IN THE HIGH COURT OF JUSTICE **CO Ref: 4908/2017**

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

In the matter of an application for judicial review

THE GOOD LAW PROJECT

Claimant

-v-

THE ELECTORAL COMMISSION

Defendant

DEFENDANT'S SKELETON ARGUMENT
FOR THE RENEWED PERMISSION HEARING

AUTHORITY BUNDLE

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Political Parties, Elections and Referendums Act 2000 c. 41

Part VII REFERENDUMS

Chapter II FINANCIAL CONTROLS

General restrictions relating to referendum expenses incurred by permitted participants

This version in force from: **February 16, 2001** to **present**

(version 1 of 1)

113.— Restriction on incurring referendum expenses.

(1) No amount of referendum expenses shall be incurred by or on behalf of a permitted participant unless it is incurred with the authority of—

(a) the responsible person; or

(b) a person authorised in writing by the responsible person.

(2) A person commits an offence if, without reasonable excuse, he incurs any expenses in contravention of subsection (1).

(3) Where, in the case of a permitted participant that is a registered party, any expenses are incurred in contravention of subsection (1), the expenses shall not count for the purposes of sections 117 to 123 or Schedule 14 as referendum expenses incurred by or on behalf of the permitted participant.

Modifications

Pt VII	Extended to Gibraltar for the purpose of the European Union referendum by European Union Referendum Act 2015 c. 36, s. 12(2)
Pt VII c. II s. 113	Modified by Political Parties, Elections and Referendums Act 2000 c. 41, Pt II s. 25(6)(a)
	Modified by Regional Assembly and Local Government Referendums Order 2004/1962, Sch. 3(2) para. 1

Subject: Criminal law **Other related subjects:** Electoral process

Keywords: Offences; Permitted participants; Referendum expenses; Referendums

Criminal Justice and Courts Act 2015 c. 2

Part 4 JUDICIAL REVIEW

Judicial review in the High Court and Upper Tribunal

This version in force from: **August 8, 2016** to **present**

(version 1 of 1)

88.— Capping of costs

(1) A costs capping order may not be made by the High Court or the Court of Appeal in connection with judicial review proceedings except in accordance with this section and sections 89 and 90.

(2) A *"costs capping order"* is an order limiting or removing the liability of a party to judicial review proceedings to pay another party's costs in connection with any stage of the proceedings.

(3) The court may make a costs capping order only if leave to apply for judicial review has been granted.

(4) The court may make a costs capping order only on an application for such an order made by the applicant for judicial review in accordance with rules of court.

(5) Rules of court may, in particular, specify information that must be contained in the application, including—

(a) information about the source, nature and extent of financial resources available, or likely to be available, to the applicant to meet liabilities arising in connection with the application, and

(b) if the applicant is a body corporate that is unable to demonstrate that it is likely to have financial resources available to meet such liabilities, information about its members and about their ability to provide financial support for the purposes of the application.

(6) The court may make a costs capping order only if it is satisfied that—

(a) the proceedings are public interest proceedings,

(b) in the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings, and

(c) it would be reasonable for the applicant for judicial review to do so.

(7) The proceedings are "public interest proceedings" only if—

(a) an issue that is the subject of the proceedings is of general public importance,

(b) the public interest requires the issue to be resolved, and

(c) the proceedings are likely to provide an appropriate means of resolving it.

(8) The matters to which the court must have regard when determining whether proceedings are public interest proceedings include—

(a) the number of people likely to be directly affected if relief is granted to the applicant for judicial review,

(b) how significant the effect on those people is likely to be, and

(c) whether the proceedings involve consideration of a point of law of general public importance.

(9) The Lord Chancellor may by regulations amend this section by adding, omitting or amending matters to which the court must have regard when determining whether proceedings are public interest proceedings.

(10) Regulations under this section are to be made by statutory instrument.

(11) A statutory instrument containing regulations under this section may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

(12) In this section and sections 89 and 90—

"costs capping order" has the meaning given in subsection (2);

"the court" means the High Court or the Court of Appeal;

"judicial review proceedings" means—

(a) proceedings on an application for leave to apply for judicial review,

(b) proceedings on an application for judicial review,

(c) any proceedings on an application for leave to appeal from a decision in proceedings described in paragraph (a) or (b), and

(d) proceedings on an appeal from such a decision,

and the proceedings described in paragraphs (a) to (d) are "stages" of judicial review proceedings.

(13) For the purposes of this section and section 89, in relation to judicial review proceedings—

(a) the applicant for judicial review is the person who is or was the applicant in the proceedings on the application for judicial review, and

(b) references to relief being granted to the applicant for judicial review include the upholding on appeal of a decision to grant such relief at an earlier stage of the proceedings.

Subject: Administrative law **Other related subjects:** Civil procedure

Keywords: Costs capping orders; Discretionary powers; Judicial review; Public interest

Criminal Justice and Courts Act 2015 c. 2

Part 4 JUDICIAL REVIEW

Judicial review in the High Court and Upper Tribunal

This version in force from: **August 8, 2016** to **present**

(version 1 of 1)

89.— Capping of costs: orders and their terms

(1) The matters to which the court must have regard when considering whether to make a costs capping order in connection with judicial review proceedings, and what the terms of such an order should be, include—

(a) the financial resources of the parties to the proceedings, including the financial resources of any person who provides, or may provide, financial support to the parties;

(b) the extent to which the applicant for the order is likely to benefit if relief is granted to the applicant for judicial review;

(c) the extent to which any person who has provided, or may provide, the applicant with financial support is likely to benefit if relief is granted to the applicant for judicial review;

(d) whether legal representatives for the applicant for the order are acting free of charge;

(e) whether the applicant for the order is an appropriate person to represent the interests of other persons or the public interest generally.

(2) A costs capping order that limits or removes the liability of the applicant for judicial review to pay the costs of another party to the proceedings if relief is not granted to the applicant for judicial review must also limit or remove the liability of the other party to pay the applicant's costs if it is.

(3) The Lord Chancellor may by regulations amend this section by adding to, omitting or amending the matters listed in subsection (1).

(4) Regulations under this section are to be made by statutory instrument.

(5) A statutory instrument containing regulations under this section may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

(6) In this section—

"free of charge" means otherwise than for or in expectation of fee, gain or reward;

"legal representative", in relation to a party to proceedings, means a person exercising a right of audience or conducting litigation on the party's behalf.

