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Case No: Folio No. 2006/472

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/10/2006

Before :

MR JUSTICE DAVID STEEL

Between :

	3C WASTE LIMITED - and - (1) MERSEY WASTE HOLDINGS LIMITED (2) MERSEYSIDE WASTE DISPOSAL AUTHORITY	<u>Claimant</u> <u>Defendants</u>
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Richard Drabble QC and Maurice Sheridan (instructed by **Jones Day**) for the **Claimants**
Derrick Wyatt QC and Stephen Tromans (instructed by **DLA Piper UK LLP**) for the **First Defendants**

David Hart QC (instructed by **Eversheds**) for the **Second Defendants**

JudgmentMr Justice David Steel:-

1. The Claimant, 3C Waste Limited ("3C"), is a limited company incorporated in England and Wales. It owns and operates a landfill site known as Arpley Meadows Moore, off Liverpool Road, Sankey Bridges, Warrington, Cheshire ("Arpley/the Site").
2. The First Defendant, Mersey Waste Holdings Limited ("Mersey Waste"), is a Local Authority Waste Disposal Company ("LAWDC"), a limited company incorporated in England and Wales. It is wholly owned by the Second Defendant, Merseyside Waste Disposal Authority ("MWDA"). It was established on 2 June 1992 specifically by MWDA in fulfilment of MWDA's duty under section 30(7) of the Environmental Protection Act 1990 ("EPA") - namely to make arrangements for its functions as a waste regulation authority to be separate from its functions as a waste disposal authority, and

pursuant to section 32 of the said Act.

3. 3. MWDA is a local government authority and an organ of the state. It had at all material times and has, amongst other matters, legal responsibility to arrange for the disposal of controlled waste arising in the Merseyside area.

Background

1. 4. The essential facts have been agreed between the parties. By a contract in writing dated 31 December 1986 and made between Cheshire County Council and MWDA ("the Contract"), Cheshire County Council undertook to accept and deposit at Arpley a guaranteed minimum of 200,000 tonnes per annum of household, commercial and industrial waste delivered by MWDA for the period of the active life of the Site which was not expected to be less than 25 years.
2. 5. At the date of the Contract both Cheshire County Council and MWDA were waste disposal authorities within the meaning of the Control of Pollution Act 1974 ("COPA"). Both the then parties to the Contract were organs of the State for the purposes of EEC (now EC) law as it then applied to the statutory duties and functions of those authorities.
3. 6. The Contract was entered into pursuant to the respective duties and functions of the original parties. Cheshire County Council, as authority issuing a waste disposal licence required for operation of the site, was under a duty pursuant to COPA to ensure that the relevant activities did not cause pollution of water, danger to public health or become seriously detrimental to the amenities of the locality affected by the activities.
4. 7. Both Cheshire County Council and MWDA were, as original parties to the Contract, subject to obligations arising under Directive 75/442/EEC in relation to the disposal of waste, including the requirement to ensure achievement of the results specified under that Directive. Such obligations were replicated in the revised text inserted by Directive 91/156/EEC. Obligations under Directive 75/442/EEC, as amended were transposed into domestic law by the Waste Management Licensing Regulations 1994.
5. 8. In or around 1993, Cheshire County Council's rights and obligations under the Contract were transferred to 3C pursuant to a transfer scheme made in accordance with Schedule 2 to the EPA. At the time of the transfer 3C was a LAWDC, but is now a subsidiary of Waste Recycling Group Limited. It is no longer under the control of a local or other governmental body.
6. 9. On 18 August 1995 MWDA's rights and obligations under the Contract were transferred to Mersey Waste pursuant to a transfer scheme made in accordance with Schedule 2 to the EPA. Prior to and upon such transfer Mersey Waste was and remained a LAWDC.
7. 10. MWDA discharges its legal responsibilities as waste disposal authority as far as material to these proceedings by means of the following arrangements with Mersey

Waste:

- i. i) an assignment to Mersey Waste by virtue of the MWDA transfer scheme of the rights and liabilities of MWDA under the Contract;
- ii. ii) a waste disposal contract known as "Contract 1" entered into between MWDA and Mersey Waste relating to the disposal of waste collected within the district councils of Merseyside; and
- iii. iii) a household waste recycling centre contract known as "Contract 2" for the provision by Mersey Waste of waste reception centres in the Merseyside area.
- iv. 11. The price payable by Mersey Waste for waste delivered to the Site during the first year of the Contract (the base price) was £4.00 per tonne. Pursuant to the original terms of the Contract that price has been adjusted annually in accordance with clause 7 thereof which provides for 90% of the base price to be indexed in accordance with inflation.
- v. 12. As at the date these proceedings were issued, the price payable pursuant to the original terms of the Contract was £7.92 per tonne. 3C contends that that figure was and is substantially below both the average "gate price" of waste delivered to the Site by other Arpley customers and the cost per tonne of waste to 3C of operating the Site.
- vi. 13. The Contract provides also:

“IN the event of war invasion hostilities (whether war has been declared or not) national emergency act of terrorism usurpation of power or by requirement of any statute rule regulation order or requisition or from strike lockout or other similar causes beyond the control of the parties hereto this Agreement becomes incapable of performance then the liabilities and obligations on the parties shall be suspended until such time as they are again capable of being performed.

