Queen's Bench Division

H J Banks & Co Ltd *v* Secretary of State for Housing, Communities and Local Government

[2018] EWHC 3141 (Admin)

2018 Oct 17, 18; Nov 23

Ouseley J

Planning — Development — Environmental considerations — Secretary of State rejecting inspector's recommendation that planning permission be granted for surface coal mining — Whether Secretary of State adopting lawful approach in balancing environmental benefits and adverse effects of proposed development — Whether wrongly ignoring biodiversity benefits in overall assessment — Whether giving adequate reasons for rejecting inspector's conclusion — National Planning Policy Framework (2012), para 149

The claimant company applied to the local planning authority for planning permission for a surface mine for the extraction of up to three million tonnes of coal from land which was to be restored to agricultural and ecological uses after the conclusion of the mining operations. The Secretary of State called in the application for his own determination and, following a public inquiry, the appointed inspector recommended that planning permission be granted since the proposal accorded with national policy and the planning balance, under paragraph 149 of the National Planning Policy Framework (2012)[1] ("NPPF"), favoured the development. The Secretary of State accepted most of the inspector's conclusions, including that there was a need for the coal to meet the country's energy needs and that the local employment benefits of the proposal would be of substantial significance, but he rejected the inspector's recommendation and refused permission in his decision letter because of the very considerable weight which he gave to the adverse effects of greenhouse gas emissions and climate change from the burning of coal from the site, which he concluded were not outweighed by the national, local and community benefits. The claimant challenged that decision under section 288 of the Town and Country Planning Act 1990 on the grounds, inter alia, that the Secretary of State (i) had erred in law in his interpretation of paragraph 149 of the NPPF, omitting in consequence a relevant benefit, namely the biodiversity benefits of the proposal, and (ii) had given inadequate reasons for his conclusions in relation to greenhouse gas emissions. In relation to the first ground, all parties were agreed that paragraph 149 of the NPPF contained a two-stage test and that the first stage was to consider all factors which might be described as "environmental", whether adverse or beneficial. The Secretary of State, supported by the second and third interested parties, contended that an acceptable approach at the second stage was to consider on the one side only the residual balance of the adverse effects as mitigated ("the net harm") and then, after allowing for environmental benefits, to balance that net harm against the "national, local or community benefits", on the other side. The claimant submitted that that approach was irrational where a particular consideration involved both mitigation and an additional benefit going beyond mitigation of the harm. In relation to the second ground, the claimant submitted, inter alia, that the Secretary of State had to explain why there would be an increase in greenhouse gas emissions rather than

[1] National Planning Policy Framework, para 149: see post, para 17.

a substitution of one form of coal for another, in the light of the evidence he had accepted.

On the claimant's application—

Held, granting the application, (1) that under paragraph 149 of the National Planning Policy Framework, coal extraction was not permitted unless it was environmentally acceptable or could be made so with conditions and obligations (the first stage), or, if it remained environmentally unacceptable, unless the national, local or community benefits of the proposal, including but not confined to the "need" case, clearly outweighed the likely impacts (the second stage); that the residual or "netting-off" approach to the second stage was not itself irrational, unlawful or a misinterpretation of paragraph 149 of the NPPF, provided that all the benefits and adverse effects were taken into account without double counting or discounting; that, however, there was a risk on the residual approach that a benefit might be excluded at the first stage, as going beyond mitigation, yet not included at the second stage if the view was taken that "national, local or community benefits" encompassed no environmental benefits; that paragraph 149 did not permit all the harm to be considered at the second stage with only part of the benefits and thus, if a residual approach was followed, both benefits and harms had to be netted off to come to a single notional value for a reduced harm then used at the second stage; that no issue arose as to the treatment of the first stage of paragraph 149 in the decision letter, since the harm taken into account outweighed the benefits taken into account at that stage, including the biodiversity benefits; but that, at the second stage, the Secretary of State had not taken a netting-off approach but had instead brought forward all the harm while failing to carry forward the biodiversity benefits, which he had ignored in his overall conclusions, and he had thus failed to have regard to all the considerations material to the second stage; and that his decision was quashed accordingly (post, paras 17, 19, 24, 35, 41, 48, 66, 122).

(2) That where the Secretary of State had explicitly accepted most of the conclusions of the inspector, including that there was a need for the coal to meet the country's energy needs, but had differed from the inspector's overall conclusion that the benefits of extraction for power generation and employment outweighed the adverse impacts including those from greenhouse gas emissions, the Secretary of State had been obliged to explain why he had reached his very different decision on that issue; and that, in the absence of any adequate explanation of how the energy need would be met, or what renewable low carbon energy sources might be used in place of imported coal, his reasoning had been wholly unclear and inadequate on a critical issue (post, paras 94–96, 102–106).

The following cases are referred to in the judgment:

Bolton Metropolitan District Council v Secretary of State for the Environment [2017] PTSR 1091; (1995) 71 P & CR 309, HL(E)

Derwent Holdings Ltd v Trafford Borough Council [2011] EWCA Civ 832; [2011] NPC 78, CA

Elsick Development Co Ltd v Aberdeen City and Shire Strategic Development Planning Authority [2017] UKSC 66; [2017] PTSR 1413, SC(Sc)

Newbury District Council v Secretary of State for the Environment [1981] AC 578; [1980] 2 WLR 379; [1980] 1 All ER 731; 78 LGR 306, HL(E)

Newick (Baroness Cumberlege of) v Secretary of State for Communities and Local Government [2018] EWCA Civ 1305; [2018] PTSR 2063, CA

North Wiltshire District Council v Secretary of State for the Environment (1992) 65 P & CR 137, CA

Preston New Road Action Group v Secretary of State for Communities and Local Government [2018] EWCA Civ 9; [2018] Env LR 18, CA

R (Friends of the Earth Ltd) v North Yorkshire County Council [2016] EWHC 3303 (Admin); [2017] Env LR 22
R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council [2010] UKSC 20; [2010] PTSR 1103; [2011] 1 AC 437; [2010] 2 WLR 1173; [2010] 4 All ER 931; [2010] LGR 727, SC(E)
R (Wright) v Forest of Dean District Council [2017] EWCA Civ 2102; [2018] JPL 672, CA
Save Britain's Heritage v Number 1 Poultry Ltd [1991] 1 WLR 153; [1991] 2 All ER 10; 89 LGR 809, HL(E)
South Bucks District Council v Porter (No 2) [2004] UKHL 33; [2004] 1 WLR 1953; [2004] 4 All ER 775, HL(E)

The following additional cases were cited in argument or referred to in the skeleton arguments:

Ashbridge Investments Ltd v Minister of Housing and Local Government [1965] 1 WLR 1320; [1965] 3 All ER 371; 63 LGR 400, CA
Brentwood Borough Council v Secretary of State for the Environment, Transport and the Regions (1998) 78 P & CR 301
Clarke Homes Ltd v Secretary of State for the Environment [2017] PTSR 1081, CA
Dunster Properties Ltd v First Secretary of State [2007] EWCA Civ 236; [2007] 2 P & CR 26, CA
Gallagher (JJ) Ltd v Secretary of State for Transport, Local Government and the Regions [2002] EWHC 1812 (Admin); [2002] 4 PLR 32
Mansell v Tonbridge and Malling Borough Council [2017] EWCA Civ 1314; [2018] JPL 176, CA
R (Fox Strategic Land and Property Ltd) v Secretary of State for Communities and Local Government [2012] EWCA Civ 1198; [2013] 1 P & CR 6, CA
R (Hampton Bishop Parish Council) v Herefordshire Council [2013] EWHC 3947 (Admin); [2014] LGR 209; [2014] EWCA Civ 878; [2015] 1 WLR 2367, CA
St Albans City and District Council v Secretary of State for Communities and Local Government [2015] EWHC 655 (Admin)
St Modwen Developments Ltd v Secretary of State for Communities and Local Government [2017] EWCA Civ 1643; [2018] PTSR 746, CA
Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014; [1976] 3 WLR 641; [1976] 3 All ER 665; 75 LGR 190, CA and HL(E)
Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening) [2012] UKSC 13; [2012] PTSR 983, SC(Sc)

APPLICATION under section 288 of the Town and Country Planning Act 1990

By a CPR Pt 8 claim form, and pursuant to permission granted by Ouseley J on 4 June 2018, the claimant, HJ Banks & Co Ltd, applied under section 288 of the Town and Country Planning Act 1990 to quash the decision of the Secretary of State for Housing, Communities and Local Government, by his decision letter dated 22 March 2018, refusing the claimant's application for planning permission for a surface mine for the extraction of, inter alia, three million tonnes of coal from land at Highthorn, on the coast at Druridge Bay in south east Northumberland, because of the very considerable weight which he gave to the adverse effects of the emission of greenhouse gases. The grounds of challenge were that the Secretary of State had, inter alia, erred in law in his interpretation of paragraph 149 of the National Planning Policy Framework, omitting in consequence a relevant

A benefit, and (ii) given inadequate reasons for his conclusions in relation to greenhouse gas emissions.

Northumberland County Council, the first interested party, did not take part in the proceedings. The second interested party, Friends of the Earth Ltd, made submissions in support of the Secretary of State. The third interested party, Save Druridge, an unincorporated association of local residents, adopted the submissions of Friends of the Earth Ltd.

B The facts are stated in the judgment, post, paras 1–4.

Nathalie Lieven QC and *Flora Robertson* (instructed by *Eversheds*) for the claimant.

David Elvin QC and *Richard Moules* (instructed by *Treasury Solicitor*) for the Secretary of State.

C *Paul Brown QC* and *Matthew Fraser* (instructed by *Solicitor, Friends of the Earth Ltd*) for the second interested party.

Estelle Dehon (instructed by *Richard Buxton Solicitors, Cambridge*) for the third interested party.

The first interested party did not appear and was not represented.

D The court took time for consideration.

23 November 2018. **OUSELEY J** handed down the following judgment.

1 HJ Banks & Co Ltd ("H Banks") applied for planning permission from Northumberland County Council for a surface mine for the extraction of coal, sandstone and fireclay from land at Highthorn, on the coast at E Druridge Bay in south east Northumberland. The land was to be restored to agricultural and ecological uses after the conclusion of the mining operations which were expected to take seven years. Up to three million tonnes of coal would be extracted. The sandstone and fireclay are not significant for this case.

2 The county council resolved to grant planning permission, but the F Secretary of State for Housing, Communities and Local Government exercised his statutory power to call the application in for his own determination. A public inquiry was held. The inspector recommended that planning permission be granted: the proposal accorded with national policy; and the planning balance, under paragraph 149 of the National Planning Policy Framework ("NPPF") favoured the development. The Secretary of State accepted most of the inspector's conclusions, but rejected his G recommendation and refused permission in his decision letter ("DL") dated 22 March 2018. He did so because of the very considerable weight he gave to the adverse effects of the emission of greenhouse gases ("GHG").

3 H Banks challenges his decision under section 288 of the Town and Country Planning Act 1990. The county council, the first interested party, did not take part. The second interested party, Friends of the H Earth Ltd ("FoE"), supported the Secretary of State with further submissions. The third interested party, an unincorporated association of local residents, Save Druridge, adopted their submissions. H Banks's first ground was that the Secretary of State had erred in law in his interpretation of paragraph 149 of the NPPF, omitting in consequence a relevant benefit. The Secretary of State denied making the error attributed to him, on a fair reading of the DL,

and argued that the issue was about the application of the NPPF and not its interpretation. H Bank's second ground, the "additionality/substitution issue", was in two parts: (a) that the Secretary of State had wrongly taken into account the GHG which would be produced during the burning of Highthorn coal in power stations for the production of electricity, or had failed to give adequate reasons for any conclusions he reached on its relevance and weight, and (b) that he had acted inconsistently with previous decisions, which had excluded the significance of GHG emitted by the burning of coal for power production, without giving adequate reasons for doing so. The Secretary of State submitted that these emissions were a material consideration to which he was entitled to give greater weight than had inspectors, and although Mr David Elvin QC for the Secretary of State conceded that this decision marked a change from the approach hitherto adopted by inspectors, this change, albeit unacknowledged, was explained clearly enough. FoE also submitted that the previous decisions had been no more than a minor part at best of H Banks's submissions at the inquiry.

4 FoE also raised an issue about the relevance attributed by the inspector and the Secretary of State to legal obligations which did not comply with the tests which a consideration had to pass to be material to a planning decision. This would only arise for decision if H Banks succeeded only on its first ground.

