Neutral Citation Number: [2015] EWCA Civ 55

Case No: C1/2014/0666

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE MITTING
CO/5245/2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 5th February 2015

Before:

LORD JUSTICE AIKENS
LORD JUSTICE SULLIVAN
and
LADY JUSTICE BLACK

- -

Between:

THE QUEEN (ON THE APPLICATION OF FCC ENVIRONMENT (UK) LIMITED)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE	**Respondent**
- and-	
COVANTA ROOKERY SOUTH LIMITED	**Interested Party**

(Transcript of the Handed Down Judgment of
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James Maurici QC and Andrew Byass (instructed by **Nabarro LLP**) for the **Appellant**
David Blundell (instructed by **Treasury Solicitors**) for the **Respondent**
Emma Harling-Phillips (instructed by **DLA Piper UK LLP)** for the **Interested Party**

Hearing date: 27th January 2015
Judgment
As Approved by the Court

Lord Justice Sullivan:

Introduction

1. This is an appeal against the Order dated 6th February 2014 of Mitting J dismissing the Appellant's claim for judicial review of the Rookery South (Resource Recovery Facility) Order 2011 ("the Order"). The background to the Appellant's claim is set out in Mitting J's judgment: [2014] EWHC 947 (Admin).

Facts

2. Covanta applied to the (now abolished) Infrastructure Planning Commission ("the Commission") for an order granting development consent under the Planning Act 2008 ("the 2008 Act") for the construction of a Resource Recovery Facility ("RRF"), comprising an Energy from Waste ("EfW") plant with an expected nominal throughput of 585,000 tonnes of residual waste per annum which would generate an average gross output of approximately 65 MWe, and a Materials Recycling Facility ("MRF") which would provide for the management of the incinerator bottom ash produced by the EfW plant, at the Rookery South Pit, near Stewartby, Bedfordshire.

3. The EfW plant was a nationally significant infrastructure project ("NSIP") for the purposes of the 2008 Act. The application for the order granting development consent also sought compulsory acquisition powers under sections 120 and 122 of the 2008 Act both to acquire land, including land owned by the Appellant and by local authorities and statutory undertakers, and to acquire rights over land, including a right to extinguish a restrictive covenant which benefits land owned by the Appellant.

4. A Panel of three Commissioners ("the Panel") was appointed to determine the application. Following an examination of the application between the 18th January 2011 and 15th July 2011, which included an issue specific hearing on compulsory acquisition between the 27th June and 1st July 2011, the Panel set out the reasons for its decision to make the Order in its "Panel's Decision and Statement of Reasons" ("SR") dated 13th October 2011. The Order was made by the Panel under section 114(1) of the 2008 Act on 22nd November 2011.

5. Because the Order authorised the compulsory acquisition of land belonging to local authorities and statutory undertakers which had made representations which they had not withdrawn, section 128 of the 2008 Act (now repealed) provided that the Order was subject to special parliamentary procedure. The Order was laid before Parliament on the 29th November 2011. Having considered petitions against the Order, the Joint Committee on the Rookery South (Resource Recovery Facility) Order 2011 reported without amendment on the 13th February 2013, and by virtue of section 6(1) of the Statutory Order (Special Procedure) Act 1945 ("the 1945 Act") the Order came into force on the 28th February 2013 when the Joint Committee's Report was published in Parliament.

Mitting J's judgment

6. Before Mitting J the Order was challenged on two grounds:

(1) The Panel had failed to give adequate reasons for its conclusion that there was a compelling case in the public interest for the grant of compulsory acquisition powers, because it had failed to explain why it had concluded that there were no reasonable alternatives to compulsory acquisition.

(2) The Respondent failed, in the light of the long delay between the making of the Order on 22nd November 2011 and its coming into force on 28th February 2013, to consider whether it was necessary to update the environmental information in the Environmental Statement which had accompanied the application, so as to ensure that his decision was based on "current knowledge and methods of assessment" as required by Article 5(1) of Directive 2011/92/EU ("the Directive").

