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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Bryson Recycling Limited's Application

IN THE MATTER OF AN APPLICATION BY BRYSON RECYCLING LIMITED FOR JUDICIAL REVIEW

AND

IN THE MATTER OF A DECISION BY BANBRIDGE DISTRICT COUNCIL

TREACY J

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Consultation

Introduction

[1] By this application Bryson Recycling Limited ("the applicant") seeks an Order quashing the decision of Banbridge District Council ("the Council") to remodel its waste management services to adopt a system of co-mingled collection of household dry recyclable material using a split bodied refuse collection vehicle operated by the Council's own staff and a decision not to retender for the provision of collection of household dry recyclable material in the Council area after the applicant's contract for this service came to an end ('the impugned decision').

[2] The applicant was represented by Mr Stuart Beattie QC and Mr Tony McGleenan QC and the respondent was represented by Mr David Scoffield QC. I am indebted to all Counsel for their comprehensive written and oral submissions which have greatly assisted the Court.

The Application for Judicial Review

[3] The detailed grounds on which relief is sought are set out in the Further Amended Statement filed pursuant to Order 53. In summary, the grounds are that the Council:

(a) failed to comply with the provisions of the Local Government (Best *Value) Act (Northern Ireland) 2002 ('the 2002 Act') in deciding not to put the Council's recycling services out to tender at the end of the applicant's contractual term in March 2012;

(b) failed to comply with the provisions of the 2002 Act in deciding to adopt a system of comingled waste collection using a split-bodied refuse collection vehicle ('RCV') operated by the Council's own staff;

(c) failed to comply with the provisions of the 2002 Act in failing to consult with interested parties before taking the impugned decision;

(d) acted irrationally and ultra vires in failing to comply with the 2002 Act and other binding guidance, procedures and requirements when procuring external consultancy services and in failing to comply with the guidance in The Green Book, Northern Ireland Guide to Economic Appraisal and Evaluation and Multi Criteria Analysis ("NIGEAE");

(e) acted irrationally in relying upon the said economic appraisal which did not comply with the terms of The Green Book including at:

(e)(x). Failed to conduct any analysis of the restrictions and limitations imposed upon the Council's waste disposal strategy by the Waste Management licences currently held by the Council for the Scarva Road civic amenity site;

(e)(xi). Failed, in breach of paragraph 2.5.15 of the NIGEAE, to consider whether the Respondent would require to seek planning permission to increase the scope for waste receipt or whether it needed a revised waste management licence to address the increase volume or needed to acquire new premises;

(e)(xii). Failed to conduct any analysis of the legal and practical consequences of the revised EU Waste Framework Directive 2008/98 including inter alia a failure to consider Article 11 which provides that "by 2015 separate collection shall be set up for at least the following: paper, metal, plastic and glass".

(f) acted irrationally in reaching the impugned decision by failing to consider and apply the Council's Sustainable Procurement Policy;

(g) in failing to seek, consider or give appropriate weight to the views of interested parties, acted contrary to the legitimate expectation of those parties that they would be consulted on proposals to restructure the management of recycling services and that appropriate weight would be given to their views in the decision making process;

(h) acted irrationally in failing to take account of and/or failing to give appropriate weight to and/or failing to give proper consideration to relevant information provided by experienced and suitably qualified organisations including at:

(h)(vii). The Council failed to take into consideration or give appropriate weight to the impact of the revised EU Waste Framework Directive 2008/98 upon a "co-mingled" waste strategy including inter alia a failure to consider the impact of Article 11(2) of the EU Waste Directive 2008/98.

(i) acted irrationally in giving inappropriate weight to inaccurate information;

(j) failed to consider or give appropriate weight to whether or not the applicant's staff engaged in recycling operations on behalf of the Council would transfer to the Council under the Transfer of Undertakings (Protection of Employment) Regulations ('the TUPE Regulations'); and

(k) demonstrated bias and pre-determination in reaching the impugned decision.

Factual Background

[4] The applicant is owned by the Bryson Charitable Group which was established in 1906 to provide services to vulnerable people in Northern Ireland. The applicant provides a kerbside box collection service for dry recyclable household waste under contract to various local councils and also operates a materials recovery facility which is used to sort mixed materials collected as waste in the eleven council districts in the eastern part of Northern Ireland, known as the 'arc21' region. Income from the applicant's recycling business provides funding for Bryson Charitable Group's services.

[5] In 2004, under a contract with the Council, the applicant commenced the weekly collection of household dry recyclable waste in Banbridge District Council area. The system operated by the applicant is known as 'kerbsort'. The applicant provided each household in the district with a 55 litre box to store dry recyclable waste and place at the kerbside on a specific day each week. The applicant collected the waste, sorted it at the kerbside and placed it in the relevant sections of its waste collection vehicle. In parallel to this, domestic landfill waste and garden waste was collected by the Council by way of a fortnightly collection of wheelie bins using standard refuse collection lorries. Commercial waste was collected by the Council also. The applicant's contract with the Council was subject to a number of extensions and finally came to an end on 31 March 2012 as a result of the decision under challenge in these proceedings.

[6] During the currency of the applicant's contract, Council workers involved in refuse collection were employed under 'task and finish' contracts which meant that they finished work for the day once that day's specific tasks were completed. Under the National Joint Council Single Status Agreement of 1997 ('the Single Status Agreement'), such contracts were to be phased out as part of the harmonisation of terms and conditions of all council staff. Implementation of the Single Status Agreement by Banbridge District Council took a number of years. In 2009, Banbridge District Council Chief Executive's Report identified that the successful implementation of the Single Status Agreement would be key in the years 2009-11. By the time the Local Government Auditor issued the annual audit letter in respect of Banbridge District Council for the year up to 31 March 2011, implementation of the Single Status Agreement was virtually complete. The Council anticipated that the implementation of the Single Status Agreement would result in staff employed in waste collection having spare capacity but it appears that this was not quantified.

[7] In late 2009, the Council, along with Armagh City and District Council and Craigavon Borough Council, requested the Waste Resources Action Programme ('WRAP') to commission a study on recycling options in the context of the proposed amalgamation of the three Council areas under the Northern Ireland Executive's Review of Public Administration ('RPA'). WRAP is a government-appointed agency which advises central government,

local authorities and others on recycling-related issues. WRAP appointed EUNOMIA, a waste consultancy, to prepare the 'Armagh, Banbridge and Craigavon Kerbside Collections Report', which was published in July 2010 ('the WRAP Report'). For the proposed amalgamated district, the Report recommended weekly kerbside sort with food waste collection on a recycling Refuse Collection Vehicle ("RCV"). It notes that the political context in relation to RPA had changed by the time it was published and, in addition to its recommendation in relation to an amalgamated district, it presents a detailed collection system option appraisal for each of the three Councils concerned. With regard to Banbridge Council, the recommended option was the same as that for the amalgamated district, namely kerbside sort with simultaneous food waste collection.