...

- a. (a) NEITHER Cheshire County Council nor Merseyside Waste Disposal Authority shall be bound by any variation to waiver of or addition to this Agreement except as agreed by both parties in writing and signed on their behalf by the Cheshire County Council Secretary and Solicitor to the Clerk to the Merseyside Waste Disposal Authority."

Changes in the law

- a. 14. On 26 April 1999 the Council of the European Union adopted Directive 1999/31/EC on the landfill of waste ("the Landfill Directive"). The Landfill (England and Wales) Regulations 2002 (SI 2002/1559) ("the Landfill Regulations") were made for

- the purpose, amongst other matters, of giving effect in national law to the Landfill Directive. They came into force so far as relevant to the matters the subject of these proceedings on 15 June 2002 with transitional provisions for existing landfills such as Arpley (see Schedule 4).
- b. 15. The Landfill Regulations provide for the issue of permits for landfills under the framework of the Pollution Prevention and Control (England and Wales) Regulations 2000 ("the PPC Regulations") which are known as "PPC Permits". For landfills already in operation or authorised by 15 June 2002, the transitional provisions in the Landfill Regulations required the operator to submit a "conditioning plan" to the Environment Agency containing details of any corrective measures considered by the operator to be necessary to comply with the relevant requirements of the Landfill Regulations. The Environment Agency may then issue a landfill permit in accordance with Regulation 10 of the PPC Regulations in cases where it does not require the site to be closed.
- c. 16. Article 10 of the Landfill Directive provides:
- "Member States shall take measures to ensure that all of the costs involved in the setting up and operation of a landfill site, including, as far as possible the costs of the financial security referred to in Article 8(a)(iv), and the estimated costs of the closure and after-care of the site for a period of at least 30 years shall be covered by the price to be charged by the operator for the disposal of any type of waste in that site."
- a. 17. So far as material as regards the Landfill Regulations, Regulation 8(3)(a)(iv) provides that a landfill permit shall include appropriate conditions for ensuring compliance with Regulation 11. Regulation 11 provides that:
- "The operator of a landfill shall ensure that the charges it makes for the disposal of waste in its landfill covers all of the following:
- (a) the costs of setting up and operating the landfill;
- (b) the costs of the financial provision required by regulation 4(3)(b) of the [PPC] Regulations; and
- (c) the estimated costs for the closure and after-care of the landfill site for a period of at least 30 years from its closure."

The PPC Permit

- a. 18. 3C was obliged to submit a "conditioning plan" for the Site. This was submitted on 9 July 2002. It did not contain any reference to Regulation 11. Pursuant to the PPC Regulations, 3C was obliged to apply for a PPC Permit to operate the Site to replace the previous "waste management licence". The Environment Agency ("EA") issued 3C with such permit and it came into force on 6 December 2004 ("the PPC Permit").
- b. 19. Condition 2.4.9.5 of the PPC Permit provides for compliance by 3C with

Regulation 11 by mirroring, *mutatis mutandis*, its terms. It provides:

"The operator shall ensure that the charges it makes for the disposal of waste in the landfill covers all of the following:

- (a) the costs of setting up and operating the landfill;
- (b) the costs of the financial provision required by condition 2.4.9.4; and
- (c) the estimated costs for the closure and after-care of the landfill site for a period of at least 30 years from its closure."

- a. 20. By Regulation 32(1)(b) of the PPC Regulations it is an offence for a person to fail to comply with the conditions of a landfill permit issued to him.

Consequential steps by 3C

- a. 21. In anticipation of these changes in the law and/or the provisions in the PPC Permit, on 24 May 2004 3C wrote to Mersey Waste to draw attention to Regulation 11 and stating that 3C had been advised that this imposes an obligation on all landfill operators to charge each customer (at minimum) the full costs associated with disposal of the customer's waste and also that Regulation 11 may impose a corollary obligation on those customers, including local authorities, to pay those charges or alternatively that it renders the contract incapable of performance. 3C stated it was currently in the process of seeking further advice on the meaning and mode of calculation of full cost, but that initial calculations indicated that full cost was considerably in excess of the current price under the Contract.
- b. 22. 3C asked Mersey Waste to agree to pay full cost. No such agreement was reached between the parties. In light of the failure to reach a mutually acceptable arrangement, on 29 November 2004, Jones Day, on behalf of 3C, wrote to DLA Piper Rudnick Gray Cary UK LLP ("DLA"), on behalf of Mersey Waste, stating that, pending determination of the issues in dispute between the parties, future disposals of waste at the Site would be invoiced "on account of full cost". Since 6 December 2004 Mersey Waste has paid and continues to pay the rate payable pursuant to the express terms of the Contract which 3C has invoiced as "on account of full cost".
- c. 23. By letter dated 22 June 2005, 3C notified Mersey Waste that "full cost" at the Site at that date amounted to £13.63 per tonne. Mersey Waste has not paid nor agreed to pay that rate or, if different, full cost. By letter also dated 22 June 2005, 3C requested MWDA to direct Mersey Waste to conclude such an arrangement with 3C to ensure payment of at least full cost by Mersey Waste in respect of each tonne of waste delivered to the Site. MWDA has not given any such direction.
- d. 24. Pursuant to the arbitration agreement contained in the Contract, on 25 July 2005, 3C commenced proceedings against Mersey Waste by service of a Notice of Arbitration and, subject to an undertaking of confidentiality on the part of Mersey Waste, agreed to provide such information as Mersey Waste would reasonably require in order to consider