7. Mitting J rejected both of these grounds. In grounds 2 and 3 of its appeal to this Court the Appellant contends that Mitting J erred in rejecting its challenge on grounds (1) and (2) (above). When dealing with ground (1), Mitting J accepted in paragraph 17 of his judgment the Respondent's submission as to the interrelationship between section 122(3) of the 2008 Act, which required the Panel to include the provisions authorising compulsory purchase in the Order only if it was satisfied that there was a compelling case in the public interest for the land to be acquired compulsorily, and section 104(3) of the Act which required the Panel (subject to subsections (4)-(8)) to decide the application in accordance with any relevant national policy statement ("NPS"). The relevant NPSs in this case were the Overarching National Policy Statement for Energy (EN-1), and the National Policy Statement for Renewable Energy Infrastructure (EN-3). These said that the need for new renewable energy projects was urgent (paragraph 3.4.5 of EN-1), and that the Commission "should act on the basis that the need for infrastructure covered by this NPS has been demonstrated." There is no challenge to this paragraph of Mitting J's judgment.

8. In paragraph 18 of the judgment Mitting J went somewhat further, and expressed his own view as follows:

> "18. For my part I find it difficult to conceive of circumstances in which the Panel in applying statutory guidance, as it must, which established an urgent need for development, could legitimately conclude that there was not a compelling case as a necessary element of the scheme, justifying compulsory acquisition of rights in land. To that extent, the established distinction between tests for the grant of planning consent and the grant of a power of compulsory acquisition (see Trusthouse Forte Hotels Ltd v Secretary of State for the Environment (1986) 53 P&CR 293 at page 299, paragraph 2 and page 300, paragraph 6) has been modified by statute."

Ground 1

9. In ground 1 of its appeal the Appellant contends that the reasoning in paragraph 18 of the judgment is erroneous in a number of respects. I can deal briefly with this ground of appeal because it was agreed by all three parties that:

(a) the judge did err in this paragraph of his judgment (see paragraph 10 below); but

(b) the error in paragraph 18 of the judgment does not affect the outcome of the appeal because there is no suggestion that the Panel made the same, or (subject to the challenge in ground 2 (below) to the adequacy of the Panel's reasons in the SR) any other legal error in its decision to grant development consent.

10. The parties were agreed that the relationship between sections 104 and 122 of the 2008 Act was correctly set out in paragraphs 35 and 36 of Mr. Blundell's Skeleton Argument, as follows:

> "35…..
>
> (1) Section 104(3) of the 2008 Act requires "the application" to be decided in accordance with any relevant NPS;
>
> (2) The tests for whether to grant powers of compulsory acquisition are set by section 122(2) and (3) of the 2008 Act and include, in section 122(3), that there must be "a compelling case in the public interest";
>
> (3) Where "the application" includes proposed powers of compulsory acquisition of land, in assessing whether there is a "compelling case in the public interest" pursuant to section 122(3), the decision-maker will have to make that assessment in accordance with the contents of any relevant NPS by virtue of section 104(3);
>
> (4) However, where, as in the present case, the NPS establishes an urgent need for development, this does not mean that the "compelling case in the public interest" test is automatically and necessarily met – section 104(3) means that, in assessing whether there is a "compelling case in the public interest", the need for the development must be treated as established and cannot be questioned, but it may be possible to meet the need without the use of the requested powers of compulsory acquisition;
>
> (5) This is a reflection of the fact that section 104(3) is a broad provision, dealing with the determination of the application as a whole and leading to an order granting development consent which may include compulsory acquisition provisions, whereas section 122(3) is a narrower test dealing specifically with compulsory acquisition powers;
>
> (6) The full and proper application of the section 122(3) test is guaranteed by section 104(6) which disapplies the requirement in section 104(3) where it would lead to unlawfulness under <u>any</u> enactment (i.e. including under a different provision of the 2008 Act) – thus, if there was any potential conflict between sections 104(3) and 122(3), the "compelling public interest" test in section 122(3) would not be overridden by section 104(3).

> 36. In this way, there is no conflict between section 104(3) and section 122(3). They each operate distinctly in the determination of the application overall (in the case of section 104(3)) and a request for compulsory acquisition powers (in the case of section 122(3)). To the extent that any conflict might otherwise arise because of the terms of particular provisions in an NPS, the conflict is avoided by virtue of section 104(6)."

