CO/6088/2011

IN THE ADMINISTRATIVE COURT

BETWEEN:

CORNWALL WASTE FORUM ST DENNIS BRANCH
Claimant

-and-

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
Defendant

-and-

SITA CORNWALL LTD

CORNWALL COUNCIL
Interested parties

CLAIMANT'S SKELETON ARGUMENT
For hearing 11 October 2011

The court has 5 bundles of materials:

- ***B*** *– Bundle containing the claim form, witness statements and exhibits to Charmian Larke's first statement*
- ***C1*** *– Claimant's bundle 1 (exhibits to Charmian Larke's first statement)*
- ***C2*** *– Claimant's bundle 2 (exhibits to Charmian Larke's first statement)*
- ***D1*** *– Defendant's bundle 1 (exhibits to Dawn Bodill's statement)*
- ***D2*** *– Defendant's bundle 2 (exhibits to Dawn Bodill's statement)*

*However, the key documents are as follows (with those documents/sections in **bold and underlined** identified for essential reading):*

- *Charmian Larke's first witness statement (Larke 1) [**B/4-14**] **paragraphs 1-78***
- *Charmian Larke's second witness statement (Larke 2) **[B/26-28] paragraphs 4-10***
- *Email exchange with planning inspectorate November 2009 [C1/1289-1290]*
- *Environment Agency email 20 November 2009 [B/41]*
- *Natural England email January 2010 [C1/1320]*
- *Inspectorate "Procedural Note" 4 February 2010 [C1/1322-1323] **whole document***
- *Inspectorate letter 15 March 2010 [B/34] **whole letter***
- *Environment Agency permit consultation draft [C2/1432-1592] at [1586, Q166]*
- *Environment Agency permit 6 December 2010 [D2/823-1067 Q 166 at p 1019]*
- *Inspector's report [D1/1-405] paragraphs 1960-1980*
- *Secretary of State's decision letter 19 May 2011 [C1/1000-1021] **paragraph 19***
- *Witness statement of Dawn Bodill [B/15-20]*
- *Witness statement of Alan Robinson [B/21-24]*

1. **This challenge**

2. This is a statutory challenge to a grant of planning permission pursuant to section 288 of the Town and Country Planning Act 1990.

3. As Langstaff J recently put it, Blackburn & Darwen –v- Secretary of State for Communities and Local Government [2011] EWHC 1923 (Admin) [2]:

4. “The principles that apply to such a challenge are not in doubt. The question for the court is whether the decision of the Secretary of State was "within the powers of this Act" (see section 288). Thus the question is whether the Secretary of State has erred in law, a question which is to be answered by the standard principles of judicial review.”

5. See also, classically, Lord Denning MR in Ashbridge Investments v Ministry of Housing and Local Government [1965] 1 WLR 1320.

6. As explained below, the claimant complains here of an unlawful breach of legitimate expectation.

7. **The parties**

8. The Claimant is an unincorporated association proceeding through Mr K Rickard, Mr B Arthur, Mr M Broadhurst, Miss E Hawken and Ms C Larke respectively.

9. The Claimant in turn comprises three groups (St Dennis Anti-Incinerator Group, Transition Cornwall Network, and Power of Cornwall) which were ‘Rule 6 Parties’ in relation to the public inquiry which preceded the planning decision here challenged, as well as an advocate for the Cornish food industry and other motivated individuals from the local area and wider afield within Cornwall.

10. Cornwall Council is the planning authority against whose decision refusing planning permission SITA had appealed to the Secretary of State (thus making him, when it came to the grant of planning

permission, the planning authority).

11. **The decision**

12. On 19 May 2011 the Secretary of State decided that planning permission should be granted for (among other things) erection of an energy from waste plant ("the incinerator") on land at St Dennis, Cornwall [C1/1000-1021].

13. He did so following a report (first made public with his letter) from an Inspector who had undertaken a public inquiry (which opened on 16 March 2010) on his behalf into the application, and who recommended the grant of planning permission [D1/1-405].

