LCA/109/2006
LCA/158/2006

LANDS TRIBUNAL ACT 1949

COMPENSATION – stop notice – preliminary issue – tipping operations – whether prohibited operations constituted a breach of planning control so that no compensation payable – held that they did – reference dismissed – Town and Country Planning Act 1990, s 186(2), (5)(a)

IN THE MATTER OF A NOTICE OF REFERENCE

BETWEEN **(1) CLIVE PAYNE**
(2) CELTIC MINERAL RECOVERY (SENGHENYYD) LTD **Claimants**

and

CAERPHILLY COUNTY BOROUGH COUNCIL **Respondent**

Re: Senghenydd Mineral Site,
Nelson Road,
Senghenydd,
Caerphilly CF83 4DW

Before: The President

Sitting at Cardiff Civil Justice Centre, 2 Park Street, Cardiff CF10 1ET
On 6 January 2009

Emyr Jones instructed by Daniel Perkins, Head of Legal Services, Caerphilly County Borough Council, for the compensating authority
Mr Payne the claimant in person and with leave of the Tribunal for Celtic Mineral Recovery (Senghenydd) Ltd

The following case is referred to in this decision:

South Buckinghamshire District Council v Porter [2002] 1 WLR 1359
R (Payne) v Caerphilly County Borough Council [2002] EWHC 866 Admin, 12 April 2002
R (Payne) v Caerphilly County Borough Council [2003] EWCA Civ 71, 16 January 2003
R (Payne) v Caerphilly County Borough Council [2003] EWHC 1514, 8 April 2003
R (Payne) v Caerphilly County Borough Council [2003] EWCA Civ 1262, 10 September 2003,

DECISION ON A PRELIMINARY ISSUE

1. The claimants in this reference seek compensation under section 186(2) of the Town and Country Planning Act 1990 in respect of loss suffered through compliance with stop notices where enforcement notices were later quashed. The subject land is an old colliery waste tip now owned by the claimant Mr Payne, who is the sole director of and shareholder in the claimant company, Celtic Mineral Recovery (Senghenydd) Ltd. The stop notices required the cessation of tipping operations on the major part of the land, and compensation is sought for the royalties lost during the period when the stop notices were in force. Under section 186(5)(a) no compensation is payable in respect of the prohibition in a stop notice of any activity which, at the time when the notice was in force, constituted a breach of planning control. The compensating authority say that tipping operations on the land to which the enforcement notice related were in breach of planning control, so that no compensation is payable. Whether they are right is the preliminary issue that I have to decide.

2. In terms the prohibition in the stop notice stated as the activity to which it related:

> "Without planning permission, the deposit of rubbish, rubble or other material on the land."

The notice required the cessation of that activity.

3. There can be no doubt, and there is no dispute, that the prohibited operations were ones that would constitute development, so that in the absence of planning permission it would be a breach of planning control to carry them on. The claimants say that they were entitled to tip waste on the whole of the subject land by virtue of a planning permission granted on 30 March 1955 to the National Coal Board by the compensating authority's predecessors, Caerphilly Urban District Council. Permission was there granted for development described as "Disposal of colliery rubbish" in accordance with plans submitted with the application. It was granted pursuant to an application dated 21 December 1954. In a letter dated 17 January 1955 the council requested cross sections showing the extent of the proposed tipping, and a plan that did this was submitted on 22 February 1955. The permission as granted was stated to be subject to a condition in these terms:

> "Permission be granted for the area covered by sections A-A and E-E, but not for the area covered by sections B-B, C-C and D-D."

Reasons for the conditions were stated to be:

> "The proposed tipping on the area covered by sections B-B, C-C and D-D will seriously affect the amenities of the locality."

4. The plan accompanying the application showed section A-A crossing the whole of the central part of the site. Sections B-B, C-C and D-D crossed a small part of it only. Section E-E crossed a small detached area of land. Each section showed by a continuous line the existing ground level and by a broken line the proposed level after tipping. From the sections it could be seen that only limited areas of the site were proposed for tipping.

5. On 10 August 1961 planning permission was granted for "Removal of the Tip" on an area lying within the northern part of the subject land. Condition 1 stated that the permission extended for a period expiring on 31 December 1971. This permission has accordingly expired and has no relevance for present purposes.

