping

3.3.1 Good construction site housekeeping practice will be applied at all times. As far as reasonably practicable the construction working areas for the Project Site will be designed using the following principles:

- All work areas will be secured;
- Any fuels or liquid materials will be stored and bunded in compliance with the relevant regulation;
- Signage and boundary fences will be regularly inspected, repaired and replaced as necessary;
- All working areas will be kept in a clean and tidy condition;
- Wheel washing and dust suppression facilities will be provided when and where required;
- Waste will be removed at frequent intervals; and
- Construction waste susceptible to spreading by wind or liable to cause litter will be stored in secure containers.

3.4 Storage of Fuels and Chemicals

3.4.1 The main contractor(s) will ensure that fuels and chemicals are stored appropriately and the measures are in place to prevent pollution of ground and water. Fuel will be stored:

- In areas where potential for contamination of water bodies is low i.e. outside 50 m of a spring, well or borehole and 10 m of an open watercourse;
- In areas that are low risk of flooding;
- In tanks that meet the manufacturing standards appropriate for the type of oil stored and comply with BS EN ISO 9001;
- With contents clearly marked on the storage containers;
- With secure and appropriately sized bunds being suitable to contain 110% of the contents (single tank). If there is more than one storage container, the bund will be capable of containing 110% of the largest tank, or 25% of the total aggregate capacity, whichever is the greatest;
- Tanks/ storage containers will be protected against vehicle collision; and
- All deliveries will be overseen by site personnel with emergency response training.

3.4.2 A Control of Substances Hazardous to Health (COSHH) store will be set up in the site compound. COSHH assessments and Material Safety Data Sheets will be held with the COSHH materials. A COSHH register will be created and maintained onsite.

3.4.3 All site personnel and sub-contractors will be made aware of the COSHH requirements through site inductions and specific toolbox talks. Daily site inspections will be used to review and monitor the storage and issue of COSHH materials.

3.5 Welfare Facilities

3.5.1 Welfare cabins, toilets and drying facilities, in line with The Construction (Design and Management) Regulations 2015 (Ref. 3.1) will be provided within the Project Site for the use of site personnel. Grey and foul water from welfare facilities will not be discharged directly into ditches or watercourse, but will be collected through a foul water drainage system that will either drain to a septic tank or a package treatment plant within the Project Site. It is likely that the latter will be the preferred option for ease of maintenance and environmental criteria. The processed water will then discharge onsite or to a nearby watercourse.

3.5.2 Where portable generators are used, industry good practice will be followed to minimise noise and pollution from such generators.

3.5.3 The risk of infestation by pests or vermin will be minimised by the appropriate collection, storage and regular collection of waste, the prompt treatment of any pest infestation and effective preventative pest control measures.

3.6 Public Right of Ways

3.6.1 There are three Public Right of Ways (PRoW) that cross the Project Site. Specific mitigation measures for the management of these PRoWs is contained within the Outline Construction Traffic Management Plan, which will be finalised post-consent, in consultation with the PRoW officer at CCS.

3.6.2 It is not proposed to permanently divert any PRoWs although measures will be implemented during the construction phase to maintain safety to users from construction traffic and also from any excavations which may be present. Any temporary closures, required for public safety, will be advertised in advance and diversions or directions to alternate routes will be provided where practicable.

3.6.3 Appropriate signage will be placed prior to the construction area to ensure users are aware of the works prior to arriving. Should works be undertaken in the immediate location of the crossing, banksman will be employed to avoid any potential adverse effects from construction traffic. In addition, suitable fencing will be implemented to ensure users of the permissive routes are segregated from construction traffic appropriately and safely if required.

3.7 Timing of Works

3.7.1 Construction will be programmed in such a way as to ensure that construction activities are undertaken in a timely manner while minimising environmental risk as far as possible, e.g. seasonal sensitivities or inclement weather will be considered. Construction activities may be undertaken simultaneously at more than one area of the Project Site. The work programme will be agreed with CCS prior to construction commencing onsite. In the event that the programme changes significantly, the changes will be communicated to CCS.

3.7.2 Construction activities will be scheduled so that works that have the potential to impact upon ecological receptors are conducted outside key periods of seasonal

activity, for instance, vegetation clearance will be conducted outside of the breeding bird season.

3.7.3 Construction activities will also be scheduled, where possible to reduce the risk of pollution. Measures include:

- Minimising the periods for which soils are exposed and stockpiled thereby reducing the risk of generating silt laden runoff;
- Avoiding, where possible, undertaking specific activities such as earthworks during prolonged and heavy rainfall thereby reducing the risk of sediment or pollutants becoming entrained in excess runoff; and
- Avoiding, where possible, undertaking activities in closer proximity to watercourses when water levels are higher and adjacent land is at risk of flooding.

3.8 Working Hours

3.8.1 Construction activities will not take place outside the hours of 08:00-18:00 Monday to Friday and 08.00-13.00 on Saturday and public holidays, unless otherwise agreed with CCS. These limits will not apply during commissioning and completion of the Project, as defined in **Chapter 3: Project and Site Description** of the ES. Local residents will be notified, as detailed in Section 2.2 Community Liaison, of any agreed changes to the working hours.

3.9 Lighting

3.9.1 The Project Site will require artificial lighting during construction to provide a safe working environment during hours of darkness. Artificial lighting can be a nuisance to any nearby residence and can disrupt nocturnal species.

3.9.2 All artificial lighting used at the Project Site will be in accordance with the Institute of Lighting Professionals (ILP) Guidelines (Ref. 3.2) and the Bat Conservation Trust's (BCT) interim guidance on artificial lighting and wildlife (Ref. 3.3).

3.9.3 In order to minimise light disturbance to ecological receptors:

- There will be no more than 1 lux beyond the boundary of the proposed Project Site, particularly within the Lletty-Morfil Site of Importance for Nature Conservation (SINC) to the north and east of the Generating Equipment Site, which is a habitat that supports bats.

3.9.4 The general design objectives that will be used to ensure that adverse effects of lighting (through adding light to a darker rural landscape) associated with construction of the Project are minimised are listed below:

- Luminaires will be appropriately designed for the required task;
- Louvres and shields will be used to prevent undesirable light break-out;
- Construction lighting will be directed away from all sensitive receptors;
- For the illumination of large areas, in order to limit light trespass, glare and sky glow from the plant, preference will be given to several, lower lighting units rather than tall, wide beam lighting units;

- Vehicle lights will be properly directed (conforming to MOT requirements) and lenses will be intact to prevent un-necessary glare and light intrusion;
- Lighting will be reduced or switched off when not required for safety purposes;
- Security lighting will be kept at the minimum level needed for visual and security protection;
- Dark corridors will be maintained along hedgerows and watercourses and any other linear features by avoiding light encroaching on these areas. This will avoid the fragmentation of habitat used by species such as bats and also otters that use these features to move at night-time; and
- If appropriate, the use of infra-red floodlighting and CCTV systems will be considered for security to reduce the need for visible lighting outside working hours.

3.10 References

Ref. 3.1 The Construction (Design and Management) Regulations 2015. S.I. 2015/51.

Ref. 3.2 ILP. (2011). Guidance Notes for the Reduction of Obtrusive Light. [Online]. Available: https://www.theilp.org.uk/resources/free-resources/ilp-guidance-notes/ [Accessed: 30/11/17]

Ref. 3.3 BCT. (2014). Artificial Lighting and Wildlife. Interim Guidance: Recommendations to Help Minimise the Impact Artificial Lighting. [Online]. Available: http://www.bats.org.uk/pages/bats_and_lighting.html [Accessed 07/12/17].

4. Environmental Management Plans

4.1 Overview

4.1.1 The following sections outline the likely contents of the topic specific Management Plans that will be developed to be submitted to discharge a DCO Requirement post-consent.

4.1.2 Other than the Emergency Response Plan which is integral to the CEMP, these plans will be subject to their own separate Requirement in the DCO and finalised as required via standalone documents.

4.2 Emergency Response Plan

4.2.1 This plan provides response measures for potential environmental emergencies that could arise during the construction of the Project. These include; discovery of unknown contaminated 'hotspots'; spills of contaminants such as chemicals, fuels or waste materials; and entry of contaminants into watercourses during flood events.

4.2.2 This Emergency Response Plan will be reviewed by the main contractor(s) and finalised in the approved CEMP. The main contractor(s) will also supply emergency contact details for nominated site personnel, relevant regulatory bodies and emergency services. These details will be available on site notice boards (paragraph 2.2.5) and will be displayed along with a plan of the Project Site that displays safe storage areas and the location of response equipment, such as spill kits.

4.2.3 The emergency plan and contact details will be shown to all site personnel as part of the Site Induction. Nominated site personnel will be provided with emergency response training. There will be regular toolbox talks on emergency response procedures and all site personnel will be informed of the notification procedure in the event of discovering contamination or a spill as part of the Site Induction.

4.2.4 All incidents where the Emergency Response Plan is implemented will be reported in line with the Incident Response Procedure detailed in Section 2.5: Monitoring and Auditing (starting paragraph 2.5.10).

a) Contaminated Hotspots Plan

4.2.5 Ground investigations will be conducted to identify any potentially existing contaminated land within the Project Site. In the case where a contaminant is identified, a contaminant specific management plan will be produced.

4.2.6 As such, the procedure below is proposed to be followed in the eventuality that an unidentified contaminant "hotspot" showing visual or olfactory evidence of contamination is discovered during construction:

- Relevant construction activities will be stopped immediately;

- The discovery will be reported to the Environmental Manager or appropriate personnel as identified by the main contractor(s);
- The area will be sealed off in order to contain the spread of contaminants;
- The area will be cleared to ensure there is nothing that could cause fire or explosion;
- The relevant regulator and/or CCS will be contacted once it is confirmed that contamination has been found;
- Testing will be arranged; and
- Details of the incident will be recorded, including photos and relevant information on the Environmental Incident Report Form.

b) Emergency Spill Response Plan

4.2.7 Appropriate spill response materials for the chemicals, fuels and oils stored onsite will be provided throughout the Project Site. Spill kits will be made available at fuel storage and refuelling locations and in individual plant and vehicles. Use of plant and hazardous materials will be done in the presence of at least one operative trained in emergency response.

4.2.8 The main contractor(s) will produce an emergency response plan that will follow the STOP – CONTAIN – NOTIFY – CLEAN UP – REPORT procedure. An indicative procedure is set out below:

- STOP
  - Relevant Construction activities will be stopped immediately;
  - Spilt substance will be identified and any information available (i.e. COSHH material sheet) obtained along with the correct PPE;
  - If safe to do so, the spill will be stopped to prevent more material spilling, e.g. oil drums will be righted or valves closed; and
  - Sources of ignition will be switched off.
- CONTAIN
  - The spillage will be immediately contained using bunds of earth or sand, drip trays, boom and or spill materials;
  - Drains and watercourses will be checked to see if the spill has reached them. Where possible, spills will be diverted and drains will be bunded to stop the spill entering the drainage network;
  - Spillage and runoff will not be washed into the drainage system.
- NOTIFY
  - The Environmental Manager will be notified;
  - The Environmental manger will then notify the relevant regulator, CCS and APL.
- CLEAN UP
  - The spill will be cleaned up using appropriate spill materials OR by an expert/ specialist clean-up contractor;
  - Contaminated soil, ground and water will be disposed of as hazardous waste (Section 4.5.11).
- REPORT
  - An Environmental Incident Report will be completed in line with the Incident Response Procedure (Section 2.5.10).

c) Flood Risk Management Plan

4.2.9 The following provides an outline of the measures to be implemented to minimise flood risk:

- The main contractor(s) will sign up to receive NRW flood warnings or flood alerts for the Afon Llan and Afon Lliw;
- The main contractor(s) will sign up to receive high rainfall alerts provided by the MET office as flood warning for the Project Site;
- Weather forecasts will be checked regularly;
- Plant, machinery and stockpiles will be stored away from watercourses, ditches and low lying areas that could flood;
- If flooding of the Project Site is expected, vehicles and plant machinery that pose a hazard will be moved to higher ground or off-site if appropriate;
- If flooding of the Project Site occurs, plant machinery and vehicles will be checked to ensure they are safe before use; and

4.2.10 Where possible, temporary works (including stockpiles and drains) will be set to direct overland flows away from the main Project Site and access routes.

4.3 Dust Management Plan

4.3.1 This plan contains a proposed dust monitoring plan and standard good practice measures for reducing dust and emissions from vehicles.

4.3.2 Guidance relevant to the implementation of air quality measures include;

- BS 6031: 2009: Code of Practice for Earth Works (Ref. 4.1);
- HSE Vehicle at Work Guidance (Ref. 4.2); and
- Institute of Air Quality Management (IAQM) Guidance on Air Quality Monitoring in the Vicinity of Demolition and Construction Sites (Ref. 4.3).

a) Contents of Plan

4.3.3 In line with IAQM guidance (Ref. 4.3) on monitoring air quality at construction sites; daily visual inspections of dust emissions (and weekly recording) will be made in conjunction with dust emissions monitoring at locations to be agreed with NRW. This data will be used to ensure that mitigation measures are appropriate and being applied rigorously and to provide early warning of increased dust emissions to inform the cessation or modification of activities prior to impacts occurring.

4.3.4 Monitoring will be undertaken in the vicinity of the Lletty-Morfil SINC. Since the risk for ecosystems relates to dust deposition, a real time monitor for total suspended particulate matter will be installed. Trigger levels for the instrument, which would suggest increasing risk/emissions, will be agreed with NRW prior to the commencement of construction. The monitoring stations will be mobile and will be moved around the Project Site as the principal activities move.

4.3.5 The following are general good practice measures that will be implemented onsite to control dust and vehicle emissions. If inspections and monitoring find that plumes

of dust are visible, behind moving vehicles for example, or dust was visibly deposited on roads outside of the Project Site, more vigorous control measures may be required.

i. Site Management

- All personnel will be made aware of nuisance dust and will be trained in dust management; and
- Project Site plant will be maintained so as to reduce emissions.

ii. Earthworks

- Disturbance of the ground will be kept to a minimum wherever possible;
- Necessary vegetation/ topsoil removal will be carried out in discrete sections with progressive restoration of exposed areas to minimise wind erosion;
- Earthworks and excavation areas will be kept damp, and will be avoided during periods of exceptionally dry weather; and
- Earthworks will be undertaken following BS 6031:2009 (Ref. 4.1).

iii. Material Handling

- The number of handling operations will be kept to a minimum to ensure that dusty material isn't moved or handled unnecessarily;
- Soil handling will be restricted during adverse weather conditions such as high winds or exceptionally dry spells;
- Drop heights will be kept to a minimum and will be enclosed where possible;
- Transportation of aggregates and fine materials will be conducted in enclosed or sheeted vehicles;
- Dampening methods will be used where necessary; and
- Methods and equipment will be in place for immediate clean-up of spillages of dusty or potentially dusty materials.

iv. Stockpiles

- Stockpiles will be located away from sensitive receptors where dust nuisance is likely to result;
- During exceptionally dry and windy periods stockpiles will be kept damp;
- Soils will, where appropriate be landscaped into suitable shapes for secondary functions e.g. visual screening; and
- Appropriate shrouding/ wind shielding measures dependent on particulate size will be put in place to prevent dust generation from stockpiled materials. Long-term stockpiles may be capped or grassed over.

v. Traffic Measures

- Unsurfaced roads will be graded regularly to remove loose gravel and kept in a clean and compacted condition;
- A mechanical road sweeper will be made available if required for the cleaning of public roads (in agreement with CCS and South Wales Trunk Road Agent (SWTRA));
- Wheel/ vehicle wash facilities will be provided at Project Site entrance/exit; and

vi. Emissions Management

- Plant and equipment will be operated as far as possible away from residential areas or sensitive receptors near to the Project Site;
- An onsite speed limit will be implemented by the main contractor(s) that will be appropriate to the types of construction plant utilised and the Project Site hazards in line with Vehicles at Work guidance from the Health and Safety Executive (HSE) (Ref. 4.2);
- Onsite vehicle movement will be kept to a minimum and restricted to adequately compacted internal roads;
- All plant utilised on Project Site should be regularly inspected. Monitoring of plant will include:
  - Ensuring no black smoke is emitted other than during ignition;
  - Ensuring exhaust emissions are maintained to comply with the appropriate limits;
- Vehicle exhausts will be directed away from the ground and other surfaces and preferably upwards to avoid road dust being re-suspended to the air; and
- Exhausts will be positioned at a sufficient height to ensure adequate dispersal of emissions.

4.4 Pollution Prevention Management Plan

4.4.1 This plan covers measures to minimise the risk of pollution to ground and water from the storage and use of potentially polluting materials onsite. The sections below detail the storage of fuels and oil, management of non-oil chemicals, potential pollution from construction vehicles, plant and machinery and the use of cement and concrete.

4.4.2 An Emergency Spill Response Plan is set out within Section 4.2.7.

4.4.3 All fuel storage will comply with the Water Resources (Control of Pollution) (Oil Storage) (Wales) Regulations 2016 (Ref. 4.4).

4.4.4 Further water specific management measures can be found in ES Appendix 3.2: Surface Water Management Plan.

a) Contents of Plan

i. Movement, Parking and Re-fuelling of Vehicles and Plant

4.4.5 Vehicles and plant will comply with the following:

- In order to prevent compaction and erosion of undeveloped ground, movement of construction plant and vehicles will be limited to clearly defined access tracks and construction areas only.
- Where possible, all construction plant and vehicles will be parked/stored at least 50 m away from surface waterbodies and springs.
- All construction plant and vehicles will be checked daily for oil and fuel leaks and record of such checks kept by the Environmental Manager (or ECoW).
- Mobile plant will be in good working order, kept clean and fitted with drip trays where appropriate.

- Refuelling of construction plant and vehicles will be undertaken on an impermeable surface at a temporary construction compound only.
- All refuelling activities will be supervised by site personnel with emergency response training.

ii. Cement and Concrete

4.4.6 Concrete and cement are alkaline and corrosive, and can have a highly polluting impact in water and on land and are harmful to human flesh.

4.4.7 Due to the size of the Project Site it is likely that concrete batching will occur onsite. The equipment used for concrete batching should be operated in accordance with Process Guidance Note 3/01(12) (Ref. 4.5).

4.4.8 Mixing and washing of concrete will not take place within 10 m of any watercourse or swale and waste waters will not be discharged into the water environment. All site personnel will receive training on concrete washout as part of their Site Induction.

4.5 Waste and Material Management Plan

4.5.1 To ensure efficiency of resource use, prevention of litter nuisance and compliance with waste legislation, this sections sets out good practice waste and material management measures.

4.5.2 Construction activities associated with materials and/or waste generation include:

- Site clearance will remove vegetation and undergrowth in work areas generating organic materials and waste;
- Excavation; it is estimated that the overall quantity of excavated material (solid) from the construction is to be approximately 19,000 m^3m^3. This figure is a measure of excavated material in the ground and bulk material. The worst case scenario assessed in **Chapter 12: Traffic, Transport and Access** of the ES assumes that none of this excavated material can be reused within the Project Site. However the worst case is not anticipated; and
- General day-to-day construction operations such as use of welfare facilities and deliveries generating packaging, domestic waste and sewage.

4.5.3 Waste likely to be generated during construction includes:

- Topsoil and subsoil;
- Excess concrete, mortar and grout;
- Wood off cuts and used wood (crates and concrete formwork);
- Bricks, pavers and concrete block off cuts;
- Roofing materials;
- Metal including steel reinforcement off cuts;
- Plastic wrapping and packaging;
- Paper;
- Delivered material bags, wrappings and coverings; and
- Miscellaneous materials

4.5.4 The EU Waste Framework Directive (WFD) (Ref. 4.6) provides the overarching legislative framework for the collection, transport, recovery and disposal of waste, and includes a common definition of waste. The Project will operate in accordance with the WFD, together with the Environmental Permitting (England and Wales) Regulations 2016 (Ref.4.7) and the Hazardous Waste (England and Wales) Regulations 2005 (as amended by the Hazardous Waste (England and Wales) Amendment Regulations 2009 and 2016) (Ref. 4.8).

4.5.5 Other guidance referred to within the CEMP includes:

- The Waste Classification Technical Guidance WM3 (Ref. 4.9), which sets out a standardised classification of waste based on material properties;
- Welsh Government Guidance on Applying the Waste Hierarchy (Ref. 4.10); and
- The Department for Environment, Food and Rural Affair's (DEFRA) Waste Duty of Care Code of Practice (Ref. 4.11).

a) Contents of Plan

i. Waste Hierarchy

4.5.6 Onsite waste management will align with the Waste Hierarchy, which promotes efficient resource use and minimisation of waste through the priority ordering of the following measures:

- Prevention;
- Preparing for re-use;
- Recycle;
- Other recovery; and
- Dispose (Ref. 4.11).

4.5.7 The priority order may be deviated from if a better overall environmental outcome is recognised for a particular resource or waste.

ii. Waste Prevention

4.5.8 The following preventative measures will be adopted:

- Building materials ordered will be the correct size so as not to be wasted due to being obsolete;
- The appropriate volume of material will be ordered to avoid excess;
- Ordering of new materials will be avoided if there are existing materials available or able to be adapted to the task within the Project Site;
- Deliveries will be timely and directly placed in secure storage areas, double handling will be kept to a minimum;
- Re-usable materials will be identified onsite and removed for storage and re-sale;
- Excess materials will be returned to the supplier if possible; and
- General information on site waste management will be provided in Site Inductions and toolbox talks with feedback welcomed.

iii. Classification of Waste

4.5.9 APL and/ or the main contractor(s) will identify and classify all Project Site waste streams in line with the categories and methods set out in the Waste Classification Technical Guidance WM3 (Ref. 4.9).

iv. Storing Waste

4.5.10 Where resources are earmarked for recycling, recovery or disposal the following method of storage will be implemented to minimise the risk of waste escaping, litter and/ or pollution:

- All waste will be stored at the location in which it is generated, or within a designated central waste storage area;
- These designated waste storage areas will be isolated from surface water drains and areas that discharge directly to the water environment;
- Waste will be stored in suitable containers of sufficient capacity to avoid loss, overflow or spillage;
- Storage of liquid wastes will be on impermeable bunds that hold the capacity of the container;
- Waste will be segregated by waste stream and storage containers will be clearly signed with the waste that they will hold e.g. wood, metal, plastics or other appropriate waste stream;
- Storage containers will be secure, covered or enclosed;
- There will be separate containers for hazardous waste (see Paragraph 4.5.11);
- Skips will be monitored and action taken if waste levels are too high; and
- Burning of waste is prohibited.

v. Hazardous Waste

4.5.11 “Hazardous waste” is any waste which contains properties that might make it harmful to human health or the environment (Ref. 4.8).

4.5.12 Hazardous waste could arise during construction from the following sources:

- Maintenance of plant and machinery;
- Oily water waste;
- Oily rags;
- Oil absorbent pads etc.; and
- Environmental Spill recovery (small amounts only; larger volumes taken away directly for disposal).

4.5.13 All Hazardous waste will be segregated by type and from other waste streams. All waste oil will be stored in a bunded facility until such times that it is collected. Used filters, rags and absorbents will be stowed in the hazardous waste container in drums or waste oil bags.

vi. Organic Matter

4.5.14 The waste wood and foliage material resulting from site clearance will be managed in-line with the Waste Hierarchy (as detailed within paragraph 4.5.6), thus helping to minimise potential environmental issues pertaining to this process.

4.5.15 Wherever feasible, the generation of tree and foliage waste will be prevented and these features will be retained in-situ. However, the retention of trees and foliage will not always be possible; therefore the reuse of material onsite will be explored wherever practicable, with wood material either reused in construction, or within landscaping aspects such as the use of wood chippings, or as mulch to enhance soil quality to aid the reinstatement of the Project Site.

4.5.16 Should this not prove to be a viable option for all generated material, then excess wood waste will be stored under cover, such as tarpaulin, to protect wood from the weather so that it may be re-used wherever possible off-site e.g. as carpentry material or offered to the local community for fire wood and biomass.

4.5.17 Attention will also be paid to the proximity principle, with local uses for waste materials considered where this represents the best practicable environmental option. For all material that cannot be re-used on- or off- site, or recycled, then elements of the wood and foliage material can be converted into wood-chip. By following this process, it will be possible to limit the volume of tree and foliage waste sent for disposal as far as practicably possible.

4.5.18 Any topsoil or subsoil generated will remain onsite to be reused for any landscaping.

vii. Transporting Waste

- Waste contractors will be checked periodically (bi-annually) to ensure they have valid licences; and
- All waste leaving the Project Site will be accompanied by a Waste Transfer Note (WTN) for non-hazardous waste or a Special Waste Consignment Note (SWCN) for hazardous waste. A copy of which will be retained for 2 (WTN) or 3 years (SWCN).

4.6 References

Ref. 4.1 BSI. (2009). BS 6031:2009 Code of Practice for Earthworks.

Ref. 4.2 HSE. (n.d.) Speed Limits. [Online]. Available: *http://www.hse.gov.uk/workplacetransport/factsheets/speed.htm* [Accessed 20/11/17].

Ref. 4.3 IAQM. (2012). Guidance on Air Quality Monitoring in the Vicinity of Demolition and Construction Sites. [Online]. Available: *http://www.iaqm.co.uk/wp-content/uploads/guidance/monitoring_construction_sites_2012.pdf* [Accessed: 30/11/17]

Ref. 4.4 Water Resources (Control of Pollution) (Oil Storage) (Wales) Regulations 2016. W.S.I. 206/359/W112.

Ref. 4.5 DEFRA. (2012). Process Guidance Note 3/01(12): Statutory Guidance for Blending, Packing, Loading, Unloading and Use of Cement. [Online]. Available: *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/573004/blending-packing-loading-unloading-and-use-of-cement-process-guidance-note-3-01_12_.pdf* [Accessed 21/11/17].

Ref. 4.6 Directive 2008/98/EC The Waste Framework Directive L312/3.

Ref. 4.7 The Environmental Permitting (England and Wales) Regulations 2016. S.I. 2016/1154. Environmental Protection, England and Wales.

Ref. 4.8 HSE. (n.d). Hazardous Waste. Available: *http://www.hse.gov.uk/waste/hazardouswaste.htm*. [Accessed 20/11/17].BSI. (2012). BS 5837. Trees in Relation to Design, Demolition and Construction – Recommendations.

Ref. 4.9 NRW, SEPA, NIEA and EA. (2015). Waste Classification. Guidance on the Classification and Assessment of Waste (1st Edition 2015). Technical Guidance WM3. [Online]. Available: *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/427077/LIT_10121.pdf*The Waste (England and Wales) Regulations 2011. S.I. 2011/988. Environmental Protection, England and Wales. [Accessed 20/11/17].

Ref. 4.10 Welsh Government. (2012). Guidance on Applying the Waste Hierarchy. [Online]. Available: *http://gov.wales/docs/desh/publications/120119wastehierarchyguideen.pdf* [Accessed 01/12/17].

Ref. 4.11 DEFRA. (2016). Waste Duty of Care Code of Practice. [Online]. Available: *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/506917/waste-duty-care-code-practice-2016.pdf* [Accessed 01/12/17].

Appendix A

Appendix A: Mitigation Register

A.1 Introduction

A.1.1 This Appendix provides a register of mitigation for all mitigation measures that have been identified in the ES for the Project, and are incorporated within the Outline CEMP and all other topic-specific Management Plans.

A.1.2 Table A.1 – Table A. 2 collate the mitigation measures outlined in the ES and have been separated into construction, operation and phases. Decommissioning measures will be similar to that of construction. These tables show the corresponding reference to the ES, the relevant Management Plan(s) and their document reference, and also cross-referencing the responsibility for the preparation, approval and delivery as set out in the CEMP.