14. **The background to the claimant's concerns**

15. The site for the proposed incinerator is adjacent to two EU 'Special Areas of Conservation' as designated for the purposes of the Habitats Regulations and EU Habitats Directive. The nearest (Breney Common and Goss and Tregoss Moors) is only 91m distant.

16. The Claimant, its members and those it represents (among others), are very concerned about the potential impact of the incinerator on these SACs [Larke 1 B/7 paragraphs 29-36].

17. **The Habitats Regulations**

18. Regulation 61(1) of the Habitats and Species Regulations 2010 (giving effect to the requirements of the EU Habitats Directive) imposed obligations

on the “competent authorities” including to consider the impact of the proposals on the SACs (including potentially through a formal Appropriate Assessment) before granting any consent permission or other authorisation.

19. By virtue of Regulation 7, both the Secretary of State (here contemplating the grant of planning permission) and the Environment Agency (in relation to the environmental permitting of the plant) could (in the abstract) potentially be the competent authority for those purposes.

20. However, by regulation 65(2):

21. “Nothing in regulation 61(1) or 63(2) requires a competent authority to assess any implications of a plan or project which would be more appropriately assessed under that provision by another competent authority.”

22. The problem here, as below, was that objectors, including the claimant and indeed the Council, had a legitimate expectation that the Secretary of State would act as competent authority including in deciding whether a formal Appropriate Assessment was required (and not simply leave that to the Environment Agency), and to determine the application for planning permission on the basis of having discharged that function. They proceeded on that basis.

23. However, when it was too late for them to challenge the legality of the approach taken by the Environment Agency (in deciding that formal Appropriate Assessment was not required, the Secretary of State decided (in the decision under challenge

here) simply to leave it to the Environment Agency.

What happened here

24. Objectors, including the claimant, had, through the inquiry process and in written representations after it, made clear to the Inspector that they considered that the approach adopted by the Environment Agency in assessing the impact of the incinerator on the SACs (and potentially in its discharge of obligations - under the Regulations - in deciding whether a formal Appropriate Assessment was required) was legally flawed and legally insufficient to meet the requirements of the Habitats Directive, particularly when considered for the purposes of the grant of planning permission.

25. Although objectors did not take great issue with the raw figures produced by the Environment Agency (albeit, of course, only in emissions, such as stack emissions, within its jurisdiction), they had acute concerns about how the Environment Agency had interpreted those figures for the purposes of the Habitats Regulations and Habitats Directive, including concerns about the legality of its approach (in 'screening') to deciding whether a formal Appropriate Assessment was required [Larke 2 B/29 para 10].

26. With a view to ensuring that, in placing any weight on the Environment Agency's views the Secretary of State would not repeat its erroneous legal approach on that screening question, objectors, including the Council, thus made clear their concerns in their submissions to the Inspector (and thus the Secretary of State) [Larke 1 B/11, paras 58-61].

27. Cornwall Council produced detailed submissions making that point [C2/1718-1808 at paragraphs 277-330].

28. Mindful of the Inspector's injunction not simply to repeat what other parties had said, the claimant and others relied upon those submissions [Larke 1 B/11, para 52].

29. However, the planning inspectorate had stated (and proceeded during the inquiry on the basis that) that the Secretary of State would take the role of competent authority for the purposes of the Habitats Regulations (and thus the Habitats Directive) and so objectors did not thus think it necessary directly to challenge the legality of the directly challenge the Environment Agency's approach to screening (i.e. by a judicial review of the Environment Agency's permit).

30. The witness statements of Charmian Larke for the claimant [B/4-14] and [B/25-31], which the court is asked to read in full, explain what happened (as set out in summary below).

31. As Charmian Larke explains [Larke1 B/7, para 27], in November 2007, in the period up to the submission of SITA's planning application, 'all parties accepted that the planning authority [i.e. Cornwall when considering the planning application in the first instance and the Secretary of State in dealing with any appeal against refusal] was the Competent Authority for AA issues within the realm of the planning process'. That evidence has not been disputed.