[8] On 15 February 2010, the Technical Services Department of the Council reported to the Council's Environmental Services Committee proposing a new system of collection of *commercial* waste which would involve the acquisition of a split-bodied RCV to replace an existing standard RCV which had come to the end of its useful life. A standard RCV has one compartment for storing waste whereas a split-bodied RCV may be split into two such compartments and has a pod for the collection of glass. Accordingly, a split-bodied RCV can be used for the collection of two types of waste at the one time, without mixing them, and allows for the separate collection of glass also. On 17 February 2010, the Environmental Services Committee approved the proposal and this decision was ratified by the full Council on 1 March 2010. On 28 June 2010, the Council resolved to seek tenders for the purchase of a split-bodied RCV. A Tender Report was brought to the Council's Policy and Resources Committee on 2 August 2010. The Committee accepted the lowest priced tender and this decision was ratified by the full Council on the same date. On 22 September 2010, a loan sanction for the purchase of a split-bodied RCV was approved.

[9] In parallel to the restructuring of the Council's commercial waste collection, between February 2010 and June 2010, the applicant and Council officers had ongoing discussions and engagement regarding the provision of the applicant's service during which time the applicant put forward suggestions regarding how its service could be enhanced. This suggestion was rejected by the Council's officers who were aware that this enhanced scheme was the subject of an application for grant aid for a pilot by Armagh City and District Council.

[10] On 21 June 2010, the Environmental Services Committee agreed a proposal from the Technical Services Department to run a pilot scheme to test the cost effectiveness of an alternative model of collecting household dry recyclable waste involving the collection of dry recyclables using dedicated green wheelie bins and the soon to be purchased split-bodied RCV. This option was not under consideration by EUNOMIA when preparing the

WRAP Report. On 28th June 2010, the full Council agreed that grant aid for the pilot scheme should be applied for from the Department of the Environment. On 21st July 2010, a quarterly contract meeting was held between the applicant and the Council. The Council advised the applicant that it wished to commence the pilot for a twelve month period, beginning in April 2011. This would involve some 4000 domestic properties and the Council was prepared to negotiate an appropriate compensatory payment to the applicant if the pilot proceeded. The applicant subsequently wrote to the Council Chief Executive, the Chair of the Environmental Services Committee and all of the Councillors raising concerns with regard to the proposed pilot, including potential redundancies. On 2 September 2010, the Council was informed that its grant application for funding for the pilot had been unsuccessful. On 10 September 2010, Huhtamaki, a paper recycling company which was one of applicant's biggest customers, wrote to the Council expressing concerns about the proposed pilot and stating its view that the pilot would have an adverse impact on the quality of materials collected.

[11] On 5 November 2010, the Council commissioned Tribal Group ('Tribal') to carry out an economic appraisal of a number of options for kerbside collection of dry mixed recyclables ('the Tribal Report').

[12] On 17 November 2010, the applicant wrote to the Council confirming its offer to trial the enhancements to its current services as set out in the WRAP Report.

[13] At the quarterly contract meeting on 18 November 2010, for which there is no minute, the Council informed the applicant that it was not going to proceed with the proposed pilot and that it had commissioned the Tribal Report.

[14] On 25 November 2010, a further meeting took place between Council officers and the applicant at the request of the applicant. There is no minute of this meeting. The applicant outlined opportunities to enhance its service beyond the enhancements set out in the WRAP Report and provided information on recent examples of how kerbsort systems had been adopted in England with excellent results. Issues around material quality and the impact that co-mingled recyclables would have on local reprocessors were also discussed. The applicant raised the issue of the potential impact of the TUPE Regulations should the Council bring in-house the collection of dry recyclable household waste.

[15] On 26 November 2010, the applicant sent an email to the Council restating its concerns regarding potential TUPE ramifications. On 30 November 2010, the applicant's concerns regarding TUPE were raised by the applicant's HR Manager in an email to the Council. In the event, no members of the applicant's staff transferred to the Council under the TUPE

Regulations and the applicant made seven members of staff redundant in the two month period after its contract with the Council ended on 31 March 2012.

[16] There was ongoing provision of information from the Council to Tribal while the Tribal Report was being prepared, including provision of the WRAP Report on 16 November 2010 with the comment that the Council's officers were dissatisfied with it on the basis that it did not reflect their real-life experience and because it assumed a blank sheet starting point, taking no account of existing systems and infrastructure. The Council was provided with a draft of the Tribal Report on 9 December 2010 and provided comments on the draft on 10 December.

[17] The Tribal Report was produced on 15 December 2010. It stated that it was prepared in the context of the ending of the applicant's contract in March 2012, increasing costs pressures on the Council, increased internal refuse collection capacity due to the phasing out of 'task and finish' contracts and technological advancements in recycling since the award of the applicant's contract in 2004. Among the constraints identified was spare capacity created by the conclusion of 'task and finish' contracts. Six potential recycling collection options were identified initially and three proceeded to full economic appraisal. In summary, these were: Option 1 – continue with the current system, namely external provider operating a kerbsort, one-box system; Option 4 – external provider operating a kerbsort, three-box stacked system; and Option 6 – Council-provided co-mingled collection, using the split-bodied RCV to collect garden waste at the same time. The options were assessed for monetary costs and benefits; associated risks and uncertainties; specified non-monetary factors; and net present value, each of which was given a weighting. Additionally, each non-monetary factor was given a weighting in terms of its relative importance, with the total weighting of all non-monetary factors equalling 100%. Included in the non-monetary factors was 'Efficient Use of Existing Resources' which is described as 'Ensuring maximum use of available Council refuse collection staff and other resources with the phasing out of 'task and finish' and to thereby avoid redundancies'. This was weighted at 20% on the instruction of the Council. The Tribal Report concluded that Option 6 (council-provided co-mingled collection) should be the preferred option.

[18] On 20 December 2010, the Environmental Services Committee had a presentation from Tribal on its report and considered a report from the Council's Technical Services Department dated 15 December 2010 which recommended that Option 6 be approved for adoption from April 2012. The Committee further considered the matter at its meeting on 24 January 2011 and recommended that the Council proceed with Option 6 from the proposed date. This decision was ratified by the full Council at its meeting on 7 February 2011 ('the February decision').

[19] On 9 February 2011, the Council wrote to the applicant to advise of its decision to bring in-house the collection of dry recyclable household waste at the end of the applicant's contract. On 10 February 2011, the applicant made a request for information to the Council under the Freedom of Information Act 2000. Information was provided by the Council on foot of that request on 22 February 2011.

[20] On 5 April 2011, the applicant's solicitors issued a lengthy pre-action protocol letter. Three of the points raised, namely, additional gate fees for increased organics tonnages, the application of a GDP deflator and the possibility of TUPE applying, were given further consideration but this did not materially alter the outcome of the Tribal Report. On 18 April 2011, the full Council re-affirmed its decision of 7 February 2011 ('the 18 April decision'). A response to the pre-action protocol letter was issued on 21 April 2011 stating, inter alia, that the 7 February decision had been superseded by the 18 April decision which was of like effect. The applicant then issued a series of requests under the Freedom of Information Act 2000.

[21] On 21 July 2011, the applicant submitted an application for leave to apply for judicial review and leave was granted on 13 February 2013.

