RMC Aggregates

DB.JD020703

2 July 2003

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The National Park Officer
Peak District National Park Authority
Aldern House
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Derbyshire
DE45 1AE

FAO Mr D Bent

Dear Sir

Longstone Edge – Environment Act Submission

I refer to your letters dated 5 March 2003 and 28 May 2003.

I note that you have requested copies of the formal assignment documentation between RMC and Bleaklow Industries. As we have previously explained, no assignment of the application has taken place therefore there is no documentation.

The current situation is that Bleaklow and their advisors are pursuing the application acting as agent for RMC, a simple arrangement established as a result of other legal obligations.

The application is therefore moving forward in the RMC name with this Company's authority although RMC have declared that it will not operate the quarry if successful and it no longer has any legal interest in the site.

I hope this clarifies the situation, further questions related to the application should therefore be directed at Bleaklow.

Yours faithfully,

Jo Davies
Senior Planning Officer

PEAK AUTHORITY
3 JUL 2003
OFFICER
ACKNOWLEDGEMENT
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GLEBE MINES LIMITED

679

25 July 2003

Mr D Bent
Minerals Planning Officer
The Peak National Park Authority
Aldern House
Baslow Road
Bakewell
Derbyshire
DE45 1AE

Dear David

Re: Environmental Act Review Scheme for Longstone Edge

As discussed in previous telephone conversations should any attempt be made by any party to register the above scheme with the Peak Park, Glebe Mines would formally object. Glebe own the vein mineral rights in the Peak Pasture area of the scheme and also the vein mineral and surface ownership in the Deep Rake, Bow Rake and High Rake areas,

When the scheme was originally conceived by RMC a lease option was drawn up on the aforementioned rights between RMC and Laporte. This option was surrendered to Glebe on 13th November 2002 and in any case expired on 19th April 2003.

We would be grateful if any attempt is made to register the scheme that you would not do so but point out to the registering party the relevant land and mineral ownership details and our objection.

Thanking you

Yours sincerely

J W Parkhouse
General Manager / Director

PEAK DIST[illegible] 3ITY
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Company Registration No. 3846248

CO/4270/2007

Neutral Citation Number: [2008] EWHC 606 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 7 March 2008

B e f o r e:

MR JUSTICE SULLIVAN
Between:
THE QUEEN ON THE APPLICATION OF BLEAKLOW INDUSTRIES LTD
Appellant

v

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
First Respondent

PEAK DISTRICT NATIONAL PARK AUTHORITY
Second Respondent

MMC MINERAL PROCESSING LTD
Interested Party

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190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

Mr Martin Kingston QC and **Mr Timothy Jones** (instructed by Bremners of Liverpool) appeared on behalf of the Claimant
Mr J Maurici (instructed by Treasury Solicitor) appeared on behalf of the First Respondent
Mr A Evans instructed by and for the Second Respondent
Mr Craig Howell-Williams appeared on behalf of the Interested Party

J U D G M E N T
(As Approved by the Court)

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1. MR JUSTICE SULLIVAN:

Introduction

2. This is an appeal under Section 289 of the Town & Country Planning Act 1990 ("the Act") against a decision of an inspector appointed by the first respondent dismissing the appellant and the interested party's appeals on grounds (b) and (c) in Section 174 (2) of the Act against an enforcement notice issued by the second respondent. The inspector rejected the appeals on grounds (b) and (c) but allowed the appeals on ground (f) in Section 174 (2) and upheld the notice as varied in the terms set out in his decision letter. No issue arises in respect of his decision to allow the appeals on ground (f).

3. The decision letter is dated 26 April 2007. It followed an inquiry which sat for 10 days between 13 and 28 February 2007 and a site visit on 26 February 2007.

4. The enforcement notice was issued on 5 May 2006 in respect of land at Backdale, Hassop, Longstone Edge, Derbyshire ("the site"). The breach of planning control alleged in the enforcement notice was "the winning and working of limestone other than in accordance with Planning Permission 1898/9/69". The requirements of the notice were in two parts. Over most of the site shaded grey on the plan attached to the notice, all winning and working of limestone was to cease. In respect of a small part of the site not shaded grey, the requirement was to cease the winning and working of limestone other than the working of such limestone as is won in the course of working fluorspar and barytes.

5. When allowing the appeals against the enforcement notice on ground (f) the Inspector deleted these two requirements and substituted the following requirement -

> "Cease the following mining operations on the land edged red on the attached plan:
>
> the winning and working of limestone other than the working of such limestone as is won in the course of working fluorspar and barytes."

Subject to that variation, he upheld the notice.

6. Permission 1898/9/69 ("the permission") was granted by the Minister of Housing and Local Government in a decision letter dated 24 April 1952. Having recited the background to the application for planning permission, the operative part of the decision letter is in these terms:

> "In the exercise, therefore, of his powers under the Town & Country Planning Act 1947 the Minister has decided to grant permission for the winning and working of fluorspar and barytes and for the working of lead and any other minerals which are won in the course of working these minerals, by turning over old spoil dumps, by open-cast working and by underground mining within the area shown outlined in black, excluding the area cross-hatched, on the attached plan and the tipping of waste

materials on the areas shown hatched vertically on the plan, subject to the following conditions:

[conditions 1 and 2 relate to the disposal of waste material from rakes outside the appeal site].

3. Waste material other than that referred to in conditions (1) and (2) and other than that tipped in the areas shown hatched vertically on the plan shall be disposed of in the hollows left by old workings, in agreement with the Local Planning Authority, or, in the event of disagreement, as shall be determined by the Minister;

[Paragraphs 4, 5 and 6 are not relevant]"

7. The permission covers a large area within the Peak District National Park, including the site which is some 12 hectares in extent, and land to the west, east and north, totalling some 155 hectares.

8. The appellant owns the freehold of the site and most of the area covered by the permission, including in particular land known as Peak Pasture immediately to the north of the site. The appellant owns the vein mineral rights in the site, but not in substantial parts of the other areas covered by the permission, including Peak Pasture. Those rights are owned by Glebe Mines Ltd ("Glebe"), the successor to the Laporte Ltd. As its name implies, the interested party is a minerals processing company. On 4 July 2003 it was granted a lease of the site and Peak Pasture by the appellant. The interested party's operations on the site were the subject of the enforcement notice.

The Permission

9. In paragraph 4.4 of the decision letter the inspector noted that there was no dispute that limestone was a mineral and was therefore included within the words "any other minerals" in the permission. As indicated by the terms of the enforcement notice, it was the working of limestone that was in issue. In a nutshell, the appellant and the interested party contended that limestone was being won and worked at the site for the purpose of winning and working fluorspar in accordance with the permission while the second respondent contended that the limestone was being won and worked for its own sake, not in accordance with the permission.

10. The references in the permission to lead and to barytes were not relevant for the purposes of the appeal before the Inspector. Like the Inspector, I have omitted any further reference to these minerals in the interests of brevity.

11. It was agreed at the inquiry that the permission had two limbs: the first granted permission for "the winning and working of fluorspar", the second "for the working of [limestone] which [is] won in the course of working [fluorspar] by turning over old spoil dumps, by open-cast working and by underground mining ..... "

12. The meaning of the words "winning" and "working" was considered by the Court of Appeal in English Clays Lovering Pochin Ltd v Plymouth Corporation [1974] 27 P & CR 447. The issue in that case was whether a plant processing china clay slurry was permitted development under the Town & Country Planning (General Development) Order 1963. Giving the judgment of the court, Lord Justice Russell said at page 450 to 451:

> "It is perhaps not necessary to be dogmatic on the point in this case: but our present view is that to 'win' a mineral is to make it available or accessible to be removed from the land, and to 'work' a mineral is (at least initially) to remove it from its position in the land [.] In the present case the china clay is 'won' when the overburden is taken away, and 'worked' (at least initially) when the water jets remove the china clay together with its mechanically associated and other substances from their position in the earth or land to a situation of suspension in water."

13. Although these definitions were obiter, they accord with the distinction drawn between "winning" and "working", insofar as is possible to draw a clear distinction between the two activities, in the earlier authorities.

14. In Lewis v Fothergill [1869] 5 Ch D 103, Lord Hatherly LC said at page 111:

> "There is also a dispute about what is the meaning of the word 'winning'. I conceive that the coal is won when it is put in a state in which continuous working can go forward in the ordinary way. It is not when you first dig down to the seam of coal and come to water immediately, but when you have got the coal in such a state that you can go on working it, and make provision, if provision is necessary, for sufficient drainage ....."

This definition of "winning" was approved by the Court of Appeal in Lord Rokeby v Elliott [1879] 13 Ch D 277. Lord Justice James, giving the judgment of the court, said at page 279:

> "We think the definitions of winning given in the case of Lewis v Fothergill are accurate, as accurate as definitions can be of a term like winning, which probably is itself as intelligible and plain as any definition can be.
>
> A coal-field is won when full practicable available access is given to the coal hewers so that they may enter the practical work of getting the coal."

15. At the inquiry the parties were agreed that in construing the permission one could have regard only to the terms of the operative paragraph in the decision letter and the conditions (see above), and that it was not permissible to have regard to the application for planning permission or to any other extrinsic evidence such as contemporaneous correspondence: see R v Ashford Borough Council ex p Shepway District Council [1998] EWHC Admin 488 paragraph 27 per Mr Justice Keene (as he then was).

16. However, at the hearing before me the parties were agreed that the words in the operative part of the decision letter should not be construed in the abstract. They had to

SMITH BERNAL WORDWAVE

be construed in context. In the present case the context for the grant of this planning permission included the known geological characteristics of fluorspar, since that is the mineral which was to be won and worked. The most convenient summary of those characteristics is contained in the Fluorspar Mineral Planning Fact Sheet prepared by the British Geological Survey ("BGS") and published by the Office of the Deputy Prime Minister in January 2006:

> "Fluorspar resources are restricted to two areas in England: the Southern and Northern Pennines orefields. Fluorspar occurs mainly as vein infillings in faults that cut limestones of Carboniferous age. Intense alteration of limestone, and occasionally other vein wall rocks, has led to the formation of important replacement deposits adjacent to several major veins.
>
> Fluorspar always occurs in association with other minerals, the most important commercially being barytes and galena. The proportion present can be highly variable depending on location within the orefield.
>
> .....
>
> In the Peak District, mineralisation is largely confined to the eastern half of the limestone outcrop. The [fluorspar barytes galena] mineralisation occurs in major east-west veins (rakes) and stratabound replacement deposits (flats) together with some cave infill deposits (pipes). The richest mineralisation is concentrated in the uppermost limestones (Monsal Dale Limestones) beneath the overlying cover of mudstones (Millstone Grit), which acted as a cap rock to the mineralising fluids.
>
> .....
>
> Fluorspar-bearing veins typically have varying widths and exhibit variable grades in mineralogy. This means that it is more difficult to assess the quantity of fluorspar that can be recovered economically than with many other economic mineral deposits."

