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IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 22nd March 2001

B e f o r e :

THE HONOURABLE MR JUSTICE STANLEY BURNTON

	CASTLE CEMENT	<u>Applicant</u>
	- and -	
	THE ENVIRONMENT AGENCY	<u>Respondent</u>

(Transcript of the Handed Down Judgment of
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John Howells QC and Tim Ward (instructed by the Solicitors for the Environment Agency) for
the Respondent

Judgment
As Approved by the Court

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Mr Justice Stanley Burnton:

Introduction

1. This application raises the issue whether the burning of Cemfuel, as a fuel in the Ribblesdale and Ketton Cement Works operated by the Applicant (Castle), amounts to the burning of “hazardous waste”, as the Environment Agency has concluded, or to the burning of a non-waste fuel, as Castle contends.
2. This issue is one of European waste law, in particular, as to whether the provisions of Council Directive 94/67/EC on the incineration of hazardous waste (the “HWID”) are applicable to the Works, because the material is, on a proper construction of the Directive, a “waste”. Castle seeks a declaration that Cemfuel is not hazardous waste.
3. The manufacture of cement requires an enormous amount of energy. The temperature in the burning or reaction zone of a cement kiln must reach about 1450 degrees Centigrade, a temperature which is achieved by a flame operating within the kiln at about 2000 degrees Centigrade. Historically, the principal fuel used was coal. For reasons of cost and environmental constraints, alternative fuels have been sought. Castle, one of the largest cement producers in this country, a subsidiary of Heidelberger Zement AG, the third largest cement producer in the world, uses Cemfuel as its principal alternative fuel.
4. Cement manufacture is a prescribed process for the carrying on of which an authorisation is required under section 6 of the Environmental Protection Act 1990. Such authorisations are required to include such conditions as appear to the enforcing authority to be appropriate. In addition certain other conditions are required to be included in accordance with section 7 of the 1990 Act, including those specified in directions given by the Secretary of State and those required to ensure that the “Best Available Techniques Not Entailing Excessive Costs” are used (commonly referred to as “BATNEEC”). The authorisations in these cases permitted ‘Cemfuel’ to be burnt in kilns at the Ketton and Ribblesdale Cement Works. The conditions subject to which such authorisations are granted must be reviewed at least once every four years and may thus become more stringent. In addition, the Secretary of State may direct enforcing authorities to vary the conditions in a specified manner. It follows that there are stringent controls on the manufacture of cement quite apart from those under the HWID.
5. The notices impugned in this case varied the conditions of the authorisations in accordance with the Hazardous Waste Incineration Direction 1998 so as to apply the provisions of the HWID to the use of ‘Cemfuel’ at those plants. Many of the requirements of the HWID were already covered by the existing conditions imposed on the authorisations. The principal changes required related to reduced air emission limits and increased monitoring of air emissions.
6. The specific instances at issue in which the Environment Agency have sought to apply their conclusion that Cemfuel was a waste are as follows. On 27 June (Ketton) and 30

June 2000 (Ribblesdale), the Environment Agency issued variations in respect of the Works' Integrated Pollution Control authorisations which had been issued under the provisions of section 10 of the Environmental Protection Act 1990. The variations purported to apply the Hazardous Waste Incineration Direction given by the Secretary of State for the Environment to each Works. The Environment Agency had power to issue those variations if Cemfuel is waste, but not otherwise. It follows that the grant of a declaration in favour of Castle would have the necessary consequence of requiring the variations to be quashed.

7. The central issue is a relatively narrow one. Castle does not dispute that if Cemfuel is "waste", it is a hazardous waste for the purposes of the HWID. However, whilst it has never been in issue that Cemfuel is made from various different waste streams, Castle contends that the process of recovery of fuel from those waste streams has ceased by the time that Cemfuel leaves its producer for delivery to Castle's works, and hence it has become a raw material akin to any other fuel. The Environment Agency on the other hand contends that the burning of Cemfuel in the cement kilns is part (in fact the end) of that recovery process, and hence Cemfuel remains waste until it is burnt. Castle submits that such a conclusion misapplies the definition of waste as interpreted by European and domestic courts.
8. The definition of waste for present purposes is to be found in the Waste Framework Directive, 75/442/EEC, as subsequently amended by Council Directives 91/156/EEC and 91/692/EEC and Commission Decision 96/350/EEC. I shall refer to it as the WFD.
9. The decision of the Court in a case such as the present is at the primary, not the secondary, level. The question is not whether the Environment Agency could reasonably have determined that Cemfuel is waste for the purposes of the relevant legislation, but whether or not it is "waste". The question whether Cemfuel is waste for the purposes of the relevant legislation is a jurisdictional question: if Cemfuel is not "waste", the Environment Agency had no power to issue the variations referred to above.
10. Given the recent guidance given to national courts by the European Court of Justice in *Arco and Epon*, to which I refer below, neither party asked me to make a reference to the European Court of Justice. In view of the similarities between the questions considered by the Court in those conjoined cases and the present case, I agree that it is unnecessary to do so.

Background

11. Cemfuel is the proprietary name for a substitute liquid fuel produced by Solvent Resource Management Ltd ("SRM"), an affiliated company of Castle. It was developed in the early 1990's, and produced using mainly solvents and liquids derived from waste sources. These are processed in a sophisticated and highly controlled manner requiring a considerable degree of skill to produce a highly specified fuel. The specification includes minimum calorific values, and maximum values for numerous metals and compounds. The specification varies to some extent, as it is tailored to the site where it is to be used.

According to Castle's evidence:

The concepts which lie behind the specification of Cemfuel (are) safety of our operators, low impact on the environment, and no adverse impact on the process or product.

12. Cemfuel has a number of environmental advantages over coal. Its use reduces the consumption of fossil fuels. The waste from which it is produced is consumed instead of being consigned to a landfill or incinerated as a means only of disposal.
13. For the purposes of this judgment, I have accepted Castle's evidence, in the form of the first witness statement of Mr Weller, as to the manufacture of Cemfuel. The relevant part of that statement, paragraphs 35 to 54, is appended to this judgment as Appendix 1.

The regulatory framework

14. I can take this from the Environment Agency's skeleton argument, edited for the purpose, which is uncontroversial. It is Appendix 2 to my judgment.