General Overview of the New System

[22] A general overview of the switch from the old Bryson system to the new in-house system is set out in paras 5-17 of Mr Lindsay's first affidavit. Mr Lindsay is the Director of Environmental Services with the Council. Up to the introduction of the new scheme in April 2012, the Council was already making weekly waste collections from houses in its district. These alternated between black bin collections one week (for waste taken to landfill) and brown bin collections the next (for garden and food waste). With each collection, the waste being collected that week was put into one compartment on the back of a 'standard' RCV.

[23] At the same time as the Council was making weekly collections, it was also paying Bryson to do the same. Therefore, each house had 'two passes' each week. Bryson was collecting dry recyclable materials such as paper, plastic, cans, glass etc in a 55 litre box. The Bryson vehicle had many compartments into which the various articles were sorted at the kerbside.

[24] Under the new system the Council continued to collect waste from each house once *per* week collecting from black bins and brown bins on alternate weeks. At the same time as making the brown bin collections the houses' dry recyclables are also collected – so that dry recyclables and organic recyclables are both collected in one pass. The dry recyclables are now placed in a new 240 litre green bin with much greater capacity than the Bryson box, and with a separate caddy for glass which fits inside the green bin. Dry recyclables are now collected only once *per* fortnight. However, since the 240

litre bin is much bigger than the 55 litre box there is still more space for residents to store their dry recyclables.

[25] The Council collects two types of waste from each house at a time in one pass because it now uses split-bodied RCVs. These are slightly larger bin lorries than standard RCVs and have two compartments, rather than one, with an additional 'pod' behind the driver's cab in which to store glass separately.

[26] There are a number of efficiencies to the new system eg (i) waste is now collected from houses each week in one pass rather than two; (ii) the Council no longer has to pay substantial sums to an outside contractor, namely Bryson, to provide weekly collection services when its own staff can provide this service at the same time as providing the black/brown bin service they were providing in any event; (iii) the ability to use Council employees' time fully after the system of "task and finish" came to an end (see para6 above).

[27] The Council's information indicated that the use of the Bryson box for dry recyclables (the 'take-up rate') was low. Many residents did not use the box regularly or at all for various practical reasons such as the relatively small amount of materials which would fit within the box, the absence of wheels, the tendency for the lid to blow off etc. These issues do not arise with the new green bins, which also have a much greater capacity than the box. This means people are more likely to use them to recycle; and that they can fit more into them. This, it is said, has resulted in a much higher volume of recyclable materials being collected and, consequently, much greater recycling than previously. Not only is this more environmentally friendly, but as material is being diverted from landfill, there is a further financial saving in terms of landfill expenditure, such as landfill tax. Additionally, the Council estimated that residents were more likely to leave out their brown bins more regularly, if they were leaving their green bin out in any event at the same time. This would result in an increased collection of organic waste for recycling.

[28] The new scheme also costs a lot less than the old scheme. The main additional cost was the capital cost of the three split-bodied RCVs required to operate the new system. However, at the time decision was made to move to the new system, the Council already had one such vehicle, since it had been purchased some time earlier to enable the Council to make dual collections from commercial premises, for which it is also obliged to collect waste and which has always been done by the Council rather than by a private operator. It therefore had to make only a relatively modest investment in two further split-bodied RCVs in order to enable the new system to operate. As two standard RCVs were coming to the end of their useful life and required to be replaced, the Council was able to replace those vehicles with two of the new split-bodied RCVs.

[29] The other major potential cost was increased staff costs. Although the end of 'task and finish' meant that existing employees would have spare time within which to carry out the additional work involved in the new green bin collections, they are not able to do all of this. Some additional staff were therefore to be employed. This has the advantage of creating further employment. From the Council's perspective the end of favourable bonus/premium payments associated with task and finish, meant that additional staff have been employed without the staffing budget for collections increasing in real terms. In summary the Council says more work is being done for essentially the same staffing costs.

[30] In addition to no longer having to pay an external contractor for the service, the Council also now has an additional income stream – which is the money it is paid by reprocessors for the dry recyclable materials it has collected. Reprocessors purchase these materials from the Council in order to recycle them into products they can then sell on.

[31] It appears that the Tribal report accurately forecast significant savings and benefits which the new scheme would deliver and which it now has delivered following its introduction in April 2012.

[32] The Tribal report showed clearly that the new scheme would give rise to significant savings for the Council in its arrangements for the collection of mixed dry recyclables. The savings were to the tune of £3m over a ten year period. The new system ('Option 6' in the Tribal report) clearly represented a better and cheaper option than the 'old' Bryson system ('Option 1') or, indeed, a new more sophisticated variation of the box-based kerbside sort scheme ('Option 4'). The outcome of the report is summarised at paras 107-108 of Mr Lindsay's first affidavit:

> "Having regard to the evaluation contained in the report, the selection of Option 6 as the best way forward was far from being irrational, but was obvious. Option 6 was very significantly cheaper than continuing with the present model (Option 1) or a new three-box model (Option 4), resulting in projected savings to the Council of almost £3m across the life of the project (see section 1.6 of the Tribal report). Not only was Option 6 by far the cheapest option, but it was also assessed as much less of a risk than Option 4 and only very marginally more of a risk than continuing with the present model (see section 1.7 of the Tribal report).

> However, monetary factors were also not the only factors which were taken into account. The Council also considered issues of customer satisfaction, efficient use of existing resources, recycling gains, etc. – all of which I believe to be perfectly acceptable and relevant considerations for the Council to assess and evaluate. When assessed against these non-monetary factors, Option 6 again scored significantly more highly than Option 1 or indeed Option 4. It was obviously both the cheapest and most effective solution."

[33] Thus, in summary, the Council says it is doing more for less; collection rates for recyclable materials are significantly higher; costs are significantly lower; customers are happier. The Council's move to the new system, they say, was an obvious move to secure a better solution and represents significantly better value and significant environmental gain over the previous system (or, indeed, a new and improved variant of that system).

Legislative, Guidance and Policy Frameworks

[34] Article 20(1) of the Waste and Contaminated Land (Northern Ireland) Order 1997 ('the 1997 Order') places a duty on district councils to arrange for the collection of household waste.

[35] Article 25(1) of the 1997 Order provides requires each district council to make arrangements for the disposal of waste collected or removed under Article 20.

[36] Article 26 of the 1997 Order sets out councils' powers in relation to recycling waste.

[37] **Directive 2008/98/EC of the European Parliament and Council of 19 November 2008 on waste and repealing certain directives,** known as the 'revised Waste Framework Directive' ('rWFD'), introduced new European provisions in order to boost waste prevention and recycling, clarified key concepts such as the definitions of waste, recovery and disposal and lays down the appropriate procedures applicable to by-products and to waste that ceases to be waste. Article 40(1) of the rWFD provides that it shall be transposed into domestic law by 12 December 2010.

[38] Article 4 contains a 'waste hierarchy' which sets out the order of priority of types of waste prevention and management to which member states should adhere is developing the relevant policies and legislation. Article 4(2) provides:

> "Member states shall ensure that the development of waste legislation and policy is a fully transparent process, observing existing national rules about the consultation and involvement of citizens and stakeholders."

