HOUSE OF LORDS SESSION 2007–08
[2008] UKHL 22

on appeal from: [2006] EWCA Civ 877

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

R (on the application of Edwards and another (Appellant)) v Environment Agency and others (Respondents)

Appellate Committee

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Hearing date:
21-23 JANUARY 2008

ON
WEDNESDAY 16 APRIL 2008

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LORD HOFFMANN

My Lords,

1. This appeal arises out of an application to quash a permit issued on 12 August 2003 by the Environment Agency ("the Agency") to Rugby Ltd for the operation of a cement works in Lawford Road, Rugby. The chief grounds are that the Agency did not disclose enough information about the environmental impact of the plant to satisfy its statutory and common law duties of public consultation. Rugby Ltd has since been taken over by the Mexican multinational Cemex and is called Cemex UK Cement Ltd, but I shall for convenience refer to it as "the company".

The PPC Regulations

2. Cement has been made at Rugby since the time of Dr Arnold. But the Lawford Road plant was built less than 10 years ago. It represents the latest technology in cement making. When it was built, the manufacture of cement required authorisation under Part I of the Environmental Protection Act 1990. Authorisation was granted in 1999 and the plant began commissioning in the following year. In 2000 a new system of pollution control was introduced by the Pollution Prevention and Control (England and Wales) Regulations SI 2000/1973 ("the Regulations"). These Regulations were made under the Pollution Prevention and Control Act 1999, mainly to enable the UK to give effect to the European Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control ("the IPPC Directive") but in some respects going further than the directive required.

Principles of pollution control

3. The Regulations provide that anyone operating a cement plant must obtain a permit from the Agency. No distinction is made between plants already in operation and new plants. Part II of the Regulations sets out the principles upon which the Agency must act in deciding whether to grant a permit. They are quite complicated and involve a lot of acronyms (there is a glossary at the end of the printed version of my speech), but I shall try to explain them as briefly as the subject will allow, because some knowledge of the general scheme is necessary to understand this case.

4. The Regulations use, broadly speaking, two approaches to the control of pollution. The first is based upon the IPPC Directive. It is to impose limits ("emission limit values" or ELVs) on the quantities of polluting matter which a given activity may emit; e.g. requiring that a plant may not emit more than so much nitrogen dioxide: see regulation 12(2) and (6). That approach is helpful so far as it goes, but does not prevent excessive pollution caused by there being simply too many sources of nitrogen dioxide in the area. The other method is based upon the Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (the "Air Quality Directive"), which provides a framework for specific directives imposing quantitative limits (environmental quality standards or "EQS") on the extent to which the environment may be polluted. Relevantly in the present case, Council Directive of 22 April 1999 (1999/30/EC) imposed limits on concentrations of sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air. The application of an EQS may in some cases be unfair to an applicant whose plant appears likely to breach the limit but will actually emit very little pollutant compared with other existing sources. He may be refused a permit because he happens to be at the end of the queue.

5. The Regulations use, as I say, a combination of these techniques. Regulation 11(2) says that the object of regulation is to ensure that —

> (a) all the appropriate preventative measures are taken against pollution, in particular through application of the best available techniques; and
>
> (b) no significant pollution is caused.

6. To give effect to (a), the Agency requires applicants to satisfy them that they are using the best available techniques ("BAT") calculated to prevent, or at least to minimise, the emission of polluting matter. BAT are required irrespective of whether the emission would cause a breach of an overall pollution limit: as the Agency says in its Sector Guidance Note for the Cement and Lime Industry (IPPC S3.01) Version 1, April 2001, at p. 1, the regulations "[require] us not to consider the environment as a recipient of pollutants and waste, which can be filled up to a given level, but to do all that is practicable to minimise the impact of industrial activities." (To similar effect, Buxton LJ in *R. (Rockware Glass Ltd) v Chester City Council* [2007] Env LR 3, paras 33-39). Sector Guidance Notes, such as that to which I have referred, contain "indicative" standards of what the Agency considers to be BAT for activities in that industry. They take the form of a description of the technology which should be used and a "benchmark" of the emission limits which should be achieved. An applicant has to justify any departure from these indicative standards. Regulation 12 (6) requires that the permit, when granted, should contain conditions imposing ELVs based upon what BAT should be able to achieve.

7. The second principle is that the activity shall not cause "significant pollution" (regulation 11(2)(b)), whether it is using BAT or not. If BAT cannot prevent significant pollution, the activity should not be licensed at all. But what is significant pollution? For the purposes of the regulations, it is pollution which causes a breach of an EQS. Regulation 12(7) provides:

> "Where an environmental quality standard requires stricter emission limit values than those that would be imposed pursuant to paragraph (6), paragraph (2) shall require those stricter emission limit values; and for the purpose of this paragraph 'environmental quality standard' means the set of requirements which must be fulfilled at a given time by a given environment or particular part thereof, as set out in Community legislation."

8. As I have already mentioned, a crude application of regulation 12(7) could be unfair when an applicant will cause very little pollution but the air is already close to breaching an EQS because of pollution from other sources. Guidance on the question of whether a European EQS will "require" stricter ELVs is contained in *Integrated Pollution Prevention and Control: A Practical Guide*, Edition 4 issued by DEFRA in June 2005:

"10.1…[T]he main basis for setting ELVs under the PPC Regulations will be the application of BAT. However, ELVs must also satisfy regulation 12(7), among other provisions. Regulation 12(7) states that where an environmental quality standard (EQS) as set out in Community legislation requires stricter ELVs than those achievable under BAT, the regulator must impose those stricter limits….

10.7 Where an existing installation is the main or only cause of a breach of a Community EQS the regulator must set ELVs accordingly. If those are not viably achievable, the regulator should refuse the permit…

10.8 Where an existing installation is a significant contributor to a breach of a Community EQS, but other sources such as traffic also make major contributions, regulators should explore all options for securing compliance with that EQS. It may be right for them to restrict releases from the other sources rather than tighten the IPPC limits. How far a regulator can do this will depend on its powers to control the other sources. Alternatively, the regulator may find that there are other things it can do to rectify the breach, such as draw up an action plan for an air quality management area (AQMA) under Part IV of the Environment Act 1995. However, if the regulator does not have powers to control the other sources, and does not believe that other means will bring about compliance with the EQS, it must impose stricter permit conditions, but it should involve the operator in that consideration so that the operator has the opportunity to suggest solutions. A combination of controls on all sources must ensure that Community EQSs are met.

10.9 Where an existing installation makes only a minor contribution to a breach of a Community EQS caused mainly by other, non-IPPC sources, ELVs for the installation should reflect that and would generally be expected not to differ significantly from those which would apply regardless of the applicability of the Community EQS. It will be much more important for the regulator to use whatever other powers it has to control the main sources of the breach.

