Neutral Citation Number: [2010] EWHC 535 (Admin)

Case No: CO/6439/2009

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Birmingham Civil Justice Centre
33 Bull Street, Birmingham B4 6DS

Date: 15/03/2010

Before :

THE HONOURABLE MR JUSTICE BEATSON

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Between :

THE QUEEN ON THE APPLICATION OF
(1) PERSIMMON HOMES LIMITED
(2) BDW TRADING LIMITED **Claimants**
- and -
VALE OF GLAMORGAN COUNCIL **Defendant**

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MR S. DAVIES QC AND MR R. FENTEM
(instructed by **M & A Solicitors LLP**) for the **Claimants**
MISS M. ELLIS QC AND MR R. GREEN
(instructed by **Vale of Glamorgan Council**) for the **Defendant**

Hearing dates: 2 & 3 March 2010 at the Cardiff Civil Justice Centre

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Judgment

Mr Justice Beatson:

Introduction:

1. By section 62 of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"), local planning authorities in Wales must prepare a Local Development Plan setting out their objectives in relation to the development and use of their land. The 2004 Act and the Town and Country Planning (Local Development Plan) (Wales) Regulations 2005 SI 2005 No. 2839 made under it ("the 2005 Regulations") require a local planning authority to carry out an appraisal of the sustainability of the plan and to formulate its preferred strategy, and to consult on them before "depositing" them and documentation concerning site allocation and submitting the plan to the Welsh Assembly Government for independent examination. This application challenges a decision made by the defendant, the Vale of Glamorgan Council, endorsing a "Draft Preferred Strategy" and an "Initial Sustainability Appraisal", two important steps in the process leading to the adoption of its Local Development Plan.

The 25 March 2009 decision:

2. The defendant first endorsed the "Draft Preferred Strategy" and "Initial Sustainability Appraisal" on 25 March 2009. The Draft Preferred Strategy is to concentrate development opportunities in Barry and the south east of the Vale of Glamorgan, option 5 of nine options (see [37] below) considered and appraised by the defendant and its then consultants Hyder Consulting (UK) Ltd ("Hyder"). The claimants, Persimmon Homes Ltd ("Persimmon") and BDW Trading Ltd ("Barratts"), have substantial land options at a site of some 192 hectares known as Llandow Newydd in the western half of the Vale of Glamorgan. The site is situated on and around a disused World War Two airfield between Cowbridge and Llantwit Major. The claimants wish to develop a new settlement with some 2750 housing units on it.

3. The effect of the defendant's decision is to exclude Llandow Newydd from consideration in the process of allocating sites for development and therefore from the Local Development Plan unless in due course it can persuade the person undertaking the independent examination of the plan to so recommend. Once the Local Development Plan has been made, a developer will generally need to ensure that a proposed development fits within the strategies and options contained in the Local Development Plan in order to have a realistic prospect of obtaining planning consent for that proposed development.

4. These proceedings were instituted on 23 June 2009. His Honour Judge Curran QC ordered that permission be considered at an oral hearing. Silber J granted permission on 6 October. The decision is challenged on the following grounds. The first (the "insufficient or misleading information" ground) is that the defendant was misled by the officers' report presented to the Cabinet meeting at which the decision was made. It is claimed that the report was misleading in omitting to make reference to or make available the only independent appraisal of the option (option 8a) involving a new settlement at Llandow Newydd conducted on behalf of the defendant by Hyder. Hyder had given that option a higher score than the option (option 5) favoured by the defendant's officers. It is also claimed the report is misleading in not explaining alterations to Hyder's sustainability appraisals, the limited ambit of the involvement of Levett-Therivel, the consultancy which replaced Hyder, and in wrongly summarising, misquoting or selectively citing various reports and policy guidance documents.

5. The second ground on which the decision is challenged (the "predetermination" ground) is that the officers preparing the report, in particular Mrs Harvey, the defendant's Head of Forward Planning, were illegitimately predisposed towards option 5 and biased against alternative options including option 8a. The third ground (the "bias and conflict of interest" ground) is that Mrs Harvey is married to an employee of Persimmon who worked on the Llandow Newydd project until

December 2007 and this should have caused her to recuse herself from involvement in the process. The fourth ground of challenge (the "inadequacy of statutory consultation" ground) is that option 8a emerged after the initial consultation but there was no further consultation as to its inclusion in the defendant's Draft Preferred Strategy.

The 3 February 2010 decision:

6. The defendant considered its position in the light of the grant of permission. On 10 December it decided to reconsider what its preferred strategy should be. It did so on 3 February 2010. Its Cabinet had before it a report prepared by Mr Quick, its Director of Environmental and Economic Regeneration. That report stated that the Cabinet was being asked to decide the question afresh and was not bound in any way by the earlier decision or by the views of officers. The report referred to or annexed information (in particular three draft appraisals of option 8a by Hyder) which was said to have been improperly omitted from the earlier report. Mrs Harvey took no part in this process. The Cabinet resolved to endorse the Draft Preferred Strategy.

7. The defendant's perfected grounds submitted that, as a result of this decision, it would be an abuse of process for the claimants to continue these proceedings. The written submissions of both parties dealt with this as a preliminary issue. I did not deal with it in this way. I did not consider the defendant's submissions put the matter beyond doubt. Moreover, the preliminary issue required consideration of many of the issues concerning the decision of 25 March 2009 to be considered through the prism of the later decision and I considered that to do so would have resulted in a more complex hearing.

The evidence:

8. The evidence before me on behalf of the claimants consists of statements dated 2 June and 30 September 2009 by Mr Webber, Hyder's Director of Planning and Transport, a statement dated 30 September 2009 by Mr Muir, Managing Director of Harmers, which conducted an appraisal of option 8a for the claimants, one dated 4 November 2009 by Mr Lawley, Managing Director of Cooke and Arkwright, a firm of chartered surveyors which provided advice on the non-residential components of the proposal, and one dated 1 March 2010 by Mr Hawke, a senior Land Manager for Barratt Homes South Wales Division, and the second claimant's principal representative on the project.

9. On behalf of the defendant there are statements from: Mr James, the Cabinet Member for Planning and Transportation and Chairman of the Planning Committee and formerly leader of the Council dated 10 July 2009; Mr Thomas, Head of Planning and Transportation, dated14 July and 6 November 2009; Mr Quick, dated 9 July 2009 and

17 February 2010; and Mrs Harvey, Operational Manager, Planning and Transportation Policy, dated 14 July and 6 November 2009.

10. I have been assisted by clear and cogent written and oral submissions by Mr Stephen Davies QC, on behalf of the claimants, and Miss Morag Ellis QC, on behalf of the defendant.

The legislative framework

11. There are two relevant legislative schemes. The first is that contained in Part 6 of the 2004 Act and in the 2005 Regulations. The Act introduced a new system of development planning for Wales including the requirement in section 62(1) that a local planning authority must prepare a "Local Development Plan" for its area. Under the previous legislative regime an authority was required to prepare a Unitary Development Plan. The second legislative scheme is that contained in the Environmental Assessment of Plans and Programmes (Wales) Regulations 2004 SI 2004 No. 1651 ("the 2004 Regulations"). The 2004 Regulations implement Directive 2001/42/EC. They require local planning authorities to prepare environmental impact reports. Such reports must identify and evaluate the likely significant effects on the environment of implementing a plan, including a Local Development Plan. Regulation 8 provides that a plan, including a Local Development Plan, may not be adopted before account has been taken of the environmental report for the plan and "every opinion" expressed in response to consultation: regulation 8(3). The Welsh Assembly Government's Local Development Plan Manual, dated June 2006, recommends that the procedures under the two legislative schemes be combined.

12. As to the preparation of a Local Development Plan, section 62(5) of the 2004 Act sets out seven matters to which the local planning authority must have regard in relation to its objectives and its general policies for the implementation of those objectives in relation to the development and use of land in its area. These include: (a) current national policies, (b) the Wales spatial plan, and (d) the authority's community strategy.

13. By section 62(6) the local planning authority must: (a) carry out an appraisal of the sustainability of the plan, and (b) prepare a report of the findings of the appraisal. The Town and Country Planning (Local Development Plan) (Wales) Regulations 2005 SI 2005 No. 2839 set out the main steps in the process. A plan will only be a Local Development Plan if it is (a) adopted by resolution of the local planning authority as such and (b) approved by the Welsh Assembly Government under sections 65 or 71: section 62(8) of the 2004 Act. The Welsh Assembly Government's powers of intervention under section 65 can be exercised if it considers "that a Local Development Plan is unsatisfactory": section 65(1).

14. The plan must be prepared in accordance with the local planning authority's community involvement scheme and the timetable for the preparation and adoption of the Local Development Plan: section 63(1). An authority's community involvement scheme identifies those who will be involved in the process. It is (see section 63(2)) a statement of the authority's policy as to the involvement in the exercise of its functions of (see section 63(3)) such persons as the Welsh Assembly Government prescribes and such other persons as appear to the authority to have an interest in matters relating to development in its area. The local planning authority and the Assembly Government must attempt to agree the terms of the community involvement scheme and the timetable in a delivery agreement (regulation 9 of the 2005 Regulations).The timetable must "include all key dates". If agreement is not possible the Welsh Assembly Government has a power of direction: section 63(4) and (5).

15. The 2004 Act empowers the Welsh Assembly Government to prescribe the procedure, form and content, timing, publicity, inspection, and any relaxation of requirements in relation to the community involvement scheme and timetable: section 63(7). By section 77 of the Act the Welsh Assembly Government is given power to make regulations in connection with the exercise of Part 6 functions, including (section 77(2)(a)) "the procedure to be followed by the local planning authority in carrying out the appraisal" and (section 77(2)(b)) "the procedure to be followed in the preparation of Local Development Plans".

16. As to the procedure, the 2005 Regulations provide that the main steps are: the delivery agreement to which I have referred, a process of "pre-deposit participation for the purpose of generating alternative strategies and options" (regulation 14) and "pre-deposit consultation" (regulations 15 and 16). Following this process the proposals and specified documents (including the Sustainability Appraisal Report and the initial consultation report and pre-deposit proposals documents) must be made available for inspection. The pre-deposit proposals documents are (see regulation 2 of the 2005 Regulations) the local planning authority's "preferred strategy, options and proposals for the [Local Development Plan] and the implications of these, with earlier alternatives and implications made explicit, together with such supporting documents as in the opinion of the [local planning authority] are relevant to those documents".

