RICHARD BUXTON
SOLICITORS

ENVIRONMENTAL, PLANNING & PUBLIC LAW

Office A, Dale's Brewery
Gwydir Street
Cambridge CB1 2LJ

Tel: (01223) 328933

www.richardbuxton.co.uk
law@richardbuxton.co.uk

The Coal Authority
Lake View
200 Lichfield Lane
Mansfield
Nottinghamshire
NG18 4RG

Ref. CA11/DM/95/0025.1/C; Aberpergwm Colliery

Attn: Tim Edds, Browne Jacobson
tim.edds@brownejacobson.com

Brooke Toon, Browne Jacobson
Brooke.Toon@brownejacobson.com

Welsh Ministers
Welsh Government
Gathays Park
Cardiff
CF10 3NQ

Ref. CA11/DM/95/0025.1/C; Aberpergwm Colliery

Attn: Luke Walsh, Office of the First Minister, Legal Services Department
Luke.Walsh001@gov.wales

Hefin Gill, Office of the First Minister, Legal Services Department
hefin.gill2@gov.wales

By email only

Our ref: (COA1/2)-MM/RS
Email: mmcfeeley@richardbuxton.co.uk, rstewart@richardbuxton.co.uk

2 March 2022

FURTHER PRE-ACTION PROTOCOL LETTER
THIS LETTER REQUIRES YOUR URGENT ATTENTION

Re: Aberpergwm Colliery; License for expansion of existing mine

Dear Coal Authority / Welsh Ministers,

1. This is a further letter before action sent in accordance with the pre-action protocol for judicial review. We previously wrote a pre-action letter on 8 February 2022 ("**the PAP Letter**"). Both Potential Defendants acknowledged the correspondence and declined to respond urgently. On 22 February 2022, the First Potential Defendant, the Coal Authority, responded in substance, but without giving the requested disclosure. Also on 22 February 2022, the Second Potential Defendant, the Welsh Ministers, responded in substance and disclosed some, but not all, of the relevant documents. On the evening of 1 March, 2022, the Coal Authority disclosed certain relevant documents under cover of a letter declining to disclose others the Potential Claimant had requested.

2. As a result of those responses and the disclosure obtained thus far, the Potential Claimant has a better understanding of the factual position, including the correspondence between the Potential Defendants, and thus of the errors of law made by the Potential Defendants. The Potential Claimant thus write again to set out those errors and invite the Potential Defendants to take steps to avoid the need for legal action. For the avoidance of doubt, the proposed grounds of challenge set out in this Further PAP Letter supersede those set out in the PAP Letter.

Claimant

3. As previously stated, we are instructed by Coal Action Network ("**CAN**"). CAN work for justice for communities affected by the UK's current and historical coal consumption and mining.

Potential Defendants

4. The Coal Authority, Lake View, 200 Lichfield Lane, Mansfield NG18 4RG ("**the First Potential Defendant**"); and

5. The Welsh Minsters, Welsh Government, Cathays Park, Cardiff CF10 3NQ ("**the Second Potential Defendant**").

Decisions to be Challenged

6. As explained in detail below, the proposed claims relate to:

   (a) The Coal Authority's decision to approve a licence application by Energybuild Mining Limited in relation to Aberpergwm Colliery for a "Full Underground Licence", reference **CA11/DM/95/0025.1/C**.

   (b) The Welsh Ministers' decision that section 26A CIA 1994 does not apply to the decision by the Coal Authority that the suspended licence for Aberpergwm Colliery should come into full effect, and thus that the Welsh Ministers would not be making a determination in this case to approve the authorisation of the license referred to in (a) above under section 26A of the Coal Industry Act 1994 ("**CIA 1994**").

Dates of Decisions

7. In relation to the Welsh Ministers' decision at §6(b) above, 10 January 2022.

8. In relation to the Coal Authority's decision at §6(a) above, 25 January 2022.

Factual background

9. The key factual background, as now understood by the Potential Claimant and its legal representatives, is as follows:

10. The Coal Authority granted a conditional coal mining operating licence for

Aberpergwm underground drift mine in 1996. The Potential Interested Party, Energybuild Mining Limited, has held the licence since July 2004.