It is not suggested that these characteristics would not have been known in 1952 when the permission was granted.

17. The mining engineers instructed to give evidence at the inquiry on behalf of the appellant and the second respondent, Mr Walton and Dr Cobb, and the engineer employed by the interested party to manage the operations on site, Mr Taylor, had agreed a statement of common ground. This described the geological make up of the area:

> "The geological make-up of the area is largely in line with that shown on the British Geological Survey ..... of the area. The site is located on the southern limb of the Longstone anticline and comprises the lower Carboniferous Monsal Dale Limestones overlain by the Eyam Limestones and the Namurian Shales .....

> The principal vein in the area is the Deep Rake. There are five other named rakes in the area, these being the Gospel Rake, Camm Rake, Catlow Rake and Dog Rake (in west to east order), with Red Rake to the north of Peak Pasture. The Deep Rake, Camm Rake offshoot and Catlow Rake are shown by the BGS as extending into the Backdale area. Also in the Backdale area is a vein shown on the geological survey map, which has been named Southern Vein and also another vein which has been called the Cross Vein which does not appear on the map .....
>
> The veins are variable in content and nature. They vary one to another and there is also variation within the veins. Variation within veins can be in any direction. The veins within the Backdale area comprise fluorspar, calcite and lead, barytes being rare. The Namurian Shale will generally act as a cap to the mineralisation within the limestones, and veins are known to generally stop at the shales, although there are recorded instances of the veins crossing the shale/limestone boundary in other areas."

The Inspector's interpretation of the Planning Permission

18. Having rejected what he described as the second respondent's "highly prescriptive" interpretation of the permission (see below), the Inspector considered the appellant's and the interested party's contention that it was permissible to extract limestone provided there was "an operational nexus with the winning and working of fluorspar" (4.14) (references in parenthesis are to paragraphs in the decision letter). The Inspector rejected that interpretation of the permission, saying in 4.15 to 4.19 of the decision letter -

> "4.15 This interpretation, too, is in my view wrong. It closely resembles a permission for the winning and working of fluorspar, barytes and limestone, which is not what is allowed. Furthermore it fails to give rational and credible meaning to the omission from the permission of the wining of limestone and the restraint on its working to that which is won in the course of working fluorspar. The phrase 'in the course of' means not just that there is a connection between the activities. It also means that one activity is predominant or primary. How that primary role is demonstrated in a particular case depends upon the context but as the relative scale changes the point occurs where the phrase 'in the course of' could not correctly be applied. Although still connected, the two activities would have become equally weighted or their relative weights transposed. Since this permission is defining an operation to work minerals, it is the relative scale of the minerals worked which is determined by the terms of the permission. Value may be a guide to understanding the actions of an operator but it is not the fundamental characteristic of the permission.
>
> 4.16 The concept of primary operations, that is the winning and working of fluorspar, and secondary operations, the working of limestone, is not

only established by the phrase 'in the course of'. it also explains and is reinforced by the exclusion from the permission of the winning of limestone (or any other mineral other than fluorspar and barytes). The permission was not intended to allow winning other minerals and, by excluding this, the restriction to minerals won in the course of working was given greater force. That is significant because it confirms that the wording of the permission was deliberate and that the language used is consistent, not contradictory or uncertain.

4.17 The operative terms of the permission must be read both as a whole and with careful attention to individual words and phrases. I have already set out what the permission expressly permits and does not expressly permit in paragraph 4.12. A number of points follow from this. The operations are to be directed at the extraction of fluorspar and barytes. The working (and export) of limestone can occur where this is won in the course of working fluorspar and barytes. There is not express permission to work limestone in the course of winning fluorspar and barytes. To accord with the permission read as I have described the principal minerals removed from the land would be fluorspar and barytes. If the amount of limestone won and worked exceeds that of fluorspar and barytes, this would indicate strongly that the operations are not consistent with the terms of the permission. Since there is no specific formula within the permission, it is appropriate to adopt an approach in this respect which favours the operator. Approached in this way, a ratio of limestone to fluorspar and barytes ore exceeding 2:1 by tonnage would clearly not accord with the permission. the measured tonnage of fluorspar ore would include any mechanically associated and intermingled limestone only separated during subsequent processing of the ore, which the BGS Factsheet implies could be about one-third of the total. Operations beyond this limit would constitute the (winning and) working of fluorspar, barytes and limestone and not what is permitted.

4.18 BIL argue that economics, practicality and safety are all good reasons why the extraction of limestone could be 'in the course of working fluorspar'. I reject the direct relevance of economics because the permission is defining an operation and should be interpreted accordingly. I am satisfied that the terms of the permission are directed with this intention, as would have been wholly appropriate. One reason is that values and costs will change so that this could not sensibly be the criterion, nor does the text suggest otherwise. The thrust of this argument is that substantial amounts of limestone may be worked if this is required for reasons of safety and/or practicality. I do not agree that this is what the permission described and different terms would have been used had this been intended. The appellants have suggested that it may be necessary to 'move a mountain' in the course of extracting emeralds, that some of this material may be sold, but that this remains an emerald mine. However whether this should be described as an emerald mine would depend upon the facts of the case, including the quantity of material sold.

I am not convinced that there is a useful analogy to this planning permission and the development which has taken place, which must be understood in terms of the principles of planning law, other than to show that the facts of each particular case need to be examined.

4.19 BIL consider that the permission would allow ancillary or related activities or what might be *de minimis*. This is raised principally to support the argument that the NPA's restricted view of what is allowed excludes these possibilities and is therefore flawed. A related argument is that 'inherent' in a permission for winning and working vein minerals is permission to construct access ways or ramps, for the removal of overburden and other material preventing or impeding access to the vein mineral, and for works in accordance with sensible health and safety practice, such as benching. In my view there is no general concept of ancillary works making permanent changes to the land allied to a lawful operation. the ancillary concept arise in relation to uses of land and is not readily transferred to operations. Whether works are lawful may depend upon whether they are permanent ore merely interim stages in the implementation of the permitted development. It is a matter of fact and degree whether particular works are within the description of what is permitted. Generally this concept is of little assistance in interpreting the permission and was not argued to support the appeal on grounds (b) or (c)."

19. In paragraph 4.21 of the decision letter the Inspector summarised his interpretation of the planning permission:

> "The operative text of the planning permission defines the permitted operations. These include the winning and working of fluorspar and barytes. The working of limestone is allowed, but not its winning, and only in the course of working fluorspar and barytes. Working of limestone will necessarily be the subordinate or secondary operation and this will be reflected in the proportions of the minerals worked. If the ratio of limestone to fluorspar and barytes is less than 2:1, as described in paragraph 4.17, this is likely to be consistent with the permission whereas above that level the operations will not be within its terms."

20. *This ratio-based approach was not advanced by any of the principal parties at the inquiry. It had been raised in the pre-inquiry written submission by a third party, Mr Tippett, who was not one of the Rule 6 parties. As part of his written submissions he had said:*

> "Whilst it is true that the permission does not specify any minimum ratio of fluorspar ore (or barytes) to limestone, the phrase 'in the course of' implies that a ratio exists. reductio ad absudum, if production schedules show that for every tonne of limestone sold a tonne of fluorspar or barytes is worked, then the limestone is clearly being recovered 'in the course of working fluorspar or barytes' and complies with the permission. At the

other end of the spectrum, if a million tonnes of limestone is sold but at the same time only one tonne of fluorspar or barytes is worked, then this operation is more accurately described as 'working of fluorspar or barytes which is won in the course of working limestone', and is clearly not in compliance with the permission. At what point in the spectrum does the description flip from 'limestone in the course of fluorspar' (compliant) to 'fluorspar in the course of limestone' (non-compliant).

The ratio of limestone to fluorspar ore extracted is termed the stripping ratio. It makes sense to look at stripping ratios found to be economic in other fluorspar operations in the locality. These ratios are determined on the assumption that the limestone stripped will be returned to the void and not sold. The maximum ratio at any one site is determined by balancing the cost of rock moving against the value of fluorspar ore extracted. Backdale differs in that the limestone from there may be sold, so that from an economic point of view an infinitely large ratio would be beneficial to the operator. However the 'in course of' clause in the permission allows only limestone dislodged in getting at the fluorspar ore to be sold. In effect Backdale was being operated as if it were a traditional fluorspar operation, with the difference that the limestone may be sold instead of being returned to the void. Therefore traditional fluorspar maximum stripping ratios should apply.

Experience at Glebe Mines Ltd, the principal UK fluorspar mining company, is set out in document TIP 1. This sets out an absolute maximum ratio of 10:1, but suggests that a lesser ratio might be more appropriate.

To remain compliant with the permission, the maximum stripping ratio must apply. This ratio must be agreed between the operator and the NPA and in any case will not exceed 10:1."

21. The point was not pursued in oral evidence or in submission at the inquiry and, in particular, it was not put to Mr Walton, Mr Taylor or Dr Cobb or to any other witness at the Inquiry.

22. On behalf of the first respondent, Mr Maurici accepted that the Inspector's 2:1 ratio had not been raised by him or, indeed, by anyone else at the inquiry.

23. At the conclusion of closing submissions on 28 February 2007 the Inspector asked Mr Kingston QC, who appeared on behalf of the appellant at the inquiry and at the hearing before me, about the "general ratio of limestone to fluorspar" and as to its relevance when forming a judgment as to whether limestone extraction was "in the course of working" fluorspar.

