Case No: CO/4806/2005

Neutral Citation Number: [2007] EWHC 717 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 April 2007

Before :

Mr Justice Collins

- -

Between :

	R(Anti-Waste Ltd)	Claimant
	- and -	
	Environment Agency	Defendant

- -
- -

Mr Jeremy Cahill, Q.C. Mr Maurice Sheridan (instructed by Messrs Walker Morris) for the Claimant
Mr Jon Turner, Q.C. & Mr Gerry Facenna (instructed by The Legal Department of the Environment Agency) for the Defendant

Hearing dates: 20 and 21 March 2007

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JudgmentMr Justice COLLINS :

1. This claim started life as an application to quash the refusals by the defendant of permits to allow the claimant to deposit waste in two landfill sites in Norfolk. It also sought declarations to establish the true construction of material provisions in the relevant Regulations which apply Council Directives. The claimant accepts that the refusals rely not only on the alleged legal bar to the grant but also on factual objections and that there is a right of appeal

to the Secretary of State given by the relevant Regulations. In those circumstances, an order was made by Sullivan J that permission be granted to enable two issues of law to be argued and declarations sought. The Secretary of State was served as an interested party and has put written submissions before me. The Secretary of State does not seek to take sides but emphasises the importance of providing for proper control so as to ensure that there is no prohibited pollution from any landfill.

2. Depositing waste in landfill sites is one way of disposing of it. Historically, it has been the major means in this country. EU Directives have made it clear that other methods which are aimed at recycling must be preferred and now landfill is the option of last resort. However, at present there is no alternative to its continuing use and, as must be obvious, sites within the United Kingdom which are suitable for landfill and which have received or are likely to receive planning permission are less available. Furthermore, the controls which have to be in place to ensure compliance with the pollution requirements of the Directives and the Regulations are difficult to meet so that the defendant has not found itself able to grant the necessary permits in many cases.

3. Waste is divided into three categories under the current landfill regime, namely hazardous, non-hazardous and inert. It is not necessary to consider the distinctions for the purposes of this claim. The waste with which this case is concerned is waste which degrades over a period of time and so produces three things. These are a residual waste mass, landfill gases (mainly methane) and a liquid known as leachate. This is liquid which can result from the nature of the waste but more usually comes from the action of rainfall over the site. Leachates will contain substances which, depending on the nature of the waste in the landfill, will almost invariably contain substances which are harmful to the environment and which may be hazardous to humans if they enter the groundwater. The Groundwater Regulations 1998 (SI 1998 No.2746), implementing Council Directive 80/68/EEC on the protection of groundwater against pollution caused by certain dangerous substances, divide the substances into List I and List II. In essence there must be no direct discharge of List I substances into groundwater and limitation of such discharge of List II substances so as to avoid pollution of groundwater by those substances.

4. Many landfills have been operating for a substantial period of time and it was in the past considered appropriate to allow leachate to be diluted and dispersed through underlying ground and sometimes thereafter through groundwater. That is not now permitted and should not have been allowed since 1980 when the Groundwater Directive came into force. Landfills are now constructed in cells which have a liner and a mechanism for collecting and removing leachate and gases. In some landfills, there are cells which do not have any liner or mechanism for collecting and removing leachate since they relied on the dilute and disperse method. Equally, there are in some landfills cells which are properly constructed. In either case, cells have been closed and no further use of them is planned. What the claimant seeks to do in the two sites with which this claim is concerned is to landfill so that the waste they deposit will overlap that in the existing closed cell, being above part of it. An angled liner which is strong enough and impervious so as to prevent

leaching from the new waste through the old and compression of the old causing additional leaching from it is intended so that the new cell is independent of the old closed cell. This is known as piggybacking. It is the defendant's contention that piggybacking is not permitted by the applicable Directives and Regulations. The claimant, while recognising that there may be technical difficulties which make it impossible in some cases to avoid the risk of leaching, contends that piggybacking is lawful and that a permit can be granted if the technical problems can be overcome. I should note that the defendant says that it has dealt with a number of piggybacking applications and has refused each one because, independently of the legal objection, none has succeeded in overcoming all technical objections. Most or even, hitherto, all piggybacking applications may have been refused because of the factual circumstances applying to the landfill sites in respect of which they were made but that cannot assist in establishing whether on their true construction the relevant provisions of the Directives and Regulations prevent permits being granted even where the technical difficulties are overcome.

