

GLS Legitimate Expectation Webinar

CASE REFERENCE

R. (on the application of Cheshire East BC) v Secretary of State for the Environment

Queen's Bench Division (Administrative Court)

26 July 2011

Westlaw Case Analysis 5 pages

Official Transcript 28 pages

Status:  Positive or Neutral Judicial Treatment

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Case Analysis

Where Reported

[2011] EWHC 1975 (Admin); [2011] N.P.C. 92; [Official Transcript](#)

Case Digest

Subject: Environment

Keywords: Consultation; Funding; Irrationality; Legitimate expectation; Private Finance Initiative; Waste minimisation

Summary: The claimant local authorities had not established that they had a legitimate expectation of success or of being consulted in connection with a decision to provide Private Finance Initiative funding for a certain number of waste-diversion projects.

Abstract: The claimant local authorities (C) applied for judicial review of a decision of the defendant secretary of state that Private Finance Initiative (PFI) funding would not be provided for their waste-diversion project. In 2005, C submitted their outline business case for PFI support for a waste-diversion project. The project proposed two mechanical biological treatment (MBT) plants together with an Energy from Waste (EfW) facility. The Department for the Environment, Food and Rural Affairs (DEFRA) approved the outline case and an interdepartmental review group endorsed the DEFRA recommendation that the project should receive central government support. Approval was subject to conditions. DEFRA said that it expected the PFI credits to be £40 million. In 2009, C approached DEFRA to request additional PFI credits. DEFRA stated that the Executive Board of the Waste Infrastructure Delivery Programme (WIDP) was broadly sympathetic to the case outlined and was prepared to hold £30 million PFI credits in reserve for the project until September 30, 2010. In August 2010, DEFRA confirmed its approval of close of dialogue on the procurement process and named the preferred bidder (V). It stated that this should not be taken as a guarantee of the issue of PFI credits, which remained subject to an approval of the final business case and any other necessary approvals, as well as the project remaining consistent with departmental policies and priorities. DEFRA was aware at that time that the project as originally outlined differed from that which V now proposed. V planned that the waste which had not been reused, recycled or composted should be treated in a MBT facility, which would produce solid recovered fuel (SRF), which would then be sent for combustion. Rather than fuelling an EfW plant close to the MBT facility, as originally planned, the SRF was to be sent to an EfW facility at Runcorn. The Runcorn facility was a project which had already been approved, part funded by PFI credits, and was in the process of construction as part of a project for another local authority. Before the Government's Comprehensive Spending Review, which was due in October 2010, DEFRA decided to consider a reduction in the number of local authority waste infrastructure procurements supported by PFI credits. As part of that process, WIDP developed a methodology to appraise each of the projects which was a potential candidate for part funding. The

application of that methodology led to the decision that PFI funding would not be provided for C's project. C argued that (1) it was irrational for the methodology to disregard the SRF produced by the MBT facility when assessing the contribution to diversion from landfill made by the project; (2) they enjoyed a substantive legitimate expectation that, on fulfilment of certain conditions, they would receive some £70 million worth of PFI credits in connection with the project; (3) there was a procedural legitimate expectation of consultation in advance of the decision to withdraw funding from the project; (4) DEFRA failed to take into account a relevant consideration, or acted under a mistake of fact, in employing the assumption that 68 per cent of the waste to be landfilled by the project and of the SRF produced by the project would consist of biodegradable municipal waste, whereas available data showed a lower figure.

Application refused. (1) The submission of irrationality was not made out. To count the Runcorn capacity would have been irrational, as it would have meant attributing capacity that had already been delivered by the PFI-funded project of the other local authority to C and therefore DEFRA would have been counting the capacity twice (see para.41 of judgment). (2) The indications that funding was subject to a "satisfactory" final business case and to a "Second stage review", the clear understandings that PFI credits would be subject to the Comprehensive Spending Review, "with the project remaining consistent with departmental policies and priorities at the time approval is sought", and the deliberate uncertainty expressed by C themselves when appointing V as provisional preferred bidder all showed that there had been no unqualified assurance that funding would be forthcoming if particular conditions were fulfilled, or that a particular process would be followed through to the inevitable consequence that funding would follow. In the absence of such, there was no room for a legitimate expectation which the law would protect (para.66). (3) Once a decision had been taken to withdraw funding from a certain number of projects, it was a matter for central government to determine whether there should be consultation about that or not. The policy judgment not to engage in it was rational and not unlawful. In any event, there was an overriding public interest, namely the Government's decision that spending had to be cut significantly and quickly, for the impugned decision (paras 82, 90). (4) The adoption of a 68 per cent figure, capable of variation where a good reason was established, was not irrational. Further, even if C were right about DEFRA's approach, that would not have altered the ultimate ranking of their project (paras 100, 108).

Judge: Langstaff, J.

Counsel: For the claimants: Nigel Giffin QC, Tom Cross. For the defendant: James Maurici, Sasha Blackmore.

Solicitor: For the claimants: Trowers & Hamblins. For the defendant: In-house solicitor.

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Consultation; Implied promises; Legitimate expectation; Promises; Public authorities.

[J.R. 2012, 17\(2\), 161-176](#)

Waste: PFI support for waste infrastructure

Consultation; Funding; Irrationality; Legitimate expectation; Private

Finance Initiative; Waste minimisation; Wednesbury unreasonableness.

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R. (Cheshire East Borough Council and Others) v Secretary of State for the Environment, Food and Rural Affairs

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A fair ride?

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[N.L.J. 2011, 161\(7482\), 1279-1280](#)

Insight

[Legitimate expectation](#)

Neutral Citation Number: [2011] EWHC 1975 (Admin)

Case No: CO/461/2011

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

Leeds Combined Court Centre 1 Oxford Row Leeds

Date: 26/07/2011

Before:

MR JUSTICE LANGSTAFF

Between :

R. on the Application of Cheshire East Borough Council Cheshire West and Chester Borough Council	<u>Claimant</u>
- and -	
The Secretary of State for Environment Food and Rural affairs	<u>Defendant</u>
And	
Her Majesty's Treasury – Interested Party	<u>Interested Party</u>

(Transcript of the Handed Down Judgment of
WordWave International Limited
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190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Mr Nigel Giffin Q.C. and Mr Tom Cross (instructed by **Trowers and Hamlins**) for the
Claimant's
Mr James Maurici and Sasha Blackmore (instructed by **DEFRA Legal**) for the **Defendant**

Hearing dates: 16-17th June 2011

Judgment
As Approved by the Court

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Mr Justice Langstaff :

1. Waste collected by municipal authorities, such as household refuse, contains much which is biodegradable. If left to degrade naturally, as where the waste is placed in a landfill site, methane may be produced. It is thought that this has serious adverse environmental effects, not least in contributing to global warming. The policy of the European Union has thus been to seek to minimise the amount of biodegradable municipal waste (“BMW”) which is placed in landfill. Council Directive 1999/31/EC required member states to set up a national strategy to reduce the amount of BMW going to landfill; and (by Article 5(2) taken with Article 18(1)) that the amount of BMW going into landfill was to be reduced to 50% of the total amount by weight of BMW produced in 1995, and to 35% by 2020.
2. The Waste and Emissions Trading Act 2003 (summarising its provisions) by Section 1 obliges the Secretary of State to specify the maximum amount by weight of BMW to be allowed to go from England to landfill in a way consistent with the obligations under the Directive. Section 17(1)(a) requires the Secretary of State to have a strategy for reducing the amount of biodegradable waste going to landfill in England.
3. The strategy adopted to achieve this reduction has involved both carrot and stick. The stick is to ensure a rise in the cost of landfill, by escalating charges and taxes. The carrot has been to offer Government support for PFI schemes to be run by Local Authorities, to enable those authorities more easily to finance those projects which by a variety of means seek to avoid BMW going to landfill. Thus in May 2006 the Department for Environment Food and Rural Affairs (“DEFRA”) issued revised criteria relating to the giving of PFI credits to Local Authorities. Materially, they stated at paragraphs 2 and 3:-

“PFI credits are awarded to authorities primarily to deliver increased diversion of biodegradable municipal waste from landfill. Proposals should demonstrate how the schemes:-

-contribute to or complement longer-term national targets for recycling and composting as well as diversion of biodegradable and other municipal waste from landfill, indicating the amount of biodegradable and other municipal waste expected to be diverted from landfill over the whole life of the project;

-support or complement the authorities’ plans for recycling set out in their Municipal Waste Management Strategies.

3. Proposals should show how schemes will provide additional contribution to national landfill diversion during the contract period and up to 2020 as required under the Landfill Directive, where appropriate.”

4. The context is not, therefore, support for one local authority project taken in isolation, but as part of the national obligation to fulfil the targets in the 2003 Act and 1999 Directive.