The inspector's report and the Secretary of State's decision letter

5 It is helpful for both grounds to summarise the structure of each at this stage. I start with the inspector's report ("IR"). The matters about which the Secretary of State, in his call-in letter, said that he particularly wished to be informed included: the extent to which the proposed development was consistent with government policies for meeting the challenge of climate change (Chapter 10 of the NPPF) and for the sustainable extraction of minerals (Chapter 11 of the NPPF), the 18 November 2015 written ministerial statement ("WMS") on the replacement of coal-fired power stations with gas, and the amended online National Planning Practice Guidance on renewable and low carbon energy.

6 The inspector formulated the main issues, in the light of the call-in letter and what he thought was relevant, as including: the need for the coal having regard to likely supply and demand, the effects of the proposed development on the local and national economy, the effects of the proposed development on the emission of GHG and climate change, and the extent to which the development accorded with Chapters 10 and 11 of the NPPF, the WMS and a further WMS of 12 October 2017, and *The Clean Growth Strategy*.

7 The inspector expressed his conclusions upon a variety of issues, such as landscape character, visual effects, the character and appearance of the area, amenity considerations, biodiversity, heritage assets, highways, tourism and recreation, the extraction of minerals, employment and the local and national economy, and GHG and climate change. In Table 1, he drew together his conclusions on the significance of these effects. In Table 3 and para C123 (the C paragraph references are to the conclusions in the IR), he set out the weight he would give to each in the planning balance. To the effect on the character and appearance of the area, he accorded considerable adverse weight, but biodiversity would lead to an overall moderate benefit. There

A was great benefit in respect of minerals, employment and to the national and local economy, but considerable adverse effect on GHG and climate change.

8 The inspector then considered the weight to be given to benefits in planning obligations under section 106 of the 1990 Act, divided into those which did and those which did not comply with the requirement in regulation 122 of the Community Infrastructure Levy Regulations 2010 (SI 2010/948) ("CIL Regulations") as to which section 106 agreements could B "constitute a reason for granting planning permission". Compliance with regulation 122(2) requires a test to be met: section 106 agreements must be "necessary to make the development acceptable in planning terms", "directly related" to it and "fairly and reasonably related [to it] in scale and kind". Agreements under section 39 of the Wildlife and Countryside Act 1981 for the management of land are not covered by the CIL Regulations.

C **9** The next stage was his consideration of "Environmental acceptability and the paragraph 149 planning balance", which led him to conclude, at para C129:

> "a likely national need for Highthorn coal and … its extraction, processing, transportation and combustion to generate electricity, would benefit the economy … In my judgment, the national benefits of D the proposal would clearly outweigh the likely adverse impacts".

Accordingly, paragraph 149 of the NPPF was complied with. At para C145, he concluded that the overall planning balance in applying the NPPF as a whole favoured the proposal. The proposal was consistent with the amended online National Planning Practice Guidance: para C146. Nor would it be E inconsistent with the two WMSs nor with *The Clean Growth Strategy*: para C153.

10 The inspector's overall conclusions are set out at paras C160–C166. He directed himself correctly about the role of the development plan. At para C161, he said that other decisions for surface coal mines had been cited, "but this proposal falls to be determined on its own merits". There would be conflict with the development plan but the NPPF was "an important other F material consideration in this case". He contrasted the degree of restriction in the NPPF on the extraction of peat with the specific policy for coal extraction in paragraph 149 of the NPPF, pointing out that the Government considered that "existing planning policy and legislation already set a clear expectation that climate change would be taken into account", and that its planning guidance had not changed although it had done so for wind turbines; its G latest thinking on coal was in the WMSs, the *Consdoc* (*Coal Generation in Great Britain—The pathway to a low-carbon future*) (2016) and *The Clean Growth Strategy*.

11 He continued, at paras C163–C164:

> "C163. There is no basis for finding that the great weight to be awarded to the benefits of mineral extraction, including coal, as required H by the [NPPF], should now be reduced because of reliance on imported coal in the future, or for any of the other economic or environmental considerations relied on by those opposing the application, or as a result of the Government's recent statements on UK energy and climate change policy. FoE's submission that no new planning permissions for coal extraction should be granted until known resources have been

exhausted does not square with existing planning policy. I consider that the proposed development would comply with the [NPPF], taken as a whole, and that this is a material consideration which would indicate that the application should be determined other than in accordance with the provisions of the development plan.

"C164. FoE and other objectors are concerned that allowing this application would send the wrong signal to potential investors in energy infrastructure, and to the rest of the world, with regard to the UK's position on climate change. However, EN-1 indicates that a clear market design that provides consistent, long-term signals for investment in new generating capacity is required to drive the decarbonisation of the generating mix. The *ConsDoc* states that setting a clear end date for unabated coal generation will send a clear signal to investors in new generation capacity. More recently, *The Clean Growth Strategy* states that if the UK wants other countries to follow its example it will need low carbon technologies to be cheaper and to offer more value than high carbon ones. It is therefore evident that the Government considers that a clear market design, along with setting a clear end date for unabated coal generation, and devising low carbon technologies, are the actions that would send appropriate signals to investors and other countries. In this regard granting planning permission for the Highthorn application would only signal that the planning balance here, given current policy, fell in favour of the proposal. I do not consider that concerns about sending a wrong signal to investors, or any adverse impact on UK diplomacy regarding climate change, should be influential in determining this application on its planning merits."

12 Finally, in para C165, he concluded that the planning balance favoured permission on the basis that a "window" currently existed for the use of Highthorn coal before the Government's phase-out policy for unabated coal-fired power generation substantially reduced the need for it.

13 The Secretary of State, although disagreeing with the overall conclusion and recommendation of the inspector, agreed with many of his conclusions on particular issues. Between paras DL11 and DL31, he agreed with the inspector's analysis of the many impacts, including landscape, and biodiversity. He concluded at para DL32 that the evidence pointed to a likely need for the amount of coal that the Highthorn site would provide during its operational life in order to ensure a sufficient supply to provide the energy the country needed. He agreed that a window for its use existed.

14 He also agreed with the inspector (para DL33) that the local employment benefits of the proposal would be of substantial significance, to which he agreed great weight in the planning balance should be given. He concluded that the scheme would have an adverse effect of very substantial significance on GHG emissions and climate change, to which he gave very considerable weight in the planning balance: para DL34. "Very" may be a point of difference with the inspector's view. He also agreed (paras DL36–DL37) with the inspector's analysis of the consistency of the proposal with the various statements of government policy on GHG and climate change, coal and the National Planning Practice Guidance.

15 There was no disagreement with the inspector's analysis of the proposal's conflict with policies of the development plan, some of which were

A themselves inconsistent with the NPPF, itself another important material consideration. He agreed that paragraph 149 of the NPPF was a restrictive policy. Under the heading "Other considerations" (paras DL46 and DL48) he restated that the negative impact of GHG and climate change received very considerable adverse weight in the planning balance but he gave great weight to the benefits of coal extraction including economic benefits.

B **16** It was at this stage that he considered the question posed by paragraph 149 of the NPPF. His discussion of paragraph 149 of the NPPF in paras DL49–DL54 is the basis for ground 1, and I set those paragraphs out later. But he concluded, contrary to the inspector, that the "national, local and community benefits" did not clearly outweigh the likely adverse impacts so as to justify permission. He agreed, however, that the proposal would not be inconsistent with policies for meeting climate change; but overall he judged

C that the proposal would not be compliant with the NPPF "taken as a whole", and would not represent sustainable development. There were therefore no material considerations to warrant a decision which did not accord with the development plan, and so he refused permission.

Ground 1: The interpretation of paragraph 149 of the NPPF

D **17** The structure of the inspector's conclusions and the DL is built around paragraph 149 in Chapter 11 of the NPPF. This provides:

> "Permission should not be given for the extraction of coal unless the proposal is environmentally acceptable, or can be made so by planning conditions or obligations; or if not, it provides national, local or community benefits which clearly outweigh the likely impacts to

E justify the grant of planning permission."

18 Ms Nathalie Lieven QC for H Banks, Mr Elvin for the Secretary of State, Mr Paul Brown QC for FoE and Ms Estelle Dehon for Save Druridge were all agreed that paragraph 149 of the NPPF contained a two-stage test or two questions. All save Ms Lieven were agreed that there were two ways of approaching them.

F **19** At a very simple level, coal extraction is not permitted unless it is environmentally acceptable, or can be made so with conditions and obligations. If it remains environmentally unacceptable, the benefits of the proposal, comprising the "need" case but not confined to that, are brought into play to see if they clearly outweigh the likely impacts.

20 The inspector discussed what was meant by "environmentally

G acceptable" at paras C125–C156. He also discussed, at paras C11–C12, whether obligations which produced a benefit but which did not satisfy the test in regulation 122 of the CIL Regulations could be relevant to the second stage of paragraph 149. The Secretary of State appears not to differ from the inspector on the scope of what was relevant for "environmental acceptability". His approach to benefits, derived from section 106 obligations which did not comply with the CIL Regulations,

H does seem different. What was intended, however, to be a conceptually straightforward approach in paragraph 149, as with so much in the NPPF, ends up making matters less straightforward because of what it leaves for debate over its interpretation. Part of the problem here lies in the question of what benefits fall for consideration at the first stage, and what the scope is of "national, local and community benefits", left for introduction at the second

stage. The more significant problem lies, however, in how the Secretary of State approached that point.

21 I accept that there are two ways, at least, of approaching the two-stage question. The first, which Ms Lieven submitted was the only way to do so rationally, was (i) at the first stage, to consider all that might be described as "environmental", whether adverse or beneficial, so that a proposal for coal extraction which was environmentally acceptable, after allowing for mitigation achieved by conditions and agreements, would be permitted before the "need" case or "national, local or community" benefits fell for consideration; and (ii) at the second stage, to consider all the adverse impacts as mitigated, environmental or not, and whether or not considered at the first stage, and all the benefits, including any which had already been considered at the first stage, and which had been found insufficient to outweigh the adverse impacts. Indeed, it was difficult to see what benefits there might be which did not come within the scope of "national, local or community benefits".

22 Neither the Secretary of State nor the interested parties said that such an approach would be unlawful. Ms Lieven submitted that was the approach which the Secretary of State had indeed adopted, but he had failed to bring forward for consideration at the second stage the important environmental benefit in respect of biodiversity, though he had brought forward all the adverse impacts again. Mr Elvin did not contend, nor did anyone else, that if that is what the Secretary of State had done, he would not have erred in law, whether as a matter of interpretation or of the rational application of the approach in paragraph 149, or simply because a material consideration would have been ignored at the crucial overall evaluation stage. There was an issue, principally raised by Mr Brown, as to how far that error mattered if it had occurred, but that is a rather different point.

23 Mr Elvin submitted that an equally rational approach, and the one which the Secretary of State had in fact adopted, as he was entitled to, and indeed as the inspector had done, was (i) at the first stage, to proceed as Ms Lieven submitted should be done, but (ii) at the second stage, to consider on the one side, only the residual balance of the adverse effects, as mitigated and after allowing for environmental benefits, i e the net harm, and then to balance that net harm against the "national, local or community benefits", on the other side. These benefits were the only new factors brought in at the second stage, unless theoretically, there could be some relevant but non-environmental adverse impact left out at the first stage. A benefit considered at the first stage did not need to be brought forward at the second stage, because it would already have been given its full weight at the first stage, reducing the overall adverse balance brought forward to the second stage. The biodiversity environmental benefits did not come within the scope of "national, local or community benefits"; in any event, they had already been fully allowed for in the stage 1 netting-off process and so could not rationally come in at stage 2 as well.

24 Ms Lieven submitted that that approach was irrational where a particular consideration involved both mitigation and an additional benefit going beyond mitigation of the harm, as was the case here with biodiversity. The adverse effect was mitigated, but there was a benefit beyond that. However, in my judgment, the residual or netting-off approach is not itself irrational. Whatever may be the relative merits of either approach, neither

A is unlawful, nor a misinterpretation of paragraph 149 of the NPPF. What matters is that all the benefits and adverse effects have been taken into account without double counting or discounting. There is a risk, on the residual approach however, that a benefit may be excluded at stage 1, as going beyond mitigation, yet not included at stage 2, if the view is taken that "national, local or community benefits" encompasses no environmental benefits. The true issue here, in my judgment, is not the interpretation of B paragraph 149, but the interpretation of the DL: did the Secretary of State do what Mr Elvin submitted he had done?