5. Specific legislative control of landfilling arose under the Control of Pollution Act 1974. Waste Disposal Licences needed to be obtained but, once the filling permitted by the licence was completed, the operator could relinquish the licence and would have no continuing obligation to manage the landfill. The Environmental Protection Act 1990 amended the regime by, among other matters, preventing the relinquishing of what were called Waste Management Licences (WML) without the regulator's permission. In 1990 the regulator was the waste regulation authority but in 1996 it became and has since remained the defendant. WMLs could not be relinquished until the operator demonstrated that the landfill no longer posed any unacceptable threat to the environment or to human health. Thus there was a continuing obligation to manage a landfill even though waste was no longer being deposited in it. The Landfill Regulations 2002 (SI 2002 No. 1559) made under the Pollution Prevention and Control Act 1999, which came into force on 15 June 2002, now require an operator to obtain a landfill permit. Regulation 15 provides that a permit must require the defendant to approve any closure and obliges the operator to remain responsible for the maintenance, monitoring and control of the landfill for as long as the defendant reasonably determines that the landfill is likely to cause a hazard to the environment. In particular, the operator must monitor and control any leachate so as to stop it harming the environment or humans.

6. Since I am only concerned with the lawfulness of piggybacking, it is not necessary to deal in detail with the applications at the two sites in question. The two issues with which I have to deal are these:-

> 1. Can a landfill permit lawfully be granted for the separate operation of a landfill which partially overlies a closed cell containing previously deposited waste?
>
> 2. If a permit must relate to the whole site, namely the proposed landfill together with the closed cell, is the defendant required to refuse to grant a

> permit where the existing deposits (i.e. those in the closed cell) are responsible for harmful discharges to groundwater and where the landfills as a whole cannot be made to comply with the technical requirements of the Landfill Directives?

These two issues have been called the installation issue and the groundwater issue respectively.

7. It is necessary to refer to the material provisions of the Directives and the Regulations which have implemented them in domestic law. I remind myself that a national measure which is enacted in order to implement a Directive must be interpreted as far as possible, in the light of the wording and the purpose of the Directive, in order to achieve the result pursued by the Directive: see *Marleasing* [1992] 1 CMLR 305. The courts' obligation to achieve, so far as possible, the result the Directive has in view exists whether or not the national law has specifically enacted legislation which purports to implement the Directive: see *Connect Austria* [2003] ECR 1-5197 at paragraph 38. Thus if there is any ambiguity in the national law, the wording and the purpose of the Directive must prevail.

8. The starting point for the installation issue is the Integrated Pollution Prevention and Control Directive 1996/61/EC. This deals with pollution caused by many categories of industrial process, including waste disposal. Recital 8 reads:-

> "Whereas the objective of an integrated approach to pollution control is to prevent emissions into air, waste or soil wherever this is practicable, taking into account waste management, and where it is not, to minimise them in order to achieve a high level of protection for the environment as a whole."

Article 1 states that the activities in Annex 1 must be controlled so as to avoid pollution. Those activities include, under the heading 'waste management':-

> "Landfills receiving more than 120 tonnes per day or with a total capacity exceeding 25,000 tonnes, excluding landfills of inert waste."

Article 4 requires member States to take the necessary measures "to ensure that no new installation is operated without a permit issued in accordance with the Directive."

Installation is defined in Article 2.3 thus:-

> "'installation' shall mean a stationary technical unit where one or more activities listed in Annex 1 are carried out, and any other directly associated activities which have a technical connection with the activities carried out on

that site which could have an effect on emissions and pollution."

Article 2.9 provides:-

> "permit shall mean that part or the whole of a written decision (or several such decisions) granting authorisation to operate all or part of an installation, subject to certain conditions which guarantee that the installation complies with the requirements of this Directive. A permit may cover one or more installations or parts of installations on the same site operated by the same operator."

