Claim No:

IN THE HIGH COURT
QUEEN'S BENCH DIVISION
PLANNING COURT

B E T W E E N:

R (on the application of
MARIANNE BENNETT)

Claimant

- and –

CUMBRIA COUNTY COUNCIL

Defendant

- and –

WEST CUMBRIA MINING LTD

Interested Party

STATEMENT OF FACTS AND GROUNDS

PRELIMINARY

[T/P] is a reference to a page number in the Claim Bundle where T is a tab number and P is a page number.

Key documents:

(i) Statement of Facts and Grounds [**A/7-43**];

(ii) Witness statement filed in support of the claim [**B/1-8**];

(iii) Officer's Report to the Development Control and Regulation Committee of Cumbria County Council ("OR"), sections 1-4, paragraphs 6.39- 6.74; 6.404-6.414; 6.497-7.9 [**D/137-D145; D/156-162; D/209-211; D/223-227**];

(iv) Development Control and Regulation Committee minutes of meeting, dated 19 March 2019 [**D/343-357**];

(v) Addendum Report ("AR") [**D/382-390**]; and,

(vi) Development Control and Regulation Committee minutes of meeting, dated 31 October 2019 [**D/391-409**].

Estimated time for pre-reading: 5 hours

INTRODUCTION

1. This statement of facts and grounds is filed on behalf of the Claimant, Marianne Bennett.

2. The Claimant seeks permission to challenge the legality of the decision taken by the Defendant, Cumbria County Council, on 31 October 2019 to ratify its previous resolution to grant planning permission (on 19 March 2019) for the development of a new underground metallurgical coal mine and associated development in Whitehaven, Cumbria (the "Decision"). As explained below, that resolution made the grant of planning permission subject to the completion of a section 106 agreement, which has not yet happened such that planning permission has not yet actually been granted. Accordingly, per **R (Burkett) v Hammersmith and Fulham LBC and another [2002] UKHL 23**, while the Claimant could wait and challenge the grant of planning permission when it comes, she is entitled to challenge and (to avoid any concerns about the impact of the challenge on the implementation of the planning permission) does now challenge, the resolution itself.

3. The Claimant challenges its legality on the following grounds:

(1) The Defendant failed lawfully to consider the greenhouse gas ("GHG") emissions of the mining operations. In any event, the Defendant failed to

provide lawful reasons for its conclusions in relation to GHG emissions arising from the mining operations;

(2) The Defendant failed to consider the need for, and GHG impacts of, "middlings coal" (as explained below);

(3) The Defendant failed to give lawful reasons for the imposition of only a 15% (as opposed to lower) restriction on the production of middlings coal;

(4) The Defendant failed lawfully to consider the "Net Zero target" (as explained below); and/or

(5) The Defendant unlawfully failed to comply with the Town and Country Planning (Environmental Impact Assessment) Regulations 2011.

4. At the substantive hearing, the Claimant will seek a declaration as to the illegality of the Decision and an order quashing the Decision. In the event that the Defendant grants planning permission before this judicial review is concluded, she will also seek orders in relation to that grant of planning permission The Claimant will also seek an appropriate order for her costs.

5. The grounds set out below are plainly 'arguable'.

FACTUAL BACKGROUND

6. The Claimant is an active member and organiser of the "Keep Cumbrian Coal in the Hole" ("KCCH") campaign, led by Radiation Free Lakeland (see paragraphs 5-19 of the Claimant's witness statement [**B/2-6**]).

7. On 19 March 2019, the Development Control and Regulation Committee of Cumbria County Council (the "Committee"; the "Council") resolved to grant planning permission for application reference 4/17/9007 (the "Application") made by West Cumbria Mining (the "Applicant") **[D/343-357]**.

8. The Application was for the development of a new underground "metallurgical coal" (as explained below) mine, along with associated development, a new coal loading facility and railway sidings linked to the Cumbrian Coast Railway Line, and a new underground coal conveyor to connect the coal processing buildings with the coal loading facility (the "Development") **[D/2; D/137]**

9. The mine is located on the "former Marchon" site in Whitehaven, Cumbria. The scale of the Development is significant. The permission will allow for 50 years' of continuous coal-mining operations **[OR at 4.2; D/141]**.

10. At full capacity,[1] the mine will produce 2,430,000 tonnes per annum of "coking coal" (otherwise known as metallurgical coal) and 350,000 tonnes per annum of "middlings coal" (otherwise known as "industrial coal") **[OR at 4.4-4.5]**. There is a clear distinction between these two types of coal. The Officer's Report[2] ("OR") states (at 6.40) that coking coal:

> …is used in the steel manufacturing process as a reducing agent (through its oxidation), a source of energy to drive the manufacturing process and a source of carbon to incorporate in the steel. The coal therefore needs to meet particular specifications in terms of its quality to be effective and is a distinct product from industrial or thermal coal, which is of a lower quality and has historically been used as fuel.

By contrast, the middlings coal is not expected to be used in the steel-production industry but rather is expected (according to the OR) to be used

[1] After five years of production.
[2] Which preceded the resolution to grant, dated 19 March 2019.

merely "as a replacement fuel source in non-energy generating industries such as cement manufacture" (OR at 6.68) **[D/161]**.

11. KCCH was one of many objectors to the planning application, focussing its objections on environmental grounds. Among other things, KCCH noted the lack of any carbon footprint assessment of the emissions from the mining activities and it doubted the Applicant's allegations of expected CO_2 savings from import substitution of coking coal.[3]

Addendum Report and Decision

12. On 21 June 2019, the Claimant's solicitors wrote to the Council, on behalf of KCCH, highlighting a number of legal flaws and omissions in the planning assessment underlying the Committee's resolution to grant (broadly along the lines of what is now challenged through this claim) **[C/1-6]**.

13. In this letter, KCCH asked that the Council formally re-consider its resolution to grant permission in light of the matters raised, and having regard to two new developments that had occurred since the original resolution to grant had been made:

    (i) That British Steel had gone into compulsory liquidation in May 2019, which fundamentally undermined the "need" case for "coking coal" in the UK market; and,

    (ii) That on 12 June 2019 legislation was laid before Parliament putting a new "Net Zero target" for GHG emissions to be achieved by 2050 into the Climate Change Act 2008.

[3] See for example, the "summary of representations" in Appendix 4 to the OR [**D/303-306**].

