Neutral Citation Number: [2019] EWCA Civ 157

Case No: C1/2017/2059

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
The Honourable Mr Justice Dove
CO/2172/2017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 February 2019

Before :

LADY JUSTICE RAFFERTY
LADY JUSTICE SHARP
and
LORD JUSTICE BAKER

- -

Between :

THE QUEEN (on the application of CLEANSING SERVICE GROUP LIMITED)	**Appellant**
- and -	
ENVIRONMENT AGENCY	**Respondent**

- -
- -

Gordon Wignall (instructed by **Sharpe Pritchard LLP**) for the **Appellant**
Heather Sargent (instructed by **Environment Agency Legal Services**) for the **Respondent**

Hearing dates : 16 January 2019

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Approved Judgment

LORD JUSTICE BAKER :

1. This is an application for judicial review of policy guidance issued by the Environment Agency setting out its interpretation of certain provisions in Schedule 3 to the Environmental Permitting (England and Wales) Regulations 2016. Under the regulations, hereafter referred to as "the EPR", persons engaged in certain activities involving waste products are required to hold an environmental permit. Schedule 3, however, provides exemptions from this requirement, including, under Chapter 5, Section 2, paragraph 3 of the schedule, an exemption relating to the storage of sludge – the so-called "S3 exemption". Permission to apply for judicial review was refused on paper by Jeremy Baker J whose decision was upheld at an oral renewal hearing by Dove J. On considering an application by the claimant for permission to appeal, however, Underhill LJ, pursuant to CPR r.52.8(5), gave permission to apply for judicial review and further, pursuant to r.52.8(6), ordered that the application should proceed in this Court.

Background

2. The following summary is taken from the statement of facts and grounds of challenge filed in support of the application, the witness statement dated 2 May 2017 of Mr Brian Dollen, the claimant's finance director, and the witness statement dated 30 May 2017 of Mr David Womack, a Senior Environment Officer at the Environment Agency.

3. The claimant is a well-established company with annual sales revenue in the region of £65m and about 500 employees. Its various business activities include the emptying of cess pits and septic tanks. In 2017, the company served over 23,000 customers, of which 84% were residential and the remainder commercial.

4. A septic tank is an underground two or three chamber tank system located at residential or commercial premises and used for the treatment of sewage when a property is not connected to mains drainage. It has an inflow of sewage from the premises and outflow from the tank. The septic tank allows solid matter to settle and form as sludge at the bottom of the tank where it is naturally broken down. Liquid effluent, described by Mr Wignall on behalf of the claimant as "supernatant liquor", passes out of the tank via an outlet pipe. Before discharge into the water environment, it requires additional treatment, usually by being spread via a drainage field, a subsurface irrigation area comprising perforated infiltration pipes laid in shingle-filled trenches, where the microorganisms in the soil break down the remaining organic matter so as to prevent any pollution. Settled sludge that is not decomposed in the tank must eventually be removed to avoid overflow and blockages.

5. Sludge is removed from the septic tank by the claimant's operative viral hose inserted into the top of the tank which, by way of vacuum, transfers the sludge into the claimant's tanker. The sludge removed from the septic tanks in this way is principally used as agricultural fertiliser. This use is governed by European regulation (Directive 86/278/EEC on the protection of the environment, and in particular of the soil, when sewage sludge is used in agriculture, hereafter "the Sludge Directive") and the consequential UK regulations (the Sludge (Use in Agriculture) Regulations 1989, hereafter "SUiAR"), both considered in more detail below. There is a code of practice published by the government giving guidance as to the use of sewage sludge on

farmland. It is not practicable for sludge to be injected into the ground at certain times of year, particularly if the land is covered in snow or frost, or is waterlogged. For that reason, it is necessary for the claimant's tanker to discharge the sludge into a temporary storage tank on the farmer's property. It is recognised that septic tank sludge stored on farmland in this way represents a low risk to the environment. For that reason, such storage is exempt from the requirement to hold an environmental permit under regulatory provisions set out below.

6. The claimant has four active S3 exemptions registered in its name for four different farm sites in the West Country and, in addition, delivers septic tank sludge to another five locations that have S3 exemptions registered in the farmer's name. Each of the tanks situated on farmland is fitted with a grid at the inlet to the tank so that gravity allows debris in the sludge to be separated from the sludge itself. It is accepted by the claimant that all septic tank sludge collections contain debris, and further, that the volume of debris has become more problematic in recent years as a result, it is said, of the proliferation of wet wipes. Nonetheless, the claimant's case is that the debris forms only a very small fraction of the sludge – less than 0.04%. The claimant's evidence is that, every time a load is discharged, an operative checks the grid and, if necessary, removes sludge debris and drops it into a chute that feeds into an open skip. It is the claimant's case that there are no pollution risks from this process. Any liquid dripping from the sludge debris or escaping from the skip will drain into the field. The skip is subsequently removed to a permitted or exempt facility for the disposal of the debris.

7. In July 2016, the Agency's regional office arranged a meeting to discuss the transport, deposit and disposal of sludge. According to the claimant, the Agency's officers stated at the meeting that a permit was not required for the separation of sludge debris, provided it was disposed of correctly and that there were records to prove this had been done. In the next few months, however, the Agency's officers visited a number of sites to inspect activities. One such inspection, conducted by Mr Womack, took place on 7 November 2016 at a site operated by a contractor, Mr Gibbens. It is accepted that the claimant's tankers would regularly deposit sludge at the site. In his statement in these proceedings, Mr Womack described what he found during his inspection and exhibited photographs by way of illustration. He noted that there was no fencing or security to prevent public access to either the tanks, the pumps or any of the associated pipework. An inspection of the pipes and tanks revealed pieces of sewage waste hanging from the side of the storage tank. Sewage collected at the base of the tank on a scale which, in Mr Womack's view, had the potential to cause groundwater pollution. The skip was completely overflowing with wet wipes and sanitary products. The area around the base of the skip was wet with pools of sewage effluent. There was a strong smell of sewage and a proliferation of flies. A number of rats were present.

