In his Post-Case Management Conference Note, the Inspector identifies that for relevant appeal decisions and judgments *"each must be prefaced with a note explaining the relevance of the Decision to the issues arising in the current Inquiry case, together with the propositions relied on, with the relevant paragraphs flagged up".*

Explanation Note:

CD12.30 - Judgment, Mr Justice Burton Leicestershire County Council v Secretary of State for Communities and Local Government and UK Coal Mining Limited [2007] EWHC 1427 (Admin)

Appellant's Note

The cumulative impact assessment at Appendix 2 to my proof has been prepared on the basis of the approach set out by Mr Justice Burton in his judgement.

Worcestershire County Council's Note

I do not refer specifically to the Judgement within my proof, however at paragraph 41, a four stage overview that was defined as appropriate to review cumulative impacts of development, including impacts that on their own may not be objectionable but as one of "one, two, three of four features" that may be close to objectionable, in their totality, become objectionable, was used as a basis for reviewing the potential for cumulative impact in this instance.

CO/5542/2006

Neutral Citation Number: [2007] EWHC 1427 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Date: Monday, 11 June 2007

B E F O R E:

MR JUSTICE BURTON

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THE QUEEN ON THE APPLICATION OF LEICESTERSHIRE COUNTY COUNCIL

(CLAIMANT)

-v-

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

(DEFENDANT)

UK COAL MINING LIMITED

(INTERESTED PARTY)

- - - - - - -

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Mr Jeremy Cahill QC and Miss Jenny Wigley (instructed by Leicestershire County Council) appeared on behalf of the Claimant
Mr John Litton (instructed by Treasury Solicitor) appeared on behalf of the Defendant
Mr Timothy Corner QC and Mr Andrew Fraser-Urquhart (instructed by Nabarro Nathanson) appeared on behalf of the interested party

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J U D G M E N T

1. MR JUSTICE BURTON: This has been the hearing of an application by the Claimant, Leicestershire County Council, for whom Mr Jeremy Cahill QC and Miss Jenny Wigley have appeared, under section 288 of the Town and Country Planning Act 1990. It arises in respect of a planning application by UK Coal Mining Limited, for whom Mr Timothy Corner QC has appeared with Mr Andrew Fraser-Urquhart (the Interested Party), made to the Claimant, the Leicestershire County Council, as Mineral Planning Authority ("MPA") for planning permission in respect of opencast coal mining in a green field site between the villages of Ravenstone, Heather and Normanton le Heath in Leicestershire called Long Moor.

2. The application by the Interested Party to the MPA was refused on 30 July 2004. The Interested Party appealed, and an Inspector was appointed by the Secretary of State for Communities and Local Government, now the Defendant to this application, for whom Mr John Litton has appeared, and that inquiry was held between 13 September and 11 October 2005. It resulted in the Inspector recommending the grant of conditional planning permission. On 25 May 2006 the Defendant Secretary of State agreed with the Inspector's recommendation and granted conditional planning permission.

3. The Claimant's challenge is by reference to two policy documents issued by the Defendant and with which he must comply. The first is the Mineral Planning Guidance Note 3 (MPG3), issued in March 1999. There are two material paragraphs in MPG3. Paragraph 7 sets the scene for paragraph 8, which is the paragraph upon which the claimant relies. Paragraph 7 reads as follows:

> "Opencast coal working differs from many other types of mineral working due to the amount of overburden that has to be removed, and stored, to access the coal; the use of large engineering plant and machinery; and the need, often, to transport the coal won over significant distances. On the other hand, the large amounts of material that have to be removed means that, through careful restoration, original landforms can be recreated, or more attractive ones produced over time. In some cases, opencasting can clear derelict and despoiled land, or remove land instability from old mineral workings, and thereby restore the land ultimately to a better condition than it was before. However, the Government takes the view that, although some sites are capable of being well restored, opencast mining can be extremely damaging to the environment and amenity of a locality whilst it is taking place, and the restored landscape can take many years to mature. The proposals for restoration, and the extent to which the proposal provides local or community benefits must be weighed against the severity of the harm likely to be caused during the duration of the development and the time it would take for the landscape to regenerate following restoration."