Table A.1 Construction Mitigation Register

Ref No	Is Measure Embedded or Additional?	Construction Mitigation Measure	ES Ref	Relevant Management Plan	Responsibility		
					Preparation	Approval	Delivery
General Environmental Management Principles and Responsibility							
GEN01	Embedded	A CEMP will be prepared and then implemented during construction to mitigate any adverse environmental effects. An Outline CEMP for the Project is provided in Appendix 3.1 of the ES. It includes measures relating to the environmental topics assessed in this ES which will mitigate the effects of construction. The CEMP will be finalised and followed by the Contractor on site, once the content has been agreed with CCS. The Outline CEMP includes the following information: • Community liaison; • Complaints procedures; • Nuisance management including measures to avoid or minimise the impacts of construction works (covering dust, noise, vibration and lighting); • Dust management measures; • Site waste and materials management measures; • Surface and ground water protection measures; • Pollution control measures; • Security measures and use of artificial lighting; and A protocol in the event that unexpected contaminated land is identified during ground investigation or construction.	3.11.3	CEMP	APL/ Main contractor	CCS	Main contractor
GEN02	Embedded	Water courses and ditches will be diverted around the Generating Equipment Site in line with the Landscape and Ecology Mitigation Strategy (Appendix 3.4). These diversions will be undertaken using silt traps, straw bale filters / sedimats and an attenuation pond formed for any surface water outlet from the Generating Equipment Site. Water from the attenuation pond will be discharged in a controlled manner to the Afon Llan.	3.7.8	CEMP	APL/ Main contractor	CCS	Main contractor
GEN03	Embedded	Piling will be carried out using rotary driven piles in high load areas of the Generating Equipment Site such as plant and building column foundations. This technique will minimise disturbance of nearby sensitive ecological receptors. Shallow foundations for lighter buildings	3.7.17	CEMP	APL/ Main contractor	CCS	Main contractor

Ref No	Is Measure Embedded or Additional?	Construction Mitigation Measure	ES Ref	Relevant Management Plan	Responsibility		
					Preparation	Approval	Delivery
		will be excavated.					
Air Quality							
AQ01	Embedded	The CEMP will include the standard good practice dust mitigation measures, as set out in the Outline CEMP in Appendix 3.1 of the ES.	3.11.14	CEMP	APL/ Main contractor	CCS	Main contractor
AQ02	Embedded	Daily visual inspections of dust emissions will be made in conjunction with dust emissions monitoring at locations to be agreed with NRW. If plumes of dust are visible, behind moving vehicles for example, or dust was visibly deposited on roads outside of the Project Site, additional control measures may be required.	3.11.15	CEMP	APL/ Main contractor	CCS	Main contractor
AQ03	Embedded	Institute of Air Quality Managers (IAQM) guidance on monitoring air quality at construction sites (Ref A.1) recommends that, in addition to visual inspections, ambient air monitoring is undertaken in the vicinity of high risk sites. This data is required for two reasons: the first relates to ensuring that mitigation measures are appropriate and being applied rigorously; the second is to provide early warning of increased dust emissions which allows for the cessation or modification of activities prior to impacts occurring.	3.11.16	CEMP	APL/ Main contractor	CCS	Main contractor
AQ04	Embedded	Monitoring will be undertaken in the vicinity of the Lletty-Morfil SINC. Since the risk for ecosystems relates to dust deposition, a real time monitor for total suspended particulate matter will be installed but this needs to be an 'indicative instrument' only. Trigger levels for the instrument, which would suggest increasing risk/emissions, should be agreed with NRW prior to the commencement of construction. The monitoring stations will be mobile and would be moved around the Project Site as the principal activities move.	3.11.17	CEMP	APL/ Main contractor	CCS	Main contractor
Noise							
N01	Embedded	It is anticipated that core working hours and boundary noise will be limited during construction by a Requirement in the DCO. Working hours are likely to be between 08.00 and 18.00 on weekdays, and between 08.00 and 13.00 hours on Saturdays and public holidays. Some works may be allowed to take place outside of normal working hours provided they do not cause any noise disturbance. Should it be necessary to conduct work with the potential to generate noise, outside	3.11.21	CEMP	APL/ Main contractor	CCS	Main contractor

Ref No	Is Measure Embedded or Additional?	Construction Mitigation Measure	ES Ref	Relevant Management Plan	Responsibility		
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		these core hours, this would be with the prior written agreement of CCS. These limits will not apply during commissioning and testing of the Project.					
N02	Embedded	Measures to mitigate noise and ensure compliance with any imposed maximum boundary noise limits will be implemented during the construction phase of the Project in order to minimise impacts at local residential Noise Sensitive Receptors (NSRs), particularly with respect to activities required outside of normal working hours.	3.11.22	CEMP	APL/ Main contractor	CCS	Main contractor
N03	Embedded	Construction noise mitigation measures are included in the Outline CEMP (Appendix 3.1 of the ES). In order to keep noise effects from the construction phase to a minimum, all construction activities relating to the Power Generation Plant, Gas Connection, and Electrical Connection would be carried out in accordance with the recommendations of British Standard (BS) 5228 'Noise and Vibration Control on Construction and Open Sites' (Ref A.2) as explained in **Chapter 7: Noise and Vibration** of the ES.	3.11.23	CEMP	APL/ Main contractor	CCS	Main contractor
N05	Embedded	Method statements regarding construction management, traffic management, and overall site management would be prepared in accordance with best practice and relevant British Standards, to help to minimise impacts of construction works. One of the key aims of such method statements would be to minimise noise disruption to local residents during the construction period.	3.11.25	CEMP	APL/ Main contractor	CCS	Main contractor
N06	Embedded	Consultation and communication with the local community throughout the construction period would also serve to publicise the works schedule, giving notification to residents regarding periods when higher levels of noise may occur during specific operations, and providing lines of communication where complaints can be addressed.	3.11.26	CEMP	APL/ Main contractor	CCS	Main contractor
N07	Embedded	A detailed noise assessment would be carried out once the contractor is appointed and further details of construction methods are known, in order to identify specific mitigation measures for the Project.	3.11.27	CEMP	APL/ Main contractor	CCS	Main contractor

Ref No	Is Measure Embedded or Additional?	Construction Mitigation Measure	ES Ref	Relevant Management Plan	Responsibility		
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N08	Embedded	In addition, it is proposed that the contractor would be a member of the 'Considerate Constructors Scheme' which is an initiative open to all contractors undertaking building work.	3.11.28	CEMP	APL/ Main contractor	CCS	Main contractor

Ref No	Is Measure Embedded or Additional?	Construction Mitigation Measure	ES Ref	Relevant Management Plan	Responsibility		
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N04	Embedded	Mitigation measures for inclusion within the CEMP may contain, but are not limited to: • Abiding by any construction noise limits at nearby NSRs; • Ensuring that all processes are in place to minimise noise before works begin and ensuring that best practicable measures (BPM) are being achieved throughout the construction programme, including the use of localised screening around significant noise producing plant and activities; • Ensuring that modern plant is used, complying with the latest European noise emission requirements. Selection of inherently quiet plant where possible; • Hydraulic techniques for breaking to be used in preference to percussive techniques where practical; • Use of lower noise piling (such as rotary bored or hydraulic jacking) rather the driven piling techniques (if required), where possible; • Off-site pre-fabrication, where practical; • All plant and equipment being used for the works to be properly maintained, silenced where appropriate, operated to prevent excessive noise, and switched off when not in use; • All contractors to be made familiar with current legislation and the guidance in BS 5228 (Parts 1 and 2), which should form a prerequisite of their appointment; • Loading and unloading of vehicles, dismantling of site equipment such as scaffolding or moving equipment or materials around the Project Site, to be conducted in such a manner as to minimise noise generation; • Appropriate routing of construction traffic on public roads and along access tracks; • Consultation with CCC and local residents to advise of potential noisy works that are due to take place; and • Monitoring of noise complaints, and reporting to the main contractor for immediate investigation.	3.11.24	CEMP	APL/ Main contractor	CCS	Main contractor

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N09	Additional	The preferred approach for controlling construction noise and vibration is to reduce levels at source where possible, but with due regard to practicality. Sometimes a greater noise or vibration level may be acceptable if the overall construction time, and therefore length of disruption, is reduced.	7.6.3	CEMP	APL/ Main contractor	CCS	Main contractor
N10	Additional – Monitoring	During operation, monitoring is considered appropriate in order to track the success of delivery of proposed mitigation. Ideally this monitoring would be based on regular or fixed measurements close to the Project Site boundary to give consistency by minimising the impact of weather and extraneous sources. The measured levels at these locations must be calibrated against the levels at the receptors as part of the plant commissioning sound test procedure. Any change in Project Site boundary levels can then be related directly to changes at the receptors.	7.6.4	CEMP	APL/ Main contractor	CCS	Main contractor/ Environmental Manager/ ECoW
Ecology							
E01	Embedded	Local habitats and protected species would be protected during the construction works through measures included within the Outline CEMP (Appendix 3.1 of the ES) such as fencing to prevent access of species to working areas and translocation of protected species (e.g. reptiles).	3.11.35	CEMP	APL/ Main contractor	CCS	Main contractor
E02	Embedded	Sensitive ecology features such as the Ancient Woodland, trees and habitats have been avoided during the Project design development.	3.11.36	CEMP	APL/ Main contractor	CCS	Main contractor
E03	Embedded	An area has been allocated within the Project Site Boundary as mitigation for any habitat loss from permanent land take resulting from the construction and operation of the Project. This Ecological Mitigation Area is commensurate with the extent of mitigation required and the Landscape and Ecology Mitigation Strategy (Appendix 3.4) outlines the methods to be employed in enhancing its natural capital. The Landscape and Ecology Mitigation Plan illustrates the mitigation proposed (Figure 3.6).	3.4.27	Landscape and Ecology Mitigation Strategy and Landscape and Ecology Mitigation Plan	APL/ Main contractor	CCS and NRW	Main contractor
E04	Additional	*Lletty-Morfil SINC* Mitigation for the loss of SINC habitat (broadleaved semi-natural woodland, dense/continuous scrub and marshy grassland) will include	8.8.5	Landscape and Ecology Mitigation Strategy and	APL/ Main contractor	CCS and NRW	Main contractor

Ref No	Is Measure Embedded or Additional?	Construction Mitigation Measure	ES Ref	Relevant Management Plan	Responsibility		
					Preparation	Approval	Delivery
		the provision of replacement habitats. Indicative areas, based on the previous layout are as follows: Indicative areas, based on the plan are as follows: • 1.07 ha of woodland/scrub; • 2.50 ha of grassland (acid grassland/marshy grassland mosaic); • 900 m of hedgerow; and, • Two wildlife ponds and 180 m^2 of attenuation pond.		Landscape and Ecology Mitigation Plan			
E06	Additional	*Row of Trees – Broadleaved and Hedgerows – Species-Poor* Loss of rows of trees and hedgerows utilised by wildlife such as commuting and foraging bats, and commuting [redacted] will be mitigated for through the introduction of hedgerows and linear woodland features as shown on the LEMP and Strategy presented in Figure 3.6 and Appendix 3.4. Mitigation measures include that habitats temporarily removed will be reinstated and that mature trees removed may be replaced by standards of the same species or transplanted to a suitable location elsewhere within the Project Site Boundary	8.8.7	Landscape and Ecology Mitigation Strategy and Landscape and Ecology Mitigation Plan	APL/ Main contractor	CCS and NRW	Main contractor
E07	Additional	*Marshy Grassland* Temporarily removed habitats will be reinstated. Mitigation for the loss of marshy grassland habitat will include the provision of replacement habitat, as shown on the LEMP and Strategy, presented in Figure 3.6 and Appendix 3.4. The indicative area, based on the previous layout of the landscaping plans is 2.5 ha of grassland (acid grassland/marshy grassland mosaic); however, this area is subject to change.	8.8.9	Landscape and Ecology Mitigation Strategy and Landscape and Ecology Mitigation Plan	APL/ Main contractor	CCS and NRW	Main contractor
E08	Additional	*Standing Water* Mitigation for the loss of standing water habitat will include the provision of replacement habitat, as shown on the LEMP and Strategy, presented in Figure 3.6 and Appendix 3.4. Provisionally, it has been suggested that two attenuation ponds will be provided and function as wildlife ponds as well as two wildlife ponds within the acid grassland/marshy grassland mosaic replacement habitat. . The attenuation ponds will be planted with native wetland species and where possible maintained as	8.8.10	Landscape and Ecology Mitigation Strategy and Landscape and Ecology Mitigation Plan	APL/ Main contractor	CCS and NRW	Main contractor

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		wetland features. The wildlife ponds will be planted with native wetland species and maintained as wetland features.					
E09	Additional	*Amphibians* Recommendations for reptiles will help to limit the injury or killing of amphibians.	8.8.11	Landscape and Ecology Mitigation Strategy	APL/ Main contractor	CCS and NRW	Main contractor
E10	Additional	*Reptiles* Mitigation for the loss of habitat suitable for supporting reptiles (dense/continuous scrub and grassland) will include the provision of replacement habitats, as shown on the LEMP and Strategy, presented in Figure 3.6 and Appendix 3.4.	8.8.12	Landscape and Ecology Mitigation Strategy and Landscape and Ecology Mitigation Plan	APL/ Main contractor	CCS and NRW	Main contractor
E13	Additional	To reduce the risk of individual reptiles being injured or killed, all works will proceed under a Method Statement agreed with the Local Biodiversity Officer/Council Ecologist prior to works commencing. The risk of reptiles and the mitigation measures will be included in the Project Site induction package and prior to any site clearance and construction tasks. Full details are provided in the LEMP and Strategy in Figure 3.6 and Appendix 3.4.	8.8.19	Landscape and Ecology Mitigation Strategy	APL/ Main contractor	CCS and NRW	Main contractor
E14	Additional	The risk of reptiles and the mitigation measures will be included in the site induction package and prior to any site clearance and construction tasks.	8.8.20	Landscape and Ecology Mitigation Strategy	APL/ Main contractor	CCS	Main contractor
E11	Additional	Due to the 'Good' population of common lizard and the presence of low numbers of grass snakes within the survey area it is recommended that a trapping and translocation programme is undertaken to help protect any reptiles from being injured or killed. Due to the presence of suitable habitat for adder, the programme will include measures for this species. The actions involved in the proposed trapping and translocation are outlined below: • Any construction areas suitable or known to support reptiles, including any routes in and out, areas for site compounds, offices or storage of materials/waste, will be fenced off using suitable fencing	8.8.16	Landscape and Ecology Mitigation Strategy	APL/ Main contractor	CCS and NRW	Main contractor

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		(drift or semi-permanent) to limit individuals attempting to enter the Project Site from the adjacent land; • No construction activities, including pedestrian access will be allowed outside of the fencing in areas of habitat suitable for supporting reptiles. • A number of refugia (at a density of 50/ha) will be placed within the fenced area to attract reptiles; • Each day, up to twice a day for a minimum of 60 days an ecologist will check the refugia for the presence of reptiles; • Any reptiles or amphibians found will be captured for relocation to suitable habitat outside of the fenced areas. • After 60 days the trapping can cease once there have been five consecutive days where no reptiles have been found; • After the fenced area has been cleared of reptiles and prior to soil stripping the vegetation can undergo a process of habitat management and hand searches for reptiles; • Supervision of the soil strip during construction work by a suitably qualified ecologist will be required to help protect injury or killing of reptiles; and, • Any litter or rubble piles will be removed by hand under the supervision of an ecologist to avoid injuring or killing any reptiles. If the material is too heavy to be removed by hand it can be done so using a mini excavator carefully and slowly removing the material, under the supervision of an ecologist.					
E15	Additional	*Breeding Birds* Habitat creation measures relating to the loss of the SINC, broadleaved woodland, marshy grassland, hedgerows and lines of trees will provide additional areas for breeding birds post construction. Embedded landscape planting will also provide additional habitat for the species assemblage recorded.	8.8.22	Landscape and Ecology Mitigation Strategy	APL/ Main contractor	CCS and NRW	Main contractor
E16	Additional	*Bats* To allow the most appropriate and effective mitigation measures to be determined and to be included in a subsequent CEMP or LEMP, the	8.8.23	Landscape and Ecology Mitigation	APL/ Main contractor	CCS	Main contractor

Ref No	Is Measure Embedded or Additional?	Construction Mitigation Measure	ES Ref	Relevant Management Plan	Responsibility		
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		following surveys will be undertaken: • Building assessments and further bat surveys on Buildings 7 and 8 within the Abergelli Farm between May and July 2018; and • Pre-construction checks on trees scheduled for removal for their current bat roost potential with consideration of the seasonal survey timings (May-September).		Strategy			
E17	Additional	Based on the current Project design a European Protected Species Licence (EPSL) is not a requirement. However, should the scope of the Project change and/or if further bat roosts are identified an EPSL may be required.	8.8.24	Landscape and Ecology Mitigation Strategy	APL/ Main contractor	CCS	Main contractor
E18	Additional	Maintain connectivity of foraging and commuting habitats by the retention of trees and hedgerows wherever possible and utilising 'brown hedgerows' of brash, to maintain connectivity during construction. For linear features identified as key forging or commuting habitat, where possible the Gas Connection should be installed using drilling to retain feature and connectivity across the Project Site. Embedded mitigation includes the provision of replacement habitats that will benefit foraging and commuting bats.	8.8.26	Landscape and Ecology Mitigation Strategy	APL/ Main contractor	CCS	Main contractor
E19	Additional	Night time working with its associated need for additional lighting should be avoided as far as possible within areas near to known roosts. There should be no night time illumination of the hedgerows, woodland or mature tree lines.	8.8.27	Landscape and Ecology Mitigation Strategy / Lighting Strategy	APL/ Main contractor	CCS	Main contractor
E20	Additional	*Water Vole and Otter* A pre-construction check for water vole burrows, otter holts/couches and activity of both species will be undertaken where construction is present within 100 m of watercourses as identified as suitable for supporting the species during the 2017 field surveys. The check should be undertaken the year before works are due to commence and if the area declared clear, habitat management undertaken to help reduce the quality of the habitats for burrow and holt/couch creation for the period leading up to and for the duration of construction in that area. Additional mitigation may be required as a result of the survey.	8.8.28	Landscape and Ecology Mitigation Strategy	APL/ Main contractor	CCS	Main contractor

Ref No	Is Measure Embedded or Additional?	Construction Mitigation Measure	ES Ref	Relevant Management Plan	Responsibility		
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E21	Additional	[redacted] A pre-construction check for [redacted] setts and activity will be undertaken where construction works are within 30 m of suitable habitats for [redacted] sett creation.	8.8.29	Landscape and Ecology Mitigation Strategy	APL/ Main contractor	CCS	Main contractor
E22	Additional	Works likely to damage or destroy a [redacted] sett will require a license to close the sett prior to works commencing. The terms of the license may stipulate the requirement for compensatory setts to be created should any main setts be destroyed and/or temporarily closed.	8.8.30	Landscape and Ecology Mitigation Strategy	APL/ Main contractor	CCS	Main contractor
E23	Additional	Excavations, if left unfilled overnight, should be covered to avoid [redacted] and other animals becoming trapped. Sloping escape ramps for [redacted] should be created by edge profiling trenches/excavations and/or excavations should be fitted with a scaffolding board ramp to allow any trapped animals to exit. Crossing places will be provided across open excavations for the duration of the works on the sections where known [redacted] paths have been identified. Open pipework greater than 150 mm diameter that is left over night will be made secure by either filling in the end of the pipe or covering the end with a solid timber panel or similar.	8.8.31	Landscape and Ecology Mitigation Strategy	APL/ Main contractor	CCS	Main contractor
E24	Additional	Night time working with its associated need for additional lighting should be avoided as far as possible within areas near to setts and areas of known activity to reduce disturbance to [redacted] when they are out of their setts and foraging. There should be no night time illumination of the hedgerows, woodland or setts.	8.8.32	Landscape and Ecology Mitigation Strategy	APL/ Main contractor	CCS	Main contractor
E25	Additional	The introduction of new woodland, scrub, species-rich grassland and hedgerows will increase opportunities for resting, breeding and foraging [redacted]	8.8.33	Landscape and Ecology Mitigation Strategy and Landscape and Ecology Mitigation Plan	APL/ Main contractor	CCS and NRW	Main contractor

Ref No	Is Measure Embedded or Additional?	Construction Mitigation Measure	ES Ref	Relevant Management Plan	Responsibility		
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E26	Additional	*Invasive Species* An invasive species management plan will be produced to control and eradicate the invasive species within the Project Site Boundary. An updated invasive species survey should be undertaken to accurately assess invasive species and extents within the Project Site Boundary prior to the implementation of control measures.	8.8.34	Landscape and Ecology Mitigation Strategy	APL/ Main contractor	CCS and NRW	Main contractor
Water Quality and Resources							
WQ01	Embedded	Hydrological protection measures have been included in the Outline Surface Water Management Plan (Appendix 3.2) to prevent pollution events, with particular reference to the Gas Connection and section of new Access Road. The Surface Water Management Plan includes details of silt traps and / or sedimats to reduce flow of suspended solids, suitable phasing to reduce the need for unprotected slopes and avoidance of stockpiled materials.	3.11.39	Surface Water Management Plan	APL/ Main contractor	CCS	Main contractor
WQ02	Embedded	The Project incorporates welfare facilities which will require a site foul water drainage system. The Project Site is remote and it is believed it will be unfeasible to connect to a public sewer. Therefore, a foul water drainage system will either drain to a septic tank or a package treatment plant within the Project Site but outside any area at risk of flooding. It is likely that the latter would be the preferred option for ease of maintenance and environmental criteria. The processed water would then discharge on site or to a nearby watercourse in accordance with Environmental Permit conditions, if required.	3.11.5	Drainage Strategy	APL	CCS and NRW	Main contractor
WQ03	Embedded	An oily water drainage system will be required to receive surface water from potentially contaminated oil retaining areas and prevent contaminated water discharging from site. Oily water drainage shall be designed in accordance with National Grid Technical Specification 2.20 'Oil Containment at Electricity Substations and Other Operational Sites' or similar approved guidelines.	3.11.6	Drainage Strategy	APL	CCS and NRW	Main contractor
WQ04	Embedded	The surface water drainage system will be required to adequately drain the site and prevent ponding. The surface water drainage system will adopt the principles of the SuDS Manual – Ciria C753. – Updated SuDS Manual reference 2015.	3.11.7	Drainage Strategy	APL	CCS and NRW	Main contractor

Ref No	Is Measure Embedded or Additional?	Construction Mitigation Measure	ES Ref	Relevant Management Plan	Responsibility		
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WQ05	Embedded	To prevent inundation of the Project Site from surface runoff cut off drainage ditches will be placed around the uphill site perimeter. These new drainage ditches will be designed to carry the surface runoff around the Project Site and downstream back to the original drainage ditches/watercourses. This is detailed in the Outline Surface Water Management Plan (Appendix 3.2).	3.11.8	Surface Water Management Plan	APL	CCS and NRW	Main contractor
WQ06	Embedded	Where possible, the new levels and surfacing will be designed so they naturally drain by infiltration into the surrounding ground. Where this is not economically possible or presents an unsatisfactory risk of flooding, infiltration drains will be installed. All infiltration drains will connect to the surface water drainage system.	3.11.9	Drainage Strategy	APL	CCS and NRW	Main contractor
WQ07	Embedded	It is not expected that it will be possible to connect the surface water drainage system to an infiltration basin due to the presumed predominantly clayey ground and high groundwater level in places. This will be confirmed when the Ground Investigation surveys are carried out post-consent. Instead the discharged flow of water at the Generating Equipment Site boundary from the surface water drainage system will be attenuated in order to maintain the equivalent greenfield runoff flow for a range of events up to the 1 in 100 year event (with climate change allowance). The flow will be attenuated using suitably sized attenuation ponds with restricted discharge pipes to the existing greenfield runoff rates. An emergency overflow will be provided to the attenuation ponds to prevent site flooding in the event of an extreme rainfall event with suitable pollution prevention measures installed if possible to avoid a pollution event, although priority must be given to site security and resilience.	3.11.10	Drainage Strategy	APL	CCS and NRW	Main contractor
WQ08	Embedded	Where possible, roadside swales and infiltration drains will be used to remove and convey any standing water into the surface water drainage system from internal roads within the Project Site including the new Access Road. Where there are space constraints, or there is an elevated risk of contamination, the new site roads will be kerbed and drain via road gullies with pollution control measures. It is expected that roadside swales will discharge to nearby local watercourses at the existing greenfield runoff rate.	3.11.11	Drainage Strategy	APL	CCS and NRW	Main contractor

Ref No	Is Measure Embedded or Additional?	Construction Mitigation Measure	ES Ref	Relevant Management Plan	Responsibility		
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WQ09	Embedded	Existing field drainage that will cross the new Access Road will be culverted or bridged for a short length to allow flow up to the 1 in 100 year return period.	3.11.12	Drainage Strategy	APL	CCS and NRW	Main contractor
Geology, Ground Conditions and Hydrogeology							
G01	Embedded	The CEMP will be implemented during construction to mitigate any adverse environmental effects and includes working in accordance with best practices, such as the completion of all necessary ground investigation and risk assessments, maintaining safe working practices and the use of correct and appropriate Personal Protective Equipment (PPE).	3.11.47	CEMP	APL/ Main contractor	CCS	Main contractor
G02	Embedded	The following information which relates specifically to geology, ground conditions and hydrogeology will be included within the CEMP: • Surface and groundwater protection measures; • Peat management measures as required; and • Security measures; a protocol in the event that unexpected contaminated land is identified during ground investigation or construction.	3.11.48	CEMP	APL/ Main contractor	CCS	Main contractor
G03	Embedded	Intrusive ground investigation will be conducted to identify ground conditions and potential contaminants, as will risk assessments including gas, control waters and human health.	3.11.49	*Secured through DCO Requirement*	APL	CCS and NRW	Main contractor
G04	Embedded	A detailed mining risk assessment will be required to establish the risk of untreated shallow underground workings beneath the Project Site. There is potential for mine workings and entries requiring stabilisation treatment so ground stability will be improved.	3.11.50	*Secured through DCO Requirement*	APL	CCS and NRW	Main contractor
G05	Embedded	A mineral resources survey will be undertaken to establish the value of the sand, gravel and coal reserves.	3.11.51	*Secured through DCO Requirement*	APL	CCS and NRW	Main contractor
G06	Embedded	A foundations risk assessment is likely to be required to assess the risk of piling foundations to controlled waters; however this will be confirmed by the ground investigation.	3.11.52	*Secured through DCO Requirement*	APL	CCS and NRW	Main contractor

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Landscape and Visual							
LV01	Embedded	Mitigation measures will be implemented during the construction phase as set out in the Outline CEMP (Appendix 3.1 of the ES) in order to limit impacts on the landscape and visual resource. These measures will include: • The use of tall hoardings to screen views of ground level construction activities in relation to sensitive receptors such as residential views and views from nearby PRoW; • Materials and machinery will be stored tidily during the construction works in order to minimise impacts on views; • Lighting of compounds and work sites will be restricted to agreed working hours and those which are necessary for security in accordance with the Institution of Lighting Professionals guidelines. • The unnecessary removal of vegetation will be avoided; • The retention and protection of existing trees in accordance with BS5837:2012 Trees in Design, Demolition and Construction, Recommendations; • Public roads providing access to construction site will be maintained fee of dust and mud; • The Contractor will clear and clean all working areas and accesses as work proceeds and when no longer required for the works; • On completion of construction works, all structures, equipment, surplus materials, waste, notice boards and temporary fences used during construction will be removed from the Project Site with minimum damage to the surrounding area; and • Prompt reinstatement of areas that are no longer required following construction.	3.11.53	CEMP / Landscape and Ecology Mitigation Strategy	APL/ Main contractor	CCS	Main contractor
Traffic, Transport and Access							
T01	Embedded	Modifications to the B4489/Access Road junction to facilitate movements by abnormal loads;	3.11.60	*Secured through DCO Requirement*	APL	CCS and NRW	Main contractor
T02	Embedded	Widening and extension of the Access Road to facilitate access by	3.11.60	*Secured*	APL	CCS and	Main

Ref No	Is Measure Embedded or Additional?	Construction Mitigation Measure	ES Ref	Relevant Management Plan	Responsibility		
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		construction traffic;		*through DCO Requirement*		NRW	contractor
T03	Embedded	Physical management of the Access Road to ensure the security and safety of all staff;	3.11.60	CEMP	APL/ Main contractor	CCS	Main contractor
T04	Embedded	A Construction Traffic Management Plan (CTMP) including details of the management of construction traffic and Public Right of Way (PROW); and	3.11.60	CTMP	APL	Highway Authority, CCS and NRW	Main contractor
T05	Embedded	A Construction Staff Travel Plan (CSTP) to minimise the level of single occupancy car use by construction staff travelling to/from the site.	3.11.60	CSTP	APL	Highway Authority, CCS and NRW	Main contractor
Historic Environment							
CH01	Embedded	A Written Scheme of Investigation (WSI) will be prepared in advance of construction commencing. A watching brief will then be implemented in accordance with WSI during construction for any works associated with ground disturbance.	3.11.61	WSI	APL	CCS and NRW	Main contractor
CH02	Additional	In the event that the watching brief reveals archaeological remains, sufficient time and resources will be allowed to ensure that these are adequately excavated, recorded and removed, and for samples to be taken if appropriate. Provision will also be made for post-excavation analysis and, if appropriate, publication of the results.	13.8.10	WSI	APL	CCS and NRW	Main contractor
Other Effects Considered							
OE01	Embedded	The Outline CEMP includes a section on Site Waste Management, which will encourage reuse and recycling of waste before disposal in accordance with the waste hierarchy.	3.11.62	CEMP	APL/ Main contractor	CCS	Main contractor