[39] Article 10 provides:

> "Article 10 – Recovery
>
> 1. Member States shall take the necessary measures to ensure the waste undergoes recovery operations, in accordance with Articles 4 and 13.
>
> 2. Where necessary to comply with paragraph 1 and to facilitate or improve recovery, waste shall be collected separately if technically, environmentally and economically practicable and shall not be mixed with other waste or other material with different properties."

[40] Article 11(1) provides, inter alia:

> "Subject to Article 10(2), by 2015 separate collections shall be set up for at least the following: paper, metal, plastic and glass."

[41] The directive was transposed into domestic law by the Waste Regulations (Northern Ireland) 2011 ('the 2011 Regulations') which, in accordance with Regulation 1 thereof, came into effect on 8 April 2011, with the exception of Regulations 17, 18 and 28 (the latter of which is not of relevance to this case).

[42] Regulation 9 is an interpretation provision which, inter alia, contains the following definitions which are transposed from Articles 3 and 4 of the rWFD respectively:

> ""recycling" means any recovery operation by which waste materials are reprocessed into products, materials or substances whether for the original or other purposes. It includes the reprocessing of organic material but does not include energy recovery and the reprocessing

into materials that are to be used as fuels or for backfilling operations;"

"the Waste Hierarchy" means the priority order which shall apply to the prevention and management of waste as follows—

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

[43] Regulation 17 provides:

17.— Duty in relation to the waste hierarchy (coming into operation 8 October 2011)

(1) It shall be the duty of any person who imports, produces, collects, carries, keeps, treats or disposes of waste, or as a broker or dealer has control of controlled waste, on the transfer of such waste to take all such measures available to that person as are reasonable in the circumstances to apply the waste hierarchy priority order in accordance with Article 4 of the Waste Framework Directive.

(2) An establishment or undertaking may depart from the waste hierarchy priority order so as to achieve the best overall environmental outcome where this is justified by life-cycle thinking on the overall impacts of the generation and management of the waste;

(3) When considering the overall impacts mentioned in paragraph (2), the following considerations shall be taken into account—

(a) the general environmental protection principles of precaution and sustainability;
(b) technical feasibility and economic viability;
(c) protection of resources;

(d) the overall environmental, human health, economic and social impacts.

(4) The duty in paragraph (1) shall not apply to an occupier of domestic property as respects the household waste produced on the property.

(5) The Department may give guidance on the discharge of the duty in paragraph (1).

(6) A person discharging the duty in paragraph (1) shall, in doing so, have regard to any guidance given under paragraph (5).

[44] Regulation 18 gives effect to Articles 10 and 11 of the rWFD and comes into force on 1 January 2015:

18.— Duties in relation to collection of waste
(1) A district council, when collecting waste paper, metal, plastic or glass shall, from 1st January 2015, take all such measures to ensure separate collection of that waste as are available to it and are—

(a) technically, environmentally and economically practicable;
(b) appropriate to meet the necessary quality standards for the relevant recycling sectors.

(2) A district council, when making arrangements for the collection of waste paper, metal, plastic or glass, shall, from 1st January 2015, take measures to ensure that those arrangements are by way of separate collection.

(3) The duties under paragraphs (1) and (2) shall apply only where keeping waste separate facilitates or improves recovery.

[45] Regulation 21 came into force on 8th April 2011 and provides:

21. - Co-mingled waste

> Co-mingled collection is a form of separate collection for the purposes of regulations 18, 19 and 20.

[46] The Local Government (Best Value) Act (Northern Ireland) 2002 ('the 2002 Act') places on district councils a general duty to make arrangements for continuous improvement in the way in which their functions are exercised. Section 1 provides:

> "Best value
> 1.— (1) A council shall make arrangements for continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness.
>
> (2) For the purpose of deciding how to carry out its duty under subsection (1), a council shall consult persons appearing to the council to be representative of—
>
> (a) persons liable to pay rates in respect of hereditaments in the district of the council;
>
> (b) persons who use or are likely to use services provided by the council; and
>
> (c) persons appearing to the council to have an interest in the district of the council."

[47] The Northern Ireland Guide to Expenditure Appraisal and Evaluation ('NIGEAE') (October 2009) states in its Introduction:

> 'the primary guide for Northern Ireland Departments on the appraisal, evaluation, approval and management of policies, programmes and projects – the essential elements in the cycle of expenditure planning and service delivery.' …
>
> 'The principles in this guide must be applied to all proposals that involve spending or saving public money, including EU funds, and to all proposed changes in the use of public resources. All such proposals should be supported by evidence of suitable appraisal, approval, management and evaluation. There are no exceptions to this general requirement.

> For example, the principles apply to all expenditures regardless of whether they are large or small, capital or recurrent, and above or below delegation limits.'
>
> "Where the term "Departments" is used in this guidance, it should be understood to cover all the public bodies for which Departments have responsibility. Departments are responsible for ensuring that appropriate procedures exist in relation to all the grants, expenditures and resources for which they are accountable, including those of their Agencies, Non-Departmental Public Bodies (NDPBs) and other relevant bodies."

[48] The Court of Appeal in Loreto Grammar School's Application [2012] NICA 1 said this of the NIGEAE:

> ***"The Northern Ireland Guide to Expenditure Appraisal and Evaluation***
>
> [33] The NIGEAE was launched on 28 September 2009. Prior to that date the relevant guide was to be found in the Northern Ireland Practical Guide to the Green Book which was in line with equivalent Treasury Guidance. The basic steps of appraisal both before and after the introduction of NIGEAE sought and seek to further the overriding objective of achieving value for money. The DFP requires the principles of economic assessment to be applied with appropriate and proportionate effect to all decisions and proposals for spending public money. Step 4 of the guidance concerns identifying and describing options available with the ensuing steps examining the relevant options in terms of monetary and non-monetary costs and benefit, risks and uncertainties, affordability and so forth. The standard procedures in an EA indicate that a long list of options should be determined initially and sifted to produce a more manageable short list of options."

[49] The applicant relies, in particular, upon the following paragraphs in the NIGEAE:

"2.1.4 Appraisal and evaluation reports should begin by explaining the strategic relevance of the proposed policy, programme or project. For example, they should indicate the particular strategic aims and objectives to which it will contribute, and explain specifically how it is expected to contribute to them. Reference should be made to the relevant statutes or strategy or policy documents."

12.2.11"Terms of reference should be suitably detailed. For example, it is not generally sufficient to ask consultants broadly to 'conduct a Green Book assessment' for a proposal. This is because, although the Green Book sets out relevant general principles, the specific methodology required in individual cases can vary enormously e.g. the method required for appraising assistance to industry is very different to that required for a major capital project; and methods can also vary significantly between different types of capital project. Moreover, some of the requirements of *NIGEAE* are simply not covered in the Green Book, such as details of affordability assessments and project management arrangements. Therefore, the specific requirements for each key element of the business case (or other relevant assignment) should be spelt out in detail in a manner that is tailored to suit the case in view."

