Neutral Citation Number: [2018] EWHC 1983 (Admin)

Case No: CO/1334/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 July 2018

Before:

SIR WYN WILLIAMS
sitting as a Judge of the High Court

- -

Between:

THE QUEEN ON THE APPLICATION OF PROTREAT LIMITED	**Claimant**
- and -	
THE ENVIRONMENT AGENCY	**Defendant**
- and -	
THE SECRETARY OF STATE FOR ENVIRONMENT FOOD AND RURAL AFFAIRS	**Interested Party**

- -
- -

Mr Robert McCracken QC and **Mr Gordon Wignall** (instructed by **Sharpe Pritchard**) for the **Claimant**
Mr James Maurici QC and **Mr Richard Moules** (instructed by the **Legal Services Department of the Defendant**) for the **Defendant**
The Interested Party was not represented and did not appear

Hearing dates: 28 February, 1 and 2 March 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

Sir Wyn Williams:

Introduction

1. Waste lubricating oil (hereinafter referred to as "WLO"), as the phrase suggests, is lubricating oil that has been discarded as waste. It is capable of being hazardous; it poses a serious detrimental risk to the environment and human health unless properly managed. The activities of handling, storing, processing, transporting, disposing and using WLO are subject to a range of controls.

2. Physical and chemical processes exist whereby WLO can be converted into re-usable products. Two of the chemical processes used for such conversion are re-refining and reprocessing. Re-refining of WLO may result in it being converted into a base oil which is similar in characteristics to a virgin base oil produced from crude oil activities. Reprocessing of WLO is the process by which it is converted into oil for use as a fuel. In the Claimant's evidence, as in some of the documents adduced by the parties, these processes are sometimes referred to somewhat differently. For the sake of consistency, I will use the words re-refining and reprocessing in this judgment to mean the conversion of WLO into base oil (re-refining) and the conversion of WLO into fuel (reprocessing).

3. The conversion of WLO into such useable products may have the result that the product is no longer to be regarded as waste at all. It is of obvious importance to those engaged in re-refining or reprocessing to know whether the end product is still to be regarded as waste or has achieved "end-of-waste status". (As will become apparent this phrase is a term of art). If that status can be achieved there are considerable potential benefits to the producer – both financial and in terms of the regulatory regime which will operate. Not unnaturally, those commercial organisations which are involved in re-refining or reprocessing WLO would like to know, in advance of production, if possible, whether the end product they produce as a consequence of re-refining or reprocessing will be regarded as waste.

4. The Claimant is a company which was incorporated and/or began its activities in 2011. It provides specialist consultancy services to companies engaged in converting WLO into useable products. It is an associate member of the Oil Recycling Association Limited (hereinafter referred to as "ORA") which is a trade association representing the interests of companies and firms which promote the re-refining and reprocessing of WLO. The Claimant asserts that it has standing to bring proceedings for judicial review in respect of decisions made by the Defendant which impact upon the interest of ORA.

5. From its inception, Mr Christopher Williamson has been a director of the Claimant. The evidence filed by both parties demonstrates that he plays a very significant role in its affairs. He has very considerable knowledge of all the issues, factual, policy and legal, which are pertinent to this case. It is he who has provided witness evidence in these proceedings on behalf of the Claimant.

6. The claim form identifies the decision under challenge as having been made on 19 December 2016. The decision under attack is described in the claim form as a decision "to regard recycled oils that are generated from waste oils as still being waste". The phrase "recycled oils" in the claim form can be read as being a reference to base oil

produced by re-refining WLO. In the statement of facts and grounds which accompanies the claim form the Claimant asserts:-

> "2. Central to the claim is the extent to which the Environment Agency is obliged, in the circumstances, to provide guidance which is binding between itself and industry as to when waste lubricating oil has or has not achieved "end-of-waste" status. Whether or not *any* waste-derived product has achieved end-of-waste status is fraught with legal complexity. Should the producer be deemed not to have achieved end-of-waste status in the manufacture of a product, then there are significant regulatory and financial burdens and there is the risk of criminal prosecution. Both manufacturers and the buyers of their product need to know in advance that they are trading in products which will be considered by the regulator as non-waste (end-of-waste) items."

7. I should say at the outset that the Defendant denies that it has any obligation, either generally or in the circumstances which I will describe in this judgment, to provide guidance as to when a product derived from WLO has or has not achieved end-of-waste status through either re-refining or reprocessing.

8. At first blush, it might appear that I am being asked to decide two discrete issues. First, is the decision made by the Defendant on 19 December 2016 lawful? Second, is the Defendant under an obligation to provide binding guidance upon the issue of when WLO has achieved end-of-waste status following re-refining or reprocessing? However, the debate in this case has not been confined to these issues. I confess that, at times, it has been difficult to keep in focus, precisely, the nature of the Claimant's complaints and the legal basis for those complaints. There have been a number of twists and turns from the statement of facts and grounds through the amended statement of facts and grounds to the Skeleton Argument dated 13 February 2018 but presented on behalf of the Claimant on or about 14 February 2018. That said, I have decided that justice demands that this judgment should focus upon the issues as presented to me in the Skeleton Argument presented on behalf of the Claimant. I appreciate that the Defendant has legitimate arguments about the scope of the pleadings and about the fact that some of the points now made have never been the subject of a permission application. Nonetheless the reality is that the Defendant came fully prepared to argue the points raised in the Skeleton and I am satisfied that the appropriate course is to consider the case on the basis that it was argued. Except when it is absolutely essential for an understanding of the argument I do not propose to describe how the case was presented in the statement of facts and grounds and the amended statement of facts and grounds.

9. I have already identified the person who has provided evidence on behalf of the Claimant. Three people have made witness statements on behalf of the Defendant; they are Ms Mair Davies, Mr Howard Leberman and Mr Redwynn Sterry who are all employees of the Defendant. In some respects the evidence of Mr Williamson conflicts with evidence served on behalf of the Defendant. Fortunately, for reasons which will become apparent as this judgment unfolds, it is unnecessary for me to attempt to resolve these conflicts. That said, even if the resolution of factual disputes had been necessary I am unsure how that could have been done within the confines of an application for

judicial review in which no oral evidence was given and where disclosure was at the very least not complete.

The Legal Framework

10. In this section of my judgment I set out the relevant provisions of European Community law which provides the framework within which this case must be considered. In so far as the domestic law of England and Wales must be considered I will refer to the relevant principles when discussing the Claimant's grounds of challenge.

11. Article 4 of the Treaty of the European Union ("TEU") provides that Members States shall take "any appropriate measure, general or particular, to ensure fulfilment of the obligations of the Treaties". It also provides that Member States shall "refrain from any measure which could jeopardise the attainment of the Union's objectives".

12. Article 288 of the Treaty on the Functioning of the European Union ("TFEU") is concerned, inter alia, with the enforceability of directives issued by the European Parliament and the Council. It provides:-

> "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

13. Directive 2008/98/EC was issued by the Parliament and Council on 19 November 2008. Its subject matter is waste. It had the effect of repealing earlier directives and it has been the directive in force at all times relevant to these proceedings. I will refer to the Directive as the "Waste Directive" or "Directive" as appropriate during the remainder of this judgment. It is necessary to set out in detail some of its provisions.