Table A. 2 Operation Mitigation Register

Ref No	Is Measure Embedded or Additional?	Operational Mitigation Measure	ES Reference	Relevant Management Plan	Responsibility		
					Preparation	Approval	Delivery
Air Quality							
AQ05	Embedded	The Generating Equipment will be designed to comply with Industrial Emissions Directive (IED) emission limits. In addition the stack sensitivity assessment (Appendix 6.2 of the ES) has demonstrated that a minimum stack height of 35 m is appropriate to ensure the adequate dispersal of pollutants to ensure that no harm is caused.	3.11.18	*Secured through Environmental Permit*	APL	CCS and NRW	Main contractor
AQ06	Embedded	The Project will require an Environmental Permit to operate, and monitoring the performance of the Generating Equipment against the permit conditions will be the responsibility of NRW. The performance of the emissions control will require monitoring by stack emissions testing throughout operation and the Generating Equipment will be 'fine-tuned' so as to ensure that limits are not exceeded.	3.11.19	Environmental Management System (EMS)	The operator	NRW	The operator
Noise							
N11	Embedded	The selection of the Project Site and development of the indicative concept layout have already included consideration of potential noise effects and proximity to NSRs, with Generating Equipment being located as close to the existing electrical infrastructure as possible and as far from the NSRs as practicable.	3.11.29	*Secured through DCO Requirement*	APL	CCS and NRW	Main contractor

Ref No	Is Measure Embedded or Additional?	Operational Mitigation Measure	ES Reference	Relevant Management Plan	Responsibility		
					Preparation	Approval	Delivery
N12	Embedded	Other measures with regards to noise and vibration during operation, to be incorporated into the design include: • The Gas Turbine Generator and major compressors are to be housed in acoustic enclosures. In addition, these will be housed within secondary acoustic enclosures specified at 75 dB(A) Sound Pressure Level at 1 m. • Gas turbine air inlet filter and ventilation apertures are to be fitted with silencers, and designed such that all sensitive noise receptors benefit from screening and/or directivity corrections. • Silencers are to be fitted in the exhaust stack. Due to the impracticality of screening stack noise, discharge noise will be controlled using these silencers, which will be tuned to attenuate low frequencies from the Gas Turbine Generator exhausts. • All plant items will be controlled to minimise noise of an impulsive or tonal nature. • Noise breakout from the stack will be controlled using silencers. To achieve the predicted noise levels used in this assessment, noise from the top of the stacks should not exceed the maximum octave band sound power levels identified in Table 7-8 of Chapter 7 of ES.	3.11.30	*Secured through Environmental Permit*	APL	CCS and NRW	Main contractor
N13	Embedded	During the detailed design stage, options to mitigate potential significant residual noise effects by design will be further explored.	3.11.31	*Secured through DCO Requirement*	APL	CCS and NRW	Main contractor
N14	Embedded	Several options for configuration and suppliers of the Generation Equipment are under consideration. Preliminary modelling has shown that options are available that are capable of meeting the threshold noise levels.	3.11.32	*Secured through DCO Requirement*	APL	CCS and NRW	Main contractor

Ref No	Is Measure Embedded or Additional?	Operational Mitigation Measure	ES Reference	Relevant Management Plan	Responsibility		
					Preparation	Approval	Delivery
N15	Embedded	The Project would operate in accordance with an Environmental Permit issued and regulated by the NRW. This would require operational noise from the Generating Equipment to be controlled through the use of BAT, which would be determined through the Environmental Permit application.	3.11.33	EMS	The operator	Relevant certification bodies	The operator
N16	Embedded	If any non-normal and/or emergency operations were to lead to noise levels in excess of the agreed limits specified in the DCO Requirements, the operator will inform the local authority and local residents of the reasons for these operations, the anticipated emergency period and the steps to be taken to bring it back to compliance.	3.11.34	EMS	The operator	Relevant certification bodies	The operator
Ecology							
E27	Embedded	The stack has been designed to minimise impacts from emissions during operation, which includes minimising deposition which that could affect ecological receptors.	3.11.38	*Secured through DCO Requirement*	APL	CCS and NRW	Main contractor
E28	Additional	*Protected Species* The mitigation for partial underground cable or pipework replacement or repairs will follow best practice and any intrusive works will only commence after consultation with an ecologist to assess whether there are any impacts associated with the work. Management of newly created habitats or compensatory features will be detailed in the Landscape and Ecology Mitigation Strategy (Appendix 3.4) and will be designed to minimise disturbance or adverse effects on protected and/or priority species, such as avoiding vegetation management during nesting bird season, and cutting grass and scrub within the reptile receptor area to a height of no less than 150 mm.	8.8.36	Landscape and Ecology Mitigation Strategy	APL/ Main contractor	CCS and NRW	Main contractor

Ref No	Is Measure Embedded or Additional?	Operational Mitigation Measure	ES Reference	Relevant Management Plan	Responsibility		
					Preparation	Approval	Delivery
E29	Additional	*Bats* The lighting should utilise warm light luminaire such as yellow or amber LED. White LED lamps have a broad spectrum of light with whilst yellow and amber LED lamps each have a specific, narrower spectrum and have peak wavelengths between 590 and 660 nm, which is less attractive to invertebrates. This in turn will reduce the number of bats that will be attracted to feed and be open to predation through increased visibility.	8.8.38	Lighting Strategy	APL	CCS and NRW	Main contractor
Water Quality and Resources							
WQ10	Embedded	Adaptation of different platform levels at the locations of key elements of the Project development. In line with this, the ground level of the Welsh Water main easement area will be retained at the existing level in order to provide a path for any flood water to pass through the Project Site, thereby avoiding the elevated Power Generation Plant (PGP) areas – with the PGP finished floor level to be raised by approximately 150 millimetres (mm) above the site road crown level while keeping the plant plinths at 300 mm above the site level.	3.11.41	*Secured through DCO Requirement*	APL	-	Main contractor
WQ11	Embedded	Provision for all process water (i.e. gas turbine compressor wash water) to be collected in a drain tank removed by road tanker and disposed by an accredited company to a designated treatment facility off-site.	3.11.42	Drainage Strategy	APL	-	Main contractor
WQ12	Embedded	Rainwater will be removed from oil retaining areas by an automatic pump to the oily water drainage system. The automatic pumps will be designed to shut down in the event that a major oil spillage is detected. This will help prevent large quantities of oil entering the oily water drainage system.	3.11.43	Drainage Strategy	APL	CCS and NRW	Main contractor
WQ13	Embedded	The oily water drainage system will ultimately pass through a Class 1 Full Retention Oil Separator (As defined in BS EN 858) before discharging into surface water bodies or drainage systems.	3.11.44	Drainage Strategy	APL	CCS and NRW	Main contractor

Ref No	Is Measure Embedded or Additional?	Operational Mitigation Measure	ES Reference	Relevant Management Plan	Responsibility		
					Preparation	Approval	Delivery
WQ14	Embedded	All oil unloading areas on site have been designed to include containment for accidental spillage of fuel during unloading with the loading system equipped such that drainage is isolated during filling and any spillage goes to the dedicated interceptor.	3.11.45	Drainage Strategy	APL	CCS and NRW	Main contractor
WQ15	Embedded	The oil separator will be fitted with an alarm to indicate when the oil coalesce requires emptying. All oil separators will be sized to suit the oily water catchment area.	3.11.46	Drainage Strategy	APL	CCS and NRW	Main contractor
Landscape and Visual							
LV02	Embedded	Utilising technology (OCGT) will allow a significant reduction in stack height compared to other technology types. As a result of selecting OCGT technology, there will be no visible plume arising from the stack. The high temperature of the exhaust gases means that water vapour is well above the condensation point which would give rise to a visible plume.	3.11.55	*Secured through DCO Requirement*	APL	-	Main contractor
LV03	Embedded	The architectural design of the buildings and structures on the Project Site has been designed to reduce glare and to assimilate the Project into the surrounding landscape as much as possible by using neutral recessive colours to lessen the contrast with the surrounding landscape and break up the overall massing of the large scale structures.	3.11.56	*Secured through DCO Requirement*	APL	-	Main contractor
LV04	Embedded	External lighting has been designed to reduce trespass and configured to avoid glare and spillage. Details will be provided in the Outline Lighting Strategy to be submitted as part of the DCO Application and undertaken in accordance with the Institution of Lighting Professionals Guidelines (Ref. A.9).	3.11.57	Lighting Strategy	APL	-	Main contractor
LV05	Embedded	The Landscape and Ecology Mitigation Strategy and Landscape and Ecology Mitigation Plan (LEMP) has been developed to both provide reinstatement planting as well as to integrate the Project into the landscape and its wider setting. The planting proposals will be developed in accordance with the various utility and service constraints within the site.	3.11.58	Lighting Strategy	APL	-	Main contractor

Ref No	Is Measure Embedded or Additional?	Operational Mitigation Measure	ES Reference	Relevant Management Plan	Responsibility		
					Preparation	Approval	Delivery
LV05	Embedded	The landscape proposals will cover a minimum period of five years of monitoring, management and maintenance to ensure the landscape objectives are successfully achieved.	3.11.59	Lighting Strategy	APL	-	Main contractor

A.2 References

Ref A.1 IAQM. (2012). Guidance on Air Quality Monitoring in the Vicinity of Demolition and Construction Sites. [Online]. Available: http://www.iaqm.co.uk/wp-content/uploads/guidance/monitoring_construction_sites_2012.pdf [Accessed: 30/11/17]

Ref A.2 British Standards Institute (BSI). (2014). BS 5228 -1: 2009+ A1:2014. Code of Practice for Noise and Vibration Control on Construction and Open Sites – Part 1: Noise.

Ref A.3 Herpetofauna Groups of Britain and Ireland (HGBI) (1998). Evaluating local mitigation/translocation programmes: Maintaining Best Practice and lawful standards. HGBI advisory notes for Amphibian and Reptile Groups (ARGs). HGBI, c/o Froglife, Halesworth. Unpubl.

Ref A.4 National Grid. (2014). NGTS 2.20: Oil Containment at Electricity Substations and Other Operational Sites.

Ref A.5 CIRIA. (2015). C753: The SUDS [Sustainable Urban Drainage] Manual.BSI. (2012). BS 5837. Trees in Relation to Design, Demolition and Construction – Recommendations.

Ref A.6 ILP. (2011). Guidance Notes for the Reduction of Obtrusive Light. [Online]. Available: https://www.theilp.org.uk/resources/free-resources/ilp-guidance-notes/ [Accessed: 30/11/17]

Appendix 6

Note on which consents and licences would currently be anticipated to be required for decommissioning

ABERGELLI POWER LIMITED ("the Applicant")

WRITTEN SUMMARY OF THE APPLICANT'S ORAL CASE PUT AT THE DEVELOPMENT CONSENT ORDER ("DCO") ISSUE SPECIFIC HEARING

APPENDIX 6 – CONSENTS REQUIRED FOR DECOMMISSIONING THE AUTHORISED DEVELOPMENT

This note sets out the consents that are currently required to decommission a generating station similar to the Project. It does not consider the decommissioning controls proposed to be secured through the Draft DCO.

1. SURRENDER OF ENVIRONMENTAL PERMIT

The environmental permit will have a closure plan which will need to be discussed, updated and the details agreed with NRW. This will require all the environmental hazards to be removed / remediated and the site returned to the state it was in at commencement of the permitted operations.

The permit will require the operator to inform NRW when the decision is made to change process and downscale, ahead of decommissioning.

The process of surrendering the permit entails, in summary: removal of waste, site clearance and remediation works necessary to return the site back to the condition it was in at the point at which the permit was granted (which is determined using the baseline surveys). Environmental surveys will be required to validate the works.

2. BESPOKE ENVIRONMENTAL PERMIT (WASTE OPERATIONS)

Depending on the waste that needs to be cleared from the site during demolition of the Power Generation Plant, it is anticipated that material that will need to be cleared from the OCGT plant would include substances such as lube oil, solid waste (e.g. bricks, concrete and other building materials), pipework, operational infrastructure (e.g. boilers), electrical equipment and cables and other waste. This will require a bespoke environmental permit.

3. PIPELINE SAFETY REGULATIONS 1996

If the gas pipeline is a major accident hazard pipeline, then there will need to be a 'Regulation 20 notification' to the HSE in relation to the 'end of use of a pipeline'. The notification must set out the steps to be taken to decommission, dismantle or abandon the pipeline. The notification will comprise a timetable indicating when the pipeline is to be taken out of service, how long the line is to remain decommissioned and a description of how the line is to be made permanently safe.

4. CDM REGULATIONS

The Construction (Design & Management) Regulations govern the management of the health, safety and welfare of construction projects. CDM applies to all building and construction work, including demolition.

5. PROTECTED SPECIES

In the event that there are any protected species which could be affected by the demolition works, protected species licences may be required pursuant to the Conservation of Habitats and Species Regulations 2010.

6. PERMIT FOR TRANSPORT OF ABNORMAL LOADS

Any abnormal loads to be transported from the site will require consents pursuant to the Road Vehicles (Authorisation of Special Types) (General) Order 2003 or with authorisation from the Secretary of State under the Road Traffic Act 1988.

7. NOTICE OF INTENDED DEMOLITION

Notice of an intention to demolish a building must be given to the local authority pursuant to section 80 Building Act 1984. The local authority can issue a demolition notice in response and which can specify various matters in relation to the proposed demolition, such as the removal and sealing of drains or sewers, the conditions subject to which the demolition is undertaken and the condition the site is to be left in on completion

8. TEMPORARY ROAD TRAFFIC ORDERS AND OTHER STREET WORKS CONSENTS

Traffic and street works consents may be necessary to regulate traffic and in order to progress any street works (to the extent not provided for in the Order). These are pursuant to Road Traffic Regulations Act 1984, New Roads and Street Works Act 1991 and Traffic Management Act 2004.

9. CONTROL OF NOISE ON CONSTRUCTION SITES

Applications may be made, if required, by the demolition contractor before demolition commences, pursuant to section 61 Control of Pollution Act 1974 in relation to the control of noise on construction sites.

Appendix 7

Applicant’s sensitivity analysis document considering the effect of an operational life longer than 25 years

Technical Note

AECOM

Project:	**Abergelli Power Project**		
Subject:	**Sensitivity Test of Longer Operational Period**		
Prepared by:	**Natalie Williams**	Date:	**09/11/2018**
Approved by:	**Catherine Anderson**	Date:	**09/11/2018**

Sensitivity Test of Longer Operational Period

The Environmental Statement (ES) [APP-042] assesses relevant impacts against the design life (25 years) of the Abergelli Power Project (hereafter referred to as the "Project"). That period was selected in order to provide a defined period and (where relevant) future baseline for the Project. There is the potential that that the Project may operate beyond 25 years.

This technical note has therefore been prepared to undertake a sensitivity test assuming the Project operated for 35 years and considers whether there would be any differences in effects on a topic-by-topic basis from those identified in the ES.

This note concludes that there are no changes to the significance of effects that would be likely if the Project were to operate for 35 years (or longer). The ES is a robust assessment of the potential effects of the Project, regardless of its period of operation.

ES Chapter 6: Air Quality

The Air Quality Assessment was undertaken on the basis that the plant operates for a maximum of 2,250 hours per year when assessing annual mean effects, and permanently 24 hours a day when assessing short-term effects on air quality. The resultant effect of the Project was subsequently assessed against the Air Quality Strategy (AQS) objectives and EU limits that are applicable to the Project, i.e. long-term annual nitrogen dioxide (NO_2) concentration of 40 µg/m^3; short-term hourly concentration of 200 µg/m^3 for NO_2; and short-term 8 hour running concentration of 10,000µg/m^3 for carbon monoxide (CO). These AQS objectives and EU limit levels have been set for the protection of human health and are conservatively set to protect the most vulnerable members of society, i.e. the old, the young, and those that have existing health concerns.

The impact assessment has demonstrated that there will be no significant change in either NO_2 or CO concentrations as a result of emissions from the Project when assessed against the AQS objectives and EU limit levels. If the plant were to operate for 35 years (or longer), this would not alter the outcome of this assessment as the long-term (chronic) effects of NO_2 are assessed over an exposure period of a year based on mean exposure rather than the lifetime of the plant itself.

It should also be noted that the Project will have to apply and hold an environmental permit throughout its operational life. This permit will set the emission limits that are applicable to the plant based on current and emerging technology, government environmental policy, and understanding of health effects of NO_2 and CO.

This permit will be reviewed on an ongoing basis by Natural Resources Wales (NRW) and the emission limits applicable to the Project will be adjusted based on the understanding at that time. This has been demonstrated by the Large Combustion Plant Directive which was introduced in 2001, now part of the 2016 Industrial Emission Directive (IED), which set stringent emission limits for both new and existing plant and set a time limit within which exiting plants had to either: achieve these limits; limit their operating hours; or cease operations.

Therefore, whilst the Project has been designed and assessed based on the emission limits applicable to a new facility set out in the IED (the only standards currently known), increasing the proposed operational life time from 25 to 35 years (or beyond) will not alter the fact that should new legislation be introduced the plant would need to achieve any updated emission limits or cease operating, within the time limits set out in the new legislation, and irrespective of the lifetime of the plant on which the ES was based.

ES Chapter 7: Noise and Vibration

The Noise and Vibration Assessment was based on an assumption that the Project would operate for a period of 25 years, its design life. An increase in operating time to 35 years (or beyond) would not result in any changes to the assessment. The impact of noise during construction, operation, and demolition will only exist when the sources are present and after demolition there will be no legacy impacts.

The impact assessment for operation was based on comparison of plant operational noise with background sound levels during the daytime and absolute noise levels based on World Health Organization (WHO) guidance limits at night. The assessment concluded that the effects of the Project would be negligible and not significant. The nature of the area around the plant, which has low background sound levels, meant that the background levels at the receptors are extremely unlikely to reduce with time; therefore the impact of the plant during the day will not increase. The WHO noise criteria are based upon the levels that will result in sleep disturbance. Again, these will not change and so the night time assessment will not change.

The demolition of the plant will be subject to environmental management plans that will control noise emissions. The construction noise emissions have been assessed against the current guidance for construction noise. It may be that the legal requirements for the noise levels to be achieved during demolition could change in the future (however long the plant operates for). If so, the environmental management plan for demolition will be required to reflect the legislation and policy requirements applicable at the relevant time. No significant noise effects were predicted for the demolition phase, and this conclusion would not be altered by the plant operating for a longer period.

The environmental permit for the Project is likely to require site noise monitoring to identify increases in operational noise emissions and a regime of controls to rectify any increases that might occur over the life of the plant. As noted in the Air Quality section above, a site's environmental permit is not static, and its requirements evolve over time in response to changing legislation and policy.

ES Chapter 8: Ecology

The Ecological Impact Assessment (EcIA) identified that adverse effects would be experienced during the construction phase of the Project; these would be attributed to habitats loss and disturbance whilst plant, machinery, and human activity is at its highest. These effects were assessed to be temporary and confined to the construction period.

It is predicted that there would be no significant adverse effects on biodiversity during the operational phase of the Project and therefore the potential extension of the operational period from 25 years to 35 years would not change the assessment of effects undertaken within the EcIA. Indeed, as the landscape and mitigation habitats become more established over time they will provide greater value to biodiversity and the maintenance of these habitats for a longer period may bring about a slight benefit overall. These conclusions remain the same if the plant operated for longer than 35 years.

ES Chapter 9: Water Resources and Flood Risk

The Water Resources and Flood Risk assessment identified no significant effects, therefore no further mitigation was recommended other than those which are part of site management best practice (and which are embedded mitigation, secured through the DCO Requirements and relevant management plans).

The WFD Assessment (Document Reference 6.3, Appendix 9.2) was undertaken to assess water quality on nearby watercourses. The WFD assessment is not sensitive to an increased operational lifetime of the Project, and therefore the conclusions remain valid.

A Flood Consequence Assessment (Document Reference 6.3, Appendix 9.1) was undertaken to inform the EIA and considers the impact of the Project on flooding and drainage. The FCA assessment assumes a 25 year design life on the Project and therefore it was agreed with NRW and CCS to assess the impacts of climate change on the Project using the 'Total potential change anticipated by 2050s' specified in Welsh Government Climate Change Allowances[1]. The 'Total potential change anticipated by the 2050s' is defined as the period between 2040 to 2069 (Section 7.2.2 of FCA). Therefore the FCA assessment is considered robust for an operational life up to 51 years, and hence the storage and attenuation volumes remain appropriate. The conclusions of the FCA are therefore still valid for a Project design life of 35 years (or up to 51 years).

Given that no significant effects were anticipated for the assessed 25 year operational life, it is considered that an increase in plant operational lifetime beyond 25 years (for any period up to 51 years will not change any of the conclusions for Water Quality and Resources in the ES.

[1] Welsh Government. CL-03-16 - Climate change allowances for Planning purposes. Cardiff 2016,

ES Chapter 10: Geology, Ground Conditions and Hydrogeology

The impact assessment undertaken for geology, ground conditions and hydrogeology identified localised minor adverse effects for the Project, including sterilisation of localised sand and gravel mineral reserves and sterilisation of coal reserves beneath the Power Generation Plant footprint. These were not significant.

Potential minor adverse effects associated with the operational phase included spillage of potentially polluting materials, but these are mitigated by standard pollution control measures.

Operation of the facility over a 35 year period (or longer) is not anticipated to have any greater effect compared to operation over a 25 year period.

ES Chapter 11: Landscape and Visual Effects

The Landscape and Visual Impact Assessment (LVIA) was based on an assumption that the Project would operate for a period of 25 years. An increase in the proposed operational lifetime from 25 to 35 years (or longer) would not change the conclusions made within the LVIA.

Duration of the operational lifetime is considered in the judgements of magnitude of landscape and visual change. For instance, short term (0-5 years) landscape and visual change is considered to be of low magnitude, whilst medium term (5-10 years) is of medium magnitude, and long term (10+ years) is of high magnitude, as defined in Tables 11.9 and 11.10 in Chapter 11 of the ES. Accordingly, the operational impacts were considered to be long-term, and the conclusion on effects was based on this. If the plant were to operate for longer than 25 years (whether 35 years or longer), this would still be considered a long-term change in the evaluation of landscape and visual magnitude of change and consequently, an increase in operational life would not result in any change to the findings of the LVIA.

The Landscape and Ecology Mitigation Strategy (LEMS) will be subject to a management period running concurrently with the operational life of the Project. If the Project were to run for 35 years (or longer), the management period of the LEMS would correspondingly increase if required, given that a review is needed every 5 years and the Ecological Mitigation Area may have reached maturity and ecological equilibrium prior to the 25 years in any case. The updated LEMS (submitted at Deadline 1) no longer refers to the management period being limited to 25 years, instead referring to the operational period of the Project (if management is still required).

ES Chapter 12: Traffic, Transport & Access

During the operational phase of the Project it is anticipated that there will be minimal traffic generation, as there are likely to be up to15 staff and a resulting up to 30 vehicle movements per day including deliveries and visiting contractors. During annual maintenance periods, there will be an additional 50 movements per day. Therefore, Project-generated traffic will result in a negligible effect, which is not significant. An operational timescale of 35 years (or longer) would not affect these findings, as the level of traffic generation during the extended period would be the same as that which has already been assessed.

ES Chapter 13: Historic Environment

An extension of the operational period of the Project from 25 to 35 years (or longer) does not change the nature or extent of its impacts and effects, as identified by the Historic Environment assessment. The physical effect on known heritage assets (assessed as negligible and not significant in respect of a single asset) would occur during construction and would not be altered by a longer operational phase.

During the operational phase of the Project, Chapter 13 of the ES identified one non-significant effect upon the setting of a heritage asset. This applied to Scheduled Monument GM202, the Mynydd Pysgodlyn Round Barrow (assessed as minor adverse). No other assets were considered to be subject to an alteration to their setting. The only implication of a 35 year or longer operational phase would be that this effect would be of longer duration. The magnitude of impact and significance of effect would remain identical to that for a 25 year operational period, which was not significant.

ES Chapter 14: Socio-Economic

If the Project were to operate for longer than the 25 years assessed, this would not change the nature or extent of its likely operational impacts and effects, as identified in the assessment of socio-economic effects.

Operational employment levels and associated annual GVA generation have been calculated assuming full build-out of the Project and then commencement of operations, which would be unaffected by a longer operational period. No change to operational employment at the Site is predicted, with no change to demand for community infrastructure provision on account of the Project also predicted. In line with historical trends, annual GVA generation from the waste management and energy generation sectors is expected to increase over time due to inflationary factors, which combined with a constant level of operational employment would result in higher GVA per employee in monetary terms. However, in real terms, no change in socio-economic effects is considered likely.

Summary

Each of the technical assessments (Chapters 6-14) have been reviewed to consider if an increase in the operational lifetime of the Project (i.e. up to 35 years or beyond) would change any of the conclusions of the ES.

In summary, there are no identified changes to the assessments or significance of effects for each of the Chapters 6-14. The conclusions of the ES therefore remain valid for an operational lifetime of the Project of 35 years or longer.

Appendix 8

Examples of confiscation orders under the Proceeds of Crime Act 2002 for breaches of development control

ABERGELLI POWER LIMITED ("the Applicant")

WRITTEN SUMMARY OF THE APPLICANT'S ORAL CASE PUT AT THE DEVELOPMENT CONSENT ORDER ("DCO") ISSUE SPECIFIC HEARING

APPENDIX 8 – EXAMPLES OF CONFISCATION ORDERS UNDER THE PROCEEDS OF CRIME ACT 2002 RELATED TO DEVELOPMENT CONTROL

This note sets out examples of where the Proceeds of Crime Act 2002 has successfully been used by local planning authorities to obtain confiscation orders to strip developers of the proceeds which flow from their breach of development control.

The Encyclopaedia of Planning Law and Practice cites three reported criminal cases where confiscation orders have been made under the Proceeds of Crime Act 2002 following breaches of development control (Reference 179.20/1 – see attached extract from the Encyclopaedia for the Examining Authority's reference at Appendix 8A).

A short summary of the four cases cited is set out below, and copies of the official case reports are also attached for the Examining Authority's reference.

Example 1 – unlawful park and ride operations near Stansted Airport

Confiscation order for £760,000

Case Citation: Basso & Anor v R, Court of Appeal - Criminal Division, May 19, 2010, [2010] EWCA Crim 1119

The judgement/case report is attached for the Examining Authority's reference at Appendix 8B.

Example 2 – failure to comply with enforcement notice relating to unlawful conversion of two houses into flats without planning permission

Confiscation order for £544,358 (reduced on appeal from original confiscation order of £1.44m)

Case Citation: R. v Ali [2015] Crim L.R. 88

The judgement/case report is attached for the Examining Authority's reference at Appendix 8C.

Example 3 – failure to comply with enforcement notice relating to unlawful subdivision of a flat, let on multiple separate tenancies

Confiscation order for £494,314.30

Case Citation: R. v Hussain [2015] EWCA Crim 2344

The judgement/case report is attached for the Examining Authority's reference at Appendix 8D.

Status: Positive or Neutral Judicial Treatment

**268* R. v Luigi del Basso

Court of Appeal (Criminal Division)

19 May 2010

[2010] EWCA Crim 1119

[2011] 1 Cr. App. R. (S.) 41

Lord Justice Leveson , Mr Justice Treacy and Mr Justice Coulson :

May 19, 2010

Abuse of process; Benefit from criminal conduct; Confiscation orders; Enforcement notices;

H1 *Confiscation order—Proceeds of Crime Act 2002—benefit—proceeds of business carried on without planning consent in defiance of enforcement notice—whether receipts of business properly treated as benefit*

H2 Where the defendants carried out a business on land without the necessary planning consent and in defiance of an enforcement notice, the receipts of the business were properly treated as their benefit for the purposes of the Proceeds of Crime Act 2002 . ****269***

H3 The appellants pleaded guilty to failing to comply with an enforcement notice, contrary to the Town and Country Planning Act 1990 s.179 . An application was made for 201 parking spaces on land owned by a company owned by the first appellant, but rented to a football club. Conditional planning permission was granted, restricted to days when football matches were taking place at the football club. A further application was made for a “park and ride” facility, which application was rejected. It was subsequently discovered that the site was being used as a park and ride parking facility for passengers using an airport and the local authority informed the football club that the unauthorised parking business should cease. The warning, which was repeated, was ignored. An enforcement notice was served, but the company and the football club appealed and their appeal was subsequently dismissed. Meanwhile the parking operation was expanded. The business was carried on by the appellants, trading as a parking association. The appellants were advised that if the business remained in operation beyond a specified date a prosecution would be commenced. The local authority commenced a prosecution against the company which owned the land, the football club and the parking association for failing to comply with the enforcement notice. The allegation was confined to a single day. The parties were all convicted and each was sentenced to a fine of £20,000. Shortly before the trial the parking association was converted into a limited company, in which the appellants owned 50 per cent of the beneficial interest. A second prosecution was commenced and eventually the appellants and the other defendants pleaded guilty. Confiscation proceedings were begun against all defendants but discontinued against those defendants other than the appellants. The judge found that the first appellant had benefited in the amount of £1,881,221.19 and that the available amount was £760,000. A confiscation order was made against the first defendant in that amount. The second appellant was found to have received the same benefit but the available amount was determined to be nil.

