Neutral Citation Number: [2013] EWHC 2406 (Admin)

Case No: CO/5072/2013

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

Sitting at Bradford County Court

Date: 09/08/2013

Before:

HIS HONOUR JUDGE GOSNELL

- -

Between:

The Queen (on the application of Marton-cum-Grafton Parish Council)	**Claimant**
- and - **North Yorkshire County Council**	**Defendant**
-and- **Ameycespa Limited**	**First Interested Party**
-and- **City of York Council**	**Second Interested Party**
-and- **The Right Honourable Edward William Stephen Baron Mowbray Segrave and Stourton**	**Third Interested Party**

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Mr Anthony Crean QC (instructed by Kingswalk Law) for the Claimant
Ms Nathalie Lieven QC (instructed by the Solicitor for North Yorkshire County Council) for the Defendant
Mr Rhodri Price Lewis QC (instructed by Trowers and Hamlins LLP) for the First Interested Party

Hearing dates: 30th and 31st July 2013

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Approved Judgment

His Honour Judge Gosnell:

1. This claim has been brought by the Claimant parish council who ask the court to quash a grant of planning permission dated 14th February 2013 by which the Defendant granted consent to the First Interested Party for a development at Allerton Park Quarry near Knaresborough, North Yorkshire. The development in question was a Waste Recovery Park comprising the erection of a Tipping Hall; a Mechanical Treatment facility; an Anaerobic Digestion facility; a unit housing six air-cooled condensers and an Energy from Waste ("EfW") facility to generate electricity.

2. The Application arose because the Defendant together with the Second Interested Party chose to award a waste treatment contract to the First Interested Party following a complex procurement process. The Third Interested Party is the owner of the land upon which it is proposed to build the waste treatment facility but neither he nor the Second Interested Party have taken an active part in this litigation.

3. **Factual History**

The project became known as the Allerton Waste Recovery Park ("AWRP") and the First Interested Party became the Preferred Bidder in 2010. The genesis of the proposal was much earlier however and in October 2005 the Department for Environment Food and Rural Affairs ("Defra") wrote to the Defendant to say that they had earmarked £40 million of PFI credits in support of a waste procurement project jointly between the Defendant and Second Interested Party. Defra confirmed in 2008 that the project was ready to enter into procurement and that central government support for the project was expected to be given on the basis of £65 million worth of PFI credits.

4. On 20th October 2010 Defra wrote again to the Defendant to say that as part of the Spending Review process Defra had reviewed the amount of PFI grant to be put into waste treatment but the AWRP was one of eleven projects that retained its provisional allocation of PFI credits. A scoping opinion for the proposed Environmental Impact Assessment of the development was adopted by the Defendant on 18th November 2010 and I will refer to the contents of this document later in the Judgment. In April 2011 a dispute about a similar type of facility was taking place in Cheshire which culminated in a decision from the Secretary of State about the type of information which should be included in an Environmental Statement where combined heat and power ("CHP") pipes were laid as part of an Energy from Waste development.

5. A planning application was submitted in September 2011 by the First Interested Party to the Defendant as the planning authority which was a very comprehensive series of documents but included, inter alia, a Planning Statement, an Environmental Statement and a Heat Assessment. The First Interested Party then submitted further information in support of the planning application (following a request from the Defendant) in the form of a letter dated 15th June 2012 which was partly to update the Planning Statement and partly to update the Environmental Statement. Both sets of documents were expressed to be supplied pursuant to regulation 22 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("The EIA Regulations"). Subsequently two further documents were submitted by the First Interested Party to the Defendant both entitled "Need Update" on 4th September 2012

and 11th October 2012. These were expressed not to be supplied pursuant to Regulation 22 of the EIA Regulations.

6. Ms Victoria Perkin who is Head of Planning Services for the Defendant was responsible for the submission of a detailed report about the application to the Defendant's Planning and Regulatory Functions Committee and she recommended approval of the application in principle. On 30th October 2012 the members of the committee resolved to grant planning permission subject to conditions. One of the conditions was an agreement under section 106 of the Town and Country Planning Act 1990 which caused some delay. Another reason for delay was to give the Secretary of State the opportunity to "call in" the application for his own decision. Both these issues were successfully resolved but in the meantime there were two other developments the relevance of which is in dispute. In December 2012 HM Treasury published a report entitled "A new approach to public private partnerships" and on 7th February 2013 two officers' reports to the Planning Committee of Leeds City Council recommended that planning permission be granted for Energy from Waste facilities in that city.

7. A Decision Notice was issued by officers on behalf of the Defendant on 14th February 2013 which is in fact the decision under challenge in this case. On 21st February 2013 Defra wrote to the Defendant advising that they had made an assessment of the amount of residual waste treatment which was required nationally to meet EU Landfill Directive targets and the assessment meant that ministers had decided to withdraw the PFI credit of £65 million together with similar credits to two other projects in Merseyside and Bradford. These proceedings were commenced on 29th April 2013 and were listed for an urgent "rolled-up" hearing.

8. The Claimant initially relied on seven grounds of challenge but the last two have been withdrawn and the hearing proceeded on the basis of the first five grounds only. As this was a rolled-up hearing I have to decide firstly whether permission should be granted in relation to each ground and, if it is, a substantive decision on the merits of each ground. Ground one is a "stand alone" issue which can be considered independently of the other grounds. The remaining grounds are all concerned with the EIA Regulations but relate to two separate issues with grounds two and three on the one hand and grounds four and five on the other hand being either connected with or parasitic on each other. It is therefore convenient to structure the Judgment in this fashion.

9. **Ground One**

The Claimant contends that the decision to grant consent was unlawful for the following reasons:

(i) The resolution to grant consent was made by the Defendant Council on 30th October 2012. There subsequently arose a number of new facts which amounted to material considerations in the context of S70 (2) Town and Country Planning Act 1990 ("TCPA") and which deprived the Officer of jurisdiction to issue the consent and required him to return the matter to the Committee of the Defendant Council in accordance with the principle in *R (Kides) v. South Cambridgeshire DC* [2002] EWCA Civ 1370. Unlawfully, and in breach of the principle in *Kides,* the Officer of the

Defendant Council purported to issue the planning permission on 14th February 2013;

10. Section 70 of the TCPA 1990 states as follows:

> "70 Determination of applications: general considerations.
> (1)Where an application is made to a local planning authority for planning permission—
>
> (a)subject to sections 91 and 92, they may grant planning permission, either unconditionally or subject to such conditions as they think fit; or
>
> (b) they may refuse planning permission.
>
> (2)In dealing with such an application the authority shall have regard to
>
> (a) the provisions of the development plan, so far as material to the application
>
> (b) any local finance considerations, so far as material to the application, and
>
> (c) any other material considerations"

The issue in this case however relates not to documents which were supplied as part of the original application for planning permission but to information which came into being between the date of the committee's resolution to grant planning permission on 30th October 2012 and the publication of the Decision Notice on 14th February 2013.