17. Once the proposal and the documents are deposited, the planning authority must invite further representations and submit the deposited Local Development Plan to the Welsh Assembly Government for independent examination: section 64 of the 2004 Act. This is done by a person appointed by the Assembly Government who must give those who make representations the opportunity to be heard: section 64(1) and (6). Section 64(5) provides that the purpose of the independent examination is to determine (a) whether the plan satisfies the requirements of sections 62 and 63 and the

regulations, and (b) "whether it is sound". This enables consideration of disputed factual issues and matters of planning judgment.

18. In the light of the recommendations of the appointed person and, subject to a direction by the Assembly Government (section 67 of the 2004 Act), the local planning authority must (regulation 25 of the 2005 Regulations) adopt the Local Development Plan. It must do so within 8 weeks of the receipt of the recommendations and reasons of the person who has carried out the independent examination unless otherwise agreed in writing by the Assembly Government.

19. By section 113(2) of the 2004 Act a number of documents, including a Local Development Plan, "must not be questioned in any legal proceedings" except under section 113(3). Section 113 (3) provides for challenge within six weeks on the ground that (a) the document is not within the appropriate power, or (b) a procedural requirement has not been complied with.

Policy guidance given by the Welsh Assembly Government:

20. I have referred to the requirement in section 62(5) of the 2004 Act that local planning authorities must have regard to current national policies; that is the policies of the Welsh Assembly Government. These have been revised from time to time. The 1999 *Planning Guidance (Wales) Planning Policy First Revision April 1999* was revised in March 2002 by *Planning Policy Wales (Welsh Assembly Government 2002)* (hereafter "PPW 2002"). In June 2006 *Ministerial Interim Planning Policy Statement 01/2006* (hereafter "MIPPS 2006") was issued replacing chapter 9 of PPW 2002.

21. PPW 2002 contains a definition of previously developed or "brownfield" land. The definition excludes *inter alia* "land where the remains of any structure or activity have blended into the landscape over time so that they can reasonably be considered part of the natural surroundings".

22. Chapter 9 of PPW 2002 contained guidance about proposals for new settlements. Before the revision of chapter 9 in MIPPS 2006, broadly speaking, chapter 9 advised against new settlements if sufficient land is available within and adjoining existing settlements. The material parts of MIPPS 2006 are:

> "9.2.7 Any proposals for **new settlements** should be promoted through, and fully justified in, the development plan. Plans should state clearly the contribution which developers will be expected to make towards provision of infrastructure, community facilities and affordable housing. New settlements on greenfield sites are unlikely to be appropriate in Wales, and should only be proposed where such development would offer significant

> environmental, social and economic advantages over the further expansion and regeneration of existing settlements."

> "9.2.8 In identifying sites to be allocated for housing in development plans, local planning authorities should follow a **search sequence**, starting with the re-use of previously developed land and buildings within settlements, then settlement extensions and then new development around settlements with good public transport links."[1]

The factual background and the decision:

23. In the light of the way the challenges based on pre-determination and bias have been put, it is necessary to set out the factual background to the decision more fully than in some cases. To do so is, however, not entirely straightforward. One of the features of this case is that there are conflicts of evidence, in particular in relation to what Mrs Harvey is alleged to have said in telephone conversations and at meetings.

24. No application was made to hear witnesses and it is not possible to resolve the conflicts in the evidence. Moreover, some of the contested evidence, for example Mr Muir's accounts of what Mr Wilkinson of Merlin Marketing and Lt Col Munson of the Defence Training Academy said to him about the views Mrs Harvey expressed at meetings in May and August 2007, is only given in the form of hearsay. I reject Mr Davies's submission that, as the question of apparent bias is a question of the perception of the reasonable person, I can take account of evidence which is contested. The court is required to ascertain the relevant circumstances and consider all the evidence for itself so as to reach its own conclusion on the facts: see *R v Gough* [1993] AC 646 at 670 (Lord Goff); *R v Inner West London Coroner, ex p. Dallaglio* [1994] 4 All ER 139 at 151 (Simon Brown LJ); *Porter v Magill* [2002] 2 AC 357, at [103] (Lord Hope); *Flaherty v National Greyhound Club Ltd* [2005] EWCA Civ 1117 at [27] (Scott Baker LJ); *Gilles v Secretary of State for Work and Pensions* [2006] UKHL 2 at [17] (Lord Hope), and see [113] and [116] below. The summary of the facts in this section, on which my decision is based, reflects the uncontested evidence, although there are some references to differences between what is stated and the documents. It is broadly chronological.

25. There have been proposals for a new settlement on the site of the former Llandow airfield for over a decade. The matter was considered in the context of the

[1]The corresponding paragraphs in the unrevised version of PPW 2002 (9.2.7 and 9.2.13) are identical save that they refer to "the UDP" rather than "the development plan", and 9.2.7 (now 9.2.8) has a final sentence: "They should seek only to identify sufficient land to meet their housing requirement".

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consideration given to the Unitary Development Plan required under the previous legislation. Objections to the defendant's plan were considered by an Inspector in 1999. His Report stated that the draft plan should not be modified to include the former airfield as a site for a new settlement. He suggested that the matter should be reviewed later in the life of the defendant's Unitary Development Plan, that the size of the proposed development could lead to a glut of development and prejudice the regeneration of an area, "the waterfront strip", which was fundamental to the strategy in the draft plan.

26. The Inspector's report also states (paragraph C14.2.1) that the defendant accepted that "the site of the former Llandow airfield is brownfield". At that time the relevant guidance, the April 1999 guidance, did not contain a clear definition of what constituted brownfield land. As I have stated (see [21]), since 2002 there has been a definition of brownfield land.

27. A note made of a telephone conversation with Mrs Harvey on 8 March 2004 by Christine Sullivan of Sullivan Land and Planning records Mrs Harvey as stating that she did not favour Llandow Newydd as a future allocation for housing but preferred other sites in the urban areas. Mrs Harvey's evidence is that she has no recollection of the conversation with Mrs Sullivan and any conversation would have been in the context of the Unitary Development Plan that was being considered then. Mr Muir states that, in the light of what Mrs Sullivan said, he raised the matter with Mr Thomas who gave a more optimistic view of Llandow Newydd's prospects.

28. On 2 September 2004 there was a meeting between the Managing Directors of Persimmon and Barrett and Councillor James, Mr Maitland-Evans, the defendant's Chief Executive, and Mr Quick. The claimants' representatives said they had options over the Llandow Newydd land and asked that formal consultations be opened. Mr Quick stated that Llandow Newydd would be considered as an option in the forthcoming Local Development Plan but the defendant could not be seen to be promoting it at the expense of any other site because that could lead to legal challenge.

29. On 1 February 2006 the defendant commenced the statutory process for the preparation of the Local Development Plan. On 11 April it invited tenders for appointment to a consultancy as its "critical friend" on key stages of the sustainability appraisal. The invitation stated that the council would undertake most stages and was seeking advice and guidance in those areas. However, in respect of stage C, the assessment of the effects of the Local Development Plan and options against the sustainability appraisal framework, the tender brief stated (paragraph 2.5) the consultants were to be appointed "to ensure a transparent and unbiased approach".

30. On 26 July the defendant adopted its Delivery Agreement, and on 23 August the Welsh Assembly Government gave its approval. On 6 September Hyder accepted appointment to advise the defendant through the stages of the Local Development Plan Sustainability Appraisal and to carry out an independent assessment of the options. Hyder's team included Mr Webber, Ms Chitonga, who did most of the work on the main Options Appraisal Report, and Delyth Hayward, who assisted Ms Chitonga on the main report and did the bulk of the work on a supplementary report on option 8a, the option specifically involving a new settlement at Llandow Newydd.

31. On 26 September 2006 Mrs Harvey made a revised declaration of interest to Mr Evans, the defendant's Director of Legal and Regulatory Services and Monitoring Officer. She informed him that her husband was to start work on 2 October as the Land and Planning Manager for Persimmon Homes (Wales). The declaration states he would be involved in a number of planning and land matters in the Vale of Glamorgan, including promoting Llandow Newydd and two other candidate sites through the Local Development Plan process. Mrs Harvey stated:

> "I will have no specific involvement in these sites and their promotion through the LDP. To this end I have already referred matters relating to these sites to my Head of Service, Rob Thomas."

32. Mr Evans consulted Mr Thomas who said he did not "see a conflict arising out of the scenario" which had been put because he would:

> "… put in place procedures to liaise directly with the case officer … on any matters directly involving Persimmon Homes (Wales). Procedures would include any mail from the company relating to any policy issues being forwarded direct to myself for actioning and any requests for advice from other groups within my division being issued directly to the principal planner as opposed to Emma directly. This is the approach I have taken in the past."

33. On 16 November Mr Evans informed Mr Thomas that "the action taken is appropriate". During November Mr Harvey attended his first meeting of the consortium as Persimmon's representative. Mr Hawke, Barratts' representative on the project, states that concern was expressed about the potential conflict of interest because Mrs Harvey was heavily involved in the Local Development Plan process but that Mr Harvey stated that she would not be involved in any discussions regarding Llandow Newydd.

34. On 4 December 2006 the defendant invited bids for candidate sites for the Local Development Plan process. The claimants submitted a "candidate site form" to promote Llandow Newydd as part of the Local Development Plan on 30 January

2007. It was the only new settlement candidate site contained on the register of candidate sites.

35. Mr Muir's statement refers to a meeting in May 2007 also attended by Mr Wilkinson of Merlin Marketing and Public Relations. In a letter to Mr Muir dated 9 May 2009, written at Mr Muir's request, Mr Wilkinson stated that at that meeting he mentioned to Mrs Harvey that he was working with her husband on the Llandow Newydd project and she opined that the project would not happen because a new settlement was the last option under government guidance. Mr Wilkinson's letter stated that Mrs Harvey told him this was the internal view held at the council and mentioned Rob Thomas. He stated that in writing the letter his recollection was aided by a contemporaneous note he took during his conversation. Mrs Harvey's evidence is that she recalls speaking to Mr Wilkinson although not about Llandow Newydd, but that, if she had spoken to him about that, she would have suggested that he speak to Mr Thomas to obtain an officer view of any matter relating to it. This is consistent with Mr Wilkinson's contemporaneous note. In his statement Mr Muir states Mr Wilkinson said Mrs Harvey had said that he was "wasting his time" working on the Llandow development because "it would not go ahead". Neither Mr Wilkinson's letter nor his contemporaneous note supports what Mr Muir said in his statement.