8. Following this visit, on 7 November 2016, Mr Womack sent an email to Mr Gibbens stating *inter alia*

> "We noted a crude form of screening …. We must point out that the S3 exemption **only** allows the storage of sludge. It does not allow **any** form of treatment on site and this includes screening of the sludge prior to its application to land …. A standard rules … permit is available …. **No screening should take place until the permit has been issued**."

According to the claimant, Mr Gibbens closed down his business following receipt of this email. On 23 November 2016, the Agency sent a letter to the claimant stating *inter alia*:

> "Earlier this year the Environment Agency invited liquid waste carriers to a workshop to discuss legislation and good practice around the collection, transport and disposal of liquid waste, predominantly sewage waste.
>
> A number of points were raised and issues identified by the operators who attended which we would like to share with you. This letter highlights the legislative requirements when storing, transporting or disposing of sewage waste which you must adhere to.
>
> We wish to take this opportunity to inform you that the S3 exemption that you have registered with the Environment Agency only authorises the storage of sewage or septic tank sludge at a farm before it is spread on land.
>
> It does not authorise any treatment of sewage sludge or septic tank sludge. Therefore, activities such as screening of waste, without a suitable permit, is an offence. Please find below further explanation of what is permitted by S3 exemptions and the treatment options for sewage sludge, septic tank and cesspit waste."

The following two pages of the letter contained guidance on a number of matters, of which only the first is relevant to this case. These pages have subsequently been identified by the Agency as "the guidance document". Under the heading "Screening at Place of Spreading Under an S3 Exemption", it states:

> "Screening of sewage sludge without a suitable permit is an offence. An S3 exemption authorises the storage of waste only and does not include treatment options. The operator should apply for a Standard Rules or bespoke permit.
>
> Note: A Dorset operator was prosecuted in March 2016 for the treatment of sewage sludge, namely screening without a permit amongst other offences. Weymouth Magistrates ordered the Director to pay £10,650 in fines and costs and the company was ordered to pay a total of £31,947 in fines and costs. "

9. On 7 December 2016, the claimant wrote to the Agency expressing concern that guidance issued by the regional office was inconsistent with the Agency's position nationally. Having received no response, the claimant filed a complaint under the Agency's complaints procedure. On 8 February 2017, the Agency's Area Environment Manager replied by email to the complaint, stating that he "reiterate[d] the position we describe to you in our letter of 3 November". In fact, the Agency's letter of that date had concerned an unrelated matter. On 28 February 2017, the claimant sent a pre-action protocol letter. On 20 March 2017, the Agency replied, enclosing a number of documents including an enquiry form setting out a series of questions and answers, which included the assertion that the screening activity was a treatment activity.

10. On 3 May 2017, the claimant filed a claim for judicial review, identifying the decision under review as "the interpretation of the S3 exemption under the EPR as authorising

the storage of waste only and not permitting the screening of debris by a grid and storage in an adjacent skip", and seeking the quashing of the Agency's policy and a declaration that the storage of sludge under the exemption permits the screening of debris in the manner described. In support of the claim, the claimant filed a statement of facts and grounds and the statement of Mr Dollen referred to above. In the statement of facts and grounds, it was asserted that, if a standard rules permit was required for grid screening, it would be necessary to apply for a permit at every injection site at a cost of £1,630 as the Agency's application fee, with annual Agency subsistence charges of £3,420. It was asserted that the application fee and subsistence charge for a bespoke permit would probably cost twice as much. In addition, it was estimated that other management costs would add approximately £20,000 a year to the costs of each site.

11. On 31 May 2017, the Agency filed summary grounds of resistance, together with the statement of Mr Womack asserting (1) that the definition of "sludge" and "residual sludge" for the purposes of the EPR and the SUiAR did not include debris and/or (2) that the S3 exemption extended only to the storage of sludge and not the screening of the debris out of the sludge at the storage location. It was further contended that no decision had been made regarding screening which was capable of being judicially reviewed and quashed. The Agency had merely communicated its understanding of the scope of the S3 exemption. It was therefore argued that the claim was premature and that the claimant was seeking an advisory opinion as to the legal position on hypothetical facts. In the absence of ascertained facts, it was inappropriate for the court to make any declaration. In support of these submissions, the Agency cited the decisions of this court in ***R (Anti-Waste) v Environment Agency*** [2008] 1 WLR 923 and ***R (Clue) v Birmingham City Council*** [2011] 1 WLR 99).

12. On 19 June 2017, Jeremy Baker J refused permission to apply for judicial review, on the grounds that the Agency "has not made a decision, rather it has provided its opinion on the interpretation of legislative provisions which is not susceptible to judicial review".

13. On 23 June 2017, the claimant filed notice of renewal of the claim for permission to apply. On 20 July, following an oral hearing, Dove J refused permission. I shall consider his judgment in more detail below, but in short he decided that it was not arguable that the screening of debris in the manner described by the claimant fell within the S3 exemption, that an activity such as screening amounted to treatment of the waste which needed to take place before the operation fell within the exemption, and that there was no basis on which the activities could be excluded from the regulatory requirements on the grounds that they were *de minimis*. Dove J observed that, having heard argument, he would have been persuaded that the procedural point on which Jeremy Baker J had refused permission was arguable, but given his conclusion on the substantive issue, permission to apply for judicial review was refused.

