

Neutral Citation Number: [2015] EWCA Civ 1149

Case No: C1/2015/2871

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION, PLANNING COURT
MRS JUSTICE PATTERSON
CO/1191/2015**

Royal Courts of Justice
Strand, London, WC2A 2LL

17/11/2015

Before:

**LORD JUSTICE MCFARLANE
LORD JUSTICE FLOYD
and
LORD JUSTICE SALES**

Between:

**THE QUEEN on the application of
TARMAC AGGREGATES LIMITED
(formerly LAFARGE AGGREGATES
LIMITED)**

Appellant

- and -

**THE SECRETARY OF STATE FOR
ENVIRONMENT,
FOOD AND RURAL AFFAIRS**

Respondent

- and -

THE ENVIRONMENT AGENCY

Interested Party

**Mr Gregory Jones QC & Mr Charles Streeten (instructed by Freeth LLP) for the
Appellant**

Mr Alan Bates (instructed by Government Legal Department) for the Respondent

Mr Charles Banner (instructed by Environment Agency) for the Interested Party

Hearing date: 15 OCTOBER 2015

LORD JUSTICE SALES:

Introduction

1. This is an appeal from the decision of Patterson J in which she dismissed an application by the Appellant (“Tarmac”) for judicial review of a decision dated 29 January 2015 by an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs. By that decision the Inspector dismissed an appeal by Tarmac against a refusal by the Interested Party, the Environment Agency (“the EA”), to grant a standard rules environmental permit. For reasons of expedition, the appeal came before us on a “rolled up” basis, for the Court to consider whether to grant permission to appeal and, if so, then to hear the appeal. On the basis of our pre-reading, at the outset of the hearing we granted permission to appeal and the hearing then proceeded as a full appeal.
2. A standard rules environmental permit is the relevant environmental permit required in relation to operations involving use of waste which constitute the recovery of the waste, as distinct from its disposal. The conditions attaching to a permit for the recovery of waste are less onerous and less expensive to comply with than those attaching to a bespoke permit of the kind that is required for the disposal of waste.
3. The waste in issue in this case is spoil from quarrying operations conducted by Tarmac as the mineral operator of a site at Methley Quarry, Green Lane, Methley, Leeds (“the Quarry”) and other similar waste. Tarmac wishes to use the waste in works to remodel the landscape at the Quarry, in order to comply with a planning condition imposed by the local planning authority, Leeds City Council (“the Council”), when it granted Tarmac planning permission to quarry aggregate materials at the Quarry.
4. The case turns on the proper interpretation of the concepts of “recovery” and “recovery operations” as used in Article 3(15) of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, commonly called the Waste Framework Directive (“the WF Directive”), and in Annex II to that Directive. The EA decided that the operations proposed by Tarmac did not constitute recovery operations for the purposes of the WF Directive and its decision was upheld by the Inspector on appeal on the basis of modified reasoning. Tarmac’s claim for judicial review of the Inspector’s decision was then dismissed by Patterson J.

The legal framework

5. The WF Directive replaced an earlier Directive on the treatment of waste, Council Directive 75/442/EEC of 15 July 1975 (as amended by Council Directive 91/156/EEC of 18 March 1991 and Commission Decision 96/350/EC of 24 May 1996) (“the previous Directive”).
6. The recitals to the WF Directive are more extensive than, and do not fully correspond with, the recitals to the previous Directive. The recitals to the WF 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.

...

(8) It is therefore necessary to revise Directive 2006/12/EC in order to clarify key concepts such as the definitions of waste, recovery and disposal, to strengthen the measures that must be taken in regard to waste prevention, to introduce an approach that takes into

account the whole life-cycle of products and materials and not only the waste phase, and to focus on reducing the environmental impacts of waste generation and waste management, thereby strengthening the economic value of waste. Furthermore, the recovery of waste and the use of recovered materials should be encouraged in order to conserve natural resources. In the interests of clarity and readability, Directive 2006/12/EC should be repealed and replaced by a new directive.

...

