CO/3860/2004

Neutral Citation Number: [2005] EWHC 536 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 7 April 2005

Before :

THE HON. MR. JUSTICE EVANS-LOMBE
Neutral

- -

Between :

	THE QUEEN **On the application of** **WESTERN RIVERSIDE WASTE AUTHORITY**	**Claimant**
	- and -	
	WANDSWORTH BOROUGH COUNCIL	**Defendant**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Roger Henderson QC/Andrew Kinnier (instructed by **DLA**) for the **Claimant**
Charles Béar QC/Ben Hooper (instructed by **ASB Law**) for the **Defendant**

- -

Judgment**The Hon. Mr. Justice Evans-Lombe :**

1.In this case The Western Riverside Waste Authority *("the Authority")* applies for the judicial review of the decision *("the Decision")* of Wandsworth Borough Council

("Wandsworth") taken on the 3rd August 2004 whereby Wandsworth's executive approved the recommendations contained in a paper 04-609 written by Mr Peter Brennan, Wandsworth's Director of Leisure and Amenities. Those recommendations include the fixing and publication of a tariff of charges for the collection of commercial waste from commercial organisations situated in Wandsworth and the release of Onyx UK Ltd *("Onyx")*, Wandsworth's previous contractor, from contractual restrictions on Onyx's competing for waste collection in Wandsworth for a period of 12 months after the conclusion of its existing contract and its cooperation in an approach to commercial waste producers to notify them of the new tariff. In the course of this approach Onyx were to assist in discovering whether, in the light of that tariff, the commercial waste producers wished to use a collection service arranged by Wandsworth for the period from 26th September 2004 to 5thApril 2005. The Authority seeks orders quashing the decision and restraining all steps taken to implement the decision and an order directing Wandsworth to consider the proper discharge of its function according to law and, in the light of the courts' judgment, such steps as are necessary to remedy consequential breaches of Wandsworth's statutory duties and any other necessary relief. The Authority proceeds by permission of Mr Justice Newman after an oral hearing on the 20th December 2004 such permission having been refused as *"unarguable"* by Mr Justice Collins at the paper application stage.

2.A preliminary point was taken at the earlier stages of the proceedings that the Authority lacked standing to pursue them. That point is taken in the skeleton arguments to this court but it was not pressed and so I need not deal with it.

3.The Authority was established pursuant to the Waste Regulation and Disposal (Authorities) Order 1985 as one of four autonomous statutory bodies to take responsibility for undertaking the waste disposal functions previously undertaken by the Greater London Council. In that capacity it assumed the responsibility for the disposal of waste collected by the London Boroughs of Hammersmith and Fulham, Lambeth, Wandsworth and The Royal Borough of Kensington and Chelsea *("the Constituent Boroughs")*. The powers and duties of the Authority and the Constituent Boroughs for the purposes of the collection and disposal of waste are the subject of a succession of Acts but primarily derived from the Environmental Protection Act 1990 *("the 1990 Act")*. The Authority is a *"waste disposal authority"("a WDA"*) pursuant to section 30(2)(b)(i) of the 1990 Act. Wandsworth and the other Constituent Boroughs are *"waste collection authorities"("WCAs")* in their respective areas pursuant to section 30(3)(b)(i) of that Act.

The Statutory Scheme

4. Section 75 of the 1990 Act defines the term *"controlled waste"* used elsewhere in its provisions as follows:-

"75(4) "Controlled waste" means household, industrial and commercial waste or any such waste."

5. This judgment is not concerned with industrial waste. Household waste is defined in subsection (5) but it is not necessary to set out the detail of that subsection. This judgment is concerned with *"commercial waste"* as defined in subsection (7) as follows:-

> *"(7) Subject to subsection (8) below* [not material] *"commercial waste" means waste from premises used wholly or mainly for the purposes of a trade or business or the purposes of sport, recreation or entertainment excluding—*
>
> *(a) household waste;*
>
> *(b) industrial waste;*
>
> *(c) waste from any mine etc… from premises used for agriculture*
>
> *(d) waste of any other description prescribed by regulations…."*

Duties and Functions of a WCA

6. Section 45 of the 1990 Act provides under the heading *"collection of controlled waste":-*

> *"45.(1) It shall be the duty of each waste collection authority—*
>
> *(a) to arrange for the collection of household waste in its area except waste—*
>
> *(i) which is situated at a place which in the opinion of the authority is so isolated or inaccessible that the cost of collecting it would be unreasonably high, and*
>
> *(ii) as to which the authority is satisfied that adequate arrangements for its disposal have*

been or can reasonably be expected to be made by a person who controls the waste; and

(b) if requested by the occupier of premises in its area to collect any commercial waste from the premises, to arrange for the collection of the waste…

(3) No charge shall be made for the collection of household waste except in cases prescribed in regulations made by the Secretary of State [not material]…

(4) A person at whose request waste other than household waste is collected under this section shall be liable to pay a reasonable charge for the collection and disposal of the waste to the authority which arranged for its collection; and it shall be the duty of that authority to recover the charge unless in the case of a charge in respect of commercial waste the authority considers it inappropriate to do so…."

7. Section 48 under the heading *"duties of waste collection authorities as respects disposal of waste collected"* so far as material, provides:-

"48.(1) Subject to subsections (2) and (6) below [immaterial] *it shall be the duty of each waste collection authority to deliver for disposal all waste which is collected by the authority under section 45 above to such places as the waste disposal authority for its area directs…"*

8. In summary, therefore, so far as concerns commercial waste, a WCA is only under a duty to collect it if requested by a commercial waste producer in its area to do so, for which service it may levy *"a reasonable charge"* unless it *"considers it inappropriate to do so."* This is to be contrasted with household waste which a WCA is under a duty to collect and for the provision of which service it is entitled to receive no payment directly from the householder but must finance the service from its general revenue sources. A WCA must deliver all waste whether household or commercial collected by it *"to such places as the waste disposal authority for its area directs."*

The Duties and Functions of the Authority

9. Under the heading *"functions of waste disposal authorities"* section 51 of the 1990 Act provides:-

> *"51.(1) It shall be the duty of each waste disposal authority to arrange*
>
> *(a) for the disposal of the controlled waste collected in its area by the waste collection authorities; and*
>
> *(b) for places to be provided at which persons resident in its area may deposit their household waste and for the disposal of waste so deposited;*
>
> *in either case by means of arrangements made (in accordance with Part II of Schedule 2 to this Act) with waste disposal contractors, but by no other means.*
>
> *(2)…*
>
> *(3)…*
>
> *(4) For the purpose of discharging its duty under subsection (1)(a) above as respects controlled waste collected as mentioned in that paragraph a waste disposal authority*
>
> *(a) shall give directions to the waste collection authorities within its area as to the persons to whom and places at which such waste is to be delivered;…"*

10. In summary, therefore, a WDA has a duty to create reception points where WCAs can deposit waste collected by them for disposal and has a power to direct WCAs in its area to deposit waste collected by each WCA at such collection points as it may select.

Duties on waste producers

11. Under section 33(1) of the 1990 Act controlled waste cannot in general be treated, kept or disposed of by a person unless that person has a waste management licence (for which provision is made in sections 35 to 44 of the 1990 Act) to do otherwise constitutes an

offence, see section 33(6). Thus, in general, producers of controlled waste, including commercial waste, must ensure that their waste is transferred to other persons who are able lawfully to dispose of it on their behalf. Waste may only be transferred to authorised persons. In particular, section 34(1) of the 1990 Act provides relevantly:-

> *"34(1) …it shall be the duty of any person who… produces… controlled waste… to take all such measures applicable to him in that capacity as are reasonable in the circumstances*
>
> *(a)…*
>
> *(b)…*
>
> *(c) on the transfer of the waste, to secure*
>
> *(i) that the transfer is only to an authorised person…".*

12. The section 34(1) duty does not apply to occupiers of domestic properties with respect to household waste produced on such properties, see section 34(2) of the 1990 Act. Again failure to comply with section 34(1) constitutes an offence under section 35(6).