24. According to the contemporaneous notes of Ms Thompson, the interested party's solicitor who was present throughout the inquiry, Mr Kingston's brief reply to the

Inspector included the following points: that no ratio was imposed in a planning permission; the ratio of limestone to fluorspar was -

> "irrelevant as long as vein mineral worked in the way worked here. Ratio approach is likely to vary throughout the working life of the site. The statement of common ground records that the veins are variable. It depends where you test what ratio the results are."

25. Ms Thompson's account of this brief, and last minute, exchange between the Inspector and Mr Kingston, was not challenged by the first or the second respondents.

The Challenge to the 2:1 Ratio

26. The appellant and the interested party challenged the Inspector's interpretation of the planning permission on a number of grounds. Unsurprisingly, given the very limited and general way in which such an important issue had been raised at the Inquiry, they contended that there had been procedural unfairness because they had been deprived of the opportunity to ask not only their own expert witnesses but also the mining engineer called by the second respondent, Dr Cobb, whether a ratio-based approach in principle and a ratio of 2:1 in particular was a practical possibility in geological terms. They submitted that they had therefore been deprived of "a fair crack of the whip": see Fairmount Investments Ltd v Secretary of State for the Environment [1976] 1 WLR 1255, 1266 per Lord Russell, applied in Edward Ware New Homes v Secretary of State for Transport, Local Government and the Regions [2004] 1 PLCR 6 per Lord Justice Kennedy at paragraph 23.

27. The appellant and the interested party also contended that not merely was there no evidence whatsoever to support the Inspector's 2:1 ratio, on the undisputed evidence that was before the inquiry it was plain that the application of a 2:1 ratio was a practical impossibility and would have the effect of preventing the winning and working of fluorspar, thus negating the permission.

The Interpretation of the Permission

28. Although I have no doubt that there was procedural unfairness, it is unnecessary to explore that issue any further because the Inspector's failure to raise his approach to the interpretation of permission with the parties at the inquiry has resulted in that approach being fundamentally flawed since it was not disputed by either the first respondent or the second respondent that the application of a 2:1 ratio would have the practical effect, on the evidence before the inquiry, of preventing the winning and working of fluorspar under the first limb of the permission.

29. *In concentrating on the second limb of the permission, the inspector appears to have lost sight of what was permitted by the first limb: the winning and working of fluorspar. The appellant argued before the Inspector that the second limb of the permission must be construed so as to add something to the first limb. I would prefer to interpret the permission on the basis that it is far from clear whether the second limb of the permission was intended to enlarge the scope of the permission or to make explicit that*

which was already implicit in the first limb of the permission. Whether the second limb of the permission expands or explains what was permitted in the first limb of the permission, it does not, in my judgment, cut down or qualify whatever is permitted under the first limb. Both Mr Maurici, for the first respondent, and Mr Evans, for the second respondent, accepted that the second limb of the permission should not be construed so as to cut down the ambit of what was permissible under the first limb of the permission.

30. I will deal with the second respondent's submissions as to the effect of the second limb of the permission below.

31. Since fluorspar is a vein mineral and the host rock within which the vein (rakes) and stratabound deposits (flats) are contained is limestone, which itself is overlain by shales, it is clear that a planning permission for winning and working fluorspar also grants permission, by necessary implication, to remove - ie, to win and work, applying the definitions in English Clays (above) - so much of the host rock as is necessary to win and work the fluorspar. While limestone may not be won and worked as an end in itself, it may be removed (won and worked, see English Clays) to the extent that it is reasonably necessary to do so in order to win and work the fluorspar.

32. It is unnecessary to rehearse the geological evidence before the inquiry in any detail because both the first respondent and the second respondent either conceded or did not feel able to dispute the proposition that in order to win and work one tonne of fluorspar under the first limb of the permission it would be necessary to remove - ie, to win and work - more than two tonnes of limestone. At the inquiry there was a dispute between Mr Walton and Dr Cobb as to how much limestone had to be removed in order to win and work the fluorspar. In view of the variability of the veins, neither of them argued that a fixed-ratio approach would be practical. Because the point was not raised with them their evidence was not expressed in terms of ratios. However if their respective methodologies are expressed in terms of ratios, then the ratio of limestone won and worked to fluorspar won and worked would be very significantly more than 2:1 whether Mr Walton's evidence was accepted or Dr Cobb's evidence was accepted.

33. The second respondent accepted at the inquiry that in order to win and work the fluorspar it would be necessary to remove a substantial amount of limestone:

> " ..... overlying and surrounding material (but only that which reasonably or necessarily needs to be removed for safe and practical working) to get at the fluorspar."

It contended that its interpretation of the permission (see below) did -

> "not mean that limestone cannot be removed in order to get at the fluorspar and barytes. This point may be illustrated by postulating a vein of fluorspar extending to a depth of 20 metres below ground level with limestone above and either side of the vein. The overlying and surrounding limestone can be benched in the course of quarry development and removed from its position in the land by an open-cast method to get at the fluorspar in a safe method at depth. This is permitted by the opening words of the grant which allow the winning of fluorspar. That must allow for removal of overlying and surrounding material (but only that reasonably and necessarily needs to be removed for safe and practicable working) to get at the fluorspar. However this limestone cannot be worked in the sense of being exploited for its own sake. That is because it has been removed in the course of winning the fluorspar, not in the course of working it. The limestone which can be worked is only that which is won when the fluorspar is removed from its position in the land. What this ..... means is that only the limestone mechanically associated or inextricably intermingled with the fluorspar may be worked. The rest of the limestone removed to get at the fluorspar is waste and is then covered by the conditions dealing with waste in the permission."

34. I will deal below with the second respondent's argument that the limestone removed to get at the fluorspar cannot be exploited for its own sake. That argument does not affect the conclusion that all of the technical evidence before the inquiry demonstrates that the Inspector's 2:1 ratio is simply unworkable in geological terms. There can be no doubt that this would have been the unanimous view of Mr Walton, Mr Taylor and Dr Cobb if the Inspector had asked them for their views on this issue at the inquiry. Although they would not have agreed as to precisely how much limestone reasonably needed to be removed in order to get at the fluorspar, there can be no doubt that they would have advised the Inspector not merely that a 2:1 ratio would negate permission to win and work fluorspar, but that any fixed ratio would be bound to be arbitrary given the variability of the content, nature and direction of the veins and the depth of the overlying limestone (see the expert's statement of common ground above).

35. While I agree with the Inspector's view that the winning and working of fluorspar must be the "primary" activity under the first limb of the permission, and the winning and working of limestone will "necessarily be the subordinate or secondary operation" in the sense that the winning and working of limestone must not be an end in itself but simply the means to an end, namely the winning and working of fluorspar, it does not follow that "this will be reflected in the proportions of the minerals worked". Given the agreed geological characteristics, the proportions of the minerals worked will be variable throughout the life of the permission depending on such factors as the depth, width, direction and content of the fluorspar vein or flat within the host rock.

36. What is certain is that if open-cast working is adopted the amount of the host rock (limestone) won and worked is bound to exceed the amount of the vein mineral (fluorspar) won and worked. The fact that there is such an excess does not "indicate strongly that the operations are not consistent with the terms of the permission" (4.17). It is simply a reflection of the agreed geological characteristics of fluorspar and the largely agreed evidence as to the mining operations necessary to win and work it. The Inspector's view that "a ratio of limestone to fluorspar and barytes ore exceeding 2:1 by tonnage would clearly not accord with the permission" is belied by the unchallenged evidence of the expert witnesses as to how, and how much, limestone would have to be removed in order to win and work the fluorspar veins.

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37. There was an understandable desire on the part of the second respondent to interpret the permission so as to impose some limit on the amount of limestone that could be won and worked in order to protect the natural beauty of the National Park. The Inspector - who was a chartered town planner - appears to have shared that concern. In paragraph 4.18 of the decision letter he said that the thrust of the appellant's argument was -

> "that substantial amounts of limestone may be worked if this is required for reasons of safety and/or practicality."

The Inspector said that he did -

> "not agree that this is what the permission describes and different words would have been used had this been intended."

38. The underlying purpose of the permission is not to protect the National Park or to limit the amount of limestone that can be won and worked. It is to enable fluorspar to be won and worked. Thus the first limb of the permission permits the removal of as much or as little limestone as is reasonably necessary in order to win and work the fluorspar. If the geological conditions are such that a substantial amount of limestone has to be removed in order the win and work a much smaller amount of fluorspar, it would not be consistent with the underlying purpose of the permission to place some arbitrary limit on the amount, or ratio, of limestone extraction if to do so would prevent or inhibit the winning and working of fluorspar.

39. This approach to the interpretation of the condition does not mean that the appellant and the interested party have, in effect, a permission to win and work limestone. Whether the limestone has been won and worked as an end in itself or as a means to an end - to enable the winning and working of fluorspar pursuant to the permission - will, in the absence of any relevant limitation or condition, necessarily be a question of fact and degree.

40. The permission states that fluorspar may be won and worked by turning over old spoil dumps, by open-cast working and by underground mining. It was common ground that the interested party was engaged in open-cast working. Since there is no condition which imposes a particular method of open-cast working, it must be for the operator - in this case the interested party - in the first instance, to decide how best to win and work the fluorspar and, in the course of doing that, to decide how much limestone needs to be removed in order to win and work the fluorspar. Thus it will be for the operator to decide such operational details as the optimum depth and width of excavations, slope geometry, the maximum height of individual faces, the number and width of safety benches, etc. A breach of the terms of the permission would not be established merely because an alternative method of working could have been devised which would have resulted in the need to remove a smaller quantity of limestone in order to win and work the fluorspar.

41. At the risk of repetition, the permission is concerned to facilitate the extraction of fluorspar, not to limit the amount of limestone removed in order to achieve that end. The person implementing the permission does not have an entirely free hand. He must act reasonably. But, within the bounds of reasonableness, it is for the operator to decide how to win and work the fluorspar under the permission.

42. Although the argument was advanced by the appellant in the context of its submission as to the effect of the words "in the course of working the fluorspar" in the second limb of the permission (4.18), I endorse the underlying proposition that was being advanced by the appellant and the interested party that "economics, practicality and safety" are all considerations which would have to be taken into account by an operator when deciding how best to remove the limestone in order to win and work the fluorspar veins within it.