11. The parties were also agreed that it was not, in fact, so difficult to conceive of circumstances where an examining Panel could conclude that there was no compelling case for compulsory acquisition despite an NPS having established an urgent need for development. Three examples were given in Mr. Blundell's Skeleton Argument:

> "(1) The land proposed to be acquired compulsorily may, on proper analysis, be found to be excessive because the development proposals can be constructed without needing that land to be acquired (in which case, the section 122(2) test would also not be met);
>
> (2) The acquisition of a right over the land, rather than its acquisition, might suffice; and
>
> (3) The land may be necessary but, during the course of the Panel's consideration of the application, the owner may agree to sell it willingly rather than by compulsion (a common scenario in compulsory purchase inquiries)."

To these examples the Appellant added the example of an NPS which did not require consideration of alternative sites for the purpose of deciding whether to grant a development consent for a particular kind of infrastructure development, but where the existence of an alternative site or sites would be relevant for the purpose of deciding whether there was a compelling case in the public interest for compulsory acquisition.

Ground 2

12. It is important to appreciate the very narrow focus of the reasons challenge to the SR. The Appellant accepts that the Panel did not fall into the error of assuming that because the "urgent" need for EfW plants, as established by EN-1 and EN-3, was such as to outweigh the adverse impacts of the development in visual and other terms so that development consent should be granted, it followed that compulsory acquisition powers should also be granted. The Panel recognised that a compelling case in the public interest had to be demonstrated (paragraph 7.12), arranged a hearing to deal specifically with the issue of compulsory acquisition (paragraph 7.15), and dealt with "Compulsory Acquisition Matters" in a separate Chapter, Chapter 7, of the SR.

13. The SR must be read as a whole. Although compulsory purchase matters are dealt with in a separate Chapter, it would not be right to read Chapter 7 of the SR in isolation. Having said in paragraph 7.12 that "compulsory acquisition must be justified in its own right" the Panel continued:

> "But this does not mean that the compulsory acquisition proposals can be considered in isolation from the wider consideration of the merits of the project: there will be some overlap. There must be a need for the project to be carried out and there must be consistency and coherency in the decision making process."

The Panel returned to this issue in paragraphs 7.86 and 7.87, as follows:

> "7.86 We are, however, mindful that the DCO considers both the development and compulsory acquisition powers and that the case for the grant of compulsory acquisition powers cannot properly be considered until the position regarding the development matters has been determined. There must be consistency and coherency and accordingly we have adopted a two-stage approach: we have first formed a view on the case for development, and then in this Chapter have proceeded on the basis of that conclusion.
>
> 7.87 Chapter 6 reaches the conclusion that in development terms consent should be granted. That being said, all the issues which arose in considering the case for development have also been considered in the case for the grant of compulsory acquisition powers. Some issues relevant to the consideration of the grant of development consent were examined further in the context of compulsory acquisition. For that reason, the Panel suggested to the Applicant and affected persons a number of areas which should be tested by cross-examination at the compulsory acquisition hearing. The areas in question were scale and need, alternative sites, and policy. However, the list was not exhaustive, and all affected parties were invited to suggest other areas that might be so tested, but none did so."

14. When considering alternative sites, the Panel considered "whether the need could be met on an alternative site or in an alternative way (not requiring the grant of compulsory acquisition powers) having regard to NPS EN-1" (paragraph 7.15). The Appellant (which was then called the Waste Recycling Group Limited, and is referred to as WRG in the SR) accepts that the Panel accurately summarised its case on this issue, as follows:

> **"Need** - the principal justification for the project is the national need for energy generation. However, this can be met by small scale installations as well as a large-scale installation…..
>
> **Alternatives -** …. The Applicant's approach…… has failed to examine a fundamental alternative, namely a dispersed or local waste management solution which would have led to a conclusion that there were alternative proposals which offer advantages over the proposed site."
> (paragraph 7.47)

> "7.50 the Applicant had failed to demonstrate a need for the facility or that other alternative sites are not either readily available or likely to come forward within similar time scales and that there were significant risks of material adverse consequences."