2.5.15 For substantial proposals, the relevant costs are likely to equate to the "full economic cost of providing the associated goods and services, and for these proposals, the full economic cost should be calculated, net of any expected revenues, for each option. The full cost includes direct and indirect costs, and attributable overheads. The full cost of the base case for each option (i.e. the best estimate of its costs and benefits), as built up in this way, should also equal the total of the analysis of costs into their fixed, variable, semi-variable and stepped elements. A dual cost analysis of

> this kind enables opportunity costs to be fully considered, and sensitivity analysis to be conducted later on."

[50] The Northern Ireland Procurement Policy Handbook (2011) states that the NIGEAE is one of the principal elements of public procurement. Para1.4 thereof states:

> "As regards District Councils, the Executive accepts that their different and separate framework of accountability must be recognised and, under existing legislation, compliance with this policy can only be on a voluntary basis. However, as is the case for all NI public sector bodies, District Councils are subject to UK and EC Procurement Legislation."

The Council's Sustainable Procurement Policy

[51] The Council's Sustainable Procurement Policy ("SPP") sets out the aims of the Council with regard to sustainable purchasing, namely to purchase goods in a way which minimises the impact on the environment by minimising the amount of goods purchased and by striving to ensure that the environmental impact is minimised for all purchases. It contains a set of Sustainable Procurement Policy Principles, Guidance on and Key Concepts of Environmental Procurement and sets out the policies in relation to procurement of specific products. Paragraph 4.6 deals with the policy in relation to the purchase of vehicles and the relevant part of the 'Policy Details' section states that the all vehicles purchased by the Council will conform with all environmental legislation and be as environmentally friendly as possible in line with their expected tasks. It states that the first issue to be considered is the necessity for a new vehicle and consideration should be given to whether an existing vehicle could continue to be used or whether the purchase of a second-hand vehicle may be appropriate. It then states that every effort must be made to purchase a vehicles which are the most fuel efficient and with the best CO2 rating. Finally, the policy states that the Council has committed itself to ensuring that suppliers and contractors apply environmental standards equivalent to its own.

Susceptibility of Decision to Judicial Review

[52] The Council submits that the applicant's core grievance is the Council's decision not to retender for the provision of waste recycling services when Bryson's contract came to an end thereby depriving Bryson of any commercial opportunity to retender. This decision, the Council submits, is not amenable

to judicial review because it is a private law matter in which there is an insufficient public law element over which the Court may exercise its supervisory jurisdiction. Furthermore, the Council submits that had it decided to retender for waste recycling services, that process would not have been susceptible to judicial review because it would have been subject to the Public Contract Regulations 2006 which exclude the operation of judicial review. Moreover, the Council submits that it is doubtful whether judicial review would lie in any event because the purchase by a Council of goods or services is generally covered by private law.

[53] The applicant submits that, in determining the mode of providing recycling services, the Council was exercising a discretion. Following the Padfield principles, the role of the Court in auditing the legality of the exercise of that discretion ought properly to be confined to consideration of whether the decision reached by the Council was taken in good faith following a process of proper inquiry. If the Court is so satisfied then the exercise of the discretionary power ought to be immune from judicial criticism. There is no scope for the Court to engage in a minute examination of the merits of the competing options for the provision of recycling services or to require a particular mode of provision to be adopted on judicial review. However, the impugned decision is amenable to judicial review in this case because the process of proper inquiry has not been followed; material considerations contained in guidelines are ignored or otherwise not taken into account; and EU Directives and national legislation are ignored, misunderstood and/or misapplied.

[54] I agree with the respondent that the gravamen of the complaint underpinning these proceedings is the decision of the respondent council not to retender for the provision of collection of household dry recyclable material after the applicant's contract for this service came to an end and relatedly to bring in-house the provision of this service.

[55] If the Council had put its dry recyclables collection service out to tender, the procurement process itself would have been subject to the Public Contract Regulations 2006. The 2006 Regulations are an exhaustive code in relation to such procurement and exclude the operation of judicial review [See Cookson & Clegg Ltd v Ministry of Defence [2005] EWCA Civ 811; [2006] EuLR 1029]. Furthermore the purchase by a Council of goods or services is generally a matter covered by private law [see R v Lord Chancellor, ex parte Hibbit and Saunders (a firm) [1993] COD 326 which involved a challenge to the way in which the Lord Chancellor's Department had awarded a contract for court reporting services. The Divisional Court stated:

> "Although the applicants had been treated unfairly, the decision challenged lacked a sufficient public law element and accordingly

> was not amenable to judicial review. *It was not sufficient in order to create a public law obligation simply to say that the Lord Chancellor's Department was a governmental body carrying out governmental functions and appointing persons to public office.* If a governmental body carrying out its governmental functions enters into a contract with a third party, the obligation that it owes will be under that contract unless there also exists some other element that gives rise in addition to a public law obligation. There was no justification for distinguishing between pre-contractual negotiations and the contracts themselves. A governmental body was free to negotiate contracts, and it would need something additional to the simple fact that the governmental body was negotiating the contract to impose on that authority any public law obligation in addition to any private law obligations or duties there might be." [emphasis added]

[56] In the present case there is no statutory obligation on the Council to tender or to enter any contract with an outside body. The Court of Appeal [Glidewell, Scott, Evans LJJ] in Mass Energy v Birmingham City Council [1994] Env LR 298:

> "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, ... there would be no public law element in such a dispute at all*… I accept that because (of) the statutory powers of the council not to contract by means other than those described in ... 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 ... of the Act. In my judgment, judicial review has no further place… in this dispute." [Per Glidewell LJ at p306] [emphasis added]

[57] In the same case Scott LJ said:

> "*... 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…*" [p313] [emphasis added]

[58] The decision of the Court of Appeal in Mass Energy was applied in R v Bridgend County Borough Council, ex parte Jones [Unreported, 1 October 1999 EWHC]. In that case the tendering process was carried out pursuant to mandatory statutory provisions therefore bringing the action of the public body within the ambit of judicial review principles because of the clear wording, scheme and purpose of the particular statute. As I have already pointed out there is, in the present case, no statutory requirement upon the Council to tender or to enter into a contract for its waste disposal operations.

[59] In Mercury Energy Limited v Electricity Corporation of New Zealand Limited [1994] 1 WLR 521 at 529B it was said that it was not "likely that a decision by a state enterprise to enter into or determine a commercial contract to supply goods or services will ever be the subject of judicial review in the absence of fraud, corruption or bad faith". The respondent submitted that this must apply *a fortiori* to a decision by a public authority to decide not to tender for a commercial contract.

[60] The respondent submitted that the present case was a further step removed from Mass Energy and Bridgend because the Council was merely deciding *whether* it wished to procure services. I accept that the Council is free to decide whether it wants to purchase services from the market or not and that this is, ordinarily, not an issue of public law but an issue of private law. This is a matter for the exercise of the authority's own commercial judgment. A decision by the Council not to procure services from private contractors and to provide the relevant service in-house is a matter of commercial judgment in respect of which there is an insufficient public law element for the Court to exercise any supervisory jurisdiction.

