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Case No. CO/2434/2006

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

Royal Courts of Justice
Strand, London, WC2A 2LL
30th November 2006

Before:

MR JUSTICE BURTON

Between:

Case No: CO/2157/2006

Solvent Resource Management Ltd	Claimants
- and -	
The Environment Agency	Defendant

And between

Case No. CO/2434/2006

OSS Group Ltd	Claimants
- and -	
The Environment Agency	Defendant

(Transcript of the Handed Down Judgment of
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Case No: CO/2157/2006
Mr David Hart QC and Miss Rachel Marcus (instructed by Taylor Wessing) for the Claimants. Mr John Howell QC and Miss Dinah Rose QC (instructed by the Environment Agency Legal Services) for the Defendant

Case No. CO/2434/2006
Mr Richard Drabble QC, Mr Stephen Tromans and Miss Jess Connors (instructed by Semple Fraser WS) for the Claimants. Mr John Howell QC and Miss Dinah Rose QC (instructed by the Environment Agency Legal Services) for the Defendant

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HTML VERSION OF JUDGMENT

Mr Justice Burton:

1. This has been the hearing of two judicial review applications, directed to be heard together by order of Sir Michael Harrison on 5 July 2006, brought against the Environment Agency ("the Agency") in both of which applications a common and important issue arises, namely in what circumstances does or can material, which has become waste or derives from waste, cease to be waste if it is to be burnt as fuel: and, in particular, whether it can or does cease to be waste when a prior process is carried out for the purpose of rendering it safe to be burnt as fuel, or whether it only so ceases when it is so burnt. This question is of very considerable financial and practical significance, because, so long as material is waste, it is subject to stringent controls in respect of handling, transport, storage, disposal and, in particular, incineration, as a result of a series of important European Directives, and consequent implementing Regulations, derived from Article 174 of the EC Treaty. The most important is the Waste Framework Directive, now codified and consolidated as Directive 2006/12/EC of 5 April 2006, but deriving from 75/442/EEC as amended on various occasions between 1975 and 1996 ("WFD"), whose primary recitals are:

> "*(2) The essential objective of all provisions relating to waste management should be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste.*
>
> *(3) Common terminology and a definition of waste are needed in order to improve the efficiency of waste management in the Community.*
>
> *(4) Effective and consistent rules on waste disposal and recovery should be applied, subject to certain exceptions, to movable property which the holder discards or intends or is required to discard.*
>
> *(5) The recovery of waste and the use of recovered materials as raw materials should be encouraged in order to conserve natural resources. It may be necessary to adopt specific rules for re-usable waste.*
>
> *(6) In order to achieve a high level of environmental protection, Member States should, in addition to taking responsible action to ensure the disposal and recovery of waste, take measures to restrict the production of waste particularly by promoting clean technologies and products which can be recycled and re-used, taking into consideration existing or potential market opportunities for recovered waste.*
>
> *(11) To ensure a high level of protection and effective control, it is necessary to provide for authorisation and inspection of undertakings which carry out waste disposal and recovery.*
>
> *(14) That proportion of the costs not covered by the proceeds of treating the waste must be defrayed in accordance with the 'polluter pays' principle.*"

2. Also significant is the Waste Incineration Directive of 4 December 2000 ("WID"), whose particular materiality to this case is the extension of its application, as from 28 December 2005, from new plants, to which it had applied since 28 December 2002, to all existing plants or boilers; the effect of which, particularly for the Claimants in these proceedings, has been the need to clarify, and if at all possible to avoid, the applicability of WID by establishing that materials or products, in which they are interested, are not or no longer waste, so as not to be required to be burnt in accordance with the WID regime, which is demanding and expensive, both to install and to operate.

3. There are also of relevance the Council Directive on the Disposal of Waste Oils 75/439/EEC of 16 June 1975 ("WOD"), and various 'daughter' Directives, European Parliament and Council Directive on Packaging and Packaging Waste of 20 December 1994 94/62/EC ("PPWD") and Directive 2000/53/EC of the European Parliament and of the Council on End of Life Vehicles of 18 September 2000 ("ELVD"), and the Council Directive 96/61/EC concerning Integrated Pollution Prevention and Control ("IPPCD"). I shall call the whole series of Directives the "European waste regime".

4. The national system is controlled by the Agency, established under the Environment Act 1995, and includes the Pollution, Prevention and Control (England and Wales) Regulations 2000 ("PPC"), pursuant to the IPPCD, and the Waste Management Licensing Regulations 1994 and the Waste Incineration (England and Wales) Regulations 2002 ("WIR"), implementing WID.

5. The Claimants are "**Solvent**" Resource Management Ltd ("SRM"), for whom David Hart QC and Rachel Marcus have appeared, and OSS Group Ltd ("OSS"), represented by Richard Drabble QC, Stephen Tromans and Jess Connors. The Agency is defendant in both actions, represented in both by John Howell QC and Dinah Rose QC. All of them have worked very hard and persuasively to educate me over a substantive hearing of 5 full days, and with a mass of documentation, in what is a discrete jurisprudence, so that a decision can be reached as to what it is that, in the circumstances I have described, constitutes "*end of waste*".

6. The first proceedings in time, and listed to be heard first, were those brought by OSS. However, the documents in that case had expanded to five substantial files and over 2000 pages of statements and exhibits, from which it was entirely clear that there were considerable disputes of fact, which either could not be resolved at this stage, or would or might require another round of evidence, concentrating upon the safety or suitability for combustion of OSS's products. In the second and originally subsequent case involving SRM there was and is far less dispute of fact, and indeed a set of agreed facts contained in a Statement of Agreed Facts dated 31 October 2006. Rather than there being any question of adjourning the OSS case, or leaving it undealt with, I concluded, after hearing submissions at the outset of the consolidated hearing, that it was sensible to take the SRM case first, and it was agreed that the legal questions to be decided in the SRM case, in the resolution of which Counsel for OSS would take a full, though supporting, part, would in any event be identical to, and substantially determinative of, the legal dispute to be resolved in the OSS case. After a short break for reorganisation and completing of the paperwork in the SRM case, which had otherwise been planned to start at the beginning of the third day, the consolidated hearing resumed at lunchtime on the second day. There has been no need to resolve any dispute of fact in the OSS case in order to give full consideration, based primarily upon the facts in the SRM case, to the important questions before me.

7. In brief, SRM is engaged in the 'laundering' of "**solvents**". They have a substantial number of plants, of which five are in issue in these proceedings. They describe their principal business as the recovery and recycling of industrial waste materials, in particular the recovery of waste "**solvent**" materials. For the purposes of these proceedings, the relevant fact is that they carry out a process of fractional distillation, whereby used "**solvents**" are collected from their customers, and are either recovered and refined to the customer's specification and then returned, so laundered, to the customer as what are called PGDs (Product Grade Distillates), or are recovered and refined into a range of PGDs for sale on the open market. In particular in issue before me are six of these PGDs, namely IMS (Industrial Methylated Spirits), IPA/Methanol (a blend of isopropanol and methanol), IPA/Water (a blend of isopropanol and 20% water), gasoline blend C, kerosene and toluene. They have for some time been distilling, and thus producing, these and other PGDs in accordance with a product specification, and selling them on the market on the basis that they are not waste. Agreed Fact Number 4.5 is as follows:

> "*The outputs of the distillation process which meet the Claimant's relevant product specifications and are sold into the open market are held to have been fully recovered and to have ceased to be waste.*"

8. They thus escape the controls imposed by WFD relating to handling, transport and storage, which

would have to be complied with if they were, or remained (as of course they had been, as contaminated and used "**solvents**", prior to the distillation process by SRM) waste. There is no dispute about this aspect of SRM's business.

9. In addition however SRM have used, and wish to continue to be able to use, some of those PGDs as fuel, to operate their own plant, provided that they met not only the product specification but also a fuel specification, to which I shall refer. The benefit of this for SRM has been that, in relation to those PGDs, they had the alternative to selling them on the open market of using them as fuel to operate their plants, thus saving the expense of buying natural fuel from outside – and of course thereby preserving natural resources, by using as fuel a reconditioned material. Agreed Fact 4.6 includes the following agreed statement:

> "*The Claimant was permitted to burn Product Grade Distillates (irrespective of whether those Distillates were or were not waste) which met both the relevant product specification and also a support fuel specification. The Claimant did so for over 10 years without any compliance issues arising from the combustion of Product Grade Distillates.*"

10. However, as set out in paragraph 2 above, WID applied to all existing waste incineration installations from 28 December 2005, and, in relation to the five plants in issue in these proceedings, the Agency issued a permit, pursuant to PPC, which required that, if PGDs were to be burnt, they would be treated as waste and so would have to be subject to the WID requirements. SRM deny, and the Agency asserts, that the PGDs are, or remain, waste, such that (paragraph 4.8 of the Agreed Facts):

> "*This change in the legal requirements makes it essential to determine whether or not Product Grade Distillates are waste when burned as fuel by the Claimant.*"

11. This has a substantial financial consequence for the Claimant, as set out in the first witness statement of Mr Andrew Beutenmuller on their behalf of 10 March 2006:

> "*45. The burden of achieving compliance with the WIR with respect to the burning of PGD in SRM's combustion installations is considerable. SRM would need to install seven continuous emission monitors (one for each of its boilers), which together with installation and ancillary costs represent a capital expenditure of approximately £1,130,000 in total. Once installed, SRM would incur additional costs of approximately £400,000 per annum, which can be broken down into:*
>
> > *(a) The costs incurred in purchasing additional gas oil and/or gas, which SRM would need to use during each initial period of boiler operation in order to achieve WIR compliance, is estimated to be in the region of £100,000 per annum.*
> >
> > *(b) Servicing, maintenance and calibration costs of approximately £190,000 per annum.*
> >
> > *(c) The depreciation of this equipment would amount to over £110,000 per annum.*
>
> *46. The alternative option for SRM to achieve compliance with the WIR is to cease the use of PGD as fuel. The annual cost of the gas oil and/or gas which SRM would need to purchase to replace the PGD would be approximately £2.15 million.*"

12. The dispute between the Agency and SRM thus requires a decision as to whether what was and/or was derived from waste, and has been the subject of a recovery process but is to be burned as fuel, has ceased to be waste at the conclusion of such process, or only ceased to be waste when it has been combusted and, as the Agency describe it, the "*energy has been recovered*". There is no dispute in the SRM case, as I have described, that:

i) The PGDs can be sold on the market as "**solvents**" if they accord with the product specification, which it is not doubted that they do, and in such case are/are no longer waste.

ii) The PGDs, if burnt by SRM, are, by virtue of the fuel specification in, or can be rendered into, a condition which cannot cause in the flue gas directly resulting from their combustion emissions other

than those from natural gasoil, or a higher concentration of emissions than those resulting from the combustion of such gasoil.