43. The Inspector rejected the "direct relevance" of economics because values and costs will change (4.18). The fact that values and costs will change does not mean that they should be left out of account when a decision is being reached as to what is, at any particular time, reasonably necessary to win and work fluorspar. If the economics of the operation change so that it is, for example, possible to extract more fluorspar by working it to a greater depth (and removing more limestone in order to do so) that would be entirely consistent with the first limb of the permission. It would not be consistent with the permission to constrain the working of fluorspar by ignoring the economics of its extraction.

44. It must be acknowledged that in the absence of any conditions requiring the implementation of a particular working plan it would be very difficult for the second respondent as a local planning authority, and perhaps for any operator, to decide whether the removal of limestone is in accordance with the permission. However as the Inspector observed in paragraph 4.20 of the decision letter, the -

> "Difficulty of monitoring or measurement does not justify failing to give the permission its proper meaning."

45. When deciding whether - as a matter of fact and degree - the operator is working limestone as an end in itself or as a means to an end (in order to win and work fluorspar) all of the relevant circumstances would need to be considered. They would certainly include the factors mentioned by the appellant: economics, practicality and safety. They would also include the absolute and relative quantities of limestone and fluorspar worked. But save perhaps in an extreme case, such as that postulated by Mr Tippett (1 million tons of limestone worked and sold to 1 ton of fluorspar), this factor alone could not be determinative given the geological characteristics of fluorspar (see above).

46. Mr Maurici, whose submissions in this respect were adopted by Mr Evans, sought to persuade me that the inspector had addressed the practicality of a fixed-ratio approach in paragraph 4.20 of the decision letter. Having acknowledged that the difficulties of measurement/monitoring would not justify failing to give the permission its proper meaning, the Inspector continued in paragraph 4.20:

> "I accept that the period over which lawfulness is determined must have regard to the nature of the operations. One of the matters emphasised by

> the appellants is the statement in the Mineral Planning Factsheet produced by the British Geological Survey to the Office of the Deputy Prime Minister in 2006 that 'deposits are difficult to identify and evaluate'. The typical variability of veins is also recorded in the statement of common ground. This has perhaps been given exaggerated significance. If the prime purpose of an operation is to work fluorspar for profit the operator is likely to require some evidence that this will be achieved. Whereas the amount of investigation must have regard to the cost, BIL's evidence has included a calculated estimate of the resource at Peak Pasture. Although there must be consistency between what the condition means, determination whether a proposed operation is lawful, and deciding whether works carried out were lawful, resolution of the latter two questions will have to take account of the available evidence about the resource or reserve. Uncertainty of outcome, because of the variability of veins, will be relevant but does not remove the need to make reasonable investigations in order to benefit from the planning permission."

47. Given the agreed geological evidence, it is difficult to understand why the Inspector thought that the difficulty in identifying and evaluating deposits of fluorspar and the variability of the veins had "perhaps been given exaggerated significance" by the appellant.

48. Mr Kingston submitted that the remainder of the Inspector's reasons, and in particular the final sentence in paragraph 4.20 were unintelligible. I confess that I do not know what the Inspector had in mind in the remainder of paragraph 4.20, but, whatever it was, he was not, in this paragraph or anywhere else in the decision letter, engaging with the implications of the undisputed geological evidence that: (1) a fixed ratio approach would not be practical, and (2) a ratio of 2:1 was manifestly unreasonable because it would prevent the winning and working of fluorspar, thus taking away with one hand that which had been granted by the other under the fist limb of the permission.

49. For these reasons the Inspector's approach to the determination of the permission was fundamentally flawed.

The Second Respondent's Interpretation of the Permission

50. The second respondent accepted that under the first limb of the permission it was permissible to remove so much of the limestone as was reasonably necessary to get at (win and work) the fluorspar (see above). Its submission, which the Inspector rejected in paragraph 4.13 of the decision letter, was that the limestone, having been removed, could not be "worked in the sense of being exploited for its own sake". Instead, the limestone removed to win and work the fluorspar had to be disposed of as waste in accordance with condition 3 in the permission. This approach relied, at least initially, on drawing a firm distinction between "winning" and "working" in the second limb of the permission. Thus, the second limb permitted the working of limestone that was won in the course of working fluorspar, but did not permit the working of limestone that was won in the course winning the fluorspar. Therefore, according to the second respondent, the only limestone that could be worked was that which was intermingled with the fluorspar within the veins and flats which had to be mechanically separated in order to recover the fluorspar.

51. On this approach to the second limb of the permission the large amounts of limestone above and around the vein could not be worked because it would have been won in the course of winning the fluorspar, ie, making the veins of fluorspar available for working. As the Inspector pointed out in paragraph 4.17 of the decision letter, there are a number of difficulties with this approach. Insofar as it permits the working of limestone which is mixed together with the fluorspar within the fluorspar vein so as to recover the fluorspar, it adds nothing whatsoever to the first limb of the permission. A permission to win and work any mineral must include permission to separate it from any other minerals with which it is intermingled.

52. Faced with the obvious difficulty that the fluorspar could not be worked until it had been won, and it could not be won without removing substantial quantities of limestone, the second respondent accepted that limestone could "be removed ..... to get at the fluorspar" (see above). At that point the second respondent's insistence that there should be a clear distinction between winning and working breaks down. Applying the definitions in English Clays (above), before the limestone can be "removed" in order to get at the fluorspar it must first be "won", ie, made available to be removed from the land; for example, by removing any overlying shale. Once the limestone has been "won", it will then have to be "worked", ie, at least initially removed from its position in the ground above and around the fluorspar vein. Having been "worked" in that way, there is nothing in the permission to suggest that the limestone must then be treated as waste and may not be sold if it is profitable to do so.

53. Once the limestone has been removed (won and worked) in order to win and work the fluorspar, it must be for the operator to decide how to dispose of it; for example, by selling it or by disposing of it as waste in accordance with condition 3. If saleable material is won and worked in order to win and work fluorspar, not only is there no sensible reason why it should not be sold rather than disposed of as waste, there is a positive reason why the permission should be interpreted as permitting rather than preventing its sale. If selling the "other minerals" - removed in order to win and work fluorspar - improves the economics of the operation as a whole, it may well facilitate the extraction of more fluorspar. For example, it may become economic to extract more fluorspar by excavating to a greater depth, despite the additional cost of deeper excavation. That would be in accordance with the underlying purpose of the permission which is to facilitate, not to hinder (by making the overall operation less economic), the winning and working of fluorspar.

54. There are further reasons why the second respondent's approach to the interpretation of permission is untenable. First, it relies on there being a clear distinction between winning and working in the second limb of the permission. However it is clear that - in practice - it may be difficult to determine when winning stops and working begins (see Lord Rokeby above). Observations made in the context of a particular mining activity such as the extraction of china clay or coal mining may not be entirely apt if applied uncritically to another very different type of mining activity. Having heard Dr Cobb's evidence, the Inspector was not satisfied that there was "an unambiguous

distinction between the removal of limestone to win fluorspar on the one hand, and in the course of working it on the other".

55. Although the Inspector rejected the submission by the appellant and the interested party that the terms "winning" and "working" and "winning and working" were used interchangeably in the permission, it is clear that such usage is not uncommon. For example, in the experts' statement of common ground, it was agreed that "in common parlance, 'winning' and 'working' are often used together and interchangeably".

56. Against this background, the second respondent's somewhat pedantic approach to the meaning of the second limb of the permission ignores the first limb of the permission, but insofar as it is compelled to take it into account is internally inconsistent in that it has to adopt a different interpretation of "working" in each of the two limbs of the permission.

57. The final reason why the second respondent's interpretation of the permission must be rejected is that on the unchallenged evidence it is wholly impractical and would frustrate the object of the permission. If the large quantity of limestone that must be removed in order to get at the fluorspar cannot be sold, how is it to be disposed of? The second respondent's answer to this question was - as waste, in accordance with condition 3. The Inspector correctly described this answer as "more opportunistic than plausible" (4.17). There appears to have been no attempt by the second respondent to assess "whether the hollows left by old workings" would have had sufficient capacity to accommodate the substantial amount of "waste" limestone that would have to be extracted to win and work fluorspar On Dr Cobbs' evidence. If the waste could not be disposed of in this way, it would, as Mr Kingston put it, "drown" the fluorspar workings.

58. There was no challenge to the following paragraph in Mr Taylor's rebuttal proof of evidence at the inquiry:

> "I simply record that the holes identified in the conditions attached to the 1952 permission would not in my view be adequate for the disposal of the significant quantity of limestone involved and a very significant quantity of limestone would be spread across fields."

59. For all of these reasons I endorse the Inspector's rejection of the second respondent's "highly prescriptive" interpretation of permission.

The Ground (b) and (c) Appeals

60. Having decided how the permission should be interpreted, the Inspector then had to decide whether the operations which had been carried out by the interested party between July 2003 and January 2006 when a stop notice (subsequently replaced by a further stop notice) took effect were in accordance with the permission.

61. The appellant and the interested party contended that the operations fell into two phases prior to and following September 2004. That was because on 7 September 2004 Glebe had entered into a Section 106 agreement with the second respondent in respect of its interest in the vein mineral rights at Peak Pasture, giving the second respondent the option to purchase those rights for £1. On the same day the second respondent had granted Glebe planning permission for the "extraction of fluorspar and associated mineralisation" on land at Winster Moor, some 14 kilometres to the south of Longstone Edge.

62. Mr Maurici accepted that if I concluded, as I have for the reasons set out above, that the Inspector's interpretation of the permission was flawed, it followed that insofar as the Inspector applied that interpretation for the purpose of determining the appeals on grounds (b) and (c), his decisions in respect those appeals must also be flawed. It might be thought that in the light of this concession by the first respondent this appeal would be bound to succeed because the Inspector, understandably, applied his own interpretation of the permission when deciding whether or not the operations carried out by the interested party had been in compliance with it (see, for example, paragraphs 5.22 and 6.6 of the decision letter dealing with periods prior to and following September 2004 respectively).

63. Mr Maurici submitted that this appeal should still be dismissed because there was an alternative justification for the Inspector's decision to reject the appeals under grounds (b) and (c) in respect of part of the first period, from March to September 2004. It is common ground that the appeals on grounds (b) and (c) would fail if there had been development otherwise than in accordance with the permission at any time during the four-year period before the issue of the enforcement notice (5.1).