[61] As Mr Scoffield graphically put it in his skeleton argument:

> "If the Council decides to employ cleaners directly as Council staff to clean the town hall rather than employing a cleaning agency to provide this service, this cannot seriously be

> suggested to be an issue of public law; nor if the Council decides to employ administrative staff directly, rather than hiring them from an outside employment agency. In the same way, where, as here, the Council decides to use its own staff to provide a kerbside recycling service, rather than putting the provision of these services out to the market for provision by a private supplier, this is also not an issue of public law".

Conclusion

[62] There was no statutory requirement on the Council to tender or enter into a contract for the provision of the service in question. A voluntary decision to enter into a contract by tender (or not to tender) does not involve a sufficient public law element to attract the Court's supervisory jurisdiction. There is no suggestion in this case that the decision was infected by fraud, corruption or bad faith. Accordingly, the decision by the Council not to re-tender is not generally amenable to judicial review at the suit of a disappointed former contractor. The central issue in this case, that Bryson wants an opportunity to be awarded a public contract, is not amenable to judicial review. On that ground alone the applicant's claim must fail.

[63] As to the applicant's claim that the respondent was in breach of its statutory duty under the Local Government (Best Value) Act (NI) 2002 – this is dealt with separately in a later section of this judgment**.**

Delay, Prejudice and Discretion

[64] There is a dispute between the parties regarding the date of the impugned decision and whether there was a delay in bringing the application for judicial review which would render the application out of time. For some of the detailed chronology see paras18-21 above.

[65] The applicant dates the decision under challenge as having been made on 18 April 2011. However, the decision was taken on 7 February 2011 and was so acknowledged by the applicant's solicitors. The relevant correspondence prior to the initiation of proceedings (including pre-action correspondence and the correspondence putting the Council on notice of the leave hearing) was headed "*In the matter of an application for leave to apply for judicial review by Bryson Recycling in respect of a decision of Banbridge District Council taken on 7 February 2011 regarding kerbside recycling*".

[66] On 7 February 2011 the relevant decision was taken: from the conclusion of Bryson's kerbside recycling contract in March 2012 the Council

would provide the service itself and would not, as it had previously, tender for the provision of this service from a private company. After that decision was taken the applicant sought information by way of FOI request on 10 February 2011 which was provided on 22 February 2011.

[67] Approximately six weeks later, on 5 April 2011, the applicant sent a detailed pre-action letter against the decision of 7 February 2011. A full response was provided by the Council on 21 April 2011.

[68] The applicant's initial pre-action correspondence of 5 April 2011 raised the principal matters relied upon by the applicant in the present challenge. These included:

- Reliance on the Local Government (Best Value) Act 2002;
- Alleged failure to consult with Bryson and others;
- Detailed criticism of the Tribal report; and
- Alleged failure to take into account material factors including TUPE implications.

[69] Following the pre-action correspondence the respondent re-affirmed its earlier decision on 18 April 2011. No new grounds of challenge of material significance arose out of the 18 April 2011 decision. No formal pre-action letter was sent on behalf of the applicant in relation to the 18 April 2011 decision. The only pre-action correspondence complying with the High Court's Judicial Review Pre-Action Protocol was that sent in relation to the 7 February 2011 decision.

[70] Order 53, rule 4(1) provides:

> "An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application *first arose* unless the Court considers that there is good reason for extending the period within which the application shall be made." [emphasis added]

[71] In my view it is clear from the Order 53 Statement and affidavit evidence that the grounds on which the applicant relies "*first arose*" on 7 February 2011. The applicant's application for judicial review was made on 21 July 2011, some 5½ months after time began to run.

[72] The applicant had already set out its case in great detail in its pre-action correspondence of 5 April 2011 and there is no good reason why the applicant should not have acted promptly in bringing a challenge and certainly within the outer 3-month time limit. The judicial review was not in

fact lodged for more than 3 months after the reaffirmation of the earlier decision on 18 April 2011. Thus, the applicant did not even comply with the outer 3-month time limit in Order 53, rule 4 in respect of the reaffirmation of the earlier decision. The decision impugned, according to the application, was taken on 18 April 2011 but the proceedings were still only lodged on 21 July 2011. The applicant says it only learnt of this decision by letter dated 21 April 2011. However, time begins to run from the date of the decision, not when the applicant is informed of it [see LM's Application [2007] NIQB 68 para 20] and the clear terms of Order 53, rule 4(2)].

[73] The applicant's grounding affidavit did not explain the substantial delay. This was contrary to the requirement that such an affidavit should account for all periods of delay [see Wilson's Application [1989] NI 415 per Carswell; Bailie's Application [1995] NIJB 124 per Kerr J at 130a and Aitken's Application [1995] NI 49 at 56d; see also the discussion on the subject of delay at para 3.27 of *Judicial Review in Northern Ireland* by Gordon Anthony]. The FOI request, referred to in the applicant's affidavit, did not absolve the applicant from complying with the prescribed time limit led down in Order 53. The issue is when the grounds for the application first arose. The applicant was clearly in a position to make the application after 7 February 2011 or at any time after 18 April 2011. It is clear from the initial pre-action correspondence of 5 April 2011 that the applicant had sufficient material to lodge an application for judicial review at any time thereafter and did not do so.

[74] The application should have been brought promptly after 7 February 2011 but was not. It should certainly have been brought promptly after 18 April 2011 but was not. In fact, it was not even brought within 3 months of the outer time limit from that date. As to the requirement of promptness see para 3.27 of *Judicial Review in Northern Ireland* by Gordon Anthony and the cases cited therein.

[75] The Council complained that it had to plan for the end of the existing contract. It had taken a decision, with the assistance of independent expert advice from Tribal, that bringing the service in-house under the new model represented the best value for money. It wished to prepare for the new service provision, including by the purchase of new bins and vehicles and steps had to be taken imminently to procure these.

[76] The effect of the application for leave was to cause the Council to delay the purchase of the new vehicles until the last possible moment – which had a knock-on effect on how efficiently the new scheme could be brought into operation in its initial stages. The Council expressed concern "that the timing of the application was designed to seek to cause the maximum uncertainty around, and disruption to, the introduction of the new scheme (possibly in the hope that Bryson's contract would simply be extended). This forced the

Council to take steps to introduce the new scheme in the absence, as it would have preferred, of these proceedings having been disposed of first".

Conclusion on Delay

[77] The grounds on which the applicant relies first arose on 7 February 2011 and therefore the application for judicial review, which was made on 21 July 2011, was made some 5½ months after time began to run and therefore is out of time. Time begins to run from the date of the decision, not from the date on which the applicant is informed of it. The application for judicial review was not lodged for more than three months after the 18 April decision and so, even on the applicant's best case, it did not comply with the outer 3 month time limit. No satisfactory explanation has been proffered for the delay.

[78] Accordingly, the Court concludes that the application is out of time and no good reason exists for extending time. As to the effects of delay see also para76 of Nash v Barnett LBC [2013] EWHC 1067. The new scheme has been running successfully since its implementation which the applicant had unsuccessfully attempted to block by seeking interim relief. Ending the scheme and using the new vehicles for other duties would, as the Council pointed out, give rise to wasted expenditure, considerable inconvenience, possible redundancies and major confusion and inconvenience for the Council's inhabitants.

