Neutral Citation Number: [2023] EWHC 1194 (Admin)

Case No: CO/1168/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT IN WALES
PLANNING COURT

Cardiff Civil Justice Centre
2 Park St, Cardiff, CF10 1ET

Date: 19/05/2023

Before :

THE HON. MRS JUSTICE STEYN DBE

- -

Between :

THE KING (on the application of COAL ACTION NETWORK)	**Claimant**
- and -	
(1) WELSH MINISTERS **(2) COAL AUTHORITY**	**Defendants**
- and -	
ENERGYBUILD MINING LIMITED	**Interested Party**

- -
- -

Estelle Dehon KC (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Gregory Jones KC (instructed by **Welsh Government Legal Services**) for the **First Defendant**
Matthew Henderson (instructed by **Browne Jacobson LLP**) for the **Second Defendant**
The Interested Party did not appear and were not represented

Hearing dates: 15 and 16 March 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 19 May 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HON. MRS JUSTICE STEYN DBE

Mrs Justice Steyn DBE :

A. Introduction

1. This claim for judicial review concerns the authorisation of coal-mining operations at Aberpergwm in the Vale of Neath. Energybuild Mining Ltd ('Energybuild') holds a licence which was issued by the Coal Authority in 1996 and subsequently varied, most notably in 2013. On part of the site, which is not the subject of this claim, coal mining operations have been authorised, and on-going for various periods, since 1997. But in respect of the area that is the subject of this claim, the licence is conditional and coal-mining operations have not yet taken place. On 16 September 2020, Energybuild applied to the Coal Authority for the grant of "*an underground coal mining operating licence*" by means of the "*deconditionalisation*" of an existing conditional licence in respect of an area of 1,131 hectares (ref. CA11/DM/95/0025/1/C) ('Energybuild's application').

2. The claimant, Coal Action Network, is a small environmental campaign group whose aims include working for an end to coal extraction and coal use in power generation and steel production. The focus of their challenge is on two decisions, namely:

    i) a decision of the first defendant, the Welsh Ministers, dated 10 January 2022, that it does not have the power, pursuant to section 26A of the Coal Industry Act 1994 ('the 1994 Act'), to approve (or refuse) the authorisation of the coal-mining operations that are the subject of Energybuild's application; and

    ii) a decision of the second defendant, the Coal Authority, dated 25 January 2022, to approve Energybuild's application.

3. Permission to bring this claim was granted by Lang J on 17 June 2022. It gives rise to two points of statutory interpretation in respect of the 1994 Act. In short, the claimant contends that (a) the Welsh Ministers erred in law in deciding that section 26A of the 1994 Act was inapplicable (Ground 1); and (b) the Coal Authority misinterpreted its powers and so unlawfully fettered its discretion and/or failed to take into account material considerations in approving Energybuild's application (Ground 2).

4. Counsel for the claimant, Ms Estelle Dehon KC, made submissions on both grounds. For the defendants, counsel for the Welsh Ministers, Mr Gregory Jones KC, made submissions on Ground 1, and counsel for the Coal Authority, Mr Matthew Henderson, made submissions on Ground 2. I am grateful to all three counsel for their excellent written and oral submissions.

B. The Coal Industry Act 1994

5. The 1994 Act "*provides a comprehensive statutory scheme for the licensing and management of coal mining in the United Kingdom*": *Abbey Mine Ltd v Coal Authority* [2008] EWCA Civ 353, Laws LJ, [2]. Unless stated otherwise, all references in this judgment to a section are references to the 1994 Act.

6. Section 1 established the Coal Authority. Section 1(1) provides:

> "There shall be a body corporate to be known as the Coal Authority (in this Act referred to as 'the Authority') for the purpose of –
>
> (a) holding, managing and disposing of interests and rights in or in relation to the unworked coal and other property which is transferred to or otherwise acquired by it by or under this Act;
>
> (b) carrying out functions with respect to the licensing of coal-mining operations;
>
> (c) carrying out functions with respect to coal-mining subsidence and in connection with other matters incidental to the carrying on of any opencast or other coal-mining operations;
>
> (d) facilitating the establishment and maintenance of arrangements for the information to which persons are to be entitled under this Act to be made available to them; and
>
> (e) carrying out the other functions conferred on it by virtue of this Act." (Emphasis added.)

7. The duties of the Coal Authority with respect to licensing are specified in section 2, which provides:

> "(1) It shall be the duty of the Authority to carry out its functions under Part II of this Act in the manner that it considers is best calculated to secure, so far as practicable –
>
> (a) that an economically viable coal-mining industry in Great Britain is maintained and developed by the persons authorised by virtue of that Part to carry on coal-mining operations;
>
> (b) that such persons are able to finance both the proper carrying on of the coal-mining operations that they are authorised to carry on and the discharge of liability arising from the carrying on of those operations; and
>
> (c) that persons to whom obligations are owed in respect of subsidence damage caused at any time (whether before or after the passing of this Act) do not sustain loss in consequence of any failure by a person who is or has been a licensed operator to make such financial provision for meeting present and future liabilities as might reasonably have been required of that person.
>
> (2) Subject to section 4 below, it shall be the duty of the Authority, in carrying out its functions under Part II of this Act, to have regard to the desirability of securing –

> (a) that persons authorised by virtue of that Part to carry on coal-mining operations are persons who have at their disposal such experience and expertise in the carrying on of such operations as are appropriate for ensuring that any authorised operations are properly carried on; and
>
> (b) that competition is promoted between differing persons carrying or, or seeking to carry on, coal-mining operations.
>
> (3) …" (Emphasis added.)

8. Section 5(1) provides:

> "(1) Subject to subsections (6) and (7) below, the Authority shall have power to do anything which, in the opinion of the Authority, is calculated to facilitate, or is conducive or incidental to, the carrying out of its functions."

Subsections (6) and (7) provide, broadly, that the Coal Authority does not itself have power to carry on coal-mining operations or to explore for coal. Subsection (9) provides that subsections (2) to (5) (which identify certain matters that are within the Coal Authority's powers) "*shall be without prejudice to the generality of subsection (1)*".

9. Part II of the 1994 Act (ss.25 to 36) addresses the licensing of coal-mining operations. Section 25 provides, so far as relevant:

> "**Coal-mining operations to be licensed.**
>
> (1) Subject to subsection (3) below, coal-mining operations to which this section applies shall not, at any time on or after the restructuring date [i.e. 31 October 1994], be carried on by any person except under and in accordance with a licence under this Part.
>
> (2) This section applies to any coal-mining operations in so far as they—
>
> (a) consist in the winning, working or getting (with or without other minerals) of any coal, in the treatment of coal in the strata for the purpose of winning any product of coal or in the winning, working or getting of any product of coal resulting from such treatment;
>
> (b) are carried on in relation to coal in any part of Great Britain, in relation to coal under the territorial sea adjacent to Great Britain or in relation to coal in any designated area; and
>
> (c) are neither carried on exclusively for the purpose of exploring for coal nor confined to the digging or carrying away of coal that it is necessary to dig or carry away in the course of activities carried on for purposes which do not include the getting of coal or any product of coal.

(3) Subject to the following provisions of this Act and to the provisions of any restructuring scheme, where—

(a) a licence under subsection (2) of section 36 of the 1946 Act (licences from the Corporation to work or get coal) is in force immediately before the restructuring date, and

(b) that licence authorises the carrying on of any coal-mining operations to which this section applies,

the authorisation contained in that licence shall have effect on and after that date as an authorisation for the carrying on of those operations without a licence under this Part and, accordingly, so as to prevent the carrying on of any operations under and in accordance with that authorisation from constituting a contravention of subsection (1) above.

…" (Emphasis added.)

10. Section 26 provides, so far as relevant:

"**Grant of licences.**

(1) Subject to subsection (6) below, it shall be the Authority which shall have the power to grant a licence under this Part.

(2) An application for a licence under this Part may be made by any person who has acquired, or is proposing to acquire, (whether from the Authority or some other person)—

(a) such an interest in land comprised in the area with respect to which the application is made, or

(b) such rights in relation to coal in that area, as, apart from the need for a licence, would entitle him to carry on the coal-mining operations to which the application relates.

…

(4) An applicant for a licence under this Part shall pay to the Authority such fee (if any) in respect of the Authority's handling of that application as, having regard to—

(a) the nature of the application, and

(b) any information published under section 30 below with respect to the fixing of the fees for handling applications,

the Authority may reasonably require.

(5) Without prejudice to the Authority's power (subject to its duties under sections 2 to 4 above) to take into account all such

> factors as it thinks fit in determining whether, and subject to what conditions, to grant a licence under this Part, the factors that may be taken into account shall include, in particular, the terms on which the applicant, or any other applicant with respect to the same area, is offering to acquire from the Authority any such interests or rights as are mentioned in subsection (2) above.
>
> …" (Emphasis added.)

11. The provision that is central to Ground 1, section 26A, was inserted into the 1994 Act, with effect from 1 April 2018, by section 67 of the Wales Act 2017 (which, like the 1994 Act, is an Act of Parliament). Section 26A provides:

> "(1) If or to the extent that a licence under this Part authorises coal-mining operations in relation to coal in Wales, it shall have effect only if the Welsh Ministers notify the Authority that they approve the authorisation.
>
> (2) In this section 'Wales' has the meaning given in section 158(1) of the Government of Wales Act 2006." (Emphasis added.)

12. Section 27 provides:

> "**Authorisation contained in licence.**
>
> (1) The provisions of a licence under this Part shall specify or describe the coal-mining operations which, subject to its conditions, are authorised by the licence.
>
> (2) The provisions included in a licence in pursuance of subsection (1) above—
>
> (a) shall identify the area of Great Britain, of the territorial sea adjacent to Great Britain or of the continental shelf where the operations are to be carried on; and
>
> (b) may restrict the authorisation contained in the licence to operations carried on within such period as may be specified in the licence or as may be determined in a manner so specified;
>
> and provision made by virtue of paragraph (a) above may include restrictions as to the depth at which any operations are to be carried on.
>
> (3) Without prejudice to the generality of subsection (2)(b) above, a licence under this Part may provide—
>
> (a) for the coming into force of the authorisation contained in the licence, or of any conditions or other provisions of the licence, to be postponed until after the acquisition by the

> holder of the licence of any interest or right in or in relation to any land or other property or until after such other requirements as may be specified or described in the licence have been satisfied; and
>
> (b) for the licence to lapse if the interest or right is not acquired, or the other requirements are not satisfied, within such period as may be so specified.
>
> (4) Without prejudice to subsection (5) below, the persons who, so long as the authorisation remains in force, are authorised to carry on the operations to which a licence under this Part relates are the holder of the licence and such other persons as may be authorised by the licence or, without any contravention of the conditions of the licence, by the holder of the licence to carry on those operations on his behalf.
>
> (5) A licence under this Part may contain provision which, in such cases, in such manner and subject to such conditions or consents as may be specified in or required by the provisions of the licence, authorises the transfer of any person's rights and obligations as holder of the licence to another person.
>
> (6) Without prejudice to any provision made by virtue of section 28(7) below, the conditions and other provisions of a licence under this Part may be modified by the Authority with the agreement of the holder of the licence." (Emphasis added.)