13. By section 35(3) *"authorised persons"* under section 34(1) include any waste collection authority, any person who is the holder of a waste management licence or any person registered as a carrier of controlled waste under section 2 of The Control of Pollution (Amendment) Act 1989. Thus private commercial concerns having the necessary waste management licence or being appropriately registered are authorised to collect and dispose of controlled waste including commercial waste. In practice, of course, the vast majority of household waste will be collected by a WCA and passed to a WDA for disposal. This is because WCAs are under a statutory duty to give a free collection service for household waste. In the field of commercial waste WCAs compete with licensed private waste collecting companies, such as Onyx, to offer their services to commercial waste producers. They have the right to require payment of a *"reasonable charge"* for those services but not a duty to do so in all circumstances. They have a discretion under section 45(4) if they consider it *"inappropriate to do so"*. Thus a WCA has a discretion to subsidise, either in whole or in part, its commercial waste collection service from its other revenue sources.

14. The general statutory structure established by sections 33 to 44 of the 1990 Act reflect a long standing regime whereby the public have been at liberty to employ private commercial contractors, appropriately licensed, for the collection and disposal of commercial waste and

it is a freedom which has been and continues to be substantially exploited. It is estimated that ¾ of all commercial waste produced in Wandsworth is disposed of by licensed private contractors.

Other relevant legislation

15. Part IX of the Greater London Authority Act 1999 *("the 1999 Act")* vests the Mayor of London with certain *"environmental functions"*. By section 353(1) of the 1999 Act the Mayor of London is required to prepare and publish a *"Municipal Waste Management Strategy"* setting out his proposals and policies for the recovery, treatment and disposal of municipal waste. For the purposes of the 1999 Act, *"municipal waste"* means *"any waste in the possession or under the control of... a waste collection authority...or a waste disposal authority"* see section 360(2). Under section 355 of the 1999 Act it is provided:-

> *"355 In exercising any function under Part II of the Environmental Protection Act 1990 (waste on land)-*
>
> *(a) each of the waste collection authorities in Greater London, and*
>
> *(b) each of the waste disposal authorities in Greater London, shall have regard to the municipal waste management strategy."*

16. In September 2003 the Mayor of London discharged his duties under section 353(1) of the 1999 Act by producing and publishing his municipal waste management strategy *("the Mayor's Strategy")*.

17. Section 49 of the 1990 Act required WCAs to make plans and arrangements for the recycling of household and commercial waste. By subsection (4A) a WCA before finally determining such plan must send a copy of it in draft to the Mayor of London. Section 49 was replaced by section 32 of the Waste and Emissions Trading Act 2003 with effect from the 1st January 2005. Section 32 (1) of the 2003 Act provides so far as material:-

> *"32(1) The waste authorities for a two-tier area* [such as the area of the Authority] *must, at all times after the end of the period of 18 months beginning with the day on which this Act is passed, have for the area a joint strategy for the management of*

(a) waste from households, and

(b) other waste that, because of its nature or composition, is similar to waste from households."

18. The remaining subsections of section 32 give details as to how this is to be achieved and include a requirement at subsection (6) to have regard to the Mayor's Strategy. By subsection (12) the Mayor in revising his strategy must have regard to the waste management strategies of the WDAs and WCAs of Greater London.

19. At the material time, that is immediately before the Decision, there was in existence a draft waste disposal strategy *("the Joint Strategy")* the terms of which had been agreed by the Authority and the Constituent Boroughs but had not been formally brought into force.

The origins of the dispute

20. In 1997 Wandsworth entered into a new refuse services contract with Onyx. By that contract Onyx undertook the collection of both household and commercial waste in Wandsworth. The contract provided for *"co-collection"* of household and commercial waste. Thus a collection lorry would collect commercial waste from commercial producers whose premises it passed in the course of collecting household waste. A mixed quantity of waste would therefore be delivered to the Authority's collection points. The Authority finances itself, amongst other ways, by charges levied on the Constituent Boroughs calculated on the tonnage of waste delivered by them to the Authority's collection points. For reasons that it is not necessary to explain the charges levied on household waste are lower than on commercial waste.

21. Accordingly it is necessary to attempt to calculate the proportions of the overall tonnage of waste delivered by one of the Constituent Boroughs, of household and commercial waste, so that charges can be levied accordingly. For this purpose in 1997 and 1998 a survey was conducted of the average amount of household waste generated each week by a household in each of the four Constituent Boroughs. The result gave Wandsworth the lowest percentage of household waste per tonne delivered which resulted in Wandsworth paying a higher levy per tonne delivered than any of the other Constituent Boroughs. Wandsworth objected to the results of the survey. It is not necessary to describe in detail the ensuing negotiations and arguments. Suffice it to say that it was Wandsworth's officers view that for the year 2003/4 the total annual tonnage of household waste delivered by Wandsworth had been underestimated by the amount of 8,200 tonnes resulting in an overcharge of approximately £247,000.

22. Meanwhile, and as a result of this controversy, on the 22nd June 1999, Wandsworth's environment committee had approved a strategy of moving to separate collection of household and commercial waste so that it would be possible accurately to demonstrate the proportions in which Wandsworth was delivering household and commercial waste. While the Onyx contract remained in force, however, it was not possible for Wandsworth to introduce the change. That could only be done when the Onyx contract ran out in September 2004 when a new contract was to be entered into by Wandsworth with Biffa Waste Services Ltd *("Biffa")*. Since then there has been separate collection of household and commercial waste and it is Wandsworth's evidence from its officers, in particular, Mr Brennan, that Wandsworth's suspicions of overcharging by the Authority have been confirmed. It transpires that Wandsworth is, on average producing 21,000 tonnes of commercial waste and 115,000 tonnes of household waste in a year.

23. In anticipation of the Onyx contract coming to an end, Wandsworth, as required by the Public Service Contracts Regulations 1993 put its refuse services contract out to tender. The tender documentation invited tenders for collection services that would be carried out on the basis of a total separation of household and commercial waste streams in accordance with Wandsworth's earlier decision of 22nd June 1999. Extracts from the tender documentation were in evidence. In respect of the collection of commercial waste tenders were invited on three different bases. The first is for the collection of commercial waste, if and when requested by commercial occupiers, as part of the Non –Domestic Waste Service (collection from schools etc). This is dealt with at clause 6 of the tender document as follows:-

> *"6 Collection of commercial waste*
>
> *6.1 Under section 45(1)(b) of the 1990 Act the council has a duty to arrange for the collection of Commercial Waste from any premises within the London Borough of Wandsworth if requested by the occupier.*
>
> *6.2 The Contractor shall provide the required Commercial Waste collection service in response to any request which the Council receives pursuant to section 45(1)(b) of the 1990 Act as an integral part of the non domestic waste collection service. Without prejudice to the above it should be noted that the Council has no records of receiving any such requests leading to the provision of a direct service in the last seven years."*

24. The second basis for which tenders were invited was under the heading of *"unspecified work"* at paragraph 19. Under this head tenderers were to specify their charges at an

hourly rate for labour vehicles and plant to be made available on demand by Wandsworth to meet any request not otherwise dealt with in the contract which would include dealing with requests under section 45(1)(b).

25. The third basis on which tenders were invited was under schedule 4 of the tender document described as the *"town centre trade waste service"* as follows:-

> *"1 The Council does not wish to provide trade waste collection services. Until 25th September 2004 Onyx UK Ltd has a licence to provide trade waste services concurrently with the provision of a household waste service on a profit sharing basis. The contract provides for the sale or novation of the Council's Commercial Portfolio. However the Council is conscious that smaller shops and businesses in the main shopping areas within the Borough may still have difficulties in obtaining suitable waste services from commercial operators to collect their refuse and this may lead to the disfigurement of the shopping areas with uncollected refuse. This specification thus provides for the provision of a limited service should this be needed as a last resort. If such a service is required, it will not be started before September 2005 and will be instituted after consultation with the Contractor. It will not collect commercial waste in Bulk Bins."*

26. The tender documentation was circulated at a time when the officers of Wandsworth were of the opinion that the commercial waste being collected by Onyx was not *"directable waste"* under section 51(4) of the 1990 Act because they regarded Onyx as having contracted directly with the commercial waste producers. As will be seen as part of the Decision of the 3rd August 2004 Wandsworth accepted that this was incorrect. The tender documentation, treats Wandsworth's statutory duty under section 45(1)(b) to collect commercial waste on the basis that this will be a residual service only required in relatively exceptional circumstances, but also on the basis that the commercial waste so collected would be *"directable waste"*.