11. In 2013, by a supplemental agreement with Energybuild Mining Limited, the Coal Authority varied the licence to include two further conditional areas, which had the effect of extending the boundary of the site ("**the Licence Variation**"). The Licence Variation was subject to conditions imposed under section 27(1) of the CIA 1994. Schedule 4 to the 2013 Licence Variation included a number of conditions precedent which were to be satisfied no later than 31 December 2020, or else the licence would lapse. One of the conditions precedent was that the licensee was required to obtain planning permission for the extended mining operations by 31 December 2020. A further condition was that the licensee must supply "all information requested by the Authority for the purpose of the performance of its duties under sections 2(1)(b) and 2(2)(a) of the 1994 Act."

12. It is crucial to note that, as a result of section 27(3)(a) CIA 1994, the authorisation contained in the Licence Variation was postponed from coming into force until the conditions in the Licence Variation were satisfied. Accordingly, Energybuild Mining Limited were not authorised by the Licence Variation to extract any coal in the extended area.

13. Were the licence to come into force, it would authorise extraction of up to 40 million tonnes of coal by 2039. If combusted, the coal would be expected to release around 100 million tonnes of carbon dioxide (5.5 million tonnes per annum), plus other combustion related pollutants. It is not clear how much methane, another potent greenhouse gas, would be emitted during the mining process.

14. In 2018, planning permission was granted by Neath Port Talbot County Borough Council (ref. P2014/0729) for a consolidation and extension of planning permission for surface development and operations and an application for an extension to and reconfiguration of the underground coal workings at Aberpergwm Colliery, Glynneath, Neath SA11 5SF ("**the 2018 Permission**"). The decision provides that the extraction of coal at the site may continue until 31 December, 2039.

15. The Officer's Report which supported the grant of permission advised that the proposal would provide for the extraction of "approximately 70 million tonnes of run of mine coal over a period in excess of 25 years, of which it is estimated that approximately 42 million tonnes will be saleable coal." It was also estimated that approximately 10.4 million cubic metres of mine waste would be generated over the life of the mine, which would be transported by dump truck to an associated "mine waste repository."

16. It may also be noted that the Officer's Report made no mention or assessment in relation to climate change other than mentioning the term in reciting relevant planning policies. The Officer's Report also noted that the Coal Authority as consultee "supports the application".

17. On 16 September 2020, Energybuild Mining Limited made an application to the Coal Authority for a Full Underground licence ("**the 2020 Application**"), given reference CA11/DM/95/0025.1/C. The Potential Claimant has not seen this application. The Proposed Claimant specifically requested this document but, surprisingly, the Coal Authority refused to provide it, stating on 1 March 2022

that "*It is not apparent to us why these documents are relevant to the decision to decondition the existing licence*."

18. It is understood that the agreement between the Welsh Ministers and the Coal Authority as to how to interact in considering the approval of coal mining licences is that the Coal Authority will process the application and will issue the Welsh Ministers with a letter formally notifying them of the decision, providing the Welsh Ministers with copies of the relevant documents. The Coal Authority would not issue a response to the licensee at that stage or issue any documents, but would await the Welsh Ministers' decision on whether section 26A CIA 1994 applies and whether the Welsh Ministers considered the licence should have effect. Upon receiving the Welsh Ministers' response, the Coal Authority would work with the licensee to give effect to the Welsh Ministers' decision.

19. The Coal Authority wrote to the Welsh Ministers on 26 May 2021. It stated that the 2020 Application seeks "a full operational licence to replace [the] existing conditional licence. This would allow coal mining in a new area within [the] current coal mine." It informed the Welsh Ministers that it was nearing the end of the determination process and stated that, it was "appropriate for us to offer the Minister the opportunity to express a view on this licence application as we understand they can make a direction on this under 26A [CIA 1994]." The Coal Authority's view is thus that section 26A applies to the 2020 Application and the resulting Full Licence (otherwise described as the "deconditioned licence"). It may be noted that the Coal Authority has subsequently reiterated this view on a number of occasions, including after having seen the rationale for the Welsh Ministers' apparent view that 26A does not apply.