13. Section 28, pursuant to which the Coal Authority contends it acted when approving Energybuild's application, provides:

> "**Conditions of licence: general.**
>
> (1) A licence under this Part may include such conditions as the Authority, subject to its having regard to its duties under sections 2 to 4 above and to the following provisions of this Act, may think fit.
>
> (2) The conditions that may be included in a licence under this Part with respect to the carrying on of the coal-mining operations authorised by the licence shall include conditions having effect in relation to the carrying on, in association with those operations, of—
>
> (a) coal-mining operations for which no authorisation is required by virtue of this Act;
>
> (b) coal-mining operations the authorisation for which is contained in another licence under this Part or is conferred by virtue of section 25(3) above; or

(c) any activities carried on for purposes connected with any coal-mining operations to which the conditions relate.

(3) Conditions included in a licence under this Part may contain provision requiring the holder of the licence to render to the Authority either or both of the following in respect of the exercise of its functions in connection with, or in consequence of, the grant of the licence, that is to say—

(a) payments on the grant or coming into force of the licence of such amount as may be determined by or under the conditions; and

(b) payments, at times while the licence is in force for any of the purposes of this Act, of such amounts as may be so determined.

(4) Conditions included in a licence under this Part may contain provision requiring the holder of the licence to secure that—

(a) agreements for such purposes as may be specified in the conditions are entered into between the holder of the licence and such other persons as may be specified or described in the licence; and

(b) that the terms of those agreements satisfy such requirements as may be so specified or described.

(5) Conditions included in a licence under this Part may contain provision requiring the holder of the licence to comply with any direction given by the Authority as to such matters as are specified in the licence or are of a description so specified.

(6) Conditions included in a licence under this Part may contain provision for disputes between the Authority and the holder of the licence as to any matter to which the licence relates to be referred to the determination of such person or persons as may be specified in, or appointed in accordance with, the conditions; and any dispute to which any such provision applies shall be determined accordingly.

(7) Conditions included in a licence under this Part may contain provision for any of the following, that is to say—

(a) the authorisation contained in the licence, and

(b) any of the conditions of the licence, apart from any included by virtue of this subsection,

to cease to have effect, or to be revoked or otherwise modified, at such times, in such manner and in such circumstances as may be specified in or determined under the conditions.

> (8) Conditions included in a licence under this Part may provide for—
>
> > (a) obligations imposed on any person by the conditions of the licence, and
> >
> > (b) liabilities arising in respect of contraventions by any person of the conditions so included,
>
> to continue in accordance with the provisions of that licence, and to be capable of arising, after the authorisation contained in the licence has been revoked or is otherwise no longer in force or, where they have already arisen, to continue after the rights and obligations of the holder of the licence have been transferred to another person.
>
> (9) Subsections (2) to (8) above and section 29 below shall be without prejudice to the generality of subsection (1) above." (Emphasis added.)

14. Schedule 7 to the Wales Act 2017 contains the transitional provisions. Paragraph 6 of Schedule 7 provides, so far as relevant:

> "(1) Nothing in a provision of this Act affects the validity of anything done by or in relation to a Minister of the Crown or other public authority before the provision comes into force.
>
> (2) Anything (including legal proceedings) that is in the process of being done by or in relation to a Minister of the Crown or other public authority at the time when a provision of this Act comes into force may, so far as it relates to a function transferred to the Welsh Ministers by virtue of that provision, be continued by or in relation to the Welsh Ministers." (Emphasis added.)

C. Policies

15. The Coal Authority has published "*Guidance Notes for Underground Coal Mining Licences*" ('the Guidance Notes'). The current version was issued on 18 November 2016. The Guidance Notes state:

> "1. **Nature of Licence**
>
> We grant two types of Licence, namely:
>
> - An Operating Licence, where the applicant satisfies all our statutory licensing requirements and where all the other necessary rights permissions and consents to carry out underground coal mining operations are in place
> - A Conditional Licence as described below
>
> …

> 2. **Conditional Licence**
>
> An applicant who has not secured all the necessary permissions and consents (e.g. planning permission) might be reluctant to commit themselves irrevocably to substantial expenditure in developing a project without some assurance that they will be granted an Operating Licence and associated Lease when these permissions and consents are obtained.
>
> A Conditional Licence caters for these circumstances and defers the coming into effect of the authorisation to mine until the specified requirements have been satisfied. It will lapse if these requirements are not fulfilled within a specified period, normally a maximum of 8 years. …" (Emphasis added.)

16. The Welsh Government published its "*Coal Policy Statement*" on 22 March 2021. The Ministerial foreword states:

> "The policy of Welsh Government is to bring to a managed end the extraction and use of coal. This Coal Policy Statement is an important step towards that goal.
>
> The opening of new coal mines or the extension of existing coaling operations in Wales would add to the global supply of coal, having a significant effect on Wales' and the UK's legally binding carbon budgets as well as international efforts to limit the impact of climate change. Therefore, Welsh Ministers do not intend to authorise new Coal Authority mining operation licences or variations to existing licences. Coal licences may be needed in wholly exceptional circumstances and each application will be decided on its own merits, but the presumption will always be against coal extraction.
>
> Whilst coal will continue to be used in some industrial processes and non-energy uses in the short to medium term, adding to the global supply of coal will prolong our dependency on coal and make achieving our decarbonisation targets increasingly difficult. For this reason, there is no clear case for expanding the supply of coal from within the UK. …
>
> Hundreds of Welsh workers still rely on coal mining to support their families and communities. A managed end to the extraction and use of coal will require skills training and employment support, working in social partnership with our trades unions. It will require research and must respect the legal rights of employees and licence holders.
>
> This policy is only one part of the transition away from coal mining in Wales. It is clear the move towards a managed end to the extraction and use of coal must be decisive and delivered as soon as is feasibly possible." (Emphasis added.)

17. The Coal Policy Statement describes the context in the following terms:

> "The climate emergency has already impacted on public health and our economy and will have increasing impacts in the future as climate impacts become more frequent and severe. Tackling the climate emergency requires serious and sustained action and collaboration both here in Wales and at a global level. All countries, regardless of their relative size, have an important role to play. As we work to protect our economy and communities, we must do so in a way which maximises wider benefits, such as reducing our pollution emissions and ensuring a fairer and healthier society for all.
>
> In May 2019, during a period of increasing global concern around the impact of climate change, the Welsh Government declared a climate emergency. This was followed by the National Assembly becoming the first Parliament in the world to vote in support of such a declaration, signalling the cross party recognition of the importance of the issue.
>
> In December 2020, the Welsh Government received advice from the Climate Change Committee (CCC) that included a recommendation to set a target for net zero emissions in 2050, replacing the previous statutory target of at least an 80% reduction in 2050. In March 2021, legislation to amend The Environment (Wales) Act 2016 was passed in the Senedd to bring the net zero target into law. The Senedd also amended secondary legislation under the Act to increase the 2030 target to 63% and the 2040 target to 89%, in line with the CCC's recommendations.
>
> …
>
> In order to meet our ambitious climate targets, we must reduce emissions from energy generation, by reducing fossil fuel generation and increasing generation form renewable sources. The continued extraction and use of fossil fuels for energy, including electricity generation, heating buildings or powering transport, is not compatible with the pathway to reach net zero at a pace that addresses the climate emergency." (Emphasis added.)

18. Under the heading "*The policy*", the Coal Policy Statement identifies the "*Welsh Government's policy objective*" as being "*to avoid the continued extraction and consumption of fossil fuels*". Under the heading "*Coal extraction*" it states:

> "Welsh Ministers therefore do not intend to authorise new Coal Authority mining operation licences or variations to existing licences.
>
> However, in wholly exceptional circumstances, Welsh Government would consider the further extraction of coal. …

> Welsh Ministers will consider approval for individual licences in the context of the Well-being of Future Generations (Wales) Act 2015, our climate targets and energy policy." (Emphasis added.)

19. The Welsh Government published guidance entitled "*Requesting approval for Coal Authority mining operation licences*" on 20 July 2022 ('the Requesting approval guidance') which states:

> "**Operations that trigger S26A**
>
> Approval of the Welsh Ministers is required for:
>
> - new licences granted by the Coal Authority authorising coal-mining operations in Wales; or
> - variations to existing licences which change the time allowed for mining operations in Wales, or which alter the licence boundary in Wales; and
> - potentially other licence variations which involve coal-mining operations in Wales.
>
> …
>
> **Welsh policy considerations**
>
> Welsh Government will consider any request to approve a Coal Authority licence against relevant Welsh policy objectives and legislative requirements. …
>
> Welsh Government policy is to prevent further extraction and consumption of coal. However, our coal policy also reflects that Wales has existing mines that need to be managed and closed safely. Therefore, our policy is that unless extraction can be shown to be needed in the context of greenhouse gas emissions reductions targets, or to manage and safely close a site, Welsh Government policy is that coal extraction should not be permitted."

D. The facts

20. The Aberpergwm Colliery, comprising a number of anthracite drift mines, was operated by British Coal before its closure in 1985. It was then re-opened in 1993 by Glotech Mining under a planning permission granted in November 1993. The underground take area was extended in 1996. Mining operations have since been ongoing on the site, for various periods.

The Licence

21. On 29 March 1996, the Coal Authority issued a licence, under Part II of the 1994 Act, to "*the Operator*", then Signalfirm Ltd, in respect of Aberpergwm Colliery ('the 1996 Licence'). Following the issue of the 1996 Licence it has been varied by the Coal

Authority on four occasions, most recently on 3 January 2013 ('the 2013 Variation'). I shall refer to the 1996 Licence, as varied, as 'the Licence'. Energybuild has held the Licence since July 2004. The current holder is identified in the Licence as "*the Operator*" or "*Licensee*".

22. Clause 3 of the Licence (which remains in its original form) provides:

> "3. PERMISSION TO CARRY OUT COAL-MINING OPERATIONS
>
> 3.1 The Authority, in exercise of the powers conferred on it by Part II of the 1994 Act and subject to the terms of this Licence, permits the Operator, for the period of 99 years beginning and on the first date on which this Licence becomes unconditional in whole or in part in accordance with Clause 27.1 to carry out Coal Mining Operations within the Licensed Area subject to and upon the restrictions and conditions mentioned in the Third Schedule (but limited to underground methods and any operations ancillary thereto).
>
> …" (Emphasis added.)