15. The Panel summarised Covanta's response to WRG's argument that there were alternative sites which could be used to meet existing need without using compulsory acquisition powers, as follows:

> "[1] in view of the urgent need for additional renewable energy generation and the scale of the current need, the sites should not be looked at as alternatives – all are needed. The Government has not sought to cap the volume of development coming forward: quite the opposite. Paragraph 3.3.24 of NPS EN-1 states '*it is not the Government's intention in presenting the above figures to set targets or limits on any new generation infrastructure to be considered in accordance with the NPSs'*;
>
> [2] none of the alternative sites put forward by WRG are as capable of meeting national policy objectives as Rookery South: apart from the fact that they could not process the same volume they have not reached the same stage in the development process and cannot be truly be regarded as alternatives; …."
> (paragraph 7.69)

16. In paragraph 7.92 the Panel rejected Covanta's contention [1] (above) that it was not necessary to look at the alternative sites which comprised the Appellant's dispersed solution:

> "The Applicant suggests that because of the deficit in waste recovery capacity in the catchment area and the need for renewable energy infrastructure, there is a requirement for other projects to come forward in addition to that proposed, and therefore discussion of alternatives is inappropriate. We note and understand the reasoning behind this suggestion but we have considered the case for alternatives argued both by the Applicant and WRG and reached our conclusion having regard to the guidance in paragraph 4.4.3 of EN -1 namely that *'the IPC should be guided in considering alternative proposals by whether there is a realistic prospect of the alternative delivering the same infrastructure capacity (including energy security and climate change benefits) within the same timescale'"*

Thus far, the Appellant has no criticism of the reasoning in the SR.

17. The crucial paragraphs of the SR for the purpose of the Appellant's challenge on ground 2 are paragraphs 7.93 and 7.94:

> "7.93 A number of points were put to us in the course of the compulsory acquisition hearing including the following:
>
> - none of the alternatives is capable of delivering the same capacity;
>
> - none of the alternatives has the same prospect of delivering further carbon savings by CHP;
>
> - none of the alternatives would deliver the same benefits in terms of climate change or energy security (para 4.4.3 of EN-1 expressly emphasises the significance of such benefits in the context of alternatives); and
>
> - there is no material prospect of any comparatively sized facility coming online within the same timescale.
>
> 7.94 We are of the view that there are no alternative sites to Rookery South in terms of delivery and timescale. At the compulsory acquisition hearing the Applicant submitted a letter dated 29 June 2011 written by Mr Chilton (the Managing Director of Covanta Energy Limited) which confirmed the company's intention to progress the project with every urgency (APP/8.10). But owing to the timing of its submission, and the fact that the author was not present to respond to questioning on it, we afford limited weight to it."

This led the Panel to conclude in paragraph 7.118 that:

> "there are no sites which are an alternative to Rookery South in terms of delivery and timescale"

18. On behalf of the Appellant, Mr. Maurici QC submitted that paragraph 7.93 of the SR simply records that the four bullet points were put to the Panel, it does not say that the Panel accepted those points (which had been put to the Panel by Covanta). It is true that the Panel does not expressly agree with the four bullet points, but I have no doubt that Mitting J's conclusion that they did so by necessary implication (see paragraph 20 of the judgment) was correct. The first sentence of paragraph 7.94 would make no sense if the Panel had not accepted the four bullet points listed in the previous paragraph.

19. We were referred to a number of authorities which deal with the proper approach to challenges to the adequacy of reasons in planning and compulsory purchase cases. With one exception, it is unnecessary to refer to those authorities in any detail. They are all very familiar, and the relevant principles were not in dispute between the

parties. The one exception is the following passage in the judgment of Slade LJ in *R v Secretary of State for Transport ex p de Rothschild* [1989] 1 All ER 933, in respect of a decision letter confirming a Compulsory Purchase Order:

> "In my judgment, it could not be right to analyse and pick to pieces each sentence of the Secretary of State's letter as if it were a subsection in a taxing statute. To accept the appellants' submission would, in my judgment, involve an altogether too analytical, indeed I would say perverse, construction of the language by which the Secretary of State expressed himself, when his letter is read as a whole. On a fair reading of the letter as a whole, it is in my opinion clear that the Secretary of State was intending to endorse the whole of the inspector's conclusions."
> (see p. 943 a – b)

20. The Appellant's submission that the Panel did not endorse the four bullet points in paragraph 7.93 is an altogether too analytical, and indeed a perverse construction of the language used by the Panel if the SR is read as a whole. If that is done, earlier passages in the SR do not leave any room for doubt that the Panel did agree with the first three bullet points. The fourth bullet point was uncontroversial. It is common ground that no (single) "comparatively sized facility" was put forward as an alternative. If there was an alternative it was the "dispersed solution" consisting of a network of smaller facilities put forward by WRG and the local authorities. The Panel had considered the merits of such an alternative in paragraphs 5.33 and 5.34 of its Report when considering whether development consent should be granted for the proposed RRF:

> "5.33 Several parties argued that the size of the proposed plant was excessive, and there were alternative ways of handling waste through a network of smaller plants. Obviously, if only waste from (the former) Bedfordshire and Luton area is to be accepted that would be the case. The Applicant's intent, however, is to accept waste from a wider area and the evidence of the WRATE Report submitted with the application is that the benefits in sustainability terms of having a single plant such as that proposed, would be significant as compared to the option of developing a number of smaller plants positioned more closely to the source of the waste (DOC/5.4). We agree.
>
> 5.34 In this regard, there can be no doubt that, if a plant of the size proposed were to be developed, fewer other plants would be required to deal with a given volume of waste. Indeed, some plants that might have otherwise come forward, including ones on sites close to the Rookery, may not do so. However, whilst several schemes were put forward during the examination as 'alternatives' to the Applicant's proposal, the evidence is that most are at an early stage of development and there is no certainty that they will progress (see para 7.92 et seq below)."

21. Mr. Maurici accepted that the benefits in sustainability terms of having a single plant such as that proposed, which the Panel in paragraph 5.33 agreed would be significant as compared with the option of developing a number of smaller plants, included the benefits identified in the second and third bullet points in paragraph 7.93: delivering further carbon savings by CHP, and delivering benefits in terms of climate change and energy security. There can, therefore, be no doubt that the Panel did endorse the points listed in paragraph 7.93.

22. Mr. Maurici submitted that it did not follow that the Panel's reasoning was adequate. It is common ground that the final bullet point in paragraph 7.93 does not deal with the dispersed solution of a network of smaller sized facilities. Mr. Maurici submitted that the first bullet point was correct as far as it went – none of the suggested alternatives in the dispersed solution, if considered individually, was capable of delivering the same capacity – but it did not answer WRG's argument that, collectively, the smaller sized facilities in the dispersed solution were capable of delivering the same capacity as the proposed RRF at Rookery South.

23. Mr. Blundell (whose submissions were adopted by Miss Harling – Phillips on behalf of Covanta) submitted that the references to "the alternatives" in the first three bullet points were references to the dispersed solution of a network of smaller sized plants, and that the Panel's consideration of whether they were "capable" of delivering the same capacity would have included its consideration of whether there was a reasonable prospect of the same capacity being delivered within the same timescale, and its conclusion that they were not "capable" reflected its earlier conclusion in paragraph 5.34 (which cross-referred to paragraph 7.92 et seq) that most of the alternatives were at an early stage of development and there was no certainty that they would progress.

24. Mr. Maurici submitted that while the Panel's conclusion that "most" of the alternatives were at an early stage and there was no certainty that they would progress was adequate for the purpose of deciding whether to grant development consent because of the policy guidance in NPS EN-1 (see below), it was not an adequate basis for a conclusion that the dispersed alternative would not be capable of delivering the same capacity within the same timescale as the Rookery South proposal: the dispersed alternative did not rely on all, or even most, of the alternative sites coming forward. In paragraph 5.35 of the SR the Panel said:

> "In any event the Government's policy on capacity is clear. NPS EN-1, paragraph 3.1.2 advises that *'The Government does not consider it appropriate for planning policy to set targets for or limits on different technologies'*. In the following paragraph it states '*The IPC should therefore assess all applications for development consent for the types of infrastructure covered by the NPSs on the basis ….that there is a need for those types of infrastructure…'*. Paragraph 3.4.5 of the document records that *'The need for generation projects is therefore urgent.'*"

25. While there is some force in Mr. Maurici's submissions, it would be surprising if, having accepted the need to consider alternative ways to meeting the need (paragraph 7.15), and having accurately summarised the Appellant's case that the alternative way of meeting the need was a dispersed solution through a network of smaller plants

(paragraph 7.47), the Panel, in an otherwise thorough and comprehensive SR, had simply failed to address that alternative. In my view, on a fair reading of the SR as a whole, the Panel did not fail to address the alternative dispersed solution, it rejected it in paragraphs 7.93 and the first sentence of paragraph 7.94 of the SR. I have reached that conclusion for the following reasons.

