Case No: CO/3248/2004

Neutral Citation Number [2005] EWHC 191 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINSTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday, 18th February 2005

Before:

THE HONOURABLE MR JUSTICE ELIAS

HEREFORD WASTE WATCHERS LIMITED — **Claimant**

-and-

HEREFORD COUNCIL — **Defendant**

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
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Mr David Wolfe (instructed by Phil Shiner Y Public Interest Lawyers for the Claimant)
Mr Timothy Jones (instructed by Hereford District Council for the Defendant)

Judgment

Mr Justice Elias:

Introduction.

1. On 6th April 2004 Herefordshire Council, the defendant in these proceedings granted planning permission to Estech Europe Ltd (the interested party) to develop a waste treatment and recycling facility at the Stone Street Industrial Estate of Madley in Hereford. The permission was made subject to a whole range of conditions, some of which are material to this application.

2. The claimant seeks by way of judicial review to quash the permission. It is a company limited by guarantee, which was formed specifically to challenge the development in this case, although it proposes in the future to take an interest in, and monitor, planning applications in its area which have an impact on the environment.

3. The defendant council is the waste planning authority for Herefordshire. The proposed waste facility is intended to process 100,000 tons a year of municipal solid waste, most of which would come from municipal waste collections from Hereford and the surrounding areas. The environmental statement submitted with the application described the process in the following terms:

> "A waste treatment process known as the fibre cycle process which utilises the combination of steam autoclaves run at high temperature and low pressure to sanitise and stabilise municipal solid waste."

The process apparently neutralises the putrescible element of the waste and leaves it in a state where it can be disposed of more readily.

4. There is some dispute as to precisely how novel this process is. It is common ground that there is no similar facility operating in the world. However, each component had been tried and tested, as has the combination of components, albeit on a somewhat smaller scale than the proposed development. A demonstration plant was operated on the site and observed by staff of both the Council and the Environment Agency

5. The claimant contends that the system is not sufficiently tried and tested for it to be developed in a sensitive area. It referred to an assessment report made by a local authority in the USA, which commented, in respect of a similar process, that, "it would not be in the interests of the region to be the experimental laboratory for unproven, untested and unseen technology." However, whilst this concern underlies this application for review, the grounds are in fact more specifically focussed, being directed at two matters. The first ground relates to the environmental statement (ES) which was provided by the developers with the application. The ES is required to provide information about any significant environmental effects of the development and the measures proposed to prevent or mitigate them. The claimant submits that it has failed properly and fully to provide relevant information and that as a consequence the authority was unable to assess whether the effects were significant or not. It is alleged that the authority ought not have granted permissions subject to conditions without first having the material information available. By so doing they were potentially depriving consultees of the opportunity to be consulted about the environmental impact.

6. The second ground of challenge is that the authority failed properly to consider an alternative site. The officer's report had informed members that it was of fundamental importance that

planning permission could only be granted in accordance with the principles of best practicable environmental option (BPEO). The claimant had contended that the applicant's site was by no means the BPEO and it suggested an alternative site on an industrial estate in Hereford. The claimant submits that the officer's report referred to this alternative site but rejected it on the false premise that it was located in the flood plain and was therefore considered to be at high risk of flooding. The claimant says that it never was located in the flood plain and accordingly that in approving the report and granting permission, the members were misinformed about a highly material matter.

7. The defendant denies that either ground is sustainable. It is submitted that the members, in line with the officer's report, plainly accepted that there was no significant adverse environmental impact resulting from the operation of the process. In those circumstances there is no obligation to consult over the environmental effects at all. As to the alternative site, the defendant says that the reason for rejecting the alternative site was indeed the adverse potential impact of flooding, that this was sufficiently clear from the officer's report, and that the members would not have been misled in any way.

The environmental statement.

8. The developer provided a very detailed environmental statement ("ES"). This reflected the findings of an environmental impact assessment carried out by experts whom they appointed, namely Enviros Consulting Limited. There is a section in the report dealing with air quality assessment. It commented that the main air quality issue arose from the potential effect of the increase in heavy goods vehicle traffic and the pollution caused by the gas fired boiler on site. But it was considered that these would not cause any major increase in atmospheric pollutants, except very locally. However, as far as pollution from the process itself was concerned, the view of the developers was that "there is no combustion of the wastes in the process and there are insignificant emissions during treatment and the subsequent materials separation."(paragraph 2.2).

9. As to alternative sites, a total of ten were considered and assessed. One of the criteria adopted was what was termed "floodplain." The statement identified the relevance of this criterion as being that "due to the nature of the material to be treated by the proposed development, it would be inappropriate to site it in an area liable to suffer from floods. The potential resulting pollution could be significant."

10. The ES considered a number of sites in the Rotherwas industrial estate but only two were of a size to house the proposed development. It noted that one of these, in Twyford Road North, appeared to lie outside the floodplain but that the other did not. The various possible sites on the estate were considered together and a number of disadvantages were identified, including the fact that "much of the area is within floodplain and not suitable for the proposed use."