11. The leading case on this issue which is relied on by the Claimant is *Kides* the citation for which appears above. The Court of Appeal had to consider the legal duty of a planning officer when faced with a material change in circumstances between the passing of a resolution to grant planning permission and the formal issue of consent. The leading Judgment was given by Lord Justice Jonathan Parker and the following extract appears to be material to the issues in this case:

> "118.I begin by considering the nature and extent of a planning authority's duty under section 70(2) of the 1990 Act.
>
> 119. Section 70(2) requires a planning authority, in "dealing with" an application, to "have regard" (among other things) to all "material considerations".
>
> ***"dealing with"***
>
> 120. In the context of the activities of a planning authority in relation to a planning application, I find it hard to think of an expression which has a wider or more general meaning than the expression "in dealing with". In my judgment, "dealing with" in the context of section 70(2) includes anything done by or on behalf of the planning authority which bears in any way, and whether directly or indirectly, on the application in question. Thus it extends beyond "considering", so as to include administrative acts done by the authority's delegated officers. Nor, in my judgment, is the expression "dealing with" to be limited to the particular acts of the authority in granting or refusing permission under section 70(1). I would regard such a construction as an unjustifiable limitation on the natural meaning of the words. In temporal terms, the first act of a planning authority in "dealing with" an application will be its receipt of the application; and its final act will normally be the issue of the decision notice (certainly that is the position in the instant case).

"material considerations"

121. In my judgment a consideration is "material", in this context, if it is relevant to the question whether the application should be granted or refused; that is to say if it is a factor which, when placed in the decision-maker's scales, would tip the balance to some extent, one way or the other. In other words, it must be a factor which has some weight in the decision-making process, although plainly it may not be determinative. The test must, of course, be an objective one in the sense that the choice of material considerations must be a rational one and the considerations chosen must be rationally related to land use issues.

"have regard to"

122. In my judgment, an authority's duty to "have regard to" material considerations is not to be elevated into a formal requirement that in every case where a new material consideration arises after the passing of a resolution (in principle) to grant planning permission but before the issue of the decision notice there has to be a specific referral of the application back to committee. In my judgment the duty is discharged if, as at the date at which the decision notice is issued, the authority has considered all material considerations affecting the application, and has done so with the application in mind – albeit that the application was not specifically placed before it for reconsideration.

123. The matter cannot be left there, however, since it is necessary to consider what is the position where a material consideration arises for the first time immediately before the delegated officer signs the decision notice.

124. At one extreme, it cannot be a sensible interpretation of section 70(2) to conclude that an authority is in breach of duty in failing to have regard to a material consideration the existence of which it (or its officers) did not discover or anticipate, *and could not reasonably have discovered or anticipated*, prior to the issue of the decision notice. So there has to be some practical flexibility in excluding from the duty material considerations to which the authority did not *and could* not have regard prior to the issue of the decision notice.

125. On the other hand, where the delegated officer who is about to sign the decision notice becomes aware (or ought reasonably to have become aware) of a new material consideration, section 70(2) requires that the authority have regard to that consideration before finally determining the application. In such a situation, therefore, the authority of the delegated officer must be such as to require him to refer the matter back to committee for reconsideration in the light of the new consideration. If he fails to do so, the authority will be in breach of its statutory duty.

126. In practical terms, therefore, where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a "material consideration" for the purposes of section 70(2), it must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority *would* reach (not *might* reach) the same decision.

127 In substance, therefore, I accept the submission made by Mr Drabble in paragraph 12 of his skeleton argument (quoted in paragraph 115 above), but with the proviso (which may in any event be implicit in his formulation of the statutory duty) that the test of a

> "material consideration" is an objective one in the sense explained in paragraph 121 above. It is not for the delegated officer to decide what is a material consideration within the meaning of section 70(2). Hence it is no defence to a claim that an authority has breached its section 70(2) duty for the authority to assert that in issuing the decision notice the delegated officer did not consider the consideration to be "material". Accordingly, I respectfully agree with the judge's observation (in paragraph 71 of the judgment) that "the delegation of the consideration of new material considerations is no answer to the .... claim".

12. Whilst I accept this is a lengthy extract from the Judgment it is very helpful in the present case because it sets out clearly the appropriate test which should be applied where it is suggested that an officer of a planning authority has become aware of a material consideration before a Decision Notice is issued and has failed to bring it to the attention of the committee who made the decision to grant planning permission in principle. The Defendant and First Interested Party however were anxious that I was aware of a subsequent decision where it was recommended that caution be exercised before taking the dicta of Lord Justice Jonathan Parker too literally. In *R (Dry) v West Oxfordshire District Council* [2010] EWCA Civ 1143 Lord Justice Carnwath said at paragraph 16:

> "Without seeking to detract from the authority of the guidance in Kides, I would emphasise that it is only guidance as to what is advisable, "erring on the side of caution". Furthermore, in that case there had been a gap of five years between the resolution and the issue of the permission. The guidance must be applied with common sense, and with regard to the facts of the particular case."

13. My task would therefore appear to be to analyse the factual information which is relied on by the Claimant and to decide whether it is a material consideration in accordance with the test set out in paragraph 121 of *Kides* set out above. I remind myself that this is an objective test and the views of the decision maker are not relevant. This is an issue of law for me to decide and is not a rationality challenge to the decision of the decision maker not to refer the consideration to the planning authority. If I find the information is a material consideration I then have to consider whether the officers or the planning authority discovered or anticipated the consideration or whether they ought reasonably to have done pursuant to paragraph 124 of *Kides.* Only if they did or could have known of the matter of concern do I then address the threefold test set out in paragraph 126 of *Kides.* The relevance of *Dry* it seems to me is to urge the application of common sense to this exercise and not to place too heavy an emphasis on the first part of paragraph 126 which is guidance to planning officers as to what is advisable rather than a strict legal test.

14. The Claimant submits that there were two factual matters which did or ought to have come to the attention of planning officers between the Committee's Resolution on 30th October 2012 and the Decision Notice on 14th February 2013 which were material considerations which should have been referred back to the committee. They were:

a) a publication by HM Treasury entitled " A new approach to public private partnerships" published in December 2012; and

b) two Leeds City Council reports to their planning committee about the grant of planning permission for two Energy from Waste facilities in the Leeds area.

15. It is convenient to deal with the issues separately. The Claimant's case is that the publication by HM Treasury should have rung alarm bells that the funding from central government of £65 million in PFI credits was at risk. This was relevant to the issue of the viability or delivery of the project. The Claimant's case is that the position as to need for this facility had changed during the crucial period and Defra's decision on 21st February 2013 was a predictable consequence of this change of stance which the Defendant's officials should have "discovered or anticipated" to quote Lord Justice Parker. The Defendant and First Interested Party both say that there is nothing in the Treasury publication to give any indication that the PFI funding was at risk. It is clear from the evidence filed that the withdrawal of government funding came as an unwelcome and complete surprise. The Defendant also submits that the issue of PFI funding was not a material consideration in any event as the Defendant had through its Officer's Report instructed the Committee to place no weight on funding issues. The Claimant's response is that the First Interested Party considered that commercial considerations were relevant to its bid and advised the Committee accordingly and that £65 million in funding was such an important issue that it must be relevant to the overall viability of the project and therefore material.