64. In order to understand the Inspector's conclusions on this aspect of the appeals, it is necessary to briefly explain some of the background. In 1997 RMC Roadstone, in conjunction with Laporte Minerals, made an application for a determination of the conditions to be imposed on the 1952 permission under the Environment Act 1995, referred to in the decision letter as the ROMP (Review of Old Minerals Permissions) scheme. The ROMP scheme affected all of the land covered by the permission. But there was a detailed scheme of working imposed for a 15-year period in respect of part of the appeal site and Peak Pasture to the north. Conditions were determined by the second respondent in 1998, but that determination was quashed by the High Court in 1999.

65. For various reasons the application for approval of the ROMP scheme is "stalled", in the words of the second respondent. Thus, the ROMP submitted scheme does not authorise the carrying out of any mineral operations. Authorisation of the interested party's operations had to be found in the permission. Briefly stated, the interested party's case as presented to the Inspector at the Inquiry was that until September 2004 it was implementing phase 1 of the submitted ROMP scheme. In accordance with that scheme it was excavating limestone from the site in order to access the fluorspar veins which were to the north within Peak Pasture. After September 2004, when it became clear that it would not be possible to work those fluorspar deposits as a result of the Section 106 agreement, the interested party changed course and from October 2004 targeted the southern vein for the purpose of extracting fluorspar.

66. In respect of the latter period Mr Maurici accepted that the Inspector's conclusion that the permission was not being implemented was based entirely on his (erroneous) interpretation of the planning permission. In respect of the first period, up to October 2004, the Inspector concluded that the operations to implement the ROMP scheme were not permitted by the permission and were therefore not lawful. The respondents accept that this conclusion was also based on the Inspector's interpretation of the permission.

67. However the Inspector also considered the question, "were MMC implementing the ROMP scheme?" In paragraph 5.23 of the decision letter he said;

> "MMC accept that the lawfulness of the operations in this period is dependent upon their being part of the overall ROMP scheme. Thus the principal operations were not the winning and working of fluorspar on the appeal site but the provision of access to this mineral within Peak Pasture. On that basis the appellants say that the winning and working of limestone was in the course of winning and working fluorspar. An alternative view of the facts would be that the extraction of limestone was a profitable activity which MMC were content to carry out for its own sake and that there was no realistic prospect of proceeding into Peak Pasture."

68. The Inspector's conclusions in respect of this aspect of the appeals is contained in paragraph 5.31 as follows:

> "For the reasons set out above I have concluded that development based on the ROMP scheme permission was not lawful and therefore works substantially in that form were in breach of planning control. As a subsidiary point, I have also concluded that in the period from March 2004 MMC did not have the prospect of implementing the ROMP scheme beyond the Backdale site and the works were proceeding for the return provided independently. Judged in this way the appellants would not claim the operations were in the course of working fluorspar and barytes and thus they would necessarily be unlawful. For these reasons there was material development outside the terms of the 1998 planning permission as alleged in the notice and grounds (b) and (c) fail accordingly."

69. Mr Maurici submitted that the Inspector's conclusion on the "subsidiary point" was not dependent on his approach to the interpretation of permission, and that it was a sufficient justification for his decision that the grounds (b) and (c) appeals should fail. Subject to one qualification (see "Economics" below), I accept the first of those submissions and would also have accepted the second if the Inspector's conclusion on the "subsidiary point" had been reached applying the correct standard of proof and in a way that was procedurally fair to the appellant and the interested party.

70. For the reasons set out below, I accept the appellant's and the interested party's submissions that there was procedural unfairness in the manner in which the Inspector reached what is, in the event, not merely a subsidiary conclusion but the determining conclusion in respect of the appeals on grounds (b) and (c). I also accept that the inspector applied the wrong standard of proof.

Procedural Fairness

71. The Inspector summarised the evidence in respect of this issue, and his response to that evidence is in paragraphs 5.24 to 5.29 of the decision letter:

> "5.24 Development into Peak Pasture could not proceed without the agreement of Glebe Mines as owners of the vein mineral rights and the stopping up or diversion of Bramley Lane. Glebe Mines is the successor company to Laporte Minerals, who had participated in the submission of the ROMP scheme. Key personnel transferred between the two companies.
>
> 5.25 The main evidence relevant to this question was given by Mr Harpley and Mr Taylor. Mr Harpley was involved in negotiating the lease to MMC. His position is that he had no reason to believe Glebe's willingness to participate in the exploitation of Peak Pasture was different to that of Laporte Minerals in the 1990s until he received the letter dated 11 march 2004. He accepted that the terms of that letter were clear and although he spoke to MMC as a result, the letter came as a surprise and was not preceded by any other communication, nor did he mention having discussed this subject with Glebe or its agents thereafter. This letter and that to Merrimans are the only documents tendered on this subject, notwithstanding the potential operational importance of this to MMC, apart from the two file notes provided by Mr Bent from about the same time.
>
> 5.26 Mr Taylor was questioned at some length on this subject. He could give no direct evidence based on his own contacts and although he met Glebe management in November 2004, this is outside the critical period and the discussion concerned fluorspar trading. He is an engineer employed to manage the site and was working to the ROMP scheme plan. But he was an agent of his employer. The fact that that was what he understood he was to do does not mean that the employer genuinely or reasonably believed that to be the case or that objective assessment of all the facts would show that to be so. Mr Taylor's evidence is mainly hearsay and I report some of his replies below. There was more than one meeting with Glebe but he cannot say how many. He does not know whether there were discussions to lease the land north of Bramley Lane. He was not aware that the NPA was in a position to proceed with the Winster Moor planning permission at the time he joined MMC in April 2004 but believes the company was. He does not know when MMC knew of the November 2003 resolution. He was employed to implement the ROMP scheme and did not know it was not approved. Asked whether there was any correspondence, he replied that there may be file notes. He believes there were discussions and meeting with Glebe after March

2004. Asked whether Glebe would have been bound to refer to the impending Section 106 agreement, he replied that he had heard to the contrary but was not sure whether there were any minutes. He claims Glebe continued to give the impression that consent to proceed with work on Peak Pasture might be given, although he accepts that it was known from April 2004 that that possibility was at risk and there was a real prospect of refusal.

5.27 Regarding the need to stop up or diver the highway, correspondence provided by MMC shows that this was investigated between December 2003 and February 2004.

5.28 I have carefully considered Mr Taylor's evidence but conclude that it is of no real help since I cannot set aside the possibility that he has recounted misleading evidence in good faith. This is not a criticism of Mr Taylor but I cannot give weight to his answers. Even if meeting or conversations did occur, Mr Taylor cannot give reliable evidence of what was said. Bearing in mind the contents of the Solicitor's letter dated 11 March 2004, it is reasonable to expect a documented response of some kind whereas no note of any meeting or discussion or other written evidence has been produced. It is unlikely this reticence was the result of a reluctance to breach commercial confidence, since at the date of the inquiry any goodwill Glebe Mines and MMC appeared to have been lost.

5.29 There is no evidence that either BIL or MMC had any substantial basis for believing Glebe Mines would give its consent to the ROMP scheme. I regard an expired agreement entered into by a predecessor company, albeit with some common personnel, as insubstantial and inadequate. The work undertaken regarding the highway orders is evidence of intent in the period to mid-February 2004 but the failure to progress this further from that time is significant. There would also need to be the prospect of agreement with Glebe Mines. the appellants have identified, including in Mr Taylor's evidence, that Glebe may have been inconsistent in relation to fluorspar purchases and are also self-interested, for example in relation to negotiations with the NPA. That does not remove the obligation on MMC to produce evidence to explain its conduct. Although in closing for MMC several reference were made to discussions with Glebe, there is no reliable evidence to support these. The claim that, in the period from march 2004, 'MMC did not give up hope' is a very weak one. I appreciate that the NPA relied on the prospect of mining on Peak Pasture in defending the grant of planning permission at Winster Moor and in particular the weight given to the Section 106 Agreement in that decision. Whereas this confirms that the situation was uncertain in the absence of any formal agreement, it does not show that MMC had any hope of securing working rights. Overall I conclude that the weight of the evidence demonstrates that from mid-March 2004 there was no reasonable reliable prospect of implementing the ROMP scheme into Peak pasture and having regard also to the financial benefit to MMC

> the works were pursued on the basis of what could be carried out within the appeal site independently."

72. Mr Maurici submitted that undue emphasise should not be placed on the Inspector's conclusion in paragraph 5.28 that Mr Taylor's evidence was -

> "of no real help since I cannot set aside the possibility that he has recounted misleading evidence in good faith. This is not a criticism of Mr Taylor but I cannot give weight to his answers."

He said that there were a number of reasons why the Inspector did not feel able to accept the interested party's evidence. There was a lack of supporting documentation and in particular the absence of any response to the letter from Glebe's solicitors, dated 11 March 2004. Mr Harpley did not give any evidence as to what occurred after the letter dated 11 March 2004. Mr Taylor's evidence was of limited value because he was unable to give direct evidence of his own knowledge about any meetings and his evidence was mainly hearsay. Correspondence as to the stopping up of highways had ceased in February 2004, and the claim that from March the interested party did not give up hope was a "very weak one".

73. I accept that the Inspector's reasoning has to be considered as a whole. One should not pluck out isolated phrases and take them out of context. However if one asks the question why was there "no evidence that either BIL or MMC had any substantial basis for believing that Glebe Mines would give its consent to the wrong scheme" (5.29), the answer must be because the Inspector had concluded that he could not give weight to Mr Taylor's answers in his evidence because the possibility that he had recounted misleading evidence in good faith could not be set aside (5.28, emphasis added).

74. The Inspector's "subsidiary" conclusion that the interested party did not have the prospect of implementing the ROMP scheme applies only to the period after receipt of the letter dated 11 March 2004 (5.31). Prior to that date - from July 2003 to March 2004 when Mr Taylor was not employed by the interested party to manage the operations on the site (he joined the interested party in April 2004) - it would appear that the Inspector accepted the interested party's evidence that it did have reason to believe that Glebe would be willing to participate in the exploitation of Peak Pasture (5.25).