20. On 21 June 2021, the Welsh Ministers responded by letter to the Coal Authority, commenting that section 26A CIA 1994 was "a relatively new provision, with little in the way of precedent to draw from", and so appreciating the commitment of the Coal Authority to open discussions. The Welsh Ministers expressed the view that Energybuild Mining Limited had applied to the Coal Authority "to confirm that it has discharged the conditions precedent", and stated:

> *"Our view is that such an application would not engage section 26A of the Coal Industry Act 1994. The authorisation to undertake coal mining (subject to discharge of conditions precedent) was granted in 1996, prior to section 26A coming into effect. Applying section 26A in these circumstances would involve a degree of retrospective effect, which is not expressly permitted within the statutory provision.*
>
> *However, your letter refers to the grant of a full operational licence to replace the existing conditional licence. That is a different proposition. It would be helpful if the Coal Authority could provide the Welsh Government with a copy of the application and of any new licence it proposes to grant. This will be critical to our reaching a shared understanding as quickly as possible."*

21. The Coal Authority responded on 30 July 2021, explaining:

> *"I can confirm that the Operator is seeking to deconditionalise their current conditional licence. To help partners, stakeholders and members of the public be clear about what different types of licence mean we now talk about conditional and full licences to help draw out the distinction that a conditional licence does not allow coal extraction*

whilst a full (deconditionalised) operational licence does. In this instance the deconditionalising of the licence, or moving from a conditional to a full operational licence, would allow additional coal mining to take place at Aberpergym until 2039 (the date of the relevant planning permission).

…

We believe that section 26A of the Coal Industries Act does provide sufficient discretion for the Minister to be consulted and that it would be appropriate in this case."

22. The Welsh Ministers replied on 24 August 2021, referring to the process agreed between them and the Coal Authority for exercising their separate duties under the CIA 1994. The Welsh Ministers invited the Coal Authority to notify them of its likely decision on the 2020 Application and to provide the licence application, current licence and any proposed new licence, so that the Welsh Ministers could make a decision under section 26A CIA 1994.

23. On 4 October 2021, the Coal Authority produced a Recommendation Report concerning the 2020 Application. The Coal Authority set out a table of "Licensing Duties Under the Coal Industry Act 1994", with rows relating to the duties in sections 2(1)(a)-(d); 2(2)(a)-(b); 2(3), 3(1)(a); and 3(4)-(5), and a column of information relevant to each of those sections. The Coal Authority then came to the recommendation that the application was "*in line with the Coal Authority's licensing function*", in that "*a favourable determination will contribute towards an economically viable coal mining industry being maintained and developed by persons authorised to carry out coal-mining operations*"; financial clearance having been given and the applicant having "*demonstrates that key personnel have the appropriate experience and expertise to manage the project*".

24. On 11 October 2021, the Coal Authority wrote to the Welsh Ministers informing them that it had "completed its licence determination process." The letter set out the Coal Authority's view that it was required to base its decision on whether the licensee had "demonstrated that they have met the requisite [three] tests" under the CIA 1994. It continued:

"The licensee has demonstrated that they have met these tests and therefore, in accordance with the duties on us under the Coal Industry Act 1994, <u>we would need to grant a full licence</u>. Before we do this we need clarity on the position of Welsh Government, and the Welsh Minister's views as we have been discussing over past months." (emphasis added)

25. The Coal Authority again set out that it considered the Minister could make a determination under section 26A CIA 1994 and invited the Minister to do so.

26. On 27 October 2021, a Welsh Government Ministerial Advice document on the subject of "Coal Authority Licence Approval for Aberpergwm coal mine" was provided to the Minister and Deputy Minister for Climate Change. Among other things, the advice set out, erroneously in the Potential Claimant's view:

*"*Section 26A *applies to operations under <u>new</u> licences and to <u>variations to</u> existing licences where the degree of authorisation for mining operation changes (i.e. if the licence authorises new coal extraction)."* (emphasis in original)

27. It also wrongly advised that, should the Minister respond to the Coal Authority indicating that Welsh policy is opposed to coal extraction, the Coal Authority could not take that response into account as its "*statutory remit limits it only to considering the applicant's financial standing and competence, and the risk of subsidence.*" The advice recommended that the Minister not offer a view on whether the authorisation should be approved.

28. In a letter dated 28 October 2021 to the Secretary of State for Business, Energy and Industrial Strategy ("**BEIS**"), the Welsh Ministers set out their view that section 26A CIA 1994 can only apply to new or extended licences, and "cannot apply retrospectively", using as an example the Aberpergwm mine. The letter made it clear that:
    (a) The climate impact from the mining operation at Aberpergwm would be significant at both Welsh and UK level;
    (b) There is no clear mechanism to enforce how and where the coal products are used;
    (c) If burned, the coal would release around 100 million tonnes of CO_2 as well as other pollutants and would be like to have an impact on global emissions.
    (d) The new coal extraction would be "*entirely incompatible with the climate emergency*", particularly in light of the Climate Change Committee's letter underlining the impact of new mining in Cumbria on UK emissions.

