*609 Residents Against Waste Site Ltd v Lancashire CC

No Substantial Judicial Treatment

Court
Queen's Bench Division (Administrative Court)

Judgment Date
7 November 2007

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[2007] EWHC 2558 (Admin)
[2008] Env. L.R. 27

Queen's Bench Division (Administrative Court)

(Irwin J.):

November 7, 2007

Environmental impact assessments; Industrial development; Locus standi; Planning conditions; Planning control; Planning permission; Traffic management; Waste disposal;

H1 *Environmental impact assessment—judicial review—formation of company to bring proceedings—whether special purpose company formed after grant of planning permission had standing—whether delay in bringing proceedings—whether grant of planning permission failed to give effect to "waste objectives"—whether traffic impacts of development controlled adequately*

H2. The claimant (R) was a limited company formed to represent the interests of local objectors to a proposed major waste recycling and processing plant. The defendant (L) as Waste Disposal Authority had applied to itself as Waste Planning Authority for planning permission for the development, with an Environmental Impact Assessment carried out as part of the application. Permission was granted in November 2006 and a judicial review claim served by R on February 20, 2007. A waste PFI contract was entered into in at the beginning of March 2007 and a waste management licence was granted by the Environment Agency on March 28, 2007. L submitted that R did not have standing to bring the claim, arguing that as it had only been formed two days before issue it could not have been an interested party during the course of the application for planning permission and had been formed specifically to avoid costs liability. L also submitted that the standing requirements for such a planning challenge ought, as a matter of consistency and fairness, to be the same as those required under s.288 of the Town and Country Planning Act 1990 , which used the "persons aggrieved" formula. R argued that it was well established that a company formed by residents who objected to the grant of planning permission had standing to challenge that permission, referring to R. v Leicestershire CC Ex p. Blackfordby and Boothorpe Action Group Ltd and Herefordshire Waste Watchers Ltd v Hereford CC , and that a company did not have to constitute a "person aggrieved", referring to R. v Somerset CC Ex p. Dixon . L submitted that the claim had also not been made with sufficient promptness and that this delay had caused prejudice including entering into financial commitments. R responded that L had not been prejudiced by any delay and would not have done *610 anything differently had the claim been served earlier, such as declining to enter into the PFI contract.

H3. The substantive grounds for R's challenge were that: (1) L had acted unlawfully in failing to give effect to its obligations under para.4 of Sch.4 tp the Waste Management Licensing Regulations 1994 , which set out the relevant objectives in relation to the disposal or recovery of waste established in Art.4 of the Waste Framework Directive ; and (2) that it had unlawfully failed to secure the traffic routing recognised by L as planning authority as critical, through a planning condition where the obligation would then run with the land, instead relying upon contractual provisions.

H4. **Held,** in allowing the application:

H5. 1. The “persons aggrieved” test was designed precisely to afford rights of challenge to individuals whose private interests were affected and which very often did not turn on any suggested illegality or “public wrong” by a public body, so that the situation was not the same as that in the present case. If costs protection was the true objection, then there were better ways to address that issue than to seek to undermine the standing of the company. There was no question that the claim was frivolous, meddling or spurious, agreement had been reached on security for costs and accordingly, there was no basis on which R should be precluded from the claim by reference to standing.

H6. 2. L had known of the local opposition and anticipated the legal claim in the terms of its contractual arrangements. Although the claim had been absolutely on the brink of being out of time and might have been issued earlier, the practical implications of any lack of promptness were the important aspect. The contracts had not been halted in response to the actual issue of proceedings and there was no evidence on which to find safely that this would have been different had the proceedings been issued earlier.

H7. 3. Although both parties had agreed that the question of whether a decision failed to pay proper attention to the relevant objectives had to be judged by substance and not form, by content not language, R's attack on the decision was in truth one of language. It might be possible to say that a differential use of language was a cynical means of concealing the fact that no proper consideration had been given to the relevant objectives, while seeking to convey that it had been, to the more educated audience at the Environment Agency. However, in the absence of any contention of bad faith on the part of L, or its senior officers, it had to follow that those in charge of the process, knew of the relevant objectives and had them in mind. The fact that they expressed themselves somewhat differently in different documentation lost any real significance, in such absence of bad faith. It was clear that the underlying plans and policies developed by L fully took into account the relevant objectives, and that senior officers and Councillors had been fully aware of those statutory provisions. R had failed to demonstrate that no or no sufficient attention had been paid to the relevant objectives in reaching the decision.

H8. 4. Whilst a condition in relation to traffic routing might be possible with careful drafting, it was hardly irrational or unlawful to grant planning permission in ***611** the absence of such a planning condition. In the context of a highly vexed and difficult application such as the present case, however, a unilateral undertaking given pursuant to s.106 of the Town and Country Planning Act 1990 , which did attach to the land, should have been considered essential and judicial review would be granted on that narrow ground.

