IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(THE CROWN OFFICE LIST)

CO/1530/99

Royal Courts of Justice
Strand
London WC2

Wednesday 21st June 2000

B e f o r e:

MR JUSTICE GIBBS

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REGINA

-v-

DURHAM COUNTY COUNCIL
EX PARTE LOWTHER

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(Computer-aided Transcript of the Stenograph Notes of
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LORD KINGSLAND QC and MR G JONES (instructed by RICHARD BUXTON ENVIRONMENTAL AND PUBLIC LAW, 40 CLARENDON ST, CAMBRIDGE CB1 1JX) appeared on behalf of the Applicant.

MR M FITZGERALD QC (MR R TAYLOR appeared for the judgment) (instructed by DURHAM COUNTY COUNCIL, COUNTY HALL, DURHAM) appeared on behalf of the First Respondents.

MR D OUSELEY QC and MR T HILL (instructed by TRAVERS SMITH BRAITHWAITE, LONDON EC1A ZAL) appeared on behalf of the Second Respondents.

J U D G M E N T
(As approved by the Court)

1. MR JUSTICE GIBBS: This is an application for judicial review of a decision of the Policy and Resources Committee (Planning Subcommittee) of the first respondents dated February 1999. The first respondents are a county council and are the relevant planning authority. The subcommittee resolved that the recommendation in a report to it be accepted. That report concerned the question of whether the use of a substance known as secondary liquid fuel, SLF, at Lafarge Redland's existing lineworks at Thrislington in Durham constituted a material change of use requiring planning permission. The report was a joint report of the Director of the Environment and the county secretary and solicitor. The recommendation in it was that there was no material change of use.

2. Relief was applied for, to this court, on three grounds and permission granted on the first ground only by Maurice Kay J. The first ground on which permission was granted contended that the first respondent erred in law in its approach to the question of whether the use of the installation for burning SLF constituted a material change of use for which planning permission was required.

3. It is necessary to go into the background in some detail in order to appreciate the significance of the issue to be resolved. The applicant is a local resident with an interest in the issues arising from the subcommittee's decision. The second respondents Lafarge Redland are joined because they operate the works in respect of which the possible change of use was being considered.

4. The site to which this application relates is a quarry owned by the second respondents at Thrislington. It is located about nine kilometres southeast of Durham and one kilometre to the west of the A1M road. The nearest centre of population is West Cornforth which is a kilometre to the northeast and there are some other villages a bit further away. The surrounding land is principally agricultural. The quarry site contains a large number of buildings and items of plant used both for lime processing and quarrying. It includes a substantial amount of machinery associated with the latter process, including crushers, wash plants, kilns etc.

5. The consent for quarrying at the site was first granted in 1947 and, subsequently, consents were granted on a number of occasions including for extensive quarrying to the east of the road on which the site was located. The first rotary kiln with ancillary plant was approved in April 1956, a second rotary kiln was approved in April 1960 and a third in November of 1976. The three kilns are generally referred to by the second respondents under the names T1, T2 and T3. These are relevant to the case, in particular, although as the site was developed there were a number of other planning permissions sought and granted.

6. The works at the site, the Thrislington works, opened in 1958 in order to quarry rock for the production of an end product known as dolomite or dolime. It is a large operation, some two million tons of this substance are quarried each year. Almost all of it is processed on site. It is broken from the quarry by means of drilling and blasting and it is quarried selectively in order to obtain the type of material more suitable to be formed into dolime. It is crushed and then conveyed to the kilns. It is treated in the kilns and the gas emissions created in the process, having been treated, are allowed to escape through a tall chimney some 70 feet high. The end product is used in a variety of specialist ways, apparently important in steel production and the refractory industry.

7. The production process requires intensive heat. The way in which the heat is applied to the raw limestone during the production process affects the reactivity of the end product. It is desirable to apply heat in a very controlled manner at the correct temperature and for the correct period to ensure the conversion of the limestone into the product known as dolime.

8. The dolime is produced from two of the three kilns which I have mentioned; kiln T2, having been decommissioned in 1998 for various technical reasons. There are also good reasons why, from the second respondent's point of view, kiln T3 is used in preference to kiln T1.

9. In the relevant part of the process, namely the use of fuel in the kiln, the stone is fed, having gone through a preheating process, into the upper end of the kiln, which is slightly inclined and which rotates around its long axis. The fuel is burnt at the lower end in a flame, which has to be extremely hot, at least 1800 degrees centigrade and usually in excess of 2000 degrees. The rotation of the kiln moves the stone progressively towards the lower end of it, which is hotter, and it takes some three and a half to five hours to go through the kiln system, in the course of which the material reaches a temperature of 1400 to 1550 centigrade.

10. The exhaust gases from the system are processed and then the gas is ultimately, as I have stated, discharged through the chimney stack. There are monitors in position checking the concentrations of dust, nitrate oxides and the temperature within the cleaned gases. The purpose of this is to enable the kiln operator to take any necessary action to adjust the system so that it is working properly.

11. As to the fuel used in those processes, petroleum coke, known for short as pep coke, has been used as the only fuel in T1 since 1987 and was used as the only fuel in the decommissioned kiln T2. Pep coke is the by-product of a crude oil process and was, as a by-product, unwanted until a market developed for its use as fuel.

12. The relevant kiln in this case is T3, where SLF is used. The fuel used most of the time in T3 is a mixture of SLF and pep coke. The kiln is authorised by the Environment Agency to use SLF as a support fuel. It is used as up to 40 per cent of the contribution to the heating process, however, it is more usually used at between 20 to 25 per cent thermal substitution; the reason is that normally there is not enough SLF available to run at 40 per cent on a continuous basis. If no SLF is available at all pep coke is used as the sole fuel. It should be said immediately, because it is important in the case, that SLF consists of blended constituent parts. Each of those constituent parts consists entirely of waste produced from solvents.

13. From the second respondent's point of view the qualities of SLF make it particularly useful for their burning process in the kiln. The reason is that fuels derived from solvents burn with a shorter and sharper flame and are exceedingly effective as a means of heat transfer. In trials, and in use, the operational advantages of blending SLF with pep coke as a fuel have been convincingly demonstrated. Amongst the advantages are that such a blend is more amenable to computer control and the flow of fuel into the kiln can be more accurately organised; this ensures greater consistency of product. Because of the volatility of the material it burns more quickly and consistently and, among other things, apart from enhancing the product, lengthens the life of the kiln. However, as already indicated, it is used only as a constituent part of the mixture, up to 40 per cent, and indeed can only effectively be put to use in conjunction with pep coke.

14. The fuel is transported to the quarry site by road in tankers. The sole supplier of the fuel is a company called Solrec which specialises in solvent recovery and is based in Morecambe. Upon arrival at the site the SLF is pumped into one of four storage tanks which have been purpose built. They are located close to the relevant kiln, T3. Transfer of fuel from the storage tank to the kiln is effected through pipes, each tank having a separate pipe leading directly to the kiln supply pump.

15. The history of planning and other permissions in relation to the specific use of SLF is as follows: on 13th October 1993 an application for planning permission was made for the erection of solvent fuel storage tanks and planning permission was granted in December of 1993. In the course of 1993, prior to that, there had, in conjunction with the Environment Agency or its predecessor, been testing of the use of SLF in the kiln.