14. The claimant filed a notice of appeal to this court, relying on three grounds, namely that the judge had erred (1) in concluding that the EPR required any activity constituting the "treatment" of waste to necessitate the grant of a permit, (2) in dismissing the claimant's case as to the interpretation of the S3 exemption, and (3) considering it impossible that there may be *de minimis* waste operations falling outside the regulatory framework. On 29 June 2018, Underhill LJ, when considering

the application for permission to appeal, granted permission to apply for judicial review. In giving reasons, he stated *inter alia* that he considered it arguable that the contents of septic tanks do not cease to be "residual sludge" within the meaning of S3 only because they contain a small amount of debris of the kind described. He further directed that the application be retained in this court on the grounds that the issue may be of some general importance and that, according to the claimant, the regulations under consideration had not previously been considered by this court. He further directed that, if the Agency wished to pursue its contention that there had been no decision capable of judicial review, it would have to file a respondent's notice, adding that, on this point, "at first glance" he agreed with Dove J.

15. On 25 July 2018, the Agency filed a respondent's notice confirming that it would invite this court to uphold Dove J's order on different or additional grounds. It asserted that the email sent to the claimant on 8 February 17 was not a decision capable of judicial review. Whilst acknowledging that, in the light of Dove J's judgment and Underhill LJ's order, the guidance document distributed in November 2016 could have been the subject of judicial review, the Agency opposed the grant of permission because the three-month time limit for bringing such proceedings had expired in February 2017, several months prior to the filing of the claim. On 13 August 2018, the Agency filed detailed grounds of resistance to the claim setting out its argument on the procedural and substantive issues.

16. At the hearing of the application on 16 January 2019, we had the benefit of comprehensive written submissions, supplemented by oral argument, from counsel Mr Gordon Wignall on behalf of the claimant and Ms Heather Sargent on behalf of the Agency. We were greatly assisted by the clarity of the submissions put forward by both counsel.

The regulatory framework

17. I consider first the regulations governing the use of sewage sludge in agriculture. The starting point is the Sludge Directive, the recitals to which include the following:

> "Whereas sludge can have valuable agronomic properties and it is therefore justified to encourage its application in agriculture provided it is used correctly; whereas the use of sewage sludge must not impair the quality of the soil and of agricultural products;
>
> …
>
> Whereas sludge must be treated before being used in agriculture; whereas Member States may nevertheless authorise, on certain conditions, the use of untreated sludge, without risk to human or animal health, if it is injected or worked into the soil;
>
> …
>
> Whereas sludge from small sewage-treatment plants which treat primary domestic wastewater represent little danger to human, animal and plant health and to the environment and should therefore be exempt from some of the obligations laid down in relation to information and analysis …."

Article 2 of the Sludge Directive contains the following definitions which have been substantially adopted in domestic regulations:

> "(a) 'sludge' means
>
> (i) residual sludge from sewage plants treating domestic or urban waste waters and from other sewage plants treating waste waters of a composition similar to domestic and urban waste waters;
>
> (ii) residual sludge from septic tanks and other similar installations for the treatment of sewage;
>
> (iii) residual sludge from sewage plants other than those referred to in (i) and (ii);
>
> (b) 'treated sludge' means: sludge which has undergone biological, chemical or heat treatment, long-term storage or any other appropriate process so as significantly to reduce its fermentability and the health hazards resulting from its use;
>
> …
>
> (d) 'use' means the spreading of sludge on the soil or any other application of sludge on and in the soil."

Article 3 provides:

> "1. The sludge referred to in Article 2(a)(i) may only be used in agriculture in accordance with this Directive.
>
> 2. ….
>
> - the sludge referred to in Article 2(a)(ii) may be used in agriculture subject to any conditions that the Member State concerned may deem necessary for the protection of human health and the environment
>
> - the sludge referred to in Article 2(a)(iii) may be used in agriculture only if its use is regulated by the Member State concerned."

18. This case concerns residual sludge from septic tanks within the meaning of Article 2(a)(ii). As mentioned above, the regulations in this jurisdiction setting out the conditions for the use of such sludge in agriculture are found in the SUiAR. The regulations contain definitions of "sludge", "treated sludge" and "use" in substantially the same terms as the Sludge Directive. "Septic tank sludge" is defined as "residual sludge from septic tanks and other similar installations for the treatment of sewage". Regulation 4(1) specifies the periods of time which must pass between the use of any sludge or septic tank sludge on agricultural land and the carrying out of agricultural activities. In the case of grazing animals or harvesting forage crops, the period specified is three weeks commencing on the date of the use. In the case of harvesting fruit and vegetable crops grown in direct contact with the soil and normally eaten raw, the period is 10 months commencing on the date of the use. Regulation 4(2) provides that:

> "Where any untreated sludge has been used on agricultural land without being injected into the soil, the occupier of the land affected shall, as soon as reasonably practicable thereafter, cause such sludge to be worked into the soil of the land affected."

19. Next, there are regulations governing the management of waste, and in particular septic tanks sewage. Here, the starting point is another European regulation, Directive 2008/98/EC on waste and repealing certain Directives ("the Waste Framework Directive"). The recitals to this directive include the following:

> "(6) The first objective of any waste policy should be to minimise the negative effects of the generation and management of waste on human health and the environment. Waste policy should also aim at reducing the use of resources, and favour the practical application of the waste hierarchy.
>
> (7) In its resolution of 24 February 1997 on a Community strategy for waste management, the Council confirmed that waste prevention should be the first priority of waste management, and that re-use and material recycling should be preferred to energy recovery from waste, where and insofar as they are the best ecological options."

Article 3 lists definitions of key terms used in the Directive, including the following:

> "1. 'waste' means any substance or object which the holder discards or intends or is required to discard;
>
> …
>
> 9. 'waste management' means the collection, transport, recovery and disposal of waste, including the supervision of such operations and the after-care of disposal sites, and including actions taken as a dealer or broker;
>
> …
>
> 14. 'treatment' means recovery or disposal operations, including preparation prior to recovery or disposal;
>
> 15. 'recovery' means any operation the principal result of which is waste serving a useful purpose by replacing other materials which would otherwise have been used to fulfil a particular function, or waste being prepared to fulfil that function, in the plant or in the wider economy. Annex II sets out a non-exhaustive list of recovery operations."