13. OSS will suffer financially even more than SRM in the event of a finding in their proceedings favourable to the Agency. For more than 20 years they have been in the business of collecting, recycling and reprocessing used oils and other waste: they employ in excess of 150 staff and have a current annual turnover in excess of £17m. 75% of their turnover, and a substantially greater proportion of their profits, has come from selling a substance called "recycled fuel oil" ("RFO"), which has been very largely derived from waste, contaminated, lubricating oils, including used engine and gear/transmission oils, collected (directly or via other collectors) from some 15,000 waste oil producer locations – garages, workshops and similar premises. After treatment of those waste lubricating oils, they have produced RFO, which has then been sold to their customers to be burned as fuel. Recognising the imminent onset of WID, they have invested heavily in new and improved processes, spending approximately £3m, as a result of which they have developed, and are now selling, a new higher quality fuel oil, which they consider complies with what they assert to be the relevant British Standard, BS2869:1998, which they call CFO (clean fuel oil). They are selling CFO in competition with, and at a considerably lower price than, what are apparently the competitive natural fuels, namely HFO (heavy fuel oil), MFO (medium fuel oil) and LFO (light fuel oil). Their case and belief is that CFO can and should be sold and purchased as not being waste, i.e. as having, as a result of their process, ceased to be waste; and, if so, they can sell CFO competitively on such basis to customers who will not be subject to the waste regime, and who, in particular, when burning such oil, will be able, as they will be able in relation to their more expensive natural fuels, to combust them in non-WID compliant burners. If they must sell the product as waste, then their customers will have to be WID-compliant, which they will not be, and their customers will thus only buy natural oils not subject to the waste regime. In those circumstances what they anticipate to be an additional turnover (in replacement of, and indeed considerable increase over, their sales of RFO, which they can no longer market) of at least £20m annually will be lost. If, contrary to their contention, CFO is and remains, notwithstanding their recovery processes, waste, and must be sold as such, then all that market will be lost, there will be no purpose in their collection of waste lubricating oil from their sources (who will have to find some other, no doubt more expensive, way of disposing of their waste), their massive investment will be wasted and they fear that they will go out of business.

14. As I have described above, there is considerable and presently irresoluble factual dispute as to whether, even on their own case, the processes which OSS carry out are indeed sufficient to render the CFO sufficiently safe to burn, or sufficiently comparable to, or materially indistinguishable from, a natural fuel (if such be required), or compliant with the BS2869, even if, which the Agency does not accept, such British Standard is relevant at all. This distinguishes the OSS case factually, as I have described above, from the SRM case, where there is sufficient agreement of facts for the question of suitability combustion of some, if not all, of the PGDs in issue to be addressed, at least hypothetically. But the issue of law, common to both proceedings, encapsulated in the Agency's submissions, which I shall now summarise, can be, and has been, addressed satisfactorily even at this stage in both sets of proceedings.

15. The position of the Agency was, with some justification, criticised by OSS as being unclear, at least in the correspondence leading up to issue of the OSS proceedings. Equally it can be said that, from the point of view of SRM, the basis upon which there could be reconciliation as between the Agency's acceptance of the sale of PGDs as no longer being waste on the open market and of their effective comparability with natural gasoil, and the position the Agency has now adopted could also be said to have been unclear. However, as a result of the exchange of submissions, and, in particular, as a result of the very clear and helpful oral arguments, the Agency's position is now capable of being very clearly spelt out:

i) Whether or not a product, which was waste or derived from waste, has ceased to be waste as a result of some successful processes, if it is to be sold or used for other purposes, if it is to be burnt as fuel it does not ordinarily cease to be waste until it is burnt and the energy is recovered.

ii) There is one exception to this rule – called their 'special case' or, as dubbed by me, for a reason which I shall describe, the 'Oakley test' – namely that, where the material was originally a fuel, or was used or available for the common purpose of being used as a fuel (whether or not as only one of a number of potential uses), then it can be recovered as a fuel by an appropriate process, and ceases to be waste if:

a) it is chemically and physically identical to the original material

b) it requires no further processing.

I call this the Oakley test because a witness statement has been lodged in these proceedings by a would-be interested party, a Mr Robert Oakley of Eco-Oil Ltd, in which statement he relates that he has received notification from the Agency that "*waste fuel oil recovered back to its original specification may be classified as a product achieving 'end of waste'*" in certain circumstances, and the above two conditions are those which Mr Howell QC confirmed to me, in the course of argument, indeed apply.

16. If the Agency is right, then:

i) OSS cannot comply with either test, as CFO is intended to be burnt as a fuel, and so on the Agency's case remains waste, until it is burnt as fuel (which must be in WID-compliant processes): and was not originally a fuel, being derived from waste lubricating oils, such that it cannot comply with the Oakley test.

ii) SRM could not comply with the main test, but may be able to comply with the Oakley test, in relation to at least some of the PGDs, a matter to which I shall return.

17. As for the position taken by the two Claimants:

i) SRM assert that they comply satisfactorily with the jurisprudence of the European Court, and the proper interpretation of WFD, WID and WOD, by producing its PGDs so as to comply with a fuel specification which is accepted to be equivalent to natural gasoil as discussed above. There has thus been what is described in the leading authority in the European Court namely **ARCO Chemie Nederland v Minister Van Volkshuisvesting etc and Others** ("**ARCO**") [2002] QB 646 as a *complete recovery operation* (see paragraphs 95-96 of the judgment of the European Court at 682). Once there has been such a *complete recovery operation*, Mr Hart QC, on behalf of SRM, submits that such a PGD ceases to be waste, and can thus be burnt in non-waste compliant plant. Mr Hart QC submitted that, if there were, notwithstanding the fact that the fuel specification has, prior to December 2005, been satisfactory to the Agency, any further requirements for refining of the specification (and some were volunteered, such as an express statement that such fuel would contain no PCBs, a particular pollutant which, it was common ground, ought to be absent from a fuel, and would not be contained in gasoil) SRM were willing to comply in that regard. Thus, on SRM's primary case, give or take some minor discussion, SRM would and should be in a position lawfully to burn the six PGDs in its non-WID compliant plant as being no longer waste, as a result of the *complete recovery operation*.

ii) So far as OSS are concerned, they too assert that they have carried out a *complete recovery operation* in respect of their feedstock of contaminated lubricating oils, and that CFO is *ex-waste*. However they accept that, as a result of the irresoluble issues of fact in their proceedings, the most they could hope for at this stage would be that the Agency failed to establish their case, giving the hope that, either by agreement, or in these or further proceedings, they could establish that their process in relation to the production of CFO does indeed amount to what they assert would be a *complete recovery operation*, sufficient to bring them within their interpretation, which I would have accepted, of the European jurisprudence.

18. It can be seen from my summary of the Agency's case, that the Agency does not accept the interpretation of **ARCO** and of the concept of a *complete recovery operation*, for which both SRM and OSS contend, and, in particular, does not accept that (save in respect of its special case) such a *complete recovery operation,* or indeed any recovery process, could have any relevance, where the product was subsequently to be burned.

19. The method of enforcement of environmental law is through the criminal courts: i.e. if in this case the Claimants were to cause or allow what is asserted by the Agency to be waste to be incinerated in non-WID compliant plant, they would be liable to criminal process, and it would be no doubt a jury which would have to decide, in concluding whether to convict or not, whether there had been *end of waste*, whether the PGDs or the CFO were or remained waste when combusted. For better or for worse, there is authority which is said to result in its being wrong in principle for the Administrative Courts to make declarations, still less to grant, as Ouseley J granted in the OSS case here, on 23 March 2006, injunctive relief restraining enforcement action, where the question is one which will have to be determined in due course in criminal proceedings. In an attempt to have Ouseley J's order set aside, the Agency referred, before Sir Michael Harrison on 29 June 2006, to such authority: **R v DPP ex p. Kebilene** [2000] 2 AC 236, **R (Rusbridger) v Attorney General** [2004] 1 AC 357, **R (Pepushi) v**

Crown Prosecution Service [2004] EWHC ADMIN 798 and **Blackland Park Exploration Ltd v Environment Agency** [2004] Env. LR 652. If I may say so with respect, more than sensibly, Sir Michael Harrison dismissed the Agency's application to set aside Ouseley J's order, and there was no appeal against his decision, so that these proceedings have continued, and come now for resolution before me. Albeit that Sir Michael Harrison made the order under the, as it now seems clear, mistaken apprehension that there was or would be no dispute as to facts in the OSS proceedings (although this has been overtaken by the fact that in the parallel proceedings of SRM, as discussed above, there is a sufficiency of agreed facts), in any event, as can be seen from the very full and able exposition of the issues before me by all sides, it must inevitably have been the right course for these issues, involving as they do consideration of complicated Directives and abstruse construction of judgments of the European Court, to be dealt with in the Administrative Court rather than by or before a jury.