14. Article 1 defines its subject matter and scope. It provides:-

> "This Directive lays down measures to protect the environment and human health by preventing or reducing the adverse impacts of the generation and management of waste and by reducing overall impacts of resource use and improving the efficiency of such use".

Article 3 contains important definitions of words and phrases used in the Directive. "Waste" means:

> "any substance or object which the holder discards or intends or is required to discard".

"Recovery" means:-

> "any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy".

"Recycling" means:-

> "Any recovery operation by which waste materials are reprocessed into products, materials or substances whether for the original or other purposes. It includes the reprocessing of organic material but does not include energy recovery and the reprocessing into materials that are to be used as fuels or for backfilling operations".

"Regeneration of waste oils" means:-

> "any recycling operation whereby base oils can be produced by refining waste oils, in particular by removing the contaminants, the oxidation products and the additives contained in such oils".

15. Article 4 of the Directive is entitled "Waste hierarchy". It provides:-

> "The following waste hierarchy shall apply as a priority order in waste prevention and management legislation and policy:
>
> (a) prevention;
>
> (b) preparing for re-use;
>
> (c) recycling;
>
> (d) other recovery, e.g. energy recovery; and
>
> (e) disposal.

Paragraph 2 of Article 4 provides:

> "When applying the waste hierarchy referred to in paragraph 1, Member States shall take measures to encourage the options that deliver the best overall environmental outcome. This may require specific waste streams departing from the hierarchy where this is justified by life-cycle thinking on the overall impacts of the generation and management of such waste".

16. Article 6 provides the criteria by which waste can acquire end-of-waste status. Paragraph 1 provides:-

> "Certain specified waste shall cease to be waste within the meaning of point (1) of Article 3 when it has undergone a recovery, including recycling, operation and complies with specific criteria to be developed in accordance with the following conditions:
>
> (a) the substance or object is commonly used for specific purposes;
>
> (b) a market or demand exists for such a substance or object;

> (c) the substance or object fulfils the technical requirements for the specific purposes and meets the existing legislation and standards applicable to products; and
>
> (d) the use of the substance or object will not lead to overall adverse environmental or human health impacts.
>
> The criteria shall include limit values for pollutants where necessary and shall take into account any possible adverse environmental effects of the substance or object".

Paragraph 4 recognises that criteria within paragraph 1 may not be developed at "Community level". It provides:

> "Where criteria have not been set at Community level under the procedure set out in paragraphs 1 and 2, Member States may decide case by case whether certain waste has ceased to be waste taking into account the applicable case law."

17. Article 13 of the Directive is headed "Protection of human health and the environment". It provides:

> "Member States shall take the necessary measures to ensure that waste management is carried out without endangering human health, without harming the environment and, in particular:
>
> (a) without risk to water, air, soil, plants or animals;
>
> (b) without causing a nuisance through noise or odours; and
>
> (c) without adversely affecting the countryside or places of special interest".

18. Article 21 is concerned, specifically, with waste oils. This Article imposes specific obligations upon Member states which are complementary to more general obligations imposed by Articles 18 and 19 in respect of hazardous waste. The terms of Article 21 are as follows:-

> "1. Without prejudice to the obligations related to the management of hazardous waste laid down in Articles 18 and 19, Member States shall take the necessary measures to ensure that:
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> (a) waste oils are collected separately, where this is technically feasible;
>
> (b) waste oils are treated in accordance with Articles 4 and 13;
>
> (c) where this is technically feasible and economically viable, waste oils of different characteristics are not mixed and waste oils are not mixed with other kinds of waste or substances, if such mixing impedes their treatment.

19. Finally, I should mention Article 36. Paragraph 2 of that Article imposes upon Member States the obligation to "lay down provisions on the penalties applicable to infringements of the provisions of this Directive" and, further, "take all measures necessary to ensure that they are implemented". The Article provides that the penalties so laid down shall be "effective, proportionate and dissuasive".

20. The Claimant and the Defendant agree that the UK is bound by the terms of the Waste Directive. They also agree that the Defendant, as an emanation of the state, is bound by the Directive. However, the Defendant contends that it is bound only to the extent that compliance with the Directive is within the powers conferred upon it. By way of example, the Defendant cannot be out of compliance with the obligation to legislate in accordance with the aims and objects of the Directive when it has no power to legislate. I do not understand the Claimant to disagree with this general approach. I agree with the Defendant that it is bound to comply with the terms of the Directive to the extent that the powers conferred upon it permit it to do so. However, it cannot be obliged to act in ways which are outside the scope of its powers simply because the Directive has imposed obligations upon "Member States".

21. In June 2012 the European Commission issued a document entitled "Guidance on the interpretation of key provisions of [the Waste Directive]". The document was expressed to contain "non-binding guidance" on the Directive. Nonetheless, it represented the views of the Commission's Directorate – General, Environment. Section 3 is concerned solely with the Waste hierarchy. Paragraph 3.4 provides:-

> "3.4 **Who has to observe the hierarchy principles?**
>
> The addressees of the waste hierarchy are the Member States, which have to respect the waste hierarchy in their waste management policy and legislation.
>
> Also directly concerned are regulators and authorities at regional and local level. The CJEU has repeatedly held that 'The obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive, whether general or particular, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts.' This means that the waste hierarchy is to be observed and applied by all the relevant administrative levels within a given Member State that are concerned with waste policies and legislation.
>
> In a number of provisions of [the Waste Directive] (e.g. Articles 8, 10, 15, 21, 22, 28), reference is made to the waste hierarchy emphasising its function as an overall principle, often together with other key principles of the [Waste Directive], namely the provisions on protecting human health and the environment set out in Article 13. When implementing these provisions, Member States' authorities should therefore also consider how to bring the waste hierarchy into effective application in this context.
>
> In particular, Articles 28(1) and 29(1) [of the Waste Directive] emphasise that waste management plans and waste prevention

> programmes must be established in accordance with the waste hierarchy."

Relevant History

22. It is convenient to begin with litigation between OSS Group Ltd ("OSS") and the Defendant. At the material time (i.e. in 2005) OSS carried on the business of collecting WLO and converting it to fuel oil which it then sold to the operators of industrial plants. Thereafter, the plant operators burned the fuel oil which they had acquired. In late 2005 or early 2006 the Defendant made a decision that the fuel oil recovered by OSS from WLO did not cease to be "waste" for the purposes of the then subsisting Waste Framework Directive, namely Council Directive 2006/12/EC. Unchallenged, that decision would have meant significant adverse consequences for OSS. In consequence the company brought proceedings by way of judicial review to challenge the decision. The challenge failed at first instance, but succeeded in the Court of Appeal[1].