Subject: Administrative law **Other related subjects:** Civil procedure

Keywords: Costs capping orders; Discretionary powers; Judicial review; Regulations

Criminal Justice and Courts Act 2015 c. 2

Part 4 JUDICIAL REVIEW

Judicial review in the High Court and Upper Tribunal

This version in force from: **August 8, 2016** to **present**

(version 1 of 1)

90.— Capping of costs: environmental cases

(1) The Lord Chancellor may by regulations provide that sections 88 and 89 do not apply in relation to judicial review proceedings which, in the Lord Chancellor's opinion, have as their subject an issue relating entirely or partly to the environment.

(2) Regulations under this section—

(a) may make provision generally or only in relation to proceedings described in the regulations, and

(b) may include transitional, transitory or saving provision.

(3) Regulations under this section are to be made by statutory instrument.

(4) A statutory instrument containing regulations under this section is subject to annulment in pursuance of a resolution of either House of Parliament.

Subject: Administrative law **Other related subjects:** Civil procedure; Environment

Keywords: Costs capping orders; Discretionary powers; Environment; Judicial review; Regulations

Mass Energy Limited v Birmingham City Council

Court of Appeal

3 September 1993

[1994] Env. L.R. 298

(Glidewell, Scott and Evans L.JJ):

September 3, 1993

WASTE DISPOSAL CONTRACTS—TENDERING PROCESS— PART II OF THE ENVIRONMENTAL PROTECTION ACT 1990 —ONE BID ACCEPTED WITH CERTAIN RESERVATIONS—POST TENDER NEGOTIATIONS UNDERTAKEN—WHETHER FINAL CONTRACT WHICH WAS ENTERED INTO WAS LAWFUL

Birmingham City Council ("The respondent") offered contracts for the disposal of waste under a tendering process in compliance with Part 2 of the Environmental Protection Act 1990. An advertisement was placed in a variety of Journals offering the contracts for tenders and 47 companies enquired about the tender process and the respondent invited six companies to submit tenders by December 14, 1992. Mass Energy ("the applicant") submitted a tender as a result of the advertisement and four other tenderers put in bids. The respondent took the view that none of the original bids accorded with the conditions which were set out in the tender documentation. The respondent therefore revised the conditions and issued a new set which were sent to the five tenderers.

Onyx UK Limited ("the interested party") submitted a tender for the disposal of a variety of waste arising from the area.

The respondent required the tenderers to submit details of the manner in which they would dispose of waste by incineration. Therefore, it included in the documentation a document which was referred to as "the incinerator brief".

The applicant submitted a tender on April 19, 1993. That tender included the provision of an incinerator plant which a capacity of not less than 350,000 tonnes per annum.

The interested party also submitted a tender but its tender differed slightly in that the plant which it would operate would include two incinerators with a capacity of only 315,000 tonnes per annum. It also proposed to install an additional incinerator which made the total capacity of waste to be incinerated in excess of 350,000 tonnes per annum. This additional plant was to be provided by March 31, 2000. The interested party suggested that it only required an immediate capacity of 315,000 tonnes per annum as it would recycle more waste than the other tenderers. The price of the tender from the interested party was the lowest of the tenders. The respondent therefore decided to accept the interested party's revised tender subject only to negotiations about the final form of the contract and any other details which lacked clarity.

The applicant's tender was not rejected as a result of the failure to formally grant the tender. Instead it was held in reserve pending the conclusion of the negotiations between the respondent and the interested party.

After some negotiation it was agreed that the interested party would either provide an incinerator with a capacity of 370,000 tonnes per annum by 1996 by increasing the capacity of the proposed incinerators or have a reduced capacity incinerator in 1996 with a commitment to build a new incinerator by the year 2000 which would ensure that capacity was over 350,000 tonnes per annum.

It was on that basis that the contract for the disposal of waste was formally awarded to the interested party on July 9, 1993.

The applicant applied to move for judicial review of the two decisions of the respondent, first the resolution to accept the revised tender and secondly the decision to formally enter into the waste disposal contract with the interested party.

The applicant argued that the contract was void for two reasons. First the tender from the interested party did not comply with the original contract specifications as it only provided capacity for 315,000 tonnes of waste per annum in 1996.

Secondly the subsequent offer to comply with the 350,000 tonne capacity or make a commitment to constructing a new incinerator by the year 2000 was not part of the original tender process. The contract was, therefore, not a result of the tender process and should be quashed.

Held, in refusing leave to move for judicial review; the contract which was entered into was a consequence of the tender process and the respondent was entitled to enter into a contract on the terms specified in the tender documentation. It was open to the respondent to choose one tenderer in preference to others and then negotiate improved terms if they fell within the requirements of the original contract. Under the statutory provisions of Part 2 of the Environmental Protection Act the respondent was only under a duty to act commercially. There was no specific statutory duty to act fairly and therefore it had acted within the terms of the statutory provisions.

Representation

A. Wilkie Q.C. for the applicant.
D. Ousley Q.C. and P. Stinchcombe for the respondent.
D. Donaldson Q.C. and M. Shaw for the interested party.

GLIDEWELL L.J.:

This is a renewed application on behalf of Mass Energy Limited to move for judicial review of two decisions of the Birmingham City Council, which I shall call "the council", namely a decision of the joint sub-committee of the council's Finance and Management General Purposes Committee on May 1, 1993 to accept a revised tender of Onyx UK Limited for a contract under the council's reference number F4232 for the development and operation of facilities for the disposal of household, commercial, industrial and street cleansing waste and to authorise the council's Director of Legal Services to negotiate final documentation with Onyx; and, secondly, a decision on July 6, 1993 formally to enter into a waste disposal contract with Onyx and Esys Montenay SA.

The matter came before Hutchison J. on July 15 of this year when he refused leave: hence the renewal. The relief sought is an Order of Certiorari to quash the decision, a Declaration

further/or in the alternative that the contract entered into with Onyx and Montenay on July 9, 1993 pursuant to an implementation of such decisions is void, and an Order of Prohibition or an injunction prohibiting the council from awarding any further contract to Onyx or Montenay pursuant to and in implementation of such decisions.

The background to and the basis of the activities from which these proceedings stem is the Environmental Protection Act 1990. That Act, by section 30, contains definitions of the phrases "waste regulation authority" and "waste disposal authority", both of which are apt to comprise the Birmingham City Council.

For present purposes we are concerned with the council's functions as waste disposal authority.

By section 32 of the Act, putting it shortly, the council are required to transfer their functions as a waste disposal authority either to a waste disposal company which they have formed or participated in forming, or to some other waste disposal contractor.

By section 32(6):

> " Part 1 of Schedule 2 to this Act has effect for the purposes of this section and Part II for regulating the functions of waste disposal authorities and the activities of waste disposal contractors."

By section 51(1):

> "It shall be the duty of each waste disposal authority to arrange—
>
> (a) for the disposal of the controlled waste collected in its area by the waste collection authorities;
>
> . . .
>
> . . . by means of arrangements made (in accordance with Part II of Schedule 2 to this Act) with waste disposal contractors, but by no other means."