The Planning 's Officer's Report of 2004

11. The planning subcommittee had before it a very detailed report from the planning officer. It considered in detail various aspects of the proposal. In relation to the effect on air quality in the vicinity of the site, it drew heavily upon a separate report which had been prepared by the council's senior environmental health The planning officer's report quoted extensively from this earlier report. The relevant passages relating to air pollution were as follows:

> "The application only considers emissions to air from the two gas fired boilers (used to raise steam) and the emission from increased traffic associated with the development. It therefore presumes that emissions from the autoclaving process will be negligible, on

the basis that they internally vented, as they do not result from MSW (municipal solid waste) and CI (commercial/industrial) incineration via a stack. In this respect, it states that the only emissions from the process will be of steam, which will be released on an intermittent basis when the 'treatment' has finished and the autoclave door is opened. The application then states that much of this steam will be captured by a canopy and passed through a condenser for reuse in presumably a virtually closed system.

The application then states that any fugitive emissions escaping from this recirculatory system will be retained in the building (by negative air pressure) and will ultimately pass through dust abatement plant (a 'wringing separator') and odour abatement plant (a UV/ ozonation system) before emitted to atmosphere.

From the observed 'scaled-down' trial, I would agree that the process is not combustion and would also agree that the only probable pollutant emissions will be contained within the intermittent steam release when the autoclave doors are opened. Therefore the contentious air pollutants and counter arguments normally associated with thermal waste incineration would not appear to be the case here. However, no analysed samples of the steam and its emissions have been presented with the application in support of this.

It is my view that should permission be granted the installation should be regulated by the Environment Agency under:

(i) A permit to operate a "recovery of waste" activity, bearing in mind the application suggests that the resulting autoclaved fibre may be supplied to power stations as a bio-fuel. (See section 5.5, Part A1 of the Pollution Prevention and Control Regs 2000)

Or at very least by

(ii) A waste management licence

Under PPG 23 "Planning and Pollution", it would not normally be appropriate to propose specific conditions relating to detailed air pollution control measures that will later be regulated by conditions under specific pollution/waste control licences or permits as mentioned above. However, I understand that owing to the nature of this application, some comments would be appropriate. I therefore would offer the following:

It is of paramount importance that the building is maintained under negative pressure and the application suggests this will be achieved. However, I have reservations about this as the building is very large and a significant 'air change per hour' rate will therefore be essential if large vehicular access doors are to be left open in the working day (as the application implies). No 'air lock' HGV entrance doors are offered in the application either, which would overcome the detrimental effects of opening doors. I therefore suggest the following condition:

"All doors to the building shall be kept firmly closed when not in use."

"The general building structure and ventilation shall be designed to contain fugitive emissions and ensure containment of steam, odorous air and dust within the building. To achieve this, the ventilation system shall be suitable and sufficient, so as to maintain negative pressure at all times when processing or when steam, odours or dust are likely to be present within the building.

Note: the requirements of a permit or waste management licence are likely to include such measures and in such a case the tighter standard shall prevail."

Abatement plant has been proposed for only dust and odour, although I am not clear of the exact final discharge point to atmosphere. Both proposed abatement systems are supported with text in the appendices, but I have no experience of these designs being used elsewhere in an industrial capacity in Herefordshire. The application presumes there will be no emissions other than dust and odour from the autoclaves. I therefore offer the following:

> "Prior to the development of the site, a report shall be submitted to Herefordshire Council, which specifies the levels of all pollutants (including dust and odour) within the steam/emissions from the autoclaves and process building and the predicted emission level of these from the discharge point to atmosphere.
>
> Note: Herefordshire Council expects that this report shall be based on the analysis of captured autoclave or stack emissions."

12. The officer 's report also considered the possibility of alternative sites. It did so in the context of considering the best practicable environmental option (BPEO). The report commented that objectors had questioned the methodology which had been adopted by the developers as well as its application to the possible sites. It commented that there was some validity in those objections. It noted that some objectors had identified a site at the Rotherwas estate. The report then referred to the fact that the Environmental Agency had advised that the locations identified by the objectors lay within the indicative flood plain. The Agency had added, "any site which is located in or within close proximity to the flood plain is considered at high risk of flooding." This was stated to be one of the main reasons for rejecting those sites. The officer's conclusion with respect to the BPEO was that "it could not be argued that there are grounds for asserting that any other site in the county is a better practicable option for this proposal than the application site."(paragraph.6.61)

The Planning Authority's decision.

13. The recommendation of the planning officer was that permission should be granted subject to a number of conditions. That was the decision taken by the planning authority which adopted almost without change the conditions suggested by the planning officer. By adopting the officer's report, the members must be taken to have approved the planning permission for the reasons given by the planning officer, since there is no indication to the contrary; see *R (Richardson) v North Yorkshire County Council [2003] EWCA Civ 1860; [2004] 1 WLR1920* per Simon Brown LJ at para. 35. Given that I have no information at all of any discussions between the members when they considered this matter, the document on which I have to focus is therefore the officer's report itself.

14. Three of the conditions attached to this planning permission have been the subject of consideration in this application. Those conditions, and the reasons for them, are as follows:

> 4(g) " No development shall take place until proposals for the location and construction of the areas and means of:
> ....a report specifying the levels of all pollutants (including dust and odour) within the steam/emissions form the autoclaves and process building and the predicted emission level of these from the discharged point to atmosphere, based on the analysis of

captured autoclave or stack emissions have been submitted to and agreed in writing by the local planning authority"

"Reason; To prevent pollution of the water environment and in the interests of the amenity of local people".

