



Neutral Citation Number: [2009] EWCA Civ 206

Case No: C1/2008/0872 & C1/2008/0881

**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM QUEEN'S BENCH DIVISION**  
**THE ADMINISTRATIVE COURT**  
**(Mr Justice Sullivan)**  
**CO/4270/2007**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 18/03/2009

**Before :**

**LORD JUSTICE PILL**  
**LORD JUSTICE KEENE**  
and  
**LORD JUSTICE GOLDRING**

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**Between :**

<b>(1) The Secretary of State for Communities &amp; Local Government</b>	<b><u>Appellants</u></b>
<b>(2) Peak District National Park Authority - and - Bleaklow Industries Limited</b>	<b><u>Respondent</u></b>
<b>MMC Midlands Limited</b>	<b><u>Interested Party</u></b>

**Timothy Morshead** (instructed by **The Treasury Solicitor**) for the **Appellant (1)**

**Robert McCracken QC & Gregory Jones** (instructed by **Beverley Primhak, Peak District National  
Park Authority**) for the **Appellant (2)**

**Timothy Jones & David Park** (instructed by **Bremner Sons & Corlett, L1 6DH**) for the **Respondent**

**Craig Howell Williams & Richard Honey** (instructed by **Marrons, LE19 1WY**) for **The Interested  
Party**

Hearing dates: 10 & 11 February 2009  
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**Approved Judgment**

## **Lord Justice Keene:**

### **Introduction:**

1. The extraction of minerals often gives rise to contentious planning issues, especially where the extraction takes the form of opencast mining. Such mining may have a significant and adverse effect on the landscape, and that problem may be exacerbated where, as not infrequently is the case, the minerals are located in an area of importance in landscape or leisure terms. Yet the minerals can only be extracted where they are located and they may well be of considerable value to the national economy.
2. The present case is one where such a conflict of interests exists, though the court is not concerned with reconciling that conflict. Within the Peak District National Park is the principal source of supply of fluorspar, a mineral once important in steelmaking but now mainly used in the chemical industry. In 1952 the Minister of Housing and Local Government granted planning permission for, principally but not exclusively, the extraction of fluorspar and barytes (an associated mineral) on a site of about 155 hectares (383 acres) near Hassop in Derbyshire. On 5 May 2006 the Peak District National Park Authority (“the Park Authority”) issued an enforcement notice under the Town and Country Planning Act 1990 (“the 1990 Act”), alleging a breach of planning control by the winning and working of limestone other than in accordance with the 1952 planning permission. The enforcement notice related to part of the area covered by that planning permission, a part some 12 hectares (about 30 acres) in extent and named on some plans as Backdale. Both the freehold owner of this particular area, Bleaklow Industries Limited (“Bleaklow”), and their lessees, MMC Midlands Limited (“MMC”), who were operating on the land, appealed against the enforcement notice to the Secretary of State for Communities and Local Government.
3. A public inquiry was held over 10 days by an inspector appointed by the Secretary of State. By a decision letter dated 26 April 2007 the inspector upheld the enforcement notice, though with a variation in its terms. Bleaklow appealed under section 289 of the 1990 Act against that decision. Such an appeal lies only on a point of law. By a judgment dated 7 March 2008 Sullivan J allowed the appeals and ordered that the matter be remitted to the Secretary of State for re-determination. The Secretary of State and the Park Authority now appeal against Sullivan J’s decision.

### **The Issues:**

4. Bleaklow and MMC appealed to the Secretary of State against the enforcement notice under grounds (b), (c) and (f) of section 174(2) of the 1990 Act, that is to say, that the matters alleged in the enforcement notice had not occurred (ground (b)); that those matters (if they had occurred) did not constitute a breach of planning control (ground (c)); and that the steps required by the notice to be taken, or the activities required by it to cease, exceeded what was necessary to remedy any breach of planning control (ground ‘f’). Their appeal succeeded on ground (f), with the inspector varying the requirements of the enforcement notice so that it required the cessation of “the winning and working of limestone other than the working of such limestone as is won in the course of working fluorspar and barytes”.

5. But the appeal on grounds (b) and (c) failed. Those grounds in essence were to the effect that the winning and working of limestone on the appeal site, which had indeed been taking place, fell within the terms of the 1952 permission and so were not in breach of planning control. These grounds gave rise to two main issues: first, what was the correct interpretation of the 1952 permission; and, secondly, did the operations carried out in respect of limestone come within that meaning of the development permitted by that permission? That second, largely factual, question had to relate to the period of four years prior to the issue of the enforcement notice on 5 May 2006, because mining operations are classified as operational development, not a change of use of land, and each act of extraction constitutes a separate act of development: *Thomas David (Porthcawl) Limited v. Ponybont Rural District Council* [1972] 3 All E.R. 1092. In fact the operations carried out on the appeal site by MMC had begun in July 2003, and so in reality it was what had happened on that site between then and 8 May 2006, when a stop notice was served, that the second issue concerned.

**The 1952 Planning Permission:**

6. This permission was granted by a decision letter dated 24 April 1952. After referring to the application for permission, a report by one of his officers, and consultation with other government departments, the Minister acknowledged the location of the site within the Peak District National Park. He then stated that the reserves of fluorspar in the country were limited and that fluorspar was of importance to the steel industry, leading to his decision to grant permission. In the operative part of the decision he stated:

“The Minister has decided to grant permission for the winning and working of fluorspar and barytes and for the working of lead and any other minerals which are won in the course of working those minerals, by turning over old spoil heaps, by opencast working and by underground mining within the area shown outlined in black, excluding the area cross-hatched, on the attached plan and the tipping of waste materials on the areas shown hatched vertically on the plan, subject to the following conditions:

- (1) waste material from the rake in field O.S. No. 155 shall be disposed of in the disused quarry in that field marked X on the plan;
- (2) waste material from the rakes in fields O.S. Nos. 211, 233, 212, 231 and 230 shall be disposed of within those respective fields;
- (3) Waste material other than that referred to in conditions (1) and (2) and other than that tipped in the areas shown hatched vertically on the plan shall be disposed of in the hollows left by old workings, in agreement with the Local Planning Authority, or, in the event of disagreement, as shall be determined by the Minister;”

The other conditions are not material for present purposes.

7. The 2006 enforcement notice was directed to the winning and working of limestone, which was not expressly mentioned in the 1952 permission, but there is no dispute that limestone falls within the words “any other minerals” in the permission. As Sullivan J recorded, the references to barytes and to lead in the permission were not relevant for the purposes of the appeal and can, to all intents and purposes, be omitted. Consequently the wording of the main part of the permission can be simplified for present purposes, in the way noted by the judge at paragraph 11 of his judgment:

“It was agreed at the inquiry that the permission had two limbs: the first granted permission for “the winning and working of fluorspar”, the second “for the working of [limestone] which [is] won in the course of working [fluorspar] by turning over old spoil dumps, by open-cast working and by underground mining ...”

