Neutral Citation Number: [2019] EWHC 1924 (Admin)

Case No: CO/1191/2019

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/07/2019

Before:

MRS JUSTICE LIEVEN DBE

- -

Between:

UBB WASTE ESSEX LTD	**Claimant**
- and -	
ESSEX COUNTY COUNCIL	**Defendant**

- -
- -

James Strachan QC and Celina Colquhoun (instructed by **Norton Rose Fulbright LLP and Pinsent Masons LLP**) for the **Claimant**
Andrew Sharland QC and Richard Moules (instructed by **Essex County Council**) for the **Defendant**

Hearing dates: 9th July 2019 -10th July 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MRS JUSTICE LIEVEN DBE

MRS JUSTICE LIEVEN:

1. This case concerns the lawfulness of the grant by the Defendant of a "CLOPUD"(a certificate of lawfulness for a proposed use or development), under s.192 of the Town and Country Planning Act 1990. The Claimant seeks to challenge the said grant by the Defendant, acting as the Waste Planning Authority (WPA). This case is replete with acronyms, so a glossary is appended at the end of the judgment.

2. The application was considered by Mr Justice Holgate on the papers and he ordered a "rolled up" hearing. The Defendant is taking proceedings against the Claimant in the Technology and Construction Court concerning the waste contract between the parties dated 31 March 2012. That case is part heard before Mr Justice Pepperall and the order of Mr Justice Holgate suggests that Pepperall J may be assisted by a judgment of the Planning Court on the case before me.

3. The CLOPUD, dated 12 February 2019, certifies the lawfulness of;

> "*the importation and treatment at Tovi Eco Park MBT Facility of up to 30,000 tonnes per annum of source-segregated green garden waste from Essex Household Waste Recycling Centres, as described in the application form dated 7 December 2018…"*

The critical phrase in the certificate is "source segregated green garden waste", which is referred to elsewhere as SSGGW. The case only concerns SSGGW from Household Waste Recycling Centres ("HWRC") and not green garden waste which has been separated by householders and collected from the kerbside. In the interests of reducing the acronyms I will simply refer to the waste in issue as SSGGW.

4. The site in question is the Tovi Eco Park, at Courtauld Road, Basildon Essex. The Claimant is the developer and operator of a waste treatment facility at the site, ("the facility") subject to the grant of planning permission dated 6 December 2012 ("the

permission"). The Claimant has constructed the facility pursuant to a contract dated 31 March 2012 entered into with the Defendant in its capacity of Waste Disposal Authority ("WDA"). The Claimant holds a sub-lease of the land, pursuant to a lease dated 29 May 2012.

5. Pursuant to the various statutory regimes, the Defendant is the Waste Planning Authority (WPA) and the Waste Disposal Authority (WDA). As WPA it granted the 2012 permission and the CLOPUD, but as WDA it entered into the contract with the Claimant and was the applicant for the CLOPUD. Although the Defendant has different statutory and land holding roles in respect of the site and its operations, there is one legal entity, Essex County Council.

6. Although a number of grounds were pleaded, the case comes down to one issue, did the Defendant err in law in its grant of the CLOPUD, by reason of misinterpreting the terms of the 2012 planning permission. The matter turns on whether SSGGW from HWRCs is permitted under the planning permission to be processed at the facility. This in turn depends on whether SSGGW from HWRCs is excluded from the site by the terms of the permission. The Defendant's case is that although garden waste directly from householders would not be permitted, because it is not "residual" household waste, the same is not true for green waste coming from a Household Waste Recycling Centre (HWRC) because there is no restriction within the permission for that to be "residual" waste.

7. It is therefore necessary to consider in detail the precise scope of the planning permission, including what is set out in the documents incorporated by reference into the permission.

The Background

The Planning Permission

8. The 2012 Planning Permission is for:

> *"Enclosed facility for the Mechanical and Biological Treatment (MBT) of municipal solid waste and commercial and industrial waste, including waste water treatment infrastructure; biofilter and air filtration infrastructure; a visitor, education and office facility; parking area; surface water management system; hardstanding's; internal roads; new access and junction arrangements onto Courtauld Road; earthworks; landscaping, fencing and gates; weighbridge complex; lighting and ancillary development."*

9. The Planning Permission is subject to 32 conditions. Conditions 2, 3 and 21 are the most relevant to this application for judicial review.

10. Condition 2 of the Planning Permission states:

> *"2. The development hereby permitted shall be carried out in accordance with the details of the application dated 23 March 2012 and covering letter dated 23 March 2012, together with:*
>
> *• …*
>
> *• Environmental Statement dated March 2012 and appendices 1.1-1.9, 5.2, 5.2, 6.1, 7.1, 9.1 and 9.2,*
>
> *• Environmental Statement Non-Technical Summary dated March 2012,*
>
> *• Environmental Statement Errata dated April 2012,*
>
> *• letter from Alistair Hoyle dated 10 May 2012 and enclosed Environmental Statement Addendum to Flood Risk Statement dated May 2012 and drawing number 5093106/C/P/200,*
>
> *• Planning Statement and appendices 1-8,*
>
> *•…*[1]
>
> *And in accordance with the contents of the Design and Access Statement dated March 2012.*
>
> *and in accordance with any non-material amendment(s) as may be subsequently approved in writing by the Waste Planning Authority, except as varied by the following conditions: -*
>
> *Reason: For the avoidance of doubt as to the nature of the development hereby permitted, to ensure development is carried out in accordance with the approved application details, to ensure that the development is carried out with the*