27. At schedule 5 of the tender document Wandsworth invited bids for the purchase of its commercial waste portfolio in the following terms:-

> *"General*
>
> *1 The Council does not wish to provide trade waste*

collection services. Until 25th September 2004 Onyx Uk Ltd has a licence to provide trade waste services concurrently with the provision of domestic waste services on a profit sharing basis.

1.2 This specification provides for the sale of this Commercial Portfolio as a separate sale contract, with the service to be run separately from the services set out in other parts of this specification which shall not apply. The sale may be to any contractor and is not linked to any other contract.

Limitations

The service is not to be provided from the Council's premises and is not to use the vehicles or plant used to provide services to or for the Council or be identified in any way as being a Wandsworth Council service.

The Contractor shall make its own arrangements direct at its own expense with Waste Transfer Stations or any other licensed disposal facility for the disposal of the Controlled Waste arising from these operations.

The Contractor shall note that the Council reserves the right to establish a last resort service, as set out in schedule 4, if the commercial sector does not provide sufficient and suitable waste collection services to small businesses in the town and local centres of the Borough."

28. It is accepted that servicing Wandsworth's commercial waste portfolio was profitable. In the final year of the Onyx contract Wandsworth received £70,000 as its 40% share of the resulting profits. In due course Biffa submitted a conditional bid of £2.2M for the purchase of Wandsworth's commercial waste portfolio. However Wandsworth was not prepared to meet the conditions which required certain warranties and this bid was withdrawn. Onyx was the under-bidder for the purchase of the portfolio but was handicapped by the provisions of its previous contract with Wandsworth which operated to prevent it competing until after the expiry of 12 months from that contracts conclusion. In the result Wandsworth entered into an agreement with Onyx to release Onyx from its present contractual restrictions to take over Wandsworth's commercial waste portfolio upon payment of £750,000 there being included in the price the retention by Onyx of certain plant and equipment which would otherwise have been required to be returned to

Wandsworth.

29. Biffa was the successful bidder for Wandsworth's overall waste services contract. Its bids for the provision of a residual commercial waste service to meet Wandsworth's statutory obligations under section 45(1)(b) demonstrated that those obligations would be covered most cheaply by employing Biffa to meet any requests under section 45(1)(b) on the *"unspecified work"* rate basis under clause 19 of the tender document.

30. Consistently with its obligations under section 358 of the 1999 Act Wandsworth submitted its waste service tender documents to the Mayor of London for his consideration. This drew a letter from the Mayor's Principle Policy Adviser (Waste) of 11th December 2003 to Wandsworth. In the course of that letter the adviser draws attention to those passages in the tender documentation, some of which I have set out above, where Wandsworth expresses a wish that trade waste services are not to be provided by the Authority after the expiry of the Onyx contract on the 25th September 2004. The letter sought further information as to the reasons why such a decision had been made and expressed a concern that putting it into effect would increase the amount of fly-tipping and illegal dumping of trade waste in the household waste stream. Wandsworth's response through Mr Richard Hobbs, head of waste management, was that the Borough was confident that its proposals for trade waste would satisfy its legal obligations.

31. On the 23rd July 2004 Mr Brennan produced a paper No 04-609 for Wandsworth's Environment and Public Service Overview and Scrutiny Committee and its Executive (together *"the Decision makers"*) for the purposes of the meetings of both those bodies on the 3rd August. The document starts with a summary of its contents the first paragraph of which is concerned with Wandsworth's concession that commercial waste collected by Onyx in the course of their contract was to be treated as directable. The final two paragraphs read as follows:-

> *"The Council has already accepted the tender from Biffa Waste Services Ltd for refuse collection services, and the associated contract specification provides for the collection of directable trade waste. The Council has to determine the applicable tariff charges, and recommendations are made accordingly on the basis of full cost recovery.*
>
> *The Council's tariff with likely further increases during the coming year, is unlikely to be attractive in comparison with the existing tariff that Onyx proposes to sustain and with those of other private sector contractors. The Executive are recommended to agree that Onyx UK Ltd should be released*

from the present contractual restrictions on offering trade waste services in the Borough, and that a coordinated approach be adopted in informing these businesses about tariffs and arrangements for trade waste."

32. On its second page paper 04-069 sets out five courses of action headed (a) to (e) to which it asks the Executive to agree. For the purposes of this judgment recommendations (c) and (d) are the relevant ones. In those the Executive is asked to agree:-

> *"(c) That the Council's tariff charges for trade waste be determined as set out in paragraph 9, page 4, and that the Director of Leisure and Amenity Services be authorised to arrange for this to be published and notices to be served on existing customers and take steps to clarify whether they are or are not requesting the Council to arrange the collection of their waste in the future;*
>
> *(d) That the Council agrees to release Onyx UK Ltd from the present contractual restrictions on offering trade waste services in the Borough for a consideration of £750,000 and to adopt a coordinated approach in informing the relevant businesses about tariffs and arrangements for trade waste services… on terms to be settled by the Director of Leisure and Amenity Services in consultation with the Director of Finance and the Borough's solicitor;"*

33. At paragraphs 7, 8 and 9 the paper deals with the proposed new tariffs to be charged by Wandsworth for the collection of commercial waste (in the paper referred to as *"trade waste"*). Those paragraphs read as follows:-

"CHARGES FOR COLLECTION OF TRADE WASTE

> *7. The Council's new contract with Biffa Waste Services Ltd requires Biffa to collect any directable waste from business premises upon receipt of an instruction to do so from the Council. Setting and collecting trade waste charges, however, is a matter for the Council itself.*

Legislation requires a reasonable charge to be set for collection and disposal, and both Government guidance and previous Council policy interpret this as implying full cost recovery. From 1st April 2005, disposal costs for municipal waste will be subject to increases because of the Landfill Allowances Trading Scheme (LATS). The immediate financial impact of this is uncertain but the Government has set the penalty for exceeding allowances at £200 per tonne, making this effectively the top end of the potential trading range. When compared with the current total disposal cost of around £50 per tonne, it is clear that local authorities are facing a substantial handicap that will not apply to the private sector. Beyond the first few months, therefore, the portfolio is likely to dwindle, and this outlook could militate against full take-up of the Council's service from the outset.

8. *The Council's charges will have to reflect the level of costs in the Biffa contract, some apportionment of contract management costs, the costs of billing and recovery, and the prevailing WRWA disposal charges (including from 1st April 2005 the impact of LATS). The charges are particularly sensitive to the economies of scale in the Biffa contract: charges can be substantially less if the whole portfolio remains with the Council than if only 10% remains.*

	From 26th September 2004
	to 31st March 2005

			10% 0%
% portfolio continuing:	100%	75%	10%
Costs	£000	£000	£000
- collection	1,086	992	237
- disposal	938	744	60
- administration	154	145	61
- billing and recovery	43	35	7
Total annual costs	2,221	1,916	365

% portfolio	Weekly	Cost lift per			Current	
continuing	Service					No. of
	Charge	100%	75%	10%	Onyx	contracts
Charges	£	£	£	£	£	
Bag	1.40	1.81	2.01	3.96	1.65	814
660 litre container	1.40	9.72	10.43	31.81	7.06	67
770 litre container	1.40	11.21	12.04	37.16	7.77	16
Paladin	1.40	14.65	15.73	48.31	10.28	163
Euro 1100 litre	1.40	16.03	17.21	53.02	10.28	485
container						
Compactor Skip	1.40	273.00	274.80	363.36	175.00	9

All of the above prices will be subject to VAT at 17 ½%

9. *Even with the maximum potential economies of scale (reflected in the column headed "100%" in the above table), the charges that would have to be applied from 26th September 2004 are generally higher than current standard charges, and some current customers enjoy even lower discounted or negotiated rates. Onyx has undertaken to maintain current charges for its own customers at least until April 2005. Thereafter the Council's tariff is likely to become even less competitive because of the additional handicap of the Landfill Allowances Trading Scheme. No doubt, several other private-sector contractors could also offer competitive*

> *services similar to Onyx's. It follows that it is unrealistic to expect to retain the entire current portfolio. The economies of scale will therefore be lost, and charges should be based on the assumption that, at most, 10% will continue with the Council's contractor. The recommended charges from 26th September 2004 are, therefore, those shown in the column headed "10%" in the table above, with analogous charges for bulk containers of other sizes. It is recommended that the Director of Leisure and Amenity Services be authorised to arrange for the tariff to be publicised and notices to be served on existing customers accordingly."*

34. It will be seen from these quoted passages that the recommended charges were designed to cover the costs to Wandsworth of providing a residual commercial waste collection service in the expectation that the bulk of its approximately 1,600 commercial waste producers would remain with Onyx after the conclusion of the Onyx contract, but employing Onyx under a direct contract in which Onyx would not be acting as Wandsworth's agent so that the resulting commercial waste would not be directable by the Authority. The figures for the costs of providing such a service are based on calculations by Mr Michael Farrell since the 1st October 1999 Wandsworth's financial controller.