36. On 24 May 2007 the defendant held a "strategic options stakeholder workshop meeting". None of the landowners who were promoting their sites were invited to this. Mr Richard Price of the Home Builders Federation attended and made a note of the meeting. His note stated that there was no particular reference to the Llandow Newydd development but there were references to a large community development that would take 80-90% of the housing within the Vale. Mr Muir stated that in a conversation after the meeting, Mr Price told him that Mrs Harvey referred to Milton Keynes as a comparison for the new development proposed under one of the options. Milton Keynes is not mentioned in Mr Price's note. The note stated that the defendant "seemed to be supportive" of Llandow Newydd but was careful not to give an opinion. Mrs Harvey's evidence is that a number of areas were mentioned as possible locations for a new settlement including Llandow but she did not recall mentioning Milton Keynes.

37. I have referred to Hyder appraising nine options. Five of these were identified by the defendant's officers. Four, described as "hybrid options", were raised at stakeholder discussions. I have referred to option 5, which became the draft preferred strategy. It was:

> "to concentrate development opportunities in Barry and the south east zone, the St Athan area, to be a key development opportunity. Other sustainable settlements to accommodate further housing and associated development."

38. The other options identified by the defendant's officers involved maximising the potential of and concentrating growth in Barry, Penarth, Dinas Powys, Sully and Roose (option 1), dispersal of housing and employment opportunities based on the populations of each settlement (options 2a and b), higher growth in larger villages in rural areas (option 3), and a rural new settlement (not identified) able to promote sustainable self containment (option 4).

39. The options raised at stakeholder meetings were hybrids of the options identified by the defendant's officers. The two which were to be favoured in Hyder's report were a hybrid of options 2b and 5 (option 7) and a hybrid of options 5 and 4 (option 8), under which development opportunities would be concentrated in Barry and the south east zone, the St Athan area to be a key development opportunity but other sustainable settlements (including a new but unidentified rural settlement) to accommodate further housing and associated development. What became option 8a as a result of proposals by the claimants specifically identified Llandow Newydd as the new settlement in option 8.

40. On 12 July there was an email exchange between Mr Marks, a member of Mrs Harvey's team, and Hyder about the report Hyder was preparing. Mr Marks said the defendant did not wish to influence the option appraisal process too much as it wished it to be an independent assessment led by and developed by Hyder but the team appreciated that Hyder "will need to run things by us" and "we would hope that you will guide us on this work".

41. Concern within the consortium about Mr Harvey's involvement in the Llandow Newydd project was raised at a consortium meeting on 16 August 2007. The minutes record Mr Harvey stating that there would not be a difficulty caused by his wife's potential conflict of interest because the Council had a protocol in place to protect from conflicts and because the Local Development Plan was produced by the Council and not by any single officer.

42. On 22 August 2007 Lieutenant Colonel Munson attended a meeting also attended by Mrs Harvey. A minute of that meeting records Mrs Harvey as stating:

> "Llandow Newydd would be included in 3 of the 9 survey options and Defence Estates will have the opportunity to comment. The VoG Preferred Strategy may not include Llandow Newyyd. Current government guidance is that a new settlement is a last resort."

43. The claimant's consortium organised an exhibition at Llantwit Major on 25 August 2007. Mr Muir and Lt Col. Munson attended. Mr Muir states that Lt Col. Munson

approached him and "forcibly stated" that Llandow Newydd proposals would not go ahead because they were in conflict with Welsh Assembly Government Policy and that when he asked why had said that he had been told this in no uncertain terms by Mrs Harvey on 22 August. Again, the contents of Mr Muir's statement go further than the documentary evidence.

44. In the early hours of 3 September 2007 Ms Chitonga emailed the first full draft of Hyder's Options Appraisal Report to the defendant. An internal meeting of the defendant's officers, that is Messrs Quick and Thomas, Mrs Harvey, and Ms Turner, on 12 September decided that option 5 was the most sustainable option. In a later email commenting on what other members of the defendant's team had said, Mr Thomas stated that Hyder's comments showed they did not understand what they were doing.

45. On 26 September Mr Thomas and Mrs Harvey made presentations to an informal Cabinet meeting showing option 5 as the draft preferred strategy. On 27 September Ms Chitonga emailed Ms Turner what she described as a final draft of the Options Appraisal Report for comment by the defendant. This recommended options 5, 7 and 8 as likely to deliver benefits where they are most needed in both urban and rural settlements. Mr Wallace, a junior member of Mrs Harvey's team, expressed concern to other members of the team about the form in which options 5 and 7 were presented. He said the text of the draft reflected the views expressed at the workshops rather than an independent appraisal.

46. Mr Webber was aware (first statement paragraph 19) that the defendant's officers preferred option 5. He refers to an internal email dated 28 September 2007 from Mrs Harvey to Mr Thomas in which she states "as long as we can show how we got to each of the options and why we have chosen option 5, I don't think we should come up against any problems of lack of soundness" (a reference to the requirement in section 64(5)(b) of the 2004 Act that the plan be "sound", see [17]).

47. One of the comments made by the defendant (in fact by Mr Wallace) about Hyder's draft report was that if the three options mentioned by Hyder, options 5, 7 and 8, have "equal strengths and weaknesses" that should enable them to make an informed choice. It is also said that:

> "what the [appraisal] needs to do is to provide this analysis, and even if after this analysis and testing it is still the case that three options are comparable, at least we can show that our decision to go for option 5 (even if it is the least sustainable) is based on a 'informed' decision that has weighed up the levels of mitigation required for each of the options…"

Another comment states that:

> "The introduction paragraph needs to be written in the past tense – the strategy is already written, amend to say something along the lines of to inform the process."

Mr Davies submitted these showed a predetermination that the preferred option was to be option 5.

48. In October 2007 BE Group carried out an employment land study. At paragraph 7.8, discussing employment opportunities, this states that land at Llandow Trading Estate "is stymied by a developer led proposal for a major housing scheme". It was suggested that this should be "redacted" because it was inaccurate but, at a meeting on 29 April 2008, Mrs Harvey refused to do so. Her evidence is this was because the word was used and considered appropriate by the authors of the study. Mr Davies accepted that, in the context of an employment study what was said is unexceptional, but he relied on Mrs Harvey's refusal to "redact" it although she knew it was factually inaccurate as showing her hostility to the Llandow Newydd project.

49. On 16 October 2007 in an email to the rest of the team Mr Wallace stated that the sustainability appraisal should explain the pros and cons of each option as it performs against the sustainability appraisal objectives. He gave as an example that "option 2B could turn out to be the most sustainable option but we go for option 5 because it accords with the [Wales Spatial Plan] etc." Mrs Harvey stated that Mr Wallace was expressing concern that the Hyder appraisal lacked any analysis of what mitigation measures were needed to address the negative outcomes associated with each of the strategic options considered.

50. There were also concerns about delays by Hyder (see e.g. a chasing email from Ms Turner to Ms Chitonga dated 12 October). On 24 October Ms Chitonga emailed Ms Turner stating that Hyder could only complete the sustainability appraisal report after the preferred strategy has been confirmed. On 25 October 2007, some three weeks before Hyder's final Options Appraisal Report was produced on 19 November, she emailed Mrs Harvey. She stated that, without knowledge of the preferred strategy, the appraisal's identification of significant effects would be fairly generic and that for the appraisal to be drafted in a more targeted and specific way more detail would be required. Mrs Harvey replied stating "option 5 is our preferred strategy and this was discussed in September". Mrs Harvey accepts that the concerns the defendant had with the contents of Hyder's drafts were not discussed with Hyder at that time.

51. On 1 November Mr Wallace sent an email to other members of Mrs Harvey's team about the summary in the draft. He stated he had put together summary tables of all the scores from Hyder's option appraisal matrices:

> "and having knocked out the options that include a new settlement based on the fact that this would be contrary to national guidance this shows 5 and 7 as being the two favourable options in terms of sustainability (hurrah!!), but I think what we now need to do is to clarify further the difference between 5 and 7 by indicating that option 7 whilst identifying sustainable settlements would also disperse development among settlement based on the current population of each settlement…"

Mrs Harvey's response to this email asked Mr Wallace to confirm that a new settlement would be "totally contrary" to Welsh Assembly Government guidance. Mr Wallace replied that the answer was theoretically "no", but it was "difficult to justify a new settlement on purely meeting housing figures".

52. On 6 November Hyder responded to the defendant's comments on the draft appraisal report. This response stated *inter alia* that writing in the past tense was inappropriate because at the pre-deposit stage the initial sustainability appraisal report was intended only to identify the option that best addressed the key issues identified. Also, differing from the request made by Ms Chitonga on 24 October, this response said the appraisal of the options should take place before the preferred strategy is determined.

53. On 15 November the officers made a presentation to an informal Cabinet meeting. On 19 November Hyder produced its Options Appraisal Report with its final conclusions and the matrices showing the comparison of the options by the scoring system adopted. This went from "- -" (minus 2 marks) to "+ +" (plus 2 marks) and differentiated urban areas and the rural vale.

54. Concerns within the claimants' consortium about the position of Mr Harvey remained. On 6 December 2007 it was decided that he should cease to be involved with the Llandow Newydd project. He was promoted and on 1 February 2008 began to work as Strategic Land Director of Persimmon Homes (Wales). Mr Davies, who appeared for both Persimmon and Barrett, observed that "we" don't know what the husband's responsibilities are in the Vale of Glamorgan, by which he must have meant that someone other than one of his lay clients did not know. It was not until 28 May 2008 that Mrs Harvey made a revised declaration of interest to Mr Evans informing him of her husband's promotion. Mr Evans replied on 2 June stating that there was nothing further she needed to do at that time but stating that if a matter arose in the future where there could be conflict she would need to consider the issue. This issue was raised only shortly before the hearing and there was no evidence from Mrs Harvey as

to the reason she did not make the declaration earlier. Miss Ellis stated that she was instructed to say this was an oversight.