H9 Legislation referred to:

Directive 75/442/EEC (Waste Framework) Art.4 .
Town and Country Planning Act 1990 ss.106 and 288 .
Waste Management Licensing Regulations 1994 (SI 1994/1056) reg.19 and Sch.4 .
Planning and Compulsory Purchase Act 2004 s.38(6) .

H10 Cases referred to:

R. (on the application of Hardy) v Pembrokeshire CC [2006] Env. L.R. 16
R. (on the application of Hereford Waste Watchers Ltd) v Herefordshire CC [2005] EWHC 191 (Admin); [2005] Env. L.R. 29; [2005] J.P.L. 1469
R. (on the application of Malster) v Ipswich BC [2001] EWCA Civ 1715; [2002] Env. L.R. D8

R. (on the application of Thornby Farms Ltd) v Daventry DC [2002] EWCA Civ 31; [2003] Q.B. 503
R. v Inland Revenue Commissioners Ex p. National Federation of Self Employed and Small Businesses [1982] A.C. 617
R. v Leicestershire CC Ex p. Blackfordby and Boothorpe Action Group Ltd [2001] Env. L.R. 2
R. v Secretary of State for the Environment Ex p. Rose Theatre Trust Co [1990] 1 Q.B. 504
R. v Somerset CC Ex p. Dixon [1998] Env. L.R. 111; [2002] 3 W.L.R. 875; [2002] Env. L.R. 28
Tesco Stores Ltd v Secretary of State [1995] 1 W.L.R. 759

H11 Representation

Mr D. Wolfe , instructed by Public Interest Lawyers, appeared on behalf of the claimant.
Mr D. Elvin Q.C. and Mr C. Banner , instructed by Lancashire CC, appeared on behalf of the defendant.

MR JUSTICE IRWIN:

Factual Background and Chronology

1. The Defendant Lancashire County Council (LCC) is both the Waste Disposal Authority and the Waste Planning Authority for Lancashire. The Interested Party, Global Renewables Ltd (Global) is the main contractor for building work on the relevant site. The Claimant, Residents Against Waste Site Ltd (RAWS) is a limited company formed to represent the interests of local objectors to the development in question. The circumstances of the formation of the company ***612*** are relevant and I address them later in these reasons. RAWS seeks judicial review of the grant of planning permission for a waste technology plant on the site of the old Leyland Vehicles Test Track at Farrington Moss, Leyland in Lancashire.

2. The site in question is 14.6ha in area. Previous planning permission was granted for a smaller waste disposal facility on the site. This plan would not have occupied the whole site and was not proceeded with, but forms a backdrop to this application. There has thus for a long period been the prospect of such a development on this site, in one form or another.

3. On July 17, 2006, LCC as Waste Disposable Authority applied to itself as Waste Planning Authority for planning permission for a large facility with a capacity of dealing with 305,000 tonnes of waste per year from households and civic amenities sites in the South Ribble, Preston, Chorley and West Lancashire areas. A plan of the site was included in the evidence before me.

4. As part of the application, an environmental impact assessment was carried out, addressing the need for the development and alternative developments; the environmental context; planning policy and land use; geology soils and contamination; water resources, ecology, landscape and visual amenities; traffic, noise, air quality, and recreation and cultural heritage. The results of the assessment were set out in an Environmental Statement that was submitted with the application. There was then a period of consultation within the community. It became clear from early on that there was a degree of local opposition to the development and from relatively early on some of those opposed formed Residents Against Waste Site, although not yet as a limited company. This grouping contained and contains residents of Farrington Moss, Farrington and Leyland, and includes borough councillors from the area. The group became a focus of opposition to the development, co-ordinating and presenting opposition during the planning process.

5. Some key points in the process towards the grant of planning permission were as follows. On September 21, 2006, the head of development control for LCC, Stuart Perigo, presented a report to the Development Control Committee of the LCC. He recommended a site visit to the committee in view of some of the issues raised, including traffic increase, the proximity of the development to local residential property, flood risk, the impact of the development on the health of local residents, noise odour and light pollution, ecological impact and contamination on the site.

6. On October 20, members of the Committee visited the site and viewed the surrounding area, including a visit to No.39 Bispham Avenue, the closest property to the site.

7. In October 2003, LCC introduced web casting to its meetings, including the Development Control Committee, and all proceedings relevant to this application could be viewed live, or later through archive, accessed via LCC's web site. On October 31 the Committee heard a 30 minute presentation from a Mr Carter of RAWS. On November 1, 2006, the Committee met once more and heard further oral representations from two residents and three borough councillors. At this meeting, the Committee also received a presentation from ***613** Mr Perigo, including a summary of the project and the issues, together with an update of representations received, a summary of representations received by RAWS and a variety of other points. At the conclusion of this meeting, the Committee resolved to grant planning permission for the development, subject to the applicant (LCC as Waste Disposal Authority) signing a unilateral obligation for the provision and management of off-site ecological mitigation. Permission was also to be subject to conditions set out in the recommendation with one additional condition.