35. Mr Farrell describes the process of calculation and his approach in a witness statement the contents of which it is not necessary to summarise here. As reflected in the paper his calculations were for the purpose of arriving at the cost to Wandsworth of providing a commercial waste collection service on the basis that it retained all its existing 1,600 customers, in the alternative, that it retained 75% of those customers, and in the further alternative, 10%. On Mr Farrell's calculations it is demonstrated that Wandsworth, which, for the reasons already described had decided that it would not co-collect commercial waste with household waste, would not be able to compete with prices available from Onyx even on the basis of retaining all its existing commercial waste customers.

36. On that assumption and on the further assumption that attempting to run a competing commercial waste collection service would require subsidy by Wandsworth, which was unacceptable, (though possible and contemplated by section 45(4) of the 1990 Act), Wandsworth would rapidly lose the bulk of its commercial waste customers. Thus the recommended tariff was to be based on the cost to the Council of providing a service to 10% of Wandsworth's existing customers. The cost to Wandsworth of providing that service was based on Biffa's tender for *"unspecified work"* under paragraph 19 of the tender document as being the cheapest basis on which Wandsworth could provide this residual service. The result was a tariff to customers substantially higher than that being charged by Onyx or any of the other three Constituent Boroughs for commercial waste collection.

37. Paper 04-609 was drawn to the attention of the Authority. There followed a substantial correspondence between the Authority primarily through Mr Colin James its general manager and Mr Brennan of Wandsworth in which the Authority attempted to persuade Wandsworth not to agree Mr Brennan's recommendations or, at least, to delay their implementation. In a supplemental paper dated 30th July 2004 Mr Brennan summarised the objections raised by the Authority and set out his reasons for rejecting them. The Authority returned to the charge in a letter dated 3rd August delivered before Wandsworth's two meetings by the Decision Makers of that day in which Mr James reviews both papers 04-609 and 04-609B and seeks to reinforce his arguments in opposition to Wandsworth's proposed course of action. The two papers which had appended to them the Authority's letters of objection and Wandsworth's responses and also the Authority's letter of 3rd August with its annexure and Mr Brennan's written response were circulated to the members of Wandsworth Council before the two meetings of the 3rd August.

38. In due course the executive committee of Wandsworth approved Mr Brennan's recommendations. Representatives of the Authority and its solicitors were present at the Decision Maker's meetings of the 3rd August at which their solicitors took a note of the proceedings. Subsequently the Authority's solicitors wrote to Wandsworth's solicitors on the 5th August asking for an undertaking that Wandsworth would delay putting its decisions into effect under threat of proceedings for an injunction. That demand was rejected by Wandsworth's solicitors and the following day, through the agency of Onyx, a letter of 6th August was circulated to Wandsworth's commercial waste generating customers. Materially to this judgment that letter, which is headed with the message *"important action is required by you",* reads as follows:-

> *"You have an important choice:*
>
> - *It is important for us to know whether you want the Council to arrange for the collection of your commercial waste in future.*
>
> - *The Council will continue to arrange for the collection of your commercial waste if you request that we do so – but you need to know that the Council is unlikely to be charging the most competitive rates for that service. The choice is yours, but you would probably get a cheaper service by asking Onyx to continue to collect your waste, or by making arrangements with another reputable private contractor.*
>
> - *If we do not hear from you, any existing contract you may have*

with Onyx may be assigned to the Council. This means that Onyx would stop collecting your waste after the 26th September, and the Council's own new contractors would start to do so. You would then have to pay the Council's higher collection charges.

- *The Council has a duty to arrange collection of your commercial waste if you request that it should do so. But the Council is then normally required to make a reasonable charge for the collection and disposal of the waste. Because the Council has to pay higher charges for waste disposal, and these costs are likely to increase significantly over the coming years, we will have to charge customers more than private contractors such as Onyx are likely to charge. The Councils proposed charges are attached. Those charges will apply from the 26th September 2004, or as soon after date that as any existing contractual arrangements permit.*

- *Accompanying this letter is a letter from Onyx in which they set out their own charges and arrangements for continuing a waste collection service. If you do not wish Onyx to carry out your collection in future you MUST write to them and inform them accordingly.*

- *There are other reputable private contractors who may also be willing to collect your waste and a list of these is on the Council web site. You should get in touch with such contractors if you wish to find out more about their charges. Onyx and the Council have agreed that any customers who wish to make alternative arrangements from the 26th September 2004 will be released from any existing contracts subject to appropriate notice."*

39. As forecast in the letter it was accompanied by a form for completion by commercial waste customers indicating their choice, a paper giving Wandsworth's tariff of charges for its future commercial waste collection service and a letter from Mr Esposito of Onyx to the customer offering their services and setting out their rates.

40. These proceedings were commenced on 10th August 2004.

41. They came before Mr Rabinder Singh QC sitting as a deputy judge of the High Court on an application for interim relief by the Authority which he adjourned to any permission hearing without making any order giving such relief.

The Grounds of challenge

42. At paragraph 39 of the amended detailed statement of grounds the Authority sets out those grounds as follows:-

> *"39 The Claimant challenges the decision on three bases*
>
> *(a) The decision and its implementation frustrate the policy and objects of the Act;*
>
> *(b) The defendant failed to have regard to relevant matters in reaching the decision; and*
>
> *(c) Irrationality, in the senses of (a) and (b) above, that the decision and its implementation frustrate the policy and objects of the Act and that the defendant has failed to have regard to relevant matters in reaching the decision"*

Ground 1: Alleged frustration of the policy of the 1990 Act

43. I will deal with the challenge under paragraph 39 (a) first. At paragraph 43 of the re-amended grounds this ground is further described as follows:-

> *"43 The defendant's decision and its implementation have constituted an attempt to deny, or alternatively to thwart, its duty to collect commercial waste if requested. In particular, the tariff, by rendering the defendant's collection charges artificially high, was intended to deter and has deterred occupiers from requesting that the defendant collect commercial waste."*

44. It seems to me that under this head three questions arise, the first two are questions of fact, namely, has Wandsworth attempted to deny its duty to provide a commercial waste collection service under section 45(1)(b) of the 1990 Act, alternatively, has it attempted to thwart that duty by putting its collection charges artificially high. The third question is whether, in either of those events, Wandsworth acted unlawfully.

45. I can deal with the first two questions reasonably quickly. The first is based on the fact

that in September 2004 Wandsworth's website contained the following entry:-

> *"Commercial Waste*
>
> *The council does not provide any waste collection services for commercial premises."*

46. As to this entry on Wandsworth's website, and there were other similar entries, Wandsworth's evidence is that it accepts that those entries were unlawful and that when the Authority drew them to the Council's attention steps were taken, immediately, to remove them. They were plainly inconsistent with Wandsworth's stated intentions as to the future conduct of its commercial waste collection services contained in the tender documentation and, in particular, those passages which I have set out above. I am satisfied that it was never truly Wandsworth's intention to deny its duty under section 45(1)(b) of the Act to provide a waste collection service to commercial waste producers with premises in its area in the event that it received a request to provide such service. Wandsworth's contract with Biffa provided a means whereby any such requests could be met over the period from the expiry of the Onyx contract on the 25th September 2004 until the 5th April 2005.

47. By contrast it seems to me clear from the evidence that, at the time of the Decision, it was Wandsworth's intention so to organise its commercial waste collection services that it was left with providing a residual service to such of its occupiers as could not be persuaded to engage a private commercial waste contractor to provide that service in place of Wandsworth. It was appreciated that the packet of documents distributed to commercial waste producers by Onyx under cover of Onyx's and Wandsworth's letters of the 6th August 2004 were very likely to have that effect. The remaining question therefore, is whether pursuing such a policy was unlawful as being contrary to *"the policy and objects"* of the 1990 Act.