25 I start with how the inspector approached this, as the Secretary of State suggests no disagreement with his approach. The inspector considered all the environmental benefits and harm at the first stage, including the benefits from the biodiversity proposals to which he gave moderate weight in the planning C balance, and including the impact of GHG emissions. He did not consider the need for coal or the employment benefits at that stage.

26 The inspector explained the route to his conclusion about biodiversity: the areas of concern were the feeding areas on the site for the pink-footed goose and the yellow wagtail. The mitigation measures were adequate to provide replacement feeding areas. His overall conclusions on biodiversity D are as follows, at paras C60, C62 and C64:

> "C60. … The proposals to improve wetland habitat in the locality would be beneficial for waders and wildfowl. These habitat improvements, including on restoration of the site about 100 hectares of coastal and flood plain grazing marsh, would also be beneficial for other birds and wildlife affected by the proposed surface mine. I agree with E [Northumberland County Council's] Principal Ecologist that these wet grassland and shallow open water habitats, because of their scale and location, would have the potential to be of immense value for key species in the Druridge Bay area. There is evidence from the restoration of other surface mines that new habitats beneficial for wildlife can be created, provided that there are adequate controls and sufficient funding."
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> F "C62. The section 39 agreements pursuant to the Wildlife and Countryside Act 1981 are a material consideration in determining this application. Initially these would provide necessary mitigation and aftercare, but in the long term the requirement that from the end of the 25-year maintenance period each part of the management areas would be managed in perpetuity in such a way as promoted the development and conservation of its biodiversity, would be particularly advantageous G … The section 39 agreements should therefore be given considerable weight."
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> "C64. In the short term, I consider that the proposed development would have an adverse effect on biodiversity of minor significance given the mitigation proposed by Restoration First. In the medium term, as the on-site restoration matured, along with the ongoing benefits of the H off-site works, the scheme would result in a benefit to biodiversity of minor significance. In the long term, with some 100 hectares of land subject to the section 39 agreements, I consider that there would be a benefit to the wildlife resource of the Druridge Bay area of substantial significance. Combining these into an overall effect, it seems to me that the whole scheme would result in a benefit for biodiversity of moderate

significance. This is a factor that should be given moderate weight in favour of the proposal in the planning balance." A

27 There was no suggestion there, or before me, that this benefit was an immaterial consideration. I emphasise that because, at the inquiry, FoE did take issue with the relevance of three of the obligations to which the Secretary of State referred in his DL. They did not include those related to biodiversity. Nor was biodiversity among the areas where Mr Brown contended before me that the Secretary of State had adopted the wrong approach to non-CIL compliant agreements. B

28 The inspector explained how he approached the concept of "environmentally acceptable" in paras C125–C126:

"C125. What is 'environmentally acceptable' is not defined in the [NPPF], and there is no guidance about what factors should be taken into account. There is potentially wide scope in what environmental considerations might apply. But it seems to me from the way this policy is framed that the first limb applies to environmental rather than social or economic dimensions of the balancing exercise. However, the analysis would need to take into account short, medium and long-term environmental considerations. Furthermore, any environmental benefits applied in considering the first limb should not be taken into account in the second limb. If these were not mutually exclusive a risk of double counting might arise. C D

"C126. 'Acceptable' here, in terms of how high the bar is set for a threshold that would justify a grant of planning permission, has its ordinary meaning of 'adequate', 'satisfactory' or 'tolerable'. Therefore, an environmentally acceptable proposal need not necessarily result in no harm, or even no 'net' harm … It is on this basis that I turn next to consider the environmental balancing exercise in this application, having regard to the matters previously set out in this report, and to judgments about weight as set out in Table 3." E

29 Mr Elvin and Mr Brown drew attention to this as showing the inspector's awareness of the need to avoid double counting. In para C127, the inspector summarised Table 3 dealing with all benefits and harms, noting that great weight should be given to the "benefits of coal extraction, including to the economy" (but these do not include biodiversity which he discussed earlier in para C127), with GHG emissions and the implications for climate change being considerations of considerable weight against the proposal. F

30 The inspector then presented his analysis in the two separate stages required by paragraph 149 of the NPPF. What he said was this, at paras C128–C129: G

"C128. The planning balance here requires first a determination as to whether the scheme would be environmentally acceptable, and if not, whether other benefits would clearly outweigh the harm. On the first limb of paragraph 149 concerning environment harm/benefits, in my judgment, the considerable landscape harm would significantly outweigh biodiversity or other environmental benefits of the scheme. The other environmental harm I have identified would tip the balance even further against a favourable finding for the proposal under the first limb. I do not, therefore, consider that the scheme would be H

A environmentally acceptable, or could be made so by the imposition of planning conditions or obligations. I therefore turn to the second limb of paragraph 149.

"C129. I find, on the available evidence, a likely national need for Highthorn coal, and that its extraction, processing, transport and combustion to generate electricity would benefit the economy. This is a consideration to which the [NPPF] attributes great weight. In my B judgment, the national benefits of the proposal would clearly outweigh the likely adverse impacts. I find that the balance in the second limb of paragraph 149 falls in favour of the proposal. I consider that the proposal would comply with paragraph 149 of the [NPPF]."

31 It is perfectly clear that it was only because of the power generation C benefits which he found in the coal extraction that the planning balance within paragraph 149 of the NPPF came down in favour of granting permission. Ms Lieven made no complaint about how the inspector approached the role of the biodiversity benefit in the planning balance. The proposal would fail at stage 1 without the "national, local or community benefits". The inspector, at stage 1, considered all the environmental benefits, including the whole of the overall moderate biodiversity benefits. He then D measured them against all the environmental harm, including the harmful effect of GHGs. The scheme is found wanting without some hitherto unconsidered benefits to go into the balance. That is a perfectly normal and straightforward planning balance evaluation.

32 There is some force in the contention that the inspector carried a net adverse impact forward to stage 2 and so no further allowance for E biodiversity benefits was required or made: in para C125 he defined the scope of stage 2 "national, local and community benefits" in a constrained way so as to exclude environmental benefits. This was because they would already have been considered at stage 1. He was not drawing a distinction between environmental benefits considered at stage 1 and environmental benefits left for consideration at stage 2. He then explicitly addressed the risk of double counting in the last two sentences of para C125. As it would be F irrational to bring forward all the adverse impacts, albeit after mitigation, but not the environmental benefits which went beyond mitigation, he probably adopted a netting-off approach, and the reference in para C129, stage 2, to "likely adverse impacts" can be a reference to net effects. Although I think he probably did adopt that approach, it is far from obvious or clear; it is a conclusion I draw from quite a close analysis of what he said. His approach, G however, to environmental benefits was of no great materiality to his overall conclusion, because to him the benefits of extracting and burning the coal outweighed the adverse impacts.

33 This is relevant to the interpretation of the Secretary of State's DL, to which I now turn. The Secretary of State considered all the impacts and benefits before turning to apply paragraph 149 of the NPPF. He did not disagree with the assessment of or weight given to any of those by the H inspector, save in the overall balance. What he said was, at paras 49–55:

"*Paragraph 149 of the [NPPF]*

"49. As such the Secretary of State has gone on to consider the environmental acceptability of the proposal in the terms of the test set out in paragraph 149 of the [NPPF]. In doing so he has given careful

consideration to the inspector's analysis at paras IRC12–C130. The Secretary of State agrees with the inspector that paragraph 149 is a key consideration in the planning balance that applies in this case (IRC124).

"50. On the first limb of the paragraph 149 test, the Secretary of State agrees with the inspector that there is potentially wide scope on what environmental considerations might apply in considering the meaning of 'environmentally acceptable' (para IRC125). He agrees with the inspector's conclusion that the considerable landscape harm, together with the other environmental harm, would significantly outweigh any biodiversity or other environment benefits of the scheme (para IRC128). As such, he concludes that the scheme would not be environmentally acceptable, nor could be made so by the imposition of planning conditions or obligations.

"51. The Secretary of State has gone on to consider the second limb of the paragraph 149 test. He does not agree with the inspector's interpretation of the second limb of the paragraph 149 test that limits the second limb to social and economic dimensions of the balancing exercise (para IRC125). The Secretary of State considers that the likely impacts to be weighed in the balance under the second limb of the test are not limited to social and economic impacts. The Secretary of State considers that the environmental harm considered in the assessment of environmental acceptability under the first limb of the test constitute a major part of the likely impacts for the second limb. However, he also considers that the planning conditions and CIL compliant planning obligations considered under the first limb should not be considered as benefits under the second limb.

"52. The Secretary of State has applied the relevant considerations to the second limb of the paragraph 149 test. For the reasons set out above, he considers that the benefits of coal extraction and employment should be afforded great weight. Against this, he weighs the considerable adverse impact to the landscape character of the area, the slight harm to local amenity, the harm to heritage assets, which attracts considerable weight in line with his duty under section 66 and the very considerable negative impact caused by the adverse effect of greenhouse gas emissions and on climate change.

"53. He has also taken into account the benefit of those obligations which he has not found to be CIL compliant, as set out above (paragraph 39) … He nevertheless considers that these benefits would not make much difference overall having regard to the importance of the other material considerations.

"54. Balancing these factors he finds that the national, local and community benefits of the proposal would not clearly outweigh the likely adverse impacts such as to justify the grant of planning permission. As such he concludes that the second limb of the test does not support the proposal, and the proposal does not comply with paragraph 149. Therefore the negative presumption from paragraph 149 applies in the present case.

"*Planning balance*

"55. Given his conclusions on impact to a valued landscape, the Secretary of State finds that the proposal would be contrary to paragraph 109 of the [NPPF], in agreement with the inspector at para

IRC143. He has also had regard to the analysis of the inspector at para IRC144. While he agrees for the reasons given that the proposal would not be inconsistent with policies for meeting the challenge of climate change, as set out in Chapter 10 of the [NPPF], given his findings on paragraphs 109 and 149, he finds that overall the proposal would not be compliant with the [NPPF] taken as a whole, and the proposal would not represent sustainable development."

34 Paras C12–C130 contain the inspector's conclusion on the environmental impacts and his conclusions on both limbs of paragraph 149. Paras C143–C144 are not material to this ground.

35 No issue arises in relation to the first limb of paragraph 149, dealt with in para DL50. The harm taken into account outweighs the benefit taken into account at that stage, including the biodiversity benefit. Para DL50 makes clear, as did the inspector, that the overall environmental impact, allowing for mitigation and benefits, including biodiversity benefits, meant that permission should be refused, unless at stage 2, benefits clearly outweighed the harm. The issue is focused on paras DL51 and DL52, and stage 2.

36 Ms Lieven submits that, in paras DL51 and DL52, far from applying any form of residual harm approach, the Secretary of State at stage 2 had considered again all the adverse effects, identifying separately the principal adverse effects, but had simply ignored the biodiversity benefits. The biodiversity section 39 agreements, which created the benefit, fell outside CIL altogether, and so were not among the aspects excluded from stage 2 by the last sentence of para DL51, nor were they among the benefits considered at stage 2 in para DL53. Para DL52 made no mention of a netting-off approach. At the very least, what he had done was wholly uncertain and so inadequately reasoned on an important point.

37 Mr Elvin submitted that the Secretary of State was adopting the residual harm approach at stage 2, on a fair reading of the DL as a whole, without an overly forensic or hypercritical approach, and appreciating that it was addressed to the informed reader. At stage 1, he had taken conditions and CIL compliant planning obligations into account in order to arrive at the overall residual level of environmental harm, which he had then carried forward into the stage 2 balance. Biodiversity benefits had been fully considered at the first stage, and so rightly did not fall for further consideration, because they had already been part of the netting off process which led to the residual harm being considered at stage 2. He took me through the structure of the inspector's report and the DL, which he submitted had adopted the same approach as the inspector had; he pointed to the acceptance of the inspector's reasoning on the impact issues, and of benefits including biodiversity benefits. Para DL51 agreed with para C128. It would be very odd if the Secretary of State had simply set that to one side, and had done an overall balance at the end ignoring biodiversity benefits. He had accepted and allowed for the biodiversity benefits, but had done so at the first stage; to have included it again as a benefit in the second stage would have been to double count it.

38 I do not accept Mr Elvin's submissions. First, although the inspector's stage 1 reasoning, expressed in para C128, was agreed with by the Secretary of State in para DL51, and the environmental benefit of biodiversity was

considered by both at stage 1, the interaction between the IR and the DL does not provide the Secretary of State with an intelligible hook into the probable but not obvious interpretation of what the inspector said at stage 2. This is the stage at which their views diverge, their language is different, and in view of their different conclusions, how the Secretary of State approached stage 2 and biodiversity benefit, in his own words in the DL, matters rather more.