20. Before I turn to consider the Directives in greater detail, I should set out two general background matters against which their construction and interpretation, and that of the jurisprudence, must to my mind be set:

i) It is important to distinguish between the question, and those European authorities which deal with the question, of when material becomes waste, as against the issue for me to decide which is when material, which has on any basis already become waste, ceases to be waste. It is plain that in deciding whether what is produced as part of a process intended to manufacture some main product is a by-product, or a secondary product, or, on the other hand, is waste, such questions as whether there has been intentional production, a certainty of use and an economic value for the material in question (see e.g. **Palin Granit Oy** [2002] 1 WLR 2644 at paras 25, 35-37, and **Saetti v Frediani** [2004] Env. LR 37 at paras 42, 47) are important. These concepts are, however, in my judgment of no or little value or relevance in considering the question as to whether product which was waste has gone through a sufficient recovery operation to be able to say that it is no longer waste.

ii) It can be seen that there is a special regime in respect of waste not applicable to natural or virgin products. Waste material burned as fuel is subject to the WID regime, whereas natural or virgin fuels are not. Natural or virgin products do not become waste as a result of being burned. Natural or virgin fuels may have side effects or contain pollutants which may be damaging to health by virtue of emissions created on combustion, but they are not subject to the European waste regime or (no doubt European legislators would say 'yet') subject to any similar regime. It does not follow therefore that what is intended is to create an equivalence of treatment between waste and non-waste. There is more stringent control in respect of the handling, storage and, in particular, disposal and incineration of waste:

a) Waste products are likely to contain pollutants or contaminants not present in natural or virgin products, and certain to contain a diversity and quantity of such contaminants or pollutants by virtue of the quantity of different sources (and processes) from which such waste is derived. Thus the extent and nature of the contaminants or pollutants cannot be anticipated and, notwithstanding modern methods of chromatography, may not be identified. Certainly it cannot be said that there are any tolerated or accepted risks in respect of uncharted territory, such as some unknown mixture of previously contaminated fuel, as compared with the virgin material.

b) The fact that a waste material may have the same or similar specification to an equivalent natural product may not mean that such waste product (or the natural equivalent) is safe, or can be exempted from the waste regime. Thus in **ARCO** the European Court made clear at paragraph 66:

> "*66. The environmental impact of the processing of* [such] *substance has no effect on its classification as waste. An ordinary fuel may be burnt without regard to environmental standards without thereby becoming waste, whereas substances which are discarded may be recovered as fuel in an environmentally responsible manner and without substantial treatment and yet still be classified as waste.*"

The best example of this, and one of considerable significance in the SRM case, can be drawn from Article 3(2)(b) of WID. This is the definition section of WID, and it incorporates provisions in relation to exemptions for some waste which would otherwise be defined as hazardous waste (thus

requiring special and additional controls), by virtue of Council Directive 91/689/EEC on Hazardous Waste of 12 December 1991 (which defines hazardous waste in Annex 3 by reference to properties of wastes which render them hazardous). By Article 3(2)(b) it is provided that:

> "*For the following hazardous waste, the specific requirements for hazardous waste in this Directive shall not apply: ...*
>
> *(b) Any combustible liquid waste which cannot cause in the flue gas directly resulting from their combustion emissions other than those from gasoil as defined in Article 1(1) of Directive 93/12/EEC* [a Directive relating to the sulphur content of certain liquid fuels] *or a higher concentration of emissions than those resulting from the combustion of gasoil as so defined.*"

It can be seen therefore that, even if equivalent to, or, from the point of view of emissions, as safe as, a standard natural fuel, gasoil, a waste fuel can still be classified as a hazardous waste, and is still required to be incinerated pursuant to WID, and in accordance with its processes, but is simply exempted from certain of the more rigorous controls. The equivalent natural product would be subject to no such controls or compliance.

c) The WID regime lays down minimum standards in respect of waste. This is made clear in the recitals:

> "*(5) ... This Directive confines itself to minimum requirements for incineration ... plants.*
>
> ...
>
> *(13) Compliance with the emission limit values laid down by this Directive should be regarded as a necessary but not sufficient condition for compliance with the requirements of* [IPPCD]. *Such compliance may involve more stringent emissions for the pollutants envisaged by this Directive, emission limit values for other substances and other media and other appropriate conditions.*"

21. Waste is defined for the purpose of all these Directives in Article 1(a) of WFD, namely:

> "*(a) 'Waste' shall mean any substance or object in the category set out in Annex 1 which the holder discards or intends or is required to discard.*"

22. It can be seen that the definition of waste depends upon the meaning of the word *discard*. This is explained in the European jurisprudence, to which I shall return when I have considered the balance of the definition section in Article 1 and the annexes there referred to. Annex I lists the '*Categories of Waste*', each category being listed with a prefix Q, from Q1 through to Q16, of which the last is a clear wrap-up clause:

> "*Q16. Any materials, substances or products which are not contained in the abovementioned categories.*"

23. It can thus be seen even more clearly, given that there is no assistance by reference to the kind of material substances or products in question, how significantly the definition of waste depends upon the meaning of *discard*. Annex IIA lists '*Disposal Operations*', 15 of them, with the prefix D, including D1 ("*Deposit into or on to land (e.g. landfill, etc)*"), D10 ("*Incineration on land*") and D11 ("*Incineration at sea*"). The introductory note to that Annex states:

> "*NB: This Annex is intended to list disposal operations such as they occur in practice. In accordance with Article 4, waste must be disposed of without endangering human health and without the use of processes or methods likely to harm the environment.*"

24. Annex IIB lists Recovery Operations, 13 of them, with the prefix R, including R1 ("*Use principally as a fuel or other means to generate energy*"), R2 ("*Solvent reclamation/regeneration*"), R3 ("*Recycling/reclamation of organic substances which are not used as solvents* ..."), R9 ("*Oil re-fining or other reuses of oil*") and R10 ("*Land treatment resulting in benefit to agriculture or ecological improvement*"). There is an identical rubric to that under Annex IIA, save for the substitution of the words "*recovery operations*" for the words "*disposal operations*". Where I refer in this judgment to R1, R2 and R3, it is to these operations, as defined in Annex IIB, to which I shall be referring.

25. Although the position had been made clear by the Court earlier, i.e. in **Inter-environnement Wallonie ABCL v Region Wallonie** [1998] 1 CMLR 1057 ("**Wallonie**"), it is most clearly set out by the Court in **ARCO**:

> "*34. It should be noted as a preliminary that pursuant to article 1(a) of the Directive any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard is to be regarded as waste.*
>
> *35. However, category Q16 in Annex I is a residual category in which any materials, substances or products which are not covered by the other categories may be classified.*
>
> *36. It follows that the scope of the term 'waste' turns on the meaning of the term 'discard': ...* ***Wallonie*** *para 26.*
>
> *37. The Court has held that that term must be interpreted in the light of the aim of the Directive ...*
>
> *38. In that regard, ...* [recital 2 of WFD] *states that 'the essential objective of all provisions relating to waste disposal must be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste".*
>
> *39. It should further be pointed out that pursuant to ...* [Article 174 of the EC Treaty] *Community policy on the environment is to aim at a high level of protection and is to be based, in particular, on the precautionary principle and the principle that preventive action should be taken.*
>
> *40. It follows that the concept of waste cannot be interpreted restrictively.*
>
> ...
>
> *47. It follows more particularly from article 4 of the Directive and Annexes IIA and IIB thereto that* [the term "discard"] *includes, in particular, the disposal and the recovery of a substance or an object.*"

26. The other definition of importance in Article 1 is that in 1(b) namely:

> "*(b) "producer" shall mean anyone whose activities produce waste ... and/or anyone who carries out pre-processes, mixing or other operations resulting in a change in the nature or composition of this waste.*"

Hence a *pre-process* that is short of a recovery operation actually creates waste.

27. The other two Articles of WFD to which reference must now be made are Articles 3 and 4. Article 3(1) (a) requires Member States to "*take appropriate measures to encourage ... first the prevention or reduction of waste production and its harmfulness*", with various particular steps identified. Article 3(1) (b) sets out the second matter which they must take appropriate measures to encourage, namely:

> "*(i) the recovery of waste by means of recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials; or*
>
> *(ii) the use of waste as a source of energy.*"

28. Article 4 is the source of the obligation on Member States to take the necessary measures to ensure that "*waste is recovered or disposed of without endangering human health and without using processes or methods which would harm the environment*", with particular risks to be avoided set out in subclauses (a) to (c): and Article 10 provides that "*for the purposes of applying Article 4, any establishment or undertaking which carries out the operations referred to in Annex IIB* [Recovery Operations] *shall obtain a permit*". In the United Kingdom the requirement for a permit is satisfied, so far as SRM is concerned, through the PPC permits to which it is subject, into which the requirement that the PGDs be incinerated in WID conditions has now been incorporated, now the subject of challenge in these proceedings.