- (19) The definitions of recovery and disposal need to be modified in order to ensure a clear distinction between the two concepts, based on a genuine difference in environmental impact through the substitution of natural resources in the economy and recognising the potential benefits to the environment and human health of using waste as a resource. In addition, guidelines may be developed in order to clarify cases where this distinction is difficult to apply in practice or where the classification of the activity as recovery does not match the real environmental impact of the operation.

...

- (28) This Directive should help move the EU closer to a ‘recycling society’, seeking to avoid waste generation and to use waste as a resource. In particular, the Sixth Community Environment Action Programme calls for measures aimed at ensuring the source separation, collection and recycling of priority waste streams. In line with that objective and as a means to facilitating or improving its recovery potential, waste should be separately collected if technically, environmentally and economically practicable, before undergoing recovery operations that deliver the best overall environmental outcome. Member States should encourage the separation of hazardous compounds from waste streams if necessary to achieve environmentally sound management.”

7. Article 3(15) of the WF Directive provides a definition of “recovery” as follows:

“‘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 the wider economy. Annex II sets out a non-exhaustive list of recovery operations.”

8. Annex II to the WF Directive is headed “Recovery Operations”, and sets out a list of 13 operations, including R10, “Land treatment resulting in benefit to agriculture or ecological improvement”.
9. Annex I to the WF Directive is headed “Disposal Operations”, and sets out a list of 15 such operations. These include D1, “Deposit into or on to land (e.g. landfill, etc.)”, and D2, “Land treatment (e.g. biodegradation of liquid or sludgy discards in soils, etc.)”.
10. The previous Directive did not include a general definition equivalent to Article 3(15), but simply set out lists of recovery operations and disposal operations in Parts A and B of Annex II to that Directive. These were treated as mutually exclusive categories, as they are in the Annexes to the WF Directive.
11. That drafting technique, however, gives rise to difficult questions of categorisation of operations, since the descriptions of items in Annex I and in Annex II can in certain cases overlap. For example, the use of waste for backfill in the present case could be described as “Deposit into or on to land” (D1) or as falling within R10, as “Land treatment resulting in ... ecological improvement”. This means that additional criteria have to be brought into play to

assist in the task of interpreting the items in the respective lists and in categorising the particular operations in any particular case as recovery or disposal of waste.

12. A body of case-law of the ECJ built up in relation to the previous Directive which gave guidance on this. It is not altogether clear how directly this case-law should be transposed when dealing with the WF Directive.
13. A leading case on the previous Directive is Case C-6/00 *Abfall Services AG v Bundesminister für Umwelt Jugend und Familie* [2001] ECR I-1963 (“the ASA case”). In that case, ASA wished to transport waste slag to place it in a disused salt-mine to secure hollow spaces, and contended that this was a recovery operation rather than disposal. AG Jacobs, in his Opinion, referred in particular to the fourth recital to the previous Directive (“Whereas the recovery of waste and the use of recovered materials should be encouraged in order to conserve natural resources ...”). He concluded that whether waste can be re-used after a given operation is not a decisive criterion for the classification of that operation as disposal or recovery (para. 82); agreed with the proposition that, since the object of the previous Directive was to protect natural resources by encouraging the recovery of waste by recycling, re-use, reclamation or any other process, it is also relevant to consider whether the operation uses waste instead of primary raw materials (for example in the case of mine-fill excavations from new mines or natural resources such as sand or gravel), in which case it would be recovery, but stated that this criterion is essentially another aspect of the relevant general test, “namely the purpose of a given operation and the utility for that operation of the waste used” (para. 85); and then said this at para. 86:

“In my view the test of the overriding purpose of an operation is the correct criterion for determining whether that operation should be classified as disposal or recovery. The decisive question is whether the waste is used – or re-used – for a genuine purpose. Put another way, if waste were not available for a given operation, would that operation none the less be carried out using some other material? Applying that criterion to the case of a deposit of waste to fill hollow spaces in a disused mine, it would need to be determined whether, in the absence of that waste, those responsible for the mine would have had to arrange for the mine to be filled with other material for a purpose independent of storing the waste, for example for safety or technical reasons to do with the mine itself.”