the level of full cost at the Site. The parties have referred to that information as "the Costs Data".

- e. 25. By letter dated 1 August 2005, Mersey Waste agreed, subject to review of any proposed wording, to provide an undertaking of confidentiality in relation to the Costs Data. It also suggested that Arbitration might not be the best means of resolving differences of opinion on questions of EC Law, and that such issues should be the subject of proceedings brought in the courts, perhaps by way of originating summons, with a view to early reference to the European Court of Justice subject to Article 234 of the EC Treaty.
- f. 26. By reason of the agreement between 3C and Mersey Waste as regards the scope of this Arbitration, the dispute before the Arbitrator, Nigel Pleming QC, is thus as to what sum(s) constitute(s) "full cost".
- g. 27. 3C served its statement of case in the Arbitration on 9 February 2006. It claims that full cost is to be calculated as a price per tonne under the Contract, which it claims amounts to £13.63 per tonne.
- h. 28. The Costs Data was provided by 3C to Mersey Waste under cover of Jones Day's letter dated 17 November 2005.
- i. 29. Despite 3C's view that determination of the issue of the quantification of full cost in the Arbitration will be of binding effect as regards MWDA (pursuant to the terms of the relationship between the parties and/or in any event by operation of law) by letter dated 23 December 2005, 3C wrote to MWDA inviting it to agree to be bound by any determinations made in the Arbitration, alternatively to join the Arbitration as co-respondent. MWDA through its solicitors, Eversheds, confirmed by letter dated 8 March 2006 that it had formally resolved to join the Arbitration as a Co-Respondent.

The core arguments

- a. 30. The primary relief sought by 3C in these proceedings comprises declarations as to the effect of the PPC Permit and/or the Landfill Regulations and/or the Landfill Directive on the Contract and the duties and obligations of 3C, Mersey Waste and MWDA thereunder. The parties' respective contentions were extremely elaborate. In the event, some were abandoned and it proved unnecessary to deal with all the remaining arguments. But for completeness I set out the parties' own agreed summary of their arguments.

Full Cost

- a. 31. 3C claims that full cost is to be determined by reference to the rate per tonne of waste delivered to the Site, and that the rate payable pursuant to the original terms of the Contract is less than full cost. Mersey Waste and MWDA make no admission in relation to the quantification of full cost.
- b. 32. The question of what sum constitutes full cost has been referred to the Arbitrator.

However, it is already apparent from the statement of case served by 3C in the Arbitration that 3C claim as costs a number of costs which Mersey Waste do not consider to be costs covered by the expression "all of the costs involved in the setting up and operation of a landfill site" within the meaning of Article 10 of the Landfill Directive and Regulation 11 of the Landfill Regulations.

- c. 33. Mersey Waste contends that relevant costs of setting up and operating the landfill are the direct costs of making the site ready for purpose in accordance with the standards required by the Landfill Directive, consigning waste to landfill under the conditions specified in the Landfill Directive, and as far as possible the costs of the relevant financial security, and of closure and after care.
- d. 34. Thus Mersey Waste also contends that the following are not relevant costs: the general overhead costs of the business, the costs of capital/profits and the royalties/rent to the landlord of the landfill site. Underlying this submission is the contention that the aim of Article 10 of the Landfill Directive is not to ensure the profitability of landfill sites either for operators or their landlords. Mersey Waste contends that its aim is to ensure that landfill operators receive sufficient by way of receipts to cover the costs of compliance with the Landfill Directive so as to minimise the impact on the environment of the operation of the landfill and that to construe the Landfill Directive as going further would be disproportionate.
- e. 35. Mersey Waste contends furthermore that income from the utilisation of landfill gas (which is a requirement of the technical standards of the Landfill Directive: see Annex I, para. 4.2) should be set off against the relevant costs.