29. I have already referred to recitals (5) and (13) of WID in paragraph 20(ii)(c) above, and to the provision for exemptions from the additional hazardous waste requirements provided for in Article 3(2)(b) in paragraph 20(ii)(b) above. Waste, for the purposes of WID (and indeed all the other relevant Directives as set out above, save for WOD), is expressly as per the definition as set out in WFD. WID imposes (and WIR enacts in this country) detailed provisions for operating conditions (Article 6), air emission limit values (Article 7), control and monitoring (Article 10) etc. By Article 1 the "*Objectives*" of WID are set out:

> "*The aim of this Directive is to prevent or to limit as far as practicable negative effects on the environment, in particular pollution by emissions into air, soil, surface water and ground- water and the resulting risks to human health, from the incineration and co-incineration* [being a reference to a plant where waste is used at least in part in the generation of energy] *of waste. This aim shall be met by means of stringent operational conditions and technical requirements, through setting emission limit values for waste incineration and co-incineration plants within the Community and also through meeting the requirements of* [WFD]."

30. I have mentioned, in paragraph 3 above, WOD. This applies to waste oils, and thus, in particular so far as the hearing before me is concerned, to the waste lubricating oils, the feedstock of OSS: by Article 1 "*waste oils*" are defined as:

> "*any mineral-based lubrication or industrial oils which have become unfit for the use for which they were originally intended, and in particular used combustion engine oils and gearbox oils ...*"

31. The significant Article of WOD for our purposes is Article 3, for which it is necessary to consider the definitions of "*regeneration*" and "*combustion*" in Article 1:

> "- *'regeneration' means:*
>
> *any process whereby base oils can be produced by refining waste oils, in particular by removing the contaminants, oxidation products and additives contained in such oils;*
>
> - *'combustion' means*
>
> *the use of waste oils as fuels with the heat produced being adequately recovered.*"

32. Article 3 sets out what is accepted to be a set of priorities:

> "*1. Where technical, economic and organisational constraints so allow, Member States shall take the measures necessary to give priority to the processing of waste oils by regeneration.*
>
> *2. Where waste oils are not regenerated, on account of the constraints mentioned in paragraph 1 above, Member States shall take the measures necessary to ensure than any combustion of waste oils is carried out under environmentally acceptable conditions, in accordance with the provisions of this Directive, provided that such combustion is technically, economically and organisationally feasible.*
>
> *3. Where waste oils are neither regenerated nor burned, on account of the constraints mentioned in paragraphs 1 and 2, Member States shall take the measures necessary to ensure their safe destruction or their controlled storage or tipping.*"

33. It is not suggested that the process which OSS carries out in its production of CFO from the contaminated lubricating oils amounts to "*regeneration*" as defined.

34. Finally it is helpful to look at 2 'daughter' Directives, if only for the purpose of distinction. In each case *waste* is defined by reference to the WFD:

i) The PPWD, referred to in paragraph 3 above, draws in Article 6 a distinction between the "*recovery*" and the "*recycling*" of packaging waste, by dint of giving different targets for each. In 6(a) and (b) minimum and maximum proportions of packaging waste are to be either "*recovered or incinerated at waste incineration plants with energy recovery*" and by (c) and (d) different targets are set for *recycling*. In Article 3(6), *recovery* is defined by reference to the operations in Annex IIB of the WFD (i.e. including R1): by Article 3(7) recycling is differently defined, and so as to exclude energy recovery:

> "*'recycling' shall mean the reprocessing in a production process of the waste materials for the original purpose or for other purposes including organic recycling but excluding energy recovery.*"

'Energy recovery' is defined in Article 3(8) as meaning "*the use of combustible packaging waste as a means to generate energy through direct incineration ... with recovery of the heat.*"

ii) In the ELVD, again referred to in paragraph 3 above, separate provision is made in relation to vehicles which are waste within the meaning of the WFD. *Reuse*, defined by Article 2(6) as "*any operation by which components of end of life vehicles are used for the same purpose for which they were conceived*", and *recovery* (as defined in the WFD) are dealt with by Article 7. There is separate treatment within Article 7 of "*recycling*", which is defined in Article 2(7) as meaning:

> "*the reprocessing in a production process of waste materials for the original purpose or for other purposes, but excluding energy recovery* [materially as defined in the PPWD]."

The Case for the Claimants

35. Mr Drabble QC, for OSS, set out in writing his proposed formulation of what he called the "*end of waste test*". This was as follows:

> "*Any material (including a material which is intended for use as a fuel), which is deliberately produced, to a specification, from waste materials of any kind (not limited to waste materials whose original common uses included use as a fuel) will no longer fall to be treated as "waste" for the purposes of the Waste Framework Directive simply by virtue of its derivation from waste materials if and when it has been processed, whether by an operation listed in Annex IIB of the Waste Framework Directive or by another operation, so as to be suitable for an identified use of uses (including use as a fuel to generate energy), without further processing, in the same way as the non-waste-derived or "virgin" material(s) which it will in practice be used to replace, under the same conditions of environmental protection, without any greater danger of harm to human health or to the environment when it is stored, transported, handled or used than in the case of the relevant v virgin material(s), and it is certain that it will be put to that identified use or one of those identified uses.*"

36. He gives four explanations of this proposition:

i) He submits that there is no principled or legal reason to distinguish between materials intended for use as a fuel and other materials: hence his formulation of the first sentence.

ii) He makes the same point in relation to his second parenthesis, namely that there is no principled or legal reason to distinguish between materials derived from materials originally intended for use as fuel and other materials.

iii) He explains his reference to operations other than listed in Annex IIB by pointing out that Annex IIB is not intended to be an exhaustive list of recovery processes.

iv) Finally, and significantly, he points out, so far as the comparator is concerned, that it may be clear in some cases that there is a single virgin product which will be replaced, but in many cases there will be a range of virgin substitutes which may be replaced, in which case it is what he calls "*the realistic range of virgin substitutes which must be addressed*".

37. In this way Mr Drabble QC submits that his clients can show that they are carrying out a recovery operation which produces a product which is eliminating "*the dangers typical of waste*" or which is "*no more polluting*" than an equivalent natural product. He recognises that, on the present state of the evidence, he is not able to establish in these proceedings that CFO, in accordance with the latest specification, so qualifies. He submits, however, that he will be able to establish that CFO complies with that latest specification, and that that latest specification complies with, or is analogous to, what he submits to be the relevant British Standard, namely the "*British Standards Specification for Fuel Oils for Agricultural, Domestic and Industrial Engines and Boilers: BS 2689:2006*". Insofar as there are differences from that British Standard, for example in respect of there being contaminants or pollutants in CFO which are not to be found in a natural fuel normally the subject of the British Standard, he submits that CFO does not materially differ in any way which endangers health or the environment. He produces a number of comparative tables showing the similarities and differences between CFO and sample natural fuels, HFO, MFO and LFO, and seeks to explain how they can be reconciled. We did not engage on the exercise of comparisons in this hearing.

38. Mr Hart QC has an easier task. SRM assert that their PGDs, if to be burnt, must, and do, comply with a fuel specification, providing for them to be equivalent to (natural) gasoils and, as set out in paragraph 17(i) above, accept that, if that specification needs to be clarified or strengthened, it will, and can, be, so as to ensure such equivalence. The Agency produced, in the course of the hearing, a long list of contaminants or pollutants, apart from the PCBs to which specific reference was made, which might be found in the PGDs, by virtue of the wide variety of sources from which the waste "**solvents**" are collected, but which would not be contained in gasoil. Having accepted that there could be an amendment to the present fuel specification to make clear that there should be no PCBs, SRM, through Mr Hart QC, also accepted that they would need to look at the substances on that list: but they appear to be confident that, as a result of the use of gas chromatography, they ought to be in a position to identify the presence of such pollutants or contaminants, and thus to agree to a specification which provided for the absence (elimination) of them in PGDs. Hence the SRM position is that they are able to put forward a case that their PGDs, by virtue of their equivalence to gasoil, do not present a "*danger typical of waste*" or are "*no more polluting*" than the equivalent natural fuel (namely gasoil), without the need to rely on Mr Drabble QC's more extended formula.

The Claimants' Submissions on Policy

39. The Claimants rely upon the following matters to support their case that, if they produce their CFO and their PGDs in the manner discussed above, they have achieved "*end of waste*", and can then cause or allow the CFO and the PGDs to be burnt on the basis that they are no longer waste and need not comply with the requirements and controls of WID.

40. The Claimants emphasise that one of the two main purposes of the European waste regime, the other of course being the control of waste, is to encourage the regeneration/reuse/reclamation/recycling of waste, and thus to preserve natural resources by using safe substitutes. The Claimants point to recitals (5) and (6) and Article 3(1)(b) of WFD, set out in paragraphs 1 and 27 above. If waste can be recovered into a material which is as environmentally satisfactory and safe as a natural product, its use should be encouraged and not penalised. OSS may be driven out of business if they cannot sell CFO as waste, and the environmentally friendly provision of the collection of contaminated lubricating oils from small operators throughout the country would be rendered uneconomic. A "*complete recovery operation*" of waste product, so that it achieves the status of *ex-waste*, is not inconsistent with the regime which exercises control over a product which remains waste: so far as incineration is concerned, a product of the boiler will be safe if what is put into the boilers is safe, or, at any rate, as safe as natural products which can be incinerated on exactly the same basis.