H4 **Held:** the sentencing judge concluded that although the parking association and the parking company were run on businesslike lines, they were nevertheless illegal operations. It followed that the appellants had a “criminal lifestyle” within the meaning of the Proceeds of Crime Act 2002 , as they had committed offences over a period of at least six months. The sentencing judge rejected the argument that the operation of the park and ride schemes was outside the scope of the Proceeds of Crime Act 2002 , holding that the Crown Court was obliged to proceed to confiscation in accordance with s.6 of the Act. The sentencing judge found that the appellants had “obtained” the sums paid to the parking association despite the fact that the money was used for the benefit of the football club. The sums concerned were paid into bank accounts over which the appellants had exclusive control. The submission that the confiscation proceedings represented an abuse of process was also rejected. The sentencing judge determined that it was not appropriate to “pierce the corporate veil” of the parking company but that the proceedings

should not be stayed. The appellants had embarked on the park and ride operation without planning permission and continued it, knowing that it was unlawful and in defiance of the authorities, in the belief that the future profit would outweigh any loss which might flow from their unlawful activities. In the Court's view, it was common ground that the appellants were convicted of offences before the Crown Court and the prosecutor asked the court to proceed under s.6 of the Proceeds of Crime Act 2002 . It followed that the Crown Court was required to ***270** decide whether the appellants had benefited from the conduct and the recoverable amount. The provisions of the Act had been clarified in the cases of *May [2008] UKHL 28; [2009] 1 Cr. App. R. (S.) 31* (p.162), *Jennings v Crown Prosecution Service [2008] UKHL 29; [2008] 2 Cr. App. R. 29* (p.414) and *Green [2008] UKHL 30; [2009] 1 Cr. App. R. (S.) 32* (p.182). It had been said in *Sivaraman [2008] EWCA Crim 1736; [2009] 1 Cr. App. R. (S.) 80* (p.469) that in considering questions of confiscation, the focus of the inquiry was on the benefit gained by the defendant, whether individually or jointly. Similar observations had been made in *Grainger [2008] EWCA Crim 2506* . It was submitted for the Crown that the phrases "benefit gained", "real benefit" and "true benefit" were not directed to the profit made by the offender, but to any benefit as defined by the statute obtained by the offender rather than benefit that he might have played a part in assisting others to obtain. In the Court's judgment, it was necessary to return to the words of the statute as explained in *May* . It was clear that the legislation looked to the property coming to an offender which was not his and not what happened to it subsequently. The court was concerned with what he had obtained; whatever disposition of that property was made, whether for socially worthwhile reasons or otherwise, was irrelevant. Profit was not the test. This analysis was confirmed by the decisions in *Nelson [2009] EWCA Crim 1573; [2010] 1 Cr. App. R. (S.) 82* (p.530). The Court rejected the argument that the language of the statute permitted the court to look at what the defendant "actually made" net of expenses. This was contrary to the statement in *May* that "benefit gained is the total value of the property or advantage obtained, not the defendant's net profit after deduction of expenses". It was for the judge to find as a fact what property the defendant had obtained and thus the extent of the benefit. What happened to that benefit after it had been obtained formed no part of the statutory test. The sentencing judge had focused on property personally obtained by the defendants and refused to pierce the corporate veil of the corporate vehicle through which the scheme operated in its later stages. The appellants also advanced the argument that the commencement of confiscation proceedings was an abuse of the process of the court, relying on *Shabir [2008] EWCA Crim 1809; [2009] 1 Cr. App. R. (S.) 84* (p.497). In *Nelson* the Court expressed concern that orders staying confiscation proceedings were being too readily made and that an abuse of process argument could not be founded on the basis that the proper application of the legislative structure might produce on oppressive result with which the judge might be unhappy. Where the prosecution invoked the confiscation process, the court lacked any corresponding discretion to interfere with that decision if it had been made in accordance with statute. In the Court's judgment, that observation disposed of the argument advanced in the case. The case was not similar in any way to *Shabir* , where the Court was concerned that if the charges been chosen differently, the criminality would have been fully reflected and the confiscation regime not engaged. In the case before the Court, from the moment that the first appellant had exhausted his rights of appeal against the enforcement notice it was his duty to obey the law: he chose deliberately not to do so. The local authority provided him with another five months to comply and yet he refused to do so. The economic or environmental harm arising from the appellant's activities was only one part of the picture: the other was that a requirement to observe the law was imposed on all and the appellants had themselves to blame for the persistent failure to do so. The confiscation aspect of the proceedings did not represent an abuse of process. The Court endorsed the sentencing judge's observation to the ***271** effect that those who chose to run operations in disregard of planning enforcement requirements were at risk of having the gross receipts of their business confiscated, even though this greatly exceeded their personal profits. The appeal would be dismissed.

Cases cited:

Morgan [2008] EWCA Crim 1323; [2009] 1 Cr. App. R. (S.) 60 (p.333)

Seager [2009] EWCA Crim 1303; [2010] 1 Cr. App. R. (S.) 60 (p.378)

May [2008] UKHL 28; [2009] 1 Cr. App. R. (S.) 31 (p.162)

Jennings v Crown Prosecution Service [2008] UKHL 29; [2008] 2 Cr. App. R. 29 (p.414)

Green [2008] UKHL 30; [2009] 1 Cr. App. R. (S.) 32 (p.182)

Sivaraman [2008] EWCA Crim 1736; [2009] 1 Cr. App. R. (S.) 80 (p.469)

Grainger [2008] EWCA Crim 2506

Xu [2008] EWCA Crim 2372

Neuberg [2007] EWCA Crim 1994; [2008] 1 Cr. App. R. (S.) 84 (p.481)

Nelson [2009] EWCA Crim 1573; [2010] 1 Cr. App. R. (S.) 82 (p.530)

Shabir [2008] EWCA Crim 1809; [2009] 1 Cr. App. R. (S.) 84 (p.497)

H6 **References:** confiscation orders, benefit, Current Sentencing Practice J 11-2C

H7 **Representation**

A. Trollope QC for the first appellant.

A. Heaton-Armstrong for the second appellant.

D. Perry QC and S. Ray for the Crown.

JUDGMENT

LEVESON L.J.:

1 On June 8, 2007, at the Crown Court at St Albans, Luigi Del Basso ("Mr Del Basso") and Bradley Goodwin ("Mr Goodwin") pleaded guilty, on re-arraignment, to five and two counts respectively of failing to comply with an enforcement notice contrary to s.179(1) and (2) of the Town and Country Planning Act 1990 ("the 1990 Act"). As a consequence, there was then initiated a hearing under the Proceeds of Crime Act 2002 (POCA 2002) conducted initially by the Asset Recovery Agency and latterly the Serious Organised Crime Agency. This led to substantial hearings before H.H. Judge Michael Baker QC who was required to deliver two lengthy judgments (on July 28, 2008 and July 10, 2009). We shall return to the complexity of these proceedings at the conclusion of this judgment.

2 The upshot of the prosecution was that Mr Del Basso was fined £3,000 on each count (with six months imprisonment concurrent on each count in default of payment) and ordered to pay £20,000 costs. Additionally, he was adjudged to have received a benefit of £1,881,221.19; the judge having determined that £760,000 was available, he made a confiscation order in that sum under s.6(5)(b) of POCA 2002 ; in default of payment, he imposed a term of 18 months' imprisonment consecutive to the term of six months. Mr Goodwin was fined the nominal sum of £5 on each of the two counts that he faced, adjudged to have received the same benefit but,

because of his financial position, the recoverable amount was determined to be nil. Both appeal against the confiscation order with leave of the single judge; Mr Del Basso's application for leave to appeal against the fine was refused and has not been renewed. ***272**

The facts

3 In order to understand the background to this prosecution, it is necessary to go back to June 1999 when an application was made for 201 parking spaces on land at Dunmow Road, Bishop's Stortford. This land was owned by a company, Timelast Ltd, owned by Mr Del Basso, but rented to Bishop's Stortford Football Club ("the Football Club") and intended to provide parking for those attending football matches. Conditional planning permission was granted but restricted to days when football matches were taking place at the football club. Four weeks later, however, a further application was made for a "park and ride" parking facility. In July 2000, this application was rejected.

4 At the time that this application was rejected, the relevant local authority became aware that part of the Football Club site was being used as a "park and ride" airport parking facility for passengers using Stansted Airport. On August 2, 2000, the local authority wrote stating that planning permission was required to operate the parking business and advised the Football Club that the unauthorised parking business should cease. Although this warning was repeated in numerous letters and meetings held between the local authority and the Football Club, it was ignored and the parking business continued to operate.

5 On January 28, 2003 the local authority served an enforcement notice. Timelast Ltd and the Football Club appealed to the Planning Inspector. On October 30, 2003, following a two day hearing, the appeal was dismissed. In the period of nine months between service of the enforcement notice and the appeal hearing, however, far from taking heed of the local authority's concerns, the parking operation was expanded. A further appeal to the High Court was mounted but, in February 2004, permission to appeal was refused. Thus, the end of the line had been reached.

6 Throughout this time, the "park and ride" business had continued to be operated by Mr Del Basso and Mr Goodwin trading as Bishop's Stortford Football Club Members' Parking Association ("the Parking Association"). On March 9, 2004, the local authority advised the Parking Association that if the business remained in operation beyond August 11, 2004, a prosecution would be commenced immediately and without further notice. So it was that, on August 13, 2004, officials from the local authority visited the Football Club site. The airport parking business was still operating, apparently expanded; since the appeal decision, no attempt had been made to comply with the enforcement notice.

7 On September 17, 2004, the local authority commenced a prosecution against Timelast Ltd (the owner of the land), the Football Club (which occupied the site) and Mr Goodwin (trading as the Parking Association) for failing to comply with the enforcement notice. The allegation was confined to the single day of the visit, August 13, 2004. On November 10, 2005, after a trial, all three were convicted and, on December 22, each defendant was sentenced to a fine of £20,000. Applications for leave to appeal were refused by the single judge, not renewed in relation to conviction and, as to sentence, were also refused by the Full Court (see R. v Bishop's Stortford Football Club [2006] EWCA Crim 3098).

8 Meanwhile, prior to the criminal trial, the arrangements for the "park and ride" business were changed. The Parking Association had operated as a non-incorporated partnership of which Mr Del Basso and Mr Goodwin were the only partners and the revenue received was paid into a bank account over which they had joint exclusive control. From July 1, 2005, it was operated by Bishop's Stortford Football ***273** Club Members' Parking Association Ltd ("the Parking Company") with 50 per cent of the beneficial interest in the shares being held by Mr Del Basso and Mr Goodwin. Having said that, in the period July 1, 2005 to October 31, 2005 there was a crossover between the Parking Association and the Parking Company. During this period revenue from the "park and ride" business continued to be paid into the Parking Association bank account despite the operation of the Parking Company.

9 On November 22, 2005, after the conviction in the trial, local authority officials again visited the Football Club site and found the parking business continuing as before. As a result, on January

17, 2006, a second prosecution was commenced, again for offences arising from the failure to comply with the enforcement notice. The defendants were: Timelast Ltd, the Football Club, the Parking Company, Mr Del Basso and Mr Goodwin; proceedings against two further defendants were discontinued. It is this prosecution that culminated on June 8, 2007 when all five defendants pleaded guilty to the charges which they faced. Timelast Ltd, the Football Club and the Parking Company were fined nominal sums.

10 Confiscation proceedings under s.6(3)(a) of POCA 2002 were initially commenced against all five defendants but, during the course of legal argument, discontinued against all but Mr Del Basso and Mr Goodwin. The first hearing lasted a week and in a detailed 38 page reserved ruling delivered on August 11, 2008, H.H. Judge Baker determined a number of preliminary issues (reduced into 15 written questions not all of which he then answered) although he gave leave to the parties to submit further argument in the light of a recent decision of this Court. There were then further hearings and his second ruling, dated July 10, 2009 (covering a further 24pp. of transcript) made a number of findings of fact and reached conclusions on remaining issues sufficient for him to determine the matter.

The approach of the judge

11 The case for the Crown was that the "park and ride" operation became criminally unlawful from the moment the enforcement notice became effective, that Mr Del Basso and Mr Goodwin were to be treated as having had a criminal lifestyle and, as a result, were subject to the assumptions set out in s.10 of the 2002 Act, unless these assumptions were incorrect or would result in a risk of serious injustice. The turnover of the scheme represented the benefit of the offenders irrespective of the corporate vehicle through which the turnover was generated.

12 On behalf of Mr Del Basso, it was argued that the purpose of the Parking Association, later the Parking Company, was to provide income for the Football Club; it had an altruistic motive and no element was run for personal profit. In fact the Football Club was in a parlous financial state and the scheme had provided much needed income in the form of rent for the use of the land: over the life of the scheme, total payments to the Football Club amounted to some £500,000 and represented nearly 30 per cent of the Club's income. Further, virtually all the income from the scheme was spent on necessary running expenses. Mr Del Basso, himself, had made a very significant financial contribution to the football club and derived only modest income from services or loans; his income had been approximately £125,000. On behalf of Mr Goodwin, it was added that the breaches of the 1990 Act were modest and had caused little environmental harm and no economic harm. ***274**

13 The judge concluded that although the Parking Association and Parking Company were run on business-like lines, employing staff, honouring contractual obligations towards employees and third parties alike, while at the same time conducting business in an open manner, they were, nevertheless, illegal operations. He also concluded that Mr Del Basso and Mr Goodwin had a criminal lifestyle within the meaning of the 2002 Act as they had committed offences over a period of at least six months and had received some benefit from their offending: this last finding was not challenged.

14 Having regard to the grounds of appeal, it is appropriate to set out rather more extensively some of the questions posed for the judge and the answers he provided. Thus, the first question was whether the continued operation of the "park and ride" after the enforcement notice became effective was in itself "an entirely lawful activity" such as to make the application of the confiscation regime of POCA 2002 misconceived. Judge Baker dealt with this question in this way:

> "The obligation of the Court to proceed to confiscation is made mandatory by section 6 of POCA . The relevant conditions precedent to the confiscation proceedings in this case are (1) that the defendant is convicted of an offence in proceedings before the Crown Court and (2) that the prosecutor has asked the court to proceed under section 6 . Both these conditions are met. There is no suggestion in POCA that certain types of offence are excluded from its operation. The case is in my judgment, akin to *R v Neuberg (Karen Jayne) [2007] EWCA Crim.1994* in which the Act was held to apply to a company operated in breach of section 216 of the Insolvency Act which forbids the use

> of a prohibited trading style. The business of the company itself was lawfully conducted. It became unlawful because it was conducted using a prohibited name associated with another and insolvent company. Furthermore, the suggestion that the activities in this case were either 'entirely' or 'inherently' lawful is simply wrong. The activity of conducting a 'park and ride' operation was entirely and inherently criminally unlawful from the moment the enforcement notice became effective. This is so regardless of the fact that it appears to have been conducted in a way which complied with the law relating to employment, income tax and VAT. The lawfulness of the manner in which the activity was carried out cannot affect the unlawfulness of the activity itself. My answer, therefore, to the question is 'no' which favours the prosecution."

15 Question 3 concerned the issue whether the offences with which the court was concerned were outside the confiscation regime of POCA 2002 . The judge concluded that the offences brought into operation the scheme of the legislation ("four square within it") and rejected the contention to the contrary for the following reasons:

> "First the breach of the enforcement notice rendered the activity itself unlawful, however compliant it was with other legal requirements in the manner in which it was actually carried out. Second, as already stated, section 6 of POCA is mandatory. It clearly obliges the Court to apply the confiscation regime to any offence in proceedings before the Crown Court if the conditions within the section are satisfied."

16 The sixth question concerned the creation of the Parking Company and whether it was apt to allow the court to pierce the corporate veil to equate the activities of ****275*** the company with those of Mr Del Basso and Mr Goodwin. Although he initially declined to deal with this question, by his second ruling, he determined that it was not appropriate to pierce the corporate veil of the Parking Company. He explained:

> "1. The decision whether or not to pierce the corporate veil is very much a fact-specific decision … it is a matter of judgment on the facts rather than a more general discretionary decision;
>
> 2. It is inescapable that the 'park and ride' 'business carried on by the [Parking Company] was wholly unlawful;
>
> 3. [The Parking Company] was not, however, formed in order to conceal the true nature of the business. It was formed, as I have found, for good business reasons;
>
> 4. In the minds of [Mr Del Basso and Mr Goodwin] the hope and at various times the expectation was that the 'park and ride' operations would become lawful and the Parking Company would be the vehicle through which it ran its lawful operation."

17 Question 7 dealt with the question of benefit as defined by POCA 2002 and asked whether, in the circumstances of this case and, in particular, the nature and purpose of the 'park and ride' operation and the use to which the money received into the accounts maintained by the partnership and the Company was put, the payments made in the periods covered by the relevant counts amounted to a statutory obtaining of benefit by the defendants. The judge answered in the affirmative, making vital findings of fact (the emphasis of which is ours) which it is important to note are not the subject of appeal:

> "Section 76(4) of POCA … provides that a person who obtains benefit from conduct if he obtains property as a result of or in connection with the conduct. This applies equally to general and to particular criminal conduct. Section 7 provides that the recoverable amount is an amount equal to the benefit unless the defendant shows that the amount available for a confiscation order is less than the benefit figure. …
>
> In the case of *May* stress is placed on the need to apply the language of the statute shorn of judicial gloss and paraphrases to the facts of the case. In my judgment neither the purpose of the 'park and ride' nor the use to which the money received into the

> partnership or company accounts was put, are facts which are relevant to the question whether the defendant 'obtained' those sums. The question is not how the monies were used but how they were acquired. The closing words of the end note in *May* provide the following guidance which both the prosecution and the defence rely upon:
>
> 'The defendant ordinarily obtains property if in law he owns it whether alone or jointly which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else. He ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject. Mere couriers or custodians or other very minor contributors to an offence rewarded by a specific fee and having no interest in the property or proceeds of sale are unlikely to be found to have obtained that property. It may be otherwise with money launderers'. The sums claimed as benefit in this case were paid into bank accounts to which the defendants were the only signatories and over which they had ***276** exclusive control. They did not have a mere passing interest. They were not mere couriers or custodians, nor were they just very minor contributors to the offending. I conclude that they each obtained the monies paid into the Parking Association account …."

18 It was also contended that the confiscation proceedings represented an abuse of the process of the court. Without reaching a definitive conclusion, in the course of his first ruling, the judge dealt with the arguments about level of economic and environmental damage and lack of proportionality in this way (at paras 89–90):

> "… I am unable to make any sort of refined value judgment. The best I can do is recognise: (1) that the defendants' breaches were flagrant and long-lasting; (2) they do not seem to have attracted significant criticism from the local populace; (3) the crime they have committed was an environmental and economic one rather than one which caused direct personal physical injury.
>
> The argument that the sums claimed against [the appellants] were disproportionate to the benefits they gained from them is one which has caused me much more concern. It is not one that can be taken care of by some imaginative construction of POCA or by declining to make the statutory assumptions; at any rate it cannot be done while at the same time following authoritative case law. If the full amount claimed (or anything close to it) were to be the benefit figure used in this case it might very significantly indeed exceed the actual sums made by the defendants, though the actual amounts of benefit attributable to their particular criminal conduct are unclear to me at this stage. The problem is exacerbated by the fact that in many respects the Parking Association and the Parking Company were run as if they were legitimate businesses."

19 Discussing the decision of this Court in *Morgan [2008] EWCA Crim 1323; [2009] 1 Cr. App. R. (S.) 60* (p.333), in which Hughes L.J. observed (at [29]) that it would not be sufficient to establish oppression (and thus abuse of process) where the effect of a confiscation order would be to extract from a defendant a sum greater than the profit from his crime, Judge Baker went on (at [94]):

> "In the present case … the size of the benefit would not by itself justify a finding of oppression. The present case may, however, possess additional features which leads me to keep open the issue of oppression and a stay of proceedings. The first is that the calculation of benefit in this case necessarily disregards the legitimate manner in which the company appears to have been carried out with the legitimate employment of a significant number of staff, the payment of their wages and related taxes and the payment of VAT. Although both the Parking Company and the Parking Association were vehicles to conduct a business which was illegal, the manner in which the business was conducted appears to have been legal. In that respect it differs significantly from businesses conducted for example, by the distribution of drugs in which every person involved is a criminal. If, as the defendants claim, the effect of a confiscation order in the sum of £5.05 million … would exceed by many times anything they may have made out of it that, in the circumstances of this case would disturb me. The second reason is that

> although I cannot fully evaluate the aim of the planning legislation, and although I equally cannot ***277*** disregard it, it does seem to me to be fairly clear that the main concern of those responsible for the prosecution of the breaches of the enforcement order was to stop the defendants from persisting in breaking the law, rather than to punish them for a major environmental or economic crime."

20 Returning to the argument in his second ruling, Judge Baker noted that the effect of his decision not to pierce the corporate veil was to reduce the amount of benefit for both appellants from £5.05 million to £1.88 million which, he observed, "to some extent reduces the potency of any argument based on financial disproportion". He rejected the submission that the motive behind the running of the "park and ride" scheme was "entirely altruistic" because the appellants had received significant income during the period of its illegal operation. Notwithstanding an apparent lack of evidence of economic or environmental loss, and notwithstanding what he described as "some financial disparity" if the benefit figures in the sums retained while the operation continued unlawfully were contrasted, he decided that the proceedings were not oppressive and that proceedings should not be stayed, stating:

> "… the inescapable and fundamental point is that the [appellants] embarked on a ' park and ride' operation without planning permission. They continued it knowing that it was unlawful and they did so in defiance of the authorities in the ill-founded belief that the future profit (of whatever kind) would outweigh any financial or reputational loss which might flow from their unlawful actions."

21 Having decided that the credit transfers to the scheme passing through the Parking Association (i.e. between August 16, 2004 and October 31, 2005) amounted to £1,881,221.19, the judge went on to consider the recoverable amount. He determined that Mr Del Basso's realisable assets were the value of his company Servebase and a motor boat and amounted to £760,000 whereas Mr Goodwin was bankrupt. It was in those circumstances that the orders were made.

22 We need only add that, after the judge had prepared his second ruling, those representing Mr Del Basso and Mr Goodwin invited him to consider further submissions in the light of the very recent decision in *R. v Seager [2009] EWCA Crim 1303; [2010] 1 Cr. App. R. (S.) 60* (p.378). The judge declined to do so, first, on the basis that the proceedings had already taken nearly a year; secondly, he did not believe that the decision would necessarily affect any of the issues he had decided and, finally, he considered that it was in the interests of justice that final disposal of the case should proceed on the day that had long been fixed for judgment to be handed down.

23 It is against these decisions that the appeal is mounted. Mr Andrew Trollope QC for Mr Del Basso (supported and adopted by Mr Antony Heaton-Armstrong for Mr Goodwin) has argued that the judge erred in not deducting money spent to meet legitimate expenses incurred by the parking business when calculating the benefit figure and that the benefit was to be equated with net profit, not turnover. Further, it was said that the decision by the prosecution to pursue confiscation in the circumstances of the case represented an abuse of the process of the court and should have been stayed: the judge should have had regard to the lack of environmental and economic damage caused by the breaches of the enforcement notice, the legal advice which had been received and the effect of confiscation. Finally, it was argued that the judge was wrong not to reconsider his decision in ***278*** the light of *Seager* although this ground does not add anything on the basis that if the proper reading of that decision is that the judge erred, the decision will fall for review for that reason alone.

The regime of confiscation

24 In the light of Mr Trollope's arguments, it is appropriate to start with the legislation. The relevant part of s.6 of POCA 2002 provides:

> "(1) The Crown Court must proceed under this section if the following two conditions are satisfied.

(2) The first condition is that a defendant falls within any of the following paragraphs—

(a) he is convicted of an offence or offences in proceedings before the Crown Court; …

(3) The second condition is that—

(a) the prosecutor asks the court to proceed under this section, or

(b) the court believes it is appropriate for it to do so.

(4) The court must proceed as follows—

(a) it must decide whether the defendant has a criminal lifestyle;

(b) if it decides that he has a criminal lifestyle it must decide whether he has benefited from his general criminal conduct;

(c) if it decides that he does not have a criminal lifestyle it must decide whether he has benefited from his particular criminal conduct.

(5) If the court decides under subsection (4)(b) or (c) that the defendant has benefited from the conduct referred to it must—

(a) decide the recoverable amount, and

(b) make an order (a confiscation order) requiring him to pay that amount."

25 A defendant has a "criminal lifestyle" if one of the offences of which he is convicted falls within the statutory catalogue in s.75 of POCA 2002 , the list includes:

"(c) … an offence committed over a period of at least six months and the defendant has benefited from the conduct which constitutes the offence."

This provision is not satisfied unless the defendant obtains relevant benefit of not less than £5,000: s.75(4) of POCA 2002 .

26 Section 76 of POCA 2002 defines the terms "conduct" and "benefit" in this way:

"(1) Criminal conduct is conduct which –

(a) constitutes an offence in England and Wales, or

(b) would constitute an offence if it occurred in England and Wales.

> (2) General criminal conduct of the defendant is all his criminal conduct, and it is immaterial –
>
> (a) whether conduct occurred before or after the passing of this Act;
>
> (b) whether property constituting a benefit from conduct was obtained before or after the passing of this Act. …
>
> (4) A person benefits from conduct if he obtains property as a result of or in connection with the conduct. … ****279***
>
> (7) If a person benefits from conduct his benefit is the value of the property obtained"

27 In the context of this case, it is common ground that the appellants were convicted of offences before the Crown Court and that the prosecutor asked the court to proceed under these provisions. Although challenging the implication of the description, Mr Del Basso and Mr Goodwin concede that they fall within the statutory definition of having a criminal lifestyle, although in the context of the case, s.6(4)(c) of POCA 2002 would, in any event, require a similar analysis. Thus, the court was then required to proceed under s.6(5) as defined by s.76(4) of POCA 2002 to decide whether the relevant appellant had benefited from the conduct and the recoverable amount, making a confiscation order accordingly.

28 These provisions have generated a great deal of case law although the position has been considerably clarified by three decisions of the House of Lords heard consecutively by the same constitution and each the subject of a single opinion of the Appellate Committee: *R. v May [2008] UKHL 28; [2009] 1 Cr. App. R. (S.) 31* (p.162), *Jennings v Crown Prosecution Service [2008] UKHL 29; [2008] 2 Cr. App. R. 29* (p.414) and *Green [2008] UKHL 30; [2009] 1 Cr. App. R. (S.) 32* (p.182). Each of these cases was concerned with the calculation of criminal benefit albeit under different (but similar) statutory regimes.

29 *May* was concerned with apportionment of benefit between co-conspirators, reflecting the share that each conspirator received. It was held that to apportion liability between those jointly liable would be "contrary to principle and unauthorised by statute" and that in any case "the statutory questions must be answered by applying the statutory language, shorn of judicial glosses and paraphrases, to the facts of the case" (see [46] per Lord Bingham). Similarly in *Green* , the approach to confiscation arising out of drugs related offences (the aggregate of the overall purchase and sales prices of the drugs plus expenditure) was upheld without deduction of the profits retained by co-defendants.

30 Reverting to *May* , in what was described as an "Endnote", in recognition of the importance and difficulty of this jurisdiction, the Appellate Committee emphasised "the broad principles to be followed by those called upon to exercise it" in these terms ([48]):

> "(1) The legislation is intended to deprive defendants of the benefit they have gained from relevant criminal conduct, whether or not they have retained such benefit, within the limits of their available means. It does not provide for confiscation in the sense understood by schoolchildren and others, but nor does it operate by way of fine. The benefit gained is the total value of the property or advantage obtained, not the defendant's net profit after deduction of expenses or any amounts payable to co-conspirators.
>
> (2) The court should proceed by asking the three questions posed above: (i) Has the defendant (D) benefited from relevant criminal conduct? (ii) If so, what is the value of the benefit D has so obtained? (iii) What sum is recoverable from D? Where issues of criminal lifestyle arise, the questions must be modified. These are separate questions calling for

separate answers, and the questions and answers must not be elided.

(3) In addressing these questions the court must first establish the facts as best it can on the material available, relying as appropriate on the statutory assumptions. In very many cases the factual findings made will be decisive. ***280**

(4) In addressing the questions the court should focus very closely on the language of the statutory provision in question in the context of the statute and in the light of any statutory definition. The language used is not arcane or obscure and any judicial gloss or exegesis should be viewed with caution. Guidance should ordinarily be sought in the statutory language rather than in the proliferating case law.