5. Also of note is the reference at paragraph 9 of the same criteria to the need for “residual disposal solutions” such as refuse derived fuel to “demonstrate the destination of any residual output.”
6. The 2006 criteria are additional to those general criteria which must be met by all PFI projects. The Office of the Deputy Prime Minister in its introduction to the “PFI Project Support Guide (2006 to 2007)” recorded that notification that grant would be paid, and the conditions and level of capital investment which would be supported, would be set out by issuing a “PFI credit” in the form of a letter from the sponsoring department. Administrative arrangements for central government support, annexed to that paper, envisage a multi-stage process beginning with the submission of an outline business case, followed by a procurement exercise which progressively eliminates those who bid to perform the contract until reaching a preferred bidder, then proceeding to a final business case, and written confirmation that financial close has been reached, after which a PFI credit letter is to be issued.
7. In July 2005 Cheshire County Council submitted its outline business case (“OBC”) for PFI support for a waste diversion project. The project proposed two mechanical biological treatment (“MBT”) plants, of 300,000 tonnes capacity per year (“300ktpa”) together with an Energy from Waste facility (“EfW”) to cope with 120ktpa.
8. In December 2005, DEFRA Ministers approved the OBC and an interdepartmental review group (“PRG”) endorsed the DEFRA recommendation that the project should receive central government support. Approval was expressly subject to conditions set out in a letter dated 20th June 2006. DEFRA said it “expected” the PFI credits to be £40 million. Support was said to be conditional upon the project continuing to meet all the published criteria in the PFI Project Support Guide and a detailed timetable. The approval said (amongst other matters):-

“Once you are clear about the value of eligible expenditure under the contract you may request a promissory note confirming the level of support you can expect to receive from the Department.

We will formally issue PFI credits on the basis of an approved final business case (FBC) and a letter confirming the date the contract was signed. The FBC should be sent to the Department once you are confident that its contents will not markedly change further. It should be a full business case, at the same time referring back to the OBC and noting where it has changed.”

9. By early 2008, four bidders had been identified in the course of procurement in accordance with the Public Contracts Regulations of 2006. They were invited to submit detailed solutions. At that time, however, local government was about to be re-organised. The relevant responsibilities of Cheshire County Council were to be adopted by Cheshire East Borough Council, and Cheshire West and Chester Borough Council, together the claimants. In answer to a question whether this might affect the availability of PFI finance, DEFRA wrote to Mr Collin of the Claimants of the 3rd June 2008 to say, amongst other matters:-

“I can confirm that the credits will not be withdrawn solely as the result of the reorganisation and, subject to the following points, can either be assigned to one of the two New Authorities or split between them in a ratio to be agreed between the New Authorities. The PFI credit award will be subject to the usual condition that a satisfactory Final Business Case must be submitted to, and approved by, DEFRA before the final confirmation of the allocation.”

10. On 13th January 2009 DEFRA agreed to waive the initial requirement to reach financial close by 31st March 2009: but this was subject to two conditions. The first was the achievement of key milestones including entry into an Inter Authority Agreement recording that the procurement of the Project would continue as a joint project between the New Authorities, and secondly a clear and deliverable timetable.
11. In December 2009, the claimants approached DEFRA to request additional PFI credits. They recognised that “in the current climate public finances are under even greater pressure”. In its response (29th December 2009) DEFRA summarised the position that PFI credit allocations were made on a provisional basis on approval of the OBC and then confirmed at financial close, but that it was prepared to consider applications for further credits. On 19th February 2010 DEFRA wrote to Mr Collin to say that it was not currently possible to confirm a formal provisional allocation:-

“However I can confirm that EWT...” [An acronym for the Executive Board of the Waste Infrastructure Delivery Programme (“WIDP”)] “...is broadly sympathetic to the case you have outlined and is prepared to hold £30m PFI credits in reserve for the Cheshire project until 30 September 2010.”

12. It was expressly noted that this did not commit DEFRA to making an additional PFI credit allocation, which could only be done after the submission and evaluation of an appropriate Business Case and ultimately ministerial and PRG approval. It was also subject to various other conditions. In a part of the letter under the heading “Process” it was said:-

“An award of this scale will be subject to both DEFRA Ministerial and PRG approval. **The project** is also subject to a Second Stage Review by PRG, as well as the new three stage FBC approval process....” (emphasis added)

13. The defendant (correctly) points out that this reference is to the whole project, and is not limited merely to the application for additional PFI credit.
14. In May 2010 the Coalition Government took office, replacing the previous administration. A Comprehensive Spending Review was planned for October, the details of which were to be announced on the 20th October. When it became apparent that both the two bidders who had been invited to submit final tenders had been refused planning permission for their proposals, an email of June 2010 (to Mr Collin) reminded the claimants that:-

“...the strongest prospect of maintaining additional credits is to present a project timetable demonstrating that financial close is possible this calendar year... a financial close date that is targeted for post March 2011 will mean that any PFI credits (both the initial allocation and the proposed additional allocation) will be subject to the outcome of the spending review in October...”

15. By 6th August 2010, however, DEFRA confirmed its approval of close of dialogue on the procurement process: Viridor being the preferred bidder. This email, however, expressly noted in a final paragraph that this:-

“should not be taken as a guarantee of the issue of PFI credits which remains subject to an approval of the FBC and any other necessary approvals as well as the project remaining consistent with departmental policies and priorities at the time approval is sought.”

16. Also in August 2010, however, the Treasury indicated an intention to transfer the revenue costs of payment of Local Authority PFI grants from the revenue support grant to the sponsoring department. This caused DEFRA to begin to assess the scale of the potential financial commitment it faced and the scope for, and implications for Government objectives of, scaling back the programmes which it had previously proposed to support in various Councils across the country. DEFRA began to examine internally the prospect of scaling back the waste diversion programme. This led to Benedict Prynne at DEFRA circulating an internal email seeking information from which to compile an up to date and accurate assessment of the benefits to be provided by the various different proposed projects in terms of diversion of BMW from landfill by 2020. It asked the recipients to agree figures for diversion from landfill with the Local Authority concerned. One such recipient was James Papps. He was a “Transactor” (one of a number of people who were allocated individually to particular programmes to ensure liaison with DEFRA). That liaison would have ensured that DEFRA knew that the project as originally outlined in the OBC differed from that which the likely preferred bidder, Viridor, proposed. Viridor planned that the waste which had not been reused, recycled or composted (“residual waste”) should be treated in a MBT facility which would produce solid recovered fuel (“SRF”) which would then be sent for combustion. Rather than fuelling an EfW plant close to the MBT facility, as originally planned, the SRF was to be sent to an EfW facility at Runcorn. The Runcorn facility was a project which had already been approved, part funded by PFI credits, and was in the process of construction as part of a project for the Greater Manchester Waste Disposal Authority (“GMWDA”). It was to be operated by Viridor through a joint venture company, specifically designed to process SRF rather than unprocessed residual domestic waste, with appropriate consents for that purpose. Although the evidence established that Runcorn could deal with unprocessed residual domestic waste, to do this would require appropriate consents as a necessary precondition.
17. An email from Amar Qureshi of DEFRA of 6th August 2010 shows that DEFRA was aware that the Cheshire proposal involved the use of the facility to be constructed at Runcorn.

18. On 20th September 2010 James Papps asked the claimants to provide information about the project in conjunction with the spending review negotiations. A day later, the claimants' project board appointed Viridor as the provisional preferred bidder. This led to an approval on 29th September by the executive of Cheshire West and Chester Borough Council of the appointment of Viridor as provisional preferred bidder. This was expressly subject to the availability of PFI credits.
19. Things moved quickly. On 4th October 2010, James Papps sought completion by the claimants of a pro-forma, giving information about the project, which had been pre-populated with much data by Mr Prynn. DEFRA indicated that part of its overall objective was to assemble data current at the close of business on the 6th October 2010. Although the claimants were not aware of this at the time, the decision had been taken within DEFRA to consider a reduction in the number of Local Authority waste infrastructure procurements supported by PFI credits. As part of that process, between 15th and 27th September WIDP developed a methodology to appraise each of the projects which was a potential candidate for part funding by PFI credit payment. This methodology, finalised on 28th September, was to be applied to projects based on the relevant data as at the close of business on 6th October 2010: hence the date to which the information in the pro-forma was to be current.
20. The pre-populated pro-forma sheets were thus, I conclude, designed to feed this process, and to provide information relevant to the methodology which had been adopted (further described below).
21. The returned sheet showed that the proposal was for an MBT producing SRF for combustion (2 waste transfer stations were also included in the project, but are not material to the present application). It was no longer intended to build an EfW plant alongside the MBT facility, as proposed in the OBC, though (as already noted) DEFRA had been aware of this for a while. The plant was designed, so the data showed, to cope with up to 200ktpa of municipal waste, of which the general operational capacity would treat 182ktpa. The BMW content of the input waste being 68% of capacity, the expected throughput of BMW by 2020 was 124ktpa.¹
22. The pre-populated proforma showed that 128ktpa of BMW would be diverted from landfill if the project were to be supported. This took account of the diversion to be achieved through the Runcorn facility by burning SRF there. On 6th October 2010, Dr Jonathan Arch (lead technical advisor to the Cheshire project) made a small adjustment to increase the diversion figure from 118ktpa to 122ktpa. Dr Arch asked if he could argue that an assumption made by DEFRA (to the effect that 68% of the output from a plant would be BMW, after treatment) should be modified in the case of the Cheshire plant to reduce it to a figure as low as 30%. Although that question was forwarded to Mr Prynn by Mr. Papps, Mr Prynn's response – that it could vary from 68% if there was a convincing story as to why it had gone down – was never relayed back.
23. On 8th October 2010, Mr Prynn told Mr Papps that there were no plans to “invite authorities to make a case” in respect of their inclusion or exclusion as a consequence

¹ The evidence of Doctor Jonathan Arch was that of the 182ktpa there would be a mass loss of 29,500tpa, 16,500tpa would be recycled, SRF would be 127ktpa, and 9ktpa would go to landfill, this last figure (later reduced to 8ktpa) would have a BMW content of 30%, resulting in 2,000tpa of BMW being disposed of to landfill: therefore the project would achieve 122ktpa diversion from landfill.

of the spending review which was then imminent. Mr Prynne also told Mr Papps that when decisions had been taken, authorities would be notified. I shall return to the reasons for not allowing the “making of a case” later.

