Neutral Citation Number: [2026] EWHC 1345 (Admin)

Case No: AC-2025-LON-002407

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/06/2026

Before :

THE HONOURABLE MRS JUSTICE LIEVEN

- -

Between :

THOMAS ARMSTRONG (AGGREGATES) LIMITED — **Claimant**

- and –

(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT
(2) CUMBERLAND COUNCIL
(3) PLUMBLAND PARISH COUNCIL — **Defendants**

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Matthew Reed KC (instructed by **Aaron & Partners LLP**) for the **Claimant**
Robert Williams KC (instructed by **Government Legal Department**) for the **First Respondent**
Alan Evans (instructed by **Emma Priest at Cumberland Council**) for the **Second Respondent**

Hearing dates: 29-30 April 2026

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Approved Judgment

This judgment was handed down remotely at 11:30 am on Friday 12th June 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MRS JUSTICE LIEVEN

The Honourable Mrs Justice Lieven:

1. This is a challenge to the decision of the Secretary of State for Housing Communities and Local government, (SoS), through a planning inspector, JP Sargent, (the Inspector) concerning an application under paragraph 9, Schedule 13 of the Environment Act 1995 (EA 1995). The application concerned a site at High Close Quarry, Plumbland, Cumbria (the Site). The Claimant is the owner of the Site. The Second Defendant is the Minerals Planning Authority (MPA).

2. The Claimant was represented by Mr Matthew Reed KC. The First Respondent was represented by Mr Robert Williams KC, and the Second Respondent was represented by Mr Alan Evans.

3. The case concerns the interpretation of the statutory scheme under Schedule 13 of the EA 1995, which deals with the review of old minerals planning permissions, known as "ROMPs".

4. On 8 December 1954 planning permission was granted for the "continued working" of High Close Quarry subject to 8 conditions (the 1954 Permission). The planning permission stated (as relevant);

"The continued working of High Close Quarry, Parsonby, Aspatria subject to due compliance with the conditions specified hereunder.

1. Excavations shall be limited to the area edged green on the attached plan.

2. Permission is given in principle for quarrying to be carried out within the area edged blue on the attached plan, but quarrying shall not commence until full details have been submitted to and approved by the Local Planning Authority, who reserve the right to impose reasonable conditions.

…

4. No tipping of waste material shall take place outside the excavated area.

…

6. Any further fixed plant which may be required in connection with the undertaking shall be sited on the floor of the quarry."

5. As can be seen the site was divided into the "Green Land" and the "Blue Land". The Green Land was the area of the pre-1954 workings with an existing void and extended in a dog leg to the west. The Blue Land was the rest of the application site which lay to the north and the south of the Green Land.

6. Quarrying work within the Green Land had been ongoing for some 50 years prior to the 1954 permission. Following the grant of permission, quarrying continued until approximately 1956 within the Green Land. No application was ever made in accordance with condition 2 respecting the Blue Land, and the Blue Land has never been subject to quarrying.

7. In 1976 permission was granted for the controlled tipping of waste, (the Landfill Permission). This permission covered about 40/50% of the Green Land. In 1990, in accordance with the terms of the Landfill Permission condition 7, the quarry void within the Green Land had been filled and the land restored to agricultural use. The Inspector found that there is *"now little apparent on the surface [of the site] to indicate the presence of the quarry void, the landfill operations or the activities associated with either of these uses"*. In other words, there is now no quarry void, no quarry floor and the site, certainly to an untrained eye, is simply agricultural land.

8. In August 2019 the Claimant made an application under para 9 of Schedule 13 of the EA 1995 for determination of new conditions in respect of the 1954 permission. The EA 1995 had introduced a process for reviewing "old" planning permissions for mineral working and imposing new conditions in appropriate cases.

9. The MPA failed to determine the application and the Claimant appealed to the SoS. An Inspector was appointed to hear the appeal. There was an inquiry which proceeded on the basis of submissions only in respect of the issue of whether a ROMP application could be made. The Decision Letter (DL) is dated 16 June 2025.

The Statutory Scheme under the Environment Act 1995

10. Schedule 13 sets out the process for the review of old mineral planning permissions.

11. The purpose of the scheme is explained by the Supreme Court in *G Hamilton (Tullochgribban Mines) Limited v The Highland Council* [2012] UKSC 31 ("*Hamilton*") at [2]. Although the case concerns the Scottish equivalent scheme, for all material purposes the provisions are identical to the present case.

"2. The principal legislative purpose of these provisions is to ensure that old mineral permissions are made subject to conditions meeting modern environmental standards. Some of the old permissions were granted many years ago subject to conditions less stringent and less precise than are appropriate today. Where more stringent conditions are imposed compensation is payable in certain cases, but only where the mineral site in question is classified as "active" rather than "dormant". A subsidiary purpose of the legislation is to achieve better and more reliable records of old planning permissions for mineral working. The evolution of the legislation has been described in detail by the Lord President (Lord Cullen) in LaFarge Aggregates Ltd v Scottish Ministers 2004 SC 524, paras 2 and 3."

12. Schedule 13 sets out the relevant definitions (under paragraph 1).

    a. The Schedule is concerned with "mineral sites". These are defined, by paragraph 1(2) as (in terms relevant to the current challenge) land to which a "relevant planning permission" relates.

    b. A "relevant planning permission" means "any planning permission, other than an old mining permission or a planning permission granted by a development order, granted after 30th June 1948 for minerals development": para. 1(1).

    c. "Minerals development" for these purposes means development "consisting of the winning and working of minerals or involving the depositing of minerals waste": s. 96 of the 1995 Act.

13. By paragraph 1(1), there are three categories of mineral sites: a phase I site, a phase II site and a dormant site which can be either a phase I or phase II site.

14. The basic difference (subject to variations that are not relevant for present purposes) between these categorisations is that phase I sites are either higher priority sites in environmental terms or are older permissions than phase II sites. Phase II sites are those sites whose permissions were granted after 1969 but before 21 February 1982: para 2.

15. The purpose behind this distinction was administrative prioritisation (*Hamilton* [3]), i.e., given their environmental sensitivity or the likelihood that, as older permissions, they would have inadequate conditions, and the review of phase I sites should come first.

16. Dormant sites are those phase I or phase II sites in respect of which no minerals development has been carried out to any substantial extent at any time between 22 February 1982 and 6 June 1995: para. 1(1). Therefore, the present site is a dormant phase 1 site.

17. Schedule 13 has two operative stages. This is explained by Lord Walker in _Hamilton_ at [4];

"Stage 1 involves the preparation of two lists, termed the first list (para 3) and the second list (para 4). The first list has three main functions: (i) to list all mineral sites in the authority's area (para 3(1) and (2)); (ii) to sort them into the three categories already mentioned (para 3(3)); and (iii) for active Phase I sites only, to specify a date by which a para 9 application is to be made (para 3(4) and (5)). In that way active Phase I sites are given priority. The second list is simpler. It relates only to active Phase II sites and performs function (iii) above for them (para 4(3), (4) and (5))."

18. Administrative provisions (including advertisement, inclusion applications, postponement of the application date, and service of notices) related to listing is provided for in paragraphs 5-8.