75. It seems that it was the letter of 11 March 2004 and in particular the lack of any written response to it that was the turning point in the Inspector's view. The letter was from Glebe's solicitors to Mr Harpley, a director of the appellant. It asserted in emphatic terms Glebe's ownership of the vein mineral rights in Peak Pasture and warned that if those rights were infringed Glebe "will consider taking further steps to protect its position without notice". It will be noted that the letter says nothing about Glebe's likely response to any offer to negotiate for the acquisition of its rights.

76. Mr Howell Williams, in closing submissions on behalf of the interested party at the inquiry, summarised its case on this aspect of the appeal as follows:

"The reality was that throughout the period up to September 2004 the NPA and MMC had a shared view that there was a realistic prospect of the working of the vein minerals in Peak Pasture. We know why MMC's view remained that the ROMP scheme could be pursued because we heard that there were meetings with Glebe which suggested to them that Glebe's position was not a fixed one. That has not been contradicted. The NPA's view too must have been that the position was not secure. Otherwise why would it have felt the need to pursue the Section 106 and grant planning permission for Winster Moor? Whilst Glebe was discussing the prospect of the Section 106 agreement from the NPA, they were not ruling out the prospect of mineral working so far as MMC were concerned. As Miss Patterson [QC, who appeared on behalf of the second respondent at the Inquiry] put it, Glebe were running two horses at the same time."

77. Mr Maurici pointed out that the Inspector did have regard to the Section 106 agreement in paragraph 5.29 of the decision letter. However the inspector's acknowledgement that "the situation was uncertain in the absence of any formal agreement" fails to recognise the fact that, whatever might have been said by Glebe in correspondence, until the Section 106 agreement was signed Glebe had to keep its options open. If it had committed itself not to work or to permit anyone else, including the interested party, to work Peak Pastures, before the Section 106 agreement was entered into and planning permission was granted for Winster Moor there would have been no proper basis for the second respondent to enter into the Section 106 agreement, and the second respondent had made it plain that without the agreement there would be no planning permission for Winster Moor. Thus, Glebe had to keep both horses in the race until the Section 106 agreement was signed.

78. In paragraph 5.26 the Inspector records that Mr Taylor was questioned at some length on the interested party's response, or lack of it, to the letter dated 11 March 2004. His evidence included the following as summarised by the Inspector: (a) "there was was more than one meeting with Glebe but he cannot say how many", and (b) "Glebe continued to give the impression that consent to proceed with work on Peak Pasture might be given".

79. Since the Inspector referred to the questioning of Mr Taylor by the second respondent and Mr Taylor's answers to those questions, it is important to see how the second respondent was putting its case at the inquiry.

80. Was it being contended that there had been no meetings with Glebe, or that Glebe were not giving the impression to the interested party that consent to proceed with work at Peak Pasture might be given? Was it being suggested that Mr Taylor had, in his answers to the second respondent's questions, recounted misleading evidence albeit in good faith? It is not suggested by Mr Maurici that the Inspector himself put any such suggestions to Mr Taylor.

81. All of the principal parties, including the second respondent, made written submissions to the Inspector. Mr Evans, who appeared at the inquiry as Miss Patterson's junior, confirmed that the written submissions fairly reflected the way in which this aspect of the second respondent's case was put:

"Working to September 2004

This period of working is said to be in accordance with the ROMP scheme and was intended to access vein mineral to the north of Backdale and Peak Pasture.

The evidence that the MMC were in fact working to the ROMP scheme is somewhat unsatisfactory. Mr Taylor's evidence was replete with hearsay in relation to what happened before he came on the scene. In their first letter in response to the NPA MMC made no reference to the ROMP scheme and say that they cannot predict the percentages of minerals to be won because the geological information is insufficient. Further in their response to the PCN served on 20 December 2003 MMC assert that the working of the ROMP was appropriate due to the fact that the NPA had previously considered the working scheme acceptable. Details of the scheme of working were said still to be in the course of production. None has ever been produced. The NPA has always been clear that the ROMP proposals for Backdale were unacceptable ..... Further the determination of conditions although quashed on other grounds did not approve what was submitted in relation to Backdale. There is no evidential base to assert that was being pursued within Backdale had ever been satisfactory to the NPA. As accepted there has been no document since that has indicated that there has been any change to that position on the part of the NPA. No inquiry was made by MMC as to the NPA attitude to their working the ROMP before so doing. Glebe's hostile documented attitude in March 2004 ..... to allowing the working of their mineral in Peak Pasture sits rather uncomfortably with the different picture they were said to be giving in discussions. There is doubt if the working needed to extend as far east as it did in order to effect the ROMP breakthrough to Peak Pasture [that was a submission with which the Inspector did not feel it necessary to deal (see paragraph 5.30)]. The claims as to what they were doing have to be viewed with scepticism.

Be those matters as they may, if the assumption is made that MMC were in fact working to the ROMP scheme, such working was not ..... "

82. I have set out the whole of that passage because it is clear that the second respondent was not submitting that the interested party was not working to the ROMP scheme because there was no reasonable prospect of Glebe agreeing to the interested party working into Peak Pastures.

83. Most of the second respondent's submissions in this respect were concerned with its own attitude to the acceptability of working. It was not suggested that following the letter of 11 March 2004 there were no meetings with Glebe; nor was it suggested that there was no reasonable prospect of Glebe agreeing to working in Peak Pastures. No

doubt with the implications of the Section 106 agreement well in mind, the second respondent merely submitted that "Glebe's hostile documented attitude ..... sits rather uncomfortably with the different picture they were said to be giving in discussion".

84. If Miss Patterson had intended to submit either (a) that the interested party was not implementing the ROMP scheme following the letter of 11 March because thereafter there was no reasonable prospect of Glebe agreeing to the interested party working into Peak Pasture, or (b) that Mr Taylor had, albeit in good faith, recounted misleading evidence about meetings with Glebe and or Glebe's attitude to working, she would undoubtedly have done so. The fact that she was unable to go further in her submissions than suggesting that the evidence that the interested party was working to the ROMP scheme was "somewhat unsatisfactory" is readily explained by the evidence of the second respondent's own planning witness Mr Bent, both in-chief and in cross-examination.

85. Ms Thompson's contemporaneous notes of his evidence were not challenged by the respondents. In-chief, Mr Bent answered this question from Miss Patterson:

> "Q Was it your understanding MMC were trying to work the ROMP scheme until September 2004?
>
> A. Yes - from correspondence received."

When cross-examined by Mr Kingston, Mr Bent was asked:

> "Q But in respect of what MMC did, you are not suggesting that they did anything other than work in accordance with the ROMP scheme."

He replied:

> "No."

86. In concluding that the interested party was not working in accordance with the ROMP scheme, the Inspector was therefore rejecting not merely Mr Taylor's evidence but also the evidence of the second respondent's planning witness. While the Inspector was entitled to reach his own conclusions, they had to be based on the evidence before him. Since it was not being suggested by the second respondent that, following the letter of 11 March 2004, there was no evidence that the appellant or the interested party had any substantial basis for believing that Glebe would give its consent to the implementation of the ROMP scheme into Peak Pasture and, of particular importance, it was not being suggested that Mr Taylor was recounting misleading evidence, albeit in good faith, it was essential, if the Inspector was minded to reach such damaging conclusions of his own volition, that they were put fairly and squarely to the appellant and the interested party at the inquiry.

87. Mr Taylor's uncertainty as to the number of meetings with Glebe, and as to whether there were file notes, provides a useful illustration of the unfairness of the approach adopted by the Inspector. Mr Taylor, when asked whether there was any correspondence, replied that "there may be file notes". Mr Maurici pointed to the lack

of any documentation. But so long as leading counsel for the second respondent in her questions of Mr Taylor was merely "exploring" the position and was not suggesting either that misleading evidence was being given unwittingly or that the ROMP scheme was not being implemented because the interested party had no basis for believing that Glebe would agree to working Peak Pasture, there was no need for any search of the files to be made to see if Mr Taylor's understanding could be supported by file notes or if the number of meetings with Glebe could be established.

88. As Mr Howell Williams put it in his closing submissions to the Inspector:

> "Miss Patterson chose to 'explore' the background to the ROMP scheme with Mr Taylor. Nothing he said in this regard was actually disputed.
>
> Notwithstanding this, Miss Patterson now submits that the evidence that MMC was working the ROMP scheme was 'somewhat unsatisfactory' ..... The fact that the NPA might have considered the ROMP scheme to be unacceptable has nothing to do with the question as to whether MMC were following it as a scheme of work.
>
> In any event, all this is made irrelevant in the light of Mr Bent's confirmation that the NPA never suggested that MMC were doing other than working the ROMP scheme. Miss Patterson's submission ignores the evidence of her own witness and should be rejected."

89. Mr Maurici emphasised the fact that in appeals under grounds (b) and (c) the burden of proof lies on the appellant. Therefore, he submitted, it was up to the interested party to produce the file notes or face the consequences. That submission ignores the highly structured nature of the modern public inquiry under the Inquiry Procedure Rules, and the very focussed nature of this inquiry in particular where the parties were not merely encouraged but required to confine their evidence to matters that were in issue.

90. In two notes before the inquiry the Inspector set out a list of the issues. He did so because he wished the parties "to focus the evidence on matters that are likely to be decisive". It is one thing to expect an appellant under grounds (b) and (c) to produce evidence in response to matters that are being put in issue by the local planning authority, it is quite another to expect an appellant to produce evidence on the off-chance that the Inspector might decide, without any warning, to adopt a radically different approach for reasons of his own making, particularly if those reasons include a concern that misleading evidence might have been recounted.

91. That leads me to the next question. In reaching his conclusion on the "subsidiary point," did the Inspector apply the correct standard of proof?

Standard of Proof

92. It is well established that although the burden of proof on appeals under grounds (b) and (c) lies on the appellant, that burden has to be discharged to the civil, not the criminal, standard of proof. There can be no doubt that the language used by the Inspector - "I cannot set aside the possibility that Mr Taylor has recounted misleading

evidence in good faith" [emphasis added] - is an indication that on this issue he was applying the criminal standard of proof. "I cannot set aside the possibility" that X has occurred equals "I cannot be sure that it did not occur", not "I am satisfied that it probably did or did not occur".