33. "The general building structure and ventilation shall be designed to contain fugitive emissions and ensure containment of steam, odorous air and dust within the building. To achieve this, the ventilation system shall be suitable and sufficient, so as to maintain negative pressure at all times when processing or when steam, odours or dust are likely to be present within the building"

34. "Prior to the discharge of process air from the building, suitable and sufficient abatement plant shall be installed to abate dust and odour (and any other pollutant identified) prior to its release to atmosphere. Details of these plant shall be submitted to Herefordshire Council for approval, and shall not be installed until they have expressed their satisfaction in writing."

For each of these conditions the reason given was "To prevent pollution of the environment and in the interests of local people and businesses."

The Law.

15. The origin of the law regulating the environmental impact of development is the Council Directive 85/337/EEC of 27 June 1985 as amended. This Directive requires that prior to consent to a development being granted, there should be an environmental impact assessment which will provide the competent authorities with relevant information to enable them to take a decision on a specified project with a comprehensive understanding of the project's likely significant impact on the environment. The United Kingdom has given effect to the Directive by Regulations. The current regulations, which were also in force at the material time, are the Town and Country Planning (Environmental Impact Assessment) Regulations 1999. They must where possible be construed so as to give effect to the Directive. The purpose of the Directive is described in the speech of Lord Hoffman in *Berkley v Secretary of State for the Environment* [2001] 2 AC 603 at 615 in the following terms:-

> "I said in *R v North Yorkshire County Council, Ex p Brown* [2000] 1 AC 397, 404 that the purpose of the Directive was "to ensure that planning decisions which may affect the environment are made on the basis of full information". This was a concise statement, adequate in its context, but which needs for present purposes to be filled out. The Directive requires not merely that the planning authority should have the necessary information, but that it should have been obtained by means of a particular procedure, namely that of an EIA. And an essential element in this procedure is that what the Regulations call the "environmental statement" by the developer should have been "made available to the public" and that the public should have been "given the opportunity to express an opinion" in accordance with article 6(2) of the Directive. As Advocate General Elmer said in *Commission of the European Communities v Federal Republic of Germany* (Case C-431/92) [1995] ECR 1-2189, 2208-2209, paragraph 35:
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> > "It must be emphasised that the provisions of the Directive are essentially of a procedural nature. By the inclusion of information on the environment in the consent procedure it is ensured that the environmental impact of the project shall be included in the public debate and that the decision as to whether consent is to be given shall be adopted on an appropriate basis."

The directly enforceable right of the citizen which is accorded by the Directive is not merely a right to a fully informed decision on the substantive issue. It must have been adopted on an appropriate basis and that requires the inclusive and democratic procedure prescribed by the Directive in which the public, however misguided or wrongheaded its views may be, is given an opportunity to express its opinion on the environmental issues. In a later case (*Aannemersbedrif P K Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland* (Case C-72/95) [1996] ECR 1-5403, 5427, para 70), Advocate General Elmer made this point again:

> "Where a member state's implementation of the Directive is such that projects which are likely to have significant effects on the environment are not made the subject of an environmental impact assessment, the citizen is prevented from exercising his right to be heard.""

16. The emphasis therefore is on the need for a fully informed decision, the relevant information being provided in the first place by the developer, with further information resulting from the public consultation.

17. However, it is not necessary for information to be provided in the ES about every potential environmental effect. The Directive itself, as the first paragraph of the Preamble and Article 2 for example make clear, is concerned only with projects which are likely to have significant effects on the environment. The regulations are to the same effect. Regulation 3(2) provides:

> "The relevant planning authority ... shall not grant planning permission pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration and they shall state in their decision that they have done so."

18. According to Regulation 2(1), "environmental information" means:

> "the environmental statement, including any further information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development."

19. "An "environmental statement" means a statement –

> (a) that includes such information referred to in Part I of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but
> (b) that includes at least the information referred to in Part II of Schedule 4."

20. Part I of schedule 4, which sets out the information for inclusion in the statement, provides that it must include a description of the development; an outline of the main alternatives and an indication of the main reasons for the site chosen; a description of the aspects of the environment likely to be **significantly** affected by the development; a description of the likely **significant** effects of the development on the environment; and a description of the mitigating measures designed to prevent, reduce or offset any **significant** adverse effects.

21. The information set out in Part II, which is the minimum information which must always be provided, includes "the data required to identify and assess the **main** effects which the development is likely to have on the environment." (emphasis added,)

22. It is therefore only with respect to anticipated significant effects that relevant information, including relevant data, should be provided.

23. These provisions have been considered in a number of authorities. They were brought together and helpfully analysed by the Court of Appeal in *Smith v Secretary of State for the Environment* [2003] EWHC 262, [2003] Env LR 32. Waller LJ, with whose judgment Sedley LJ and Mrs Justice Black agreed, said this:

> "We have also been referred to the following decisions: *R v Rochdale Metropolitan Borough Council ex parte Tew and others* [1999] 3 PLR 74 and *R v Rochdale Metropolitan Borough Council ex. P. Milne* [2001] JPL 470 decisions of Sullivan J ; *R v Cornwall County Council ex p. Hardy* [2001] Env LR 26 a decision of Harrison J which followed Sullivan J's approach in *Tew* and *Milne*; *R (on the application of Barker) v London Borough of Bromley* [2002] Env LR 631 CA in which Sullivan J's approach in *Milne* and *Tew* was approved.
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> Principles which those authorities establish seem to me to be the following:- First, where outline planning consent is being applied for (and *Tew and Milne* were cases concerned with outline planning consent, *Milne* being round 2 of a battle over the same development), it is at the outline consent stage that the planning authority must have sufficient details of the proposed development, sufficient details of any impact on the environment, and sufficient details of any mitigation to enable it to comply with its article 4(2) obligation.
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> Second, the reason for that is that once outline planning consent has been given there is effectively no going back without (at the very least) the payment of compensation. As Sullivan J said in *Tew* "Even if significant adverse impacts are identified at the reserved matters stage, and it is then realised that mitigation measures will be inadequate, the local planning authority is powerless to prevent the development from proceeding" [97F]. There will accordingly be no proper opportunity when the planning authority considers the matters reserved to reappraise the environmental issues. Indeed *Barker* held that the obligation under article 4(2) is not an obligation on the planning authority at the consideration of the reserved issue stage.
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> Third, the planning authority or the Inspector will have failed to comply with article 4(2) if they attempt to leave over questions which relate to the significance of the impact on the environment, and the effectiveness of any mitigation. This is so because the scheme of the regulations giving effect to the Directive is to allow the public to have an opportunity to debate the environmental issues, and because it is for those considering whether consent to the development should be given to consider the impact and mitigation after that opportunity has been given. As Harrison J put it in *Hardy:-*
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> > "Mr Straker laid emphasis upon the fact that the local planning authority felt that, in imposing conditions, it had ensured that adequate powers would be available to it at the reserved matters stage. That, in my view, is no answer. At the reserved matters stage there are not the same statutory requirements for publicity and consultation. The environmental statement does not stand alone. Representations made by consultees are an important part of the environmental information which must be considered by the local planning authority before granting planning permission. Moreover, it is clear from the comprehensive list of likely significant effects in paragraph 2(c) of Schedule 3, and the reference to mitigation measures in paragraph 2(d), that it is intended that in accordance with the objectives of the Directive, the information contained in the environmental statement should be both comprehensive and systematic, so that a decision to

grant planning permission is taken "in full knowledge" of the project's likely significant effects on the environment. If consideration of some of the environmental impacts and mitigation measures is effectively postponed until the reserved matters stage, the decision to grant planning permission would have been taken with only a partial rather than a "full knowledge" of the likely significant effects of the project. That is not to suggest that full knowledge requires an environmental information statement to contain every conceivable scrap of environmental information about a particular project. The Directive and the Assessment Regulations require likely significant effects to be assessed. It will be for the local planning authority to decide whether a particular effect is significant, but a decision to defer a description of a likely significant adverse effect and any measures to avoid, reduce or remedy it to a later stage would not be in accordance with the terms in Schedule 3, would conflict with the public's right to make an input into the environmental information and would therefore conflict with the underlying purpose of the Directive".

Fourth, (and here as it seems to me one reaches the most difficult area) it is certainly possible consistent with the above principles to leave the final details of for example a landscaping scheme to be clarified either in the context of a reserved matter where outline planning consent has been granted, or by virtue of a condition where full planning consent is being given as in the instant case."

24. *Smith* was concerned with outline planning consent, but the same principles clearly apply to the grant of planning permission itself.

25. The authorities make it clear, therefore, that if the planning authority consider that a process or activity will have significant environmental effects then the ES needs to include the detailed information identified in schedule 4 to the regulations. It cannot leave the matter to be covered by conditions at a later stage. Even if that might otherwise be a satisfactory way of dealing with the problem, it frustrates the democratic purpose of the consultation process.

26. However, as the observations of Harrison J in the *Hardy* case make clear, it is a matter for the authority itself whether or not the development will have significant effects, and its decision on the point can only be challenged on traditional public law grounds. There is a screening system whereby the authority may give a decision whether an ES is required or not, and the regulations set out the material information which the developer has to provide if it seeks such an opinion (see regs 4, 5 and 7). In this case no screening opinion was required since the developer voluntarily provided the ES. But if the information is defective because it fails to deal with all significant environmental effects, even if it deals with some of them, then the ES will be inadequate and the consultation process will not reach to its full extent.

27. Mr Wolfe for the claimant contends that this is precisely what has occurred here. He accepts that it may have been open to the planning authority, in the light of the information which was provided by the developer, to have concluded that there were no significant environmental effects arising out of the operation of the process itself. In other words, the authority could properly have adopted the developer's own assessment. Had it done so, it would legitimately have required no further information from the developer. But he contends that this is not what the authority have done. Indeed, he alleges that, on the contrary, such indications in the report as there are suggest that it was assumed that there could be significant environmental effects. The thrust of the complaint is, therefore, that the authority ought to have required further information prior to granting permission and not as a condition of the development.