10.10 A breach of a Community EQS could result from the combined effects of a number of installations. This could occur in an industrial area with elevated concentrations of air pollutants, or in an estuary where high levels of pollutants have accumulated due to releases

> up-river. In such cases it may be appropriate to review several permits in the area to set slightly stricter ELVs for each installation rather than simply imposing the entire burden of compliance on the last applicant."

The permit application

9. My Lords, against that regulatory background I can explain how the dispute in this case arose. The company applied for a permit on 21 August 2001. Paragraph 1 of Schedule 4 of the Regulations requires an application to provide information as to a large number of matters, including:

> "(g) the nature, quantities and sources of foreseeable emissions from the installation…into each environmental medium, and a description of any foreseeable significant effects of the emissions on the environment;
>
> (h) the proposed technology and other techniques for preventing or, where that is not practicable, reducing emissions from the installation…"

10. For the most part, the activities for which the permit was sought were the same as those which had already been authorised under the 1990 Act. If nothing else had been proposed, it may be doubted whether it would have stirred up much opposition. After all, the inhabitants of Rugby had been living with a cement works for a long time and, although it seems to have had some teething troubles, the new, state-of-the-art plant was in principle more environmentally friendly than the old one. What caused intense controversy was a new proposal, contained in a lengthy appendix to the application, for permission to replace some of the fuel (coal and petroleum coke) with shredded tyres. Although the company explained that burning tyres at very high temperatures would not produce unpleasant smoke, smells or other pollution, the local people were sceptical and reluctant to be experimented upon. The result was, as the Agency subsequently said in its decision document (at para 4.46), "few determinations have been subjected to such intense scrutiny and debate as this one." The debate concentrated overwhelming on the question of burning tyres: "Almost without exception" said the Agency in para 1.6 of its decision "the representations received during this consultation focused on the proposed use of tyres as a fuel in partial substitution for coal and petcoke" at the installation.

11. Burning fuel is not, however, the only potential source of pollution from a cement plant. The product is made by mixing chalk, limestone and clay (with some sand and iron oxide) in the kiln at high temperature to produce a clinker which is then ground in a mill to make cement powder. The waste gases produced in the kiln by burning the fuel and sintering the raw materials are discharged through a tall chimney. They will include oxides of sulphur and nitrogen, water vapour and dust. In addition, the movement and mixing of raw materials and the grinding of the clinker will produce dust within the plant, some of which may escape from other points into the atmosphere. These are called low level point sources ("LLPS") as opposed to discharges from the main stack.

12. In its application, the company described the techniques which it was using or proposed to use to prevent or reduce emissions of, among other pollutants, dust or "particulate matter". The particulates which are environmentally most significant are those smaller than 10 microns (millionths of a metre) in diameter ("PM_{10}"). They are important because they can be inhaled and cause respiratory diseases. The relevant indicative BAT standard in the Agency's Sector Guidance Note for the industry (IPPC S3.01) said (at pp. 43-44) that BAT for reducing emissions of PM_{10} required the use of fabric filters. These are large numbers of fabric bags which trap the dust and enable it to be collected and removed. The benchmark emission value was stated (at p. 86) to be 20-30 mg/m^3.

13. The application identified various LLPS and said that fabric filters would be used and that the benchmark emission value would be achieved. In the case of emissions from the kiln through the main stack, however, it was proposed to use electrostatic precipitators (EP) instead of fabric filters. The application presented arguments as to why EP were as good as, if not better than, fabric filters and should also be regarded as BAT. In the end the Agency accepted these arguments, although the question is now academic because the company has gone over to using fabric filters.

Judicial review

14. The application for judicial review, launched by Mr David Edwards, a resident of Rugby, on 28 October 2003, was based on three grounds, the third of which need not be considered because it was abandoned by amendment on 12 March 2004. The first was a discrete

point on the European Council Directive of 27 June 1985 "on the assessment of the effects of certain public and private projects on the environment" (85/337/EEC) ("the EIA directive"), to which I shall return later. The second was an allegation that, in allowing the company not to use fabric filters for the kiln gases, the Agency had failed to ensure that it used BAT.

15. In the course of the application, however, this ground of complaint was also abandoned and an entirely new one introduced. This concerned PM_{10} emissions from LLPS. In the case of these emissions, it could not be said that the Agency had failed to comply with its duty under regulation 11(2)(a) to ensure that the company was using BAT. The application described in section 2.3.2 the various LLPS under the headings "(B) Raw Materials Handling, Storage and Preparation", "(C) Fuel Storage and Handling", "(E) Clinker Handling and Cement Milling" and "(F) Cement Loading, Packing and Despatch". In each case it was said that fabric filters were in use and that emissions were expected to be within the Agency's indicative benchmark. It has never been questioned that this was BAT.

16. Instead, the appellant's complaint is that the Agency did not properly discharge its statutory obligation of public consultation before reaching a decision on the other limb of pollution control, namely, whether the plant, notwithstanding its use of BAT, would cause significant pollution (regulation 11(2)(b)).

The application's assessment of environmental impact

17. Paragraph 1(g) of the Fourth Schedule to the Regulations, which I have already quoted, requires the application to state—

> "the nature, quantities and sources of foreseeable emissions from the installation…into each environmental medium, and *a description of any foreseeable significant effects of the emissions on the environment*" (emphasis added)

18. Section 4 of the application dealt with impact on the environment. For this purpose, the company commissioned consultants to run a computer model of the effect of emissions from the main stack

on ground level concentrations of gases such as sulphur dioxide, nitrogen dioxide, and carbon monoxide, and also of PM_{10}. Such a computer model is a complicated calculation, involving assumptions about quantity of emissions, the heights from which they are dispersed, weather conditions and so forth. The conclusion in relation to PM_{10} was that the maximum contribution from the works would be (expressed as 24 hour mean) a 0.17 $\mu g/m^3$ contribution to an ambient air concentration of 36-40 $\mu g/m^3$, as against a European EQS (imposed by Council Directive of 22 April 1999 (1999/30/EC)) of 50 $\mu g/m^3$. The application commented: "The maximum predicted contribution to ambient concentrations of fine particulate matter is insignificant in terms both of the ambient air quality and the assessment criteria."

19. The application said nothing, however, about the effect of adding the contribution of emissions of PM_{10} from LLPS to the ambient air quality. The consultants had not been asked to include these emissions in their computer model. Dr Evans explained this in his second witness statement on behalf of the company (at para 8):

> "The rationale for this was that releases from the main stack were considered to be of more significance than those from the other point sources, such as the cement mills, where there would be lower discharge volumes and concentrations. We considered this general risk assessment approach to be satisfactory and in line with general guidance."