48. It is first necessary to examine whether the tariff that was actually fixed by Wandsworth and circulated to commercial waste producers under cover of Wandsworth' letter of the 6th August 2004 was unlawful in the sense that it did not represent *"a reasonable charge for the collection and disposal of waste to the Authority which arranged for its collection"* for the purposes of section 45(4) of the 1990 Act. For that purpose it is necessary to construe the words *"reasonable charge"* when used in this subsection.

49. In *Luby v Newcastle under Lyme Corporation [1964] 2 QB 64* the Court were considering the construction of the words *"reasonable charges"* as found in section 111 of The Housing Act 1957 which provided that local authorities could make *"such reasonable charges for the tenancy or occupation of the houses as they may determine."*

Lord Justice Diplock at page 70 of the report having set out the section continued as follows:-

> *"This subsection gives to the local authority a complete discretion as to the rents which they will charge subject to only the requirement that they shall be "reasonable". I doubt whether the addition of the adjective "reasonable" has the effect of narrowing the wide discretion which the local authority would have if that word were not present since (see Roberts v Hopwood [1925] AC 578) where a local authority is exercising a discretion conferred on it by Parliament it must in any event exercise it "reasonably…""*

50. Lord Justice Diplock then went on at page 71 of the report to cite the ***Wednesbury*** test as applicable to the word *"reasonable"* in this context.

51. In ***R v Independent Television Commission ex-parte TSW Broadcasting Ltd [1996] JR 185*** the House of Lords were considering the application of section 15 of the Broadcasting Act 1990 whereby the Independent Television Commission were directed to invite applications for Channel 3 licences and by section 16(1) were obliged to reject an application:

> *"…unless it appears to them –*
>
> *(a) That his proposed service would comply with the requirement specified in subsection (2) and*
>
> *(b) That he would be able to maintain that service throughout the period for which the licence would be enforced."*

52. The House of Lords were dealing with the application of a previous licensee for judicial review of the decision of the Independent Television Commission not to renew its licence. At page 192 of the report Lord Templeman is recorded as saying:-

> *"An applicant for judicial review must show more than a mistake on the part of the decision maker or his advisers. Where a decision is made in good faith following a proper procedure and as a result of conscientious consideration, an applicant for judicial review is not entitled to relief save on grounds established by Lord Greene MR in [Wednesbury]…"*

53. In *Puhlofer v Hillingdon London Borough Council* the House of Lords were considering an application for judicial review of the decision of a housing authority to provide accommodation to the applicants under the Housing (Homeless Persons) Act 1977 on the grounds that their existing accommodation constituted accommodation which was available for the family's occupation within the meaning of section 1(1) of the act so that the applicants' were neither homeless nor threatened with homelessness so as to impose any duty on the Housing Authority to procure for them substitute accommodation. At page 518 of the report Lord Brightman says this:-

> *"Although the action or inaction of the local authority is clearly susceptible to judicial review where they have mis-construed the Act or abused their powers or otherwise acted perversely, I think that great restraint should be exercised in giving leave to proceed by judicial review. The plight of the homeless is a desperate one, and the plight of the applicants in the present case commands the deepest sympathy. But it is not, in my opinion appropriate that the remedy of judicial review, which is a discretionary remedy, should be made use of to monitor the actions of local authorities under the Act save in the exceptional case. The ground upon which the courts will review the exercise of administrative discretion is abuse of power – e.g. bad faith, a mistake in construing the limits of the power, a procedural irregularity, or unreasonableness in the Wednesbury sense – unreasonableness verging on an absurdity see the speech of Lord Scarman in Reg v Secretary of State for the Environment ex parte Nottinghamshire County Council [1986] AC 240 247-244. Where the existence or non existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debateable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously are acting perversely."*

54. In *Bromley LBC v Greater London Council 1983 AC 768* the House of Lords were considering a challenge to the decision of the GLC to subsidise bus and tube fares at the expense of ratepayers. In his speech at page 837 Lord Scarman says this:-

> *"Bromley's submissions rely not only on the Act but also on the case law applicable to local authorities. The House is invited to construe the Act in the light of the principle that a local authority owes a fiduciary duty to its ratepayers. It is an invitation which has to be accepted: and I did not understand*

> *counsel for the appellants to argue otherwise. But the invitation does not decide the case. For, as the statute must be interpreted in the light of the general law, so also must the general law be adapted and applied in a way consistent with the statute…."*

55. Lord Scarman continues at page 842:-

> *"This construction of the section,* [advanced by the GLC supporting a case for subsidy] *if correct, would make mincemeat of the fiduciary duty owed to the ratepayers. It would also be inconsistent with what was a key principle of earlier legislation, that transport undertakings were to be operated on a "break-even" basis, so far as practicable."*

56. It is clear that the principles set out in these authorities apply to the discretion conferred on Wandsworth to fix the charges applicable to commercial waste producers within its area who request the collection and disposal of commercial waste. The court must not attempt to substitute its own judgment for what would constitute a reasonable charge but must review Wandsworth's exercise of the discretion to fix such charges on Wednesbury principles. A matter to be taken into account in the exercise of that discretion, must be Wandsworth's fiduciary duty not to impose on its council taxpayers unnecessary burdens.

57. In my judgment there is no basis upon which this court can hold that Wandsworth's fixing of its tariff for the provision of commercial waste collection services under cover of Wandsworth's letter of the 6th August 2004 was unlawful as not constituting a *"reasonable charge"* pursuant to section 45(4) of the 1990 Act. I have arrived at this conclusion for the following reasons:-

1) As Mr Farrell's evidence discloses the fundamental features of his calculations which produced a level of charges substantially greater than those available from Onyx or those being applied to a similar service by the other three Constituent Boroughs were:

   a) Wandsworth's policy that its charges for the collection of commercial waste should, as far as possible, cover the cost of the provision of the service. Section 45(4) conferred on Wandsworth a discretion to subsidise if thought *"appropriate"*. Wandsworth has decided not to take that course and, in the light of the ***Bromley*** case it cannot be said that such a policy is unreasonable indeed the contrary was not suggested.

   b) The assumption made by Wandsworth, and reflected in the calculations of

Mr Farrell that their rates should be calculated on the basis that Wandsworth would be providing a residual service to a clientele consisting of approximately 10% of its existing customer base for commercial waste collection services.

c) Wandsworth's assumption under (b) was itself based on their view, derived from the results of the tendering process which I have set out above, that even if they retained 100% of such customer base they could not compete with Onyx's rates and at the same time cover the costs of providing the service, and thus would be likely quickly to lose the bulk of those customers.

d) A likely cause of this lack of competiveness was the inability to make use of the efficiencies flowing from a system of co-collection of commercial and household waste which had been operated by Onyx but which flowed from Wandsworth's decision for other confirmed financial reasons, not to permit commercial waste to be delivered mixed with household waste after co-collection.

2) It was Wandsworth's view that the provision of a commercial waste collection services would prove to be very price-sensitive and thus, even if an attempt was made to run the service fixing a price on the basis that they would retain all their previous customers, the loss of those customers would take place very quickly notwithstanding that Wandsworth was in a position to prevent Onyx from competing for a period of twelve months from the expiry of Onyx's contract. It was their view that the attempt to do so would prove very costly. Thus the appropriate course was to fix a tariff at the level appropriate to cover the costs of the provision of a residual service straight away.

3) The Authority attacked the decision to base Wandsworth's charges on the costs of providing a residual service calculated on the basis that 10% of Wandsworth's previous customers would be retained and also on the basis that Wandsworth were wrong in basing their charges on the results of the tenders submitted for *"unspecified work"*. It was suggested that Wandsworth should have sought tenders for the co-collection of household and commercial waste which would have involved a departure from Wandsworth's *"separate collection"* decision. Apart from this no serious challenge was mounted to Mr Farrell's calculation of the costs of providing a residual service to 10% of the existing customer base which was plainly vigorous, conducted by an expert, and disclosed no artificial increase in the charges over the cost of provision given the factors which I have set out above. The Authority's evidence conceded that the cost of providing a collection service varied inversely to the number of customers served.