55. The defendant's Cabinet endorsed the Draft Preferred Strategy and Initial Sustainability Appraisal at a meeting on 12 December 2007. The results and matrices in Hyder's report were included in the sustainability appraisal without alteration. Option 5 was identified as the proposed strategy for the emerging Local Development Plan "in line with the majority of relevant stakeholder views".

56. After the claimants learned of the Cabinet's decision, on 7 January 2008 Mr Muir wrote to Mr Thomas expressing concerns about the contents of the draft strategy and initial sustainability appraisal. At a meeting between Mr Muir and his team with Mr Webber on 14 January 2008, Mr Muir asked Hyder to carry out an appraisal of Llandow Newydd. Mr Muir stated (paragraph 29) that the claimants and his firm were not aware that Hyder had a long term contract with the defendant. There is no evidence as to what Mr Webber was told the meeting was to be about. His evidence is (second statement, paragraph 15) that he said Hyder was unable to act for the claimants because of its retainer to act as the defendant's consultants.

57. On 16 January 2008 the draft preferred strategy and initial sustainability appraisal were published for pre-deposit consultation. Paragraph 5.3.1 of the Initial Sustainability Appraisal Report, reflecting Hyder's tender brief, states "The consultants… ensured that the Council satisfied the requirements of the [2004] Regulations. The use of consultants also ensures that an objective and independent appraisal of the implications for sustainable development is undertaken".

58. On 29 January representatives of the claimants (Mr Muir and Mr Keogh) met Mr Thomas and Mrs Harvey to discuss the concerns Mr Muir had referred to in his letter of 7 January. Mr Muir and Mr Keogh suggested that the sustainability appraisal of options 5 and 8 would result in an even more sustainable outcome, judged against the sustainability appraisal framework objectives, if, instead of making a general reference to a new rural settlement, it specifically addressed the Llandow Newydd site and proposal. What they had in mind was what became option 8a although it was not at that stage identified as such. The minutes of the meeting (prepared by Mr Muir's firm) record (paragraph 6) that Mrs Harvey stated that, unless Llandow Newydd was included in the defendant's preferred strategy, it would not be considered as part of the candidate site assessment. Mr Muir is recorded as saying that to include it would not conflict with national policy contained in PPW 2002 and also said (paragraph 24) that the railway station would not be provided initially but only when the park and ride facility at Llantwit Major was full.

59. An amendment to the minutes substituting the word "was" for "is" suggests that the Council did not accept that the site "is" brownfield but only that it "was" brownfield at the time of the UDP review. The minutes of this meeting also show a willingness by Mrs Harvey to accept further submissions (see paragraph 17), and state (paragraph 2) that at the Cabinet meeting which adopted the draft strategy members emphasised the strategy was a "draft". There are comments about the impact of the Welsh Assembly Government's policy on new settlements on the proposal, whether its benefits outweigh the predilection against new settlements and Mr Thomas asked what the claimants would offer by way of a section 106 agreement: paragraphs 10, 11, 13, 38.

60. During February the claimants commissioned Mr Muir's firm, Harmers, to carry out a sustainability appraisal of option 8a. This was submitted to the defendant as part of the claimants' representations on the pre-deposit consultation. Thereafter the defendant instructed Hyder to carry out a sustainability appraisal of option 8a on its behalf (the formal commission was on 16 May 2008).

61. There were further exchanges between Mr Muir and Mr Thomas as to whether a new settlement would conform to PPW 2002. Mr Muir considered it would and asked for confirmation. Mr Thomas's reply on 24 April 2008 stated "it is a matter of judgment and opinion as to whether Llandow Newydd as the proposal stands is or is not a departure from national policy" and that the defendant would have to consider this issue "in the coming weeks and months".

62. Representatives of the claimants met Mr Thomas and Mrs Harvey on 29 April. The minutes prepared by Mr Muir record Mrs Harvey as stating "she did not agree that Llandow Newydd should be given consideration at this stage as it is a Candidate Site and the strategic options were not intended to be site specific". They also record: (a) that Mr Thomas said the defendant had agreed to the consortium's request for Harmers' sustainability appraisal of option 8a to be validated by Hyder, and (b) a discussion about what would happen if Hyder concluded that the option including Llandow Newydd should be the preferred option. Mr Muir's draft minute states that Mr Thomas said that the draft strategy would have to be amended and published for further consultation and that Mrs Harvey stated that when Hyder provided comments it was likely she would have queries on them. Mr Thomas' response to the draft sent to him by Mr Muir was to add to this part of the minutes:

> "on a 'without prejudice' basis, if we decide to alter the LDP strategy to include Llandow Newydd there would be a need for re-consultation".

He also stated that once the Hyder work has been done "it will almost certainly be necessary to meet with Hyder to discuss any points or comments which may need

further clarification". Mrs Harvey's evidence is that she expected to have queries on Hyder's report in view of the difficulties they had with their previous report.

63. On 15 May Mr Smith of Hyder informed Mrs Harvey that Ms Chitonga was on leave and that Delyth Hayward would undertake the appraisal of what would become option 8a. He said she would do so on the basis that she had not seen the Harmer's assessment and this would produce "an independent and unbiased view". Mr Webber, who had seen the Harmer's assessment, would then carry out his own assessment for comparison.

64. A first draft of Hyder's appraisal of option 8a, now identified as such, was produced on 23 May. Section 3 of its summary conclusion stated, *inter alia:*

> "in general terms the findings of the assessment are not dissimilar for option 8. That said, it has been possible to more confidently predict some of the likely outcomes for option 8A based on the proposal for the Llandow Newydd settlement which provides detail regarding elements such as housing allocations, infrastructure provisions and an outline of the expected facilities associated with the development".

65. In May 2008 Mr Lawley, the surveyor who was providing the claimants with "market-focussed advice on the non-residential components" of the Llandow Newydd proposal, wrote to the lead Cabinet members including Councillor James, about Llandow Newydd. He expressed some doubt as to whether the matter had been properly considered, and asked whether the consortium could make a direct presentation of its merits. On 29 May Mr Muir wrote to Mr Thomas (copying the letter to Hyder) commenting on the brownfield/greenfield issue. Apparently not fully alive to the implications of the change to the minutes of the meeting on 29 January (see [59]), he stated it had been agreed at the time of the 1999 inquiry that the site was a brownfield site. On 3 June Mr Thomas asked Mr Muir not to contact Hyder directly. This was because Hyder were the defendant's consultants and undertaking the work for it. He said requests by the claimants for information from Hyder should be made through the defendant.

66. On 2 June representatives of the defendant and Hyder met to discuss the first draft of the sustainability appraisal report on option 8a and their differences. The matters queried by the defendant's representatives included the proportion of the site that was brownfield and the proportion over which the claimants had control. Mr Webber states he explained the rationale behind the scoring "but it was obvious that the Council officers wanted to reduce the scoring of option 8a". He considered (paragraphs 29-33) the officers' comments on the draft revealed certain misunderstandings and the amendments they sought were to support their views opposing the development at Llandow but that this did not accord with his

professional opinion. He said that, to his annoyance, he was accused of having liaised with the claimants for the purposes of Hyder's report: first statement paragraphs 23-25. The defendant asked Ms Chitonga to review the appraisal of option 8a to make sure that it was consistent with the appraisal of the other options in the main report: see Mrs Harvey's email to George Smith dated 2 June 2008. Ms Chitonga and Mr Webber later visited the site and reconsidered the scoring.

67. On 6 June Mr Muir requested a copy of Hyder's assessment and on 9 June Mr Thomas wrote stating that the defendant had not received it. He also stated that "once the Hyder work is undertaken, it will almost certainly be necessary for officers to meet with Hyder to discuss any points or comments which may need further clarification". While it was reasonable for Mr Thomas not to release a first draft with which he was dissatisfied, this letter is misleading. It conceals the fact that a draft had been received, that the meetings and discussions had in fact started on 2 June, and that what had to be "undertaken" was a further draft.

68. On 11 June Mr Muir reiterated his request to see the Hyder assessment. He also stated that "the claimants still have a number of concerns about statements that have been made in relation to Llandow as part of the LDP process which are misleading".

69. On 12 or 13 June Hyder produced a second draft of its appraisal of option 8a in the light of Ms Chitonga's review and the visit to the site. The conclusions were fundamentally unchanged. By this time Hyder was aware of the position taken by the defendant's officers and relations between the defendant's officers and Hyder were not good. Mr Webber said:

> "There are 'green' areas, but also significant areas of previously used land, there are few landscape features of merit."
>
> …
>
> "I appreciate you may not agree with the [second draft] but our role is to inform and advise based on our professional opinion and this is what we have done… We would be reluctant to represent your authority at any public enquiry where we have serious reservations on a range of issues with regard to the Llandow new settlement. We must emphasise that the work undertaken by Hyder on behalf of the Vale of Glamorgan has been without any third party influence."

70. On 16 June Mr Thomas replied to Mr Muir's letter of 11 June assuring him that the claimants' proposals were being given detailed consideration and that, once the defendant had received, considered and published Hyder's appraisal, the claimants would be given an opportunity to consider it. The letter also asked Mr Muir to identify the statements which he said were misleading.

71. On 18 June Mr Lawley wrote to Councillor James. He stated (paragraph 11) that he did so because some time had elapsed since Hyder had been commissioned to do the work and they had had comments suggesting that, although the draft report had been received, the Council was not prepared to release the conclusions or to inform the claimants of the results. On 19 June, Mr Thomas telephoned Mr Muir. He informed him that the first draft of the Hyder appraisal was problematic, that they were looking at a second draft, and advised Mr Muir to wait. Councillor James replied to Mr Lawley's letter on 25 June. He stated that two draft reports had been received by the officers and that Hyder had been asked to make various typographical and factual corrections and were waiting for a final version and that key Cabinet members had to be involved in the discussion and have sight of the report before it was released for general consumption.