16. The nature of the substance to be stored in the tanks was disclosed in the planning application; in other words, it was disclosed that the substance was derived from the by-products of solvents. Traffic considerations and the nature and quality of the emissions produced by the burning of the solvents in the second respondent's kiln were plainly in the mind of the first respondent, as

planning authority, as was the visual effect of the tanks; this is apparent from the documents, including the report of the Director of the Environment dated 9th November 1993. The views taken by the director included the following: that traffic consequences were neutral; that there was some visual impact from the storage tanks but that that was not significant and could be kept to a minimum; and that the effect of the use of the fuel was to reduce emissions from the kiln. At the same time it is right to record that no particular attention was paid to the significance of the substances being either described as waste or as hazardous; indeed I do not think that the word waste was used in the documentation, or if it was no particular stress was placed on it by the first respondents. Equally, as I have indicated, there is no suggestion that the nature and quality of the substance was concealed from the first respondents, on the contrary, the second respondents were open about the source of the substitute fuel. In parallel with the planning process went the process of authorisation by the Environment Agency, (previously the HMIP) to which I have already briefly referred.

17. The burning of SLF at Thrislington is authorised by the Environment Agency. The second respondents originally applied for authorisation to operate a lime-making process in February 1993, as required by section 6 of the Environmental Protection Act 1990. Discussions were going on between the HMIP before and subsequent to the submission of the application and a number of trials took place between 1993 and 1996. On 2nd February 1996 the second respondents made a formal application to vary the authorisation, in relation to the burning of fuel pursuant to section 11 of the Environmental Protection Act 1990. The application contained full details of the solvent fuel trials together with other technical details. It was advertised in the Northern Echo on 26th February 1996 and the documents placed on the public register. According to the evidence of Mr Carlill, from whose detailed statement much of the history is taken, there were other steps also taken to ensure that the public was consulted. Again, it is right to say that whilst the details of the fuel, the subject of the authorisation, were stated, its significance as waste or hazardous waste, was either not mentioned or, if mentioned, not stressed.

18. The application was granted and the authorisation thereby varied on 18th July 1996. Since then the Environment Agency have carried out a four-year review in relation to the site, in accordance with the requirements of the 1990 Act, and have issued a further variation notice dated 25th June 1999. The net effect of the history of those authorisations is that operations at Thrislington have been carried out at all times in consultation with, and with the approval of, the Environment Agency.

19. However, the matter is not as simple as that. First, a dissatisfied local resident, a Mr Gibson,

became concerned at the effect of the variation granted on the local community and particularly, apparently, upon his allotments. He, therefore, applied for leave for a judicial review of the variation decision.

20. In May 1998, in a lengthy and considered judgment which is before this court, Harrison J refused leave. He noted in his judgment the evidence that the Environment Agency had taken into account the relevant objectives under the Waste Management Licencing Regulations 1994; these included noise nuisance, odours, visible amenity and traffic. Some, if not most, of these objectives overlapped though did not coincide with the areas that a planning authority might have considered. The agency had concluded that the variation did not give rise to danger to human health; it had concluded that the variation would result in a net environmental gain. The judge, upon the application for judicial review, did not accept that there were any grounds to challenge the agency's decision in law.

21. However, even as these developments were taking place there is evidence that local disquiet was being aroused for a somewhat different reason and the source of this evidence is the applicant's witness statement. The applicant, Mrs Lowther, has lived in Cornforth for some 30 years and the Thrislington works have been there as long as she can remember. Her evidence is that until the works started burning SLF, she thinks about '94, they were regarded as fairly harmless apart from the kind of dust and dirt emissions to be expected from quarrying. She says that the current problems, of which she makes complaint, began about seven years ago when there was a spillage from a tanker delivering SLF to the works. If one is pedantic about it, the use of SLF appears to have started in about February of 1993; however, it is perfectly clear that the applicant was not being precise about it and there is no dispute that the spillage was of SLF.

22. She describes how solvent leaked from the tanker on or near a children's recreation ground. The spillage was quite large and the effect of it so serious that one can, on occasion, still detect the smell even now. She herself developed asthma at about the time of the spillage and had not suffered from that complaint before. She believes, though there is no real evidence of this, that others were similarly afflicted. She points out that the consequences of the unfortunate and serious incident to which I have referred, is that the village quite soon obtained the by-pass which it had been asking for for some years and that the second respondents paid for a new recreation ground, that being a more practical alternative than endeavouring to clean up the soil at the original site. There is no doubt that the applicant is recording here genuine experiences which she believes to be connected with the introduction of SLF.

23. The next matter to mention is a meeting of the first respondents development control subcommittee on 16th July 1996. On that date the subcommittee considered their report concerning the use of SLF at Thrislington and another works. It considered the advice of specialist planning counsel, Mr Robert McCracken. Mr McCracken had advised the first respondents that the fact that the burning of waste and the production of cement formed part of a single process did not prevent the burning of waste from constituting a separate activity. The committee resolved to accept Mr McCracken's advice that the substitution of SLF for pep coke constituted a material change of use. The basis of Mr McCracken's advice was, at least in part, his interpretation of the decision in the case of West Bowers Farm Products v Essex County Council [1985] Property and Compensation Reports, 368. In consequence of their decision the first respondents asked the second respondents to make the appropriate planning application. As is pointed out by Lord Kingsland, on behalf of the applicant, by virtue of Directive 85/337/EEC and the corresponding implementing regulations, an environmental assessment is required before development consent is granted for projects which are likely to have significant affect on the environment.

24. Meanwhile Redland the second respondents disputed the need for planning permission to use SLF. They maintained that no material change of use had taken place. A party cannot be compelled to seek planning permission and, therefore, in the light of the second respondents declining to make application, the first respondents had the option either to reconsider their position or to take enforcement action. The first respondents took no enforcement action; but what they did do was to take further advice, on this occasion from leading planning counsel Mr Fitzgerald, who has appeared in these proceedings as advocate for the first respondents. Following Mr Fitzgerald's advice the subcommittee decided to reverse its previous opinion and decision in requiring, or requesting, that planning applications be submitted.

25. Mr Fitzgerald's opinion is summarised in the report which is challenged in these proceedings at paragraph 13:

> "We have consulted Mr Michael Fitzgerald QC, a leading member of the planning bar, who advises as follows.
>
> Following the European Waste Framework Directive and United Kingdom Government Guidance, Mr Fitzgerald distinguishes between disposal and recovery and concludes that the use of SLF cannot be both. Mr Fitzgerald takes the view that the use of SLF - because of its high calorific value - is energy recovery. The recovery process is so entirely part of the manufacture of cement for lime that it would be wrong to categorise it as a separate use; there is no waste disposal use in addition to the permitted use.
>
> In the West Bowers case there were two separate activities, separated both in time

> and in their nature. At Thrislington (and putatively at Eastgate) [I interpose to say that Eastgate is a quite separate site with which we are not concerned], there is no separation in time between the burning of the SLF and the use of its heat in the production process. Because it would be categorised as energy recovery rather than disposal, then the nature of the activity is the use of fuel, which is not different from using coal or petroleum coke.
>
> Mr Fitzgerald, in considering the West Bowers case and the case of East Barnet UDC v British Transport Commission (1961) attaches importance to the objective purpose of the process. The use of SLF does not make any difference to the creation of the product. The objective purpose of the process therefore remains the same.
>
> Mr Fitzgerald draws support from the judgment of Mr Justice Harrison and advises in clear terms that the use of SLF at Thrislington (and its prospective use at Eastgate) does not and would not constitute a material change of use."

26. That is an important extract from the report which preceded the challenged decision in the case.

27. I now come to certain relevant legal provisions. A number of these concern the issue of what constitutes waste. A number of such provisions, in the form of European directives, United Kingdom legislation, both by way of statute and statutory instruments and case law have been referred to, as well as government guidance. In part these provisions have been analysed with a view to defining what is meant by the word "waste". Several potentially relevant issues arise. There is some common ground between the parties. The parties are at one in agreeing that all the component parts of SLF consist of waste. It is submitted by the second respondents that once those components are blended in their final form, blended by someone other than the second respondents, so as to be suitable for use as a specialist fuel for their kilns, that blend should be regarded as fuel and not regarded as waste. The applicant, on the contrary, says that waste does not cease to be waste until it is actually burned in the kiln.