(4) The Authority also criticised the fixing of the tariff on the ground that its

calculation was affected wrongly by Wandsworth's ill conceived view of the effect in the future of the Landfill Allowance Trading Scheme established by the 2003 Act. I can see no reason to reject Mr Farrell's evidence that the possible effects of the Scheme played no part in his calculations. If they played a part in the assumption of a 10% customer base I fail to see how this can be categorised as Wednesbury unreasonable.

In my judgment subject to the issue of *"mistake in construing the limits of its power"* with which I will shortly deal it is not possible for the court to find that Wandsworth's fixing of its tariff of charges for the collection of commercial waste was done in bad faith or as the result of procedural irregularity or was unreasonable in the Wednesbury sense. See per Lord Brightman in the ***Puhlofer*** case.

58. In the course of the argument I asked why it was that the charges of the other three Constituent Boroughs for commercial waste collection were so much lower than those fixed by Wandsworth. The relevant information was not available but it was suggested that a number of factors might be involved including co-collection and partial subsidisation. But this simply illustrates that the discretion to fix charges conferred by section 45(4) is one that can throw up a variety of results each capable of being reasonable in the circumstances pertaining to different boroughs.

59. Mr Henderson on behalf of the Authority makes the broad submission that Wandsworth's actions in relation to its waste collection services flowing from the Decision, taken as a whole, are unlawful being in breach of the policy of the 1990 Act. This submission is set out between paragraphs 14 and 18 of the re-amended grounds and are repeated and added to in his written submissions at paragraphs 50 to 56 as follows:-

> *"50. The policy and objects of the Act generally and Part II in particular are to secure the efficient public collection and disposal of household and of commercial waste, when the latter is requested.*
>
> *51. Public authority functions are likely to be more environmentally friendly and efficient than commercial operations. Public authorities can reliably ensure that household and commercial waste is collected and disposed of in accordance with overarching national and regional (here London-wide) strategies.*
>
> *52. First, waste collection authorities must collect commercial waste, if requested, and by implication, they may not lawfully thwart that duty. It is not, as D's Counsel*

contended at the permission hearing, a "long stop duty" or a "matter of logistics and practicality". It is correct that occupiers who produce commercial waste have a choice as to whom they request to collect such waste. However, the existence of private sector alternatives does not deny the existence of D's duty to collect commercial waste on request nor does it render the duty of lesser or no public or statutory purpose. No waste collection authority can lawfully act as though, let alone aver that, it has no duty to collect commercial waste if requested or take decisions designed to prevent occupiers from using such service.

53. *Secondly, there is a statutory policy that a waste disposal authority be able to plan their disposal arrangements and be able to direct waste collection authorities in such ways as will best achieve the efficient discharge of their functions set out in section 51(4). This policy is implicit in the duty of direction. It was formerly implied in the waste collection authority's section 49 duty of notification of recycling. It is now enshrined in the duty imposed on C and D by section 32 of the 2003 Act to formulate joint Waste Management Strategies.*

54. *Thirdly, there is a statutory policy that household and, where requested, commercial waste collection and disposal be regionally organised in an efficient way with appropriate duties on London waste collection authorities to heed and obey directions by the London waste disposal authorities and by the Mayor of London.*

55. *The waste collection and disposal regime established under Part II of the Act therefore constitutes a comprehensive statutory scheme where a waste collection authority may not so order its affairs as to avoid being asked to collect commercial waste.*

56. *However, D's impugned decision and its implementation constitute a denial, or alternatively thwarted, its duty to collect commercial waste on request. In particular, the tariff, by rendering D's collection charges artificially high, was intended to deter and has*

deterred occupiers from requesting that D collect commercial waste."

It seems to me that these submissions involve the court taking the view that Part 2 of the 1990 Act confers on a WDA a power to interfere in and to direct the manner in which a WCA, in its area, is to discharge its statutory functions.

60. In support of his submissions Mr Henderson cited the well known passage from the speech of Lord Reid in the House of Lords decision in *Padfield v Minister of Agriculture Fisheries and Food [1968] AC 997.* In that case the House of Lords were considering a provision in the Agricultural Marketing Act 1958 section 19 providing that:-

> *""(3)(b) A committee of investigation shall…(b) be charged with the duty, if the Minister in any case so directs, of considering, and reporting to the Minister on… any complaint made to the Minister as to the operation of any scheme which, in the opinion of the Minister, could not be considered by a consumers' committee …."*

61. The Minister declined to exercise his discretion to refer a substantial complaint to a committee of investigation. At page 1029 Lord Reid says this:-

> *"The question at issue in this appeal is the nature and extent of the Minister's duty under section 19(3)(*b*) of the Act of 1958 in deciding whether to refer to the committee of investigation a complaint as to the operation of any scheme made by persons adversely affected by the scheme. The respondent contends that his only duty is to consider a complaint fairly, and that he is given an unfettered discretion with regard to every complaint either to refer it or not to refer it to the committee as he may think fit. The appellants contend that it is his duty to refer every genuine and substantial complaint, or alternatively that his discretion is not unfettered, and that in this case he failed to exercise his discretion according to law because his refusal was caused or influenced by his having misdirected himself in law, or by his having taken into account extraneous or irrelevant considerations.*
>
> *In my view the appellants' first contention goes too far… Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the*

Act; the policy and objects of the Act must be determined by construing the Act as a whole, and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court."

62. Mr Henderson also drew my attention to a passage in the speech of Lord Browne Wilkinson in *R v Secretary of State for the Home Department ex-parte Fire Brigades Union [1995] 2 AC 513* at page 551. In this case the House of Lords were considering the failure of the Home Secretary to exercise his discretion to bring into force a scheme for compensation for the victims of criminal acts while making available compensation under prerogative powers at different and less generous levels. Lord Browne Wilkinson says this:-

"There is a second consequence of the power in section 171(1) being conferred for the purpose of bringing the sections into force. As I have said, in my view the Secretary of State is entitled to decide not to bring the sections into force if events subsequently occur which render it undesirable to do so. But if the power is conferred on the Secretary of State with a view to bringing sections into force, in my judgment the Secretary of State cannot himself procure events to take place and rely on the occurrence of those events as the ground for not bringing the statutory scheme into force. In claiming that the introduction of the new tariff scheme renders it undesirable now to bring the statutory scheme into force, the Secretary of State is, in effect, claiming that the purpose of the statutory power has been frustrated by his own act in choosing to introduce a scheme inconsistent with the statutory scheme approved by Parliament."

63. It follows from these authorities that if the 1990 Act, read as a whole, requires that WCAs must exercise their powers so as to maximise the flow of waste collected in their areas by themselves or agents on their behalf, to WDAs, then Wandsworth by its actions in encouraging commercial waste producers to use private collection services has acted unlawfully.

64. In my judgment the submission fails for the following reasons:-

1) There is no express provision in the Act which requires a WCA to act in this way nor is there an express provision conferring on WDAs a regulatory power or directing power over WCAs in the exercise of their functions as waste collection authorities. Section 51(4) of the Act only indirectly, and not sufficiently for the purposes of the Authority in these proceedings, creates such a power. The subsection enables a WDA, once controlled waste has been collected either by or on behalf of a WCA, to direct that it be delivered to a particular point for disposal and a WCA by section 48(1) is bound to obey such direction. This means that, in respect of household waste, WDAs have a power of direction over all or substantially all household waste because householders will want to use the free service which WCA's are bound to provide. In respect of commercial waste, however, where WCAs have the right to charge, commercial waste producers have a choice and that choice will be influenced by price. The power conferred by section 51(4) does not extend to directing WCAs so to fix their charges that waste producers will be likely to select the WCAs' service rather than that of a private waste contractor.

2) The pattern of the regulatory functions contained in Part 2 of the 1990 Act is significant in coming to a conclusion as to whether the 1990 Act is to be construed in the way contended for by the Authority. The bulk of those functions are given to the Environment Agency see section 30(1) and include the granting of waste management licences under section 36; revoking licences in whole or in part under section 38(3) and (4); supervising activities carried out under such licences under Section 42; inspecting land of any person who wishes to surrender a waste management license under section 39(4); requiring occupiers to remove unlawfully deposited waste etc under section 59(1) (shared with WCAs); maintaining public registers of such things as waste management licences under section 64(1) and powers to obtain information under section 71(2).