8. The decision granting the planning permission was issued on November 22, 2006, a decision co-ordinated with the signing of the unilateral undertaking on ecological mitigation on the same date.

9. On November 28, 2006, representatives of RAWS contacted Mr Philip Shiner, the solicitor who subsequently formed the company RAWS Ltd and was retained for the application before me. Mr Shiner saw some from the group on November 29 and on December 1, 2006 requested formal instructions from the group, and advised them of the need for urgency and promptness in making any application for judicial review and pointed out that an application would in any event have to be made before February 21, 2007. There was a further meeting on December 11, 2006, when it is clear that a fairly detailed explanation was given to the group as to what might be involved in mounting a legal challenge to the development.

10. Between December 11, 2006 and January 17, 2007, according to the witness statement of Mr Shiner of May 2, 2007, the members of the protest group “engaged in various awareness and fundraising activities”, addressed the question of costs and refined their areas of concern, at least to some degree. It was only on January 17, 2007 that Mr Shiner was given authority to instruct counsel. He sent such instructions on January 24, 2007 and counsel advised promptly in an opinion written on Sunday January 28, 2007. As a result, Mr Shiner wrote a pre-action letter on January 31, 2007, which itself received a prompt and detailed response from LCC dated February 12. The outcome was that a claim was served on LCC and on Global on February 20, 2007. This claim was therefore served three months and three weeks from the resolution that planning permission would be granted and was two days short of three months from the actual grant of planning permission on November 22.

11. Common sense suggests that LCC and Global were perfectly alive to the risk of a legal challenge to the grant of planning permission. Contractual arrangements reached between them, mean that, in effect, LCC bear the financial risk of such a challenge. During the period between the decision of November 22 and the pre-action letter of January 31, LCC incurred external fees and internal costs in the region of £400,000 and Global incurred external fees and internal costs in the region of £2.38M. It is not surprising that in a project of this size, progress needs to be made and such costs incurred. On March 2, 2007, LCC entered into the Waste PFI Contract with Global. This contract also provides for the development of another plant elsewhere in the county. These two facilities are intended to enable LCC and Blackpool BC to meet their obligations under the Landfill Directive and the waste emissions legislation, to divert biodegradable municipal waste from landfill. It thus follows that LCC and Global entered the ***614** contract in the knowledge of the legal challenge, as is made clear in the witness statement of Arthur Browne, LCC's Director for Waste and Natural Resources Management. It was considered that LCC had no realistic option other than to conclude the contract.

12. A waste technology plant such as this requires a waste management licence to be granted by the Environment Agency. This was given on March 28, 2007.

13. An Acknowledgement of Service was filed with summary grounds on March 14, 2007. On May 8, 2007, Keith J. ordered that there should be a "rolled-up" hearing of the application for permission to proceed with the claim and the substantive claim. He gave directions for accelerated service of detailed grounds and evidence and for the hearing. By this route, these rolled-up applications come before me. The matter was heard on September 20 and 21, 2007. I gave my decision on the second day of the hearing, with reasons reserved. I now give those reasons. It should be noted that throughout the hearing it was clear that there was an identity of interest and viewpoint between LCC and Global. The latter took no independent part in the proceedings.

Standing

14. LCC takes the point that RAWS lacks standing to bring the claim. Mr Elvin Q.C. for LCC conceded immediately that the group of local residents and borough councillors who are members and officers of RAWS would as individuals have sufficient standing and that while they formed an incorporated association, those individuals and any unincorporated association formed of them, could properly bring this claim. The point thus turns on the formation of a company limited by guarantee.

15. The Claimant company was incorporated on February 14, 2007, 2 days before the claim was issued. Mr Elvin makes the point that the Claimant company could not therefore have been an interested party during the course of the application for planning permission. He goes on to say that no clear explanation has been put forward by the Claimant for the formation of the company and that:

> "… the only reasonable conclusion is that the claimant was incorporated by members of the unincorporated Residents Against Waste Site solely for the purpose of limiting their exposure to costs."

He cites some text from the RAWS website, where the message he said is clear:

> "We can limit our own liability by becoming a company limited by guarantee."

16. Mr Wolfe for RAWS argues that it is well established that a company formed by residents who object to the grant of planning permission has standing to challenge that permission: see for example *R. v Leicestershire CC Ex p. Blackfordby and Boothorpe Action Group Ltd [2001] Env. L.R. 35* (Richards J.) and Herefordshire Waste Watchers Ltd v Hereford Council [2005] EWHC 191 (Admin) (Elias J.). Mr Wolfe says it is not correct that there should be a test that such a company constitutes a "person aggrieved" and that such an approach has long been discredited—see ***615** *R. v Inland Revenue Commissioners Ex p. National Federation of Self Employed and Small Businesses [1982] A.C. 617* per Lord Diplock 642b–e. In so far as LCC rely upon the limit set out in *R. v Secretary of State for the Environment Ex p. Rose Theatre Trust Co [1990] 1 Q.B. 504* , Mr Wolfe says the approach in that case no longer represents the Courts approach to standing, see *R. v Somerset Council Ex p. Dixon [1998] Env. L.R. 111* . In that case, Mr Justice Sedley, as he then was, reviewed extensively the development of the law on standing and then said this at p.121:

> "I have taken some time on this issue because I am concerned to see that even the clear decision in the World Development Movement case, affirming as it does a strong line of modern authority and restoring as it turns out a powerful line of older authority, does not appear to have stopped attempts, some of them successful, to elevate the question of standing at the leave stage above the elementary level of excluding busybodies and trouble makers and to demand something akin to a special private interest in the subject matter. Such an argument may — depending on the issue — be insufficient even at the substantive hearing to exclude an applicant. At the leave stage it is, in my respectful view, entirely misconceived.
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> Public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs — that is to say misuses of public power; and the courts have always been alive to the fact that a person or organisation with no particular stake in the issue or the outcome may, without in any sense being a mere meddler, wish and be well placed to call the attention of the court to an apparent misuse of public power. If an arguable case of such misuse can be made out on an application for leave, the court's only concern is to ensure that it is not being done for an ill motive. It is if, on a substantive hearing, the abuse of power is made out, that everything relevant to the applicant's standing will be weighed up, whether with regard to the grant or simply to the form of relief."

17. Mr Elvin submits that the standing requirements for a planning challenge of this kind should as a matter of consistency and fairness be the same as those required under s.288 of the Town and Country Planning Act 1990 , which uses the "persons aggrieved" formula. In my judgment, Mr Wolfe is right to reject this approach. The "persons aggrieved" test is designed precisely to afford rights of challenge to individuals whose private interests are affected and which very often do not turn on any suggested illegality or "public wrong" by a public body. The situations are not the same.

18. Mr Wolfe relies upon the approach taken by Richards J., as he then was, in the Blackfordby case cited above. In that case, the Judge dealt with an analogous situation to the instant case. Counsel for Leicestershire CC submitted on the facts there that the company had been formed specifically "… with the intention that its members would not be liable in costs should the proceedings fail" and that in such circumstances as a matter of public policy, the Court should not accord standing to such a company. The learned Judge refused to draw the adverse inference in that case, but concluded that on the evidence there, the company had been formed to achieve a proper formal and legal structure to ***616** administer the funds of the action group in question and manage its affairs properly and to enable the group to represent the community in a more formal and acceptable way. The Judge went on to say this:

> "In my view the incorporation of a local action group ought not to be a bar to the bringing of an application for judicial review. Technically, it may be said, the company does not have a relevant interest of its own; but in substance it represents the interests of local residents who, many of whom, do have a relevant interest. Incorporation has a number of advantages, some of which motivated the incorporation of the action group in this case. It is true that another advantage is the avoidance of substantial personal liability of members for the costs of unsuccessful legal proceedings. But that should not preclude the use of a corporate vehicle, at least where incorporation is not for the sole purpose of escaping the direct impact of an adverse costs order (and possibly even where it is for that purpose). The costs position can be dealt with adequately by requiring the provision of security for costs in a realistically large sum. In the present case, security was ordered in the sum of £15000. Whether that was sufficient may be open to doubt, given the sheer size of the case … it is, however, the right approach in principle."

19. I accept that formulation of the proper approach to this problem. If the true objection to the grant of standing to a company, formed in circumstances such as this, is the costs protection afforded to those who might otherwise have a starker choice as to whether to take legal action or not, then the proper approach must surely be to address the costs problem, rather than seek to undermine the standing of the company.

20. The question of costs was addressed in this case. Initially, a request for security for costs in the sum of £60,000 was made on behalf of LCC on April 4, 2007. Negotiations continued throughout that month and into May. Eventually on May 6, the solicitors for RAWS confirmed that they were holding £25,000 towards costs liability and on May 18, LCC accepted that offer of security for costs in the following terms:

> "To avoid the time and expense of making an application to the court, I am instructed to accept this offer without prejudice to our right to apply to the court at a later date for the security to be increased if there is any change in circumstances."

No further application for security has been made.

21. The courts must retain capacity to prevent time-wasting or meddling applications for judicial review. Subject to that principle, on an application for leave (or as here, a rolled-up application) the court will look to the substance of the matter. Costs are a discrete question and it is perfectly open to a defendant in this situation to make energetic attempts for adequate security before costs.

22. In any event, on the facts of this case, there is no question that the claim is frivolous or meddling or spurious. Agreement was reached on security for costs and accordingly, it seems to me there is no basis on which this Claimant should be precluded from this claim by reference to standing.