23. The technical and legal issues considered by the Court of Appeal are not germane to the issues which I need to determine. However, during the course of a judgment with which the Master of the Rolls and Maurice Kay LJ agreed, Carnwath LJ (as he then was) expressed himself thus:

> I hope, however, that in the light of this judgment, it may be possible for DEFRA and the Agency to join forces in providing practical guidance for those affected. It is unfortunate that the difficulties of interpreting the pronouncements from Luxembourg are compounded by the failure of the national authorities to agree a common approach. It is important that the national authorities should use their expertise and experience to assist those concerned with treatment and handling of waste, and also the courts (civil or criminal) who may well be faced with deciding individual cases without the benefit of any comparable expertise. The Court of Justice recognises the scope for the national authorities to fill in some of the gaps left by the Directive. For example, in *Niselli's* [2004] ECR 1-10853, while noting the lack of any "decisive criterion" for determining the holder's intention, it added at para 34:
>
> > "In the absence of Community provisions, Member States are free to choose the modes of proof of the various matters defined in the directives which they transpose, provided that the effectiveness of Community law is not thereby undermined…""

24. Even before judgment in *OSS* was handed down the Defendant had already become involved in what was known as the "Waste Protocol Project". It participated in the project with an organisation known as "Waste and Resources Action Programme" (WRAP). WRAP was a not for profit company which was substantially financed by funding from the UK and devolved governments. It was seen to be and intended to be

[1] *R (on the application of OSS Group Ltd) v Environment Agency and others* [2007] EWCA Civ 611

a bridge between the Defendant and commercial organisations operating in the waste industry. The Waste Protocol Project was responsible for producing a number of Quality Protocols covering a wide range of wastes and industry sectors. Each Quality Protocol so produced set out in a standard format the practical requirements which operators had to meet in order that the particular waste-derived product with which it was concerned could achieve end-of-waste status. The first Quality Protocol was produced in 2004 and a second came into existence in May 2006. In the aftermath of the judgment in the *OSS* case, work began on a Quality Protocol in respect of WLO. In due course a Quality Protocol for Processed Fuel Oil was published. It was given the acronym PFO QP. Its final version dates from 2011. The PFO QP did not define which processes were to be used to convert the WLO; rather it provided specifications which the end product had to meet if it was to achieve end-of-waste status.

25. It is common ground that this Quality Protocol was not concerned with non-fuel products, i.e. it was not concerned with base oils produced by re-refining WLO. My understanding is this was quite deliberate. At the time i.e. during the period 2008 to 2011 the emphasis was upon bringing into existence a Quality Protocol which was concerned with fuel products. The evidence suggests that commercial organisations based in the UK showed little interest, if any, in a Quality Protocol concerned with non-fuel products produced by re-refining.

26. It is also worth recording at this stage that in the aftermath of *OSS* the Defendant decided to form an Advisory Group known as "Waste Oils Technical Advisory Group" (WOTAG). The work of this group, so far as is relevant to these proceedings was carried out in 2007 and 2008. The group had a large number of participants including "Groupement Europeen de l'industrie de la Regeneration (GEIR) – the European re-refining industry section of the Union of the European Lubricants Industry. Notwithstanding that WOTAG had participants who were engaged in re-refining, the work of this group, too, in the main, was focussed upon the production of guidance relating to fuel products derived from WLO. In any event, WOTAG ceased to exist after 2008.

27. The Waste Protocols Project had been the beneficiary of funding independent of the Defendant at its inception; that state of affairs continued for many years. However, in 2011/2012 the external funding which had supported the development of Quality Protocols was withdrawn and, thereafter, no new Quality Protocols were developed (although work on protocols which had been started continued until late 2015). As it happens, the PFO QP was substantially funded by the Defendant for reasons which are explained in its evidence but which need not be repeated here. Following the withdrawal of external funding, however, the Defendant, from its own resources, did not contemplate funding or substantially funding new Quality Protocols.

28. Following the publication of PFO QP the European Commission raised a complaint about its contents. This complaint proved to be long-running in the sense that it took some years to resolve. In her first witness statement, Ms Mair Davies explains that the substance of the complaint related to an allegation by the Commission that PFO QP failed, properly, to apply Article 6 of the Waste Directive. The evidence filed on behalf of the Claimant suggests that the Commission was concerned that PFO QP did not relate to re-refining WLO. That is denied, with some vigour, in the first witness statement of Ms Davies (see paragraph 137). Obviously, it is not possible for me to determine that issue in the absence of all the relevant documents relating to the complaint (which have

not been adduced in evidence in this case). Nonetheless, it does seem clear that following the making of the complaint representatives of DEFRA, the Defendant and ORA began engaging in discussions about whether guidance should be produced in respect of end-of-waste status in relation to the products of re-refining.

29. At all times material to these proceedings the company known as Whelan Refining Limited (Whelan) engaged in re-refining WLO. The company's activities had come to the attention of the Defendant in 2013. In January 2014 the Defendant received a complaint to the effect that Whelan was selling products derived from re-refining as non-waste oils when that was not justified. The Defendant was asked for clarification of its approach to the status of certain products which were the result of re-refining, i.e. whether such products were regarded as waste or non-waste. Relevant correspondence relating to this complaint is exhibited to witness statements adduced in these proceedings. The Defendant's evidence is to the effect that it did not acknowledge then (2013/2014) and it has not acknowledged subsequently that Whelan's products achieved end-of-waste status; equally the Defendant accepts that it has never taken enforcement action of any kind against the company in respect of such products.

30. By the end of December 2013, at the latest, the Defendant was aware that a group of companies involved with reprocessing WLO was concerned that there was insufficient clarity surrounding end-of-waste status of products which had been produced by re-refining. I say that because on 9 December 2013 an umbrella group for the companies, PFO Producers Group, wrote to Mr Leberman seeking "clarification as to how the [Defendant] applies end of waste regulation to base oil production". On 13 March 2014 Mr Roger Cresswell, a director of ORA, e-mailed a number of persons at DEFRA and Mr Leberman following a meeting which had taken place on 6 March 2014 and which had been attended by representatives of ORA and one of its members ReGroup, DEFRA and the Defendant. The email attached notes relating to the meeting. The notes record that one of the agenda items had been a discussion on waste oils and in particular a review of the uncertainties which existed about end-of waste status in respect of products converted from WLO. It seems clear that ReGroup and ORA were asserting that such uncertainties were undermining investment in technologies; it also seems likely that they were asserting that the removal of such uncertainties would help to support the Waste hierarchy contained within the Waste Directive. The e-mail itself ended with the following paragraphs:-

> "We confirm our willingness to continue the dialogue and in particular to addressing the more urgent issues of EoW and oil collections.
>
> There are a number of members who are taking a serious look at investment here in the UK in modern oil recovery in operations that will critically depend on feed stop avail. They will need to be satisfied of the field on which play occurs is a level one."

The notes of the meeting contained a section entitled "Summary of EoW issues/ways forward". This Summary was in the following terms:

> "i. Setting EoW criteria is crucial for oil recovery investment decisions.