Mersey Waste – and emanations of the state

- a. 36. Mersey Waste and MWDA admit that Mersey Waste is wholly-owned by MWDA (subject to one share being held by an MWDA nominee who is an officer of MWDA), but deny (i) that it is "under the control" of MWDA or (ii) that it is an organ or emanation of the state for the purposes of the case law of the European Court of Justice on the direct effect of EC Directives.
- b. 37. Mersey Waste is required by statutory provisions further to the Local Government and Housing Act 1989 ("LGHA") and the Local Authorities (Companies) Order 1995 to state on its letters to the public that it is controlled by MWDA for as long as it stays so controlled. Mersey Waste has complied and continues to comply with such obligation. 3C claims that this in itself suffices for the purposes of establishing that Mersey Waste is an emanation of the state for the purposes of these proceedings.
- c. 38. Mersey Waste avers that it is an "arm's length company" independent from MWDA which contracts on commercial terms with all parties, including MWDA. MWDA avers that it owns the shares in Mersey Waste and hence "controls" it within the meaning of section 32(9) of the EPA but contends that MWDA is duty bound under the same subsection to secure that Mersey Waste is an "arm's length company" for the purposes of Part V of the LGHA.

- d. 39. By section 68(1)(a) and (d) of the LGHA , a company which is either (i) a subsidiary of a local authority by virtue of section 736 of the Companies Act 1985 or (ii) under the control of another company which, by virtue of the same subsection, is itself under the control of the local authority, is under such control unless the Secretary of State directs otherwise. By section 68(6), notwithstanding that a company is under the control of the local authority, the company is an arm's length company if the conditions of section 68(6) have been applied in relation to the financial year in question.

EC Law

- a. 40. 3C claims that Article 10 of the Landfill Directive is sufficiently precise and unconditional so as to have direct effect. Alternatively it imposed and imposes an obligation on organs and emanations of the State to achieve the result to be attained thereby and/or to refrain from acting such as to jeopardise attainment of such result. Accordingly, after the date of the grant of the PPC Permit, 3C contends that it became unlawful for Mersey Waste and/or MWDA to continue with any arrangement whereby the rate per tonne of waste disposed of at the Site is less than full cost.
- b. 41. Mersey Waste and MWDA deny that Article 10 has the effect contended for by 3C, or that it is sufficiently precise and unconditional to have such effect.
- c. 42. In the alternative, even if Article 10 has such effect, Mersey Waste claims that Article 10 and any national rules giving effect to Article 10 are subject to the principles of proportionality and legitimate expectation, and other relevant principles of EC Law from which it follows that:
- ii. i) Article 10 and any national measures taken to implement the Landfill Directive should modify existing contracts to the least extent necessary to ensure the aims of Article 10 are achieved and preclude landfill operators from unilaterally adjusting the rates in existing contracts;
 - iii. ii) a landfill operator can only renounce existing contracts on the ground that the rates payable are inadequate to cover costs if the other party to the contract, having had an appropriate opportunity to examine and assess cost data provided by the landfill operator which demonstrates convincingly that the current contract rate is inadequate, and likely to remain so, refuses for the future to pay a price covering the landfill operator's costs.
- iv. 43. Whether or not Mersey Waste is an emanation of the state, MWDA denies that it has any enforcement role in respect of Mersey Waste's actions; instead it is for the EA, not MWDA, to enforce compliance with the PPC Permit. Alternatively, even if MWDA may have in some circumstances a residual role, it is a matter of fact whether or not MWDA is duty-bound to direct Mersey Waste as 3C alleges dependent upon, inter alia, (i) information available to Mersey Waste and MWDA regarding whether 3C is in breach of its PPC Permit, (ii) the involvement of the EA and the EA's views on enforcement of the PPC Permit, and (iii) Mersey Waste's response to 3C's contentions and/or any views expressed by the EA.

- v. 44. 3C denies that its "dealings" with the EA in relation to the PPC Permit or condition 2.4.9.5 thereof (if any) are relevant to these proceedings; the matters within these proceedings being questions of law for determination by the Court independent of any position adopted or not by the EA.