28. On the latter interpretation the question then arises as to how one should define the purpose for which the substance is then being used. Is it being used as a fuel for the second respondents' kilns or is it being burned as waste? Or, indeed, is the proper way to describe the situation that there is a dual use? A separate but connected issue arises as to whether such a use, that is burning as waste, should properly be regard as waste disposal or waste or energy recovery.

29. As regards the definition of waste, and for how long it should be regarded as such in the course of reprocessing and recovery, there is some law to which I have been referred by Lord Kingsland. Waste is defined in article 1 of the European Communities Waste Framework Directive, (Directive 75/422/EEC, as amended by Directive 91/156/EEC) as I quote:

> "...any substance or object in the categories set out in Annex 1 which the holder discards or intends or is required to discard."

30. One of the categories mentioned is contaminated solvents such as those which form the constituent parts of SLF. The word "holder" is defined as including the producer of the waste or anyone in possession of it and the "producer" is anyone "whose activities produce waste", i.e. the original producer or anyone who,

> "carries out reprocessing, mixing or other operations resulting in a change of the nature or composition of the waste."

31. This definition has been incorporated in paragraph 74 subparagraphs 1 to 3 of schedule 18 of the Environment Act 1985 and section 9(2) of the Waste Management Licencing Regulations 1994, SI1056. Many of the substances referred to, if they are wastes, are also hazardous wastes as defined by the relevant EEC directives. It is, I think, uncontroversial that, at least in its original component form as waste, SLF is included in the definition of hazardous waste.

32. The definition of waste is the subject of detailed analysis in the Department of Environment circular, but, for reasons pointed out by Lord Kingsland, that circular has no special status in European Union law and the Department of the Environment accepts that the ultimate interpretation would depend on the opinion of the European Court; but there is apparently no opinion of the European Court sufficiently in point to assist this court.

33. The circular further provides as follows in paragraph 2.46:

34. "a substance or object which meets the criteria for definition as waste at the point of its original production should be regarded as waste until it is recovered...within the meaning of the Directive".

35. This, as Lord Kingsland points out, raises the question of when a substance or object which is waste and is not fit for use in its present form may cease to be waste because it has been recovered within the meaning of the directive. He attaches importance, in particular, to the proposition that once a substance or object is classified as waste, recovery within the meaning of the directive, can only mean recovery by one of the methods laid down by Annex IIB of the directive. The reason for this is that article 1, paragraph (f), of the directive states, and I quote:

36. "For the purposes of this Directive "recovery" shall mean any of the operations provided for in Annex IIB."

37. Annex IIB contains a number of operations in a list. That has been the subject of some

discussion in the course of argument, and certain of it initiated by me. I do not find it relevant for the purposes of this judgment to rehearse that discussion or indeed to draw any conclusions from it, but it is clear that the list of operations does not include blending.

38. Lord Kingsland attaches particular importance also to article 1 paragraph (b) of the directive, which I have already quoted, that includes in its definition of the producer of waste:

> "anyone who carries out reprocessing, mixing or other operations resulting in a change in the nature of composition of waste."

39. So those engaged in the activity of blending waste products, which does not amount to its regeneration, are, says Lord Kingsland, positively identified as producers of waste. These wide definitions of waste are relied on by the applicant in particular.

40. Coming to the applicant's submissions, Lord Kingsland relies on those provisions as showing that when the substance arrives on site it is waste, indeed hazardous waste, and remains so until the moment that it is consumed by burning. He says that at no point does the officer's joint report make the subcommittee aware of that situation and, indeed, he maintains that it suggests the contrary.

41. Now the matters of law to which I have just referred are not unimportant. I have rehearsed them in detail because they are particularly stressed on the applicant's behalf. They reflect, it would seem to me, a developing and understandable concern, both in European and domestic law, regarding the regulation of waste, especially dangerous waste. However, the interpretation of the relevant provisions is not, in my judgment, a central part of the present dispute and, for reasons which will appear, I consider that no definite ruling is required upon them here. The significance of the provisions is to provide the context for the central issue in the case, that is: was the subcommittee of the first respondents misled to a significant extend by the joint report so as to invalidate their decision, based, as it was, on the recommendation in that report?

42. But it should be noted that the subcommittee, in fact, proceeded on the basis that SLF was classified as waste even though put to use as a fuel. Thus it took a view of the law which is not inconsistent with the applicant's case, as forcefully put in this regard by Lord Kingsland. Indeed, it could be said that it took the view, on this point, most favourable to the applicants, so far as the definition of waste and its application to this case is concerned.

43. In addition to a detailed written argument Lord Kingsland helpfully summarised the totality of his submissions with four brief propositions: (1) that paragraph 13 of the joint report is defective

in law; (2) that paragraph 13 is the fundamental reason why the first respondents decided to change their minds; (3) by virtue of the misdirection in law the decision of the first respondents is fatally flawed and, therefore, could not be saved by the exercise of discretion; (4) alternatively, in any event, any discretion that is open to the court should be exercised in favour of the applicant.

44. Going into more detail on each of those heads of submission, Lord Kingsland submits that the distinction made by Mr Fitzgerald between waste disposal and energy recovery is not relevant to the subcommittee's decision and should not have been taken into consideration. The disputed section of the report reads:

> "Mr Fitzgerald distinguishes between disposal and recovery and concludes that the use of SLF cannot be both. Mr Fitzgerald takes the view that the use of SLF - because of its high calorific value - is energy recovery."

45. And in a later extract:

> "Because it would be categorized as energy recovery rather than disposal, then the nature of the activity is the use of fuel, which is not different from using coal or coke."

46. Mr Fitzgerald relies on the fact that irrespective of whether the burning of SLF is classified as disposal or recovery, under the European Directive it remains hazardous waste up to the moment that it is burned, that the atmospheric emissions, as a result of the burning, are in either case identical, that the land use consequences are the same whether the hazardous waste is categorised as forming a waste disposal or waste recovery activity. A separate point is a submission that it was wrong in law for the report to say, on the basis of Mr Fitzgerald's opinion,

> "the recovery process is so entirely part of the manufacture of cement for lime that it would be wrong to characterize it as a separate use;..."

47. It is wrong, says Lord Kingsland, to say that because the process of product manufacturing and waste burning are indivisible they cannot amount to separate land uses. He submits that that is the approach prohibited in the West Bowers case. He reminds the court that in that case the facts were that a reservoir was dug; in the course of digging a quantity of sand and gravel was extracted to enable the reservoir to be constructed and no further material than was necessary for that purpose was extracted. He cites the leading judgment from Nourse LJ (at p.374), I quote:

> "Mr Schiemann, for the appellants, submitted that the impossibility of constructing the reservoir without extracting the gravel demonstrated that the latter activity was an integral part of the former. There was one indivisible process. Therefore, permission for the former was permission for the latter. I accept the premise of that submission but reject the conclusion. The planning legislation is not impressed by

> the indivisibility of single processes. It cares only for their effects. A single process may for planning purposes amount to two activities. Whether it does so or not is a question of fact and degree. If it involves two activities, each of substance, so that one is not merely ancillary to the other, then both require permission."

48. Mr Fitzgerald, it is accepted, referred to the West Bowers decision but, Lord Kingsland submits, directed the first respondents officers to the wrong conclusion arising from it. Lord Kingsland also criticises the report for citing Mr Fitzgerald's view about the objective purpose of the process. Paragraph 13, as already quoted, refers to Mr Fitzgerald saying that importance should be attached to the objective purposes of the process which remain the same. This is criticised on the grounds that whether the object of the process remains the same or not is not the fundamental issue. The crucial question is whether or not as a consequence of the introduction of hazardous waste on to the land, there are two land use activities instead of one. The Master of the Rolls, Sir John Donaldson, is quoted in connection with this argument, I quote (at p.378)

> "purpose is undoubtedly a factor to be taken into account. Scale, however, is also relevant... It is a question of fact and degree in each case."