6. The effect of the 1955 permission has been the subject of extensive litigation over recent years. It first arose, somewhat obliquely, in proceedings that followed an application made by Mr Payne for the determination of conditions under paragraph 9 of Schedule 13 to the Environment Act 1995. Under the procedure to which that schedule relates the applicant is required to identify any planning permission for minerals development relating to the site and to set out the conditions to which he proposes the permission should be subject. The minerals planning authority have 3 months in which to determine the application, and, if they fail to do this within that time, the conditions to which the permission is subject are those specified in the application.

7. In proceedings before Sullivan J (*R (Payne) v Caerphilly County Borough Council* [2002] EWHC 866 Admin, 12 April 2002) the issue was whether conditions put forward by Mr Payne in this way had taken effect by reason of the authority's failure to determine the application. The judge held that they had, and the Court of Appeal (*R (Payne) v Caerphilly County Borough Council* [2003] EWCA Civ 71, 16 January 2003) upheld that decision. In his judgment, agreeing with the full judgment of Dyson LJ (with which Mummery LJ agreed), Schiemann J said:

> "I also agree, and only add that in relation to the 1955 permission nothing in the decision of this court is concerned to define further the area of the site which is covered by that permission. In order to discover that one must look back at the terms of the 1955 permission."

Dyson LJ then said:

> "I would add that having heard what Schiemann LJ has said, I agree with it."

8. Following the decision the council included in the planning register the following entry against "land at Nelson Road, Senghenydd":

> "Deemed permission secured in respect of the 1955 permission (reference number 1722) but not for the 1961 permission (reference number 4240) after 3 months from the date of the application in accordance with the judgment of the Court of Appeal. The conditions attached to the permission are those contained in the application together with the condition attached to the 1955 permission."

9. Mr Payne challenged in judicial review proceedings (*R (Payne) v Caerphilly County Borough Council* [2003] EWHC 1514, 8 April 2003) the decision of the council to make an entry in those terms. He said that the final words in the entry, "together with the condition attached to the 1995 permission", were unlawful because the condition attached to the 1955 permission ceased to exist when his proposed conditions won the day pursuant to paragraph 9.

Having recorded this submission, the judge, Maurice Kay J, went on to determine the issue in this way:

> "6…The case for the Council, advanced by Mr Jarman QC, is that the so-called condition attached to the 1955 permission was never, in fact, a condition at all. It was merely a way of clarifying on a pro forma document the area over which the disposal of colliery rubbish was being permitted. If that is right, then, as I observed to Mr Jarman in the course of argument, it is regrettable that it is still referred to as a 'condition' in the register, but perhaps that was intended to direct the reader to the part of the document which appears under the heading of that word. This is, as both Mr Payne and Mr Jarman say, a very short point, but an important one for all that. The question is whether the Council has failed to enter upon the register that which has been the outcome of the litigation before Sullivan J and the Court of Appeal. I have come to the conclusion, notwithstanding the eloquence and force of Mr Payne's submissions, that Mr Jarman is right. I say that principally because of what Schiemann LJ said in the Court of Appeal and what Dyson LJ then said in agreement with it. What emerged from the litigation, once some consideration was given to the area of the site which is covered by that permission (which consideration was not given in the judgment of Sullivan J, for good reason), was that the 1955 permission was approached on the basis that nothing in the decision of the Court of Appeal was concerned to define the area of the site covered by that condition because 'in order to discover that one must look back at the terms of the 1955 permission'. In other words, Schiemann LJ, whose eminence in the field of planning law is renowned, clearly considered that, notwithstanding the fact that Mr Payne's conditions for the site prevailed, the site itself still fell to be defined by reference to the words on the face of the 1955document. It is implicit in that that he was approaching those words not as conditions in the strict sense, but as being a definition of the area of the site covered by the permission. It seems that any conclusion from me to the contrary would fly in the face of what the Court of Appeal decided and said.
>
> 7. In those circumstances, in my judgment, the application of Mr Payne for further relief in the form of a mandatory order effectively removing the words 'objected to' from the face of the register, must fail. It will remain a matter for the Council as to the wording on the register, but I do rather take the view that it may be appropriate to express the area of the site which is covered by the permission otherwise than by reference to the word 'condition' attached to the 1955 permission..."