20. One reason for excluding LLPS from the company's modelling exercise may have been the great difficulty of doing so with any pretence at accuracy. Whereas emissions from the main stack are continuous and from a single fixed point above all the surrounding buildings, the emissions from LLPS are from a number of different places at different heights for irregular periods of time and may be affected by the layout of the buildings. An attempt at modelling may therefore not have been able to produce very helpful information. And the Sector Guidance Note for the Cement and Lime Industry (IPPC S3.01) says (at p.3) that "an applicant is not required to supply detail that could not reasonably be expected to contribute to a decision to issue a permit".

The Air Quality Modelling Assessment Unit

21. The Agency decided, however, that in view of what its technical adviser Mr Sheldon called "the contentious nature of the application" (second witness statement, para 163) it was essential to have an independent assessment of the application data. He therefore went to the Agency's in-house experts on air quality, a highly respected group of scientists called the Air Quality Modelling Assessment Unit ("AQMAU") and asked them to run their own computer model and report whether it confirmed the results submitted on behalf of the company.

22. AQMAU produced a report dated 7 January 2003 which has been called AQMAU 2 because it followed an earlier draft or report of work in progress dated 21 November 2002 which has been called AQMAU 1. The AQMAU model did try to take LLPS emissions of PM_{10} into account. The result was a prediction that, as the decision document said at para 9.46, "the relevant EQS will be breached locally, if all the sources were emitting at the ELVs at the same time." The basis for this statement was the statement in para 5.4 of AQMAU 2 that "within model uncertainty, the air quality objectives for PM_{10} are likely to be exceeded. This is due to the high background concentrations of PM_{10}." In other words, there was already so much dust in the air of Rugby that, on certain assumptions fed into the model, the addition of PM_{10} from the plant appeared likely to breach the EQS.

23. Para 9.46 said that the Agency's view was that this was not a situation which was likely to occur in practice. It went on in para 9.47 to say:

> "In addition, there are uncertainties with the modelling used to carry out the…assessment (although it can with certainty be said to have been very precautionary and to have overestimated the actual impact) because of the physical layout and variability of the emission conditions. The Agency considers that it is possible that, in the reality, the relevant EQS may not be exceeded. As explained above, current abatement techniques are considered to comply with indicative BAT"

24. The Agency decided however to include in the permit a condition 9.1.1.13 to "enable the Agency to consider further whether additional abatement measures might be justified on BAT grounds":

> "The operator shall complete a comprehensive audit of all particulate emissions from the site including point source and fugitive emissions. The audit will then be used to assess the combined impact of the emissions on air quality for both short term and long term scenarios. The operator shall develop BAT proposals for any remedial work required. A report outlining the assessment, its conclusions and measures to address any issues raised is to be forwarded to the Agency."

Was failure to disclose the AQMAU reports a procedural irregularity?

25. There is no suggestion that, on the basis of the AQMAU report and the other material available to the Agency, the grant of the permit and the conditions imposed were in any way unreasonable. The complaint is that the Agency failed in its duty of consultation and the grant of the permit is therefore vitiated by a procedural irregularity. The breach of duty is a failure to publish both the AQMAU reports. The public was thereby deprived of the opportunity to make representations about the matters contained in these documents which could have influenced the Agency's decision.

26. The legal basis for this duty of consulting the public is put as having been the requirements of, first, the IPPC directive; secondly, the regulations, and thirdly, the common law duty of the Agency as a body exercising public functions.

The IPPC Directive

27. I shall first consider the directive. Unlike the regulations, it distinguishes between existing installations on the one hand and new installations, or "substantial changes" to existing installations, on the other. All are subject to control under the directive, but both the recitals and the body of the directive make it clear that the duty to make information available to the public applies only to new installations or substantial changes. Thus recital 23 says:

> "Whereas, in order to inform the public of the operation of installations and their potential effect on the environment, and in order to ensure the transparency of the licensing

> process throughout the Community, the public must have access, before any decision is taken, to information relating to applications for permits for new installations or substantial changes and to the permits themselves, their updating and the relevant monitoring data."

28. Nothing there about publishing applications for permits (or any other information) relating to existing installations. Likewise, article 15.1 says:

> "…Member States shall take the necessary measures to ensure that applications for permits for new installations or for substantial changes are made available for an appropriate period of time to the public, to enable it to comment on them before the competent authority reaches its decision.
>
> That decision, including at least a copy of the permit, and any subsequent updates, must be made available to the public."

29. There is no dispute that the plant was an existing installation. A "substantial change" is defined in article 2.10(b) as—

> "a change in operation which, in the opinion of the competent authority, may have significant negative effects on human beings or the environment"

30. There is an unchallenged finding of fact that the only change in operation proposed by the application, namely the use of tyres, would not have significant negative effects on human beings or the environment: see the judgment of Lindsay J at para 31. A claim based on the directive must therefore fail.

The PPC Regulations

31. The second legal basis for the duty is the regulations. These, as I have said, do not distinguish between existing and new installations. There is a general duty upon the Agency under regulation 29 to maintain a register, open to inspection by the public, which contains the

particulars specified in paragraph 1 of Schedule 9. These include "(a) all particulars of any application made to the [Agency] for a permit". But the AQMAU documents were not particulars of the application. They were internal documents generated by the Agency in dealing with the application.

32. Paragraph 4 of Schedule 4 provides that the Agency may—

> "…by notice to the applicant, require him to furnish such further information specified in the notice, within the period so specified, as the regulator may require for the purpose of determining the application…"

33. Paragraph 1(b) of Schedule 9 then adds particulars of the notice and any information furnished in response to the notice to the matters which must be put on the register. The Agency did give a notice under para 4 of Schedule 4 and received a substantial answer (both of which were put on the register), but none of this was relevant to LLPS emissions. The AQMAU documents certainly did not constitute either requests to the applicant or answers.

34. The argument on the Regulations is put in two alternative ways. First it is said that the AQMAU documents demonstrated that the application had been incomplete. Without new information about LLPS which appeared to have been supplied by the company to AQMAU for the purposes of its report, the application did not comply with the requirement of paragraph 1(g) of Schedule 4 and in particular, the need to describe "any foreseeable significant effects of the emissions on the environment". Section 4 of the application said nothing about the effects of LLPS emissions of PM_{10} on the environment. It was confined to the effects of emissions from the main stack.