49. And the criticism of Mr Fitzgerald is that he attached too great an importance to the objective purpose. Finally, it was submitted that it was both wrong and misleading for the joint report in paragraph 13 to accept support from any comment Harrison J might have made on material change of use since that was not the issue before him.

50. On the second argument put forward by Lord Kingsland he makes the points which are undoubtedly important to the applicant's case in the following ways: (A) that the joint report had as its sole object to communicate legal advice on the issue dealt with by Mr Fitzgerald. He said there was no suggestion that there was any other factor susceptible to change from the earlier decision of the subcommittee on the same topic; (B) that the subcommittee was plainly dependent on the report and were not in a position to form their own legal view; and (C) having looked at the matter in 1996 there was no other change to the situation except the application of the law to the facts. In essence, the submission is that the subcommittee were told to do more than simply take account of Mr Fitzgerald's advice; in effect, they were directed towards a decision; and that is why paragraphs 13 and the conclusion paragraph 14 are said to be so fundamental to the decision.

51. Criticism is made that the committee were not reminded that the decision was a question of fact and degree for them, but by implication it was put to them that it was exclusively based on Mr Fitzgerald's advice. Support is gained for that by the use of the words: "it would be wrong to categorise it (the process in question) as a separate use". It is said that that must mean "wrong in law". If, in summary, the subcommittee are being told that they cannot lawfully come to a view

other than that of Mr Fitzgerald then that is plainly flawed reasoning, which invalidates the decision.

52. That leads straight to argument (3), that the flaw is a fundamental error on the face of the joint report and it would be, under those circumstances, quite wrong even to consider exercising the court's discretion in this matter not to grant relief.

53. Finally, it is argued that if it does come to a matter of discretion then it is plainly right to exercise such discretion in favour of the applicants, the principal reason for that is that the first respondents had earlier received conflicting advice from that on which they relied on in the subsequent occasion and that it would be right under those circumstances, in any event, quite apart from any other factors, for the planning process to be invoked again by quashing the decision.

54. The response of the first respondents, through Mr Fitzgerald, can, I hope, be relatively briefly summarised without doing it an injustice. Reliance is placed on the judgment of Judge LJ in the unreported decision of the Court of Appeal in Oxton Farms v Selby District Council and Persimmon Homes (Yorkshire) Ltd (18th April 1997) QBCOF 95/0553/D;97-0612. I shall come to the relevant extract in the case later in the judgment, but the message which Mr Fitzgerald derives from it is that the correct test to apply is this: the onus is upon the applicant to demonstrate that the overall effect of the joint report significantly misled the committee about material matters which were thereafter left uncorrected at the subcommittee's meeting.

55. The submission on behalf of the first respondent is that the applicant has failed to meet that test. Mr Fitzgerald deals with the criticisms made of the joint report, in particular, that the report is said, by the applicant, to fail to record that SLF consists of waste until burnt and that it incorrectly analyses the West Bowers case. Mr Fitzgerald points out that in the very first paragraph of the joint report the question is posed in this way:

> "The question at issue is: does the use of SLF, considered as waste, constitute a material change of use of the works?"

56. Paragraph 3 points out that,

> "Although SLF is used as a fuel, it is still classified as waste by the Environment Agency for the purposes of pollution control."

57. He submits, and this is a point to which I have already referred, that SLF as waste was a matter before the subcommittee, and that in that regard there is no evidence that the first respondents were significantly misled, indeed quite the contrary.

58. Mr Fitzgerald accepts, indeed asserts, that the question of whether the activity being considered at Thrislington was a single process or two separate activities is a matter of fact and degree. He submits that the statement attributed to him, and relied upon by the applicant as being directive or mandatory upon the first respondents, is no more than an expression of his view, looking at the situation as a matter of fact and degree, that the activity was a single process.

59. He further argues that in the light of the history of this matter and the detailed facts his view was, in fact, correct. He submits that it is not right to say that the first respondents failed to take into account the appropriate test in making its decision. He submits that members of such a committee can be taken to be aware of the need to consider whether or not a material change of use had arisen as a matter of fact and degree. He says there is no indication before this court that the members of the subcommittee did not consider the matter on that basis. He points to the representations recorded from the second respondents at paragraph 11.2 of the joint report, representations to the effect that it was a question of fact and degree whether a change of use had occurred and if so whether it was material. He submits that the applicants would need to show that the first respondents had failed to take that representation into account in order to succeed in this application today, and that the applicant has failed to do so. In summary, it is submitted that the report cannot be described as seriously misleading and there is nothing to indicate that the first respondents addressed the matter on anything other than the correct basis.

60. He goes on to deal with the suggestion that the first respondents failed to consider the land use implications of the change of fuel, in particular implications concerning transport and handling of the waste and storage. In that regard he points out that those matters are already covered by the planning permission dated in 1993, and the matters raised are of either no or, at their highest, limited relevance to a decision relating to the supposed change of use at issue in this case.

61. As to the objective purpose test, Mr Fitzgerald submits as follows: that there is no suggestion in the officer's report that the objective purpose test of a land use operation was conclusive of its development status. The expression used was Mr Fitzgerald "attaches importance" to the objective purpose of the process; he submits that that is a perfectly tenable and, indeed, correct proposition to quote, and in that respect also the officer's report did not significantly mislead.

62. He submits that there was nothing wrong with his approach, as reported to the subcommittee, to the effect that support could be drawn from the judgment of Harrison J. Again, he points out that there is no suggestion of more than support being drawn; it is not suggested, for

example, that Harrison J was making any observations bearing directly upon, still less conclusive of, the planning situation. As a whole, it is submitted that the officer's report was not significantly misleading in that or in any other respect; and if it were necessary to come to the question of discretion, Mr Fitzgerald, among other matters, particularly relies on the absence of any evidence of factors such as transport, handling, storage or, indeed, any other matter which might possibly give rise to a realistic chance that any different decision would be made if the matter was quashed and sent back for reconsideration.

63. The second respondents support the first respondent's submission on the question of supposed illegality. They too contend that the subcommittee and the first respondent approached the matter lawfully and stress the fact that so far as the substance, SLF, being regarded as waste the matter was approached by the first respondents in the manner least favourable to the second respondents. Mr Ouseley recites the matters in paragraph 13 of the officer's report concerning the use of SLF, the nature of the recovery process and the effect on the creation of the product. He says that they are clearly conclusions of fact and degree, and were properly taken into consideration.

64. He submits that the first respondents, when one looks objectively at the facts, reached the only possible conclusion that they could have reached. He says that choosing the planning unit most favourable to the applicant's case, that is, the site as a whole but only the third kiln, the change of fuels cannot be said to be a material change of use even of that kiln. The burning of fuel is not ancillary to the primary use of the kiln; it is an essential use of it, and that if the activity on site is the same, the change merely in the source of supply of the fuel used on the land is not relevant to its use as a planning unit.

65. He submits that upon a close analysis of the West Bowers case it is proper to draw a distinction between its facts and the facts of this case. He makes the submission that SLF is not waste, and if that is right there clearly cannot be any separate use; but that even if it is waste it is still possible and proper to find here, as the first respondents found, that the use of SLF as a matter of fact and degree does not amount to a separate use, or, alternatively, that any waste disposal use is ancillary to the use already permitted. If it comes to matters of discretion, it was submitted by Mr Ouseley, that the planning issues which are potentially relevant to this case have been considered in detail when permission was granted for the use of the kilns and the construction and use of storage tanks for SLF. The environmental issues have already been considered by the Environment Agency and he cites the government guidance given in paragraph 1.3 of PPG 23 which states:

> "The planning system should not be operated so as to duplicate controls which are the statutory responsibility of other bodies,"

and paragraph 1.34 of the same guidance states:

> "Planning authorities...should not seek to substitute their own judgment on pollution control issues for that of the bodies with the relevant expertise and the statutory responsibility for that control."