4. Paragraph 8 then follows:

> "8. In applying the principles of sustainable development to coal extraction, whether opencast or deep-mine, and to colliery spoil disposal, the Government believes there should normally be a presumption against

development unless the proposal would meet the following tests:

(i). is the proposal environmentally acceptable, or can it be made so by planning conditions or obligations?

(ii). if not, does it provide local or community benefits which clearly outweigh the likely impacts to justify the grant of planning permission?"

5. There is thus a presumption against development; for the purpose of considering whether that presumption is rebutted, the two limbs of the test have loosely been referred to as costs or detriments on the one hand and benefits on the other.

6. The other policy document is Mineral Planning Statement 2 (MPS2), issued in March 2005. This post-dated the refusal of permission by the MPA, but antedated the inquiry. Central to our consideration has been paragraph 12 of MPS2:

> "With respect to an individual site, the effect of all relevant impacts (ie of noise, dust, traffic, on landscape etc.) should be considered objectively. Impacts that are acceptable individually should not be regarded as unacceptable in combination without a proper assessment."

7. The conclusion by the MPA in refusing planning permission was recorded by the Inspector at paragraph 7.2 of her report as follows:

> "7.2 The reason for refusal is concise. It refers to an unacceptable cumulative environmental impact adversely affecting those who live, work and pursue leisure activities in the area, 'as a result of the combination of the impacts of noise, dust, vehicle movements, landscape loss and visual amenity, and also because of the effect of previous open cast coal activity in the area'. This cumulative environmental impact would not be outweighed by the proposal's benefits nor overridden by the need for the development."

8. Both the MPA and the Interested Party called expert witnesses at the inquiry. The MPA called an independent expert, Mr Hunt, who was not involved in the original decision.

9. Each alleged or possible feature in respect of which there could be actual or potential individual impact on the environment was considered and addressed by both the MPA and the Interested Party, and considered and concluded upon individually by the Inspector in her report. There were nine of them as set out in paragraph 14.22, namely landscape and visual impact, ecology, soil and agricultural land quality, noise, dust, archaeology, hydrology and hydrogeology, rights of way, and traffic. In respect of each of them, for the reasons given by the Inspector, which sets out the rival contentions before her, she concluded that they did not stand in the way of the grant of permission. In respect of one of them, the MPA had before the Inspector contended that it did of itself amount to an objection to grant of planning permission. That was noise, and the Inspector set out her conclusion in paragraph 14.48 and following:

> "14.48. The site is in a quiet rural area and those living there are particularly concerned at the likelihood of disturbing and unacceptable noise from the opencast site and lorries on the haul road, especially those who remember previous workings. The adverse environmental impact of noise is considered by the MPA to be so unacceptable in itself as to justify refusal of permission, although that is not stated in its reason for refusal."

10. The conclusion by the Inspector in that regard commences at paragraph 14.75, and ends at 14.78:

> "I am satisfied that the noise conditions drafted and included in Annex A would meet the advice in MPS2 that planning conditions must be precise, capable of being monitored ..., defined succinctly ..., relevant to planning and to the development, and reasonable. I conclude on noise that whilst there would be an adverse environmental impact it would be controlled to an acceptable level and thus would comply with ... [and then she sets out the various policies]."

11. No challenge is made by the Claimant before me to the Inspector's conclusion, and indeed the Defendant's acceptance of that conclusion, in respect of noise, on this application, or indeed at all. In those circumstances, the Inspector set out what she calls her overall conclusion on individual environmental impacts as follows:

> "14.119 The proposal would give rise to a number of adverse environmental impacts, some of which, like landscape and visual impact and dust, would be significant. National and local policy requires consideration to be given to whether these impacts can be kept to an acceptable level. I have considered each individually and determined that they could be made so by the use of conditions and the undertakings contained in the S106 to ensure adequate control and mitigation. I find none on their own sufficiently objectionable and unacceptable as to warrant refusal of permission and dismissal of the appeal on that ground alone.
>
> 14.120 The MPA in its reason for refusal did not find any individual environmental impact to be unacceptable on its own. Whilst it later argued at the inquiry that noise impact would be significant and sufficiently unacceptable as to justify refusal, I have not been persuaded by that argument."