8. What then needs to be determined is the meaning of the words “winning” and “working”, both generally in planning law and in particular in this permission. Like the inspector, Sullivan J referred to the Court of Appeal decision in *English Clays Lovering Pochin Ltd v. Plymouth Corporation* [1974] 27 P. & C.R. 447. That was a case which concerned the issue of whether a plant processing china clay slurry was permitted development under the Town and Country Planning (General Development) Order 1963, Class XVIII of which permitted the erection by mineral undertakers in certain circumstances of “any buildings, plant or machinery ... required in connection with the winning or working of minerals ...”. Russell LJ, giving the judgment of the court, said this at pages 450-451:

“It is perhaps not necessary to be dogmatic on the point in this case: but our present view is that to “win” a mineral is to make it available or accessible to be removed from the land, and to “work” a mineral is (at least initially) to remove it from its position in the land: in the present case the china clay is “won” when the overburden is taken away, and “worked” (at least initially) when the water jets remove the china clay together with its mechanically associated other substances from their position in the earth or land to a situation of suspension in water.”

9. The court in that case seems to have recognised earlier on page 450 that sometimes the phrase “winning *and* working” may be appropriately used, but there seems little doubt that the court was of the view that the terms “winning” and “working” described distinct activities, drawing attention as it did to the disjunctive phraseology of the General Development Order, “winning *or* working” (emphasis in the original text, page 450). The court’s interpretation of each term drew upon earlier decisions: in *Lewis v. Fothergill* [1869] 5 Ch D 103, a coal-mining case, Lord Hatherley, L.C., had said:

“There is also a dispute about what is the meaning of the word “winning”. I conceive that the coal is won when it is put in a state in which continuous working can go forward in the

ordinary way. It is not when you first dig down to a seam of coal and come to water immediately, but when you have got the coal in such a state that you can go on working it, and make provision, if provision is necessary, for sufficient drainage.”

That interpretation of ‘winning’ was approved by the Court of Appeal in *Lord Rokeby v. Elliott* [1879] 13 Ch D 277, 279.

10. The inspector in the present case acknowledged that he was concerned with the meaning to be attached to these words in the 1952 planning permission, rather than their meaning in the abstract or in some different context, but nonetheless he concluded that the interpretation adopted by Russell LJ in the *English Clays* case was the appropriate one. In particular, he held that the words “winning” and “working” had separate meanings when used in this planning permission:

“A fair reading of this permission is that the words “winning” and “working” were being used to convey a different and distinct meaning.” (paragraph 4.9).

11. As for how these distinct meanings were to be applied in the context of fluorspar mining, the inspector, like Sullivan J, took into account the geological context. Indeed, Sullivan J quoted both from the Fluorspar Mineral Planning Fact Sheet, prepared by the British Geological Survey and published by the relevant planning minister in 2006, and from agreed expert evidence at the inquiry. It is unnecessary to repeat those extracts, but the significant characteristics can be summarised quite briefly. Fluorspar, along with such associated minerals as barytes, is found mainly in veins which run through the limestone outcrop, though some occur in “stratabound replacement deposits (flats) together with some cave infill deposits (pipes).” The veins vary in width. Some limestone may also be found within the veins, but in general limestone is the host rock through which the veins run.
12. The inspector in his decision concluded that the 1952 permission expressly permitted certain activities: the winning of fluorspar, the working of fluorspar, and the working of limestone won in the course of working fluorspar. He went on to say (paragraph 4.12):

“It does not expressly permit the winning of limestone. Insofar as it permits the working of limestone, this is a qualified permission, limited to that ‘won in the course of working fluorspar’.”

He added subsequently (paragraph 4.17)

“The operative terms of the permission must be read both as a whole and with careful attention to individual words and phrases. I have already set out what the permission expressly permits and does not expressly permit in paragraph 4.12. A number of points follow from this. The operations are to be directed at the extraction of fluorspar and barytes. The working (and export) of limestone can occur where this is won in the course of working fluorspar and barytes. There is not express

permission to work limestone in the course of winning fluorspar and barytes. To accord with the permission read as I have described the principal minerals removed from the land would be fluorspar and barytes.”

13. At the inquiry, the parties were arguing for very different meanings in practice of the permitted operations. Bleaklow and MMC contended that the permission allowed the getting/working of limestone provided that there was an “operational nexus” between that operation and the winning and working of fluorspar. The inspector summarised their case as follows:

“So far as I can judge, the intended meaning seems to be that provided some fluorspar ore is worked, the overall operation involving the formation of benches and the digging out of limestone and fluorspar is authorised. There is no restraint on the relative amounts of limestone and fluorspar removed nor is the commercial value of the fluorspar held to be relevant. It is probably accepted that the ore must be capable of commercial sale, although this may be as a result of blending with richer ore, so that this would have a very limited role in determining what might be regarded as ore at a particular location. This approach makes no particular distinction between winning and working, which is consistent with the view that these words have a single meaning.”

The inspector rejected that approach, emphasising that the winning of limestone was not permitted, and that “in the course of” working fluorspar meant more than just some connection between that activity and the extraction of limestone.

14. He also rejected the approach advocated by the Park Authority, which was in essence that the only limestone which could be removed from site was that which was inextricably intermingled with the fluorspar and which had to be worked in order to work the fluorspar. This seems to have related to that limestone actually mixed in the vein with the fluorspar. The inspector regarded this as too prescriptive a meaning. He appears to have taken the view that some additional limestone could legitimately be worked (and then exported from the site) in the course of working the fluorspar, no doubt because the veins of fluorspar were not of even width, nor with straight sides. Some additional flexibility beyond merely the extraction of the intermingled limestone was required.
15. He then sought to find some practical measure which could be applied to determine whether what was happening on site accorded with this approach. He took the view that, on the basis of his interpretation of the permission, the principal minerals removed from the land would be fluorspar and barytes. He then went on:

“If the amount of limestone won and worked exceeds that of fluorspar and barytes, this would indicate strongly that the operations are not consistent with the terms of the permission. Since there is no specific formula within the permission, it is appropriate to adopt an approach in this respect which favours the operator. Approached in this way, a ratio of limestone to

fluorspar and barytes ore exceeding 2:1 by tonnage would clearly not accord with the permission. The measured tonnage of fluorspar ore would include any mechanically associated and intermingled limestone only separated during subsequent processing of the ore, which the BGS Factsheet implies could be about one-third of the total. Operations beyond this limit would constitute the (winning and) working of fluorspar, barytes and limestone and not what is permitted.”

16. Sullivan J criticised the inspector’s approach in a number of respects. First and foremost, the judge observed that:

“In concentrating on the second limb of the permission, the inspector appears to have lost sight of what was permitted by the first limb: the winning and working of fluorspar. The appellant argued before the Inspector that the second limb of the permission must be construed so as to add something to the first limb. I would prefer to interpret the permission on the basis that it is far from clear whether the second limb of the permission was intended to enlarge the scope of the permission or to make explicit that which was already implicit in the first limb of the permission.”

It will be remembered (see paragraph 7, ante) that, when the judge used the expression “the second limb”, he was referring to that part which granted permission “for the working of [limestone] which [is] won in the course of working [fluorspar]”, just as the term ‘the first limb’ referred to “the winning and working of fluorspar”.

17. He then went on to make the point that, under the first limb of the permission, a large amount of the host rock, limestone, would have to be removed to win and work fluorspar. That is undoubtedly true, especially in respect of winning fluorspar. Thus the judge properly concluded that the first limb of the permission

“permits the removal of as much or as little limestone as is reasonably necessary in order to win and work the fluorspar” (paragraph 38).