14. The Council stated in a holding reply, dated 10 July 2019 **[C/7]**, that it was in the process of providing a substantive response to each of the points raised in the letter and that it would provide the response to KCCH once it was completed. In the event, it failed to do this, and instead decided (over four months after KCCH's letter) to return the application to Committee in order to reconsider the resolution to grant in light of the points raised in KCCH's letter.

15. An "Addendum Report" **[D/382-390]** was produced by officers and published on the Council's website shortly before the Committee's meeting on 31 October 2019. Somewhat surprisingly, at no stage did the Council inform the Claimant that this was the approach it would take and, in fact, it was only by complete chance that the Claimant heard about the meeting (by word of mouth from other interested parties who had, of their own accord, checked the Council's website).

16. At the meeting on 31 October 2019, the Committee reconsidered its previous resolution to grant, in light of the addendum report, and, following the officer's recommendation set out in the Addendum Report **[D/382-383]**, resolved **[D/408]**:

> "that having considered carefully the details of the letter from Leigh Day Solicitors, Committee resolve to ratify their original decision that Planning permission be GRANTED subject to:
>
> (i) the Committee determining the application on the basis of the reasons set out in the Original Committee Report as updated by this Addendum Report;
>
> (ii) the conditions set out in the Original Committee Report;
>
> (iii) the applicant (West Cumbria Mining) and other relevant interest holders first entering into a Section 106 legal agreement with the County Council covering the heads of terms set out in the Original Committee Report and an additional financial contribution of

£68,327 index linked for improvements to the Mirehouse Road / St Bees Road junction and the Mirehouse Road/rail load facility access road junction; and

(iv) The Secretary of State withdrawing the direction preventing the Council from granting planning permission."

17. Point (iv) reflected the fact that the Secretary of State for Housing, Communities and Local Government had previously issued a holding direction, on 1 July 2019 **[D/376]**, under Article 31 of the Town and Country Planning (Development Management Procedure) (England) Order 2015. Immediately following the Council's Decision, on 1 November 2019, the Secretary of State decided not to call in the Application for his own determination **[D/410-411]**.

PLANNING POLICY

NPPF, paragraph 211

18. Paragraph 211 of the National Planning Policy Framework ("NPPF") provides that:

> "Planning permission should not be granted for the extraction of coal unless:
>
> a) the proposal is environmentally acceptable, or can be made so by planning conditions or obligations; or
>
> b) if it is not environmentally acceptable, then it provides national, local or community benefits which clearly outweigh its likely impacts (taking all relevant matters into account, including any residual environmental impacts)."

Evidently, this balancing exercise places environmental harm at the forefront of the assessment, requiring national, local or community benefits to "clearly outweigh" any environmental impacts.

19. In **H J Banks & Co Ltd v SSHCLG** [2018] EWHC 3141 (Admin), the court considered the correct approach to applying paragraph 211's predecessor, paragraph 149 of the 2012 NPPF.[4] The court emphasised that it was a two-staged test, and at the second-stage (i.e. bullet point (b) in paragraph 211), the decision-maker can either (i) reconsider all the harms and benefits (including all those environmental harms and benefits considered at stage 1), or she can (ii) simply consider the residual balance of the adverse environmental effects (i.e. the net harm) against the additional benefits brought in at stage 2 (including the "need" case for the coal, see at [19]) (see at [21]-[24]). Whichever approach was taken, what mattered is that there should be no double counting or discounting (at [24]). In that case, the court concluded that an environmental benefit (relating to biodiversity) had been unlawfully left out of account at stage 2 (at [48]).

20. Here, the OR explained at 6.15 **[D/152-153]**:

> "The Council's approach to the two stage test for paragraph 211 of the NPPF is as follows:
>
> i) at the first stage, to consider whether the proposal is environmentally acceptable, taking into account only environmental effects, both adverse and beneficial or whether the proposal could be made environmentally acceptable by planning conditions or obligations, before the "need" case or "national, local or community" benefits fall for consideration under the second stage if required; and
>
> ii) if the policy is not satisfied at the first stage, to go to the second stage and consider whether the national, local and community benefits clearly outweigh the likely impacts, taking into account all relevant matters, including any residual environmental impacts, by taking into

[4] Paragraph 149 was drafted in almost identical terms to paragraph 211. It stated:
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 justify the grant of planning permission.

account all of the environmental effects, both adverse and beneficial, after mitigation again, which in effect takes account of the extent of the residual environmental impacts, along with any other national, local and community benefits and any other impacts that are not environmental."

21. Accordingly, the OR concluded that the Development did not meet the first stage of the NPPF test because the environmental harm could "clearly outweigh" the environmental benefits, so the Development could not be considered "environmentally acceptable" (OR at 6.511) **[D/225]**. However, applying the stage 2 test, the OR recommended that the national, local and community benefits of the proposed development would "clearly outweigh" the likely adverse impacts, such that the Development would comply with paragraph 211 (OR at 6.517-6.518) **[D/225]**.

Policy DC13, Cumbria Minerals and Waste Local Plan

22. The relevant policy of the Cumbria Minerals and Waste Local Plan, policy DC13, provided for a similar balancing exercise for assessing applications for coal extraction:

"Planning applications for coal extraction will only be granted where:

- the proposal would not have any unacceptable social or environmental impacts; or, if not
- it 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 justify the grant of planning permission.

For underground coal mining, potential impacts to be considered and mitigated for will include the effects of subsidence including: the potential hazard of old mine workings; the treatment and pumping of underground water; monitoring and preventative measures for potential gas emissions;

and the disposal of colliery spoil. Provision of sustainable transport will be encouraged, as will Coal Mine Methane capture and utilisation."

23. The OR highlighted (at 6.9) **[D/151]** that policy DC13 refers to an assessment of whether the proposal has any unacceptable environmental *or social* impacts, whereas paragraph 211 of the NPPF only refers to environmental acceptability. The OR recommended that "reduced weight" should be given to this policy "to the extent of this inconsistency" (OR at 6.9) **[D/151]**.

24. The OR recommended that – for the same reasons given in relation to its assessment under paragraph 211 – the Development would comply with the test in DC13, because (so it reasoned) the national, local or community benefits clearly outweighed the likely impacts of the Development (OR at 6.525-6.526) **[D/226]**. However, as explained below, that analysis does not stand scrutiny.