Turning to Schedule 2 of the Act, Part II which is the relevant part, provides in paragraph 19(2):

> "A waste disposal authority shall be entitled—
>
> (a) to invite tenders for any such contract [a contract of the kind which is here relevant] and,
> (b) to accept or refuse any tender for such a contract and accordingly to enter or not to enter into a contract,

by reference to acceptance or refusal of acceptance by persons tendering for the contract of any terms or conditions included in the draft contract in pursuance of sub-paragraph (1) above."

The vital paragraph with which we have been concerned in these proceedings is paragraph 20.

"20(1) A waste disposal authority which proposes to enter into a contract for the keeping, treatment or disposal of controlled waste shall comply with the following requirements before making the contract and if it does not any contract which is made shall be void.

(2) The Authority shall publish, in at least two publications circulating among waste disposal contractors, a notice containing—

(a) a brief description of the contract work;
(b) a statement that during a specified period any person may inspect a detailed specification of the contract work free of charge at a specified place and time;
(c) a statement that during that period any person will be supplied with a copy of the detail specification on request and on payment of the specified charge;
(d) a statement that a person who wishes to submit a tender for the contract must notify the authority of his wish within a specified period; and
(e) a statement that the authority intend to invite tenders for the contract, in accordance with sub-paragraph (4) below.

(3) The Authority shall—

(a) ensure that the periods, place and time and the charge specified in the notice are such as are reasonable;
(b) make the detailed specification available for inspection in accordance with the notice; and
(c) make copies of the details specification available for supply in accordance with the notice.

(4) If any person notified the authority, in accordance with the notice, or their wish to submit tenders for the contract, the authority shall—

(a) if more than four persons did so, invite at least four of them to tender for the contract;
(b) if less than four persons did so, invite each of them to tender for the contract.

(5) In this paragraph—

"the contract work", in relation to a contract for the keeping, treatment or disposal of waste, means the work comprising the services involved in the keeping, treatment or disposal of the waste under the contract; and

"specified" means specified in the notice under sub-paragraph (2) above."

The Secretary of State gave to the council a direction under section 32 of the Act on January 17, 1992 requiring the council to form a waste disposal company before February 28, 1992. In consequence of that direction, the council formed a company called Tyseley Waste Disposal Limited, which is wholly owned by the council. There followed a transfer scheme under which the council transferred to Tyseley Waste Disposal Limited its own waste disposal undertaking at some date before April 1, 1993. Thereafter it was and is the council's intention to transfer the functions of its waste disposal undertaking from Tyseley Waste Disposal Limited to a private company.

In order to effect that, the council inserted in various relevant journals in April 1992 an advertisement with the heading "Environmental Protection Act 1990, Waste Disposal Operations Contract F4232" . The relevant part reads:

> "In accordance with the Environmental Protection Act 1990, Birmingham City Council will, in due course, invite tenders for the keeping, treatment and disposal of household, commercial, industrial and street cleansing waste arising within the City. Currently the Council operates an Incinerator Plant, three Transfer Stations and five Public Waste Disposal Sites. A Bulk Haulage Fleet and a Maintenance Unit inclusive of workshop and store support these functions. The Council currently employs a workforce of around 170 to carry out the service. Other staff provide part-time support.
>
> The City has established a wholly-owned waste disposal company (LAWDC) following a direction issued by the Secretary of State under the Act. The Council will transfer to the LAWDC all assets and liabilities employed in its waste disposal undertaking by means of a transfer scheme under the Act, subject to its approval by the Secretary of State.
>
> The Council has strategic policies which favour the re-use and recycling of waste, obtaining high payloads for the transportation of waste, and the derivation and use of energy from waste.
>
> Following competitive tendering, it is proposed that the successful tenderer and the Council will form a Joint Venture Company/New Company/Partnership which will take over the LAWDC and then perform the contract, and will develop and operate the means of disposal for over 400,000 tonnes of waste which arise each year within the administrative boundary of Birmingham City Council. This is to include the financing, construction and subsequent operation of new incineration plant(s) having a capacity of at least 350,000 tonnes per annum.
>
> Organisations who want to receive further information, including the specification, should apply to the address below . . ."

This was the beginning of the process outlined in paragraph 20 of Schedule 2. However, it is right to say that the advertisement did not contain one of the matters specifically required by that paragraph, namely, the requirement in paragraph 20(2)(e) that the advertisement should contain:

"a statement that the authority intend to invite tenders for the contract, in accordance with sub-paragraph (4) below."

Under sub-paragraph (4) it was provided:

"If any persons notified the authority, in accordance with the notice, of their wish to submit tenders for the contract, the authority shall—

. . . invite at least four of them to tender."

One of the grounds which was advanced before Hutchison J. was that the contract made in July was void because the advertisement did not contain that statement. That ground is not pursued before us, for very good reason. First of all, there was no detriment at all to Mass Energy: it was a technical point, so far as Mass Energy is concerned, without any practical consequence because they knew perfectly well what was intended (and, as I shall say in a moment, they duly tendered); secondly, because an application in respect of the advertisement was very well out of time.

We are concerned only with the other ground upon which Mass Energy seeks to challenge the two decisions. For my part I take the view that the decision which matters for this purpose is the decision to enter into the contract. It is upon that that I intend to concentrate.

Following the advertisement, some 47 companies expressed an interest in tendering, of which six, including both Mass Energy and Onyx, were invited to submit tenders by December 14, 1992. With the letter inviting those six companies to tender, the council sent three documents: first what were called "guidance notes"; secondly, requirements for the new incinerator plant which has been referred to as "the incinerator brief"; and thirdly, the specification for the whole of the works, including the incinerator plant.

The documents made it clear that the specification and the incinerator brief were contractual documents in this sense: any tender was to be any contract entered into in acceptance of a tender would be on the terms and conditions contained in those documents. On the other hand, it was made expressly clear that the guidance notes were not a contractual document; they were what they said they were and they did not form part of the invitation to tender as such.

Mass Energy submitted a tender on December 15, 1992. Four other tenders were received. The council took the view that none of them was in accordance with the tender conditions. Accordingly, the council decided to issue revised conditions of contract with an invitation to submit a schedule of revised tender prices by April 19, 1993. That was sent to all five tenderers who had submitted the first tenders.

The incinerator brief was not altered in any way. The five tenderers then submitted revised tenders, including a revised bid from Mass Energy which was submitted on April 19, 1993. That tender included the provision of an incinerator plant, with a capacity at the first required date (December 31, 1996 when the plant was first to be operational) of not less

than 350,000 tonnes per annum.