Annex II lists 13 recovery operations (R1 to 13), including:

> "R10 Land treatment resulting in benefit to agriculture or ecological improvement.
>
> …
>
> R12 Exchange of waste for submission to any of the operations numbered R1 to 11.

> R13 Storage of waste pending any of the operations numbered R1 to 12 (excluding temporary storage, pending collection, on the site where the waste is produced)."

A footnote to R12 adds:

> "If there is no other R code appropriate, this can include preliminary operations prior to recovery including pre-processing such as, *inter alia*, dismantling, sorting, crushing, compacting, pelletising, drying, shredding, conditioning, repackaging, separating, blending or mixing prior to submission to any of the operations numbered R1 to R11 [my emphasis]."

20. The "waste hierarchy" to be applied as a priority in waste management legislation and policy is identified in Article 4(1):

> "(a) prevention;
>
> (b) preparing for re-use;
>
> (c) recycling;
>
> (d) other recovery, e.g. energy recovery; and
>
> (e) disposal."

Article 10, headed "Recovery", provides

> "(1) Member States shall take the necessary measures to ensure that waste undergoes recovery operations, in accordance with Articles 4 and 13.
>
> (2) Where necessary to comply with paragraph (1) and to facilitate or improve recovery, waste shall be collected separately if technically environmentally and economically practicable and shall not be mixed with other waste or other material with different properties."

Article 13, headed "Protection of human health and the environment", provides

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

21. Chapter IV of the Waste Framework Directive imposes obligations about permits and registrations. Article 23 (1) provides

"Member States shall require any establishment or undertaking intending to carry out waste treatment to obtain a permit from the competent authority."

Article 24, headed "Exemptions from permit requirements", provides

"Member States may exempt from the requirement laid down in Article 23(1) establishments or undertakings for the following operations:

(a) disposal of their own non-hazardous waste at the place of production; or

(b) recovery of waste."

Article 25(1) stipulates *inter alia* that the rules about the treatment of waste "shall be designed to ensure that waste is treated in accordance with Article 13".

22. Turning to domestic legislation and regulations, s.33 of the Environmental Protection Act 1990 provides insofar as relevant to this case:

"(1) subject to subsections (1)(a), … (2) and (3) below, a person shall not

(a) deposit controlled waste …, or knowingly cause or knowingly permit controlled waste … to be deposited in or on any land unless an environmental permit authorising the deposit is in force and the deposit is in accordance with the permit;

…

(1A) Paragraph (a) … of subsection (1) [does] not apply in relation to a waste operation that is an exempt operation.

…

(2) … [P]aragraph … (a) … of subsection (1) above [does] not apply in relation to household waste from a domestic property which is treated, kept or disposed of within the curtilage of the property.

…

(3) Subsection (1)(a) … above [does] not apply in cases prescribed regulations made by the Secretary of State ….

(6) A person who contravenes subsection (1) above commits an offence.

…

(8) … [A] person who commits an offence under this section is liable

(a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine or both ;

(b) on conviction on indictment, to imprisonment for a term not exceeding five years or a fine or both "

23. Under s.75(4) and (5) of the 1990 Act, "controlled waste" includes household waste from a domestic property, but s.75(8) qualifies this definition by providing that:

> "Regulations made by the Secretary of State may provide that waste of a description prescribed in the regulations shall be treated for the purposes of provisions of this Part prescribed in the regulations as being or not being household waste; and references to waste in … this subsection do not include sewage … except so far as the regulations provide otherwise."

The relevant regulations are the Controlled Waste (England and Wales) Regulations 2012 (SI 2012/811). Under these regulations, "Directive waste" means anything that is waste within the meaning of Article 3(1) of the Waste Framework Directive (see above) and "septic tank sludge" and "sludge" have the meaning given in regulation 2 of SUiAR (also see above). Regulation 3(2)(c) of the Controlled Waste regulations provides that septic tank sludge which is used on agricultural land, insofar as it is "Directive waste", is not to be treated as household waste for the purposes of the 1990 Act.

24. Finally, I set out the relevant provisions of the EPR which were introduced in 2016 replacing and consolidating earlier regulations and which, as stated above, lay down the environmental permit regime currently applicable in England and Wales. The scope of the EPR extends across a wide range of activities impinging on the environment of which waste management is only a part. For the purposes of the EPR, "waste" is again defined as "waste within the meaning of Article 3(1) of the Waste Framework Directive". Regulation 12(1)(a) provides that:

> "a person must not, except under and to the extent authorised by an environmental permit, operate a regulated facility"

but the definition of "regulated facility" in regulation 8 excludes, *inter alia*, "an exempt facility", which, under regulation 5, includes, *inter alia*, "an exempt waste operation", defined as meaning

> "a waste operation (a) that is not carried on at an installation, and (b) that meets the requirements of paragraph 4(1) of Schedule 2".

The latter paragraph provides, so far as relevant to these proceedings:

> "For the purposes of the definition of 'exempt waste operation', the requirements are
>
> (a) that a waste operation
>
> (i) falls within a description in Part 1 of Schedule 3, and
>
> (ii) satisfies the general and specific conditions specified in that part in relation to the description,
>
> (b) … that
>
> (i) the waste operation is registered, and

(ii) an establishment or undertaking is registered in relation to it, and

(c) that the type and quantity of waste submitted to the waste operation, and the method of disposal or recovery, are consistent with the need to attain the objectives mentioned in Article 13 of the Waste Framework Directive."