(5) In determining, under the 2002 Act, whether D has obtained property or a pecuniary advantage and, if so, the value of any property or advantage so obtained, the court should (subject to any relevant statutory definition) apply ordinary common law principles to the facts as found. The exercise of this jurisdiction involves no departure from familiar rules governing entitlement and ownership. While the answering of the third question calls for inquiry into the financial resources of D at the date of the determination, the answering of the first two questions plainly calls for a historical inquiry into past transactions.

(6) D ordinarily obtains property if in law he owns it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else. He ordinarily obtains a pecuniary advantage if (among other things) he evades a liability to which he is personally subject. Mere couriers or custodians or other very minor contributors to an offence, rewarded by a specific fee and having no interest in the property or the proceeds of sale, are unlikely to be found to have obtained that property. It may be otherwise with money launderers."

31 *Jennings* concerned the refusal to discharge a restraint order and turned upon s.71(4) of the Criminal Justice Act 1988 ("a person benefits from an offence if he obtains property as a result of or in connection with its commission") which is reflected in the language of s.76(4) of the 2002 Act. In the Court of Appeal ([2006] 1 W.L.R. 182), Laws L.J. had concluded that the approach was an instance of the conventional approach to causation explaining (at [38]) that the word "obtain" contemplated that the relevant defendant had been "instrumental in getting the property out of the crime" so that his acts "must have been a cause of that being done". Disagreeing with that construction of the language, Lord Bingham expressed the view of the Appellate Committee in this way ([13]):

"The focus must be and remain on the language of the subsection … There is a real danger in judicial exegesis of an expression with a plain English meaning, since the exegesis may be substituted for the language of the legislation. It is, however, relevant to remember that the object of the legislation is to deprive the defendant of the product of his crime or its equivalent, not to operate by way of fine. The rationale of the confiscation regime is that the defendant is deprived of what he has gained or its equivalent. He cannot, and should not, be deprived of what he has never obtained or its equivalent, because that is a fine. This must ordinarily mean that he has obtained property so as to own it, whether alone or jointly, which will ordinarily connote a power of disposition or control, as where a person directs a payment or conveyance of property to someone else.

… A person's acts may contribute significantly to property (as defined in the Act) being obtained without his obtaining it. But under section 71(4) a person ***281** benefits from an offence if he obtains property as a result of or on connection with its commission, and his benefit is the value of the property so obtained, which must be read as meaning 'obtained by him'."

32 This movement away from the concept of causation has been reflected in a number of the subsequent authorities which have generated dicta upon which Mr Andrew Trollope QC (for Mr Del Basso) relies. Thus, in *R. v Sivaraman [2008] EWCA Crim 1736; [2009] 1 Cr. App. R. (S.) 80* (p.469), this Court was concerned with the manager of a service station who accepted deliveries of "off road" diesel on behalf of his employer, then sold by his employer without payment of duty.

The judge felt constrained ("contrary to his commonsense view of the true benefit") to conclude that the manager who had been paid £15,000 by his employer for his participation had jointly benefited in the total amount of duty evaded, amounting to £128,520, and made an order in that sum. On appeal, it was held that the judge was not so constrained: he had not received the diesel as a joint trader but as an employee. Toulson L.J. observed (at [20]):

> "[W]hen considering questions of confiscation the focus of the enquiry is on the benefit gained by the relevant defendant, whether individually or jointly."

33 In *R. v Grainger [2008] EWCA Crim 2506* , the appellant had been convicted (along with the controlling shareholder) of fraudulent trading in a company of which he was group financial director and in which he had a small interest. A confiscation order was made on the basis that he had obtained benefit that represented the total receipts into the company from the fraud although what he had personally obtained was employment by a company that would otherwise have gone into liquidation and a variety of fringe benefits. Toulson L.J. explained (at [14]) that it was:

> "… essential, first, for the prosecution and then for the judge to look to see what real benefit the offender has obtained and to examine the evidence relating to it in order to arrive at a fair valuation. "

34 The following day, in the same constitution of the Court, Toulson L.J. returned to the same issue in *R. v Xu [2008] EWCA Crim 2372* which concerned a facilitation of the breach of immigration law by the employment of illegal immigrants in a Chinese restaurant. The recorder had assessed the benefits as the entire receipts of the business over the period when the immigrants were employed. Toulson L.J. observed that had the appellants been forthcoming about the real part played in the business by these employees, they might have been able to show that the "true benefit" was relatively modest.

35 In this regard, Mr Trollope pointed to the decision in *R. v Seager [2009] EWCA Crim 1303; [2010] 1 Cr. App. R. (S.) 60* (p.378) which concerned management of a company in contravention of a disqualification undertaking contrary to s.13 of the Company Directors Disqualification Act 1986 . That Court discussed the decision in *R. v Neuberg [2007] EWCA Crim 1994; [2008] 1 Cr. App. R. (S.) 84* (p.481) which had examined turnover to calculate the "benefit" as opposed to looking at her profits from her use of the unlawful name for trading. Aikens L.J. considered the decision on that issue inconsistent with the analysis in the trilogy of House of Lords cases and said (at 840 E): ***282**

> "74 …. The judge should have asked the question: what benefit had Mrs Neuberg, as the relevant offender, obtained as a result of or in connection with her offence of trading under a prohibited style without the leave of the court contrary to the Insolvency Act 1986 ? It was not correct necessarily to equate the turnover of the business with the benefit that had been obtained by Mrs Neuberg as a result of or in connection with her offence.
>
> 75. On the law as it stands, the benefit obtained by an offender is a question of fact to be determined by the judge. However, the turnover of any company through which the offender acted may be relevant to ascertaining the benefit obtained by the offender. That was held to be so by this Court in *R v Xu* …"

Analysis

36 Mr Trollope argues that each of the expressions—"focus on the benefit gained", "commonsense", "real benefit", "true benefit" and "benefit" all point to a requirement that the court should pay attention to the reality and look at what Mr Del Basso "actually made" from the crimes to which he pleaded guilty. That requires the court to recognise that almost all the income which derived from payments by members of the public to park and then be taken to Stansted Airport was expended on the costs of operating the scheme, including VAT, national insurance contributions for the staff and business rates to the council (which had initiated the prosecution) as well as the rent that went to support the Football Club (which itself was laudable). Mr Heaton

Armstrong, for Mr Goodwin, supported that argument saying that any other would produce an unjust result and that what as required was a more liberal and common sense approach to this jurisdiction.

37 Mr David Perry QC for the Crown submits that this analysis represents a fundamental misunderstanding of the law. The phrases “benefit gained”, “real benefit” and “true benefit” are not directed to the profit (i.e. turnover less expenses) made by the offender but, instead, to any benefit as defined by the statute rather than benefit that he might have played a part in assisting others to obtain. Thus, the diesel in *Sivaraman* was obtained by the appellant’s employer: he was simply paid for assisting. In *Grainger* , *Seager* and *Blatch* , the relevant company had obtained the benefit and, without piercing the corporate veil, as Aikens L.J. made clear, it is not necessarily appropriate (our emphasis) to equate the turnover of the business with the benefit although, as in *Xu* , turnover might well be relevant to ascertaining benefit.

38 In our judgment, it is necessary to revert to the words of the statute as explained by the House of Lords in *May* . Thus, it is clear that the legislation looks at the property coming to an offender which is his and not what happens to it subsequently; the court is concerned with what he has obtained “so as to own it, whether alone or jointly, which will ordinarily connote a power of disposition or control”; whatever disposition of that property is made (whether for socially worthwhile reasons or otherwise) is irrelevant. If it was otherwise, the court would be called upon to make a series of almost impossible value judgments: profit is not the test and the use of the words “true” or “real” to qualify “benefit” does not suggest to the contrary.

39 This analysis is clearly confirmed by the decisions of this Court in *R. v Nelson [2009] EWCA Crim 1573; [2010] 1 Cr. App. R. (S.) 82* (p.530) which concerned three different sets of facts. Thus, *Nelson* was found in possession of a digger worth £14,000; he admitted handling stolen goods on the basis that he had been promised ****283*** £1,000 (which he had not then received) for providing a log book and duplicate number plates. The digger was recovered undamaged for its owner. Although the judge had stayed confiscation proceedings as an abuse of process (to which issue we shall return), this Court held that Nelson had obtained the digger so as to own it and thereby benefited from his criminal conduct: a confiscation order should have been made. Pathak had stolen from his employers, using the proceeds to buy property (which, in one case, had been sold at a profit and in another used to obtain rent). The fact that he had repaid what he had stolen did not make confiscation an abuse of process: what was required was an assessment of benefit resulting from criminal activities. Finally, Paulet, living in the United Kingdom illegally, had obtained employment by false representations that he was entitled to work; notwithstanding that his wages had been paid in consideration of his performing the work, a confiscation order was made in the total amount of his earnings less tax and national insurance which Mr Perry explained on the basis that his earnings had been paid net of those sums which had been deducted by his employers.

40 In the circumstances, we reject the argument that the language of the statute permits the court to look at what Mr Del Basso “actually made” net of all expenses: the reverse is the case as the first paragraph in the Endnote to *May* (“benefit gained is the total value of the property or advantage obtained, not the defendant’s net profit after deduction of expenses”) makes abundantly clear. It is for the judge to find as a fact what property the two men had obtained and, thus, the extent of the benefit. What happens to that benefit after it has been obtained (for example, how it might have been spent) forms no part of the statutory test. Here the judge did just that in the emphasised part of the citation from his remarks at [17] above: those findings have not been challenged as wrong or unjustified by reference to the evidence. Neither did he fall into error in his analysis of the law.

41 As for the refusal to reconsider his second judgment in the light of *Seager* this authority emphasised the need to focus on the property obtained by the offender (in place of the causation test which had been undermined in *Jennings*). In this case, H.H. Judge Baker did focus on property personally obtained; indeed, he refused to pierce the corporate veil of the corporate vehicle through which the scheme latterly operated and so did not bring the money obtained directly by the Parking Company into the calculation at all. *Seager* and *Blatch* thus had no impact on Judge Baker’s ruling.

Abuse of process

42 The alternative argument advanced by the appellants was to approach the commencement of confiscation proceedings in this case as an abuse of the process of the court. Mr Trollope relied on *R. v Shabir [2008] EWCA Crim 1809; [2009] 1 Cr. App. R. (S.) 84* (p.497) which concerned a pharmacist who inflated several monthly claims to the health service payment body by a small amount. Hughes L.J. made it clear that the jurisdiction to stay must be exercised with considerable caution "indeed sparingly" and that the fact that the effect of confiscation will be to extract a sum greater than the net profit from the crimes is "clearly not sufficient". In that case, however, he said (at 509):

> "27. The enormous disparity between the excess of Shabir's inflated claims (some few hundreds of pounds) and the confiscation order of over £212,000 ***284*** raises the real likelihood that this order is oppressive. As it seems to us, however, such a disparity will not in every case by itself establish oppression …
>
> 29. What was patently oppressive in the present case was to rely on the form of the counts for obtaining a money transfer by deception (i) to bring the criminal lifestyle provisions into operation when they could not have applied if the charges had reflected the fact that the defendant's crimes involved fraud to an extent very much less than the threshold of £5,000 and (ii) to advance the contention that the defendant had benefited to the tune of over £179,000 when in ordinary language his claims were dishonestly inflated by only a few hundred pounds."

43 Thus, Mr Trollope explained that Mr Del Basso was an entirely respectable local businessman who had attempted to help his local football club and for whom the consequences of this prosecution had been utterly devastating. His "profit" over the period of the operation of the scheme (including the period not covered by the convictions) had amounted to less than £180,000, that is to say less than 10 per cent of benefit assessed, and that the way that he had operated the scheme, paying taxes, rates and VAT was utterly different to the normal situation in which this legislation is brought into play in relation to drugs dealers, fraudsters and similar criminal operations.

44 In *Nelson* , this Court expressed concern that orders staying confiscation proceeds were perhaps too readily being made in Crown Courts. The Lord Chief Justice said ([35] at p.798E):

> "Abuses of the confiscation process may occur and, when they do, the appropriate remedy will normally be a stay of proceedings. However an abuse of process argument cannot be founded on the basis that the consequences of the proper application of the legislative structure may produce an 'oppressive' result with which the judge may be unhappy. Although the court may, of its own initiative, invoke the confiscation process, the responsibility for deciding whether properly to seek a confiscation order is effectively vested in the Crown. When it does so, the court lacks any corresponding discretion to interfere with that decision if it has been made in accordance with the statute. The just result of these proceedings is the result produced by the proper application of the statutory provisions as interpreted in the House of Lords and in this Court. However to conclude that proceedings properly taken in accordance with statutory provisions constitute an abuse of process is tantamount to asserting a power in the court to dispense with the statute. "

45 In our judgment, that observation entirely disposes of the argument advanced in this case. This case is not similar in any way to *Shabir* , where the Court was concerned that had the charges been chosen differently, the criminality would have been fully reflected but the confiscation regime not engaged. In this case, from the moment that Mr Del Basso had exhausted his rights of appeal against the enforcement notice, it was his duty to obey the law: he chose, deliberately, not to do so. The local authority could have prosecuted immediately but provided him with another five months to comply and yet, still, he refused to do so. Even after Timelast Ltd (Mr Del Basso's company), the Football Club and Mr Goodwin were prosecuted to conviction, again, Mr Del Basso and Mr Goodwin refused to comply; ***285*** it was only after the second prosecution that confiscation proceedings were commenced. The economic or environmental harm is only one part of the picture: the other is that a requirement to observe the law is imposed on all and Mr Del Basso and Mr Goodwin have only themselves to blame for their

persistent failure to do so. The confiscation aspect of these proceedings does not represent an abuse of process.

46 It is worth concluding this aspect of the case by further reference to Judge Baker's final remarks which are to like effect and with which we entirely agree:

> "I conclude with a final observation about the mentality of the [appellants] and other similar law breakers. I have received the strong impression that neither the [appellants] nor … their accountant appreciated fully the risk that the companies and individuals involved in the park and ride operation faced from confiscation proceedings. They have treated the illegality of the operation as a routine business risk with financial implications in the form of potential fines or, at worst, injunctive proceedings. This may reflect a more general public impression among those confronted by enforcement notices with the decision whether to comply with the law or to flout it. The law, however, is plain. Those who choose to run operations in disregard of planning enforcement requirements are at risk of having the gross receipts of their illegal businesses confiscated. This may greatly exceed their personal profits. In this respect they are in the same position as thieves, fraudsters and drug dealers. Although the peculiar facts of the present case have led me to exclude the receipts of the parking company from the confiscation, that is a decision reached very much having regard to the unusual circumstances presented to me. [Counsel for the prosecution's] submission that a defendant should not escape the confiscation consequences of his conduct by the expedient of running his unlawful operation through a company will, I expect, generally carry the day. "

47 Before parting with this case, we must express concern at the length of time that these proceedings took. That is not to criticise the parties but to recognise that, at least in part, it was a consequence of the complexity of the law. We hope that the trilogy of House of Lords decisions and the subsequent decisions of this Court (particularly the judgment of the Lord Chief Justice in *Nelson*) will have served to clarify the position and, for the future, ensure that the parties and their legal representatives, work to reach agreement as to the principles and the basic figures, if not the outcome.

48 These appeals are dismissed. ***286**

*841 Regina v Ali (Salah)

Court of Appeal

31 July 2014

[2014] EWCA Crim 1658

[2015] 1 W.L.R. 841

Beatson LJ , Wilkie , Haddon-Cave JJ

2014 July 17; 31

Crime—Sentence—Confiscation order—Defendant converting and using four houses in breach of planning control—Defendant breaching enforcement notices issued in respect of two of those houses—Defendant convicted of breaching enforcement notice issued in respect of one house—Whether defendant's benefit for purposes of confiscation proceedings including rent received in respect of houses where no enforcement notice served or before expiry of time for compliance with notice— Town and Country Planning Act 1990 (c 8), s 179(1)(2) (as substituted by Planning and Compensation Act 1991 (c 34), s 8)— Proceeds of Crime Act 2002 (c 29), ss 6(4), 75

Crime—Sentence—Confiscation order—Judge holding confiscation hearing in defendant's involuntary absence—Whether judge having power to make confiscation order or to apply criminal lifestyle assumptions— Proceeds of Crime Act 2002, ss 6(4), 10, 27(5)

The defendant converted four houses into flats without having obtained planning permission. Enforcement notices were issued in respect of two of the houses, requiring him to cease using each house in breach of planning control by a specified date, but he continued to use all four houses as flats and received housing benefit or rents in respect of all four. He was convicted of breaching one of the enforcement notices, contrary to section 179(2) of the Town and Country Planning Act 1990[1] , and confiscation proceedings were commenced under the Proceeds of Crime Act 2002 [2] . ***842** The confiscation hearing was adjourned twice on the ground that the defendant was in no fit mental state to attend court, but the judge refused an application on behalf of the defendant for a further adjournment and proceeded with the hearing in the defendant's absence. Proceeding on the basis that the defendant had a criminal lifestyle for the purposes of section 6(4) of the 2002 Act, and accordingly applying the criminal lifestyle assumptions set out in section 10 , the judge found that the defendant's benefit from his “general criminal conduct” included the housing benefit and rents received in respect of all four properties in the six-year period ending with the date on which the criminal proceedings against the defendant had been started, and made a confiscation order in that sum. The defendant appealed on the grounds, inter alia, that (i), since the defendant had been involuntarily absent through illness, the judge had had no power to apply the criminal lifestyle assumptions pursuant to section 10 of the 2002 Act; and (ii) the defendant's benefit from his general criminal conduct should not have included housing benefit or rents received in respect of either properties where no enforcement notice had been served or periods before the time for compliance with an enforcement notice had elapsed.

On the appeal—

Held , (1) that a court could make a confiscation order under the Proceeds of Crime Act 2002 and apply the criminal lifestyle assumptions under section 10 of that Act in the involuntary absence of the defendant; that, in particular, to apply the criminal lifestyle assumptions to a person who was involuntarily absent would not be to treat him less favourably than an absconder who, by section 27(5)(d) of the 2002 Act, could not be made subject to the assumptions, since the assumptions would by virtue of section 27(6) apply to an absconder once he had been caught; that, rather, the question for the court would be whether the defendant could have a fair trial notwithstanding his absence; and that, accordingly, since the judge had not erred in concluding that the defendant had had a fair hearing, he had been right to apply the criminal lifestyle assumptions (post, paras 44, 45, 46).

But (2), allowing the appeal, that since a breach of planning control was not per se a criminal offence and since “criminal conduct”, as defined in section 76(1)(a) of the 2002 Act, was conduct

which amounted to a criminal offence under the law of England and Wales, activities which were in breach of planning control did not, of themselves, amount to criminal conduct for the purposes of the 2002 Act; that, although in principle the conduct of a person who set out to defeat the statutory planning regime and any enforcement notice might amount to an offence of conspiring or attempting to breach an enforcement notice, since the judge had not expressly or impliedly made a finding of conspiracy or attempt against the defendant the benefit from his general criminal conduct should not have included housing benefit or rents received in respect of either properties where no enforcement notice had been served or any period before the time for compliance with an enforcement notice had elapsed; that the period to which a confiscation order related was not limited to the period of offending with which the defendant had been charged and could include the whole period up until the order was made; that, on appeal, section 11(3) of the Criminal Appeal Act 1968 did not preclude the substitution of a confiscation order which related to a period ending later than that in the order under appeal, provided that taking the case as a whole it did not deal with the defendant more severely than that order had done; and that, accordingly, the confiscation order made by the judge would be quashed and there would be ***843** substituted an order made on the basis that the defendant's benefit included the housing benefit or rents received in respect of the two properties which had been the subject of enforcement notices, from the date when time for compliance with each notice had elapsed until the date when the confiscation order had been made (post, paras 55, 57, 59, 60, 63, 64, 65–68).

The following cases are referred to in the judgment of the court:

Attorney-General's References (Nos 1 and 2 of 1979) [1980] QB 180; [1979] 3 WLR 577; [1979] 3 All ER 143; 69 Cr App R 266, CA

Maltedge Ltd v Wokingham District Council (1992) 64 P & CR 487, DC

R v Amir [2011] EWCA Crim 146; [2011] 4 All ER 417; [2011] 1 Cr App R 464, CA

R v Bhanji [2011] EWCA Crim 1198; [2011] Lloyd's Rep FC 420, CA

R v Del Basso [2010] EWCA Crim 1119; [2011] 1 Cr App R (S) 268, CA

R v Gavin [2010] EWCA Crim 2727; [2011] 1 Cr App R (S) 731, CA

R v Geary [2010] EWCA Crim 1925; [2011] 1 WLR 1634; [2011] 2 All ER 198; [2011] 1 Cr App R 73, CA

R v Jackson [1985] Crim LR 442, CA

R v Jones (Anthony) [2002] UKHL 5; [2003] 1 AC 1; [2002] 2 WLR 524; [2002] 2 All ER 113; [2002] 2 Cr App R 128, HL(E)

R v Loizou [2005] EWCA Crim 1579; [2005] 2 Cr App R 618, CA

R v Nelson [2009] EWCA Crim 1573; [2010] QB 678; [2010] 2 WLR 788; [2010] 4 All ER 666, CA

R v O'Hadhmaill [1996] Crim LR 509, CA

R v Reed [1982] Crim LR 819, CA

R v Shabir [2008] EWCA Crim 1809; [2009] 1 Cr App R (S) 497, CA

R v Waya [2012] UKSC 51; [2013] 1 AC 294; [2012] 3 WLR 1188; [2013] 1 All ER 889, SC(E)

The following additional case was cited in argument:

R v Harvey (Jack) [2013] EWCA Crim 1104; [2014] 1 WLR 124, CA

APPEAL against confiscation order

On 29 September 2010 at Brent Magistrates' Court, the defendant, Salah Mahdi Ali, was convicted of failing to comply with an enforcement notice contrary to section 179(2) of the Town and Country Planning Act 1990 and was committed to the Crown Court for sentence and confiscation proceedings. On 25 September 2012, in the Crown Court at Harrow, sitting in Norwich, Judge Holt made a confiscation order against the defendant in the sum of £1,438,180·59 to be paid within six months, with ten years' imprisonment in default, and sentenced him to a fine of £4,000 to be paid within six months, with three months' imprisonment in default.

The defendant appealed against the confiscation order on the grounds, inter alia, that (1) it was wrong in law for the statutory assumptions in section 10 of the Proceeds of Crime Act 2002 to be applied to a case where a defendant was voluntarily or involuntarily absent through illness; and (2) the defendant's benefit (particular and general) under sections 6 and 10 of the 2002 Act should not have included rents received in respect of properties for which no enforcement notice had been served or before the time for compliance with an enforcement notice had elapsed.

The facts are stated in the judgment of the court.

***844**

Simon Farrell QC (instructed by *Kingsley Napley LLP*) for the defendant.

Andrew Campbell-Tiech QC and *Kriston Berlevy* (instructed by *Director of Legal and Procurement, Brent London Borough Council, Wembley*) for the prosecution.

The court took time for consideration.

31 July 2014. BEATSON LJ

handed down the following judgment of the court.

1 On 29 September 2010 the defendant, Salah Madhi Ali, now aged 54, was convicted at Brent Magistrates' Court of failing to comply with an enforcement notice contrary to section 179(2) of the Town and Country Planning Act 1990 , as substituted by section 8 of the Planning and Compensation Act 1991 . He had converted a house at 211 Willesden Lane, NW6 into 12 flats without planning permission and failed to comply with an enforcement notice served on him on 8 February 2008 by Brent London Borough Council ("the council") requiring him to cease the use of the premises as more than one dwelling by 20 June 2008.

2 The defendant was committed to the Crown Court at Harrow pursuant to section 70 of the Proceeds of Crime Act 2002 (hereafter " POCA ") for sentence and confiscation proceedings. On 25 September 2012, in that Crown Court, sitting in the Crown Court at Norwich, Judge Holt made a confiscation order against him in the sum of £1,438,180·59. The sum ordered was to be paid within six months with a period in default of ten years' imprisonment. On that date Judge Holt also sentenced him to a fine of £4,000, to be paid within six months with a period in default of three months' imprisonment. The defendant appeals by leave of the full court [2014] EWCA Crim 1064 against the confiscation order.

3 The confiscation order was made on the basis that the defendant was to be treated as having a criminal lifestyle and that the assumptions in section 10 of POCA apply so that, unless he showed otherwise, property transferred to him in the six years ending with the date when the proceedings for the offence were started was obtained as a result of his general criminal conduct. The order made

was calculated on the basis that the six-year period ended on 31 March 2009, the date of the summons. It was also made on the basis that, as well as his benefit from housing benefit/rents obtained from the flats at 211, Willesden Lane, the application of the statutory assumptions meant that some £1·2m he obtained from housing benefit/rents in respect of three other houses he had also converted into flats without planning permission were obtained from his criminal conduct.

4 The principal issues in this appeal are:

(a) The circumstances in which the statutory assumptions in section 10 of POCA are to be applied in a case where the defendant is absent from the confiscation proceedings through illness;

(b) Whether, and if so on what basis, a defendant's particular and general benefit within sections 6 and 10 of POCA includes rent received in respect of a property where no enforcement notice has been served, or in respect of a period before the expiry of the time for compliance with an enforcement notice, and

(c) Whether the judge erred in not adjourning the defendant's case before proceeding with the confiscation hearing in order to seek further medical ***845*** evidence about his readmission to hospital and in refusing to stay the proceedings as an abuse of process in the light of the defendant's circumstances and mental health.

To the extent that the appeal is allowed, a further issue will arise in relation to 211 Willesden Lane. It is whether, if the order is varied pursuant to section 11(3) of the Criminal Appeal Act 1968 , this should be done to reflect the requirement in section 8(2) of POCA that the court must "take account of conduct occurring up to the time [the Crown Court] makes its decision" in the confiscation proceedings (29 September 2012) rather than, as in the existing order, 2 February 2009, the end of the period for which the defendant was charged.

5 The defendant suffers from mental health problems. He was an in-patient at the Park Royal Centre for Mental Health between 9 May 2011 and 10 August 2012 and from 19 September 2012 to an unspecified date after the confiscation hearing on 25 September. Since the grounds of appeal include the submission that the judge erred in refusing to adjourn the hearings scheduled for 24 and 25 September and to stay the confiscation proceedings in the light of the defendant's ill-health, we summarise the relevant parts of the procedural history as well as the relevant material on the defendant's benefit and realisable assets. During the hearing, the court was informed that the defendant remains very unwell, lacks capacity, and is now subject to the jurisdiction of the Court of Protection. His son, who has recently been appointed his interim deputy, has been fully apprised of this appeal.

I. The material principles of law

6 The following summary of the position under POCA is derived from the decision of the *Supreme Court in R v Waya [2013] 1 AC 294* , and that of this court in R v Gavin [2011] 1 Cr App R (S) 731 :

(1) Under section 6(2) of POCA , it is mandatory to proceed with a view to a confiscation order being considered once two conditions are satisfied, namely that the defendant is convicted of an offence before the Crown Court and that the prosecution applies for the order to be made.

(2) A central feature of Part 2 of POCA is the distinction between cases in which the defendant is, or is not, to be treated as having a criminal lifestyle (as prescribed by section 75). It is accepted in this appeal that, because the offence of which the defendant was convicted was an offence committed over a period of at least six months and he has a relevant benefit of over £5,000 from the conduct that constituted the offence, that he has, by virtue of section 75(2)(c) , benefited from a criminal lifestyle.

(3) In cases where a defendant has benefited from a criminal lifestyle, the court must

determine how much he has benefited from his general criminal conduct. If he does not have a criminal lifestyle, the court must determine whether he has benefited from the particular criminal conduct. In both cases, the first stage is to identify the benefit: see sections 6(4), 8 and 76 . Section 8(2) requires the court to "take account of conduct occurring up to the time it makes its decision" in the confiscation proceedings.

(4) In cases where a defendant has a criminal lifestyle, when deciding whether he has benefited from his general criminal conduct and deciding what his benefit is from the conduct, the courts must, in accordance with section 6 , make the assumptions contained in section 10 . Broadly stated, the ***846** effect of these assumptions is that property in the possession of a defendant in the six years ending with the day when proceedings for the offence concerned were started against the defendant is assumed to be the product of his criminal activities unless he can show otherwise on the balance of probabilities. In other words, in such a case the burden of proof is reversed since the defendant has to show how he came by his assets.

(5) The second stage is the valuation of the benefit. It may fall to be valued (see sections 79 and 80) either at the time when it is obtained, or at the date of the confiscation order.