Onyx also submitted a tender at about that time, but their tender was that the incinerator plant which they intended to provided by December 31, 1996 would be a plant with two incinerators with a total capacity of 315,000 tonnes per annum. They also proposed to provide later an additional incinerator with an additional capacity which would take the total capacity well above 350,000 tonnes per annum—that additional plant to be provided by March 31, 2000.

Onyx's estimate and their tender on the basis that a 315,000 tonnes per annum plant would at least initially suffice, was made partly because Onyx concluded that a greater proportion of the total waste arising would be recycled than had been concluded by any of the other tenderers, particularly Mass Energy.

I should say that it is common ground that, with the exception of small quantities of particular materials, the vast majority of the waste arising will be disposed of by the successful tenderer by three different methods: by incineration, by landfill and by recycling.

The price of the Onyx tender was the lowest of the five tenders. Accordingly, the council passed the first resolution referred to in the application for leave to move for judicial review. On May 11, the council decided to accept Onyx's revised tender and they authorised the Director of Legal Services to negotiate with Onyx about the final form of the contract and about any other details about which there was any lack of clarity.

The Mass Energy tender was put—as far as the council's resolution was concerned—what I might call "on hold", that is to say, it was not to be rejected. It was the second preferred tender and the Council decided that while they would not indicate to Mass Energy that they were accepting their tender, they would defer indicating that it was rejected until such time as they concluded their discussions with Onyx. The other tenders, as I understand it, were rejected in May 1993.

As far as the council were concerned, the tender documents, the specification and particularly the document describing the incinerator, had made it clear that it was open to a tenderer to provide for an incineration plant with sufficient capacity to incinerate as much as possible of the waste material arising, anticipated as at December 31, 1996, and in order to deal with the expected increase in amount of waste, up to and beyond the year 2000, to provide that a further plant should be added to the initial plant not later than March in the year 2000.

The council's expressed view before the tender documents went out, was, we are told, that any tenderer which tendered on the basis of a two-stage provision would have to commit itself to providing any additional plant by the year 2000. It is quite clear that the Onyx tender as such did not say anything specifically about this, but in the negotiations with Onyx, it then became apparent that Onyx was hoping not to be committed to providing the additional plant by the year 2000 but only to undertake to provide it when it took the view that it was necessary and economically viable.

That was a provision that the council were not prepared to accept and they made it quite clear to Onyx that they were not prepared to accept it. Whether it was apparent to the council from the start that the Onyx bid was conditional or not is a matter which is in

dispute, because the council document itself (that is to say a report on the bids) contains conflicting information about this. To my mind, it does not very much matter what view the council's officers took of what Onyx intended in the initial bid, because what Onyx were hoping to do was made clear in the negotiations.

As I have said, the council made it clear that they were not prepared to accept a tender bid on a basis of providing an incineration plant in two stages unless the tenderer was willing to commit itself to provide the second stage by the year 2000. In the event, Onyx came back to the council and said that it would agree so to commit itself, provided that it could be given the alternative option of providing initially a plant with a capacity exceeding 350,000 tonnes per annum, namely, one with a capacity of 370,000 tonnes per annum. This was to be achieved by increasing the capacity of the initial two incinerators.

That, of course, was after the date for the receipt of tenders because this was all part of the negotiations and discussions between Onyx and the council. It was on this basis—that is to say, Onyx were being committed, at its option, either initially to provide a 370,000 tonnes per annum incinerator plant by 1996 or 315,000 tonnes per annum by 1996 and a further plant to bring the capacity over 350,000 tonnes by 2000—that the council agreed to accept Onyx's tender, and resolved in the second resolution under challenge to conclude the contract. On that basis, the contract was entered into on July 9, 1993 and it is that decision which is now the principal subject of these proceedings.

The submissions by Mr Wilkie for Mass Energy can be summarised as follows:

> (1) The specification and the incinerator brief required that any tenders should be for an incinerator with not less than 350,000 tonnes per annum capacity to be provided by December 31, 1996. The Onyx tender put in initially did not comply with that requirement.
> (2) The eventual proposal by Onyx to build either 315,000 tonnes, plus an extra incinerator by 2000 or two incinerators with the capacity of 370,000 tones per annum, was, so far as the second part was concerned, not made until well after the date for submission for tenders and thus did not form part of the tender process.
> (3) It follows, in Mr Wilkie's submission, that the contract entered into on July 3, 1993 was not entered into as a result of, or in consequence of the following of the tender procedure.
> (4) Therefore, either the contract is void under paragraph 20(1) and we should so declare, or, at the very least, Mass Energy had a legitimate expectation that the council would not depart from the tender process with any tenderer, or enter into a contract with any tenderer outside the tender process, without giving other tenderers the opportunity to reconsider their tender. Thus on that basis also, we should declare that the contract was void and/or quash it.

In my view, these arguments raise matters for our consideration which I can summarise as follows: first of all, is this a proper matter for judicial review at all? It is only right to say that this issue seems not to have been raised, at least in these terms before Hutchison J., and is not raised in the skeleton arguments for the city council and Onyx. Nevertheless, it did seem to me that the Court was bound to consider it.

On its face, this is really a commercial dispute between a successful and an unsuccessful tenderer; a situation which is not, of course, at all uncommon. If there were no statutory requirement that the city council should enter into a contract for its waste disposal operations, and particularly the construction of the incinerator to be the subject of a

contract entered into by tender, but if the council had sought voluntarily to enter into a contract by tender deciding to adopt that process of its own volition, then in my view there would be no public law element in such a dispute at all. Mass Energy could then only hope to bring an action against the council on some contractual basis, for instance, if they could persuade a court that there was some sort of implied term which entitled them to recover the wasted cost of tendering. Whether they had any such right is a matter with which I do not concern myself.

However, as Mr Wilkie urges upon us, I accept that because the statutory powers of the council not to contract by means other than those described in Part II of Schedule 2 of the Act, there is a public law element in this dispute to this extent (but only to this extent): that it is a proper subject for judicial review to consider whether the council have complied with section 51(1) and entered into a contract as a result of following the procedure laid down in Schedule 2, Part II of the Act. In my judgment, judicial review has no further place in my judgment in this dispute.

The second matter about which I think it right to express some views, is the proper approach of this Court to this application. When a judge sitting in the Crown Office List or which this Court on a renewed application is dealing with an *ex parte* application for leave to move for judicial review, if the judge or the court takes the view that the applicant has an arguable case, leave will normally be granted. But what is the position here?