26. I have already mentioned the fact that the parties are agreed that the fourth bullet point in paragraph 7.93 is concerned with the prospect of a single, comparably sized facility coming online within the same timetable. By contrast with that final bullet point, the first three bullet points all commence with the words: "none of the alternatives". Any informed reader of the SR would realise that "the alternatives" were not an alternative site (because there was no site on which there was any prospect of a comparatively sized facility coming forward) but a combination of smaller sites, and the network of smaller sites which comprised the dispersed solution was the only such alternative which had been put forward in any detail.

27. The Panel's agreement with the second and third bullet points reflects its earlier conclusion in paragraph 5.33 that a network of smaller plants would not have the significant sustainability benefits of a single plant such as that proposed. If the SR is read as a whole it is plain that "the alternatives" which would not deliver further carbon savings by CHP, or the same benefits in terms of climate change and energy security, are the network of smaller plants referred to in paragraph 5.33. There is no reason to give a different meaning to "the alternatives" in the first bullet point. If Mr. Maurici's submission was accepted, and the first bullet point was to be read as a statement that none of the alternatives, when considered individually (but not collectively) was capable of delivering the same capacity, it would add nothing to the fourth bullet point: there was no alternative, comparatively sized, facility.

28. I accept Mr. Blundell's submission that, when read in context, the Panel's conclusion that none of the alternatives is capable of delivering the same capacity is not simply a conclusion as to the capacity of the alternative dispersed solution, whether that capacity is measured in terms of tonnes of residual waste per annum or MWe, in the abstract, but is the Panel's response to the question posed by the policy guidance in paragraph 4.4.3 of EN-1, to which it had referred in the previous paragraph of the SR: was there a realistic prospect of the alternative delivering the same infrastructure capacity within the same timescale? Given the policy on capacity in NPS EN-1, it did not have to answer that question at the earlier stage, but the Panel did consider this issue, and it had reached the conclusion, in effect, that there was not a realistic prospect of the dispersed solution delivering the same infrastructure capacity within the same timescale because most of the 'alternatives' were at an early stage and there was no certainty that they would progress. The cross-reference in paragraph 5.34 to paragraph 7.92 et seq was inserted for a purpose: to make it clear that in the Panel's view its conclusion in paragraph 5.34 was also relevant for the purpose of its application of the guidance in paragraph 4.4.3 of EN-1 when considering the alternatives to compulsory acquisition. The Panel could have gone into greater detail on this issue (which was but one of very many issues dealt with in the SR) but it was not required to do so.

29. Mr. Maurici submitted there was a further reason why it should be inferred that the four bullet points in paragraph 7.93 of the SR were not dealing with the dispersed solution; they were a summary of four points which had been put to the Panel by

Covanta in a paragraph of its closing submissions in which it had been dealing with a number of alternative sites owned by WRG about which WRG had been able to give more detail. Covanta had responded to the dispersed solution, which included those sites together with other sites not owned by WRG, in a later paragraph of its closing submissions in which it had described this alternative as "nebulous in the extreme and entirely lacking in substance." While Covanta in its Closing Submissions did deal separately with WRG's alternative sites and the "nebulous" dispersed strategy which included other sites, its criticisms of the former, if they were accepted by the Panel, would apply with no less force to the latter. In these circumstances, it would not be right to rely on the order in which Covanta put its points in its closing submissions as the basis for an inference that the first three bullet points in paragraph 7.93 of the SR were not addressed to the dispersed solution. On a fair reading of paragraph 7.93 the Panel dealt with the dispersed solution which comprised a number of smaller sized facilities in its first three bullet points, and the final bullet point then recorded that there was no prospect of a single comparatively sized facility coming online within the same timescale.

30. For these reasons, I would dismiss Ground 2 of this appeal.

Ground 3

31. It is common ground that when an Environmental Statement ("ES") is required, the environmental information it contains should be compiled on the basis of "current knowledge and methods of assessment.": see Article 5.1 of the Directive and the definition of "environmental statement" in regulation 2(1) of The Infrastructure Planning (Environmental Assessment) Regulations 2009 ("the Regulations"). The Appellant accepts that the ES which was submitted by Covanta in support of the application for the Order in August 2010 complied with this requirement. The Appellant's submission under ground 3 is that by the time when the Order came into force in February 2013 the environmental information in the ES was outdated, and had ceased to reflect current knowledge and methods of assessment.