[1] Drawing numbers not listed here

> *minimum harm to the 18 local environment and in accordance with East of England Plan Policies ENV7, WM1, WM2, WM3, WM8, SS1 and ENV1, Basildon District Local Plan Policies C15, E10 and E24 and Waste Local Plan Policies W3A, W3C, W4A, W4B, W4C, W7A, W8A, W10A, W10B, W10E and W10F".*

Condition 3 of the Planning Permission states:

> *"3 No waste importation shall take place until a detailed scheme, for the restriction of the importation of waste arising from outside the administrative boundaries of Essex and Southend-on-Sea, has been as submitted to and approved in writing by the Waste Planning Authority. The scheme shall make clear how sources of waste coming to the site shall be monitored and managed in order to control the importation of such material from outside of the administrative boundaries of Essex and Southend-on-Sea…*
>
> *Reason: In the interests of the environment by assisting Essex and Southend-on-Sea to become self-sufficient for managing its own waste ensuring that the waste is transported proximate to the site thereby minimising transportation distances, reducing pollution and minimising the impact upon the local environment and amenity and to comply with East of England Plan Policy WM3 and Waste Local Plan W8A."*

Condition 21 of the Planning Permission states:

> *"21. No waste other than 416,955t tpa of those waste materials defined in the application details shall enter the site. Records of waste type and tonnage shall be kept by the operator and made available to the Waste Planning Authority upon written request.*
>
> *Reason: waste material outside of the aforementioned would raise additional environmental concerns, which would need to be considered afresh and to comply with East of England Policy WM1, Basildon District Plan Policy C15 and Waste Local Plan Policies W3A, W3C, W8A and W10E"* [emphasis added]

11. Condition 2 therefore limits the use of the site to the details set out in the documents listed which include the Planning Statement (PS); the Environmental Statement (ES) ; the Environmental Non-Technical Statement (NTS). Each of the parties rely on various parts of these documents, which I will refer to below.

12. Condition 3 requires the developer to submit a detailed scheme for the restriction of the importation of waste from outside the named authorities and for that scheme to be agreed before any waste could be brought on to the site. The scheme which was approved dealt not only with how the waste was to be monitored and managed but also its anticipated composition;

    (a) *Residual household waste - 78%*
    (b) *Street sweepings - 2%*
    (c) *Bulky waste - 0.5%*
    (d) *Trade waste - 5.5%*
    (e) *Household Waste Recycling Centre ("**HWRC**") Residual Waste - 14%*

13. Given the terms of condition 2 both parties accept that the PS, ES and NTS fall to be considered when interpreting the planning permission. The Claimant in particular relies on a large series of references within these documents, and I will only set out below what I consider to be the most important ones. The Defendant accepts that within all three documents there are very many references to "residual waste", and it is therefore unnecessary to set all of these out. The Defendant's position is that those references do not limit HWRC waste to being "residual waste".

14. The PS at section 1.2 [1/13/493] under the heading *"The proposal"* states that the

> *"proposal… will satisfy the residual municipal waste management needs of Essex County Council and Southend on Sea Borough Council … The Facility is capable of treating up to 416, 955 tonnes per annum (tpa) of residual waste, but with a smaller proportion of locally derived commercial and industrial (C&I) (third party) waste … The technology consists of: Pre-processing – sorting raw residual waste and extracting recyclables such as plastic and metals for beneficial use …"* [emphasis added]

15. The PS at section 1.3 [1/13/494] under the heading *"The Benefits"* states that

> *"The need for the proposed Facility has been considered in the context of a number of strategic policy documents and drivers.*

> *This has demonstrated a clear need for the development. The justification for this need can be summarised as follows: …*
>
> *The Facility would help meet the capacity gap in residual waste treatment within Essex and Southend (see section 8 for the Assessment of Need).”*

16. The PS at section 1.4 [1/13/495] under “Conclusions” states

> *“The proposal provides a sustainable solution to the management of residual waste streams within the administrative areas of Essex and Southend of Sea … The proposal fully accords with all relevant policies of the Development Plan and a range of other material considerations …”.*

17. Section 5.0 of the PS is entitled *“Description of Development”.* At section 5.1 under the heading *“Introduction”* it states [1/13/501]:

> *“The Facility will have the capacity to treat up to 416,955 tpa of waste. This will include Waste Collection Authority (WCA) residual waste, trade waste, bulky waste, street sweepings and waste from Household Waste Recycling Centres. The facility will also have the capacity to receive a smaller proportion of locally derived C & I [Commercial and Industrial] wastes.*
>
> …..
>
> *In broad terms the pre-processing stage will allow for the recovery of high levels of recyclable material from the residual waste stream with the remaining (largely organic) fraction being passed through the bio stabilisation phase”* [emphasis added]

The Defendant argues that the waste which is “defined” for the purpose of condition 2 is that set out in section 5.1 of the PS, which includes “waste from Household Waste Recycling Centres” not limited to “residual waste”.