First, we have had the benefit of detailed *inter partes* argument of such depth and in such detail that, in my view, if leave were granted, it is more unlikely that the points would be canvassed in much greater depth or detail at the substantive hearing. In particular, we have had all the relevant documents put in front of us. Secondly, Mr Ouseley for the council urges us that we should take into account, in deciding whether or not to give leave, the fact that the time-scale for the provision of the incinerator plant and thus for the achievement of the council's plan of incinerating most of the waste which arises in its area starting in 1996, depends upon the following of a contractual and construction process for which there is a very tight schedule.

If leave be granted, the full hearing and a possible appeal by either party following a full hearing or certainly possible appeal by Mass Energy if they were unsuccessful at the full hearing, would not only cause extra expense, but, most importantly says Mr Ouseley, would take a great deal of time which might well set back the date at which, in the end, the incinerator could be provided. That would be a very considerable public disadvantage.

Mr Ouseley urged that factor as being a matter which should enter into the discretion which we have to exercise in deciding whether or not to give leave. I put it in a slightly different way: I regard it as being an entirely proper factor to take into account in deciding what approach we should take to the question which we have to answer, or to put it more precisely: what is the question we have to answer?

Thirdly, as I have already said, we have most, if not all, of the documents in front of us; we have gone through the relevant ones in detail—indeed in really quite minute detail in some instances—in a way that a court dealing with an application for leave to move rarely does, and we are thus in as good a position as would be the court at the substantive hearing to construe the various documents.

For those reasons taken together, in my view, the proper approach of this Court, in this

particular case, ought to be—and the approach I intend to adopt will be—that we should grant leave only if we are satisfied that Mass Energy's case is not merely arguable but is strong; that is to say, is likely to succeed. So the question I have posed to myself is: is Mass Energy's case likely to succeed if we grant leave?

The submissions made by Mr Wilkie really raised two questions. First of all, did the specification and the incinerator brief require a tenderer to provide an incinerator which would have an initial capacity (that is to say, a capacity at December 1996) of at least 350,000 tonnes per annum?

It is quite clear that both the advertisement and the guidelines said that that is what the council intended. On the other hand, none of the contractual documents say that in terms or indeed clearly at all. The figure "350,000 tonnes per annum", is not actually to be found in the relevant part of the incinerator brief.

It is, however, also clear to me that what the council believed (on advice no doubt from its officers) would probably be necessary in order to achieve the desired aim of incinerating as much as possible of the waste, was a plant with an initial capacity of about 350,000 tonnes. That is why it was in the advertisement. Mr Wilkie submits that the incinerator brief, though not in precise terms, does in fact require a tender to be on the basis of not less than a 350,000 tonne plant initially. He spells it out by following a path through the requirements in the incinerator brief itself and the annexes to that part of it which deals with the quantification of amount.

Mr Ouseley for the council refers us to paragraph 2 of the incinerator brief which describes the wastes which are to be handled; they are: household, domestic, commercial, industrial and street cleansing waste, and it is said that the estimated quantities of each type of waste to be handled by the new company for the period of the contract are given in annexe A.

In paragraph 5.1 is the provision that the new company shall arrange for as much of the waste as possible "defined under paragraph 2(a) above to be incinerated". Paragraph (a) does not contain a specific provision as to how much is to be incinerated, and certainly does not contain the figure of 350,000 tonnes per annum in terms.

Mr Ouseley submits that the requirement was, to incinerate as much as possible of the waste after deducting such quantities as were to be recycled, and the minimal quantities which were to be disposed of in other ways. That, he submits, is a matter of estimation. Each tenderer could make its own estimate as to what capacity of plant was required. Of course, the Council might say that it disagreed with the estimate, and, if so, it would not accept the tender, but an estimate below 350,000 tonnes per annum, was not, of itself, in breach of the requirements of the tender documents.

The brief indicated the likely totals and the council could then agree or disagree, but it could not say that this was not in accordance with the incinerator brief or specification.

I agree with Mr Ouseley's submissions in that respect; I do not propose to go through all the figures in the two annexes to which Mr Wilkie referred. It is my view that a tenderer could perfectly properly do as Onyx did and say, "We tender for a plant with a capacity of . . ." stating an amount less than 350,000 tonnes per annum, of any amount, and it was then for the council to decide whether, in its view, that would or would not be an estimate

which would be, on the basis of the tender, sufficient to achieve the desired aim of incinerating as much as possible.

Thus, in my view, the initial Onyx tender which provided for two incinerators with a capacity of 315,000 tonnes per annum and a third incinerator by the year 2000, did comply with the tender documents, the incinerator brief and the specification. However, it only complied, of course, provided that the requirement to provide the third incinerator was a binding commitment and the council were perfectly entitled to do as they did and say: "We will not accept this unless it is a binding commitment." If a contract had been entered into on that basis, it would, in my view, have been unchallengeable.

The matter which caused me more concern was this: as a result of the discussions, as I have already said, Onyx then, in effect, said, "We will comply with what you wish, but may we do it in an alternative way by providing that the initial incinerators will have a total capacity exceeding 350,000 tonnes per annum", namely 370,000 tonnes per annum, "and thus will have the capacity to deal not merely with the position at 1996 but after the year 2000." The council agreed to that as an alternative and it seems that that is the basis upon which Onyx intend to provide the incineration plant.

Did that fall outside the requirements of the statute? In terms, except for the point under paragraph 22(e), the council did comply with all the requirements in paragraph 20. I accept what the council could not do was, having complied with all those requirements and got in tenders, then to say: "Now we have gone through the tendering process we can forget all about this and go off to some other contractor and enter into bilateral negotiations with him and arrange a contract which has nothing to do with the tender." That would be outside what is clearly the intention of the provisions of section 51 and Schedule 2 of the Act.

Once the council had received the tenders, to allow otherwise successful tenderers whose tender complied with the requirements of the tender documents to meet those requirements in an alternative way, without altering the price tendered, did not, in my view, mean that the arrangements made by the council for the disposal of the waste, would not have been made in accordance with Part II of Schedule 2. To put it another way around: I am of the view that the contract entered into between Onyx and the council was entered into in consequence of the tender process which had properly been followed earlier and that the council were ***310*** entitled to enter into a contract in the end on the terms of this particular contract.

It follows, in my judgment, that the contract is not void by virtue of paragraph 20(1) and I can see no legitimate expectation arising from the history of this matter which would give Mass Energy the right to challenge the council's power to enter into a contract on this basis.

I would, therefore, for those reasons, refuse leave to move.

SCOTT L.J.:

I agree and would gratefully adopt the recital of facts which has been given by Glidewell L.J.

This renewed application for leave raises some important questions regarding the effect of certain provisions of the Environment Protection Act 1990 on the procedure to be observed by waste disposal authorities before entering into contracts for the disposal of their waste.