> ii. A recovery process requires an EoW assessment for all of its output streams for that directly impacts on economic values.
>
> iii. Allowing recoverers to voluntarily choose whether or not to seek EoW status is akin to asking a Fox to write a Chicken's Guide to Survival.
>
> iv. The EU free market approach is compromised by a lack of EoW congruency and UK firms are suffering through different standards being applied or no intervention at all.
>
> v. ReGroup have asked the Commission to launch an investigation into the EoW practices of the European waste oil industry and welcomes DEFRA support on that.
>
> vi. Until greater EoW clarity is achieved, ReGroup is unlikely to invest in a UK re-refining activity but may look to other Member States where standards are openly easier.
>
> vii. Ora wish to see a much greater co-ordination between REACH/IED Regulators' on EoW issues."

31. In the months that followed the Defendant began to consider the way forward. It began to give serious consideration to the possibility of inviting those involved in converting WLO to develop an end-of-waste framework for the base oil produced by re-refining. More or less contemporaneously the Defendant began preparatory work with a view to publishing a Regulatory Position Statement ("RPS"). RPSs are published by the Defendant in a wide variety of circumstances. Essentially, they are formal documents which specify that for a limited period of time no enforcement action will be taken in respect of activities identified in the RPS provided the criteria specified in the RPS are met.

32. The prospect of issuing a RPS in respect of re-refining of WLO to produce base oil first gained traction in the spring of 2014. Mr Leberman and Ms Davies produced a briefing paper about it which was provided to senior management within the Defendant. In due course the proposed RPS was considered by an internal group within the Defendant known as the Modern Waste Regulation Panel and its approval was given for the publication of a RPS relating to re-refining. The result was Regulatory Position Statement 185 ("RPS 185"). This document was headed "Recovering Waste Mineral Lubricating Oils". Immediately following the heading the following information was provided:

> "If you comply with the requirements below, we will not require waste consignment notes, a waste operation permit or permit conditions, for the transfer, storage and/or use for those outputs from a permitted re-refining activity producing waste derived mineral lubricating oil streams intended for non-fuel applications.

> This regulatory position will be reviewed before 2 November 2015 and withdrawn on 31 "October 2016."

33. The next part of the document set out relevant background. The reader was informed that the "regulatory position" would allow time for the waste oil re-refining sector and end-users "to develop end-of-waste framework(s) for re-refined waste mineral lubricating outputs".

34. There followed a section of the document headed "Our approach". It was in this section that the Defendant set out the standards that had to be met and the "outputs" to which the RPS applied. In this judgment it is sufficient to record that it applied to "the re-fined outputs from the input waste types" set out in the table which followed immediately.

35. Both Ms Davies and Mr Leberman say in their evidence that RPS 185 was always intended to be an interim or temporary measure so as to allow ORA and other interested organisations the time to develop "an end-of-waste submission for re-refined base oils". In the light of the terms of RPS 185 itself it does not seem to me that any other conclusion can be justified.

36. It may be that during the course of initial discussions ORA anticipated that RPS 185 would, in due course, give way to a quality protocol or similar document and that the Defendant would take the lead in producing such a document. Be that as it may, it is clear from the Claimant's own evidence (as summarised in the amended statement of facts and grounds at paragraphs 66-72) that as from about late summer/ early autumn 2015 members of ORA took the lead in producing documentation intended to lead to guidance as to when the products of re-refining were to be regarded as having achieved end-of-waste status. A Working Group was formed which was chaired by Mr Williamson. On 20 October 2015 ORA sent to Ms Davies a document described as an "interim decision document" which was intended to demonstrate that RPS 185 should remain in force beyond its review date, i.e. 2 November 2015; it was also intended to demonstrate that ORA was working towards a definitive document which could replace RPS 185 before or at the date upon which it was to be withdrawn, i.e. 31 October 2016.

37. Between late 2015 and May 2016 ORA finalised what it hoped would be a definitive document. There were a number of exchanges of views and information during this period between ORA and the Defendant. These exchanges are dealt with in some detail in the evidence but they need not be considered in this judgment since they do not throw any particular light upon the legal issues with which I must grapple.

38. Meanwhile, on 10 December 2015, the long-standing complaint of the European Commission about PFO QP was closed.

39. On 13 May 2016 ORA submitted an end-of-waste guidance document to the Defendant. It is headed "Oil Recycling Association Working Group Interim Response to Environment Agency Regulatory Position Statement 185". In the skeleton arguments and oral argument it has been referred to as ORA's "end-of-waste submission" and I will use that same phrase or the word "submission" to describe it.

40. The submission has a preamble and six discrete sections. For the purposes of this case it is sufficient to identify that section 1 sets out the legal position as ORA then

understood it to be and that sections 2 and 3, respectively, contain proposals for a Distillate Fuel Specification (section 2) and a Base Oil Specification (section 3).

41. The submission is long; to the lay observer, at least, it contains a large amount of technical information. Neither Mr McCracken QC nor Mr Maurici QC suggested that it was necessary for me to master its contents nor indeed, seek to summarise the contents as part of this judgment.

42. As at May 2016 the Claimant regarded the document as "an end-of-waste submission" which was "complete save for the actions specified for distillation bottom products" – see paragraph 72 of the amended statement facts and grounds. Reduced to its essentials, the Claimant regarded the document as being sufficiently detailed and precise to form the basis for determining whether the products of re-refining were to be regarded as having achieved end-of-waste status.

43. It was always understood that the Claimant's submission would be considered by a body which had been constituted by the Defendant and known as the Definition of Waste Panel. How that Panel came into existence, initially, and the work it undertook over many years is described in detail in the evidence of the Defendant. At all material times it was a Panel constituted by the Defendant which was charged with the task of providing an opinion upon whether a particular operator's specific waste derived product or products met end-of-waste status. Throughout the period in which it operated it was free of charge to the organisation which was seeking its opinion.

44. For many years and, indeed, as at the beginning of 2016 the Panel was reasonably well resourced. However, throughout 2016 its funding was reduced. In September 2016 a decision was taken at a senior level within the Defendant that the Panel would be closed to new submissions for a period of three months. It was hoped that in this three-month period the back log of submissions which had been received prior to September 2016 could be cleared.

45. That did not work out. On 19 December 2016 the Defendant notified "customers" that the Panel would be closed "until further notice whilst its role and purpose [was] reviewed in the context of [the Defendant's] waste regulation strategy".

46. Completely coincidentally, as appears from the Defendant's evidence, the Panel issued its decision on the end-of-waste submission made by ORA in May 2016 on the same date as it closed i.e. 19 December 2016. The Panel's response to ORA's submission was contained in a letter written by Mr Sterry (hereinafter referred to as "the decision letter"). It is not possible, in a few sentences, to summarise accurately the terms of the response. For the purposes of this judgment, however, it is sufficient to record that the Defendant was not prepared to accept the submission as a proper basis for determining whether products of re-refining had reached end-of-waste status. Essentially, the Defendant's complaint was that there were gaps in the information and/or data provided which needed to be filled. (I stress that this is a crude summary).

47. Despite the Defendant's negative view of the submission by ORA, the door was not closed, entirely, to further work and discussion. It seems to me to be clear from the way the decision letter concludes.