39 The Secretary of State disagreed with the inspector about the scope of "national, local and community benefits" pointing out that the inspector's approach was too narrow. He cannot obtain the support which the inspector's narrower approach offered to his probable adoption of a residual approach. Nor can the Secretary of State point to para DL54 and the phrase "likely adverse impacts" as meaning what the inspector may have meant in para C129, nor did he accept the para C129 balance anyway. Most of para DL51 expresses disagreement with para C125, and the last two sentences are not expressly adopted as a reminder of the risk of double counting.

40 Second, I focus on the DL by itself. Lest it be objected that what follows is an unwarrantedly close analysis of the text, I point out that in my judgment no tolerably straightforward reading of the DL supports Mr Elvin's submissions as to what the Secretary of State meant. The DL makes no mention of a residual approach being adopted or of any other approach. The Secretary of State reminded himself first that the stage 2 benefits are not limited to social and economic benefits, which I take to be the benefits from generating power and the employment benefits. This correction to the inspector's summary of the scope of the second limb of the benefits in paragraph 149, so that they are not confined to social and economic benefits, is not adverse to the arguments of Ms Lieven. It emphasises instead the breadth of the scope of the words "national, local or community benefits", for application at stage 2.

41 The Secretary of State then took account again of all the environmental harm considered at stage 1; sentence 4 of para DL51 permits of no other reading. He says that this harm constituted "a major part of the likely impacts". Mr Elvin explained that the Secretary of State did not mean to convey that there were other harmful impacts, environmental or otherwise, which he had taken into account at stage 2: "a major part" meant "all". I accept that it would be unduly forensic not to accept that rewrite, albeit to perfectly clear language, on the basis that there was nothing else to which it could refer, and the informed reader, reading the DL as a whole, would know that there was nothing else, and no harm other than environmental harm which had been identified. But one thing it cannot mean is that some harm was not brought forward to stage 2. So, all the harm was brought forward into stage 2. Mr Elvin did not suggest that the "major part" was the residual part of the adverse impacts taken forward to stage 2, and it would have been inconsistent with his submission that "major part" meant "all" for that to be so. Nor is that how it reads. The reference to "the likely impacts for the second limb", consistent as it is with para DL52, can only be a reference to multiple impacts and not to a single residue albeit with a number of components mixed together. What the Secretary of State said is simply incompatible with a netting-off approach.

42 At para DL52, he refers to various areas of harm considered at stage 2, without once suggesting that it was a residual exercise after biodiversity

benefits were discounted. He does not treat them as a single notional adverse balance as a simple residual exercise would require. He would not need to identify separately the various adverse impacts he did, if he were adopting a residual approach. I also have some difficulty in seeing why he needed to refer to certain considerations being excluded "as benefits" at stage 2, if he were adopting a residual approach in which they had already been allowed for and dealt with at stage 1 in para DL50. He implies that some benefits are being brought forward, consistently with the adoption of a full re-examination of benefits to be set against all the harm.

43 Third, para DL51 creates further problems for the Secretary of State. In para DL51, he put out of account "as benefits" the "planning conditions and CIL compliant planning obligations" taken into account at stage 1. This tells the informed reader that he has not put out of account at stage 2 the section 39 agreements which provide for the biodiversity benefits, since they are neither conditions nor planning obligations nor covered by CIL. But Mr Elvin's submission is that he did put them out of account at stage 2, because he had taken them into account at stage 1. However, if in para DL51 the Secretary of State should be taken to have treated the section 39 agreements as CIL compliant obligations, and necessary therefore to mitigate biodiversity impacts, the informed reader would know that he treated the undoubted biodiversity benefits as if it were all necessary mitigation. On that basis, they would largely fall out of account "as benefits", and the Secretary of State would simply have shown another way of illustrating the vice rather than the rational use of a residual method. Biodiversity was not just mitigation but a benefit in its own right and a material consideration of some weight: paras IRC62–IRC64 and DL22.

44 In para DL53, he says however that he has taken into account at stage 2, those benefits which are not CIL compliant. That may give rise to a different issue, as Mr Brown contends, but for present purposes, I note that the Secretary of State spells out which are the material non-CIL compliant agreements he has taken into account, and they do not deal with biodiversity. He makes no mention in this context either of the moderate benefits of the biodiversity proposals. It follows that biodiversity benefits have not been taken into account at this stage. He makes no reference to the land management agreements made with the local authority under section 39 of the Wildlife and Countryside Act 1981, for the general purpose of conserving and enhancing the natural beauty of land or for promoting its public enjoyment. These do not have to be CIL compliant and are neither conditions nor planning obligations. The reference to para DL39 takes this point no further. His confusion is confirmed at para DL39, where he treated para IR159 as covering CIL agreements without distinguishing, as para IR159 does, between CIL and section 39 agreements. The Secretary of State, unlike the inspector, has not grappled with the distinction between mitigation and benefit arising in the section 39 agreements relating to biodiversity. If the biodiversity benefits, which went beyond mitigation, were not taken into account at stage 1, they had to be taken into account at stage 2. The DL suggests that at stage 1, only mitigation was taken into account and that CIL compliant benefits were left out at stage 2. And there is no description of how the biodiversity benefits were classified or taken into account, other than that they are not non-CIL compliant either.

45 Fourth, there is no reason for the informed reader to understand the paragraph 149 process in the way Mr Elvin described it. The DL refers to no other document or other decisions where the residual approach to paragraph 149 is discussed. There is nothing in paragraph 149 of the NPPF to point to any particular way in which the two stages have to be approached. The residual approach is far from being the only or the obvious one. Mr Elvin did not cite other DLs to show some practice on the Secretary of State's part in relation to paragraph 149, which the informed reader of his or her coal extraction decisions should know of, and it would not have helped his ground 2 arguments either to have done so. There are therefore no external sources of assistance which the informed reader might have had in mind, whether the IR, NPPF or routine planning decisions.

46 Mr Brown pointed to a post-DL July 2018 change to paragraph 149 of the NPPF. This adds in brackets at the end of paragraph 149(b) "taking all relevant matters into account, including any residual environmental impacts". He submitted that this was an endorsement, albeit after the event, of the approach taken in the report and DL; it was a clarification rather than a change. I do not know which it was; it could be either. The reference to taking all relevant matters into account suggests no narrowing of what is relevant at the second stage. Moreover, if this parenthetical addition is to be accorded significance, the reference to "residual environmental impacts" (plural) suggests that the netting-off process on which Mr Elvin relies to produce a single notional deficit, with environmental advantages and disadvantages already all netted off, to be weighed against the restricted range of stage 2 benefits, is not what was envisaged. If there is not a single notional deficit, it is difficult to see how the biodiversity benefit has been netted off so as not to be brought forward to the second stage without double discounting.

47 The reference to "residual environmental impacts" was, Mr Brown also said, concerned with "the *net* harm having regard to any mitigation which can be secured by condition or section 106 obligation". This does not help the argument either. Although the harm to be considered, at either stage and by whatever method, is the harm after mitigation, that does not deal with the problem posed by the biodiversity benefit here, in which the harm was mitigated to a minor adverse harm, and the restoration scheme itself produced a substantial benefit over the long term, leading to an overall moderate benefit. Additionally, it was to a significant extent secured by agreements under section 39 of the Wildlife and Countryside Act 1981, not conditions or section 106 agreements.

48 Accordingly, despite Mr Elvin's cogent and forceful endeavours, I have come to the view that Ms Lieven has shown that the Secretary of State has ignored the biodiversity benefits in his overall conclusions, failing to carry them forward to the stage 2 exercise, and failing to have regard to all the considerations material to that stage. Paragraph 149 does not permit all the harm to be considered at stage 2 with only part of the benefits. If a residual approach is followed, both benefits and harms must be netted off to come to a single notional value for a reduced harm then used at stage 2; that he did not do.

49 Mr Elvin, at times, did succeed in creating a genuine doubt in my mind as to what the Secretary of State had done, and whether he had acted lawfully. Had I retained that doubt, I would still have found for Ms Lieven on ground

A 1, on reasons grounds instead. The biodiversity benefit was an important part of H Banks's case; it was found to be overall a moderate benefit. Such a benefit could be decisive where permission is refused because the benefits did not "clearly outweigh" the harm. H Banks is entitled to know whether it has been taken into account at the second stage or not, and if not why not. Where the reasoning leaves such great uncertainty on such a point, it is legally inadequate to the prejudice of H Banks which lacks a clear answer B enabling it to identify whether a legally impermissible approach has been taken to biodiversity benefits. The reasoning is inadequate for the Secretary of State's asserted treatment of a benefit of some significance, an important issue in the case for H Banks.

50 On that basis I would quash the decision. But Mr Brown contends that I should not do so as a matter of my discretion on the basis that if C the Secretary of State had not made that error, the outcome for H Banks would inevitably have been the same, dismissal of its planning application, because the Secretary of State had made a countervailing error in favour of H Banks, which cancelled out the biodiversity error, as I have found it to be. Mr Brown submitted that the Secretary of State took into account irrelevant considerations to which he attached the same weight as he would have attached to the biodiversity benefits, if he had taken them into account. D

51 The asserted unlawfulness of the Secretary of State's approach is principally to be found in paras DL30, DL35 and DL53:

> "30. He agrees, for the reasons set out at paras IRC92–IRC93, that the third CIL obligation would not be compliant with the CIL Regulations, and as such he accords it no weight in the overall planning E balance. However, he gives it moderate weight, for the reasons given, in his consideration below of compliance with paragraph 149 of the [NPPF].
>
> "35. He further agrees that the fourth obligation would not be CIL compliant, for the reasons set out at para IR117. However, he gives it moderate weight, for the reasons given, in his consideration below of compliance with paragraph 149 of the [NPPF].
>
> F "53. He has also taken into account the benefit of those obligations which he has not found to be CIL compliant, as set out above (para 39). In respect of these, he agrees with the inspector that little weight should be given to the Chibburn Preceptory improvements and to provisions for Hemscott sand extraction and moderate weight should be given to the local or community benefits of Discover Druridge and the skills fund. G He nevertheless considers that these benefits would not make much difference overall having regard to the importance of the other material considerations."

52 I have set out part of para DL53 again for convenience.

53 Mr Brown's argument focused on the "moderate weight" given to Discover Druridge, and to the skills fund. The former is the third CIL H obligation referred to in para DL30. The latter is the fourth section 106 obligation referred to in para DL35.

54 To each, in Table 2, the inspector had given "moderate weight". The inspector described Discover Druridge in para C93 under the heading of tourism and recreation: a charitable fund would be established with £400,000 for its purposes. The inspector described its aims and ambitions

as "so broad that the fund could be used in ways that were completely unrelated to the acceptability of the coal extraction in planning terms". He found it not to comply with the CIL Regulations, because it was not necessary to make the development acceptable in planning terms. But were it necessary mitigation, it could not be given as much weight as if it were a benefit. If required to be taken into account at stage 2 of the paragraph 149 balance, it should be accorded moderate weight.

55 The inspector described the skills fund in para C117: a levy per tonne of coal sold would fund training to meet local employment needs, but he does not say that it was designed to furnish the local workforce with the skills required to work on the coal extraction processing and transfer, and its description suggests it is much broader. This would be beneficial, albeit not CIL compliant, and, if required to be taken into account at stage 2 of the paragraph 149 question, it should be given moderate weight.

56 He also expressed the view in para C130 that, if the Secretary of State disagreed with the balance he had struck under paragraph 149 in favour of the grant of permission, the weight given to these non-CIL compliant benefits would not make much difference to the overall balance, having regard to the importance of the other considerations. They would not therefore be rendered CIL compliant by being necessary to achieve compliance with paragraph 149. There are two issues: can a planning obligation which is not CIL compliant be a material consideration? If it can be, was Discover Druridge a material consideration? The answers in my judgment are "yes" and "no", respectively.

57 Regulation 122 of the CIL Regulations provides that if an obligation under section 106 does not comply with the tests set out, it cannot constitute "a reason for granting planning permission for the development". The tests are set out in para 8 of this judgment. This is slightly curious language, given that Parliament could instead have used the phrase, well known in planning law, of "material consideration" if that is what it had meant. Instead, the language of the tests is not that of materiality. *R (Wright) v Forest of Dean District Council* [2018] JPL 672, para 28(iii) shows the test under regulation 122 is not the same as the test for materiality: see also the extensive analysis of "materiality" in *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] PTSR 2063, paras 21–26.