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Lack of Promptness

23. The Defendant takes several points under the heading of promptness. First, although the formal decision was issued on November 22 it is said, the resolution of the Committee on November 1 was effectively the decision and the Claimant was in full knowledge of that. Next, LCC do not dispute the claim was brought within three months from the date when the grounds of challenge arose but, in the circumstances, they say that was not a "prompt" claim because of the earlier resolution. Next, LCC take the point that a pre-action letter should have been sent, and could have been sent between November 1 and the issue of permission on November 22 in the period when LCC still had the power to change the grant of planning permission. This last point from LCC is designed to meet the argument made by RAWS that no pre-action letter is appropriate, according to the Protocol, where the Defendant does not have the legal power to change the decision being challenged. LCC also say that there is no explanation for the delay up to the issue of the claim on February 20, 2007. LCC adds that there is prejudice to the Defendant arising from the delay. In reliance on two other cases, by way of illustration, LCC claims that in circumstances such as this, delay should be fatal to this claim. Those cases are *R. (on the application of Hardy) v Pembrokeshire CC [2006] Env. L.R. 16* and *R. (on the application of Malster) v Ipswich BC [2002] P.L.C.R. 14; [2001] EWCA Civ 1715* . In both those cases, specific circumstances applied which meant that the claimant had been put on notice as to particular urgency of time and as to the risks and consequences that would be caused by delay.

24. In the instant case, RAWS' response to this criticism is to say, in effect, that nothing different would have been done by LCC had the claim been mounted earlier. This is not a case where a contract would not have been signed or a football stadium not demolished. Indeed, says the Claimant, quite the contrary. LCC (and the Interested Party) have carried on regardless, not only after having been told the claim was pending but also since the claim was formally commenced.

25. In my judgment, it is not necessary to deal with this aspect of the claim at great length. LCC knew of the local opposition and it is clear they were watching developments on the RAWS website throughout the period through to the issue of the claim. They anticipated the legal claim in the terms of their contractual arrangements with Global. There is every indication

that they proceeded along the same timetable as they would have done, had there been a letter before planning permission was formally granted. In my judgment there is no basis in the evidence for saying otherwise.

26. On the other side of the fence, RAWS took some time to get themselves organised, both in terms of creating the company, but also in facing up to the risks of challenge. They did not do so in secret. It may be that they could have issued proceedings three or even four weeks earlier. However, in the event they managed to do so just within the three month limit from the issue of planning permission. In my judgment, the claim was absolutely on the brink of being out of time. However, as Sullivan J. emphasised in the Hardy case to which I have made reference: ***618**

> "Promptness is not to be considered in the abstract. One is concerned with the practical implications of any lack of promptness. The interested parties could not reasonably have been expected to halt their multi million pound contracts in response to [tentative indications that proceedings may be issued]."

In the instant case, the Interested Party and Defendant did not halt their contracts in response to the actual issue of proceedings and there is no evidence on which I can find safely that they would in fact have done so had the proceedings been issued three or four weeks earlier.

27. For those reasons, I do not refuse to grant permission to apply for judicial review upon the ground of delay or any consequential prejudice.

The Substantive Grounds of Challenge

28. The Claimants' letter before action on January 31 listed eight putative grounds for judicial review of the decision. Of these only two are pursued. First, that LCC acted unlawfully in that it failed to give effect to its obligations under para.4 of Sch.4 to the Waste Management Licensing Regulations 1994 , which sets out the relevant objectives in relation to the disposal or recovery of waste.

29. The second ground which is sought to be maintained is that the LCC unlawfully failed to secure the traffic routeing around and to the site which the application for planning permission, and the council as planning authority, had recognised to be critical. I will take those two grounds in turn.

Ground 1 "The relevant objectives"

30. The statutory framework giving rise to the relevant objectives is not in itself contentious. The obligations arising from Art.4 of the Framework Directive on Waste (75/442/EC as amended) are given effect in England by reg.19 of and Sch.4 to the Waste Management Licensing Regulations 1994 (the Regulations). Paragraph 2(1) of Sch.4 to the Regulations requires that:

> "The competent authorities shall discharge their specified functions, in so far as they relate to the recovery or disposal of waste, with relevant objectives."

31. It is agreed that LCC was the "competent authority" in relation to which the grant of planning permission was a "specified function".

32. Paragraph 4(1) of Sch.4 then says this:

> "For the purposes of this Schedule the following objectives are relevant objectives in relation to the disposal or recovery of waste — (a) ensuring that waste is recovered or disposed of without

> endangering health and without using processes or methods which could harm the environment and in particular without — (i) risk to water, air, soil, plants or animals; or (ii) causing nuisance through noise or odours."