12. The battlefield on this application before me has been, and been alone, the question of cumulative impact. At 14.121 the Inspector said:

> "That however [consideration of the individual impacts] is only the first part of the consideration of the development. It is also necessary to look at the cumulative impact of the development and MPS2 at [paragraph] 12 refers to the extent of impacts that a particular site, locality, community,

environment or wider area of mineral working can reasonably be expected to tolerate over a particular or proposed period."

13. I have read the MPA's reason for refusal, to which I refer. In support of its case it made submissions, and of course referred to Mr Hunt's evidence, to which I will return, and at paragraph 7.109 the concise submissions of the MPA, as they remained before the Inspector just as they had been in their original conclusion, are set out as follows:

> "7.109 In this case, there has been an objective analysis of each of the likely impacts ... All the likely impacts have been properly and objectively assessed individually and in combination and it has been concluded that the combined effect is unacceptable."

14. Mr Hunt's evidence, which underlay that submission, together of course with the MPA's original conclusion to which I have referred, is before me. It too can be described as concise, in the sense that there was a lengthy planning proof of evidence, extending over 50 pages, but in this regard only a few paragraphs. Under the heading: "Cumulative impacts" at paragraph 10.2.7 Mr Hunt said this:

> "The judgment as to whether or not cumulative impacts are acceptable or not is perhaps even more complex [this is after a lengthy dealing with the individual impacts]. I have taken into account the advice in MPS2 that 'impacts that are acceptable individually should not be regarded as unacceptable in combination without a proper assessment'."

15. In dealing with the individual impacts, he had asserted his opinion that a number of them "would contribute to the cumulative impact of the development".

16. At paragraph 10.2.8 he said this:

> "The preceding consideration of adverse environmental effects has identified negative noise, dust, ecological, landscape and visual impacts resulting from the proposed development including vehicle movements along the haul road. In turn, there would be a reduction in the amenity of local residents and an adverse effect on the character of this area of countryside for those using rights of way in the area ... Together, and in some cases individually, these impacts would appear to make the development contrary to policies of the development plan ..."

17. At 10.2.9 he said:

> "In my view, the cumulative effect of these adverse impacts taken together is at the very least significant enough to demand that planning permission is not granted without first applying the second test in LRRSP Resource Management Policy 11."

That is a reference to the ‘benefits’ test.

18. He then addresses whether the adverse impacts of the appeal proposals would be unacceptable because of the cumulative impacts which might occur because of other developments taking place, and he ruled that out, and he referred to the earlier history. Then he concluded at 10.2.12:

> "Taking all of this into account, I consider that the cumulative impacts of the proposals are unacceptable under the first test of LLRSP Resource Management Policy 11 [which is the 'costs/detriment' test]."

19. Those paragraphs of the proof, no doubt supplemented in cross-examination, were addressed in submissions to the inquiry by the Interested Party, as summarised by the Inspector in the following paragraphs of her report:

> *"Combined effects of the appeal scheme*
>
> 8.143 The starting point for consideration of this category of cumulative impact must be the recognition that all surface mineral workings have effects which occur together. However no one is suggesting that there is any policy embargo on surface mineral working in general or surface mineral working of coal in particular. Therefore the mere fact that effects of a proposal for such working will be experienced in combination cannot be sufficient to justify refusal and there would have to be something more. There must, in short, be something out of the ordinary that elevates impacts that are acceptable on an individual basis into an unacceptable cumulative impact when experienced together.
>
> 8.144 This is made explicit by the very recent guidance of MPS2 at [paragraph] 12 [which she then sets out].
>
> 8.145 The guidance offers no indication as to how the *proper assessment* [which is plainly a reference to those words as used in paragraph 12 of MPS2, and in this judgment I shall put them in italics wherever they appear] should be carried out. It must, however, be the case that the paragraph envisages a two-stage process. The individual effects must be objectively assessed. That is obviously necessary in order to assess any effect. There must then be a further *proper assessment* of any alleged cumulative impact. The guidance explicitly states that they cannot simply be regarded as unacceptable without such an assessment. It was notable that no suggestion was made to Mr Heaton [the expert for the Interested Party] in cross-examination that a further *proper assessment* had been made. It appeared to be suggested that a *proper assessment* had been made because each individual effect had been subject to objective assessment. That shows a failure to appreciate what is being said in the guidance. There must be a further *proper assessment* if combined effects are to justify refusal.
>
> 8.146 Nowhere has the MPA provided any such further *proper assessment*. There was no such assessment in the report to committee.