18. PS 5.2 [1/13/502] under the subheading *“Authority Requirements"* then states:

> *“Primarily the design of the Facility has focused on meeting the waste management requirements of Essex County Council Essex and Southend-on-Sea Borough Council as Waste Disposal Authorities. Through the design of the Facility UBB has ensured that the Authorities future predicted waste generation will be treated through a process which is flexible*

> *with regards to waste tonnage, seasonal fluctuations and potential future changes in waste composition. The facility has been designed in order to meet the Authorities requirements to manage approximately 377,000 tpa of Authority residual waste plus additional third-party C&I waste, providing a total maximum capacity up to 416, 955 tpa.* [emphasis added]

The anticipated composition of the Authorities waste is as follows…

- *Residual household waste 78.5%*
- *Street sweeping 1.8%*
- *Bulky waste 0.4%*
- *Trade waste 5.4%*
- *HWRC waste 13.9%"*

19. The Environmental Statement Volume 1 sets out

> *"1.5.1 Waste management*
>
> *The majority of waste streams which will be accepted at the Facility are managed by the 12 District and Borough Councils as Waste Collection Authorities (WCAs), Southend-On-Sea Borough Council as a Unitary Authority (Waste Collection and Disposal Authority) and Essex County Council as Waste Disposal Authority (WDA).*
>
> *These 14 Authorities make up the Essex Waste Partnership (EWP). The Essex Waste Partnership was formed in order to ensure cost-efficient and sustainable waste management is delivered across the country. In order to manage the municipal waste arisings from the Partnership area, a network of waste facilities is required. The MBT Facility at Courtauld Road is proposed as the main treatment centre and would be supported by five satellite waste transfer stations, together with a separate facility to treat source segregated organic waste. A more detailed assessment of needs is provided within Chapter 4 of this ES."* [emphasis added]

The Defendant says that this reference to a facility to treat source segregated organic waste is merely a future intention and does not affect the waste that was permitted to be treated at the facility.

20. Chapter 4 of the ES deals with need for the facility, and at paragraph 4.3 (2/15/869-873) under '*Needs Assessment'* there is a review of waste policy in England 2011. As part of that review, it refers to the "*Essex Joint Municipal Waste Management*

Strategy" ("Essex JMWMS") and states that the *"main aims"* of the *"proposed strategy"* therein are (inter alia) to:

> *"- Favour composting treatments such as Anaerobic Digestion for source segregated organic waste, and*
>
> *Explore innovative disposal solutions, based on Mechanical Biological Treatment family of technologies, to assist in diverting biological municipal waste from landfill and recycle and recover more value from residual wastes".*

21. Chapter 5 of the ES is the Traffic and Transportation section which at para 5.1 states;

> *"it should be noted that the existing planning permission relates to a wider site than the current application and contained processing capacity to deal with the residual waste as well as the food and green waste (biowaste). This Biowaste element of waste will not be managed via the proposed development and will require treatment in another facility".*

Chapter 5 of the ES then goes on to consider the potential cumulative impacts of a bio-waste facility being developed on the adjoining land.

22. The NTS under "Assessment of potential environmental effects" states;

> *"The existing planning permission for the site was for a larger waste treatment facility that could process a variety of waste streams including food and garden waste – known as biowaste. The proposed development does not contain proposals to deal with this waste stream and so the council will need to find an alternative site for this treatment facility. There is a potential site on the vacant land to the west of this facility and given the two sites are closely located the assessments have considered this development as well. This particularly true of the traffic assessment*." [emphasis added]

23. The Claimant also refers to the policies which are themselves referred to in the reasons for condition 21. The most relevant policies for these purposes are W3A and W8A of the Essex and Southend Waste Local Plan 2001 both of which reflect the Waste Hierarchy, The Waste Hierarchy originates from the Waste Framework Directive (2008/98/EC) and has been repeated and confirmed in numerous national

and local policy document since. Its essence is to seek the option for waste as high up the hierarchy as possible, taking into account wider environmental impacts.

The law

24. This a judicial review of a decision by the Defendant under s.192 of the TCPA. Section 192 states;

> *"(1) If any person wishes to ascertain whether—*
>
> *(a) any proposed use of buildings or other land; or*
>
> *(b) any operations proposed to be carried out in, on, over or under land,*
>
> *would be lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use or operations in question.*
>
> *(2) If, on an application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect; and in any other case they shall refuse the application.*
>
> *(3) A certificate under this section shall—*
>
> *(a) specify the land to which it relates;*
>
> *(b) describe the use or operations in question (in the case of any use falling within one of the classes specified in an order under section 55(2)(f), identifying it by reference to that class);*
>
> *(c) give the reasons for determining the use or operations to be lawful; and*
>
> *(d) specify the date of the application for the certificate.*
>
> *(4) The lawfulness of any use or operations for which a certificate is in force under this section shall be conclusively presumed unless there is a material change, before the use is instituted or the operations are begun, in any of the matters relevant to determining such lawfulness."*

25. Given that a certificate under s.192 amounts to a decision on the lawfulness of a proposed use, there is no dispute that such a certificate is amenable to judicial review, and it is a matter of law for the court to determine as to whether the certificate was correctly granted. In other words this is not a matter of planning judgement where the court would start by deferring to the decision maker.