Had the constraints of time that bear upon the Birmingham City Council, one of the

respondents before us, not been present, it would not, I think, have been difficult to conclude quite quickly that the issues raised by the applicants were sufficiently arguable as to deserve a leave to move for judicial review, but the grant of leave would, it seems to me, place both the council and its preferred contractor, Onyx UK Limited, in a very difficult position.

The council at present incinerates its burnable waste at an incinerator at Tyseley. This incinerator is required to be closed not later than the end of 1996 "because it will then no longer operate within emission control standards". (See paragraph 12 of Mr Seller's affidavit). In order for alternative arrangements to be made in due time, the council must enter into a contract with a suitable contractor under which the contractor accepts responsibility for the disposal of the council's waste, including responsibility for the construction of one or more incinerators which comply with current emission control standards, and which will have a capacity judged adequate to cope with the volume of waste required to be incinerated. The new incinerator must be ready for use by January 1, 1997.

The council on a date in early July—the exact date I am not quite clear about, and if I refer to it as July 5 and that is not the right date, nothing turns upon the error—entered into a contract with Onyx under which Onyx has a contractual obligation to construct the requisite incinerator or incinerators to be ready for use by January 1, 1997.

The grant of leave on this application will place the council in a position of uncertainty as to whether its present arrangements with Onyx can stand, or whether, if it must make new arrangements, there will be time before the expiry of the time limits to which I have referred. Onyx on its part will, if leave is granted, not known whether or not it should continue with the discharge of its contractual obligations under the July contract—its expenditure is running at the rate of £80,000 per annum, we were told—or whether Onyx should suspend work under the contract and await the result of the judicial review application in the knowledge that, if the application fails, the delay may bring it inevitably, into serious breach of its contractual obligations.

If the case for judicial review were a clear one with a likelihood of success, then it seems to me that, notwithstanding the consequences for the council and for Onyx that might follow, leave should be granted. The case for judicial review depends upon: first, the true effect of the relevant provisions of the 1990 Act; and, secondly, the true effect of the tender documents in response to which Onyx and the applicant, Mass Energy Limited, tendered for the waste disposal contract and on the true effect of the contractual documents constituting the contract eventually entered into between the council and Onyx.

In these circumstances, it seems to me to be right that this Court should try and form a view, not as to whether a case for judicial review is arguable, but as to whether the case is a good one and likely to succeed. If a conclusion cannot be reached that the case is a good one and likely to succeed, leave should not, in my opinion, be granted.

Let me start, therefore, by examining the relevant provisions of the 1990 Act. Part II of the Act, relating to the keeping, the treatment and the disposal of waste, came into effect on April 1, 1993. For the purposes of Part II of the Act, the Birmingham City Council is a waste disposal authority. (See section 30(2))

Section 32(6) provides:

> "Part 1 of Schedule 2 to this Act has effect for the purposes of this section and Part II for regulating the functions of waste disposal authorities and the activities of waste disposal contractors."

Section 51(1) proves:

> "It shall be the duty of each waste disposal authority to arrange
>
> (a) for the disposal of the controlled waste collected in its area by the waste collection authorities;
>
> . . .
>
> in either case by means of arrangements made (in accordance with Part II of Schedule 2 to this Act) with waste disposal contractors, but by no other means."

Turning to Part II of Schedule 2 to the Act, paragraphs 18, 19(1) and 20(1) impose particular requirements on waste disposal authorities in regard to the entering into of contracts for the disposal of their waste. There is no breach alleged of any of the requirements of those paragraphs.

Paragraph 20 is the important paragraph for present purposes. Sub-paragraph (1) provides:

> "A waste disposal authority which proposes to enter into a contract for the keeping, treatment or disposal of controlled waste shall comply with the following requirements before making the contract and if it does not any contract which is made shall be void."

Sub-paragraphs (2), (3) and (4) contain the requirements referred to. As Glidewell L.J. has mentioned, there was an allegation of a breach by the Birmingham City Council of the requirements spelled out in sub-paragraph 2(e), but that has not been pursued for the purposes of the argument for leave brought before us. Subject to that one point on sub-paragraph 2(e), it has not been suggested that, in the arrangements made by the council in the present case for the submission of tenders, the council was in breach of any of the requirements referred to.

In my judgment, it is implicit in paragraph 20, although surprisingly not explicit, that a contract to be entered into by a waste disposal authority for the keeping, treatment or disposal of controlled waste, must be entered into in consequence of the tendering process required under sub-paragraph 4 of paragraph 20, but it is, in my judgment, significant, although not surprising, that the legislature has not prescribed what the terms of the invitation to tender will be, or what the tender procedure to be adopted in consideration of tenders that come in is to be.

It is open, for example, to the authority, as to any other individual inviting tenders for a commercial contract, to prescribe a time within which tenders are to be submitted, but to reserve to itself the right to allow an extension of time to any individual tenderer it may chose. It is open also to the authority, as to other individuals inviting tenders, to reserve to itself the right to negotiate with any tenderer with a view to persuading that tenderer to improve the terms of its tender.

The statutory purpose of requiring tenders does not seem to me to be hard to discern. It is, in my opinion, to ensure that competitive bids for waste disposal contracts are obtained before the contract is placed by the waste disposal authority. But it is no part of the discernable statutory purpose to place waste disposal authorities in a statutory strait-jacket as to the tendering procedure to be observed, or to require, once the tenders are in, the acceptance of one or other of the tenders, as submitted, without the possibility of the waste disposal authority negotiating for an improvement of the terms of one or other of the tenders. An attempt by the waste disposal authority to persuade one or other of the tenderers to revise the tender terms in some respect or other does not, to my mind, in any sense run counter to any statutory intention that I can see in the relevant provisions of the 1990 Act.

Mr Wilkie, for Mass Energy, has argued that while it may be open to the council to negotiate with the tenderer on, so to speak, fringe details of its tender, it is not open to the council to negotiate with the tenderer on a major item in the tender so as to produce what Mr Wilkie characterised as a "new bid". If by a "new bid" Mr Wilkie meant a bid which in some significant respect was not consistent with the terms and specifications required by the invitation to tender, I would be inclined to agree with him. But provided the so-called "new bid" corresponds with the terms and specifications of the proposed contract for which tenders had been invited, I can find nothing in the statutory scheme, express or implied, to prevent the acceptance of the new bid.

There is, in my opinion, no context in the Act which prevents a waste disposal authority from allowing a particular tenderer an extension of time within which to tender, or an opportunity to improve its tender, or an opportunity to bring a tender which did not comply with the terms and specifications of the tender invitation into compliance therewith. These examples are not intended to be exhaustive. Provided that the requirements of paragraph 20 have been complied with and that the contract eventually entered into is a contract which complies, save in immaterial details, with the contract for which tenders were invited and, probably, although I would reserve a final decision on this point, that the chosen contractor was one of the tenderers, there will, in my judgment, have been no breach by the waste disposal authority of the obligations regarding the making of waste disposal contracts imposed by section 51(1) and paragraph 20 of Part II of the second Schedule to the Act.