29. This last point referred to an open letter, dated 29 January 2021, from Lord Deben, the Chair of the Climate Change Committee, to the Secretary of State for BEIS, on the proposed planning permission for a new Cumbrian coal mine to 2049. The letter stated that emission from the mine would have "*an appreciable impact on the UK's legally binding carbon budgets*." That mine was projected to increase UK emissions by 0.4 million tonnes of CO_2e per annum, which Lord Deben pointed out "*is greater than the level of annual emissions projected from all [operational] UK coal mines to 2050*."

30. On 19 November 2021, the Welsh Ministers wrote to Energybuild Mining Limited, drawing attention to the Welsh Government's policy on coal extraction, stating the need to transition away from activity that contributes to CO_2 and other harmful emissions and asking to explore whether they could support Energybuild Mining Limited in a new business model compatible with Welsh policy.

31. Also on 19 November 2021, DBEIS responded by e-mail to the Welsh Ministers, stating its view that the section 26A CIA 1994 power "*is widely drafted because Welsh Ministers wanted autonomy in coal operations (not by reference to the types of licences being applied for, or held by a coal operator) in Wales.*" DBEIS' view was that the Welsh Ministers could exercise the power in relation to the Aberpergwm 2020 Application, and that the only way the dispute might be able to be resolved "*is by the court*".

32. On 10 January 2022 (although the letter bore the date 7 January 2022), the Welsh Ministers wrote to the Coal Authority setting out their view that section 26A CIA 1994 did not allow the Welsh Ministers to refuse or approve a licence in the circumstances of the 2020 Application and that they would not be making a determination.

33. On 25 January 2022, the Coal Authority approved the 2020 Application. The Potential Claimant has not seen that approval. Again, surprisingly, although the

Proposed Claimant specifically requested this document, the Coal Authority stated on 1 March 2022 that it would not produce this document because "*It is not apparent to us why these documents are relevant to the decision to decondition the existing licence*."

34. In §§17-18 of the PAP Letter, we set out the correspondence between the Potential Claimant and the Coal Authority in January and early February 2022, triggered by the Potential Claimant seeing on 26 January 2022 that the Coal Authority's website has been changed to show that the "Decision" in relation to full application CA11/DM/95/0025.1/C stated "Approved".

35. In its pre-action response dated 22 February 2022, the Coal Authority confirmed that it has concluded the relevant conditions should be discharged, but stated that the signed documents giving effect to the formal decision to decondition the licence have not yet been issued.

36. In its pre-action response dated 22 February 2022, the Welsh Ministers confirmed that they have not made a determination under section 26A CIA 1994 and they do not consider their power to approve is engaged.

Summary of legal principles

37. We previously set out the Coal Authority's powers and duties regarding coal mine licensing and how they derive primarily from the CIA 1994 (see paragraphs 20-26 of the PAP Letter). We do not repeat that here, save to emphasise that Part II of the CIA 1994, dealing with "Licensing of coal-mining operations", gives the Coal Authority a broad discretion when making licensing decisions.

38. Section 27(3) CIA 1994 permits a licence to provide:

> *"(a) for the coming into force of the authorisation contained in the licence, or of any conditions or other provisions of the licence, to be postponed until after the acquisition by the holder of the licence of any interest or right in or in relation to any land or other property or until after such other requirements as may be specified or described in the licence have been satisfied"*

39. Accordingly, a licence may be granted but the authorisation contained in the licence may be "*postponed*" until conditions are met – essentially, it is a suspended licence.

40. Sections 26(1)-(3) CIA 1994 give the Coal Authority wide powers to make licensing decisions, both in respect of initial applications and of "further applications", including application such as in the instant matter, for the Coal Authority to decide whether the conditions in a suspended licence have been complied with, such that the authorisation should have effect.

41. The same broad discretion applies: section 26(5) CIA 1994 refers to the Coal Authority's power to "take into account all such factors as it thinks fit" in relation to its licensing decisions under section 26(3).

42. Section 2 of the CIA 1994 imposes a number of duties on the Authority. In particular, when the Authority is exercising its discretion under section 26(3), section 2 requires that it act in "the manner that it considers is best calculated to secure, so far as practicable", in summary:

(a) The maintenance of an economically viable coal-mining industry in Great Britain;
(b) That licensees are able to finance the coal mining operation and discharge any liabilities arising from those operations; and
(c) That any damage or loss sustained due to subsidence can be compensated by the licensee;

43. Section 2(2) further provides that the Coal Authority should have regard to the desirability of securing:
(a) That licensees have at their disposal such experience and expertise as are appropriate for properly carrying on licenced operations and that competition is promoted in the coal industry.