26. There is extensive case law on the correct approach to the interpretation of planning permissions including the conditions attached to them. The first issue is in what circumstances reliance can be placed on material outside the words of the permission itself. This was dealt with comprehensively by Keene J (as he then was) in *R v Ashford BC ex p Shepway DC* [1999] PLCR 12, a decision which has frequently been cited with approval since. Keene J said as follows at p.19C;

> *"The legal principles applicable to the use of other documents to construe a planning permission are not really in dispute in these proceedings. It is nonetheless necessary to summarise them:*
>
> *(1) The general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself, including the conditions (if any) on it and the express reasons for those conditions: see Slough Borough Council v. Secretary of State for the Environment (1995) J.P.L. 1128 , and Miller-Mead v. Minister of Housing and Local Government [1963] 2 Q.B. 196 .*
>
> *(2) This rule excludes reference to the planning application as well as to other extrinsic evidence, unless the planning permission incorporates the application by reference. In that situation the application is treated as having become part of the permission. The reason for normally not having regard to the application is that the public should be able to rely on a document which is plain on its face without having to consider whether there is any discrepancy between the permission and the application: see Slough Borough Council v. Secretary of State (ante); Wilson v. West Sussex County Council [1963] 2 Q.B. 764; and Slough Estates Limited v. Slough Borough Council [1971] A.C. 958 .*
>
> *(3) For incorporation of the application in the permission to be achieved, more is required than a mere reference to the application on the face of the permission. While there is no magic formula, some words sufficient to inform a reasonable reader that the application forms part of the permission are*

> *needed, such as "… in accordance with the plans and application …" or "… on the terms of the application …," and in either case those words appearing in the operative part of the permission dealing with the development and the terms in which permission is granted. These words need to govern the description of the development permitted: see Wilson (ante); Slough Borough Council v. Secretary of State for the Environment (ante). *20*
>
> *(4) If there is an ambiguity in the wording of the permission, it is permissible to look at extrinsic material, including the application, to resolve that ambiguity: see Staffordshire Moorlands District Council v. Cartwright (1992) J.P.L. 138 at 139; Slough Estates Limited v. Slough Borough Council (ante); Creighton Estates Limited v. London County Council, The Times, March 20, 1958.*
>
> *(5) If a planning permission is challenged on the ground of absence of authority or mistake, it is permissible to look at extrinsic evidence to resolve that issue: see Slough Borough Council v. Secretary of State (ante); Co-operative Retail Services v. Taff-Ely Borough Council (1979) 39 P. & C.R. 223 affirmed (1981) 42 P. & C.R. 1."*

27. There are two recent Supreme Court decisions which deal with the interpretation of permissions. It is worth noting that in neither case did the issue turn on the incorporation or content of extrinsic material, so the particular issue in this case as to how to approach a very large amount of incorporated documentation, did not arise. In *Trump International Golf Course v Scottish Ministers* [2016] 1 WLR 85, the Supreme Court was concerned with the interpretation of conditions under s.36 of the Electricity Act 1989. Although this was not strictly speaking a planning permission, it has been applied in a planning context by the Court of Appeal, and most recently by the Supreme Court itself in *London Borough of Lambeth v Secretary of State for Housing Communities and Local Government* [2019] UKSC 33. Therefore, the judgments in *Trump* are wholly applicable to the present case.

28. The relevant argument was that condition 14 of the consent was void for uncertainty because it required the submission of a design statement, but did not require that statement to be approved or implemented. The Court held that other conditions in practice overcame the failings in condition 14 and therefore Lord Hodge and Lord Carnwath's comments on the approach to the interpretation of condition 14 were

obiter. However, again they have subsequently been applied and relied upon both by the Court of Appeal and by the Supreme Court in ***Lambeth*** so they are binding upon me.

29. The leading judgment was given by Lord Hodge and his analysis of the interpretation issue is at [31] to [37]. The whole of these passages are relevant but I only set out [34];

> *"34. When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. Whether the court may also look at other documents that are connected with the application for the consent or are referred to in the consent will depend on the circumstances of the case, in particular the wording of the document that it is interpreting. Other documents may be relevant if they are incorporated into the consent by reference (as in condition 7 set out in para 38 below) or there is an ambiguity in the consent, which can be resolved, for example, by considering the application for consent."*

30. Lord Hodge concluded in [37] that if he had needed to, then applying the approach set out, he would have inferred that the condition required the developer to conform with the design statement submitted. Lord Mance warned against too rigid an approach in considering interpretation of a contract or permission, or implication of terms into it. They are both part of *"an overall, and potentially iterative, process of objective construction of the contract as a whole."*

31. Lord Carnwath gave a separate judgment to which the other members of the Court did not expressly agree. However, in ***Lambeth***, Lord Carnwath referred extensively to his judgment in ***Trump*** and the other members of the Court did there agree with his judgment. It therefore follows that Lord Carnwath's reasoning in ***Trump*** has now been adopted by the Court.