28. Mr Jones rightly points out that in assessing whether there the development will have significant environmental effects the planning authority is entitled in an appropriate case to have regard to the proposed mitigating measures. The authority can in certain cases properly conclude that given the mitigating measures, what would otherwise have been significant emissions will not in fact materialise. He relies upon the decision of the Court of Appeal in *Bellway Urban Renewal Southern v John Gillespie* [2003]EWCA Civ 400, [2003] Env LR 30. In that case the court was faced with the question whether the Secretary of State was entitled to conclude on the evidence that a particular development did not have any significant effects on the environment. It was common ground that the relevant site to be developed was contaminated land and various remedial measures were proposed to deal with the contamination. The Secretary of State held that having regard to these measures there would not be significant effects and therefore no environmental impact statement was required. Richards J quashed the decision on the grounds that the Secretary of State had erred in coming to that conclusion, and the Court of Appeal upheld his ruling. The Court considered whether and in what circumstances mitigating measures could be taken into account in determining whether the effects would or would not be significant. Pill LJ said this (paras 37-39):

> "The Secretary of State has to make a practical judgment as to whether the project would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location. The extent to which remedial measures are required to avoid significant effects on the environment, and the nature and complexity of such measures, will vary enormously but the Secretary of State is not as a matter of law required to ignore proposals for remedial measures included in the proposals before him when making his screening decision. In some cases the remedial measures will be modest in scope, or so plainly and easily achievable, that the Secretary of State can properly hold that the development project would not be likely to have significant effects on the environment even though, in the absence of the proposed remedial measures, it would be likely to have such effects. His decision is not in my judgment pre-determined either by the complexity of the project or by whether remedial measures are controversial though, in making the decision, the complexity of the project and of the proposed remedial measures may be important factors for consideration.
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> This approach accords with that of Sullivan J in *The Queen v Rochdale MBC ex parte Milne* [2001] Env LR 406 though the point in that case was a different one. It was whether a local planning authority could properly conclude that it had sufficient information to enable it to assess the likely significant effect on the environment notwithstanding that certain details of reserved matters were lacking. As Richards J, commenting on *Milne* in the present case, stated (paragraph 76):
>
> > "... it was clearly contemplated that various requirements relating to mitigation measures or feeding through into mitigating measures could properly be taken into account in assessing the likely significant environmental effects of a development."
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> It follows that I do not accept the submission of Mr Wolfe, for the respondent, that proposed mitigating measures are to be ignored when a screening decision is made or his submission that the "proposed development" for the purposes of Regulation 2 is the proposal shorn of remedial measures incorporated into it. That would be to ignore the "actual characteristics" of some projects. He is, however, correct in his submission that devising a condition which is capable of bringing the development below the relevant threshold does not necessarily lead to a decision that an EIA is unnecessary. The test stated in *Bozen* requires a fuller scrutiny of the likely effects of the development project. Consideration must be given to the extent of the investigation, up to the time of decision, into the impact of the development and environmental problems arising from

it, the nature of any proposed remedial measures, the extent to which those measures have been particularised, their complexity and the prospects of their successful implementation (and see Annex 10 to PPG 23 and Circular 11/95 already cited). Consideration must also be given, where appropriate, to the prospect of adverse environmental effects in the course of the development, even if of a temporary nature, as well as to the final effect of the development. All aspects of the development project must be considered; the relevant considerations may be different in a case where the central problem is the eventual effect of the development upon the environment and a case such as the present where the central problem arises from the current condition of the land. "

29. Laws LJ adopted an approach which suggests that whilst mitigating measures can be considered, it is only where there is no real doubt as to their efficacy and appropriateness. He said this (para.46):

> "Where the Secretary of State is contemplating an application for planning permission for development which, but for remedial measures, may or will have significant environmental effects, I do not say that he must inevitably cause an EIA to be conducted. Prospective remedial measures may have been put before him whose nature, availability and effectiveness are already plainly established and plainly uncontroversial; though I should have thought there is little likelihood of such a state of affairs in relation to a development of any complexity. But if prospective remedial measures are not plainly established and not plainly uncontroversial, then as it seems to me the case calls for an EIA. If then the Secretary of State were to decline to conduct an EIA, as it seems to me he would pre-empt the very form of enquiry contemplated by the Directive and Regulations; and to that extent he would frustrate the purpose of the legislation.

30. Lady Justice Arden agreed with both judgments and noted that the issue turned on the nature of the remedial measures rather than the complexity or controversiality of the development.

31. It follows that in an appropriate case it is open to the planning authority to conclude, having regard both to the process and the mitigating measures adopted with respect to it, that it does not require further details of a matter because, to use the language of Sullivan J in *R v Rochdale Metropolitan Borough Council ex parte Milne* 81 P.& C.R.27 at para 114, it is "satisfied that such details , provided they are sufficiently controlled by condition, are not likely to have significant effect." Mr Jones submits that such is the case here. There was a well established mitigating technique involving negative pressure which virtually eliminated any environmental problem.

32. Mr Jones also put some emphasis on the fact that, as the planning officer recognised, the Environment Agency would have an important role to play in enforcing relevant standards. He relied upon an observation of Sullivan J in *Milne* to the effect that a planning authority is entitled to assume that the Environmental Agency will carry out its functions "with a reasonable degree of competence"(para 128) a comment which mirrors current government advice in PPS 24 para. 10:

> "Planning authorities should work on the assumption that the relevant pollution control regime will be properly applied and enforced. They should act to complement but not seek to duplicate it."

33. Mr Jones came close to submitting that these safeguards can be relied upon so as to entitle the authority to assume the other agencies will so act as to preclude any adverse environmental effects. Plainly that is not the implication of these observations. The primary obligation to ensure that the environmental safeguards are complied with rests with the planning authority

and they cannot abdicate responsibility by relying upon other enforcement agencies to make good their failings. They can, however, assume that if a system is in principle capable of operating without creating significant environmental effects, or if the details of the project are left to be determined with an input from other agencies, it should be assumed that the relevant enforcement agencies will operate competently to ensure that the system will operate as it should. Even if the system would have significant effects if not competently regulated, the authority should not act on the premise that this may occur.