72. The defendant's comments on Hyder's second draft were sent to Hyder under cover of a letter dated 23 June. Mr Lawley and Mr Muir met Mr Thomas at Mr Muir's office on 26 June. Mr Thomas confirmed that Hyder's report concurred with Harmers' assessment of option 8a as the most sustainable option. He also asked Mr Muir to produce an agricultural report by the Kernon Countryside Consultants for the claimants in 2006 on the brownfield/greenfield issue, and any work undertaken to investigate the potential of the railway station.

73. On 30 June 2008 Mr Muir sent the defendant the Kernon agricultural report and repeated the explanation he had given on 29 January as to the timing of the opening of the railway station and said there were no technical obstacles. He also said that he had contacted Hyder to enquire about the progress of its work because Mr Thomas did not return his calls. Mr Thomas responded on 14 July, and again asked Mr Muir not to be in direct contact with Hyder. It is suggested in Mr Davies's chronology and his oral submissions that this letter misrepresents Mr Muir's letter in referring to the claimants "not providing" a railway station. It would have been better to add the word "initially" or "from the outset", but in context this is an unfair suggestion. Mr Thomas was responding briefly to Mr Muir about a long paragraph in Mr Muir's letter. He referred to paragraph 24 of the minutes of the meeting on 29 January which sets out the position accurately. There is, however, more force in Mr Davies's submission that an email by Mrs Harvey to Hyder on 15 July stating that "currently" the claimants' scheme "does not involve the train stopping at Llandow" misrepresented the position. The Kernon report was made available to Hyder that day.

74. There was a further informal Cabinet meeting on 16 July. This included a site visit to Llandow Newydd. Miss Ellis submitted that the visit was relevant to the greenfield/brownfield issue since (see [21]), if the remains of a structure or activity have blended into the landscape over time, policy guidance states the site is not to be treated as brownfield. The members of the Cabinet would have been able to form a view about this when they visited the site.

75. On 17 July Mr Webber responded to the defendant's comments on Hyder's second draft of the sustainability appraisal of option 8a and enclosed a third draft. By now relations between Hyder and the defendant's officers were strained. Referring to a letter from the defendant that is not before the court, Mr Webber stated:

> "I have worked in planning in South Wales for over 30 years and have never taken a commission or represented a client at a public enquiry where I had no confidence that, at least, some sound planning arguments could be developed. I have a long-standing knowledge of the Llandow area [and referred to teaching his children to drive there]. I cannot agree with the arguments that [Mrs Harvey] and yourself are putting forward".

76. Mr Webber particularly referred to and disagreed with an argument put by the defendant's officers that a concentration of development does not assist the opportunity for sustainable transport, a range of housing and job opportunities and an appropriate level of facilities. He also stated:

> "[I]t is not Hyder's role just to prepare reports that reflect client preconceived views, but to offer independent advice, which of course, can or cannot be taken on board. Hyder has had a consistent view throughout the SA/SEA with regard to a new settlement and the identification of a site has enabled some of the assessment work to be consolidated. The views with regard to option 8A are not just my views but those of all the team. After detailed consideration of your comments presented both at the meeting and on the report I would therefore agree that it would be difficult for Hyder to represent the Vale of Glamorgan at any future public enquiry."

77. Following this letter, on 21 July Mrs Harvey emailed her team and Mr Thomas inviting their views on her belief that the defendant should terminate Hyder's contract. She said that its work had been:

> "of extremely poor quality and is often late". She also stated that "once" Hyder's contract was terminated "most of the remainder of the [sustainability appraisal] work is handled in-house with a consultant to independently review and question what we have done."

78. On 7 August the defendant's legal department wrote to Hyder giving it notice of termination of the contract. That letter states that the option 8a report is incomplete and contains factual inaccuracies, and that there have been issues with Hyder's work throughout the contract relating to standard and timescales. It states:

> "It is apparent that your views on both the Llandow site and on the main sustainability appraisal are in conflict with those of the Council in several

> respects, to the point where you now feel that your company will be unable to represent the Council in any future public examination relating to the LDP. Representation at such an examination was of course a requirement under the terms of your company's engagement."

79. Mr Webber wrote to the defendant on 14 October. He stated he believed the main issue was a difference of opinion in assessing the sustainability of option 8a, and expressed disappointment that the defendant was not willing to agree to the termination of the agreement by mutual consent.

80. In his first statement (paragraphs 36-37) Mr Webber stated he believes that it was his refusal to amend the option 8a report which led to the termination of Hyder's contract. There had been little criticism of Hyder's work prior to this and although certain timescales had slipped that had not been an issue about which the Council had expressed particular concern. In his second statement he observed (paragraph 14) that, although in Mrs Harvey's statement she says she had concerns about the quality of Hyder's work, she did not raise those concerns with him except with respect to the option 8a assessment. He relied on the absence of complaint and a letter dated 31 March 2008 stating that the writer appreciated the extra work Hyder undertook and agreeing to pay an extra sum (albeit less than Hyder may have wished). He stated (paragraph 16) that when Hyder was commissioned on 16 May 2008 to appraise option 8a no adverse comments were made about the quality of its previous work. Indeed it was a requirement that the appraisal should be consistent with the previous work and was to be an independent report not simply a review of the work done by Harmers on behalf of the claimants. Mr Webber's statement also relied on an email dated 3 June from Mrs Harvey to Ms Chitonga which invited her to chat through any issues but did not indicate any substantial concerns about Hyder's work.

81. On 8 September 2008 at one of the regular meetings between the defendant's officials and officials of the Welsh Assembly Government attended by Mrs Harvey, she said the question of changing the draft preferred strategy to include a new settlement was still under consideration. In the light of the discussion, on 3 October Mr Butts of the Assembly Government's Planning Department wrote to her stating that at the meeting "you indicated you would be considering revising the current preferred strategy of the Local Development Plan (LDP) to include one or more new settlements" and outlining the evidence that would be required to justify a new settlement. The letter refers to the importance of getting robust mechanisms to secure the infrastructure in place at an early stage to avoid reinforcing un-sustainable travel plans.

82. I have referred to the Kernon agricultural report commissioned by the claimants. The defendant had instructed Reading Agricultural Consultants to appraise the agricultural issues concerning the site and to review the Kernon report. The Kernon report assessed the agricultural land at Llandow Newydd as within land categories 3b

(moderate quality) to 5 (poor quality)). Reading, which, unlike Kernon undertook laboratory work as well as site bores, reported on 14 October. It concluded that the land was of better or more versatile quality, although (see paragraph 4.4.10) because "to fully verify these areas a full re-survey of the site would be necessary … these figures should be treated as provisional." Table 3 of the Report shows that Kernon assessed 48.5% of the area to be land of moderate or poor quality and none of good quality, whereas Reading assessed 27% to be of good quality and 20% as of moderate or poor quality.

83. In October the defendant appointed Levett-Therivel to review the sustainability appraisal documentation to ensure that it complied with the 2004 Act and the 2004 and 2005 Regulations, and to review the appraisals by the council's officers. A draft report was prepared and on 28 November it was published on the Council's website. The report was to be considered by the Cabinet on 3 December 2008.

84. Mr Lawley wrote to Councillor James on 1 December complaining about the treatment of Hyder and stating the claimants' view of the reasons Hyder's contract had been terminated. The Cabinet report stated that Hyder was terminated due to "concern over their work". Mr Lawley's letter stated:

> "The probable reality, of course, is that they were too much of a 'critical friend' and would not bend to officers' pre-determined views against the Llandow option. They were then sacked after having been advising for some years, and another firm of consultants parachuted in at the very last minute. The corollary of this of course is that if Hyder Consulting were no good in their assessment of option 8a then they were no good on all of the Draft Preferred Strategy option work, and therefore the whole option appraisal process should go back some years to stage one."

Mr Lawley copied this three page letter to all Cabinet members. By then, Councillor James had, on 29 November and 1 December, written to Mr Thomas raising important points about the report and instructed that it be withdrawn from the agenda for the meeting.

85. There were further email and telephone exchanges between Mr Lawley and Councillor James, and in mid-January, Councillor James agreed to meet Mr Lawley and Mr Muir on 19 February 2009. At that meeting Mr Lawley and Mr Muir expressed their concerns about the officers' report for the December Cabinet meeting. They said it contained inaccuracies. Mr Muir referred to a statement in the report that any creation of a new settlement under option 8 or 8a would be "contrary to advice contained in PPW 2002 and MIPPS 01/2006". The reference to the Reading Agricultural Report was said to be inaccurate. They were told that the defendant would not publish its revised sustainability appraisal until the deposit stage of the plan. Mr Thomas, who was at the meeting, indicated that the Hyder report had found

Llandow Newydd to be the most sustainable option. At that stage Councillor James had not seen the report but he requested and received a copy.

86. Councillor James stated (statement, paragraphs 47 and 51) that he read the Hyder report on option 8a. His evidence (statement paragraphs 30, 34 and 35) and that of Mr Quick is that he had meetings on 5 and 20 January and 26 February with senior council officials including Mr Quick at which he put points about the reports to them and heard the response of the officers to those points. He also informed himself on the policy of the Welsh Assembly Government.

87. At the meeting with senior officials on 26 February Councillor James discussed a revised officer's report entitled "*Local Development Plan 2001-2026 Sustainability Appraisal Revised Options Appraisal Report"*. He agreed it could be presented to the defendant's Cabinet meeting scheduled for 11 March. This item was, however, adjourned to a meeting on 25 March. The revised officers' report included Hyder's main November 2007 options appraisal report but did not include Hyder's appraisal of option 8a. It contained the officers' appraisal of option 8a. The appraisal in the report reflects changes by the officers to the methodology used by Hyder. Paragraph 3.2.1 of the revised sustainability appraisal refers to the change and states "italic font indicates where original methodology has been refined". The changes are under the headings of "temporal", "secondary, synergistic and cumulative impacts (positive or negative)", and "mitigation to reduce negative impacts and enhance positive outcomes".

88. The revised sustainability appraisal report differed from the Hyder sustainability appraisals in the results and the matrices. The matrix in the revised report shows option 5 attaining higher scores on most of the sustainability objects than those in Hyder's main November 2007 report. The matrix scoring for option 8a shows a lower result, in particular in respect of the rural Vale of Glamorgan, than that in the Hyder sustainability appraisal. The principal reason for the difference between the revised report and Hyder's work resulted from the identification of mitigation measures. Paragraph 6.2 of the conclusions states:

> "The initial options appraisal report identified options 5, 7 and 8 for further consideration, whereas the refined assessment methodology has only identified options 5 and 7. A key reason for this different outcome has been the identification of mitigation measures; the relationship between mitigation measures inherent within each option; and the influence that mitigation measures may have on each option."