RELEVANT LEGAL PRINCIPLES

Interpreting an officer's report

25. Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if members of the council followed the officer's recommendation that they did so on the basis of the advice that the officer gave in the report (**Mansell v Tonbridge and Malling BC** [2017] EWCA Civ 1314 at [42(2)]).

Illegality

26. The principle grounds of judicial review are well-known to the court. Lord Millett provides a useful summary in **Begum v Tower Hamlets LBC** [2003] UKHL5 at [99] (see also at [7]):

> "A decision may be quashed if it is based on a finding of fact or inference from the facts which is perverse or irrational; or there was no evidence to support it; or it was made by reference to irrelevant factors or without regard to relevant factors. It is not necessary to identify a specific error of law; if the decision cannot be supported the court will infer that the decision-making authority misunderstood or overlooked relevant evidence or misdirected itself in law…." [underlining added]

27. In a relevant judicial review, the court must, therefore, ask whether there is sufficient evidence to support the decision-maker's findings (see also **Reid v Secretary of State for Scotland** [1999] 2 AC 512 at 541G) and whether inferences that have been drawn from the facts are justified **Higham v University of Plymouth** [2005] EWHC 1492 (Admin) at [32]).

28. Overall, the court needs to ask whether the decision is one that "does not add up", such that there is an error of reasoning which robs the decision of logic (see e.g. **R v Parliamentary Commissioner for Administration, ex parte Balchin (No. 1)** [1998] 1 PLR 1).

29. In **Association of Independent Meat Suppliers v Food Standards Agency** [2019] UKSC 36, the Supreme Court (Hale and Sales, with whom the other members of the Court agreed) recently explained that [8]:

> "The High Court may quash a decision of an OV on any ground which makes the decision unlawful, including if he acts for an improper purpose, fails to apply the correct legal test or if he reaches a decision which is irrational or has no sufficient evidential basis." [underlining added]

30. As explained below, on any view and even with the most cursory judicial scrutiny, the decision here does not meet those requirements.

31. But it is now also well established that the *Wednesbury*[5] standard of review is a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake **Secretary of State for Education and Employment, ex parte Begbie** [2000] 1 WLR 1115 at 1130B-C).

32. And here the court here can and should adopt the approach explained to be appropriate by Ouseley J in **McMorn v Natural England [2015] EWHC 3297 (Admin)** in a case falling (as this one also does) within the Aarhus Convention, namely a "more intensive form of scrutiny" and "close examination".

33. That includes close consideration of the nature of and basis for any evidence (including expert evidence) relied on, and the way in which it was interpreted and applied, as seen in Jay J's decision (not then appealed by the Secretary of State) in **Wealden DC v Secretary of State for Communities and Local Government [2017] EWHC 351 (Admin).** Without trespassing on the substantive merits of the evaluation, that nonetheless involves the court (as part of applying "traditional public law principles" (per Jay J at [111]) considering (per [92]) whether there was a sensible or logical basis for the approach taken by the experts and (per [101]) whether their advice can be supported on logical and empirical grounds. Plainly that includes consideration of whether the advice given actually supports what the decision-maker has drawn from it. As the Court of Appeal in **Baci v Environment Agency [2019] EWCA Civ 1692** noted at [86] without criticising Jay J's approach, what he identified was a "legally flawed planning judgment". "No sufficient evidential basis" (as per the Supreme Court, above) is an aspect of that.

[5] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

Material considerations

34. There is a legal obligation on decision-makers to take into account considerations that a statute expressly or impliedly requires to be taken into account, but there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them will not be lawful, notwithstanding the silence of a statute (**Findlay, Re** [1985] AC 318, per Lord Scarman at 333-334).

35. A decision-maker must take into account a matter which might cause him to reach a different conclusion to that which he would reach if he did not take it into account (**Bolton MBC v SSE** (1990) 61 P&CR 343 at 352-3, per Glidewell LJ, clarifying that "might" meant a real possibility).

Adequacy of reasons

36. The House of Lords in **South Bucks DC and anr v Porter** [2004] UKHL 33 established the correct approach to determining whether a decision's reasoning is adequate, at para 36:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand

how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

GROUNDS OF CHALLENGE

37. Permission in judicial review is a low threshold: "to prevent the time of the Court being wasted by busybodies with misguided or trivial complaints of administrative error …" (see **IRC v National Federation of Self-Employed and Small Businesses** [1982] AC 617 per Lord Diplock at 642).

38. Additionally, where a case, such as this, raises important points of EU law (see ground 2 below), the Court should not shut the door to it unless there is a very clear reason to do so.[6]

Ground 1: Failure to appropriately consider GHG emissions

39. The GHG emissions associated with the Development were obviously highly material to the decision at hand and needed to be fully considered by the Council.

40. Indeed, the Development's impact on climate change, and its contribution to GHG emissions, was central to the planning balance. The Committee needed to fully consider it under both national (paragraph 211 NPPF) and local policy (DC13). The Council failed to do so.

[6] Hence it has been held that "…where there is a case which has a European element, which conceivably could require the parties to consider a reference to Europe, it would be wrong for the High Court to refuse the applicants the opportunity of obtaining a reference, if that is something to which they are entitled, by failing to give them leave to apply for judicial review." (per Woolf LJ in *R v HM Customs and Excise ex p Davies Products (Liverpool) Ltd* (unreported, 25 June 1991)

Relevant factual background

41. To best understand this ground of claim, it is worth first considering both how the OR and the Addendum Report sought to assess GHG emissions, including the differences and discrepancies between the two reports.

42. By way of background, a key claim made by the Applicant had been that the *coking coal*[7] to be extracted could be used by steel manufacturers in the UK and Western Europe and, in so doing, it would act as a substitute for coking coal imported into these jurisdiction from the US, Russia and Australia. The Applicant argued that this would result in CO_2 emissions "savings" associated with the reduced shipping/transportation distances that the coking coal would need to travel to reach the steel manufacturing market (see OR at 6.41-6.43) **[D/156]**. As stated in the Applicant's planning statement (paragraph 4.2.9) **[D/43]**:

> "A key driver of the proposal is the fact that there are no metallurgical coal mines in the UK and that demand from British steel manufacturing is currently met from supplies in America and Australia. The development of a new metallurgical mine in the UK eliminates the requirement for the importation of the volume of metallurgical coal which would be produced by the proposal. The very purpose of the proposals – meeting some of the UK demand for metallurgical coal from within the UK - results in the carbon dioxide (CO2) emissions savings from shipping associated with long distance imports. The anticipated market for the metallurgical coal that would be produced is not just the UK, but also Europe. The same principles still apply, the proposal would still contribute to sustainable development, in part by resulting in much reduced journey distances for metallurgical coal to Europe when travelling from the UK than from America and Australia."