The duties and obligations of the parties pursuant to the Contract and/or EC Law

- i. 45. 3C claims that the objectives of the Landfill Directive can only be met in an effective manner by ensuring that for each site full cost is charged as a minimum in respect of each tonne/unit of waste received for disposal.
- ii. 46. 3C claims that, after the date of the grant of the PPC Permit, it became unlawful for 3C to charge and/or charge but not collect a rate per tonne of waste disposed of at the Site less than full cost.
- iii. 47. 3C claims that it is in any event a term of the Contract to be implied therein that full cost per tonne of waste is payable by Mersey Waste under the Contract in order to ensure compliance with the requirements of any licensing and/or regulatory regime applicable to the matters being the subject of the Contract for the term of the Contract given that the parties thereto were statutory waste disposal authorities required to provide for fulfilment of statutory and other legislative (including EC law) obligations relating to the disposal of controlled waste arising in the area of MWDA.
- iv. 48. Alternatively they were entering into a contract that was expected and intended by them to last not less than 25 years and that, as necessary, the said rights and obligations as set out in the Contract were to be treated as amended so as to ensure such compliance. In the further alternative, the parties were to conduct themselves as regards rights and obligations arising in relation to the matters being the subject of the Contract so as to ensure such compliance.
- v. 49. If necessary, 3C claims that full cost per tonne is in any event payable by Mersey Waste further to the obligations on it under EC law as an organ or emanation of the State to achieve the result intended by the Landfill Directive; alternatively is to be paid by Mersey Waste by way of amendment to the Contract further to MWDA exercising its powers as a person in control of Mersey Waste so as to meet the obligations on the latter and/or on MWDA under EC law to achieve the result intended by the Landfill Directive; or in the further alternative, the rate payable per tonne of waste under the Contract is amended by operation of EC law to full cost so as to ensure compliance with EC law and achievement of the result to be attained under the Landfill Directive, and as necessary Directive 75/442/EEC as amended.
- vi. 50. 3C claims that Mersey Waste and/or MWDA are in breach of the said implied term and/or their/its duties under EC Law.
- vii. 51. In the alternative, 3C claims that, on the coming into force of the PPC Permit, the rights and obligations of the parties under the Contract became suspended pursuant to the Contract terms, alternatively the Contract became frustrated.

- viii. 52. 3C claims to be entitled to damages and/or to be paid the difference between a rate per tonne of waste equal to full cost and the price which Mersey Waste has paid for waste disposals at the site since 6 December 2004.
- ix. 53. Mersey Waste and MWDA admit that the PPC Permit requires 3C to charge full cost but contend that such obligation is only to adopt a pricing policy at the Site in order to ensure that 3C's charges in respect of all deliveries to the Site over the remaining lifetime of the Site exceed full cost rather than in respect of each tonne of waste. 3C claims that such an obligation is inconsistent with the objectives of the Landfill Directive.
- x. 54. Even if the obligation under the PPC Permit is to charge a rate per tonne in excess of full cost, Mersey Waste claims that it does not require 3C to seek to modify or withdraw from existing contractual obligations which it has no power to terminate, or that 3C is committing any offence under the PPC Permit. Mersey Waste claims that the obligation on 3C is only to "ensure" that it charges full cost. 3C cannot be said to fail to "ensure" that consequence in a situation where costs are fixed by an existing contract with no provision for unilateral price revision by 3C.
- xi. 55. Even if the obligation under the PPC Permit is to charge a rate per tonne in excess of full cost, MWDA claims that the best that 3C can establish is that the effect of the coming into force of the PPC Permit is to create a matter for negotiation between 3C and Mersey Waste and an obligation on 3C to justify to Mersey Waste in a transparent way its claim to charge a higher price.
- xii. 56. Mersey Waste denies the existence of the implied term pleaded by 3C. It contends that such term is neither reasonable, nor necessary to give business efficacy to the Contract, nor is it required by EC Law; further, it is contrary to the commercial context under which the Contract was negotiated.
- xiii. 57. Mersey Waste further denies that payment of any increased rate per tonne is required in order to achieve the result intended by the Landfill Directive; or that MWDA is obliged to require Mersey Waste to amend the Contract, or that MWDA has any power so to require; or that the rate payable under the Contract is or can be amended by operation of EC law or that such amendment would be necessary to ensure compliance with EC Law or achievement of any results to be attained under the Landfill Directive or Directive 75/442/EEC as amended.
- xiv. 58. Even if such term were implied, Mersey Waste denies breach of the said implied term and both Mersey Waste and MWDA deny breach of their/its duties under EC Law.
- xv. 59. Mersey Waste denies that it is unlawful for 3C to charge and/or Mersey Waste to pay the price payable pursuant to the express terms of the Contract and, accordingly, that the Contract has become either suspended or frustrated.

Discussion

- i. 60. As already noted, during the course of the hearing, these elaborate contentions

became greatly refined and restricted. It is convenient to go straight to the heart of the dispute. At the centre of all these issues is Article 10 of the Landfill Directive (Directive 1999/31/EC) (the “Directive”) which has already been quoted in part. It provides:

“Member States shall take measures to ensure that all of the costs involved in the setting up and operation of a landfill site, including as far as possible the cost of the financial security or its equivalent referred to in Article 8(a)(iv), and the estimated costs of closure and aftercare of the site for a period of at least 30 years shall be covered by the price to be charged by the operator for the disposal of any type of waste in that site. Subject to the requirements of Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, Member States shall ensure transparency in the collection and use of any necessary cost information.”