The Methodology

24. The methodology for choosing which projects would continue to be supported, and which would not, was described in a supporting analysis made some 2 months after the event (in a document dated 6th December 2010). This looked at the total waste likely to arise by 2020, making assumptions about the likely recycling rate in order to determine the amount of residual waste generated and assessing the biodegradable content of that waste (since the targets in the Landfill Directive apply only to such biodegradable waste). It then analysed the capacity which was likely to be available by 2020 to deal with that waste, in order to meet the targets in the Directive. Four specific scenarios with their respective probabilities of occurrence were examined: each scenario set out estimates of possible waste generation on the one hand against capacity to divert it from landfill on the other. As to the probable supply of capacity, the department included PFI-funded projects and public private partnership projects procured to date, adjusted for risk (it should be noted, in a pessimistic direction only), examined facilities currently being procured by Local Authorities (a process which would have included the Cheshire project), and made an estimate of those “merchant facilities” i.e. privately funded and operated plants which were likely to be available in 2020. Using the four possible scenarios the department judged whether cutting support for a number of funded projects would risk the U.K. not being able to meet the landfill targets by 2020 as required by the Directive and the Statute. Since the greatest probability was that the result would lie between scenarios two and three, sub scenarios were developed – one at the half way point between 2 and 3 (2.5) and one a little less (2.33). The judgment as to what was a reasonable scenario to adopt in the circumstances was a judgment for Ministers to make, informed by the relevant policy advice. The advice, as a result of the analysis presented to Ministers on what were said to be reasonable assumptions, was that the provisional allocation of PFI credits could be withdrawn from 7 projects without creating an excessive risk of failing to meet the 2020 landfill diversion targets.
25. If this opportunity was to be taken it necessarily implied selection as between projects to identify those that would no longer be supported. Projects were evaluated by reference to three criteria: deliverability of the project (weighted at 50%) the benefit delivered by the project relative to the funding (weighted at 40%) and the timing of the benefits (10%). Once projects had been scored, the highest mark was awarded a score of 100 for that criterion, and the worst a score of 0 (zero). Intermediate marks between the best and worst were then awarded scores between 0 and 100 based on interpolation. This un-weighted score was then multiplied by the relevant weighting for that criterion to give a weighted score for each project.

Application of the Methodology to Cheshire.

26. The form returned by 6th October in respect of Cheshire was in two parts. The first (rows 1-11) detailed the throughput and diversion efficiency of the MBT producing SRF for combustion. In a second box, rows 12-18 sought information about “additional diversion by EfW”. This contained a note, blanking out any results, which read:-

“Not used as the EfW to be used is not a new build facility built for the project”

27. Cheshire was the only case where this occurred. No other project was in the same position. Mr Prynn’s evidence was that:-

“The intention was to avoid including 100% of the capacity provided by the Runcorn facility (i.e. the capacity used by Cheshire plus all the remaining capacity as well) in the Cheshire figures because this did not represent new capacity and would be double counting the same capacity. However, the presentation of the form was consistent with the inclusion of part of the Runcorn capacity i.e. that used by Cheshire...this approach was subsequently regarded as inappropriate.”

28. It became regarded as inappropriate on a review on Monday 11th October by WIDP branch heads. Mr Prynn says, at paragraph 156 of his first witness statement:-

“156. At this point it was observed that the Cheshire project was receiving credit for the combustion capacity it was using at Runcorn. It was also noted that this capacity:

- a had been generated by the Greater Manchester waste disposal authority PFI project and
- b would be available in 2020 with or without Cheshire’s waste
- c had already been included in WIDP’s capacity forecasts.

157. In addition it was noted that, independently of the spending review process, the South London Waste Partnership Project had already been informed, in July 2010 that usage of an existing facility (as opposed to a new build option) was not compatible with DEFRA PFI criteria which required projects to provide additional contribution to national landfill diversion.

158. It was decided that it would be unfair and illogical to treat usage of BMW diversion capacity at Runcorn as new BMW capacity delivered by the Cheshire project and that the fair approach was to give Cheshire the credit only for the BMW diversion generated by the new MBT facility”

29. The effect of this was that Cheshire dropped from the ranking that it would otherwise have occupied within the supported projects to eleventh place out of seventeen projects (or 12 if considered out of 18: another project was for good reason brought within the scope of the evaluation, making it 18). On either basis it fell immediately below the last project which was successful in retaining funding.

30. It was not, however, recommended at that stage that Cheshire funding should be withdrawn. Rather, the documentary evidence shows that by 15th October the Secretary of State was presented with a submission to Ministers which presented a choice between scenarios 2.5 and 2.33 from the analysis mentioned above. If the former were adopted, this would result in 14 out of 18 projects being supported. Cheshire would have been included. If the latter, Cheshire would be excluded. By 18th October, only two days before the spending review was to be announced, the Secretary of State said in discussion with her private secretary that she wished to go with Option one (14 schemes) and only if “pushed very hard by the Treasury” would she go to Option two (11 schemes), but no further.
31. Ultimately, on the following day, she went with Option two. It was thus not until the 19th October that the die was cast, just one day before the results of the Comprehensive Spending Review were to be announced.
32. Within the preceding week, on 13th October, a draft report produced by WIDP had recommended to the WIDP board that the £40 million allocation of credits to the Cheshire project be confirmed, subject to certain conditions, and Mr Collin was advised that the final business case was acceptable. However, he was also advised at the same time that PFI credits were under review as a consequence of the spending review. On the 14th October, the claimants, at full Council meetings, each endorsed the recommendation of their joint waste board to appoint Viridor as the provisional preferred bidder subject to the availability of credits.
33. However, on 20th October 2010 the Comprehensive Spending Review was published. The claimants were then told by letter that PFI funding would not be forthcoming for their project.

Challenges

34. The decision not to support the Cheshire project with PFI credits is challenged on three grounds which have the permission of HHJ Pelling Q.C., sitting as a Deputy High Court Judge to proceed, and two additional grounds made by amendment to the originating application, which formally require leave, but which it was convenient to argue at the same hearing.
35. The grounds are, firstly, that the decision was Wednesbury unreasonable: it was irrational to disregard the SRF produced by the MBT facility when assessing the contribution to diversion from landfill made by the project. Secondly, the claimants enjoyed a substantive legitimate expectation that (according to the formal grounds)

“...on fulfilment of certain conditions, it would receive some £70 million worth of PFI credits in connection with the project; alternatively £40 million worth of such credits ”;

thirdly, that there was a procedural legitimate expectation of consultation in advance of the decision to withdraw funding from the project; fourthly that DEFRA failed to take into account a relevant consideration, or alternatively acted under a material mistake of fact, in employing the assumption that 68% of the waste to be landfilled by the project and of the SRF produced by the project would consist of BMW whereas available data showed a different and lower figure; and finally, that when assessing

national capacity to divert waste from landfill the analysis of the contribution to that from existing and future merchant facilities was flawed, in consequence of which the basis for withdrawing PFI credit from the unsuccessful projects could not be sustained.

36. **Irrationality: Runcorn.**

The first of the five issues took centre stage throughout the argument. If SRF had been treated as waste diverted from landfill by the project, it would have remained eligible for PFI credit. The decision to treat the project as diverting only 46 ktpa from landfill (and only 31 ktpa of BMW) was the reason why it scored so poorly. Mr Giffin QC argued that the project would in fact convert waste which would otherwise have been sent to landfill into SRF; but that, being SRF, it would not be landfilled but burnt to produce energy. Yet the effect of DEFRA's approach was to treat the SRF in exactly the same way as if it had been residue dumped into landfill. By providing pre-treated waste for burning to a facility which is only permitted to burn pre-treated waste, and which cannot pre-treat the waste itself, the project provides the U.K. with greater capacity for diversion than it already has. Runcorn was not in itself capacity for taking municipal waste and diverting it from landfill. It required SRF. On the facts, there was no informed assessment that the capacity at Runcorn would be fully utilised burning SRF from sources other than Cheshire regardless of whether SRF was supplied to Runcorn by the Cheshire project. It was spare capacity. There was no true double capacity, as the late thoughts of DEFRA suggested there might be. Mr Giffin QC drew attention to the forensic point that until the 11th October DEFRA had proceeded as if the diversion from landfill would be the entire 122 (or 118) ktpa of BMW, and had at the last minute taken an "off the cuff" decision to change that approach. Dr Jonathan Arch explained in his witness statement why it was in his view illogical to disregard the Runcorn facility as DEFRA had done. It could not operate in isolation, and required pre-treatment infrastructure such as the Cheshire project in order to operate lawfully and economically. It had more capacity than was needed for GMWDA, so new BMW diversion capacity would be utilised by the project. Next, the Runcorn facility was "an integral part of the (Cheshire) project". Moreover, DEFRA had developed methodology for determining the amount of waste and BMW diversion from landfill (known as "WasteDataFlow total waste diversion"). To take into account the Runcorn facility would be consistent with WasteDataFlow.