[7] It is important to note that this argument only applies to the coking coal to be extracted by the Development; it does not apply to the middlings coal (see further below).

43. The Applicant then provided an example comparing the (i) CO_2 emissions from transporting coking coal from central Appalachia in the US to Rotterdam with (ii) the CO_2 emissions from coal transported from the proposed development to Rotterdam (planning statement at 4.2.10-4.2.21) **[D/43-44]**. By contrasting shipping emissions from Baltimore to Rotterdam with those from Redcar to Rotterdam, a saving of 5.3 million tonnes of CO_2 is estimated over the 50 years of the permission (4.2.21) **[D/44]**.

44. The environmental impact assessment supporting the Application did not provide much more detail. Paragraph 1.4.1 **[D/95b]** refers to the "significant reduction in carbon emissions" that would arise from obviating the need to transport coal by sea from distant parts of the world (by developing a mine to produce metallurgical coal to serve the UK domestic market). In Chapter 5, "project description", it states at 5.5.9-5.5.10 **[D/103]** that:

> "The environmental impacts arising from the operation of the mine are assessed in detail in the Environmental Impact Assessment submitted with the application. WCM is strongly committed to reducing environmental impacts and the coal it produces in Cumbria will replace an equivalent volume of coal that is used in the UK and Europe which is currently being imported primarily from the east coast of the USA.
>
> WCM has presented calculations of carbon dioxide (CO2) emissions arising from transport of coal from the east coast of the USA to ports in Europe (see Planning Statement). A similar calculation has been presented for the CO2 emissions from transport of coal from the UK to ports in Europe. This shows that, because of the significantly reduced travel distances between the UK and Europe, versus the travel distances between the east coast of the USA and Europe, that at peak mine production there will be an annual 'saving' of 107,430 tonnes of CO2 per year from coal transported from the UK to Europe rather than from the USA to Europe."

45. This calculation was also provided in the planning statement.

46. In light of that contention, the OR, stated at 6.43 **[D/157]**:

> *"*The applicant has attempted to estimate the approximate savings in CO2 emissions as a result of the operation of the mine over a 50 year period in relation to emissions associated with transportation. Any calculation of this nature would necessarily rely on many assumptions, and so at best could only form a very approximate estimation of the potential order of magnitude of the savings. However, the applicant estimates the figure to be 5.3 million tonnes, which I consider weighs in favour of the proposals when assessing its overall impact as considered above. It should be noted that Friends of the Earth and others have raised objections in respect of the arguments made about potential CO2 savings, which I have addressed below. Objectors have also made representations that climatic factors, which require assessment through EIA, lack sufficient assessment."

However, the OR nonetheless recognised in the next paragraph, 6.44, that (emphasis added):

> "Conversely, CO2 emissions will result from the extraction and processing of the coal and their impact upon climate change must be taken into account"

47. Similarly, towards the end of the report where the OR considered and weighed the relevant environmental harms and benefits of the proposal under the first stage of the NPPF paragraph 211 test **[E/1]**, the OR recognised both (i) the alleged GHG savings from import-substitution of coking coal (at 6.502) and (ii) the GHG emissions associated with the extraction and processing of the coal (at 6.503) [**D/223-224**]. It is worth quoting from the OR in full on these points (emphasis added):

> "6.499 Considering the first stage test of paragraphs 211 of the NPPF, the environmental effects, both adverse and beneficial, have been considered in detailed earlier in this report and are taken into account here after mitigation.

6.500 In summary climate change and CO2 emissions are clearly global considerations and are relevant here in respect of the transportation of coking coal, principally due to the fact that current sources for European industry are in other parts of the world. Whilst the majority of the adverse impacts of the proposal would be confined to the Whitehaven area, in respect of assessing the acceptability of the mine in principle it is necessary to consider these much wider impacts rather than constrain the assessment geographically to Whitehaven, Cumbria or even the UK.

6.501 When compared to the current baseline situation, it is clear that since the UK imports almost all coking coal from abroad (principally USA, Russia and Australia) CO2 savings would result from the reduction in transportation distances. There are also potential further CO2 savings in respect of supplying the wider demand within Europe.

6.502 Therefore, whilst the arguments in respect of implications of coking coal extraction and climate change are complicated, it is the case that without wider policy or market changes, the extraction of coking coal in Whitehaven to meet European demand would reduce greenhouse gas emissions from transportation when compared with the current situation of importing products from other parts of the world. I consider this to be an environmental benefit of the scheme which should be afforded moderate weight.

6.503 Conversely, the CO2 emissions from the extraction and processing of the coal and their impact upon climate change should be afforded moderate weight against the proposal."

48. Accordingly, the OR accepted that there would be a negative impact from the GHG emissions arising from the operation of the mine itself, and that this was notwithstanding any alleged "GHG savings" associated with the import-substitution of coking coal from abroad.

49. However, whilst the OR clearly applied "moderate weight" to the CO_2 emissions that would arise from the extraction and processing of the coal, there had been no assessment whatsoever of what the expected level of these emissions would be. Indeed, the Council accepts that there had been

no assessment of GHG emissions arising from the mining operation in its Addendum Report (at paragraph 4.2) **[D/385]**.

50. There was, therefore, an inherent flaw in the Council seeking (through the OR) to attribute "moderate weight" (OR at 6.503) to the CO_2 emissions associated with a development, in circumstances where they are entirely unaware of the overall level of those CO_2 emissions (c.f. the OR's application of "moderate weight" (at 6.502) to the environmental benefit of the alleged GHG savings associated with import-substitution of coking coal, which had at least been crudely estimated (at 5.3 million tonnes of CO_2)).

51. When KCCH's letter (dated 21 June 2019 **[C/1-6]**) highlighted this omission (i.e. the failure to assess the emissions generated by the mining operations themselves) the Council responded through the Addendum Report as follows at 4.2:

> *"*The greenhouse gas emissions of the mining operations were not estimated, because our assessment in the Original Committee Report proceeded on the basis that coal production at Whitehaven would substitute for coal production elsewhere. Therefore, we consider that the greenhouse gas emissions of the mining operations would <u>be broadly carbon neutral</u>."