The application before us is for judicial review. It seeks a review of whether the council has complied with its obligations under public law. But any process of contracting, any process of tendering by a waste disposal authority or by any private citizen or company, is apt to produce private rights. It is, I conceive, possible that the terms of an invitation to tender issued by a waste disposal authority may vest in the invitees who accept the invitation private rights of a contractual character. An individual who invites tenders may, by the terms of his tender, bind himself to those who accept the invitation not to entertain tenders

made after a specified date, or not to permit any substantial alteration in tenders after that date, or to accept the tender containing the highest price, and so on.

The submission of a tender may constitute a contract between the tenderer and the invitor whereunder the invitor becomes contractually bound to observe the terms of the invitation to tender. A breach by the invitor of those terms may entitle a disappointed tenderer to some contractual remedy for breach of contract, whether damages or injunction, as the case may be. All of this may, in a particular case, result from an invitation to tender issued by a waste disposal authority pursuant to paragraph 20(4) of Part II of the second Schedule to the Act. If so, the aggrieved tenderer's remedy lies, in my opinion, in private law not in judicial review. Judicial review should be confined to dealing with breaches by the waste disposal authorities of their public law obligations. If the actions and decisions of Birmingham City Council of which complaint is made in the present case involve breaches of their public law obligations under the 1990 Act, then judicial review is the proper remedy; but, if there is no more than a complaint that the council has failed to comply with some express or implied term of the invitation to tender—not being a term required by the statutory scheme to be included in the terms of the invitation—Mass Energy's remedy, if it has one at all, lies, in my judgment, in private law. The case would not be one for judicial review.

Mass Energy's first complaint relates to the decision of the council on May 11, 1993 to prefer Onyx's tender to those of the other tenderers, including Mass Energy. It is contended that Onyx's tender did not correspond to the terms and specifications of the invitation to tender in that it did not undertake to construct an incineration plant with the capacity of incinerating a minimum of 350,000 tonnes per annum. In my judgment, the contractual specifications and the incineration brief, read together and fairly construed, did not require a rigid undertaking to the effect contended for, but required, rather, an undertaking to provide an incinerator or incinerators of such capacity as would deal with the volume of waste that over the period of the contract would require to be incinerated. Onyx's revised tender, on its true construction, complied, in my judgment, with the tender invitation. On this point I, too, preferred Mr Ouseley's arguments to those of Mr Wilkie.

But this point is, in my judgment, immaterial. It is immaterial because the council did not contract with Onyx on the terms of Onyx's revised tender. Instead, the council had discussions with Onyx extending over and beyond the date originally prescribed by the council for the submission of the revised tenders, and the result of which was the agreed substitution of an obligation to build at once—by which I mean by January 1, 1997—an incinerator with an annual capacity of 370,000 tonnes odd in place of the corresponding obligation contained in Onyx' original revised tender.

Mass Energy's second complaint is directed to the contract resulting from this agreed variation. Mr Wilkie has argued that in the post-tender discussions, Onyx was allowed to put in a "new bid" after the date prescribed by the council for the submission of tenders had passed. It is accepted by Mr Wilkie that this "new bid" did comply with the terms and specifications of the invitation to tender, but, he submitted, it was not open to the council to negotiate an agreed variation of Onyx's original tender. The council, he said, had no alternative but to start again from the beginning with a new tendering procedure, complying again with all the relevant requirements of paragraph 20.

I would reject the proposition that the statutory scheme imposed by the 1990 Act on waste

disposal authorities demands this conclusion. The discussions between the council and Onyx leading to the contract entered into on July 5, 1993 were carried on by the council with knowledge of the contents of the competitive tenders that had been submitted by the five tenderers, including Mass Energy. The council was endeavouring to improve the terms offered by one of the tenderers. The purpose of the statutory scheme of requiring competitive tenders before a waste disposal contract is concluded was, therefore, achieved. The terms of the contract comply with the terms and specifications in the tender invitation. The requirements, express and implied, of paragraph 20 have all been complied with.

Mr Wilkie has complained of unfairness to Mass Energy in that the council chose to negotiate with Onyx as to the capacity of the incinerators that Onyx would build, while not choosing to negotiate with Mass Energy on the price for which Mass Energy had stipulated in its tender. I can see no relevant unfairness in this. It is open to a person inviting tenders, unless he has contractually barred himself from doing so, to choose one tenderer in preference to the others and to endeavour to negotiate with the chosen tenderer an improved deal within the ambit of the invitation to tender. The statutory scheme does not bar a waste disposal authority from proceeding in that way. At least it does not do so expressly. To hold that it does so by implication would be to inflict upon waste disposal authorities a statutory scheme of a rigidity that no private individual inviting tenders for a comparably complex contract would be likely to accept, a statutory scheme that lacks, in my mind, commercial realism and it is not necessary to achieve the object of the statutory requirement.

For these reasons I, too, would dismiss Mass Energy's application for leave.

EVANS L.J.:

I also agree. The combined effect of section 51(1) of the 1970 Act and of Part II of Schedule 2 to the same Act, in particular paragraphs 20 and 21, is to impose certain express statutory obligations upon the waste disposal authority.

They also impose, in my view, a general obligation which is implied, and perhaps surprisingly was not express, to enter into waste disposal contracts only by accepting an offer made in the course of and in consequence of the tender process.

The Act is silent as to the course which the tendering process should take once it has been properly instituted. I, for my part, in agreement with my Lords, would infer that these processes should following what I would call "normal commercial processes". In other words, the council is free to exercise its own commercial judgment, subject only to its compliance with the particular expressed and general implied statutory obligations to which I have referred.

Normal commercial processes include some degree of negotiation with individual tenderers after their tenders have been submitted, if only to clarify and to remove uncertainty in them. In a commercial contract, those negotiations may lead to major revisions of the tenderer's offer and to a contract the terms of which differ markedly from those which were originally specified. But in such a commercial context there would almost certainly have been some express provision which entitled the employer to reject all or any offers if he was so advised.

I would be prepared to hold that that freedom does not exist under this statute to its full extent. There are two reasons: first, the term "contract works" is defined in paragraph 20 of the second Schedule in a way which in summary shows that the contract terms have to relate, substantially at least, to the works proposed by the original specifications. Secondly, it seems to me for the reasons I have already given that the tender as accepted must be substantially the same as the tender which was invited at the earlier stages.