37. There is logical force, in my view, in arguing that the effect of building the MBT facility was to divert BMW at least into SRF. If there were a virtual certainty that SRF would be burned, then the effect of the operation of the plant would be to divert waste from landfill. However, an essential stage in this process is the incineration facility. Without it, wherever the diversion facility might be, there could be no diversion from landfill. If the SRF were not incinerated, it too would have to go to landfill. As I understand the evidence the treatment did not remove BMW by converting it into SRF: the SRF retained a BMW content.
38. Mr Maurici, for the defendant, drew attention at the outset of his submissions to paragraph 58 of the Amended Grounds of Claim, in which the claimants asserted that DEFRA had proceeded on the misconceived basis that it could not take into account the full capacity offered by the project because it had already taken into account the capacity at the Runcorn facility to which SRF from the project would be sent, adding:-

“that may have been a legitimate approach had DEFRA been assessing the overall capacity that would exist within the U.K. However it was not a legitimate approach when it came to considering the quite distinct question of the value for money offered by the project.”

39. Mr Giffin accepted in argument that if the “Runcorn issue” was properly to be resolved by asking the question whether and to what extent the Cheshire project would add to the U.K.’s capacity to divert BMW from landfill, the answer which the department gave was entirely logical. This is in line with the passage just set out from the Amended Grounds. However, he maintained, it was not the appropriate question.

Discussion and Conclusion: the Runcorn Issue.

40. The decision under review is that of the Secretary of State. Her interest in part funding projects concerned with diversion of waste from landfill is a national one. The targets to be met are national targets. The approach which DEFRA took was necessarily not that of looking at any one plant in isolation, and considering its capacity to divert waste from landfill as if it were isolated. The PFI credit criteria promulgated in May 2006 specifically required projects to show an “additional contribution to national landfill diversion”. The capacity to burn SRF provided by the Runcorn project was capacity which was already about to be delivered. DEFRA took the view that the capacity would not remain unutilised if the Cheshire project did not send SRF to it.² It was not suggested that the production of SRF in itself created any diversion of BMW from landfill. It may have been a stage in the process, but it did not achieve the result of that process.
41. As DEFRA did when looking at the cost/benefit which the project would supply, it was not illogical to assess the benefit by asking what additional national capacity for diverting waste from landfill it would provide. It was not in my view inappropriate to ask that question. Indeed, contrary to Mr. Giffin’s submissions it seems to me to be the right question to ask, although the court does not need to go that far in order to determine this issue in favour of the defendant. I accept what Mr. Prynne said (at paragraph 183, first statement)

“.. to count the Runcorn capacity would have been irrational as it would have meant attributing capacity that had already been delivered by the PFI funded Greater Manchester project to Cheshire and therefore DEFRA would have been counting the capacity twice.”

42. Accordingly, seductively though Mr Giffin argued it, the first and principal ground of challenge must fail.

Substantive Legitimate Expectation.

43. Both the parties relied upon the reasoning of Mr Justice Holman in R (Luton Borough Council and others and the Secretary of State for Education) [2011] EWHC 217

² In paragraph 9 of his second statement Mr. Prynne noted: “in current conditions the uncertainty is...not about whether a plant [such as Runcorn] would be full, but at what gate-fee it is filled up”

(Admin), not least because the facts, viewed broadly, show many similarities with the present case.

44. A similarity of factual circumstance may be an unreliable guide: it is the principles applied in one case which form the precedent, persuasive or binding as the case may be, for the next. However, such may be the similarity that when accepted principles of law are applied, the result in a subsequent case should be the same as that in the former unless there is any material factual difference between them, for such is the importance of the principle of legal consistency. Therefore, in deference to the arguments of the parties, I turn to consider the facts of that case in broad outline.
45. The case concerned the funding of new schools and school improvements under a programme known as Building Schools for the Future ("BSF"). When BSF was launched, local authorities could apply to participate in it. It was to be implemented over 15 years in a series of "waves". A Funding Allocation Model (FAM) was developed, allocating an authority's estimated overall funding requirement between the different waves. The overall funding earmarked for a particular local authority was known as its "funding envelope". At this point a local authority needed to develop, first, a Strategic Business Case (SBC); and after approval of that, their Outline Business Case (OBC). The OBC was a document, written to a template prescribed by "Partnership for Schools" ("PfS") which set out in some detail the scope, costs, affordability, risks, procurement route and timetable of the project or projects concerned. The OBC was then considered by PfS (and others, including HM Treasury) who decided whether or not to grant "OBC approval". In the context of a local authority's first wave of projects, OBC approval was the trigger for establishing a Local Education Partnership (LEP) which was a joint venture partnership for delivery of the projects, formed between the respective local authority, PFS and a Private Sector Partner (PSP). The PSP was the contractor, identified after a tendering process in accordance with EU requirements, who would actually deliver the projects and build or refurbish the schools. Very importantly, so Holman J. held, the LEP, once established, was not limited to the first wave or sample schools, but was expected to endure for the 10 – 15 years required to fulfil the whole BSF programme for the respective local authority. Provisions of the Strategic Partnering Agreement (SPA) between the local authority and the LEP granted exclusivity to the LEP for the remainder of that building/refurbishment programme.
46. Once OBC approval had been given, the local authority and the LEP did further work on the detailed scope, costs and plans for the projects in question, and prepared a document, again written to a prescribed PfS template, called a Final Business Case (FBC). If this was approved, PfS (in conjunction with HM Treasury) gave "FBC approval" and issued a "promissory note" to fund the respective project. At that stage, funding was assured.
47. On 5th July 2010, the Secretary Of State for Education announced to Parliament that funding would be withdrawn from a number of projects where it had been previously anticipated that it would be forthcoming, and upon the basis of which the local authorities concerned had incurred expenditure sometimes to a significant extent. This came as a bolt from the blue. Six authorities sought to challenge the decision on a number of bases, which included an argument based on the authorities having a substantive legitimate expectation that funding would be forthcoming, and a

procedural legitimate expectation that they would at least be consulted about any decision to withdraw funding in advance of it being determined.

48. The factual similarities of that process to that adopted in the present case are plain, that case involving as it did progress from OBC to FBC and only thereafter to a guarantee of funding, withdrawn because of national financial pressures and without advance notice. Some differences are less immediately apparent, but might be real: first, that the funding was to the entire cost of the school, and not by way of a partial subsidy of year-on-year funding costs; that here a decision to support a project was one for the local authority to make, and might have been funded in some potential cases without the involvement of central government finance; third, that the possible withdrawal of funding was telegraphed in advance, though not many days before it occurred; and, fourth, that the decision here was made as part of a Comprehensive Spending Review which had been well trailed, and which concerned not simply a funding decision about schools but about and between all those departments which had claims upon central government finance. As I shall return to say below, in the present case reasons were documented for not consulting about the decision in advance of it, in the context of this Review: there was no parallel to this in the cases concerning the Secretary of State for Education's decision about funding for BSF.
49. Holman J. found against the claimants on their submission that the circumstances were such that they enjoyed a substantive legitimate expectation; but upheld the submission that they enjoyed a procedural legitimate expectation (see respectively paragraphs 62 – 82, and 83 – 97 of his judgment).
50. Holman J. held that in the circumstances of the Luton case there had been no promise or assurance capable of creating an expectation which the law could support as giving rise to substantive rights. It may have been because of this that Mr. Giffin placed his argument on this third in the order of those he put before me, though numerically it was the second of the grounds, and began his skeleton argument on this point by saying that his submissions (on ground 3 – procedural legitimate expectation) had dealt with why there was such an expectation but "...if the councils can go a stage further and establish that they enjoyed a substantive legitimate expectation of a certain benefit, certain important consequences follow..." namely that DEFRA would have to establish an overriding public interest to defeat the expectation, must have considered the expectation properly as part of the decision-making process, and that it would "at the very least" have been unlawful for the expectation to have been defeated without the councils first being consulted.
51. He fought shy, however, of arguing that there was here a legitimate expectation that the Councils would receive funding (though this was the way in which the grounds in the originating application appeared to be framed), because he accepted that everything that was said to the Councils made it clear that the ultimate award of PFI credits would depend upon the satisfaction of certain further conditions, including the approval of the FBC, conditions about timetable, use of standard documentation and so on. In my view, on the facts as set out before me in answer to the claim as originally formulated, he was bound to make this concession. His argument was subtly, but importantly, different. The expectation relied on was not that of funding support being provided – but rather that the process of determining funding would take its normal course, rather than being prematurely terminated: alternatively put, that "the councils had no legitimate expectation that the Project would ultimately be

found to have satisfied the conditions for the award of credits, but they did have an expectation that they would be given an opportunity to satisfy those conditions (and would be awarded PFI credits if they did)”³.