Various regulatory functions are conferred on the Secretary of State by the 1990 Act; by section 35(7) to direct the form of waste management licences; by section 35(8) to give guidance to waste regulation authorities concerning their functions; by section 37(3) to require modifications to be made to existing licences; by section 38(7) to require licences to be revoked; by section 42(8) to direct WDAs to exercise their supervisory powers; by section 43(1) to hear appeals relating to licences; by section 57(1) to give directions to the holders of waste management licences as to their actions in that capacity; under section 57(2) to require any person who is keeping controlled waste on any land to deliver the waste to a specified person on specified terms with a view to its being treated or disposed of by the other person; and a further power to obtain information under section 71(2). Apart from the power to direct the delivery of waste in section 51(4) the 1990 Act, at the time of the Decision, conferred no regulatory powers on WDAs.

In the light of the above it seems odd that if the legislature intended that WDAs

should have control over controlled waste collected by WCAs in their area that it did not confer such control by express statutory provision similar, for example, to section 57(2).

It also seems to me significant that Section 30 of the Act, as originally enacted, required waste regulation authorities who are also waste disposal authorities to keep those functions separate from each other.

3) The absence of any such express provision is to be contrasted with the insertion by section 31 of the 2003 Act into the 1990 Act of a new section 51(4A) with effect from the 1st January 2005 which provides as follows:-

> *"'(4A) A waste disposal authority in England which is not also a waste collection authority may in directions under subsection (4)(a) above* [i.e. in directions issued pursuant to the *"duty of direction"*] *include requirements about separation that relate to waste as delivered, but may do so only if it considers it necessary for assisting it to comply with any obligation imposed on it by or under any enactment."*

WCAs have a corresponding duty to comply with any directions as to separation see section 48(1A) also inserted. These provisions assist WDAs in the performance of any duty to recycle waste.

As already set out by section 355 of the 1999 Act a WCA in Greater London must have regard to the Mayor's Strategy for waste disposal.

Section 356(1) grants the Mayor a power to give WDAs and WCAs in London, directions as to how they exercise their functions where necessary for the purpose of implementing his municipal waste management strategy.

A WCA must notify the Mayor of proposed waste contracts under section 358(1) of the 1999 Act and the Mayor may direct the waste collection authority to provide him *"with such information about the contract as he may require for the purposes of deciding whether the contract would be detrimental to the implementation of"* such strategy: see section 358(3). It is significant that at no stage in this process does the statute proscribe or even permit any involvement of a WDA.

It seems to me that both these sets of provisions, flowing from the 1999 Act and the 2003 Act, are inconsistent with the existence of a power, implied into the 1990

Act, conferred on WDAs to control the operations of WCAs, in the manner contended or by the Authority.

4) At paragraph 10 to 13 of this judgment, under the heading *"duties on waste producers"* I set out a series of provisions of the 1990 Act. From those provisions it emerges that, by contrast with household waste, in the field of commercial waste the 1990 Act and its predecessors have contemplated that, on the one hand, WCAs should be at liberty to charge for their collection services but, on the other hand, there should be a system of licensed private waste disposal contractors able to provide a similar service to commercial waste producers. Thus the 1990 Act contemplates that producers are to have a choice. Against that background it seems clear that the purpose of section 45(1)(b), or at least one of the purposes, is to protect commercial waste producers in a particular area from the possibility that private waste disposal contractors may not be available or, alternatively, are asking an extortionate price for their services. This conclusion seems to me to preclude the existence of any such statutory purpose or implied power in a WDA for which the Authority contends. Against this statutory background it seems to me that a WCA must have the power to fix its tariff of charges for its commercial waste collection services at the level appropriate to the provision of a residual service, if minded to do so, and provided that the tariff is *"reasonable"* for the provision of such a service.

Ground II: The alleged failure to have regard to relevant considerations

65. I turn to consider the second main ground of challenge set out at paragraph 39(b) of the amended detailed grounds of challenge namely that Wandsworth failed to have regard to relevant matters in reaching the Decision. The various matters which it is alleged that Wandsworth failed to have regard to are set out between paragraphs 64 and 78 of that document. They are six in number as follows:-

a) The Mayor's Strategy

b) The Draft Joint Municipal Waste Management Strategy;

c) The failure to justify the assumption, in calculating its tariff to commercial waste customers, that its customer base would drop to 10% of its existing level.

d) The charges imposed by other Constituent Boroughs.

e) Past experience of increased charges and the effect on the customer base;

f) The environmental impact of the Decision.

66. Initially the recommendations in paper number 04-609 were to be considered by the Decision Makers on the 19th and 20th July 2004. However, as the Authority was expressing concerns about the proposals contained in the paper the meetings were deferred until 3rd August in order that the Authority's views could be fully explored and account taken of them as part of the decision making process although Wandsworth was under no duty to consult the Authority.

67. The meetings of the Decision Makers held on the 3rd August 2004 were preceded by extensive correspondence between the Authority and Wandsworth. The relevant letters start with a letter from the Authority's chairman dated the 22nd July 2004 to the leader of Wandsworth council. This contains a number of criticisms of paper number 04-609. Wandsworth's response of the 28th July written by Mr Brennan is directed to Mr Colin James in the absence of the chairman. The Authority's response of the 29th July is written by Mr James. On the 30th July Mr Brennan prepared and circulated a further paper 04-609B which, amongst other things, had appended to it all these letters. The paper summarised the contents of the letters and set out Mr Brennan's response to the points being raised by the Authority. In a letter with annexures dated the 3rd August but delivered before the meetings, Mr James' commented on papers 04-609 and 04-609B. Mr Brennan produced his response to this letter on the same day. The Decision Makers thus had had circulated to them before the meetings both Mr Brennans' papers and their attached correspondence. They also had an opportunity to read Mr James letter of the 3rd August and Mr Brennan's comments upon it before the meetings took place.

68. I do not need to summarise the contents of the papers and the attached correspondence save to draw attention to the final paragraph of Mr Brennan's letter of 28th July 2004 where he says:-

> *"If there are matters that need further clarification, or any matters that the Council should properly take into account before taking the proposed decisions of the 3rd August, WRWA* [the Authority] *should let us know without further delay, in the interests of good administration and good relations among all the Western Riverside Authorities."*

69. All that I need point out for the purposes of this judgment is that it is now accepted that items (c) and (f) on which the Authority relies as not having been brought to the attention of the meetings, appear, and the arguments relating to them are rehearsed, in this documentation. It follows, as a matter of fact, that those matters were before the committees which took the Decision. In particular, under (f), the criticism that the Decision involved a breach of the policy to maximise the use of water transport, as being more environmentally beneficent, was before the meetings. So also was the criticism that the diversion of commercial waste from the waste stream passing to the Authority might undermine, or if emulated by other of the Constituent Boroughs, might undermine, the economics of the proposed Belvedere incinerator.

70. As to item (d) I accept what Mr Brennan says at paragraph 133 of his first witness statement. Little of value is to be gained from a comparison of charges levied by Wandsworth which had a long standing decision to collect separately household and commercial waste with the charges of the other Constituent Boroughs which have a policy of co-collection. It was Wandsworth's policy to fix their tariffs at the level necessary to cover the cost of a residual service available on demand by what Wandsworth expected to be the rump of its commercial customers. I have found this policy to be lawful.

71. As to item (e), this arises as part of the argument as to whether (c), the calculation of Wandsworth's tariff on the basis that it would retain only 10% of its existing commercial customers is justified. In any event the point is raised on the second page of the chairman of the Authority's letter to the leader of Wandsworth's Council dated 22nd July 2004 which is one of the letters circulated with paper 04-609 to the Decision Makers and thus must be treated as having been before them when the Decision was taken.

The Mayor's Strategy

72. That the Decision was potentially in conflict with the Mayor's Strategy was not raised in the course of the correspondence between the Authority and Wandsworth leading up to the Decision. That it was not raised seems to me to lead to the conclusion that it was not a matter on which the Authority was placing very much weight in the arguments that it was making to Wandsworth.

73. Section 355 of the 1999 Act requires Wandsworth as waste collection authority when exercising those functions *"to have regard to"* the Mayor's Strategy. Paragraph 67 of the grounds reads as follows:-

> *"67 The defendant is unable to demonstrate that it had any or due regard to the Mayors Strategy. Neither paper 04-609 nor paper 04-069B refers to the Mayor's Strategy at all. Consequently, there is no consideration of*

the implications of the Decision or its implementation, in particular the proposed tariff and their compatibility with the Mayor's Strategy.