25. Part 1 of Schedule 3 to the EPR provides descriptions and conditions of exempt waste operations to which s.33(1)(a) of the 1990 act does not apply. The operations cover the use of waste (Chapter 2, paragraphs U1 to 16), the treatment of waste (Chapter 3 paragraphs T1 to 32)), the disposal of waste (Chapter 4, paragraphs D1 to 8) and the storage of waste (Chapter 5, S1 to 3). The present proceedings concern the exemptions relating to storage of waste and in particular under paragraph 3 of Chapter 5, headed "Storage of sludge (S3)". This S3 exemption is defined as follows:

"3. Storage of sludge (S3)

(1) The storage of relevant waste.

(2) The table specifying relevant waste for the purposes of this paragraph is set out below.

Codes	Waste types
190805	Residual sludge from sewage plants treating domestic urban waste waters and from other sewage plants treating waste waters of a composition similar to domestic and urban waste waters only
200304	Residual sludge from septic tanks and other similar installations for the treatment of sewage only

(3) For the purposes of this paragraph, the specific conditions are that —
(a) the total quantity of waste stored at any one time does not exceed 1,250 tonnes,
(b) no waste is stored for longer than 12 months,
(c) the waste is stored in a secure location at the place where it is to be used,
(d) the waste is stored at least
(i) 10 metres from any watercourse;
(ii) 50 metres from any spring or well, or from any borehole not used to supply water for domestic or food production purposes;
(iii) 250 metres from any borehole used to supply water for domestic or food production purposes,
(e) no waste is stored
(i) within a zone defined by a 50-day travel time for groundwater to reach a groundwater abstraction that is used to supply water for domestic or food production purposes;
(ii) within 0.3 metres of the top of an open storage container or within 0.75 metres of the top of an earthbank tank or lagoon, and
(f) after storage, the waste is to be used in accordance with the Sludge (Use in Agriculture) Regulations 1989".

26. In short, this means that the storage of residual sludge from septic tanks is exempt from the requirement for an environmental permit, and outside the provisions of s.33 of the 1990 Act, provided the storage complies with the specific conditions in subparagraph S3(3) aimed at preventing pollution.

27. Under the regulations which preceded the EPR, the government introduced a registration scheme for the owners of septic tanks by which the owner of a septic tank registered under the scheme was exempt from the requirement to hold an environmental permit authorising the storage of sewage. In 2015, however, a new scheme was introduced introducing so-called "general binding rules", and these rules remain in force under the EPR. Provided the owner or operator of the septic tank complies with the rules, he or she is no longer obliged under the EPR to register small discharges of sewage effluent in order to be exempt from the requirement to hold a permit. The general binding rules require the owner or operator of the septic tank *inter alia* to ensure that the equipment complies with relevant standards and, in addition, that sludge from the system is safely disposed of by an authorised person, such as the claimant company.

Dove J's judgment

28. At paragraphs 15 to 20 of his judgment, Dove J gave the following reasons for his conclusion that it was not arguable that the screening of debris from the sludge prior to storage was an activity comprised within the exemption:

> "15. Firstly it has not been contended by Mr Wignall on behalf of the claimant that the screening of waste so as to remove material like the debris is not capable of being characterised as treatment of the waste. Treatment of the waste would require a permit. Mr Wignall's argument is that, if and insofar as that can be characterised as treatment …, nevertheless there are two ways in which it should be viewed as part and parcel of the S3 exemption. The first is that there should be some *de minimis* exemption for activity [of] that kind on the basis that, firstly, it is [a minor] operation and, secondly, that there is nothing within the legislative regime, taking a purposive construction to it, which indicates that such *de minimis* activity is not incorporated within the exemption.
>
> 16. In my view, that argument is unsustainable. The legislative regime is, in my view, entirely clear and inclusive. This is an exemption which is for the storage of waste, that is to say storage after any treatment which it may need in order to be properly characterised as the residual sludge which is authorised to be stored as part and parcel of the activity …. [T]he debris has no business being in the sludge which is being stored. It is not capable of forming any part of that storage, nor is it capable of being deployed in the manner which is required for storage to be exempt. I make that observation because at clause 3(3)(f) of the relevant exemption:
>
> > 'The waste is to be used in accordance with the [SUiAR].'
>
> 17. There is simply no basis to conclude that the debris could form any part of that activity. Thus, the screening activity is not within the four corners of the [legislation] and it is, in my judgment, an activity which occurs and needs to

> occur prior to anyone taking advantage of this exemption, as storage of the debris could not fall properly within the S3 exemption.
>
> 18. The alternative argument presented by Mr Wignall is that the requirement for the waste operation, including the type and quantity of waste and the method of disposal or recovery, to be consistent with Article 13, provides a suitable and appropriate overview for any *de minimis* activity of this kind.
>
> 19. I am again unable to accept that this is an arguable proposition. It appears plain to me that paragraph 4.1(c) of the 2016 regulations is overarching. All exempt waste operations … comprises activities not simply confined to storage, but also other forms of waste operation.
>
> 20. The reference to disposal or recovery does not lead to the reading into S3 of activities of the kind which are in point in this case. This qualification to the definition of exemption waste operations is sensible so as to ensure that the exemption is not taken advantage of in a way which would breach those general requirements of Article [13] of the Directive. It does not authorise what would otherwise be required to be permitted, namely the treatment of the waste."

29. Given his conclusion on the substantive issue, Dove J stated that it was, strictly speaking, unnecessary for him to deal with the procedural issue which had led Jeremy Baker J to refuse permission. He added, however, that, having had the benefit of hearing argument on the point, he would have been persuaded that the point was arguable.