Discussion

15. The concept of "waste", as normally used, is relatively straightforward; which is doubtless why it is obvious, and is not in issue, that the original constituent substances of Cemfuel are waste. Similarly, I should have thought it obvious that material which is not waste can be recovered from waste. One might, for example, be able to recover from waste relatively pure metals, such as chromium and molybdenum, which are for all practical purposes identical to unused materials. In ordinary language, one would not describe such recovered substances as "waste". On the other hand, other materials would be described as waste notwithstanding processing. For example, used rubber tyres would not cease to be waste because they had been reduced to very small particles or powder with a view to burning them or burying them in a landfill site. There are clearly difficulties in deciding whether a substance has ceased to be waste, and these difficulties are reflected in the jurisprudence. However, subject to the terms of the relevant legislative instruments and guidance from authority, I would expect the question whether a substance derived from waste remains waste to depend not only on the processes involved in its production, but also on the nature of the substance itself. I should not regard the fact that the qualities of the substance are highly specified to affect this question. Used tyres remain waste tyres even if their specification is comprehensive and would exclude the very great majority of tyres. Furthermore, the removal of unwanted substances from the material would not of itself cause something to cease to be waste. Whether it does would normally be a question of fact and degree. For example, as indicated above, one would not expect a pure metal recovered from a production process and indistinguishable from the metal produced from natural ore to be regarded as waste.
16. It is in addition difficult if not impossible to base the classification of a material as "waste" by comparing its characteristics with regard to the environment or to health with a "natural" material. Coal may be an environmentally damaging fuel, but is not waste; asbestos is a

natural material which may be extremely damaging to health. Conversely, there may be harmless waste materials. Furthermore, if a comparison is to be made between a particular waste material and a non-waste material, the question has to be asked: what non-waste material is to be used for the comparison and what is the basis for its selection? In the case of a fuel, is it to be the most efficient and most environmentally-friendly non-waste fuel, or to the least efficient and least environmentally-friendly non-waste fuel, and why?

17. Furthermore, whether a material is “waste” cannot depend on whether any particular holder of it stores and uses it in an environmentally and otherwise safe manner. Its categorisation should depend on its qualities, not on the qualities of its storage or use. Otherwise, a material would be and cease to be waste, and come within and outside the controls on hazardous waste, as it passed from one holder to another. This would be inconsistent with any rational system of waste control.
18. I turn to consider the legislative material and relevant authority. In this connection, I refer to paragraph 14 of Castle’s skeleton argument. It states that:

“The European Court of Justice has had considerable difficulty in extracting a coherent meaning from the definition of waste in the Framework Directive.”

I agree. In the most recent decision on the Waste Framework Directive, Advocate-General Alber opined:

... it should be noted that the definition of the term “waste” contained in the Directive is too vague to lay down a generally valid, comprehensive definition of waste. Instead a decision must be made on a case-by-case basis as to whether or not a treated substance must be regarded as waste in a particular situation.

See paragraph 109 of his Opinion in conjoined cases C-418/97 and C-419/97, to which I shall refer as *Arco* and *Epon* respectively, and (I hope not confusingly) to *Arco* collectively. Moreover, I am sure that all parties to this case would agree that the guidance given by the European Court of Justice to national courts has been less than pellucid. The Court summarised the law in relation to substances resulting from a recovery operation (as Cemfuel, according to Castle, is) as follows:

“Whether (a substance resulting from a recovery operation) is waste must be determined in the light of all the circumstances, by comparison with the definition set out in Article 1(a) of the directive, that is to say the discarding of the substance in question or the intention or requirement to discard it, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined.”

See the judgment of the European Court of Justice in *Arco* at paragraph 97;
and c.f. paragraph 88.

19. Even this Delphic utterance may positively mislead. In the context of the Directive, “discard” is used in a special sense. There is a valuable discussion of the term in the judgment of Carnwath J in *Mayer Parry Recycling Ltd v Environment Agency* [1999] Env. LR 489 (referred to as *Mayer Parry No. 1* because of the subsequent unreported decision of Collins J in *R v The Environment Agency ex p Mayer Parry*, referred to as *Mayer Parry No. 2*), at paragraphs [24] to [42] and ff.. I refer specifically to Carnwath J’s warning as to the meaning of “discard”, and the negative connotations of that word in ordinary English. I can also adopt Carnwath J’s summary of the proper approach to the construction of E.U. directives, at paragraph [21] and [22].
20. Carnwath J cited among others the following passages from the judgment of the European Court of Justice in *Inter-Environment Wallonie v Region Wallonne* (Case C-129/96):
 - “26. First of all, it follows from the wording of Article 1(a) of Directive 75/442, as amended, that the scope of the term ‘waste’ turns on the meaning of the term ‘discard’.
 27. It is also clear from the provisions of Directive 75/442, as amended, in particular from Article 4, Articles 8 to 12 and Annexes IIA and IIB, that the term ‘discard’ covers both the disposal *and recovery* of a substance or object.”
[Italics added.]
21. But for the subsequent judgment of the European Court of Justice in *Arco*, I should have gratefully adopted Carnwath J’s fine exegesis of the law on this subject. As it is, and regrettably from my point of view, his judgment must now be read subject to the decision of the Court in *Arco*. In particular, the last sentence of paragraph [46] of his judgment is inconsistent with paragraphs 94 and 97 of the judgment in *Epon*. I shall, therefore, set out the relevant parts of the WFD and extracts from the judgment of the Court in *Arco* and *Epon*.
22. As stated above, for present purposes, the crucial European legislative instrument is the Waste Framework Directive, as amended. The most important recitals are the following:

Whereas the essential objective of all provisions relating to waste disposal must be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste;

Whereas the recovery of waste and the use of recovered materials should be encouraged in order to conserve natural resources; ...

23. Article 1 includes the following definitions:

(a) 'waste' shall mean any substance or objects in the categories set out in Annex 1 which the holder discards or intends or is required to discard.

The Commission, acting in accordance with the procedure laid down in Article 18, will draw up, not later than 1 April 1993, a list of wastes belonging to the categories listed in Annex 1. This will be periodically reviewed and, if necessary, revised by the same procedure.

(b) 'producer' shall mean anyone whose activities produce waste (original producer) and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste.

(c) 'holder' shall mean: the producer of the waste or the natural or legal person who is in possession of it.

(e) 'disposal' shall mean: any of the operations provided for in Annex II, A;

'recovery' shall mean: any of the operations provided for in Annex II, B.

.....

24. It may be significant that Article 3(b) deals separately with the use of waste as a source of energy and other uses. It requires Member States to take appropriate measures to encourage:

(i) the recovery of waste as a means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials, or

(ii) the use of waste as a source of energy.

25. The Environment Agency's case is that Cemfuel is indeed a case of the use of waste as a source of energy. Castle Cement's case is that Cemfuel, by the time it is used as a source of energy, has ceased to be waste.