19. Stage 2 of Schedule 13 relates to applications for the determination of replacement conditions which is provided for in paragraphs 9-16. Paragraph 9 is the operative paragraph. As relevant that states;

"(1) Any person who is the owner of any land, or who is entitled to an interest in a mineral, may, if that land or mineral is or forms part of a dormant site or an active Phase I or II site, apply to the mineral planning authority to determine the conditions to which the relevant planning permissions relating to that site are to be subject

…

(2) An application under this paragraph shall be in writing and shall-
(c) identify any relevant planning permission relating to the site.

…

(6) Where the mineral planning authority receive an application under this paragraph in relation to a dormant site or an active Phase I or II site they shall determine the conditions to which each relevant planning permission relating to the site is to be subject; and any such permission shall, from the date when the conditions to which it is to be subject are finally determined, have effect subject to the conditions which are determined under this Schedule as being the conditions to which it is to be subject.

(7) The conditions imposed by virtue of a determination under sub-paragraph (6) above—

(a) may include any conditions which may be imposed on a grant of planning permission for minerals development;

(b) may be in addition to, or in substitution for, any existing conditions to which the permission in question is subject."

20. A right of appeal is granted against a Council's decision to impose conditions that differ from those proposed in the application: para. 11(1). The appeal to the SoS was made on the basis of non-determination as stated above. The right of appeal under para 11(1) was applicable in this case to the non-determination by virtue of regulation 50(5)(a) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011.

21. No relevant planning permission which relates to a dormant site shall have effect to authorise the carrying out of minerals development unless an application for a determination as to what new conditions should be imposed has been applied for and approved: para. 12(3).

22. The challenge provisions contained in ss. 284-288 of the Town and Country Planning Act 1990 apply to a decision on an appeal under paragraph 11: para. 16(1) and (4).

23. In R v Oldham MBC ex p Foster [2000] Env LR 395 per Keene J at p402-3 held that;

    a. The list is a list of mineral sites, not a definitive list of planning permissions;

    b. Continuing validity is part of the concept of a "relevant planning permission";

    c. The MPA is entitled to consider the validity of the permission at the stage of a paragraph 9 application .

24. In R (Payne) v Caerphilly CBC [2003] PLCR 25 Sullivan J agreed with this analysis. At [23] he said that Parliament cannot have intended that paragraph 9 should apply to mineral planning permissions that were no longer extant.

25. In the Court of Appeal [220] Env LR 31 Dyson LJ expressly agreed with this analysis.

The Decision Letter

26. At DL 8 the Inspector set out two main issues:

    a. Whether a ROMP application can be made in respect of the site;

    b. If it can, what conditions should be imposed.

27. It is the first main issue which is at the centre of this appeal. The Inspector referred to the 1954 Permission as "CA.49".

28. Under the first issue, the Inspector first dealt with five arguments raised by Plumbland Parish Council, (the PC). None of these arguments form the subject of this claim. However, at DL37 the PC had raised an argument that the Green Land was not included on the MPA's First List. At DL37 the Inspector said:

    "I accept that in the First List the description of development subject to permission CA.49 differs from that given on the actual decision notice for that application, but to my mind this has no bearing on this matter. I am clear it is unambiguous that the First List includes all of the site subject of permission CA.49, and so includes the Green Area, Blue Area and Red Area."

29. At DL41 the Inspector turned to whether the 1954 Permission, should be considered a relevant planning permission as it concerns the Green Land. At DL41-46 he said:

    "41. Under Condition 1 permission CA.49 allowed excavations within the Green Area, and it was accepted that work in connection with this element of the permission was undertaken immediately the permission was granted. Moreover, it would appear that the on-going development then contemplated involved a quarry void continuing to be present. This was because Condition 4 prohibited tipping outside of the excavated area, while Condition 6 said that any further fixed plant that may be required in connection with the undertaking had to be sited on the floor of the quarry.

42. I see no reason why permission CA.49 would have prevented a second quarry void being opened in the Green Area, provided that there was continued compliance with the conditions imposed. This would have meant that tipping and further fixed plant associated with the second quarry would have had to be in the original void initially, until such times as the second quarry void became large enough for them to be accommodated there.

43. However, by infilling the original quarry void with landfill and then restoring the land, nearly all visual evidence of that previous permission in the landscape was swept away and no quarry presently remains. As a result, it would not now be possible to resume permission CA.49 by excavating elsewhere, as, at the outset at least, there could be no compliance with Conditions 4 and 6. This is because tipping would have to take place outside the excavated area and further fixed plant could not be confined to the quarry floor, as no such floor would exist.

44. Therefore, noting the Pilkington judgment, whilst I accept that it is possible to excavate mineral from elsewhere in the Green Area, for the reasons given above I nonetheless consider that the total infilling of the quarry under the landfill permission has made it physically impossible to carry out that which was authorised, as the works cannot be in accordance with the associated conditions. Consequently, in connection with the Green Area, I consider that permission CA.49 cannot be considered as a relevant planning permission capable of being reviewed under the ROMP procedure.

45. I have also had regard to the judgment known as Hillside, but I see nothing in that to lead me to different conclusions on the status of the Green Area.

46. Accordingly, I conclude that permission CA.49 can no longer be treated as a relevant planning permission insofar as it concerns the Green Area." [emphasis added]

30. At DL47 he considered whether the 1954 Permission should be considered a relevant planning permission as it concerned the Blue Land. He referred to the agreed position that Condition 2 had never been discharged.

31. At DL48-50 he said:

"48. In this regard I have been particularly mindful of the LaFarge judgment6. Although this is a Scottish judgment, made by the Inner House of the Court of Session, given the close parallels with English legislation I consider it to be strongly persuasive. It concerned a minerals development where permission had been granted in principle with conditions to require full details of the operations before works began – conditions that seemed to be similar in effect to Condition 2 on permission CA.49. The judgment went on to address the status of land akin to the Blue Area at High Close Quarry, where details in connection with the condition had been neither submitted nor approved. It differed though to the situation before me as the challenge against the Scottish Ministers was, among other things, on the omission of this land from the First List. However, this difference, to my mind, has no particular bearing on the application of the judgment insofar as it concerns this case.

49. That judgment found that the land to which the relevant permission relates means land in respect of which specific minerals development has been authorised7. Lord Marnoch also expressed the opinion that, in order to meet the definition of a relevant planning permission, the full and final permission for the carrying out of operations relating to minerals development is required8. However, by approving only the principle of the winning and working of minerals, the permission subject of that judgment merely prevented subsequent opposition to the principle of such development. It did not authorise the activity of winning and working of minerals throughout the site, as that would only occur once the details were discharged and approval given in accordance with the conditions. Accordingly, the judgment found the parts of the site that enjoyed the benefit of a relevant planning permission were only those where specific minerals development had been *subsequently authorised through the discharge of the relevant condition. It did not include the other areas, which were akin to the Blue Area at High Close Quarry, where the permission in principle had been granted but the outstanding details had never been submitted, and so the winning and working of minerals had never been authorised.*

50. In my opinion, although the Blue Area has undoubtedly been subject of a valid planning permission for what I have found to be the winning and working of minerals, such development cannot now take place there as it has not been authorised by the approval of full details by the MPA, under the discharge of Condition 2. As such, I find there is not a relevant planning permission for the Blue Area."