52. This may seem an attempt to sidestep the inevitable – that there was here no promise or assurance that PFI credit would be given – by arguing that all that was to be expected was process not outcome. However, Mr. Giffin argued that the reasoning of Sullivan J. in R (on the application of Merseyside Transport Authority) v Secretary of State for Transport [2006] EWHC 226 (Admin) showed this argument was not heterodox.
53. In that case, it was alleged that the Department had broken a promise to release £170 million in grant funding for Merseytram Line 1 on the terms set out in a letter of 2002, which terms were attainable, on which it relied, and on the faith of which it had incurred expenditure. The breach consisted of adding an unattainable requirement that two local councils concerned should undertake to fund any overspend.
54. The claim was rejected on its facts, but Sullivan J. in the course of doing so observed (therefore, obiter) at paragraph 54: “I accept that the 2002 letter would have been capable of giving rise to a legitimate expectation...”. The letter referred to was set out in its material terms earlier in his judgment, and was capable of being read as an offer or promise subject to certain conditions which could be achieved.
55. In principle, a promise to do an act if such-and-such a condition is met is just as much a promise as one without any such condition – at least where the condition is itself objectively capable of achievement without the judgment of the promisor having to be exercised to permit it.
56. The Defendant contends this is too slight a foundation for the edifice Mr. Giffin seeks to build upon it. Albeit that the reach of legitimate expectation in practice is still being explored, the principles upon which such a case is to be based were recently and authoritatively propounded by Laws LJ in R (Bhatt Murphy) v Independent Assessor [2008] EWCA Civ 755 (see paragraphs 26 – 52). The paradigm case of *procedural* legitimate expectation arises where a public authority has provided an unequivocal assurance, whether by means of an express promise or an established practice, that it will give notice or embark upon consultation before it changes an existing substantive policy (see paragraph 29), with the result that the court will not allow the decision-maker to effect the proposed change without notice or consultation, unless the want of notice or consultation is justified by the force of an overriding legal duty owed by the decision-maker, or other countervailing public interest such as the imperative of national security (paragraph 30). By contrast, a *substantive* legitimate expectation arises where the court allows a claim to enforce the continued enjoyment of the content — the substance — of an existing practice or policy, in the face of the decision-maker's ambition to change or abolish it. Such a claim (citing Simon Brown L.J. in Ex p. Baker [1995] 1 All ER 73 at 89) “...will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it. The

³ Paragraph 58, Claimants’ skeleton argument

doctrine employed in this sense is akin to an estoppel.” (paragraph 32). The promise or practice is of present and future substantive policy (paragraph 33); otherwise, if it is a promise or practice of notice or consultation it would fall to be classified as procedural legitimate expectation.

57. The starting point, however, must be to recognise that both forms of legitimate expectation “are concerned with exceptional situations” (paragraph 41), since a public body will not often be held bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon. Nor will the law often require such a body to involve a section of the public in its decision making process by notice or consultation if there has been no promise or practice to that effect. Central government is entitled (indeed, bound) to “formulate and re-formulate policy” (per Sedley LJ in BAPIO [2007] EWCA Civ 1139, paragraph 43) and this entitlement generally denies a third party any entitlement either to require he be given substantive rights contrary to newly decided policy, or that he should have any enforceable right to be consulted about the change from the old policy to the new. Thus (per Laws LJ at para.42) the decision maker’s proposed action must be so unfair as to amount to an abuse of power, by reason of the way in which it has earlier conducted itself. He went on hold that an assurance would have to be of a “pressing and focussed” kind if a substantive legitimate expectation of the kind a court would uphold were to be engendered by it (see in particular paragraph 46).
58. Further, “the more the decision challenged lies in what may inelegantly be called the macro-political field, the less intrusive will be the court’s supervision. More than this: in that field, true abuse of power is less likely to be found, since within it changes of policy, fuelled by broad conceptions of the public interest, may more readily be accepted as taking precedence over the interests of groups which enjoyed expectations generated by an earlier policy” (R v Secretary of State for Education and Employment ex parte Begbie [2000] 1 WLR 1115, per Laws LJ cited with approval by the court of Appeal in R (Bibi) v London Borough Of Newham [2001] EWCA Civ 607, at paragraph 23).
59. In the Luton case, Holman J. reviewed the authorities, and concluded that “...there must be a commitment which can be characterised as a “promise” (although the word “promise” will rarely, if ever, have been used) such that to renege on the promise would be so unfair as to amount to an abuse of power (R (Bibi) v Newham London Borough Council [2002] 1 WLR 237 at paragraph 34)”. It must, said Holman J., in any event be “a promise which is ‘clear, unambiguous and devoid of relevant qualification’” (per Lord Hoffmann in R (Bancoult) v Foreign Secretary (no 2) [2009] 1 AC 453 at 488 paragraph 60, citing with approval a phrase first used by Bingham LJ; see also Lord Rodger at paragraph 115 and Lord Carswell at paragraph 134). He also reminded himself that in deciding whether there had been such a commitment, however, a court must not look “purely from the point of view of the disappointed promisee who comes to the court with a perfectly natural grievance”, and it was important to remember that sometimes many promises may have been made “all of which cannot be fulfilled” (Bibi at paragraphs 35 and 36).
60. I adopt this approach to the authorities. In the light of them the first question is to identify whether anything which may amount to a commitment was made by DEFRA whether expressly or by implication, either to funding or to funding subject to specific and achievable conditions.

61. I am satisfied - in accord with the claimants' argument - that there was nothing here which might amount to such a commitment so far as funding itself is concerned. It was plain from the outset that funding would be guaranteed only if and when the FBC was approved; and equally clear that approval was no simple rubber stamping exercise. It may only have been later on in the chronology, after the change of colour of the Government, that express recognition was given by the Claimants to the fact that funding might be affected by the Spending Review, but no note of surprise was struck when so doing. This is indicative of a mindset which fully accepted that the macro-economic landscape might affect the individual decisions as to support for the Cheshire project. Throughout, the promise, assurance or commitment, if such there was, was never devoid of relevant qualification. In 2009, for instance, the words that accompanied the information that £30 million PFI credits would be reserved for potential use for the project made it expressly clear that no promise was being given (see paragraph 12 above).
62. I therefore accept Mr. Maurici's primary argument that there is no room for a substantive legitimate expectation, on grounds similar to those upon which Holman J. decided the Luton case.
63. This does not however directly answer the way in which Mr. Giffin has put the claim – he says there was in effect a conditional promise, and the conditions were not such as to defeat the expectation of funding, since they were objective. Thus, if the conditions could be seen to be fulfilled, there was a promise which could be subject of a legitimate expectation.
64. I do not accept this. Although there may be cases in which it is conspicuously unfair to the point that it is an abuse of power for an assurance which is subject to specific and objective conditions not to be met, it must at least be clear in such a case that if the conditions are met the assurance will be honoured, and that no other consideration will intervene. As HHJ Langan QC put it (at paragraph 135) in R (Grimsby Institute of Further and Higher Education) v Chief Executive of Skills Funding [2010] EWHC 2134 (Admin), the fact that there was nothing in the nature of a specific undertaking that a practice (if it existed) of confining consideration of an application for grant to the merits of that application would continue was sufficient to defeat the claim.
65. That was a case of an Institute which had spent substantial sums working up an application to the point where it applied to the Defendant for a grant. It did not receive one, not because of any inherent lack of merit in the scheme but because the Defendant had overcommitted itself and had run out of funds. The claimant pleaded (as do the claimants before me) that its application for a grant would be dealt with and approved in the usual way, subject to satisfying the Learning Skills Council (the name by which the defendant had been known) of relevant criteria. The claim was rejected by HHJ Langan QC sitting as a High Court judge for lack of a clear and unambiguous statement of the kind required to found a legitimate expectation (para.130), and in addition and relevantly (at paragraph 134) because there was throughout the process of applying for the grant “an appreciation on the part of the officers of the institute that they were proceeding at risk of failure. It would be remarkable if, after the risk came to fruition, a claim based on legitimate expectation of success were to be established”.

66. The indications in the present case that funding was subject to a “satisfactory” FBC⁴, subject to a “Second stage review”⁵, the clear understandings that PFI credits would be subject to the Comprehensive Spending Review once announced, and “with the project remaining consistent with departmental policies and priorities at the time approval is sought”⁶, and the deliberate uncertainty expressed by the claimants themselves when appointing Viridor as provisional preferred bidder (in expressly making it subject to the availability of PFI credits⁷) all show that there was here no unqualified assurance that funding would be forthcoming if particular conditions were fulfilled, or that a particular process would be followed through to the inevitable consequence that funding would follow. In the absence of such, there is no room for a legitimate expectation which the law will protect.
67. I derive no support for Mr. Giffin’s arguments from R (on the application of Merseyside Transport Authority) v Secretary of State for Transport. Not only is the observation on which he relies very much an aside, but the funding arrangements there were not subject to a carefully structured, staged approval process as were the schemes in both Luton and Grimsby, inherent in which is the possibility that funding will not in the event be approved. Moreover, the conditions which Sullivan J. had in mind as applicable were not based on judgment or the exercise of discretion, as Mr. Maurici submits, with proper force, is the case in respect of some of the “objective” conditions here.

Procedural Legitimate Expectation

68. Here, Mr. Giffin puts his case in two ways. First, there was legitimate expectation that the Claimants would be consulted about the potential withdrawal of funding. In this respect, he argues that the Luton case should be followed, so similar are its facts. Second, it was in any event (and separately) unfair for DEFRA to invite agreement to a pro-forma pre-populated with figures showing that 118 ktpa of waste would be diverted from landfill, only to change the figure, significantly to Cheshire’s disadvantage, without so much as a word to the claimants.
69. As to the first, more general, ground, no indication was given by DEFRA (beyond some indications that consideration was being given to reviewing PFI supported projects) as to the basis on which PFI credits would be reviewed. No comment was invited as to the methodology adopted. The criteria for selection were not made available prior to the decision.
70. There was here, he submitted, that “pressing and focussed” impact of DEFRA’s past conduct so that it might be expected that the approach which had been adopted hitherto would be continued. There were strong echoes of those aspects of the Secretary of State’s conduct towards the claimant councils in the Luton litigation to which Holman J. drew attention at paragraph 93 of his judgment: continuous and intensive dialogue towards an agreement to fund; OBC approval; the fact that the claimants continued to act and spend on the basis that the approvals which had thus

⁴ See para. 9 above

⁵ See para. 12 above

⁶ See para. 15 above

⁷ See para. 18 above

far been forthcoming would continue (to the extent, here, of some £4.4 million); and the sums involved were likewise of significant magnitude.