26. Article 4 of the WFD requires Member States to take the necessary action to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular:

“without risk to water, air, soil and plants and animals.

without causing a nuisance through noise and odours.

without adversely affecting the countryside or places of special interest.”

It also requires Member States to take “the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste”.

27. It is to be noted that the word “discard” is not used in the last sentence of Article 4. This is another indication that it is used in the Directive in a special sense, and not in the sense of “abandon” or “dump” or “dispose of”, if by “dispose of” is meant abandonment.

28. Article 10 is as follows:

For the purposes of implementing Article 4, any establishment or undertaking which carries out the operations referred to in Annex II B must obtain a permit.

29. I do not need to quote the remainder of the body of the WFD, although the whole of it is relevant to the issue before me.

30. Annex 1 lists categories of waste. The term is clearly intended to have a very wide meaning. Beyond this, the assistance which can be gained from Annex 1, towards understanding the concept of waste in the Directive is limited, particularly since its last category is:

Any materials, substances or products which are not contained in the above categories.

31. Annex II A lists disposal operations. It sets out operations such as tipping. I do not have to consider it further, but I point out again that “discard” in the present context has a very different meaning to “dispose”, since it includes recovery of waste, which is the subject of Annex IIB.

32. Annex IIB lists “Operations which may lead to recovery”. It begins with a note:

NB: This Annex is intended to list recovery operations such as they occur in practice. In accordance with Article 4, waste must be disposed of without endangering human health and without the use of processes or methods likely to harm the environment.

33. It follows that the list in Annex II B is not intended to be an exhaustive list of recovery operations. For present purposes, it is sufficient to set out certain of the recovery operations in the list:

R 1 Use principally as a fuel or other means to generate energy

R 2 Solvent reclamation/regeneration

R 3 Recycling/reclamation of organic substances which are not used as solvents (including composting and other biological transformation processes)

R 4 Recycling/reclamation of metal and metal compounds

R 7 Recovery of components used for pollution abatement

R 9 Oil re-refining or other reuses of oil

R13 Storage of wastes pending any of the operations numbered R1 to R12 (excluding temporary storage, pending collection, on the site where it is produced).

34. The list reads as if the recovery operations identified do not overlap: i.e., that any actual operation would not fall within more than one paragraph. There is an obvious difference between R1 and the other substantive operations applicable to waste materials, i.e., R 2 to R 9. R1 refers to an end use of waste, whereas R 2 to R 9 refer to operations carried out in order to enable waste to be used. Mr Howell explained this on the basis that R 1 is concerned with the recovery of energy, which does not take place until a substance is used as a fuel. The difference between R 1 and the other substantive waste material recovery operations reflects the wording of Article 3.2(b) of the WFD. R 1 reflects Article 3.2(b)(ii), whereas the other operations R 2 to R 9 reflect Article 3.2(b)(i).
35. On this basis, the answer to the question before me is straightforward: the wastes which are used to produce Cemfuel are not recovered for the purposes of the WFD until they are used as a fuel or other means to generate energy; that operation does not take place until Cemfuel is so used by Castle or another cement producer; and it follows that Cemfuel is waste for the purposes of the Directive irrespective of the processes used to produce it from substances which are indisputably waste, and irrespective of the differences between it and its constituent substances.
36. This approach receives support from the use in Annex II B of the expressions “reclamation”, “recycling”, “recovery of components”, which refer to operations leading to the reuse of substances rather than their incineration. In my judgment, R 9, which Mr Havers suggested covered the production of Cemfuel, does not. The context and wording indicate otherwise. The reuses of oil referred to in R 9 are uses as oil, i.e., as a lubricant or the like, and do not include use as a fuel.
37. Apart from authority, therefore, I should hold that Cemfuel remains waste within the

meaning of the WFD until it is used as fuel. Its constituent wastes are not “recovered” until the Cemfuel is incinerated. However, this matter is not free from authority. In the *Arco* and *Epon* conjoined cases, the European Court of Justice was concerned with the questions whether LUWA bottoms, used as a fuel in the cement industry, and whether ground wood residues from building and demolition activities, used as fuel to generate electricity, are to be regarded as waste. The Court did not follow the process of reasoning summarised in paragraphs 34 and 36 above. Paragraph 85 (which I set out below) of the judgment of the Court, in particular, is inconsistent with that reasoning. As will be seen, the Court also did not adopt the reasoning of the Advocate-General.

38. LUWA bottoms are one of the by-products of the manufacturing process used by Arco. They result from a distillation process, the “bottoms” being left at the bottom of the distillation column. They have a high calorific value, comparable to that of first-grade coal, and are used, like Cemfuel, as a fuel in the cement industry. They may be so used without any further processing. Arco disputed that they were “waste” within the meaning of the WFD. The national court had referred the following questions to the European Court of Justice for a preliminary ruling:

1. May it be inferred from the mere fact that LUWA-bottoms undergo an operation listed in Annex IIB to Directive 75/442/EEC that that substance has been discarded so as to enable it to be regarded as waste for the purposes of Directive 75/442/EEC?
2. If Question 1 is to be answered in the negative, does the reply to the question whether the use of LUWA-bottoms as a fuel is to be regarded as constituting discarding depend on whether:
 - (a) LUWA-bottoms are commonly regarded as waste, it being relevant whether they may be recovered in an environmentally responsible manner for use as a fuel without substantial processing?
 - (b) the use of LUWA-bottoms as a fuel amounts to a common method of waste recovery?
 - (c) The substance used is a main product or a by-product (a residue)?

39. As mentioned above, the *Epon* case concerned the use of wood residues from the construction and demolition of buildings delivered in the form of wood chips, which were to be transformed into a wood powder and used as a fuel to generate electricity. The material in question was the subject of a specification, which excluded sand, paint particles, stone, glass, plastic particles, textile and fabric particles and metal parts. The questions referred by the national court were similar to those in *Arco*:

1. May it be inferred from the mere fact that wood chips undergo an operation listed in Annex IIB to Directive 75/442/EEC that that substance has been discarded so as to enable it to be regarded as waste for the purposes of Directive 75/442/EEC?

2. If Question 1 is to be answered in the negative, does the reply to the question whether the use of wood chips as a fuel is to be regarded as constituting discarding depend on whether:

- (a) in regard to the building and demolition waste from which the chips are produced operations are carried out already at an earlier stage than burning which are to be regarded as a discarding of the waste, namely operations (recycling operations) to render the waste suitable for re-use (use as fuel)?

If so, is an operation to render waste suitable for re-use (recycling operation) to be regarded as an operation for recovery of waste only if that operation is expressly mentioned in Annex IIB of Directive 75/442/EEC, or also if that operation is analogous to an operation mentioned in Annex IIB?