(6) The third stage is the valuation as at the confiscation date of all the defendant's realisable assets, described in section 9 as "the available amount". The "available amount" operates as a cap on the amount of the confiscation order, termed "the recoverable amount" in section 7 .

(7) POCA laid down a procedure to enable the court to obtain the information necessary to make findings as to benefit and assets. The prosecution serves a statement of information pursuant to section 16 ("a section 16 statement"), outlining what it considers to be matters potentially relevant to the inquiry. The defendant may be ordered to indicate to what extent he accepts the matters in the statement, and to particularise those matters which he does not accept in a response: see section 17 . A defendant may also be required to provide information to help the court carry out its functions: see section 18 .

7 Much of the argument in the appeal focused on section 76 of POCA , which we set out in full:

"Conduct and benefit

"(1) Criminal conduct is conduct which— (a) constitutes an offence in England and Wales, or (b) would constitute such an offence if it occurred in England and Wales.

"(2) General criminal conduct of the defendant is all his criminal conduct, and it is immaterial— (a) whether conduct occurred before or after the passing of this Act; (b) whether property constituting a benefit from conduct was obtained before or after the passing of this Act.

"(3) Particular criminal conduct of the defendant is all his criminal conduct which falls within the following paragraphs— (a) conduct which constitutes the offence or offences concerned; (b) conduct which constitutes offences of which he was convicted in the same proceedings as those in which he was convicted of the offence or offences concerned; (c) conduct which constitutes offences which the court will be taking into consideration in deciding his sentence for the offence or offences concerned.

"(4) A person benefits from conduct if he obtains property as a result of or in connection with the conduct.

"(5) If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.

> "(6) References to property or a pecuniary advantage obtained in connection with conduct include references to property or a pecuniary advantage obtained both in that connection and some other.
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>
> "(7) If a person benefits from conduct his benefit is the value of the property obtained."

8 The defendant also relied on section 27 of POCA , which deals with a defendant who absconds after inter alia he is committed to the Crown Court for sentencing: section 27(2)(b) . Where section 27 applies, the court must proceed under section 6 in the same way as it must proceed if the two conditions in section 6 are satisfied but, by section 27(5)(d), the section 10 assumptions to be made in a case of criminal lifestyle "must be ignored". Once the defendant ceases to be an absconder, section 19 , which governs reconsideration of a case where the defendant is convicted of an offence before the Crown Court or committed to the Crown Court for sentence, is satisfied if no court has proceeded under that section, and if (see section 27(7)) "there is evidence which was not available to the prosecutor … on the relevant date". In cases not involving an absconder, by section 19(1) , where a defendant is convicted before the Crown Court or committed to the Crown Court but no court has proceeded under section 16 , reconsideration is only possible if (see section 19(1)(b)) "there is evidence which was not available to the prosecutor on the relevant date".

II. The factual and procedural background

9 The defendant acquired 211 Willesden Lane on 11 January 2005. Absent an appeal against the enforcement notice issued on 8 February 2008, the notice "took effect" on 19 March 2008. The time for compliance with it was three months after that date, ie 20 June 2008. The defendant did not comply with the enforcement notice and, on 31 March 2009, he was summoned to attend Brent Magistrates' Court. The summons stated that the alleged offence was that "between 20 June 2008 and 2 February 2009, after the end of the period for compliance with the enforcement notice … [the defendant] was in breach of the notice in that he failed to take the steps required in the notice". As we have stated, he was convicted on 29 September 2010.

10 The defendant's case was first listed in the Crown Court at Harrow for sentence and consideration of confiscation on 9 November 2010. On that day, an order was made pursuant to section 18 of POCA requiring him to provide information, but the confiscation proceedings and sentencing hearing were adjourned by the court to 1 April 2011. On 7 December 2010 the defendant, through his solicitors, replied to the section 18 order.

11 On 18 January 2011, the prosecution served its first section 16 statement of information. This dealt with its financial investigation into the defendant's affairs for the six-year period commencing on 1 April 2003. The notice consists of 22 pages with 753 pages of appendices. It stated that, because the offence of which the defendant was convicted was an offence committed over a period of at least six months and he has a relevant benefit of over £5,000 from the conduct that constituted the offence, he has, by virtue of section 75(2)(c) of POCA , benefited from a criminal lifestyle. It also recorded the defendant's previous convictions in 2003 and 2005 failing to comply with enforcement notices about 19 Brook Avenue, another property he converted without planning permission, and an enforcement notice in 2006 for three instances of smoke nuisance.

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12 The defendant's reply to the prosecution's first section 16 statement (his " section 17 statement") is in a witness statement dated 15 March 2011. A few days later, on 21 March 2011, the prosecution served its second section 16 statement. This consists of 12 pages and a six-page appendix. The prosecution's third section 16 statement was served on 16 June 2011. By this time, the hearing listed for 1 April 2011 had been adjourned until 28 October 2011, as a result of the defendant's mental health. He was admitted to the Park Royal Centre for Mental Health on 9 May.

13 On 5 August 2011 a hearing was listed for 2 December 2011 before Judge Holt to deal with the legal argument on confiscation. That hearing was adjourned because the defendant's treating doctor, Dr Singh, stated that he was in no fit mental state to attend a court hearing as he would not be able to understand the proceedings or answer questions.

14 In February 2012, the date for the legal argument on confiscation was refixed for 2 July 2012. On 2

July, however, there was a further application for an adjournment because of the defendant's health. The judge heard evidence from the defence psychiatrist, Dr Meehan, and the prosecution psychiatrist Dr Romilly, and the defendant's daughter also gave evidence. She stated that she had prepared the defendant's POCA section 17 statement and that he had little input into it because of his health. The judge reserved his decision. On 13 July, in the light of a further letter from Dr Singh about the defendant's health, he adjourned the case to 7 September 2012 in order to hear from Dr Romilly and Dr Meehan about Dr Singh's letter.

15 The defendant was discharged from hospital on 10 August 2012. Thereafter, addendum reports were received from Dr Romilly and Dr Meehan and, on 31 August 2012, the confiscation hearing was refixed for 24 September in the Crown Court at Norwich, where Judge Holt would be sitting.

III. The rulings on the applications to adjourn and to stay the proceedings as an abuse of process

16 We have referred to the fact that the defendant was readmitted to hospital on 19 September, a few days before the hearing of the confiscation proceedings listed for 24 and 25 September. On 21 September, the defence informed the court that it had unsuccessfully attempted to obtain information from the hospital as to the basis for the readmission. It applied for an adjournment of the confiscation proceedings so that Dr Singh could give the court an up-to-date assessment of the defendant's condition. That application, and an application to stay proceedings as an abuse of process, came before the court on 24 and 25 September 2012.

17 During the hearing on 24 September, defence counsel unsuccessfully attempted to contact Dr Singh to obtain information about the basis on which the defendant had been readmitted to hospital. On that day, further evidence was heard from Dr Romilly and Dr Meehan. Dr Romilly had been in contact with Dr Singh after the defendant's readmission, and said that she did not think that Dr Singh was involved in arranging it because of the way she spoke about it. She did not know what happened, but said it could have been that the home treatment team wanted to readmit the defendant. It was not clear whether the admission was under the Mental Capacity Act 2005 or ***849** not, but it was certainly not under the Mental Health Act 1983 . The judge refused to adjourn the proceedings.

18 The judge stated that “there does not seem to have been any question of [the defendant] being sectioned under a court order or under the powers a psychiatrist can exercise, but it was a voluntary readmission”. As to the application that he adjourn in order to ascertain the up-to-date position of the defendant before making a decision on the application to stay the confiscation proceedings as an abuse of process, he stated that the history of the case was “significant”. Proceedings had begun on 17 May 2011, some 18 months earlier, and this was the seventh court hearing. One of the features of all the medical evidence is that the proceedings in themselves were probably causing the defendant a great deal of stress, “and so it is in everyone's interests, but perhaps particularly his interests, that these matters be concluded as soon as possible”.

19 After referring to the prosecution's submission that if there was an adjournment for another month this situation could arise again, the judge stated that the decision he had to make on the application to stay the proceedings as an abuse was whether or not the defendant was able to give instructions and put forward his case in relation to the application under POCA . He noted that the defendant had filed a full section 17 reply, set out in terms of “I did this and I did that”. The judge stated that he and the prosecution had been told for the first time on 2 July by his daughter that, in fact, the document was her work. He concluded that, taking all those matters into consideration, it was not appropriate to adjourn proceedings again.

20 On the following day, 25 September, the judge refused to stay the proceedings as an abuse of process. The judge stated that the issue he had to decide was whether the defendant “is in fact involuntarily absent through mental health problems, and whether he is unable to issue instructions and follow these proceedings”. He referred to the evidence of Dr Meehan, on behalf of the defence, who had concluded that the defendant was mentally disordered and incapable of following proceedings. He said the defendant suffered from dissociative disorder, psychosis and depression. His behaviour was involuntary, and his capacity to engage was limited. Dr Meehan also stated that the stress of the proceedings had led to the defendant's present state, and his problems would only reduce once they had concluded.

21 Dr Romilly's evidence, on behalf of the prosecution, was that the defendant was capable of

following proceedings and would be capable of giving instructions. She had stated that she thought there were elements of malingering and there were some symptoms which did not, in her view, make sense. She considered he was capable of following proceedings. Although he might be suffering from some dissociative disorder and depression, this was less than the malingering element. The judge referred to Dr Singh's unavailability and the fact that attempts to contact her to obtain information about the basis of the defendant's readmission to hospital had not succeeded because she was on leave. He referred to Dr Romilly's conversation with Dr Singh, and to Dr Singh's apparent surprise about the readmission. He also referred to Dr Singh's report, which he stated coincided remarkably with Dr Romilly's opinion in that both psychiatrists formed the view that there was an element of malingering.

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22 The judge rejected the evidence of the defendant's daughter about the production of his section 17 response and her view that the defendant was not capable of understanding proceedings as incredible. He stated that it was not until just before the hearing on 2 July 2012 that anyone was told that the section 17 statement (which we remind ourselves was dated 18 January 2011) was prepared not by the defendant but by his daughter. It was, he stated, contrary to common sense that she, a medical student, would not have mentioned to her solicitors or said to anyone that the statement was not the defendant's statement but was her statement and she had done all the work.

23 The judge then looked at all the evidence before him. He stated that it was common in the Crown Court at Harrow, where the confiscation proceedings started,

> "for those in the business of letting properties and dividing properties and subletting rooms in properties, contrary to the planning restrictions … to view the enforcement notices as a business expense. The limited fines that are passed in the magistrates' court are merely a business expense as far as they are concerned, and it is worth their while delaying and delaying and delaying, because in the meantime they are gaining much larger income from the rent they are receiving from the various tenants in their properties."

He then concluded that it seemed to him "on all the evidence" that the defendant "was operating his business along exactly those lines"; that is the defendant operated the business on the basis that delaying enforcement notice proceedings was in his interests, because in the meantime he continued to receive rental income.

24 The judge found it significant that two of the three psychiatrists concluded that there was an element of malingering in the defendant's actions, and that he was discharged after the last court hearing but, a few days before the current hearing, was readmitted to hospital. He concluded that, on all the evidence, the defendant was capable of providing proper instructions and being present if he wished to be. Accordingly, this was not a case where the defendant was involuntarily absent so as to make it just for the court to step in and stop proceedings. He stated that a stay for abuse was an extreme matter and was something which should not be used unless the matter could not be resolved within the trial process. Since the defence had put forward a full section 17 statement, it had effectively put forward the defendant's arguments.

IV. The confiscation ruling

25 We turn to the hearing of the confiscation proceedings and the ruling. We have referred to the two section 17 statements filed by the defence in response to the section 16 statements filed by the prosecution. Some of the material set out in the defence section 17 statements was not backed up by any independent material such as bank statements. Exhibits stated to be from members of the defendant's family had been translated into English but not notarised or attested to in some similar way. The judge therefore had the section 17 statements but no evidence in proper form from the defendant or from independent witnesses.

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26 After giving his stay ruling, the judge asked if the defendant's counsel needed time to consider the position. He asked her if she wished to make a further application for an adjournment to allow the defendant to attend and give instructions. After consideration, no application was made.

27 The prosecution case was that the defendant had a criminal lifestyle pursuant to section 75 of POCA , and therefore the assumptions in section 10 of that Act applied. The prosecution's first section 16 statement of information covered the six-year period commencing on 1 April 2003. Section 6 of the report states that there were unsourced bank credits into ten bank accounts totalling £2,609,517·64, including £237,978·08 paid by the council in relation to 211 Willesden Lane. The statement also refers to two other properties converted without planning permission, 195 Church Road and 19 Brook Avenue. The second section 16 statement of information also refers to 340–342 High Road. The prosecution stated that the section 75 assumptions also applied to a Volkswagen vehicle owned by the defendant, valued at £5,000. It also relied on the defendant's previous convictions in 2003 and 2005 failing to comply with enforcement notices about 19 Brook Avenue and in 2006 for three smoke nuisance offences. In the light of the defendant's responses, the prosecution adjusted its figures and agreed that the general benefit figure is £1,570,138·74. It stated that the value of the properties was greater than this because of the increase in the value of property. The available amount was assessed by the prosecution at £1,755,009·57. By the time of the confiscation hearing, there had been further adjustments, and the prosecution claimed that the general benefit figure was £1,438,180·59.

28 The defendant's original section 18 reply stated that the Brook Avenue property was held on trust for his sister, Salima Mahdi Ali, the Church Road property on trust for his brother-in-law, Iqbal Abdul Jaleel, and 80% of the Willesden Lane property on trust for his sister, Salima Mahdi Ali, the remaining 20% being owned by the defendant. 340–342 High Road is stated to be owned by Abdul Zahra Al-Mislmani and Jinan Al-Mislmani, but the first three properties are registered to the defendant. Three substantially identical declarations of trust were produced. The prosecution questioned the authenticity of the documents and suggested the trusts were a sham.

29 The defence case was that the section 10 assumptions ought not to apply where a defendant is involuntarily absent and that, had the judge granted the application to adjourn to obtain medical evidence, he would not have found the defendant to be voluntarily absent, and even if he refused to stay the proceedings for other reasons, the determination that the defendant was involuntarily absent would have precluded the prosecution from relying on the assumptions. The second limb of the defence case was that the benefit figure ought to be confined to rental income from 211 Willesden Lane only, and that only the benefit for the period of offending, that is between June 2008 and 2 February 2009, was relevant. On the defence case, the benefit would be £113,316·75. It was submitted that this was a figure so much lower than the benefit figure calculated by the prosecution that there was a serious risk of injustice. Moreover, the beneficial ownership of 19 Brook Avenue and 195 Church Road was in his sister and brother-in-law, and 80% of the equity in the Willesden Lane property belonged to his sister.

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30 In his ruling, the judge stated that the defendant's assertions in his section 17 statements were not supported by any independent evidence. The defence were in a difficult position because of the situation. They had been given ample opportunity over many months to produce further information and further evidence but had failed to do so, and their submissions were necessarily limited. He stated: “it seems to me that this is exactly the sort of the case that Parliament considered where section 10 assumptions should apply, and it follows from that that, in my judgment, the correct benefit figure is one that is applied for the prosecution, and that is £1,438,180·59, and I thus find that as the benefit figure in this case.”

31 As to the available amount, he stated that the prosecution had recently carried out a valuation of the properties and the figures for the properties added up to £1,819,876·66, so that was the available amount. As that amount exceeded the benefit figure, the confiscation order would be made for the full amount of the benefit figure; £1,438,180·59.

V. The grounds of appeal and a summary of the amounts in contention

32 After leave was given by the full court, Mr Farrell QC and Ms Naqshbandi, who appeared in the Crown Court on behalf of the defendant, prepared a useful document summarising the grounds of appeal. There are four: (a) Whether it is correct in law, and if so in what circumstances, for the statutory assumptions in section 10 of POCA to be applied in a case where a defendant is either voluntarily or involuntarily absent through illness; (b) Whether the defendant's benefit (both particular and general benefits) within the meaning of section 6 and section 10 of POCA includes rents received

where no enforcement notice has been served or before the time for compliance with an enforcement notice; (c) Whether the judge erred in not adjourning the case on 24 September 2012 in order to seek further medical evidence as to the basis of the defendant's readmission to the Park Royal Centre for Mental Health on 19 September 2012; (d) Whether the judge was wrong to refuse to stay the proceedings as an abuse of process.

33 The defendant's case was that it was wrong to apply the assumptions where a defendant was absent from the hearing through illness, but alternatively, that the defendant's particular and general benefit could not include housing benefit/rents received in respect of properties where no enforcement notice was served and, where a notice was served, in respect of the period before the time for compliance, three months after the notice takes effect, in the case of 211, Willesden Lane 20 June 2008 and in the case of 195 Church Road 10 January 2007. The prosecution's primary position was that the statutory assumptions were properly applied in respect of all the sums claimed by the prosecution for the period ending 31 March 2009. Mr Campbell-Tiech QC, on behalf of the prosecution, submitted that, if the court decided that the defendant's benefit in this case could not include sums received in respect of properties where no enforcement notice was served or for periods before the time for compliance, it should vary the confiscation order pursuant to section 11(3) of the Criminal Appeal Act 1968 and make a new order reflecting section 8(2)(a) of POCA and covering benefit received up to 25 September 2012, when the Crown Court made its order.

34 We have set out the figures given in the prosecution's section 16 statement, and the way the judge arrived at his decision. It became clear ***853** during the hearing that view of the defendant's health and all the time that has elapsed, both Mr Farrell and Mr Campbell-Tiech, on behalf of the prosecution, considered that, should the court set the order aside, it should not remit the case to the Crown Court for redetermination of the benefit, but determine it itself on the basis of the material before it. To this end, the parties agreed the following figures for benefits received by the defendant on different hypotheses reflecting their respective principal and alternative cases. We have proceeded on the basis of these figures, which are:

211 Willesden Lane:

(enforcement notice issued on 8 February 2008 requiring compliance by 19 June 2008)

(a) £237,978·08 housing benefit received between January 2005, when the property was bought, and 31 March 2009, the date of the summons.

(b) £113,316 housing benefit received between 20 June 2008, the commencement of the time for compliance with the enforcement notice, to 2 February 2009, the end of the period for which the charge was brought.

(c) £418,095 housing benefit/rent for the period between 20 June 2008 and 25 September 2012, when the order was made.

195 Church Road:

(enforcement notice issued on 25 August 2005, appealed and compliance due by 10 January 2007)

• £376,435·32 housing benefit received between 1 April 2003 and 31 March 2009 (the six-year period).

• £126,263 housing benefit received between 10 January 2007, when compliance was due, and 25 September 2012.

184 Church Road:

(no enforcement notice issued)

• £526,448·69 housing benefit for the six-year period from 1 April 2003 to 31 March 2009.

340–342 High Road:

(no enforcement notice issued)

• £405,472·99 housing benefit for the six-year period between 1 April 2003 and 31 March 2009.

VI. Analysis and decision

35 We first consider grounds 3 and 4.

(a) Grounds 3 and 4: adjournment and stay

36 Mr Farrell relied on the medical evidence available on 24 and 25 September and also adduced further evidence obtained since the ruling. No objection was taken by the prosecution to the new evidence. It consisted of a report by Dr Amin, which appears to have been written on 15 October 2012, a further report by him dated 29 October 2012 and a report by Dr Waheed dated 27 November 2012. Dr Amin's reports make it clear that the defendant was admitted to the Park Royal Centre for Mental Health on 19 September under the Mental Capacity Act 2005 as he was found to be lacking capacity to make decisions regarding his admission to hospital. Dr Waheed's report explained the use of the Mental Capacity Act 2005 to admit a person who is compliant with the admission and the treatment to a hospital.

37 Mr Farrell submitted that this evidence shows that the judge erred in regarding the defendant's admission as voluntary, and that there was no evidence to suggest that he was readmitted by psychiatrists. He submitted that the judge was wrong to refuse the application to adjourn because the ***854** further evidence would have been significant to his assessment of whether or not the defendant was voluntarily or involuntarily absent, and thus to his decision on abuse of process. Essentially, this was also the ground on which he submitted that the judge was wrong to refuse to stay proceedings as an abuse of process.

38 When giving leave, the full court stated [2014] EWCA Crim 1064 at [9] that it had reservations about the grounds of appeal challenging the judge's exercise of discretion, not least given the acceptance by Mr Farrell on that occasion that the defendant's sickness could not be used forever to stave off the confiscation proceedings, and the fact that the judge had before him a detailed section 17 statement. It did not, however, limit leave.

39 We agree with the indication given by the full court and reject Mr Farrell's submissions. The judge concluded, on the medical evidence before him and the background of adjournments, that the defendant might never be able to attend. He also concluded that a fair hearing could take place because he had the defendant's full defence case in the section 17 statements. We do not consider that, in all the circumstances of this case, the judge erred in the exercise of his discretion in concluding that the defendant could have a fair hearing. The only real criticism of the refusal to adjourn is that it denied the defendant an opportunity to present himself as involuntarily absent, and thus to assist his characterisation of the proceedings as an abuse of process.

40 As to abuse of process, we start by reminding ourselves that, while the court retains the jurisdiction to stay an application for confiscation where it amounts to an abuse of the court's process, as this court has said on a number of occasions, “this jurisdiction must be exercised with considerable caution, indeed sparingly”. See, in particular, R v Shabir [2009] 1 Cr App R (S) 497 , para 24, a constitution presided over by Hughes LJ (as he then was) and *R v Nelson [2010] QB 678* , para 36, a constitution presided over by Lord Judge CJ. In R v Shabir this court stated that the jurisdiction should be confined to cases of true oppression.

41 In this case, as in all cases, the question for the judge was whether, in all the circumstances, it was fair to proceed in the absence of the defendant. The reason for that absence was only one factor in the way the judge assessed the fairness of the proceedings as a whole. He took into account what evidence and information had been placed before him by and on behalf of the defendant. He also took into account the medical evidence that had been called, and the fact that two of the three psychiatrists had come to the conclusion that there was an element of malingering in the defendant's

actions.

42 It is also of importance that any contention that the assessment of benefit was inaccurate, for example because one or more of the houses had been the subject of an application for planning permission, could have been addressed without recourse to evidence from the defendant personally. The defendant's case as to the assessment of the available amount was also not dependent on evidence from him. He claimed he did not own three of the properties and only had a small interest in the fourth, and relied on the declarations of trust. It would have been possible to call other witnesses, in particular the beneficiaries of the trusts and the solicitor who had drafted, to attest to their validity, but this was not done.

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(b) Ground 1: Application of the statutory assumptions

43 Mr Farrell submitted that, whether the defendant was absent voluntarily or involuntarily, the statutory assumptions do not apply. His submission relied on the analogy of the position of an absconder where, as a result of section 27 of POCA , and in particular section 27(5)(d) , the statutory assumptions in section 10 are disapplied. He argued that the judge had no power to apply the assumptions and thereby erred. Alternatively, in so far as the judge had a discretion whether to apply the assumptions, in the light of cases such R v Gavin [2011] 1 Cr App R (S) 731 and *R v Bhanji [2011] Lloyd's Rep FC 420* , in the case of absence through sickness or otherwise that discretion is one which should only be exercised highly exceptionally. It should virtually never be exercised where there is a risk of imprisonment arising in default of payment. Mr Farrell submitted that to do otherwise would be to punish the sick, but to reward those who deliberately abscond.

44 We reject the proposition that there is a principle of law that prevents a confiscation order being made in the involuntary absence of the defendant or in applying the presumptions where it is so made. The question for the court is again one of fairness: see R v Bhanji , para 14. It is true that, in R v Gavin , this court stated that, in the case of absconding defendants, even if their absconding constituted a waiver of the right to attend trial and be legally represented, it did not amount to a waiver of the right to the basic elements of a fair trial and did not relieve the court of the duty to satisfy itself that the defendant in question would receive the basic elements of a fair trial notwithstanding his absence. But this court also stated, at para 19, that the discretion to proceed in the absence of a defendant “may be exercised more readily where the issue concerns sentence rather than the question of guilt itself and in particular where the proceedings have already been commenced”. We add, in the light of Lord Bingham of Cornhill's speech in *R v Jones (Anthony) [2003] 1 AC 1* , that the discretion may also be exercised more readily where a defendant has been represented and will remain represented. In this defendant's case, the judge, when considering the application for a stay, considered that he had sufficient information in the section 17 defence statements to weigh the competing interests. The judge had rejected the defendant's daughter's evidence that it was she who prepared the section 17 statements, and it therefore followed that he found that the defendant had done at least some of the work necessary to produce those statements.

45 More fundamentally, we accept Mr Campbell-Tiech's submission that Mr Farrell's analogy with the position of an absconder is misconceived. We are satisfied that the application of the assumptions to a person in the position of the defendant would not treat him less favourably than an absconder. This is because, although section 27(5)(d) of POCA provides that the assumptions in section 10 are to be ignored in the case of an absconder, when the absconder is caught the prosecution can continue with the confiscation. Significantly, as a result of section 27(6) , it is able to do so on the basis that it had not proceeded at the time of the conviction or committal with a view to a confiscation order being considered, and to deploy the section 10 assumptions in relation to all the evidence. By contrast, in the case of a person who is unwell and absent, if no order is made because of the absence of the defendant on account of illness, the effect of ***856** sections 19 and 20 of POCA is that, when the case is reconsidered after his recovery, it will only be possible to deploy the assumptions in relation to evidence which was not available to the prosecutor at the earlier time. Accordingly, acceding to Mr Farrell's submission would not treat a sick person in the same way as an absconder. It would put him or her in a much better position.

46 Finally, in relation to fairness, we observe that the defendant's legal team were offered the opportunity to apply for an adjournment to seek evidence, for example as to the beneficial ownership of the properties, from witnesses other than the defendant. They did not take up the judge's invitation. For these reasons, we do not consider that the judge erred in the exercise of his discretion in

concluding that the defendant did have a fair hearing.

(c) Ground 2: The position where no enforcement notice has been served and before the time for compliance

47 Ground 2 involves the determination of two questions. The first is whether the defendant's benefit (both particular and general benefit), within the meaning of section 76 and section 10 of POCA in this case, includes rents received where no enforcement notice has been served or where, if one has been served, the time for compliance has not yet lapsed. The second is whether, if the basic position is that such rents do not generally qualify as the defendant's benefit under POCA , they will do so where the conduct amounts to the commission of an inchoate offence, either a conspiracy to disobey an enforcement notice or an attempt to do so. The point of law raised by these questions is of practical importance because breaches of planning law may not be discovered for a considerable time.

48 Mr Farrell argued that rental income received where no enforcement notice has been issued or before the time for compliance has expired cannot, in law, be treated as the proceeds of crime. He submitted that, at worst, the rents received were revenues legitimately received by the defendant, albeit that he might have been in breach of planning regulations or administrative obligations. His case was that, in assessing whether a person has benefited from his general or particular “criminal conduct” under POCA , the court may not take into account proceeds received from activities prior to the expiry of the time for compliance with the enforcement notices because only then is the continuance of such activities an offence.

49 Mr Farrell also relied on the decisions of this court in three money laundering cases, R v Loizou [2005] 2 Cr App R 618 , *R v Geary [2011] 1 WLR 1634* and *R v Amir [2011] 4 All ER 417* . He submitted that these cases show that a defendant's benefit from criminal conduct within section 340(2) did not embrace property which was not “criminal property” at the time he or she acquired it, and that this is so even where the defendant intended to acquire it by criminal conduct. Those decisions concerned sections 327 and 328 of POCA , and the definition of criminal “conduct” and “property” in section 340(2)(3) . Mr Farrell that the fact that the definition of “criminal conduct” in section 340(2) is the same as that in section 76(4) , with which this case is concerned, is a powerful indication that the inchoate analysis does not suffice in the context of the strict approach to the construction of POCA : see eg the statement in *R v Waya [2013] 1 AC 294 referred* to, at para 52 below. He maintained that, in the present ***857*** context, the rents or housing benefit received cannot be benefit from criminal conduct if, at the time they were received, they were not criminal property because at that time no offence had been committed because no enforcement notice had been served and become effective.

50 Mr Campbell-Tiech submitted that the argument on behalf of the defendant that there was no offence until his conduct was discovered and an enforcement notice served is fallacious. He argued that the defendant's conduct was criminal conduct within section 76 of POCA because the defendant, with others, set out to defeat the statutory planning regime in general and in particular not to comply with any enforcement notices. He maintained that in the circumstances of this case the defendant's conduct, which was more than merely preparatory, amounted to the commission of an inchoate offence, either a conspiracy to disobey an enforcement notice or an attempt to do so. Mr Campbell-Tiech acknowledged that the judge made no specific finding to this effect in the confiscation ruling itself, but relied on the fact that, in his abuse ruling on the same day (see para 23 above), he found that the defendant viewed “the limited fines that are passed in the magistrates' court [as] merely a business expense”. Mr Campbell-Tiech submitted that this was a finding that the defendant was operating his business on the basis that it was in his interest not to comply with enforcement notices and to pay the fines because the income he continued to receive from the properties was greater than the fine. Accordingly, the judge was entitled in his confiscation ruling to treat rents derived from all the properties converted without planning permission as derived from “criminal conduct”.