He then, in a passage which is criticised by both appellants, equated such “removal” with winning and working the limestone:

“Since fluorspar is a vein mineral and the host rock within which the vein (rakes) and stratabound deposits (flats) are contained is limestone, which itself is overlain by shales, it is clear that a planning permission for winning and working fluorspar also grants permission, by necessary implication, to remove – ie, to win and work, applying the definitions in English Clays (above) – so much of the host rock as is necessary to win and work the fluorspar. While limestone may not be won and worked as an end in itself, it may be removed (won and worked, see English Clays) to the extent that it is

reasonably necessary to do so in order to win and work the fluorspar.” (paragraph 31).

18. Having concluded that the first limb permitted the limestone to be won and worked in those circumstances, Sullivan J then held that such limestone could be removed from the site and sold commercially. He observed that

“there is nothing in the permission to suggest that the limestone must then be treated as waste and may not be sold if it is profitable to do so.” (paragraph 52).

It was for the operator to decide how to dispose of the limestone which had been removed (won and worked) in order to win and work the fluorspar. That might be by selling it or by disposing of it as waste in accordance with condition 3. As for the second limb of the permission, the judge does not seem to have reached a clear view on what role that was intended to play, given his interpretation of the first limb, as can be seen from the passage quoted earlier at paragraph 16 of this judgment. He did say that the second limb did not “cut down” what was permitted under the first limb, but that of course depends on what meaning one attaches to the first limb. In essence, therefore, the judge held that the permission entitled the operator to win and work and export from the site any limestone, the removal of which from its original place in the ground was reasonably necessary for the winning or the working of the fluorspar.

19. The judge also criticised the inspector’s use of the 2:1 ratio as a method of determining whether the operations in respect of limestone went beyond what was permitted under the 1952 permission. That issue does not directly concern the proper interpretation of the wording of the permission, and I shall return to it later.
20. The appellants argue that the interpretation of this permission must reflect what must be seen as its careful and deliberate use of the words “winning” and “working” as distinct concepts, albeit that in some situations it may be appropriate to describe an activity as “winning *and* working”. Mr Morshead on behalf of the Secretary of State points to the way in which the permission first uses the words together in respect of the “winning and working of fluorspar and barytes”, but then specifically chooses to use them separately in the remainder of the permission. This, he submits should be regarded as deliberate. While the *English Clays* case post-dates this permission, the distinction which it drew between “winning” minerals on the one hand and “working” them on the other was based on the earlier authorities. Mr McCracken, QC, for the Park Authority also draws attention to the fact that the Town and Country Planning (General Development) Order in force at the time when this permission was granted, namely the 1950 Order, contained the same disjunctive phraseology which influenced the court in the *English Clays* case, namely “winning *or* working”: see 1950 Order, Class XIX.2. So the reasoning in the *English Clays* case was just as applicable in 1952.
21. On that basis, the appellants contend that “winning” means achieving full practical access to the target mineral (or minerals), while “working” is the process of removing that mineral from its position in the land. Mr Morshead submits that such an approach makes sense of and gives effect to all parts of the permission, including the requirement about the disposal of waste set out in condition 3, whose mandatory nature is indicated by the phrase “*shall* be disposed of ... .” Consequently there are

three classes of material identified in the permission: first, the fluorspar and barytes referred to in the first limb – these may be won and worked; secondly, the minerals covered by the second limb, “lead and any other minerals”, including limestone, which may be worked but only to the extent that they are won in the course of working the fluorspar and barytes; and thirdly, waste, the residual category which includes the by-products of the processes involved in the first two classes. That last category will include such limestone as has to be removed from its position in the earth in order to get access to the fluorspar, i.e., during the process of winning (as opposed to working) the fluorspar. To allow such limestone waste to be exported from site and sold at the option of the operator would turn this in reality into a permission for the extraction of limestone and would rob condition 3 of its obligatory nature.

22. Both Mr Morshead and Mr McCracken accept that substantial amounts of the host limestone have to be removed from their original position in order to win the fluorspar. But they argue that the judge was wrong to equate that with “winning and working” limestone. In so doing, it is submitted, he misinterpreted the *English Clays* case, which only used the words “winning” and “working” in respect of the target minerals, that is to say, the minerals which the operations were intended to extract, not those which had to be removed simply because they were obstacles to the extraction of the target minerals. One does not win or work the overburden which has to be removed before the target mineral can be worked, and the same is true of the limestone through which the veins of fluorspar run, whether one describes that limestone as overburden or host rock. Once removed in the process of winning the fluorspar, such limestone is waste. Consequently, the judge was wrong, it is said, to have treated limb one of the permission, which permitted the winning and working of fluorspar and barytes, as impliedly permitting the winning, working and subsequent export from site for commercial purposes of limestone, merely because the latter had to be got out of the way in order to get to, i.e. win, the fluorspar.
23. In addition, the appellants submit that the approach adopted by Sullivan J renders the second limb of the permission otiose. That limb permits the working of limestone (and other minerals, apart from fluorspar and barytes) but only in limited circumstances, namely when the limestone is won in the course of working the fluorspar and barytes. That is a carefully restricted formulation. It was intended to serve some purpose, and the permission should be construed so that that second limb is not rendered redundant. But if the judge is right, the second limb was unnecessary, because all the limestone which it permits to be worked could be worked anyway under the first limb. Mr McCracken contends that the second limb helps one to understand what was covered by the first limb and reinforces the view that the first limb does not permit the winning and working of limestone but only its removal within the site.
24. Both Bleaklow and MMC seek to support the judge’s approach to the interpretation of the permission. Both contend that the permission was not necessarily being precise in its use of the terms “winning” and “working”. Such terms may sometimes be used interchangeably, and it will often be difficult to discern where “winning”, in the *English Clays* sense, stops and “working” begins. Mr Jones on behalf of Bleaklow argues that, if the limestone removed in the course of winning fluorspar is commercially saleable, then it is not to be treated as waste and would fall outside the

scope of condition 3. Mr Howell Williams for MMC makes the same submission and points out that, if such limestone is not waste, then there is nothing in the permission which prevents it being exported from site and sold. He makes two further points: first, the permission uses both the phrase “other minerals” and the term “waste”, and since it is agreed that limestone comes within the phrase “other minerals”, it cannot be waste. Secondly, he submits that the word “winning” in this context refers merely to the very initial stages of extraction, such as the removal of topsoil, and that the process of digging down further to the fluorspar comes within the term “working”.

25. Mr Jones conceded that, on the approach adopted by the judge and the respondent, the second limb of the permission was otiose and unnecessary. However, he argues that it could be seen as illustrative of one of the operations covered by the first limb of the permission. It cannot be regarded as limiting what is permitted by the first limb. Moreover, if the Minister had wished to prevent the export of limestone obtained in the course of winning fluorspar, he could have made that clear in the wording of the permission, but he did not do so.
26. Mr Jones also seeks to advance an argument not raised before the inspector or the judge, even though he describes it as providing “a simple answer” to the interpretation question. Since it is agreed that the permission allows the severance of limestone from the land in order to gain access to the fluorspar, the issue is really what then happens to that severed limestone. As at 1952 and for some years later, it would have been treated as a chattel and would therefore not have needed planning permission for its export from the site. In this connection, our attention has been drawn to three Ministerial decisions on planning appeals in the period 1950 – 1952, which accepted the principle that the removal of chattels from land did not amount to development requiring planning permission, though Mr Jones accepts that whether heaps of minerals were chattels or alternatively had adhered to the land depended on the facts in each particular case. He acknowledges that no findings of fact on that issue have been made in the present case, but argues that the point would be relevant as a matter of principle to the interpretation of this permission. He does, however, accept that, even if severed limestone could be seen as a chattel, its removal from site could lawfully be prevented by a condition on the planning permission which allowed its severance in the first place.