- (b) wood chips are commonly regarded as waste, it being relevant whether they may be recovered in an environmentally responsible manner for use as fuel without substantial processing?
- (c) the use of wood chips as a fuel amounts to a common method of waste recovery?

40. Paragraphs 36 to 40 of the judgment of the European Court of Justice are as follows:

36 It follows that the scope of the term ‘waste’ turns on the meaning of the term ‘discard’ (Case C-129/96 *Inter-Environment Wallonie ASBL v Region Wallone* [1997] ECR I-7411, paragraph 26).

37 The Court has held that that term must be interpreted in light of the aim of the directive (see, in particular, joined Cases C-206/88 and C-207/88 *G. Vessosso and G. Zanetti* [1990] ECR I-1461, paragraph 12).

38 In that regard, the third recital of the preamble to directive 75/442 states the ‘the essential objective of all provisions relating to

waste disposal must be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste’.

39 It should further be pointed out that, pursuant to Article 130r(2) of the EC Treaty (now, after amendment, Article 174(2) EC), Community policy on the environment is to aim at a high level of protection and is to be based, in particular, on the precautionary principle and the principle that preventative action should be taken.

40 It follows that the concept of waste cannot be interpreted restrictively.

41. The Court pointed out that some of the disposal and recovery operations in Annex IIB of the WFD may be applied to substances that are not waste. Petrol and natural gas are not waste, but may be used as a fuel as described in category R9. The Court therefore answered the first question in both *Arco* and *Epon* in the negative.

42. Turning to question 2 in each case, the Court stated:

64. As the Court has already pointed out, the method of treatment or use of a substance does not determine conclusively whether or not it is to be classified as waste. What subsequently happens to an object or a substance does not affect its nature as waste, which, in accordance with Article 1(A) of the directive, is defined in terms of the holder discarding it or intending or being required to discard it.

65. Just as the concept of waste is not to be understood as excluding substances and objects which are capable of economic reutilisation (see *Vessoso and Zanetti*, ...) it is not to be understood as excluding substances and objects which are capable of being recovered as fuel in an environmentally responsible manner and without substantial treatment.

66. The environmental impact of the processing of that substance has no effect on its classification as waste. An ordinary fuel may be burnt without regard to environmental standards without thereby becoming waste, whereas substances which are discarded may be recovered as fuel in an environmentally responsible manner and without substantial treatment yet still be classified as waste.

67. As the Court observed in paragraph 30 of the *Inter-Environmental Wallonie* judgment, cited above, moreover, there is

nothing in the directive to indicate that it does not apply to disposal or recovery operations forming part of an industrial process where they do not appear to constitute a danger to human health or the environment.

68. The fact that substances may be recovered as fuel in an environmentally responsible manner and without substantial treatment is, indeed, material to the question whether the use of that substance as fuel should be authorised or encouraged or to the decision as to the degree of control to be exercised.

69. Likewise, although the method of treating a substance has no impact on its nature as waste, it may serve to indicate the existence of waste. If the use of a substance as fuel is a common method of recovering waste, that use may be evidence that the holder has discarded or intends or is required to discard that substance within the meaning of Article 1 (a) of the directive.

70. In the absence of specific Community provisions on proof of the existence of waste, it is for the national court to apply the provisions of its own legal system in that regard, while taking care that the objective and effectiveness of the directive are not undermined.

71. As to what is commonly regarded as waste, that element, too, is irrelevant in view of the express definition of waste in Article 1 (a) of the directive, but it may also serve to indicate the existence of waste.

72. It follows that the answers to part (a) and (b) of the second question in Case C-418/97 and parts (b) and (c) of the second question in Case C-419/97 must be that for the purpose of determining whether the use of a substance such as LUWA-bottoms or wood chips as a fuel is to be regarded as constituting discarding, it is irrelevant that those substances may be recovered in an environmentally responsible manner for use as fuel without substantial treatment.

73. The fact that use as fuel is a common method of recovering waste and the fact that those substances are commonly regarded as waste may be taken as evidence that the holder has discarded those substances or intends or is required to discard them within the meaning of Article 1(a) of the directive. However, whether they are in fact waste within the meaning of the directive must be determined in the light of all the circumstances, regard being had to

the aim of the directive and the need to ensure that its effectiveness is not undermined.

43. The Court dealt separately with question 2(c) in the *Arco* case. It stated:

85. The use of a substance such as LUWA-bottoms as fuel, instead and in place of a normal fuel, is a factor which may give the impression that its user is discarding it, either because he wishes or because he is required to do so.

86. The fact that the substance is a residue for which no use other than disposal can be envisaged may also be regarded as evidence of discarding. That fact gives the impression that the holder of the substance acquired it for the sole purpose of discarding it, either because he wishes to or because he is required to, for example under an agreement with the producer of the substance or with another holder.

87. The same will apply where the substance is a residue whose composition is not suitable for the use made of it or where special precautions must be taken when it is used owing to the environmentally hazardous nature of its composition.

It follows that the answers to part (c) of the second question in Case C-418/97 must be that the fact that a substance used as fuel is the residue of the manufacturing process of another substance, that no use for that substance other than disposal can be envisaged, that the composition of the substance is not suitable for the use made of it or that special environmental precautions must be taken when it is used may be regarded as evidence that the holder has discarded that substance or intends or is required to discard it within the meaning of Article 1(a) of the directive must be determined in the light of all the circumstances, regard being had to the aim of the directive and the need to ensure its effectiveness is not undermined.

44. The Court then turned to consider question 2 in *Epon*:

89 By part (a) of the second question in Case C-419/97 the national court asks whether, in order to determine whether the use of wood chips as fuel is to be regarded as constituting discarding, it is necessary to consider whether the waste from the construction and demolition sector from which the chips were made has already undergone, prior to burning, operations which are to be regarded

as a discarding of the waste, namely operations (recycling operations) to render the waste suitable for re-use as a fuel, and if so, whether the operation may be regarded as an operation for recovery of waste only if it is expressly mentioned in Annex IIB to the directive or whether it may also be so regarded if it is analogous to an operation mentioned in that annex.

90 The appellants in the main proceedings maintain that the wood used as fuel by Epon is impregnated with very toxic substances and should be treated as hazardous waste. The fact that the wood is transformed into chips and the chips reduced to powder does not in any way alter the nature or the composition of the substance, which retains the toxic agent.

91 Epon contends that a substance which has undergone a recycling operation must not be regarded as waste where it was used in an environmentally responsible manner, that is to say where its use was no more hazardous to human health or to the environment than the use of a primary raw material.