66. He submits that it is highly improbable that the planning authority would reach a different view even if it was returned to them on the basis of a defect in law, and he puts it bluntly in his oral submissions, even if there are grounds to quash this decision, then to do so would be absolutely pointless. He says that on the facts it would result in a situation more unfavourable to the locality in planning terms; I shall return to that in the course of the findings, to which I now come.

67. Amongst the many and detailed points cogently argued by all three counsel, a consensus has emerged as to the central issue in the case, not the only issue but certainly the central one: was the approach adopted by the authors of the joint report defective in law? Was it defective so as to invalidate the decision of the subcommittee, especially as regards paragraph 13 and 14? Those matters, of course, coincide with the ground on which application for leave was granted. The law is that there may be circumstances in which the decision of the planning committee may be quashed on such a basis. I consider that a very useful guide to the circumstances under which that might occur is given by Judge LJ in the Oxton Farms case to which I have already referred, and the following quotation from his judgment in that case is relevant: (transcript 22C- 23A)

> "the report by a planning officer to his committee is not and is not intended to provide a learned disquisition of relevant legal principles or to repeat each and every detail of the relevant facts to members of the committee who are responsible for the decision and who are entitled to use their local knowledge to reach it. The report is therefore not susceptible to textual analysis appropriate to the construction of statute or the directions provided by a judge when summing a case up to the jury.
>
> From time to time there will no doubt be cases when judicial review is granted on the basis of what is or is not contained in the planning officer's report. This reflects no more than the court's conclusion in the particular circumstances of the case before it. In my judgment an application for judicial review based on criticisms of the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken."

68. Counsel are agreed that this represents a correct statement of the law but not about its application to this case.

69. I take into consideration that amongst the contents of the joint report was advice from counsel. I further take into consideration that the report was not simply from the planning officer

but also from the county solicitor. Nevertheless, in my judgment there was no need for the joint report to include a reminder to the subcommittee that planning matters, including whether or not there was a change of use which required planning permission, were a matter of fact and degree for them. That point was actually mentioned in the report, as I have already said, paragraph 11.2. It was mentioned as part of representations put forward by the second respondents and it was uncontradicted. However, in my judgment there was no need for it to have been endorsed by the authors of the report nor was there a need for them to remind the subcommittee of it specifically. The subcommittee, in my judgment, can be taken to have been well aware of the principle as applying to planning matters which regularly came before them. To extend, I hope properly, Judge LJ's analogy, the subcommittee were not in the position of a jury needing in each case to be reminded, for example, that they were the judges of fact and that questions of fact and degree were for them.

70. It is only if and in so far as the applicant shows that their function of exercising their planning judgment on the issue before them was effectively removed as a result of what was said in the report, that the applicant's central argument succeeds. There is no doubt that Mr Fitzgerald's advice, as summarised in the joint report, was clear. There is no doubt that it would have had a strong persuasive effect on the subcommittee. But unless it can be interpreted as a direction to the committee in law that they could not properly make a decision contrary to his view then it cannot, in my view, be said that the committee was having the exercise of its judgment removed from it.

71. The high point of an applicant's argument is the use in the report of the words: "It would be wrong to characterize it as a separate use.", "On the basis of the advice given by Mr Fitzgerald we would conclude etc...". Further, the emphasis placed on the advice is accentuated by its being reported in the section immediately before the recommendation.

72. However, it is important to look at the context and the content of the report as a whole. Conducting that exercise I do not find that the effect of Mr Fitzgerald's views, as reported, have the effect for which the applicant contends. The report, in my judgment, is not simply a token dissertation of the history, followed by something akin to a direction in law to decide the matter in a certain way.

73. The contrary view to that of Mr Fitzgerald was plainly put for the committee's consideration in an earlier part of the report. At paragraph 5, under the heading "Previous consideration by the committee" the following appears:

> "The Development Control Sub-Committee on 16 July 1996 considered a report

about the use of SLF and the need for planning permission. The report was based upon advice received from Counsel, Mr Robert McCracken. He advised that the use of SLF was effectively the disposal of it. That was in his view a materially different use from the permitted uses of the mere production of cement or Dolomet or Dolime. The fact that it occurred as an integral part of what the operators regarded as a single process did not prevent it from constituting for planning purposes a separate activity. Mr McCracken relied upon the case of West Bowers Farm Products v Essex County Council (1985) and concluded that the use of SLF was a material change of use from the manufacture of cement or lime.

The Sub-Committee resolved to accept the advice that the use of SLF constituted a material change of use and resolved that Redland and Blue Circle be asked to make planning applications for the change of use."

74. In other words, Mr McCracken's status as counsel, his advice which differed from that of Mr Fitzgerald and his interpretation of the West Bowers case, which differed from that of Mr Fitzgerald, were clearly placed before the subcommittee and the subcommittee was reminded that its predecessor actually accepted that advice. Furthermore, the dissenting views of consultees were clearly put in paragraph 11 of the report. At paragraph 11 under the representations of Professor Valentine the views were put that,

"(1) The issue of planning permission was not before the Court; therefore the judgment does not in any way affect the County Council's decision.

(2) The County Council has a statutory duty to require the operators to submit an assessment of the environment effects.

(3) Lafarge Redland has continued to dispose of substantial quantities of hazardous waste at Thrislington."

75. Also, the passages that follow cited Mr Sullivan on behalf of the Weardale Action Group. I am not going to quote them in full but they remind the subcommittee that Harrison's J judgment of 8th May 1998 does not affect the committee's earlier decision of 16th July 1996; that the second respondents had refused to comply with the committee's decision of the 16th July 1996, which was made on the advice of Mr Robert McCracken of counsel, and other matters. Furthermore, the joint report gives a substantial factual history which includes extracts from the most recent House of Commons Environment Select Committee reports and the Government's response to them.

76. In my judgment it was plainly open to the subcommittee to come to a view contrary to that expressed by Mr Fitzgerald, or indeed, if, as a consequence of the differences of opinion revealed in the joint report, they were in doubt, then it was open to them to have a full debate about it and/or to call for further information and clarification. In my judgment, taken in that context the reported advice of Mr Fitzgerald including the words "it would be wrong to characterise it as a separate use" is a means of conveying to the committee his clear view that there is here no separate use on the

facts of the case before them; the recommendation was an invitation to the subcommittee to accept that view, not a requirement or direction in law.

77. I have referred to the undoubtedly persuasive affect of Mr Fitzgerald's advice. It might be said that because of the weight likely to be attached to it by the subcommittee any serious defect in the advice would undermine the subcommittee's decision, even though they were not, as I have found, constrained to follow it. It might be said that they still have been significantly misled. I look therefore at paragraph 13 which is the subject of criticism. In that paragraph a distinction is made between disposal and recovery. It is said that the process cannot be both. That, on the evidence before me, is a perfectly valid observation. The view that the use of SLF is recovery rather than disposal is again, in my judgment, perfectly valid based upon a wealth of evidence and statutory material placed before me.

78. The next passage referred to I quote in full, even though I am repeating myself:

> "The recovery process is so entirely part of the manufacture of cement for lime that it would be wrong to characterise it as a separate use; there is no waste disposal use in addition to the permitted use.
>
> In the West Bowers case there were two separate activities, separated both in time and in their nature. At Thrislington (and putatively at Eastgate) there is no separation in time between the burning of the SLF and the use of its heat in the production process. Because it would be categorised as energy recovery rather than disposal, then the nature of the activity is the use of fuel, which is not different from using coal or petroleum coke."