### **Conclusions on the Meaning of the 1952 Permission:**

27. All the parties are agreed that, in interpreting a planning permission, the general rule is that, in the absence of ambiguity, regard may only be had to the planning permission itself, including the conditions on it and the express reasons for those conditions: *R v. Ashford Borough Council, ex parte Shepway District Council* [1999] P.L.C.R. 12, at 19 C/D. In the course of argument counsel have taken us to a report by an officer of the Ministry of Housing and Local Government which preceded the grant of the 1952 permission. We have looked at this report on a *de bene esse* basis. The recommendation in it is expressed in different terms from those in which permission was eventually granted. Both sides have sought to draw some comfort from this, if resort can lawfully be had to such extrinsic material. For my part, I do not regard it as appropriate to use that report as a means of construing the later planning permission, for the reasons set out in the *Ashford* case and in other

authorities such as *Slough Borough Council v. Secretary of State for the Environment* [1995] JPL 1128. A planning permission runs with the land and should be capable of being relied on by later landowners and others who may well not have access to officers' reports and other extrinsic material.

28. I am satisfied that the wording of the 1952 planning permission should be regarded as deliberate and meaningful. There is no basis for treating it as having been loosely worded. Indeed, the sequence of the words "winning" and "working" suggests the opposite, since the operative part begins by using them together ("the winning and working of fluorspar ...") and then goes on to use them separately and distinctly: "the *working* of lead and any other minerals", which are "*won*" in the course of "*working*" these minerals, i.e. the fluorspar and barytes. Moreover, as the appellants submit, the planning regulations of the time, in the shape of the 1950 General Development Order, drew a distinction between "winning" and "working", and so there is no reason to think that the Minister in granting this permission was not using those terms with precision.
29. The meaning of each of those two words was adequately spelt out by this court in the *English Clays* case. I need not repeat the relevant passage: it appears at paragraph 8 of this judgment. The meanings attached there to "winning" and "working" did not break new ground – they were not some novel approach originating in that decision of 1974 but drew instead on earlier authorities. Those meanings must, of course, then be applied in an appropriate fashion to the mining of fluorspar as opposed to the mining of china clay or coal, but in principle it must be the case that "winning" as used in the 1952 permission refers to the process of achieving access to the desired mineral, so that it can then be worked, and "working" refers to the process of removing the desired mineral from its position in the land. When the fluorspar is contained in a vein embedded in limestone, "winning" will consist of obtaining access to the vein and "working" will describe the process of extracting the fluorspar from the vein.
30. Adopting these meanings, the 1952 permission certainly has the two limbs identified by Sullivan J. On the face of it, the second limb does permit the working of limestone in certain circumstances, because limestone comes within the words "other minerals". So the second limb permits limestone to be worked when it is won in the course of *working* fluorspar, but only in those circumstances. There is no express permission to work limestone won in the course of *winning* fluorspar, which would (if permitted) allow for the working of much more substantial quantities of limestone.
31. But the judge has concluded that the first limb of the permission, in allowing the winning and working of fluorspar, has *impliedly* allowed the winning and working of limestone, and its ultimate export from the site, insofar as the removal of that limestone from the ground is reasonably necessary for the winning and working of fluorspar. Is that the proper interpretation of this permission?
32. I do not believe that it is. I find the appellants' arguments compelling. The concept of "winning" a mineral involves achieving access to the desired mineral, the "target mineral" as Mr Morshead describes it, not obtaining access to overburden or to host rock which simply has to be removed as part of the process of winning the target mineral, which in the case of the first limb of this permission is fluorspar and barytes. In the present case, in making the fluorspar available, so that it can be worked, one has to get the host limestone out of the way, but one is not seeking to make the

limestone available, any more than one is seeking to make overburden available. Likewise any minerals, whether limestone or any other rocks, which have to be removed in that process are not being “worked” in the sense used in planning law. In my judgment Sullivan J misunderstood the *English Clays* case. The host rock, whatever it is, on this site may have to be removed in substantial quantities from its original location, but it is not being won or worked.

33. The express grant of permission in the second limb for the extraction of “other minerals”, including limestone, in certain limited circumstances, confirms this interpretation. As Mr Jones recognizes, the judge’s approach renders the second limb of this permission otiose. All that could be done under it could already be done under the first limb if the judge is right. Nor is there any reason why the carefully-formulated second limb should be seen as having been included as a mere illustration of what could be done under the first limb. That seems to me to be most implausible. In principle, one should seek an interpretation which gives effect to both limbs of this permission, and that can only be achieved by construing this permission as meaning what it says: that is, allowing the winning and working of fluorspar and barytes (but not limestone) under the first limb and allowing the winning and working of limestone (and other minerals) but only in the circumstances described in the second limb.
34. What is to happen to the quantities of host rock removed in the course of winning fluorspar? The answer is that which is put forward by the appellants, namely that it is to be treated as waste, and consequently it is to be disposed of in accordance with condition 3. That means that it is to

“be disposed of in the hollows left by old workings, in agreement with the Local Planning Authority, or, in the event of disagreement, as shall be determined by the Minister.”

The mere fact that it could have a commercial value does not take it outside the scope of that condition. Nor do I find Mr Howell Williams’ argument that the permission uses the terms “other minerals” and “waste” separately as any impediment to this construction. Insofar as limestone is worked in the course of working the fluorspar, its working is permitted and it may be exported from site and sold. It falls within the expression “other minerals”. Insofar as limestone is merely removed in order to obtain access to the fluorspar, i.e. to win the fluorspar, it comes into a different category and, like any other residual material, constitutes waste. There is no inconsistency in this, nor is there anything unusual in minerals being treated as waste. Mineral Policy Guidance Note 2 (MPG2), issued by the Secretary of State, itself uses the expression “mineral waste”: see Annex C, paragraph 23.

35. The judge was influenced in his decision by the existence of some evidence that the “hollows left by old workings” would not be adequate to cope with the amount of limestone which has to be removed in order to win and work the fluorspar: paragraph 58 of the judgment. One problem with this is that there is no finding to this effect by the inspector, and the evidence quoted by the judge is unspecific as to the date at which such inadequacy would have arisen and whether it is referring to the old workings on the appeal site or to those on the whole of the much larger permission site. But in any event, this argument provides no real guide to the correct meaning of the permission, for several reasons. First, the permission was for the winning and

working of fluorspar “by turning over old spoil dumps, by opencast working and by underground mining”. Of these three methods, only the second would necessarily generate a large quantity of waste, and though this method may be what in practice has been adopted, it is not to be assumed that that was what was envisaged in 1952, when the permission was drafted. Secondly, this argument based on inadequate disposal workings assumes that the permission contemplated the extraction of fluorspar without any constraint or limit resulting from condition 3. Yet there is no reason why that assumption should be made. Once the hollows referred to in condition 3 were filled, whenever that might be, it was always open to the landowner or operator to seek a variation of the condition, through the normal process of planning control.