35. I rather doubt the factual basis for the allegation that the AQMAU documents reveal a communication of significant information to the Agency. It is true that AQMAU 1, a working paper drafted by Ms Bethan Tuckett-Jones, a member of AQMAU, and a couple of e-mails from her to Mr Mair, an officer of the Agency, show that she was asking Mr Mair for some additional information about LLPS for the purposes of her model. Para 6.12 of her draft said:

> "In addition to the main stack, 15 potential sources of particulates have been identified at the plant. The information used to identify and quantify these sources has been supplied by Dick Mair in consultation with Rugby Cement…"

36. But there is no evidence about the extent of the consultation. Dr David Evans, a head of the environmental function for the company, said (second witness statement, para 9) that he had not seen the AQMAU documents till they were produced in these proceedings:

> "I would stress these are simply the estimates of the AQMAU authors of the report, and in my view some are very significant over-estimates. Had the report been provided to [the company] for comment, I expect we would have queried or challenged those estimates."

37. It would appear from the way the matter was treated in the decision document that what the AQMAU did was to take all possible LLPS in the plant (which had been fully described in the application) and assume that each would be emitting PM_{10} at the maximum concentrations permitted by the relevant ELVs. It then ran its own computer model and produced its own results. No attempt was made in the evidence to assess the significance of any actual information which Mr Mair may have obtained from the company.

38. Long before AQMAU was called in, the Agency had accepted the application as a valid application. It did not regard the failure to include LLPS emissions in the computer modelling as a fatal defect. The regulations do not require computer modelling of the environmental effects. It may in appropriate circumstances be enough to leave the Agency to draw the obvious inference that emissions of PM_{10} will, to a greater or lesser extent, affect the quality of the air. The Agency could have determined the application pursuant to paragraph 10.9 of *Integrated Pollution Prevention and Control: A Practical Guide* on the basis that even if LLPS emissions took air quality over the EQS limit, they made a minor contribution to the pollution and should not affect the grant of a permit to an existing installation. Or it could have decided that the application provided sufficient information to enable AQMAU (or anyone else) to decide for themselves whether LLPS emissions might result in a breach of the EQS limit. It is, as both the judge (at para 38) and the Court of Appeal (at para 84) held, primarily for the regulator to

judge the adequacy of the information which the applicant has supplied. Mr Wolfe, who argued the appeal with great learning and ability, did not challenge this proposition. But he said that the gap in the information about the environmental effects of PM_{10} was so manifest that the Agency could not reasonably have judged the application to be valid. For the reasons I have given, I do not accept this submission. The remarks of Sullivan J in *R (Blewett) v Derbyshire County* Council [2004] Env LR 29, at para 41 about environmental statements, with which I agree, seem to me equally applicable to applications under the regulations:

> "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…but they are likely to be few and far between."

39. In agreement with the judge and the Court of Appeal, I therefore think that the Agency was entitled to find that the application was valid.

40. Mr Wolfe's alternative submission on the Regulations was that even if the application was valid, the Agency was not entitled to take into account information which had been supplied by the company pursuant to an informal request. The fact that the Regulations gave the Agency power to request information formally, coupled with the duty to put the request and the answer on the register, gave rise to an implied obligation on the Agency not to accept significant information from the applicant otherwise than in the application or by formal request. Otherwise the publicity requirements of regulation 29 could be evaded by secret communications between the applicant and the Agency.

41. As I have said, I doubt the factual basis for the allegation that significant new information was supplied. But I also do not think that one can imply into the Regulations any restriction on the information which the Agency may obtain by informal inquiry. Plainly the application has to provide the statutory minimum of information. Recital 13 of the IPPC directive says that "applications for permits under this Directive should include minimum data". But this requirement does not seem to me inconsistent with the Agency being able to ask for more data if it finds it necessary or useful in determining the application. On the contrary, that seems to be implied in the use of the term "minimum data". In allowing formal requests for additional information under para 4 of Schedule 4, the Regulations assume that an application may satisfy the minimum requirements of the directive but the Agency may still consider that it needs more information to make a decision. That seems to me correct. And since the directive makes no distinction between formal and informal methods of obtaining supplementary information, it would follow that informal inquiries are not inconsistent with the directive. But the directive does not require the results of such inquiries to be published.

42. The publicity requirements of the Regulations already go further than the directive in two respects: first, as we have seen, in applying to existing installations, and secondly, in requiring publication of formal supplementary inquiries and the information thereby obtained. I see no reason to imply a further requirement which excludes informal communication between the applicant and the Agency. In a complicated application, one would expect the Agency officials to have discussions with the applicant about matters of concern. It would be extremely inhibiting if the Agency ran the risk that its decision would be vitiated because the applicant was held to have communicated some item of information which ought to have been the subject of a formal inquiry.

43. Thus in my opinion there was no breach of any express or implied term of the regulations. Everything that needed to be put on the register was duly published.

Common law duty of fairness

44. The third basis for the duty of consultation is that the Agency owed a duty of fairness at common law to disclose one or both of the AQMAU documents: see *Regina v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213. It was, it was said, a

procedural irregularity not to do so. This argument was accepted by Lindsay J (at paras 42-64) and the Court of Appeal (paras 86-106). There is no challenge to this finding in the Agency's printed case and I shall therefore not spend much time upon it, except to say briefly that I would not have come to the same conclusion. The IPPC directive specifies with some precision what information should be made available to the public. The regulations both give effect to these requirements and extend them. When the whole question of public involvement has been considered and dealt with in detail by the legislature, I do not think it is for the courts to impose a broader duty. Secondly, the AQMAU documents were part of the Agency's decision-making process, prepared after a lengthy period of public consultation. If the Agency has to disclose its internal working documents for further public consultation, there is no reason why the process should ever come to an end.

45. The reason why the Agency has not challenged the finding of procedural unfairness in relation to the AQMAU documents is that neither the judge nor the Court of Appeal regarded it as being, in all the circumstances, a sufficient reason for quashing the grant of the permit. The appellant says that they were not entitled to take this view. But I shall defer consideration of this question until I have dealt with Mr Wolfe's argument based on the EIA directive, which I mentioned briefly in paragraph 14.

The EIA directive 85/337 EEC of 27 June 1985

46. The EIA directive requires Member States to undertake an environmental impact assessment before giving consent to projects falling within the terms of Annex I or II. Projects in Annex I must always be assessed and those in Annex II must be assessed if they fall within certain criteria as to their environmental effect.

47. The definition of a project in article 1 of the directive is:

> "- the execution of construction works or of other installations or schemes,
>
> - other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources"

48. Annex I includes—

> "10. Waste disposal installations for the incineration or chemical treatment as defined in Annex IIA to Directive 75/442/EEC under heading D9 of non-hazardous waste with a capacity exceeding 100 tonnes per day."

49. Annex II includes—

> "11. (b) Installations for the disposal of waste (projects not included in Annex I);"

50. Mr Wolfe submitted that the adoption of tyres as a fuel fell within one or other of these paragraphs. The application was to burn 10 tonnes of tyres an hour, which indicated that the plant had a capacity exceeding 100 tonnes a day.