Jurisprudence

41. The Claimants submit that there is support, if not express authority, in the European jurisprudence for this approach, and that it has been expressly adopted and approved by Lord Reed in the Outer House of the Court of Sessions in **Scottish Power Generation Ltd v Scottish Environment Protection Agency** [2004] Scot (D) 38/12 [unreported] ("**Scottish Power**"). This derives from the opinion of Advocate General Alber in **ARCO**, referred to in paragraph 17(i) above, which was a decision in

respect of two conjoined cases, Arco itself and Epon, both of which related to whether materials intended to be burned as a fuel were or remained waste. The essential paragraph of Alber AG's opinion is in paragraph 109, which reads as follows:

> "*109. In conclusion it should be noted that the definition of the term 'waste' contained in the Directive is too vague to provide a generally valid, comprehensive definition of waste. Instead it must be determined on a case-by-case basis whether or not the substance concerned is to be regarded as waste in the particular circumstances. Most of the criteria mentioned by the national court may be regarded as an indication that a substance constitutes waste but are in themselves insufficient to determine whether that is in fact the case. For that reason it is necessary to consider the spirit and purpose of the Directive and determine whether or not the substance poses a danger typical of waste. That danger distinguishes between waste and primary raw materials. If a waste material is recovered or reprocessed so that a substance is obtained that no longer poses a danger typical of waste and, when used in a normal manufacturing process, does not pollute the environment any more than, but at most in the same way as, a primary raw material, that substance probably is no longer to be regarded as waste in the sense of being subject to control or authorisation for its further use. It is for the national court and the competent authorities to examine whether or not the substance in question constitutes a danger typical of waste - that is to say one which goes beyond the dangers posed by a comparable primary raw material - so that supervision in accordance with the Directive must continue to be regarded as necessary. Such supervision does not preclude recycling, which constitutes a specific policy objective, and use of such substances as substitutes for primary raw materials. The substance and the recovery operation are subject to the controls provided for in the Directive to avoid harm to human health and the environment. For that reason the shipment of such substances must also be supervised and, where necessary, freedom of movement must be restricted for as long as that danger typical of waste persists.*"

42. This was not as radical as the words of Advocate General Jacobs in **Wallonie** at paragraph 80:

> "*80. It seems to me that a similar approach would be appropriate in interpreting the term "waste" in the Community legislation. The directive seeks to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment. The notion of waste must therefore be interpreted sufficiently broadly to ensure that any processing of a substance that is undertaken by reason of its nature as waste falls within the regulatory system of the directive. Thus where, owing to the fact that it is a residue, by-product, secondary raw material or other material resulting from an industrial process, a material – or the process which it undergoes – does not meet normal health or environmental requirements or standards, it must be regarded as waste and subject to special regulation under the directive. In so far as a material is wholly interchangeable with another product and requires no additional regulation or supervision beyond that applicable to the product it is replacing, it is unnecessary for it to be classified as waste.*"

43. However, the passage in Jacobs AG's opinion in **Wallonie** had not been adopted by the European Court in its judgment, when it stated rather the following:

> "*30. Second, while Article 4 of* [WFD] *provides that waste is to be recovered or disposed of without endangering human health or using processes or methods which could harm the environment, there is nothing in that directive to indicate that it does not apply to disposal or recovery operations forming part of an industrial process where they do not appear to constitute a danger to human health or the environment.*"

44. However the Claimants assert that on this occasion, in **ARCO**, the conclusions of Alber AG were adopted by the European Court, namely in the following paragraphs of the Court's judgment in **ARCO**:

> *"94. In that regard, it should first be noted that even where waste has undergone a complete recovery operation which has the consequence that the substance in question has acquired the same properties and characteristics as a raw material, that substance may none the less be regarded as waste if, in accordance with the definition in Article 1 (a) of the directive, its holder discards it or intends or is required to discard it.*

> *95. The fact that the substance is the result of a complete recovery operation for the purposes of Annex IIB to the Directive is only one of the factors to be taken into consideration for the purpose of determining whether the substance constitutes waste and does not as such permit a definitive conclusion to be drawn in that regard.*
>
> *96. If a complete recovery operation does not necessarily deprive an object of its classification as waste, that applies a fortiori to an operation during which the objects concerned are merely sorted or pre-treated, such as when waste in the form of wood impregnated with toxic substances is transformed into chips or those chips are reduced to wood powder, and which, since it does not purge the wood of the toxic substances which impregnate it, does not have the effect of transforming those objects into a product analogous to a raw material, with the same characteristics as that raw material and capable of being used in the same conditions of environmental protection.*
>
> *97. The answer to part (a) of the second question in Case C-419/97* [Epon] *must therefore be that the fact that a substance is the result of a recovery operation within the meaning of Annex IIB to the directive is only one of the factors which must be taken into consideration for the purpose of determining whether that substance is still waste, and does not as such permit a definitive conclusion to be drawn in that regard. Whether it is waste must be determined in the light of all the circumstances, by comparison with the definition set out in Article 1(a) of the directive, that is to say the discarding of the substance in question or the intention or requirement to discard it, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined."*

45. The Claimants accept that this leaves open the possibility that, after a "*complete recovery operation*", the *ex-waste* may revert to waste if "*its holder discards it or intends or is required to discard it*". But unless this occurs, they say that a *complete recovery operation* is effective to convert waste into *ex-waste*, and that, in relation to the facts relating to both Claimants, there has been such a recovery operation so as to produce the CFO and the PGDs. In relation to the latter, the recovery operation is asserted to be R2. It is because neither R3 nor R9 can be said to apply to what must be said to have occurred in respect of CFO that Mr Drabble QC repeats the submission made by Epon at paragraph 92 of **ARCO**, which does not appear to have been rejected by the European Court, namely that the list of operations in Annex IIB to the WFD is not exhaustive. The Claimants point out that, in both of the conjoined cases, ARCO and Epon, the issue involved the burning of the materials in question, and that if it had been intended that, as asserted by the Agency in these proceedings, where material was to be burnt, it remained waste until burnt, the European Court would have said so in terms.

46. Lord Reed certainly construed the passage of the European Court judgment set out above as adopting Alber AG's approach, in his judgment in **Scottish Power**. After reciting paragraphs 94 to 97, he said as follows:

> *"102. A number of points emerge from this passage. First, paragraph 94 introduces the concept of a "complete recovery operation": something which has the consequence that the substance in question has the same properties and characteristics as a raw material. Paragraph 96 draws a distinction between a complete recovery operation and pre-treatment. A substance which is subjected merely to the latter type of operation remains waste. That is consistent with the definition of "produce" in Article 1(b) of* [WFD] *as "anyone whose activities produce waste ('original producer') and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste". Secondly, in distinguishing between a complete recovery operation and pre-treatment, the criterion which the Court appears to have applied was to ask whether the operation had the effect of transforming the substance in question into "a produce analogous to a raw material, with the same characteristics as that raw material and capable of being used in the same conditions of environmental protection". The transformation of the waste wood into wood chips or powder did not fulfil that criterion, because the operation did not purge the wood of the toxic substances (such as creosote) which impregnated it. Thirdly, the passage contains a reminder that even where waste has undergone a complete recovery operation which has the consequence that the substance in question has acquired the same properties and characteristics as a raw material, that substance may nevertheless be waste if its holder discards it. That is plainly correct: even the product of a recycling operation, such as glass manufactured from broken bottles, or steel manufactured from scrap metal, may be waste if its holder cannot find a market for it. The fact that the substance is the result of a complete recovery operation does not therefore permit a definitive conclusion to be drawn (as the Court*

stated at paragraph 95)."

47. He also said:

> *"107. Although this approach may in some circumstances be difficult to apply, it nevertheless appears to me to be in accordance with the case law of the Court (in relation to which the judgment in Mayer Parry, discussed below, is also relevant). Although not directly material, I note that the same approach is also adopted by the OECD, as explained below. Moreover, this approach appears to me to be correct in principle. The danger which is typical of waste is a danger of harm to human health or the environment caused by the manner of its disposal. It is that danger which the directive seeks to address, by making waste subject to supervision designed to ensure that it is recovered or disposed of in a manner which is controlled so as to protect human health and the environment. When it is claimed that what was waste has ceased to be waste and has become a material which can and will be used in the same way as a material which is not waste, and that it need therefore no longer be subject to such supervision, it is accordingly correct in principle to consider not only whether the material in question can and will be used without further processing in the same way as a non-waste material, but also whether the material can be used under the same conditions of environmental protection as the non-waste material with which it is otherwise comparable, without any greater danger of harm to human health or the environment.*
>
> *...*
>
> *137. In a case where there is no doubt that a material was at one time waste, and the question is whether it has ceased to be waste, the evaluation required is different to some extent; but it is still directed towards deciding whether the material is "discarded", that decision being taken on the basis of the circumstances of the individual case, and in the light of the aims of the directive. The danger which is typical of waste is a danger of harm to human health or the environment caused by the manner of its disposal. The directive seeks to address that danger by making waste subject to supervision designed to ensure that it is recovered or disposed of in a manner which is controlled so as to protect human health and the environment. Once a material has been classified as waste, it therefore remains subject to that supervision at least until that objective has been achieved. It is only then that the material may cease to be waste within the meaning of the directive. When it is claimed that what was waste has ceased to be waste as the result of a complete recovery operation, and has become a material which can and will be used in the same way as a material which is not waste, and that it need therefore no longer be subject to such supervision, it is accordingly necessary to assess whether that claim is well-founded. That assessment requires consideration no only of whether the material in question can and will be used without further processing in the same way as a non-waste material, but also of whether the material can be used under the same conditions of environmental protection as the non-waste material with which it is otherwise comparable, without any greater danger of harm to human health or the environment. Other factors, including some of those mentioned above, may also be relevant in considering whether waste has been subjected to a recovery operation or merely to pre-treatment. One factor mentioned by Advocate General Jacobs it the direction in which payment is made: whether the person carrying on what is claimed to be a recovery operation pays for the operation or is paid for it."*

48. Consequently the 'special case' (or 'Oakley Test') which the Agency puts forward is submitted by the Claimants to be too restrictive, too stringent and without justification. In order to comply with the Directive, they submit, it is not necessary that there be a return, indistinguishably or otherwise, to the original product which became contaminated, nor, if it is to be used as a fuel, did it have originally to have been a fuel. Reference is made to the case to which Lord Reed, in paragraph 107 of his judgment set out above, referred, namely **R (Mayer, Parry Recycling Ltd) v Environment Agency** [2004] 1 WLR 538 ("**Mayer Parry**"), at paragraphs 67 to 69, so as to support at least the latter proposition:

> *"67. Also, the waste may be regarded as recycled only if it has been reprocessed so as to obtain new material or a new product "for the original purpose". This means that the waste must be transformed into its original state in order to be useable, where appropriate for a purpose identical to the original purpose of the material from which it was derived. In other words, metal packaging waste must be regarded as recycled where it has undergone reprocessing in the course of a process designed to produce new*

material or make a new product possessing characteristics comparable to those of the material of which the waste was composed, in order to be able to be used again for the production of metal packaging.