44. Section 2 only obliges the Coal Authority to "secure" these matters "so far as practicable" (for (a)-(c) above) or to have regard to the desirability of securing (d) above. It does not require the Authority to approve applications, such as those to deconditionalise a licence and thus give effect to the authorisation, if those criteria are met. Nor does it otherwise limit the very broad discretion to take into account and make its decision based on any other factors the Authority thinks fit.

45. Turning to the Welsh Ministers' power, section 26A(1) of the CIA 1994 provides:

> *"If or to the extent that a licence under this Part authorises coal-mining operations in relation to coal in Wales, it shall have effect only if the Welsh Ministers notify the Authority that they approve the authorisation."*

Grounds of Challenge

Decision by the Welsh Ministers

Ground 1: Error of Law by the Welsh Ministers in Deciding s26A CIA 1994 is not applicable

46. Section 26A of the CIA 1994, as amended, is drafted in wide, unambiguous terms. It applies "*if or to the extent that"* a licence under Part II CIA 1994 "*authorises coal-mining operations in relation to coal in Wales*" (emphasis added). The point at which a suspended licence authorises coal mining operations is when it is "deconditionalised", i.e. when the Coal Authority determines that the conditions postponing the coming into force of the authorisation contained in the licence have been met.

47. On its face, the power in section 26A applies in the instant case.

48. As correctly set out in correspondence by DBEIS, section 26A does not operate by reference to the types of licences being applied for, or held by a coal operator. The power refers to the authorisation being given by the licence, not to whether the licence is new or a variation.

49. The Welsh Ministers wrongly consider that applying section 26A to the deconditionalisation of a licence "*would involve a degree of retrospective effect,*

which is not expressly permitted within the statutory provision". That is incorrect, as there is no retrospective effect in issue. The suspended licence does not, and has not ever, given authorisation for the coal-mining operations it describes. That authorisation only comes "into force", to use the wording of section 27(3)(a) CIA 1994, when the Coal Authority makes the deconditionalisation decision.

50. Furthermore, the decision to be made by the Coal Authority in circumstances such as this where the application is for deconditionalisation of a licence (as opposed to a new licence), is clearly not "mechanical" – i.e. it does not remove discretion from the Coal Authority to consider its statutory duties and relevant circumstances when deciding whether to grant the authorisation, as the position of the Welsh Ministers seems to imply. This can be seen, e.g., from the fact that, (1) Schedule 4 of the agreed 2013 Licence Variation requires the licensee to submit any information requested by the Coal Authority for the purpose of the performance of its duties under sections 2(1)(b) and 2(2)(a) of the 1994 Act", which clearly vests discretion in the Authority to consider whether those duties are met; and (2) the way the Coal Authority actually undertook its decision-making further reinforces the discretionary nature of the decision, as can be seen in the 4 October 2021, Coal Authority Recommendation Report.

51. In their PAP response, the Welsh Ministers set out some of the terms of the licence granted in 1996. It is clear that, in line with the legislative provisions in section 27 CIA 1994, the Licence only authorises coal mining operations from the date of the Licence becoming "*unconditional*". This reinforces the Potential Claimant's case (and, indeed, the approach to section 26A CIA 1994 taken by the Coal Authority and the Secretary of State DBEIS).

52. Nothing in the transitional provisions in Schedule 7 of the Wales Act 2017 prevents the application of section 26A CIA 1994 to deconditionalisation decisions. Paragraph 6(1) of Schedule 7 of the Welsh Act 2017 states: "*Nothing in a provision of this Act affects the validity of anything done by a … public authority before the provision comes into force*." Paragraph 6(2) maintains the effectiveness of anything a public body is "*in the process" of doing when a provision of the Wales Act 2017 comes into force*". Finally paragraph 6(2) maintains the effectiveness of anything done by a public authority "*which is in force when a provision of this act comes into force*" and which was done for/under a function transferred to the Welsh Ministers.

53. The use of section 26A CIA 1994 to prevent the coming into effect of the authorisation upon the deconditionalisation of the licence does not affect the validity of the decision made in 1996 to issue the suspended licence.