Local Government (Best Value) Act (NI) 2002 / Consultation

[79] The applicant submits that section 1(2) of the 2002 Act (set out at para46 above) imposes a positive duty on the Council to consult with interested parties and that the Council failed to engage in an appropriate consultation process before taking the impugned decision, thereby failing to comply with the substantive and procedural requirements of section 1. As a result, relevant material factors were overlooked by the Council when making its decision. The applicant submits that the lack of consultation was both procedurally improper and gave rise to a substantively flawed decision in breach of the statutory obligation.

[80] The Council submits there was no obligation to consult in making its decision and nor had the applicant any legitimate expectation that it would do so in the absence of any promise or practice of consultation in relation to this type of decision. The applicant has no rights in issue, the only rights it had being of a private law nature under the contract for recycling services which was due to terminate on 31 March 2012. Thereafter, the applicant had no right or expectation of being able to provide any service to the Council or

of being able to tender to provide such a service in the absence of the Council deciding that it was going to tender for such a service.

[81] The Council submits that section 1(2) of the 2002 Act requires the Council to consult generally on a "one-off basis" in relation to establishing best value arrangements. The duty in section 1 is a broad 'target duty' which is not enforceable by the Court and does not impose an obligation in relation to individual procurement decisions. Even if this is incorrect, the impugned decision is designed to improve the exercise of the Council's functions and does so. The allegation that section 1(1) of the 2002 Act has been breached is merely a way of saying that the applicant disagrees with the Council's conclusion.

[82] Moreover, even if all of that were wrong, the Council submits that section 1(2) requires only consultation with those who are properly representative of rate-payers, service-users and those with an interest in the district. This does not include organisations such as the applicant pursuing their own commercial interests. The applicant submits that it pays rates in the district because it has commercial premises therein and therefore is entitled to be consulted on that basis.

[83] Section 1 of the 2002 Act is analogous to the "Best Value" duly enshrined in Section 3(2) of the Local Government Act 1999 which provides:

> "(1) A best value authority must make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness.
>
> (2) For the purpose of deciding how to fulfil the duty arising under subsection (1) an authority must consult-
>
> (a) representatives of persons liable to pay any tax, precept or levy to or in respect of the authority;
> (b) representatives of persons liable to pay non-domestic rates in respect of any area within which the authority carries out functions;
> (c) representatives of persons who use or are likely to use services provided by the authority, and
> (d) representatives of persons appearing to the authority to have an interest in any

> area within which the authority carries out functions."

[84] In Nash v Barnett LBC [2013] EWHC 1067 Underhill LJ examined the contours of the best value duty in the 1999 Act particularly at paras 61-77. At para 67 he examined the background to the 1999 Act and noted that it was introduced to replace the previous competitive tendering regime with a more flexible model:

> "It is clear from the White Paper (see in particular chapters 1 and 2) that, although "best value" is a very general concept, the principal means by which it was envisaged it would be achieved was through "innovative partnership developments" with organisations in the private and voluntary sectors – in short, by outsourcing.."

[85] The Court then analysed the meaning of section 3(1) against that statutory purpose at para 69:

> "I start with sub-section (1), which establishes the substantive best value duty. I would analyse it as follows:
>
> (1) The core subject-matter is "the way in which" the authority's functions are exercised. That is very general language. It could in a different context cover almost any choice about anything that the authority does. But in this context it seems to me clear that it connotes high-level choices about how, as a matter of principle and approach, an authority goes about performing its functions. I do not say that the choice of whether, or to what extent, to outsource is the only such choice; but in the light of the legislative background outlined above the "ways" in which functions can be performed must include whether they are performed directly by the authority itself or in partnership with others: indeed that would seem to be a paradigm of the kinds of choices with which section 3(1) is concerned.
>
> (2) The duty is aimed at securing "improvements" in the way in which the

> authority's functions are exercised. That inevitably means change, where the authority judges that change would be for the better having regard to the specified criteria.
>
> (3) The actual duty is not formulated as a duty to secure improvements simpliciter but as a duty to "make arrangements" to do so. I am not sure why this formula was adopted. I do not think that the draftsman was concerned with administrative "arrangements". It may have been thought that to impose a duty simply "to secure improvements" would expose authorities to legal challenges from those who contended that particular decisions were for the worse, or that authorities were wrong in failing to take particular steps which it was asserted would make things better: the reference to "making arrangements" would make it clear that the duty was concerned with intentions rather than outcome. It may also be that the draftsman wanted to emphasise the need to build the fulfilment of the best value duty into authorities' plans and procedures. Or perhaps it is just circumlocution. But, whatever the explanation, the important point for present purposes is what the arrangements are aimed at, namely securing improvements in the way in which authorities perform their functions. It follows that one of the effects of the best value duty is to require local authorities to outsource - or, if you prefer, to make arrangements to outsource - the performance of particular functions where it considers, having regard to the specified criteria, that that would constitute an improvement."

[86] The applicant invited the Court to note that the contractual arrangements operated with Banbridge District Council was the type of outsourcing arrangement envisaged in the 1999 and 2002 Acts.

[87] At para 70 of the judgment the Court notes that the Council in that case advanced the submission that the duty to consult in section 3(2) was limited to consultation about the *"purpose of deciding about the arrangements"* and not about the substantive issue of the arrangements or the improvements that

might be wrought. The learned judge rejected the submission and held at para 73:

> "In the first place I do not think that the use of the formulation "for the purpose of deciding how to fulfil" as opposed to, say, "about how to fulfil" will bear the weight that Ms Carss-Frisk puts on it. Of course it is important to pay close attention to the statutory language, but I do not see how you can consult "for the purpose of' making a decision without inviting views on the substance of the decision itself. And even if that is theoretically possible, I do not see how it is possible to consult for the purpose of deciding whether to undertake a major outsourcing programme without inviting views on the proposal to undertake that programme. Consultation only about "priorities", or about other general matters that might "assist" the authority in deciding whether to outsource, is not the same thing and is not what is required.
>
> [74] That seems to me not only the natural reading of the statutory language but what I would expect Parliament to have intended. It is hard to see why authorities should be entitled to fulfil their duty to consult in a way which avoided seeking views on the central issues raised by the substantive duty. Ms Carss-Frisk was of course obliged to put her case in the way that she did because it is clear that in the present case the Council did not make any attempt to consult on the specific question of whether the functions and services covered by the NSCSO and DRS contracts should be outsourced."

[88] On this reasoning, the applicant submits, a "best value" consultation must engage in examination of the central issues raised in the substantive duty. In the instant case it is said this must involve a fully engaged consultation on the relative cost/benefits of Option 6 v Option 4. The Council, Mr Beattie submitted, did not engage in the type of consultation required by the "best value" duty. It did not consider the 2002 Act in the context of consultation at all.

[89] At para 75 the Judge addressed the contention that this interpretation of the duty would place public authorities under an unreasonable burden to consult on every issue:

> "(1) I fully accept that it cannot have been the statutory intention that every time that an authority makes a particular operational decision, by way of outsourcing or otherwise, it is required by section 3 to consult about that decision simply because that could be said to be part of "the way in which" it performs its functions. As I have said above, in this context that phrase connotes high-level issues concerning the approach to the performance of an authority's functions, and it is about those and not about particular implementation that consultation is required.
>
> (2) ... I repeat that that does not mean that it should have consulted on all the particular decisions, great or small, that fell to be taken by way of implementation: ...
>
> (3) ...
>
> (4) ..."