68. The definition of recycling states in addition that the waste may be reprocessed in a production process for the original purpose "or for other purposes". It follows that the concept of recycling is not limited to the situation where the new material or new product, possessing characteristics comparable to those of the original material, is used for the same purpose of metal packaging. Use for other purposes also features in the concept.

69. Those other purposes may be of any kind so long as the reprocessing of the packaging waste does not take the form of energy recovery, since that is expressly excluded by article 3(7) of PPWD], *and is not effected by means of disposal, a method which would run counter to the very concept of recycling as a form of waste recovery."*

49. In any event, submits Mr Drabble QC, it may be as difficult to arrive, for the purpose of the 'special case', at a decision as to whether a product is chemically or physically the same as an original product as to decide whether the product is comparable to a relevant alternative natural fuel.

50. If necessary, Mr Drabble QC submits that he can rely on Article 3(1)(b) of WFD, set out in paragraph 27 above, given the non-exhaustiveness of Annex IIB, so as to assert that what has occurred in relation to the process carried out by OSS is "*recovery of waste by means of recycling, reuse or reclamation or any other process with a view to extracting secondary raw materials*". There may well be considerable difficulty for him in establishing this, not least on the facts – the Agency suggests that all that is happening is a *pre-process*, making it easier to burn (cf **Arco** judgment paragraphs 90, 96).

Anomaly

51. SRM have a further and discrete argument, by reference to what they submit to be the anomalous, and hence unsupportable, position that the Agency has adopted, arising out of the fact that it has accepted, and still accepts, that after their fractional distillation the PGDs are no longer waste when sold to third parties. There has thus been, submits Mr Hart QC, a *complete recovery operation*, an R2 operation (see paragraph 24 above). The PGDs are thus not waste, and so can be used for any purpose for which the PGDs, as **'solvents'**, can properly be used, either by such third parties or by SRM themselves. Mr Howell QC points to what he submits to be a weakness in the SRM case, in that he asks why, if indeed their R2 operation amounted to a *complete recovery operation*, enabling the PGDs to be regarded as no longer waste, SRM have felt that they cannot burn them without first applying to such *ex-waste* a fuel specification, and indeed will not burn the PGDs if they do not comply with such fuel specification. Mr Hart QC responds by saying that all that occurs is a check that the *ex-waste* **'solvents'** could properly be put to one of their uses, i.e. that they were fit for one of their purposes. In any event, implicit in his case is that SRM could have carried out – and no doubt if necessary, i.e. if that made all the difference, would now carry out – the fuel specification check at the same time as, and as part of, the R2 operation.

The Agency's Answer

Policy

52. Although of course it is an important part of the purpose of the European waste regime that regeneration etc should be encouraged, its primary purpose, and in particular the primary purpose of the WID, is to ensure high standards in relation to all steps taken with regard to waste. Mr Howell QC points to recital 5 of WID, set out in paragraph 20(ii)(c) above, indicating that the controls in WID are, or involve, minimum requirements. Article 3(1) of WFD makes it quite plain that there is a hierarchy in the purposes of the Directive, and that encouraging "*the prevention or reduction of waste production and its harmfulness*" comes expressly before the encouragement of waste recovery. Mr Howell QC puts it that it is inconceivable, indeed would undermine the entire structure of the Directives, if the careful controls were replaced simply by a system of trust. It may be that, by dint of product specifications, the dangers of the presence of contaminants or pollutants can be reduced or even eliminated, but the only safe course is for the supposedly safe product derived from waste to be burnt in accordance with WID controls. There are provisions for the relaxing of those controls (e.g. Article 3(1) of WID) but even in such case substantial controls would remain, such that any contaminants or pollutants would be caught. There are very limited provisions for exemptions in Article 11 of WFD, but they would not be satisfied by taking a specification, or compliance with a specification, on trust. The fact, for example,

that the Agency has been able to trust SRM, who compile their own fuel specification in relation to product burnt at their own plants, could not allow or justify a policy which would have to apply to product being transported from one place, or indeed one Member State, to another, in which such product would be said to have been the subject of a *complete recovery operation* and thus to be safe to be burned as if it were a natural product and outside WID.

53. Mr Howell QC submits that the entire structure of the Directives is inconsistent with any suggestion that product derived from waste can simply be safely burned. Indeed he points to Articles 5(3) and 16 of WOD which specifically empower measures to be taken entirely to prohibit the combustion of waste oils, from which power, it is now to be suggested, an *ex-waste* fuel could be exempted.

54. Mr Howell QC submits that there is another hierarchy implicit in the structure of the Directives, and this is a hierarchy of forms of recovery:

i) Article 3 of WOD, set out in paragraph 31 above, sets out the order of priority. First comes the processing of waste oils by regeneration (as defined in Article 1, i.e. refining waste oils so as to produce the base oils): this is not what OSS or SRM are doing. Then if regeneration is not possible – but only if such is due to the identified constraints – (safe) combustion: and then disposal.

ii) There is then the following provision in Article 6(2) of WOD:

> "*Without prejudice to the requirements laid down by national and Community provisions with a purpose other than that of this Directive, a permit may be granted to undertakings which regenerate waste oils or use waste oils as fuel only where the competent authority has satisfied itself that all appropriate environmental and health protection measures have been taken, including use of the best type of technology available, where the cost is not excessive.*"

iii) Article 8(1) of WOD contained provisions relating to the careful precautions necessary to be taken in relation to the use of waste oils as fuel. This provision was repealed only when WID replaced it. Article 8(2) has not been repealed and it provides that:

> "*The Member States shall further ensure that:*
>
> *(a) the residues from the combustion of waste oils are disposed of in accordance with Article 9 of Directive 78/319/EEC*
>
> *(b) the waste oils used as fuel do not constitute a toxic and dangerous waste ... and do not contain PCB/PCT in concentrations beyond 50 ppm.*"

iv) The two 'daughter' Directives, PPWD and the ELVD both, as appears from paragraph 34 above, deal separately with *recovery* and *recycling*: and *recycling* specifically excludes, as there appears, *energy recovery through the use of combustible waste* (as pointed out in relation to PPWD in **Mayer Parry** at paragraph 69, set out in paragraph 48 above). **Mayer Parry** was a case only relating to the former, PPWD, and only dealt with issues of recycling, and hence is of no value to the Claimants' argument. So far as the latter, ELVD, is concerned, there are specific provisions relating to the oil, inevitably waste oil, contained within the end of life vehicles.

v) It is quite plain that recovery, the subject of R1 of the WFD, namely "*use principally as a fuel or other means to generate energy*", stands apart as an entirely separate recovery process. Indeed recovery by combustion falls to be contrasted with disposal operations D10 and D11, being incineration on land or sea (rather as there is a contrast between recovery operations in respect of land treatment (R10) and disposal operations by way of land treatment (D2)).

55. The only way in which Mr Drabble QC is able to circumnavigate all of this is to assert that his CFO has become *ex-waste*, such that all these detailed provisions are avoided and do not apply.

56. The Agency asserts that the Directives cannot be so avoided. Its special case arises out of the specific provision for true regeneration (within Article 3(2) of WOD), or re-refining of oil by way of recovery operation R9. In the event of such a recovery process occurring, then the fuel is regenerated, or is to be reused, and for the same purpose, i.e. burning as fuel.

57. I accept the Agency's submissions. Recovery operation R1 falls to be contrasted with R2 and R3. Mr Hart QC submits that, by carrying out a recovery process in respect of PGDs, he is recovering a "**solvent**", which can then be used for fuel, if that is one of its purposes. However, I am satisfied that the recovery operation R2 relates to the reclamation or regeneration of "**solvents**" for the purpose of their being used as "**solvents**". This seems to me to be clear from considering R3, which relates to recycling or reclamation of organic substances which are not used as "**solvents**". In my judgment, both R2 and R3 fall to be contrasted with the different recovery operation under R1. Hence the operation which the Agency has accepted with regard to PGDs, namely with a view to their being marketed to third parties, has been an acceptance of an R2 operation. If the PGDs are subsequently to be used for fuel, then, unless it were the case that the PGDs had indefeasibly and for all purposes been rendered *ex-waste*, they simply undergo a further recovery process, being R1. It is apparent from the decision of the European Court in **Sita Ecoservice BV v Minister Van Volkhuisvesting, Ruimtelijke Ordening** [2004] QB 262, at paragraph 41, that there can be more than one recovery process:

> "*A waste treatment process can in practice include several successive stages of recovery or disposal.*"

58. In any event, as further discussed below, it is apparent from paragraphs 94-97 of the judgment of the European Court in **ARCO** cited above, that the European Court accepted that waste that was the subject of a *complete recovery operation* could indeed revert back to being waste, i.e. its conversion to *ex-waste* was not indefeasible.