51. Like my noble and learned friend Lord Hope of Craighead, whose speech I have had the opportunity of reading in draft, I have very considerable doubt as to whether this can be right. The first indent of the definition of "project" — "the execution of construction works or of other installations or schemes" — appears to contemplate the creation of something new and not merely a change in the way existing works are operated. The German version — "die Errichtung von baulichen oder sonstigen Anlagen" — makes this even clearer. "Errichtung" means erection or construction and "Anlage" means an installation or plant. (The French version is "la réalisation de travaux de construction ou d'autres installations ou ouvrages ".)

52. The second indent — "other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources" – clearly applies to activities, such as mining or quarrying, or dragging for cockles (*Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (Case C- 127/02) [2004] ECR-7405) which alter or destroy the natural environment. But this concept cannot easily be applied to changing the fuel in an existing installation.

53. This distinction between the installation and the way it is used is in my opinion reinforced by two matters. First, the Annexes generally describe projects by reference to their purpose (in para 10 of Annex I, an installation *for* the incineration of waste) rather than the use to which they may from time to time be put. Secondly, the size of the installation is described by reference to its *capacity* (in para 10, over 100 tonnes a day) rather than the amount of waste actually incinerated. These features of the description both suggest that the relevant paragraphs are concerned with the creation of an installation of a particular size for a particular purpose rather than with the quantity of waste from time to time incinerated. No doubt the Lawford Road works had an enormous capacity in the sense that if the company had run it entirely on tyres, large quantities could have been incinerated. It would however be strange if the effect of that capacity, constructed for a different purpose, was that any use of waste as a fuel brought it within para 10 of Annex I.

54. Mr Wolfe referred to *Commission v Italy* (23 November 2006) Case C-486/04, in which a power station fuelled by combustible material derived from waste and biomass had been built at Massafra in Apulia without any assessment under the EIA directive. The Court of Justice had no difficulty in holding that the plant came within paragraph 10 of Annex 1. It seems to me entirely reasonable to describe the project as having been the construction both of an installation for the incineration of waste and an installation for the generation of electricity. It fell within both descriptions. But the present case does not involve the construction of anything and therefore in my opinion falls outside the directive.

55. Mr Wolfe says that it would be odd if one could build an installation which ran on, say, oil, and then change to using more than 100 tonnes a day of waste, without at either stage coming within paragraph 10 of Annex I. It should not be possible to achieve in two stages what could not lawfully be done in one. I do not however find this a startling anomaly. First, Annex I provides a rule of thumb which identifies in a rough and ready way those projects which must necessarily be assessed. It does not say that other projects or changes in existing projects may not have environmental effects which require assessment. In particular, the possibility of a change in the nature or use of an installation which makes an assessment necessary is covered by article 13 of Annex II:

> "13. - Any change or extension of projects listed in Annex I or Annex II, already authorized, executed or in the

process of being executed, which may have significant adverse effects on the environment;"

56. Secondly, the EIA is only one weapon in the European regulatory armoury for the protection of the environment. There are other directives dealing with, for example, pollution (the IPPC directive) and waste disposal (the Waste Incineration Directive 2000/76/EC). In considering whether there are gaps or anomalies, it is necessary to consider the system as a whole and not just the EIA directive. It is no coincidence that, as I shall later explain, the application under the regulations included all the information relevant to tyre burning which an environmental statement under the EIA would have required.

57. In this case, if the introduction of tyres as fuel has to be accommodated within the EIA directive at all, the heading under which it would most naturally fall is a "change" in a project within the meaning of para 13 of Annex II. But there is a finding of fact, which I have already mentioned, that the change would not have significant adverse effects on the environment. Thus it seems to me that to construe paragraph 10 of Annex I to require an environmental assessment in addition to an application under the Regulations would be not purposive but pedantic.

58. Nevertheless, although the point seems to me to be clear, I am not sufficiently confident that the Court of Justice would hold the same opinion to be able to say that the question is acte clair and I understand some of your Lordships to share this view. If therefore, a decision on the point was necessary for the determination of the appeal, I would propose a reference to the Court of Justice. But I do not think that it is necessary because, if the EIA directive applies, I have no doubt that its requirements were complied with. The PPC application in my opinion contained enough information about the proposal to burn tyres to satisfy the requirements of an environmental statement for the purposes of the EIA.

59. It must be remembered that if the decision to grant the permit comes within the EIA directive at all, it does so only because of the introduction of tyres as fuel. It is that which must be assumed to have been the "project" for the purposes of the directive. The directive (in paragraph 4 of Annex 4) required the applicant for consent to provide—

> "A description of the likely significant effects of the proposed project on the environment resulting from…the emission of pollutants…and a description by the developer of the forecasting methods used to assess the effects on the environment."

60. The use of tyre fuel could result in the emission of pollutants only from the main stack. So the criticisms which the appellant has made of the adequacy of the information about LLPS emissions are in this context irrelevant. I have already described the computer modelling exercise which was undertaken in relation to emissions from the stack. In my opinion this and the other information provided in the application amply satisfied the requirements of paragraph 4 of Annex 4. Mr Wolfe attempted to enlarge the applicant's obligations by reference to a footnote to paragraph 4 which says that the description of the effects of the project must include "cumulative" effects. But assuming that "cumulative" can mean the effects of the project together with the effect of anything else having an effect on the environment, precisely such a description was given by the modelling exercise, which described the contribution of the emissions from the main stack to the ambient air.

61. In *Commission of the European Communities v Federal Republic of Germany* (Case C-431/92) [1995] ECR I-2189 the German authorities gave consent to the construction of a power station without requiring the submission, *eo nomine*, of an environmental statement. (At that time the EIA directive had not yet been transposed into German law). Instead, the authorities required and published the information specified by the *Bundesimmissionsschutzgesetz* (Federal Pollution Protection Law). The Court of Justice found that as this information coincided with that required by the EIA directive and the public had been given the opportunity to make representations about it, the requirements of the directive had been satisfied. The same is in my opinion true of the application in this case. No doubt more information could have been provided, but the observations of Sullivan J in *R (Blewett) v Derbyshire County* Council [2004] Env LR 29 at para 41, which I have quoted in paragraph 38, show that this does not make the statement inadequate. I should add that this is not a case like *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 in which the alleged environmental statement had to be pieced together from a number of documents emanating from different sources. The application itself, emanating from the applicant as the EIA directive requires, was perfectly adequate.

Remedy for breach of common law duty of consultation

62. That brings me, finally, to the question of whether the judge and the Court of Appeal were right to refuse relief for the one procedural irregularity which they found established, namely the failure to publish the two AQMAU reports.