32. At DL50-52 he referred to the *Hamilton* judgment and said that it did not conflict with *LaFarge.* At DL52 he said that *Hamilton* did not conclude that the fact that a site was on the First List meant that it was a "relevant planning permission". He therefore concluded that the 1954 Permission should not be treated as a relevant planning permission so far as it concerned the Blue Land.

33. He set out his final conclusions in DL55 and said;

"55. Indeed, as the appellant's proposals straddle the Green Area and the Blue Area and there is nothing before me to show either can be worked in isolation, had I found that only one or other of the Green and Blue Areas did not have the status of a relevant planning permission that would have been sufficient to reach the same conclusion."

The Grounds

34. Ground One concerns the Green Land. There are three sub-Grounds:

a. Ground 1(i): The Inspector erred in finding that Conditions 4 and 6 were no longer capable of being complied with and such a finding was irrational and failed to take into account obviously relevant considerations;

b. Ground 1(ii): The Inspector was wrong to rely on the cases of *Pilkington v Secretary of State for the Environment* [1973] WLR 527 (*Pilkington*) and *Hillside Parks Ltd v Snowdonia National Park Authority* [2022] UKSC 30 (*Hillside*) and should rather have applied the approach in *Hart Aggregates v Secretary of State and Hartlepool BC* [2005] EWHC 840 (approved by the Court of Appeal in *Greyfort Properties Ltd v SSCLG* [2011] EWCA 908).

c. Ground 1(iii): The Inspector erred in ignoring the power under the ROMP regime to amend or substitute conditions.

35. Ground Two concerns the Blue Land. There are two sub-Grounds:

a. Ground 2(i): The Inspector was wrong to rely on *LaFarge Aggregates v Scottish Ministers* [2004] UKSC 524;

b. Ground 2(ii): The Inspector should have followed the Supreme Court decision in *Hamilton* and found that the fact that the Blue Land fell within the planning permission that was placed on the List was determinative of whether there was a relevant planning permission.

Ground 1

Ground 1(i)

36. Mr Reed submits that the Inspector reached an irrational conclusion that Conditions 4 and 6 could not be complied with, even though there was no existing quarry void. Further, he submits that the Inspector failed to consider an obviously relevant consideration, namely that the conditions could be complied with. He seeks permission to admit two witness statements that seek to explain how it is said that the quarry could be worked without any fixed plant on the quarry floor (there not currently being a quarry floor) and by taking all materials off site, until there is a void large enough to allow tipping on site. In other words, the new evidence purports to show that the quarry could be worked without breaching either condition 4 (no tipping outside the excavated area) or 6 (all fixed plant to be sited on the quarry floor).

37. Mr Williams, with the support of Mr Evans, raises as a preliminary issue that this argument was not raised before the Inspector and should not be permitted to be raised in this Court. He argues that the two witness statements should not be admitted.

38. The tests for whether to allow a point to be raised which was not raised before the Inspector was set out by Holgate J (as he then was) in _Barker Mills Estates v Test Valley BC_ [2017] PTSR 408. At [77] he said;

"77 In an application for statutory review of a planning decision there is no absolute bar on the raising of a point which was not taken before the inspector or decision-maker. But it is necessary to examine the nature of the new point sought to be raised in the context of the process which was followed up to the decision challenged to see whether the claimant should be allowed to argue it. For example, _one factor which weighs strongly against allowing a new point to be argued in the High Court is that if it had been raised in the earlier inquiry or appeal process, it would have been necessary for further evidence to be produced and/or additional factual findings or judgments to be made by the inspector, or alternatively participants would have had the opportunity to adduce evidence or make submissions (or the inspector might have called for more information)_: see e g the Newsmith Stainless Ltd case [2001] EWHC Admin 74 at [13]—[16]; HJ Banks & Co Ltd v Secretary of State for the Environment [1997] 2 PLR 50; R (Tadworth and Walton Residents Association) v Secretary of State for the Environment, Food and Rural Affairs [2015] EWHC 972 (Admin) at [95]; Kestrel Hydro v Secretary of State for Communities and Local Government [2015] LLR 522, paras 66—67; and Distinctive Properties (Ascot) Ltd v Secretary of State for Communities and Local Government [2015] JPL 1083, para 49." [emphasis added]

39. Mr Reed, who was not counsel at the inquiry, submits that the MPA was only relying on an "in-principle" point about the planning permission not being capable of continued implementation and was not arguing that Conditions 4 and 6 could not as a matter of fact be complied with. He says that explains why the Claimant did not engage with the point. The Inspector raised the issue in the DL, which he was entitled to do, but only if he then dealt with it properly.

40. Mr Evans, who represented the MPA throughout the appeal process, submits that the point that Conditions 4 and 6 could not now be complied with was squarely raised, and the Claimant did not respond to it. The Inspector had ordered that each party, including the PC, serve composite written submissions which were then exchanged. Mr Evans refers to the MPA's submissions dated 11 March 2025. In respect of the Green Land, the document says, inter alia:

"34. The 1954 Permission was, by the express terms of the grant, for "the continued working of High Close Quarry" such that the quarry had necessarily to continue in existence under that permission for its working to be continued. The conditions of the 1954 Permission reinforce that position with their requirements, dependent on the continuation of the quarried area, for no tipping of future waste material to a height exceeding the original ground level, for no tipping of waste

material to take place outside the excavated area and for any further fixed plant which might be required to be sited on the floor of the quarry. These conditions are intrinsically tied not just to the existence of the quarry void at the time of grant in 1954 but also to the ongoing existence of the same thereafter so that there continued in existence the excavated area into which waste could be tipped and the quarry floor on which any required further fixed plant could be sited. Further, there was no requirement for any restoration of the quarry, whether on a phased or progressive basis or at all. On the contrary, all that was required on conclusion of operations was that the site should be cleared of all pieces of plant and building material and left clean and tidy. Thus, it was contemplated that a quarry, albeit disused, would then remain.
35. However, once the void left in the Green Area when working ceased in 1956 was thereafter landfilled and restored under the Landfill Permission, High Close Quarry (or any quarry, even a disused one) ceased to exist and no continuation of its working in the Green Area was thereafter possible in any form but certainly not in accordance with the terms of the 1954 Permission with a remaining excavated area for the tipping of waste material and quarry floor for any required fixed plant. Just as in Pilkington the later construction of a bungalow under a second permission had "destroyed" a smallholding on which a previously consented bungalow was to be built (the basis of the impossibility in question)18, so here the landfilling in the Green Area has obliterated any quarry and thereby precluded any further working of the same. Any working thereafter would thus not be the continuation of what had gone before but the initiation of fresh working and the creation of a new quarry in the Green Area, not in accordance with the terms of the 1954 Permission."
[emphasis added]

41. The closest the Claimant came in its written submission to the point was at [19] and [21];

"19. There is no physical impediment to the continued working of High Close Quarry in the substantial areas not previously worked and restored. This fact is demonstrated by the proposed working scheme details prepared pursuant to the current application."