The revised report re-confirmed (see paragraph 6.4) "the council's view that option 5 would provide the most appropriate spatial framework for addressing the economic, spatial and environmental issues affecting both the urban and rural vale over the LDP period". Paragraph 8.13 states:

> "For the remaining new settlement options 8 and 8a, the outcomes were similar in that they would both produce some positive benefits in both urban and rural areas, although the overall [e]ffect would be mixed across the vale. However, the identification of a new rural settlement at Llandow… within option 8a allowed the appraisal to consider more site specific issues that resulted in the appraisal identifying more mixed benefits and negative outcomes within the rural vale than option 8. For instance, a significant proportion of the Llandow Newydd site is classified as subgrade 3A, good quality agricultural land and the site is poorly served by public transport. However, common to both options, was the limited ability to address outcomes through mitigation due to the relationship between the location of a new settlement and the ability to provide equal benefits across the wider area, including reduced opportunities for new development to address issues where they exist."

89. I turn to the material parts of the revised officers' report. Paragraph 18 states of the character of the site:

> "In terms of specific issues relating to Llandow Newydd, the promoters claim that the site is predominantly brownfield. However, it should be noted that existing businesses and trading estates (that they include in their candidate site) are not within their ownership and do not therefore form part of their proposals, although they do have some element of control over future proposals relating to the trading and business estates. The site is therefore predominantly greenfield."

90. Paragraph 14 states:

> "In order to fully consider the representations [on option 8a] the council, has drafted for consideration and inclusion within the deposit draft plan, a revised options appraisal report. The council has been assisted with this review by consultant Levett-Therivel."

It also states that:

> "As part of your officers' consideration of this additional strategic option the council appointed Reading Agricultural Consultants to validate the representor's agricultural land survey undertaken by Kernon Countryside Consultants. The Reading Agricultural Consultant's study concludes in summary at paragraph 6.1.1 that 'the agricultural land on the application site is classified as entirely subgrade 3B (i.e. moderate quality) agricultural land or lower by Kernon Countryside Consultants, but the verification survey conducted by Reading Agricultural Consultants indicates that a significant proportion of the site should be classified as subgrade 3A, good quality agricultural land'."

91. Paragraph 16 states:

> "Planning Policy Wales (2002) advises against proposals for new settlements if sufficient land is available within an adjoining existing settlement. Planning Policy Wales (2002) refers to the need to promote a sustainable settlement strategy and the Draft Preferred Strategy achieves this by concentrating development in and around settlements in the south east zone as well as other sustainable rural settlements."

92. Paragraph 19 states:

> "The agricultural land quality of the site is considered above, but in short a significant proportion of the site is classified as grade 3A which falls within the best and most versatile land as classified in Planning Policy Wales (2002) and should be protected save for in exceptional circumstances. No such exceptional circumstances exist in this case."

93. Paragraph 20 describes officers' views that the Llandow Newydd proposal is not sustainable. Paragraph 22 of the revised report states:

> "The DAW have also offered advice to officers on the issue of new settlements and state among other things that 'new settlements should only be proposed where such development would offer significant environmental, social and economic advantages over the further expansion or regeneration of existing settlements.[2] No such advantages exist in the case of the vale, particularly in view of the sustainable nature of the Draft Preferred Strategy clearly demonstrated by the draft SA."

94. On 23 March the claimants' solicitors sent a letter before action, stating that they would apply for judicial review of a decision of the Cabinet based on the revised officers' report. A pre-Cabinet meeting to discuss proposed business of formal Cabinet meeting was held. Councillor James briefed members of the Cabinet about the assessment contained in it. It is not stated that he provided a copy of the appraisal for the informal or the formal Cabinet meetings. He states (statement, paragraph 51) that he outlined the issues for and against the Llandow Newydd scheme to members and told them he had considered all the evidence, and had taken into account PPW 2002, the MIPPS 2006 revision, and the Hyder report including full details of the claimants' option 8a proposals.

95. At the Cabinet meeting on 25 March, copies of the claimants' letter before action and the defendant's response to it were tabled. The Cabinet agreed to endorse the Draft

[2] The quotation should have been closed at this stage. The report omitted to do so. The claimants criticised this as being at the very least misleading.

Preferred Strategy agreed in December 2007 in the light of the responses to the consultation and to use it and the Initial Sustainability Report for the preparation of the draft Local Development Plan to be deposited.

96. I have referred (see [6]) to the decision to reconsider the matter in the light of the grant of permission and the Cabinet's resolution on 3 February 2010 endorsing the Draft Preferred Strategy on the basis of a revised officers' report. The matter was considered by the defendant's planning committee on 4 February. The Cabinet's resolution was upheld by the defendant's Scrutiny Committee on 9 February.

Discussion

Ground 1: Insufficient or misleading information in the officers' report:

97. This ground is intertwined with the predisposition and bias grounds because (as is seen from paragraph 18 of Mr Davies' written submissions) its starting point is that Mrs Harvey had come to a settled position that the Local Development Plan should not allow for a new settlement at Llandow Newydd, refused to change her view despite Hyder's appraisal of option 8a, and recommended Hyder's dismissal.

98. Mr Davies relied on the fact that about a quarter of the officers' report for the Cabinet meeting on 25 March 2009 was about option 8a and was (see claimant's submissions paragraph 19) "in so unambiguously pejorative terms as to reject the inclusion" of that option. He submitted that the report shows an attempt positively to persuade Cabinet that option 8a was not sustainable. He relied on the fact that Hyder's appraisal of option 8a was not referred to or made available whereas Hyder's appraisal of all the other options in its November 2007 report was made available to Cabinet as a background paper.

99. Mr Davies also relied on the omission in the report to inform Cabinet of the circumstances in which Hyder had been dismissed or that the revised options appraisal report increased the sustainability rating of option 5 and reduced the rating of other options, including option 8a. He invited me to conclude that, in view of the centrality accorded by the defendant and its officers to there being an independent sustainability appraisal to ensure transparency, objectivity and consistency, these were significant omissions which would mislead Cabinet. He also submitted that the way Levett-Therival's involvement was described was misleading because the impression from paragraph 13 of the report was that they had carried out something akin to the work undertaken by Hyder in its November 2007 report whereas they had only reviewed the documentation to ensure that it complied with the 2004 Act and the 2005 Regulations. The presentation of the Reading Agricultural Land Survey was also said to be misleading because it was not stated that the conclusions were provisional pending a full site survey and PPW 2002 was said to have been wrongly summarised,

misquoted or over-stated to suggest that something exceptional was necessary before land of grade 3a could be developed.

100. The submission on behalf of the claimants was that the overall result was that the report did not meet the standards set out in a number of decisions, in particular *Oxton Farms v Selby DC* (Court of Appeal 18 April 1997), *R v Durham CC, ex p Lowther* [2001] EWCA Civ 781; [2002] Env. LR 13 at [98]; and *R (Georgiou) v Enfield LBC* [2004] EWHC 779 (Admin), [2004] LGR 497 at [94]. In *Oxton Farms* and *ex p Lowther* Pill LJ stated that an officers' report is not to be construed as though it were a statute and that in considering defects of presentation in a report it has to be borne in mind that there is usually further opportunity for advice and debate and that the members themselves can be expected to acquire a working knowledge of the statutory test. However, he also stated that what must be considered is the overall fairness of the report and that the duty of officers includes a positive duty to provide sufficient information and guidance to enable members to reach a decision applying the relevant statutory criteria and not only a duty not actively to mislead. In *Georgiou's* case Richards J, as he then was, stated that "members needed to be fully aware of the nature and extent of concerns expressed on all material issues so that they could perform the requisite judgments" but also accepted that a sensible and practical approach must be adopted to such reports.

101. Mr Davies submitted that there was no satisfactory explanation for the failure to refer to the positive draft sustainability appraisal carried out on option 8a by Hyder. The fact Councillor James had read that report and briefed members of Cabinet about its assessment in informal meetings did not suffice because those meetings are "opaque, unminuted, undocumented" and thus contrary to the relevant regulations. It was also insufficient because, although Councillor James may have seen and read Hyder's report on option 8a, a copy was not provided to other Cabinet members.

102. On this issue, I accept Miss Ellis' submissions. I start from the position, referred to by Pill LJ in *Oxton Farms v Selby DC* that, while clarity is important, defects of presentation in an officers' report will not necessarily, or even often, render a decision made following its submission to the elected members, liable to be quashed. In that case Judge LJ stated that the report "is not and is not intended… to repeat each and every detail of the relevant facts to members of the committee who are responsible for the decision". In *R v Mendip District Council, ex p Fabre* [2000] JPL 810 at 821 Sullivan J, as he then was, stated:

> "[P]art of a planning officer's expert function in reporting to committee must be to make an assessment of how much information needs to be included in his or her report in order to avoid burdening a busy committee with excessive and unnecessary detail."

103. This was reiterated by Elias J, as he then was, in *R (British Telecommunications plc) v Gloucester CC* [2002] JPL 993 at [117]. He stated:

> "It is important that the principal issues and the key information are put to [members], but it is not necessary, or indeed desirable that the report should be exhaustive. Plainly there will always be room for dispute as to whether the report should in certain respects have been fuller, or whether certain guidance should have been expressly referred to… but it is not for the court to second guess the officers…"

104. Although the history of this matter shows that at the initial stage the defendant placed some importance on the fact that independent consultants were to be appointed, neither the Act, the 2005 Regulations nor Welsh Assembly Government guidance suggest that local authorities must obtain an independent sustainability appraisal or, having obtained such an appraisal, must consider themselves bound by it. The statutory duty in section 62(6) of the 2004 Act for the appraisal of the sustainability of the plan lies on the authority.