71. In Bhatt Murphy Laws L.J. recognised at paragraph 50 that one of the three categories of case in which a legitimate expectation might arise was where an authority, without any promise, had established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so. In such a case ordinarily the authority must consult before effecting any change. This, submitted Mr. Giffin, was applicable here.
72. In response, Mr. Maurici noted (correctly) that there was here no statutory duty to consult. Nor was there any promise nor any assurance that DEFRA would do so. Nor was there any established practice of consultation. There had been a rational decision directed to a proper purpose reached by a lawful process, such that in the words of Lord Woolf MR in R. v North and East Devon Health Authority Ex parte Coughlan [2001] Q.B. 213, at paragraph 66, "...in the ordinary case there is no space for intervention on the grounds of abuse of power". Laws LJ had recognised in Bhatt Murphy (at para.41) that the general approach was that the law would not often require such a public body to involve a section of the public in its decision-making process by notice or consultation if there had been no promise or practice to that effect, adding:

"There is an underlying reason for this. Public authorities typically, and central government par excellence, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across a wide spectrum. Generally they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel."

73. The Luton case was to be distinguished: there was no question of applying cost-benefit techniques to the projects there involved, as there was here. Not only was there no reason to require consultation in the present case, but there were compelling reasons why consultation was not undertaken. It is unlikely, moreover – and there was no evidence that – anything that might have been said in the process of consultation would have assisted in formulating advice to Ministers: the reality is that the various councils concerned would have suggested criteria which would have differed, but would inevitably have favoured their own projects, and WIDP would still have had to develop fair criteria. Next, Mr. Maurici went so far as to submit that even if there had been consultation there was nothing that could have been said which would have made a difference.

Discussion

74. Laws L.J. observed in Bhatt Murphy (at paragraph 49) that the "secondary case of legitimate expectation" (i.e. the procedural) would not often be established. That is a comment on the likelihood of occurrence, rather than a statement that the court requires to find the exceptional: but it serves to remind the court that the facts taken overall must not be assumed too easily to meet what is in principle a high hurdle. It cannot too readily be assumed that public authorities are unfair, to the extent of abusing power.

75. The determination of whether, albeit there was no promise to consult nor practice of it, the conduct of the Defendant amounted to an abuse of power insofar as it extended to denying the claimants consultation where fairness otherwise demanded it, is necessarily heavily fact dependent. Fairness is to be judged overall, and not examined purely from the perspective of the aggrieved. Here, DEFRA had reasons for not consulting. The evaluation of overall fairness must therefore take those reasons into account.
76. Mr. Prynne, at paragraph 135 of his first witness statement says that:
- “Whilst we considered it desirable and necessary to engage with Authorities to ensure we were using up to date data in the evaluation process no-one involved within WIDP involved in the process suggested a consultation exercise on the criteria and the weightings would be helpful in terms of formulating advice for Ministers or improving our understanding of the views of the Authorities. James Papps raised the question in an e-mail to me dated 7 October and I advised that there would not be any opportunities to make a case to DEFRA”
77. The reasons for this emerge from the balance of that paragraph and the next: that those banks most active in the sector were complaining that waste projects were developing too slowly, that authorities would advance criteria which would support their own cases, still leaving it to DEFRA to devise fair criteria of its own, and the time constraints imposed by the Spending Review announcement scheduled for the 20th October worked strongly against it. It would, he considered, be destabilising for all the projects concerned if DEFRA conducted a consultation.
78. In his second witness statement, in answer to Dr. Arch’s contention that consultation would have been quick because he, Dr. Arch, was in a position to respond quickly, Mr. Prynne said (at paragraph 12) that if there had been consultation it would have had to have been in respect of all 18 projects with the local authorities concerned. So far as the argument seeking broad consultation, the first of Mr. Giffin’s two, is concerned, this must be right. If consultation were to have been conducted in accordance with Cabinet Office guidelines, it would have lasted some weeks (usually 12). Time was undoubtedly short: in a way in which it was not suggested to be short in Luton. Consultation might have begun in August, rather than been left to wait until the eleventh hour before the Review; but this is apparent only in hindsight, and I do not detect in the evidence any attempt deliberately to leave a decision so late that consultation could not occur. There was no manipulation here. There was no hint of bad faith. If the cuts were to be announced on 20th October, but not on whom the brunt of them was to fall, a great degree of uncertainty would have been caused: I accept Mr. Maurici’s argument that given the difficulties of funding generally, this was a real concern, and that it was desirable at the least (he submitted, essential) that the Spending Review identify which projects would be affected, and which not.
79. The question whether there would be any benefit in deferring a decision was, moreover, carefully considered. Of a memorandum which was 51 pages long, sent to Lord Henley by John Burns of DEFRA on 11th October 2010, Annex 10 devotes its 3 pages entirely to a consideration of the benefits and balancing disadvantages there might be in either delay for a period of some 2 years or for some shorter period.

There were substantial risks in any delay, which the paper concluded made it inadvisable, not least because it potentially had an adverse impact upon the attraction which funding PFI waste diversion schemes held for the market.

80. I cannot accept Mr. Maurici's point that consultation, if it had occurred, would have been pointless, for two reasons. First, there is a value in consultation for its own sake: in a participative democracy, it involves those who may be affected by a decision. Though what is said by them or on their behalf may in the event effect no change in the policy or proposal about which there is consultation, there is greater assurance that their point of view has at least been listened to with respect by the decision maker. The process adds value to the way in which the final decision is likely to be received. Second, no decision maker should be so confident that he has considered all possibilities and angles that he refuses to consider even the risk that he might have overlooked some matter: experience teaches that those who are most confident in their views are often most at risk of being mistaken. If there should have been consultation, it is speculative to say what the results would have been. Here, aspects of the methodology proposed might have been influenced by observations from one or other affected authority. It cannot realistically be said that there was only one way in which to achieve fairness as between the projects seeking funding: what an authority had to say might have changed the scheme. Without knowing what might have been advanced, it is in my view close to impossible to say it would have made no difference.
81. That, however, does not resolve whether there has been conspicuous unfairness of the nature required. The remarks are true of all consultation, and it is axiomatic that central government, in particular, has no general duty to consult, however advantageous it might be in principle.
82. Inherent in the process here was the possibility that funding might be withdrawn from one, or many projects. The claimants were not, in the words of Laws LJ, in reason entitled in the circumstances to rely on its continuance. The facts of this case must be judged on their own value: whereas Luton might provide a guide, it does not provide either an answer or a precedent which must be distinguished. Once a decision had been taken to withdraw funding from 7 projects, it was in my judgment a matter for central government to determine whether there should be consultation about this or not. The policy judgment not to engage in it was rational. It was not unlawful. It was not wholly unreasonable. It is relevant to unfairness that the decision could not have been impugned on traditional public law grounds, for the court is then required to deal with non-consultation where there is no statutory or specific promissory obligation nor practice to consult, and a perfectly acceptable decision (in public law terms) not to do so. It was not unfair: although the councils might have thought that they would have funding for their particular projects, and had (in Cheshire's case) expended considerable sums in that belief, it was a proper exercise of power and not abusive for central government to choose to review it, and having so chosen, to determine internally and without consultation upon a method which was rational and sought reasonably to achieve a fair selection of the projects which would, or would not, be funded. The internal discussion about whether to consult at all was not premised on that consultation having no value, but rather upon it being counter-productive. That was a judgement which I cannot say was wrong. Nor do I consider it unfair.