79. This was criticised on the ground that the West Bowers decision cannot in that way properly and reasonably be distinguished from the present case; the fact that the use of SLF and the burning of fuel constitute an integral process does not prevent there being a separate use, and the distinction between disposal and recovery is not material to the issue of whether or not there is a separate use. As to those matters in my judgment a distinction is capable of being reasonably and properly drawn on the facts between the West Bowers case and the present one. I do not propose to elaborate on that in detail. However, it can be said for example that in the West Bowers case whilst the removal of earth and stones was a necessary result of excavating the reservoir, the process of carrying away the excavated material was a physically distinct activity from that of creating the reservoir.

80. In the present case there was only one process, albeit one which would have the effect of burning up the waste material as well as fueling the kiln. Other potentially valid distinctions have been advanced in argument. It is an issue which is, I think, arguable either way but the view of Mr Fitzgerald on the point, as conveyed to the committee, was in my judgment a reasonable one and

cannot be said to have significantly misled them, especially as the contrary view of Mr McCracken was also put.

81. As to the distinction between recovery and disposal similar considerations apply. It would appear that in the case of the use of waste as fuel the test to be applied for resolving the issue is whether the calorific value achieves more than a certain level. The rationale of the test seems to me to be that where the value is high a degree of usefulness can be obtained from the substance so as to justify the use of the word "recovery", whereas with lower values the burning of the fuel is to be regarded as mere disposal.

82. Mr Fitzgerald's point is that since the overall calorific value of the blended waste is high, so as to render it extremely effective as fuel, this adds weight to his views that the process under discussion is essentially the indivisible one of the use of fuel and has no distinct component of disposal of waste. That, in my judgment, was a legitimate point to make.

83. Lord Kingsland's argument is that the point did not assist and was indeed irrelevant because waste remains waste whatever its calorific value, whether blended or not, and whether in terms of its use as a fuel, recovered or disposed of. Having considered now in some detail the United Kingdom provisions to which I have been referred, I think there is force in Lord Kingsland's submission on the interpretation of the expression of waste as applying to SLF notwithstanding it having been blended, transported, stored and put to use as fuel. It is not a point which I find necessary to decide. What I do not accept, however, is that the distinction between disposal and recovery is shown to be irrelevant to the matter upon which Mr Fitzgerald was giving his opinion.

84. For the reasons I have given I find that it was a proper and reasonable point for him to make and for the subcommittee to weigh in the balance. Furthermore, the subcommittee, as I have already said, had plainly been advised at the outset to consider the fuel as being waste and were in no way misled as to that. Equally, I find nothing misleading about the observation that Mr Fitzgerald attached importance to the objective purpose of the process. The judgment of Donaldson LJ, the then Master of the Rolls, in the West Bowers case clearly permits weight to be given to that factor. Mr Fitzgerald is not reported as saying that it is conclusive simply that he attaches importance to it. None of the other matters on which Mr Fitzgerald is quoted can, in my judgment, be termed significantly misleading, whilst of course there may well be legitimate differences of view on the weight to be attached to them. Further, as already mentioned, the committee were also told of Mr McCracken's contrary views. It was not in my judgment misleading for the subcommittee to be told that support was derived from Harrison J's judgment. Accordingly, I find no defect in law arising

from the joint report.

85. The findings which I have just outlined conclude the application in favour of the respondents without the need to consider the exercise of discretion. However, much argument has taken place in the case and the material presented to me which has been directed at what might be described as the broader merits or implications of the subcommittees's decision. The result of that decision is of course that unless it is successfully challenged the burning of the SLF in the kiln will be taken as conforming with existing planning law and the second respondents will not require separate permission for it. I do not wish to go into great detail regarding the broader merits and implications of the decision, that would have been necessary, of course, if I had had to decide on the exercise of discretion. However, in deference to the submissions which have been made on these matters I think it appropriate to make some brief observations. My initial reaction in response to Mr Fitzgerald's submissions was that if I were to find the decision of the committee fatally flawed I would be reluctant to decline relief. The reason for this was and is because the effect of refusing relief would be to deny the opportunity for the matter to be referred back for consideration by the planning authorities, who are best placed to deal with planning judgments, best placed to assess matters of fact and degree and last but not least, if they were to decide that there was a change of use it would be open to public consultation and representations on issues which whatever their merits are rightly sensitive and of interest to the public.

86. I also note and, up to a point, accept Lord Kingsland's argument that the environmental impact of a process such as the use of a waste substance as fuel is capable of being material in planning terms despite the Environment Agency's duties in that regard. It is capable of being material in planning terms both in deciding whether there has been a change of use and also if a change of use has been established in deciding whether or not to grant planning permission. I do not, however, accept that it would have been reasonable, let alone necessary, for the subcommittee to commission a full environmental assessment in deciding whether there had been a change of use. Nor do I think it would be necessary or reasonable for that purpose for the committee to revisit and analyse the variation application granted by the Environment Agency in 1996 in coming to their decision. What they would be entitled to do is to look broadly at the evidence relating to the actual or potential environmental impact of the process in question in deciding whether or not there had been a change of use. They would also be entitled to weigh all of the other relevant factors such as the significance, if any, of the process in planning terms, their interpretation of the West Bowers' decision and so on.

87. Mr Fitzgerald for his part argued that even if the subcommittee had approached the matter

on the wrong legal basis, the result would have been the same if they had approached it on the basis of any reasonable test. However, acting on behalf of the public body he conceded and, in my judgment responsibly so, that he would not press the point if I took the view that the committee's decision was fatally flawed. He recognised the force of the argument that in those circumstances I should not strive to uphold the subcommittee's decision on other grounds, as opposed to quashing the decision and remitting it to the planning authority for further consideration.

88. Mr Ouseley, for the second respondents, took a more robust line. He supported it by detailed argument based on the facts of the case; put bluntly, he said that to quash the decision and reopen the issue was completely pointless. If it resulted in the second respondents not being allowed to use SLF in their kiln it would actually do more harm than good to the environment and the locality. He said that because two responsible bodies, namely the planning authority 1993 and the Environment Agency in 1996 had both decided that the use of SLF improved the quality of the emissions from the kiln or reduced them. The latter decision has been subject to judicial review and the judge's rejection of the case for judicial review had lent further support to the decision. I find there is considerable force in Mr Ouseley's submissions. The second respondents already have planning permission to bring SLF on to the site; they have permission to store it there. These are significant points.

89. Any arguably adverse impact resulting from those uses are wholly irrelevant to the present application. It has to be pointed out that the harm caused by the spillage of fuel six or seven years ago, serious though it was, resulted from an activity which is unquestionably covered by planning permission. This includes the land contamination of which the applicant understandably complains and which has caused her trouble. It includes the asthma from which she unfortunately suffers, assuming, as I do, that it probably emanates from the spillage. There was, subject to one exception, no evidence drawn to the attention of this court of any adverse environmental impact resulting from the process which is the subject of the present dispute. That process can be defined in this way, and indeed confined in this way, to the following: the transmission via a pipe from a storage tank to one of the second respondents' kilns of the blended waste, it is burned within the kiln and the emission of the resultant gases after processing in accordance with strict requirements comparable to those of dangerous waste set out by the Environmental Agency; that emission takes place though a tall chimney.

90. Apart from the possible affect on the quality of the emissions from the chimney it is extremely difficult, if not impossible, to envisage any effect whatever, either in planning terms or in terms of impact on the environment, of the process that the applicant now argues should be

regarded as a material change of use. If there is an effect in planning terms it would be a highly theoretical one. As to the emissions, as I have already indicated, all the findings in relation to those have been to the effect that the new process has been of net benefit. The one exception referred to me, and referred late in the case in reply, consisted of a submission to a parliamentary select committee by an interested group. In fairness Lord Kingsland did not rely on the content of this submission, as such, but relied on it to indicate that the evidence was not necessarily all one way. He also submitted that account could and should be taken of the criticisms made by the select committees over the years of the openness of the Environment Agency's procedures and of its methodology, albeit that the relevant criticisms were not, apparently, accepted by the Government and were refuted by the agency itself.