36. Mr Jones’ argument about “severed limestone” constituting a chattel is of no real assistance in interpreting this planning permission, since he accepts that the fate of such severed limestone could be legitimately governed by a condition in the permission which allowed its severance in the first place. If, therefore, severed limestone falling *outside* the second limb of the permission amounts to waste, it could not be exported from the site (whether regarded as a chattel or not), since that would be contrary to condition 3. Moreover, that argument has no force today independently of the 1952 permission, since the law has been changed since the Ministerial decisions to which he refers. By section 55(4) of the 1990 Act, the removal of material from a “mineral working deposit” constitutes development requiring planning permission.
37. I have concluded, therefore, that the judge was wrong in his view that the first limb of this permission allowed the winning and working and subsequent export from the site of any limestone severed in order to win fluorspar or barytes. The permission insofar as it allows the commercial extraction of limestone is much more limited than that. Such extraction is only permitted to the extent allowed by the second limb of the permission. There is nothing surprising about such a limitation. The Minister in his grant of permission refers expressly to the location of the site within the Peak District National Park, but decides to grant permission because of the importance of *fluorspar* to industry, not because of the need for limestone to be quarried. This was not intended to be a permission for the winning and working of limestone. I turn therefore to the second issue: whether the operations carried out in respect of limestone fell within this meaning of the permission.

### **The Practical Application of this Interpretation:**

38. Like the inspector, I do not accept the very narrow application of the second limb suggested, at least at the inquiry, by the Park Authority. To confine that part of the permission to those quantities of limestone “inextricably intermingled” with fluorspar, principally within the fluorspar veins, seems to me to be impractical and not what this permission could have intended. Some additional flexibility is required if the fluorspar is to be worked. Some limestone immediately adjacent to the fluorspar vein would inevitably be removed when removing fluorspar, and that could properly be seen as falling within the scope of the permission.
39. It seems that it was in an attempt to allow for this and to provide a practical measure or guideline for development control purposes that the inspector put forward the 2:1 ratio criterion: see paragraph 15, ante. His use of this ratio has been criticised on two main grounds. First, it is said that it would render impractical the extraction of

fluorspar. This argument is based on the contention that the ratio was advanced as a “stripping ratio”, that is to say, the ratio of overburden (including limestone) required to be removed, set against the amount of target mineral. On this footing, Bleaklow and MMC say that a 2:1 ratio would be quite unworkable, and they draw attention to the fact that vastly more limestone has had to be removed in order to win and then work the fluorspar than that ratio would allow.

40. That is certainly true. The figures are not entirely clear: the inspector in his decision letter refers to an overall ratio on the appeal site of extracted limestone to fluorspar as possibly having been in the range of 47 to 58:1 (paragraph 5.22). The quantitative figures for the period from July 2003 to 8 May 2006 are given as 670,000 tonnes of limestone extracted and exported for sale, as compared to about 9,000 tonnes of fluorspar ore extracted in the same period (paragraphs 5.4 and 5.5). That would give a ratio of about 75:1. It is unnecessary to resolve those differences in the ratios. It is self-evident that they greatly exceed, indeed literally by an order of magnitude, the 2:1 ratio.
41. But it is quite clear that the inspector was not using his 2:1 ratio as a “stripping ratio”, comparing how much limestone could be removed from its original resting-place in order to win and work the fluorspar. I have set out the relevant passage from his decision earlier in this judgment at paragraph 15. What he put the 2:1 ratio forward as was as a measure of the permissible amount of limestone which could be *won and worked* in comparison to the amount of fluorspar and barytes. For the reasons set out earlier in this judgment, limestone simply removed in order to get access to fluorspar has not been won and worked (and cannot be exported for sale). Those quantities of limestone are not to be included within the 2:1 ratio. There is, therefore, nothing inherently impractical in the ratio adopted by the inspector.
42. The other criticism advanced of the 2:1 ratio is that it was not a figure put to any witness at the inquiry, so that it could be tested, and in consequence, say Bleaklow and MMC, there has been procedural unfairness. To deprive them of the opportunity of addressing such a figure was contrary to the principles set out in *Fairmount Investments Limited v. Secretary of State for the Environment* [1976] 1 WLR 1255. That was a case where the House of Lords upheld the quashing of a compulsory purchase order made under the housing legislation because the Secretary of State had confirmed it on the basis of the inadequacy of the foundations of the houses in question, when no issue as to the foundations, their adequacy or inadequacy, had been raised at the public inquiry. This process was held to be contrary to natural justice because the owner had been deprived of any opportunity of dealing with any allegation of inadequate foundations. Mr Howell Williams now submits that the same defective procedure has arisen in the present case: his clients and Bleaklow had no opportunity of demonstrating to the inspector that a 2:1 ratio was unworkable.
43. For my part, I entirely accept the *Fairmount* principle, which is indeed merely an illustration of the broader requirement of procedural fairness. But I do not accept that there has been any breach of procedural fairness in this respect. There are two reasons for that. First, while the particular ratio of 2:1 had not itself been raised at the inquiry, the topic of ratios, whether they were appropriate or not, was debated. Bleaklow and MMC in their pre-inquiry statement, paragraphs 9 and 10, argued that such an approach was unjustified. That was, in part, a response to the suggestion of one of the objectors, a former Secretary of the Save Longstone Edge Group, Mr

Tippett, that a ratio was appropriate. At the end of the inquiry, the inspector returned to this topic in the course of the closing submissions of leading counsel for Bleaklow, suggesting that a ratio of limestone to fluorspar might be relevant as to whether the limestone extraction was “in the course of working” fluorspar. Arguments were then advanced on behalf of Bleaklow to the effect that a ratio was irrelevant and difficult to apply. The specific ratio of 2:1 was not debated, but it did not have to be, in order to achieve fairness in the procedure. That particular ratio represents a conclusion arrived at by the inspector, following his consideration of the evidence and arguments. He was not obliged to put some form of draft conclusion to the parties at the inquiry. As Lord Diplock memorably said in *Hoffmann-La Roche and Co., v. Secretary of State for Trade and Industry* [1975] AC 295, 369 D-E:

“Even in judicial proceedings in a court of law, once a fair hearing has been given to the rival cases presented by the parties the rules of natural justice do not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a decision. If this were a rule of natural justice only the most talkative of judges would satisfy it and trial by jury would have to be abolished.”