83. It follows that upon the broader, first, ground upon which it is advanced, I reject Mr. Giffin's case of breach of a procedural legitimate expectation.
84. As to the second ground, this may appear to be both more pressing and more focussed. It directly affects Cheshire only. There is much greater strength in the argument that it was unfair to invite the claimants to agree to a form, with its pre-populated data, suggesting that DEFRA would base its future funding of the project on its producing a figure of 118 (or, it may be, 122) ktpa of BMW being diverted from landfill, only then to change the figure so significantly downwards, without so much as a "by your leave", that decisions were based on a figure which Cheshire never appreciated they would be till after the die had been cast.
85. For much of the argument, I was inclined to the view that this was so conspicuously unfair that it could amount to an abuse of power. I have ultimately come to the conclusion it was not. The decision was made at the last moment. True it is that it might have been made earlier, once it was appreciated that Cheshire's SRF would go to capacity at Runcorn which would undoubtedly be in operation whether or not the Cheshire project went ahead. But there was no hint of any ulterior motive in this accident of timing. If it had been recognised there was an obligation to consult I can see no adequate basis on which it could have been restricted to Cheshire alone – for the question of what kilo-tonnage it was appropriate to take into account in determining value for money would, in a competitive ranking exercise such as was being undertaken, affect other councils' prospects of funding. There would have to be something, at least, of the very consultative exercise which for the reasons I have already accepted as valid DEFRA had set its face against.
86. Moreover, here the argument that there was little which consultation might have achieved has much greater force. The difference between 118 (or 122) ktpa and the figure adopted (31 ktpa of diversion) depended entirely on whether the capacity utilised at Runcorn by the burning there of SRF from Cheshire was to be included, or excluded. This was a matter of logical conclusion, one way or the other, not susceptible of shades of agreement or nuanced argument. I have already determined that DEFRA was entitled (and right) to conclude as it did on this. It was not suggested that the claimants would have done more than seek to convince the department of the correctness of the arguments deployed on their behalf by Mr. Giffin in advancing his first ground of challenge. The failure to permit them to do so, viewed against the background of spending pressures, time pressures, and a rational judgment that consultation would be counter-productive was not, taken overall, a breach of a legitimate expectation that if the figures on the pro-forma were to be changed Cheshire would be told so that it might make representations about it.
87. If I were wrong in my view that in neither the case of the claimed substantive nor procedural legitimate expectations was there any factual circumstance sufficient to create such an expectation, I would have considered whether there were here nonetheless compelling grounds for denying either the process (claimed on ground 2) or the consultation (on ground 3) so as to defeat the action.
88. The principles applicable here are those in Paponette v Attorney-General of Trinidad and Tobago [2010] UKPC 32. The task is weighing the requirements of fairness against any overriding interest relied upon for the change of policy (see per Woolf MR in Coughlan, at paragraph 57). Once it is established that the expectation is

legitimate, “the onus shifts to the authority to justify the frustration of the legitimate expectation. It is for the authority to identify any overriding interest on which it relies to justify the frustration of the legitimate expectation” (per the Board at para.37). “The principle that good administration requires public authorities to be held to their promises would be undermined if the law did not insist that any failure or refusal to comply is objectively justified as a proportionate measure in the circumstances” (per Laws L.J. in Nadarajah v Secretary of State for the Home Department [2005] EWCA Civ 1363, para.68). Often it is only the authority that knows why it has gone back on its promise, and it must “give details of the public interest so that the court can decide how to strike the balance of fairness between the interest of the applicant and the overriding interest relied on by the authority” (Paponette, paragraph 41). “Where an authority is considering whether to act inconsistently with a representation or promise which it has made and which has given rise to a legitimate expectation, good administration as well as elementary fairness demand that it takes into account the fact that the proposed act will amount to a breach of the promise. Put in public law terms, the promise and the fact that the proposed act will amount to a breach of it are relevant factors which must be taken into account.” (para.46).

89. This thus involves three questions: was there an overriding public interest, was the fact that there had been a promise taken into account, and was the eventual decision proportionate when drawing the balance between the interest of the public and the promise to the individual (here, authority)?
90. I am entirely satisfied that there was here an overriding public interest. As Mr. Maurici submitted, the Government decided on a macro-political and macro-economic basis that spending had to be cut significantly and quickly. A plan for deficit reduction was to be set out in an emergency budget within 50 days. The Spending Review itself recorded that the Government saw it as an urgent priority to secure economic stability. Choices were required, as a result of which departmental budgets were to be cut by “an average of 19 per cent over four years”. In that context, I accept that a decision maker in an individual department of State must be accorded a very wide margin of appreciation, and a court must be reluctant to interfere with technical expert judgements such as are in issue here: as Lord Millett said in Southwark LBC v Mills [2001] 1 AC 1 at 26, priority in the allocation of resources must be resolved by the democratic process, national and local, and the Courts are ill-equipped to resolve such issues.
91. Mr. Giffin’s answer to this is that some compelling need to cancel *this* project had to be shown; and that DEFRA’s conduct was suggestive of it having a free hand in deciding how many projects should succeed, whereas because of the legitimate expectations authorities had it was only legitimate to cancel support for projects where there was a compelling need to do so. There was no sign, he submitted, of the expectations of authorities having been considered as a factor when the Secretary of State decided to proceed with only 11 rather than 14 projects.
92. I cannot accept Mr. Giffin’s arguments. If there is a compelling need to cut cost across a broad range of projects, this necessarily implies that the costs of individual projects within that range may be cut as a part of satisfying that need. If it were otherwise, then no individual project would have its costs cut despite the overarching requirement of public policy. There may be particular reasons why amongst projects vulnerable to the impact of costs saving measures some should be “saved”, and others

sacrificed – but providing a rational basis for selection between them is adopted by those who are mindful of what has been assured to each, and (at least broadly) of the costs incurred by each in reliance on that assurance, none could complain unless the decision were plainly disproportionate. Such a scheme was adopted here. It is not necessary that there should be both a compelling reason to make a selection and separately derived compelling reasons for the particular selection. I do not accept that DEFRA behaved as if it had a free hand: the internal communications show that the Secretary of State hoped to fight her corner, as late as the 19th October, to preserve as many of the projects as she could, but had to bow to Treasury pressure. I accept that the expectations of authorities were not considered under a discrete sub-heading. But this is not required. The Department plainly had in mind the positions of the projects. Through James Papps it knew of the expenditure which Cheshire had incurred, and the stage that had been reached. The careful discussion about whether to consult or not was because it was appreciated that the authorities might have points of view to express, which it might be appropriate to invite them to state. In substance, therefore, it had in mind those features of the facts which are relied on by the claimants as amounting to a promise or assurance as to future conduct. Substance, rather than form, is what is required. There is sufficient evidence to conclude that DEFRA had in mind the fact the position of the claimants and what they might have (in DEFRA's eyes) looked for and (on the claimant's case) expected.

93. Accordingly, if (contrary to my primary view) there was an expectation of either a substantive or procedural kind, to which it would generally be unfair not to give effect, the Defendant has shown that the failure to do so was because there was an overriding public interest, which was taken into account, in the light of which the action taken was not disproportionate.

Ground 4: the “68% factor”

94. The claimants alleged that the Defendant failed to take into account the effect of the MBT process on the amount of diversion of BMW from landfill which the Project would achieve.
95. The factual basis for this is that MBT treatment reduces the BMW content of the waste fraction which will eventually be diverted to landfill. Waste contains, but does not consist entirely of, BMW. The more of it which is purely biodegradable is removed during the recycling process, the lower will be the proportion of BMW which remains. This effect is known to DEFRA, and allowed for by an “Adjustment Factor” of 68%. On 5th October, the claimants emailed DEFRA to claim that the ultimate BMW content of the project's residues destined for landfill would be 30%, and not 68%, in view of the particular processes to be undertaken by the Cheshire plants. They asserted that DEFRA's approach thus overstated the amount of BMW assumed to be in the SRF, and reduced the amount of BMW which had truly been diverted from landfill. In calculating the BMW content of the MBT output which on any showing would go to landfill at the end of the process, the adoption of 68% again overstated the amount of BMW content: if 30% had been adopted, it would be assumed that the amount of BMW diverted from landfill would be greater.
96. The claimants argue that (a) they never understood that the claim that the BMW in the SRF was diverted in its entirety from landfill was being rejected, until it was, on the basis that Runcorn was not new capacity. If they had done, they could have pointed

out that the BMW content of the SRF (now to be assumed to be heading for landfill) was lower than the assumed 68% would suggest, and that therefore the MBT process had reduced the BMW content of the input waste to a greater extent – and thereby ensured a greater diversion from landfill⁸. Given the figures, this was critical; (b) the message from Mr. Prynn to James Papps that, if the evidence were cogent, the claimants could make a case that the percentage was lower, was never passed on to the claimants; (c) DEFRA simply did not take any steps to acquaint itself with the relevant considerations.

97. Mr. Maurici points out that even if the 30% figure were adopted, there would have been no difference to the final outcome. The project would still have been that which showed the lowest benefit per pound of PFI funding, and would have scored 0 for the cost/benefit factor under the adopted methodology. Even if Dr. Arch were correct, the most that would have resulted on his evidence was a resulting cost/benefit score of 1.2, rather than 0: in his skeleton argument, he submitted this would not have sufficed to alter the relative ranking of the Cheshire project, but in oral argument expressly did not advance this argument.
98. But, he submits, in any event DEFRA was aware that a residue of waste would be produced by the MBT facility, and knew of the issues around the 68% figure – Dr. Arch had raised it explicitly with Mr. Papps, and he with Mr. Prynn. He returned the pro-forma corrected to show data on the basis of the 30% figure. Mr. Prynn's evidence was that he was aware of the figures which Dr. Arch had provided. The 68% figure was used to assess all projects. The question of what figure to adopt lay in an area of specific scientific and technical judgment, and it was not a case of a decision maker failing to take account of relevant considerations nor of proceeding under a material mistake of fact. But in any event, he argued, the grounds for establishing material misapprehension of fact were not established. They are set out in the well-known case of E v Secretary of State for the Home Department [2004] EWCA Civ 49: there must be a mistake as to an established fact which was uncontentious and objectively verifiable, that the appellant or his advisers had not been responsible for the mistake, and that the mistake had played a material though not necessarily decisive part in the tribunal's reasoning. It had to give rise to unfairness so as to be an error of law. Here, the "fact" was a difference of view. It could not in any event be verified unless and until the plant were operational. And the mistake, if mistake it was, played no material part in the reasoning.
99. He cautioned (rightly) that the court should be scrupulous to avoid involvement in minute scrutiny of a mass of detail – see R (Ahmad) v Newham London Borough Council [2009] UKHL 14, in particular at paras. 2-7 (Lord Scott), and 15, 17, 22 (per Baroness Hale); and referred also to Holmes-Moorhouse v Richmond upon Thames LBC [2009] UKHL 7.