14. In the judgement in the ASA case, the ECJ held (para. 64) that “where, having regard solely to the wording of the operations in question, a waste treatment operation cannot be brought within one of the operations or categories of operations referred to in Annex II A or II B to the Directive, it must be classified on a case-by-case basis in the light of the objectives of the Directive.” The ECJ held that it followed from Article 3(1)(b) and the fourth recital of the previous Directive “that the essential characteristic of a waste recovery operation is that its principal objective is that the waste serve a useful purpose in replacing other materials which would have had to be used for that purpose, thereby conserving natural resources” (para. 69); and this was something to be assessed on a case-by-case basis by the national judge (paras. 70-71).
15. Subsequent cases affirmed this test: Case C-458/00 *Commission v Luxembourg* [2003] ECR I-1553, judgement, para. 36; Joined Cases C-307/00 to C-311/00 *Koewit CB v Minister van Volkshuisvesting Ruimtelijke Ordening en Milieubeheer* [2003] ECR I-1821, judgement, paras. 95-99; Case C-103/02 *Commission v Italy* [2004] ECR I-09127, judgement, para. 62. Article 3(15) of the WF Directive gives legislative expression to this test.
16. In his Opinion in *Commission v Luxembourg*, AG Jacobs referred at para. 42 to para. 86 of his Opinion in the ASA case, which he obviously took to be consistent with and confirmed by the ECJ’s judgement in that case. *Commission v Luxembourg* concerned the classification as a recovery operation (R1: “use principally as a fuel or other means to generate energy”) or

disposal operation (D10: “incineration on land”) of incineration of municipal waste at an incineration plant generating heat which would be used as energy. AG Jacobs emphasised at para. 42 that the decisive question for classification as a recovery operation was whether the waste was “used for a genuine purpose: if it were not available for a given operation, would that operation none the less be carried out using some other material?” He continued,

“In the case of waste being incinerated in a plant developed for that purpose, the answer to that question is clearly ‘no’: in the absence of available waste, there would be no incineration. In those circumstances it would not be right to describe the operation as recovery simply because, whenever waste is available and incinerated, the heat generated by the incineration is used, wholly or partly, as a means to generate energy. That fact does not of itself make the principal objective of the incineration the use of the waste as a fuel or other means to generate energy” (*ibid.*)

17. AG Jacobs regarded the notion of the “principal objective” as a criterion of general application (para. 43); emphasised that operations involving incineration of household waste with merely incidental energy recuperation, where the principal objective is in fact disposal of the waste, could not be classified as recovery operations (paras. 44-47); and contrasted the position in Case C-228/00 *Commission v Germany* regarding classification of incineration of waste in cement factories to replace to a significant degree conventional fuel which would otherwise have to be used in that industrial process, which would qualify as recovery (para. 47; he observed: “If one puts the question whether, if the waste were not available for a given operation, that operation would none the less be carried out using some other material, the answer in the case of waste used as fuel for a cement factory is clearly ‘yes’: in the absence of available waste, the factory would still operate using other fuel”).
18. The ECJ in its judgement in *Commission v Luxembourg* agreed with the main thrust of AG Jacobs’ Opinion, that it was necessary to consider the principal objective of the incineration operation, even if all or part of the heat produced by combustion were reclaimed; and that the principal objective had not been shown to be the recovery rather than disposal of waste (paras. 36-46). It did not explicitly affirm his elaboration of the analysis in para. 47 of his Opinion, but certainly indicated no dissent from it.
19. Although there are many similarities between the WF Directive and the previous Directive, there are also differences between them which may be significant. The recitals to the WF Directive are not the same.

Factual background

20. Tarmac has quarried aggregates materials at the Quarry for a number of years. On 14 August 2006 Tarmac applied to the Council for planning permission for an extension of its sand and gravel extraction operation there in phases. The application sought permission to extract a total of 432,700 tonnes of sand and gravel over a period of about two and a half years (the period was later extended).
21. The development site was bisected by a public footpath. Tarmac proposed that the early stages of extraction should proceed leaving the footpath in place and that for the last phase it would be temporarily diverted around the edge of the Quarry under a diversion order to be made by the Council while the land on which it stood was dug out. After this had been done, it was proposed that restoration works would be carried out at the Quarry site to create two areas of wetland divided by an embankment or land bridge along the original line of the footpath and restoration of the footpath to its original line along the top of that land bridge.
22. The wetland to the east of the footpath would allow use for angling in the southern part, while the northern part would be a mix of reed-bed and shallow open water for nature conservation,

with islands to divide the areas. The wetland to the west of the footpath would comprise a mix of reed-bed and shallow open water and would be managed solely for nature conservation purposes.