16. The document from HM Treasury runs to 104 pages in the Trial Bundle. I have not read the whole document, but I have read those parts which the parties referred me to. The Claimant relies on two phrases "..The Government….recognises the concerns with PFI and the need for reform" and "This document sets out the Government's new approach". The types of problems which were identified were; the procurement process could be slow and expensive; there was insufficient flexibility during the operational period; insufficient transparency on future liabilities as between both parties; inappropriate risks being transferred to the private sector with a higher risk premium to the public sector and equity investors perceived to have been making windfall gains. These concerns would seem to me to warrant changes being considered in future PFI projects but none appear to suggest or recommend the reduction or withdrawal of funding. The Defendant and First Interested Party both point out that amongst the 104 pages there is no specific reference to this project nor even waste projects in general. They also rely on the fact that the letter withdrawing funding dated 21st February 2013 does not allude to the previous HM Treasury report and in fact gives the following reasoning ;

> "As part of the continuous monitoring of our progress towards meeting EU Landfill Directive Targets Defra has made an assessment of the amount of residual waste treatment infrastructure it is estimated, on reasonable assumptions, is required nationally to meet our obligation to reduce the amount of waste that is sent to landfill. As a result of this assessment I regret to inform you…"

Whilst it is not essential that the withdrawal of funding is causally connected to the HM Treasury report the fact that it clearly was not adds some weight to the suggestion that the Defendant's officials did not and could not have known that PFI funding was at risk. The assessment which is referred to in the letter was published the same day and is clearly a complex assessment prepared on a national basis which could not have been anticipated or replicated by the Defendant's staff. The evidence of David Bowe who is the Defendant's Director of Business and Environmental Services is that he had no indication that the funding was about to be withdrawn until the letter dated 21st February 2013 arrived. There is support for this evidence at page 345 of the Trial

Bundle in the form of a press release where the elected leader of the Defendant described the decision as "baffling and disappointing". It is abundantly clear that the Defendant did not know the funding was about to be withdrawn before it was but ought they to have had concerns based on the HM Treasury report? The report appears to be concerned with future PFI arrangements rather than previously approved projects and there is nothing in the document, in my assessment which would lead any competent planning officer to be concerned that, as a consequence of the contents of the report, the PFI funding for the AWRP might be affected. It follows from this conclusion that I find as a fact that the HM Treasury report and its contents were not a material consideration in that they would not have tipped the balance in the decision maker's scales to any extent on the information which was available to both the officers and committee members at that time.

17. Given this finding I do not need to address the issue of whether the loss of the PFI funding was relevant to the grant of planning permission. I recognise that the report which was prepared by the planning officers advised the Committee not to give any weight to the PFI grant. I do however accept that the loss of £65 million in funding, even if viability had not been a specific issue in the planning application, is the type of dramatic event which is likely to become material, where perhaps it had not been at the forefront previously. If, however, the loss of funding had been known by the officers prior to the Decision Notice (which I have found that it was not) it is inconceivable that it would also not be known by the committee members shortly afterwards who could then decide whether it affected their decision to grant planning permission before the Decision Notice was issued.

18. The next issue is the Leeds City Council planning reports. The Claimant's case is that the need for this facility was a crucial aspect of the planning application. Ms. Perkin had balanced the need for the facility against the harm it might cause carefully in her report to the Committee recommending approval of the application. She appears to concede in her witness statement that she was aware of these reports but did not consider them to be material considerations. The Claimant's case is that the two new waste treatment facilities in Leeds had the capacity to take 464,000 tonnes of waste per annum. This was bound to have an effect on the regional need for EfW facilities and was a material consideration on the vital issue of need which should have been referred back to the Committee.

19. Leading Counsel for the Defendant carefully analysed these proposals in paragraphs 25-30 of her Summary Grounds for Resistance. This showed that if both facilities were built and operated as planned the minimum predicted arisings showed a requirement of 470,000 tonnes against a maximum capacity of 464,000 tonnes from these two facilities. There would appear from these figures to be no spare capacity that the Defendant and Second Interested Party could utilise. The Committee in Leeds were also informed that "The proposals allow for no more than 1% of the waste input for non-city waste". The prospect of these two facilities affecting the need for an EfW facility in North Yorkshire does not seem likely from these figures.

20. The Defendant and First Interested Party also submit that it would not be usual to give weight to other consented facilities which were not yet operational. Ms Perkin in the report to committee stated at 7.524:

> " Recent appeal decisions relating to the provision of waste treatment capacity have generally followed an approach of not giving weight to potential alternative capacity which is not yet operational and given the range of uncertainty about delivery of operational capacity, referred to above, it is considered that this is a reasonable approach. It is therefore considered that there is currently a lack of sufficient available and operational capacity in North Yorkshire and the Yorkshire and Humber Region to deal with the volume of residual waste requiring management."

21. It would appear from the evidence submitted that the Committee were already aware of both of these projects but may well not have been aware that officers had recommended that planning permission be granted. In the Need Update submitted in October 2012 a schedule was prepared of other waste treatment facilities at Appendix B. Under the title "Facilities in Development- Energy Recovery" the two projects in Leeds are listed under status "in planning". The site to be operated by Veolia was listed with capacity of 190,000 tonnes per annum with available capacity of the same figure. The site to be operated by Biffa Waste Services was listed with a capacity of 300,000 tonnes with an available capacity of nil. The distinction between these two figures is explained by the column marked "likelihood of development" where Veolia is marked as "High" and Biffa as "Low". The reason why they were treated differently is that the Biffa project is a merchant facility without local or central government backing whereas the Veolia facility was a PFI project like AWRP. The Claimant contends that as the Biffa facility was calculated at nil , the fact that it had , or was likely to get planning permission as a result of the report dated 7th February 2013, was a material consideration as suddenly 300,000 tonnes of capacity had been released which had not been counted previously.

22. In order to assess the materiality of this piece of information it is necessary to stand back and to consider the information in the context of what was already known and what the state of knowledge was at the time of what was likely to happen using a common sense approach. There were two waste facilities in Leeds in the planning stage the existence of which was already known to the Committee. The Officer's Report indicated that it was usual not to take into account consented facilities which were not yet operational. The Needs Update shows that at least one of the two facilities was already taken into account despite its non-operational status. It does seem to me to accord with common sense to give more weight to a facility which is operating and progressively less weight to facilities in the planning stage with comparative weight diminishing the further away they are from completion. It was clearly right to take into account that even if these two facilities both became operational they would not satisfy the total need for waste disposal from public and private sources in the City of Leeds. It was also right to take into account that there was a policy decision that no more than 1% of waste could be accepted from outside Leeds (from any area, not just the Defendant and Second Interested Party).

23. What difference if any did it make that a report had been prepared by planning officials in Leeds recommending that both projects obtain planning permission? All of the above considerations still apply, save that the projects are marginally nearer completion theoretically than they were, although they are still a long way from being operational. It could be argued that it made no difference at all with the Veolia project as the capacity of 190,000 tonnes had already been taken into account in the needs report with a high likelihood of development anticipated. In the case of the Biffa project the likelihood of development was said to be low, but did the grant of planning

permission alter that assessment so that the capacity of 300,000 tonnes could be factored into the equation? In my view it did not as the reason for the low assessment is set out in paragraph 4.3.2 of the Needs Update:

> "Of this regional capacity, available capacity to North Yorkshire and York waste producers will be restricted by the following critical factors :
>
> - The lack of long term contracts means that funding cannot be generated resulting in many proposed merchant facilities not being built."