> "**Extension of RPS 185**. It is recognised that there have been delays in both information being provided to the Environment Agency and in the Environment Agency responding. Therefore we are happy to extend RPS 185 for a period of 12 months. The new expiry date will be the 31 October 2017. However, we cannot agree to indefinitely extend it nor extend it until such time as an end-of-waste status is agreed. This is for two reasons.
>
> 1. An RPS is not a solution to a regulatory problem in its own right, rather a stepping stone whilst a permanent solution is found.
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> 2. End-of-waste status is by no means a certainty, we have yet to see evidence that the legal end-of-waste test has been met. The RPS should be viewed as covering the period up until the evidence is gathered and a view about end-of-waste status reached. A further 12 months should easily cover the length of time taken to get together the required information.
>
> **Next steps**. The Environment Agency's definition of waste panel is closed. We are continuing to review the service in the context of our wider approach to waste and regulation and there is now no formal national mechanism in place to offer a view on whether end-of-waste status has been achieved. We currently regard these materials as waste.
>
> With respect to end uses that fall outside the PFO QP you can come to your own view about whether end-of-waste status has been achieved
>
> If the ORA wish to take the existing distillate spec with new test methods or take the revised distillate oil spec forward the comments above will need to be fully addressed. Future work by the EA on the existing QPs is now also under review".

48. ORA's response was swift and pointed. In a letter dated 21 December 2016 (sent by e-mail on 22 December 2016) Mr Cresswell took issue with a number of the points of detail which had been made by Mr Sterry. His letter concluded:

> "**Timing and next steps**.
>
> In July 2007 after the Court of Appeal's judgment in OSS, the Environment Agency adopted OSS proposed PFO specification from their judicial review claim as the 'interim PFO specification' claiming that an end-of-waste protocol would be in place within one year. It actually took the Agency 4 years to launch the PFO protocol before the interim specification was withdrawn. It was actually 5 years before the test methods were also finalised. This was for just one fuel product.

> The Agency's 10 month timeframe (not 12 months as suggested in your letter) to complete the position for the numerous EoW products detailed in our May 2016 submission is totally unrealistic and inconsistent with the Agency's own prior conduct.
>
> The Agency's decision to abandon the definition of waste panel with a whimsical approach to reviewing what comes next is an abrogation of the Agency's public law and statutory responsibilities.
>
> Accordingly, you will appreciate that we cannot accept the position that leaves us with 'no place to go'. We will consult further with members but must stress the frustration created by the Agency's approach seems disappointingly to be leading to a breakdown in conventional relations. May we urge you to please urgently reconsider and find a way to get the dialogue back on track?"

49. On the same day that Mr Cresswell wrote to Mr Sterry on behalf of ORA, Mr Williamson, on behalf of the Claimant wrote a pre-action protocol letter to the Defendant. The letter specified that the judicial review, threatened in the letter, would relate to a number of issues. These were described as follows:-

> "(1) The Environment Agency's delay in engaging with the ORA and its technical member Protreat, in relation to the ORA's proposed end-of-waste framework(s) for re-refined waste mineral lubricating oil outputs;
>
> (2) The Environment Agency's decision to close its definition of waste panel three months after the ORA's proposed end-of-waste framework(s) for re-refined waste mineral lubricating oil outputs were submitted to the Environment Agency, seven months after the Environment Agency had reviewed the ORA's interim proposal, and with no plans to change that position prior to the expiration of the moratorium that the Environment Agency itself had imposed;
>
> (3) The Environment Agency's failure to confirm the extension of the RPS 185 the moratorium until the proposed waste frameworks have been accepted and adopted as a new Quality Protocol for re-refined waste mineral lubricating oil outputs, and its announcement that it will be extended only for a limited period of 12 months;
>
> (4) The Environment Agency's decision to close its definition of waste panel to remove its former national mechanism to offer a view on whether end-of-waste status has been achieved, a matter which will affect both the consideration of ORA's proposal and also prevent undertakings from obtaining clearance as to individual processes;

> (5) Despite the Court of Appeal's judgment in *OSS Group Limited v The Environment Agency* [2007] EWCA Civ 611, the Environment Agency's current decision to regard re-refined waste mineral lubricating oil outputs as waste".

As was to be expected in a pre-action protocol letter, significant detail was provided on behalf of the Claimant as to the basis upon which it proposed to make its challenges.

50. By letter dated 12 January 2017 the Defendant made a robust defence of its actions. It pointed out, too, that it was in an "ongoing dialogue" with ORA and that the RPS 185 had been extended to 31 October 2017. The Defendant maintained, in the light of these two factors, that any claim for judicial review would be premature.

51. On 31 January Mr Sterry wrote to ORA. Essentially, the letter was in two parts. First, it set out the steps which ORA should take to fill the gaps in its end-of-waste submission. Second, it set out potential next steps. On any view, in my judgment, there was still the prospect of an on-going dialogue with ORA given the terms of this letter.

52. By 22 February 2017 neither the Claimant nor ORA had responded, substantively, to the letters sent by the Defendant on 12 January 2017 and 31 January 2017. ORA did reply on 10 March 2017 but the reaction of the Claimant was to begin these proceedings – the claim form was issued on 16 March 2017.

The Grounds of Challenge

Ground 1

53. As formulated in the skeleton argument on behalf of the Claimant, this ground alleges that the decision taken by the Defendant, as set out in the decision letter was unlawful and unfair in that:-

> "(i) It involved generally treating recyclers by re-refining of waste oil for non-fuel use less favourably than re-processors who merely enable recovery of energy from waste oil.
>
> (ii) It involved giving less favourable treatment to other potential re-refiners than the existing waste oil re-refiners such as Whelan whose products, the specification of which was known or could have been known to the EA, were not treated by the EA as waste subject to the [Waste Framework Directive]".

54. It is an unexplained curiosity in this case that the Claimant is Protreat Limited rather than ORA. That said, I do not propose to burden the parties or other readers with a discourse on the issue of standing. Rather, it seems to me that I should determine whether ORA and its members have been the victim of less favourable treatment, as alleged, in the circumstances prevailing in this case.

55. I confess that I have always struggled to see how the decision contained within the decision letter of 19 December 2016 could, by itself, constitute unfavourable treatment. The nature of the decision taken is described at paragraph 46 above. It has not been suggested that the decision is unreasonable or irrational. As is argued in the skeleton argument presented on behalf of the Defendant, the principle of equal treatment cannot

compel the Defendant to approve what it reasonably and rationally regards as an inadequate submission. More specifically, the principle cannot require the Defendant to approve a technical submission that the Defendant reasonably and rationally concludes lacks all the necessary relevant information before a judgment can be made that a given product has achieved end-of-waste status.