34. I would therefore summarise the material principles in play here, as derived from *Smith* and *Gillespie* and the decisions to which they refer, as follows:

1. The decision whether a process or activity has significant environmental effects is a matter for the judgment of the planning authority. In making that judgment it must have sufficient details of the nature of the development, of its impact on the environment and of any mitigating measures.
2. Equally, it is for the planning authority to decide whether it has sufficient information to enable it to make the relevant judgment. It need not have all available material provided it is satisfied that it has sufficient to enable a clear decision to be reached.
3. In making that determination, the planning authority can have regard to the mitigating measures provided that they are sufficiently specific, they are available and there is no real doubt about their effectiveness. However, the more sophisticated the mitigating measures and the more controversy there is about their efficacy, the more difficult it will be for the authority to reach a decision that the effects are not likely to be significant.
4. If the authority is left uncertain as to the effects, so that it is not sure whether they may be significant or not, it should either seek further information from the developer before reaching a conclusion, or if an ES has already been provided it should require a supplement to the ES which provides the necessary data and information. It cannot seek to regulate any future potential difficulties merely by the imposition of conditions.
5. The authority cannot dispense with the need for further information on the basis that it is not sure whether or not there are significant environmental effects, but that even if there are, other enforcement agencies will ensure that steps are taken to prevent improper pollution. However, it should assume that other agencies will act competently and it should not therefore anticipate problems or difficulties on the basis that those agencies may not do so.

The grounds of challenge.

Ground 1: Did the report conclude no significant environmental effects?

35. The first ground is that the authority made no concluded finding that the operation did not give rise to significant environmental effects and accordingly it was wrong for the authority to grant permission subject to conditions.

36. Mr Wolfe relies on three factors in particular which would suggest that the authority failed to reach any conclusion at all about the potential environmental effects of the process. First, nowhere does the officer's report state as much, and it must be assumed that the reasons for the decision were those set out in the report, given that there is no indication to the contrary: see the observations of Simon Brown LJ referred to in para.12 above. Second, it is inconsistent with any such conclusion to impose in particular condition 4(g), requiring further information especially since this is required prior to the commencement of development. Why, he submits,

ask for further information before the development can begin if it is clear that there are no significant effects? It may be that the information will disclose a greater level of emissions than the developer has envisaged. Third, it does not sit happily with the words used in the report. As to this, he points in particular to the fact that although they agreed in view of the "scaled down trial" that the only probable emissions will be the intermittent steam releases when the autoclave doors are open, he observed that no analysed sample of steam and its emissions had been provided to support this. In addition, he considered that it was of "paramount importance" that the building be kept under negative pressure, yet he expressed personal reservations about whether this could be done given the large vehicular access doors.

37. In the light of these factors Mr Wolfe submits that the officer never did make any finding that there would be no significant environmental effects. On the contrary, the officer appears to have had reservations about that. It follows that he could not, in accordance with established principles, recommend the planning permission and leave the potential difficulties to be dealt with by conditions, and the members could not lawfully act upon such an unlawful recommendation.

8. Mr Jones submits that if the report is read fairly, it is plain that the planning officer was wholly satisfied that there would be no significant environmental effects. He properly observes that the ES, produced by reputable experts, had taken this view that there would be no emissions resulting from the operation of the process, and there was no serious evidence to the contrary. The nature of the process and the application of the negative pressure system would prevent any emissions. True it is that the claimant had expressed some concerns that the system would be costly and that dust would clog the fans, but these were trifling matters. This was a case where the conditions could properly be imposed because they were merely to ensure that the mitigating measures would be properly and effectively implemented. As to the requirement for more data, that was understandably required to monitor the system given that there was no data provided on this matter with the application. However, the condition was entirely consistent with the view that there may be some, but insignificant, emissions which it was desirable to keep under scrutiny. It did not justify the conclusion that he had any real doubts about the effects of the operation.

39. I also bear in mind that it is not in principle disputed that the technique being proposed of negative pressure is a relatively well established one. No one seems to have suggested that some entirely different mitigating technique should be adopted. It might be said that this would be obvious to and would be another factor he could consider when assessing the likely significance of any emissions.

40. Finally, Mr Jones also relies upon a witness statement provided by the planning officer, Mr Dean, in these proceedings in support of the view that the development clearly gave rise to no significant environmental effects. Mr Wolfe submits that this is ex post facto reasoning and that it is illegitimate for me to have regard to it. I consider this point further below.

41. Leaving to one side for the moment Mr Dean's comments, I am not persuaded that the planning officer did reach the view that there were no significant effects. He certainly has not said so, and in my judgment on such an important matter, one would have expected him to say so if that were his assessment. It seems to me that the observations in the report leave the position open; the officer has some reservations about the views expressed in the ES and remains unsure about precisely what the effects will be.

42. As to the requirement for further information, I accept, as Mr Jones submits, that it is not **only** consistent with the assumption that the emissions would, or at least may, be significant. It could indeed have been imposed for monitoring purposes. But in my view it is **more** consistent

with the former explanation. In general, conditions should not be imposed unless it is necessary to do so, and it is not easy to see why it would be necessary to impose as a condition something which merely enables the more effective monitoring of what the officer is satisfied will be insubstantial emissions.