The Biffa site is a merchant facility and the granting of planning permission is unlikely to solve the major difficulty of the length of contract affecting funding generation. The prospects of it becoming operational therefore appear to remain low. Taking all of the evidence as a whole the fact that these two projects appear to have passed or were about to pass the hurdle of planning permission had little if any effect on the need for an EfW facility in North Yorkshire. Even if Leeds had any spare capacity, which seemed unlikely, it would be limited to 1% for all outside sources and one of the two facilities had been assessed of having a low prospect of actually being developed. I form the view that this information was so marginal it would not tip the scales one way or the other and was not relevant on the issue of whether the application should be granted or refused.

24. In relation to this ground of challenge I find that the case was arguable and accordingly I grant permission. For the reasons I have indicated however I dismiss the substantive application.

25. The remaining grounds all concern the contents of an Environmental Statement pursuant to the EIA Regulations. Before dealing with those grounds it may be helpful to set out the regulatory framework.

26. **The Regulatory Framework**

The genesis of the obligation to carry out an Environmental Impact Assessment arose in European Law and the current provision is Directive 2011/92/EU dated 13 December 2011 and Article 5(1) provides:

> "1. In the case of projects which, pursuant to Article 4, are to be made subject to an environmental impact assessment in accordance with this Article and Articles 6 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV inasmuch as:
>
> (a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;
>
> (b) the Member States consider that a developer may reasonably be required to compile this information having regard, inter alia, to current knowledge and methods of assessment."

27. Article 5(3) and Annex IV provide the requirements but these are substantially replicated in similar provisions in the EIA Regulations. The distinction is not material so far as this case is concerned and so I will not set them out in full in this Judgment.

28. These European regulations found expression in English law in the EIA Regulations referred to earlier in this Judgment. The definitions are found in Regulation 2 and the following definitions are relevant to the issues in this case:

> "environmental information" means the environmental statement, including any further information and any other information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development;
>
> "environmental statement" means a statement—
>
> (a) that includes such of the information referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but
>
> (b) that includes at least the information referred to in Part 2 of Schedule 4;"

29. Schedule 4 provides as follows:

> "SCHEDULE 4 Regulation 2(1)
> Information for inclusion in environmental statements
> PART 1
>
> 1. Description of the development, including in particular—
> (a) a description of the physical characteristics of the whole development and the land-use requirements during the construction and operational phases;
> (b) a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used;
> (c) an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc) resulting from the operation of the proposed development.
>
> 2. An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for the choice made, taking into account the environmental effects.
>
> 3. A description of the aspects of the environment likely to be significantly affected by the development, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the interrelationship between the above factors.
>
> 4. A description of the likely significant effects of the development on the environment, which should cover the direct effects and any indirect, secondary, cumulative, short, medium and long term, permanent and temporary, positive and negative effects of the development, resulting from—
> (a) the existence of the development;
> (b) the use of natural resources;
> (c) the emission of pollutants, the creation of nuisances and the elimination of waste, and the description by the applicant or appellant of the forecasting methods used to assess the effects on the environment.
>
> 5. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.

6. A non-technical summary of the information provided under paragraphs 1 to 5 of this Part.

7. An indication of any difficulties (technical deficiencies or lack of know-how) encountered by the applicant or appellant in compiling the required information.

PART 2

1. A description of the development comprising information on the site, design and size of the development.

2. A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.

3. The data required to identify and assess the main effects which the development is likely to have on the environment.

4. An outline of the main alternatives studied by the applicant or appellant and an indication of the main reasons for the choice made, taking into account the environmental effects.

5. A non-technical summary of the information provided under paragraphs 1 to 4 of this Part."

30. **Grounds Two and Three**

The Claimant contends that the decision to grant consent was unlawful for the following reasons:

(ii) The form of the application was in conflict with the EC Directive on the assessment of the effects of certain projects on the environment (85/337/EEC) as amended, ("The EIA Directive") and the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("The EIA Regulations") in that it failed to constitute a single and accessible compilation produced at the very start of the application process. In fact what the IP produced was a disparate collection of documents traceable only by a person with a good deal of energy and persistence and thereby failed to make available to the public the Annex III information which they ought to have provided, and in so doing acted in conflict with the principle in Berkeley v. Secretary of State for the Environment [2000] ENV LR 24;

(iii) The content of the Environmental Statement ("ES") was in conflict with the EIA Directive and EIA Regulations in that the Defendant Council wrongly excluded vital information from the ES despite it being provided by the IP to supplement information already contained in the ES;

Leading counsel for the Claimant at the hearing described ground two as a procedural failure and ground three as a substantive failure of law. At the heart of these issues is whether evidence in relation to the need for the development should be included in the Environmental Statement or in the Planning Statement. The Claimant says that in principle evidence of need should be included in the Environmental Statement and if

it is not then the Environmental Statement is defective and the Defendant has no power to grant planning permission pursuant to regulation 3(4) of the EIA Regulations. The procedural failure stems from the way which the First Interested Party dealt with additional information after submission of the planning permission and the way in which information was disseminated to the public.

31. The Defendant and First Interested Party do not dispute the fact that evidence in relation to need did not go into the Environmental Statement but was part of the original Planning Statement. The Claimant does not dispute that the scoping opinion did not determine that need should be part of the Environmental Statement. The Claimant's case is that the scoping opinion does not determine what in law has to be in an Environmental Statement. The facts in relation to further disclosure are not in dispute either. The Defendant by letter of 28th February 2012 requested further information from the First Interested Party which they were entitled to do under regulation 22 of the EIA Regulations. If "further information" is provided pursuant to such a request the planning authority is obliged to publish it pursuant to regulation 22(3) which reads as follows:

> "(3) The recipient of further information pursuant to paragraph (1) or any other information shall publish in a local newspaper circulating in the locality in which the land is situated a notice stating ….."

There is a further provision in regulation 22(7) which effectively suspends determination of the planning application until this procedure has been complied with.

32. The factual history of what actually occurred is set out in the witness statement of Ian David Clarke. When replying to the request for further information on 15th June 2012 Mr Clarke submitted further and other environmental information which comprised of Part A which was an update to the Planning Statement and Part B which was an update to the Environmental Statement. The covering letter stated "The information contained within all of these documents comprise environmental information for the purposes of the EIA Regulations 2011". Mr Clarke said he treated all of the documentation as "further information" out of "an abundance of caution". The Claimant contends that the First Interested Party included evidence in part A which related to need because they accepted that evidence in relation to need should be part of the Environmental Statement. The Claimant also complains that in publicising this information the Defendant is then publicising a document which is an addendum to the Planning Statement but the Planning Statement is not a document already published in the same way. This is then confusing and unfair on the interested members of the public the Claimant contends. The First Interested Party then provided two further documents both entitled Need Update on 4th September 2012 and 11th October 2012 which were intended to be updates to the Planning Statement and were specifically stated not to be further information pursuant to regulation 22. The Defendant did not publish them in a local newspaper as a result but the Claimant claims they should have done.