Submissions

30. On the preliminary procedural issue, Mr Wignall submitted to Dove J that the Agency's promulgation of its guidance as to the screening of debris from septic tank sludge was a "decision" or "action" within the meaning of CPR r.54.1(2)(a). Alternatively, he submitted that, if there was no "decision" in the formal sense, none was required for the claim to proceed because the law does not recognise the need to satisfy any such threshold standard when called on to grant a remedy which will serve a useful purpose. The High Court has jurisdiction to correct an error of law by a public body contained in a non-statutory document and to make an appropriate declaratory ruling: *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112. Mr Wignall argued that the Agency's contention that the challenge was premature was wrong because the critical factual issue has crystallised, namely whether the screening of debris by means of a grid is within the terms of the S3 exemption. The remedies sought by the claimant would serve a useful purpose. Given that the issue is likely to come to court for resolution at some point, an adjudication of this claim would advance the overriding objective.

31. In his submissions to this court, Mr Wignall contends that Dove J had been correct in concluding that there was a reviewable decision. Furthermore, he submits that the Agency's concession in its respondent's notice that the guidance document published in November 2016 could have constituted a reviewable document was important since it demonstrated the existence of a long-term policy which is still in place and, on the claimant's case, is unlawful. In response to the Agency's assertion that a claim in May 2017 for judicial review of the guidance document issued in November 2016 was out

of time, Mr Wignall pointed out that, between November 2016 and February 2017, the claimant had tried to use the Agency's official complaint procedure, and submitted that the court will ordinarily make proper allowance for parties seeking to use a process of alternative dispute resolution. He added that, permission having been granted, the right approach for the court to take if concerned about undue delay would be to refuse relief in the exercise of its discretion. In this case, however, the delay had caused no detriment or prejudice to the Agency.

32. On the substantive issue, the claimant's central submission is that the residual content of septic tanks after removal of the supernatant liquor does not cease to be "residual sludge" within the meaning of the S3 exemption merely because it may contain a small amount of debris. The debris at the bottom of septic tanks is part of the residual waste removed by operators such as the claimant and therefore falls within the literal meaning of "residual sludge from septic tanks" under the exemption. It is submitted that, if the Agency contends that it has discovered some new waste which requires specific regulation, it should redraft its legislative instruments or guidance to make specific provision. Prior to such a process, it should engage in a process of consultation with the industry.

33. Mr Wignall draws attention to a "regulatory position statement" published by the Agency in August 2011 at a point when the government was conducting the review of the registration of small sewage discharge which ultimately resulted in the new scheme based on general binding rules described above. In the statement, the Agency indicated that, pending the outcome of the review, the registration obligations on septic tank owners then in force would not be imposed provided the discharge complied with requirements set out in the statement, which broadly anticipated those subsequently adopted in the general binding rules. The point in the statement on which Mr Wignall relies is contained in a footnote in which "domestic sewage" is defined as:

> "sewage effluent from residential properties and services that originates predominantly from the human metabolism and from household activities. Domestic sewage includes waste arising from normal domestic activities wherever these are carried out."

Mr Wignall submits that this definition plainly includes items of debris (wet wipes, condoms, sanitary products etc). He describes this as a relevant definition which contemplates the admixture of such debris with, and as a constituent part of, "residual sludge".

34. It is not accepted by the claimant that the use of the metal screen or grid to remove debris from the sludge amounts to "treatment". Even if it does amount to treatment, it does not follow that it requires a permit. Mr Wignall submits that the approach adopted by Dove J, starting with the notion that there is an activity called "treatment" which necessarily requires a permit, is wrong. Not all forms of treatment require a permit under the EPR – the starting point is the type of activity and the quantities involved. The wider regulatory framework recognises a range of activities – whether storage, treatment or otherwise – which are of such a low risk that they are deemed not require full-blown regulation under the permit regime. One example is the "general binding rules" which exempt septic tank owners from the obligation to register provided certain conditions are met. Mr Wignall submits that it is abundantly

clear that the material in question is unlikely to contain pollution as the septic tank owners are ostensibly under no regulation whatsoever. Similarly, a farmer using septic tank sludge on his land is outside the regulatory requirements for a permit. Mr Wignall submits that, since neither the septic tank owners nor the ultimate users of septic tank sludge are required to obtain a permit to screen debris, it would be illogical to impose such an obligation on operators who collect the sludge from the septic tank owners and deliver it to the farmers.

35. It is further submitted that the claimant's interpretation is supported by a purposive approach. The starting point for such an approach should be the policy of the Waste Framework Directive, to ensure compliance with the aims identified in Article 13 of the Directive on a proportionate basis, and to keep regulatory burdens to a minimum where there is a low risk of pollution. Mr Wignall suggests that a purposive approach would include consideration of the agronomic advantages of the SUiAR, the proper avoidance of health and safety risks which would result if the debris were allowed onto agricultural land, and, on the claimant's case, the very limited risk of pollution involved in screening. It is submitted that, applying such an approach, the storage of sludge should not be excluded from the S3 exemption merely because it includes a process of screening of the sort carried out by the claimant. Mr Wignall further submits that the storage of septic tank sludge prior to use in agriculture is at most a "recovery" operation within the definitions in R10 and R12 of Annex II to the Waste Framework Directive. The footnote to R12 states that "exchange of waste" for submission to land treatment includes preliminary operations such as "sorting" and "separating". It is submitted that the screening of sludge prior to storage is a form of recovery for which an exemption can be granted in accordance with Article 24 of the Directive.

36. It is further submitted on behalf of the claimant that the judge was wrong to conclude that the legislative regime does not allow of any *de minimis* exceptions. Mr Wignall advances an argument by way of *reductio ad absurdum* that, on the Agency's interpretation, the removal of a single hair grip would require a permit. He relies on the claimant's evidence that the debris constitutes no more than 0.04% of a load and that any drips falling from the sludge as a result of the screening process fall onto the field for which the load is intended.