93. I accept Mr Maurici's submission that the phraseology used by an inspector in a particular paragraph of a decision letter is not necessarily determinative and should not be considered in isolation. There will be many appeals where the precise formulation employed by an inspector in one paragraph of a decision letter is of no real consequence because it will be clear from the context of the decision letter as a whole that the inspector was in fact applying the correct standard of proof. That is not the position in the present case. In reaching his conclusion on the "subsidiary point" the Inspector was not preferring the case of the second respondent to that of the appellant or the interested party. He was going significantly further and making a different case which the second respondent - no doubt mindful of the evidence and the correct standard of proof - had not felt able to advance after the issue had been explored in questions to Mr Taylor and Mr Bent.

94. The Inspector was able to reach his own different conclusion adverse to the appellant and the interested party, not because Mr Taylor had failed to persuade him that his evidence was probably true but because the Inspector was unable to rule out the possibility that Mr Taylor's evidence was misleading albeit it had been given in good faith.

95. In summary, the Inspector was able to go further than the second respondent because he effectively applied the criminal standard of proof to Mr Taylor's evidence and was able therefore to reject it. It was only upon that basis that there was "no evidence" that either the appellant or the interested party had any substantial basis for believing that Glebe Mines would give its consent to the ROMP scheme.

96. For these reasons I am satisfied that there was both an error of law (the application of the wrong standard of proof) and manifest procedural unfairness in the manner in which the Inspector reached his conclusion on the subsidiary point.

Economics

97. In the circumstances I deal very briefly with the further complaint made by Mr Kingston that the Inspector having rejected the "direct relevance" of economics when interpreting the permission (4.18 above) then considered part only of the overall economic picture, namely the revenue values of the limestone and fluorspar, when deciding whether or not the operations carried out by the interested party had been in accordance with the permission (see paragraphs 5.19, 5.22 and 5.29). In the last of these paragraphs the Inspector justified his conclusion in respect of the period from March to September 2004 partly by "having regard also to the financial benefit to MMC".

98. Mr Maurici submitted that in that passage the Inspector was doing no more than stating the obvious. The interested party was working the limestone because it was a profitable

exercise. Had it not been profitable the limestone would not have been worked. I do not accept that submission. While the revenues from the sale of limestone were clearly a relevant consideration for the purposes of the appeals under grounds (b) and (c), to consider those revenues alone while at the same time rejecting the relevance of economic considerations generally when considering whether or not limestone was being extracted in order to win and work fluorspar was to adopt a one-sided approach to a relevant issue - the economics of extracting fluorspar - that should have been, but was not, considered in the round. Because of the Inspector's approach to the interpretation of the permission earlier in the decision letter this one-sided, revenues-only, approach fed through into the remainder of the decision letter including that part of the decision letter dealing with the period March to September 2004.

99. Had this ground of challenge stood alone I might have hesitated before allowing the appeal. As it is, it merely serves to reinforce the other reasons set out above why this appeal must be allowed and the matter remitted to the first respondent for re-determination in accordance with the interpretation of the permission contained in this judgment.

Other matters

100. For the sake of completeness, and the avoidance of doubt when the matter is re-determined by the first respondent, I have not found it necessary to deal with all of the grounds of challenge made by the appellant and the interested party, for example, that the Inspector failed to have regard to the unchallenged evidence as to need for the blending of fluorspar ores of different qualities when drawing conclusions from the quality of the fluorspar recovered from the site. It should not be assumed that I would have rejected those submissions. When the appeals are returned they will have to be considered wholly afresh.

101. When making arrangements for the fresh inquiry the planning inspectorate may wish to consider whether the appointment of an inspector or assessor with relevant qualifications in mining engineering would be appropriate.

102. MR JONES: I apply for costs against the first respondent to be determined if not agreed between the first respondent and the appellant.

103. MR MAURICI: That is not disputed, detailed assessment if not agreed.

104. MR JUSTICE SULLIVAN: Yes, indeed. You may have that order, detailed assessment if not agreed.

105. MR HOWELL WILLIAMS: I would like to make an application for costs in this matter. The general approach is well settled. The fundamental rule is that it is within the discretion of the court to determine second costs awards, having regard to all the circumstances.

106. MR JUSTICE SULLIVAN: The formal position is that there were two appeals in front of the Inspector. He was dealing with two separate appeals, the appellant's appeal and your appeal.

107. MR HOWELL WILLIAMS: That is correct.

108. MR JUSTICE SULLIVAN: You have the letter that says there are

two appeals formally in front of him, two separate appeals. I realise obviously there is a huge amount of overlap between them. That is the formal position.

109. MR HOWELL WILLIAMS: In short, there are four reasons why, in these particular circumstances, there should be an additional award of costs for the interested party here. First, the interested party has a clear and separate interest in the proceedings. Your Lordship has recognised that the company has a legal interest in the Backdale site subject of the enforcement notice and it is the operator of the site. It was represented separately at the inquiry. It proceeded with its own appeal. It is, I hope, self-evident that the proceedings directly affect the future lawful working of the site. More than this, the operator is also the operator of mining operations on land known as Waders (?) Flat adjoining the Backdale site. Again these proceedings directly affect the future workings there, in particular the interpretation. The first submission is that.

110. The second submission is this that the scale of the issues and the implications are important for MMC and the outcome of these proceedings and in particular the meaning of the 1952 planning permission. It is quite an exceptional case in that regard. I have in the back of my mind that in the Bolton case the scale of development, the implication there was taken into account.

111. The third reason is that the interested party has been directly concerned with all the grounds of appeal pleaded by the appellant and supporting it. If I may, I turn to one or two matters of detail in that regard. First, the meaning of the 1952 planning permission being of obvious importance to the company and the arguments set out in my skeleton argument which I hope at least have been of some assistance additional to the arguments put so ably by Mr Kingston. I have in mind only filling one gap which was what I call, for short, the perversity argument, the winning and working distinction, which you have recognised expressly as being an argument put forward by the Peak Park authorities not being an acceptable one because the distinction simply breaks down and is internally inconsistent. Although you did not refer to my submissions on that matter - - - - -

112. MR JUSTICE SULLIVAN: That was effectively your submission.

113. MR HOWELL WILLIAMS: - - - - - I would like to take a little bit of credit for it because some effort was put in to dealing with what your Lordship recognised to be a wholly pedantic and unreal interpretation of the permission. There are other matters where the interested party has added to the argument. I remind you of the issue quality and blending providing a useful background which I hope has fed into your Lordship's quick appreciation of the way fluorspar mining is carried out. Likewise, it is important to recognise that so far as I am aware, and I will be corrected if I am wrong but the interested party was the only party in this court expressly to ask that in circumstances where you would quash the decision you would remit the matter back with an opinion of the court relating to the 1952 planning permission. No other party until the first day

made that request expressly. I take that back in this respect. The second respondent's supplementary skeleton argument, you recall, by Mr Evans - - - - -

114. MR JUSTICE SULLIVAN: They wanted their - - - - -

115. MR HOWELL WILLIAMS: It was quite late in the day. They - perhaps having regard to our request - decided to put that matter forward. While it is true that all the arguments - - most of the argument put forward by us in our skeleton argument supported or reflected the argument put forward by Mr Kingston, even in the Bolton case that was not regarded as a sufficient ground on its own to deprive another party of costs. In other words, counsel for the appellant was to raise the same arguments.

116. On a small point, but I hope it is fair to point it out, your Lordship in introducing the last grounds under (b) and (c) referred to - I think there were two arms to it - the wrong standard of proof and procedural unfairness. To be accurate, in our skeleton argument we focussed on the wrong standard of proof, there being no supportive evidence for the Inspector to reach his conclusion. We did not further plead the unfairness point but I think Mr Kingston - - - - -

117. MR JUSTICE SULLIVAN: That was Mr Kingston.

118. MR HOWELL WILLIAMS: There was also, I hope, additional and supportive evidence in Miss Thompson's witness statement. I mention, for example, the notes of the exchange

between the Inspector and Mr Kingston which your Lordship indeed has referred to expressly in the judgment relating to the generality of ratio and so on. Also the confirmation that Mr Taylor [was] not asked about his view of the ratio. And in particular there was considerable extracts of evidence put forward from Mr Taylor's evidence dealing in particular with the blending issue. You will recall the table with submissions set out. But a document for which we should take considerable credit, if I may say so, [was] the BGS document which your Lordship has found most helpful and it was our party who put that forward to assist the court.

119. MR JUSTICE SULLIVAN: If one judged it by the number of times one found it helpful to refer to the interested party's supplementary bundle of evidence, that is quite an indication of the extent to which the interested party in this particular appeal did help things along.

120. MR HOWELL WILLIAMS: I will not take it any further. I think in evidence and I hope in argument, the particular reference to the perversity argument, bearing in mind part of the reason for putting it and explaining that particular argument was to deal with the authority's submissions to your Lordship which echoed the submissions at the inquiry. It would not be an answer, if Mr Maurici was to put it forward, to say that is the argument dealt with at paragraph 4.13 of the decision letter which Mr Kingston dealt with because the perversity argument that I put forward to the inquiry is not dealt with in paragraph 4.13. The point dealt with at paragraph 4.13 relates merely to the

question of inextricably intermingled, not the distinction between the winning and working application in English Clays definition.

121. MR JUSTICE SULLIVAN: The thing that strikes me is that, in a sense, it was up to Mr Maurici. He could have said once the Inspector got it wrong on permission, if he did, then that is it, hands up, just a matter of interpretation. And on matters of interpretation it might be said Mr Howell Williams is backing (?) up Mr Kingston. As it is of course it focusses on you. That is the basis on which it was said by the Secretary of State, if the Inspector's interpretation of permission was wrong, nevertheless the decision letter could be saved. It was not a concession. It was argued out on the basis that the Inspector was entitled to conclude that your witness Mr Taylor had inadvertently given misleading evidence and so forth. It seems to me that you were directly in the frame as to what happened on that issue. It was not the appellant. It was you, your evidence and Miss Thompson's evidence about who said what to whom that was of critical importance in deciding whether or not the Inspector fairly raised this point with Mr Taylor, what the second respondent was saying about it and so on.

122. So I am bound to say that my own view on that is that Mr Maurici is hoisted on his own petard on the second issue. The Secretary of State chose to fight it out to the end - I do not see why, given the general quality of this decision letter - and has to take the consequences. Inevitably I had to hear you and I had to hear argument about the interested party's position in order to dispose of the appeal. I take that view.