33. The Claimant's submissions on these issues are set against the background of European Jurisprudence. In Kraaijeveld BV and Others v. Zuid Holland c-72/95 the Court held that the interpretation to be placed on the EIA Directive was that it had "a broad reach and a wide scope". Whilst Schedule 4 of the EIA Regulations does not

specifically state that evidence of need should be included in the Environmental Statement the Claimant submits that as need is connected to policy and is a critical consideration it should be addressed amongst other policy considerations in the Environmental Statement which should have a broad reach and a wide scope. The Claimant relies on the phrase "a description of the project" in Annex IV of the European Directive which is translated to "a description of the development" in the EIA Regulations as sufficiently wide to include evidence of need.

34. The Claimant relies heavily on the inconsistent way that the First Interested Party has treated evidence of need by declaring it to be regulation 22 information on 15th June 2012 whilst declaring it not to be regulation 22 information in the further submissions in September and October 2012. The Claimant submits that the current situation is comparable with the problems identified by Lord Hoffman in *Berkeley v. Secretary of State for the Environment* [2000] ENV LR 34 when he stated:

> "My Lords, I do not accept that this paper chase can be treated as the equivalent of an environmental statement. In the first place, I do not think it complies with the terms of the Directive. The point about the environmental statement contemplated by the Directive is that it constitutes a single and accessible compilation, produced by the applicant at the very start of the application process, of the relevant environmental information and the summary in non-technical language. It is true that article 6.3 gives Member States a discretion as to the places where the information can be consulted, the way in which the public may be informed and the manner in which the public is to be consulted. But I do not think it allows Member States to treat a disparate collection of documents produced by parties other than the developer and traceable only by a person with a good deal of energy and persistence as satisfying the requirement to make available to the public the Annex III information which should have been provided by the developer."

35. The Defendant and First Interested Party however rely on a recent comment by Lord Carnwath about this decision in *Walton v The Scottish Ministers (Scotland)*[2102] UKSC 44 where he said:

> "127.Although of course these statements carry great persuasive weight, care is needed in applying them in other statutory contexts and other factual circumstances. Not only did they rest in part on concessions by counsel for the Secretary of State, but the circumstances were very unusual in that, by the time the case reached the House of Lords, the developer had abandoned the project, and the decision had lost any practical significance."

36. The Defendant and First Interested Party also rely on a series of decisions which deal with the issue of what an Environmental Statement must contain.
In *R (Blewett) v Derbyshire County Council* [2003] EWHC 2775 (Admin) Sullivan J stated as follows:

> "32. Where there is a document purporting to be an environmental statement, the starting point must be that it is for the local planning authority to decide whether the information contained in the document is sufficient to meet the definition of an environmental statement in Regulation 2 of the Regulations.
>
> 33. The local planning authority's decision is, of course, subject to review on normal Wednesbury principles: see R v Cornwall County Council ex parte Hardy [2001] JPL

786, per Harrison J at paragraph 65, applying R v Rochdale Metropolitan Borough Council ex parte Milne [2001] Env LR 416 at paragraph 106.

40. In the light of the environmental information the local planning authority may conclude that the environmental statement has failed to identify a particular environmental impact, or has wrongly dismissed it as unlikely, or not significant. Or the local planning authority may be persuaded that the mitigation measures proposed by the applicant are inadequate or insufficiently detailed. That does not mean that the document described as an environmental statement falls outwith the definition of an environmental statement within the Regulations so as to deprive the authority of jurisdiction to grant planning permission. The local planning authority may conclude that planning permission should be refused on the merits because the environmental statement has inadequately addressed the environmental implications of the proposed development, but that is a different matter altogether. Once the requirements of Schedule 4 are read in the context of the Regulations as a whole, it is plain that a local planning authority is not deprived of jurisdiction to grant planning permission merely because it concludes that an environmental statement is deficient in a number of respects.

41. Ground 1 in these proceedings is an example of the unduly legalistic approach to the requirements of Schedule 4 to the Regulations that has been adopted on behalf of claimants in a number of applications for judicial review seeking to prevent the implementation of development proposals. The Regulations should be interpreted as a whole and in a common-sense way. The requirement that "an EIA application" (as defined in the Regulations) must be accompanied by an environmental statement is not intended to obstruct such development. As Lord Hoffmann said in R v North Yorkshire County Council ex parte Brown [2000] 1 AC 397, at page 404, the purpose is "to ensure that planning decisions which may affect the environment are made on the basis of full information". In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the "full information" about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting "environmental information" provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations (Tew was an example of such a case), but they are likely to be few and far between.

42. It would be of no advantage to anyone concerned with the development process - applicants, objectors or local authorities - if environmental statements were drafted on a purely "defensive basis", mentioning every possible scrap of environmental information just in case someone might consider is significant at a later stage. Such documents would be a hindrance, not an aid to sound decision-making by the local planning authority, since they would obscure the principal issues with a welter of detail."

The Defendant and First Interested Party contend that the Claimant in this case is indulging in the "unduly legalistic approach" which was the subject of criticism by Mr Justice Sullivan as he then was.

37. The First Interested Party relies on the fact that the scoping opinion did not determine that need was to be included in the Environmental Statement. Both Defendant and First Interested Party rely on the terms of both Annex IV of the Directive and Schedule 4 of the Regulations which, they contend, on any fair reading do not require that evidence of need is included in an Environmental Statement. Whilst they accept

that in the letter of 15th June 2012 Mr Clarke appears to have included evidence as to need in part A as regulation 22 additional evidence this does not actually have any effect on what legally has to go into an Environmental Statement and what information is subject to the strict publication requirements of Regulation 22. They contend that the public were not in fact prejudiced or confused and since the Supreme Court decision in *Walton* (above), if there was no actual prejudice to the public there should be no relief.

38. It is clear that the purpose of Schedule 4 of the Regulations is to set out the information which should be included in Environmental Statements. It is a thorough description of all the issues which might impact on an Environmental Assessment of the consequences of a proposed development. It is obviously drafted in the knowledge that other documents will be filed as part of the application which deal with issues which have no direct environmental significance. I have read Schedule 4 of the EIA Regulations carefully and have also considered Annex IV of the European Directive for completeness. Not only is there no express mention of the requirement for evidence of need to be included there is no description or phrase where it could be sensibly argued that evidence of need is required by implication. Even accepting that the Directive has a broad reach and a wide scope it cannot in my view include evidence of a topic which has no logical connection with environmental issues and cannot be brought sensibly within the language of either Annex IV or Schedule 4. It is, in my view, not surprising that the Claimant was unable to produce any authority where a court had found that evidence of need should be included in an Environmental Statement. This is not a legal lacuna as the draftsmen no doubt appreciated that evidence of need would be dealt with elsewhere in the planning process usually in the Planning Statement.

39. I therefore find that the First Interested Party had no obligation in law to include evidence of need in the Environmental Statement and the Defendant had no obligation in law to insist on them providing it. This finding obviously has an impact on the procedural challenge which is Ground 2. My finding on the substantive legal issue means that the First Interested Party cannot be criticised for not treating the Need Updates in September and October 2012 as Regulation 22 "further information". This also means that the Defendant cannot be criticised for failing to advertise it in a local newspaper pursuant to Regulation 22(3). The only criticism which can be made is that the First Interested Party described the material in Part A of the submission of 15th June 2012 as Regulation 22 "further information" when on my finding it should not have been. This means that some evidence in relation to need was published with evidence relevant to environmental issues when it should not have been. Whilst evidence as to need is not published in the local newspaper it is unrealistic to expect that members of the public who have an interest in the application would not know where to find the Planning Statement. The case of *Berkeley* relied on by the Claimant was a somewhat extreme case where no Environmental Impact Assessment at all had been done. This is a case where I have found that all matters set out in Schedule 4 have been properly addressed but one tranche of supplementary information has been advertised on the basis it was environmental evidence when it should not have been. This minor error goes nowhere near the type of wholesale confusion that Lord Hoffman was referring to in *Berkeley* in the passage quoted above.