105. The documentation shows that there was some internal concern in September and October 2007 about Hyder's work for what became the November 2007 main appraisal, in particular in relation to mitigation. This was four months before Hyder was asked to appraise option 8a. The officers' principal concerns about Hyder's draft appraisal of option 8a related to the impact of the Assembly Government's policy about new settlements on this site, whether it was a brownfield or greenfield site, whether the report accurately reflected the prospects of providing new commercial facilities in a settlement of that size, and the position in relation to the railway station and mitigation measures. These were, in the light of the available facts, matters of planning judgment.

106. Planning judgment is a matter for the relevant planning authority not the court: see for example Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780. The examination pursuant to section 64 of the 2004 Act which will, in due course, take place is the appropriate forum to question the defendant's planning judgment. The traditional tools of judicial review, of course, apply in this area but, short of *Wednesbury* unreasonableness or, in Lord Diplock's terminology, "irrationality" the court cannot adjudicate on the merits of different views held by qualified planners. In this case the principal reasons for the difference between Hyder's approach to option 8a and that of the officers concerns the identification and treatment of mitigation measures. I accept Miss Ellis' submission that it was reasonable for the defendant to have regard to the potential mitigation measures against the adverse consequences of each option. Accordingly, the officers did not stray outside their legal entitlement in concluding that Hyder's draft appraisal was defective. Once they had so concluded, given the stage of the process, it was reasonable not to engage another consultant to start afresh. It was also reasonable not

to append Hyder's appraisal of option 8a to the revised report. To do so might, given the differences in methodology (see [87]-[88]) have been confusing.

107. As to the errors and omission relied on by Mr Davies, the reference to Levett-Therivel's role was not misleading. The officers' report states that Levett-Therivel "have undertaken a review of Hyder's previous SA work as well as critically examining the council's responses to the ISA report representations". It is not, as the claimants submit, suggested that Levett-Therivel had carried out "something akin to the work required by Hyder's original brief".

108. As to the Reading Agricultural Survey, the officers' report did not include the qualification that the view was provisional but members were directed to the Council website where both the Reading and the Kernon reports could be viewed. I do not consider that this was likely to have had any real impact on the Cabinet's deliberations but in any event the claimants' solicitors' letter before action which referred to the status of the report as "provisional", was before members of the Cabinet. As Pill and Judge LJJ recognised in *Oxton Farms v Selby DC,* even a material omission from a report can be corrected by informing the members of the relevant committee before the decision is taken.

109. As far as the treatment of the greenfield/brownfield land issue in the report is concerned, the defendant, in particular Mr Thomas, had attempted to explore this matter with the claimants. Since the claimants had always stated that the two existing trading estates at Llandow Newydd would remain, the report was not unreasonable in not taking them into account in assessing what land was available for new development at the site. Moreover, the statement that the estates were not within the ownership of the claimants was factually correct.

110. Similarly, although members of the Cabinet did not have a copy of Hyder's appraisal of option 8a, they knew of its existence from Mr Lawley's letter of 1 December (see [84]), the letter before action, and the informal briefings. Unless the conclusion that Hyder's appraisal was defective was *Wednesbury* unreasonable or tainted by improper bias, the officers would have been and were entitled to inform members of their view about the quality of the appraisal or to decide not to include it in the report or as an annex to it.

Grounds 2 and 3 - Pre-determination, bias and conflict of interest

111. Mr Davies' submissions focus on the words and actions of Mrs Harvey and her team in the defendant's Planning Policy Department. He submitted that it was apparent from their internal communications and communications with Hyder and third parties

that they had decided in advance that the draft preferred strategy should be for option 5. He relied on Mrs Harvey's email to Mr Thomas dated 25 September stating that as long as they could show how they "got to each of the options and why [they] have chosen option 5" she did not think they would come up against problems of lack of soundness and the other communications (see [49]-[51], 16 and 25 October and 1 November 2007) and the comments on Hyder's September 2007 draft report (see [45]-[47]). He also relied on reports about Mrs Harvey's views during the previous Unitary Development Plan process (see [27], [35]-[36], and [43], 12 August 2003, 8 March 2004, and May and August 2007). He also relied on Mrs Harvey's question to Mr Wallace on 2 November 2007 asking whether it would be "totally contrary" to Assembly Government guidance to have a new settlement.

112. It is not said that the members of the defendant's Cabinet themselves determined in advance to reject any option which included Llandow Newydd. What is said is that there is strong prima facie evidence that officers had determined well in advance that option 5 should be the preferred strategy for the Local Development Plan and that Llandow Newydd should not be incorporated into it. Mr Davies submitted that the effect was a report which was so strongly in favour of approving the officers' preferred strategy as to taint the Cabinet with the officers' lack of objectivity and predetermination. On analysis, his submissions drew together two separate grounds of challenge; predetermination in the sense of a failure to exercise a discretion lawfully, and bias.

113. Save in relation to Mrs Harvey, Mr Davies did not submit that there was actual bias. His position was that, on the tests enunciated in *R v Gough* [1993] AC 646 as clarified in *Porter v McGill* [2002] 2 AC 357, a fair minded and informed observer would conclude that the defendant's officers had determined their preferred strategy before the production of the sustainability appraisal and sought to ensure that it would justify the choice of that strategy by the Cabinet. He submitted that in this case there was a real likelihood that the officers, who had participated in the decision making process by preparing the report for Cabinet, would impose their influence on the Cabinet in making its decision so satisfying the test in *R v Gough* [1993] AC 646 at 664C and *R (Agnello and others) v Hounslow LBC* [2003] EWHC 3112 (Admin) at [85]. Mr Davies (submissions paragraph 41) described what had occurred as "a form of inherited bias, in which the test of apparent bias is applied to the decision making body in the light of a determination of whether advice (or a report) given to the decision making body is itself effected by bias or predetermination". He submitted that what had occurred in this case went beyond a legitimate pre-disposition towards a particular outcome and (see *R (Condron) v National Assembly for Wales* [2006] EWCA Civ 1573, [2007] LGR 87) amounted to an illegitimate predetermination of the outcome in the sense of a mind that was closed to the consideration and weighing of relevant factors.

114. Mr Davies submitted that the emotive terms in which Mr Wallace' email dated 1 November 2007 (see [51]) and its use of "hurrah!" was (submissions paragraph 43)

"the culmination of a calcified determination by the policy team that option 5 should ultimately be preferred". He also relied on the reference in Mr Wallace' commentary on Hyder's September 2007 draft (see [47]) to showing "that our decision to go for option 5 (even if it is the least sustainable)" is based on "informed" decision. He also relied on the dismissal of Hyder after, as he put it (claimants' submissions paragraph 49) "Hyder refused to produce a report downplaying option 8a" and the absence of real criticism and unhappiness on the part of the defendant's officers with Hyder's previous work.

115. Finally, Mr Davies submitted (claimants' submissions paragraph 53) that it was apparent that, even if Mrs Harvey was not in fact biased against option 8a, the fair minded and informed observer would come to the view that there was a real possibility that she was in the light of her statements over time and the conflict of interest caused by her relationship with Mr Harvey who, until November 2007, was Persimmon's principal representative in the promotion of Llandow Newydd. Mr Davies relied on the defendant's own recognition that Mrs Harvey was placed in a position of conflict after her spouse became involved in the promotion of Llandow Newydd as part of the Local Development Plan process, her revised declaration of interest in 2006 and her involvement in the site despite her statement at the time that she would have no involvement in it. Despite this she was involved and accepts that she was involved in the Llandow Newydd proposal from January 2008 onwards and intimately involved in the process of appraising option 8a.

116. The starting point in assessing Mr Davies' submissions is to recognise that, although in some cases predetermination and the appearance of bias have been treated together (see *National Assembly of Wales v Condron* [2006] EWCA Civ 1573; *R(Lewis) v Redcar and Cleveland BC* [2008] EWCA Civ 746, [2009] 1 WLR 83) they are distinct concepts. Predetermination is the surrender by a decision-maker of its judgment by having a closed mind and failing to apply it to the task. In a case of apparent bias, the decision maker may have in fact applied its mind quite properly to the matter but a reasonable observer would consider that there was a real danger of bias on its part. Bias is concerned with appearances whereas predetermination is concerned with what has in fact happened.

117. As Wade and Forsyth observe (*Administrative Law* 10th ed. p.390) "the significance of the conceptual distinction between predetermination and the apprehension of bias lies in the fact that administrative decision-makers, unlike judicial decision-makers, will often, quite rightly, be influenced, formally or informally, in their decision by policy considerations". It was because of this that in *R (Lewis) v Redcar and Cleveland BC* Longmore LJ stated (at [109]) that "the test of apparent bias relating to predetermination is an extremely difficult test to satisfy" and Pill LJ stated (at [71]), albeit with reference to the position of councillors rather than officers, that "the importance of appearances is… generally more limited in this context than in a judicial context".

118. Policy considerations have played an important part in this case. By section 62(5) of the 2004 Acts the defendant was required to have regard to "current national policies" in preparing its Local Development Plan. In the light of that, the officers in preparing their report for the elected members were entitled and indeed required to take into account the Welsh Assembly Government's policy on new settlements and to test emerging ideas and options against that policy. They were also entitled to take account of the steer given to them by the elected members in December 2007 in endorsing the draft strategy and appraisal which was to be put out for consultation.

119. An examination of the summary of the facts shows that the differences between the defendant's officers and Hyder related to matters upon which planning professionals could come to different conclusions. These included the impact of the Assembly Government's policy on a proposal for a new settlement on this site, whether it was a brownfield or greenfield site, whether the proposals for a railway station were sufficiently firm, the approach to mitigation measures and the proportion of the site controlled by the claimants. For the reasons I have given (see [106]) the officers' criticisms of Hyder's appraisal of option 8a on planning grounds were not ones which were *Wednesbury* unreasonable and therefore outwith their powers.

120. I reject the submission that the factual circumstances show an illegitimate predetermination by the defendant's officers. Those acting for the claimants reported Mr Thomas as providing a more optimistic view of the prospects of a new settlement on the site in March 2004 than Mrs Harvey. His decision in the first quarter of 2008 to approve a sustainability appraisal for the site put the claimants in a special and advantageous position *vis a vis* other specific sites in the Local Development Plan process. Mr Quick's views at the September 2004 meeting do not indicate a disposition to shut Llandow Newydd out and his comment that the defendant could not be seen to be promoting it at the expense of any other site was an appropriate and proper one to make.