Article 18.2 provides, so far as material:-

> "Without prejudice to the requirements of this Directive, the technical requirements applicable for the landfills covered by category … 5.4 of Annex 1, shall be fixed by the Council …"

Council Directive 1999/31/EC on the landfill of waste provides the detailed provisions for landfill of waste.

9. The Regulations which apply the IPPCD are the Pollution Prevention and Control (England and Wales) Regulations 2000 (SI 2000 No. 973)("the Pollution Control Regulations). Installation is defined in Regulation 2 to mean:-

> "(i) a stationary technical unit where one or more activities listed in Part 1 of Schedule 1 are carried out;
>
> (ii) any other location on the same site where any other directly associated activities are carried out,
>
> And, other than in Schedule 3, references to an installation include references to part of an installation."

Regulation 9 imposes a requirement to have a permit to operate an installation and Regulation 10(6) provides:-

> "A permit may authorise the operation of more than one Part A installation … on the same site operated by the same operator … but may not otherwise authorise the operation of more than one installation."

Schedule 1 identifies the activities which are covered by the Regulations. Waste

management is dealt with in Section 5. Paragraph 5.2 relates to disposal of waste by landfill and, under Part A, identifies:-

> "(a) The disposal of waste in a landfill receiving more than 10 tonnes of waste in any day or with a total capacity of more than 25,000 tonnes, excluding disposals in landfills taking only inert waste.
>
> (b) The disposal of waste in any other landfill to which the 2002 Regulations apply."

Sub-paragraph (b) was added by the 2002 Regulations in question which are the Landfill (England and Wales) Regulations 2002 (SI 2002 No.1559).

10. As is clear from Article 2.9 of the Directive and Regulation 10(6) of the Pollution Control Regulations, a site is not coterminous with an installation. There can be more than one installation on a site. Since the Landfill Directive constitutes the means whereby the technical requirements for landfills are to be identified, it would be likely that definitions in the IPPCD would apply to that Directive unless the contrary was specified. Sub-paragraph 5.2(b) of Schedule 1 to the Pollution Control Regulations suggests the same approach is applicable to the Landfill Regulations.

11. The Council Directive on the landfill of waste is 1999/31/EC. The overall objective of the Directive is set out in Article 1 and can be summarised in the need to provide for measures, procedures and guidance to prevent or reduce as far as possible negative effects on the environment, in particular pollution of inter alia groundwater from landfilling of waste during the whole life-cycle of the landfill. 'Landfill' is defined in Article 2 to mean:-

> "… a waste disposal site for the deposit of the waste onto or into land (i.e. underground) …"

Article 7 specifies what particulars an application for a landfill permit must at least contain. These include:-

> "(c) the proposed capacity of the disposal site;
>
> (d) the description of the site, including its hydrogeological and geological characteristics …"

Article 8, which deals with conditions to be contained in a permit, specifies in 8(a)(ii):-

> "the management of the landfill site will be in the hands of a natural

person who is technically competent …"

Article 13 deals with closure and after-care procedures. (a) and (b) refer to the procedures for closure of a 'landfill or part of it', but (c) provides:-

> "after a landfill has been definitely closed, the operator shall be responsible for its maintenance, monitoring and control in the after-care phase for as long as may be required by the competent authority, taking into account the time during which the landfill could present hazards."

Article 14 deals with existing landfill sites. It sets out time limits, the maximum being 8 years, within which landfills must be made to comply with the provisions of the Directive if they are to be able to obtain a permit.

12. It is apparent from Article 2 that a landfill can be constituted by the deposit of waste underground. It is open to Member States to make special provisions for underground storage, which is defined as 'permanent waste storage facility in a deep geological cavity such as a salt or potassium mine'. Such provisions may disapply certain requirements, including some in Annex 1. Those that can be disapplied do not include the need to take into consideration inter alia 'the distances from the boundary of the sites to residential and recreation areas.' There are no special directions pursuant to Article 3.5 (which gives the power) and so it is plain that the Directive is intended to and does apply to landfills which are wholly underground in, for example, an old mine.