40. It follows from my assessment of the law and facts that Grounds 2 and 3 both fail. I have to say that I consider them unarguable and accordingly I refuse permission in relation to both grounds.

41. **Grounds four and five**

The Claimant contends that the decision to grant consent was unlawful for the following reasons

(iv) The content of the Environmental Statement was in conflict with the EIA Directive and EIA Regulations in that it wrongly excluded information about the likely significant effects of the proposal which ought to have been included in the Environmental Statement , namely; the impact of the Combined Heat and Power ("CHP") pipes on the environment;

(v) Alternatively to (iv) above, the Defendant Council failed to take into account a material consideration in assessing the acceptability of the ES as a condition of granting consent; namely the analysis of the Secretary of State of a failure to provide environmental information about the likely significant effects of laying CHP pipes in a similar proposal at Cheshire;

42. The Claimant relies on the wording of Schedule 4 of the EIA Regulations to contend that where CHP pipes are part of the development then the potential impact of them on the environment should be part of the Environmental Statement. In paragraph 1(a) " a description of the physical characteristics of the whole development…" is required. Where CHP pipes are to be laid as part of the development then the Claimant contends that this was a main effect of the project which required assessment.

43. It is common ground that the provision of CHP pipes was not part of the original application for planning permission, nor did the scoping opinion prepared by the Defendant indicate that an assessment should be made of the environmental impact of the pipes. The Defendant contends that the decision what to put in the scoping opinion and whether the ambit of the Environmental Statement is adequate is a matter of judgement for the decision maker challengeable only on *Wednesbury* grounds. The Claimant contends that if the Environmental Statement is in fact inadequate in law then any planning permission granted pursuant to it is unlawful irrespective of the view of the decision maker. The factual case of the First Interested Party was that the intention was to construct an EfW facility which would provide power to the National Grid and be enabled so that at some stage in the future CHP pipes could be fitted if there was a market for heat from neighbouring businesses.

44. The Claimant relied very heavily on a comparable case which was determined by an Inspector in April 2011 in Middlewich Cheshire. A dispute had arisen between the local authority and the developer Covanta Energy Limited ("Covanta") as to the contents of an Environmental Statement. This was also an EfW facility enabled for both electricity and CHP. The issue was whether the environmental effects of the CHP pipes should be part of the Environmental Statement. In April 2011 the Secretary of State published his decision with regard to the contested issues and found that it was necessary for the EfW application to provide information about the likely

significant environmental effects of laying CHP pipes to future end users in order to comply with the EIA Regulations then in force (which are not materially different from the EIA Regulations with which this application is concerned).

45. The Inspector's conclusion on "Main Effects" appears at paragraphs 6 to 7 of his conclusions as follows:

> "6. I consider that the fundamental purpose of the EfW development subject of Appeal A is to recover energy from waste in accordance with the aims of the revised Waste Framework Directive 2008 (Directive 2008/98/EC) and the Waste (England and Wales) Regulations 2011 (SI 2011: NO 988). To fulfil the purpose of the EfW facility therefore the energy by the facility must be exported and used or it will not substitute for energy derived from other fuels. In those circumstances, the operations at the EfW facility could not be considered as recovery operations as defined in Article 3 of the revised Directive and in paragraph 5(b) of Part I of Schedule 2 to the 2011 Regulations. Neither could the proposed development be considered an EfW facility.
>
> 7. Accordingly, I conclude that the export of energy from the development subject of Appeal A, whether as electricity to the grid or to any other user, as CHP, whether to British Salt or any other user, is a necessary and intrinsic part of that development. Therefore the effects of those supplies are main effect of the development and those effects fall to be assessed by the EIA Regulations."

46. The developer in that case had agreed heads of terms with a company called British Salt to deliver heat by CHP pipes in addition to electricity to the National Grid. Whilst an assessment had been made for an indicative corridor to British Salt no assessment had been made to a nearby Industrial Park called Midpoint 18. The developer sought to argue that any future connection to Midpoint 18 was unlikely and they were only potential future connections which did not need to be assessed. The Inspector found it probable that CHP would be supplied not only to British Salt but also to the occupiers of all three phases of Midpoint 18 the last of which had not yet been developed. In the light of that finding it was perhaps not surprising that he found that the potential adverse environmental effects of the pipe laying and use should be assessed. The Claimant contends that the facts of that case are "eerily similar" to the present case as the CHP pipes were not part of the planning application and had not been included in the scoping opinion by the local authority as is the case here.

47. The Defendant and First Interested Party's response to this case is to rely again on the dicta in *R (Blewett) v Derbyshire County Council* quoted previously to the effect that the contents of an Environmental Statement are a matter for the local planning authority and their judgement can only be impugned on *Wednesbury* grounds. This argument deployed in relation to grounds two and three can be deployed equally validly in relation to grounds four and five they claim.

48. In addition they also rely on an authority which was handed down after the Covanta decision and which made specific reference to it on a similar issue to the present claim. In *R (Bristol City Council) v Secretary of State for Communities and Local Government* [2011] EWHC 4014 (Admin) Collins J said:

> "26. The Covanta decision, in my view, quite clearly does not indicate that in all the circumstances, where CHP is a possibility there must be an environmental impact assessment which covers that possibility. That would be absurd because unless and until

it is at least known on the basis of probability, putting it no higher, that a particular route for that process to be carried out is at least considered, then it would be quite impossible to make a sensible assessment because one would simply not know what areas were likely to be affected and what would be the nature of any such effects.

27. It was only because on its facts, as is clear, that there was known to be a probability of CHP and the routes were again known, in the sense that there had been a degree of research into what would be appropriate, that it was considered, on the facts of that case to be a reasonable requirement (and note a reasonable requirement). There is an element of judgment involved in whether that situation can properly be said to have arisen."

49. The final sentence of this decision would appear to add weight to the Defendant's argument that the decision as to what is likely to be a reasonable requirement in the Environmental Statement is a matter of judgement for the local authority. In the Covanta decision this issue did not arise as the issue of what should be in the Environmental Statement was the issue that the Inspector was asked to determine - it was not a judicial review of the officer's decision. It is fair to point out that the facts of the case in Bristol were different to Covanta as is clear from paragraphs 18 and 19 of the Judgment:

"18. Let me turn to the question of the application for leave to amend to deal with the EIA point. In June 2009 the interested party submitted to the Council a request for a scoping opinion, setting out the intended scope of the EIA and seeking the Council's opinion on whether that was appropriate. The material part of the request for our purposes was 6.20, under the heading "Heat Plan" and this is said:

"West of England Partnership undertook a heat demand survey to assess whether there is sufficient potential heat demand in proximity to an identified site to justify CHP in addition to an EFW facility. It is considered that the application site and location offers excellent potential for the utilisation of the heat for the process, it is veiled [sic] to carry out a comprehensive assessment to establish whether the carbon footprint of the EFW can be further reduced by the utilisation of waste heat and quantify the addition carbon savings that may be achieved. The feasibility of a combined heat and power scheme relies on consistent market on the heat supplied by the plant. In order to determine the existing potential market for heat in the Avonmouth area a base line assessment will be carried out which will involve looking at facilities in the local area, such as industry, hospital, schools, local authority housing, large commercial premises, all of which could provide an essential base load for the proposed CHB scheme."