23. Clause 27 of the Licence (which also remains unamended) provides:

> "27. CONDITIONALITY
>
> 27.1 Subject to Clauses 27.2 and 27.3 this Licence (apart from Clauses 1, 2, 9, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26 and this Clause 27) shall not take effect in relation to any part of the Maximum Licensed Area, unless and until such time as all the conditions mentioned in Part I and Part II of the Fourth Schedule shall in relation to such part and in the reasonable opinion of the Authority have been fulfilled.
>
> …
>
> 27.3 If the provisions of this Licence (apart from those referred to in Clause 27.1) have not taken effect in relation to part (including the whole) of the Maximum Licensed Area by 1.30pm on the date specified in Part IV of the Fourth Schedule this Licence shall thenceforth cease to have any further effect in respect of that part, (save for any right or remedy of the Authority against the Operator for any antecedent breach of the terms of this Licence.)
>
> …" (Emphasis added.)

Importantly, clause 3 is not one of the excepted clauses listed in clause 27.1.

24. Relevant definitions include:

> "'**Licence**' means the Underground Conditional Licence issued by the Coal Authority on 29th March 1996 and subsequently transferred to the Licensee, as part de-conditionalised on 7th January 1997 ('the Effective Date') and as varied by agreements dated 22nd November 2000, 31st October 2005 and 11th August 2011 ('the Previous Agreements') and includes any instrument supplemental to that Licence" (2013 Variation, clause 1);
>
> "'**Licensed Area**' means the land described in Part 1 of Schedule 2 of the Licence" (2013 Variation, clause 1); and
>
> "'**Maximum Licensed Area**' is the land described in Part 2 of Schedule 2 or as may be modified from time to time in accordance with Clause 18.1" (2013 Variation, Schedule 1).

25. Schedule 2 (which was substituted by the 2013 Variation) provides:

> "**Part 1**
>
> **Licensed Area**
>
> The Land comprising :-
>
> 1. the three surface drifts and access roads, the approximate locations of which are shown on coloured brown on Plan A(3), together with all other underground roadways and other underground spaces used or occupied at the date of this Licence in connection with the winning, working or getting of Coal from the Specified Seams which are within the areas edged red on Plan A(3); and
>
> 2. the part or parts (if any) of the Maximum Licensed Area in respect of which all the provisions of this Licence are fully in effect in accordance with condition 27.
>
> **Part 2**
>
> **Maximum Licensed Area**
>
> The Specified Seams together with the three former surface drifts and access roadways, the approximate locations of which are shown coloured with a thick black line on Plan A(3), together with all other underground roadways and other underground spaces which are within the area edged red, the areas edged green and the areas edged purple on Plan A(3).
>
> In Part 1 and Part 2 of this schedule '**Specified Seams**' means :-
>
> Such parts of the White Four Feet, Eighteen Feet, Cornish, Nine Feet and Bute seams as lie in the County Borough of Neath Port Talbot beneath the surface area of 1312 hectares or thereabouts as shown edged red on Plan A(3) and the surface areas of 1460

hectares or thereabouts as shown edged green or edged purple on Plan A(3).” (Emphasis added.)

It can be seen that the Maximum Licensed Area includes the seams beneath (i) a surface area of 1312 hectares (edged red) and (ii) beneath a surface area of 1460 hectares (edged green or purple). The Licensed Area includes any part of the Maximum Licensed Area which is fully in effect in accordance with clause 27.

26. Schedule 4 (which was also substituted by the 2013 Variation) provides:

“**Part 1**

Date by which Conditions Precedent are to be satisfied

1. The Conditions Precedent are to be satisfied no later than 31st December 2020.

…

Part 2

Conditions Precedent

1. The Licensee has served a valid notice pursuant to the Option Agreement in relation to the relevant part of the Maximum Licensed Area so as to entitle the Licensee, subject to the provisions of paragraph 3.2 of the Third Schedule to the Option Agreement, to be granted a lease of the Coal in the relevant part of the Maximum Licensed Area.

2. The Planning Condition Precedent as described in Paragraph 2.3 of Schedule 2 to the Option Agreement has been satisfied.

3. The Licensee has secured all other rights and permissions necessary to carry out Coal-Mining Operations in the relevant parts of the Maximum Licensed Area.

4. The Licensee has supplied all information requested by the Authority for the purpose of the performance of its duties under sections 2(1)(b) and 2(2)(a) of the 1994 Act.

5. The Licensee has become a party to the Interaction Agreement.

6. Where :-

(a) all the above Conditions Precedent are fulfilled in respect of the relevant part of the Maximum Licensed Area; and

(b) the Authority has not, within one calendar month of receipt of the Licensee’s notice pursuant to paragraph 4.1 of the Option Agreement, notified the Licensee that :-

> (i) it requires further information to be supplied for the purpose aforesaid,
>
> or
>
> (ii) it has decided, in the performance of its duties under sections 2(1)(b) and 2(1)(a) of the 1994 Act, that the Licence should not become unconditional in relation to such parts of the Maximum Licensed Area; and
>
> (c) the Licensee has given notice to the Authority referring to this Condition 6;
>
> This Condition 6 shall be construed as if the Licensee had at the expiry of the said period of one calendar month served the Licensee with a notice that the Licence had become unconditional in relation to such part." (Emphasis added.)

27. Variation of the Licence is addressed in clause 18.1 which provides:

> "The provisions of this Licence (including the Licensed Area, the Maximum Licensed and/or the Area of Responsibility) may be varied from time to time, temporarily or permanently, by express agreement between the Authority and the Operator and on such terms as the Authority and the Operator may agree."

28. The Coal Authority may terminate the Licence pursuant to clause 15 if the Operator is in breach of an enforcement order or the Licence (in the limited circumstances defined in clauses 15.1.1 and 15.1.2) and the Coal Authority has followed the prescribed notification procedure (in clause 15.2).

29. The circumstances in which the Coal Authority may unilaterally revoke the Licence are prescribed in clause 16. In summary, the Coal Authority may only revoke the Licence where one of the following conditions is met:

    i) After the Coal Authority has given notice to the Operator concerning the Operator's default (clause 16.1.1.1);

    ii) Following the dissolution of the Operator where the Operator is a body corporate (clause 16.1.1.2);

    iii) Following the bankruptcy of the Operator where the Operator is an individual (clause 16.1.1.3);

    iv) If the Operator becomes subject to insolvency proceedings (clause 16.1.1.4); or

    v) After the termination of the Lease (clause 16.1.1.5).

30. When issued, the 1996 Licence was (adopting the Coal Authority's terminology, and the language of both the 1996 Licence and the 2013 Variation) a conditional licence, not an operating licence. On 7 January 1997, the Coal Authority determined that the conditions in the 1996 Licence had been satisfied for part of the Maximum Licensed

Area, and so "*part de-conditionalised*" the 1996 Licence, with the effect that it became an operating licence in respect of the Licensed Area.

31. By means of the 2013 Variation, the Licensee and the Coal Authority expanded the Maximum Licensed Area from the 1312 hectares (identified in Schedule 2, Part 2 as the area edged red) to include a further 1,460 hectares (identified in Schedule 2, Part 2 as the area edged green or purple; 'the Extended Area'). In respect of the Extended Area, the Licence remained conditional. Accordingly, Aberpergwm colliery comprises an operational area beneath a surface area of about 1,312ha, in respect of which coal-mining operations are currently authorised, and a conditional area beneath a surface area of about 1,460ha.

Planning permission

32. One of the conditions precedent in the Licence was the obtaining of planning permission for the Extended Area by 31 December 2020. On 23 July 2014, Energybuild applied for planning permission (ref. P2014/0729), which included an application for consolidation and extension of planning permission for surface development and operations, and for an extension to and reconfiguration of the coal workings at Aberpergwm Colliery.

33. The planning officer's report noted:

> "It is proposed to provide for the extraction of approximately 70 million tonnes of run of mine coal over a period in excess of 25 years, of which it is estimated that approximately 42 million tonnes will be saleable coal."

34. On 19 April 2018, Neath Port Talbot County Borough Council made a request to the Welsh Government to call-in the application. The Welsh Government decided the application was not in conflict with national planning policies in place at that time and decided not to call-in the application. On 27 September 2018, Neath Port Talbot County Borough Council granted planning permission. Although the Licence expires on 7 January 2096, the planning permission states that coal mining must cease no later than 31 December 2039.

Energybuild's application

35. On 16 September 2020, Energybuild submitted an application to the Coal Authority for 1,131 hectares of the Extended Area to be 'deconditionalised'; confirming they have no interest in the remaining 329 hectares of the Extended Area and are content for the conditional licence to lapse in respect of that part of the Extended Area. The application was submitted on the Coal Authority's form headed, "*application for an underground coal mining operating licence*". On the form, the interested party identified the type of application as being to "*De-conditionalise existing Conditional Licence*", rather than an application for a "*New Operating Licence*" or for a "*Variation to an existing Operating Licence*".

36. On 23 December 2020, the Coal Authority gave notice that it would continue to determine the application beyond the conditional licence expiry date of 31 December 2020.

Correspondence between the Coal Authority and the Welsh Government

37. On 26 May 2021, the Coal Authority wrote to the Director of Climate Change, Energy and Planning for the Welsh Government, offering the Minister "*the opportunity to express a view on this licence application*", and expressing the Coal Authority's view that the Welsh Ministers "*can make a direction on this under 26A of the Coal Industry Act*".

38. On 21 June 2021, the Director of Climate Change, Energy and Planning responded to the Coal Authority:

> "The Welsh Government understands that the existing licence (originally granted by the Coal Authority in 1996) and subsequently varied by agreement in 2012) authorises coal mining operations, but suspends the effect of the authorisation until the conditions precedent are discharged. We understand that Energy Build Mining Limited has applied to the Coal Authority to confirm that it has discharged the conditions precedent, and can undertake coal mining operations as set out in the existing licence.
>
> Our view is that such an application would not engage section 26A of the Coal Industry Act 1994. The authorisation to undertake coal mining (subject to discharge of conditions precedent) was granted in 1996, prior to section 26A coming into effect. Applying section 26A in these circumstances would involve a degree of retrospective effect, which is not expressly permitted within the statutory provision."

39. The Coal Authority replied on 30 July 2021:

> "I can confirm that the Operator is seeking to deconditionalise their current conditional licence. To help partners, stakeholders and members of the public be clear about what different types of licence mean we now talk about conditional and full licences to help draw out the distinction that a conditional licence does not allow coal extraction whilst a full (deconditionalised) operational licence does. In this instance the deconditionalising of the licence, or moving from a conditional to a full operational licence, would allow additional coal mining to take place at Aberpergwm until 2039 (the date of the relevant planning permission).
>
> …
>
> We believe that section 26A of the Coal Industries Act does provide sufficient discretion for the Minister to be consulted and that it would be appropriate in this case.

> I would be grateful if you would consult the Minister, in light of the conversation above, and confirm to me the outcome so that we can appropriately determine the licence application. …"

40. On 24 August 2021, the Director of Climate Change, Energy and Planning wrote to the Coal Authority requesting that if they had now completed their determination of Energybuild's application, and were minded to grant it, that they send the Welsh Government "*a copy of the licence application and the current licence*", and "*any draft new licence proposed to be issued*".