> Instead there was simply [an] assertion that there would be an unacceptable environmental assessment. The MPA's witness at the inquiry does no better. Mr Hunt's proof simply states: 'It is significant that there would be a number of different impacts; that these would all occur during the working life of the mine; and the some would continue for some time afterwards. Taken together ... these impacts would appear to make the development contrary to the policies of the development plan'. This is nothing more than an assertion that the effects are experienced together. The fact that effects are experienced together does not mark this application out from any other for surface mineral working."

20. In paragraph 8.147 are recorded the Interested Party's submissions regarding what they call "the only factor on which the MPA relies as establishing something unusual or particular to this case" - which apparently arose in Mr Hunt's answers in re-examination - and their case that there was nothing out of the ordinary.

21. Finally, at 8.148 the Interested Party's submissions are drawn together:

> "If the effects are examined together, they do not justify a refusal on the grounds of cumulative impact by the combined effects of the proposal. There is nothing unusual about the combination of minor impacts which would be created by this scheme. If the list of impacts arising from this scheme is compared with the list in Annex C of MPG3, it is apparent that there is nothing unusual about this site.

22. The Inspector's conclusions are set out under the heading: "The combined effects of multiple environmental impacts" at paragraph 14.130:

> "The effects of all the relevant impacts have to be considered objectively. UK Coal accepted that the MPA had done that and I take a similar view, even though on certain impacts I have come to a different view as to the extent and acceptability of the impact. However more needs to be done and a further step taken if an unacceptable cumulative impact is to be demonstrated. MPS2 [paragraph] 12 refers to 'impacts that are acceptable individually should not be regarded as unacceptable in combination without a proper assessment'. There is no other guidance on what this proper assessment might be nor was anything that looked like an assessment put forward in the report to committee on the appeal proposal."

23. At 14.132 she refers to her conclusions on the individual environmental impacts set out above, and refers to the fact that all of those impacts could be kept to an acceptable level through the use of conditions and obligations to secure control and mitigation.

24. At 14.133 she says:

> "However, would these impacts, acceptable individually, when taken

> together with the other minor impacts be environmentally unacceptable and tip the balance back firmly against the proposal? There is nothing about the combination of impacts that is unusual [she thus accepts the submission made to her by the Interested Party]. In the absence of any evidence to indicate that a proper assessment has been carried out or how it might be done, it is my judgment that the combined effect of the multiple environmental impacts is not such as to tip the balance back against the proposal."

25. Consequently her conclusion in 14.134 is that:

> "... subject to the imposition of appropriate conditions and the provisions of the S106, the proposal meets the requirements of [the relevant policy] in that its adverse environmental impact, including the potential for cumulative impact, can be kept to an acceptable level."

26. The submissions of Mr Cahill in his skeleton argument are summarised conveniently in paragraph 36 of his skeleton, where he says this:

> "It is submitted that pursuant to her own guidance in MPG 3 paras 7 and 8 the correct approach should have been
>
> (1) to acknowledge that although the appeal constituted a re-hearing pursuant to section 79 of TCPA 1990 (or a "fresh look") [the reference to which I will come back to], the fact that the MPA had refused the application having concluded that it had unacceptable environmental effects was an important material consideration in the re-hearing (the reference in section 79(1) that the Secretary of State '... may deal with the application as if it had been made to him in the first place' is permissory ... and does not create a statutory obligation to ignore the MPA's conclusion on acceptability of environmental impacts which the Secretary of State's policy in MPG 3 now requires);
>
> (ii) to acknowledge that this important material consideration constituted a rebuttable presumption that the MPA's assessment of the environmental acceptability was correct;
>
> and
>
> (iii) if she believed the presumption had been rebutted she should give clear and adequate reasons as to why it had been rebutted and why the MPA's assessment should not prevail."

27. Those submissions were not really in issue between the parties. As to "fresh look", the Inspector did say at paragraph 14.14 of her report the following:

> "Submissions were made as to the interpretation to be placed on the last part of MPG3 [paragraph] 8 and that the MPA's assessment of environmental acceptability should normally prevail. That is however

> qualified by being 'subject always ... to normal rights of appeal' which provide for a fresh look to be taken at a proposal if permission is refused."