33. The Court of Appeal has considered the obligations of a planning authority with regard to the relevant objectives in *R. (on the application of Thornby Farms Ltd) v Daventry DC [2002] EWCA Civ 31; (2003) Q.B. 503* . ***619** At [53], Pill L.J. held:

> "An objective in my judgment is something different from a material consideration. I agree with Richards J that it is an end at which to aim, a goal. The general use of the word appears to be a modern one. In the 1950 edition of the Concise Oxford Dictionary the meaning now adopted is given only a military use: "towards which the advance of troops is directed". A material consideration is a factor to be taken into account when making a decision and the objective to be attained will be such a consideration, but it is more than that. An objective which is obligatory must always be kept in mind when making a decision even while the decision-maker has regard to other material considerations. Some decisions involve more progress towards achieving the objective than others. On occasions, the giving of weight to other considerations will mean that little or no progress is made. I accept that there could be decisions affecting waste disposal in which the weight given to other considerations may produce a result which involves so plain and flagrant a disregard for the objective that there is a breach of obligation. However, provided the objective is kept in mind, decisions in which the decisive consideration has not been the contribution they make to the achievement of the objective may still be lawful. I do not in any event favour an attempt to create a hierarchy of material considerations whereby the law would require decision-makers to give different weight to different considerations."

34. The Court of Appeal was clearly seeking to avoid an artificial "hierarchy of material considerations". The formulation that a "plain and fragrant … disregard for the objective" conveys the correct sense of what is required by the law, before a breach of duty is established. The objectives are to be kept in mind, must not be disregarded, and must be set alongside all the other considerations which are material in the given case.

35. Counsel for LCC sought to emphasise—in my judgment, correctly—that it is the substance of the relevant objectives which must be kept in mind. The decision does not have to set out explicitly the relevant objectives, or refer expressly either to the Directive or to Sch.4 to the Regulations. Lip service is not sufficient. Reference to the relevant objectives in the course of an otherwise unlawful decision could not save it. An absence of reference to the relevant objectives in an otherwise lawful decision, where the decision maker has in fact paid proper attention to them, will not condemn the decision. A challenge on these grounds must not become a semantic game.

36. In the course of the hearing, both Mr Elvin and Mr Wolfe agreed with the proposition that the question of whether this decision failed to pay proper attention to the relevant objectives must be judged by substance and not form, by content not language. Yet the thrust of RAWS' attack on the decision was in truth one of language. In this regard, Mr Wolfe's submissions made orally did not depart from his written submissions, whether the Grounds of Claim or subsequent skeleton argument. Mr Wolfe attacked the report to the Development Control ***620** Committee from Mr Perigo because it made no mention of Art.4 of the Directive nor of the relevant provisions of the Regulations—see the Grounds, para.20. He attacked the language of the report because it stated that:

> "The proposal would not result in unacceptable [emphasis added] adverse impacts on people or the environment by reason of noise, odour, dust or traffic."

See the Grounds para.21. Indeed, throughout the written and oral submissions of the Claimant, the approach was really consistent: the report to the Committee, the supporting documentation and, by extension, the decision of the LCC was couched in statements that environmental impacts of the kind which engaged the relevant objectives were "acceptable" or "not unacceptable"; levels of emissions were "at appropriate levels".

37. By these distinctions of language, Mr Wolfe no doubt intended to convey that those advising the LCC and the Committee in reaching its decision had in substance the wrong considerations in mind, and thus reached an unlawful conclusion. Mr Wolfe argued that the LCC in general, and Mr Perigo in particular, must have been fully alive to the relevant distinctions of language, since the LCC made explicit reference to the relevant objectives, and used the language of minimisation of environmental impacts, when applying to the Environment Agency for the operating licence. Yet in my view, this argument is self defeating.

38. There is no suggestion of bad faith on the part of the LCC, or its senior officers responsible for this complex series of steps. If bad faith were in question, then it might be possible to say that a differential use of language was a cynical means of concealing the fact that no proper consideration had been given to the relevant objectives, while seeking to convey that it had been, to the more educated audience at the Environment Agency. However, in the absence of any contention of bad faith, it must follow that Mr Perigo and the others at LCC in charge of the process, knew of the relevant objectives and had them in mind. The fact that they expressed themselves somewhat differently in different documentation loses any real significance, in the absence of bad faith.

39. It is also noteworthy that little by way of different outcome was claimed, as even a potential consequence of the wrong approach for which Mr Wolfe contended. It was said that the council's report did not deal with or respond to suggestions which residents had raised including the choice of site access and the location within the site of the diesel storage tanks and the "wagon wash". While these are not insignificant questions, they are relatively limited in scope.

40. On behalf of LCC, Mr Elvin emphasised that the relevant objectives were held in mind actively throughout two stages crucial to this planning decision. The first stage was in the preparation of the development plan, which was the context into which this planning decision fell. The second stage was when those responsible within LCC were considering and preparing planning applications.

41. Section 38 (6) of the Planning and Compulsory Purchase Act 2004 requires a planning authority to determine planning applications in accordance with the development plan, unless material considerations indicate otherwise. The Lancashire Minerals and Waste Local Plan was adopted on December 28, ***621** 2001. This plan was adopted taking into account and giving effect to the relevant objectives, which were set out extensively in Appendix 6 to the plan and the plan itself in paragraph 1.8 makes direct reference to the need to the key objectives. There are other stipulations throughout the plan itself emphasising the importance of the relevant objectives.