19. Accordingly, as it is said in the written submissions from the interested party that no likely end user had at that stage been identified for heat from the scheme. Nor had any likely or possible route from the pipework been identified."

50. There is a temptation to ask the question whether the current case is more like the Covanta case or the Bristol case and much of the submissions before me seemed to be directed towards that exercise. However, I think what can be learnt from a comparison of the two decisions is that where the installation and use of CHP pipes is probable the environmental effects of laying them and using them should be assessed. This of course makes logical sense as if it is probable that the pipes will be used then it is easier to argue that they are part of the physical characteristics of the "whole development" and subject to environmental assessment. Conversely if they are

unlikely to be used it is easier to argue they are not part of the physical characteristics of the "whole development". I will leave aside for the moment the issue of whether this is an issue of law or fact for the court to determine or whether it is a question of Judgment for the decision maker at the local authority.

51. Leading Counsel for the Claimant sought to argue that the laying and use of CHP pipes was "probable" in relation to the AWRP. He conceded that the original planning application was not submitted on this basis nor was it part of the scoping opinion. He also conceded that the First Interested Party had sought to argue that it was more of an aspiration than a definite proposal but he submitted that each of those factors had applied to the Covanta project but the Inspector had still found as a fact that CHP take-off was probable. It seems to me the only way for me to address this issue is to look at the material which was prepared by both the Defendant and First Interested Party at the relevant time and determine what the likelihood was of CHP being actually operated in addition to electricity to the National Grid.

52. The first source document is a Heat Assessment which was prepared by the First Interested Party as part of the Planning Statement to demonstrate how they considered the potential to use heat and how the facility was ready for heat take-off. Heat take off would involve waste steam at the low pressure end of the turbine being bled off to provide low grade heat for another system ,such as a district heating scheme whilst still generating electricity. The following extracts are taken from the Heat Assessment:

> "4.1 Urban Mines were commissioned to undertake a survey to identify potential users of the low grade heat and their demand within a 10km radius of Allerton Park Quarry (the report is included at annex 1). In an urban environment, a catchment of 4 to 6km is more usual for this type of work. However, with the most rural nature of the area surrounding the development site it was thought that a survey area of this size was more likely to identify significant heat demand, especially as this extends into Knaresborough and Harrogate south-west of the site.
>
> 4.4 The outcome of this survey indicated there is currently a total potential heat demand of approximately 76,054 MWh/annum, of which the majority would lie between 5-10km from the site. The survey established two main corridors emanating from the site:
>
> - North of the Allerton Quarry site towards Boroughbridge ,with potential users consisting of mainly industrial and business properties ,but also with planned residential developments
> - South-West of the Allerton Quarry site towards Knaresborough and Harrogate , with a number of sizable potential heat users, including Harrogate District Hospital , a number of retail and mixed use developments , senior schools and sports facilities , including the swimming pool at Knaresborough
>
> 4.5 Recommendations within the report suggested AmeyCespa open dialogue with major heat users and undertake a technical appraisal of the feasibility and cost implications of instituting such a system.
>
> Summary
> 4.8 AmeyCespa has established that there is possible demand and physical ability to consider CHP

> 4.9 It is therefore now necessary to establish if, and which, potential users are interested in supply of heat from the proposed development. To this extent AmeyCespa has begun, and will continue, dialogue with a number of potential users.
>
> Conclusions
> 6.1 AmeyCespa has an optimistic approach to CHP, but is aware of the barriers to implementation. All factors outlined above will be reviewed on a continuous process, in particular dialogue with potential users who are the key to such a scheme's implementation."

53. By way of comment, it is clear from the above that no particular customer at all has been identified nor has any particular development, save for the theoretical corridors identified in paragraph 4.4. These corridors are reflected in a plan attached to the report showing estimated heat demand. Unsurprisingly this is concentrated on the nearest substantial conurbations adjacent to AWRP in Boroughbridge, Knaresborough and Harrogate. In Harrogate the heat demand is over 10km from AWRP and appears to be three or four km wide at its furthest point. These would have to be very broad corridors indeed.

54. The other relevant document is the report which was prepared by Ms Perkin and her team for the benefit of the Committee before they made their decision. The following extracts appear relevant:

> " 7.434 It should be noted, however, that the provision of CHP has a knock-on dis-benefit of reducing the amount of electricity that can be generated as reject steam is diverted away from the turbine and its ability to produce the wattage of electricity currently calculated to be produced. The applicant has indicated that the AWRP facility could be configured so as to enable the utilisation of CHP. However, at this stage, no specific user of heat has been identified and there is therefore considerable uncertainty as to whether the facility would operate as a CHP facility"
>
> 7.436 In this respect Members' attention is drawn to the fact that the applicant has produced a Heat Assessment…….
>
> 7.437 The report states that the majority of these are between 5km and 10km from the site. Objectors have expressed the view that there is no realistic prospect of the AWRP facility operating as a CHP facility and that this is a fundamental drawback of the proposal. Overall, it is concluded that there is likely to be some potential for heat utilisation from the scheme, but the extent of this potential is limited by the location of the site in relation to other major development. In the absence of realistic prospect of delivery of CHP at this point in time, it would not be appropriate to give significant weight to any potential heat usage.
>
> Conclusion on energy-related issues
> 7.440…….However , the absence of a confirmed ability to deliver CHP reduces the certainty that the maximum potential energy supply benefit from the scheme could be realised and it is considered that this reduces the overall amount of weight that could otherwise attach to such benefit. If Members were minded to resolve to grant planning permission, it is recommended that a condition is imposed to ensure that the applicant takes ongoing steps during the life of the development to explore and where possible deliver opportunities for utilisation of CHP."

55. It is fair to say that Ms Perkin's assessment was more about potential for future use of CHP than the likelihood or probability of CHP take-off. If this represented her view at the time the report was prepared it would be difficult to argue that she was wrong to exclude the CHP pipes from the scoping opinion "in the absence of a realistic prospect of delivery of CHP at this point in time". Ms. Perkin is criticised, firstly for excluding the environmental impact of CHP pipes from the scoping opinion and secondly for accepting the First Interested Party's Environmental Statement without insisting on further information about the impact of CHP pipes. Were those decisions irrational or unreasonable in the *Wednesbury* sense? As I have indicated if she is right that "no specific user of heat has been identified and there is therefore a considerable uncertainty as to whether the facility would operate as a CHP facility" and "in the absence of a realistic prospect of delivery of CHP" then it cannot be irrational to exclude the laying and use of CHP pipes from environmental assessment when, on present information, it is unlikely that they will be used.