32. Lord Carnwath analysed the earlier caselaw in some detail. At [53] he warned against attempts to establish general principles, as Beatson LJ and Elias LJ had sought to do in *Hulme-v- Secretary of State for Communities and Local Government [2011] EWCA Civ 63* and *Telford and Wrekin Council v Secretary of State for Communities and Local Government* [2013] EGLR 87 (QBD Admin) respectively, and made the point that most of the judgments cited in support of the proposed principles, actually turned on their own facts. At [56] to [57] he referred with approval to *Crisp from the Fens v Rutland County Council* [1950] 1 P&CR 48, where the Court of Appeal had implied words into a condition in order to reflect what they said was the clear intention of the condition as expressed in the reason for condition, namely the protection of local amenity. At [65-66] Lord Carnwath said;

> *"Before leaving this subject I should add one comment on the judgment of Arden LJ in the Carter Commercial case [2003] JPL 1048 (cited by Sullivan J in the passage quoted above). At the outset of her concurring judgment she said:*
>
> > *"27. I start from the position that this planning permission is not to be construed like a commercial document, but is to be given the meaning that a reasonable reader would give to it, having available to him only the permission, the variation, the application form and the Lewin Fryer report referred to in condition 4 in the planning permission itself …*
> >
> > *"28. The reasonable reader for this purpose is to be contrasted with, for instance, the testator into whose armchair the court is enjoined to place itself in order to construe a will, or the position of parties to a commercial contract from whose standpoint the court will construe a commercial contract having regard to all the background information reasonably available to them. This is a public document, to which very different principles apply."*
>
> *She cited the judgment of Keene J in R v Ashford Borough Council, Ex p Shepway District Council [1999] PLCR 12 , as indicating the "very strict limitations on the extrinsic material that can be used in construing an application, including a permission …"*
>
> *66. I do not question the decision of the court in that case, or the reasoning on which it was based. As will have become apparent, however, and in agreement also with Lord Hodge JSC, I do not think it is right to regard the process of*

> *interpreting a planning permission as differing materially from that appropriate to other legal documents. As has been seen, that was not how it was regarded by Lord Denning in the Fawcett case [1961] AC 636 . Any such document of course must be interpreted in its particular legal and factual context. One aspect of that context is that a planning permission is a public document which may be relied on by parties unrelated to those originally involved. (Similar considerations may apply to other forms of legal document, for example leases which may need to be interpreted many years, or decades, after the original parties have disappeared or ceased to have any interest.) It must also be borne in mind that planning conditions may be used to support criminal proceedings. Those are good reasons for a relatively cautious approach, for example in the well established rules limiting the categories of documents which may be used in interpreting a planning permission (helpfully summarised in the judgment of Keene J in the Shepway case [1999] PLCR 12 , 19–20). But such considerations arise from the legal framework within which planning permissions are granted. They do not require the adoption of a completely different approach to their interpretation"*

33. In the subsequent case of ***Lambeth*** the local authority had granted a permission in 1985 for a DIY store and garden centre with a condition that prevented the sale of food. In 2014 Lambeth granted permission under s.73 TCPA for a variation of conditions, but the conditions expressly attached did not repeat the non-food condition. It was plain from the words of the decision notice that Lambeth had intended to continue the non-food restriction but the Court of Appeal held that the 2014 permission did not contain such a restriction, and it was wrong as a matter of law to read an entire condition into the permission.

34. However, the Supreme Court allowed the appeal. Lord Carnwath set out the principles of interpretation at [15] to [19] largely extracting these from his and Lord Hodge's judgments in ***Trump***. At [19] he said;

> *"In summary, whatever the legal character of the document in question, the starting-point - and usually the end-point - is to find "the natural and ordinary meaning" of the words there used, viewed in their particular context (statutory or otherwise) and in the light of common sense."*

35. Lord Carnwath found on the facts of the case that the wording of the operative part of the grant of permission was clear and unambiguous, and therefore that Lambeth had approved the "proposed condition", as set out in the Decision Notice and had not intended to discharge the non-food condition.

The submissions

36. Mr Strachan's submissions on ground one can be broken down into four sub-headings which interact with each other. Firstly, he says that the waste materials allowed onto the site under condition 21 are expressly defined in the application documents as being "residual waste". He refers to paragraphs 5.1 and 5.2 of the Planning Statement, and a number of references in the ES and NTS to "residual waste". Residual waste is defined in Glossary to the PS as "*Waste that is not sent for reuse, recycling or composting".*

37. In response to Mr Sharland's construction argument, that para 5.1 of the PS "defines" the waste categories permitted, he points to the fact that the description of development in the permission itself is for a "Mechanical and Biological Treatment (MBT) plant…" and an MBT is defined in the Glossary to the PS as *"MBT is a residual waste treatment process that involves both mechanical and biological treatment processes*". He therefore argues that it is the very nature of the facility as described in the permission that it is for the processing of "residual waste".