42. A similar point is made in relation to the Joint Lancashire Structure Plan adopted in March 2005. The objectives also feature directly in the drafting of the LCC's Municipal Waste Management Strategy (MWSS). In short, LCC contends that the governing development plans and the Municipal Waste Management Strategy all incorporated the objectives and set a strong framework within which this particular application was prepared.

43. Mr Elvin also agreed the objectives had to be kept specifically in mind during the more detailed work. It is clear that Mr Perigo says they were. In addition to pointing to the emphasis given to the "relevant objectives" in the various broader policy documents adopted, he emphasised that specific training was given to members of the Development Control Committee, which included an explanation of the statutory regime and involved teaching about the Waste Directive and the relevant objectives. In addition, at the level of planning application Mr Perigo emphasised that:

> "All planning applications must be assessed against the policies of the development plan. Given the nature of this proposal it is important to consider it against the relevant objectives. The reports clearly assess the proposals against all the relevant development plan policies. These policies reflect the objectives of the framework. It was considered unnecessary to reiterate the objectives when they are so clearly reflected in the relevant policies."

44. Thus, in summary, the position taken by the LCC is that the over arching plans and policies under which this planning application was prepared and considered, enshrined the relevant objectives. He was aware of them. Councillors had been educated about them. The fact that there was no further explicit mention of the relevant objectives in the detailed documentation was because that was unnecessary.

45. Mr Perigo went on to add this:

> "I take issue with the Claimant's approach to the Report to Committee. It was not balancing benefits from the proposals against the harm it (sic) might cause. Instead officers were satisfied that any potential problems associated with the proposal had been dealt with and that the proposal complied with the Plan Policies (drafted to embody the WFD Objectives) without generating unacceptable impacts. This was not a case where officers (with whom members agreed) considered that the benefits had to be set against breaches of policy in order to justify the ground of permission."

46. Mr Elvin also relied on the fact that the Report to the Committee in relation to this decision drew members' attention to the national policy document PPS10 which itself embodies the relevant objectives in paras 1 and 3. It is not necessary for me to quote the text.

***622**

47. Finally, the Defendant argued that more explicit reference to the relevant objectives than was made, would have made no difference to the outcome given the issues considered through the application of development plan policy.

48. As I have already indicated, in my judgment this ground was just arguable and had it been considered in the normal sequence, I would have granted permission for judicial review proceedings. However, it is not made out. The question can only properly be determined by reference to substance. It is clear that the underlying plans and policies developed by LCC fully took into account the relevant objectives. It is also clear that Mr Perigo and the other senior officers of LCC were fully aware of these statutory provisions. Councillors had been taught about them, no doubt as one of a number of legal provisions, before they took up their duties of this Committee. In my judgment, the Claimant has failed to demonstrate that the LCC, its officers and members, paid no or no sufficient attention to the relevant objectives in reaching this decision. It might have been desirable for Mr Perigo to include a paragraph in his report to the Committee stating that specific consideration had been given by officers, and should be given by the Committee, to the relevant objectives. However, even that observation may in truth come perilously close to recommending lip-service to the relevant objectives. The key here is: were they borne properly in mind? The Claimant has failed to show they were not.

49. Were it necessary to make a finding on the point, on the material presently before me, I would find that even a more concentrated explicit or extended consideration of the relevant objectives would have made no difference to the outcome.

Ground 2: Routeing of Traffic

50. Traffic routeing around this site was of particular concern to many of the residents. The complaint is that LCC unlawfully failed to secure the traffic routeing which the application for planning permission, and the council as planning authority, had recognised to be critical, and as a consequence the council acted unlawfully in granting planning permission. The desirable traffic routeing is not really the issue here. The question is one of enforcement.

51. The factual position is helpfully set out in the witness statement of Mr John Geldard, who is Group Head: Waste and Minerals Policy, within the Environment Directorate of LCC. Mr Geldard explained that there were widespread representations from the public and other interested parties about traffic routeing and that with changes to the site area, it became feasible to meet those requests. Thus even though it was not considered essential by the council as planning or highway authority, the council as Waste Development Authority decided the proposal should only utilise the northern

entrance. Mr Geldard goes on to explain that there is a contractual obligation between LCC and Global to comply with routeing provisions, which can be enforced as between those parties by penalties under the contract and policed using satellite navigation technology.

**623*

52. However, whilst planning permission runs with the land, obligations imposed through contract between LCC as Waste Development Authority and Global do not run with the land. Here lies the problem.

53. Traffic concerns were addressed by the Committee in its meeting of November 1, 2006. It is agreed that there was an error in the minute of the proceedings which records Stuart Perigo as having said that "traffic routeing would be controlled by means of a condition to the planning application". The error was that Mr Perigo said "vehicle movements" not "vehicle routeing" would be the subject of a planning condition. This error was identified by the Claimants' letter of January 31, 2007 and the minutes were amended. Accordingly, there is and was no condition relating to vehicle routeing and such condition was not suggested or decided on at the time.