…

"21. CA49 has been implemented and is extant. CA49 can continue to be worked lawfully once an appropriate working scheme and planning conditions are agreed in compliance with the procedures required by the Environment Act. There is no impediment to the continued working of High Close Quarry and its subsequent restoration. It is notable that Cumbria County Council did not require and had no reason for the earlier permission to be revoked when determining the Waste Permission."

42. The Inquiry proceeded on submissions only and there were no written closing statements. Mr Reed accepts that there was no evidence that Conditions 4 and 6 could be met, and he does not seek to rely on any notes of Closing to suggest that there were any further submissions on the point by the Claimant.

43. In my view it is clear that the argument that Conditions 4 and 6 could be met by, for example, using mobile plant and removing waste materials off site for a period of time, was not raised by the Claimant at the inquiry. The inability to comply with conditions had been put in issue by the MPA at paragraph 35 of their submissions and in particular by the words *"…no continuation of its working in the Green Area was thereafter possible in any form but certainly not in accordance with the terms of the 1954 Permission with a remaining excavated area for the tipping of waste material and quarry floor for any required fixed plant"* [emphasis added]. The underlined passage is a clear reference to the requirements of Condition 4 and 6. If Mr Evans had anticipated the arguments now being put then doubtless he could have expanded the sentence, but he had squarely raised the issue that the Conditions could not be met by simply resuming operation of the quarry.

44. Further, if the Claimant was going to argue that they could work the quarry in accordance with the conditions then it would have been highly likely that they would have needed to put in evidence to

show how this could be done, for example as to whether the use of mobile plant was feasible. They did not do so. This is a strong pointer to the fact that that was not being argued.

45. In terms of applying *Barker-Mills* at [77], if this issue had been raised then it would have been necessary for evidence to be produced as to the feasibility of continued working of the quarry without breaching Conditions 4 and 6. This is a question of fact. As Holgate J said, that factor weighs strongly against allowing the argument to be raised in the High Court. This is a clear case where it would be wrong to allow a new issue to be raised on appeal, when it turns on matters of fact which were not put before the Inspector.

46. For these reasons I conclude I should refuse to allow the Claimant to raise this issue.

47. For the purposes of completeness, I should add that I do not think that it is so obvious that the Conditions could be complied with that the Inspector concluded irrationally in the DL or failed to take into account a material consideration, namely that they could be complied with. There are factual issues as to whether and how they could be complied with, and the Inspector was perfectly entitled to take the view that as the MPA had raised the issue, and the Claimant had made no argument on the point, he could assume that the conditions could not be complied with.

Ground 1(ii)

48. This Ground is that the Inspector was wrong in law to apply the test set out in *Pilkington* of whether it was "physically impossible" to resume work under the 1954 Permission, in the light of the Landfill Permission. Mr Reed submits that *Pilkington* does not apply to cases where the alleged barrier to continuing work under the first permission is that there would be a breach of condition by reason of implementation of the second permission. He says that the *Pilkington* test is limited to cases of operational development, where it is physically impossible to complete the first permission because of the physical development which has been implemented under the second permission, and not situations, such as the present, where the barrier to continued implementation is the inability to comply with conditions.

49. Mr Reed submits that to apply the *Pilkington* test to a situation where the only barrier to implementation of the first permission is a breach of conditions, is a "blunt tool". He points out that in such situations the obvious solution is to apply to vary the relevant conditions in the first permission, under s.73A Town and Country Planning Act 1990. To find that whenever there is a breach of a condition on the first permission, by reason of something that has been done under the second permission, the first permission can no longer be implemented by reason of *Pilkington*, could lead to very wide ranging and undesirable consequences.

50. Therefore, he submits that the more onerous test from *Hart Aggregates*, i.e. does the condition in issue go to the heart of the planning permission, should be applied.

51. It is not in dispute that this argument was not advanced before the Inspector. However, it is wholly a point of law which requires no further evidence, and as such in my view falls on the other side of the line within [77] of *Barker-Mills*. I therefore permit the Claimant to pursue this Ground.

52. In order to understand the scope of the legal issues, it is necessary to consider the facts and ratio of the various cases in some detail.

53. In *Pilkington* the first permission was for the erection of a bungalow and the use of the land as a smallholding, see p.1529. The second permission was also for a bungalow, but on a different part of the site, see p.1530. There was a condition on the second permission, that there was only to be one dwelling on the site, and the rest of the land was to be the curtilage of the bungalow. Mr Pilkington built the second bungalow and then argued that he could implement the first permission and build another bungalow on the same site.

54. Lord Widgery CJ said;

"Accordingly, one now looks back at permission 601 to see whether the development there contemplated is a practical possibility having regard to what has been done or may be done under number 756. I have no doubt in my mind that it is quite clear that the development contemplated by number 601 cannot now be carried out. As I endeavoured to explain earlier, the development contemplated by number 601 was the building of a bungalow, but the building of a bungalow in a particular site as ancillary to the smallholding which was to occupy the rest of the site. It is not now possible to build a bungalow on number 601 subject to those terms, and it does not follow in the least that if the local planning authority had been asked to give permission for a bungalow on site A that they would have done so if they had known that the remainder of the site was not to be made available for the smallholding which was clearly in contemplation all the way through"

...

"My views on this matter are not based on any election on the part of Mr. Pilkington; they are not based on any abandonment of an earlier permission, and they do not in any way depend on the fact that the building on site A may have been a breach of the condition in number 756. I base my decision on the physical impossibility of carrying out that which was authorised in number 601. I mention this because I do not regard the case as one in which the Secretary of State's decision depends on the condition in number 756. Had it done so and had it been necessary for the Secretary of State to rely on the condition in that permission, we should have had to consider the point put before us by Mr. Dobry that that was not the basis on which the enforcement notice had been framed."

55. <u>*Pilkington*</u> was considered by the House of Lords in <u>*Pioneer Aggregates v SSE*</u> [1985] AC 132, where Lord Scarman strongly emphasised the fact that town and country planning is a statutory regime, and the importance of remaining within that statutory regime, see 141B, and only incorporating principles of private (land) law in exceptional cases. He supported the analysis in <u>*Pilkington*</u> at 145A-C.

56. <u>*Pilkington*</u> was further considered, in the context of a minerals permission, in <u>*Staffordshire CC v NGR Land Development*</u> [2002] EWCA Civ 856. In that case in 1956 there had been a permission for the extraction of clay on a site known as Campions Wood. In 1987 permission had been granted for an open cast coal mine on a site known as Streets Lane. There was an Area of Overlap between the two sites. The 1956 permission was implemented. In 1995 the MPA placed Campions Wood on the first list, but excluded the Area of Overlap.

57. The Court of Appeal held that because it was still possible to implement the 1956 permission in accordance with its terms (including conditions) the principle in <u>*Pilkington*</u> did not apply.

58. In <u>*Hillside*</u> the facts were that in 1967 the LPA had granted permission for 401 dwellings in accordance with a Masterplan. 41 houses were built, but none of them in accordance with the Masterplan and rather on the basis of the grant of a number of other permissions on parts of the land. The Judge found that it was now impossible to complete the 1967 permission fully in accordance with the permission and therefore further development would be unlawful. This was upheld by the Court of Appeal.