63. It is well settled that "the grant or refusal of the remedy sought by way of judicial review is, in the ultimate analysis, discretionary" (Lord Roskill in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 656.) But the discretion must be exercised judicially and in most cases in which a decision has been found to be flawed, it would not be a proper exercise of the discretion to refuse to quash it. So in *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603 it was conceded, and the House decided, that the Court of Appeal had been wrong to refuse to quash a planning permission granted without the impact assessment required by the EIA directive on the ground only that the outcome was bound to have been the same. The relevant domestic legislation provided that in such a case the grant of permission was to be treated as not within the powers of the Town and Country Planning Act 1990. Lord Bingham of Cornhill said (at p.608) that even in a domestic context, the discretion of the court to do other than quash the relevant order "where such excessive exercise of power is shown" is very narrow. The Treaty obligation to give effect to European law reinforces this conclusion. I made similar observations at p. 616. But I agree with the observation of Carnwath LJ in *Bown v Secretary of State for Transport, Local Government and the Regions* [2004] Env LR 509, 526, that the speeches in *Berkeley* need to be read in context. Both the nature of the flaw in the decision and the ground for exercise of the discretion have to be considered. In *Berkeley*, the flaw was the complete absence of an EIA and the sole ground for the exercise of the discretion was that the result was bound to have been the same.

64. In the present case, by contrast, there was no breach of European law and the only breach of domestic law was the failure to disclose information about the predicted effect of LLPS emissions of PM_{10} on the EQS. Since then, however, the actual emissions from the plant have been monitored. In August 2004 the company produced a report in accordance with condition 9.1.1.13 of its licence (see paragraph 24 above). Rugby Borough Council commissioned consultants, Faber Maunsell, to make a detailed assessment of particulate emissions around the works. They produced a report in 2005. Both reports confirmed that

the EQS was not being exceeded. Faber Maunsell recommended that the Council should not designate an air quality management area around the works for PM_{10}. The Council has accepted this advice. In November 2007 they published a draft Air Quality Action Plan which designates Rugby an Air Quality Management Area in respect of nitrogen dioxide (mainly caused by road traffic) but not in respect of PM_{10}. The Plan says "studies have shown no exceedances as a result of the Cemex plant or their operations of the PM_{10} National Air Quality Objectives."

65. Thus the relevance of the AQMAU reports has been completely overtaken by events. We no longer need to rely upon predictions. We know what has actually happened. As Auld LJ said in the Court of Appeal (at para. 126) "it would be pointless to quash the permit simply to enable the public to be consulted on out-of-date data." To this pointlessness must be added the waste of time and resources, both for the company and the Agency, of going through another process of application, consultation and decision. In my opinion, therefore, the judge and the Court of Appeal were right to exercise their discretion against quashing the permit. I would dismiss the appeal.

Postscript

66. On 23 January 2008 the hearing in this appeal was concluded. On Friday 4 April 2008, after the members of the Appellate Committee had prepared drafts of the speeches which they proposed to deliver, the solicitors to the parties were notified that judgment would be given on 9 April. In accordance with the practice of the House, copies of the draft speeches were provided in confidence with a request that counsel check them for "error and ambiguity". On Monday 7 April the appellant's solicitors notified the Judicial Office that they proposed to submit a memorandum pointing out errors in the judgments but that it could not be submitted until the following morning. Judgment therefore had to be postponed until 16 April. The memorandum when it arrived, consisted of 27 paragraphs of closely typed submissions referring to three directives which had not been mentioned in the appellant's lengthy submissions to the House and repeating other arguments which had already been considered. It contains nothing which causes me to wish to change the views expressed in my draft speech. In my opinion the submission of such a memorandum is an abuse of process of the procedure of the House. The purpose of the disclosure of the draft speeches to counsel is to obtain their help in correcting misprints, inadvertent errors of fact or ambiguities of expression. It is not to enable them to reargue the case.

GLOSSARY

Agency	The Environment Agency
AQMAU	Air Quality Modelling Assessment Unit (a unit within the Agency)
AQMAU 1	AQMAU report dated 21 November 2002.
AQMAU 2	AQMAU report dated 7 January 2003.
Air Quality Directive	Council Directive of 27 September 1996 on ambient air quality assessment and management (96/62/EC)
BAT	best available techniques (see para 6 and regulation 11(2))
EIA	environmental impact assessment (required by the EIA directive).
EIA directive	Council Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (85/337/EEC)
ELV	emission limit value (see para 4 and regulation 12(2) and (6))
EP	electrostatic precipitators (see para 13)
EQS	environmental quality standard (see para 4 and regulation 12(7))
IPPC directive	Council Directive of 24 September 1996 concerning integrated pollution prevention and control (96/61/EC)
LLPS	low level point sources (see para 11)
mg/m^3	milligrams per cubic metre

$\mu g/m^3$	micrograms (millionths of a gram) per cubic metre
PM_{10}	Technically, "particulate matter which passes through a size-selective inlet with a 50% efficiency cut-off at 10 μm [10 microns or millionths of a meter] aerodynamic diameter". Roughly speaking, particles of less than 10 μm diameter.
regulations	The Pollution Prevention and Control (England and Wales) Regulations 2000 SI 1973

LORD HOPE OF CRAIGHEAD

My Lords,

67. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. I agree with it, and for the reasons he gives I too would dismiss the appeal.

68. Like him, I very much doubt whether the proposal to use shredded tyres in partial substitution for the conventional fuels for the burning of which the plant had already been authorised brought the project within Annex I of the EIA Directive, with the consequence that an environmental impact assessment in accordance with articles 5 to 10 of the Directive was mandatory under article 4(1). The appellant submits that the effect of this proposal was to change the project from an installation for the manufacture of cement within the meaning of point 5(b) in Annex II to a waste disposal installation for the incineration of non-hazardous waste, and that as its capacity was to exceed 100 tonnes per day it falls within point 10 in Annex I. But it seems to me, reading the EIA as a whole, that the category into which this proposal falls is that of a change to a project listed in Annex II which has already been authorised within the meaning of point 13 in Annex II.

69. The definition of "project" in article 1 appears to contemplate the construction of something new, not a change to an installation or scheme which already exists. Changes to existing projects are dealt with

elsewhere in the Directive: see point 22 in Annex I and point 13 in Annex II. The words used to describe the various categories in Annex I and Annex II indicate that it is the purpose for which the installation to be used, not how it is to be fuelled, that determines the category that it falls into. The installation in this case, which has already been authorised, is one for the manufacture of cement. That remains its purpose, irrespective of which fuel is used to provide power for it. The fuel that is to be used is one of the characteristics of the production process, about which information must be given under article 5(1): see para 1 of Annex IV. But the purpose of the installation is not to burn fuel. Its purpose is the manufacture of cement. Point 22 of Annex I brings into Annex I any change or extension of projects of the kind listed in that Annex where such change or extension in itself meets the thresholds, if any, set out in that Annex. The capacity of an installation for the disposal of waste is an example of the kind of project whose place in the Annexes is determined by its capacity: compare point 11(b) of Annex II with point 10 of Annex I. But the means by which a project is fuelled is not listed as one of the thresholds by which it is to be determined whether a project which was constructed for a different purpose falls within Annex I or Annex II.