10. Mr Payne sought leave to appeal against this decision (*R (Payne) v Caerphilly County Borough Council* [2003] EWCA Civ 1262). Leave was refused, however, after a hearing on 10 September 2003 before Buxton LJ, who said this:

> "6. This matter clearly turns, as was perceived by Maurice Kay J, and indeed by the Court of Appeal who previously considered the matter, upon the construction of the grant in 1955. Mr Payne's point quite shortly is: if the document says condition then that must be a condition and not any limitation of the grant. I quite agree with him and indeed with Maurice Kay J that the document is unfortunately phrased. It should not have set out the limited permission that was granted under the heading of

'Conditions'. No doubt that was because this was a standard form document that the local authority used for that purpose.

"7. That said, however, it seems to me entirely clear that what was being granted in 1955 was what the local authority said was being granted: that is to say, permission for the area covered by sections AA and EE, but not for the area covered by sections BB, CC and DD. In other words, the permission was limited to part of the sought site. No permission at all was granted in respect of sections BB, CC and DD and therefore it was appropriate for conditions to be imposed in respect of those areas, because there can be no conditions on an area which is not the subject of planning permission…

10. This is a short case of construction. I agree with the view taken of it by Maurice Kay J. I am also fairly confident that that was the view of the matter taken by Schiemann LJ when this matter was before the Court of Appeal, but the matter was not argued out there and I make it clear that I do not decide this case on the basis that I am bound by what Schiemann LJ said. I decide it on the basis, as did Maurice Kay J, of my own construction of the underlying document."

11. In early 2004 operations to recover minerals from the subject land were started, and the council resolved to take enforcement action. An enforcement notice dated 12 May 2004 was served on the present claimants (and on Gareth Evans, Mr Payne's former business partner, now deceased, and Celtic Minerals Holdings Ltd, another company owned wholly by Mr Payne and Mr Evans). The area to which the enforcement notice related (coloured red on the plan accompanying the notice) was the greater part of the subject land. Excluded was an area, left white on the plan, that appeared as an island in the sea of red and constituted perhaps 10% or 15% of the total area of the land. The notice stated as the matters which appeared to constitute the breach of planning control:

"Without planning permission, the removal of stone, aggregate, minerals or other material from the land, the deposit of rubbish, rubble or other material on the land, and the sorting and recycling of stone, aggregate, minerals, rubbish, rubble or other material on the land."

12. The enforcement notice contained seven requirements, of which those lettered (a), (b), (c) and (d) related to the cessation of the activities that were said to constitute the breach of planning control. The other three requirements related to restoration of the land. The claimants appealed against the notice. They continued with the tipping operations.

13. The council then served the stop notice. It was dated 28 July 2004. It required this cessation of the activity (ie the deposit of rubbish, rubble or other material on the land), and stated that it was to take effect on 4 August 2004, when all the specified activity must cease.

14. Following an inquiry in October 2004 a planning inspector dismissed the appeals and upheld the enforcement notice but with variations to the requirements. The sole ground of appeal was (c) in section 174(2) of the 1990 Act – that the development was not in breach of planning control. The contention advanced by the appellants was that the 1955 permission did

not have the effect of limiting the area on which tipping could take place. The inspector rejected this contention. He said that the matter had been dealt with in the Court of Appeal judgments of Schiemann, Dyson and Buckley LJJ. He said:

> "13... There can be no doubt from these judgements that the 1955 permission does not extend to the whole of the area south of Nelson Road that was the subject of the application. It was limited to the area of the section A-A. Consequently, the 1955 permission gave no approval for development of any kind other than on the land covered by the permission and any works of tipping, mineral processing or recycling that have taken place outside that permitted area do not have the benefit of planning permission."