59. The Supreme Court (Lord Sales and Lord Leggatt) considered <u>*Pilkington*</u> at [41]-[45] and said;

"THE PILKINGTON PRINCIPLE

[41] The principle underlying the Pilkington case can be analysed further. In the passage of his judgment quoted at para [36] above Lord Widgery said that his decision was based on the 'physical

impossibility' of carrying out what was authorised by the unimplemented planning permission; and elsewhere in his judgment he used the phrase 'practical possibility' (see [1974] 1 All ER 283 at 287, [1973] 1 WLR 1527 at 1532). Two points arise from this. First, it is important to recognise that the test of physical impossibility applies to the whole site covered by the unimplemented planning permission, and not just the part of the site on which the landowner now wishes to build. Thus, in the Pilkington case, as pointed out in later cases, it remained perfectly possible to build a bungalow in the position authorised by the earlier, unimplemented planning permission, as that part of the site remained vacant. The reason why it was not physically possible to carry out the development authorised by the earlier permission was that the proposal for which permission was granted involved using the rest of the land as a smallholding and this could not be achieved when part of that land was occupied by the first bungalow: see R v Arfon BC, ex p Walton Commercial Group Ltd [1997] JPL 237; Staffordshire CC v NGR Land Developments Ltd [2002] EWCA Civ 856, [2002] All ER (D) 327 (May) (at para [56]); and R (on the application of Robert Hitchins Ltd) v Worcestershire CC [2015] EWCA Civ 1060, [2016] JPL 373 (at para [42]).

[42] A second point to note concerns Lord Widgery's formulation of the relevant test (in the passage quoted at para [31] above) as 'whether it is possible to carry out the development proposed in that second permission, having regard to that which was done or authorised to be done under the permission which has been implemented' (emphasis added). The words 'or authorised to be done' ought, we think, to have been omitted as they are not consistent with the ratio of the decision.

[43] On the facts of the Pilkington case the planning permission which had already been implemented included a condition that the bungalow built in accordance with that permission should be 'the only dwelling to be erected' on the plot. Lord Widgery, however, specifically stated that his decision did not in any way depend on the fact that building the second bungalow would be a breach of this condition (see [1974] 1 All ER 283 at 287–288, [1973] 1 WLR 1527 at 1532). What mattered, as he made clear, was whether it was physically possible to carry out the development authorised by the terms of the unimplemented permission. That depends upon (a) the terms of the unimplemented permission and (b) what works have actually been done. It would not make sense to have regard to the terms of the permission under which development has already taken place, as a central theme of the judgment is that mere inconsistency between the two permissions does not prevent the second permission from being implemented. What must be shown is that development in fact carried out makes it impossible to implement the second permission in accordance with its terms.

[44] This point is illustrated by Prestige Homes (Southern) Ltd v Secretary of State for the Environment and Shepway DC (1992) 64 P & CR 502, [1992] 3 PLR 125, where a house had been built pursuant to a planning permission which was subject to a condition that the existing trees on the site should be retained. The question then arose whether a separate planning permission to build a house on part of the site (which did not include the land on which a house had already been built but did include some of the trees) was capable of being implemented. The local planning authority argued that it could not be implemented because the house contemplated by the second permission could not be built without felling some of the trees on the site, which would be contrary to the terms of the first permission. Mr Malcolm Spence QC, sitting as a Deputy Judge, held that this objection was misplaced. Applying the reasoning in the Pilkington case, all that mattered was that there was no physical impossibility in carrying out the development authorised by the second permission, which there was not. The Pilkington case did not decide that mere incompatibility with the terms of another permission already implemented has the consequence that a permission which is capable of being implemented is of no effect. This decision was approved and similar reasoning applied by the Court of Appeal in Staffordshire CC v NGR Land Developments Ltd [2002] EWCA Civ 856, [2003] JPL 56.

[45] <u>In essence, the principle illustrated by the Pilkington case is that a planning permission does not authorise development if and when, as a result of physical alteration of the land to which the permission relates, it becomes physically impossible to carry out the development for which the</u>

permission was granted (without a further grant of planning permission). Unlike a doctrine of abandonment, this principle is consistent with the legislative code. Indeed, as Lord Scarman observed in Pioneer Aggregates [1984] 2 All ER 358 at 366, [1985] AC 132 at 145, it serves to 'strengthen and support the planning control imposed by the legislation'. Where the test of physical impossibility is met, the reason why further development carried out in reliance on the permission is unlawful is simply that the development is not authorised by the terms of the permission, with the result that it does not comply with s 57(1)."

60. And at [69];

"[69] The Pilkington principle should not be pressed too far. Rightly in our view, the Authority has not argued on this appeal that the continuing authority of a planning permission is dependent on exact compliance with the permission such that any departure from the permitted scheme, however minor, has the result that no further development is authorised unless and until exact compliance is achieved or the permission is varied. That would be an unduly rigid and unrealistic approach to adopt and, for that reason, would generally be an unreasonable construction to put on the document recording the grant of planning permission – all the more so where the permission is for a large multi-unit development. The ordinary presumption must be that a departure will have this effect only if it is material in the context of the scheme as a whole: see Lever (Finance) Ltd v Westminster Corp [1970] 3 All ER 496 at 500–501, [1971] 1 QB 222 at 230. What is or is not material is plainly a matter of fact and degree."

61. Mr Reed submits that neither Pilkington nor Hillside were concerned with a situation where the alleged impossibility of completing the first permission was because the second permission made a breach of conditions on the first permission inevitable. None of the judges concerned addressed the issues that would arise in the present type of case. Mr Reed submits that to apply a Pilkington analysis to a breach of condition issue is a "blunt tool", is contrary to the statutory scheme and will lead to wide ranging and unintended consequences.

62. He points out that the obvious solution to a situation where there would be a breach of planning condition is to make an application under s.73A TCPA to amend the conditions. There is a clear distinction in the TCPA and in the caselaw between cases where there is a breach of planning control and where there is a breach of planning condition.

63. Mr Reed submits that in a case where it is being argued that the implementation of a second permission means that conditions in the first permission can no longer be complied with, i.e. the facts he says of this case, then the appropriate caselaw to apply in that set out in R (Hart Aggregates Ltd) v Hartlepool BC [2005] EWHC 840 (approved by the Court of Appeal in Greyfort Properties Ltd v SSCLG [2011] EWCA 908).

64. Hart Aggregates was a case under the EA 1995 Schedule 13 where it was being argued that there was no relevant planning permission. It was submitted that the 1971 permission had lapsed because there had been a pre-commencement condition which had not been complied with, and therefore the principle in Whitley & Sons v Secretary of State for Wales [1992] 3 PLR 72 arose. The effect being that there was no longer a valid or relevant planning permission. The case turned on the construction of the relevant condition, condition 10, see [19]-[22]. It was argued that any breach of a pre-commencement condition would mean that the planning permission had not been implemented. Sullivan J (as he then was) said at [60];

"60. In my judgment, the principle argued for by the defendant applies only where a condition expressly prohibits any development before a particular requirement, such as the approval of plans, has been met. Condition 10 is not such a condition. If it had been breached some 34 years ago, the effect of that breach would have been to render any restoration in breach of condition, and therefore unlawful. Other activities permitted by the 1971 permission, such as extraction, would not have been rendered unlawful."