- i. 61. As already explained, 3C’s position is that this Article imposes an obligation on Member States to ensure that existing contracts (i.e. those entered into before the implementation date of the Directive) are only performed at a price which meets (as a minimum) the “full cost” within the meaning of the Article.
- ii. 62. In response, the Defendants adopted the threshold proposition that the Directive was not intended to impact upon existing contracts but only to impose a pricing policy on landfill operators as regards to the making of new contracts.
- iii. 63. As a matter of first impression, the express terms of Article 10, in my judgement, support 3C’s case particularly having regard to the commercial realities of the situation:
 - a. a) The costs include those of “setting up” and “operation”. It is not suggested by the Defendants that the Directive only applies to new sites. Thus the construction contended for by them will result in the avoidance on the part of the landfill operator to meet the conditions or requirements of the Directive where existing contracts were sufficient to satisfy the full capacity of a site.
 - b. b) Further, where there was additional capacity within the site to absorb new contracts, the burden of meeting the full cost would fall entirely on those entering into new contracts. This would be by way of subsidy of existing contractors.
 - c. c) The mechanism for covering costs is by way of the price “for the disposal of any type of waste”. The inference is that the rate for any specific form of waste should be the same across the board, regardless of the question of whether the relevant waste was being delivered under a new or old contract.
- d. 64. This initial impression is, in my judgment, strongly supported by the background to the Directive:

- e. a) The 1975 Waste Framework Directive recited the policy of encouraging the recovery of waste material to conserve natural resources and recorded the position that the proportion of the costs not covered by the proceeds of treating the waste should be defrayed “in full accordance with the polluter pays principle”. Article 15 went on to provide that the costs must be borne inter alios by the previous “holders of the waste”.
- f. b) The European Commission’s Explanatory Memorandum to the Proposal for the Directive contains the following comments:

“Increased Cost of Landfilling

As reflected in the review of the community strategy on waste management, Member States should ensure that the price charged for the disposal of any type of waste in the landfill covers at a minimum all costs involved in the setting up and operation of the site.... This provision aims at restoring the balance between the cost of the landfilling of waste which at present tend to be too low and the costs of other treatment methods, such as environmentally sound recovery operations, for which the costs are relatively high....

Economic Considerations

....The static costs [.....] by the Directive depend on the way landfill sites are actually operated. A landfill site that is already properly managed is likely to incur little or no compliance costs. On the contrary unregulated or illegal landfill sites whose building and operating costs by definition are practically zero are bound to demand some financial resources to comply with the proposed measures. According to a recent study the European average cost of landfill and municipal waste is about 32Ecu per tonne in urban sites and 20Ecu in rural sites (1993 prices). This difference is accounted for by the cost of land which is by far the most important cost element.”

- a. c) The Revised Community Strategy on Waste Management contains the following paragraphs:

“51. Frequently the cost of waste disposal does not reflect the true costs of the environmental damage caused. For instance, the costs of the whole lifetime of the landfill - 100 years or more – are often not taken into consideration. Low prices for waste disposal offer no

incentive to recovery operations or the free treatment of waste. Therefore the Member States should in the long run ensure that the price to be paid for these operations remain more transparent. In particular, the objective should be that the price accurately reflects the full cost of disposal for example as regards the closure and after care of a facility.”

- a. d) The Resolution of the Council of Ministers approving the strategy recites as follows:

“13. Believes that in accordance with the polluter pays principle and the principle of shared responsibility all economic actors including producers, importers, distributors and consumers bear their specific share of responsibility as regards the prevention, recovery and disposal of waste....”

- a. e) The recital of the Directives itself is instructive: -

“18. Whereas, because of the particular features of the landfill method of waste disposal, it is necessary to introduce a specific permit procedure for all classes of landfill...and whereas the landfill site’s compliance with such a permit must be verified in the course of an inspection by the competent authority before the start of disposal operations...

26. Whereas the future conditions of operation of existing landfill should be regulated in order to take the necessary measures. Within a specified period of time, for their adaptation to this Directive on the basis of a site conditioning plan...”

- a. 65. This background material, in my judgment, is only consistent with the position that the Directive:

- b. a) applies to all sites unless already closed,
- c. b) contemplates that only those landfill sites which are able to comply with the technical and environmental requirements of the Directive will obtain a permit and remain operative,
- d. c) imposes a regime intended to ensure parity of treatment in regard to polluters, taking full account of external cost.

- e. 66. As I understand the Defendants’ case, it was contended that the Directive merely imposed an obligation on a Member State to require a landfill site “to adopt a pricing

policy at the relevant site to ensure that charges in respect of all deliveries to the site of the remaining lifetime exceeded full cost rather than by reference to each tonne of waste”.

- f. 67. If and in so far as such a policy is directed at all deliveries, it furnishes no basis for excluding deliveries under existing contracts. If, in contrast, the policy is said to be directed at deliveries under new contracts only, it is exposed to the very same criticism as outlined above:
 - ii. i) It means that a site to which deliveries is only made under an existing contract are immune.
 - iii. ii) It means that a site which accepts deliveries under both an old and a new contract will have a vast disparity between the prices charged.
 - iv. iii) Further, in the event that the new tonnage is only a small fraction of the total deliveries, that fraction will nonetheless bear almost the entirety of the operating and closure costs.