58 The language of regulation 122 is also different from the tests for the lawfulness of a condition, which obviously has to be a material consideration before it can be imposed. A condition to be lawful and material does not have to be necessary to make a development acceptable: see *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, 599H and *Elsick Development Co Ltd v Aberdeen City and Shire Strategic Development Planning Authority* [2017] PTSR 1413, paras 28–32. Nor does a condition have to relate "directly" to the development, but "fairly and reasonably". Otherwise a condition must come within the rational discretion of the planning authority. The tests are similar (see *Derwent Holdings Ltd v Trafford Borough Council* [2011] EWCA Civ 832; [2011] NPC 78, para 6) but the *Forest of Dean* case shows that they are not the same.

59 A material consideration has to relate to a planning decision, and the relationship must be a planning one, but the "fair and reasonable" relationship for a condition is not the test. This is not the place to embark on

A a consideration of how these various aspects interrelate, but the decision of the Supreme Court in *R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2010] PTSR 1103 repays analysis, and para 63 to start with.

60 If the language of regulation 122 is to be interpreted as if it said that an obligation which did not comply with the tests was not a material consideration where it was not necessary for acceptability, a condition to the same effect could still be used lawfully, if it were otherwise a B suitable alternative. This seems an odd result. The expressed aim of the CIL Regulations is to prevent the weight or significance of a specific reason for the grant of planning permission being given to an agreement which fails the tests. The tests are rather more restrictive than would be necessary merely to prevent agreements which embody immaterial considerations being taken into account. But of course that, in its turn, creates the problem of how an C agreement which was a material consideration but failed the tests should be dealt with. There is an obvious difficulty in drawing a distinction between what is material, and what, in any given decision, constitutes a reason for the grant of permission: does it mean that it could be taken into account in favour of the grant of permission just so long as it did not constitute of itself a reason for the grant of permission? My initial reaction was that D the language of regulation 122 should be interpreted as if it forbade a non-compliant CIL from being a material consideration. But I now consider that cannot be right in the light of the very specific language and tests in regulation 122, and the different tests for materiality and the lawfulness of conditions. Problematic though it may be, drawing a distinction between "reasons for the grant of permission" and "a material consideration" would fit with the tests in the CIL Regulations being more stringent than those necessary for a E lawful condition or a material consideration. It may not be easy to operate in practice, but then neither would the straight substitution of "material consideration". So, the differing treatments which agreements, which did not comply with regulation 122, have received at times in the IR and DL does not of itself show that an error of law was made.

61 The crucial argument, however, is not about compliance with CIL F Regulations, but is much more fundamental: were the obligations material considerations at all? This issue is not resolved simply by showing an agreement not to be CIL compliant. The agreement in the *Forest of Dean* case [2018] JPL 672 was held to be immaterial, by reference to ordinary planning principles of materiality, and not by reference to CIL Regulations. The problem there with the community contribution from the wind turbine operator was that the fund could be spent on any community benefit G without any restriction, even to a planning purpose, let alone one related to the particular planning proposal. It was a source of funds for unspecified community benefits, desirable no doubt but immaterial in planning terms. The purpose of the fund was too broad for the fund to be a material consideration in a planning decision: see para 58.

62 The vice of the *Forest of Dean* fund, submitted Mr Brown, was the vice H of Discover Druridge, as described by the inspector in para C93, a description with which the Secretary of State agreed. There was no limit on what the fund could be spent on; it was not confined to a planning purpose or one related to the development proposed. It was again too broad. I cannot see any material distinction between the Discover Druridge fund and the community fund in the *Forest of Dean* case. No party, including the Secretary of State, suggested

one. Mr Elvin recognised the difficulties. The inspector and Secretary of State both concluded correctly that Discover Druridge was not CIL compliant. But compliance with CIL is not the be all and end all of the issue. The issue which the inspector and Secretary of State also had to address was whether Discover Druridge was itself a material consideration. They ought to have concluded that it was not. This meant that it could not be taken into account at any stage of the planning balance either in relation to the specific topic of tourism, or in what the Secretary of State calls "the overall planning balance" preceding his consideration of paragraph 149, or in his consideration of the balance in paragraph 149. I accept therefore the premise of Mr Brown's argument that the Secretary of State has unlawfully taken an immaterial consideration into account as a moderate benefit to which he accorded moderate weight.

63 Mr Brown then submits that that error of inclusion balances out the error of omission which I have found in relation to biodiversity benefits; the net result is that the outcome for H Banks would not have been different if neither error had been made. This is an argument about how I should exercise my discretion in relation to granting a remedy for the error I have found. I am not persuaded that it would be right to refuse relief.

64 The Secretary of State says that Discover Druridge, and indeed the other non-CIL compliant benefits which he has taken into account when considering paragraph 149, "would not make much difference overall having regard to the importance of the other material considerations": para DL53. Obviously, were he now to leave out of account a benefit he considered when refusing permission, he would still refuse permission. I am far from persuaded that the converse can be shown, on the simple basis that the biodiversity benefit of moderate weight would now replace the Discover Druridge benefit of moderate weight. I am not satisfied that the comment at para DL53 can simply be applied to it. First, one cannot necessarily treat the concept of "moderate" weight or benefit as being a narrow band; it may be a broad band with considerably different weights capable of being attached to those within its breadth. Second, those benefits described as "moderate" within even a narrow band, may be accorded different weights when applied to different issues in an overall balance; a helpful tabulation or structure is not a pseudo-mathematical analysis across a range of topics. A moderate tourism benefit and a moderate biodiversity benefit may not be accorded the same weight. Besides, para DL54 does not say that the adverse impacts clearly outweighed the benefits; rather it is the converse: "the benefits would not clearly outweigh the likely adverse impacts such as to justify the grant of planning permission." One must be careful not to read too much into that language, but a permissible interpretation, and the more likely one, is that the benefits did outweigh the adverse impacts but not clearly enough. Even with a not very significant benefit removed, I am not satisfied that the biodiversity benefits could not tip the balance into a clear outweighing of the likely adverse impacts.

65 The skills fund, prayed in aid in support of Mr Brown's argument, was not shown to be an immaterial consideration. The fact it was not CIL compliant does not make it immaterial. It did not suffer from the vice of Discover Druridge. Its purpose was clear and defined. There may be scope for debating materiality, but FoE's contention is too debatable for me to hold it immaterial in a side wind to this challenge, and then also to subtract its moderate weight from what ought to have weighed in favour of the proposal.

That would be to make a decision which it is for the Secretary of State to make.

66 Accordingly, I quash the decision on ground 1.

Ground 2: Addition or substitution: (i) wrongly concluding there would be an increase in the emission of greenhouse gases, GHG, from the use of Highthorn coal, and (ii) failing to justify departing from a clear line of previous planning decisions

67 It is convenient to consider these issues together since the issue evolved during submissions from all sides, and the relationship of this decision to earlier decisions became clearer.

68 Both Mr Elvin and Mr Brown pointed to the issues upon which the Secretary of State sought information, which they said was the first time, in a coal extraction case, in which the relationship of the proposal to Chapter 10 of the NPPF and climate change policies had been specifically raised. This was the 11th of the main considerations for the inspector: "The effects of the proposed development on the emission of greenhouse gases (GHG) and climate change."

69 Evidence was given by H Banks and FoE to the inquiry about that issue. There was a debate about how far, at the inquiry, H Banks had accepted the relevance of the emission of GHG from burning Highthorn coal. It had given evidence about emissions, whilst disputing FoE's contention that they were an important effect of the proposal. For the purposes of this case, Ms Lieven accepted that GHG emissions from burning of coal for power generation were capable of being a material planning consideration even though the generation took place off-site and at a power station which would be subject to other controls. The core of her argument was that the Secretary of State (i) had to explain why there would be an increase in GHG emissions rather than a substitution of one form of coal for another, in the light of the evidence he had accepted, and (ii) had to explain why he differed from previous decisions in which he or inspectors had accepted that coal extraction for power generation would not increase GHG emissions, because of import substitution.

70 I set the scene for this ground first with the NPPF. Chapter 10 deals with climate change. Paragraph 93 states:

> "Planning plays a key role in helping shape places to secure radical reductions in greenhouse gas emissions, minimising vulnerability and providing resilience to the impacts of climate change, and supporting the delivery of renewable and low carbon and associated infrastructure. This is central to the economic, social and environmental dimensions of sustainable development."

Paragraph 97 encourages the use and supply of renewable and low carbon energy in a variety of ways, but does not deal with planning permission for coal extraction.

71 Chapter 13 deals with minerals. Part is general; part is mineral specific. Paragraph 142 is general: "Minerals are essential to support sustainable economic growth and our quality of life. It is therefore important that there is a sufficient supply of material to provide the … energy … the country needs." Local planning authorities determining planning applications should

"give great weight to the benefits of the mineral extraction, including to the economy": para 144. But they should not grant planning permission for peat extraction. Aggregates and industrial minerals are then dealt with. I have already set out paragraph 149, the coal specific policy. It is a restrictive policy for the purposes of paragraph 14 of the NPPF.

72 Although the Secretary of State disagreed with the inspector's overall recommendation, he accepted most of his conclusions en route. I set out those relevant to this ground.

The inspector's report and the decision letter

73 Under the topic heading "Demand/need for and supply of coal", the inspector judged that the only need for the coal which mattered was for generating electricity. The demand for coal for this purpose had fallen significantly since 2012 "but there is evidence that it continues to provide an important contribution to the energy mix, particularly during the winter". Assessing the need was problematic because it depended on a whole host of market considerations. There was some doubt about how much new gas-fired capacity "would be available in the timescale that the Highthorn mine would operate". The cessation of the use of unabated coal by 2025 would not occur unless a secure and reliable electricity supply would be maintained. He considered the first WMS of 25 November 2015 on the replacing of coal-fired power stations with gas ones, and the *Consdoc*, pointing to the problems of bringing the already permitted gas capacity on stream. He then said, at para C105:

> "I do not share the applicant's view about the likely future contribution of renewable sources of energy. The evidence indicates a likelihood that the strong trajectory of growth in renewables will continue into the foreseeable future. The applicant also underestimates the role that new battery technology could play in the period in which the Highthorn mine would be operating. Using large scale batteries to spread out peaks in demand could impact upon the role that coal currently plays in that regard."

74 Next, the inspector concluded that, even if Parliament and Council Directive 2010/75/EU of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (OJ 2010 L334, p 17) ("the Industrial Emissions Directive") led to a reduction in coal-fired capacity post 2020, there would still be scope for the use of a substantial amount of coal in Industrial Emissions Directive-compliant generators, exceeding what Highthorn could produce annually.

75 He concluded that it was likely that "predicted demand for the period from 2018–2025 would exceed the supply from other permitted coal sites in the UK". FoE argued that there would always be sufficient imported coal available to make up the shortfall. The inspector continued, at paras C107–C109:

> "C107. … However, there is nothing to indicate that any difference between demand and known UK supplies over this period would, or should, be made good by imports alone. There would be economic advantage for the UK in using indigenous coal, and possibly

savings in transport emissions. There is no evidential basis for FoE's conclusion that Highthorn coal would create a surplus in UK domestic requirements.

"C108. Ultimately the need for coal in the period that the Highthorn mine would be operational would be dependent in large part on the relative prices of coal and gas. This is a matter for the market and would be unlikely to be influenced by granting planning permission for three million tonnes of coal. Whether the need for coal would be met from indigenous or imported supplies would also be a matter for the market. Nevertheless, there is some force in the applicant's submission given the uncertainty about the need for coal up to 2025, that it would be unsafe to conclude that there will not continue to be demand/need for coal over this period, particularly for the duration of the planned Highthorn operation.

"C109. The evidence before the inquiry points to a likely need for the amount of coal that the Highthorn site would produce during its operational life in order to ensure a sufficient supply to provide the energy the country needs. Given this finding, along with my views regarding consideration (16) later in this report, I consider that a 'window' currently exists for the use of the Highthorn coal. But this window is narrowing. Much will depend on the details of the implementation for the phase-out of unabated coal for power generation, including the regulatory approach adopted and its timing, which are yet to be determined by the Government. The benefits of the coal and to the economy are related so I have considered them together in assessing significance. How these should weigh in the planning balance is a matter that should properly be incorporated into the next consideration (10), which deals with economic effects."