65. This judgment was supported by the Court of Appeal in *Greyfort Properties v SSHCLG* [2012] JPL 40. Mr Reed submits that the Inspector should have applied this approach, asking himself whether the non-compliance with the conditions went to the heart of the permission granted.

66. Mr Williams submits that the Inspector applied *Pilkington*, wholly in accordance with the analysis set out in *Hillside*. Importantly in *Hillside* the Supreme Court referred to the principle applying to whether the permission could be carried out in accordance with its terms at [43]:

"What must be shown is that development in fact carried out makes it impossible to implement the second permission in accordance with its terms."

This must include not just physical impossibility of the operational development, but also not being able to comply with relevant conditions.

67. The permission comprises the description of development and the conditions to which it is subject, see *Pye v Secretary of State for the Environment, Transport and the Regions* [1999] PLCR 28. Therefore, the Inspector was correct to consider the entirety of the 1954 Permission and whether it was now physically possible to comply with it.

68. *Hart Aggregates*, and the principle in *Whitley* concerned non-compliance with pre-commencement conditions, and the degree to which those conditions were central to the permission. The present case concerns a different issue, namely whether or not there is a relevant permission at all. The two legal issues are entirely separate, and the *Hart Aggregates* line of cases has nothing to do with the issue in the current case, i.e. the physical alteration of land undertaken under one permission rendering it no longer possible to implement the other permission.

69. The 1954 Permission was for "*continued working"* of the Quarry. The Inspector was correct to recognise that the permission rested on a quarry void continuing to exist. That accords with conditions 4 and 6, that themselves assume a continued void. The Inspector was therefore entirely correct at DL44 to say that in respect of the Green Land the 1954 Permission could not be considered as a relevant planning permission.

70. Mr Evans adopts Mr Williams' submissions.

Conclusion on Ground 1(ii)

71. The answer to this Ground lies in the terms of the planning permission and the factual situation that appertained at the time of the Inspector's decision. The 1954 Permission was for the "continued working" of the quarry. Reading the permission as a whole, as I must in accordance with *Pye v SSETR* [1999] 3 PLR 28, and taking the approach of a reasonable reader, it is clear that what was being permitted was the extension of an existing quarry. However, as the Inspector records, the condition of the land had been fundamentally changed by the implementation of the Landfill Permission. There is no existing quarry, with no void and no quarry floor. Therefore, applying the principle in *Pilkington,* it is now physically impossible to carry out the development in accordance with the permission. The inability to do so is not merely because of conditions 4 and 6, but also because of the change in the nature of the land. Therefore, the Inspector was correct to apply *Pilkington* to the present case.

72. It is possible to see that if the principle were applied rigidly to any situation where there might be a breach of a condition on the first permission then unintended (and perhaps unfortunate in planning terms) consequences might follow. However, that is guarded against by what the Supreme Court said in *Hillside* at [69]. The principle should not be pressed too far and too rigidly. Mr Reed is, in my view, wrong to say that if the *Pilkington* test is applied there is no nuance. The judgment in

Hillside makes clear that there can be an element of nuance or flexibility in the application of the *Pilkington* test. Therefore, quite apart from the fact that the *Whitley* and *Hart Aggregates* line of authority arise in a different context, namely whether there has been compliance with pre-commencement conditions, there is no purposive need to introduce them into the *Pilkington* analysis.

73. Here the situation is highly analogous to that in *Pilkington*. The implementation of the second permission has changed the nature of the land so that what was permitted in the first permission can no longer be carried out. For those reasons the Inspector did not err in law and this Ground fails.

Ground 1(iii)

74. The Claimant submits that the Inspector erred by ignoring the power to impose, amend or remove conditions under the ROMP regime, when assessing whether the conditions on the Green Land were capable of being complied with. Mr Reed relies on Schedule 13 paragraph 9(7) which gives the Inspector the power to change the conditions. He submits that the Inspector erred by treating the permission as if the ROMP application had not been made. He submits that it is no part of the ROMP scheme to take away established rights.

75. The Inspector had found at DL44-46 that the 1954 Permission was not a *"relevant planning permission"* because the total infilling of the quarry under the Landfill Permission had made it physically impossible to carry out the permission.

76. Mr Williams submits that in order for there to be a *"relevant planning permission"* within the meaning of para 9(1) of Schedule 13 of the EA 1995, the planning permission must continue to be valid/extant, see *R v Oldham MBC ex p Foster* [2000] Env LR 395, per Keene J, and *R (Payne) v Caerphilly BC* [2002] PLCR 25, per Sullivan J. *Payne* was upheld by the Court of Appeal [2003] Env LR 31, although the issue taken on appeal was different and therefore the Court of Appeal does not expressly deal with the relevant argument here.

77. In *Foster* the minerals permission was not valid because the operations had not lawfully begun before the time limit imposed by condition had expired, applying the *Whitley* principle. The owner argued that once the site is on the first list it is no longer open to the MPA to decide whether or not the relevant planning permission is still valid, see p.401. Keene J (as he then was) rejected this argument, see p.402-3. He said; "*... it would be absurd to require the MPA to determine conditions for a lapsed permission. The MPA is entitled to consider the validity of any permission alleged in a paragraph 9 application to be a "relevant planning permission" and to do so at any stage when it is dealing with that application"*.

78. In *Payne* the minerals permission was not valid because it was subject to a condition limiting the period for consent, which had expired. Sullivan J (as he then was) followed *Foster* see [23] and said that Parliament did not intend that paragraph 9(1) should apply to invalid consents.

79. Mr Williams submits that it is no part of the ROMP scheme to resurrect permissions which are no longer valid on the basis of established legal principles.

80. Mr Reed submits firstly, that *Foster* and *Payne* concerned situations where the permissions could no longer be implemented because of conditions that limited their time span. Therefore, there was no permission that was capable of going through the ROMP process. That process is premised upon there being an existing permission. Here, there is no such time limited permission. Therefore, those cases can be distinguished.

81. Secondly, he says that they have effectively been overruled by the subsequent Supreme Court decision in *Hamilton*. I deal with the facts of *Hamilton* in some detail below, under Ground Two.

However, it is apparent that the Supreme Court did not consider that they were overruling those decisions, given that they refer to them in the citation at [23].

Conclusion on Ground 1(iii)

82. In my view this Ground must fail. The Inspector had found, correctly, that the 1954 permission could no longer lawfully be carried out, and therefore was not a relevant planning permission for the purposes of Schedule 13. In those circumstances applying the principles set out in *Foster* and *Payne* the power in paragraph 9(7) no longer arose. Once it has been determined that there is no relevant planning permission then the powers under paragraphs 9(6) and (7) do not arise.