28. However, it is quite plain that the Inspector did not simply give a 'fresh look' ignoring the conclusions of the MPA, because they were put before her as submissions based not only upon the evidence of Mr Hunt, but upon the case which the MPA, through Mr Cahill, sought to uphold as the appropriate way of looking at the planning permission application, and it is totally apparent that the Inspector paid full regard to those submissions, as I shall describe.

29. It is also apparent that the Inspector recognised that there was a presumption against the mining development. She said as much in paragraph 14.171, when she concluded:

> "I find that the presumption against open cast working in MPG3 ... is outweighed."

That was repeated and recognised by the Defendant in paragraph 46 of the decision letter.

30. It is also accepted and common ground that reasons are required in planning decisions, not only as in other administrative decisions, but perhaps even more so for the reasons clearly, fully and bindingly set out in South Buckinghamshire County Council v Porter (No 2) [2004] 1 WLR 1953, particularly per Lord Brown at paragraph 36, and in Save Britain's Heritage v Number 1 Poultry Limited [1991] 1 WLR 153, particularly per Lord Bridge. That is not only for ordinary purposes whereby a person in the position of an application for planning permission can know why such an application has been refused, but also so that in the circumstance of an appeal being allowed against an original decision of a planning authority the planning authority should know in the future the reason why its decision has been overturned, so as to be able to take into account the appropriate approach in its decision on future applications.

31. I drew to the attention of the parties a particular example in the planning area of the need for and importance of the giving of reasons by an Inspector in Dunster Properties Limited v First Secretary of State [2007] EWCA Civ 236; [2007] PLSCS 40. That was a case where a second planning Inspector differed in view from a first planning Inspector, but did not give adequate reasons as to why he did so, and the Court of Appeal concluded that it was necessary to show why there was a difference from the first decision and on what basis. It appeared to me that it was a similar situation here, where there is the paramount decision of the MPA which is being differed from by an Inspector, namely that it is necessary for the Inspector to give good reasons why such decision was being differed from, particularly where it involves the rebutting of a presumption against such development.

32. Once again the parties did not differ in their approach to the applicability of Dunster. Indeed, it is apparent that, insofar as the MPA had a view about noise, from which the Inspector differed, giving full reasons, Mr Cahill did not object, indeed he concluded that the Inspector had approached the position in the correct way, and no challenge, as I have earlier indicated, was sought to be made in respect of it. It is to that position,

namely that the Inspector is entitled to differ from the view of the MPA, but if he or she does so, particularly if it involves rebutting the presumption against development, then adequate reasons must be given for doing so, and adequate reasons for overriding that rebuttable presumption, if that is what occurred, is that in the end the issue reverted by reference to the question of cumulative impact.

33. The MPA in this case had given its decision, as I have said earlier, before MPS2 was in place. Nevertheless, it is common ground that it was appropriate and necessary to consider and take account of cumulative impact. It was also common ground that it was appropriate and necessary for the Inspector to apply MPS2; and the very application of MPS2 might amount to a reason for the difference in the decisions if that were the case.

34. It is important, and I record, that Mr Cahill wished to submit that, if it were the case that there were going to be any criticism of the MPA for not giving a "*proper assessment*", the very fact that MPS2 was not in place at the time of the MPA's decision should be taken into account in accordance with MPS2, given that MPS2 was not available to give it guidance. I am entirely clear however that there is no question in any event of such criticism. MPS2 is simply a very helpful way of approaching the issue. The absence of what she concluded to be *proper assessment* was what enabled, or entitled, the Inspector to differ from the MPA's decision.

35. The warning that is given by MPS2 was also of course not before the MPA, who cannot accordingly be in any way blamed for not having that in red lights before it -- the warning, namely that it cannot and should not be an automatic conclusion that there is a cumulative effect simply because features arise in relation to more than one different potential environmental impact.

36. Mr Cahill submitted, first, that the impact of MPS2 simply underlined the fact that there was an obligation and entitlement on an MPA to address cumulative impact; secondly, that in this case the MPA did address cumulative impact; thirdly, that this MPA, like all MPAs in the light of MPG3, was in a special position; fourthly, that there was no need for any *proper assessment* of the cumulative impact to be in a separate document or to be the subject matter of a separate report. It was sufficient if it was addressed, as he submits it was here.