92 As regards the second part of the question, Epon points out that the list in Annex IIB to the directive is not exhaustive and that it must be possible to take new recycling methods into consideration. It states, however, that waste from the construction and demolition sector has already been subject to a recycling operation referred to in category R2 of Annex IIB to the directive, namely 'Recycling/reclamation of organic substances which are not used as solvents'.

93 The Governments which have submitted observations and the Commission argue essentially that the fact that the waste as issue in the main proceedings has undergone prior operations when it was sorted and transformed into chips is not sufficient for it to lose the character of waste. Such operations do not constitute a recovery operation for the purposes of Annex IIB to the directive but a simple pre-treatment of the waste. A substance ceases to be waste only when it has undergone a complete recovery operation within the meaning of Annex IIB to the directive, that is to say when it can be processed in the same way as a raw material or, as in this case, when the material or energy potential of the waste has been used during burning.

94 In that regard, it should first be noted that even where waste has undergone a complete recovery operation which has the consequence that the substance in question has acquired the same properties and characteristics as a raw material, that substance may

none the less be regarded as waste if, in accordance with the definition in Article 1(a) of the directive, its holder discards it or intends or is required to discard it.

95 The fact that the substance is the result of a complete recovery operation for the purposes of Annex IIB to the directive is only one of the factors to be taken into consideration for the purposes of determining whether the substance constitutes waste and does not as such permit a definitive conclusion to be drawn in that regard.

96 If a complete recovery operation does not necessarily deprive an object of its classification as waste, that applies a fortiori to an operation during which the objects concerned are merely sorted or pre-treated, such as when waste in the form of wood impregnated with toxic substances is transformed into chips or those chips are reduced to wood powder, and, which, since it does not purge the wood of the toxic substances which impregnate it, does not have the effect of transforming those objects into a product analogue to a raw material, with the same characteristics as that raw material and capable of being used in the same condition of environmental protection.

97 The answer to part (a) of the second question in Case C-419/97 must therefore be that the fact that a substance is the result of a recovery operation within the meaning of Annex II B to the directive is only one of the factors which must be taken into consideration for the purpose of determining whether that substance is still waste, and does not as such permit a definitive conclusion to be drawn in that regard. Whether it is waste must be determined in the light of all the circumstances, by comparison with the definition set out in Article 1(a) of the directive, that is to say the discarding of the substance in question or the intention or requirement to discard it, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined.

45. I confess to finding important parts of the judgment of the European Court of Justice Delphic. However, it is clear that the carrying out of a “complete” recovery operation, whatever that may be, does not necessarily result in a substance ceasing to be waste. To this extent, the judgment of Carnwath J in *Mayer Parry No. 1* must be regarded as superseded: c.f. paragraph 48 of his judgment.
46. Castle submit that Advocate-General Alber, in *Arco*, at paragraph 109 of his opinion, correctly set out the test to be applied in this case. He said:

If a waste material is recovered or reprocessed with the result that a substance is produced that no longer poses a danger typical of waste and therefore does not pollute the environment any more than, but at most in the same way as, a primary raw material, that substance probably does not have to be regarded as waste in the sense that it must be monitored or that its re-use must be authorised. In that respect it is for the national court and the authorising authorities to examine whether or not a danger typical of waste – that is to say one which goes beyond the dangers posed by a comparable primary raw material – is inherent in the relevant substance with the result that supervision in accordance with the Directive continues to be regarded as necessary. ...

47. The Environment Agency criticise this test as uncertain. What, they ask, is “a danger typical of waste”? How does one select the primary raw material with which comparison is to be made? The opinion of the Advocate-General provides no answers to these questions. As will be apparent from paragraphs 15 to 17 above, I agree with these criticisms. More importantly, this test seems to me to be inconsistent with the judgment of the European Court of Justice. I refer in particular to paragraph 94 of the judgment in *Arco*, set out above.

48. There was debate before me whether in paragraphs 94 and 97 of its judgment, the European Court of Justice used the word “discard” in the special and technical sense in which it is used in the WFD. Mr Havers QC, for Castle, submitted that it did not; Mr Howell QC, for the Environment Agency, and Mr Hutchings, for Mrs Lowther, submitted that it did. On the basis of his submission, Mr Havers submitted that neither SRM nor Castle intend to “discard” Cemfuel, since they did not intend to throw it away or to dump it. I have no doubt that the Court did use the word in its special sense. If the Court had intended to use a non-technical synonym, it could and would have done so. The word is associated in this paragraph of the judgment with “holder”, another expression having a special, and in this case defined, meaning in the Directive. Furthermore, the references to intention to discard and to a requirement to discard come from the definition of waste in the Directive. Lastly, as Mr Hutchings pointed out, in paragraph 73 of its judgment the Court referred to use as a fuel as a common method of *recovering* waste.

49. I also reject Castle’s submissions that:

The recovery of fuel from the various waste streams was complete when its supplier, SRM, completed the manufacture of the fuel, i.e., prior to delivery to Castle’s Cement Works.

The recovery operations carried out by SRM include some of those listed in Annex IIB to the Directive, in particular R2, R3, R4 and R7.

Neither the supplier, SRM, nor Castle, have any intention of “discarding” Cemfuel. Both intend that it be used by Castle as fuel,