The Coal Authority's Recommendation Report

41. On 8 October 2021, the Coal Authority's Recommendation Report was approved. In two tables headed, respectively, "*licensing duties under the Coal Industry Act 1994"* and "*property duties under the Coal Industry Act 1994 associated with licensing*", the Recommendation Report sets out the Coal Authority's conclusions in respect of ss.2(1)(a), 2(1)(b), 2(1)(c), 2(2)(a), 2(2)(b) and 2(3), and ss.3(1)(a), 3(4) and 3(5) of the 1994 Act. The Recommendation Report states:

> "It is recommended that on the basis of:-
>
> - The application being in line with the Coal Authority's licensing function and a favourable determination will contribute towards an economically viable mining industry being maintained and developed by persons authorised to carry out coal-mining operations;
>
> - Financial clearance having been given by the Authority's Finance Business Partner and an updated credit check confirming there has been no change of the financial position of the licensee;
>
> - The applicant having demonstrated that key personnel have the appropriate experience and expertise to manage the project;
>
> **then Energybuild Mining Limited should be offered a deconditionalisation to their existing conditional licence and an associated lease for a term which is co-terminus with the expiry of the current planning permission.**" (Original emphasis.)

The Coal Authority's letter of 11 October 2021

42. On 11 October 2021, the Coal Authority wrote to the Welsh Government,

> "…I write to inform you that the Coal Authority has completed its determination process. As you know we have to base our decision on whether the licensee has demonstrated that they have met the requisite tests under the provisions of Coal Industry Act 1994. These tests are:

> 1. Whether the applicant can sufficiently finance its coal mining operations and related liabilities;
>
> 2. The nature of the land or property that could be impacted by any subsidence, and that the applicant could provide financial compensation if this was ever to occur;
>
> 3. That the operation will be carried out by properly trained and experienced people.
>
> The licensee has demonstrated that they have met these tests and therefore, in accordance with the duties on us under the Coal Industry Act 1994, we would need to grant a full licence. Before we do this we need clarity on the position of Welsh Government …
>
> As we highlighted in our letter dated 30 July 2021 when our Chief Executive, Lisa Pinney, recently met with the Climate Change Minister, they discussed the need to ensure that Welsh Ministers had the opportunity to contribute to discussions about coal licensing and the relevance to Welsh considerations about climate change, net zero and delivery of the Well-being of Future Generations (Wales) Act 2015. Minister James was clear that Welsh Government policy now has a presumption against coal mining and that Welsh representatives should have the opportunity to be heard about any new coal mining activity.
>
> The conditional licence was issued before devolution, and both the conditional licence and planning permission were issued before the publication of the Welsh Government's coal policy statement.
>
> We are therefore very mindful that the Welsh Minister or Welsh Government officials have never had the opportunity to comment formally on this application.
>
> We consider the Minister can make a determination under s.26A of the Coal Industry Act and would be grateful if you would consult the Minister on this application. We enclose a copy of the licence application, the current licence and a copy of the legal documentation we propose to issue to the licensee and understand that you now have the information that you need to give us a formal indication of the Minister's thinking."

Draft agreement

43. The legal documentation the Coal Authority proposes to issue consists of (i) a "*Notice to operator of licence becoming unconditional as to part*"; (ii) an "*AGREEMENT supplemental to a Coal Industry Act 1994 Underground Licence*"; and (iii) a "*DEED OF VARIATION supplemental to an Underground Lease*". The draft Agreement is expressed as being supplemental to, and so would form part of, the Licence.

44. The draft Agreement provides for the variation of clause 3.1 of the Licence, changing the term to end on 31 December 2039, for the substitution of Plan C (attached to the draft Agreement) for Plan A, and for the substitution of Schedule 2. In the draft Agreement the Schedule provides:

> "…**Part 2**
>
> **Maximum Licensed Area**
>
> The Specified Seams together with all other underground roadways and other underground spaces which are within the area edged red on Plan C.
>
> In Part 1 and Part 2 of this Schedule '**Specified Seams**' means :-
>
> Such parts of the Nine Feet and Eighteen Feet seams as lie beneath the surface area of 2443 hectares or thereabouts as shown edged red on Plan C." (Emphasis added.)

45. This variation would remove from the definition of the Maximum Licensed Area the surface area of 329 hectares in respect of which the conditional licence has lapsed. The surface area of 2443 hectares consists of the currently operational area (1312 ha) and the area to be deconditionalised (1131 ha).

Welsh Government's Ministerial Advice

46. On 27 October 2021, Ministerial Advice on the subject of the "*Coal Authority Licence Approval for Aberpergwm coal mine*" was provided to the Welsh Government's Minister for Climate Change. The recommendation to the Minister was to write to the Secretary of State for Business, Energy and Industrial Strategy ('BEIS'), and to agree to officials writing to the Coal Authority, "*setting out it would not be appropriate for Welsh Ministers to share an opinion on this case*".

47. The Ministerial Advice states:

> "5. Section 26A applies to operations under new licences and to variation to existing licences where the degree of authorisation for mining operation changes (i.e. if the licence authorises new coal extraction). Section 26A does not give the Welsh Ministers full coal licensing powers: these remain with the Coal Authority.
>
> …
>
> 7. … The Coal Authority consider that the Welsh Ministers can make a determination under section 26A, and the October letter formally requested that the Minister be consulted on the application.
>
> …

> 14. However, officials [redacted] do not agree that section 26A is engaged, and have asked why the Coal Authority considers it does. …
>
> 15. Should the Minister respond to the Coal Authority indicating that Welsh policy is opposed to coal extraction, the Coal Authority cannot take that response into account. Its statutory remit limits it only to considering the applicant's financial standing and competence, and the risk of subsidence. …
>
> 16. Notwithstanding the formal working arrangement agreed with the Coal Authority, the CIA requires that the Coal Authority formally issue a licence before the Welsh Ministers' powers are engaged, i.e. the licence comes first and then it is for the Ministers to notify the Coal Authority whether or not they approve the authorisation. The approval is required in order for the licence to take effect. In other words, the statute envisages that the Coal Authority issues a licence without knowing what the decision of the Welsh Ministers will be.
>
> 17. For these reasons, … officials recommend that the Minister does not offer a view on whether the authorisation should be approved.
>
> …
>
> 24. Notwithstanding the absence of a quick legislative fix, the Aberpergwm case clearly highlights that section 26A is not working as it was intended and that further action is needed. The licensed activities are likely to increase Welsh, UK and global greenhouse emissions and therefore make it more difficult for the Welsh and UK climate change targets to be met. The licence and associated planning permission would allow for the extraction of up to 40 million tonnes (Mt) of coal by 2039. If combusted, the coal would be expected to release circa 100Mt of CO_2 (5.5Mt per annum) plus other combustion related pollutants.
>
> 25. … The inability of Welsh Ministers to prevent the licensed activities taking place highlights the deficiencies in section 26A." (Emphasis added.)

48. The Minister accepted the recommendations on 28 October 2021.

Correspondence between the Welsh Government and the UK Government

49. On 28 October 2021, the Minister for Climate Change wrote to the Secretary of State for BEIS regarding Energybuild's application:

> "I am writing in the week before the crucial COP26 conference, to ask you to intervene in a licensing decision that will have a

> major impact on Welsh and UK greenhouse gas emissions over the next two decades.
>
> Your letter of 24 September to the First Minister indicated that BEIS considers the powers in the Coal Industry Act 1994 (as devolved by the Wales Act 2017) enabled the Welsh Ministers to give effect to our policy. I agree that this was the policy intent. However, my letter of 26 October raised the issue that the drafting of the legislation means the powers only apply to new or extended licences. I am writing again as we now have an example of the impact of the current drafting. Our view is that s26A cannot apply retrospectively, and therefore the powers devolved cannot achieve the UK Government's intention of the Welsh Ministers giving effect to their policy, in the case of Aberpergwm.
>
> …
>
> The climate impact from mining at Aberpergwm is expected to be significant at both the Welsh and UK level. The licence and associated planning permission enables up to 40 million tonnes of coal to be extracted by 2039. There is no clear mechanism to enforce how and where the coal products are used. If burned, the coal would be expected to release about 100 million tonnes for CO_2 as well as other pollutants, which is likely to have an impact on global emissions too. My view is that new coal extraction is entirely incompatible with the climate emergency and the UK Government's role as host of COP26. This view is reinforced by the letter Lord Deben [Chair of the Climate Change Committee] wrote in January 2021 to the Secretary of State for Housing, Communities and Local Government, underlining the impact of new mining in Cumbria on UK emissions and urging the UK Government to consider further the UK's policy towards all new coal developments, for whatever purpose.
>
> The form of powers devolved to the Welsh Ministers prevents me taking action to refuse a licence that has been brought forward under the historic regime established by the UK Government, and which is clearly not appropriate in the current climate crisis. As the Coal Authority's sponsoring body, and as the holder of a greater range of functions under the Coal Industry Act 1994, I urge you to intervene in this instance." (Emphasis added.)

50. BEIS responded by email to the Welsh Government on 19 November 2021, followed by a letter dated 7 January 2022, in essentially the same terms as the email, from the (UK) Minister of State for Energy, Clean Growth and Climate Change to the (Welsh) Minister for Climate Change. BEIS agreed that "*the Coal Authority's statutory duty to promote an economically viable coal industry … is at odds with our climate leadership ambitions and policies on coal so we are looking at measures to review that duty*". But in relation to Energybuild's application the letter stated:

> "…Our view is that under Section 26A of the Coal Industry Act 1994, where a coal operator wants to mine in Wales, it must seek the approval of the Welsh Ministers as part of its application for a licence to do so. This is widely drafted because Welsh Ministers wanted autonomy in coal operations (not by reference to the types of licences being applied for, or held by a coal operator) in Wales. Owing to Section 26A, it would not be appropriate for BEIS Ministers to intervene in coal mining operations in Wales."

The Welsh Minister's decision

51. The decision of the Welsh Ministers that is challenged is contained in a letter of 10 January 2022 (although dated 7 January) to the Coal Authority. The letter stated:

> "… The Welsh Government considers that section 26A of the Coal Industry Act 1994 is triggered if the Coal Authority issues, on or after the date section 26A came into force (i.e. 1 April 2018), a licence authorising mining in relation to coal in Wales. The 1996 Aberpergwm licence (as amended by the deed of variation in 2013) granted the authorisation for certain coal mining operations, but suspended the effect of the authorisation until certain condition precedents had been discharged. The application to de-condition the Aberpergwm licence seeks to give effect to the authorisation already granted by the Coal Authority in 1996 (and varied in 2013).
>
> The Welsh Ministers' function under section 26A only applies to new or extended licences (such as where the degree of authorisation for mining operations changes to allow new coal extraction), and does not therefore allow Welsh Ministers to refuse or approve a licence in these circumstances. Therefore, the Welsh Ministers will not be making a determination in this case. Officials have also written to Energybuild formally confirming this position. …"

The Coal Authority's decision

52. In the statement of facts and grounds, the claimant identified the Coal Authority's decision to approve Energybuild's application as having been made on 25 January 2022, on the basis that on that date the Coal Authority's website changed to show that the decision in respect of Energybuild's application was "*approved*". In a letter to the claimant dated 2 February 2022, the Coal Authority stated:

> "The operator has demonstrated that they have met the requisite tests under current legislation which includes planning permission from the relevant Welsh authorities. The Coal Authority, having consulted Welsh Government on the application, has a legal duty to approve the licence application. This was done on 25 January 2022." (Emphasis added.)