Scope of the implementing regulations

- i. 68. The Directive was transposed into English law by the Landfill (England and Wales) Regulations 2002. The relevant rules are as follows:
 - a. a) The Regulations do not apply to any landfill which finally ceased to accept waste before the 16 July 2001: reg. 4.
 - b. b) Landfill permits may be granted by the Environment Agency which must specify the total quantity that is authorised to be deposited and includes requirements for compliance with Regulation 11 (which deals with the costs of disposal): reg. 8.
 - c. c) The operator of a landfill site should ensure that the “charges” it makes cover the costs of setting up, operation and closure: reg. 11.
- d. 69. In my judgment, this machinery is entirely coincident and consistent with the Directive. Indeed, in the event, 3C applied for and was granted a landfill permit which made express provision for the charges as in reg.8. If it remained the Defendants alternative case that, assuming the Directive did encompass existing contracts, the Regulations did not, I reject it: -
 - e. a) The express terms of the Regulations do not depart in any material manner from the Directive.
 - f. b) It is trite law that the transposing measure will be construed in a manner which reflects the underlying objective of the Directive.
- g. 70. However, the Defendants contend that it was clear that Regulation 11 of the

Landfill Regulations was not intended to adjust or frustrate existing contracts. On this topic the first point advanced by the Defendants is that the Defra Consultation Paper associated with the Regulations proceeded on the basis that Article 10 would not impose any additional burden on landfill operators. The UK's view during the course of consultation was that, at private sector landfills, all costs would be already reflected in the price charged and therefore no additional measures would be needed (the first Consultation Paper was 19 October 2000). But, despite this, it was expressly recognised that prices might not cover the full price: in the result, for some, there would be no impact but, for others, additional measures might be required.

- h. 71. The second point taken by the Defendants on the Regulations is said to arise from the absence of any requirement as regards the provision of cost information. Absent this material, it was suggested, it would not be possible to police the imposition of proper charges under the existing contracts, a proposition fortified, it was contended, by the need under the express terms of Article 10 for Member States to ensure “transparency in the collection and use of any necessary cost information.”
- i. 72. The short answer, in my judgment, is that in terms of policing there is no distinction between the old or the new contracts in this regard. In any event the Pollution Prevention and Control Regulations afford powers to the relevant regulator to require an operator to provide any information as may be specified. The fact that no such information is being sought by the Environment Agency as regards cost is not suggestive of those powers having been limited.
- j. 73. Thirdly, it is submitted that the absence of any express power by way of modification of existing contracts points to the fact that no impact is intended. A stark contrast is drawn with the implementation of other EU Directives which might clash with existing contractual commitments: cf. Reg.4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006 No.246 and Regulations 10, 12 and 17 (Package Travel, Package Holidays and Package Tours Regulations 1992 SI No.3288).
- k. 74. I derive little assistance from the absence of any such provision, not least given the difficulty of drafting a provision by reference to a minimum price. Indeed, when asked to identify the terms of a “clear and precise provision for the purposes of this argument”, the following was tendered by the Defendants:-

“A contract providing for the disposal of waste at an existing landfill shall be adjusted to the extent necessary to enable the landfill operator to ensure that the charges made for the disposal of waste cover all of the costs of the landfill...

Such adjustment shall take place by agreement of the parties within [specified period] of the Environment Agency disclosing to the customer of the landfill operator the cost information collected for the purpose of verifying compliance with Regulation 11...

Failing adjustment within the [specified period] there shall be implied into the contract a term that the price shall be fixed at a level which covers all of the costs ... etc...”

- a. 75. It was, in these circumstances, somewhat ironic for the Defendants to insist that a further basis for resisting the proposition that Regulation 11 was also intended to impact on, if not adjust, existing contracts was that such would be inconsistent with the principle of legal certainty. The point here, as I understand it, is that the customers would not have available the material necessary to determine whether the price satisfied the requirements of Article 10. But again, even if the point be well made, it draws no distinction between existing and new contracts.

Impact on the Contract

- a. 76. The machinery of the PPC Regulations was adopted for the purposes of granting landfill permits: reg.6. I accept that the Claimants are required by the terms of the permit granted to them on 6 December 2004 to charge “full cost” to all its customers at the Arpley Meadows Landfill site. Further I accept that accordingly by virtue of Regulation 32 of the PPC Regulations it would be an offence to fail to comply with such terms.
- b. 77. The contract to which 3C and Mersey Waste had become a party had, as already noted, been entered into in 1986. It provided for waste to be delivered at £4 a tonne subject to annual adjustment. There was also a force majeure clause which is set out above.
- c. 78. On the assumption that the “full cost” calculated in accord with the permit is greater than the charges payable under the contract, it follows that the Claimants are prohibited from receiving waste in respect of which it has not ensured that the full cost is charged. 3C had various submissions as to the implications of such a state of affairs, bearing in mind the European Court strictures in Marleasing S.A v. La Comercial Internacional de Alimentacion S.A. Case C-106 89 [1990] ECR. I-4135:-

“It follows that in applying national law whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the treaty.”