23. It was clear from this that the restoration proposal would require the re-integration into the Quarry site of a large amount of material to allow remodelling of the physical contours at the site by replacing a significant part of the sand and gravel which would have been extracted from it so as to produce the reed-beds and areas of shallow water and provide a suitable platform for the restored footpath. The Inspector recorded that approximately 69,581 tonnes of material would be needed for this (“the backfill material”), some of which would be provided from spoil from the works at the Quarry itself and some of which would have to be imported onto the site (Decision Letter – “DL” – para. 4).
24. The restoration proposals in relation to Tarmac’s application for planning permission were the subject of negotiations between Tarmac and the Council. The Council emphasised in a letter to Tarmac dated 14 November 2006 that the Quarry site was well placed for accessibility for the general public and that Tarmac should come up with imaginative proposals to give something back to the local community by providing an area of environmental interest catering for different types of habitat, “including reed-beds, ... gently sloping shallows, islands etc”, with the restored footpath providing reasonable access to the public. Tarmac’s developed restoration proposals met these objectives.
25. The Council considered that the restoration proposals which Tarmac put together in response to its request for an imaginative restoration solution were of acceptable quality and would provide significant environmental enhancement of the land on completion of the works. The EA stated that, subject to the conditions proposed, it had no objection to the application for planning permission.
26. Planning permission was granted in late 2007 subject to conditions which included a condition that the Quarry site should be restored in accordance with Tarmac’s proposals as approved by the Council (“the restoration condition”).
27. On 20 March 2009 a temporary public path diversion order was made to divert the footpath around the edge of the Quarry for a period of six years, to allow the last phase of extraction pursuant to the planning permission to take place. On 2 April 2012 the planning permission was varied to allow mineral extraction until 30 November 2014 with completion of the restoration works by 20 November 2015.
28. On 4 February 2013 Tarmac applied to the EA for a standard rules environmental permit which would allow it to use inert waste as the backfill material. This would be a considerably more cost-effective way for Tarmac to comply with its obligation under the restoration condition than by using primary, non-waste material.
29. By notice dated 16 April 2013, the EA refused to issue a standard rules environmental permit in relation to the backfill material. In the EA’s view, use of waste for backfill would not constitute a waste recovery operation for the purposes of the WF Directive. In reaching that conclusion, the EA had sought to apply criteria set out by it in its Regulatory Guidance Paper No. 13, *Defining Waste Recovery: Permanent Deposit of Waste on Land* (“EPR 13”). The EA also considered that the restoration works would not constitute “construction” for the purposes of satisfying the requirements for a standard rules environmental permit.
30. Tarmac appealed. The Secretary of State appointed Mr Clive Sproule as the Inspector. Appeal inquiry hearings were held on 7 and 8 August and 18 September 2014. The Inspector issued the Decision Letter on 29 January 2015.