13. The Landfill Regulations 2002 implement the Landfill Directive. Landfill is defined in Regulation 3(2), so far as material for the purposes of this claim, as 'a waste disposal site for the deposit of the waste onto or into land.' The expressions 'landfill' and 'landfill site' are used in the Regulations, although the latter would appear to be tautologous. Otherwise, I do not think it is necessary to cite any other of the provisions since they follow the Directive.

It is apparent that the word 'site' is used in its ordinary sense to cover the place where the deposit of waste is to take place. That is after all the primary meaning of site. The Shorter Oxford Dictionary's first definition is:-

> "The place occupied by something."

It can also mean an area of land, for example, in a building site or the site of a town. It seems to me to be apparent that the purpose of the definition in the Directive was to identify the place in which the landfill was to be. It could be wholly underground in an old mine. That would then constitute its site. I note that in the French text of the Directive, the word used is 'décharge'. This has been translated in the English version as 'landfill'. But

it is not surprising in the circumstances that the word 'site' is used (it is the same word in the French version) since it was necessary to identify where the décharge or landfill was. Thus it may well be, to marry the IPPCD and the Landfill Directive, that what is described as the installation in the former becomes the landfill in the latter and so the installation covers the place where the landfill occurs.

14. The defendant has issued Regulatory Guidance Notes (RGN) which are to be followed by its staff when considering applications for permits. RGN 6 is concerned with the interpretation of the engineering requirements of Schedule 2 to the Landfill Regulations. It is said to apply to "all proposals to engineer new cells or new places of landfills". Paragraph 12 under the heading 'Separation of Landfills' contains the following advice:-

> "Circumstances may lead operators to consider arranging for the separation of areas within existing landfills either by specific measures and/or by making use of existing features. In either case the aim should be to create a real, permanent and readily defined boundary between the areas concerned.
>
> Operators may decide to create these boundaries in order to:
>
> - Exclude previously-filled areas from the installation to be permitted
>
> - Establish separate, differently classified landfills in the same proximity
>
> The listed activity is the disposal of waste in a landfill. A landfill is defined in the Landfill Regulations (Regulation 3(2)) as a waste disposal site for the deposit of the waste onto or into land. The test as to whether closed areas can be excluded therefore depends on whether they are part of the same site for waste disposal as the active areas or whether they can be considered to be a separate site. If there is a separate site, there is a separate landfill and hence a separate installation. Where it is proposed to establish separate, differently classified landfills at the same location, for example where there is a proposal to operate adjacent non-hazardous and hazardous landfills, these too must be separate waste disposal sites and therefore separate installations.
>
> As 'site' is not defined in the Regulations it would carry its ordinary meaning of 'an area of ground'. As such, a line on a plan must be able to define the waste disposal site. The landfill would include both what is above and below the surface identified on the plan and a definition of a landfill that seeks to delineate the waste disposal site other than by reference to a line on a plan is not acceptable. This means that an attempt to produce separation through engineering a barrier overlying previously deposited

wastes would not be acceptable."

15. As I have already indicated, I do not accept that the ordinary meaning of site is 'an area of ground'. Accordingly, it is not correct to say that it is necessary to delineate a landfill by a line on a plan. That approach is not appropriate for an underground site. The parties agreed at the conclusion of the hearing to look further into the question of 'underground storage' and I am grateful to Mr Turner who drew my attention to a material unreported decision of the Court of Appeal, *Blackland Park Exploration Ltd v Environment Agency* [2003] EWCA Civ 1795. What was in issue in that case was whether the deposits of liquid waste into sandstone and limestone strata lying some 1000 metres below sea level through a borehole constituted the site a landfill within the meaning of the Landfill Regulations. The court decided that it did. The court had no difficulty in regarding the underground reservoir created by the activities of the appellant as a site. Counsel for the appellant argued, as Mr Turner did before me, that the requirements in Annex 1 to the Directive (repeated in Schedule 2 to the Regulations) were inappropriate for regulation of underground landfills such as the one in question. Scott Baker, LJ, with whose judgment the other members of the court agreed, said this at paragraph 49:-