- a. 79. 3C put forward its arguments under 4 headings:-
 - ii. i) The operation of an implied term.
 - iii. ii) Alternatively, the conclusion that the contract was frustrated.
 - iv. iii) In the further alternative, the operation of the force majeure clause.

A yet further alternative to the effect that there was an “amendment of the contract by EC Law” was not in the event pursued.

- i. 80. As regards some form of implied term, I invited 3C to state the terms of the alleged implied term, since none was pleaded and none was spoken to in the extensive skeletons. The response, in due course, was “the parties will operate the contract at a price which is lawful”. I was quite unable to see the basis of such an implied term on any of the recognised criteria:- see e.g. *Phillips Electronique Grand Public S.A. v. British Sky Broadcasting* [1995] EMLR 472 at p.480, particularly having regard to the express terms of the contract in regard to price adjustment, force majeure and arbitration.
- ii. 81. The point becomes a fortiori given that the suggested implied term does not prescribe what will happen in the event that the contract price is rendered illegal. It is not suggested that a new price is to be inserted, let alone what price.

Force Majeure

- i. 82. It is convenient to turn to the force majeure clause leaving aside for the moment the argument directed at frustration. I did not understand it to be controversial that, if I found that the affect of Condition 2.4.9.5 of the Permit had the affect of rendering it unlawful for the Claimants to continue to accept waste at Arpley at a sum less than full cost, that the outcome is that the contract has “become incapable of performance” by “the requirement of any regulation... or other similar cause beyond the control of the of the parties.”
- ii. 83. It follows that the contract is in those circumstances suspended pending agreement on a new price mechanism or acceptance of an award in that respect under the arbitration clause: cf *Egham and Staines Electricity Co.Ltd v. Egham D.C.* [1944] 1 All ER 107. Whilst in theory suspension could become frustrating in character such has not and is most unlikely to arise.
- iii. 84. In one sense the question of price is within the control of the parties. But absent agreement (with or without the benefit of arbitration) the contract cannot lawfully be performed. If the point is still alive, I reject the Defendant’s argument that the failure to charge full cost is not unlawful during any period of negotiations to establish a new price.
- iv. 85. Nor is it appropriate to extend the concept of legitimate expectation to allow negotiations to be completed (even if restricted to a reasonable period) before the issue arises. Put another way, it is not arguable that, prior to disclosure by 3C of all materials relevant to the issue of full cost, the force majeure clause is itself suspended. In my judgment it is clear from the permit system established under the Regulations that the obligation to comply with its provisions (including the charging of full cost) bites as from the date when the permit comes into effect (in this case as from 6 December 2004).
- v. 86. If that conclusion is right, the parties appeared to be ad idem that during the interregnum the Claimants would be entitled to charge on a quantum meruit basis, such to take account of matters properly included in the full cost assessed under the

Regulations.

Other issues

- i. 87. These conclusions render it unnecessary to consider the interesting issues as to whether Mersey Waste was an “emanation of the state” for the purposes of considering direct effect of the Directive or, indeed, the implications of any direct effect on MWDA (who were of course accepted to be an emanation of the state).

Items within full cost

- i. 88. I now turn briefly to the issues regarding the scope of “full cost”:-

- a. **A) Revenue from Electricity Generation**

The Defendants contend that, in assessing full cost, the income of 3C from electricity generation through utilisation of landfill gas should be set-off. This is challenged by 3C on the basis that Article 10 is concerned with establishing a minimum price by reference to gross costs, there being no reference to revenue. In the alternative 3C contend that only the proceeds deriving from waste “treatment” are allowable by way of set-off and the gas is not given off in the course of treatment.

3C’s contention, in the context of ensuring that costs are covered by way of a minimum charge, is a surprising one. I do not accept it:-

- a. (a) The original framework Directive (75/442/EEC) made express reference both in the preamble and in the body of the relevant article to the cost being “less any proceeds derived from treating the waste” and justified this as being “in accordance with the polluter pays principle.”
 - b. (b) The Directive was amended in 1991 and the words “less any proceeds derived from treating the waste” were indeed removed from the relevant article but the statement of principle was maintained in the preamble.
 - c. (c) Accordingly this does not demonstrate, as 3C argued, a deliberate alteration to the policy in regard to the proceeds of treatment.
 - d. (d) While I recognise the distinction maintained in the legislation between a disposal operation and a recovery operation, it strikes me as clear that for the purposes of establishing full cost, the one must be set off against the other.
 - e. (e) “Treatment” is defined as “the physical, thermal, chemical or biological processes, including sorting, that change the characteristics of the waste in order to reduce its volume or hazardous nature, facilitate handling or enhance recovery.”

The relevant operation of burning methane from biodegradable waste to produce electricity falls, in my judgment, squarely within that definition.

a. B) Revenue

It is submitted that “the cost” should include an element of profit. I reject this submission as a matter of construction. Such is not a “cost”.

C) Overheads

I did not understand there was any live issue here. It became accepted that any relevant overhead was deductible.