Subsequent Discarding

59. Stanley Burnton J was of the view in **Castle Cement v Environment Agency** [2001] 2 CMLR 19, a very similar case to this, in which Castle Cement sought a declaration that Cemfuel, a liquid fuel derived from waste which it wished to burn in its kilns, was no longer waste, as a result of the processes carried out by them, that to adopt an Alber AG-type test that waste was no longer waste if a process had been carried out to eliminate the *danger typical of waste* was inconsistent with the judgment of the European Court in **ARCO**. The basis for his conclusion was primarily in paragraphs 48 to 51 of his judgment, which relied upon the construction, referred to above, of the word "*discard*" used by the European Court in paragraph 94 of **ARCO**. Counsel in **Castle Cement** sought to persuade him that the Court had concluded that there had been, and could be, a *complete recovery operation* of a product intended subsequently to be used as fuel, and that (paragraph 48) "*neither SRM nor Castle intend to "discard" Cemfuel, since they did not intend to throw it away or to dump it*". Stanley Burnton J was quite clear (paragraph 51 of his judgment) that "*both SRM and Castle do intend to "discard" Cemfuel, by its 'Use principally as a fuel'. That intention is an important consideration in determining whether Cemfuel is waste.*"

60. I agree with that analysis. It seems to me inconceivable that, when the European Court had specifically set out in paragraphs 46 and 47 of its judgment that the term *discard* "*includes, in particular, the disposal and recovery of a substance or an object*" that they could or should have had anything else in mind in using that same expression in paragraph 94. Lord Reed, to my mind, plainly fall into error in **Scottish Power** when he recited in paragraph 102 of his judgment that the passage in paragraph 94 of the **ARCO** judgment:

> "*... contains a reminder that even where waste has undergone a complete recovery operation which has the consequence that the substance in question has acquired the same properties and characteristics as a raw material, that substance may nevertheless be waste if its holder discards it. That is plainly correct: even the product of a recycling operation ... may be waste if its holder cannot find a market for it.*"

61. He is clearly thereby inferring a non-technical meaning of 'abandon' which was not meant by the European Court's use of the word *discard*. Mr Drabble QC manfully attempts to reconstitute the unsuccessful argument in **Castle Cement** while abjuring such error. He submits that the reference in paragraph 94 to the concept of *discard* can be construed, as he put it, as "*a reference to the normal Directive concept, covering the spectrum from abandonment to recovery, and including disposal*": and he then suggests that there would need to be a separate decision to carry out a recovery operation resulting in the burning of a fuel e.g. if there were a market collapse, such that the holder was *discarding* it. Quite apart from the fact that, in the case of SRM, it could be said that this is exactly what happens when they decide to burn their PGDs rather than sell them, I have no doubt at all that no such subjective intention is required. What has occurred is that after the first recovery operation which has, if

it has, been sufficient to render the product suitable for one purpose, there is then a further recovery operation (R1) when the energy is recovered, and the material is *discarded*.

No Anomaly

62. This analysis of the European Court's decision in **ARCO** appears to me to put paid entirely to the SRM case, and also to alleviate any suggestion that the position of the Agency in relation to the PGDs was in some way anomalous in recognising that there has been a recovery process (under R2) sufficient to allow them to be sold on the open market as "**solvents**", but such that, if there was a subsequent intention to burn them as fuel, that would then be an R1 operation and they would revert to waste. On the same basis, the process which renders the contaminated lubricating oil fit to be burned as CFO may be a recovery process, but is overtaken by the subsequent decision of a third party purchaser to discard that oil by an R1 operation. The Claimants assert that, if this is what was intended by the European Court in **ARCO,** that would, and could, have been said in terms, but was not. It may however be thought that the European Court came as close as they ever do to foreclosing the national court from making findings of fact, when they concluded their second finding at the end of the judgment on page 684 as follows:

> "*The fact that that use as fuel is a common method of recovering waste and the fact that substances commonly regarded as waste may be taken as evidence that the holder has discarded that substance or intends or is required to discard it within the meaning of Article 1a of* [WFD]. *However, whether it is in fact waste within the meaning of that Directive must be determined in the light of all the circumstances, regard being had to the aim of the Directive and the need to ensure its effectiveness is not undermined.*"

The Alber Test

63. On that basis, even if there has been what could be characterised as a *complete recovery operation*, the European Court overrides that, by their conclusion in paragraphs 94 to 97, once the product comes to be burnt as fuel. But I am far from persuaded that, in any event, the Court accepted that there would be a *complete recovery operation* by reference to the *no more polluting* or *danger typical of waste* tests. It is certainly right that, in paragraphs 94 to 96, there is an uncritical reference to the hypothetical existence of a "*complete recovery operation that has the consequence that the substance in question has acquired the same properties in characteristics as a raw material.*"

64. However:

i) In numerous passages in its judgment, the European Court appears to reject such tests:

- Paragraph 54 poses the question whether "*in order to determine whether the use of a substance such as LUWA-Bottoms or wood chips as fuel is to be regarded as discarding that substance, it is necessary to take into consideration the fact that those substances are commonly regarded as waste or the fact that those substances may be recovered in an environmentally responsible manner for use as fuel without substantial treatment.*"

- In paragraph 56, **ARCO** is recorded as contending for the conclusion that a substance recovered *in an environmentally responsible manner* constituted a cogent argument that the substance in question is not waste. Epon, according to paragraph 58 of the judgment, similar so argued, conditioning the proposition upon the requirement that "*the use of the substances concerned does not have a more adverse effect on human health and the environment than the use of primary raw materials.*"

- In paragraph 65 of the judgment, the Court appears to make it clear that products so recovered can still be waste: and the answer to the question and to the contention is then firmly set out in paragraph 72:

> "*For the purpose of determining whether the use of* [such substances] *as a fuel is to be regarded as constituting discarding, it is irrelevant that those substances may be recovered in an environmentally responsible manner for use as fuel without substantial treatment.*"

This is repeated in the second finding on page 683 and in the second

finding on page 684, just prior to the passage which I have cited in paragraph 62 above.

ii) Very significantly, the Court did not adopt in its conclusions the passage twice repeated by Alber AG in his conclusions in paragraph 110 of his Opinon:

> "*It must be considered whether the substance still poses a danger typical of waste such that supervision of the recovery appears necessary or whether the substance has ceased to constitute waste, which is the case if it poses no greater danger than a comparable primary raw material.*"

iii) Two subsequent decisions of the European Court appear to be inconsistent with the *no more polluting* test. In **Palin Granit,** at paragraph 21 of the judgment, one of the questions referred to the Court is recited, namely: "*What relevance does it have that the leftover stone is harmless to human health and the environment? To what extent generally is importance to be attached to its possible effect on the environment in assessing whether it is waste?*" The answer given, both in paragraph 47 and in the second finding on page 2662 is that "*the fact*[s]*, even if proven, that the stone does not pose any real risk to human health or the environment are not relevant criteria for determining whether the stone is to be regarded as waste.*" Similarly in **Niselli** C-457/02 the answer given by the Court in paragraph 53 of its judgment of 11 November 2004 is that "*the meaning of waste ... is not to be interpreted as excluding all ... residues which can be or are reused in a cycle of production or consumption ... without harm to the environment*".

65. However, whether or not ruled out by the European Court, the *no more polluting* and *danger typical of waste* tests have certainly not led to any result in the European Court based upon them, whether in **Wallonie** or in **ARCO**, nor did it inform the actual conclusion at paragraph 128 of the Opinion of Advocate General Kokott in the most recent case of **KVZ Retec gmbh v Republic of Austria** delivered on 7 September 2006, where the judgment of the Court is still awaited. I am entirely satisfied that to adopt such tests would be wholly unworkable and would indeed, as Mr Howell QC submits, wholly undermine and be inimical to the European waste regime, and the very careful control, particularly of incineration of waste, which governs this area. Stanley Burnton J in **Castle Cement** was persuaded of the problems of operating such a test in paragraphs 16 and 47 of his judgment. However, in my judgment, he actually underestimates the problems that would be caused by such a test and the impossibility of putting it into effect.

66. The first point to make is that the formulation of the 'Alber test' is uncertain, as Mr Howell QC points out. His actual words which, as I have pointed out when reciting them in paragraph 64(ii) above, the European Court did not adopt, are very wide.

67. He himself had used in paragraph 109, but omitted in his summary findings in paragraph 110 as set out above, the qualification "*when used in a normal manufacturing process*". When the reference is made, in paragraph 96 of its judgment, by the European Court to the *complete recovery operation* which is still not sufficient if there is a subsequent *discard* or *intention to discard*, the words it uses are "*a product analogous to a raw material, with the same characteristics of that raw material and capable of being used in the same conditions of environmental protection*". Lord Reed expands this formulation slightly in his recitation in paragraph 107, including the question "*whether the material can be used under the same conditions of environmental protection as the non-waste material with which it is otherwise comparable, without any greater danger of harm to human health or the environment*".