56. In my judgment the Defendant's skeleton correctly identifies that the Claimant's complaint about unequal treatment relates not just to the decision of 19 December 2016 but to the history which preceded it and, in particular to the Defendant's failure to produce end-of-waste guidance in relation to the products of re-refining. I agree with the Defendant that this aspect of the Claimant's complaints about the Defendant's conduct and decision-making is better considered when dealing with ground 2 and, accordingly, I shall consider this aspect below. I say now, however, that at the heart of this contention must be the Claimant's central thesis that there has been and is a legal obligation upon the Defendant to provide end-of-waste guidance in relation to the technique of re-refining.

57. As ground 1 is formulated there remains the complaint that "potential re-refiners" have been treated less favourably than "the existing waste oil refiners such as Whelan".

58. In my judgment, no evidence has been adduced before me which casts any reasonable doubt upon the Defendant's evidence that it has not adopted any end-of-waste position vis-à-vis Whelan in respect of any of its products which have been produced by re-refining. The evidence before me from the Defendant is to the effect that Whelan's products are presumed to be waste. As Ms Davies explains in her second witness statement, that assessment or conclusion is based on such information as has been provided by Whelan to the Defendant over time. I have found nothing in the evidence adduced by the Claimant which casts any significant doubt upon what Ms Davies has to say on this topic.

59. In so far as the Claimant is suggesting that other "oil refiners" are the beneficiaries of alleged favourable treatment I simply observe that the Claimant has not identified any such organisations specifically and the evidence I have seen does not disclose their identities.

60. As is acknowledged by the Defendant, no enforcement action has been taken against Whelan. It asserts that the absence of enforcement action since 2013 is consistent with its published policies and explains why that is so in its evidence. I have been referred to no substantial evidence which demonstrates that the contentions of the Defendant on this issue are wrong.

61. In any event, there is no evidence that any other organisation involved in re-refining in the UK has been the subject of enforcement action in circumstances which should or even might lead to the conclusion that it is being treated less favourably than Whelan. No doubt that is why the Claimant relies upon the assertion that "potential" re-refiners may be treated less favourably. Yet there is a singular lack of explanation as to how or in what circumstances such "potential" re-refiners would or might be treated less favourably.

62. In my judgment, the Claimant has failed to establish that the Environment Agency indulged Whelan in the sense of failing to take enforcement action against that company

yet took such action against comparable organisations operating in comparable circumstances and producing similar products.

63. At some stages in the argument I began to wonder whether the Claimant's point was that end-of-waste status has been conferred upon Whelan's products without there being a need for that company to satisfy an end-of-waste quality protocol and that this constitutes partiality in favour of Whelan because end-of-waste status is conferred upon the products of those involved in reprocessing only if PFO QP is satisfied. I do not believe that to be the argument presented on behalf of the Claimant, but, if it is, the argument founders because the Defendant has not conferred end-of-waste status on Whelan's re-refined products.

Ground 2

64. I deal with this ground as it is articulated between paragraphs 14 and 20 of the skeleton argument on behalf of the Claimant.

65. As appears from the text of Article 288 of the TFEU, the Waste Directive is binding, as to the result to be achieved, upon each Member State. However, as Article 288 itself makes clear, the means by which the result is achieved is a matter for each Member State.

66. There can be no doubt, too, that there is an obligation upon each Member State to take "any appropriate measure" to ensure fulfilment of the obligations arising out of the Treaties – see Article 4 TEU. That same provision imposes "duty of restraint" as it is characterised in the Defendant's skeleton argument.

67. The Claimant contends that the Defendant, as an emanation of the State, is under a duty proactively to direct its resources and use its powers to seek to ensure the result required by the Waste Directive. It is submitted, too, that the result required includes "the management of waste in accordance with the waste hierarchy set out in Article 4 of the Waste Directive". According to the Claimant, this requires the Defendant to perform its functions, so far as possible, to ensure that waste oil treatments higher in the waste hierarchy "are more attractive than treatments lower in the hierarchy".

68. It is common ground that re-refining falls within the expression 'recycling' at paragraph 1(c) of Article 4 of the Directive. It is also agreed that reprocessing falls within paragraph 1(d). Accordingly, re-refining is higher in the Waste hierarchy than reprocessing. The Claimant submits that a proper analysis of the history leading to these proceedings demonstrates that the Defendant has failed to exercise its functions so as to ensure that waste oil treatments higher in the hierarchy are more attractive than treatments lower in the hierarchy. That, according to Mr McCracken QC, renders the Defendant in breach of the Directive and, specifically, Article 21 since paragraph 1(b) requires Member States and it relevant regulatory agencies to take necessary measures to ensure that waste oils are treated in accordance with Article 4.

69. As I have said already, I accept that the phrase 'Member States' in the Waste Directive is apt to describe emanations of the State such as the Defendant. That is completely consistent with case law and, so far as the application of the Waste hierarchy is concerned, completely consistent with the Guidance issued by the Commission – as to which see paragraph 21 above. It follows that I am prepared to accept that, when

exercising the functions which have been conferred upon it by Parliament, the Defendant must take such measures as are necessary to comply with "the result to be achieved" by the Directive. It is necessary to stress, however, that this obligation can only arise in relation to the exercise of the powers which have been conferred upon the Defendant. At the risk of stating the obvious, the Defendant cannot be obliged to comply with the provisions of the Waste Directive unless it has the power to act in a way demanded by the Directive. So, for example, Article 4 of the Directive makes it clear that the Waste hierarchy is to apply in "waste prevention and management legislation and policy". No one suggests that the Defendant has legislative powers in the field of waste prevention and management and, accordingly, it could not be held accountable for any failures to apply the hierarchy in legislation.

70. All that said, Article 21(b) appears to impose an obligation upon Member states to take necessary measures to ensure that waste oils "are treated in accordance with Article 4 and 13". It would be difficult to avoid the conclusion that this obligation is imposed upon the Defendant when it exercises relevant powers and I do not understand Mr Maurici QC to contend to the contrary. For him, the crucial battleground was not whether his client had to comply with Article 21 but rather what was the nature and extent of the obligation imposed by the Article. Only when that question is answered, submits Mr Maurici QC, can one determine whether the Defendant has been or is in breach of the Article as the Claimant submits.

71. The starting point must be the terms of Article 4 itself. Without doubt, it creates a hierarchy which must be applied "as a priority order in waste prevention and management legislation and policy". Even when applying the hierarchy in this context, however, member states must take measures to encourage the options that deliver "the best overall environmental outcome". In my judgment that is a clear recognition that a strict application of the hierarchy in all circumstances is not always justified. So, for example, a policy which dictates or encourages the expenditure of large sums of money solely on prevention - the top rung of the Waste hierarchy - would not be a "necessary measure" if it made no contribution to the best overall environmental outcome. Put another way, if the best overall environmental outcome would be achieved by a policy which spread the expenditure between prevention and a number of other measures then, in my judgment, the terms of Article 4 would be satisfied and there would be no breach by the body which adopted and applied such a policy.

72. I consider, too, that there is force in the argument presented by Mr Maurici QC that if the Waste hierarchy is always to be applied strictly in accordance with the descending order of priority set out in Article 4 one would never logically get beyond prevention unless and until it became clear and obvious that prevention could not be achieved in relation to a particular form of waste. In my judgment such an approach would be wholly impracticable.