44. Secondly, the complaint of Bleaklow and MMC in practice, and the prejudice which it is said would result from the inspector’s choice of ratio, is based on the assumption that it is a “stripping ratio” of limestone overburden to fluorspar. This is readily apparent from the witness statement lodged in these proceedings by Mr Kevan Walton, a chartered mining engineer: see paragraphs 5, 6.1, 6.2, 6.8 and 6.13 therein. On that basis, the inspector’s adoption of a 2:1 ratio is said to negate the permission, by rendering the excavation of fluorspar impractical. But this argument collapses the moment it is appreciated that the 2:1 ratio was not intended by the inspector as a stripping ratio: see paragraph 41 ante. It was a ratio of that limestone which could be won and worked under the terms of the permission, to the amount of fluorspar won and worked. It represented no constraint on the amount of limestone which could be removed during the course of winning the fluorspar.
45. It is of course, right that the 2:1 ratio chosen by the inspector was a somewhat crude device to guide him in ascertaining whether more limestone had been won and worked and exported for sale than was permitted. He evidently sought to allow for a margin of error or flexibility in favour of the operators: see paragraph 15, ante. But one needs to bear in mind that these proceedings concern an enforcement notice alleging that limestone had been won and worked otherwise than as permitted by the 1952 permission. The figures which I have quoted earlier (paragraph 40) show that the amount of limestone won and worked on and from the appeal site represented a ratio to fluorspar of between 47:1 and 75:1. The reality is that, once it is appreciated that the 2:1 is not a stripping ratio, the criticisms advanced of the inspector on this aspect of the case lose all their force.
46. The remaining issues in the case relate to an attempt by Bleaklow and MMC to show that the large volumes of limestone extracted and exported from the site during the relevant period, the four years prior to 5 May 2006, were obtained in the course of *winning* fluorspar, not so much on the appeal site but on a nearby area to the north known as Peak Pasture. That in particular is true of the period up to September 2004.

(After that date, a section 106 agreement (see paragraph 48, post) made it clear that it would not be possible to work the Peak Pasture deposits.) By no stretch of the imagination or of the English language could it be suggested that the limestone from the appeal site had been excavated in the course of *working* the fluorspar which existed at Peak Pasture. Even as at 5 May 2006, no access to any fluorspar-bearing vein at Peak Pasture had been obtained, and so no working of any such vein had commenced. It follows, as Mr Jones expressly conceded on behalf of Bleaklow, that to defeat the enforcement notice his clients and MMC had to succeed *both* on the issue of the proper interpretation of the 1952 permission (so that it covered limestone won and worked in the course of *winning* fluorspar) *and* on the issue of whether the limestone had in fact been worked in the course of winning fluorspar which existed at Peak Pasture. It was indeed argued at the inquiry that limestone was extracted from the appeal site in order to access (i.e. to “win”) the fluorspar veins within Peak Pasture.

47. However, if I am right as to the meaning to be attached to the planning permission, that extraction of limestone would not fall within it, and this appeal must succeed and the enforcement notice be upheld. The owner and the operator cannot show that their operations fell within the terms of the permission, irrespective of those issues which concern Peak Pasture. I therefore propose to deal with those remaining issues somewhat more briefly.

#### **The Peak Pasture Issue:**

48. Peak Pasture is an area of land which falls within the area covered by the 1952 permission but is separated from the appeal site, principally by a lane called Bramley Lane. It is owned by Bleaklow and leased to MMC, but the vein minerals rights at Peak Pasture are owned by another fluorspar operator, Glebe Mines. In March 1997 an application was made under the Environment Act 1995 for a determination of conditions and, as part of this application, a detailed scheme of working for a 15 year period of Peak Pasture and part of the appeal site was submitted. This has been referred to as the ROMP scheme (Review of Old Mineral Permissions). The application has not yet been finally determined. On 7 September 2004 Glebe Mines entered into a section 106 agreement with the Park Authority in respect of its mineral rights on Peak Pasture, an agreement which was subsequently quashed by the High Court, though after the period with which the present enforcement notice is concerned. The inspector accurately recorded that development into Peak Pasture could not proceed without the agreement of Glebe Mines as owners of the vein mineral rights and the stopping up or diversion of Bramley Lane (paragraph 5.24).
49. He found that there was from mid-March 2004

“no evidence that either [Bleaklow] or MMC had any substantial basis for believing Glebe Mines would give its consent to the ROMP scheme”,

and no reasonably reliable prospect of implementing that scheme into Peak Pasture. Thus he concluded that the works on the appeal site were, from March 2004, pursued on the basis of what could be carried out on the appeal site independently (paragraphs 5.29 and 5.31).

50. His conclusion to that effect was held by Sullivan J to have been vitiated by two flaws. The first was described as procedural unfairness, based on the inspector having arrived at a finding on a matter which (it was said) the local planning authority (the Park Authority) had not put in issue. This was because the Park Authority's planning witness had agreed in cross-examination that he was not suggesting MMC had done anything other than work in accordance with the ROMP scheme and because the Authority's counsel in closing had merely submitted that the evidence that MMC was working to that scheme was "somewhat unsatisfactory". Consequently, said the judge, it was unfair for the inspector to have found that the work on the appeal site was not being carried out in the course of obtaining access to fluorspar at Peak Pasture.

51. In challenging that part of the judge's decision, the Secretary of State draws attention to the inspector's note about draft issues, circulated to the parties in advance of the inquiry. The note included references to "reserves on the adjoining land ... which might be exploited by lawful mining operations on the appeal site", and the question was then posed:

"Should this possibility be disregarded because of legal and ownership restrictions?"

Consequently, submits Mr Morshead, the issue about the need for consent from Glebe Mines as the relevant owner was squarely raised, since the "adjoining land" was clearly a reference to Peak Pasture. The view that the inspector then takes of the evidence eventually put before him about the significance of the ownership restrictions is a matter for him, subject to the usual Wednesbury principles.

52. Mr McCracken points out that other parties to the inquiry raised the issue about the willingness or otherwise of Glebe Mines to agree to MMC working fluorspar at Peak Pasture. The Campaign to Protect Rural England ("CPRE") in its opening statement challenged MMC on this point, saying that the company which controlled the Peak Park mineral rights

"is therefore justly resistant to the area being worked by the appellants."

In closing its case at the inquiry, the CPRE emphasised that

"Glebe continue to maintain the position (last stated by letter to Bleaklow and MME of 11 March 2004) that they are unwilling to let 'others work, extract or otherwise trespass upon ... [their] mineral ownership'." (paragraph 11).

Another objector, the Save Longstone Edge Group, in its closing statement made the point (paragraph 35) that the vein mineral rights at Peak Pasture belonged to Glebe, that there was no evidence that Glebe wished to exercise those rights and "much evidence that they did not".

53. Mr Jones for Bleaklow makes the point that the inspector's note about draft issues referred to the topic of legal and ownership restrictions in respect of those vein mineral rights under the heading of appeal ground (f), i.e. the ground dealing with the

steps to be taken so as to remedy any breach of planning control. The inspector had not raised it under the topic of whether there had been a breach of planning control through non-compliance with the terms of the 1952 permission. That is true, as things stood at the date of that note, 5 September 2006, but even on that basis one would have expected Bleaklow and MMC to have produced evidence to deal with the significance of the ownership restrictions, so as to make good their ground of appeal (f). But in any event by the time the public inquiry opened in February 2007, it had become clear that those ownership problems had wider implications. The Park Authority in its opening remarks, paragraph 16, said that

“the ownership restrictions are a present fact; it would be quite unrealistic not to take them into account as a consideration of some weight as they are relevant to the question of what can lawfully be done at present and *what has been done under the permission.*” (emphasis added).