76 The inspector then concluded that the jobs would make a significant contribution to the local economy before continuing in para C111:

"Furthermore, if the coal is needed to contribute to national energy needs it would make a significant contribution to the national economy. The [NPPF] provides that great weight should be given to the benefits of mineral extraction, including to the economy (paragraph 144). I find that the benefits of the coal and employment to the economy would be of major significance. But these benefits would only apply in the short term, and so overall I consider that they would be of substantial significance. But in the overall planning balance this is a factor which should be given great weight in accordance with the provisions of the [NPPF]."

77 The next topic was "Greenhouse gases and climate change". Burning Highthorn coal would release some seven million tonnes of CO2 into the atmosphere. The extraction process would be a substantial addition to that figure. But although it was impossible to calculate the likely emissions "overall" from imported coal, para C113, if it was "transported some distance by ship that would be likely to result in overall higher carbon emissions than using indigenous coal".

78 The inspector rejected FoE's argument that the extraction of coal could affect the price and availability of coal, when the 0·7 million tonnes per annum from Highthorn was set against the annual coal production globally

of some 5,500 million tonnes. His final conclusion under this topic heading was, at para C115:

> "The extraction, processing and combustion of up to three million tonnes of coal would result in significant emissions of GHG, albeit probably less than would result from using the same quantity of imported coal. But in assessing this application I do not consider that the argument that imported coal would substitute for Highthorn coal if the application was refused should hold sway. In this scenario there would be some uncertainty about what might replace the energy that would have been generated from Highthorn coal, possibly resulting in a different level of GHG emissions. Whereas if the application was approved and the permission implemented there is much more certainty about the likely GHG emissions that would result. I find that GHG emissions from the proposed development would adversely impact upon measures to limit climate change. Most of the GHG would be emitted in the short term, resulting in an adverse effect of substantial significance, reducing to minor significance in the medium term. GHG emissions in the long term would be negligible, but given that the effects of carbon in the atmosphere would have a cumulative effect in the long term, I consider that overall the scheme would have an adverse effect on GHG emissions and climate change of substantial significance, which should be given considerable weight in the planning balance."

79 Ms Lieven took considerable issue with this paragraph, upon which Mr Elvin came to place critical weight.

80 The inspector later dealt with paragraph 149 of the NPPF and the National Planning Practice Guidance as follows, at paras C144 and C146:

> "C144. The extraction and combustion of up to three million tonnes of coal would generate GHG emissions, which would be at odds with the core planning principle about supporting the transition to a low carbon future in a changing climate. But the overall thrust of the [NPPF] with respect to climate change is for planning to play a key role in helping to shape place to secure radical reductions in GHG emissions and supporting the delivery of renewable and low carbon energy infrastructure. Discouraging the extraction and use of coal is not included in any of the measures set out in paragraph 95 for supporting the move to a low carbon future, or in paragraph 96 concerning the determination of planning applications. The approach taken in the [NPPF] for coal contrasts with that taken for peat extraction. I find therefore that the proposed development would not be inconsistent with Government policies for meeting the challenge of climate change as set out in Chapter 10 of the [NPPF]."
>
> "*National Planning Practice Guidance*
>
> "C146. FoE argues that increasing the supply of a fossil fuel could have a negative impact on carbon emissions because it could decrease the price of coal, increase demand, and disincentivise the shift to alternatives. The Guidance helps local councils in developing policies for renewable and low carbon energy and identifies relevant planning considerations. The proposed surface mine would only be inconsistent with this guidance if granting permission would impact adversely on

A the aim of increasing the amount of energy from renewable and low carbon technologies, or would impair the important role planning has in the delivery of new renewable and low carbon energy infrastructure. However, there is evidence that growth in renewable and low carbon technologies has continued to proceed concurrently with the use of coal, and continues to do so even with the changes in subsidies for renewable energy. I do not consider that allowing this surface mine would have a significant effect on future investment in renewable and low carbon infrastructure. I find that the proposed development would be consistent with the Department's amended online guidance on renewable and low carbon energy."

81 The two WMSs, *Consdoc* and *The Clean Growth Strategy* came next, with this conclusion from the inspector in para C152:

"The window available for the use of unabated coal for generation in the UK is narrowing. However, the only firm indication from the Government is the commitment to phase out the use of unabated coal for electricity production by 2025. This would provide a window for use of the Highthorn coal, which would not breach CCC's current carbon budgets. In the absence of more details about options for implementing the coal phase-out, which are still being assessed, and the details of the regulatory approach to give it effect, I find that the proposed development would not be inconsistent with the written ministerial statement on the central government's commitment to replace coal-fired power stations with gas, as made by the Secretary of State for Energy and Climate Change on 18 November 2015 (WMS1), and that furthermore, it would not be inconsistent with WMS2 and *The Clean Growth Strategy*."

82 I have already set out his overall conclusions, in paras C163–C165, at paras 11–12 above.

83 Ms Lieven submitted that the inspector had accepted H Banks's case at the inquiry as to why there would be no increase in GHG emissions from burning Highthorn coal for generating electricity; there would be no increase because the alternative source of power generation would be imported coal. One GHG-producing source would be substituted for another.

84 I agree that he accepted a great deal of H Banks's case but what he said in para C115 was at least a qualification of it. There was doubt about how much new gas capacity would replace coal-fired generation during the operational period of the Highthorn mine: para C104. The inspector accepted at para C108 that the need for the coal would be dependent in large part on the relative prices of coal and gas. The price of coal, however, would not be affected by the production of coal from Highthorn. There was some force in the contention that it would be unsafe to conclude that the demand or need for coal over the operational period of the mine would not continue. There was no benefit economically or in emission terms in using imported coal: paras C107, C113–C114. On that basis, the inspector had concluded that there was a likely national need for the coal and that its extraction and use to generate electricity would benefit the economy: para C129. He found that that benefit, and the employment and other benefits, clearly outweighed the impacts.

85 The inspector reached that conclusion notwithstanding the points which he made in paras C105 and C115. In the former, he referred to the likely strong trajectory of growth in renewables continuing into the foreseeable future and the role that new battery technology could play during the mine's operational period, spreading out peaks in demand in the way coal currently did. In para C115, he accepted the argument that GHG emissions would probably be less than would result from using the same quantity of imported coal, but did not consider that "the argument that imported coal would substitute for Highthorn coal if the application was refused should hold sway".

86 What follows in para C115 is important, indeed critical to the debate, and it has to be analysed closely. There was "some uncertainty" about what might replace Highthorn coal were permission refused; it could possibly be a source of energy which produced lower GHG emissions. But were permission granted it was "much more" certain that Highthorn coal would be burnt, with the adverse effects of its GHG emissions "upon measures to limit climate change". It was because of this adverse effect on those "measures" that the scheme would "overall" have an adverse effect on GHG emissions and climate change of "substantial significance, which should be given considerable weight in the planning balance". Para C115 contains no reference back to para C105 as containing the measures he referred to in para C115. The para C115 "measures" are not identified at all.

87 The inspector found in para C144, that "Discouraging the extraction and use of coal is not included in any of the measures" in paragraphs 95 or 96 of the NPPF for supporting the move to a low carbon future or determining planning applications. These NPPF measures, submitted Ms Lieven, were the carbon tax, investment in renewables, and signals about transition to a low carbon economy. If these "measures" were the unspecified "measures" in para C115, she pointed out that the inspector concluded that the price of coal would be unaffected by permission for Highthorn (para C114), investment in renewables and low carbon infrastructure would not be affected significantly (para C146) and the "wrong signals" claim by FoE was roundly rejected: para C164.

88 The Secretary of State's conclusions adopt most of the inspector's. He said this in relation to the demand/need for and supply of coal:

> "32. The Secretary of State has had careful regard to the inspector's analysis at paras C99–C109 … He concludes, for the reasons given, that the evidence points to a likely need for the amount of coal that the Highthorn site would provide during its operational life in order to ensure a sufficient supply to provide the energy the country needs. He further agrees that a window currently exists for the use of the Highthorn coal (para IRC109).
>
> "34. The Secretary of State has given careful consideration to the inspector's analysis at paras IRC112–C115. For the reasons given he agrees that greenhouse gas (GHG) emissions from the proposed development would adversely impact upon measures to limit climate change. He further agrees that most of the GHG emissions would be emitted in the short term, resulting in an adverse effect of substantial significance reducing to minor significance in the medium term; and that greenhouse emissions in the long term would be negligible, but that

A the effects of carbon in the atmosphere would have a cumulative effect in the long term (para IRC115). Given that cumulative effect, and the importance to which the Government affords combating climate change, he concludes that overall the scheme would have an adverse effect on greenhouse gas emissions and climate change of very substantial significance, which he gives very considerable weight in the planning balance.

B "*Written ministerial statements and Clean Growth Strategy*

"36. The Secretary of State has given careful consideration to the inspector's analysis at paras IRC147–C152 and agrees, for the reasons given that the proposed development would not be inconsistent with the written ministerial statement on the central Government's commitment to replace coal-fired power stations with gas, as made by the Secretary of

C State for Energy and Climate Change on 18 November 2015 (WMS1), and nor would it be inconsistent with WMS2 and *The Clean Growth Strategy*.

"*National Planning Practice Guide*

"37. The Secretary of State agrees, for the reasons given by the inspector at para IRC146, that allowing the proposal would not have a significant impact on future investment in renewable and low carbon

D infrastructure and as such concludes that the development would be consistent with his department's guidance on renewable and low carbon energy.

"*Other considerations*

"46. For the reasons given above, the Secretary of State affords considerable negative weight to the harm to the landscape character

E of the area. The negative impact on the greenhouse gases and climate change receives very considerable adverse weight in the planning balance. He gives further slight weight to the harm to local amenity.

"48. In favour of the proposal, he gives great weight to the benefits of the coal extraction including economic benefits. He also gives moderate weight to the biodiversity benefits which will flow from the proposal,

F slight weight to the third CIL obligation, moderate weight to the third obligation, further moderate weight to the fourth obligation and slight weight to the sixth obligation."

"*Paragraph 149 of the [NPPF]*

"52. The Secretary of State has applied the relevant considerations to the second limb of the paragraph 149 test. For the reasons set out above, he considers that the benefits of coal extraction and employment

G should be afforded great weight. Against this, he weighs the considerable adverse impact to the landscape character of the area, the slight harm to local amenity, the harm to heritage assets, which attracts considerable weight in line with his duty under section 66 and the very considerable negative impact caused by the adverse effect of greenhouse gas emissions and on climate change.

H "54. Balancing these factors he finds that the national, local and community benefits of the proposal would not clearly outweigh the likely adverse impacts such as to justify the grant of planning permission. As such he concludes that the second limb of the test does not support the proposal, and the proposal does not comply with paragraph 149.

Therefore the negative presumption from paragraph 149 applies in the present case.

"*Planning balance*

"55. Given his conclusions on impact to a valued landscape, the Secretary of State finds that the proposal would be contrary to paragraph 109 of the [NPPF], in agreement with the inspector at paras IRC143. He has also had regard to the analysis of the inspector at para IRC144. While he agrees for the reasons given that the proposal would not be inconsistent with policies for meeting the challenge of climate change, as set out in Chapter 10 of the [NPPF], given his findings on paragraphs 109 and 149, he finds that overall the proposal would not be compliant with the [NPPF] taken as a whole, and the proposal would not represent sustainable development."

The submissions

89 Ms Lieven submitted that para IRC115, accepted by the Secretary of State at para DL34, was the sole basis for his decision that there would be a very considerable adverse impact on GHG and climate change, which outweighed the expressed and accepted need for coal, given the other conclusions which he accepted. She and Mr Elvin are agreed on that. If that is not the explanation, there is a significant internal contradiction, she submitted, and I agree, between what he accepted at paras DL32, DL36, DL37, DL48 and DL55 (in relation to Chapter 10 of the NPPF), and his conclusions that there would be harm from the GHG, since he would otherwise have no basis for rejecting the conclusion that Highthorn coal would be a simple substitute for imported coal. He had accepted that the availability of Highthorn coal would not reduce the price of coal, thus encouraging the use of coal instead of a lower carbon source. He accepted that there would be less GHG emitted overall if Highthorn coal were used in substitution for imported coal. He said at paras IRC165 that if the Secretary of State disagreed with him that a window existed for the use of Highthorn coal in power generation, the need for and benefits of Highthorn coal "would be much diminished". Yet the Secretary of State agreed that the window did exist: paras DL32.