73. It must also be remembered that Article 4, and for that matter Article 21, must be interpreted in the context of the whole of the Directive. The purpose of the Directive is set out expressly in Article 1 – see paragraph 14 above. It would be a very strange outcome if Article 4 was interpreted in such a restrictive way that on occasions its application had the opposite effect in practice to that intended by the Directive as articulated in Article 1. Indeed there is much to be said for the argument that "the result to be achieved" by the Waste Directive is the result dictated by Article 1 and that the member states are free to choose the means by which that result is achieved, although,

perhaps fortunately, this case can be resolved without determining the validity of that particular contention.

74. I am clear in my view, however, that Article 4 is to be interpreted flexibly. It cannot be the case that whatever the circumstances a breach of the Article occurs if the hierarchy is not applied strictly in accordance with the descending order of priorities. Further, and importantly in my judgment, it must be applied in a manner which is consistent with the context in which its application is being considered and consistently with the aim and scope of the Directive as set out in Article 1.

75. I turn to Article 21 in the light of these general observations. The obligation in relation to waste oils is that they are "treated in accordance with Articles 4 and 13". If Article 4 is interpreted flexibly, rather than rigidly, as I have suggested should be the case, it would follow that this flexibility exists when waste oils are treated in accordance with Article 4. Further, it is worth stressing that Article 21 requires that waste oils must be treated in accordance with both Articles 4 and 13. Article 13 imposes an obligation upon Member States to take necessary measures to ensure that waste management is carried out "without endangering human health, without harming the environment……". Again, it would be very peculiar if a strict application of the Waste hierarchy was thought necessary even if such application, in a particular context, had the tendency to frustrate the aims and objects of Article 13.

76. It seems to me, therefore, that whether or not there has been a breach of either Article 4 or Article 21 can be determined only following a close examination of all the circumstances relating to the particular case under consideration. It is not sufficient simply to look at the descending order of the Waste hierarchy. It is only following the examination of the circumstances that a conclusion can be reached about whether a breach has occurred.

77. Before turning to an analysis of the circumstances in this case let me consider at this point the specific contention that the Defendant has been under an obligation to produce end-of-waste guidance for re-refining.

78. I do not see how that obligation can be spelled out from the words of Articles 4 or 21 in the sense that it arises simply by virtue of the words used in the Articles. There are no express words within those Articles which could give rise to an obligation upon either the Member State or a regulator to produce end-of-waste guidance and I do not see either, how words to that effect could be implied into the Articles.

79. What is the significance of Article 6? This Article is concerned solely with the criteria by which products of waste can achieve end-of waste status. Paragraph (1) lays down criteria by which products can achieve end-of-waste status provided they comply with "specific criteria" which are developed in accordance with broad criteria set out in the paragraph. Paragraph (2) contains further provisions which provide criteria for end-of-waste status. However, paragraph 4 recognises that criteria for meeting end-of waste-status may not be set "at Community level"; that being so the paragraph confers a discretion upon Member States to "decide case by case whether certain waste has ceased to be waste taking into account applicable case law".

80. In my judgment the terms of Article 6 and, in particular, paragraph 4 thereof, do not support the contention that the Directive imposes upon Member States a specific

obligation to provide end-of-waste guidance whether in relation to the products of re-refining or the products of any other process of conversion of waste. The power to decide end-of-waste status "case by case in accordance with the case law" would, no doubt, permit a regulator to issue guidance. I am not persuaded, however, that this language can be the vehicle for the creation of a specific obligation to issue guidance.

81. In my judgment, therefore, if the obligation exists to issue specific guidance it arises by virtue of the circumstances as they have unfolded in this case. What then are the circumstances against which I should judge whether the Defendant is in breach of any provision of the Directive? I have set out the relevant history above but some repetition is called for.

82. I am satisfied that the evidence establishes that in the period between the judgment in the *OSS* case and the publication of PFO QP there was no perceived need, either by those operating commercially or on the part of the Defendant, to produce end-of-waste guidance in respect of re-refining. In reality, the evidence on this issue is all one way and points unequivocally to that conclusion. Indeed the evidence is scant as to the extent, if at all, re-refining was carried on in the UK. In the circumstances then prevailing I do not consider that the Defendant was in breach either of Article 4 or Article 21 in concentrating its resources upon PFO QP.

83. In or about late 2013 it became clear to the Defendant that there was a growing interest in the commercial possibilities associated with re-refining with the consequence that the need to produce guidance relating to end-of-waste status of the products of re-refining became a topic for discussion and exploration. Although there are some factual disputes as to the nature of the discussions which took place thereafter, I am clear that the evidence establishes that ORA and the Defendant engaged in constructive and, in the main, harmonious discussions with a view to the production of appropriate guidance.

84. The first important staging post was the publication of RPS 185. At the time when it was published in December 2014 there was no complaint by the Claimant, ORA or any of its members to the effect that RPS 185 was not appropriate as an interim solution while a permanent solution was considered and worked out.

85. It became clear, within a short timeframe of the publication of RPS 185, that ORA would assume the responsibility for providing a detailed submission as to the appropriate guidance for end-of-waste status for the products of re-refining. That submission would then be considered by the Defendant and, if acceptable to the Defendant, it would form the basis for published guidance. ORA produced its first submission prior to November 2015 and, of course, it produced its substantive submission in May 2016. At no stage did it assert that it was incapable of producing such a submission either in terms of its resources or expertise. It did not complain that it had not had sufficient time to produce an adequate submission. By this stage, without doubt, it knew that the Defendant was being subjected to "austerity measures" as a consequence of the economic policies of the UK government. It did not protest that despite these measures the Defendant had an obligation to produce an end-of waste document in respect of re-refining which transcended the work ORA was in engaged in.

86. I accept (as does the Defendant) that there was a significant lapse of time between the Defendant receiving the submission and its decision letter of 19 December 2016. However, I do not consider that the Claimant can rely upon delay, in itself, to demonstrate

that the Defendant was in breach of any duty imposed upon it either by Article 4 or Article 21 of the Directive.

87. The decision letter did not close the door to further work by ORA. On any view, in my judgment, the Defendant's letter of 19 December 2016 left open the possibility that work would be done by 31 October 2017 which would bring to a satisfactory conclusion the issue of end-of-waste guidance for re-refining. Mr McCracken QC sought to explain the letter somewhat differently in his oral submissions but, in my judgment, the terms of the letter are self-explanatory. The plain fact is RPS 185 was extended to 31 October 2017; the only purpose for extending the RPS was the prospect of satisfactory guidance emerging before that date.

88. I am also clear that the correspondence sent by the Defendant to ORA after 19 December 2016 (i.e. in January 2017) and the response to the Claimant's pre-action protocol letter was to the effect that the Defendant was prepared to engage with ORA so that the work of completing a satisfactory end-of-waste submission could be achieved.