121. As for Mrs Harvey, it is clear that she considered that the Assembly Government's policy constituted an important obstacle to a new settlement at Llandow Newydd. Many of her comments reflected the Assembly Government's policy. She was, however, recorded as being open-minded about an additional alternative strategy option at the 29 January 2008 meeting and I do not consider that her email dated 28 September 2007 shows illegitimate predetermination. She was responding to Mr Thomas who had expressed concern about Hyder's understanding of what they were doing and she was setting out what was a legitimate interpretation of the purposes of sustainability appraisal.

122. Mr Davies' reliance on Mrs Harvey's email dated 2 November 2007 to Mr Wallace asking whether it would be "totally contrary" to Assembly Government guidance to have a new settlement is misplaced. The email was a response to Mr Wallace's statement (see [51]) that he had "knocked out the options that include a new settlement". She was not, herself initiating this, or seizing on points hostile to the claimant's case. She was challenging Mr Wallace about his decision to knock new settlements out and requiring him to justify doing so. The question does not indicate that she had determined in advance that an option involving a new settlement would not be included in the draft preferred strategy. If anything, what it did was to indicate a reluctance to exclude an option unless the Assembly Government's policy clearly did so.

123. It is also clear from Mrs Harvey's meeting on 8 September 2008 with representatives of the Assembly Government (see [80]) that even at that stage (i.e. after Hyder's contract had been terminated) she raised the question of changing the draft preferred strategy to include a new settlement and that possibility was still under consideration by the defendant.

124. In *R (Lewis) v Redcar and Cleveland BC* [2008] EWCA Civ 746, [2009] 1 WLR 83 at [106] – [107] Longmore LJ stated:

> "it is clear from the authorities that the fact that members of a local planning authority are 'predisposed' towards a particular outcome is not objectionable" and that "what is objectionable… is 'predetermination' in the sense … that a relevant decision maker made up his or her mind finally at too early a stage."

While the background in this case shows a clear policy preference against a new settlement, the examples I have given show that the officers' minds were not closed. Longmore LJ stated the test was extremely difficult to satisfy. I do not consider that it has been satisfied in this case.

125. I turn to the submissions on actual bias and conflict of interest on the part of Mrs Harvey. It is not suggested that her husband's role in Persimmon after he was removed from any responsibility from the promotion of Llandow Newydd created a continuing conflict of interest. What is said is that her failure to inform the monitoring officer that he had been promoted and to ask whether she could now have specific involvement in the Llandow Newydd settlement constituted a breach of the rules and the maintenance of an apparent conflict of interest or any steps to ensure that the conflict was negated.

126. Mrs Harvey may well have breached the rules in the defendant's Officers' Code of Conduct concerning declarations of conflict of interest. She delayed in reporting her husband's promotion for a number of months after his role in respect of Llandow Newydd ceased. She did not then seek or obtain permission to become directly involved in the Llandow Newydd project and its appraisal by the defendant. But the original arrangement made with the Monitoring Officer, Mr Evans, was that mail from Persimmon relating to any policy issues would be forwarded directly to Mr Thomas and requests for advice from other divisions in his group would go directly to the principal planner and not to Mrs Harvey. The arrangement does not appear to preclude her dealing with Hyder, as she did from the autumn of 2007 in connection with Hyder's main appraisal report. However, she and Mr Thomas attended the meetings with the claimants' representatives on 29 January and 29 April 2008 about their proposal that a specific site appraisal be undertaken. She was never expressly authorised by the Monitoring Officer to be involved in this way, either before she informed him of her husband's promotion or afterwards. The question, however, is whether any breaches by Mrs Harvey of the defendant's rules or those of her own professional body, the Royal Institute of Town Planners, means that the defendant's decision is tainted. Absent a disqualifying bias I do not consider they do.

127. The test of bias is an objective one. As I have stated (see [24]) the court must start by identifying the circumstances which are said to give rise to bias and, after ascertaining all the relevant circumstances, ask whether they would lead a fair-minded and informed observer to conclude that a real possibility of bias existed. The reasonable member of the public who is considering the facts and the appearance of those facts is, in the words of Justice Kirby in the High Court of Australia, "neither complacent nor unduly sensitive or suspicious": *Johnson v Johnson* (2000) 200 CLR 488, at [53]. Here, the facts show that Mrs Harvey espoused the Assembly Government's general policy against new settlements.

128. Mr Davies submitted the court cannot know whether a spouse has developed strong personal feelings on an issue which affects objectivity and there can be no rule other than the disqualification of a spouse from participation in the relevant decision making: the fact of the relationship is sufficient. That, however, would be to introduce an automatic disqualification in the case of spouses, contrary to the decision in *R v Gough* [1993] AC 646 which held that the only case of automatic disqualification is pecuniary interest.

129. In this case there is no suggestion that there was any dispute or difficulty between Mr and Mrs Harvey so that she might be antagonistic on personal grounds to him or to his employer. Mr Davies submitted that one cannot know whether Mrs Harvey had her spouse's pecuniary interest (via his employers) in promoting Llandow Newydd in mind or whether she was fiercely competitive within the marriage and determined to ensure that the claimants did not succeed in persuading her of their case. The first is an unrealistic suggestion given the circumstances of this case and the position taken

by Mrs Harvey. The latter possibility is one which goes to the question of illegitimate predetermination rather than bias *simpliciter*.

130. I have concluded that the reasonable member of the public who, in Justice Kirby's words, is neither complacent nor unduly sensitive or suspicious, knowing Mrs Harvey conducted herself in relation to the Welsh Assembly Government's policy and other matters concerning the new settlement in a way that was adverse to the interests of the company employing her husband, would not have concluded that a real possibility of bias existed. The position would have been quite different had she taken this line in relation to a competitor of her husband's employer in circumstances in which her husband's employer might benefit from her participation in the decision.

131. Additionally, it must be shown that predetermination by Mrs Harvey or other officers infected the decision makers. Bearing in mind the differences between predetermination and bias but using the language of Lord Goff in *R v Gough* [1993] AC 646 at 664 about bias, there must be a real likelihood that the person acting in an advisory capacity "would impose his influence on" the decision maker. In this case Councillor James closely supervised the process of preparing the officers' reports. He withdrew the draft that was intended to be considered at the December 2007 meeting. He had several meetings with senior officers including Mr Quick putting points to them and hearing their responses. He informed himself about the Assembly Government's policy and in February 2008 received Hyder's draft appraisal on option 8a. He communicated with other members of the Cabinet at informal meetings. The Cabinet also had before it the claimants' solicitors' letter before claim and the response of the defendant's Director of Legal, Public Protection, and Housing Services to that letter. In these circumstances, in particular given the extent of Councillor James' involvement and the informal briefings, the factual scenario for any infection of predetermination by Mrs Harvey or other officers is not made out.

Ground 4: Inadequacy of statutory consultation

132. Mr Davies submitted that regulation 16 of the 2004 Regulations required the defendant to consider any representations made on the predeposit proposals documents provided the representations were made within 6 weeks of the defendant complying with regulation 15. He submitted that this meant that once the defendant decided to appraise option 8a it was required to submit it to predeposit consultation. He stated that his case could be understood by hypothesising the counterfactual case that Cabinet had in fact endorsed option 8a as part of the draft preferred strategy. The adoption of that option would not have been a minor amendment of the draft preferred strategy so as to fall within the authorisation in regulation 16(3) by reference to representations made in the predeposit public consultation period, not least because this strategic option was not included in the predeposit proposals documents. He submits that since a deposit Local Development Plan including option 8a would be vulnerable to challenge had there been no consultation on option 8a, it is not rational

to argue that because option 8a was not in fact chosen there was no requirement to consult.

133. I reject this submission. It would, as Miss Ellis argued, be a recipe for perpetual consultation rather than effective policy making. The defendant engaged with a number of consultation bodies pursuant to regulation 14 of the 2004 Regulations with a view to generating reasonable strategic options for consideration. Of the nine options which were generated, three included a new settlement.

134. The defendant publicly consulted on its draft preferred strategy and initial sustainability appraisal pursuant to regulation 15 of the 2004 Regulations. That draft strategy and initial appraisal constituted "the pre-deposit proposal documents" under regulation 2(1). Those documents "made explicit" the "earlier alternatives and implications" because the initial sustainability appraisal contained a description of the rejected options. Neither regulation 15 nor any other regulation or statutory provision requires the authority to re-consult on representations received during the consultation that is undertaken. The statutory scheme (regulation 2(1)) only requires "earlier options and their implications to be made explicit". Section 63 of the 2004 Act requires the development plan to be prepared in accordance with the timetable agreed in the delivery agreement. The 2005 Regulations require the timetable to "include all key dates", including "a definitive date for each stage of the LDP procedure up to deposit stage". These show a legislative concern with the timely preparation of Local Development Plans. The Welsh Assembly Government's guidance only suggests any obligation to re-consult where a local planning authority decides to change its draft prepared strategy. The revised options appraisal report which includes option 8a will be subject to consultation pursuant to regulation 17 of the 2005 Regulations at the deposit stage.

The 3 February 2010 decision:

135. In the light of my conclusions I can deal with the effect of the defendant's decision on 3 February 2010 briefly. I accept Miss Ellis' submission that this rendered consideration of the earlier decision moot and also cured the principal complaints about it. The claimants' skeleton argument for the permission hearing before Silber J stated:

> "At the heart of the case is the failure of officers to ensure that Cabinet had full cognisance of a sustainability appraisal carried out by Hyder into option 8a before it came to a decision."

That issue was addressed in the later decision. Moreover, Mrs Harvey took no part in the preparation of the report for that decision.

136. The claimants' submission was that, notwithstanding these and other changes, the later decision was also outside the defendant's powers. This was said to follow from the absence of an independent assessment of option 8a and because the officers' treatment of Hyder's assessment of option 8a blighted it in the eyes of the Cabinet. This submission, however, refocuses the case. It does so in a way which, given when this occurred, meant there was no (or little) evidence about the refocused case before the court. In any event, for the reasons I have given (see [106]) at the stage the defendant concluded it was dissatisfied with Hyder's appraisal it was not required to engage another consultant to start afresh.

Conclusion:

137. For the reasons I have given, this application is dismissed.