91. There is no doubt that parliamentary select committees have an important political and constitutional role in, amongst other things, holding public bodies to account. They are entitled to make criticisms and it is their duty to do so if they think it right. However, for the purposes of this case one must descend from the general to the particular. In the face of the extremely limited scale of the change to the burning process involved in the use of SLF, in view of the absence of useful evidence of any significant environmental impact of that change, other than a beneficial one, and in view of the total absence of any other impact at all, one would be forced to conclude that on the information available any subcommittee properly directed would come to the same conclusion as this one had. Those observations, as I have already indicated, are not central or necessary to my decisions in this case, but since many of the considerations to which I have referred in the latter passages were the subject of detailed and cogent argument I felt it right to say something about them in the course of the judgment. The result of my findings is that the application must fail.

92. MR TAYLOR: My Lord, in relation to costs there are two matters to be dealt with, firstly the cost of this hearing and secondly, that costs of the permission hearing were reserved. In relation to this hearing we would ask for our costs and for an order that detailed assessment by a costs officer be made. I believe that the applicant is legally aided so that would have to be subject to the usual legal aid order, that the order not be enforced without leave of the court. In relation to the permission hearing you are, of course, aware there were three grounds pursued, two of which were, as it were, knocked out at that stage.

93. MR JUSTICE GIBBS: Yes.

94. MR TAYLOR: The remaining matter coming before you in the light of your Lordship's decision on that matter we would ask for our costs of the permission hearing as well.

95. MR JUSTICE GIBBS: Yes.

96. MR TAYLOR: Yes.

97. MR JUSTICE GIBBS: Before going to Lord Kingsland on the substance of the matter, assuming I that make a costs order against the applicant, who is covered by a legal aid certificate, I would make the order in the terms approved in the case of Parr v Smith, not that it be not enforced without leave but it be subject to a determination under the relevant regulations, such determination to be adjourned without a date, but in view of the Civil Procedure Rules I think in principle it would be right to add permission to apply to restore it but if no application is made within say two years the matter will be dismissed.

98. MR TAYLOR: I am obliged, your Lordship.

99. MR JUSTICE GIBBS: I say that because of the requirements in civil justice now that finality really must be brought earlier rather than later, so in case I forget to say it, if I do make an order, could the appropriate provision be drafted to ensure finality? Lord Kingsland, do you have anything to say?

100. LORD KINGSLAND: Yes. I cannot argue with the costs for this hearing, my Lord.

101. MR JUSTICE GIBBS: Yes.

102. LORD KINGSLAND: But as to the leave application, as I understand it there was a request by the first respondent to Richards J, who was considering it on paper, to have the matter referred to an inter partes hearing, at what is now called the permission stage.

103. MR JUSTICE GIBBS: Whose request was that?

104. MR OUSELEY: I think it was by the first respondents.

105. MR TAYLOR: That is perfectly correct.

106. LORD KINGSLAND: So the first respondent asked to have an inter partes leave hearing. I think it is fair to say that the central issue of the leave hearing was the issue that has now been before your Lordship. As to the other two issues one was a question of the direct effect of the, not the existing, but the former environment assessment directive. There was a short argument about that which was dismissed by Kay J. The second point, which arose actually in an exchange between myself and Mr Jones yesterday--

107. MR JUSTICE GIBBS: You withdrew.

108. LORD KINGSLAND: I withdrew it, so there is authority, my Lord, saying that in circumstances where a series of events like that occur that a respondent should not get their costs at the leave hearing from the applicant.

109. MR JUSTICE GIBBS: Well, I think costs are within my discretion are they not, subject to the guidance.

110. LORD KINGSLAND: Of course, my Lord, the general rule is, I can draw your attention to a couple of cases if your Lordship is prepared to hear them.

111. MR JUSTICE GIBBS: Well, certainly I will be prepared to do so, I am just -- at the moment in the light of the matters to which you have referred I am inclined to make no order for costs of the permission hearing.

112. LORD KINGSLAND: Yes.

113. MR JUSTICE GIBBS: And if I -- unless you seek anything better than that.

114. LORD KINGSLAND: No, that is all, I think, under the existing authority I can and, indeed, I dare ask for.

115. MR JUSTICE GIBBS: Yes, that is a provisional view, I will go to Mr Taylor in reply to it and see if you can dissuade me of that. I think in normal circumstances I would be sympathetic to the application but since you requested the oral hearing and the result of it was permission, perhaps no order for costs in relation to that would be more suitable.

116. MR TAYLOR: There is one matter I would draw your Lordship's attention to, however, which is that we had written to the applicants beforehand saying that we were going to contest the grounds that were relied on and ask them to review their position on some or all of the grounds and indeed we were successful in getting -- and we said we would be seeking an order from the court limiting the grounds on which they could pursue--

117. MR JUSTICE GIBBS: Have you got the letter there?

118. MR TAYLOR: I do, I have letters here, sorry to produce this in reply as it were.

119. MR JUSTICE GIBBS: And Lord Kingsland will have an opportunity to deal with it.

120. MR TAYLOR: It is the first letter in the small bundle I have handed up, the letter requesting the hearing. If you turn to the second letter, my Lord, it is dated 30th April 1999. It acknowledges the client's application and explains that the council does not consider it has made any error of law and sets out reasons for each of the grounds. It is the second page of the letter that I draw your Lordship's attention to, the second full paragraph on that page:

> "In the circumstances, I would ask your client to reconsider her application on some or all of the grounds contained in it and I would ask you to draw to your client's attention her potential liability for cost and..."

121. MR JUSTICE GIBBS: Yes, I have read that, yes.

122. MR TAYLOR: And so the applicant really was on notice that that was the way we were intending to proceed. They, nevertheless, pursued all three grounds. One of the grounds was not pursued although we did not find that out until we were actually at the hearing, the two others were pursued. One was considered to be unarguable and the other one came forward. At the very least, in my submission, the council should be entitled to its costs in relation to the two grounds that were not pursued.

123. MR JUSTICE GIBBS: Yes, thank you. Lord Kingsland, I will invite you to reply briefly to that.

124. LORD KINGSLAND: Well, my Lord, if I can just direct you to ground 1, which the first respondents regarded as not an arguable point, I accept, of course, my Lord, that we did come with all three points to the hearing, but I would emphasise that the first point was dropped. In fact, the first point, the application, would have been very difficult to pursue in view of the fact that it was not contained in the decision to quash, so I thought it would have been a matter of common sense to see the third ground dropped. I cannot explain why it was not dropped earlier but clearly it should have been dropped. But the respondent wanted to have the inter partes hearing. It was clear that the inter partes hearing had to take place, whether it was one or three matters that were concerned and though I accept that the word "some or all" were in the letter, I nevertheless do not think that it is a sufficient factor for your Lordship to change your initial view in this matter.

125. MR JUSTICE GIBBS: Yes, thank you. Well, I have considered the letter carefully and it was clear that the first respondents were including in their ammunition before the oral leave hearing the request to limit the matter to grounds found to be arguable, nevertheless, I maintain my provisional view now as a conclusive one that the proper order here would be no order for costs, which means that each side bears its own costs, because of the simple fact that the first respondents

wished for an oral hearing as to whether there were any arguable grounds and there were found to be arguable grounds. The point may be academic but that is the decision. Lord Kingsland?

126. LORD KINGSLAND: My Lord, I have two matters, the first one is to ask your Lordship for legal aid taxation for the applicant's costs.