53. However, the Coal Authority has not yet issued a formal decision notice or executed the supplemental agreement to the Licence or the deed of variation of the lease, necessary to give effect to the decision.

E. Ground 1: Does section 26A of the 1994 Act apply?

The parties' submissions

54. The claimant contends the Welsh Ministers erred in their interpretation of section 26A, and in particular in determining that it provides them with no power to approve (or not) the authorisation of new coal-mining operations in the Extended Area in the circumstances of this case. Whereas counsel for the Welsh Ministers, Mr Gregory Jones KC, submits the claimant's interpretation is "*contorted*", "*bizarre*" and "*absurd*"; and should be rejected because it has retrospective effect.

55. The parties agree that this ground gives rise to a question of statutory construction, principally of section 26A. As a matter of statutory interpretation, words are presumptively given their natural and ordinary meaning. As Lord Carnwath put it in *London Borough of Lambeth v the Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33, [2019] 1 WLR 4317, at [19],

> "… the starting-point – and usually the end-point – is to find 'the natural and ordinary meaning' of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense."

As is often the way, they agree the section is unambiguous, but disagree as to its meaning.

56. Ms Dehon submits section 26A is drafted in wide terms and, on its face, applies in the instant case. The 1994 Act differentiates, carefully, between the "*licence*" and the "*authorisation*". It is clear from their decision and detailed grounds that the Welsh Ministers have erroneously conflated these terms. The power given to the Welsh Ministers by section 26A is to approve "*the authorisation*", not "*the licence*". Come what may, the "*licence*" exists and has effect. However, if the Welsh Ministers do not approve the "*authorisation*" of coal-mining operations, the authorisation will be of no effect.

57. The claimant contends the position articulated by Mr Edward Sheriff, in his witness statement submitted on behalf of the Welsh Ministers, evidences the erroneous conflation of the licence and the authorisation. In §26 of his statement, Mr Sheriff refers to the terminology used to distinguish a licence with conditions from one without conditions, and observes: "*it is fundamentally always the same licence and authorisation*". The claimant submits that is incorrect. While the licence remains the same, the "*authorisation*" does not come into being until the conditions are discharged: it changes from an authorisation which has no force or effect, to an authorisation which is in force.

58. In accordance with section 27(3)(a), the "*coming into force*" of the authorisation in respect of the Extended Area is "*postponed*" until the conditions in the Licence are satisfied. That is the terminology used in the Act, and it is the clear effect of clause 27

of the Licence. Ms Dehon emphasises the use of the term "*postponed*" (rather than a term such as suspended), indicating the thing that has been postponed has not yet happened. The Licensee is not authorised to extract any coal in the Extended Area; it remains subject to the general prohibition on coal-mining operations in section 25(1). It is only when the Coal Authority determines that the conditions postponing the coming into force of an authorisation contained in a licence have been met, and issues its formal decision, that a (formerly postponed) authorisation authorises coal mining operations. If the conditions are not satisfied, the authorisation will lapse.

59. The claimant submits that when Mr Sheriff comments that, when "*conditions are discharged, there is no new licence issued and no new coal operations authorised*", he is incorrect as regards the Licence in issue in this case: new coal operations are "*authorised*" because the authorisation comes into force. Previously, the Licence existed, but it did not authorise any extraction of coal in the Extended Area. It is also, the claimant submits, a fundamental misunderstanding for Mr Sheriff to state that, in this case, when the Coal Authority decides that the conditions in the Licence have been satisfied and issues an instrument to that effect, "*the original authorisation has been entirely untouched*". On the contrary, the authorisation changes profoundly. In relation to the 1,131 hectares of the Extended Area which are the subject of the application, the authorisation, which has previously been a potential authorisation, of no effect and not permitting any coal-mining operations, becomes an actual authorisation which has legal effect and permits coal-mining operations in that Extended Area; while in relation to the remaining 329 hectares of the Extended Area, the potential authorisation disappears, as it lapses.

60. The Welsh Ministers' power in section 26A operates in the same way as the Coal Authority's power in section 27(3)(a), by permitting the authorisation to remain not in force. That is how the Welsh Ministers can exercise control over coal-mining operations after the Coal Authority has issued a licence authorising the operations. The language in section 26A – "*if or to the extent that*" – demonstrates an intention to capture any new or additional authorisation, even if the licence previously authorised coal-mining operations to some extent.

61. Ms Dehon submits that the Welsh Ministers' reliance on the terms of the Licence is misplaced as the contents of a licence cannot be used as an aid to interpretation of a statute. Ms Dehon acknowledges that the views expressed in correspondence as to the meaning of section 26A are also not legitimate aids to interpretation. Nonetheless, she submits that Mr Jones's disparagement of the claimant's construction as absurd is bold given the UK Government and the Coal Authority interpreted it in the same way. She submits that paragraph 5 of the Welsh Government's Ministerial Advice (see paragraph 47 above) covers the facts here: there will be a variation to the Licence (reflected in the draft Agreement) and the degree to which coal-mining operations are authorised will change.

62. Ms Dehon contends that the claimant's interpretation does not involve giving section 26A retrospective effect. The suspended licence does not, and has not ever, authorised coal-mining operations in the Extended Area. Energybuild's application was made after the coming into force of the Wales Act 2017. The authorisation in respect of that area was not in force prior to the commencement of the Wales Act 2017 (and, with it, section 26A of the 1994 Act), and if the Welsh Ministers do not approve the authorisation, it will merely continue to be not in force. Nothing in the transitional provisions in

Schedule 7 of the Wales Act 2017 prevents the application of section 26A of the 1994 Act to deconditionalisation decisions. The use of section 26A to prevent the coming into effect of the authorisation upon the deconditionalisation of the licence does not affect the validity of the decision made in 1996 to issue the suspended licence. There is no retrospective effect to the requirement that the Welsh Ministers approve a decision made by the Coal Authority to authorise new coal mining in Wales.

63. In any event, if I were to find that construing section 26A as applying where a licence is deconditionalised does have an impact going forward on existing rights, nevertheless, the claimant submits the language of section 26A is plain and it is clear that section was intended to cover this type of case. The claimant readily acknowledges that section 26A has no application insofar as the Licence authorises coal-mining operations in respect of the original 1312ha area, given that that authorisation was in force and effective long before 1 April 2018, when section 26A came into force.

64. Ms Dehon submits the claimant's meaning is the sensible purposive interpretation, as well as the natural and ordinary meaning of the words. She contends that the Explanatory Notes cannot be used to narrow section 26A (*R (Kaitey) v Secretary of State for the Home Department* [2022] QB 695, Singh LJ, [109]); and the Welsh Ministers' reliance on an analogy with the planning regime, in which the term "*postpone*" is not used, is misplaced. Unlike an outline planning permission, which establishes that the development is acceptable in planning terms, there is nothing in the 1994 Act to support the notion that the Licence established the acceptability of coal-mining operations in the Extended Area.

65. Mr Jones submits the Welsh Ministers correctly interpreted the extent of their powers to make determinations under section 26A; and correctly stated the position in their letter of 7 January 2022. In fact (and law) the Licence was granted in 1996 (and varied in 2013) and the "*authorisation*" to mine was contained within it. That is the case notwithstanding that the effect of the authorisation was suspended on terms. Discharging the conditions precedent merely gives effect to the pre-existing authorisation. The Coal Authority's decision did not grant a new licence. It simply confirmed that the conditions of the Licence had been complied with such that the authorisation already granted was now fully effective.

66. The Welsh Ministers consider that the terminology used by the Coal Authority is not always useful and, as Mr Sheriff put it, can be problematic as "*a licence with conditions, and one without conditions … is fundamentally always the same licence and authorisation*" (Sheriff, §26). Nonetheless, applying that terminology, the Welsh Ministers submit the Licence was an "*operating licence*" which contained conditions, not a "*conditional licence*". Notwithstanding the form used for Energybuild's application, it was not in fact an application for an "*operating licence*" or a "*full licence*" but for notice that certain conditions had been appropriately discharged.

67. By section 27(1) a licence is required to specify the coal-mining operations which, "*subject to its conditions, <u>are</u> authorised*" (s27(1)). By section 27(3)(a), a licence may postpone the "*coming into force of the authorisation contained in the licence*" (s27(3)(a)). This is consistent, Mr Jones submits, with the authorisation in respect of the Extended Area having been given with the grant of the Licence. It was not, the Welsh Ministers submit, the authorisation itself that was postponed, merely its effect.

There is nothing in the statute which supports the point that a postponed authorisation is not an authorisation.

68. The Welsh Ministers contend that the natural and ordinary meaning of the words contained in section 26A does not support the claimant's contention that the licence and the authorisation "*are two separate things*". Mr Jones contends that a licence and an authorisation are effectively the same in this context. It is the *Licence* which authorises the coal-mining operations at the Site albeit that the effect of that authorisation was suspended on satisfaction of matters set out by conditions. The coal operations were authorised, albeit on suspended terms, as far back as 1996, as varied by the 2013 Variation Agreement. It is therefore inaccurate to say any new coal-mining operations have been authorised as a result of the Coal Authority's decision. The Welsh Ministers' power to approve is therefore not engaged. Their powers under s26A apply (and can only apply) in respect of new or extended authorisations granted by the Coal Authority on or after that section was in force (namely, 1 April 2018). The effect of section 26A, in a situation where it applies, is to suspend the effect of any such licence authorisation until the Welsh Ministers approve the authorisation.

69. Mr Jones submits the words "*if or to the extent*" in section 26A address the fact that a single licence could potentially authorise coal mining operations that cross the border between England and Wales. The words make clear the geographical limitation to Wales of the Welsh Ministers' power. Ms Dehon accepts that those words are apt to ensure the power is limited geographically, but contends they are also consistent with a licence and an authorisation being discrete concepts.

70. The Welsh Ministers submit that a detailed consideration of the Licence itself supports their interpretation. If the licensee in fact has no authorisation, the detailed clauses in respect of variation, revocation and dates for compliance with the conditions precedent would make no sense.

71. The Welsh Ministers also contend that the claimant's interpretation should be rejected because, as Lord Millett observed in *R (Edison First Power Ltd) v Central Valuation Officer* [2003] UKHL 20, [2003] 4 All ER 209, at [116],

> "The Courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless."