51 Mr Campbell-Tiech emphasised the scale of the defendant's activity. The defendant had converted four properties into a total of 38 flats without applying for planning permission. He had taken no action in respect of the enforcement notices served in relation to two of those properties, and he has a history of failing to comply with enforcement notices in the past and of convictions for such failures. Mr Campbell-Tiech argued that the defendant's activity qualified as “criminal conduct” within POCA because the only sensible inference from the entirety of the circumstances is that he never intended to comply with an enforcement notice and had a business model involving wholesale disregard of the

planning regime. He ran a family business which purchased properties and converted them into flats without planning permission. He rented those flats out and profited from the rents. If his activity did not come to the attention of the local authority the profit from the rents would be substantial, often at the expense of the local authority which made payments of housing benefit. If the conduct did not come to the attention of the local authority for four years, at the end of that period, he would make a very substantial additional profit because he would be able to get planning permission for the flats.

52 It is clear, for example from the decision of the *Supreme Court in R v Waya [2013] 1 AC 294* , that the purpose of POCA is to ensure that criminals, especially professional criminals, do not profit from their crimes. As Lord Walker of Gestingthorpe JSC and Hughes LJ stated at para 8, “because POCA covers a wide range of offences, Parliament has framed the statute in broad terms with a certain amount of … ‘overkill’”. They also stated, at para 2, that POCA “sends a strong deterrent message” and “although the statute has often been described as ‘draconian’, that cannot be a warrant for ***858*** abandoning the traditional rule that a penal statute should be construed with some strictness”. However, their Lordships also stated that, subject to that and to the Human Rights Act 1998 , the task of the Crown Court judge is to give effect to Parliament's intention as expressed in the language of the statute, which must be a given a fair and purposive interpretation in order to give effect to its legislative policy: see para 8.

53 We turn to the questions before us with that in mind. The relevant provisions of POCA are section 6(2) and 6(4) . Section 6(2) is clearly satisfied because the defendant was committed to the Crown Court for sentence in respect of his offence. Section 6(4)(a) requires the court to decide whether the defendant has a “criminal lifestyle”. The court then has to go on to decide whether the defendant has benefited from his “general criminal conduct” or “particular criminal conduct” depending on the answer to the first question: see section 6(4)(b)(c) .

54 In our judgment, the answer to the question whether, in assessing whether a person has benefited from his general or particular “criminal conduct” under POCA , the court may take into account proceeds received from activities prior to service of enforcement notices which render the continuance of such activities illegal, lies in having close regard to the relevant definitions in the statute itself. We consider those definitions before turning to Mr Campbell-Tiech's submission that the defendant's conduct in relation to all the properties amounted to an inchoate offence.

55 The definitions in Part 2 of POCA , which deals with confiscation, are to be found in sections 75 and 76 . Section 76(1)(a)(b) gives “criminal conduct” a simple and straightforward meaning in the interpretation section of the Act, namely “conduct which … constitutes an offence in England and Wales” or “would constitute an offence if it occurred in England and Wales”.Section 75 deals with criminal lifestyle and provides, in subsection (2)(b), that a defendant has a criminal lifestyle where the offence, or any of the offences, constitutes “conduct forming part of a course of criminal activity”. It is, however, important to note that the opening words of section 75(2) require the relevant “conduct” in question to comprise an “offence” or “offences”. The term “offence” is also used in section 75(2)(c) and in the provision in section 75(3) concerning conviction of three or more other “offences”. The definition of “criminal conduct” in Part 7 of POCA , which deals with money laundering, is the same as that in section 76(1) : see section 340 . It is, thus, clear from the Act itself that “criminal conduct” simply means conduct which amounts to a criminal offence under our criminal law.

56 Section 179(1)(2) of the Town and Country Planning Act 1990 provide that “where, at any time after the end of the period for compliance with an enforcement notice, any step required by the notice to be taken or any activity required by the notice to cease is being carried on … the owner of the land is in breach of the notice” and is “guilty of an offence”. The position under POCA of benefit derived from a breach of planning control was considered by this court in R v Del Basso [2011] 1 Cr App R (S) 268 . The defendants in that case had pleaded guilty to offences of failing to comply with an enforcement notice as a result of their use without planning permission of land at Bishop's Stortford as a “park and ride” facility for Stansted Airport. Confiscation proceedings were commenced in respect of benefits derived from the unauthorised use of the land. The trial judge stated ***859*** (see para 14) that “the activity of conducting a ‘park and ride’ operation was entirely and criminally unlawful *from the moment* the enforcement notice became effective” (emphasis added). In a judgment delivered by Leveson LJ, this court stated, at para 45: “ *from the moment* that [the defendant] had exhausted his rights of appeal against the enforcement notice, it was his duty to obey the law: he chose, deliberately, not to do so” (emphasis added).

57 Mr Campbell-Tiech was correct in observing that, in that case there was no dispute about the position before the expiry of the time for compliance with the enforcement notice because (see para

11) the prosecution proceeded on the basis that the operation of the “park and ride” facility only became *criminally* unlawful from the moment when the local authority enforcement notice became “effective”. But, even on the assumption that what was said is not strictly binding, the assumptions on which the prosecution, the trial judge and this court proceeded are clearly correct. A breach of planning control is not per se criminal. Subsections (1) and (2) of section 179 of the Town and Country Planning Act 1990 expressly provide that it is the failure to comply with the enforcement notice the local planning authority issues by the expiry of the time for compliance that renders the unauthorised use criminal. The result is that a person who is served with an enforcement notice will know whether and when his conduct amounts to the commission of an offence.

58 The position is illustrated by the decision of the *Divisional Court of the Queen's Bench Division in Maltedge Ltd v Wokingham District Council (1992) 64 P & CR 487* . Two convictions for failing to comply with enforcement notices were set aside because the informations laid before magistrates did not allege the date by which there had to be compliance with the notices. Laws J stated, at pp 489–490, that the date by which an enforcement notice was to be complied with was part of the definition of the offence in the statutory predecessor of section 179 of the 1990 Act. It followed that, without an averment and proof of the date on which the periods for compliance expired, the informations and the convictions were defective. Although the language of section 179 differs from that of the Town and Country Planning Act 1971 , the nature of the offence in the 1990 Act remains the same in this respect.

59 Leaving aside the argument based on the commission by the defendant of an inchoate offence, the same is true in the present case. The defendant was obtaining rent for houses which he had converted into flats without having first obtained the requisite planning permission. His activities may have been in breach of planning and other regulations. His conduct did not, however, constitute “an offence in England and Wales” within the meaning of section 76(1)(a) in relation to any particular property until any enforcement notice was actually served and became effective in relation to that property, ie the relevant notice period in relation to that property had expired. Unless and until that moment in time arrived, the defendant could not be said to have been engaged in general or particular “criminal conduct” within the meaning of section 6(4) of POCA . Accordingly, subject to Mr Campbell-Tiech's argument based on an inchoate offence, any rents or proceeds derived from tenants in such properties *prior* to the expiry of any enforcement notice period cannot, in law, constitute relevant proceeds of “criminal conduct” for the purposes of POCA .

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60 We turn to the submission that the defendant's conduct with others amounted to the commission of inchoate offences of either conspiracy or attempt or both, and therefore amounted to criminal conduct. We can see that in principle the conduct of a person who sets out to defeat the statutory planning regime and any enforcement notice could amount to such an offence. We note Mr Farrell's submission that the inchoate offence analysis is inconsistent with (or at its lowest does not sit comfortably with) the approach this court has taken in money laundering offences in respect of the identically worded definition in section 340 . But we also observe that those cases did not consider the inchoate offence analysis, and that in *R v Waya [2013] 1 AC 294* it was stated that the task of the court is to give effect to Parliament's intention and that POCA's language must be given a fair and purposive (if somewhat strict) construction. The dividing line drawn in POCA is between conduct that is “criminal” and conduct that is not. There is no indication on the face of the statute that conduct which is criminal because it amounts to an inchoate offence is to be treated differently from other criminal conduct.

61 The nature of inchoate offences and their particular requirements, however, mean that the inchoate offence analysis may not be straightforward. The potential difficulties that analysis may pose have led us to conclude that it is necessary for there to be a clear finding in the confiscation proceedings that the conduct under consideration amounts to an attempt or a conspiracy. Quite apart from the need to construe POCA with “some strictness”, an important reason for requiring a clear finding is that, when applied to breaches of planning control, the inchoate offence analysis involves questions of conditional intent and conditional agreement because the conduct is not intrinsically criminal. In relation to attempt, it also involves potentially difficult questions of proximity. What the defendant intended was to make money from his breaches of planning control in the form of rents from the converted premises and, absent the service of an enforcement notice, he would do so without committing an offence.

62 The conditionality or contingency planning element of a person's intention or the agreement made

with another does not necessarily preclude there being a criminal attempt or conspiracy: see *Attorney-General's Reference (Nos 1 and 2 of 1979) [1980] QB 180* , *R v Reed [1982] Crim LR 819* , *R v Jackson [1985] Crim LR 442* and *R v O'Hadhmaill [1996] Crim LR 509* . But what has to be shown is that there was an ex ante intention or an agreement not to comply with any enforcement notice served. The example given in R v Reed of A and B agreeing to drive from London to Edinburgh in a time which can be achieved without exceeding the speed limits, but only if the traffic which they encounter is exceptionally light, which was stated not necessarily to involve the commission of any offence, shows that a conditional intent or agreement about something which is not intrinsically criminal will not always constitute an inchoate offence.

63 In this case there are no such findings on the face of the judge's ruling. Mr Campbell-Tiech in effect invited the court to infer that there were. But, in the confiscation proceedings, the prosecution based its case against the defendant on the way he ran his business. Even on Mr Campbell-Tiech's submission, the judge's finding was only that he ran his business on ***861*** the basis that delaying enforcement notice proceedings was in his interests because he continued to receive income from the properties. There was no suggestion that the defendant conspired with anyone else or who that person might be, and no finding of an agreement satisfying the requirement in section 1 of the Criminal Law Act 1977 that, if it is carried out, “will necessarily amount to or involve the commission of an offence or offences by one or more parties to the agreement”. Similarly there is no finding of attempt.

64 We have concluded that there was no finding of attempt or conspiracy, and that on the evidence before the judge, and in particular the failure to identify an agreement with one or more co-conspirators or the ingredients of an attempt, it would be wrong to infer one. We consider that, in the particular circumstances of this case, the evidence before the judge, and the terms of his ruling, Mr Campbell-Tiech's valiant attempt to reconfigure the decision below as proceeding on the basis of an inchoate offence does not succeed.

65 The benefit relied on by the prosecution is rent derived from four properties converted into flats in breach of planning regulations. Our decision on this ground means: (a) In respect of 184 Church Road and 340–342 High Road there has been no enforcement notice issued and the order must be set aside in so far as it reflects the housing benefit/rents attributable to those properties. These were stated by the prosecution to have been respectively £526,448·69 and £405,472·99. (b) In respect of 211 Willesden Lane, where the time for compliance with the enforcement notice lapsed on 19 June 2008, the failure to comply with the notice was only criminal conduct from 20 June 2008 and the receipt of housing benefit/rent was only the benefit from such conduct from that date. The agreed figure for the period from that date to 2 February 2009, the end of the period for which the defendant was charged, is £113,316. (c) In respect of 195 Church Road, the receipt of housing benefit/rent could only be criminal conduct from 11 January 2007. The agreed figure for the period from that date is £126,263.

66 Two questions remain. The first is whether, as Mr Farrell submitted, the conduct comprising the criminal offence in respect of a property for which an enforcement notice has been issued is limited to the period that is actually charged, in the case of 211 Willesden Lane between 20 June 2008 and 2 February 2009. In our judgment, the conduct is criminal, whether or not charged, once the time for compliance with the enforcement notice has elapsed, here after 19 June 2008, and it remains criminal, so that the order need not be limited to the period ending on 2 February 2009.

67 The second question is whether, when varying the order pursuant to section 11(3) of the Criminal Appeal Act 1968 to reflect our decision, we should, as Mr Campbell-Tiech submitted, do so by reflecting the requirement in section 8(2) of POCA that the court must “take account of conduct occurring up to the time it makes its decision” in the confiscation proceedings. On that basis, the relevant end date for the calculation of benefits is 25 September 2012. The agreed figure for 211 Willesden Lane for the period from 20 June 2008 until 25 September 2012 is £418,095. Mr Farrell submitted that we are precluded from varying the order to reflect this because to do so would mean that the part of the order attributable to 211 Willesden Lane would deal with the defendant more severely on appeal ***862*** than he was dealt with by the court below and thus be contrary to section 11(3) . We reject this submission. What the proviso to section 11(3) prohibits is the exercise by the court of its powers under the subsection so that, “taking the case as a whole”, the defendant is “more severely dealt with on appeal than he was dealt with by the court below”. The order made was in the sum of £1,438,180·59. It cannot be said that, taking the case as a whole, the defendant would be dealt with more severely by an order reflecting the benefit in respect of 211 Willesden Lane for the period ending 29 September 2010.

VII. Conclusion

68 For these reasons, and to the extent we have stated, the appeal on ground 2 is allowed. The confiscation order made against the defendant is set aside, and in place of it we make a confiscation order in the total sum of £544,358 to be paid within six months, with a period of imprisonment in default of five years.

Appeal allowed in part.

Confiscation order quashed.

Confiscation order in sum of £544,358, with five years' imprisonment in default, substituted.

Georgina Orde, Barrister

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1. Town and Country Planning Act 1990, s 179 , as substituted: "(1) Where, at any time after the end of the period for compliance with an enforcement notice, any step required by the notice to be taken has not been taken or any activity required by the notice to cease is being carried on, the person who is then the owner of the land is in breach of the notice. (2) Where the owner of the land is in breach of an enforcement notice he shall be guilty of an offence."

2. Proceeds of Crime Act 2002, s 6(4) : "The court must proceed as follows— (a) it must decide whether the defendant has a criminal lifestyle; (b) if it decides that he has a criminal lifestyle it must decide whether he has benefited from his general criminal conduct …" S 10 : "(1) If the court decides under section 6 that the defendant has a criminal lifestyle it must make the following four assumptions for the purpose of— (a) deciding whether he has benefited from his general criminal conduct, and (b) deciding his benefit from the conduct. (2) The first assumption is that any property transferred to the defendant at any time after the relevant day was obtained by him— (a) as a result of his general criminal conduct, and (b) at the earliest time he appears to have held it. (3) The second assumption is that any property held by the defendant at any time after the date of conviction was obtained by him— (a) as a result of his general criminal conduct, and (b) at the earliest time he appears to have held it. (4) The third assumption is that any expenditure incurred by the defendant at any time after the relevant day was met from property obtained by him as a result of his general criminal conduct. (5) The fourth assumption is that, for the purpose of valuing any property obtained (or assumed to have been obtained) by the defendant, he obtained it free of any other interests in it …. (8) The relevant day is the first day of the period of six years ending with— (a) the day when proceedings for the offence concerned were started against the defendant, or (b) if there are two or more offences and proceedings for them were started on different days, the earliest of those days.… (10) The date of conviction is— (a) the date on which the defendant was convicted of the offence concerned, or (b) if there are two or more offences and the convictions were on different dates, the date of the latest."S 27: "(1) This section applies if the following two conditions are satisfied. (2) The first condition is that a defendant absconds … (5) If the court proceeds under section 6 as applied by this section, this Part has effect with these modifications— … (d) [section] 10 … must be ignored … (6) Once the defendant ceases to be an absconder section 19 has effect as if subsection (1)(a) read— '(a) at a time when the first condition in section 27 was satisfied the court did not proceed under section 6 ,'."S 75: "(1) A defendant has a criminal lifestyle if … the following condition is satisfied. (2) The condition is that the offence … (b) … constitutes conduct forming part of a course of criminal activity; (c) … is an offence committed over a period of at least six months and the defendant has benefited from the conduct which constitutes the offence …"S 76: see post, para 7.

Neutral Citation Number: [2014] EWCA Crim 2344

Case No: 201303560B4

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM HARROW CROWN COURT
HHJ Mole Q.C.
S20110408

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 18th November 2014

Before:

SIR BRIAN LEVESON: PRESIDENT OF THE QUEENS BENCH DIVISION
MR JUSTICE GREEN
and
SIR COLIN MACKAY

- -

Between:

Hussan Hussain	**Appellant**
- and -	
The Crown (London Borough of Brent)	**Respondent**

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

K. Khalil QC and Q. Newcomb (instructed by **Hodders Law**) for the A**ppellant**
E. Robb (instructed by **London Borough of Brent**) for the **Respondent**

Hearing dates : 4 November 2014

Judgment
As Approved by the Court

Sir Colin Mackay:

Introduction

1. On 16 December 2011 after a two day trial before Magistrates, the appellant was convicted of, and committed to the Crown Court for sentence and confiscation proceedings in respect of, the offence set out below.

2. On 10 June 2013, at the Crown Court sitting at Harrow before HHJ Mole Q.C. he was sentenced for breach of an enforcement notice contrary to Section 179 (2) and (9) of the Town and Country Planning Act 1990 to a fine of £20,000, with 12 months' imprisonment in default of payment, and ordered to pay £38,422 towards the costs of the prosecution.

3. On the same date he was made subject to a confiscation order under the Proceeds of Crime Act 2002 ("POCA") in the sum of £494,314.30, with three years' imprisonment in default.

4. He appeals against sentence and the confiscation order by leave of the single judge.

The Facts

5. On the 9 July 2003 the respondent London Borough of Brent issued a Planning Enforcement Notice in respect of a property at 219 Church Road London NW10. The existing planning use of that property was stated as being "for retail and one flat". The notice required the following action to be taken within six months:

> "Cease the use of the premises as two or more flats and its occupation by more than one household and remove all fixtures and fittings associated with that use"

6. That notice was served on, among others, the then owner and occupier of the property, a limited company Tusculum Investments NV ("Tusculum") which was the registered proprietor of the land and of which the appellant was a director and part owner. Its registered office was in the Bahamas. He held three of the issued shares and his wife one. However on 11 October 2007 the appellant and his wife and co-accused, Maha Ali, purchased the property in their capacity as individuals, and were registered as proprietors. Mrs Ali was convicted with her husband, but received a modest fine to reflect her relative lack of involvement and no confiscation proceedings were launched against her. The reality was that from October 2007 the appellant was and acted as the owner of the house.

7. Notwithstanding that it had sold its legal interest in the property Tusculum continued after the sale to the appellant to receive rents as they came in, either from the tenants or from the respondent in the form of housing benefits. It instructed and paid sub-agents to carry out the collections, rewarding them with a percentage commission. Tusculum was a separate legal entity. In due course the appellant's two sons were appointed directors and the shareholdings changed so that all four family members held three of the issued shares in the company. There was no formal contract between the appellant as owner of the house and Tusculum as to the terms on which it received the rents. Mr Khalil QC accepted that the relationship was contractual and that it was

open to the appellant at any time had he so wished to take the collection and receipt of rents into his own hands and dispense with the services of Tusculum and its various sub-agents. We will have to return to consider the import of this relationship.

8. Between September 2009 and the issue of the summons in this case on 24 August 2011 there were a number of visits by the respondent's planning officers to the premises which revealed on each occasion multiple lettings, of the order of eight or nine separate contracts. On these occasions the effect of the enforcement notice was pointed out to the appellant. Following the final visit a warning letter was issued stating that a prosecution was being considered. Throughout this period the properties continued to be let.

Confiscation Proceedings

9. Although they contended that the provisions of Section 75 (2) (c) could be said to be engaged by the facts of the case, the offence having been committed over a period of more than six months and more than £5,000 having been obtained, the Crown limited its claim in the confiscation proceedings to the rental income received during the period covered by the information levelled against the appellant namely 11 October 2007 to 12 August 2011, for all of which time the appellant was himself owner of the property.

10. The rental income received in this period was calculated by reference to the housing benefit that the respondent had paid out to the tenants, which for the period covered by the charge was some £347,410. However the property had continued to be used in breach of the requirements of the notice throughout the confiscation proceedings until the date of the final hearing, by which time the sum concerned has risen to £514,314.30. These figures were not in the end disputed, nor was there any issue as to whether the appellant had assets available which equalled or exceeded that amount. There were a large number of hearings in relation to the confiscation proceedings but by the time of the final hearing the appellant was raising the arguments which are now his grounds of appeal, to which we now turn.

The Grounds of Appeal

11. As is well known Section 76 (4) of POCA reads:-

> "A person benefits from [particular criminal] conduct if he obtains property as a result of or in connection with the conduct"

The appellant's first argument is that he has not benefited from his criminal conduct, namely his refusal to comply with the enforcement notice, and his actions in continuing to allow the premises to be occupied by numerous tenants in breach of planning control, i.e. the criminal offence of which he stands convicted. He says that these rents were "obtained" by Tusculum and he received no benefit, or at most the benefit he could be said to have obtained was the director's remuneration he received over the relevant period.

12. As it seems to us the relationship between the appellant and Tusculum is clear, and no piercing of the corporate veil is required. They stood in the position of principal and agent, and Tusculum as the agent was instructed and engaged to gather in the rents which at all times were the property of the appellant. Tusculum had no interest in the land nor any right to gather retain or dispose of the money it received from the agents who did the collecting. All rights of disposition and control of the proceeds remained with the appellant, and he was free to do as he wished with them. It appears to have served some purpose of his to have left the funds with the family company Tusculum, but that in no way undermines the obvious conclusion that they were from first to last his money which he was free to dispose of as he did. No reason for this arrangement was explored before the judge or before this court.

13. The appellant therefore did "obtain" the rents within the meaning of s.76 (4).

14. The appellant's next argument is that, even if he is taken as having obtained the rents, there is no sufficient causal link established between the criminal conduct which has been proved and the property obtained, as this was not "as a result of or in connection with" his criminal conduct.

15. He relies on this court's decision in Sumal and Sons (Properties) Ltd v The Crown (London Borough of Newham) [2012] ECWA Crim 1840; 2013 1 WLR 2078. In that case the defendant had let residential properties, lying within a "selected area", without the necessary licence in circumstances where the Housing Act 2004 Section 95 (1) made it a criminal offence to do so. The particular provisions of that statute were closely examined by this court. These were set out by Davis LJ, giving the judgment of the court, at paragraphs 40-43. These provisions were:

(1) Section 96 (3) which stated

> "No rule of law relating to the validity or enforceability of contracts in circumstances involving illegality is to affect the validity or enforceability of
>
> a) Any provision requiring the payment of rent…or
>
> b) Any other provision of such a tenancy or licence.

(2) The 2004 Act also contained a statutory code by which "rent repayment orders" could be made against a person letting premises without a licence in contravention of the Statute by a tribunal on the application of the local authority – Section 96 (5) (b).

As Davis LJ pointed out (paragraph 37) the existence of that code necessarily contemplates that the landlord has in the interim lawfully received the rent or housing benefit.

16. Other distinguishing features of the facts in Sumal, as we see them, were (a) that the particular property concerned had been tenanted prior to the commencement of the licensing regime introduced by the 2004 Act and (b) it was common ground that the defendant would have been granted the necessary license had he ever applied for it.

17. In the present case the judge found more assistance from the earlier decision of this court in R v Luigi Del Basso [2010] EWCA Crim 1119: 2011 1 Cr App R (S) 41.

18. That case, like the present appeal, concerned a failure to comply with an enforcement notice relating to the use of land. The owner had made an unsuccessful application for planning permission to operate a "park and ride" facility in connection with a local airport. Notwithstanding his lack of success he continued in the face of repeated warnings to operate the proposed scheme. The trial judge had found that more than £1.8m had been received as a result of that activity and made a confiscation order for £760,000 in view of the available amount on the evidence before him. He found that this benefit had been obtained by the appellants who had embarked on and continued to run this operation in knowing defiance of the enforcement notice.

19. The appellant in that case had sought to focus on the lack of profit to him from these activities, saying among other things that virtually all the income from the scheme had been spent on necessary running expenses and significant financial contributions to the local football club which had a lease which covered the relevant land. The judge had found that the appellant had derived a benefit from his conduct and this court had the advantage of three well known decisions of the House of Lords, heard consecutively on this issue, namely R v May [2008] UKHL 28: [2008] 1 AC 1025: Jennings v CPS [2008] UKHL 29; 2008 1 AC 1046; and R v Green [2008] UKHL 30; 2009 1 Cr App R (S) (32).

20. In his analysis of the case law, Leveson LJ, as he then was, stated that it was necessary to go back to the words of the statute as had been explained by the House of Lords, particularly in May, and concluded (at paragraph 38) as follows:-

> "Thus it is clear that the legislation looks at the property coming to an offender which is his and not what happens to it subsequently; the court is concerned with what he has obtained "so as to own it, whether alone or jointly, which will ordinarily connote a power of disposition or control"; whatever disposition of that property is made …is irrelevant. If it was otherwise the court would be called upon to make a series of almost impossible value judgments: profit is not the test and the use of the words "true" or "real" to qualify "benefit" does not suggest to the contrary"

On that basis the court dismissed the appeal, and it is plain from the judgment of Davis LJ in Sumal that he accepted and did not dissent from this analysis of this position. It was binding on him as it is on us. He reached his conclusion, as we have set out above, influenced by the particular facts of the case that was before him.

21. Returning then to the present appeal and applying a familiar and straight forward test where issues of causation are in play in order to consider Section 76 (4) in this connection, the position can in our judgment simply be said to be this : if the appellant had obeyed the enforcement notice when he became owner with his wife of the premises the lettings would not have been allowed to continue, no new lettings would have been allowed, and therefore but for his criminal conduct in ignoring the notice the rents in the relevant period covered by the charge would not have come into his hands or within his disposition or control as they did.

Proportionality

22. This court in Del Basso held that this legislation looked at what the offender had obtained, in the words of May, "so as to own it, whether alone or jointly, which would ordinarily connote a power of disposition or control" whatever disposition of that property is made. Leveson LJ said at 40;-

> "In the circumstances we reject the argument that the language of the statute permits the court to look at what Mr del Basso "actually made" net of all expenses: the reverse is the case as the first paragraph of the Endnote to May ("benefit gained is the total value of the property or advantage obtained, not the defendant's net profit after the deduction of expenses") makes abundantly clear"

23. The appellant sought to re-visit the question of proportionality in the light of the House of Lords' decision in R v Waya [2013] 1 AC 294, where the impact of Article 1 Protocol 1 of the Human Rights Convention concerning the offender's right to property was considered. The House considered cases where goods or money had been appropriated but rapidly restored in their entirety to the loser, such as the burglar who returns all the stolen goods with minimal delay. But it widened its consideration at paragraph 34 in these terms:

> "There may be other cases of disproportion analogous to that of goods or money entirely restored to the loser. That will have to be resolved case by case as the need arises. Such a case might include, for example, the defendant who, by deception, induces someone else to trade with him in a manner otherwise lawful, and who gives full value for goods or services obtained. … whether a confiscation order is proportionate for any sum beyond profit made may need careful consideration".

24. As an example of such a difficult case is this court's decision in R v Sale [2014] 1 WLR 663, a case of a corruptly awarded contract, where in the absence of complete evidence and any proper analysis of the pecuniary advantage accruing to the offender the court declined to approve a confiscation order which included the additional turnover resulting from the offender's criminal acts and allowed only the offender's company's profits. The court acknowledged that this was a generous outcome for the offender but it was necessitated by an absence of any evidence on the basis of which it could value the other pecuniary advantage obtained, which probably existed but had not been explored in evidence in the lower court.

25. In the present case the trial judge did apply his mind to this problem in his ruling of 12 December 2012 in the light of the Waya decision. Having reminded himself of paragraph 34, which we have cited above, he considered arguments that the appellant had given good value to the tenants in the form of tenancies of these properties, had expended money on the premises and on remuneration to agents collecting the rents. With one exception he saw no disproportion in making the gross sum of money obtained the subject of the confiscation order rather than deducting from it the cost of those items.

26. The judge said in that ruling:-

> "To think that …would make the mistake of equating Mr Hussain's breach of the enforcement notice as being a failure to provide proper accommodation of tenants – but that is not the point in this case – it was against the law to provide the accommodation at all in breach of an enforcement notice, however good it [sc. the accommodation] was… The reasons for issuing the enforcement notice referred to planning detriment that had nothing to do with the standard of the flats but had to do with matters such as noise, disturbance of residential amenities and effect on the character of the area."