The Decision Letter

31. The Inspector disagreed with the EA on the question whether the restoration works constituted “construction” (DL, paras. 31-33). However, by reference to Article 3(15) of the WF Directive he held that the use of waste for backfill material in the proposed restoration works would not constitute recovery of waste for the purposes of the WF Directive and so dismissed Tarmac’s appeal.
32. The Inspector found that the waste materials which Tarmac proposed to use for backfill would be suitable for the remodelling restoration works at the Quarry (DL, para. 14). If the land bridge for the footpath were constructed, the Inspector found that the minimum amount of waste would be used in the restoration works (DL, para. 15).
33. The Inspector recorded that Mr Titman, the engineer expert witness called by Tarmac, had knowledge of restoration works at very many quarry sites but knew of only one site which had been restored using primary, non-waste backfill material in the form of crushed scalplings (DL, para. 17): this reflected the greater expense involved in using primary material rather than waste for backfill. The Inspector found that Tarmac had shown that the use of non-waste material would be financially viable, if necessary, but noted that it would be in the company’s interest to reduce cost (DL, para. 28). He found that, in terms of compliance with the restoration condition, it would be acceptable for Tarmac to use either primary materials or waste for the backfill material (DL, paras. 19-20).
34. At DL, para. 18 the Inspector rejected an argument by Tarmac that an earlier EA decision to treat the use of waste from the Crossrail project for re-modelling coastal wetlands for the Wallasea Island Wildcoast Project as a waste recovery operation (“the Wallasea decision”) meant that it should, on grounds of consistency, treat the proposed use of waste for the restoration of the Quarry as a waste recovery operation as well. The Inspector noted that in the Wallasea decision the EA had granted the relevant permit on the footing that the use of waste for the works would constitute a waste recovery operation even though it recognised that, if waste had not been used for the works and use of primary materials was the only option, the works would have been too expensive and would not have been carried out. I return to this issue in the discussion below. The Inspector rejected the comparison with the Wallasea decision, but also held that “In any event, the appeal scheme falls to be considered against the Art. 3(15) legal test in its own right”, and the Wallasea decision could not set a binding precedent for the application of the WF Directive in the present case. In other words, it could not be assumed that the EA had correctly interpreted Article 3(15) when making the Wallasea decision and the Inspector had to make his own assessment of the proper application of Article 3(15) in relation to the restoration of the Quarry.
35. The Inspector found that by an email dated 16 September 2014, sent in the course of the inquiry, the Council had confirmed its objectives for the restoration of the Quarry as identified in its letter of 26 November 2006 (DL, para. 23), and he proceeded on the basis that this was “the stated and approved objective for the restoration of the site and the footpath” (DL, para. 27). He noted that “Reinstatement of the footpath with waste would not only be beneficial to the use of the public right of way, it would provide environmental interest through biodiversity enhancement of the quarried area and the footpath would enable this to be enjoyed” (DL, para. 24).
36. Nonetheless, the Inspector accepted the EA’s position (DL, para. 25) that it was necessary to identify how likely the replacement of non-waste material would be, and reasoned as follows at DL paras. 26-30 (omitting footnotes):
 - “26. Consideration of alternatives in this context does not suggest that a function should not be carried out at all, or that some other function should be carried out instead. It does

provide an indication of: the potential for alternative approaches to be explored; and, how likely alternative forms of land bridge would be, and therefore whether waste would be replacing it.

27. Alternative approaches to that approved by the planning permission would include complete infilling of the quarry, but that is not the stated and approved objective for the restoration of the site and the Footpath. A modified landform that includes a bridge structure, or that would necessitate the permanent diversion of the Footpath, would require the approved restoration to be changed. It has not been shown that these alternative approaches would be likely to cause a significant reduction in the ecological and recreational benefits sought from restoration of the quarry.
28. It is the EA's case that, while reinstatement of the quarried section of the Footpath could be carried out using materials other than waste, the financial cost of such works would result in it being unlikely that it would be done in the same manner and proportion as the approved scheme. Reinstating the footpath by backfilling with non-waste material would be a costly exercise. Although the use of non-waste material has been considered by the appellant company and shown to be financially viable it would be in the company's interest to reduce costs.
29. Inquiry document 6 confirms the range and relative scale of costs that would be expected to be incurred during restoration of the site/reinstatement of the Footpath. External fill would be a significant proportion of the expenditure. If there were to be a need to use non-waste material to complete the restoration works, this would reasonably be expected to cause the site's restoration to be revisited, with consideration given to all feasible options that may cost less than the importation of non-waste fill material. Indeed as noted above, only one example of non-waste restoration was referred to.
30. Whether the competent authority would permanently divert the Footpath around any restored water body is not known, nor is the likely extent of opposition to such a diversion, or any local planning authority's decision regarding a variation to the approved quarry restoration. Despite these significant areas of doubt, the evidence in this case confirms it to be very likely that these alternative approaches would be sought if non-waste materials would otherwise have to be used for the reinstatement of the footpath. Accordingly, in such circumstances reinstating the Footpath by using waste would not be serving a useful purpose by replacing other materials that would otherwise have been used to fulfil that function."
37. In the conclusion section of the Decision Letter, the Inspector noted that EPR 13 had the potential to lead the EA to an approach which was not tightly aligned with the test in Article 3(15) (DL, para. 34), but he correctly sought to apply Article 3(15) itself as the operative provision in the relevant legislation for the purposes of the question he had to decide. At DL, paras. 35 and 36 he wrote:
 - "35. At the heart of this case is whether the reinstatement of the excavated section of the Footpath would be likely to occur if waste were not to be used. The material that once occupied the void has been removed and it is a requirement of the planning permission that the site and Footpath be restored. The appellant's engineering explanation for the scale and design of the proposed landform for the reinstatement of the Footpath has not been shown to be inappropriate, and is agreed within the Statement of Common ground.
 36. Both the scale of the landform, and the resulting cost of using non-waste materials, would make it likely that alternative approaches would be considered for the reinstatement of the Footpath. These approaches would reasonably be expected to