89. In the light of the history which I set out more fully at paragraphs 22 to 51 above but which I have summarised in the preceding paragraphs has the Claimant established that the Defendant has been in breach of Articles 4 and 21 of the Waste Directive? In my judgment it has not. In the early years after *OSS* the Defendant had no obligation to promote re-refining by taking proactive measures to ensure compliance with the Waste hierarchy given that all those then concerned with WLO were focussed, more or less exclusively, on reprocessing. However, had there been a need for the products of re-refining to be assessed for end-of-waste status the Defendant's Definition of Waste Panel was in existence and it could and would have carried out an appropriate assessment. When re-refining became more attractive commercially (at least potentially) the Panel was still in existence and willing to undertake assessments. RPS 185 was published in December 2014 and as from a date shortly thereafter it was agreed between ORA and the Defendant that ORA would be the organisation which would undertake the work to produce an end-of-waste submission. That remained the agreed position until December 2016. It is only since the rejection of the Claimant's submission on 19 December 2016 that there has been a suggestion on behalf of ORA that the Defendant is in breach of provisions of the Waste Directive and/or it was obliged to produce end-of-waste guidance in relation to the products of re-refining.

90. For the avoidance of any doubt I am also of the view that in the circumstances I have described no obligation has arisen either under the Directive or under the domestic law of England and Wales to produce end-of-waste guidance in relation to the products of re-refining. No authority was cited to me to demonstrate how such an obligation could have arisen in domestic law and I accept the thrust of Mr Maurici's submission that an obligation on the part of a public authority to produce guidance as to how it will operate in a particular context arises, rarely, if at all. In my judgment, it is hard to see any kind of basis for such an obligation arising in domestic law when, as I have found, no such obligation arises either generally or upon the facts of this case by virtue of the Waste Directive itself.

91. That leaves two issues; the closure of the Defendant's Definition of Waste Panel and its allocation (or as the Claimant would have it non-allocation) of resources. These issues, of course, do not arise by virtue of the Claimant's pleaded case and do not arise full square by reason of the way that the challenge is described in the skeleton argument.

Yet underlying this challenge, without doubt, is the contention that the Defendant's allocation of its resources is misplaced. This argument has been advanced primarily, of course, in the context of the Defendant's alleged failure to apply the Waste hierarchy appropriately. But it seems to me that this is a recurring theme which in truth has a wider thrust.

92. Whether that latter point is correct or not I cannot make any kind of judgment upon these issues. Such a judgment would require an in-depth analysis of the whole of the Defendant's activities and then an equally comprehensive appraisal of how resources are managed and spent. That is not my function. My function is to adjudicate upon whether the Defendant has acted unlawfully within the reasonable confines of a particular dispute which has crystallised between parties. I decline to make observations upon matters which are beyond the scope of these proceedings even allowing for the generous way in which I have decided to permit the Claimant to advance its arguments by reference to its skeleton argument as opposed to the pleadings.

Ground 3

93. This ground was raised for the first time in the Amended Statement of Facts and Grounds. It was a complaint that the end date for RPS 185 was chosen arbitrarily and/or irrationally as was the date to which that end date was extended in the decision letter. At paragraph 21 of the Claimant's skeleton argument the suggestion is made that the Defendant failed to carry out any assessment of how long it would take to produce end-of-waste guidance and it failed to indicate whether it would provide sufficient resources for such guidance to be completed by 31 October 2017. Quite how these complaints relate to the decision of 19 December 2016 is something of a mystery but, as I have said, I propose to consider them.

94. When RPS 185 was published in December 2014 the Defendant made it clear that its end date was 31 October 2016. It also indicated that it would review whether RPS 185 should continue to its end date on or about 2 November 2015. ORA did not, as of December 2014, protest that these timescales were insufficient. It did not, when submitting its interim document in October 2015 complain about a lack of time to finish its work. Indeed, throughout the relevant period, i.e. between December 2014 and May 2016, ORA proceeded on the basis that it would complete the work necessary to produce end-of-waste guidance in respect of re-refining within the relevant timescale.

95. Given that the timescales suggested in RPS 185 met with no adverse response from ORA when it was first published and that, as a matter of fact, ORA produced what it thought was a complete submission (save for one aspect) by May 2016 it seems to me to be a reasonable inference that the Defendant did, indeed, give some thought to the likely timescale of producing end-of-waste guidance. It is very unlikely, in my judgement, that the Defendant plucked its timescales "out of thin air" i.e. arbitrarily or irrationally. In my judgment, it is much more probable that the timescales were chosen after proper consideration had been given to the likely work involved.

96. Following its decision on 19 December 2016, RPS 185 was extended to 31 October 2017. As the Claimant correctly points out, this was an extension of 10 months from the date of the Defendant's rejection of its submission. The Claimant has produced no evidence to suggest that the additional work required of ORA could not have been

completed in that sort of timescale although, as a matter of fact, no further submission was made by ORA.

97. I am not prepared to conclude that the Defendant acted either irrationally or arbitrarily when it chose 31 October 2016 as the date when RPS 185 was to expire nor when it decided to extend the expiry date to 31 October 2017. All the indications are that these were reasonable periods of time for the work to be undertaken. Even if I am wrong about that, however, there is simply no proper basis to conclude that no assessment of the time necessary to complete the ORA submission was undertaken or that the Defendant acted arbitrarily or irrationally when choosing the original or extended end dates for RPS 185.

98. The suggestion that the Defendant has failed to demonstrate that it was prepared to direct sufficient resources to the development of end-or-waste guidance is not made out on the facts. Although the Definition of Waste Panel closed to "new business" in September 2016 and closed on 19 December 2016 there is no reason to suppose that the Defendant would not have considered, appropriately, any further submission made by ORA prior to 31 October 2017. It seems to me that is the only inference reasonably to be drawn given the willingness of the Defendant to extend RPS 185 to 31 October 2017.

Reference to ECJ

99. I decline to make a reference. I do not think the points raised in this case require clarification at the level of the ECJ. In any event I am not a court of last resort and the Claimant may seek permission to appeal against my judgment. The reference is opposed. These factors strongly militate against a reference.

Conclusions and directions

100. For the reasons given I conclude that each ground of challenge fails and, accordingly, the claim must be dismissed.

101. This judgment will be handed down at the Cardiff Civil Justice Centre on Monday 30 July 2018 at 11.30 am. In the order which will be issued at the hand down I will direct that any application for permission to appeal should be made directly to the Court of Appeal. It is not practicable to convene a hearing for the hand down of this judgment in London at which the Claimant, if so advised, could develop arguable grounds of appeal and it is not reasonable or cost effective to require the parties to attend in Cardiff. Given the looming long vacation I will also direct that any application for permission to appeal must be lodged at the Court of Appeal by 4pm 10 September 2018. If the parties cannot agree an appropriate order for costs in the light of this judgment they must file written submissions with Ms Carol Stevens in accordance with the following time table; the Defendant must file any application for costs by 4pm 25 July 2018; the Claimant must respond by 12 noon 27 July 2018 any reply must be filed by 3pm 27 July 2018. If the parties are able to agree an order consequent upon this judgment and these directions I would be grateful if they would submit the same to Ms Stevens by 10 am 30 July 2018.