70. The scope of the Directive has been held to be very wide and its purpose very broad. So the concept of waste disposal in point 10 of Annex I must be given a meaning which fully satisfies the objective of the Directive. It has been held to cover all operations leading either to waste disposal, in the strict sense of the term, or to waste recovery where waste is treated in a way that enables it to serve a useful function: *Commission v Italy* (Case C-486/04) [2006] ECR I-11025. The dispute in that case had its origins in Italian legislation which allowed for the exemption of waste recovery operations from the application of the EIA Directive: Advocate General Colomer, para 28. The Court held that the incineration of waste to generate electricity was waste disposal, and that a project for the generation of electricity by the incineration of waste with a capacity exceeding 100 tonnes per day fell into the category of a waste disposal installation for the incineration of non-hazardous waste in point 10 of Annex I. Had it not been for its capacity, the project would have fallen into the category of an industrial installation for the disposal of waste of the kind not included in Annex I: see point 11(b) of Annex II.

71. But the project in that case was classified as an installation for waste disposal because its purpose was to generate electricity by the recovery of waste. It offers no assistance on the question whether a project which falls within another category at the outset must be taken to

have moved to a waste disposal category because of a change in the fuel that is used for its purposes. The rules by which the effect of any change to a project is to be determined are set out in points 22 of Annex I and point 13 of Annex II. It has not been suggested that point 22 of Annex I applies to this case. The conclusion that I would draw is that the case falls to be dealt with under point 13 of Annex II, with the result that the question whether the change of fuel required an EIA must depend on whether this might have significant adverse effects on the environment.

72. I appreciate that this reading of the Directive is not so plain as to enable it to be said that the matter was *acte clair*. But I agree with Lord Hoffmann that enough information was given in the PPC application to satisfy the requirements of an EIA within the meaning of article 3 of the Directive. On this view a preliminary ruling by the Court of Justice on this issue for the determination of the appeal is unnecessary.

73. I should like to add that I am in full agreement with the postscript to Lord Hoffmann's speech. The appellant's solicitors took the liberty of making further submissions after the hearing was concluded and while the case was awaiting judgment. They, and the comments on them by the other parties, were considered before the judgment was finalised. Direction 38.1 of the House of Lords Practice Directions applicable to Civil Appeals provides for this. The opportunity to submit further arguments is at an end when the parties are provided with copies of the draft speeches under direction 20.3. Counsel are expected to inform the Judicial Office of any apparent error or ambiguity in the speeches as soon as possible: direction 20.4. The memorandum which was submitted purported to be devoted to the correction of errors and ambiguities. But in substance it was an attempt to re-submit submissions already made and to make new submissions. It was an abuse of the procedure.

LORD WALKER OF GESTINGTHORPE

My Lords,

74. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. For the reasons he gives, with which I agree, I too would dismiss this appeal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

75. I have had the advantage of reading in draft the opinions of the other members of the Committee and, like them, I too would dismiss this appeal.

76. I add only that, immaterial though this is to the outcome of the appeal, I incline rather to the view of my noble and learned friend Lord Mance than to that of the other members of the Committee regarding both (a) whether a requirement exists under the Pollution Prevention and Control (England and Wales) Regulations 2000 SI 1973 for any significant (a word I would emphasise) information, even if only informally obtained by the Agency, to be published in the public register, and also (b) whether the change to tyre burning in the company's manufacturing operation constituted a project within paragraph 10 of Annex I rather than a change of project within paragraph 13 of Annex II of the Environmental Impact Directive 85/337/EEC.

LORD MANCE

My Lords,

77. I have had the advantage of reading in draft the opinions of my noble and learned friends, Lord Hoffmann and Lord Hope of Craighead. While I agree with them that this appeal should be dismissed, my reasoning differs in certain respects.

Integrated Pollution Prevention and Control Directive 96/61/EC and UK Pollution Prevention and Control (England and Wales) Regulations SI 2000/1973

78. For the reasons given by Lord Hoffmann in paragraphs 27 to 30 as well as the last two sentences of paragraph 41 of his opinion, I agree that the European Community's Directive 96/61/EC does not cover the present situation or assist the appellant. However, as Lord Hoffmann points out in paragraph 31, the United Kingdom Regulations SI 2000/1973 go further than the Directive, in not distinguishing between existing and new installations. Regulation 29 requires the Agency to maintain a public register containing the particulars described in paragraph 1 of Schedule 9. Paragraph 1 requires the register to contain "(a) all particulars of any application made to the regulator for a permit; (b) all particulars of any notice to the applicant by the regulator under paragraph 4 of Schedule 4 and paragraph 3 of Schedule 7 and of any information furnished in response to such a notice; ….". Under paragraph 1 of Schedule 4, an application for a permit must contain, inter alia, "the following information: ….. (g) the nature, quantities and sources of foreseeable emissions form the installation ….; (h) the proposed technology and other techniques for preventing or, where that is not practicable, reducing emissions from the installation ….". Under paragraph 4:

> "The regulator may, by notice to the applicant, require him to furnish such further information specified in the notice, within the period so specified, as the regulator may require for the purpose of determining the application and if the applicant fails to furnish the specified information within the period specified the application shall, if the regulator gives notice to the operator that it treats the failure as such, be deemed to have been withdrawn at the end of that period."

Schedule 7 paragraphs 1 and 3 are similar provisions relating to information and the regulator's power by notice to require further information relating to any application for variation of conditions.

79. I agree that the AQMAU documents were neither particulars of the application nor information obtained from the applicant company. But the Agency obtained from the company further information about low level emissions points, about the company's projections and other matters at a site visit and in writing, to enable AQMAU to undertake its work and to report as it did, and none of this information was made available to the public for comment. Lord Hoffmann considers that there was no obligation to make any such information available in the register for public scrutiny, because the Agency, rather than finding it necessary

to issue a written notice requiring it to be furnished, was able to obtain it informally.