43. Furthermore, there were concerns expressed by the officer about the efficacy of the negative pressure system. Whilst the system itself may be relatively well established, it was a matter of concern to the planning officer whether it could properly and effectively be applied to this particular plant. In those circumstances, I doubt whether the officer could, consistent with the observations of the Court of Appeal in *Gillespie*, have been satisfied that the mitigating measures did not need to be the subject of the consultation process. In saying this I recognise of course that there was indeed consultation about the negative pressure system, and the claimant was able to- and did- express concerns about it. But it seems to me that the nature and scope of its response might have been different if it had had available to it at the consultation stage the information which the planning officer has recommended and which is now required in condition 4(g). The consultation is to be in response to all material information, not just some of it.

Mr Dean's observations.

44. In his witness statement, Mr Dean said this:

> "The Defendant was satisfied at the date when it granted the disputed permission that it was fully aware of the likely significant environmental effects of the proposed development and that it had sufficient information in order to carry out all its obligations under the [regulations]. It remains satisfied of this. It is my firm opinion that the problems postulated by the objectors are not merely unlikely and insignificant, but wholly fanciful"

45. Can I have regard to the observations of Mr Dean to make good the lack of clarity in the report itself? That raises a difficult question about when and whether material provided in the course of judicial review can legitimately be taken into account to remedy defects or weaknesses in the original reasons, or to make good ambiguities or omissions. I was referred in this connection to certain helpful observations of Stanley Burnton J in *Nash v Chelsea College of Art and Design* [2001] EWHC Admin 538. Having reviewed a number of authorities on the point, including the Court of Appeal decision in *Westminster City Council ex p. Ermakov* [1996] 2 All E R 302 he summarised the position as follows:

> "34. In my judgment, the following propositions appear from the above authorities:
>
> (i) Where there is a statutory duty to give reasons as part of the notification of the decision, so that (as Law J put it in *Northamptonshire County Council ex p D*) "the adequacy of the reasons is itself made a condition of the legality of the decision", only in exceptional circumstances if at all will the Court accept subsequent evidence of the reasons.
>
> (ii) In other cases, the Court will be cautious about accepting late reasons. The relevant considerations include the following, which to a significant degree overlap:
>
> (a) Whether the new reasons are consistent with the original reasons.
>
> (b) Whether it is clear that the new reasons are indeed the original reasons of the whole committee.

(c) Whether there is a real risk that the later reasons have been composed subsequently in order to support the tribunal's decision, or are a retrospective justification of the original decision. This consideration is really an aspect of (b).

(d) The delay before the later reasons were put forward.

(e) The circumstances in which the later reasons were put forward. In particular, reasons put forward after the commencement of proceedings must be treated especially carefully. Conversely, reasons put forward during correspondence in which the parties are seeking to elucidate the decision should be approached more tolerantly.

35. To these I add two further considerations. The first is based on general principles of administrative law. The degree of scrutiny and caution to be applied by the Court to subsequent reasons should depend on the subject matter of the administrative decision in question. Where important human rights are concerned, as in asylum cases, anxious scrutiny is required; where the subject matter is less important, the Court may be less demanding, and readier to accept subsequent reasons.

36. Secondly, the Court should bear in mind the qualifications and experience of the persons involved. It is one thing to require comprehensiveness and clarity from lawyers and those who regularly sit on administrative tribunals; it is another to require those qualities of occasional non-lawyer tribunal chairmen and members."

46. I consider that in accordance with these principles there should be no absolute bar to considering supplementary reasons, even if given in the course of the judicial review itself. The report was produced by non lawyers, and it covered significant ground. It will sometimes be the case that certain matters may not be analysed with the clarity or detail which is desirable, and it is surely proper to allow further explanation in an appropriate case.

47. However, as the principles enunciated in *Nash* and indeed the decision in *Ermakov* make plain, any supplementary reasons must elucidate or explain and not contradict the written reasons. It will be rare indeed for an inconsistent explanation, given in the course of the judicial review proceedings, to be accepted as the true reason for the decision.

48. This is in accordance with basic principles of fairness. Plainly the courts must be alive to ensure that there is no rewriting of history, even subconsciously. Self deception runs deep in the human psyche; the truth can become refracted, even in the case of honest witnesses, through the prism of self justification. There will be a particular reluctance to permit a defendant to rely on subsequent reasons where they appear to cut against the grain of the original reasons.

49. That in my view is the position here. The impression given by the witness statement is that the whole idea that there could be any concerns over emissions is quite fanciful and unreal. I do not believe that one can fairly read the officer's report and gain a similar impression. Moreover, there is no attempt to explain why the condition requiring further information has been imposed.

50. There is a further problem. The new witness statement was produced by Mr Dean. He is, I believe, the planning officer who was responsible for the report, although his witness statement does not in fact make that clear. The material question before the court, however, is how the members understood the report. Yet he has not sought to deal specifically with that. No doubt in most cases where it is undisputed that the authority has acted on the basis of the report, a statement from the planning officer can be taken to reflect the views of the members.

However, that does not seem to me to be appropriate where there is ambiguity in the report and the question is whether the members were acting on a particular premise or understanding of the report or not. In such cases either the Chair should provide the relevant witness statement, or if the planning officer does it, he should be reporting views directly expressed to him by the members. Even where the Chair provides the additional witness statement, it will not be enough for him to give his own understanding; it is the understanding of all the members which is material and which will need to be addressed. As Stanley Burnton J pointed out in *Nash*, it is highly desirable, and in some cases may be necessary, for each member of the committee to subscribe to the reasons given.