37. Central to the claimant's case is that the screening process is a low-risk activity. Mr Wignall submits that the legislator cannot possibly have intended that what he describes as "this small-scale exemption", to be used alongside the SUiAR, would require an operator to go to the expense of having to apply for a separate permit to screen the small amount of debris found in septic tank sludge. It is submitted that the Agency's proposal that either a standard rules permit or a bespoke permit be obtained to cover the screening of debris from the sludge would impose a grossly disproportionate regulatory burden and prohibitive additional costs. Mr Wignall characterised this proposal as a sledgehammer to crack a nut. Such an interpretation would be inconsistent with the general policy to reduce "red tape" and an impediment to economic growth. Furthermore, given the claimant's assertion that it will abandon this trade if obliged to obtain permits for screening the sludge, the Agency's proposed interpretation is an unreasonable interference with commercial activity. It is further submitted that the Agency's interpretation also breaches the rule that legislation

should be clear before it can give rise either to penal consequences or an interference with a person's economic interests.

38. In oral submissions, Mr Wignall argued that the definition of "exempt waste operations" in paragraph 4(1) of Schedule 2 to the EPR provided the Agency with a remedy in cases where screening activity gave rise to pollution. He submitted that it is unnecessary to interpret the S3 exemption in the strict way proposed by the Agency because waste activities falling outside paragraph 4(1)(a) of Schedule 2 and Part 1 of Schedule 3 are still liable to regulatory control under paragraph 4(1)(c) of Schedule 2. In other words, he contends that the effect of paragraph 4(1) is that activities falling outside the exemptions in Schedule 3 (including the S3 exemption) will only be exempt if the type and quantity of waste submitted to the waste operation, and the method of disposal recovery, are consistent with the objectives in Article 13 of the Waste Framework Directive.

39. In replying to submissions on behalf of the respondent, Mr Wignall suggested that the court could give effect to the intention of the legislature by reading the word "substantially" into regulation 5(b) of the EPR so that the definition of "an exempt waste operation" would be read as "a waste operation (a) that is not carried on at an installation, and (b) that *substantially* meets the requirements of paragraph 4(1) of Schedule 2". In a written note filed after the hearing before this court, Mr Wignall sought to support the submission by reference to a reported authority not cited during the hearing. The respondent objected to this supplemental submission, but in any event I do not derive any assistance from the cited case, which relates to a wholly different regulatory regime.

40. On behalf of the Agency, Ms Sargent reiterated her client's position that the email sent on 8 February 2017 did not constitute a decision capable of judicial review. The Agency accepts that the guidance document issued in November 2016 could have been the subject of such an application but contends that such an application should have been made promptly and in any event within three months of the guidance being published. Good regulatory administration would be undermined if a fresh decision capable of being judicially reviewed were to result from every reference in correspondence by a public body to existing guidance. Such a situation would also make the status of the guidance significantly uncertain, contrary to the very purpose behind the production of guidance by public bodies.

41. In oral submissions, Ms Sargent suggested that the proper course open to the claimant would have been to invite the Agency formally to reconsider its guidance and then, if appropriate, seek to judicially review the response to that invitation. Such an approach would be consistent with the legal imperative of pursuing alternative methods of resolving disputes before resorting to litigation.

42. On the substantive issue, the Agency contends that the claimant's argument that the definition of septic tank "sludge" or "residual sludge" includes debris of the kind screened out in this case is plainly wrong. This is evident from the face of the relevant regulations. The effect of the SUiAR is to authorise the use of "residual sludge" on agricultural land provided that the conditions of the regulations are complied with. None of those conditions requires the "residual sludge" to undergo any further treatment. "Residual sludge" therefore necessarily refers to waste that is ready for use without any further treatment. Similarly, the S3 exemption is concerned with

"residual sludge" (see the table in sub-paragraph S3(2) set out in paragraph 25 above) and expressly provides (in sub- paragraph S3(3)(f)) that, after storage, the waste "is to be used" in accordance with the SUiAR. As noted above, "use" under the SUiAR has the same meaning as in the Sludge Directive, namely "spreading on the soil or any other application on or in the soil". It is submitted that "residual sludge" for the purposes of the S3 exemption must therefore be waste that has been treated and is simply being stored pending its use. Any waste that contains debris of the sort arising in this case is not ready for use. In support of this contention, Ms Sargent relies on an observation in the claimant's statement of facts and grounds that "if the debris were not removed then even if a pump injector were not damaged, then there would be the risk that it would emerge separately in farmers' fields, leading to health and safety concerns".

43. In the alternative, the Agency argues that, even if "sludge" or "residual sludge" includes debris, the process of screening the debris out of the sludge at the storage location plainly falls outside the scope of the S3 exemption, which extends only to storage and not to any form of treatment. The Agency submits that the screening process carried out by the claimant is indisputably a form of treatment. In support of this submission, Ms Sargent draws attention to provisions within the T exemptions in the EPR in which "screening" waste is included within the definition of "treatment".

44. The Agency submits that the S3 exemption does not admit of the operation of the *de minimis* principle. Ms Sargent invites the court to approve and adopt the reasoning of Dove J at paragraphs 16 and 17 of his judgment. It is submitted that the claimant's *de minimis* argument amounts, in effect, to an invitation to curtail the Agency's enforcement discretion whereas the exercise of that discretion is only susceptible to legal challenge on standard public law grounds. It has not been suggested by the claimant that the Agency has committed any public law error in failing to exercise its discretion not to enforce the need for a permit in respect of the screening process.

45. In the alternative, if the S3 exemption does admit of the operation of the *de minimis* principle, the Agency submits that it is for the operator to establish a defence to a prosecution that, on the specific facts of the individual case, the treatment activity is indeed *de minimis* and within the scope of the S3 exemption. It is therefore submitted that, even if the claimant is correct to contend that the exemption admits of the operation of the principle, the Agency has not erred in law in advising in the abstract that the screening process is a treatment activity so as to fall outside the exemption.