123. MR HOWELL WILLIAMS: That is entirely right. We would have been here in any event. It was of genuine concern to us, not just the giving of incorrect evidence but a matter of dishonesty. My position was not based on procedural unfairness. We could have sought further evidence. In the light of the evidence given there was no need for that, for us to call further evidence. I made it quite clear to Miss Patterson on the basis of exploring. That is what she was doing and she did not put it any other way in her closing submissions.

124. MR JUSTICE SULLIVAN: In substance, I have accepted your submissions on that and quoted a chunk from your reaction to Miss Patterson. There is no need for you to go further.

125. MR HOWELL WILLIAMS: That is the real point. There is no need to; I could have done because I would have had to deal with the balance of probability, but there was no need to deal with that in the light of the submissions made and in particular no direct assertion of dishonesty.

126. MR MAURICI: My Lord, I do resist the second costs. The starting point is Bolton and the fact that generally there should not be more than one set of costs. The principle in Bolton, the interested party is only going to make a case that he is entitled to his costs if he can show that there was a likely separate issue not covered by counsel for the claimant, on which he was entitled to be heard, or that he had an interest which required separate representation.

127. I start with the separate issue or the separate argument point. The evidence and the submissions made by Mr Howell Williams were simply wholly supportive of the arguments of Mr Kingston. They did not add anything of substance. You will know that - although it is partly in jest - the exchange between your Lordship and Mr Howell Williams at the beginning of his submissions where Mr Howell Williams resisted your suggestion that he was going to fill in any gaps. He made quite plain that he did not think there were any gaps. That is the important point. If there were any gaps then there was not a separate issue or a separate argument that was put forward by the interested party. Certainly they did not pursue any separate ground outside.

128. In the submissions made today by Mr Howell Williams he seeks to suggest that there was a gap which he sought to fill on the winning and working distinction and on the Court of Appeal decision. Your reference to those points in your judgment was to reject the NPA's alternative interpretation of planning permission. That was the only reference you made to that gap which Mr Howell Williams says he has filled.

129. At 4.13 the Inspector had rejected those arguments. As you referred to his judgment in 4.13, the Inspector in particular in rejecting the arguments of the NPA did make the point that he did not think there was an unambiguous distinction between removal of limestone to win fluorspar, on the one hand, and the course of working, on the other. He was accepting, as far as it was relevant, Mr Howell Williams' point that he says was filling the gap.

130. In terms of separate issue, separate argument, no separate ground is advanced, no separate argument is advanced. It is merely supportive. It did not fill any gaps. The only gap that has been filled effectively goes to the NPA's arguments advanced, not the Secretary of State's in addition, in terms of separate issue argument, blending, which in the end formed no part of the findings of your Lordship.

131. The only other point is Mr Taylor - an issue on the evidence - I want to come back to that separately. Separate interest: Bolton makes crystal clear that the mere fact that in the usual situation where the applicant for second set of costs is a developer that in itself does not justify a separate set of costs. Similarly, here the mere fact that MMC is the operator rather than the owner is insufficient. They must have not just a separate interest - a legal interest, otherwise there would always be a second set of costs. They must have a separate interest in the outcome of the proceedings. In my submission, they had an entirely common interest in terms of the outcome of proceedings. They make common cause, and their interest was effectively a single one in terms of the outcome of these proceedings. No separate issue, no separate interest insofar as the Bolton test, is made out.

132. The interested party refers to the witness statement of Miss Thompson. What that statement does - and you have seen it a number of times as you pointed out - is to go through the claimant's grounds one by one doing two things: first of all, exhibiting and explaining a number of documents that were already before the Inquiry. So NET 1, 2, 4, 5, 6 and 8 - I think five of the eight exhibits - are merely exhibiting and describing documents already before the inquiry or the hearing - the inquiry - which could equally well have been put forward by the appellant had they thought them necessary and,

indeed, some may have been put forward by the Secretary of State, in the Secretary of State's evidence, had they not been put in by the appellant. In my submission, five of the eight exhibits and the majority of the witness statement add very little and certainly add little that the appellant itself could not have produced.

133. The only three things that it does in three of the exhibits is to exhibit notes of evidence taken at the inquiry. Two thing about that: first of all, very similar evidence on these points is given in the claimant's statements. He describes in more detail his recollection of the exchange between Mr Kingston and the Inspector in those submissions. In my submission it adds nothing, in reality, to what is already there. Secondly, if there was a need to put in more - like notes - the appellant in these proceedings had a team of professional representatives and solicitors at the inquiry and they could have produced their own notes had they thought it necessary to do so.

134. MR JUSTICE SULLIVAN: But they did not necessarily. No doubt, the contemporaneous notes were very helpful. I have actually referred to them. They were very helpful. They were more helpful than the Inspector's belated but wholly inaccurate recollection, if I may say so.

135. MR MAURICI: The fact of the matter is the matter is dealt with already in the evidence of the claimant; that was not disputed by the Secretary of State. Mr Howell Williams has added it in but I say it has not had any substantial impact on the proceedings. I do say this in this regard, it is not as if the claimant has skimped in the preparation of this case. It has come to this court with QC and junior. Their schedule of costs, when this was only a two-day case, are near on £100,000, and will be well in excess of that now that we are on the third day. It is not a case where the interested party had to come in because the job was not being done properly. I say there were no gaps to fill, and the job has been done very thoroughly and comprehensively by the appellant. Even if your Lordship considered the witness statement was necessary and the documents in it produced were necessary, contrary to my submissions, I would still say that there was not any necessity for attendance by the interested party through counsel and solicitors.

136. The submissions of Mr Howell Williams were, in the end, all reference to - and effectively doing no more than really drawing your attention to - the witness statement exhibits in Miss Thompson's witness statement. The court can look at those. The court had them. Mr Kingston referred to them to the extent that he considered necessary on a limited number of occasions. And there was no need for Mr Howell Williams to attend even if you think there was a necessity for the witness statement.

137. I think it was Mr Howell Williams who says he was the only person to request that the court remit with an opinion. In my submission, obviously the NPA are seeking their own view to be upheld. In any event, in my submission it was inevitable that your Lordship, in considering whether the Inspector interpreted planning permission correctly, would have to say something about what the planning permission actually did or did not say. In any event, if it needed your opinion you could have done so through a letter and hardly needed counsel and solicitors to attend to make a one-line point in Mr Howell Williams' skeleton argument.

138. Finally on Mr Taylor and what the Inspector said about Mr Taylor's evidence: although on one level I cannot deny that is a matter that affects MMC, first, you put it to Mr Howell Willliams it was not an argument he sought to deploy on paper on costs. Certainly if one actually looks at what is sought to be added on that point the answer is next to nothing. There is one exhibit dealing with that point which is the exchange with Mr Bent. In my submission, in any event, that point is covered in Mr Taylor's evidence and was not disputed by the Secretary of State.

139. MR JUSTICE SULLIVAN: You say it was not disputed. We did not know until a matter of days before the hearing what the Secretary of State's attitude was.

140. MR MAURICI: True. But it was not disputed.

141. MR JUSTICE SULLIVAN: I thought Mr Taylor was the interested party's witness anyway.

142. MR MAURICI: Sorry, not Mr Taylor; Mr Walton. The final point in that regard is that this point about the way Mr Taylor's evidence was dealt with was clearly, fairly and squarely, around issues by the appellant. All the relevant material, relevant to that ground, was put forward by the appellant and nothing of substance was added by the interested party. For all those reasons I say it is not a case where exceptionally there should be a second set of costs.

RULING

143. MR JUSTICE SULLIVAN: In deciding whether or not there should be two lots of costs, I shall be guided by the principles in Bolton. Generally one would not expect there to be put forward two sets of costs, but it is clear that the court retains a discretion. Basically one has to look to see; amongst other matters, whether there is a separate issue, whether there is some reason for requiring separate representation.

144. The formal position is that there were two appeals before the Inspector. That clearly would not be enough to justify an award of two lots of costs because, in practice, before the Inspector the appellant and the interested party made common cause and, to a very large extent, their cases overlapped. However it is right to bear in mind the very considerable significance of this case for the interested party as a minerals processing operator, not merely on the appeal site but on nearby land. There is no doubt that - in terms of the scale and complexity of the case - this was an unusual enforcement notice. So far, that would not be enough to justify an award of two costs.

145. However this is a case where I have found Miss Thompson's evidence as to what occurred at the inquiry - and in particular her contemporaneous notes - of particular value; for example, as to precisely what was put by the Inspector to Mr Kingston, as to what evidence Mr Bent had given (to take but two examples).

146. What, in my judgment, is of particular importance is that, in the event, what turned out to be the determining issue in this appeal was the validity or otherwise of the Inspector's conclusions on the subsidiary point. While it is perfectly fair to say that there was a great deal of overlap on the interpretation point, so far as the subsidiary

point is concerned, it is important to bear in mind that that arose because the Inspector concluded that there was not any evidence that either the appellant or the interested party had any substantial basis for believing that Glebe Mines would give its consent to the ROMP scheme. The reason why he concluded that was because he could not set aside the possibility that the interested party's witness Mr Taylor had recounted misleading evidence in good faith.

147. Given the Inspector's approach to the matter and his (I emphasise "his") view that there might have been misleading evidence, a case that was not advanced by the second respondent, it seems to me that it is essential from the interested party's point of view that it should be here and represented and robustly respond, as it did, to that conclusion of the Inspector. In that respect, for example, what the second respondent was saying about the interested party's case, what the interested party was saying in response in Mr Howell Williams' closing submissions to the Inspector, what Mr Bent had said in his answers and so forth, the extent to which Mr Taylor was or was not questioned, were all issues on which the interested party had a direct interest and one which, in my judgment, did require separate representation - one just has to stand back and ask if the interested party had not been represented - to respond to the suggestion by the Inspector that one of its witnesses might have given misleading evidence.

148. In these circumstances since that was a matter that was pursued to the bitter end by Mr Maurici it seems to me that it would be most unfair if the interested party did not have its costs.

149. For those reasons I think it appropriate to make an exception to the normal rule and the Secretary of State should pay both the appellant's and the interested party's costs.

150. MR MAURICI: Detailed assessment if not agreed?

151. MR JUSTICE SULLIVAN: Of course, yes. Detailed assessment if not agreed.