72. The Welsh Ministers submit that if the claimant's argument is correct, and followed to its logical conclusion, any authorisation contained in a licence, no matter how long ago it was granted, could be revoked if and when the Welsh Ministers so wish. Parliament could not have intended section 26A to have such an effect. It would render an otherwise valuable licence of no value, and leave operators on tenterhooks regarding their ability to exercise an authorisation they had been granted in a licence, regardless of whether or not they had already complied with the terms and conditions precedent in the licence.

73. The Welsh Ministers contend that, contrary to the claimant's submissions, their interpretation would give section 26A retrospective effect. If a licence is granted subject to conditions precedent, the recipient of the licence is entitled to expect that if they

satisfy those conditions, the authorisation will take effect. On the claimant's interpretation, section 26A deprives the licensee of a valuable asset they held before that provision came into force. As the authorisation is not separate from the Licence but contained within it, the application of section 26A to Energybuild's application would amount to a retrospective application of the law.

74. In the absence of clear wording, it is to be presumed that Parliament did not intend the provision to have retrospective effect. The 1994 Act is a comprehensive code. It does not confer any unilateral power on the Welsh Ministers or the Coal Authority to revoke the coal-mining operations authorised by the licence unless the operator has failed to adhere to the terms of the licence.

75. Mr Jones submits that the planning regime provides a striking analogy. A licence subject to preconditions which is granted by the Coal Authority is analogous to an outline planning permission. It is unlawful to implement an outline planning permission, just as it is unlawful for a licensee to undertake coal-mining operations in an area in respect of which preconditions have not been fully discharged. Nonetheless, an outline planning permission is a valuable asset which establishes that the development is approved in principle. Local planning authorities have an express power under section 97 of the Town and Country Planning Act 1990 ('the TCPA') to revoke or modify any permission (or permission in principle) where the works have not already been carried out but, importantly, when permission is revoked compensation is payable (s.107 of the TCPA). There are no equivalent provisions in the 1994 Act. The fact that the 1994 Act uses the word "*postpone*" does not undermine the analogy: postponement is merely a temporal issue. Parliament could choose not to pay compensation, but if it did so it would have to be clear that was what it was doing. Mr Sherriff states that he is "*not aware of any evidence that would suggest it was the intention of Parliament that s26A would have retrospective effect*".

76. The Welsh Ministers suggest the definition of retrospective legislation provided in *Craies on Legislation* (12th ed., 2020), at §10.3.1, fn.151, provides a useful framework for considering the issue in this case:

> "A statute is deemed to be retrospective which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already in the past."

They emphasise the final phrase and submit that section 26A would clearly be retrospective if it allowed the Welsh Ministers to approve or refuse an authorisation which the licensee has gone to considerable time and expense to exercise by securing compliance with the preconditions, including securing planning permission.

77. Parliament has the power to apply legislation retrospectively provided it "*uses sufficiently clear words*": *Azam v Secretary of State for the Home Department* [1974] AC 18, Lord Wilberforce at 59D; and *Times Newspapers Ltd v Flood* [2017] UKSC 33, [2017] 1 WLR 1415, Lord Neuberger PSC, [53]. If Parliament had used clear words, the Welsh Ministers submit the claimant would have pleaded that the provision was retrospective at the outset, not raised it in the alternative in reply. And an assessment of

the likely effects of making the provision retrospective would have been included in the UK Government's Impact Assessment for the Wales Bill (as it then was).

78. The Welsh Ministers further submit that in determining whether Parliament intended section 26A to have retrospective effect the court must have regard to the need to ensure fairness, particularly when vested interests are at stake (*Granada UK Rental and Retail Ltd v Pensions Regulator* [2019] EWCA Civ 1032, [2020] ICR 747, Patten LJ (giving the judgment of the court), [56]) and to the nature of the authorisation as a possession for the purposes of article 1 of protocol 1, which should not be revoked without compensation or a right of appeal (*Rola v Slovenia* (12096/14 and 39335/16) [2019] ECHR 411, [2019] LLR 835).

79. Finally, if contrary to the Welsh Minister's submissions the court considers that section 26A is ambiguous, they place reliance on the Explanatory Notes and a passage from Hansard in support of their submission that it has prospective effect only. The Explanatory Notes state, in relation to section 67 of the Wales Bill (which inserted section 26A):

> "This section provides that where a coal operator wants to mine in Wales, it must seek the approval of the Welsh Ministers as part of its application for a licence to do so."

80. The extracts from the Hansard debates of the Wales Bill on which they rely are:

i) A statement of the then Secretary of State for Wales, Alun Cairns, during the Second Reading of the Wales Bill in the House of Commons that

> "… Welsh Ministers will have a say on whether licences are granted for <u>new coal mining operations</u>. It is difficult to believe that, with all of the Wales Acts that have passed since 1997, the Welsh Assembly does not have the power to sanction a new coal mine; it needs approval from the UK Government." (14 June 2016, Vol.611 Col.1644; emphasis added.)

ii) A statement of the then Parliamentary Under-Secretary of State for Wales, Guto Bebb, during Day 2 of the Public Bill Committee in the House of Commons, that

> "Clause 49 provides that where a coal operator wants to mine in Wales, it must seek the approval of Welsh Ministers as part of its <u>application for a licence</u>." (11 July 2016, Vol.613 Col.54; emphasis added.)

Analysis and decision

81. Ground 1 raises a question of statutory interpretation. The court must ascertain the meaning of the words used in a statute in the light of their context and the purpose of the statutory provision. In this case, the court is concerned with an amendment to a statute. The 1994 Act, as amended, falls to be construed as a whole. The meaning and effect of section 26A must be ascertained by an examination of the 1994 Act.

82. Nonetheless, in my view, in this instance it is legitimate to have some regard also to the amending statute. The Wales Act 2017 amended the Government of Wales Act 2006 by moving to a reserved powers model for Wales. Section 26A was introduced in the context of that strengthening of the devolution settlement. The context in which section 26A was inserted into the 1994 Act was also one of developing national and international policy to combat climate change, as reflected in the Climate Change Act 2008 and the United Nations Framework Convention on Climate Change ('the Paris Agreement'), which set targets for the reduction of greenhouse gas emissions and global warming. The United Kingdom signed the Paris Agreement on 22 April 2016 and ratified it on 17 November 2016.

83. As Singh LJ observed in *Kaitey* at [117],

> "it is important to appreciate that a purposive approach is still an objective approach; it is not an attempt to divine the subjective intentions of Parliament or individual members of it. Even if that were possible, it would be irrelevant."

The views expressed by UK and Welsh Ministers, and by the Coal Authority, as to the meaning of section 26A, in correspondence that post-dates the enactment of the Wales Act 2017, and the statement of Mr Sherriff, provide no assistance in considering the purpose of that provision or the context in which it was enacted, and I have placed no weight on them. I also agree with the claimant that the terms of the Licence do not assist in construing section 26A.

84. The court's first task is to find the natural and ordinary meaning of the words, considered in context, and applying common sense: see paragraph 55 above, with which I agree. Section 26A uses the words "*licence*" and "*authorisation*". It is generally presumed that the drafter of an Act uses different words to convey different meanings, "*not to indulge in elegant variation*": *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed., 220) ('*Bennion*'), §21.3. That presumption is rebuttable but, in my judgment, it is plain that the terms "*licence*" and "*authorisation*" are intended to convey different meanings, not least given that other provisions of the 1994 Act refer expressly to an authorisation "*contained*" in a licence: see sections 25(3), 27(3)(a) and 28(7)(a). The Welsh Ministers have erroneously conflated those two terms.

85. The power given to the Welsh Ministers by section 26A is to approve (or not) an authorisation of coal-mining operations in relation to coal in Wales which is contained in a Part II licence. Unless and until the Welsh Ministers notify the Coal Authority that they approve the authorisation, it has no effect. This effectively defers the coming into force of the authorisation until such time, if ever, as the Welsh Ministers' approval is given.

86. It is implicit in the words "*it shall have effect only if*" that the power does not apply to an authorisation which already had effect before section 26A was brought into force on 1 April 2018. Section 26A falls to be construed in a way that, to that extent at least, does not have retrospective effect. Moreover, if that were not plain on the face of section 26A, it is also clear that paragraph 6(1) of Schedule 7 to the Wales Act 2017 would prevent section 26A operating in a way which rendered ineffective an authorisation that was in force before that provision came into force. The Welsh Ministers' contention that the logic of the claimant's argument is that they would have the power to revoke

any authorisation no matter how long ago it was granted does not stand up to scrutiny. On any view, an authorisation which was in force before 1 April 2018 (such as that contained in the Licence in respect of the 1312ha area) did not cease to have effect that day, pending the approval of the Welsh Ministers.

87. In my judgment, the words "*If or to the extent*" ensure both that the Welsh Ministers' power of approval is limited to coal-mining operations in relation to coal *in Wales*, and that approval is required before any new or additional authorisation, whether it is contained in a new or existing licence, can come into effect. But that leaves open the question, what counts as new?

88. In ascertaining the meaning, the central question is whether the words "*authorises coal-mining operations*" encompass an authorisation which has not come into force, having been "*postponed*" pursuant to conditions imposed in accordance with section 27(3) which have not yet been satisfied. On balance, I am of the view that the *language* of the provision favours the claimant's interpretation.

89. First, a postponed authorisation does not in fact permit the licensee to undertake any coal-mining operations. It would be natural to interpret the words "*authorises coal-mining operations*", and the term "*authorisation*" in section 26A, as referring only to those authorisations which are in force and, subject to the Welsh Ministers' approval, which currently authorise coal-mining operations. Moreover, I agree with the claimant's submissions as summarised in paragraphs 57 to 58 above60 above.

90. Secondly, it would be natural to infer that the words "*it shall have effect only if*" mean that upon the Welsh Ministers notifying their approval, the authorisation takes effect. But if section 26A encompasses postponed authorisations then the Welsh Ministers could approve a postponed authorisation before any of the conditions have been satisfied; and so it would continue not to be in force until such time as the Coal Authority gives notice that the conditions are satisfied.

91. Thirdly, a related point is that if the Welsh Ministers were to approve a postponed authorisation, the effect may be that many years later, at the point when the conditions are satisfied and coal-mining operations are set to begin for the first time, the Welsh Ministers who are then in post would have no power to prevent such operations. As a matter of policy, the Coal Authority normally specifies a maximum of eight years for conditions to be satisfied, but nothing in the 1994 Act prevents the period being much longer.

92. However, this interpretation is not clear-cut. The language of section 27(3)(a) uses the term "*the authorisation contained in the licence*" to describe a postponed authorisation. This provides some support for the Welsh Ministers' interpretation of the term "*authorisation*" in section 26A as wide enough to include a postponed authorisation. I note that section 27(1) uses the present tense when referring to coal-mining operations which "*are authorised*", subject to conditions; and I accept that provision clearly applies to a licence which contains a postponed authorisation. However, it does not seem to me that undermines the point made in paragraph 89 above, given the express words "*subject to its conditions*" which find no likeness in section 26A.