15. The inspector went on:

> "14. I turn next to the definition of the area covered by the 1955 permission, which the Council says is the area of 'white land' excluded from the notice. The south west boundary of the white land is defined by the boundary of the 1955 application site. The western extremity, where it comes to a point over the former reservoir, and its northern boundary are also defined by the 1955 application. To define the rest of the area covered by the 1955 permission the Council has looked at the 1955 survey drawing on which the cross sections are shown. Cross section A-A shows an unbroken black line and it was agreed at the inquiry that this shows the existing ground levels at that time. The cross-section contains a dotted line rising from the Nant Cae'r Moel stream at the south western end to a height of 800 feet AOD; it was agreed that this indicates the extent of the proposed tipping. No new tipping is shown along the rest of the cross section, where the site rises above 800 feet. The Council has therefore used the 800 feet ground contour in 1955 to define the northern extremity and eastern boundary of the white land, since tipping was shown by cross section A-A not to exceed this height. This would appear to coincide with a dotted line drawn on the 1955 survey drawing. This dotted line continues to the south east and the Council has used it to define the south east boundary of the white land. This boundary cuts across a steep slope where the land would have been capable of being tipped to the height of 800 feet shown on the cross section A-A. Nevertheless, I accept the Council's argument that if it had been intended to fill this area it would be reasonable to assume that cross sections B-B, C-C and D-D would have been extended across this south west part of the 1955 application site, rather than being limited to a strip along the opposite south east boundary.
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> 15. For the appellants it was argued that the boundary of the white land, put forward by the Council as the area covered by the 1955 permission, is contrived and totally unconvincing. But I am satisfied that the boundary of the area excluded from the enforcement notice is reasonable and based on the best interpretation of the area of land covered by the 1955 permission that can be drawn from the available information. The appellants put forward no alternative boundary, but merely continued to assert, contrary to the clear judgements of the courts, that the 1955 permission covered the whole of the 1955 application site. The appellants have in my view failed to put forward any new evidence that has not already been considered by

the courts to show that the 1955 permission includes the land covered by the enforcement notice."

16. The inspector then went on to consider the requirements of the notice relating to restoration of the site, even though the grounds of appeal had not extended to this. He said that requirement (f), requiring the submission to the local authority of a scheme of levelling and planting, was unacceptable because of the uncertainty it introduced. He directed that this requirement (and a consequential further requirement, (g)) should be deleted and replaced by three new requirements. These required the removal of mounds of tipped material, the redistribution of certain other tipped material, and the covering and seeding of the tipped areas.

17. Mr Payne and Mr Evans sought to appeal against the inspector's decision under section 289 of the 1990 Act. Before their application for permission was determined, the council had decided to seek an injunction under section 187B of the Act restraining both them and their two companies from tipping on, removing from, sorting or recycling on the land colliery rubbish and other material. Section 187B(1) and (2) provide as follows:

> "187B – Injunctions retraining breaches of planning control.
>
> (1) Where a local planning authority consider it necessary or expedient for any actual or apprehended breach of planning control to be restrained by injunction, they may apply to the court for an injunction, whether or not they have exercised or are proposing to exercise any of their other powers under this Part.
>
> (2) On an application under subsection (1) the court may grant such an injunction as the court thinks appropriate for the purpose of restraining the breach."

On 8 March 2005 and again on 21 March 2005 His Honour Judge Wyn Williams QC sitting as a High Court judge granted interim injunctions in the above terms.

18. On 23 May 2005 Judge Wyn Williams QC sitting in the High Court granted leave to appeal against the enforcement notice decision. Leave was limited to one ground only of the two that the appellants sought to advance, namely, whether the enforcement notice was a nullity because it failed to comply with the requirements of section 173 of the 1990 Act. The judge refused leave on the other ground, the contention that the activities on the site did not constitute a breach of planning control. The judge said that that point had been decided authoritatively against the appellants by Maurice Kay J in his judgement of 8 April 2003.

19. Following the hearing of the substantive appeal, Judge Wyn Williams QC handed down judgment on 29 September 2005. On the interpretation of the 1955 planning permission the judge said this:

> "15. In my judgment the proper interpretation of this planning permission has been determined by Maurice Kay J. That decision was the subject of an unsuccessful application for permission to appeal. Accordingly the parties are bound by the decision and I have no option but to apply it in these proceedings.