54. Accordingly, the Welsh Ministers erred in law in concluding that:
    (a) Section 26A applies only to operations under new licences and to variations to existing licences where the degree of authorisation for mining operation changes;
    (b) Section 26A does not apply in the instant case; and
    (c) The Welsh Ministers should not make a determination in relation to the 2020 Application.

Decision by the Coal Authority

Ground 2: Unlawful fettering of discretion / misinterpretation of legal powers

55. As set out above, the CIA 1994 grants the Coal Authority wide discretion to consider such matters as it considers relevant in making its licensing decisions under Part II CIA 1994.

56. The Coal Authority stated in its letter of 11 October 2021 to the Welsh Government, excerpted at §24 above, that it considered it has a duty to "*grant a full licence*" if the three "*tests*" set out in the letter were met. This is reflected in the Recommendation Report, in which it is clear that the Coal Authority only took into account factors relating to its duties under sections 2(1); 2(2) and 3 of the CIA 1994.

57. This consistent position has been expressed by the Coal Authority on a number of occasions, including in correspondence with the Potential Claimant, and it is therefore clear that this is not an inapt phrasing by the Coal Authority, but an established view inside the Authority that other factors cannot be considered. For instance, when the Coal Authority produced "reactive lines" on 24 January 2022 in anticipation that the decision would soon be released publicly, one of these stated "*If these tests are met then we have a legal duty to approve the licence application under current legislation*."

58. The Coal Authority has clearly misunderstood the nature of its legal powers under the CIA 1994, as it has treated the statutory duties as a "test" and has failed to exercise any discretion beyond taking into account enumerated factors relating to the duties in sections 2 and 3 of the CIA 1994. This represents an error of law which independently infects the decision to grant the licence. The Coal Authority appears to have proceeded on the basis that it could not take matters other than those enumerated in s 2 of the CIA 1994 into account when making its decision and/or that, if it considered the matters in s 2 CIA 1994 would be secured, it was obliged to approve the deconditionalisation of the licence.

59. The Coal Authority thus unlawfully fettered its discretion and/or otherwise erred in law by determining that it could consider only those enumerated factors. See R v SSHD ex p Venables [1997] AC 407 at 496.

60. Further or alternatively, the Coal Authority failed to take into account material considerations, namely all circumstances that did not go to the enumerated factors in s2, including but not limited to (1) the Welsh Ministers' announced stance that an appropriate application of Welsh policy would not see the licence granted, and (2) the potential climate change impacts of the granting of a licence.

Standing

61. The Coal Authority, but not the Welsh Ministers, questioned the Potential Claimant's standing to bring the claim. The Supreme Court in *Walton v Scottish Ministers* [2013] Env LR 16 observed that the courts have moved away from an unduly restrictive approach to standing which presupposed that "the only function of the court supervisory jurisdiction was to redress individual grievances and ignored its constitutional function of maintaining rule of law" (§90 of Lord Reed's judgment). Instead, "environmental law… proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone", such that claims for judicial review can be brought by persons who, even if not directly or personally affected by the decision at issue, have a

"genuine interest in the aspects of the environment that they seek to protect" (§152-153 of Lord Hope's judgment).

62. The Potential Claimant has a real and genuine concern about the integrity of the Potential Defendants' decision-making in a matter which both Potential Defendants acknowledge would have a significant environmental impact, in particular on climate change, as a result of the authorisation of extraction of up to 480,000 tonnes of coal, annually, until 2039. The Potential Claimant therefore clearly satisfies the test for standing laid down by the Supreme Court in *Walton*.

What the Welsh Minsters are requested to do

63. The Welsh Ministers are asked immediately to write to the Coal Authority and notify the Authority that they accept that section 26A CIA 1994 applies to the Authority's decision on application CA11/DM/95/0025.1/C and to state that they do not approve the authorisation.

64. The Potential Claimant notes the view expressed by the Welsh Ministers in §31 of the PAP Response that there is no requirement in section 26A CIA 1994 to state that they do not approve the authorisation and that, even if their primary position that section 26A is not engaged is incorrect, the licence will be of no effect simply by the Welsh Ministers doing nothing and not approving the authorisation. In circumstances where the Welsh Ministers have informed, in writing, both the Coal Authority and Energybuild Mining Limited that they do not consider section 26A CIA 1994 to be applicable, it would create unjustified uncertainty for the Ministers also to adopt the position that the licence may be of no effect simply if they do nothing further. Accordingly, whether or not there is a general requirement under section 26A CIA 1994 that the Welsh Ministers express a view that they will not approve an authorisation (on which the Potential Claimant reserves its position), they are required to write in the instant circumstances. Nothing in the CIA 1994 prevents the Ministers from writing in the terms requested.