It is a feature of this legislation that by preventing the council from entering into contracts otherwise than in accordance with its terms—and I have in mind particularly the words "and no other" in section 51(1)—Parliament has said that the council shall not enter into contracts which, had they been free of statutory restrictions, they would have regarded as being in the best interests of the authority which they represent. Parliament has preferred the advantages of a competitive tendering process to an unfettered freedom to contract to that extent. So it is no surprise that what Mr Ouseley Q.C. has described as the "commercial judgment" of the council does not permit it to deal with the tenderers or with individual tenderers as freely as he submits.

The issue in the present case is whether the council could properly accept the Onyx UK offer in its final form. That offer included an incinerator which matched the original specification, that is to say, with an immediate 1996 capacity of 350,000, or perhaps 370,000 tonnes per annum. I am not entirely certain about the provisions for future growth which were required by clause 1.02 of the incinerator brief, but no issue has been raised before us. It is accepted that the offer in fact accepted was within the original specification in that respect.

The original Onyx tender—meaning the April 1993 tender (which was in fact a revised tender)—did not include that incinerator capacity. It provided for a two-line plant with a capacity of 315,000 tonnes per annum, plus, on one view of the offer as submitted, an undertaking to construct a further line, giving further capacity, in accordance with the option given by clause 1.02.

Mr Ouseley Q.C. submits that that is the correct view to take of the terms of the tender. I remain doubtful. But it is agreed, and indeed common ground, that subsequently Onyx resiled from any such undertaking and preferred to substitute a 350,000 or 370,000 tonnes per annum capacity which was accepted in July.

Mr Ouseley and Mr Donaldson Q.C. submit that Onyx made an offer which included the undertaking, then resiled from it and then abandoned it under pressure during negotiations. I remain sceptical.

The evidence tends to contradict that submission. The council officers reported on May 11 that Onyx's tender and another gave no undertaking with regard to future capacity. That view was strangely prescient if that was not in fact the attitude of Onyx at that time, although they took precisely that attitude subsequently when negotiations began.

The evidence is incomplete and in my view unclear, and there is none from Onyx explaining why it was that the council officers on May 11 did accurately predict that Onyx was unwilling or would be unwilling to offer such an undertaking.

If the validity of the contract eventually made depended upon the question whether the Onyx (April) tender conformed in all respects with the specification, I would hold that it did

not, or at least that the plaintiffs have a clear case that it did not, for the reasons I have given.

Similarly, on the question whether the specification required 350,000 rather than 315,000 tonnes per annum as a matter of contract, I tend to think that the plaintiffs are correct. The figures in annexe A were given contractual effect by clause 1.02 of the incinerator brief, and they are figures based upon the council's estimate. Those figures lead to the conclusion that the council's estimate of the required capacity was about 350,000 tonnes per annum, certainly more than 315,000 tonnes. The council officers certainly thought so, and it seems from their later report of the meeting held on July 6 that Onyx had sought to justify their original tender, not on the basis that it did conform to the council's estimate, but that their own different estimates should be preferred.

But even if one assumes that the original (meaning April) offer did not conform with the specification in that respect or those respects, the fact remains that the revised offer, as eventually accepted, did so conform. The question is whether the council could properly accept that offer.

In my view, for the reason given, the test is whether the contract was entered into by the acceptance of a tender made in the course of, and in consequence of, the statutory tendering process.

It is unnecessary to express a concluded view, but I, for my part, would not accept that the council was free to reject all the tenders and to contract with some other party who had not tendered at all.

I assume in the plaintiff's favour that the contract entered into must not depart from the original published specification in any material or substantial respect.

It is necessary, however, to allow for what I have called the "normal commercial processes" of negotiation with a preferred tenderer. Such negotiations may well result in the terms of the offer being changed and without parting substantially from the specification. There could even be a case where negotiation was necessary in order to point out that the tender as submitted did not comply with the specification in some respect and should be brought in line if the tenderer so wished.

For these reasons, and in view of the judgments given by my Lords, with which I agree, I would hold that the plaintiffs do not establish that the July 11 contract was unlawful.

However, the plaintiff's submissions certainly are arguable and, if I may say so, they have been ably argued by Mr Wilkie, and this is an application only for leave.

Adopting the views expressed by my Lords, it seems to me that in the present circumstances one should go further. It seems to me that at the very least the question of discretion arises also. The fact that the respondent entered into a contract at a time when they were on notice that the plaintiffs were seeking judicial review would normally count very strongly in the plaintiff's favour, but it is neutralised in the present case by the fact that, on June 10, the council expressly referred the plaintiffs to the possibility of their seeking interim relief.

The plaintiffs started these proceedings on June 18, but they conspicuously failed to apply for interim relief as they could have done before the contract was made.

Other discretionary factors which can be described generically as "consequent disruption and delay" count very strongly against the grant of leave.

I bear in mind that, if the plaintiffs are correct, they may well have private law rights, and, if they do, they can ventilate them in other proceedings. It may well be said, for example, that the statutory terms have contractual effect as between the plaintiffs and the council, and there is the possibility also of private rights against Onyx as well.

For these reasons, notwithstanding that the matter is arguable, I, for my part, would refuse lave for the reasons I have given.

The plaintiffs raised an alternative argument, which was to this effect: they were entitled to have and did have a legitimate expectation that the council would deal fairly as between tenderers in the course of this statutory process.

They say the council gave Onyx the opportunity to revise their tender as regards the incinerator because the Onyx bid was more attractive on price.

The plaintiffs say that they were willing to renegotiate their price, or more specifically what is called the "profile of payments", in a way which affects the price ultimately paid, and, of course, there was no suggestion that their incinerator proposals were not acceptable or within the specification. The council, however, was unwilling to do so and the plaintiffs say that that was "unfair".

I would agree that there was an element of unfairness in it. It is unclear why the council was not prepared to give the plaintiffs a further chance as they undoubtedly gave to Onyx, but the question is whether they were bound to do so, I would add whether they were bound by statute to do so.

Consistently with my view of the effect of the Act, the council was entitled to deal with the tenderers on a commercial basis, subject only to the statutory restrictions as outlined. In commerce, life is not always fair, and in this situation it seems to me that Mr Ouseley Q.C.'s submission is relevant.

The council was entitled to act as a commercial animal at the stage when it was considering the tenders they had received. I find it impossible to say more than that the council were bound to act commercially. That, unfortunately, does not guarantee complete fairness and maybe the plaintiffs did not receive it, but that is not a ground, in my view, for complaint under the Act.

Private law rights, of course, are different. It may be that what I have just said is another way of saying that, provided that the statutory requirements are complied with, this is not a case for judicial review.

Representation

Solicitors— Evershed Wells and Hind for the applicant; the Solicitor to Birmingham County Council for the respondent; Pinsent & Co. for the interested party.