Ground 2

83. Ground Two concerns the Blue Land. The Inspector found on the basis of *LaFarge* that in respect of the Blue Land there was only an "in-principle" approval and no approval that would actually allow works to commence. In those circumstances there was no relevant planning permission to which the ROMP regime would attach.

84. The position in respect of the Blue Land is made complex by the fact that the Inspector appears to have proceeded on the basis that the 1954 Permission was severable, and there were two permissions. The SoS in his Skeleton Argument had also worked on the basis that the Inspector had treated the 1954 Permission as being severable. However, by the time of the hearing both the SoS and Claimant had agreed that the Court should proceed on the basis that there was only one permission. The law on the severability of planning permissions is complex, and in my view Mr Williams was correct to make his submissions on the basis of there being one permission in respect of the entirety of the land.

85. However, the effect of this position is that the Claimant has to succeed on Ground One before Ground Two can arise. If Ground One fails then there is no relevant planning permission for the entire site and the case fails. However, even if the Claimant succeeded on Ground One, in respect of the Blue Land it would still be necessary for the Claimant to also succeed on Ground Two for the Blue Land to be included in the relevant planning permission.

86. Ground Two has two limbs. Firstly, that the Inspector misdirected himself on the ratio of *LaFarge*. Secondly, and entirely separately, that the effect of *Hamilton* is that the placing of the 1954 Permission on the list is determinative of whether or not there is a "relevant planning permission" for the purposes of Schedule 13.

Ground 2(i)

87. In order to understand the *LaFarge* decision, it is necessary to consider its facts in some detail. The parties differ as to the true ratio of the case, and therefore whether or not the Inspector misconstrued its effect.

88. *LaFarge* concerned Schedule 9 of the Town and Country Planning (Scotland) Act 1997, which for all relevant purposes is in the same terms as Schedule 13 of the EA 1995. In February 1965 an application had been made for permission to extract minerals at Rodel, Isle of Harris. A site plan showed an area of 600 ha, but there was no plan showing the location, nature or extent of the minerals to be extracted. The application said that there needed to be further investigation before details of operations could be submitted. In March 1965 permission was given in the following terms, see [8];

"It stated that the planning authority, in pursuance of their powers under the Town and Country Planning (Scotland) Acts 1947-1963 and the Town and Country Planning (General Development)(Scotland) Orders 1950-1960 "hereby grant approval in principle for the extraction of minerals from an area of Rodel, Harris in accordance with the plan (s) submitted to the Council and docqueted as relative hereto". It also stated that the permission was granted subject to the following conditions:

> *"(1)That before any work is commenced full details of the proposed operation be submitted for the approval of the Council e.g. in relation to such matters as mode and direction of working, the precise location of the working face, plant, buildings etc., the arrangements for prevention of contamination of water sources, the proposed road accesses, measures for the preservation of amenity such as re-habilitation of the ground.*
>
> *(2) In connection with any immediate exploratory operations (any proposed investigations other than minor will require to be detailed to the Council before being undertaken) there will be complete re-habilitation of the ground."*

89. The Court described this as purporting to be a conditional planning permission. It is of some relevance that the concept of an outline and reserved matters permission was not introduced into the Planning Acts until the Town and Country Planning Act 1968.

90. In June 1965 the company submitted a map showing two parts of the 600ha as being for immediate development. Extraction commenced on those two plots only.

91. In 1997 the applicants applied for the 600 ha site to be entered on the statutory list. The application was refused and the applicant appealed to the Scottish Ministers. The Scottish Ministers also refused, and the matter came before the Scottish Inner House First Division.

92. At [16] the Lord President (Lord Cullen) said, "*the extraction of minerals was not permitted until the planning authority was satisfied with the details of proposed workings."*. He then said at [44];

"[44]I am not persuaded that 1965/79 was not a valid grant of planning permission. None of the cases or legislation demonstrates that the planning authority was not entitled to grant planning permission in principle for the winning and working of minerals within a defined site, subject to such conditions as it considered appropriate in order to safeguard the interests of good planning. However, the critical question is - what did 1965/79 grant? In my view, in exercise of their statutory powers, the planning authority merely approved the principle of the winning and working of minerals within the 600 hectares. This meant that they were not thereafter entitled to refuse approval of a specific development on the ground that they were opposed to the principle of such a development. However, they did not authorise the activity of winning and working of minerals throughout the 600 hectares. The Dean of Faculty was correct in pointing to the significance of the total absence at that time of any scheme of proposed development. Neither the applicants nor the planning authority knew what would be proposed and in particular as to where and to what extent winning and working of materials in the 600 hectares would be proposed to take place. As he pointed out, condition 1 of 1965/79 was not so much concerned with a future provision of details, as with a future proposal for development."

93. He found at [48] that the 1965 permission did not allow developers to make successive applications. Alternatively, at [49] he held that any further application would have had to be made by December 1979 and therefore it no longer remained open to the developer to make an application. This was because the Town and Country Planning (Minerals) (Scotland) Regulations had created a 10 year time limit for the commencement of relevant development, see [13].

94. Lord Cullen's conclusion is at [51]:

“"The land to which a relevant planning permission relates" means, in my view, the land in respect of which specific minerals development has been authorised. In the circumstances of the present case land which satisfies that description comprises only the three areas identified in the 25 inch map. The remainder of the 600 hectares does not satisfy that description since winning and working of minerals in these areas has never been authorised. The reporters did not truly "cut down" 1965/79.”

95. Lord Marnoch arguably went further than Lord Cullen, saying at [56];

“[56] Read short, the definition of "relevant planning permission" in para. 1 of Schedule 9 is that it means "planning permission ... for ... development" (as it happens "minerals development") and, as your Lordship has made clear, the question at the core of this reclaiming motion is what is meant in that context by the word "development". Leaving aside change of use, the only sort of "development" for which planning permission is ultimately required under the legislation is the actual "carrying out" of "operations" within the meaning of section 26(1) of the Act. As it seems to me, therefore, full and final permission for such a "carrying out" is required if the definition in question is to be satisfied. That sort of permission can appropriately be referred to as "full planning permission" notwithstanding that it may be subject to suspensive conditions independent of any further approval of the Planning Authority. If I am right so far, it follows, I think, that a "mineral site", as also defined in the Schedule, can in the normal way only comprise an area of land which enjoys the benefit of full planning permission for mineral development, albeit that area may well form only part of a larger site in respect of which planning permission was originally sought.”

96. Lord Weir agreed with Lord Cullen saying at [70].

“[70] I agree with your Lordship in the chair that the "land to which a relevant planning permission relates" means the land in respect of which specific minerals development has been authorised. As it has transpired, the only authorisation which has been made relates to the areas identified in the 25 inch map. The remainder of the large area has not been authorised for development as a mineral site and accordingly cannot be listed. In my opinion the decision reached by the Ministers in accepting the recommendations of the reporters was correct, and I agree with your Lordships that the appeal should be refused.”

97. There is a dispute between the parties as to the ratio of *LaFarge*. The Claimant submits that the reason for the decision that the 1965 permission was not a relevant permission was that it had only allowed a single application for approval of details, not successive applications [48], and that the time had passed for any further applications [49]. Therefore, there was no permission that was capable of being implemented. To the degree that Lord Marnoch was going further and saying that the permission had to have “crystallised”, that was wrong and not part of the ratio of the case. Mr Reed therefore submits that *LaFarge* does not apply to the facts of this case and the Inspector erred in applying it.