127. MR JUSTICE GIBBS: I think you do not need it, but if you do need it you can have it.

128. LORD KINGSLAND: Well, I am much obliged. The second one is to ask your Lordship's permission to go to the Court of Appeal.

129. MR JUSTICE GIBBS: Yes.

130. LORD KINGSLAND: Perhaps your Lordship would like -- I have one very simple point to put to your Lordship. Towards the end of your judgment your Lordship said that your Lordship found no defect in law in the joint report.

131. MR JUSTICE GIBBS: Yes.

132. LORD KINGSLAND: My Lord, in my submission there were two contradictory statements of the law expressed in the joint report, one by Mr McCracken in paragraph 5 and the other by Mr Fitzgerald QC in paragraph 13. In my submission they both cannot be right. They are both, on the face of the record -- and if your Lordship finds no defect in law in the report, then one version of the law must be the correct one. If the version of the law that is a correct one is Mr McCracken's version and not Mr Fitzgerald's version then on the face of the law, in my submission, the committee must have been misled, and all that follows from my submissions about Kebilene to your Lordship, which your Lordship did not raise in your judgment, would flow. So that is the point, that would be the ground for which I would seek permission.

133. MR JUSTICE GIBBS: Well, on the latter point it is quite true that I did not specifically refer to Kebilene in the judgment.

134. LORD KINGSLAND: I am not saying the fact that you did not is a ground.

135. MR JUSTICE GIBBS: I did have it in mind in dealing with your third point, and, indeed, as the whole of the judgment was not, as it were, written out--

136. LORD KINGSLAND: No, I entirely accept that.

137. MR JUSTICE GIBBS: I might have mentioned Kebilene (* see footnote) and given the

citation of it if it had been available to me when I gave judgment. I probably will put it in the perfected judgment, but that is an absolutely minor point.

138. LORD KINGSLAND: I used it as simply to underline, not suggesting, my Lord, at a moment that that would be a ground for an appeal, I simply used it because it in a sense flowed from the point that I made in my submissions, but the ground for the appeal would be your statement in your Lordship's judgment that you found no defect in law in the joint report.

139. MR JUSTICE GIBBS: Yes, thank you. Do either counsel have any observations on the application for permission or the grounds?

140. MR TAYLOR: My Lord, I do not.

141. MR OUSELEY: My Lord, I would oppose this litigation continuing. Your Lordship has dealt with the first issue, the central issue, by way of saying, in effect, that on a proper understanding of the report it was not a dictate by Mr Fitzgerald which removed the ability of the council to consider things as a matter of effect and degree, and the issues raised in relation to the West Bowers case can properly be treated as simply the identification of factors which were relevant to the consideration of facts and degree and that it was perfectly legitimate to distinguish West Bowers for the reasons that your Lordship has given. In my submission, therefore, there is nothing in the plain, general point, that warrants going further. It is simply a question of the view one forms of this report, but secondly your Lordship has also identified the strong view that your Lordship has taken, as I understand it, in relation to the potential exercise of discretion if it had arisen. And in those circumstances even if there was an arguable point of some general relevance that was worth pursuing, in my submission your Lordship's views in relation to the discretion show that this is a case which should now be stopped.

142. MR JUSTICE GIBBS: Anything to add to that, Lord Kingsland in reply?

143. LORD KINGSLAND: May I reply?

144. MR JUSTICE GIBBS: Yes. It does not address directly the ground that you put forward, and if I may say so, the ground you put forward is ingenious and it is not for me to say conclusively since it relates to the judgment that I have given as to whether it is a good ground or not, but what I think I can properly say is this that my statement that I found no defect of law in the report was based on the observation, based on my finding, that the joint report put relevant material before the subcommittee including the conflicting advice in law about the question of use, change of use. Of course, if two people give contrary advice on the same point by definition one is right and one is

wrong; one is good and the other is defective. But my use of the word “no defect in law” was addressing, or intending to address, the report as a generality.

145. LORD KINGSLAND: Well, my Lord, you did use those words.

146. MR JUSTICE GIBBS: Of course, I am not denying that I did, but I was saying that there was no defect in law partly because those conflicting pieces of advice were placed before the committee. Had only one piece of advice been put forward as a dictate, to adopt Mr Ousley’s expression, when there may have been a defect in law, of no conflicting advice.

147. LORD KINGSLAND: This is not the moment to reopen the case, but in paragraph 14 it does quite clearly say, it is Mr Fitzgerald’s advice and indeed Mr Fitzgerald is--

148. MR JUSTICE GIBBS: Yes, I appreciate that point.

149. LORD KINGSLAND: An ornament to the planning bar and the Queens Counsel. I think it would be, in my submission, one would have to say on the construction of that report that there was a very clear indication in the report of which legal advice was viewed as the better legal advice, and is I think I said in my submission the planning authority were really not in a position to take another view or approach --

150. MR JUSTICE GIBBS: Yes, I certainly have that point clearly in mind, it was just the relationship of the expression “defect in law” to the conflicting opinions which I felt it right to raise.

151. LORD KINGSLAND: I entirely understand. My learned friend Mr Ouseley said it was time this litigation -- the other point I would just make about that is that my submission with respect to what my learned friend said about the exercise of discretion, I accept that your Lordship has taken a view on that in the judgment, nevertheless it has always been my central submission that if a defect of law was founded on the face of the report that would be the end of it and in the language of Bolton was so fundamental that your Lordship would be obliged to quash, without more -- and perhaps I could just, I entirely understand Mr Ouseley’s concerns about the litigation continuing but I would submit to your Lordship that this is a matter of public importance; this is a very important activity effecting a lot of people and although Mrs Lowther was only one, nevertheless the issue raised, as I think I put it yesterday, my Lord, is a potential public wrong, not a question of the end -- although she is one individual, my Lord, the fact of the matter is that we are talking about a wide public issue. And for those reasons, I think that it would not be appropriate to approach the case on the basis of, you know there has been a lot of litigation about it, it is about time that it stopped. I do

not think that would be a proper way to approach this matter, my Lord.

152. MR JUSTICE GIBBS: Is that saying - I see a note being passed - is there any other matter you would wish to raise?

153. LORD KINGSLAND: I think it is what is known in the profession as a billet-doux. My learned junior points out to me that the second respondent did not seek expedition.

154. MR JUSTICE GIBBS: Yes.

155. LORD KINGSLAND: But that is really a supplement to the general point that I have made.

156. MR JUSTICE GIBBS: Thank you. Well, I accept what Lord Kingsland says to this extent, that the whole subject matter of this case is one of public importance. It is quite clear from the documentation that has been referred to, that anxious consideration has been given, especially to the environmental issues that arise out of operations such as this and, indeed, this one in particular. But I do refuse leave and, first of all, because, ingenious though it is, I do not believe that Lord Kingsland's interpretation of my use of the words "defect in law" can actually be maintained. If one looks at the purport to the judgment as a whole there were conflicting pieces of advice given to different subcommittees. In a way it follows that if advice conflicts, one piece of advice must be correct and the other defective, but the expression "no defect in law" referred to the conclusion that I reached which was partly based on the lawfulness of the committee, precisely in the fact that it did have placed before it conflicting pieces of advice as part of the material on which it had to make its decision.

157. But secondly, and more broadly, acknowledging that the issues relating to these operations are of public interest and importance, it is simply that having given the matter the closest possible consideration, I do not consider that the focus of the attack upon these matters is properly the one which is used in this case. For the reasons given in the judgment, I simply do not think it is properly maintained in that way. For those reasons I refuse permission to appeal and the matter will necessarily have to go, I am afraid, to the Court of Appeal.

158. Footnote:

159. * R v Director of Public Prosecutions ex parte Kebilene and others 1999 3WLR 972. On further reflection it was decided not to include a reference to this decision in the revised judgment.