16. Maurice Kay J decided that the permission granted for the disposal of colliery rubbish and the widening of that permission which was the effect of the conditions attached to the permission by virtues of Mr Payne's application in December 2000 applied only to that part of the land which was the area covered by sections A-A and E-E upon the plan which accompanied the application for permission in 1955. Upon the plan attached to the enforcement notice and upon the plan attached to the interim injunction in this case the sections A-A and E-E are shown as an unshaded area as if in white and the remainder of the land which was the subject of the 1955 application is shaded in red. The effect of the decision of Maurice Kay J is that the Defendants are permitted to dispose of colliery rubbish on to the 'white land' and additionally, dispose of brick, stone, concrete and builders rubble on to that area and, further, they are permitted process these materials by machinery or otherwise 'within the confines of the site' (i.e. upon the 'white land') and export the recycled materials from the site.

17. In his closing legal submissions on behalf of all Defendants the First Defendant does not dissent from this analysis."

20. The judge then summarised the evidence of Miss Walsh, the council's witness on the activities that she had observed on the defendants' land. He said that, in summary, she described tipping of material brought onto the defendants' land in lorries on areas of land that were not the white land. He went on:

"23...While the First Defendant disputed the assertion made by Miss Walsh that operations on site had significantly intensified between the two dates he did not suggest that Miss Walsh was inaccurate in describing what she had seen. In any event, I am completely satisfied that Miss Walsh accurately described what she saw on the occasions of her visit. Further as the photographs at JMW 19 to JMW34 amply demonstrate the activities undertaken and observed were not upon the 'white land' but rather upon the remainder of the site under the control of the Defendants.

24. Ostensibly, therefore, as of a date shortly before the institution of these proceedings the Defendants were undertaking activities in breach of planning control..."

21. The defendants contended that the activities were permitted development under the General Development Order 1995, but the judge rejected this contention. He concluded:

"29. In my judgment the reality is that the Defendants have sought to carry out on the whole of the site under their control that which they claimed was permitted under the 1955 permission…

35. I have reached the clear conclusion that until restrained by the injunction granted by me the Defendants were in breach of planning control in the manner described in the enforcement notices served upon them…

37. In the instant case the Defendants have demonstrated remarkable tenacity in their refusal, in effect, to accept the decision of Maurice Kay J. Notwithstanding his decision, the Defendants began their activities in early 2004 and they continued them

> in the face of an enforcement notice and a stop notice. It is true that the appeal against the enforcement notice suspended its effect; nonetheless the continued attempt by the Defendants to argue that the decision of Maurice Kay J was wrong or misunderstood was, in my judgment, simply a means of seeking to continue to carry on activities on the whole of the land which the First and Second Defendant knew full well were not permitted. In my judgment nothing short of an injunction will stop the illegal activity."

The judge made the injunction permanent. On 26 May 2006 Mummery LJ refused the defendants leave to appeal.

22. It is clear from the above accounts of the various sets of proceedings that the question whether the 1955 planning permission was or was not limited to particular parts of the land to which it related has been decided. Maurice Kay J in his judgment of 8 April 2003 held that the effect of the planning permission was to limit the permitted operations to the area covered by the section A-A. That was a conclusion that was essential to the decision. Leave to appeal that decision was refused by Buxton LJ, who expressly endorsed the conclusion.

23. The judgment of Maurice Kay J did not define the extent of the area covered by section A-A. But the judgment of Judge Wyn Williams QC did so at paragraph 16 He held that under the permission the area for tipping was limited to the white land. Thus the judgment determined that no planning permission existed outside the white land for tipping operations, so that such activities on the red land would constitute a breach of planning control.

24. Mr Payne's principal submission is that, in order to rely on section 186(5)(a) as a defence to a properly made claim for compensation, the local planning authority must have issued and served a valid enforcement notice setting out the breach of planning control and what measures were required to remedy the breach and that the alleged breach of planning control must have been confirmed by the Secretary of State. The Secretary of State is, he says, the sole arbiter of an allegation that there had been a breach of planning control where that allegation was devised and the appeal process invoked, and a court has no jurisdiction to determine whether there has been a breach of planning control. Mr Payne relies for this proposition on part of the judgment of Simon Brown LJ in *South Buckinghamshire District Council v Porter* [2002] 1 WLR 1359 at paragraph 38:

> "It seems to me perfectly clear that the judge on a section 187B application is not required, nor even entitled, to reach his own independent view of the planning merits of the case. These he is required to take as decided within the planning process, the actual or anticipated breach of planning control being a given when he comes to exercise his discretion. But it seems to me no less plain that the judge should not grant injunctive relief unless he would be prepared if necessary to contemplate committing the defendant to prison for breach of the order, and that he would not be of this mind unless he has considered for himself all questions of hardship for the defendant and his family if required to move, necessarily including, therefore, the availability of suitable alternative sites. I cannot accept that the consideration of those matters is, as Burton J suggested was the case in the pre-1998 Act era, 'entirely

foreclosed' at the injunction stage. Questions of the family's health and education will inevitably be of relevance. But so too, of course, will countervailing considerations such as the need to enforce planning control in the general interest and, importantly therefore, the planning history of the site. The degree and flagrancy of the postulated breach of planning control may well prove critical. If conventional enforcement measures have failed over a prolonged period of time to remedy the breach, then the court would obviously be the readier to use its own, more coercive powers. Conversely, however, the court might well be reluctant to use its powers in a case where enforcement action had never been taken..."

25. In the present case, Mr Payne says, the Secretary of State had quashed the enforcement notice on the remission of the case to him by the High Court. He did not thereafter issue a further enforcement notice in respect of the allegations made by the local planning authority, as he had power to, nor did the authority themselves issue a further enforcement notice. There has thus been no confirmed breach of planning control. Mr Payne further submits that operations that are in breach of planning control are not illegal until an enforcement notice in respect of them has been served and has taken effect or a stop notice has been served. When the stop notice was served, he says, the claimants complied with it, so they have at no point broken the law.

26. I cannot accept Mr Payne's contention that only the Secretary of State can determine whether there has been a breach of planning control. Under section 187B application for an injunction may be made in respect of "any actual or apprehended breach of planning control", and it was thus necessary for Judge Wyn Williams QC to determine if there had been a breach of planning control or if a breach was to be apprehended, and he did so. He concluded, firstly, that the 1955 permission did not extend to the white land and, secondly that tipping operations had taken place on the defendant's land outside the white land. Since there was no planning permission for these operations they constituted an actual breach of planning control; and since the judge considered that nothing short of an injunction would stop this activity, it is implicit that he considered that future breaches could be apprehended.

27. It is clearly not the case that only the Secretary of State can determine whether there has been a breach of planning control. Under section 187B the local planning authority may seek an injunction whether or not they are proposing to take enforcement action, and they may do so in respect either of an actual breach or of an anticipated breach. It is for the judge to determine whether the case for an injunction has been made out. Not surprisingly there is nothing in Simon Brown LJ's judgment in *Porter* to suggest otherwise. In the passage relied on by Mr Payne he was simply saying that the planning merits (such matters as go to the question of whether planning permission ought to be granted) were not for the judge.

28. The consequence of that decision of Judge Wyn Williams QC making permanent the injunction is that, as between the claimants in the reference and the respondent authority, these matters are res judicata. It is not open to the claimants to contend either that the operations were not carried out (and they do not contend this) or that the operations did not constitute a breach of planning control. It follows that the claim must founder on the provisions of section

186(5)(a) since it is in respect of loss of royalties from the operations constituting the breach of planning control that compensation is sought.

29. The effect of this determination is that the claim fails, and the reference is therefore dismissed. The parties are now invited to make representations on costs, and a letter relating to this accompanies this decision, which will become final when the question of costs has been determined.

Dated 9 January 2009

George Bartlett QC, President

ADDENDUM ON COSTS

30. I have now received submissions on costs from the compensating authority. The claimant has made no submissions. The compensating authority ask for their costs on the basis that they have been successful on the preliminary issue and that costs should follow the event. They say that, if I am minded to award costs, consideration should be given to an award in respect of counsel's fees only, £2725 excluding VAT.

31. I agree that the compensating authority should have their costs since the result of the determination in their favour of the preliminary issue was that the claim was dismissed. I accept also their suggested quantification of those costs. The claimant must pay the compensating authority's costs in the sum of £2725 plus VAT.

Dated 25 February 2009

George Bartlett QC, President