52. That was an odd claim because at <u>no</u> point in the OR, had there been any claim that the proposal would be "broadly carbon neutral".

53. Rather, the OR had emphasised the alleged import-substitution GHG savings, but such alleged savings in no way supports the claim that the <u>entire proposal</u> would be carbon neutral (particularly as these savings only related to the *coking* coal that was to be produced).

54. The Addendum Report continued (and again it is worth quoting this section in full) (emphasis added):

> *"*4.3 In paragraph 6.47 we said that "the opening of the mine would be unlikely to create additional demand for coking coal as the demand for coking coal is led by the demand for steel. Therefore, it is reasonable to assume that coking coal produced from a mine in the proposed location is very likely to end up as a substitute for coking coal produced further away". Furthermore in paragraph 6.406 we said "since the opening of the new mine is unlikely to have any impact on the overall demand for steel, it is reasonable to assume that the coal extracted would be used primarily as a substitute for (as opposed to in addition to) coal currently extracted in other parts of the world and imported by ship". What we meant by this is that the emissions from mining operations at Whitehaven would most likely be a substitute for those of similar operations elsewhere rather than being a source of additional emissions. Perhaps put more simply, <u>if the coking coal from Whitehaven proved more competitive because it is located closer to steel manufacturing plants of the UK and Europe than the rest of the world, then mining operations elsewhere would be very likely to reduce their output by a similar level of production, leaving CO2 emissions from extraction and processing in balance globally. Furthermore, if the coal from Whitehaven became less financially competitive than alternative sources, then there would be no market for its product, which would mean it would then remain in the ground, leading once again to a carbon neutral situation.</u>
>
> 4.4 In paragraph 6.503 of the Original Committee Report we attributed moderate weight against the proposal from the release of CO2 emissions resulting from the extraction and processing of coal. <u>It would have been clearer if this statement in 6.503 had simply said that greenhouse gas emissions globally as a result of the extraction and processing of coal would be broadly in balance</u>. However, this point was made in other paragraphs of the Original Committee Report (paragraphs 6.47 and 6.406), and additional explanation has been provided above in respect of the thought processes behind the views set out in the Original Committee Report.
>
> 4.5 The applicant has made provision for the capture and reuse of methane when the mining system is sufficiently developed to freely liberate methane and allow it to be effectively captured. This is encouraged by Policy DC13 and a proposed planning condition is included as part of the Original Committee Report that requires a Mine

Gas Capture Management scheme including for methane to be submitted and approved before mineral working takes place and requires the gases to be managed and used beneficially in accordance with the approved scheme.

4.6 In summary, whilst the greenhouse gas emissions of the mining operations are very likely to be carbon neutral, it is still considered that some carbon savings must exist from reduced transportation distances associated with the more locally sourced coking coal at Whitehaven, as noted in paragraphs 6.43 and 6.46 of the Original Committee Report. This supports the original recommendation in the Original Committee Report."

55. However, the statement made at 4.4 of the Addendum Report, simply does not make sense. The Addendum Report has simply attempted to re-write the OR, such that the "moderate weight" attributed to "the CO_2 emissions from the extraction and processing of the coal and their impact upon climate change", should really be understood to mean that "greenhouse gas emissions globally as a result of the extraction and processing of coal would be broadly in balance". But that is not what 6.503 of the OR actually said.

56. Moreover, as the Decision was made "on the basis of the reasons set out in the Original Committee Report as updated by the Addendum Report", the reasonable reader is (at best) left utterly confused as to how the Council has considered the direct GHG emissions arising from the operation of the mine itself.

Flawed approach to assessing GHG emissions

57. The new assumption set out in the Addendum Report, and then given effect to by the Committee in reaching the Decision, namely that the mining operations would be carbon neutral, was anyway fundamentally flawed including for the following reasons:

(i) It relied on the unsubstantiated premise that demand for the coal produced by the mine will remain static, or "capped" at current levels, such that new production at Whitehaven will merely substitute for alternative production elsewhere in the world.[8] This was not supported by <u>any</u> evidence; indeed it directly contradicted the "steel consumption forecasts" graph at 6.411 of the OR **[D/156]** (showing a clear upward trend in global demand for steel). Moreover, the OR clearly stated that it is "not possible to say with any certainty how demand for steel, and therefore, coking coal, will vary during the proposed lifetime of the development" (at 6.413) **[D/211]**. The Committee's assessment of GHG emissions nonetheless depended on a flawed premise that there can never be any increase in demand (at a global level) for the coal produced by the mine at any stage over the lifetime (50 years) of the Development.[9]

(ii) The Committee could not lawfully rely on the alleged GHG "savings" expected to be achieved by import substitution of coking coal in the UK. Whilst the Claimant does not accept the estimated savings figure of 5.3 million tonnes of CO_2 is robust, it is important to note that this relates to a distinct economic argument – namely, that domestic production of coking coal will be preferred to foreign imports in the

[8] See printed minutes of the Committee meeting on 31 October 2019, p. 14 **[D/404]**:
The whole basis of the view now and then was that there was only a finite demand for steel and if capacity was added to the supply of coking coal, it was very likely that coking coal producers further afield would reduce their production whilst they sell off their surplus stocks and that coking coal produced from a mine in the proposed location would end up as a substitute for coking coal produced further away. As such, we consider that worldwide prices would generally be unaffected.

[9] The Defendant argues (see PAP Response at paragraph 3(i)) that it did not rely on the premise that demand for coal produced by the mine would remain static but the "quite different" premise that "demand for coking coal was led by the demand for steel and that the opening of the new mine was unlikely to have any impact on the overall demand for steel". The Claimant does not accept that this is a "quite different" premise, but in any event the same criticism still applies to the assumptions underlying both premises.

UK/other European steel markets. This in no way implies that foreign production of coking coal will likely reduce to an equivalent amount to production at Whitehaven, such that any GHG emissions produced at Whitehaven will be "offset" by reductions in production elsewhere in the world.

(iii) It entirely ignored the substantial amount of "middlings" coal that will be produced and the GHG emissions associated with this production (see Ground 3 below). The conclusion that operations would be "carbon neutral" was based solely on assumptions about the economics of the coking coal market and steel industry. It simply was not possible to reach a conclusion that operations would – overall – be carbon neutral, when the emissions associated with 15% of production had not been factored into that assessment.