51. It follows that in my view the planning permission is flawed. The information which the planning authority requires, and which it has stipulated should be made available prior to the development commencing, should have been made available prior to the planning permission being granted. It may be that the information will confirm the assessment made by the developer. But I cannot properly make that assumption, and I should not deny the claimant and any other potential consultee the possible opportunity to respond to whatever is forthcoming. I would therefore quash the planning permission on this ground.

Ground 2: BPEO.

52. I can take this matter more shortly. It is common ground that the site chosen should be the BPEO. The claimant says that one of the alternative Rotherwas sites was rejected on the grounds that it was in the floodplain when in fact it was not. There is again some ambiguity in the report about this. It arises because there were in fact two possible sites in the Rotherwas estate and as I have said, the report dealt with them both together. However, reading the report it seems clear that the concern was that the Rotherwas estate was subject to floodplain constraints; that is not in fact saying that both relevant sites are in the floodplain. As the comments of the Environment Agency reproduced in the report make plain, the site does not have to be actually within the floodplain to be at risk of flooding. It is enough that it is within close proximity to it. The site at Twyford Road falls within that category. Indeed, Mr Dean pointed out that the authority's unitary development plan identifies both sites as being in an area "liable to flood" and that there was regular flooding of the access route to the estate. That is a factual matter to which I consider I can have regard. It is entirely consistent with the somewhat more cryptic conclusions summarised in the report. I also accept Mr Dean's observation that this risk of flooding would have been well known to the members. Accordingly the report would not have needed to spell out matters in any detail.

53. The planning officer had obviously formed the unambiguous view that none of the alternative proposed sites was BPEO, and that a main problem with the Twyford road site was flooding. Whether that is because the site itself will be flooded or because lorries taking refuse will be unable to take it along flooded roads, as Mr Dean says, seems to me to be of secondary importance. Either way the problem is water. Mr Dean also submitted in his witness statement that there were other problems with the site which rendered it wholly inappropriate, but it is not necessary for me to engage with those matters.

54. It was suggested that the chosen site also has a flood risk. However, it is clear that this is very small and of a totally different dimension to either of the Rotherwas sites. It would not begin to make the flood difficulties similar for the two sites, as Mr Wolfe claimed.

55. Accordingly, I do not find for the claimant on this ground.

56. Nevertheless, for the reasons I have given, this application succeeds. I therefore quash the grant of planning permission.

MR JUSTICE ELIAS: I hand down the judgment in terms already shown to counsel. I am grateful for the matters that have been picked up from the draft. Thank you.

MR PURCHASE: My Lord, there are just one or two points outstanding, which is whether or not permission to appeal should be granted. I appear for the claimant and my learned friend Mr Jones appears again for the defendant. There has been prepared a draft order. I do not know if your Lordship has seen a copy of that.

MR JUSTICE ELIAS: Yes.

MR PURCHASE: The first two points in that order are agreed between the parties, and it is only the third point which remains to be dealt, with so perhaps I should hand over to Mr Jones at this point who seeks permission to appeal.

MR JONES: My Lord, there would be perhaps two substantial points that I would seek to raise before the Court of Appeal.

MR JUSTICE ELIAS: Yes.

MR JONES: The first point is that the relevant issue was not whether there was a possibility of significant environmental affects caused by emissions from the premises, but whether there was a likelihood of such effects. What I intended to submit in respect of the further information was that planning conditions should properly be imposed, not merely to cover likely effects, but also to cover unlikely, even the highly unlikely. In particular, paragraph 24 of my supplementary skeleton argument concluded:

> "It is perfectly proper to impose a condition to cover matters that are unlikely or even remote possibilities."

MR JUSTICE ELIAS: Yes.

MR JONES: My Lord, that is different from imposing conditions solely for monitoring purposes and in my submission is well within the test of necessity.

If that submission is accepted, that has an affect on your Lordship's conclusions on the consistency of paragraph 42 of your Lordship's judgment, particularly when it is recalled that the officer's report included the Senior Environmental Health Officer's comments from the internal scaled down trial.

> "I would agree that the process is not combustion and would also agree that the only probable polluted emissions will be contained within the heat emitters released when the doors are opened."

The second point, my Lord, that I would seek to raise before the Court of Appeal is that the efficacy of the negative pressure system is a matter fully within the competence of the Environment Agency and is one of those matters that it is appropriate to assume the Agency would regulate properly.

I should make it plain, my Lord: I do not seek leave to challenge your Lordship's conclusion in respect of Mr Dean's observations on the first ground. My Lord, that is my submission.

MR JUSTICE ELIAS: Yes. Thank you very much.

MR PURCHASE: My Lord, I would simply say in response to that that the law which was applied by your Lordship in this case was relatively settled, and by reference to Court of Appeal authority, and in my submission that the outcome of this turned on its own facts. In my submission, it was quite right for your Lordship to have come to the conclusion that the defendant had to be satisfied on full information as to the likely significant environmental impact, and that on the facts, it was not. So, my Lord, in my submission leave to appeal should be refused.

MR JUSTICE ELIAS: Yes. I think I will grant leave in this case. I think it is an area where I think still there will always be developments.

MR JONES: Thank you, my Lord.

MR JUSTICE ELIAS: And I think you should be entitled to put your points before them. Thank you.