54. It seems to me to be impossible to say that Bleaklow and MMC did not have sufficient notice that their ability to exploit the Peak Pasture fluorspar, despite ownership constraints, both in the past and in the future, would be in issue. The position adopted by the CPRE and the Save Longstone Edge Group only serves to emphasise that. Whatever admission may have been made by the Park Authority’s planning witness under cross-examination could not prevent this matter being an issue for the inspector to determine. Planning inquiries are not a *lis* between two opposing parties: they involve third party objectors and sometimes supporters as well, and no developer is entitled to assume that a concession, even if it had been made formally by the local planning authority, would prevent third parties from successfully running the argument.
55. Once the position has been reached where it can be seen that there was an issue as to whether MMC had genuinely been excavating limestone on the appeal site as part of obtaining access to fluorspar at Peak Pasture, all that remains is whether the inspector was entitled to come to the finding which he did, quoted at paragraph 49 (ante). It is in that context that Sullivan J’s other criticism of the inspector’s finding needs to be seen. The judge held that the inspector had erred in his approach to some of the evidence given on this topic, namely that from an MMC witness, Mr Taylor, because the inspector had applied the criminal standard of proof and not the civil standard, and on that footing had rejected Mr Taylor’s evidence. This was because the inspector had, in the first sentence of paragraph 5.28 of his decision, said of Mr Taylor:

“I cannot set aside the possibility that he has recounted misleading evidence in good faith.”

56. The context of this was a summary by the inspector of the evidence about the prospects of Glebe Mines agreeing to MMC working the fluorspar at Peak Pasture, a summary to be found at paragraphs 5.24 to 5.29 of the decision. Those paragraphs are set out in full in Sullivan J’s judgment, paragraph 71, and I do not propose to repeat them in full. The essence of them was as follows. First, a director of Bleaklow, Mr Harpley, said that he had no reason to doubt Glebe’s willingness to consent until receiving a letter dated 11 March 2004. (That letter, from solicitors acting for Glebe, referred to Glebe’s mineral rights in Peak Pasture, expressed concern that Bleaklow was proposing mineral extraction there which would infringe Glebe’s exclusive

rights, and sought a written undertaking that Bleaklow would not take any steps on Glebe's land which might infringe those rights, "failing which our Client will consider taking further steps to protect its position without further notice".) The inspector recorded Mr Harpley as accepting that the terms of that letter were clear and as not mentioning any subsequent discussion on this topic with Glebe or its agents. The inspector then remarked on the paucity of documentary evidence tendered on this subject, notwithstanding its potential importance to MMC.

57. There was, in fact, also a letter before the inspector from Glebe to the Park Authority. That was dated 16 February 2007, and it sought to make the point that it had made it clear to Mr Harpley *before* March 2004 that Glebe would not permit Bleaklow/MMC to use Glebe's mineral rights at Peak Pasture.
58. The inspector went on in his decision to refer to the evidence from Mr Taylor on behalf of MMC, observing that he could give no direct evidence based on his own contacts with Glebe. A meeting which he had with Glebe management came after September 2004, the end of the period during which reliance was being placed on Peak Pasture. Mr Taylor was the site manager, employed by MMC. He understood that he was "working to the ROMP scheme plan", but (said the inspector) that did not mean that his employer genuinely or reasonably believed that that was the situation. His evidence was mainly hearsay. The inspector records many matters about which Mr Taylor did not know. Mr Taylor claimed that Glebe continued to give the impression that consent might be given, but he accepted that it was known from April 2004 that there was a real prospect of refusal.
59. The statement criticised by the judge comes in the following paragraph:

"I have carefully considered Mr Taylor's evidence but concede that it is of no real help since I cannot set aside the possibility that he has recounted misleading evidence in good faith. This is not a criticism of Mr Taylor but I cannot give weight to his answers. Even if meetings or conversations did occur, Mr Taylor cannot give reliable evidence of what was said. Bearing in mind the comments of the Solicitor's letter dated 11<sup>th</sup> March 2004, it is reasonable to expect a documented response of some kind whereas no note of any meeting or discussion or other written evidence has been produced. It is unlikely the reticence was the result of a reluctance to breach commercial confidence, since at the date of the inquiry any good will between Glebe Mines and MMC appeared to have been lost."
60. That is followed by the inspector referring to the absence of evidence to show that there was any substantial basis for believing that Glebe would consent. He then concluded that "the weight of the evidence" demonstrated that from mid-March 2004 there was no reasonable reliable prospect of proceeding into Peak Pasture.
61. One also needs to take into account the inspector's express statement, when embarking on the topic of what had been done on the appeal site, that the issues under grounds (b) and (c) "are decided on the balance of probability with the onus of proof on the appellants", i.e. Bleaklow and MMC (paragraph 5.1). That was an entirely accurate statement of the approach to be adopted. That approach is reflected in the

inspector's comment in his paragraph 5.28, quoted above, that it was "unlikely" that the absence of any documented response to the letter of 11 March 2004 was due to a reluctance to breach commercial confidence. "Unlikelihood" is the language of the civil standard of proof.

62. It seems to me that the judge attached too much significance to the inspector's comment about 'not setting aside the possibility'. It was an inappropriate turn of phrase, but one which gives the impression of having been used in a desire to be tactful about Mr Taylor's hearsay evidence. I do not accept that, when put into the context which I have described, it indicates that the inspector was applying the criminal standard of proof. In any event, whatever standard of proof is applied, it is clear that Mr Taylor was not in a position to give any reliable evidence on this topic, as the inspector said. There is no realistic possibility that the inspector would have reached any other conclusion than the one he did. The only documentary evidence was against Bleaklow and MMC on this, and neither Mr Harpley nor Mr Taylor had any oral discussions on this topic with the Glebe management after the 11 March 2004 and before 7 September 2004. I can see no basis for regarding the inspector's finding that the operations on the appeal site had been pursued independently of Peak Pasture as being flawed.
63. It follows that the inspector did not err in law in his conclusions on the Peak Pasture issues. As I have already said, given the view I have formed as to the meaning of the 1952 permission, this aspect is in any event of less significance than might otherwise have been the case. Nonetheless, the end result is that the inspector was entitled to conclude that the operations carried out during the relevant period in respect of limestone extraction on the appeal site exceeded that which was permitted by the 1952 permission.

**Conclusion:**

64. The inspector was therefore right, given his findings of fact, to have upheld the enforcement notice and to have dismissed the appeals brought under grounds (b) and (c) of section 174(2). No issue arises as to the variation he made to the requirements of the notice as a result of the appeal on ground (f). I would therefore allow the appeal by the Secretary of State and the Park Authority against the decision of Sullivan J and restore the decision of the inspector. It has been suggested that this court should make a declaration as to the true meaning of the 1952 permission. My own provisional view is that that is unnecessary and that that true meaning is sufficiently ascertainable from the judgments of this court, but if the parties wish to make further submissions in writing on that topic, they should do so before these judgments are formally handed down.