(iv) It failed to take into account the fact that the vast majority of coking coal will be exported (only 360,000 tonnes is destined for the UK steel plants at Scunthorpe and Port Talbot; whereas over 2 million tonnes is destined for "onward distribution and / or export"). Nothing in the proposed planning permission restricts these exports to Europe (or Western Europe) and it remains entirely possible for the Applicant to export the coal further afield (particularly as the permission will remain in place for 50 years, over which time the markets for both coking coal and middlings coal will continue to change). If the coal is exported further afield, the alleged GHG savings from import substitution could easily be cancelled out, or outweighed by additional transport emissions associated with exported coal from the mine to non-European destinations.

(v) It failed to take into account the fact that an increase in coal production could lead to depreciation in the worldwide price of coal which could, in turn, lead to an increase in demand for coal. The OR noted that this concern had been raised (at 6.45) **[D/157]** but seemingly dismissed it on the basis of the same flawed approach described in point (i) above (see the OR at 6.46-6.47) **[D/157-158]**.

(vi) More generally, it failed to take into account the fact that <u>any</u> addition to the global stock of fossil fuels will in fact increase the likelihood of GHG emissions. If the Development were to be permitted, a very substantial amount of coal would be added to the global stock over a very significant amount of time (50 years). This will clearly increase GHG emissions overall and such was an obviously material consideration to which the Council needed to have had regard.

58. Overall, the Defendant acted unlawfully by failing lawfully to consider the GHG emissions associated with the Development and/or by relying on bald assertions with no supporting evidence (for example that "if the coking coal from Whitehaven proved more competitive because it is located closer to steel manufacturing plants of the UK and Europe that the rest of the world, then mining operations elsewhere would be very likely to reduce their output by a similar level of production, leaving CO2 emissions from extraction and processing in balance globally" (Addendum Report at 4.3 **[D/385-386]**)).

59. Contrary to what is asserted in the Defendant's PAP response, such assertions are not "immune from challenge by way of judicial review" (PAP response, paragraph 3(vi) **[C/33]**). They require at least <u>some</u> evidence as justification (and proper scrutiny by the court), in order to show that they are lawful planning judgments.

60. The conclusion that the mine's operations would have, on balance, a carbon neutral impact was fundamentally flawed including for the reasons given above, and the Committee's reliance on it was also, therefore, irrational.

61. Further, or in the alternative, the Council failed to give lawful reasons for its conclusions on the level of GHG emissions arising from the mining operations themselves. Reading the OR alongside the AR, it is simply not possible to work out how "moderate weight" could still lawfully be given to the adverse impact of "CO_2 emissions from the extraction and processing of the coal and their impact upon climate change" (OR at 503), if such emissions are assumed to be carbon neutral (AR at 4.2-4.3) **[D/385-386]**. Nor, is it understandable how the Council reached the fundamental conclusion that emissions would be "broadly in balance" without reference to any supporting evidence.[10]

62. The UK Parliament passed a motion to declare a climate emergency on 1 May 2019 and the High Court has recently recognised that the increase in global temperatures is "potentially catastrophic" **Spurrier and others *v SST*** [2019] EWHC 1070 (Admin) at [559]). In this context, it was imperative on the Committee to scrutinise any potential for an increase in GHG impacts arising from increased coal production at Whitehaven. And then, as above, for the court properly to scrutinise the evidential and logical basis for that decision.

63. The Defendant asserts that these arguments simply concern "matters of judgment" (Defendant's PAP Response, paragraph 2 **[C/31]**) as if that insulated them from scrutiny. But, as above, that is not the legal position.

[10] The Applicant only provided rough estimates for GHG savings from import substitution, associated with reduced transportation emissions. Nowhere in the EIA or planning statement did the Applicant provide any economic analysis to suggest that coal production at Whitehaven would only act as a substitute for production elsewhere in the world.

64. And so, for example, the Council could not logically or lawfully go from the conclusion that there would be some GHG savings associated with reduced transportation distances from any import-substitution in the UK (and possibly European)[11] to the irrational conclusion that the *entire* operations of the mine would be "broadly carbon neutral". That was not a conclusion open to it on the evidence for the reasons given above.

Ground 2: failure to comply with the Town and Country Planning (Environmental Impact Assessment) Regulations 2011

65. The Development is agreed to be EIA development and, therefore, any grant of permission would need to comply with the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("2011 EIA Regs). As such, the Council could not resolve to grant planning permission for the Development unless they have first taken the necessary environmental information into consideration (2011 EIA Regs, reg 3(4)).

66. In terms of what that environmental information needed to include, regulation 2 defines "environmental information" by reference *inter alia* to the "environmental statement" which in turn means a statement (emphasis added):

> (a) that includes such of the information referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but
>
> (b) that includes at least the information referred to in Part 2 of Schedule 4; [underlining added]

[11] For the avoidance of doubt, the Claimant does not accept that any such "GHG savings" from import-substitution have been robustly justified.

67. Paragraph 1 of Part 1 of Schedule 4 then provides for a:

> "Description of the development, including in particular—
> …
> (c) an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc) resulting from the operation of the proposed development. [underlining added]

68. Furthermore, paragraph 3 of Part 1 of Schedule 4 provides:

> "A description of the aspects of the environment likely to be significantly affected by the development, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors." [underlining added]

69. Finally, paragraph 4 provides:

> "A description of the likely significant effects of the development on the environment, which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the development, resulting from—
>
> (a) the existence of the development;
>
> (b) the use of natural resources;
>
> (c) the emission of pollutants, the creation of nuisances and the elimination of waste, and the description by the applicant or appellant of the forecasting methods used to assess the effects on the environment."

70. Here, an assessment of GHG emissions associated with the Development's operation was clearly "reasonably required" in order to assess its environmental impacts.

71. However, as has been noted above, the Applicant's environmental statement simply failed in this regard. There was no assessment of the GHG emissions

from the operation of the Development itself (contrast with **Preston New Road Action Group v SSCLG** [2018] EWCA Civ 9 at [71]).

72. The EIA Regs have more recently been replaced by the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("2017 Regs"). The 2017 Regs require (see reg 4(2)(c)) that the EIA must "identify, describe and assess in an appropriate manner, in light of each individual case, the direct and indirect significant effects of the proposed development on [inter alia]… air and climate". Sch 4, para 4 specifies that in considering "climate" under reg 4(2)(c), this includes considering GHG emissions; similarly, sch 4, para 5(f) specifies that the environmental statement should include a description of the likely significant effects of the development on the environment resulting from "the impact of the project on climate (for example the nature and magnitude of greenhouse gas emissions)…".