37. He then submitted in paragraph 57 of his skeleton as follows:

> "In these circumstances ... the absence of any reasons to explain why the assessment was not proper leaves the MPA ignorant as to:
>
> (a) what the Secretary of State's policy does require by way of assessment;
>
> (b) in what way the assessment provided in this case failed to meet that requirement;
>
> (c) what assessment would be 'proper' in order properly to assess cumulative impact in future opencast applications."

38. Effectively, Mr Cahill set this within the kind of criticisms such as were enunciated by Lord Bridge in Save Britain's Heritage, namely that they (the MPA) were left not knowing what they had done wrong or not knowing what they should do for the future.

39. It is obviously a concern to the court if it is said by a Council that, if an appeal is upheld by an Inspector, it is left not knowing what it did wrong. If indeed this were a case in which some criticism was being made of the Council on the basis of an allegation that the assessment was not *proper* in any sense -- that either it was improper or negligent or did not take sufficient care -- then I could entirely understand and sympathise with that approach. But it is quite plain to me what was meant by the Inspector in her conclusion, as she accepted was being submitted to her by the Interested Party, namely that all that the MPA's assessment was was the subject matter of an assertion: see paragraph 14.130 onwards in which the Inspector accepts the submissions to that effect made to her by the Interested Party.

1. It was indeed a value judgment, as Mr Cahill himself rightly submitted, and a value judgment made by a party which was recognised to be the most experienced in this regard. The Inspector herself recognised that in paragraph 14.127 of her report; namely "that the local community has had first-hand experience of the effects of opencast working adds legitimacy to its views. MPG3 at [paragraph 8] refers to the costs and benefit of an opencast proposal being best assessed by the communities and local authorities who are directly affected".

40. But I would seek to take this opportunity to spell out what seems to me to be obvious, namely that although the MPA's conclusion on cumulative impact – in concise form, as the Inspector said - was indeed an *assessment*, and no doubt from one point of view a *proper assessment* of the view of the MPA, it did not give any reasons; and although that may well not be a criticism because it is not here being suggested that there should have been, for example, or could have been, judicial review of that decision - there was an appeal to the Inspector, which is a better remedy - the fact is that that decision was without reasons. The less 'concise' the *assessment*, the more difficult it would be for an Inspector to differ from it, given the paramountcy of the views of the MPA, and if therefore the MPA is in this case looking to the future, not by way in any way criticising what they have done in the past but so as to make it more likely that their views in future will be upheld by an Inspector, the best advice would be: give your reasons for your value judgment – your *assessment* – because, if given, then they would likely be, if not unassailable, pretty difficult to assail.

41. Speaking as a layman in this area, I can only give what appear to me to be examples of such reasoning as to cumulative impact, which I put in the course of argument to Mr Cahill. But it may well be that there could be reasons that could be given along the following lines: (1) even though each individual area of potential impact was not objectionable yet each such feature was so close to objectionability that, although none could be said to be individually objectionable, yet because each was nearly objectionable, the totality was cumulatively objectionable; or (2), one, two, three or four of the particular features were close to being objectionable and that would be an important matter to take into account when looking at the totality; or (3) one particular combination of two or three otherwise unobjectionable features could cause

objectionability in their totality; or (4) as was specifically addressed by the Interested Party and by the Inspector here, and found not to be the case, there could be some unusual feature or some unusual combination of features such as to render that combination objectionable when the individual feature was not. This is not to say that there was a requirement to say that. But it is, in my judgment, a requirement to say that, if it is then to be asserted that there is no basis upon which an Inspector can differ from that view. The more reasoned the assessment by the Inspector would have to be in order to differ from it, and indeed the more unlikely it would be that he would wish to differ from it.

42. In those circumstances, what the Inspector here said, after being satisfied to that effect by considering not only the individual impacts themselves but his conclusion as to the totality or cumulative nature of those impacts, was that all there had been was the *ipse dixit* of the MPA, the assertion of the MPA, and that, given that there were no reasons - no separate, no *proper assessment*, no adequate assessment -- none of those words necessarily the correct ones -- but at any rate no reasons, she, the Inspector, because she saw the case in the way that she did after full consideration, was then entitled to differ from what would otherwise, or could otherwise, have been the decisive value judgment of the MPA.