32. In exchanges between objectors and the planning inspectorate in November 2009 (following Cornwall's refusal of planning permission and SITA's appeal to the Secretary of State against that refusal), the inspectorate emphasised that the Secretary of State would need to "be satisfied that

he has all the information before him to enable him to undertake the appropriate assessment (if required) and this may include evidence presented at the inquiry" [Larke1 B/9 para 38] and [C1/1289-1291].

33. The EA itself made clear in an email of 20 November 2009 [B/41] that it did not think it would be appropriate for it to be the lead competent authority [B/9 Larke 1 para 39] and [B/29 Larke 2 para 13]:

34. "We agree that it is not appropriate for the EA to be the lead competent authority for the appropriate assessment."

35. It repeated that position in the draft permit it later issued for consultation and in the final permit, both of which said directly [Larke 2 B/29 para 11] [C1/1586, Q166] and [D1/1019 Q166]:

36. "The appropriate assessment is being conducted by the Planning Authority [i.e. the Secretary of State by that time]".

37. In January 2010, Natural England also made clear that the EA should be the competent authority *for the permit* but that the planning authority should be the competent authority *for the overall development* [i.e. for the purposes of planning permission]. [C1/1320-1321].

38. In January 2010, before the public inquiry started, Charmian Larke wrote directly to the Inspector requesting his view on the Secretary of State as 'competent authority'. In his response in

Procedural Note form dated 4th Feb 2010, the Inspector stated that [C1/1322-1323]:

1. "the question of Appropriate Assessment is a matter, in the first instance, for the Inspector in making a report to the Secretary of State. However, the ultimate decision on this point, as on the appeal itself, lies with the Secretary of State. In coming to a view on Appropriate Assessment, the Inspector will rely on the evidence that has been placed before the inquiry and tested by cross-examination."

39. As Charmian Larke explains [Larke 1 B/10, para 46]: "All the Rule 6 parties understood that to mean that the Secretary of State would act as the competent authority and would therefore (on the evidence to be presented at the inquiry) undertake the screening and thus potentially carry out an appropriate assessment." Her evidence on the point has not been contradicted.

40. A letter of 15 March 2010 from the planning inspectorate to the local MP (passed on by him to Mr Rickard of the claimant) then said this [Larke 2 B/27, para 9] and [B/34]:

41. "Thank you for your letter of 24 February to the Secretary of State about the proposal for an incinerator for St Dennis. As the proposal is being considered by way of an appeal being handled by the Planning Inspectorate, I have been asked to respond.

42. As you may be aware the inquiry into the appeal is due to open on 16 March, at The Exhibition Hall, Kingsley Village, Fraddon. The inquiry is

expected to last 24 days. After considering all the evidence the Inspector will prepare a report, which will be considered by the Secretary of State, before a decision is issued.

43. I can confirm that as part of the inquiry process the Inspector will consider the effect of the proposal under the Habitats Directive. If he deems it to have significant adverse effect he will undertake an appropriate assessment having first ensured that he has the necessary evidence to do so. The appropriate assessment will then form part of the Inspector's report to the Secretary of State.

44. When considering this matter the Inspector will judge whether the effect of the proposed development could be overcome with, for example, conditions or a Section 106 agreement, or whether there are grounds sufficient enough to justify recommending dismissing the appeal and not granting permission. This assessment cannot be carried out until the Inspector has considered all the submitted evidence, including that heard at the inquiry. That evidence would come from the parties involved in the inquiry. Natural England, the Environment Agency and other statutory bodies would have been consulted by the local planning authority at application stage, would have been notified of the appeal and would, therefore, have the opportunity to comment on the proposed development and its effect. Other parties would also have had the opportunity to make their views known. That evidence can then be considered by the Inspector.

45. I hope I have clarified the situation on appropriate assessment." [underlining added]

46. On about 29th July 2010, the Inspector released his list of topics to be covered in closing submissions at the end of the inquiry. It included "the weight to be given to the views of the EA and NE in making an appropriate assessment under the Habitat Regulations". [C2/1593].