> "What it comes to in my view is this. None of the technical standards … support [the] argument that it cannot have been the intention of the legislator that the appellant's activity should fall within the scope of the Directive. I accept [counsel for the Respondent's] submission that these standards are expressed with sufficient flexibility to show that they are intended to apply to different factual situations. The draughtsman probably had in the forefront of his mind the type of classical landfill site as most people understand it. Whilst Whisby is said to be a unique landfill, I am unimpressed that these technical requirements help the appellant's case that it was not a landfill site as defined in the regulations. In my judgment, the judge was right to say that these requirements merely go to show how stringently the framers of the Directive view what might qualify as a landfill."

16. Mr Turner seeks to overcome that decision by submitting that in that case and in another instance involving deposits in a disused mine in Cheshire the area of landfill was, as he put it, absolutely clear. The boundary could be easily identified which is not the case with the arrangements proposed in the two applications before me. They are, he submits, neither sufficiently distinct from the cells underlying them to be regarded as a separate site nor capable of separate management so as to be regarded as a separate technical unit.

17. A further relevant guidance note, RGN 16, has been drawn to my attention. This concerns the area to be covered when a Pollution Prevention and Control Permit is sought for a landfill site. This is material because, the permit required by the Landfill Regulations is "the permit which is required by the 2000 Regulations for the carrying out of the disposal

of waste in a landfill": see Regulation 6(2). Mr Turner has a second string to his bow, namely that, even if a piggybacking landfill can be regarded as a site for the purposes of the Landfill Regulations it is not a stationary technical unit and so not an installation within the meaning of the Pollution Control Regulations.

18. Paragraph 2 of RGN 16 refers to Government Guidance which explains that a technical unit can be taken to mean:-

> "something which is functionally self-contained in the sense that the unit – which may consist of one component or a number of components functioning together – can carry out the Schedule 1 activity or activities on its own."

The activity in question is disposal of waste in a landfill which receives the defined quantities or, if it does not qualify under that heading, the disposal of waste in any other landfill to which the Landfill Regulations apply. It is noted that by Regulation 4(d), the Landfill Regulations do not apply to a 'landfill that finally ceased to accept waste for disposal before 16th July 2001'. The conclusion drawn in Paragraph 2 of RGN 16 is:-

> "… the stationary technical unit for any particular landfill may consist of a number of components, i.e.
>
> - Those parts of the site where waste is being disposed of by being deposited into or onto land together with
>
> - Any other parts of the site (e.g. adjacent cells) that function together to enable the listed activity to take place.
>
> In other words, in the case of landfill, the stationary technical unit includes not only that part of the site where active tipping is taking place but also 'closed' areas (e.g. completed cells) which are interdependent – in provision of containment or leachate collection systems for example."

Paragraph 6 refers specifically to the question whether areas which are no longer receiving waste have to be included. This is said:-

> "Areas that no longer receive waste ('closed' parts of the landfill) should be regarded as part of the installation where there is no significant physical or engineered separation between such areas i.e. they are interdependent and so managed as a single entity in order to protect the environment.
>
> The installation will therefore include previously-filled, 'closed' areas where there is a high degree of interdependence between the

operational and closed parts in the provision of risk management measures. This is most likely to be the case where the site is either:

- Essentially a single waste body (i.e. there is no physical separation between operational and closed areas) or

- Where separation between such areas is provided by natural or artificial (i.e. 'engineered') 'barriers' that are likely to break down before the permit is surrendered."

19. I have no doubt that a permit cannot be granted for piggybacking if there is any serious risk that as a result of the new deposits pollution may occur from the old cell, for example because of compression. Equally, there must be no interference with the ability to control any pollution from the old cell such that there is a risk of serious pollution of the environment. Thus if engineered barriers may not survive for a sufficiently long time to cater for any after care requirements, a refusal will be justified. But the guidance does not suggest that a piggybacking deposit is incapable of constituting a technical unit, but only that there must be no interdependence between the new and the old.