43. In those circumstances, I am satisfied that there is no basis of challenge to the Inspector's conclusion, and consequently the Defendant's acceptance of that recommendation. The cumulative impact was considered by the Inspector and by the Defendant, and after addressing the conclusions to the contrary by the MPA and its conciseness or lack of reasoning, and the firm reasons given the other way which the Inspector accepted, what she did when she said that there was no *proper assessment* by the MPA was to articulate that there was nothing in the short concise assessment that had been put forward by the MPA which caused her any reason to conclude that she could not and should not differ from it, even though it meant rebutting the presumption against development.

44. In those circumstances I am satisfied that there is no basis for this challenge.

45. MR LITTON: Thank you, my Lord. On the question of costs I do not anticipate that there is any resistance to the principle that the claimant should pay the Secretary of State's costs. There has not been any schedule of costs prepared because it was anticipated it might take a little bit longer, my Lord. But I have had an opportunity to speak to my learned friend and I think he agrees that it should be taxed if not agreed.

46. MR CORNER: My Lord, I make no application.

47. MR JUSTICE BURTON: Well, that makes your life easier.

48. MR CAHILL: It does. Small mercies are always welcome, my Lord, and I cannot object to my learned friend's application in relation to his costs. I am also content that that should be taxed if not agreed.

49. MR JUSTICE BURTON: Thank you very much.

50. MR CAHILL: My Lord, I make an application which your Lordship may or may not be surprised to hear. My Lord, it is a novel point. It is of interest. My Lord, insofar as it is reasons, clearly reasons arguments are common place in the Administrative Court, but this is an unusual aspect of reasons because it is reasons set against a very clear presumption, and it is an unusual presumption. I think, as you have seen from the papers, it is not a presumption which exists elsewhere, certainly in terms of mineral planning is concerned. Therefore, my Lord, I ask for leave not on the basis --

51. MR JUSTICE BURTON: Well, you have seen, I think, from my judgment, indeed from what occurred in the course of submissions -- our discussions -- that I do not see that there is a point of principle here in the sense that it was hardly in issue between the parties that there was a presumption and that reasons needed to be given for shifting that presumption. So it is almost limited to its precise facts in that the Inspector said there was no proper assessment, when if she had said: "Although there was an assessment, I am satisfied that, because there were no reasons, I am entitled to differ from it and rebut the presumption", it would not have been challengeable. So I do not see there being a point of law in this case.

52. MR CAHILL: I must, as your Lordship knows, make my application to you. Your Lordship has made it clear that that is not going to be successful. My Lord, I know not how long it would be before the approved transcript will be available. My Lord, I wonder whether you might be kind enough to give me 14 days from receipt of the approved transcript if my clients wish to put in an application.

53. MR JUSTICE BURTON: What is the timescale here? You probably want to get cracking.

54. MR CAHILL: From the point of view of my clients we, as you put it, want to get cracking. My Lord, I would regard with some alarm 14 days from the delivery of a transcript --

55. MR JUSTICE BURTON: It depends when that is likely to be. Let me make enquiries as to what the state of play is likely to be. (pause)

56. I think it may not be necessary in the sense that the extremely diligent shorthand writer is, as ever, willing to help and you should have on that basis, all things being equal, the transcript in your hands probably by Tuesday of next week, which is a week. I cannot remember whether it is 21 days anyway, is it?

57. MR CAHILL: Whether it is 21 or not, my Lord, I am sympathetic to my learned friend's point. We need to make our mind up and act within 14 days, and that is the limit that I would ask for.

58. MR JUSTICE BURTON: I think you have 21 days actually so --

59. MR CAHILL: The norm is 21 days.

60. MR JUSTICE BURTON: But it is 21 days from today and not from the date when you get your transcript. So in effect you will have 13 days or so. At any rate, no special order in those circumstances.

61. MR CAHILL: That was my request, and clearly by virtue of the efficient working of the stenographer, I am going to get what I ask for, so I am grateful.

62. MR JUSTICE BURTON: Thank you very much.