56. The next issue is whether the conclusions which she reached in her report were justified on the evidence available to her. The only real evidence she had was the Heat Assessment which I have summarised at paragraph 51 above. The report speaks of "potential" heat demand and "possible demand and physical ability to deliver CHP". This seems to me to be a long way from probability. The report does no more than identify a number of institutions and businesses who have a demand for energy and may be interested in heat (for example a swimming pool, schools and a hospital). None of these institutions have actually expressed an interest, let alone been prepared to discuss terms and consider the cost of retro-fitting pipework to accept CHP. The corridors which are identified for the pipework are no more than the logical direction between AWRP and the nearest large conurbations. The developer is yet to identify if and which potential users are interested in heat supply and it does seem to me that the concept of CHP take-off is an aspiration rather than a probable development. I find that the comments in the Officer's Report were justified on the evidence before her and that in the circumstances it was not irrational or unreasonable to exclude CHP pipes from the scoping opinion and permit it to be excluded from the Environmental Statement.

57. I have approached this issue on the basis that the challenge to the Defendant on ground four and five is a rationality challenge impugnable only on *Wednesbury* grounds. I reach this conclusion as I believe previous authority supports this approach. In paragraph 36 of this Judgment I quote extensively from the decision of Mr Justice Sullivan as he then was in *R (Blewett) v Derbyshire County Council* in which he gives a clear opinion that challenges to the content of Environmental Statements can only be made on *Wednesbury* grounds. In addition the following paragraph is also particularly apposite to this case:

> "68. I have dealt with it in some detail because it does illustrate a tendency on the part of claimants opposed to the grant of planning permission to focus upon deficiencies in environmental statements, as revealed by the consultation process prescribed by the Regulations, and to contend that because the document did not contain all the information required by Schedule 4 it was therefore not an environmental statement and the local planning authority had no power to grant planning permission. Unless it can be said that the deficiencies are so serious that the document cannot be described as, in substance, an environmental statement for the purposes of the Regulations, such an approach is in my judgment misconceived. It is important that decisions on EIA applications are made on

the basis of "full information", but the Regulations are not based on the premise that the environmental statement will necessarily contain the full information. The process is designed to identify any deficiencies in the environmental statement so that the local planning authority has the full picture, so far as it can be ascertained, when it comes to consider the "environmental information" of which the environmental statement will be but a part."

58. There is further support for this proposition in the judgment of Mr Justice Hickinbottom in *R (Miller) v North Yorkshire County Council* [2009] EWHC 2172 (Admin) in which he said:

> "33. Therefore, in my view, Annex IV to the EIA Directive (and, in its turn, Schedule 4 to the EIA Regulations) requires a developer to include in his environmental statement a description of significant environmental hazards to which the proposed development will give rise. However:
>
> (i) As indicated above (paragraph 28), by virtue of the definition in Regulation 2 of the EIA Regulations, a developer's obligation to provide information in an environmental statement is restricted to that which is "*reasonably* required to assess environmental effects" and that which he can "*reasonably* be required to compile" (emphasis added).
>
> (ii) It is for the planning authority to decide whether the information contained within an environmental statement is sufficient to meet the requirements of the EIA Directive and Regulations (R (Blewett) v Derbyshire County Council [2003] EWHC 2775 (Admin); [2004] Env LR 29, a case to which I shall return in relation to Ground 4). That is a matter of planning judgment for them, subject only to challenge on Wednesbury grounds.

59. This issue was revisited again in *R (Bowen-West) v Secretary of State for Communities and Local Government and others* [2012] EWCA Civ 321 where Lord Justice Laws opined as follows:

> 11. There is a further ground of appeal. The appellant says that the deputy judge was also in error in applying the conventional Wednesbury standard of review (Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1 QB 223) as a test of the legality of the Secretary of State's view as to the proper scope of the required EIA. It is submitted that the law of the European Union requires a more intensive judicial scrutiny.
>
> 39. I turn to Ground 2. It is in the circumstances (if my Lords agree with my conclusions on the first ground) strictly unnecessary to embark upon the debate about the appropriate intensity of review. I will deal with it shortly. R (Goodman) v LB Lewisham [2003] EWCA Civ 140, paragraph 9; Jones v Mansfield DC [2004] ELR 391, paragraphs 14 to 15 and R(Blewett) v Derbyshire CC [2003] EWHC Admin 2775, paragraphs 32 and 33, all indicate, as it seems to me, that the conventional Wednesbury approach applies to the court's adjudication of issues such as arise here, if I am right in holding that such issues are a matter of fact and judgment.
>
> 40. In R (BugLife) v Medway Council and Ors [2011] EWHC Admin 746, His Honour Judge Thornton QC opined that the courts might visit the question whether European Union law required them to apply a proportionate standard. For my part, I do not see that there is any true question of proportionality arising in the present case. We are not concerned with the exercise of discretion and therefore we are not concerned with assessing whether a response to a particular aim is or is not proportionate. We are concerned with a fact-finding exercise. There is nothing, as it seems to me, in the jurisprudence of the Court of Justice to show that the conventional English law approach

> is inapt. Paragraph 48 of Ecologistas perhaps suggests, though I accept it does not state, the contrary. Paragraph 39 of Abraham & Ors, C-2/07, which is a screening not a scoping decision, does not in my judgment assist the appellants. Mr Drabble has relied in a supplementary skeleton argument on other authority of the Court of Justice. However Commission v Germany C-431/92 and Commission v Spain are infringement cases in which the Court of Justice must inevitably make all judgments of fact and law. Kraaijeveld in the circumstances takes the matter no further.
>
> 41 I am inclined to accept Mr McCracken's submission for the third respondents that the Court of Justice is of course concerned to see that the law is properly applied in the Member States, but in the present context that is achieved by the Wednesbury standards.

All of this learning suggests that a challenge can only be made on rationality grounds.

60. The Claimant's case was put however on the basis that the court is entitled to substitute its own view for that of the decision maker and if the court finds that the laying and use of CHP pipes was probable then this makes the Environmental Statement inadequate and the planning permission unlawful. In the event that my legal analysis is proved to be wrong I find as a fact that the laying and use of CHP pipes was not probable at the time the relevant decisions were made. I have set out carefully the relevant evidence from the Heat Assessment and it is some distance away from evidence which would lead an objective reader to the conclusion that CHP take-off was more likely than not. Whilst I do not have to distinguish this case from Covanta, the most obvious distinction is that in that case there was already one identified user of CHP who had signed heads of agreement and a particular industrial estate adjacent to the facility where it seemed that CHP take-off was likely as at least part of the development had not yet been built and would not have the extra expense of retro-fitting. The route of pipework was therefore easy to identify. Here there are no identified users, merely three conurbations, one at least 10km away who may have customers who may or may not be interested in CHP in the future.

61. It follows from these findings of fact and law that grounds four and five also fail. On reflection, I am prepared to give permission for both grounds but dismiss them on a substantive basis.

62. This Judgment will be handed down on a future date currently listed on 9th August 2013 at 10 a.m. Time for appealing the Judgment will not start to run until the Judgment is handed down. CPR PD 40E shall apply. If the parties are able to agree the form of order to reflect my Judgment the attendance of Leading and Junior Counsel and Solicitors may be excused at the hearing. If any consequential orders are disputed those issues may be adjourned to another hearing date more convenient to the parties.