What the Coal Authority is requested to do

65. For the reasons set out in this letter, the First Potential Defendant, the Coal Authority, is asked to withdraw its decision to deconditionalise the licence and offer a full license to the applicant. If the Coal Authority does not consider that it has the power to withdraw this decision, it should set out the basis on which it consider this to be the case, including by reference to relevant legislation.

66. If the Coal Authority does not consider it has the power to withdraw its decision, then it is asked to agree to the quashing of its decision made on 25 January 2022 to approve a licence application by Aberpergwm Colliery for a "Full Underground Licence", reference CA11/DM/95/0025.1/C and to agree to pay the Claimant's costs of and relating to this prospective claim.

67. Separately, it is noted that the correspondence disclosed indicates the clear view of the Coal Authority that Section 26A is applicable to the decision to deconditionalise the licence. The Coal Authority is therefore requested to confirm to all parties to this letter, including the Potential Claimant and the Potential Interested Party, that it considers that its decision of 25 January 2022 to deconditionalise the licence is of no effect until and unless "the Welsh

Ministers notify the Authority that they approve the authorisation" pursuant to section 26A(1).

Details of Information Sought

68. The Potential Claimant thanks the Welsh Ministers for the disclosure made thus far. The Potential Claimant notes that the Welsh Ministers have disclosed the Coal Authority's letter of 11 October 2021 but not the attachments to that letter. Please could those attachments be provided urgently.

69. Separately, the potential Claimant requested an unredacted copy of the Ministerial Advice dated 27 October 2021. The Welsh Ministers have indicated that they consider all information not shared "*falls outside scope or is privileged*". The law is clear that once a legal advice is disclosed, privilege in the entire advice has been waived and a litigant cannot "cherry-pick" which parts of the advice it discloses: see *Kasongo v Humanscale UK Ltd* UKEAT/0129/19. The full advice should therefore be disclosed, as there is no privilege in any part of it, and – as the advice relates to the very legal point in issue – it is clearly untenable to argue that portions of the advice are not within the scope of the duty of candour.

70. In relation to the Coal Authority, the Potential Claimant thanks it for the disclosure made yesterday. However, first, it is wrong to assert that your client is not under a duty of full and frank disclosure at the pre-action stage. The duty of candour "*applies to every stage of the proceedings including letters of response under the pre-action protocol*.": see Treasury Solicitor, Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings (2010). See also *K v Secretary of State for Defence*, [2014] EWHC 4343 (Admin) at para 11, approvingly quoting this section of the Treasury Solicitor's guidance. The Guidance also states, importantly, that:

> *"The duty of candour gives rise to a weighty responsibility. The obligation of candour is the reason why the rules as to standard disclosure do not apply to applications for judicial review as a matter of course. When responding to an application for judicial review public authorities must be open and honest in disclosing the facts and information needed for the fair determination of the issue.[3] The duty extends to documents/information which will assist the claimant's case and/or give rise to additional (and otherwise unknown) grounds of challenge[4]."*[1]

71. The response is, respectfully, contrary to these legal principles and also to the Pre-action Protocol for Judicial Review, which indicates that prospective Defendants "*should comply with any request [for information and documents] … unless there is good reason for it not to do so*" as long as the request is proportionate and limited to what is properly necessary for the proposed claimant to understand why the challenged decision has been taken and/or to present the claim in a manner that will properly identify the issues.

72. Where, as here, the Proposed Claimant has identified a small number of enumerated documents (all of which were enclosed with a single letter) and

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[1] Citing *Secretary of State for Commonwealth Affairs v Quark Fishing Ltd* [2002] EWCA Civ 1409 at footnote 3 and *R v Barnsley Metropolitan Borough Council ex p. Hook* [1976] 1 WLR 1052 at footnote 4.

asked for their disclosure specifically, it is hard to see how it can be in accordance with the pre-action protocol to decline to provide these. The relevance of these documents, which form the documentary basis the Welsh Ministers were provided when making a decision about whether 26A was applicable, are clearly relevant to the proposed claim. We therefore reiterate the requests made in our email of 27 February 2022 and in the PAP letter at 53(a) to (d).