**Lord Justice Goldring:**

65. I agree.

**Lord Justice Pill:**

66. I also agree that the appeal should be allowed.
67. The case for Bleaklow and MMC has obvious attractions. Limestone is a valuable commodity and very substantial amounts of it have to be removed from the site in order to obtain a relatively small amount of fluorspar. There are real benefits not only to those parties but to the community if beneficial use is made of the limestone extracted. The word “waste” in the conditions to the planning consent of 1952 suggests unwanted material, which the limestone is not. It is submitted that, if the Secretary of State had intended to prevent sale of the limestone extracted, clearer language would have been used than that in the permission.
68. On the wording of the permission, it is submitted that once the excavation is open, the “working” of the fluorspar begins. In the context of this planning permission and these minerals, that is the sensible and workable construction. It is also submitted that “inherent” in the grant is the right to remove limestone extracted, provided there is an operational nexus between the extraction and the winning and working of fluorspar.
69. The judge substantially accepted those submissions. Before expressing my conclusions, I find it helpful to set out the judge’s approach in some detail. He stated, at paragraph 38:

“The underlying purpose of the permission is not to protect the National Park or to limit the amount of limestone that can be won and worked. It is to enable fluorspar to be won and worked. Thus the first limb of the permission permits the removal of as much or as little limestone as is reasonably necessary in order to win and work the fluorspar. If the geological conditions are such that a substantial amount of limestone has to be removed in order the win and work a much smaller amount of fluorspar, it would not be consistent with the underlying purpose of the permission to place some arbitrary limit on the amount, or ratio, of limestone extraction if to do so would prevent or inhibit the winning and working of fluorspar.”

70. In reaching that conclusion, the judge plainly attached importance to economic viability. He stated, at paragraph 43:

“It would not be consistent with the permission to constrain the working of fluorspar by ignoring the economics of its extraction.”

At paragraph 45, the judge stated:

“When deciding whether - as a matter of fact and degree - the operator is working limestone as an end in itself or as a means to an end (in order to win and work fluorspar) all of the relevant circumstances would need to be considered. They would certainly include the factors mentioned by the [applicants]: economics, practicality and safety. They would

also include the absolute and relative quantities of limestone and fluorspar worked. But save perhaps in an extreme case, such as that postulated by Mr Tippett (1 million tons of limestone worked and sold to 1 ton of fluorspar), this factor alone could not be determinative given the geological characteristics of fluorspar.”

71. Against that background, the judge concluded, at paragraph 52:

“Once the limestone has been "won", it will then have to be "worked", i.e., at least initially removed from its position in the ground above and around the fluorspar vein. Having been "worked" in that way, there is nothing in the permission to suggest that the limestone must then be treated as waste and may not be sold if it is profitable to do so.”

He added, at paragraph 53:

“If selling the "other minerals" - removed in order to win and work fluorspar - improves the economics of the operation as a whole, it may well facilitate the extraction of more fluorspar. For example, it may become economic to extract more fluorspar by excavating to a greater depth, despite the additional cost of deeper excavation. That would be in accordance with the underlying purpose of the permission which is to facilitate, not to hinder (by making the overall operation less economic), the winning and working of fluorspar.”

72. That reasoning appears to me to be driven by economic and, it may be thought, practical considerations. It is necessary to consider whether an error of law in the inspector’s construction of the permission has been demonstrated.

73. At paragraph 4.16 of his decision letter, the inspector considered the use of the expression “in the course of working [fluorspar and barytes]” used in the planning permission. He stated:

“It also explains and is reinforced by the exclusion from the permission of the winning of limestone (or any other mineral other than fluorspar and barytes). The permission was not intended to allow winning other minerals and, by excluding this, the restriction to minerals won in the course of working was given greater force. That is significant because it confirms that the wording of the permission was deliberate and that the language used is consistent, not contradictory or uncertain.”  
[emphasis in original]

74. At paragraph 4.12, the inspector stated:

“This is an operational planning permission in which the relevant text is describing the permitted operation. Conditions

1-3 state how the waste material it was anticipated would arise as a result of the permission being implemented should be dealt with. The permission expressly permits: the winning of fluorspar, the working of fluorspar, and the working of limestone won in the course of working fluorspar. It does not expressly permit the winning of limestone. In so far as it permits the working of limestone, this is a qualified permission, limited to that ‘won in the course of working fluorspar’.”

75. However, the inspector added remarks at paragraph 4.17 which, while not impugning the above conclusion, with which in the event I agree, were not in my view helpful on the question of construction. He stated:

“To accord with the permission read as I have described the principal minerals removed from the land would be fluorspar and barytes. If the amount of limestone won and worked exceeds that of fluorspar and barytes, this would strongly indicate that the operations are not consistent with the terms of the permission.”

At paragraph 4.21 the inspector added:

“... Working of limestone will necessarily be the subordinate or secondary operation and this will be reflected in the proportions of the minerals worked.”

That appears to me to start from the wrong end: how much limestone can be extracted depends on the construction of the permission, and particularly of the words “winning” and “working”. That is not determined by ratios actually extracted. I agree with the judge (paragraph 45) that the ratio is not determinative.

76. However, I agree with the 2:1 ratio adopted by the inspector, in the second part of paragraph 4.17, if the basis and reason for it is understood. Having referred to the 2:1 ratio, considered also by Keene LJ, the inspector added:

“... The measured tonnage of fluorspar ore would include any mechanically associated and intermingled limestone only separated during subsequently processing of the ore, which the BGS Factsheet implies could be about one-third of the total. Operations beyond this limit would constitute the (winning and) working of fluorspar, barytes and limestone and not what is permitted.”

77. I agree with Keene LJ’s explanation of the ratio at paragraphs 38 to 45 of his judgment. The ratio was adopted not as an assessment of the total amount of limestone necessarily removed in order to extract fluorspar but to give some flexibility to the amount of limestone which could be removed while “working” the fluorspar closely associated with it in the ground. Given the complexity of the structure, it was an assessment the inspector was entitled to make. The judge’s finding, at paragraph 48, that “a ratio of 2:1 was manifestly unreasonable” was correct only on an assumption, erroneous in my view, that it was used by the inspector to

include the limestone removed while “winning” the fluorspar. I also agree that there was no lack of procedural fairness in the adoption of that ratio by the inspector.

78. Appealing though the approach of Bleaklow and MMC, and the judge’s reasoning, is, especially in straightened times, it does not, in my view, accord with the permission granted. I agree with the conclusion of Keene LJ. The permission, and the conditions attached to it, bear every sign of having been drafted carefully and with an understanding of and an intention to respect the meaning and significance of the words “winning” and “working”, and the difference between them. The words are explained in the authorities, in particular *English Clays* and *Lewis v Fothergill* cited by Keene LJ at paragraphs 8 and 9 of his judgment. *Lewis* demonstrates how far “winning” must proceed before “working” commences. Winning and working are separate concepts, as recognised in the authorities and in dictionary definitions.
79. The construction favoured by the inspector permits the two limbs of the permission to complement each other, each having a meaning and effect. Condition 3 then makes provision for material removed and not otherwise covered by the permission. In the face of clear wording, arguments based on the economic and financial desirability of permitting the limestone to be sold cannot, in my view, prevail. Neither can the argument that the purpose of the permission, the mining of fluorspar, is more likely to be achieved if the extractor is permitted to sell substantial quantities of limestone.
80. The permission granted was a measured attempt to permit extraction of fluorspar, a valuable mineral, in a National Park. It permitted the extraction of limestone on defined terms. The permission was not intended to, and did not, allow the large scale commercial removal of limestone extracted in the course of winning fluorspar, or permit such removal as long as there was an “operational nexus” between the winning and working of fluorspar and the removal of limestone.
81. I agree with Keene LJ’s analysis of the Peak Pasture issue and his conclusion.
82. I see no need for a more detailed declaration as to the meaning of the 1952 permission but would be prepared to consider written submissions on the subject before a decision is made.
83. The appeal is allowed.