27. He continued:-

> "I do however note the point in paragraph 34 [of Waya] as I have already indicated that while bearing in mind that the whole purpose of the legislation, and bearing in mind what Waya said is that what they say does not entitle a judge to simply take a lenient view as to what he thought "proportionate" would amount to and simply leave it to his discretion. The judge has to be very careful to bear in mind the purpose of the legislation and proportion is a different matter from just general feelings of fairness. But nonetheless it is, it seems to me, important for the judge at the end of the day to step back when he has got the figures in front of him and consider whether or not a confiscation order that goes beyond a profit is still proportionate".

28. The argument developed before us was that in the first place substantial sums had been spent by the appellant complying with an abatement notice in August 2004 with a schedule of works to be carried out, two notices, one to execute works and another to execute repairs, both served in March 2005 and a further abatement notice at a date which was unclear. It is argued that compliance with these had led to legitimate expenditure of "considerable sums" which should be deducted, though there was no evidence in the event to the court or before us as to what these amounted to, even in broad terms. Mr Khalil was suggesting that if his argument was seen in a favourable light by us then it would be for the parties to agree figures and to that end to adjourn this appeal until the outcome of their negotiations. We would be most reluctant to accede to such a course given the length of time these proceedings have already taken, something the trial judge emphasised in his final remarks. We note that in Waya Lord Walker rejected the submission that all costs and expenses incurred in realising the gain should be excluded and that only the net benefit should be made the subject of an order. He stated that a proportionate order could have the effect of requiring "…a defendant to pay the whole sum which he has obtained by crime without enabling him to set off the expenses "(ibid paragraph 26). Everything therefore turns upon the facts.

29. At the heart of the appellant's argument lies the proposition that the agreements between the appellant and his tenants were not themselves unlawful. Whether the contract is illegal as performed, and, if so, the consequences, does not fall for

decision. Whether the proper analysis of the respective rights and duties of the parties might be, no conclusion stops the continued receipt of rent by the appellant from being criminal conduct, as found by the magistrates, for the reason the judge gave, namely that the whole purpose for the enforcement notice regime was the public interest in adherence to planning controls

30. The appellant before us referred to the arguments which had been advanced unsuccessfully before the trial judge when he declined to stay the proceedings as an abuse of process, against which decision there is no appeal. But the grounds of that application were in general terms namely the length of delay in bringing the proceedings to court and the incentivisation of the respondent by virtue of the fact that it retains a percentage of the confiscation order when recovered. Mr Khalil asked us to consider these matters when addressing proportionality. We have done so and in our judgment they have little or no influence on the outcome of this case.

31. The judge also declined to deduct the commissions paid to the sub-agents who collected the rent from the tenants. He regarded this as a benefit to the appellant because he did not then have to go to the trouble of collecting it himself and so obtained a very real benefit for himself. We agree with that analysis.

32. The judge, however, did consider the question of unpaid rent. He heard evidence from a number of witnesses about that, none of whom seem to have been clear or conclusive in his eyes, but nevertheless he did not dismiss this argument out of hand. He agreed that where a tenant simply did not hand over the housing benefit which he had received in respect of his premises then the landlord did not "obtain that property". That proposition in principle seemed to him perfectly clear as it does to us. The problem was one of quantification. But the judge did not shrink from that, and he made an estimate having heard the evidence that was put before him. He addressed the question properly and did the best he could with the material before him, deducting £20,000 from the notional gross receipts as representing housing benefit given direct to tenants who then kept it for themselves and did not pass it on to the landlord. We cannot accept that he was wrong in any way in his approach to this or to issues of proportionality generally.

33. It seems to us in the post Waya climate all such cases require to be carefully considered in the light of that decision. This judge in our view did just that and we do not propose to interfere with his order on the ground of lack of proportionality.

Sentence

34. The judge did not accept the appellant's protestations of ignorance as to the existence of the enforcement notice, certainly not from 2007 when he became owner. He had been written to in 2009 and twice in 2011 in addition to the site visits by planning officers to which we have referred above and he had every opportunity to stop the breach.

35. The ground of appeal against the sentence is that it was manifestly excessive because it was the maximum amount of fine that could have been imposed and made no allowances for any mitigation such as the previous good character of the appellant and the fact that, whatever his criminality was, he provided decent accommodation for his tenants over this period.

36. The magistrates were content to retain jurisdiction over this matter and must be assumed to have been aware that their sentencing powers following conviction were a fine not exceeding £20,000. They committed the appellant for sentence solely because the prosecution sought to launch confiscation proceedings. Had the appellant been convicted at the Crown Court the power to fine would have been unlimited, but as it was the judge was restricted to the magistrates' maximum figure.

37. In his sentencing remarks the judge found that the appellant had neglected his duties as a landlord by failing to comply with these notices and stressed again the reasons for issuing the notices were to protect the rights and enjoyment of others living in that area. He had not ceased his letting activities even when notified of an intended prosecution. The judge could see no mitigation. He had a very good view of this case having spent some ten days hearing the various applications relating to it. With a continuing offence such as this, committed over a period of years, the effect of a previous good character is significantly diminished.

38. This sentence was in our judgment severe but justifiably so and we decline to quash it as being manifestly excessive.

39. It follows therefore that both of these appeals must be dismissed.

Appendix 9

Working draft s106 Agreement

DATED 2018

(1) THE COUNCIL OF THE CITY AND COUNTY OF SWANSEA

(2) ABERGELLI POWER LIMITED

(3) SARAH ANN MARINA LLEWELLYN

DEED OF DEVELOPMENT CONSENT OBLIGATIONS

pursuant to Section 106 of the Town and Country Planning Act 1990 (as amended) relating to the Abergelli Power Project in Swansea

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Pinsent Masons

THIS DEED is made on 2018

BETWEEN:

(1) **THE COUNCIL OF THE CITY AND COUNTY OF SWANSEA** of Civic Centre, Oystermouth Rd, Swansea SA1 3SN (the "**Council**");

(2) **ABERGELLI POWER LIMITED** of Drax Power Station, Drax, Selby, United Kingdom, YO8 8PH (the "**Developer**");

(3) **SARAH ANN MARINA LLEWELLYN** of Abergelli Fach Farm, Felindre, Swansea, SA5 7NN (the "**Owner**").

WHEREAS:

(A) The Council is the local planning authority for the Site and can enforce the obligations contained in this Deed.

(B) The Owner is the freehold owner of the Land.

(C) The Developer has an equitable interest in the Land under an option agreement dated 26 June 2014 and made between (1) Sarah Ann Marina Llewellyn (2) Sarah Ann Marina Llewellyn, Meidwen May Thomas, Bryan Emyr Llewellyn and Eric Davies as trustees of the Abergelli Fach Settlement 2014 and (3) Abergelli Power Limited.

(D) On 25 May 2018 the Developer submitted the Application to the Secretary of State for development consent to construct and operate the Project. The Application was accepted for examination by the Secretary of State on 21 June 2018.

(E) It is intended that the Developer will be the undertaker for the purposes of the Development Consent Order and the Developer intends to construct and operate the Project as authorised by the Development Consent Order.

(F) The Council and the Developer have agreed to enter into this Deed as a development consent obligation under the 1990 Act in order to secure the planning obligations contained in this Deed which are necessary to mitigate the impacts of the Project and to make the Project acceptable in planning terms.

(G) The Council, the Owner and the Developer have given due consideration to the requirements of paragraph 4.1.8 of the Overarching National Policy Statement for Energy (EN-1) and agree that the development consent obligations contained in this Deed are:

(i) relevant to planning;

(ii) necessary to make the Project acceptable in planning terms;

(iii) directly related to the Project;

(iv) fairly and reasonably related in scale and kind to the Project; and

(v) reasonable in all other respects

2. DEFINITIONS AND INTERPRETATION

2.1 Where in this Deed the following defined terms and expressions are used, they shall have the following respective meanings unless otherwise stated:

"**1990 Act**"	means the Town and Country Planning Act 1990 (as amended);
"**2008 Act**"	means the Planning Act 2008 (as amended);
"**Application**"	means the application for a development consent order under section 37 of the Planning Act 2008 in relation to the Project and submitted to the Secretary of State on 25 May 2018 and given reference number EN010069;
"**Beyond Bricks and Mortar**"	means the Council's initiative of the same name or such local business and employment initiative as may replace it from time to time
"**Commence**"	has the same meaning as in Article 2 of the Development Consent Order and the words "**Commencement**" and "**Commenced**" and cognate expressions are to be construed accordingly;
"**Construction Period**"	means the period from Commencement until the Date of Final Commissioning (inclusive);
"**Date of Final Commissioning**"	has the same meaning as in Article 2 of the Development Consent Order;
"**Deed**"	means this deed;
"**Developer's Group**"	means companies and organisations which are a "group company" (such expression being as defined in section 479 of the Companies Act 2006) of the Developer
"Development Consent Order"	means the development consent order to be made pursuant to the Application;
"**Education Scheme**"	means a programme of visits to schools located within Swansea to be made by the Developer which will be used to explain the Project and how such a facility fits within the provision of energy for the United Kingdom;
"**EPC Contracts**"	means the main contracts for the design, engineering, procurement, construction, installation, completion, commissioning and testing of the Project;
"**Excluded Contracts**"	means:

(a) the EPC Contracts;

(b) the LTSA Contract;

(c) any contract to be let to a company within the Developer's Group;

(d) any framework contract which is already in place in relation to goods or services required both for the Project and other projects proposed by a company in the Developer's Group; and

(e) any contract for works undertaken by NGET, NGG or another statutory undertaker.

Commented [A1]: CCS to review and confirm definition.

Commented [A2]: Definition under discussion.

"**Expert**"	means an independent person of at least 10 years standing in the area of expertise relevant to the dispute to be agreed between the Parties or, failing agreement, to be nominated at the request and option of any of them, at their joint expense, by or on behalf of the President for the time being of the Law Society.
"**First Footpath Contribution**"	means the sum of £[XX] (XX pounds) to be used by the Council for the purposes set out in Schedule 3
"**Footpath Improvements**"	means [*text required to describe the improvements, cross referencing a plan to be attached to the agreement,*], or such other improvements to public rights of way in the vicinity of the Project as may be agreed between the Developer and the Council
"Land"	means the land to be bound by the development consent obligations in this deed, which is registered at the Land Registry under title number WA710190 and shown edged in [blue] on Plan 2.
"**Local Employment Scheme**"	means a scheme setting out the details and mechanisms for securing the use of local labour contractors goods and services during the Construction Period and Operational Period of the Project including: (f) the measures that the Developer will take in order to ensure that opportunities for Local Organisations to bid for contracts during the Construction Period are advertised locally; (g) the measures that the Developer will take in order to ensure that opportunities for Local Organisations to bid for contracts during the Operational Period of the Project (for example for maintenance, waste, cleaning or security services) are advertised locally; (h) a requirement for the Developer to notify the Council when the procurement process for any construction contracts required during the Construction Period is due to begin in order to allow the Council to advertise opportunities via any brokerage scheme that it may run; (i) a requirement for the Developer to notify the Council when the procurement process for any operational contracts required during the Operational Period is due to begin in order to allow the Council to advertise opportunities via any brokerage scheme that it may run; (j) the anticipated number of local supplier days that will be hosted by the Developer prior to and during the Construction Period; (k) promotion of the Local Employment Scheme and liaison with contractors engaged in the construction of the Project to ensure that they also apply the Local Employment Scheme so

far as is practicable having due regard to the need and availability for specialist skills and trades and the programme for constructing the Project;

(l) a procedure for monitoring of the Local Employment Scheme and reporting the results of such monitoring to the Council including details of the origins, qualifications, numbers and other details of candidates; and

(m) a timetable for the implementation of the Local Employment Scheme

"Local Organisations"	means businesses located within the administrative area of the Council
"**LTSA Contract**"	means the main contract for the provision of long term maintenance services consisting of parts, scheduled outage services and unscheduled outage services in respect of the Project;
"**NGET**"	means National Grid Electricity Transmission plc (Company Registration Number 02366977) whose registered office is at 1 to 3 Strand, London, WE2N 5EH;
"**NGG**"	means National Grid Gas plc (Company Registration Number 02006000) whose registered office is at 1 to 3 Strand, London WC2N 5EH;
"**Operational Period**"	means the period from the Date of Final Commissioning to when the Project is decommissioned in accordance with requirement 27 of Schedule 2 of the Development Consent Order;
"**Parties**"	means the Council, Owner and the Developer and "**Party**" means any one of them as the context so requires;
"**Plan 1**"	means the plan attached to this Deed marked "Plan 1" showing the Site; [*DN – this is the Order Limits*]
"Plan 2"	means the plan attached to this Deed marked "Plan 2" showing the Land; [*DN – this is the land proposed to be leased for the main power generation plant site - the blue land on the option agreement*]
"**Project**"	means the "authorised development" as defined in Article 2 and Schedule 1 of, and to be authorised by, the Development Consent Order which is to be located on the Site;
"**Second Footpath Contribution**"	means the sum of £[XX] (XX pounds) to be used by the Council for the purposes set out in Schedule 3
"**Secretary of State**"	means the Secretary of State for Business, Energy and Industrial Strategy or such other Secretary of State of Her Majesty's Government that has the responsibility for determining projects relating to energy development;

"**Site**"	means the Order Limits (as defined in the Application), shown for the purposes of identification edged in [red] on Plan 1.
"**Utilities**"	means main services including gas, electricity, potable water and telecommunications.
"**Working Day**"	means any day apart from Saturday, Sunday and any statutory bank holiday on which clearing banks are open in England for the transaction of ordinary business.

2.2 In this Deed, unless otherwise indicated, reference to any:-

2.2.1 Recital, Clause, sub-clause, paragraph number, Schedule, Appendix or plan is a reference to a Recital, Clause or sub-clause of, paragraph number of, Schedule to, Appendix to or plan annexed to this Deed;

2.2.2 words importing the singular meaning include the plural meaning and vice versa;

2.2.3 words of the masculine gender include the feminine and neuter genders and words denoting actual persons include companies, other corporate bodies, firms or legal entities and all such words shall be construed interchangeably in that manner; and

2.2.4 Act of Parliament shall include any amendment, modification, extension, consolidation or re-enactment of that Act for the time being in force and in each case shall include all statutory instruments, orders, regulations and directions for the time being made, issued or given under that Act or deriving validity from it.

2.3 Headings where they are included are for convenience only and are not intended to influence the construction and interpretation of this Deed.

2.4 Any notice, notification, consent, approval, agreement, request or statement or details to be made, given or submitted under or in connection with this Deed shall be made or confirmed in writing.

2.5 Wherever an obligation falls to be performed by more than one person, the obligation can be enforced against every person so bound jointly and against each of them individually unless there is an express provision otherwise.

2.6 Each of the Parties to this Deed shall act in good faith and shall co-operate with each of the other Parties to facilitate the discharge and performance of all obligations on them contained in this Deed and Developer shall comply with any reasonable requests of the Council to provide documentation within its possession (such documentation to be provided by the developer at its own expense) for the purposes of monitoring compliance with the obligations contained in this Deed.

3. **LEGAL EFFECT**

3.1 This Deed is made pursuant to:

3.1.1 section 106 of the 1990 Act; and

3.1.2 section 111 of the Local Government Act 1972, section 1 of the Localism Act 2011 and all other enabling powers that may be relevant to the enforcement of the obligations contained in this Deed.

3.2 The obligations, covenants and undertakings on the part of the Owner and the Developer in this Deed are development consent obligations for the purposes of section 106 of the 1990 Act and so bind the Land. Subject to Clause 8, the obligations, covenants and undertakings on the part of the Owner and the Developer are entered into with the intent that they shall be enforceable by the Council not only against the Owner and the Developer but also against any person deriving title in the Land or any part of it from the Owner or the Developer as if that person had been an original covenanting party in respect of the interest for the time being held by it.

3.3 Insofar as any obligations, covenants and undertakings in Clause 3.2 are not capable of falling within section 106 of the 1990 Act they are entered into in pursuance of the relevant powers referred to in Clause 3.1.2.

3.4 So far as the obligations, covenants and undertakings in this Deed are given by or to the Council, they are entered into under the relevant powers referred to in Clause 3.1 and those obligations, covenants and undertakings are enforceable by or against the Council.

3.5 Nothing in this Deed restricts or is intended to restrict the proper exercise at any time by the Council of any of its statutory powers, duties, functions or discretions in relation to the Land or otherwise.

4. CONDITIONALITY

4.1 Subject to Clause 4.2, the Parties agree that:

4.1.1 Clauses 2, 3, 4, 5, 8, 9, 10, 13, 14, 15, 16, 17, 18, and 19 shall have operative effect upon the date of this Deed; and

4.1.2 Clauses 6, 7, 11 and 12 shall not have operative effect unless and until the Development Consent Order has come into force.

4.2 Where the Development Consent Order becomes the subject of any judicial review proceedings:

4.2.1 until such time as such proceedings including any appeal have been finally determined, the terms and provisions of this Deed will remain without operative effect unless the Project has been Commenced; and

4.2.2 if following the final determination of such proceedings the Development Consent Order is capable of being Commenced, then this Deed will take effect in accordance with its terms.

4.3 Wherever in this Deed reference is made to the final determination of judicial review proceedings (or cognate expressions are used), the following provisions will apply:

4.3.1 proceedings by way of judicial review are finally determined:

(a) when permission to bring a claim for judicial review has been refused and no further application may be made;

(b) when the court has given judgment in the matter and the time for making an appeal expires without an appeal having been made or permission to appeal is refused; or

(c) when any appeal is finally determined and no further appeal may be made.

5. DURATION

5.1 This Deed will end (to the extent it has not already been complied with), if the Development Consent Order:-

5.1.1 is quashed, revoked or otherwise withdrawn at any time so as to render this Deed or any part of it irrelevant, impractical or unviable; or

5.1.2 expires before Commencement.

5.2 Where this Deed ends the Council must remove all entries made in the Register of Local Land Charges in respect of this Deed within 20 Working Days ceasing to have effect.

6. **OWNER AND DEVELOPER'S DEVELOPMENT CONSENT OBLIGATIONS**

The Owner and the Developer covenant with the Council so as to bind their respective interests in the Land to observe and perform the obligations undertakings covenants and agreements in Schedule 1, Schedule 2 and Schedule 3.

7. **COUNCIL'S OBLIGATIONS**

The Council covenants with the Owner and the Developer to observe and perform the covenants and obligations on their part contained in Schedule 1, Schedule 2 and Schedule 3.

8. **SUCCESSORS IN TITLE AND RELEASE**

8.1 References in this Deed to the Council include the successors to its respective statutory functions.

8.2 Subject to Clause 8.3, references to the Owner or Developer respectively include persons deriving title from them.

8.3 The obligations in this Deed are not binding or enforceable against any statutory undertaker or other person who acquires any part of the Site or any interest in it for the purposes of supplying Utilities or public transport services.

8.4 Nothing in this Deed will prevent compliance with any obligation under it before that obligation comes into effect and early compliance will not amount to a waiver of the effect of this Clause 8.

9. **FURTHER PLANNING PERMISSIONS AND DEVELOPMENT CONSENT ORDERS**

Nothing in this Deed shall be construed as prohibiting or limiting rights to use or develop any part of the Site in accordance with and to the extent permitted by a certificate of lawful use, planning permission, development consent order or other statutory authority granted either before or after the date of this Deed, other than the Development Consent Order.

10. **APPROVALS**

Where any approval, agreement, consent, confirmation or an expression of satisfaction is required under the terms of this Deed such approval, agreement, consent, confirmation or expression of satisfaction shall be given in writing and shall not be unreasonably withheld or delayed.

11. **GOOD FAITH**

The Parties agree with each other to act reasonably and in good faith in the discharge of the obligations contained in this Deed.

12. **CERTIFICATES OF COMPLIANCE**

The Council shall upon written request certify compliance with the development consent obligations in this Deed.

13. **DISPUTE RESOLUTION**

13.1 If a dispute between the Parties persists beyond 10 Working Days and relates to any matter contained in this Deed, the dispute may be referred to the Expert by any Party. The Expert will act as an expert and not as an arbitrator. His decision shall be final and binding on the Parties.

13.2 Each Party will bear its own costs and the Expert's costs will be paid as determined by him.

13.3 The Expert will be appointed subject to an express requirement that he must reach his decision and communicate it to the Parties within the minimum practical timescale allowing for the nature and complexity of the dispute, and in any event not more than 20 Working Days from the date of his appointment to act. His decision will be given in writing with reasons and in the absence of manifest error will be binding on the Parties.

13.4 The Expert will be required to give notice to each of the Parties, inviting each of them to submit to him within 10 Working Days written submissions and supporting material and will afford to the Parties an opportunity to make counter submissions within a further 5 Working Days in respect of any such submission and material.

14. **COSTS**

On completion of this Deed the Developer will pay to the Council the reasonable legal costs incurred in the preparation, negotiation and execution of this Deed in the sum of £500 (five hundred pounds).

15. **CONTRACTS (RIGHTS OF THIRD PARTIES) ACT**

Nothing in this Deed will create any rights in favour of or be enforceable by any person who is not a party to this Deed under the Contracts (Rights of Third Parties) Act 1999.

16. **NOTICES**

16.1 Any notice or other written communication to be served on a Party or given by one Party to any other under the provisions of this Deed will be deemed to have been validly served or given if delivered by hand or sent by first class post or sent by recorded delivery post to the Party on whom it is to be served or to whom it is to be given and will conclusively be deemed to have been received on:-

16.1.1 if delivered by hand, the next Working Day after the day of delivery;

16.1.2 if sent by post, the day 2 Working Days after the date of posting; or

16.1.3 if sent by recorded delivery, at the time delivery was signed for.

16.2 If a notice, demand or any other communication is served after 4.00pm on a Working Day, or on a day that is not a Working Day, it is to be treated as having been served on the next Working Day.

16.3 The address for any notice or other written communication shall be within the United Kingdom.

16.4 A notice or communication will be served or given:-

16.4.1 on the Council at its address given above or such other address for service as shall have been previously notified in writing to the other Parties and any such notice shall be marked for the attention of Director of Place, Civic Centre, Oystermouth Road, Swansea SA! 3SN;

16.4.2 on the Developer at its address given above or such other address for service as shall have been previously notified in writing to the other Parties and any such notice shall be marked for the attention of the Company Secretary and copied by electronic mail to Legal.Notices@Drax.com; and

16.4.3 on the Owner at its address given above or such other address for service as shall have been previously notified in writing to the other Parties and any such notice shall be marked for the attention of [XX].

16.5 Any notice or written communication to be given by the Council will be deemed valid and effectual if on its face it is signed on behalf of the Council by an officer or duly authorised signatory.

17. **LOCAL LAND CHARGE**

17.1 The Council must register this Deed as a local land charge immediately after the date of this Deed.

17.2 The Council must cancel all entries made in the Register of Local Land Charges relating to this Deed as soon as all obligations under this Deed have been satisfied.

18. **JURISDICTION AND LEGAL EFFECT**

18.1 This Deed will be governed by and interpreted in accordance with English Law.

18.2 If any provision of this Deed if found (for whatever reason) to be invalid, illegal or unenforceable, that invalidity, illegality or unenforceability will not affect the validity or enforceability of the remaining provisions of this Deed

19. **WAIVER**

No waiver (whether expressed or implied) by any Party of any breach or default in performing or observing any of the covenants terms or conditions of this Deed shall constitute a continuing waiver and no such waiver shall prevent the relevant Party from enforcing any of the relevant terms or conditions or for acting upon any subsequent breach or default.

SCHEDULE 1

THE EDUCATION SCHEME

1. Prior to the Commencement of the Project, the Developer shall deliver an Education Scheme to the Council for approval.

2. The Developer and the Council shall work together to establish the initiatives set out within the approved Education Scheme.

3. The Developer shall not Commence the Project until the Education Scheme has been approved by the Council and the Developer shall thereafter carry out the approved Education Scheme for a period of five years from the date of Commencement of the Project.

4. The Developer shall be entitled to submit requests to vary the Education Scheme to the Council for approval.

Commented [A3]: A meeting was held between APL and the Council's education team on 11 October to discuss the Education Scheme in more detail.

Updates to this Schedule are pending.

SCHEDULE 2

THE LOCAL EMPLOYMENT SCHEME

Commented [A4]: Initial round of review and comment complete.

Further development anticipated before drafting is finalised.

1. Prior to Commencement of the Project, the Developer shall submit the Local Employment Scheme to the Council for approval.

2. The Developer and the Council agree that the Excluded Contracts will not be included within the Local Employment Scheme.

3. The Developer and the Council (through its Beyond Bricks and Mortar initiative and team) shall work together to establish the initiatives set out within the approved Local Employment Scheme, such initiatives to be aimed at unemployed and economically inactive people in Swansea (such people to be identified by Beyond Bricks and Mortar).

4. The Developer shall not Commence the Project until the Local Employment Scheme has been approved by the Council.

5. The Parties agree that the contractors engaged in the construction of the Project will be obliged to comply with the terms of this Schedule 2 through the obligation on them to comply with 'third party contracts' and the Developer will use reasonable endeavours to procure that the contractors engaged in the construction of the Project assist in the implementation of the Local Employment Scheme.

6. For the avoidance of doubt, the Local Employment Scheme shall not require the Developer or any contractors to award any contract for the construction or operation of the Project to any specific company.

7. The Developer shall implement the Local Employment Scheme until the end of the Operational Period in accordance with the timetable contained in the approved Local Employment Scheme **PROVIDED THAT** the Developer may from time to time seek approval for revisions of the Local Employment Scheme from the Council.

8. The Local Employment Scheme shall include targets for the recruitment, employment and training of unemployed people (such targets to be agreed between the contractor and the Council (through its Beyond Bricks and Mortar team)) and the Developer shall interview and if appropriate recruit suitably qualified applicants as part of the Local Employment Scheme.

9. The Council (through its Beyond Bricks and Mortar team) will provide assistance to the contractors in relation to the obligations in paragraph 8 above.

10. The Developer shall:

    (i) advertise invitations to tender for all contracts for the provision of services and materials to the Project including by posting on the Sell2Wales website (www.sell2wales.gov.uk, or such website as may replace it from time to time) and in at least one local newspaper with a circulation in all areas within a 25 mile radius of the Site (save in respect of the Excluded Contracts); and

    (ii) invite at least two companies who have responded to an advertisement published in accordance with paragraph 9.1 of this Schedule 2 and whose principal offices are located within a 25 mile radius of the Site to tender for each contract in relation to the construction of the Project including in relation to the supply of materials and services

    PROVIDED THAT nothing in this paragraph shall require the Developer to award any contract for the construction or operation of the Project to any such company.

11. The Developer shall be under no obligation in respect of paragraph 10 of this Schedule 2 to invite any company or advertise any contract for the provision of services and materials where, to the Developer's knowledge, there is no company within a radius of 25 miles of the Site that is capable of fulfilling any such contract **PROVIDED THAT** it notifies the Council of the contracts to which this paragraph 10 applies.

SCHEDULE 3

THE FOOTPATH IMPROVEMENTS

1. The Developer covenants to pay the First Footpath Contribution to the Council on Commencement of the Project.

2. Following:

   (i) Commencement of the Project; and

   (ii) notice and evidence being given to the Developer by the Council that all relevant land rights and consents required to undertake the works referred to in paragraph 3(ii) below

   the Developer shall pay the Second Footpath Contribution to the Council.

3. The Council covenants to:

   (i) use the First Footpath Contribution for the purposes of liaising with land owners and obtaining the relevant consents required to undertake the works referred to in paragraph (ii) below, and for undertaking any of the Footpath Improvements which can be undertaken without the need for any additional land rights or consents; and

   (ii) use the Second Footpath Contribution for the purpose of implementing the Footpath Improvements (as have not already been carried out pursuant to paragraph (i) above);

   (iii) on receipt of the First Footpath Contribution and the Second Footpath Contribution to place each of them in an interest bearing account; and

   (iv) repay any part of the Footpath Contribution (plus interest received) to the Developer which remains unspent at the date which is 5 (five) years after the date the relevant monies were paid to the Council.

Commented [A5]: As some of the footpath improvements look likely to require additional consents or land owners' permission the s106 provides for the contribution to be split. This allows CCS to use the first contribution to a) do any works not requiring consents and b) seek to obtain those consents. The second contribution is then to implement the remaining works.

EXECUTED AS A DEED by the parties on the date which first appears in this Deed.

The **COMMON SEAL** of **CITY AND COUNTY OF SWANSEA COUNCIL** was hereunto affixed in the presence of:	)))
	Head of Legal, Democratic Services and Business Intelligence /Authorised signatory
EXECUTED as a **DEED** by **ABERGELLI POWER LIMITED**	))
acting by two directors or one director and the company secretary:	Director Director / Secretary
EXECUTED as a **DEED** by **SARAH ANN MARINA LLEWELLYN**	))
	In the presence of …..... Witness …..... Full name …..... Address