32. In cases which are subject to environmental impact assessment the assessment, which includes the developer's ES, must be carried out before "development consent" is granted: see Article 2 of the Directive and regulation 3 of the Regulations. Article 1(2) of the Directive provides that:

> "(c) 'Development consent' means the decision of the competent authority or authorities which entitles the developer to proceed with the project."

Paragraph (f) defines 'competent authority or authorities':

> "(f) 'competent authority or authorities' means that authority or those authorities which the Member States designate as responsible for performing the duties arising from this Directive."

33. Mitting J accepted the Respondent and Covanta's submission that in the present case there was only one competent authority – the Panel acting on behalf of the Commission under the 2008 Act, and there was only one development consent - the

Order made by the Panel on 22nd November 2011. Parliament had not been designated as a competent authority for this purpose and its report on the Order without amendment to Parliament on the 28th February 2013 was not a development consent, even though by operation of statute (section 6(1) of the 1945 Act) the Order did not come into force until that date: see paragraphs 24 and 25 of the judgment.

34. I agree. Mr. Maurici fairly accepted that, as a matter of domestic law, the conclusion reached by Mitting J was inescapable. However, he submitted that the Regulations had failed properly to transpose the requirements of the Directive because "development consent" had an autonomous meaning, and EU case law established the proposition that the decision that allowed a developer to commence the works for carrying out its project was a development consent: see *R (Wells) v Secretary of State for Transport, Local Government and the Regions* [2004] 1 CMLR 31, and *R (Barker) v Bromley London Borough Council* [2006] QB 764 at paragraphs 44 - 45. It was common ground that Covanta could not commence the development until the Order came into force on 28th February 2013.

35. Mitting J concluded that *Wells* and *Barker* were distinguishable. I agree. In paragraph 45 of its judgment in *Barker* the ECJ said:

> "It is apparent from the scheme and the objectives of Directive 85/337 that that provision refers to the decision (involving one or more stages) which allows the developer to commence the works for carrying out his project."

In paragraph 46 the ECJ said:

> "Having regard to those points, it is therefore the task of the national court to verify whether the outline planning permission and decision approving reserved matters which are at issue in the main proceedings constitute, as a whole, a "development consent" for the purposes of Directive 85/337: see, in this connection, the judgment delivered today in *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* (Case C – 508/03), post, p 501B, paras 101 and 102."

It is readily understandable that an outline permission, in which certain matters which may have effects on the environment are reserved for later approval, and the subsequent approval of reserved matters should constitute, as a whole, a "development consent." If they do not, there will have been no assessment of the environmental effects which were not identifiable until the reserved matters stage: see paragraph 47 of the ECJ's judgment.

36. The ECJ's reference in paragraph 48 of its judgment to a consent procedure "comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters of the principal decision" was made in the context of a two stage process – outline permission and approval of details – in which the environmental assessment at the first stage might not be comprehensive and would therefore need to be completed at

the second stage when those environmental effects which were not identifiable at the first stage had to be assessed.

37. That is not the position in the present case. The Order did not reserve any detailed matters which might have environmental effects for further consideration and approval by Parliament. The ES in support of the Order had to be, and was, a comprehensive environmental assessment of the development for which development consent was granted by the Order. Since the Joint Committee reported on the Order without amendment there was no change in the development for which consent had been granted which might have led to the need for a further assessment of its effects on the environment.

38. Mr. Maurici accepted that if a Joint Committee considering an Order under the special procedure set out the 1945 Act reported that the Order be not approved so that the Order had to proceed as a Bill (see subsections 6(3) – (5)), then Parliament would be in a position to require a further environmental assessment under its Standing Orders. He submitted that a lacuna remained, because there would not necessarily be an opportunity for a further environmental assessment if a Joint Committee reported an Order with amendments (see subsection 6(2)). This point is wholly academic. If there was such a lacuna in our domestic legislation it no longer exists, section 128 of the 2008 Act having been repealed, and it has no bearing on the present case in which the Joint Committee reported on the Order without amendment.

39. I would dismiss this appeal.

Lady Justice Black:

40. I agree

Lord Justice Aikens:

41. I also agree.