38. Secondly, he relies on the exclusion of source segregated green waste from the facility, again by reference to the PS, ES and NTS. These references are somewhat more equivocal than those relied on for his first submission. However, ES Volume I pages 18-19 as referred to above, refers to *"a separate facility to treat source segregated organic waste";* and the references in the ES to policy in the Essex JMWMS to favouring composting for source segregated organic waste.

39. He also relies on the passages in the NTS as set out above, which refers to bio-waste (food and garden waste) being dealt with at an alternative site. Mr Sharland says that this is no more than a statement of intention.

40. Thirdly, Mr Strachan argues that it is necessary to take a composite approach applying common sense, by looking at all the relevant material together. He argues that the overall purpose of the condition was to exclude residual waste from treatment at the facility, because that waste should be dealt with further up the Waste Hierarchy. He relies on the terms of the policies expressly referred to in the reasons for condition 21, and the references to the Waste Hierarchy in those policies.

41. Fourthly, he argues that there is a European law dimension to the case. There are two aspects to this. He relied on the Waste Framework Directive, and the requirement therein to treat waste in accordance with the Waste Hierarchy. He also relied on the EIA Directive, and argued that SSGGW had not been assessed as going into the facility, and therefore either there would be a breach of the Directive/Regulations if SSGGW could be treated at the facility; or that the permission should be interpreted in such a way as to conform with the EIA Directive in accordance with the ***Marleasing*** principle.

42. Mr Strachan also relies on the delegated officer's report which led to the grant of the CLOPUD. This obviously cannot be used to interpret the planning permission, but it does show that the officers of the WPA agreed with many of the points made by the Claimants about the background to the 2012 permission. The report says;

> a) *"At present the SSGGW from the HWRCs are sent elsewhere for composting";*
>
> b) *".. given the information from both the planning application and the Environmental Statement it does seem that there was the intention that biowaste (kitchen and garden waste) would be treated separately, and as such the use of the application site for its treatment was never proposed or considered in relation to the planning application…."*
>
> c) *"… it is recognised that the use of the site for green garden waste treatment has not been explicitly applied for or considered by the WPA."*
>
> d) *"The WPA agrees that the treatment of green waste at the facility would remove it from its current recycling*

> *into use as compost and move it to use as Solid recovered Fuel (SRF) or Solid Output Material (SOM). This would be contrary to the waste policies considered at the time of the grant of permission…and to waste policy in general…."*

43. Mr Strachan did not seek to proceed on grounds 2, 3 and 4.

44. Ground 5 is that the Defendant should not have granted the certificate without having considered environmental information in accordance with the EIA Regulations. He drew an analogy with *Barker v London Borough of Bromley* 2007 1 AC 470 where the CJEU found that the grant of reserved matters was the grant of development consent for the purposes of the EIA Directive, and should have been subject to a separate EIA process. I found it difficult to understand ground 5 as a free-standing ground separate from ground 1. The argument seemed to be that if the Claimant lost on ground one, so the certificate was not contrary to the proper interpretation of condition 21 and SSGGW was allowed into the facility under the permission, then because significant environmental effects were likely to follow which had not been assessed in the ES, then such an assessment had to be carried out as part of the CLOPUD. However, if that were correct and a CLOPUD could lawfully be granted in circumstances where the consequence was a likely significant environmental affect which had not been assessed, then it seems to me either (a) the CLOPUD should not have been granted (i.e. ground one succeeds); or (b) the original planning permission would have been flawed.

45. Mr Strachan refers to the fact that the Defendant when it applied for the CLOPUD (in its capacity as WDA) submitted a report by Ricardo (a consultancy firm) assessing the air quality and traffic impact of the CLOPUD. This is a somewhat odd document because it must have been the Defendant's case that the certificate was not seeking to allow an activity that was not already permitted. It is therefore not clear what the legal justification for the Ricardo work was. However, ultimately, I do not need to decide whether ground five does raise a free standing ground, as I find that ground one is made out.

46. Mr Sharland's argument had the benefit of simplicity. He said that neither the words of the permission nor any of the conditions exclude SSGGW from HWRCs. He agreed that SSGGW from kerbside collections could not be accepted at the facility, but said the documentation specifically did not attach the word "residual" to waste from the HWRCs. He argued that for the purposes of condition 21 the permissible waste materials "are defined" in paragraph 5.1 of the Planning Statement, which limits WCA waste to "residual waste", but does not limit HWRC to residual waste. He says that the absence of the word "residual" from "waste from Household Waste Recycling Centres" was deliberate. He distinguishes between para 5.1 which he says defines the waste permissible, and para 5.2 which is dealing with the design of the facility.

47. He makes a similar point in respect of para 1.3 of the ES, saying that the first part of the paragraph "*the facility will provide the waste management solution for residual waste treatment…"* is not part of the definition, but the second part which is in the same form as para 5.1 of the PS, is part of the definition. He argues that the documentation does not exclude all non-residual waste, and points out that the waste allowed under the CLOPUD at 30,000 tpa is only a small proportion of the total input of the facility, (417,000tpa, or the WDA element 377,000 tpa).