73. The disclosure provided to date indicates that despite the conditions precedent in Schedule 4 to the 2013 Licence Variation not having yet been fulfilled, the Coal Authority decided to "continue determining the application beyond 31 December 2020." Please provide information to indicate on what basis that was done, and in particular, please provide an indication:
    (a) What information was provided by 31 December 2020 by the applicant in respect of its application to deconditionalise the licence,
    (b) Was further information provided by the applicant after 31 December 2020 which was considered in respect of the "financial approval" given on 19 March 2021? (see Disclosure Bundle pg. 265)
    (c) What is meant by the entry at the top of Disclosure Bundle 265 "financial appraisal requested: 15 February 2021" (and similar entry in the "Chronology of Key events" on page 271 of the Disclosure Bundle provided which indicates "15/02/2021 – Request for financial appraisal to be undertaken")? Who made the request and to whom was it made? Was information provided by the applicant after 31 December 2020 which was considered in relation to the financial appraisal?
    (d) Was any information provided by the applicant to the Coal Authority after 31 December 2020 which was considered as part of its determination whether granting the deconditionalisation would be in accordance with its duties under sections 2(1)(b) and 2(2)(a) of the 1994 Act?

74. The 1996 Licence informatives state that "Neither this licence nor anything arising out of it relieves the operator of any need, before commencing any coal-mining operations, to obtain a separate licence to vent methane …" (CA disclosure bundle, pg 48).
    (a) Does the Coal Authority consider that a licence is required to vent methane at Aberpergwm Colliery? If not, is any other authorisation from any other body (e.g. the Environment Agency) required for such venting?
    (b) Does the Coal Authority have information to indicate that such a license or other authorisation is in effect? (This may relate to the requirement at Schedule 4 of the 2013 Licence Variation that "The Licensee has secured all other rights and permissions necessary to carry out Coal-Mining Operations in the relevant parts of the Maximum Licensed Area.")

Orders Sought

75. Should the Potential Defendants not take the actions set out at §§63-67 above, the following orders will be sought from the Court:
    (a) A quashing order in respect of the Coal Authority's decision of 25 January 2022;
    (b) A declaration that section 26A CIA 1994 is applicable to decisions such as that taken by the Coal Authority on 25 January 2022;
    (c) An order that the Welsh Ministers reconsider the decision made on 10 January 2022 that section 26A CIA 1994 was not applicable to the decision on application CA11/DM/95/0025.1/C and thus not to make a determination;

(d) An Aarhus Costs Order;
(e) Costs.

Other applications

76. As was noted in the PAP letter, if the claim proceeds the Claimant will apply for a protective costs order (PCO) pursuant to CPR 45.43 on the basis that the claim is an environmental matter: *Venn v Sec State CLG* [2015] 1 WLR 2328.

77. Both Potential Defendants are asked to please indicate their agreement that the proposed claim would fall within the definition of Aarhus Convention Claim in CPR 45.41(2)(a). If you disagree that this is an Aarhus matter please give your reasons.

Details of Legal Advisors Dealing with this Claim

78. ***Solicitors***
Richard Buxton Solicitors
Office A, Dale's Brewery
Gwydir Street
Cambridge
CB1 2LJ

Attn: Matthew McFeeley & Rebecca Stewart

Email: mmcfeeley@richardbuxton.co.uk; rstewart@richardbuxton.co.uk

Counsel
Estelle Dehon
2-3 Gray's Inn Square
London
WC1R 5JH
DX: LDE 316 (Chancery Lane)

Details of Interested Party

79. Energybuild Mining Limited

Registered Office:
Aberpergwm Colliery Engine Cottage Site
Glynneath
Neath
West Glamorgan
SA11 5AJ

By email to: Rory.Hutchings@jcpsolicitors.co.uk

Address for Reply and Service of Court Documents

80. Richard Buxton Solicitors
Office A, Dale's Brewery
Gwydir Street

Cambridge
CB1 2LJ

Attn: Matthew McFeeley & Rebecca Stewart

Email: mmcfeeley@richardbuxton.co.uk; rstewart@richardbuxton.co.uk

Proposed reply date

81. Both Potential Defendants have had over 14 days to consider the general substance of the legal arguments made in the proposed grounds. The Potential Defendants are therefore asked to respond urgently, and at the latest within 7 days (i.e. by 9 March 2022).

Yours faithfully

Richard Buxton Solicitors

Richard Buxton Solicitors
Environmental, Planning and Public Law

cc: Rory.Hutchings@jcpsolicitors.co.uk (for the Interested Party)