80. There is nothing express in the Regulations to preclude the Agency obtaining information from an applicant informally. But if there were no obligation to publish information so obtained, it would create a remarkable lacuna in the intended regulatory scheme. I cannot accept that this is the case. The two paragraphs (Schedule 4 paragraph 4 and Schedule 7 paragraph 3) giving the Agency a power to serve a written notice requiring information must be read purposively. Both are linked with the stated consequence that, if such information is not provided, the Agency may treat the application as withdrawn. The service by the Agency of a formal written notice under either paragraph is likely to have been regarded as a last resort. In the ordinary run, the Agency would be likely to request and receive information informally, without having to wield a stick. But information relating to a subject-matter mentioned in paragraph 1(1)(g) or (h) of Schedule 9 is just as relevant to the public as any information contained in the original written application or furnished under the threat of the application being treated as withdrawn. The requirement under paragraph 1 of Schedule 9 is to publish "all particulars of any application", not confined to particulars in the application. In my opinion paragraph 1 can and should be read as covering information obtained informally from the company relating to any subject-matter mentioned in paragraph 1(1)(g) or (h) of Schedule 9. So read, the regulatory scheme is coherent. Otherwise, it makes little sense. The only alternative that would make sense is that it was intended that all information should be obtained formally by written notice under Schedule 4 paragraph 4 (or Schedule 7 paragraph 3). In that case, again paragraph 2 of Schedule 9 would require its publication.

81. On this basis there was a breach of the United Kingdom Regulations, although not of the Directive. However, it is not a breach in respect of which I consider that any remedy is appropriate as a matter of discretion. The considerations which Lord Hoffmann identifies as militating against any relief in respect of the failure, in breach of common law duty, to disclose the AQMAU reports for public consideration (paragraphs 64-65) apply with equal force to any failure to publish under Schedule 9 such information as was obtained from the company. Indeed, any assistance that the public might have obtained from the raw information supplied to the Agency for the purpose of AQMAU's preparation of its reports would have been considerably less than that which the reports themselves might have provided. Be that as it may, events have long overtaken the relevance of both, and it would be inappropriate to grant the relief sought.

Environmental Impact Directive 85/337/EEC

82. Both Lord Hoffmann and Lord Hope discuss the question whether the change to tyre burning constituted a project within Annex I, and both express considerable doubt whether it did, while accepting that, if the point were critical, it would not be acte clair and would have to be referred to the European Court of Justice. They go on to conclude that the point is not decisive, because the information supplied by the application satisfied the requirements of the Directive. On the last point (satisfaction of the Directive by the information actually supplied), I agree.

83. However, had it been relevant, I would have regarded it as probable that the change to tyre burning would have brought the project within Annex I paragraph 10 (rather than Annex II paragraph 13) of Directive 85/337/EEC. I say this for a combination of reasons. First, the language versions of Article 1 of the Directive that I have inspected appear to vary quite considerably. The German is the most sparse. But others with their various final references to "the execution of…..schemes" (English) or "the realisation of…..works" (French, Spanish, Dutch and Danish) are on their face more expansive. Further, both Annexes I and II list "projects" within article 1, and it seems clear from the nature of some of these projects that activities not involving construction works may be "projects": for example, in Annex II, intensive fish farming (paragraph 1(f)) , treatment of intermediate products and production of chemicals (paragraph 6(a)), manufacture or packing and canning of various products (paragraph 7) or storage of various items (paragraphs 3(c) and (e) and 11(e)).

84. Second, the plan to change to tyre burning did in any event involve not inconsiderable physical adaptation of the company's site and plant. This is described in part 4.1 of its detailed application to allow burning of tyres. They were to be discharged into a covered reception area, from which they were to be transferred by crane or mechanical conveyors into a storage area (holding up to 300 tons) fitted with smoke detectors linked with an alarm and with a water spray system. From there they were to be extracted mechanically and conveyed to a metering system inside the pre-heater tower and then fed to the combustion chamber via an airlock system. All this, including the vital combustion chamber was new.

85. Third, the European Court has said repeatedly that "the scope of Directive 85/337 is very wide and its purpose very broad": see its decisions in *Commission v. Germany* (Case C-431/92) [1995] ECR I-2189, *Commission v. Italy* (Case C-486/04) [2006] ECR I – 11025, paragraph 37 and *Paul Abraham v Région Wallonne* (Case C-2/07) (28 February 2008), paragraph 32 The first case concerned a thermal power station, which in its unmodified form fell within Annex II (no doubt as an "industrial installation for the production of electricity, steam and hot water, unless included in Annex I"). A new block was constructed with a heat output of 500 megawatts. The Court held that this involved a project within Annex I paragraph 2, viz a "thermal power station with a heat output of 300 megawatts or more", rather than a modification of the existing power station within the then equivalent of Annex II paragraph 13 (para 36 of the Court's judgment).

86. The second case involved "an installation for the production of electricity by the incineration of [waste] and biomass" in excess of 100 tonnes a day (judgment of the Court paragraphs 22, 38 and 45). The Court held that it came within Annex I paragraph 10 (paragraph 45). So the ultimate purpose of the installation as a power station did not preclude it also counting as a waste disposal plant within Annex I. This being so, I believe that it is probable that the European Court of Justice would hold that the modification of an existing power plant so that it was fuelled by burning waste in excess of 100 tonnes per day had constituted a project within Annex I paragraph 10. If the purpose of waste disposal is not subsumed in the ultimate aim of power generation when such a plant is constructed, it seems improbable that it should be ignored when it is separately introduced at a later stage in time. The Court's decision in *Commission v. Italy* contains a number of passages underlining a purposive approach to the application of Annex I. They focus on the "significant effects on the environment" which Annex I treats it as axiomatic that the burning of 100 tonnes or more of waste are likely to have. The purpose for which such burning takes place is in this context irrelevant. The same considerations apply to conversion of an existing installation to burning in excess of 100 tonnes of waste per day. I do not consider that the Court of Justice would be likely to regard paragraph 13 of Annex II as an adequate substitute for a uniform application of the stricter provisions of Annex I to what must, in terms of the likelihood of "significant effects on the environment" be regarded as identical situations.

87. In the third case the Court was concerned with modification of an existing airport already exceeding 2100m in runway length and so

already within Annex I, and held the modification to be within paragraph 12 (the equivalent at the relevant time of the present paragraph 13) of Annex II. The Court at paragraph 25 cited *Commission v Spain* (Case C-227/01); [2004] ECR I- 8253, where works to convert a regional railway (construction of which would itself have fallen within Annex II) into part of a long-distance route by doubling the track were held to constitute "Construction of….lines for long-distance railway traffic" within Annex I.

88. None of the cases to which I have referred in paragraphs 85 to 87 throws any doubt on the view which I have expressed in paragraph 83 – rather the contrary. However, as I have indicated in paragraph 82, my disagreement on this point is not critical. For the reasons I have given, I too would dismiss this appeal.