50. The fact that recovery operations listed in Annex IIB are carried out to the constituent parts of Cemfuel or to all of them during the process of its production would not of itself mean that Cemfuel is not waste: see Paragraph 97 of the judgment of the Court in *Arco*. Indeed, as Mr Howell pointed out, the fact that a substance is subjected to a process described in Annex IIB of the WFD cannot of itself cause it to cease to be waste, given that those processes include as R 13 “Storage of waste pending any of the operations R 1 to R 12 ...”. However, as appears from paragraph 36 above, I agree with Mr Howell that none of the processes applied in the production of Cemfuel are (as Castle claim) processes within R2, R3, R4 or R7.
51. Secondly, both SRM and Castle do intend to “discard” Cemfuel, by its “Use principally as a fuel”. That intention is an important consideration in determining whether Cemfuel is waste: see, e.g., paragraphs 94 and 97 of the judgment.
52. Looking at the issue more broadly, having “regard ... to the aim of the Directive and the need to ensure that its effectiveness is not undermined”, I consider that the production process used for Cemfuel is not sufficient to cause its constituent parts to cease to be waste; and that Cemfuel is therefore “waste” for the purposes of the WFD and the relevant controls. For the reasons I gave in paragraph 15, the fact that the specification of Cemfuel and its production process are tightly controlled are of little assistance. The fact that different waste streams or materials are used in its manufacture is similarly barely relevant. The fact that if necessary non-waste materials are used to increase the calorific value of the material does not cause it to cease to be waste, given the relative proportions of waste and non-waste materials, and that additives are rarely used: see paragraph 5.14 of Mr Whitworth’s first witness statement. The maceration of some material does not change its constitution. What is waste in large pieces is likely to remain waste when reduced to small pieces or even to powder, or if dissolved in a liquid which itself is waste. On this point, see paragraph 96 of the judgment of the Court in *Arco*.
53. In my judgment, SRM is a producer of waste within the meaning of the WFD, i.e., the processes applied to the waste streams which go into Cemfuel are “pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste”, but not in its ceasing to be waste. In this connection, I refer to an SRM consignment note for Cemfuel, which describes it as “A blend of organic liquids containing dissolved resins and oils and suspended fillers, polymers and pigments.”
54. Castle sought to distinguish Cemfuel from LUWA-bottoms on the basis that, unlike LUWA-bottoms, Cemfuel is the result of processing. In my judgment, as appears from the previous paragraph of my judgment, this is not a sufficient distinction: c.f. paragraph 97 of the judgment of the European Court of Justice in *Arco*.
55. Castle sought to distinguish Cemfuel from the wood chip material considered in *Epon* on the ground that in that case the contaminants in the wood had not been removed or neutralised. However, Cemfuel itself is potentially harmful to the environment and to health. The consignment note to which I referred in paragraph [52] above classifies all of

the ingredients of Cemfuel not only as highly flammable but also as harmful. Under the heading “Hazards Identification” it states:

Inhalations	Vapour narcotic in high concentrations.
Skin Contact	Degreases skin, possibly causing dermatitis
Eye Contact	Pain, redness, watering, blurred vision. Can cause serious damage if splashed in eyes.
Ingestion	Abdominal pain, nausea

These matters lead me to the view that the regulation of the holding and use of Cemfuel pursuant to the WFD is appropriate, and that to hold that it is not waste would undermine the effectiveness of the WFD..

56. The economic value of Cemfuel is also a relevant, but not decisive, circumstance: see *Euro Tombesi* [1997] ECR I-3561 at paragraphs 47, 48 and 52.. The evidence indicates that Castle may pay SRM for Cemfuel, but that also, depending on market conditions, SRM may pay Castle to take it away. Evidence given by a predecessor company of SRM to the House of Commons in 1996 was to the effect that it had to pay a charge to the operators of cement kilns to use the fuel. This points towards Cemfuel being waste, which SRM discards. As Mr Hutchings submitted, if Cemfuel has no positive value, its producer or holder has an incentive to dump it. Its possession and use should be regulated pursuant to the WFD. The classification of Cemfuel as waste cannot depend on economic circumstances, any more than it can depend on the identity or character of its holder. The liberal application of the WFD which the European Court of Justice has enjoined supports the view that Cemfuel is waste at all times.
57. The evidence also shows that fuels such as Cemfuel are regarded as waste by the European Commission and by the UK Government. The guidance notes published by the commission on Best Available Techniques in the Cement and Lime Manufacturing Industries treats fuels such as Cemfuel as waste: see paragraph 1.2.3.3. The United Kingdom Government’s “Waste Strategy 2000 for England and Wales”, Cm 4693-1, expressly refers to Ketton under the heading “Hazardous Waste Incineration”. These references are by no means decisive but they “may also serve to indicate the existence of waste”: see the *Arco* judgment at paragraphs 71 and 73.
58. I am comforted in my decision by the terms of Directive 2000/76/EC on the incineration of waste, which provides for controls on emissions from the burning of waste in incineration and co-incineration plants. Annex II contains special provisions for cement kilns co-incinerating waste, which on the basis of my decision the kilns operated by Castle at Ribblesdale and Ketton are. It would be regrettable if the incineration of Cemfuel at those kilns fell outside the Incineration of Waste Directive. Indeed, I note that Castle accept that this Directive was intended to cover substitute liquid fuels such as Cemfuel.

Conclusion

59. Cemfuel is a hazardous waste, and has rightly been treated as such by the Environment Agency. This application fails.

appendix 1

The Manufacture of Cemfuel

Cemfuel is a substitute liquid fuel. It is made from waste solvents, oils etc and is produced to a strict specification by external suppliers who are responsible for securing appropriate constituents of the fuel. It is delivered by lorry to the Works, where it is stored in tanks before being fed by pipes to the kilns.

The actual process of manufacture is complex, involving a series of testing procedures before receipt, processing and manufacture on site, testing following completion, delivery and then testing on receipt by the appropriate Works, namely either Ketton or Ribblesdale.

Prior to waste being accepted by the Cemfuel suppliers, for whatever purpose, be it solvent recovery, manufacture of Cemfuel or refining, the original producer of the waste is required to supply to the Cemfuel manufacturer a precise description of the:

- (i) waste produced
- (ii) a safety data sheet
- (iii) a chemical analysis; and
- (iv) a sample.

The sample is then analysed by the Cemfuel manufacturer. The results of this analysis are then compared with the information originally provided by the waste producer.

If the waste can be processed without impacting upon the safety of the process and operators the environment and the quality of the product, a formal supply contract with the waste generator can be agreed.

When the bulk or drummed waste is delivered to the fuel manufacturer, it is first again sampled to

ensure that it still complies with the detailed analysis agreed previously with the waste producer. If the waste is found to be different from the sample analysis it can be rejected and returned to the generator if it is unsuitable for processing.

If the waste stream is accepted, it will be processed in a number of different ways depending upon its composition, chemical properties and physical properties. For example, a solid waste which is soluble in solvents must be dissolved before further processing. Other solid waste on the other hand may have to be melted to produce a liquid that is more easy to handle.

There are essentially two methods of waste delivery to the manufacturer: in bulk and in drums.

After sampling and analysis by the Cemfuel manufacturer, bulk wastes are transferred from road tankers to special quarantine storage tanks, where the manufacturer can decide upon the most appropriate recovery route. His decision will be based on economic, safety and environmental considerations. Depending upon the origin of the waste it may be processed prior to storage by maceration to ensure that any solids contained in the bulk tank are reduced in size so that they remain in suspension during storage.

Wastes that are delivered to the Works in drums will be sampled and analysed before being processed through the de-drumming plant. Carefully selected drums are then fed by conveyor to the drum shredder in a predetermined order. This selection of type of drum and the order in which it is fed into the process is essential to ensure the product at this stage meets a broad specification of physical and chemical properties. Care is also taken in selection of drums to ensure that there are no undesirable chemical reactions between different wastes, the order of processing similarly being managed to ensure that certain compatible wastes are mixed. Bulk solvents may be added to the shredder to ensure the liquid product can be easily pumped as it passes through the various stages in the

manufacturing process.