54. The Defendants argued that such a condition was unnecessary and inappropriate, having regard to the likely traffic implications of the development. They argued this is a matter of planning judgment and said not to be readily amenable to judicial review: see for example the speech of Lord Hoffman in *Tesco Stores Ltd v Secretary of State [1995] 1 W.L.R. 759* at 780. The Defendants further argued that national policy advises that conditions should only be imposed if they are "necessary, relevant to the development to be permitted" and "reasonable in all other respects". At the time of this decision, the relevant Department of Environment circular was DOE Circular 11/95 which at para/71 advises:

> "Planning conditions are not an appropriate means of controlling the right of passage over public highways."

55. Mr Wolfe for the Claimant argued that while it may be inappropriate normally to grant a condition in relation to traffic routing, because all or most of the vehicles belong to the public, such considerations do not apply where all, or very nearly all, of the vehicles are heavy lorries owned or controlled by corporate clients (whether public or private corporations) utilising a site such as this. In the end, I was unpersuaded by this argument as a basis of a claim for judicial review. While such a condition might be possible, it would require careful drafting. In the face of established planning practice and national policy as outlined, it would hardly be irrational or unlawful to grant planning permission in the absence of such a planning condition.

56. However, there was another mechanism. As was in due course volunteered by LCC in the course of the hearing, with careful drafting it is possible for the LCC to give a unilateral undertaking, in its capacity as applicant for planning permission pursuant to s.106 of the Town and Country Planning Act 1990 . Such an undertaking does attach to the land and thus would not expire, if and when there were subsequently to be a different operator at the site.

57. It seems to me that it was, on balance, a failure not to consider it essential to ensure that traffic routeing conditions were secured to the land, by means of LCC as Waste Development Authority offering, and in any event LCC as Waste Planning Authority insisting upon, the relevant contractual stipulations as to traffic routeing being made a planning obligation, within the meaning of s.106 of the Town and Country Planning Act 1990 . In the context of a highly **624* vexed and difficult application such as this one, that should have been considered essential.

58. For those reasons, as I have already indicated, I give permission for judicial review on this narrow ground. I find that the ground is made out to the extent I have indicated. The LCC having already undertaken to bring about such an obligation, no further order is required from me.

Conclusion

59. The Claimant has thus established standing, and the application for judicial review is not ruled out on grounds of time. The Claimant has leave to proceed to judicial review on Ground 2 of the application and substantive relief in the form of the

undertaking already given by LCC. On the main ground of the application, permission would have been granted if the matter was heard separately, but the application for judicial review fails.

COMMENTARY

C1. Access to justice in the environmental context has proved to be an increasing challenge, with the pressure to ensure that citizens are practically, as well as legally, able to challenge decisions increasing as obligations under the Aarhus Convention start to bite. As Sullivan J. has stated in the recent report on *Ensuring access to environmental justice in England and Wales* :

> "Unless more is done, and the Court's approach to costs is altered so as to recognise that there is a public interest in securing compliance with environmental law, it will only be a matter of time before the United Kingdom is taken to task for failing to live up to its obligations under Aarhus." (www.wwf.org.uk/filelibrary/pdf/justice_report_08.pdf)

C2. That report explores the challenges and considers whether current law and practice creates barriers to access to justice in environmental matters. One of the main conclusions is that, whilst administrative judicial procedures might well be considered fair, equitable and timely (though the latter is debatable in many cases), there is a significant barrier to those seeking to ensure that environmental laws are complied with, in the form of prohibitive expense. The main problem appears to be that the costs rules have been designed with private litigants in mind and so do not take sufficient account of the public interest in environmental issues. The report considers Legal Aid and public funding of environmental cases, the application of general costs principles in the environmental context, the use of Protective Costs Orders, costs awards against defendants, the availability of injunctions and other remedies, and case management in environmental judicial review. The use of limited liability companies as claimants, with appropriate security for costs, is given a section of its own. Sullivan J refers to the present case, together with the Blackfordby case, as authority that it is acceptable for members of the public to form a limited company to act as a claimant in judicial review cases. Costs issues are generally dealt with by the provision of advanced security for costs to avoid the problem of companies ***625*** having only nominal share value; in the present case, the claimant company provided £25,000 as security, the sum agreed by the defendant local authority. This demonstrates that the company cannot be used as a device to avoid paying costs, but as a means of providing a limit on the potential exposure (which is, of course, precisely what limited companies are meant to do). Sullivan J. suggests that the courts should give judicial consideration to the level of such security, so as to ensure compliance with the requirements of the Convention. It is perhaps no surprise that limited companies should be seen as acceptable vehicles for judicial challenge in a context where special purpose companies and public/private contracting is increasingly seen as an effective means of securing delivery of public services. Those on the "other side" have good reason to manage and limit exposure to liabilities in these and other ways and it would seem inequitable to prevent challengers from limiting (not avoiding) potential exposure in similar ways, provided that there is sufficient interest amongst the company members as individuals in the issues at play.

626