Discussion

100. The Claimant's argument that DEFRA erred in its approach to assessing the BMW content of the residue from the MBT process to be disposed of to landfill was met by the Defendant responding that even if the Claimant were correct in this, it would have

⁸ Dr. Arch's evidence was that so far as SRF was concerned, the diversion efficiency rate through MBT lay between 38 and 49% - i.e. a BMW content of 51 – 62%.

made no difference to the ultimate ranking of the project. I accept this: and, so far as residue was concerned, it was in the end uncontroversial. On this argument, I would refuse relief on this ground alone.

101. A second plank of the argument, however, distinguishes between the BMW content of residue to be sent to landfill, and the BMW content of SRF. It does not necessarily follow that the same consequence in terms of ranking would follow if a mistake had been made as to the assessment of this figure. Dr. Arch states at paragraph 52 of his second statement that if DEFRA had correctly assessed the waste diversion by taking account of the lower proportion than it had assumed, the resulting cost/benefit score would have been no lower than 1.2.
102. In his skeleton argument, at paragraph 85(v) and footnote 7 Mr. Maurici submitted that the point, if valid, also goes nowhere in terms of relief since the relative rating of the Cheshire project would remain unaffected: but he did not adhere to this submission orally. He submitted rather that the evidence of Dr. Arch as to the calculation was not “objectively verifiable”, and was not agreed: at most, if a good point, it would go to the question of relief.
103. However, I do not accept that the argument is valid. The central issue is one of priority in the allocation of the financial resources available to central government. It is inherent in this that there will be winners, and losers; that if the scheme involves ranking, a cut-off level must be placed at some point; and that there may be many other entirely rational schemes which might be proposed which would share the same overall result, but place individual candidates for funding in a different order.
104. There are broad similarities between a scheme seeking to determine priority in the allocation of financial resources and one which, for instance, seeks to determine priority as between different applicants for social accommodation to be provided by their local authority. As to the latter, Nicholas Blake QC (as he was) said in words endorsed by Baroness Hale, with which Lords Hope, Scott, and Walker expressed agreement, at paragraph 22 of Ahmad:

“It is apparent that all judges considering this problem have stressed that it is for the local authority to provide an allocation scheme according to its Part VI duty, and the merits as to who, how and when priority should be afforded is a matter for the local authority subject to its special duties. Judges must be particularly slow in entering the politically sensitive area of allocations policy by over-broad use of the doctrine of irrationality. A particular scheme cannot be castigated as irrational simply because it is not a familiar one to the court or is not considered to be the perfect solution to a difficult, if not impossible, question to resolve”
105. The precise figure adopted as part of the process by which priority for funding was to be determined in the present case is not a matter for review by the court, short of it clearly being shown to be irrational. The adoption of 68% as the adjustment factor was not in itself irrational. Mr. Prynne explained in his witness statement (at paragraph

184) that it provided an approach, common to all potential candidates for funding, which avoided being drawn into a complex technical debate about the exact percentage that should be applied. He states that the percentage is supported by existing research, and “it is considered the best available proxy for all municipal waste...” (paragraph 76, and footnotes to it).

106. One reason for arguing that the adoption of the figure was irrational was that in one case - that of the project of Essex and Southend-on-Sea - the figure of 68% was not used. From the Essex data sheet Dr. Arch (in his second statement) says that he can calculate that the BMW content of outputs from the Essex MBT would be around 47%. If so, this contradicts the evidence of Mr. Prynne as to the adoption of 68% across the board.
107. The explanation which Mr. Prynne gave for that (in his second statement, replying to Dr. Arch's point) was that Essex was in a different position from that of Cheshire. The MBT process in Essex was specifically designed to reduce the content of BMW in the treated waste heading for landfill: it was therefore necessary, he says, to take into account some measure of the effectiveness of the reduction in BMW by the specific Essex process.
108. No complaint is made by the claimants as to the treatment of Essex as such (which they regard as appropriate) – rather, the point here is that if it was not a case of “one figure fits all” then DEFRA was required to take into account all reasonably available information concerning the extent to which the Cheshire project reduced BMW, and it did not do so. Mr. Prynne however states that information was given by Cheshire, but the figures proffered ranged from 30% to 60% to 100%, giving no certainty as to the claimed figure or any sound basis for it, and that establishing a precise figure was inherently uncertain where the plant was not yet operative. I have concluded that the adoption of a 68% figure, capable of variation where a good reason was established as it was in the case of Essex, was not irrational; and that on the evidence there was insufficient to show that DEFRA should have treated a good reason as being established in the case of Cheshire.

Ground 5: Failure to take into account considerations material to “merchant capacity”

109. The decision that 7 projects could no longer be supported was based not only on estimates of future waste levels, and of the capacity to be provided by PFI-supported schemes, but also on estimates as to the probable extent of merchant capacity. DEFRA reckoned that by 2020 there would be some 2m. tpa capacity. This forecast was based on an assessment internal to DEFRA of over 70 potential plants, weighting the forecast to allow for the risk that each plant might not become operational, or would not have the estimated capacity, further adjusted downwards by another 25% as a general risk adjustment.
110. It was suggested by the claimants that in three respects the assessment was irrational. First, it divided up projects into those which were “operational” (with a 100% probability of proceeding), “planning consent given” (70%), “planned” (60%), and “proposed”(20%). That appeared to relate only to the planning status of the project rather than the potential source of waste, and finance, despite the fact that both were

said in DEFRA's analysis to be "key components" of commercial viability. The categorisation simply ignored these features. Second, the percentage chance of proceeding ascribed to projects not already operating was irrationally high, in the light of the fact that the majority of recent planning applications for merchant facilities had been refused by local authorities and this showed no sign of changing, finance was very difficult to secure, and banks and other commercial lenders had shown themselves unwilling to support projects which had no long-term contracts in place to secure the necessary waste inputs. Third, there was no rational basis on which it could be said that such a large number of merchant plants were being planned unless DEFRA were taking into account facilities proposed in conjunction with PFI supported projects. If this was the case, it was double-counting, and inconsistent with the department's approach in respect of Ground 1.

111. The force of this argument lies in its consequence. If DEFRA had materially over-estimated merchant capacity, then it would have underestimated the need for PFI supported capacity, and Cheshire (being next on the list to those authorities who had successfully retained the prospect of financial support) would probably have been supported too. The basis for excluding it (and others) would be undermined. However, this is also the context within which the argument has to be evaluated. What is in issue is a decision to accept as an estimate upon which policy is to be based figures which are uncertain, and on the evidence heavily discounted to allow for that uncertainty.
112. Mr. Prynne explained in his first witness statement⁹ the basis for the assessment. It is plain this involved a predictive judgment in an uncertain world. In his second witness statement, he forcefully defended the estimates. If anything, he claimed, there had been an underestimate of future merchant capacity.¹⁰
113. I cannot accept Mr. Giffin's argument that, having identified two factors as key, the department ignored them in its assessment, and that this was an error of public law.
114. Mr. Maurici points out that it was to be expected that planning status would be the principal and dominant factor in any assessment. Permission was a necessary pre-requisite both for construction of any facility and for finance. But he pointed out that assessments had, on the available evidence, been adjusted for the other two factors, giving specific examples of this in his written argument. It was wrong, therefore, to say that the other factors had been ignored.
115. I accept that issues of relative weight as between scoring factors in a competitive selection process are not usually amenable to judicial review. In the absence of bad faith, or perversity, they are for the decision-maker to evaluate, and not the courts. Neither bad faith nor perversity applies here.
116. The absence of either of those factors is relevant also to the court's approach to the exercise of estimating future capacity. Estimates are just that. To attack them on the basis of inaccuracies, or by reference to detailed technical argument, is to fall into the error against which R (Ahmad) v Newham London Borough Council cautioned, and to tempt a court into an arena where it should rarely tread. It must almost always be

⁹ Paragraphs 86-7; 90-93.

¹⁰ Paragraphs 18, 19.

possible to show that an estimate is likely to be unreliable for this or that or many reasons; or to argue that it has been over or under stated; or that insufficient allowance for risk, or its converse opportunity, has been made. Much is likely to depend on the perspective of the commentator.

117. The evidence does not establish that the estimate of future capacity made here was plainly wrong, or wholly unreasonable. It does show that relevant considerations - whatever the argument about relative weighting as between them - were taken into account. The claim must fail on this ground.
118. This last ground did not seem to me to merit full argument before a court. Although it is only a difference of form, I would refuse permission on this ground; as to Ground 4 (which needs permission) it seemed to me to be arguable on the merits. I would however have refused relief (in the exercise of discretion) even if I had been minded to hold in favour of the claimants, since there was no sufficient evidence that the consequence would have been that Cheshire would have been included as remaining eligible for PFI support.

Conclusions

119. For the reasons set out above, each of the grounds must be dismissed. In form, (though I have heard full argument on the point) permission is refused to argue ground 5; all other grounds are dismissed on their merits; in addition, in respect of one of the bases on which ground 4 was advanced I would not have granted any relief because, if successful on the merits, and given my conclusions on grounds 1 – 3, it could not be shown to make any difference to the ranking of the Cheshire project.