20. There is no definition of 'stationary technical unit' in the Directive or the Regulations. The meaning suggested in the Government Guidance seems to me to be appropriate. When applied to landfill, I see no reason why in principle a new deposit in a defined area which excludes an old cell should not qualify. I am not persuaded that it is necessary to apply a test of independence. If the unit risks serious pollution from the existing old cell, for example because it causes it by compression or because it prevents measures which would prevent such pollution occurring being applied, it may not receive a permit. This will not be because it does not qualify as a technical unit in its own right but because it cannot meet the requirements necessary to avoid any serious risk of pollution. It is the inability to meet the necessary requirements that has, according to the defendant, led to refusals in these and in all other piggybacking applications that have been made. The Agency says it has been its practice to consider all such applications on their merits independently of the view that they cannot legally be granted. However, the claimant has complained that it has not been able because it has not been asked to deal with all technical matters which have raised concerns and may have resulted in bars to the grant of a permit.

21. One problem which has been referred to by the defendant in its evidence is the difficulty in identifying the culprits if there is any pollution following piggybacking. This can occur where the operator responsible for after care of a closed cell is not the same as the operator of the new landfill or where, because of its age, there are no after care provisions in place. I do not think that the existence of such problems is a reason to decide that the law does not permit piggybacking. Conditions can help to provide a means of establishing responsibility. As Mr Leeson in his statement on behalf of the claimant points out, similar difficulties can arise where landfills are divided into installations which can accept hazardous and those which can accept non-hazardous waste. In addition, in a given case, an applicant may accept the need to take over the responsibility for after-care if he is to

receive a permit.

22. Mr Turner took me through the evidence of the defendant's witness identifying the practical difficulties which were inherent in piggybacking. These were in their turn considered by the claimant's witness. I do not think it is necessary to go through that exercise in this judgment since these matters are the subject of the appeal process which will address all technical issues, and do not show that a permit cannot be granted as a matter of law.

23. In dealing with the Pollution Control Regulations, it is to be noted that references to an installation are said in Regulation 2 to include references to part of an installation. Thus a permit may authorise the operation of more than one installation or may be limited to part of an installation – see Regulation 10(6). It will therefore be possible not only that there is more than one technical unit on a site but that a permit can apply only to part of such a unit. All this is in my view consistent with the possibility of identifying a particular landfill which is indeed separate from an existing closed cell as itself a technical unit. Alternatively, if the two have to be regarded as one installation, the permit can lawfully attach to the new part provided that there is no serious risk of pollution from the whole.

24. The defendant's case is that any new landfill which seeks to make use of an existing site must be divided from the old by at least what amounts to a bund. There must in effect be a vertical divide with a degree of void so as to ensure that there is true independence. This means that a considerable volume of the possible landfill site has to be left void. However, for the reason I have given, this is not required as a matter of law and in my judgment piggybacking as claimed by the claimants is lawful. If, but only if, it can demonstrate that there is no serious risk of pollution either currently or in the future for a period covered by any after care requirements, whether that pollution may arise directly from its activities or because those activities hinder or prevent proper measures to deal with the after care of the existing cell, may any permit be granted. Further, it is in my view legitimate for the defendant to take due account of potential difficulties in any given case of identifying who is to blame since those difficulties may mean that pollution cannot properly be controlled.

25. I should add that Mr Turner submitted that this meant than an applicant could determine his own landfill through what he was applying for. There should, he said, be an objective approach. I do not see why that should be so. Provided that the extent of the proposed landfill to be covered by the permit is properly identified, I do not see the problem. It is suggested that there may be movement so that the engineered divide may not remain in precisely the same place. That does not seem to me to matter. It will provide the limit of the permitted landfill at any given moment.

26. Since I have decided that a landfill permit does not have to refer to the whole site including the old cell, the groundwater issue does not strictly speaking need to be determined. However, it has been fully argued and, since this case could go further, I should deal with

it.