93. In my view, there are two further factors that provide some support for the claimant's interpretation. First, the purpose of section 26A was to strengthen the powers of the

devolved government of Wales. Although, on any interpretation, it does so, the claimant's interpretation gives the Welsh Ministers power to address whether coal-mining operations which have not yet begun should be permitted. Whereas, on the Welsh Ministers' interpretation, in the circumstances of this case they are left asking the UK Government to exercise its powers to intervene in Wales.

94. Secondly, section 26A was enacted against the background of national and international recognition of the vital importance of urgent efforts to combat climate change. It may be thought surprising if, in this context, Parliament had intended that the Welsh government should have no power to determine whether, in a case such as this one, coal-mining operations that have not yet been permitted, should be allowed to begin and continue for nearly two decades. An interpretation that empowers the Welsh government in the present is, in my view, more consistent with the context in which section 26A was brought into force.

95. Pulling strongly in the opposite direction, however, is the fact that interpreting section 26A as applying in a case such as this, where the licence containing the postponed authorisation was granted before section 26A came into force, gives the provision a degree of retrospective force.

96. The general presumption against retrospectivity is described in *Bennion* at §7.14 in the following terms (omitting footnotes):

> "(1) Unless the contrary intention appears, an enactment is presumed not to be intended to have a retrospective operation.
>
> (2) The strength of the presumption varies from case to case, depending on the degree of unfairness that would result from giving the enactment retrospective effect.
>
> (3) The greater the unfairness the clearer the language required to rebut the presumption."

97. As the authors of *Bennion* observe at §7.14, in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486,

> "Lord Mustill, with whom all the other members of the appellate committee agreed, explained that the basis of the presumption is 'no more than simple fairness'. Having cautioned against undue or mechanistic reliance on generalised presumptions he applied the following statement from Staughton LJ in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712, 724:
>
> > 'In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to

> be expected that Parliament will make it clear if that is intended.'
>
> Lord Mustill then went on to address the question of how the courts approach the question of what fairness demands:
>
> 'Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say.'" (Emphasis added.)

98. I agree with the Welsh Ministers that if a licence is granted subject to conditions precedent, ordinarily, the recipient of the licence is entitled to expect that if they satisfy those conditions, the authorisation contained in the licence will take effect. In this regard, I have borne in mind my conclusion in respect of Ground 2 (see section F below). In my view the analogy with the planning regime, in which revocation of an outline planning permission is accompanied by rights of appeal and compensation, has considerable force.

99. It is true that lack of approval does not result in the revocation of the licence; it operates by preventing the authorisation having effect for so long as the Welsh Ministers' refrain from granting approval. It can, therefore, be said that, in this case, the licensee will continue to hold the licence containing the authorisation which was not in force before section 26A was enacted and will simply continue to have no effect, unless and until the Welsh Ministers grant approval. Nonetheless, in my judgment, the claimant's contention that on its interpretation section 26A has no retrospective effect is unrealistic.

100. As the passage from *Bennion* cited above indicates, retrospectivity is a question of degree. The claimant's interpretation is not retrospective to a degree that would be caught by paragraph 6 of Schedule 7 to the Wales Act 2017. But as stated in the passage from *Craies* cited by the Welsh Ministers (see paragraph 76 above), the instant case can be seen to be an example of a statute which, on the claimant's interpretation, "*attaches a new disability in respect to transactions or considerations already in the past*". On the claimant's interpretation, the law is changed for the future in relation to existing rights. Although Energybuild's authorisation was postponed, and so not in force, when section 26A came into effect, the licence was undoubtedly a valuable commercial asset.

If section 26A applies in this case, the prospect of the authorisation being available to use to extract and sell coal will inevitably markedly reduce, if not disappear, and with it the value of the licence is bound to diminish greatly, if not vanish: the licensee would effectively be deprived of a valuable asset. I agree with the Welsh Minister's submissions as summarised in paragraphs 76 to 78 above.

101. Given that the language of section 26A is reasonably open to both interpretations, the unfairness of the retrospective effect of the claimant's interpretation that I have identified - in the absence of any scheme for, or even consideration of, compensation or appeal - renders it highly unlikely to be the effect Parliament intended. In my view, the likelihood is that the applicability, or otherwise, of section 26A to *suspended* authorisations was not considered when the Wales Act 2017 was enacted. In these circumstances, the presumption against retrospectivity prevails.

102. I have placed no weight on the Explanatory Notes or the extracts from Hansard cited by the Welsh Ministers. It does not seem to me that the statements in Parliament address the point in issue in clear terms. The reference to "*new coal mining operations*" in the statement of the Secretary of State for Wales is equally apt to fit either parties' interpretation. And there is nothing in the statement of the Parliamentary Under-Secretary of State for Wales to indicate that he was focusing on the precise nature of what an applicant would need to apply for, not least given that on any view section 26A applies where there is an application for a variation of the authorisation. The same is true of the Explanatory Notes which, as Singh LJ observed in *Kaitey* at [109] "*are prepared by the Government in order to assist the reader in understanding the Act but do not form part of the Act and have not been endorsed by Parliament*".

103. Accordingly, I conclude that an "*authorisation*" for the purposes of section 26A includes an authorisation contained in a Part II licence which is postponed pursuant to conditions imposed in accordance with section 27(3)(a). The power does not apply if the licensee held the authorisation, or postponed authorisation, before section 26A came into force. Accordingly, the Welsh Ministers correctly decided that they had no power pursuant to section 26A to make a determination on Energybuild's application, and so I dismiss Ground 1 of the claim.

F. Ground 2: Did the Coal Authority unlawfully fetter its discretion and/or fail to take into account material considerations

The parties' submissions

104. Although the Coal Authority has not issued a formal decision notice, the Coal Authority does not object to the claim on grounds of prematurity.

105. There are two aspects to this ground. First, the claimant contends that the Coal Authority misinterpreted its powers and, consequently, fettered its discretion. Secondly, the claimant contends the Coal Authority failed to take into account material considerations.

106. In *R (Ashchurch Rural Parish Council) v Tewksbury Borough Council* [2023] EWCA Civ 101, Andrews LJ observed at [33]:

> "Subject to any matter which they are legally obliged to take into account, materiality (i.e. relevance) is something for the decision-maker alone to determine. If something is capable of being regarded as relevant to the decision on a planning application, but the planning authority does not take it into account, their decision can only be challenged on an irrationality basis, i.e. on the basis that that factor was 'so obviously material' that no reasonable decision-maker could have failed to consider it. That principle is established by a long line of authority including *Samuel Smith* [2020] UKSC 3, [2020] PTSR 221], …"

107. Although the claimant submits the comprehensive code in the 1994 Act is quite different to the planning legislation, the claimant accepts that "*the Samuel Smith principle*" applies in considering the Coal Authority's decision, when addressing the second aspect of this ground. However, the claimant's primary contention is that the *Samuel Smith* principle is inapplicable because, as Andrews LJ said at [69] of *Ashchurch*, albeit obiter,

> "that principle arises when the decision-maker has itself determined whether a factor is material or not, and thereby exercised an unfettered discretion to leave something out of consideration."

108. Ms Dehon submits that if the claimant's primary contention is correct that the Coal Authority fettered its discretion, and so failed to determine whether factors were material or not, then it is unnecessary to address the second aspect of this ground.

109. The claimant contends that the Coal Authority erred in its understanding of its powers under the 1994 Act by taking the view that it was required to "*grant a full licence*" if Energybuild could demonstrate that it had complied with the conditions and if three "*tests*" were met (see paragraph 42 above). The Coal Authority's assertion that "*the scope of the authority's determination was controlled by the terms of the condition*" in the Licence shows, the claimant submits, that the Coal Authority has erred. The Licence does not delimit the powers in the 1994 Act. The powers of a regulator like the Coal Authority are set out in the relevant statutory scheme.

110. The claimant submits that the Coal Authority's powers when determining Energybuild's application were as broad as they would be when granting a new licence. Nothing in the 1994 Act renders them narrower. The Coal Authority asserts that the power it was exercising in determining Energybuild's application was section 28. That section contains the power to impose conditions; it does not contain any *express* power to determine, on application, whether those conditions have been satisfied. If the power the Coal Authority relies on is implied into section 28, then there is no basis for the necessary implication to be that the power is narrow. Such an implication would not sit well with the rest of the statutory language in Part II and the broad discretion given to the Coal Authority under that Part.

111. While the claimant accepts that the necessary power could be implied into section 28, the claimant points to the Coal Authority's general power in section 5 as a possible alternative source of the power it was exercising in this case. If section 5 applies, the claimant contends it, too, shows that the power is broad, not narrow. Wherever the

relevant power was located, Ms Dehon submits that it was not a mere residue of the power to impose conditions that was exercised in 1996 and 2013; it is a separate licensing function.

112. The claimant submits that the Coal Authority's use of the language of planning law (e.g. referring to the "*discharge*" of "*conditions precedent*"), and reliance on planning caselaw, is inapt. The Coal Authority is not a planning authority. It is a statutory body corporate whose powers are entirely circumscribed by the comprehensive statutory scheme in the 1994 Act. The planning case law is decided against the backdrop of quite different statutory powers which use language specifically referring to "*discharge of conditions*" and intended to narrow planning authorities' powers in relation to those decisions. The 1994 Act, by contrast, does not contain any such language; does not specifically set out any process by which the Coal Authority is required to determine whether conditions have been satisfied and gives the Coal Authority broad powers (e.g. section 26), exercisable only subject to the regulatory duties in section 2. Whereas an outline planning permission has legal effect because approval in principle has been granted, a postponed authorisation is not in force and does not have such a legal effect.

113. The claimant observes that the Coal Authority's submissions as to the narrowness of its task are, in fact, inconsistent with its Recommendation Report, which shows that it did not mechanically consider whether the conditions had been complied with, but to some extent exercised its discretion. This can be seen, for example, by the Coal Authority's offer of an operational licence with the end date brought forward by more than 56 years to match the planning permission. A licence can have a different term from the planning permission, so that was an exercise of discretion. The terms of the Recommendation Report show that the difference between the claimant and the Coal Authority is about the extent of its discretion. The claimant submits the Coal Authority has more discretion than it appreciated.