73. Particularly in light of this recent clarification, but in any event upon a plain reading of the text, where the 2011 EIA Regs refer to "climatic factors" (see paragraph 3, Part 1, Schedule 4) this must encompass an assessment of GHG emissions arising from the Development.

74. At the very least, during the EIA process there should have been a calculation of the likely level of GHG emissions resulting from the extraction and processing of the coal (both coking coal and middlings coal) at the site of the Development. For the reasons set out under Ground 1, it could not lawfully be simply assumed that any GHG emissions arising from the mining operations would be cancelled out by the reduction of an equivalent level of mining production elsewhere in the world. Particularly as the Council was required to apply a precautionary approach in its assessment of likely environmental effects under the EIA Directive.

75. The Decision was based on environmental information that did not comply with the EIA Regulations' basic requirements. There has been no assessment of GHG emissions that will directly arise from the Development's operation, despite the clear need to do so under the EIA regime. To proceed to make the Decision without this basic information was Wednesbury unreasonable.

Ground 3: Failure to consider the need for, and GHG impacts of, middlings coal

76. As above, the production of middlings coal will constitute up to 15% of total output. This is roughly 364,000 tonnes per annum and is a significant amount of production in itself. It correlates, for example, to the 360,000 tonnes per annum of coking coal that will be supplied to the UK steel plants (see OR at 6.412 **[D/211]**).

77. Notably, under the heading "National, local and community benefits", the OR considered whether there was a "likely need for coking coal" (OR at 6.404-6.414 **[D/211]**). This assessment of the "need" for coking coal then factored into the planning balance under the NPPF paragraph 211 and policy DC13 tests. In particular, the OR concluded at 6.514 **[D/225]**:

> "…I consider that there is a likely need for metallurgical coal for the steel industry and that this has the potential to result in national benefits which is of considerable weight."

78. However, in stark contrast to the OR's assessment of the need for the coking/metallurgical coal that would be produced from the mine, the OR fails entirely to consider whether there is any "need" for the middlings coal – both in terms of the level of demand for it and where in the world that demand will arise.

79. The OR simply stated, at 6.70 that:

> "…since government policy is to move away from coal as an energy source, the likely market for this product will be industrial processes such as cement manufacture. Since the middlings coal would otherwise be disposed of with the waste rock material, I consider that if markets are available for this product for non-energy uses, this is potentially a beneficial use of a product that would otherwise be disposed of as waste."

80. There was no further (let alone lawful) assessment of whether such markets are available, nor where they might be located (whether in the UK, Europe or elsewhere in the world). The Addendum Report provided no further detail on the "need" case – simply noting that the coal may be used in cement manufacture but the "exact markets would be likely to change over time" (at 4.9 and 4.11) **[D/386-387]**.

81. Moreover, in terms of GHG emissions, there was no consideration (let alone any lawful consideration) of the likelihood of import substitution for middlings coal, or the expected CO_2 emissions associated with transporting it to its end destination.

82. The Committee completely failed to consider (let alone lawfully) whether – if planning permission were to be refused – any "need" for middlings coal would be likely to be met by imported industrial coal or lower carbon-emitting sources.

83. In the Addendum Report, the Council accepted that the use of middlings coal will "undoubtedly" result in GHG emissions (Addendum Report at 4.11 **[D/387]**), noting that the "industrial uses for the middlings coal would have impacts proportionate to the alternative fuel source it was substituting for, and in some cases this might be carbon neutral, but in other cases potentially

not" (Addendum Report at 4.13 **[D/387]**). But that stated, rather than dealing with, the essence of the problem.

84. The Addendum Report then asserted (wrongly and without any explanation) that it would be too difficult – "not a reasonable requirement to expect" – to assess these emissions (Addendum Report at 4.12 **[D/387]**). Not only is it entirely reasonable, it is in fact necessary, to carry out this assessment to ensure proper regard is had to the likely carbon footprint of the Development.

85. It has been accepted (as indeed it must) in previous litigation concerning coal extraction, that GHG emissions associated with the subsequent use of that coal, are a material planning consideration, notwithstanding that use would take place off-site and would be subject to other controls (**H J Banks & Co Ltd v SSHCLG** [2018] EWHC 3141 (Admin) at [69]). The Committee needed to be informed about, and have had full regard to, the level of GHG emissions expected from the use of middlings coal.

86. Notably, the Defendant has latterly tried to argue (see PAP Response at 11 **[C/35]**) that the "GHG emissions connected with the middlings coal (although not specifically estimated) were not ignored but were…weighed into the planning balance". To support this argument, the Defendant highlights, in particular, a solo phrase in paragraph 6.71 of the OR (shown in underline) (see PAP Response at 11 **[C/35]**; Addendum Report at 4.14 **[D/387]**):

> "Since the middlings coal is extracted as a by-product of the main mining operations, I do not consider its use a substitute for other products for non- energy generation uses in processes such as cement manufacture would result in unnecessary environmental or social impacts. <u>There are valid arguments made in respect of climate change</u>, but I consider these issues could be better managed by applying regulatory controls at the point of use. The planning system has no direct control over the eventual uses to which this product is put, but it would be expected they are used in accordance

with government policies and regulations which are requiring a shift away from the use of coal as an energy source. If there was not demand for the middlings coal, it would be disposed of within the mine in the same way as the rock."

87. Yet, upon any fair reading of the OR, it is readily apparent that this phrase simply cannot support the Defendant's claim (particularly in light of the phrase immediately following it). The GHG emissions associated with the middlings coal were not properly weighed in the planning balance. Nor could they have been, as they had not even been estimated.

88. Overall, the same test in paragraph 211 of the NPPF (and Policy DC13) should have been applied to the extraction of the middlings coal, as it had been to the coking coal. The test applies to the extraction of <u>any</u> coal, yet the need for the middlings coal, and the GHG emissions associated with its extraction and subsequent use, were left entirely out of account from this balancing exercise.

89. As above, the amount of middlings coal to be produced by this Development is significant. Regardless of whether the production of middlings coal is a "by-product" of the production of coking-coal, the Decision has resolved to grant planning permission including for the extraction and production of 364,000 tonnes of middlings coal per year, every year, for 50 years. That needed to be assessed fully under the relevant policy tests, which include an important presumption *against* the extraction of <u>any</u> coal.