include the redesign of the proposed landform and its construction, which could include the use of a footbridge or permanent diversion of the footpath.”

He therefore concluded (DL, para. 37) that it had not been demonstrated that the use of waste for the restoration works at the Quarry would be an act of “recovery” within the terms of Article 3(15) and so dismissed the appeal.

Discussion

38. The first ground of appeal advanced by Mr Jones QC for Tarmac was that it was sufficient for the backfill operation at the Quarry to fall within paragraph R10 of Annex II of the WF Directive if that operation made any contribution to ecological improvement beyond a *de minimis* level, which it clearly would do. I cannot accept this contention. It is contrary to the case-law referred to above, which in this regard is clearly germane to the interpretation of the WF Directive. Since the backfill operation could be characterised as falling within paragraph D1 in Annex I or within paragraph R10 in Annex II, it is necessary to go further and ask whether the principal objective of the operation is to use the waste to secure ecological improvement of the site rather than to dispose of the waste.
39. I take the second to fourth grounds of appeal advanced by Mr Jones together, as they involve different ways of contending that the Inspector erred in his assessment of the proper classification of the backfill operation in the specific factual context of this case. In my judgement, the Inspector did err in his assessment on the facts of the case.
40. On the evidence before him and on the basis of findings made by him, the Inspector clearly should have found that the backfill operation to create the lakes and the land bridge at the Quarry site was a legitimate function which would have had to be carried out in any event, whether waste was used or not. All the evidence indicated that Tarmac would indeed be required by the Council to comply with the planning obligation to which it was subject to restore the Quarry site, whether waste was used for that purpose or not. There was no evidence to suggest otherwise. In the circumstances it was irrational for the Inspector to reach any conclusion other than that Tarmac would be required to comply with the planning obligation which it had assumed by accepting the restoration condition.
41. That being so, it is obvious that substantial quantities of material would need to be used to construct the lakes, the reed-beds, the shallow water areas and the land bridge, and that if waste material is not used for this then primary materials would have to be used. Accordingly, it is clear that use of waste material for the function in question will indeed involve replacing other materials which would otherwise have been used to fulfil that function, in accordance with the definition of “recovery” in Article 3(15) of the WF Directive. It is also clear, in line with the guidance given by both AG Jacobs and the ECJ referred to above, that the primary objective in using waste to construct the lakes, the reed-beds, the shallow water areas and the land bridge is the recovery of the waste, in the sense of replacing the use of primary materials in an operation which would have to be carried out for the purpose of ecological improvement of the Quarry site in any event, thus avoiding the need to use primary materials for that purpose as would otherwise have been the case, with the result that the backfill operation ought properly to be classified as a recovery operation within paragraph R10.
42. In my view, the reasoning in support of this conclusion is clear:
 - i) The Council had required Tarmac to assume the planning obligation set out in the restoration condition as a condition for obtaining planning permission to quarry at the site, on clearly identified public interest grounds. It had never given any grounds for thinking that it had changed its mind about the importance of the public interest in issue or about the need to hold Tarmac to the restoration condition which gave effect to

promoting that public interest. Indeed, it had affirmed the restoration condition and those public interest grounds in the course of the appeal before the Inspector. The Inspector had himself correctly accepted the continuing validity of those grounds as a foundation for consideration of the case before him (see the first sentence of DL, para. 27, set out above, and DL, para. 24);