27. Article 1 of the Groundwater Directive identifies the purpose of the Directive. It is "… to prevent the pollution of groundwater by substances belonging to the families and groups of substances in Lists I or II of the Annex … and as far as possible to check or eliminate the consequences of pollution which has already occurred". List I substances must be prevented from being introduced into groundwater and the introduction of List II substances must be limited so as to avoid pollution of groundwater: see Article 3. List I contains substances which have a high risk of toxicity and List II those which could have a harmful effect on groundwater. Groundwater is defined to mean "all water which is below the surface of the ground in the saturation zone and in direct contact with the ground or subsoil." In general, no authorisation to permit disposal of any material which would or might lead to discharge of substances in List I or II into the groundwater can be granted unless discharges of List I substances are prohibited and steps are taken to limit discharge of any List II substances. Article 14 is important. It provides:-

> "As regards discharges of the substances in List I or II already occurring at the time of notification of this Directive [i.e. January 1980], the Member State may stipulate a period not exceeding four years after entry into force of the provisions referred to in Article 21(1), on expiry of which the discharges in question must comply with this Directive."

28. Article 21(1) gives the Member States 2 years within which to 'bring into force the laws, regulations and administrative provisions necessary to comply with this Directive.' It seems that the government relied on two circulars, namely 4/82 and 7/82 of 1 March 1982, relating to protection of groundwater and the existing provisions of the Control of Pollution Act 1974 as compliance with its obligations. In any event, the 6 years allowed by a combination of Articles 14 and 21 has long since expired.

29. There are now the Groundwater Regulations 1998. Under these as amended, an authorisation includes 'a permit under the Pollution Prevention and Control (England and Wales) Regulations 2000 in so far as it authorises the operation of a Part A installation … within the meaning of those Regulations.' Regulations 4 and 5 follow the language of the Directive in relation to prohibition of discharges of List I and limitation of discharges of List II substances, which are identified in the Schedule.

30. The claimant submits that, where old cells are discharging List I or List II substances because they may not have been subject to any Groundwater Controls, it could not be said that to allow landfilling activities which were in fact unconnected with the existing cells would be to permit those discharges. There would be no causal connection between the new landfilling and the discharges. Paragraph 4(1) of the Regulations prohibits the grant of an authorisation 'if it would permit the direct discharge of any substances in List I'. Similar wording is contained in Paragraph 4(3)(a) in relation to indirect discharges of any

List I substance. In relation to List II substances, Paragraph 5(2) requires that an authorisation may only be granted if "it includes conditions which require that all necessary technical precautions are observed to prevent groundwater pollution by any substance in List II." Perhaps somewhat curiously, the causation argument does not seem to be available for List II substances in the same way as for List I since there is no reference to 'permitting'. However, Mr Cahill points to Paragraph 13 which provides:-

> "The application of the measures taken pursuant to these Regulations may on no account lead, either directly or indirectly, to pollution of groundwater."

If the new landfill does not affect existing discharges an authorisation for it cannot lead to pollution: that pollution is already existing.

31. I have already referred to Article 14 of the Directive. This effectively prohibits the grant of an authorisation where there is a discharge which existed in 1979 after a maximum of 6 years. It would be inconsistent with and contrary to the provisions of the Directive if any discharge was permitted after its notification. Thus the Regulations could not lawfully produce the suggested effect.

32. In any event, I do not think that the construction suggested is correct. It is submitted that Article 1 of the Directive is in point since it refers to its purpose to check or eliminate the consequences of pollution which has already occurred 'as far as possible'. It is the following Articles of the Directive that achieve that purpose. Article 1 is not a freestanding provision of direct application which qualifies the following Articles. The position is the other way round. The following Articles implement the purpose identified in Article 1.

33. In any event, as Mr Turner points out, if an authorisation were to be sought to permit landfilling where there were existing discharges, it would permit them in the future. If discharges are occurring, and will continue to occur, that continuation must be prevented or limited otherwise the discharges will be permitted by the authorisation.

34. It follows that if I were persuaded that an installation had to be regarded as including an existing closed cell, the Groundwater Regulations would prevent the grant of an authorisation if there were any relevant discharges whether or not the new deposits themselves caused any such discharges. There would be future pollution.

35. I shall hear counsel on any relief which should follow from this judgment.