114. The claimant contends that due to its misinterpretation of the scope of its statutory powers, the Coal Authority failed to consider whether the following were material factors:

i) The Welsh Ministers' announced stance that an appropriate application of Welsh policy would not see the licence granted. The Welsh Government's "*policy objective to avoid the continued extraction and consumption of fossil fuels*" is not tied to the exercise of its power under section 26A, or to the 1994 Act.

ii) The potentially very significant adverse climate change impacts of the granting of a licence. The claimant notes that the Coal Authority does not assert that the climate change impacts of its decision-making are excluded from consideration by the 1994 Act. The claimant submits that the Coal Authority's reliance on *R (Finch) v Surrey County Council* [2022] EWCA Civ 187, [2022] PTSR 958 is misplaced. That decision concerned the specific wording of the Environmental Impact Assessment Regulations 2017, so is not relevant to the materiality of climate change impacts in the Coal Authority's decision-making.

iii) These adverse climate change impacts, and their knock-on effect on the ability of Welsh Ministers to meet their climate change targets, pulled against the Coal Authority's duties to secure "*as far as practicable*" various outcomes, including

maintenance of an economically viable coal industry, such that there was a question for the Coal Authority whether it was not "*practicable*" to secure those outcomes through the grant of Energybuild's application.

115. If I reject the contention that the Coal Authority fettered its discretion, then in the alternative the claimant contends that each of these matters was an obviously material consideration. The Coal Authority's failure to take each (or any) of these matters into account renders its decision unlawful.

116. The Coal Authority submits that in determining Energybuild's application its narrow task was to decide whether the conditions precedent contained in the Licence had been satisfied. The application did not seek a new licence for coal-mining operations. The scope of the Coal Authority's determination was controlled by the terms of the Licence (including the conditions). In particular, pursuant to clause 27.1 the task for the Coal Authority was to determine whether, in the reasonable opinion of the Authority the conditions precedent had been fulfilled. No clause of the Licence conferred a discretion on the Coal Authority to refuse the application in circumstances where the conditions precedent were satisfied, and it would have been unlawful for the Coal Authority to have done so. The circumstances in which the Licence could be revoked, terminated or varied were defined in clauses 16, 15 and 18, respectively, and were expressly limited by those provisions. There is an obvious reason for this: the Licence represents a valuable right on which the licensee must be able to rely, e.g. for the purposes of obtaining finance.

117. Nor did the 1994 Act, on proper analysis, give the Coal Authority any discretion as to whether or not to permit coal-mining operations as that question had been decided when the Licence was issued. Conditions may be imposed on a licence pursuant to section 28. That power is broad in scope. The Coal Authority can (and did) exercise the power in section 28 to impose conditions precedent requiring the later submission of details to the Coal Authority and that body's approval of the same. Mr Henderson submits that the Coal Authority's power to discharge conditions is explicit in section 28(1), and in any event, it is part and parcel of the power in section 28 which was used to determine the Energybuild's application. The Coal Authority had no power to revisit the principle of permitting coal-mining operations in the context of this determination. The fact that section 28 is broad in scope does not change the nature of the task. The Coal Authority concluded that the conditions had been satisfied; and the claimant does not challenge that conclusion.

118. The Coal Authority contends that it did not exercise its power under section 5. But even if it had, the position would have been the same. The nature of the power must be considered in the circumstances in which it was exercised; here, the task of considering whether the conditions precedent were satisfied. The duties in section 2 affect *how* the Coal Authority exercises its functions under Part II of that Act, but they do not change the nature of its functions.

119. The Coal Authority submits that a strong parallel can be drawn with the jurisprudence on the discharge of conditions on an outline planning permission. The power to approve reserved matters cannot be used as a means of revoking or modifying a permission already given: *Kent County Council v Kingsway Investments (Kent) Ltd* [1971] AC 72, Lord Morris at 96; *R. v Newbury District Council, Ex parte Chievely Parish Council* [1999] 1 PLCR 51, Pill LJ, 64B – C. Put another way, when determining an application

for reserved matters approval, the local planning authority may not use the condition to require matters inconsistent with the principles approved by the outline planning permission: *Shemara v Luton Corporation* (1967) 18 P. & C.R. 520, Diplock LJ, 524; *Redrow Homes Ltd v The First Secretary of State* [2004] EWCA Civ 1375, Mummery LJ, [26]. The power of a local planning authority under a planning condition is limited by the terms of that condition: *London Borough of Camden v Secretary of State for the Environment* [1993] JPL 466.

120. In this case, the description of Energybuild's application as being one to discharge the conditions precedent on the Licence accurately captures the effect of the Coal Authority's decision, which is to render the Licence unconditional. It would have been a misuse of the Coal Authority's functions to go beyond the determination of whether the conditions precedent had been met.

121. Mr Henderson submits that the Recommendation Report was dealing with both deconditionalisation and the option under the lease. Although the Recommendation Report went further, for the purposes of considering whether to deconditionalise the licence, the only duties the Coal Authority needed to consider were those contained in section 2(1)(b) and 2(2)(b). That is because the conditions precedent in Schedule 4, Part 2, paragraphs 4 and 6 of the Licence set up a review in respect of the matters referred to in those provisions. No such review was set up in respect of section 2(1)(a), and Mr Henderson submits that is unsurprising as such a review would be inconsistent with the 'in principle' decision to authorise these coal-mining operations, reflected in the Licence.

122. There are three categories of considerations: first, those clearly (whether expressly or impliedly) identified by statute as considerations to which regard must be had; secondly, those clearly identified by statute as considerations to which regard must not be had; and thirdly, those considerations to which the decision-maker may have regard if in his judgment and discretion he thinks it right to do so: *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2020] UKSC 52, [2021] PTSR 190, Lord Hodge and Lord Sales, at [116].

123. The Coal Authority contends that, on a proper understanding of the 1994 Act and the Licence, the matters relied on by the claimant were not material to its task and so fall into the second category. But even if they are regarded as falling into the third category, in a case such as this where the decision-maker has not adverted to them, the claimant can only show the decision was unlawful if the considerations were obviously material according to the *Wednesbury* irrationality test: *Friends of the Earth*, [120]; *Samuel Smith*, [30] and [32]. The Coal Authority submits that it is not sufficient for the claimant to establish that the considerations relied on fall into the third category, as there is no obligation on a decision maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion: *Friends of the Earth*, [120].

124. The Coal Authority submits that none of the matters relied on are obviously material to its decision. First, the Coal Policy Statement addresses coal extraction and coal use for energy generation. The policy regarding coal extraction on which the claimant relies refers to the power in section 26A. Section 26A would only fall for consideration, if it applied, after the Coal Authority's decision. The stance of the Welsh Ministers as to

how they would exercise that subsequent power was not relevant to the prior decision of the Coal Authority. Secondly, the climate change impacts did not bear on whether or not any of the conditions precedent were satisfied, and so were not relevant. And, in any event, the Coal Authority relies on *Finch* for the proposition that it was not obliged to take into account "*downstream*" emissions, and on the disconnect between the extraction and any ultimate release of emissions. Thirdly, the matters relied on by the Claimant were not material to the consideration of its duties as none of them go to the substance of those duties.

125. Finally, the Coal Authority submits that if there was an error of law, it is highly likely that the outcome for the claimant, namely the conclusion that the conditions precedent had been satisfied, such as to discharge the conditions precedent on the Licence, would have been the same. Therefore relief should be refused.

Analysis and decision

126. In my judgment, the Coal Authority is right on Ground 2, essentially for the reasons they have given. In particular, I agree with the Coal Authority's submissions as summarised in paragraphs 116, 117 (save to the extent that I consider the power to determine that conditions are satisfied is implicit in section 28(1), not explicit), and 118 to 122 above.

127. Energybuild's application was for the Coal Authority to give formal notice that the conditions precedent contained in Part 2 of Schedule 4 to the Licence have been fulfilled. Although the draft documentation produced by the Coal Authority goes beyond a simple notice, that is a matter for bilateral agreement. A supplemental agreement is not *necessary* to bring the postponed authorisation into force in respect of the seams beneath the surface area of 1,131 hectares. I accept Mr Henderson's submission that the offer of a supplemental agreement, is merely good management on the part of the Coal Authority, tidying up the Licence in light of it having lapsed in respect of 329 hectares, and in view of the time limit imposed on the grant of planning permission.

128. The Coal Authority's task was to determine whether, in its reasonable opinion, the conditions precedent have been fulfilled. The fact that the authorities cited in paragraph 119 above are derived from the planning context does not, in my view, undermine the force of the analogy drawn by the defendants. The Coal Authority issued an authorisation, subject to the satisfaction of conditions. It follows that the scope of those conditions frames the Coal Authority's subsequent determination.

129. In my judgment, that is consistent with the 1994 Act. I agree with the Coal Authority that the power to determine whether conditions imposed pursuant to section 28 have been satisfied is necessarily implicit in that provision, as well as being a matter of bilateral agreement between the parties to the Licence. Section 27(3), in allowing for a licence to provide for the coming into force of an authorisation to be postponed, refers to the postponement being until after requirements specified or described in the licence have been satisfied; and if they are not satisfied within the period specified in the licence, for the licence to lapse. Section 28(6) allows for the Licence to be modified by agreement. Section 28(7) allows for the conditions contained in a licence to include provision for the authorisation to cease to have effect, or to be revoked or modified "*in such manner and in such circumstances as may be specified in or determined under the*

conditions". It would be inconsistent with these provisions for the Coal Authority to treat an application for a determination that conditions imposed in a licence have been satisfied as a fresh opportunity to determine whether, or on what conditions, coal-mining operations should be authorised. The Coal Authority had no power when determining Energybuild's application to go back on the 'in principle' decision authorising coal-mining operations, reflected in the Licence.

130. The breadth of the Coal Authority's powers when issuing a licence provides no proper basis for asserting that it had broad powers when determining whether conditions had been satisfied. The nature of the task necessarily limits the Coal Authority's powers, and the matters that are capable of being regarded as relevant to its determination.

131. It is right to say that on the face of the Recommendation Report the Coal Authority undertook a broader assessment, by reference to its duties in sections 2 and 3, than was warranted by the task of determining whether the conditions precedent were satisfied. The reason for that may be, to some degree anyway, that the Coal Authority was also determining whether to offer an associated lease. In any event, the claimant does not challenge the decision on the basis that the Coal Authority took into account matters that were irrelevant. The challenge is based on an alleged failure to take into account relevant matters.

132. For the reasons I have given, I reject the claimant's contention that the Coal Authority misinterpreted its powers, and thereby fettered its discretion. I agree with the Coal Authority that the three matters relied on by the claimant were not material (and a fortiori not obviously material) to the Coal Authority's task. The Coal Policy Statement expresses the Welsh Ministers' statement as to what they intend to do, or not do, in future with respect to coal extraction; and, more broadly, their policy objective to avoid the continued extraction and consumption of fossil fuels, whilst recognising that the legal rights of licence holders must be respected. The Coal Policy statement was not capable of being regarded as relevant to the Coal Authority's limited task of determining whether the conditions precedent were satisfied. Nor were the adverse climate change impacts, and the effect on the Welsh Ministers' ability to meet their climate change targets, matters that were capable of being regarded as relevant to the determination whether the conditions precedent were satisfied.

133. There is no challenge to the Coal Authority's conclusion that the conditions precedent had been fulfilled. It follows, in my judgment, that this ground also falls to be dismissed.

G. Conclusions

134. For the reasons I have given, the claim is dismissed on both Grounds 1 and 2.