46. Ms Sargent refutes Mr Wignall's interpretation of paragraph 4(1) of Schedule 2 to the EPR. She points out that sub-paragraphs 4(1)(a), (b) and (c) are conjunctive, not disjunctive. The effect of paragraph 4(1), therefore, is that, even if an activity falls within an exemption under Schedule 3 Part 1 (such as the S3 exemption), it will only be exempt if the type and quantity of waste submitted to the operation and the method of recovery are consistent with the objectives in article 13 of the Waste Framework Directive.

47. The Agency does not accept that the screening of debris out of septic tank sludge is a low-risk activity. It argues that all necessary treatment, including screening, of septic tank waste should occur either at the place of production (the septic tank) or at an appropriately permitted treatment facility. If the intention is to store sludge pursuant

to the S3 exemption, only the residual sludge, excluding debris, should be taken to any site for storage and thereafter for use in accordance with the SUiAR.

Discussion and conclusions

48. On the procedural issue, the Agency has conceded that the guidance document sent to the claimant on 23 November 2016 was a statement of policy susceptible to an application for judicial review but objected to the claim proceeding because it was not filed until 3 May 2017, 10 weeks outside the three-month period prescribed in CPR rule 54.5(1). As the claimant has been given permission to apply for judicial review, however, it is unnecessary for this court to address this point.

49. I therefore turn to consider the substantive issue.

50. On this issue, I again accept the submissions made on behalf of the Agency. The case essentially turns on the interpretation of the EU directives and statutory regulations. In my judgement, under the Sludge Directive and the SUiAR, "sludge" means "sludge". It does not mean "sludge including debris". The term "residual sludge" in the S3 exemption in the schedule to the EPR means sludge which, after storage, is in a condition ready to be used in accordance with the Sludge Directive and the SUiAR by "spreading on the soil or any other application on or in the soil." I accept Ms Sargent's submission that the "residual sludge" covered by the S3 exemption is sludge that has been treated and is simply being stored pending use. The definition of "domestic sewage" in the 2011 regulatory position statement cited by Mr Wignall is also of no assistance. The material that is stored under the S3 exemption is not "domestic sewage" but "residual sludge" fit for use in accordance with the SUiAR.

51. Just as I find that "sludge" means "sludge", I also find that, under the S3 exemption, "storage" means "storage". It does not include any form of treatment. In my judgement, the screening process carried out by the claimant to remove debris from the sludge is unquestionably a form of treatment.

52. The fact that screening of sludge before storage is a form of recovery operation under the Waste Framework Directive does not assist the claimant's case. Under the Directive:

    (1) recovery of waste is a form of treatment – Article 3(14);

    (2) Member States *shall* require establishments or undertakings carrying out treatment to obtain a permit – Article 23(1);

    (3) Member States *may* exempt establishments or undertakings from the permit requirements if carrying out the recovery of waste – Article 24(b);

    (4) Member States *shall* ensure that waste undergoes recovery in accordance with the waste hierarchy in Articles 4 and 13 – Article 10;

    (5) Rules about the treatment of waste *shall* be designed to ensure that waste is treated in accordance with Article 13 – Article 25 (my emphasis).

    It follows that, in deciding whether to exercise its discretion to exempt an operator from the obligation to obtain a permit when engaged in waste recovery, a Member

State must comply with its obligation under Article 13 to ensure the protection of human health and environment. In my judgement, this analysis does not provide any support for the claimant's argument. On the contrary, it plainly supports the interpretation of the regulations put forward by the Agency

53. I do not accept Mr Wignall's submission that, since neither the septic tank owners nor the ultimate users of septic tank sludge are required to obtain a permit to screen debris, it would be illogical to impose such an obligation on operators who collect the sludge from the septic tank owners and deliver it to the farmers. The sludge collected from the septic tank owners is plainly different from the sludge stored on the farmers' land. In order to come within the exemption, sludge stored on the farmers' land must be in a condition fit for use on the land. It is unlikely that sludge collected from the septic tank owners will be fit for use on the land because of the debris that is regrettably deposited in the septic tanks. I do not agree that it is illogical that the operator who collects the sludge from a number of septic tanks and is required to remove debris from the sludge to put it into a condition fit for use on the farmers' land should be subject to regulation.

54. I also reject Mr Wignall's argument that the word "substantially" should be read into regulation 5(b) of the EPR. Whether or not the S3 exemption is subject to the *de minimis* principle is something which can only be established on the facts of a particular prosecution. Even if the claimant is correct to contend that the exemption admits of the operation of the principle, the Agency has not erred in law in advising that the screening process is a treatment activity so as to fall outside the exemption.

55. I accept Ms Sargent's submission that sub-paragraphs 4(1)(a), (b) and (c) of Schedule 2 to the EPR are conjunctive, not disjunctive, so that, even if an activity falls within an exemption under Schedule 3 Part 1 (such as the S3 exemption), it will only be exempt if the type and quantity of waste submitted to the operation and the method of recovery are consistent with the objectives in Article 13 of the Waste Framework Directive.

56. I am not persuaded that the Agency's proposal that the screening of debris in septic tank sludge would impose a disproportionate regulatory burden or prohibitive additional costs. The practical solution suggested by Ms Sargent – that if not carried out within the septic tank itself, screening of septic tank waste should occur at an appropriately permitted treatment facility – does not seem to me to particularly burdensome. No doubt the claimant would pass on additional costs to the septic tank owners, but this is hardly unfair since they are ultimately responsible for the presence of debris in the sludge.

57. For these reasons, I conclude that Dove J was right when he found that the screening of debris from sludge prior to storage was not an activity comprised within the S3 exemption. Accordingly, I would dismiss this application for judicial review.

SHARP LJ

58. I agree.

RAFFERTY LJ

59. I also agree.