47. It was thus made clear that the Inspector, and in due course the Secretary of State in the light of the Inspector's recommendations, (acting as planning authority), would take the role of competent authority for the purpose of deciding whether or not planning permission should be granted.

48. Objectors thus had a legitimate expectation that he would do so. In Bhatt Murphy –v- The Independent Assessor [2008] EWCA Civ 755 Laws LJ thus explained [51]:

49. "the underlying principle of good administration which requires public bodies to deal straightforwardly and consistently with the public, and by that token commends the doctrine of legitimate expectation, should be treated as a legal standard which, although not found in terms in the European Convention on Human Rights, takes its place alongside such rights as fair trial, and no punishment without law. Any departure from it must therefore be justified by reference among other things to the requirement of proportionality (see *Ex p Nadarajah*, paragraph 68)"

50. As for Nadarajah –v- Secretary of State for the Home Department [2005] EWCA Civ 1363, per Laws LJ [68]:

51. "Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public. In my judgment this is a legal standard which, although not found in terms in the European Convention on Human Rights, takes its place alongside such rights as fair trial, and no punishment without law. That being so there is every reason to articulate the limits of this requirement – to describe what may count as good reason to depart from it – as we have come to articulate the limits of other constitutional principles overtly found in the European Convention. Accordingly a public body's promise or practice as to future conduct may only be denied, and thus the standard I have expressed may only be departed from, in circumstances where to do so is the public body's legal duty, or is otherwise, to use a now familiar vocabulary, a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest. The principle that good administration requires public authorities to be held to their promises would be

undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances." [underlining added]

52. As for the period after the close of the inquiry but before the Inspector's report and the Secretary of State's decision: Charmian Larke says this [Larke 1 B/13, para 70]:

2. "6th March 2011 was the end of the three month period in which a judicial review could have been brought of the EA Permit. At that stage, we all still understood that the Inspector would be advising the SoS on the issues that arose in relation to an appropriate assessment and that the Secretary of State would undertake a screening decision and then potentially the appropriate assessment. Had we thought that the Secretary of State might proceed on the basis that the EA had discharged the relevant obligations (such that its assessment would be the operative one overall), we could and would have brought a judicial review challenge to the EA permit."

53. If the Secretary of State (based on his Inspector's report or otherwise), taking the role of competent authority (as had been promised), had adopted and repeated what objectors considered to be the Environment Agency's legally flawed approach, objectors including the claimant would have been able to challenge the Secretary of State's decision on that basis.

54. However, in paragraph 19 of his decision, the Secretary of State stated his conclusion (pursuant to regulation 65(2)) that he was satisfied that, "in

respect of assessing the impact of the appeal proposal on the Special Areas of Conservation in the vicinity of the site, the Environment Agency through the environmental permitting system was the competent authority" [C1/1003 para 19].

55. In doing so, he was adopting the Inspector's recommendation on the point (see thus paragraphs 1960-1980 of the Inspector's Report particularly at paragraph 1975) [D1/337].

56. It was thus only when the Inspector's report was published (along with the Secretary of State's decision) that objectors realised that the Secretary of State was, contrary to what had been promised and expected, now disavowing his role as competent authority in that way. Nor had he even evaluated the criticisms made of the approach taken by the Environment Agency.

57. The result was that (taking the role of competent authority) he neither adopted the legal approach which objectors wanted nor did he adopt and apply the Environment Agency's approach. He simply ducked the point by deciding to leave it to the Environment Agency to discharge the role of competent authority alone for the purposes of this development (thus failing to give effect to the legitimate expectation as above that he would discharge that role for himself).

58. But by then, objectors, such as the claimant, were out of time to challenge – in a judicial review of the permit granted by the Environment Agency - the legality of the approach taken by the Environment Agency.

59. The Secretary of State’s decision to grant planning permission was thus in breach of the legitimate expectation above and unlawful.

60. The objectors have been substantially prejudiced by that action.

61. The claimant thus asks the court pursuant to section 288 of the Town and Country Planning Act 1990 to quash the Secretary of State’s decision and the planning permission thus granted here.

David Wolfe

MATRIX

23 September 2011