90. The Committee unlawfully failed to have regard to the carbon footprint of the middlings coal and its potential GHG emissions impacts. This failing fundamentally undermined any assessment of the Development's overall impact on climate change.

91. Further, and in the alternative, it was irrational for the Committee to consider only the potential carbon footprint of the coking coal[12] and not all coal to be produced.

Ground 4: Failure to give lawful reasons for the imposition of only a 15% restriction (and no lower) on the production of middlings coal

92. Further, and in the alternative, the Council failed to give lawful reasons for why a 15% restriction on the production of middlings coal was appropriate. Nor has it shown why such a condition was necessary, relevant to planning, relevant to the development to be permitted or reasonable in all other respects. The Claimant and other interested parties are wholly unaware why 15% was considered to be an appropriate limit for the production level of middlings coal.

93. There is a clear lack of reasoning, let alone legally adequate reasoning, to explain how (if at all) the Council considered the GHG emissions associated with the production and use of middlings coal or, alternatively, how this factored into its decision to impose a condition restricting middlings coal to 15% of production.

94. The Defendant has since argued that the restriction of production of middlings coal to 15% of total output was "chosen to match what had been proposed and to reflect the scope of what had been environmentally assessed" (PAP Response at 12 **[C/35]**). However, for the reasons given above there had been no environmental assessment of the GHG emissions associated with this level of production of middlings coal. So that assertion stands no scrutiny.

[12] The Claimant maintains that there were flaws in its assessment of the carbon footprint of the coking coal as well (as addressed elsewhere in this statement of facts and grounds).

95. Bearing in mind the significant level of middlings coal production allowed by this condition and the lack of information or evidence on the environmental impacts (in terms of GHG emissions) of that production, this imposition of this condition was unreasonable (**TWS v Manchester City Council** [2013] EWHC 55 (Admin) at [78]).

Ground 5: Failure lawfully to consider the Net Zero target

96. On 27 June 2019 the new Net Zero target came into effect by means of the Climate Change Act 2008 (2050 Target Amendment) Order 2019. As a result, section 1 of the Climate Change Act 2008 ("CCA") now provides:

> (1) It is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline.
>
> (2) "The 1990 baseline" means the aggregate amount of—
>
> (a) net UK emissions of carbon dioxide for that year, and
>
> (b) net UK emissions of each of the other targeted greenhouse gases for the year that is the base year for that gas.

97. The Secretary of State must, therefore, now ensure that the net UK carbon account for the year 2050 is at least 100% lower than the 1990 baseline. Previously, the target had been 80%. The "net UK carbon account" is defined by s27(1) CCA by reference to "net UK emissions of targeted greenhouse gases" and carbon units credited/debited to the net UK carbon account.

98. Therefore, for purposes of assessing the Net Zero target, only UK emissions – defined as relating to GHG emissions "from sources in the United Kingdom" (s29(1) CCA) - are relevant.

99. It is not lawful, in assessing progress towards meeting Net Zero to factor in whether GHG emissions produced in the UK are likely to result in GHG emission reductions elsewhere in the world.

100. Moreover, the Net Zero target signals a step-change in efforts to address climate change. As of the year 2050, any GHG emissions in the UK will need to be off-set or mitigated to ensure no net emissions. As a result, when considering whether to grant permission for development that will emit GHGs post-2050, the decision-maker must have due regard to the level of GHG emissions involved and the fact that these will need to be offset in their entirety.

101. The Development here will operate for 50 years. If the permission were to be implemented next year, this will mean emitting activity in the UK will have been granted permission for 20 years post-2050. The impacts of this on the UK's ability to achieve the Net Zero target needed to be lawfully considered by the Committee (see **Stephenson v SSHCLG** [2019] EWHC 519 (Admin) at [71] and [73]).

102. During the Committee meeting on 31 October 2019, the Council officer reported that the Net Zero target is "obviously…an acceleration of the target" but it was "not so significant in our eyes as to warrant a different recommendation". The Council, and the Committee, have failed to appreciate at least two key aspects of the new Net Zero target:

(i) It is not merely an "acceleration" of the previous target because it requires there to now be no net GHG emissions post 2050 (cf. the previous 80% target which had allowed for net emission of up to 20% of the 1990 baseline). Therefore, any decision to grant permission for development that will continue after 2050 must have regard to the

level of emissions that the development will contribute in the UK and the offsetting measures that will then be required to maintain the Net Zero target in light of those emissions – that requires a completely different approach; and,

(ii) It is calculated solely by reference to UK-based emissions (and carbon unit trading). The Committee needed, therefore, to apply its mind to any/all GHG emissions that will be produced in the UK and it was not acceptable, for those purposes, to rely on an argument that such GHG emissions will substitute for emissions produced elsewhere in the world (they are not part of the UK domestic and international obligations).[13] As the Committee has failed to consider the GHG emissions expected from the Development's operation (see Ground 1 above), the Committee could not have had (and did not have) lawful due regard to the Net Zero target when assessing the Development.

103. The Committee was simply unable lawfully to have regard to these matters because the Council had had before it no assessment of the GHG emissions associated with the operation of the mine. Consequently, the Committee failed to have regard to an obviously material consideration and erred in law.

AARHUS CONVENTION CLAIM

104. This is agreed to be an Aarhus Convention claim for purposes of CPR 45.41 and 45.43.

[13] For the avoidance of doubt, KCCH does not accept that any such substitution-effect argument applies to the GHG emissions associated with this Development.

105. Although the Claimant brings this claim on behalf of an unincorporated and informal association of campaigners that does not change the CPR position which is that she is an individual claimant and so the default costs cap of £5,000 applies to her Claimant's liability.

CONCLUSION

106. For the reasons given above, the Decision is unlawful and must be quashed. The above grounds are at least arguable and the Claimant respectfully requests permission from the Court to bring a claim for judicial review on this basis.

DAVID WOLFE QC

MERROW GOLDEN

11 DECEMBER 2019

MATRIX CHAMBERS
GRIFFIN BUILDING
GRAYS INN ROAD, HOLBORN
LONDON, WC1R 5LN

FRANCIS TAYLOR BUILDING
INNER TEMPLE, LONDON
EC4Y 7BY