68 *As a result of this failure, the defendant failed to consider any alternative which is consistent with its duty to collect commercial waste under section 45(1)(b) or, alternatively, a tariff which is consistent with the Mayor's Strategy."*

74. In Barber v The Minister of the Environment & Ors (Bermuda([1997] UKPC 25 the opinion of the board is given by Lord Slynn. At paragraph 19 he says this:-

"19. It is not, however, necessary to decide whether either of these possible interpretations of section 57(3) applies if the Minister's powers or duties on an appeal are spelt out elsewhere. In section 57(7) in the exercise of his functions on an appeal the Minister "shall have regard to" the relevant provisions of the development plan and to any material consideration. The words the Minister "shall have regard to" are to be contrasted with the words the Board "shall not grant" in section 17. On the face of it there is a clear distinction. Under section 57 there is no absolute embargo on the grant of planning permission. The Minister must have regard to the development plan. He cannot ignore it altogether. But once he has had regard to it he may still grant or refuse planning permission. Under section 17 the Board cannot grant permission if the development would be at variance with the development plan.

20. This is the approach which has been adopted in cases where the same words have been used in United Kingdom legislation. Thus in Simpson v. Edinburgh Corporation 1960 S.C. 313 where the requirement under section 12 of the Town and Country Planning (Scotland) Act 1947 was to "have regard to the provisions of the development plan so far as material thereto and to any other material considerations", Lord Guest said at page 318:-

"It was argued for the pursuer that this section required the planning authority to adhere strictly to the

> *development plan. I do not so read this section. "to have regard to" does not, in my view, mean "slavishly to adhere to". It requires the planning authority to consider the development plan, but does not oblige them to follow it. In view of the nature and purpose of a development plan, to which I shall refer later, I should have been surprised to find an injunction on the planning authority to follow it implicitly, and I do not find anything in the Act to suggest that this was intended. If Parliament had intended the planning authority to adhere to the development plan, it would have been simple so to express it.""*

75. Section 356 empowers the Mayor, subject to certain limitations to give directions to WCAs and WDAs *"requiring the authority to exercise a function in a manner specified in the direction."* Section 358 of the 1999 Act requires a WCA to bring to the Mayor's attention any waste collection or disposal contracts which it is proposing to enter into. Prior to the Decision Wandsworth entered into correspondence with the Mayor in pursuance of its duty under section 358 in relation to its proposed contract with Biffa. Meetings took place between representatives of the Mayor and officers of Wandsworth. The Mayor was sent the tender documentation from which I have quoted above which would have made apparent to the Mayor what Wandsworth's intentions were with relation to the disposal of commercial waste. It seems that no concerns remained outstanding at the end of the consultation process regarding the handling of commercial waste under Wandsworth's intended refuse services contract.

76. Councillor Tracey was one of the Decision Makers. Until her exclusion by the Authority as a result of this dispute, Councillor Tracey had been a member of the Authority and latterly its deputy chairman. In her witness statement commenting on paragraph 67 of the grounds she says this at paragraph 26:-

> *"26 …as a member of* [the Authority] *as the Executive Member for the environment on Wandsworth Council, and as Wandsworth Council's representative on the Association of London Government* [the body that discussed at some length the Mayor's Strategy and its implications for London Councils before implementation, …] *I could not fail to be aware of the Mayor's Strategy or the fact that as an Executive Member I had a duty to take the Strategy into account when making any decisions on* [Wandsworth's] *waste management. I did not consider that the Mayor's Strategy was inconsistent with what* [Wandsworth] *were proposing*."

77. On behalf of Wandsworth Mr Richard Hobbs of the Leisure and Amenities Service Department describes in his witness statement his study of the Mayor's Strategy after its publication and also the steps taken by Wandsworth to comply. It is his view, backing up the view of Councillor Tracey, that Wandsworth's commercial waste policy does not offend against the Mayor's Strategy. There is a singular lack of particularity in the statement of grounds as to how it is alleged that Wandsworth's policy offends the Mayors Strategy.

78. On the 7th December 2004 the Mayor wrote to the Authority supporting the Authority bringing these proceedings and indicating that he did not consider the actions of Wandsworth *"to be contributable* [sic] *to sustainable waste management in London"* and *"to be potentially detrimental to my Municipal Waste Management Strategy for London."* The letter draws attention to two aspects of the Strategy, proposal 50, by which *"the Mayor will require all London waste authorities to identify ways to minimise the amount of unpaid commercial waste contaminating the household waste stream"* and secondly proposal 20 *"to fully explore opportunities for the recycling of street cleansing and trade waste, including waste collections."*

79. It is clear from the correspondence between the Authority and Wandsworth leading up to the meetings of the Decision Makers that both the anxieties highlighted in the Mayor's letter of the 7th November were before the Decision Makers at their meetings see in particular paragraphs 7.8 and 7.9 of Mr James letter to the leader of the Wandsworth Council of 3rd August 2004 which are responded to by Mr Brennan in his note to the Decision Makers of the same date. The Mayor has not followed up his letter to the Authority by any communication to Wandsworth. By contrast with the Authority the Mayor has an express power to direct a WCA as to the conduct of its waste collection services see section 356 of the 1999 Act. To date the Mayor has not sought to exercise that power.

80. In my judgment it has not been demonstrated that the Decision to organise commercial waste collection in Wandsworth, so as to minimise the service which Wandsworth is required by section 45(1)(b) to make available to commercial waste producers, was not made with regard to the Mayor's Strategy and, notwithstanding any possible conflict with the *"Mayors Strategy"*, was unreasonable in the Wednesbury sense.

The Draft Joint Municipal Waste Management Strategy

81. This again is a matter of complaint which was not raised in the course of the correspondence between the Authority and Wandsworth leading up to the Decision notwithstanding the invitation contained in Mr Brennan's letter of 28th July. Notwithstanding that Wandsworth has been party to a process of agreeing with the other

Constituent Boroughs and the Authority a Joint Waste Disposal Strategy pursuant to section 32 of the 2003 Act, and has agreed such a Strategy, the document remains in draft and Wandsworth is still in the process of raising issues with the Authority on some details of its content. It has not been formally assented to by Wandsworth. In any event Wandsworth, as an authority designated *"excellent"* by the office of the Deputy Prime Minister, will not be obliged to be party to such a strategy see regulation 2(a) of the Joint Municipal Waste Management Strategies (disapplication of Duties) (England) Regulations 2004.

82. It is also Wandsworth's submission that the terms of the Draft Strategy are so general that it had no practical bearing on the specific issues before the Decision Makers on the 3rd August. I accept that submission.

83. By contrast with the Mayor's Strategy, Joint Strategies under section 32 of the 2003 Act are not identified expressly or impliedly by any statutory scheme as a matter which must be taken into account by WCAs in the exercise of their waste management functions.

84. In *Re Findlay [1985] 1AC 318* at page 333 Lord Scarman, in a case involving the refusal of parole to long term prisoners approved the passage in the judgment of Cooke J in the New Zealand case of *CREEDNZ Inc v The Governor General [1981] 1NZLR* where he said:-

> *"What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that the consideration is one that may be properly taken into account, nor even that it is one which many people, including the court itself would have taken into account if they had to make the decision."*

85. And a further passage where Cooke J says:-

> *"There will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the Ministers ...would not be in accordance with the intention of the Act."*

86. Lord Scarman continues:-

> *"These two passages are, in my view, a correct statement of*

> *principle. In the present case the statute neither prohibits the Secretary of State from consulting the Board before adopting a policy change in the exercise of his discretionary power to grant parole nor requires him to do so. In deciding to adopt the new policy without consulting the board the Secretary of State took into account the factors of deterrence, retribution and public confidence in the administration of criminal justice. These were plainly material matters for his consideration in the exercise of his discretion. He cannot therefore, be said to have acted unreasonably in having regard to them. Accordingly I reject the submission of unreasonableness and with it the contention that failure to consult the board was unlawful."*

87. In my judgment it cannot be said that Wandsworth acted unreasonably in the Wednesbury sense in failing to have regard to the Draft Joint Municipal Waste Strategy in arriving at the Decision. It follows that the second of the main grounds of challenge to the Decision also fails. It also follows that the third ground alleging irrationality flowing from Grounds I and II also fails

88. For these reasons I would dismiss the Authority's application.