- ii) The Council had never suggested that it might be willing to compromise the public interest it had identified and required to be protected through the restoration condition by agreeing instead to permanent diversion of the footpath, as the Inspector appears to have regarded as a real possibility at DL, paras. 27, 30 and 36. The Inspector's view on this was pure speculation, unsupported by any evidence. Since the Inspector himself found that it would be financially viable for Tarmac to carry out the restoration of the site using primary materials (DL, para. 28), the Council would have had no reason to release Tarmac from its obligation to restore the site even if primary materials had to be used for the purpose, however much that might have been in Tarmac's own financial interest;
 - iii) The construction of "a modified landform that includes a bridge structure" which the Inspector appears to have contemplated as another real possibility at DL, paras. 27 and 36, was again wholly speculative and unsupported by any evidence. Moreover, if that possibility had been in contemplation, it would itself have required the use of backfill to produce the "modified landform" (i.e. raised foundation for the bridge) referred to, for which the use of waste would again have replaced the use of primary materials which would otherwise have had to be used. Moreover, the construction of the bridge would itself have required the use of primary materials, which would be avoided if waste were used to restore the path as required by the planning obligations. Therefore, even if the construction of a modified landform and bridge structure had been a real possibility, which it was not, the use of waste to comply with the planning obligation instead would still have had to be classified as a recovery operation, and there is nothing in the reasoning of the Inspector to suggest otherwise;
 - iv) The Inspector's assessment in the last sentence of DL, para. 27, that the alternative approaches would not be likely to cause a significant reduction in the ecological and recreational benefits sought from restoration of the quarry was clearly irrational and Mr Bates for the Secretary of State did not seek to defend it. If the footpath were permanently diverted, so that the land bridge was not constructed, plainly the division of the Quarry site into lakes incorporating shallows, reed-beds and so forth which the Council had identified as the key ecological and recreational benefits to be achieved would not be achieved. The same is true if a bridge were constructed in place of the land bridge required under the planning obligation. Since the Council did regard these benefits as important, it had no reason to release Tarmac from its obligations under the restoration condition.
43. On these grounds, therefore, I would allow the appeal and quash the decision of the Inspector, replacing it with a determination in favour of Tarmac that the EA should issue a standard rules environmental permit for the use of relevant waste for the backfill operation in this case.
44. That is sufficient to determine the appeal. However, there was some debate at the hearing on the question whether, if it had been open to the Inspector to find that the backfill operation would not have been carried out using primary materials (contrary to my view above), the use of waste for the purpose could in any circumstances be considered a recovery operation. Mr Bates, for the Secretary of State, and Mr Banner, for the EA, submitted that it could not. In the context of the argument on this, Mr Banner argued that the EA itself had erred in law in granting a standard rules environmental permit (i.e. a recovery operations permit) in respect of the use of Crossrail waste spoil for the creation of a nature reserve in the Wallasea decision. The Opinions by AG Jacobs referred to above support this view, though the judgements of the

ECJ were not explicit on this issue. I would wish to reserve my opinion on this question in the context of the now applicable WF Directive.

45. The final ground of appeal advanced by Mr Jones can be disposed of shortly. He submitted (ground 5) that even if the backfill operation at the Quarry was properly to be classified for the purpose of the WF Directive as a disposal operation, the EA should nonetheless have granted a standard rules environmental permit for the operation on grounds of consistency with its decision to grant such a permit in the Wallasea decision.
46. This last submission only arises on the footing that Tarmac has lost on its other grounds of appeal and the backfill operation at the Quarry was properly to be classified as a disposal operation. If that were so, the EA would have had no power in law to classify it as a recovery operation, and nothing it had done in relation to the Wallasea decision could change that.

Conclusion

47. For the reasons given above, I would allow the appeal, quash the decision of the Inspector and replace it with a determination that the EA should issue a standard rules environmental permit in relation to the restoration of the Quarry.

LORD JUSTICE FLOYD:

48. I agree.

LORD JUSTICE McFARLANE:

49. I also agree.