48. Mr Sharland argues that the Claimant's analysis involves trawling through 100s of pages of the documentation to find "scattered sentences" that support his case. He argues that this was not the right approach, and the sensible construction was the one that relied on para 5.1 of the PS, and the precise words that were set out.

49. To the degree that it was relied upon he said that the condition 3 scheme was solely in relation to the geographical source of the waste and was irrelevant to the construction of the permission.

50. In relation to the Waste Hierarchy, he accepted that sending SSGGW from the HWRC to the facility was not in accordance with the Waste Hierarchy, because that waste could be composted and therefore disposed of further up the hierarchy, however he argued that the quantum of such waste was a sufficiently small percentage as not to effect the overall judgment that the proposal accorded with the Hierarchy. He made a

similar argument in relation to the assessment of the SSGGW. He accepted that this waste stream had not been expressly assessed in the ES, but said that it was sufficiently small as for that not to be necessary.

Conclusions

51. In the light of Lord Carnwath's strictures in [53] of ***Lambeth*** I hesitate to set out any principles on the approach to the interpretation of planning permissions and their conditions. However, the following are factors which I have applied to the issues that arise in this case. It needs to be emphasised that these factors will not arise in all cases, and that much will depend on whether the permission or a specific section of the incorporated documents gives a clear cut answer.

52. Firstly, permissions should be interpreted as by a reasonable reader with some knowledge of planning law and the matter in question. This does not mean that they are the "informed reader" of a decision letter, but equally the reasonable reader will understand the role of the permission, conditions and any incorporated documents.

53. As Lord Carnwath has said the permission needs to be interpreted with common sense. Mr Sharland points out with some justification that reasonable people may differ on what amounts to common sense. In my view references to common sense are really pointing to the planning purpose of the permission or condition. If the interpretation advanced flies in the face of the purpose of the condition, and the policies underlying it, then common sense may well indicate that that interpretation is not correct. So, in ***Lambeth*** it was plainly contrary to that purpose for the permission not to limit the sale of food items, such an interpretation was contrary to common sense once one understood the planning background.

54. Secondly, it is legitimate to consider the planning "purpose" or intention of the permission, where this is reflected in the reasons for the conditions and/or the documents incorporated. The reasons for the condition should be the starting point, the policies referred to and then the documents incorporated. This is not the private

intentions of the parties, as would be the case in a contractual dispute, but the planning purpose which lies behind the condition.

55. Thirdly, where as here, there are documents incorporated into the permission or the conditions by reference, then a holistic view has to be taken, having regard to the relevant parts of those documents. This can be a difficult exercise because where, as here, the permission incorporates the application (including the Planning Statement) and the Environmental Statement and Non-Technical Summary, there can be a very large number of documents to be considered. It may be the case that those documents are not all wholly consistent, and that there may be some ambiguity within at least parts of them. In my view the correct approach is to take an overview of the documents, to try to understand the nature of the development and the planning purpose that was sought to be achieved by the condition in question. The reasonable reader would be trying to understand the nature of the development and any conditions imposed upon it. It is not appropriate to focus on one particular sentence without seeing its context, unless that sentence is so unequivocal as give a clear-cut answer.

56. Fourthly, where documents are incorporated into the permission, as here, plainly regard can be had to them. Where the documents sought to be relied upon are "extrinsic", then save perhaps for exceptional circumstances, they can only be relied upon if there is ambiguity in the condition. In my view, even where there is ambiguity there is a difference between documents that are in the public domain, and easily accessible such as the officer's report that led to the grant of the permission and private documents passing between the parties or their agents.

57. The Court should be extremely slow to consider the intention alleged to be behind the condition from documents which are not incorporated and particularly if they are not in the public domain. This is for three reasons. The determination of planning applications is a public process which is required to be transparent. Any reliance on documents passing between the developer and the LPA, even if they ultimately end up

on the planning register, is contrary to that principle of transparency. Planning permissions impact on third party rights in a number of different ways. It is therefore essential that those third parties can rely on the face of the permission and the documents expressly referred to. Finally, breach of planning permission and their conditions, can lead to criminal sanctions.

58. Applying that approach to the facts of this case, in my view the CLOPUD was not lawfully made in the light of the terms of the planning permission. The planning permission, and condition 21 when properly understood did seek to exclude SSGGW from HWRCs from being processed at the facility, and the Defendant's interpretation of the permission is plainly contrary to the policies relied upon in the reasons for condition 21.

59. The starting point is the very words of the permission itself "*facility for the mechanical and biological treatment (MBT) of municipal solid waste...*". Mechanical Biological Treatment is defined in the glossary to the Planning Statement as "*MBT is a residual waste treatment process….*". so, the reasonable reader will immediately realise that this is a facility which is aimed at the treatment of residual waste.

60. There are copious references in the PS, ES and NTS to the processing at the facility of "residual waste". Of course, that does not mean that all waste that goes to the facility must be incapable of being composted/recycled, or that no green waste will go there. But in deciding the meaning of condition 21 taking a holistic view of the incorporated documents it is highly relevant that the focus is entirely on residual waste.