The de-drumming plant shreds 200 litre steel drums. The output from the shredder is screened to produce two products. The first comprises steel shreds from the drums. These are transferred to a scrap metal merchant. The second comprises mixed organic liquids. Those which may be suitable for Cemfuel, are transferred to a storage tank via a macerating pump (to reduce the size of any solids present in the liquid). The product also passes through a continuous sampler which takes a composite sample of the tanks contents.

Before any further processing takes place, a sample of the product is analysed to determine the most suitable recovery route. The de-drumming plant also produces a small quantity of waste, which is unsuitable for further processing. This waste is disposed of to landfill.

If acceptable, the liquid product from the de-drumming plant will be one of the raw materials for Cemfuel manufacture. Other raw material for manufacture will include distillation residues from solvent recovery operations (including for example, LUWA bottoms) and bulk wastes from waste generators which have been analysed and passed as suitable for inclusion in Cemfuel.

Each raw material stream is analysed and the analysis is compared with the Cemfuel specification for suitability.

From the various input streams, a Cemfuel intermediate is produced by selecting specific quantities of each stream. Once the initial mix has been produced it is sampled and analysed for compliance with the specification.

The manufacturer will then add further specific materials either from waste streams or materials already on site or other materials specifically brought onto the site to achieve the required

specification.

Following the successful completion of this stage in the process, the manufacturer has a fuel product. The product, however, is then again sampled and analysed for compliance with the Cemfuel specification. In the unusual circumstances that the tank contents are outside the specification, a further careful addition of materials such as fuel oil is made to bring the contents into specification.

If the sample meets the specification then the finished product is isolated from the feed tanks and then a certificate of compliance is issued.

The compliance certificate is sent to Castle for approval before any Cemfuel is dispatched to the Works. Typically, the Cemfuel is produced in batches of between 200 and 500 tonnes.

The Cemfuel is loaded into road tankers and all the hatches and valves are fitted with anti-tamper custom seals. The driver carries with him a sample of the batch and a copy of the batch analysis to the cement works. The delivery paperwork is checked on arrival at the Works to ensure the correct batch has been delivered, and that the seals are all intact prior to unloading. If there are any discrepancies, the load is returned to the fuel supplier.

Audit samples of Cemfuel are collected during tanker unloading.

The finished product, i.e. Cemfuel, has to meet specific criteria. The fuel must meet the specification laid down by Castle so as to ensure that the finished product may be used satisfactorily as a fuel in Castle's kilns for the manufacture of cement.

appendix 2

THE REGULATORY FRAMEWORK IN EUROPEAN LAW

i. The Waste Framework Directive

1. Council Directive 75/442/EEC on waste, as amended by Council Directives 91/156/EEC and 91/692/EEC and Commission Decision 96/350/EEC is referred to as 'the Waste

Framework Directive’.

2. Directive 75/442/EEC stated in its recitals that:
“[2]...any disparity between the provisions on waste disposal already applicable or in preparation in the various Member States may create unequal conditions of competition and thus directly affect the functioning of the common markets;...it is therefore necessary to approximate laws in this field, as provided for in Article 100 of the Treaty;
[4]....the essential objective of all provisions relating to waste disposal must be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste
[5]...the recovery of waste and the use of recovered materials should be encouraged in order to conserve natural resources”

Directive 91/156/EEC (which amended Directive 75/442/EEC substantially) stated in its recitals that:

- [3]....common terminology and a definition of waste are needed in order to improve the efficiency of waste management in the Community;
 - [4]....in order to achieve a high level of environmental protection, the Member States must, in addition to taking action to ensure responsible removal and recovery of waste, take measures to restrict the production of waste particularly by promoting clean technologies and products which can be recycled and re-used, taking into consideration existing or potential market opportunities for recovered waste
 - [5].....any disparity between Member States’ laws on waste disposal and recovery can affect the quality of the environment and interfere with the functioning of the internal market
 - [6]....it is desirable to encourage the recycling of waste and re-use of waste as raw materials;
 - [10]....to ensure a high level of protection and effective control, it is necessary to provide for authorisation and inspection of undertakings which carry out waste disposal and recovery
 - [12]....in order that waste can be monitored from its production to its final disposal, other undertakings involved with waste, such as waste collectors, carriers and brokers should also be subject to authorisation or registration and appropriate inspection..”
3. Article 1 of the Directive as amended provides certain significant definitions. These include definitions of ‘waste’, ‘producer’ and ‘holder’. In addition it is provided that:
“(e) ‘disposal’ shall mean any of the operations provided for in Annex II, A;
(f) ‘recovery’ shall mean any of the operations provided for in Annex II, B;”

These Annexes as amended list disposal and recovery operations as they occur in practice.

4. The Waste Framework Directive contains requirements to take action to promote certain objectives as well as to regulate certain activities.
5. Objectives to be promoted are identified in Article 3(1). It provides that:
“Member States shall take appropriate measures to encourage:

(a) firstly, the prevention or reduction of waste production and its harmfulness

(b) secondly:

(i) the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials; or

(ii) the use of waste as a source of energy.”

One recovery operation listed in Annex IIB is “R1 Use principally as a fuel or other means to generate energy”. Where waste is otherwise incinerated it is disposed of, rather than recovered.

One disposal operation listed in Annex IIA is “D10 Incineration on land”.

The Waste Framework Directive also requires action to be taken to regulate certain activities and the introduction of a system of permits for them. Article 4 provides that:

“Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment....

Member States shall also take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste.”

Article 8 provides that

“Member States shall take the necessary measures to ensure that any holder of waste:

- a. has it handled by a private or public waste collector or by an undertaking which carries out the operations listed in Annex II A or B, or
- b. recovers or disposes of it himself in accordance with the provisions of this Directive.”

Article 9 requires any establishment or undertaking which carries out the operations specified in Annex IIA to obtain a permit from the competent authority. Article 10 provides that

“For the purposes of implementing Article 4, any establishment or undertaking which carries out the operations referred to in Annex IIB must obtain a permit.”

There are limited exceptions to the requirements to obtain permits under Article 11 where certain conditions are satisfied.