90 Ms Lieven submitted that paras DL34 and C115 provided no explanation in those circumstances for how a refusal of permission for Highthorn could lead to the use of a low carbon source of energy instead of imported coal. The inspector and Secretary of State had accepted H Banks's contentions on the price of coal, and there had to be some explanation as to by what means something other than imported coal would be used. "Some uncertainty" in para C115 was an inadequate reason. The reasons were legally inadequate, and could obscure an internal contradiction or irrationality unless explained, or involve a change in approach with wide but unspoken and seemingly unconsidered implications. If the inspector and Secretary of State were relying on renewables to fill the generating gap which the absence of Highthorn coal would create, there was no reasoning as to how the growth of renewables over the operational period would lead to a decrease in combustion of coal, given the continued demand and need for coal.

91 A possible increase in GHG emissions was one of the major issues at the inquiry. H Banks's case revolved around the use of Highthorn coal

A instead of imported coal. The inspector accepted that it was not quite as straightforward as that but nevertheless found a significant need for the coal outweighing adverse effects, including GHG emissions. Inevitably, he concluded that there would be a generating gap without Highthorn coal. The Secretary of State treated the "impact on measures" as of very great weight without any explanation as to what they were, or how, even on a broad basis, he assessed the degree of possibility attached to those effects, and how that B might affect GHG emissions. How he reconciled that with his acceptance of the national need for this coal to provide the country's energy required some reasoning. Otherwise, the Secretary of State might be acting irrationally but cloaking it, or contradicting himself without grappling with the issues.

92 Mr Elvin submitted that para C115 showed the inspector's conclusion was that GHG emissions "would adversely impact upon the measures to limit C climate change". Mr Elvin put it in his skeleton argument at para 34 thus:

> "the refusal of planning permission would not necessarily lead to an equivalent amount of imported coal being burned. The evidence showed that there was a real possibility of renewable energy and battery technology providing energy in the absence of Highthorn coal with lower GHG emissions."

D He had evaluated differently the significance of GHG emissions, which was a matter for his planning judgment, adequately reasoned.

Conclusions

93 "A real possibility" is not the language of paras C115 or C105 or DL34, DL52–DL55, but if it captures the sense of the first two, in my E judgment it also exposes the problem in the Secretary of State's reasoning. It was clear at the inquiry that a principal part of H Banks's case, a principal issue with FoE, and a principal issue identified by the inspector and the Secretary of State, was the effect of the grant of permission on the level of emission of GHG. The essence of H Banks's case was that the effect of refusal would be that imported coal would be burnt instead, with a probable increase F overall in GHG emissions—as the inspector found. FoE contended that there was no need for the coal because there were other renewable energy sources which would be used instead, and that there were other disadvantages from the further extraction of indigenous coal, such as sending the wrong signal about the United Kingdom's commitment to reducing its carbon emissions. That case was not accepted.

G **94** The Secretary of State explicitly accepted all the inspector's conclusions, reached en route to the latter's overall conclusion that the benefits of extraction for power generation and employment outweighed the adverse impacts, including the adverse effect of GHG emissions. The Secretary of State accepted that there was a need for the coal to meet the UK's energy needs, and a window in which the Highthorn coal would be used for that purpose. He also accepted that there would be savings in GHG emissions H compared to the burning of imported coal. He accepted that the extraction of the coal would not encourage its use by lowering its price relative to other sources. There is no suggestion in para DL55 that the Secretary of State has adopted a different approach from para IR163; or that he disagreed that the proposal was consistent with the climate change policies in Chapter 10 of the NPPF. He identified no policy statement on reducing the use of coal

or on increasing the use of renewables with which the proposal would be inconsistent except for his final conclusion on the NPPF. But that depends entirely on the prior reasoning which is where the challenge lies.

95 In essence, either the Secretary of State accepted that an energy need would not be met or that it would be met in some other way, creating less GHG emissions. Mr Elvin did not suggest that the Secretary of State concluded that he would leave the country's energy needs unmet. Nor did Mr Brown. Had that been the basis for his decision, I would have expected him to say so, with reasons as to why the GHG emissions from burning the coal meant that the energy needs should not be met. Instead, Mr Elvin and Mr Brown submitted that the Secretary of State found that there were low carbon sources of energy which would fill the gap which would otherwise arise. If that is so, then the arguments about GHG emissions disappear, but the Secretary of State is implicitly finding that there is no need for this coal, which is contrary to what the DL says, and contrary to the language of possibilities in paras C105 and C115, which they said he had accepted.

96 What the Secretary of State had to explain, on those findings, was how a proposal needed for the country's energy could be refused on the basis of the adverse impact of GHG, unless the gap was filled by renewables or low carbon sources. Given the significance of the issue, the detailed evidence at the inquiry and those conclusions of the inspector which he did accept, the DL fails to provide adequate reasoning as to how the Secretary of State reached his very different decision.

97 First, I am far from persuaded that Mr Elvin is right that the Secretary of State's reasoning on this critical issue is to be found in para DL34 in his agreement with para C115, or that the measures para C115 referred to, but did not identify, were those covered in para C105. The two paragraphs are not identified as important at all, let alone as critical, and they deal in possibilities only, not alternatives which would meet the identified need. No link between them is identified, and they are under different topic headings. I am wholly uncertain that the Secretary of State actually saw these otherwise unremarked and unlinked paragraphs as critical to his fundamental disagreement with the inspector, and to his decision to refuse permission. He may have misread and misunderstood them. They merely set out a possible adverse effect of the grant of permission, which was treated by the inspector as inadequate to overcome the strong need and economic benefit case. Mr Elvin refers to possibilities, which reflects paras C105 and C115, but "possibilities" are not the basis for the Secretary of State's decision. Para DL32 deals with the need for coal; para DL34 deals with the effect on GHG emissions. But the critical issue is about how the need is to be met by low carbon sources instead of coal, which is what the balance in paras DL52, DL54 and DL55 is about, and where the judgment on it should be found. Of course, there was almost nothing else for Mr Elvin to point to but para C115, and in its turn para C105, and that was really the only way in which his case could be argued, but that does not show it to be the basis for the Secretary of State's reasoning. Those paragraphs could provide the possibilities to which Mr Elvin refers, but not the low carbon sources of energy which would replace Highthorn coal, on the Secretary of State's reasoning.

98 Second, there are two aspects to para C115 to be considered, if it is the basis for the decision. That could provide the possibilities but not the

low carbon source of energy which would replace Highthorn coal. The first part contains the view that there could be some replacement for Highthorn coal other than imported coal, generating less GHG. The second, but it could be the same point differently put, is that there would be an adverse effect on unspecified measures to limit climate change; this is not clearly directed to what might replace some Highthorn coal, though it could be, directly or indirectly. On the latter the Secretary of State agreed with the inspector, para DL34, but did not specifically refer to the former.

99 On the former, some replacement for Highthorn coal, para DL34 contains no reference back to para C105; para DL34 refers to his considering carefully paras C112–C115. Para C105 is in the section of the report headed "Demand/need for coal". The equivalent section in the DL is para DL32. The Secretary of State there says that he has had careful regard to the inspector's analysis at paras C99–C109, and the conclusion he draws from that section, in agreement with the inspector, is that the evidence points to a likely need for Highthorn coal in order to ensure a sufficient supply for the country's energy needs, and that a window currently exists for it, as the inspector found at para IRC109. Para C105 receives no other mention. There is no basis in the DL or in the IR for treating para C105 as the basis for anything in the first part of para C115, which deals with possible replacements for Highthorn coal which produce lower GHG emissions.

100 Para C105 cross-refers to three paragraphs in the report in which the parties' cases are set out. One relates to FoE's case on BEIS and new gas capacity, which the inspector dealt with in paras C103 and C104, recognising "some doubt" about how much new gas capacity would be on stream to replace coal during Highthorn's operational period. The other FoE point concerned the ending of subsidies for renewables, and was to the effect that none the less further renewable capacity would still be coming forward. The other reference was to H Banks's case; it had contended that there was a question mark over the growth in renewables with the ending of subsidies, affecting the future growth trajectory for renewables; batteries could not do the job of coal. The inspector deals with these two points in para C105: he foresees a continued strong renewables growth trajectory and also does not share H Banks's view that battery technology would play no role. But it is not a finding that the need for Highthorn coal would be met from those sources. His conclusions about the continuing need for that coal are clear. So, if para C115 is taken, albeit wrongly, to be a conclusion that low carbon sources would meet the need, para C105 does not contain anything to support it.

101 The inspector provided no view of any quantified effect of the para C105 growth trajectory or of battery technology, clearly rejecting FoE's case that there was no need for the coal. He found that the extraction of this coal would have no effect on the relative prices of gas and coal, or have an adverse effect on investment in renewables. And his assessments in paras C103–C109 led to the conclusion in para C109 that there was a need for this coal, as the Secretary of State accepted. In para C107, he accepted that there was no basis for saying that imported coal should make up for a lack of indigenous supply to meet UK energy demands, rejecting FoE's case in that respect. The Secretary of State says nothing in the DL to fill in the gaps in para C105 which his asserted reliance on it as the basis for C115, and his refusal of

permission, require for a legally adequately reasoned decision on the critical issue. The gaps lacked any such significance for the inspector.

102 Moreover, what the inspector actually described in the first part of para C115 was the difference between "some uncertainty about what might replace the energy that would have been generated from Highthorn coal, possibly resulting in a different level of GHG emissions", and the much greater certainty of its use were extraction permitted. That is an issue of probability and degree as to which the Secretary of State is completely silent. If para C115 is the basis for his decision, it speaks only of unquantified possibilities. The extent to which the unidentified possibilities could or would replace Highthorn coal is not identified by the Secretary of State even in the broadest terms. The possible different level of emissions is not quantified even in the broadest terms. The Secretary of State does not find, or even express a view about, how any need left unmet by those possibilities would be sourced, and if by imported coal, how that affected the overall level of GHG emissions. There is nothing to suggest that the inspector, who recommended that planning permission be granted, ever thought, let alone found, in para C115, that whatever possibilities might be used could possibly replace all or even a substantial proportion of the Highthorn coal. After all, he concluded that there was a need for the coal which outweighed the GHG emissions, notwithstanding what he said in para C115. The Secretary of State's reasoning is wholly unclear and inadequate on a critical issue. He does not talk of the possibilities in para C115, nor identify alternatives, sufficiently certain in his eyes to meet the need. He has not dealt with the issues which his reasoning creates; it justifies genuine concern that significant considerations were ignored, and that the issues raised and evidence presented for his consideration have not been rationally considered.

103 So far as the second aspect of para C115 is concerned, the effect on unspecified measures, and it may or may not be the same as the first aspect expressed differently, the Secretary of State does not identify what measures he regards para C115 as referring to, though he agrees with it. I am very surprised at that. But on the benevolent assumption that they are what para C105 refers to, there is no indication that he considered the extent to which renewable energy and battery technology might be adversely affected. Nor is there any indication that he considered how the adverse effect on unspecified measures, if prevented, could lead to them contributing all of the energy which Highthorn coal would contribute, or sufficient, even if only partially, to mean that permission should be refused. He does not even provide adjectives of probability and degree. He cannot look to the inspector for the evidence or for the reasoning for he provides none in those respects. The inspector thought the evidence and his reasoning merited the grant of permission. The Secretary of State, on the critical issue, does not indicate that he has reached any conclusion on those points or what evidence he had for any conclusion he reached, or by what reasoning he arrived at it, the vital conclusion for his decision. This is impliedly that the need would be met by low carbon sources, and to the extent it was not met in that way, then that the level of GHGs emitted by, say, imported coal, would be outweighed by the need for the energy. Paras C115 and C105 provide no answers.

104 The inspector saw these other measures in para C115—whatever they may be—as a possibility, which could reduce the extent to which imported coal would have been used instead of Highthorn coal; but his other and

overall conclusions carry the necessary implication that there would still be a major and overall beneficial substitution of indigenous coal for imported coal. Para C115 was adequately reasoned in the light of his conclusion about the need for coal, and the window for its use. To him, para C115 was no more than a reflection of a possibility and to an unknown extent. The reasoning of para C115 becomes quite a different matter if used as the basis for a refusal of permission. It was never intended for that purpose, yet it is what the Secretary of State agreed with, without any further explanation or elaboration, yet used entirely differently. If he understood para C115 properly, and used it in the way submitted on his behalf, it is impossible to reconcile with his other conclusions. He treats unknown and unquantified possibilities as meeting a need which has to be met, without any explanation at all. When the Secretary of State accepted all the inspector's conclusions except how the adverse effects of GHG should be weighed, he needed to resolve what was now a significant lack of reasoning and explanation as to how the various strands of his decision could be reconciled. The DL's failings cannot be made good by reference back to the inspector's report.