98. The Defendants submit that the true ratio is the broader proposition that a relevant permission must be for “specific minerals development”. Mr Williams relies upon Lord Cullen at [51], that for there to be a relevant planning permission, it must relate to “land in respect of which specific minerals permission has been authorised”, which both Lord Marnoch and Lord Cullen agreed with. When the Inner House said that the development had to be “authorised” it meant that full details must have been approved. Therefore, it is only when the details under condition 2 are approved that a “relevant planning permission” in respect of the Blue Land is in established.

99. He submits that it is plain from Lord Cullen at [51] of *LaFarge* that the ratio is not limited to the situation where the time for submitting a further application had passed. The true ratio is that there has to be consent for the specific minerals development.

Conclusions on Ground 2(i)

100. It is in my view clear that the Inner House were going further than saying that there was no relevant permission because time had expired. This was Lord Cullen's alternative analysis, but all three members of the Inner House were adopting the approach that the permission had to grant authorisation for "specific minerals development" and not a general in principle permission, see [51]. This is the ratio of the case, and I therefore reject Mr Reed's submission that the case is limited to the purely temporal issue.

101. It is not clear precisely in every case where the specific permission test would be reached. However, given the scale of the permission in the *LaFarge* case it is easy to see that there is a distinction between permission for extraction on specific land, and an in-principle permission across a very wide area.

102. The distinction that existed in *LaFarge*, between permission for extraction in a specific area and a broad in principle permission, is precisely the same as the distinction here between the Green Land and the Blue Land. *LaFarge* is not binding upon me (or the Inspector). However, it is a carefully considered decision of three senior judges, and it is highly persuasive.

103. I accept the Defendants' submission that I should follow *LaFarge*. The analysis, that for there to be a relevant planning permission it has to be for specific minerals development, and not for what is described in condition 2 as "in-principle" permission, accords with the scheme of Schedule 13. The distinction here, as it was in *LaFarge*, is that the MPA had reserved the right to cut-down the scale and nature of the minerals permission, in ways that made a very clear distinction between the permission for the Green Land and that for the Blue Land. The facts of *LaFarge* were particularly extreme, but the same in principle distinction arises on the present case.

104. I note that *LaFarge* is mentioned by the Supreme Court in *Hamilton*. Although the issue in that case was different, if the Supreme Court had considered that *LaFarge* went too far then it might be expected that they would have commented to that effect.

105. For these reasons I conclude that the Inspector was correct in his analysis of *LaFarge* and to apply that analysis to the present case.

Ground 2(ii)

106. In *Hamilton* the issue before the Supreme Court was the extent of the site which was on the list. Planning permission for mineral extraction was granted in 1965, but the plan was subsequently lost [11]. It was assumed that the plan related to the same area as had been the subject of the sale by Lord Reidhaven [9] "the red land". There was a smaller area, *"the green land",* which was land that had been worked. The Claimants, a neighbouring landowner, argued that the "relevant planning permission" for the purpose of Schedule 9 of the Scottish Act, was only the smaller area.

107. In the Inner House, the Lord Justice Clerk held that the MPA was bound to satisfy itself that a relevant planning permission existed before placing it on the list, but it did not need to identify the permission in the list itself; "*Since the site is by definition land to which a relevant planning permission relates, the extent of it will be defined by the planning permission itself. If the site is then listed, the extant planning permission will remain alive in its entirety."*

108. Lord Walker upheld the Inner House's decision:

"26. In my judgment the Lord Ordinary and the Inner House were plainly correct. Counsel for the appellant criticised their reasoning as inadequate. But once the general scheme of Schedule 9 of the 1997 Act is understood the first point is really quite a short one. The procedure at what the Lord

Justice Clerk called Stage 1 is administrative and preliminary in nature. It involves the identification of sites and the setting of an order of priority for Stage 2 (with activity on a dormant site being frozen in the meantime). By contrast Stage 2, which is initiated in every case by a paragraph 9 application, requires decisions calling for planning judgment."

109. Mr Reed submits that this decision establishes that once the permission is placed on the list then that is determinative of whether it is a relevant permission, and the entirety of the permission is therefore placed on the list. *Hamilton* post dates *LaFarge* and being from the Supreme Court was binding upon the Inspector. Therefore, the Blue Land fell within a relevant planning permission.

110. Mr Williams submits firstly that *Hamilton* can be distinguished because it was concerned with the extent of the permission, which was on the list, not the principle of whether placing on the list was determinative of whether there was a relevant planning permission.

111. Secondly, he relies on Lord Walker's comment that the procedure of listing is "administrative and preliminary in nature". Therefore, the act of listing cannot be determinative of whether there is a relevant permission or not.

112. Thirdly, he relies on the decisions in *Payne* and *Oldham* referred to above, where the courts held that the fact that a site was placed on the list was not determinative of whether or not there was a *"relevant planning permission"*.

113. Mr Reed submits that *Payne and Oldham* have been overruled by *Hamilton.* Alternatively, those decisions should be distinguished to instances where the permission has lapsed such that no permission exists.

114. Mr Williams refers to the fact that *Hamilton* was only concerned with the extent of the site that was on the list, see [22]. It was not addressing the issue of whether the permission itself was valid or not. Therefore, *Foster* and *Payne* are the cases that are directly on point, whereas *Hamilton* is not. It is quite clear from Lord Walker's judgment that the Supreme Court was not overruling *Foster* and *Payne.*

Conclusions on Ground 2(ii)

115. I agree with Mr Williams that *Hamilton* is not dealing with the issue in the present case, namely whether there is a valid or extant permission for the development in question. That was not the issue that Lord Walker was addressing. The only issue before the Supreme Court was the physical extent of the land that was subject to the relevant planning permission and the relationship between the fact that the land had been entered on the list and the extent of the relevant permission. That is clear from the judgment as a whole, but in particular the extract at [23] where the Lord Justice Clerk had said "*If the site is then listed, the extant planning permission will remain alive in its entirety"*.

116. Further it would be inconsistent with his judgment to find that if a site is placed on the list, but subsequently found to be invalid for whatever reason, the fact of it being on the list is binding on the MPA. Lord Walker expressly says at [26] that the procedure of placing a site on the list is "administrative and preliminary in nature". This would not make sense if the MPA was then bound as to the validity of the permission which had been placed on the list.

117. There is no suggestion in the judgment that the Supreme Court thought they were departing from the judgments in *Payne* and *Foster,* which are referred to in the citation of Lord Justice Clerk's judgment, at [23]. It would be particularly surprising if the Supreme Court was departing from or overruling those judgments, given that they both contain detailed analyses of the issues, are given

by judges exceptionally experienced in planning law, and *Payne* having been upheld in the Court of Appeal.

118. In my view, *Hamilton* was addressing a different issue, the extent of the site on the list and the Inspector did not misdirect himself in this regard. Therefore, this Ground fails.

119. For these reasons the claim is dismissed.