6. The Waste Framework Directive thus provides a general framework with respect to waste. The Council of Ministers recognised, however, that more specific rules might be required in specific cases. Article 2(2) of the Directive provided, therefore, that:

“Specific rules for particular instances or supplementing those of this Directive on the management of particular categories of waste may be laid down by means of

individual Directives.”

ii. The Hazardous Waste Directive

7. Council Directive 91/689/EEC on hazardous waste was drawn up pursuant to Article 2(2) of the Waste Framework Directive. It applies the provisions of the Waste Framework Directive to hazardous waste. The Council recognised that “the correct management of hazardous waste necessitates additional, more stringent rules to take account of the special nature of the waste”. These the directive provided for.
8. It was also recognised that it was necessary to use a precise and uniform definition of hazardous waste. Article 1(2) of the Directive provided that “the definition of ‘waste’ and of other terms used in this Directive shall be those in” the Waste Framework Directive. ‘Hazardous waste’ was defined to include waste falling within certain descriptions in Article 1(4) of the Directive.

iii. The Hazardous Waste Incineration Directive

9. More specific measures were taken in Council Directive 94/67/EC on the incineration of hazardous waste given differences in (and, in some cases, the absence of) national provisions applicable to it. Article 1 of the Hazardous Waste Incineration Directive stated that:

“The aim of this Directive is to provide for measures and procedures to prevent or, where that is not practicable, to reduce so far as possible negative effects on the environment, in particular the pollution of air, soil, surface and groundwater, and the resulting risks to human health, from the incineration of hazardous waste and, to that end, to set up and maintain appropriate operating conditions and emission limit values for hazardous waste incineration plants within the Community.”

10. The term ‘hazardous waste’ in the Hazardous Waste Incineration Directive means “any solid or liquid waste as defined in Article 1(4) of” the Hazardous Waste Directive, although certain combustible liquid wastes are excluded from its scope.
11. The Directive provided that the permit required under Articles 9, 10 and 11 of the Waste Framework Directive should be granted only if the application for it shows that the incineration plant is designed, equipped and will be operated in such manner that the appropriate preventive measures against environmental pollution will be taken and that the requirements of Articles 5 to 12 of the Directive will be met. Where a plant which is not intended primarily to incinerate hazardous wastes is being fed with such wastes and the

resulting heat release is no higher than 40% of the total heat released in the plant at each moment of the operation, the Articles of the Directive listed in Article 3(3) must be applied as a minimum.

12. The Directive required its provisions to be applied to existing incineration plants within 3 years and 6 months of the date, December 31st 1996, on which the measures to comply with it had to be brought into force.

iv. Community Policy on the Environment generally

13. Community Policy on the environment is set out in what is now Article 174 (previously Article 130r) of the Treaty. This policy is specifically referred to in the recitals to the Hazardous Waste Incineration Directive. It states that

“1. Community Policy on the environment shall contribute to pursuit of the following objectives:

- **preserving, protecting and improving the quality of the environment;**
- **protecting human health;**
- **prudent and rational utilisation of natural resources;**
 - **promoting measures at international level to deal with regional or worldwide environmental problems.**

2. Community Policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.”

v. The Community regime at national level

14. Part II of the Environmental Protection Act 1990 deals with waste management generally. It has been adapted to conform with the community regime relating to the regulation of waste.
15. The operative provisions of Part II requiring a waste management licence for certain activities do not apply to the recovery or disposal of waste under an authorisation granted under Part I of the 1990 Act where the activity forms part of a process designated for central control, such as those carried on by Castle Cement. The requirements of European law with respect to waste in such cases are implemented through the system of integrated pollution control under Part I of that Act.
16. The Hazardous Waste Incineration Direction 1998 required authorisations granted under

Part I of the 1990 Act to be varied to include conditions giving effect to the Hazardous Waste Incineration Directive in accordance with a specified timetable.

MR JUSTICE STANLEY BURNTON: My judgment in this case has been distributed in draft. Copies are now available to the parties and to the public. The draft judgment sets out my conclusions.

MR WARD: May it please your Lordship, I appear for the Agency. My learned friend, Mr Hart, appears for the applicant. I ask that the applicant pay the Agency's costs.

MR HART: Which application I do not oppose.

MR JUSTICE STANLEY BURNTON: Good, so be it. Any other orders?

MR HUTCHINGS: My Lord, I appear for the interested party. I ask for two orders. One is a detailed assessment of the interested party's publicly funded costs. I believe there is a public funding certificate.

MR JUSTICE STANLEY BURNTON: Certainly, I did not appreciate that.

MR HUTCHINGS: My Lord, I also have a go at getting my costs from Castle.

MR JUSTICE STANLEY BURNTON: Putting it that way gives a little bit away, does it not!

MR HUTCHINGS: My Lord, it is not the most usual order, but I say that in the circumstances of this case it would be the right order. Firstly, the effect of Castle's application, if it succeeded, would have been that a level of environmental protection would have been removed from members of the public, including Miss Lowther. Secondly, your Lordship decided that Miss Lowther was a proper person to be heard on the application. Thirdly, I would submit that her participation in the application materially affected its outcome. So it was not as if we had nothing extra to say above and beyond what the Environment Agency had to say. Lastly, costs are not very great. It is simply the costs of attendance.

MR HART: My Lord, I oppose that. It is indeed the usual order that an unsuccessful applicant should not pay two sets of costs, particularly in circumstances where one has a government respondent on the one hand who take the point and an interested party on the other. Your Lordship will be aware of the Bolton case and the planning context in which that occurs; namely, where you have an objector claimant seeking review of a decision by a governmental respondent with the developer interested party intervening. In those cases the House of Lords has made it clear that the usual rule should be that the applicant only pay one set of costs.

MR JUSTICE STANLEY BURNTON: That is a stronger case than this case.

MR HART: Exactly. That is the way I put it. I submit that there really can be no reason for any different order.

MR JUSTICE STANLEY BURNTON: What do you have to say?

MR HUTCHINGS: My Lord, all I can really say is that this is a case which had serious ramifications for members of the public, and it was right that a member of public should be represented. It is no surprise to Castle that they should have been represented. In effect, this legislation aims to protect members of the public.

MR JUSTICE STANLEY BURNTON: Well, that is why we have an Environment Agency.

MR HUTCHINGS: My Lord, I do not think I can really add anything.

MR JUSTICE STANLEY BURNTON: The participation in this case of the interested party was beneficial. In my judgment it did not make a difference to the final result, although it was helpful, as my judgment makes clear. It seems to me that in a case such as this it would be wrong for the applicant to bear more than one set of costs. So I do not make an order against the applicant in favour of the interested party.

MR HUTCHINGS: My Lord. That just leaves me with the detailed public funding assessment.

MR JUSTICE STANLEY BURNTON: You certainly may have that order. Thank you very much.