68. However in arriving at that formulation, which he is concluding was derived by the Court with approval from Alber AG, he has only partially quoted from the Advocate General's own Opinion which, as Mr Howell QC has pointed out, may be a matter of significance. He recited paragraph 69 of that Opinion, namely as follows:

> "*Where the relevant substance may pose a danger in a particular situation and must therefore be subject to the monitoring provided for in* [WFD]*, that monitoring must remain in place until the disposal or recovery operation has been completed ..., that is to say, the substance is to be regarded as waste until that point. That also applies to a substance such as LUWA-Bottoms that may possibly be recovered in a particular operation without harming the environment or human health in any way. That substance too must be subject to the supervision specific to waste until the operation has been completed, as that is the only possible way of ensuring that it will in fact be recovered in such an environmentally sound manner. However, as long as it has to be subject to such*

monitoring it must be regarded as constituting waste. "

69. However, Lord Reed did not quote the immediately following paragraph in the Opinion.

> "*70. The same applies to wood or wood chips that contain pollutants. Since the necessary monitoring also extends to the operations to be carried out, contaminated substances and substances which cannot be recovered safely in all operations cannot in any event be recovered in normal operations in the same way in substances which are not waste. Therefore a distinction must be drawn between waste recovery and normal industrial treatment, on account of the typical risk attaching to waste. Therefore, a production process cannot be held to be normal if normal (primary) raw materials which are not waste are replaced in normal industrial treatment by substances which originally fulfilled another purpose and cannot or may not do so any longer (or never could) and which are now consigned to another purpose or to disposal and may consequently pose a certain danger.*"

70. By virtue of the absence of this latter paragraph from Lord Reed's judgment, it may be that he did not fully appreciate some of the difficulties involved in the Alber approach. Whereas the European waste regime, particularly WID, provides an overall and overarching control to ensure the absence of pollutants and contaminants, the approach which the Alber test permits of allowing that control to cease if the waste product is now – not, as he himself makes clear, in some *particular operations* but in *all operations* or in *normal operations* – to be *regarded* as having been rendered as safe as a non-waste substance.

71. There are, I am persuaded by Mr Howell QC and am satisfied, far too many uncertainties in the Alber test or the *danger typical of waste* or *no more polluting* tests, and particularly in Mr Drabble QC's formulation, for it to be conceivably workable, either as a replacement for, or as any appropriate exemption in respect of, the controls imposed by the European waste regime:

i) It is plain that if what was waste is to be converted into *ex-waste* and not subject to the controls (always subject to defeasibility by a subsequent intention to *discard* as discussed above) there must be a point at which this takes place and can be seen to have taken place and to be effective. A material or product cannot be waste in one place and not in another, and waste on one day of the week and not on another day of the week. Thus in one plant the processing carried out may be said to render it equivalent to a particular virgin fuel, because that is the virgin fuel which has previously been used in that plant, whereas when transported to another plant it would have to be tested and compared against a different such natural fuel and may not compare satisfactorily. That this is what is envisaged is clear from Mr Drabble QC's own formulation in his reply skeleton at para 32:

> "*In the case of CFO, there is no ambiguity as to the corresponding raw materials (i.e. residual fuels) which CFO would replace. If used by roadstone operators, CFO would replace LFO. If used by power station operators, it would displace HFO. In considering comparability it is important to recognise that virgin fuels are not themselves homogeneous, i.e. they are not specified in terms of pollutant content, and will contain potentially widely variable concentrations of substances such as chlorine.*"

ii) Mr Howell QC points out that it would thus be purely happenstance as to what the comparator would be. In some cases it may be a more polluting, in some cases a less polluting, natural fuel: in some cases it may be a more efficient or a less efficient one. In some cases what the comparator is may simply be driven by economics – what is the cheapest natural fuel otherwise available? There may in some cases be no comparator, for example if a plant would operate on only one fuel or if no other fuel were physically or geographically available. In some cases, the only comparator may be a waste fuel. The nature of the process may in any event affect comparability or safety.

iii) Who is to decide what the comparator is? Is this to be an objective decision or a subjective decision made by a purchaser who may choose to compare it with the most polluting natural fuel? There may be more than one comparator, as indeed Mr Drabble QC's formulation allows for. In that case how is a comparison to be carried out? Again one turns unavailingly for assistance in unravelling the problem to Mr Drabble's QC reply skeleton:

> "*33. Further, OSS submits that comparison cannot properly be undertaken simply on the basis of selecting particular substances which are found in*

> *greater concentrations in CFO than in the comparator, or are emitted in greater concentrations from CFO when burnt than from the comparator and looking at them in isolation. In some respects CFO may perform better than the comparator, in others worse. Unless it is obvious that CFO contains some substance which is a risk to health or the environment in substantially greater quantities than the comparator (a possible example might be PCBs) then the approach which is consistent with the objectives of the Directive is to consider the overall comparative impact of using CFO. To put it another way, satisfaction of the legal approach set out by Lord Reed at paras. 105-107 of Scottish Power does not require that the product be absolutely identical with the virgin comparators, but rather requires the court to make a broad judgment in addressing the relevant test.*"

iv) It is apparent that it is therefore to be the Court which decides, possibly months afterwards, and no doubt in the course of criminal proceedings, whether the alleged *ex-waste* product does or does not satisfy a comparability test. It was not suggested by the Claimants, but was at one stage canvassed by me, as to whether the Agency might be involved in some role by way of sanctioning a satisfactory comparable. Even if an available option, this could not possibly answer all the above problems, but in any event, I am satisfied it is not. At best, the Agency might be able to impose a condition in a particular PPC permit in relation to a particular plant as to what could be burnt (rather as they are incorporating into the permits for SRM plants a condition preventing SRM from using their PGDs). But quite apart from all the other problems, not all plants require a PPC permit, and, in any event, waste (or allegedly *ex-waste*) product is transported, not only throughout the country, but from abroad, including other member states, and not only incineration but also handling, transport and storage is governed by the European waste regime if the product is still waste.

v) In any event, it is not only with regard to the risk of contaminants or pollutants released on emission that protection against control and monitoring is imposed and of which the risks must be considered.

72. I am wholly satisfied that a formulation such as that suggested by Mr Drabble QC is no conceivable substitute for the control imposed by the European waste regime. I was at one stage of the hearing attracted by Mr Hart QC's suggestion that, at any rate in relation to SRM's PGDs, the answer could lie in the fact that they have been accepted, or if not yet accepted, could be accepted as having emissions no more polluting than natural gasoil, which at least is a well established and nationally or internationally available comparable. This would be no answer to the last identified concern, namely that it would still not amount to protection in respect of anything other than incineration, for questions of emission would be all that had been compared. Further there would still be the problem as to whether different incineration techniques or processes might have different effects. But at least a specification for an identified natural product and the identified waste product to be compared with it could be available and would not be the subject of the kind of disputes referred to above.

73. However, I am convinced by Mr Howell QC that it cannot possibly be a sufficient test so as to exempt a waste product entirely from the control/ monitoring regime that it can be compared, so far as emissions are concerned, with gasoil, when the gasoil comparability test is expressly chosen by that very regime to facilitate only a limited exemption i.e. by way of Article 3(2)(b) of WID, set out in paragraph 20(ii)(b) above. Natural gasoil itself would probably not comply with the WID emission limits. Albeit that there are by Article 3(2)(b) exemptions from the more stringent requirements relating to hazardous waste thus achieved, the protection is that even a product derived from waste which is comparable, so far as emissions are concerned, with gasoil must still be burnt in a WID-compliant plant, and be subject to the WID monitoring processes. Thus the assurance that, by virtue of such a specification, there should, for example, be no PCBs in the comparative product is achieved, not by way of trust, but by way of the fall-back that any such contaminants would be eliminated by the WID-compliant process.

74. In those circumstances OSS will not be entitled to any relief which will enable them or others to burn CFO other than in accordance with WID or to treat it as having undergone a sufficient recovery process so as to establish that it is no longer waste. So far as concerns SRM however, they may still be able to take advantage of the Agency's 'special case', the 'Oakley test'. Both IMS and kerosene, it is accepted, were and are **solvents** commonly used as a fuel. SRM may well be able to establish to the satisfaction of the Agency that, in that regard, those PGDs have undergone regeneration or reclamation so that they can be reused. The specification of the natural product is likely to contain tolerances with which these PGDs can comply, and SRM is likely to be in a position to establish a specification which satisfies the Agency as to the absence of PCBs and other contaminants. I do not accept that this is a comparative exercise which would suffer from the same criticisms as made in respect of the *no more polluting* test. The comparator is established and the specifications can be

compared.

75. There remains, or may remain, a problem in relation to toluene, to gasoline-blend C, a mix which includes toluene, and to IPA/methanol and IPA/water. There is, or may be, a dispute, as to whether toluene was or is commonly used as a fuel. In any event, there is no doubt that, so far as all four of these PDGs is concerned, they have (with the exception of the water) all been used as additives in other fuel, and thus been burnt. I do not see, for my part, any distinction between the use of a "**solvent**" for fuel, thus combusted as a fuel, and the use of a "**solvent**" as an ingredient in fuel and thus combusted as part of a fuel. It may be that there would have to be some addition to a specification if, in relation to the natural product, it would or should not be burnt in conjunction with some other ingredient, which would also have to be applied to the relevant PGDs, but, that apart, I see no reason why SRM should not be in a position to satisfy the Agency. Given that this relates to the combustion of PGDs in SRM's own plants, it may be that this could be something which is dealt with by a condition on the PPC permit, subject to an appeal to the Secretary of State (PPC paragraph 27(1)(d)). Alternatively it could simply be the matter of an administrative decision by the Agency which could be judicially reviewable. In either event I have not identified any lack of goodwill by the Agency towards SRM, and I have no doubt that, if it is possible to reach an accommodation between the Agency and SRM, whereby all six of these PGDs can meet the Agency's special case, that will be achieved.

76. I consequently refuse any relief in respect of OSS. With regard to SRM, I shall hear Counsel in relation to the consequence of this judgment.