61. Further the Defendant's interpretation leads to a very odd result. On Mr Sharland's approach all waste from the HWRC could under the planning permission be taken to the facility. This would undermine both the function of the HWRC and the very obvious understanding of the public that it is a recycling centre. So, on the Defendant's argument all the waste that has been carefully segregated for the purpose of recycling can then be taken to the MBT and processed further down the Waste Hierarchy. This analysis is contrary to the policy, whether set out in the Development Plan policies, or the Waste Framework Directive and Regulations, and in my view

contrary to common sense. Mr Sharland emphasises that that is not what is happening in practice, but that is not the point, it is what the Defendant says the permission allows.

62. Mr Sharland argues that the SSGGW from the HWRCs is only a small proportion of the total waste going into the facility (some 8%). However, he does not suggest that 30,000 of green waste is de minimis, and in those circumstances, I would have expected that if it had been contemplated at the time of the permission that that waste would go to the facility it would have been assessed in the ES and referred to in the officer's report.

63. In my view there is no ambiguity in the permission, but if I am wrong on that and therefore pursuant to Shepway it is appropriate to consider the 2012 officer's report, the fact that that report said the proposal was fully compliant with policy indicates strongly that it assumed that all the waste going there would be "residual waste".

64. The Defendant's argument involves taking the sentence in para 5.1 of the PS, and the equivalent sentence in the ES, and then applying what is in my view an overly legalistic approach. Mr Sharland focuses on the absence of the word "residual" before HWRC waste, and effectively argues that this is the end of the case. But the PS and ES are not documents drafted by or for lawyers, and it is not appropriate to construe them like contracts. In my view any reasonable reader would reach the conclusion that the permission was for a facility for the processing of residual waste, and that applied as much to HWRC waste as household waste.

65. In respect of Mr Strachan's fourth element of ground one, which then reappears in the fifth ground, that the Defendant's approach is a breach of the EIA Regulations I do not need to make a determination on this. I agree with Mr Strachan that if the application had intended to allow the processing of 30,000 tpa of SSGGW then the ES would have assessed that, and that is a significant pointer to the Defendant's interpretation being wrong. I do not need to go on to determine whether it would have amounted to a free-standing error of law.

66. For these reasons, I grant permission for judicial review on ground one, and quash the certificate.

Term	Definition
"1990 Act"	Town and Country Planning Act 1990
"AD"	Anaerobic Digestion
"Biowaste"	Types of food and green waste, including SSG waste
“C&I Waste”	Commercial and Industrial Waste
"CLEUD"	Certificate of Lawful Existing Use and Development (see s.191 of the 1990 Act)
"CLOPUD"	Certificate of lawfulness for a proposed use or development (see s.192 of the 1990 Act)
"EA"	Environmental Agency
"EIA"	Environmental impact assessment carried out under, at the time of the application for the Planning Permission, the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. .
"EIA Directive"	European Directive 2011/92/EU on Environmental Impact Assessment
"ES"	Environmental Statement
"Essex JMWMS"	Essex Joint Municipal Waste Management Strategy 2008-2032

"EWP"	Essex Waste Partnership
“The Facility”	The MBT Facility at Courtauld Lane, Essex
"HWRC"	Household waste recycling centre
"MBT"	A residual waste treatment process that involves both mechanical and biological treatment processes
"MSW" (Residual Municipal Solid Waste)	means waste that is household or household like - it comprises household waste collected by local authorities as well as some commercial and industrial waste (e.g. from offices, schools and shops) that may be collected by the local authority or a commercial company.
"NTS"	The Non Technical Summary of the ES
"QSRF"	‘Quick Solid Recovered Fuel’, which consists of waste processed through the QSRF Line
"QSRF Line"	a number of modifications to the Facility implemented by UBB in 2015 whereby certain waste is shredded, passed under a magnet to remove ferrous metals, diverted away from the biohalls and the Refining Hall, and then transported to the Treatment Output Loading Area.

"PAF"	Planning Application Form
"PS"	Planning Statement
"Planning Permission"	The planning permission dated 6 December 2012 allocated reference number ESS/22/12/BAS granted by Essex County Council for the Facility
"Residual Waste"	Waste that is not sent for reuse, recycling or composting and therefore excludes SSG Waste
"Residual Waste Contract"	The contract dated 31 March 2012 between UBB and the Defendant in its capacity as WDA for the County of Essex
"Ricardo"	Ricardo Energy & Environment
"SOM"	Stabilised Output Material a bulk output that is suitable for landfilling produced by the MBT plant.
"SRF"	Solid Recovery Fuel – a fuel that is capable of incineration produced by the MBT plant.
"SSG Waste" (SSGGW)	Source segregated green garden waste
"SSO Waste"	Source segregated organic waste. SSG Waste is a type of SSO Waste.
"TPA"	Tonnes per annum

Waste Framework Directive	EU Directive 2008/98/EC
Waste Hierarchy	A legislative concept of the EU of the same name that was explicitly brought into legislation in the Waste Framework Directive
"WCA"	Waste collection authority
"WCA waste"	means kerbside waste, trade waste and street sweepings.
"WDA"	Waste disposal authority
“WLP”	Essex Waste Local Plan
"WPA"	Waste planning authority