105 Mr Brown submitted that it was a rational conclusion, open to the inspector and the Secretary of State, that H Banks's customers would not be able to source alternative coal supplies, and so "entirely possible" that an equivalent quantity of coal would not be burned. The DL does not say that, and in my judgment, nor does para C115. They contain no suggestion that imported coal would cease to be available. And the Secretary of State does not suggest he is only "possibly" or "entirely possibly" meeting the need he accepts. It is not helpful to the Secretary of State however, that that submission correctly points to the need for alternative sources of energy to coal to be identified, however broadly, which would meet the need he has identified, but that, at best, all that the Secretary of State decided was that there was a possibility, entire or real or neither, of them doing so. Nowhere does the Secretary of State suggest he has left an energy gap, yet his reliance, if such it was, on "possibilities" suggests either that unwittingly he has done so, or that it would be filled by imported coal. If the Secretary of State had meant that it was "entirely possible" that there would be no need for this coal, he would or ought to have said so, explaining the degree to which the accepted need for this coal had been reduced, and why he accepted that a possibility sufficed to meet the need, or that the GHG emissions meant that the need should be left unmet or that a risk of that should be accepted. This also all serves to illustrate how difficult it is to accept para C115, and separately para C105, as the basis for the decision. With or without it, the decision is so inadequately reasoned, that I am wholly unclear as to what the real basis for the decision is.

106 Third, I do not accept Mr Elvin's contention that the Secretary of State simply reached a judgment that he would give greater weight to GHG emissions than did the inspector. That is not a correct description of what he did. The issue is mischaracterised as a simple evaluation of the weight to be given to GHG emissions, because Mr Elvin has to find something which could explain where the substitute and lower GHG emitting energy source was to be found. Otherwise, the Secretary of State accepted an unexplained energy gap, which is what Mr Elvin says he did not do. If there is a gap in his reasoning, it cannot be filled by reference to a difference in planning judgment about the weight given to GHG. If there is a need for this coal,

the emissions are inevitable. If he did adopt that simple weighing approach, it is quite inadequate to grapple with the issue which his reasoning brought to the fore: what was the replacement low carbon source to meet the energy need if Highthorn coal were not used? Para C115, at its most favourable to the Secretary of State, is about a possible reduction in GHG which the use of this coal might forestall. The fact that the Secretary of State uses "very" to explain the weight he gave to the GHG emissions, not a word used by the inspector, may point to a difference in the weight given to it but cannot explain that para C115 was crucial nor why it was crucial. Nor can it amount to a separate basis for the decision.

107 Fourth, Mr Elvin asserted that the DL embodied a new approach, albeit unheralded and unidentified, save to the extent to which the new way in which the issues were identified in the call-in letter and IR, might have alerted the astute and informed reader of such letters to the fact that something new might be afoot. Previous decisions, he agreed, had accepted that the GHG emissions from burning indigenous coal would simply substitute for imported coal's GHG emissions. The Secretary of State does not say that this is a decision on the relationship between GHG emissions and coal peculiar to this site, nor does he say that it is good generally. Mr Elvin said that it was not a change of policy, though it is difficult to see how the approach could not be applicable, if good, for every application for permission for coal extraction for power generation. since the troubling impact of GHG emissions is not by its nature specific to the location of extraction, or of its production or even to the country of its production. That looks rather like a new policy to me, but I do not have to decide one way or the other whether there has in fact been a change in policy, unannounced. The case mounted is not specifically an irrationality challenge nor a natural justice challenge to the effect that H Banks did not know that this was the line which could be adopted and so had no chance to address it.

108 It is not however the fact of change that requires explanation, but the conclusions on the principal issues in controversy. The nature of the duty does not change. In my judgment, the reasoning is so significantly inadequate that I am not prepared to accept that its reasoning embodies any new intentional approach, rather than the new "approach" being simply a description, after the event, of the output of legally inadequate reasoning, which may well disguise irrationality, internal contradiction, the ignoring of material considerations, and a failure to grapple with the principal issues in controversy. I observe that the fact of change is not identified. The basis for the change is not identified. If it truly is para C115, it is not marked as having any particular significance. Para C115 provides no basis for a change without para C105, to which it makes no reference. The consequences of the new approach if such it be, which appear applicable to all coal extraction application, are not acknowledged, explained or qualified. The policies in place, including paragraph 149 of the NPPF, have already been cast so as to restrict coal extraction, because of the importance of reducing GHG emissions and encouraging renewable energy sources. Ms Lieven pointed out, as she did to the inspector, that the very policies relating to GHG emissions and coal, restrictive of the latter because of the former, themselves struck the balance between the need, but decreasing, for coal and the encouragement in various ways of the development of low carbon energy sources. This all serves to underline the prejudice to H Banks and other developers in not

knowing how they stand in relation to future applications, equally required as here to meet a national energy need, as found by the Secretary of State, but finding the vague content of para C115 as the insurmountable obstacle.

109 Ms Lieven's contentions about earlier decision letters are really a reinforcement to her submissions on the primary issue. This is really an aspect of the arguments about addition or substitution, rather than a separate issue in its own right, which in certain circumstances previous decisions may give rise to.

110 The statutory duty to give legally adequate reasons has been considered at the highest level on more occasions than ought to have been necessary. I do not need to cite from them; they are *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153, cited in the Court of Appeal decision in *North Wiltshire District Council v Secretary of State for the Environment* (1992) 65 P & CR 137, *Bolton Metropolitan District Council v Secretary of State for the Environment* [2017] PTSR 1091 and *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953. The principal, but not new point, which the latter two emphasise is that reasons do not need to be given for the way in which every material consideration has been dealt with; reasons have to be given for conclusions on the principal or main issues; they can be brief, with particularity varying with the nature of the issues.

111 The *North Wiltshire* case is often cited in connection with the relevance of a previous decision as a material consideration; see p 145 in the judgment of Mann LJ. The previous decision there dealt directly with the critical issue in the appeal. It is on that basis, conformably with the principles he cited, that Mann LJ upheld the quashing of the decision for its failure to deal with a critical point in issue. On p 145 he said that where "there is disagreement [with a previous indistinguishable decision] then the inspector must weigh the previous decision and give his reasons for departing from it".

112 In so far as part of what Mann J said at pp 145–146 could be read as saying that there was some special rule requiring reasons when a purportedly or actually indistinguishable previous decision was raised, that would be an incorrect reading. If it were the correct reading, it was then in conflict, and even more clearly now would be at odds, with binding House of Lords authorities, and cannot be cited for such a proposition. Care is therefore required over how that decision is used in relation to reasons and previous decisions. There is no different rule for reasons about previous decisions than for any other material consideration. It depends on the importance of the issue, and whether it was a principal area of controversy. Materiality is not of itself a sufficient basis for a duty to give reasons explaining how a consideration was deal with.

113 This is illustrated by *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] PTSR 2063. Lindblom LJ analysed why the Secretary of State's failure to give reasons in relation to his inconsistent treatment of another very recent appeal involving the same quite specific issue was unlawful. Necessarily, in the light of the authorities, he did not say that reasons were required simply because the other decision was material, as he found it to be. He went considerably further, in accordance with principle: the inconsistency between the two indistinguishable decisions went, at para 56, to "an issue of critical importance". That in essence was why reasons for how the earlier one was considered and weighed or distinguished were required. Although the

inconsistent decision in the *Baroness Cumberlege* case was not cited to the inspector or Secretary of State, that did not prevent it being a material consideration in the rather striking circumstances of that case. A

114 I do not see here any basis for treating those decisions relied on by Ms Lieven, which were not cited to the inspector, as material considerations which required reasoning. They could have been material, in the sense that the Secretary of State would have been bound not to disregard them, but here they would only be material which he had to consider, if they were cited to him. The inspector provided a witness statement in which he set out what had and had not been cited to him. B

115 None of the decisions relied on were decisions of the Secretary of State; they were inspector decisions. The Field House mining scheme decision in 2016 was made by the inspector in this case. GHG emissions were not an express issue. They were dealt with as an aspect of the "need" case and in the planning balance in that same way; there would be no increase because the coal to be extracted would be used in substitution for imported coal. The Halton Lea Farm mining scheme decision of 2012 was made on the same basis: indigenous coal being burnt in substitution for the imported coal. The 2015 Leadgate decision seems to have treated GHG emissions as not very important in the context of the need for coal. C D

116 Ms Lieven also referred the inspector to *R (Friends of the Earth Ltd) v North Yorkshire County Council* [2017] Env LR 22, not for any proposition of law but because the challenge alleged that the county council, in its assessment of environmental impacts arising from hydraulic fracking of gas, ought to have taken into account the GHG emission from the burning of gas which the fracking would produce but had not done so. The gas produced would be burnt at an existing generating station under its existing permission and controls, with no net increase in capacity. The council had been entitled to conclude that those emissions did not need to be considered. Whether the energy requirements were better met through some other source was a matter for the committee's judgment on which it received extensive briefing, and could evaluate the objections. E

117 Not sent to the Secretary of State for his consideration, but cited to me, was the decision in *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] Env LR 18. This was a challenge to the grant of permission by the Secretary of State for the exploration phase for gas to be produced by fracking; it did not cover any commercial production phase. The complaint was that the increase or potential for the increase in GHG emission had been ignored. Dove J at first instance had found that there was no evidence that this would lead to any increase in GHG emission since such gas as was produced at that stage would merely be burnt in substitution for other gas, as with *R (Friends of the Earth) v North Yorkshire County Council*. The Court of Appeal upheld that approach, but at para 63 emphasised that if and when the consent procedure was being considered in relation to commercial production, the relevant effects could be different, and would all have to be considered. F G H

118 Ms Lieven submitted that the effect of these decisions was that the Government's clear position had been that GHG emissions would not increase as a result of burning coal or gas in existing power stations, unless there was a mechanism by which it could be shown that such an increase would occur. Reasons were required to explain how that would be so

here because the inspector and Secretary of State were differing from a clear line of decisions which materially addressed the same issue of general application to coal extraction permissions; there had been no policy change; the inconsistency was stark and fundamental on a major issue which played a critical role in the decision paras DL34, DL46 and DL52; it also had wide implications for how H Banks and other developers might appraise or pursue further applications in relation to coal and any other hydrocarbon source of energy.

119 Mr Elvin submitted that none of these decisions decided that GHG emissions from the burning of coal were legally irrelevant, nor did they establish any requirement for clear evidence that there would be an increase in GHG emissions.

120 Mr Brown, who had represented FoE at the inquiry, pointed to the limited reliance placed by H Banks's witnesses on the decisions which it cited. Only one, the Leadgate decision of 2015 had been referred to by its planning witness, and none by its principal witness on GHG emissions. None were mentioned in closing submissions. Accordingly, of themselves they were not a principal important issue in controversy and were no more than a small part of an issue, which was an important issue in controversy, which both the inspector and the Secretary of State dealt with. The inspector did refer briefly to other decisions in para C161. The circumstances here were not such as to call for an explanation of any change in position, and if so, para C115 sufficed. This was not comparable to the inconsistent decisions in the *Baroness Cumberlege* case [2018] PTSR 2063. Indeed, on examination there was no inconsistency; previous decisions had assumed or concluded it to be unlikely that GHG emissions would increase, whereas this decision concluded that increases were uncertain. This was a matter of judgment and weight. It would be contrary to the role of the court in review of planning judgments of the Secretary of State to require "clear evidence" of an increase in GHG emissions, or to impose a specific reasons obligation if such evidence were not found.

121 In my judgment, these previous decisions did not require any more elaborate reasoning of themselves. They were an aspect of an important issue. The fact that the Secretary of State may have been deliberately adopting a different approach from the earlier decisions does not itself here call for specific reasoning. They are not indistinguishable on a critical issue; they are distinguishable by reference to the arguments raised and addressed, and by the passage of time. Besides what matters primarily is that the reasons for the instant decision are clear; that may be sufficient to show that the Secretary of State's views have evolved, and why he evaluates issues as he now does. The previous decisions give rise to no separate issue, and if the reasoning had been otherwise adequate, the reasons given by the inspector and accepted by the Secretary of State relating to the earlier decisions would not have been unlawful.

Conclusion

122 This application succeeds and the DL is quashed.

Application granted.
Secretary of State's decision quashed.

JEANETTE BURN, Barrister