[90] The applicant submitted that the decision in this case – to end an outsourcing waste management arrangement and bring it "in-house" – engaged the best value duty. It consequently engaged the ancillary consultation duty. The applicant submitted that there are patent defects in that consultation process. In Nash the Court found that Barnet Council had not consulted at all on the issues under consideration. Underhill LJ indicated at para 76 that, but for a delay point, he would have held that the Council had not fulfilled its statutory obligations pursuant to section 3(2).

[91] The applicant submits that this decision indicates that a Court can, quite properly, quash a decision of a local council where it has not observed the "best value" duty. The applicant further submitted that the impugned decision ran counter to the legislative purpose of the 2002 Act in general terms and also, on a proper economic appraisal, would fail to deliver greater economy, efficiency and effectiveness as required by section 1.

[92] Mr Scoffield submitted that Section 1(1) of the 2002 Act merely imposed a general, target duty which is not enforceable by the Court. In support of this proposition the Court was referred to the decision of

Nicholson LJ in Re Family Planning Association's Application [2005] NI 188. However, whether this submission is correct or not – and I note that in Nash the court was, in principle, prepared to quash a decision of a local authority for failure to comply with the best value consultation duty – it is clear to me what Section 1(1) does not do. It does not impose an obligation to consult in relation to a particular operational decision. Furthermore, it is also clear that the purpose of the detailed economic appraisal by Tribal, on behalf of the respondent, was for the purpose of identifying which option would deliver greater economy, efficiency and effectiveness.

[93] I am quite satisfied that the decision to end the contract with Bryson did not run counter to the purpose of the 2002 Act. The Council's impugned decision is plainly designed to improve the exercise of its functions and, on the evidence, plainly did so. The benefits of the new system have been deposed to by Mr Lindsay in his affidavit. As previously pointed out there are significant benefits and efficiencies to the new system eg (i) waste is now collected from houses each week in one pass rather than two; (ii) the Council no longer has to pay substantial sums to an outside contractor, namely Bryson, to provide weekly collection services when its own staff can provide this service at the same time as providing the black/brown bin service they were providing in any event; (iii) the ability to use Council employees' time fully after the system of "task and finish" came to an end (see para6 above). There is considerable force in the respondent's point that the allegation that the Council had breached section 1(1) of the Act is merely another way of saying that the applicant disagrees with the Council's conclusion.

[94] The respondent submitted that the applicant's reliance on section 1(2) was also misplaced since it provides:

> "For the purpose of deciding how to carry out its duty under subsection (1), a council shall consult persons appearing to the council to be representative of —
>
> (a) persons liable to pay rates in respect of hereditaments in the district of the council;
>
> (b) persons who use or are likely to use services provided by the council; and
>
> (c) persons appearing to the council to have an interest in the district of the council."

[95] I agree with the respondent that this provision requires the Council to consult generally in relation to establishing best value "*arrangements*". It

expressly relates to consultation "for the purpose of deciding how to carry out its duty under subsection (1)". That is to say its duty to make arrangements for continuous improvements in the way in which its functions are exercised, having regard to economy, efficiency and effectiveness. Section 1(2) does not impose an obligation of consultation any time the Council decides to exercise any of its statutory functions or change the way in which it does so. It certainly does not impose an obligation to consult with the market any time the Council wishes to procure something or is deciding that it does not wish to do so.

[96] The choice of who "appear(s)... to the Council" to be representative of the three identified groups is, subject to rationality, a matter for the Council. The section requires only consultation with those who are properly representative of rate-payers, service-users and those with an interest in the district – not organisations such as Bryson pursuing their own commercial interests.

[97] In my view section 1 of the 2002 Act does not require consultation in relation to operational decisions about how a local authority delivers certain functions. The duty of consultation relates to the "high-level" best value arrangements themselves. Nash recognises that the analogous English provision is drafted in "very general language" but that it is aimed at "high level choices about how, as a matter of principle and approach, an authority goes about performing its functions" (see para [69](1) of the judgment). The Court recognised that the best value consultation obligation will only be engaged in relation to very high level choices about an authority's service provision and not in relation to more detailed operational decisions at the other end of the scale – see paras 34 and 75 of Nash.

[98] I agree with the respondent that it is hardly surprising that in Nash the judge found that the decision fell at the strategic end of the scale requiring consultation. Mr Scoffield drew my attention to the following differences between Nash and the present case, including (i) BDC is not proposing to outsource functions. The concern about private sector provision of Council services, and their lack of public service ethos, does not therefore arise in this case. Indeed, the position is quite the contrary (see para 2 of Nash). (ii) The collection of dry recyclables does not relate to "a high proportion of [BDC's] functions and services", nor are those services "wide-ranging", nor is this an issue of "major outsourcing" (or the contrary) (see paras1-2 of Nash); and (iii) BDC's decision has not been "controversial locally", save for opposition from Bryson, nor has it attracted national publicity (see para2 of Nash).

[99] The respondent was correct to submit that the decision in Nash was plainly highly strategic. The impugned decision in that case radically transformed how the Council delivered virtually all of its functions. It changed it from a body which provided services to little more than a

management board, in circumstances where the vast majority of its customer service functions, back-office functions and environment management, regulatory and design functions were to be performed by private companies.

[100] By contrast, the impugned decision in the present case related to how the Council undertook a small but important part of one its functions, namely waste collection. At the time of the Council's decision, household dry recyclable waste collected from the kerbside accounted for just 7.7% of the total municipal waste managed by the Council. This operational decision was concerned with a small part of one of the Council's many functions. There was no significant change in strategy as Bryson's contract was ending in March 2012 and the Council already directly provided the rest of its waste collection services in-house (commercial collections, black and brown bin collections and the running of recycling centres). Thus there was no high level major strategic change on the part of how the Council delivered this aspect of its services.

[101] In light of this, I accept the respondent's position that section 1(2) of the 2002 Act did not require consultation.

[102] In any event I accept that those whom the applicant claims should have been consulted (including Bryson) cannot properly be viewed as "representative" of any of the interest groups referred to in the section. Underhill LJ suggests this element of the statutory provisions should be construed strictly: see para [75](4). Furthermore, there was in fact sufficient consultation and the applicant has not identified any issue that it did not raise which might have altered the outcome of the evaluation.

[103] Underhill LJ, at para[75](2)-(3), makes clear that representative consultees are simply to be "given the opportunity to express views or concerns" in a high level way. Bryson were given the opportunity to express its views and concerns. Bryson had every opportunity to make whatever points it wished and did so on its own behalf and on behalf of a range of reprocessors.

Remaining Grounds of Challenge

[104] Ground 3(d) of the Order 53 Statement alleged, *inter alia,* irrationality in failing to comply with the NIGEAE in the respects set out at para3(d)(i)-(vi) of the Order 53 Statement. Ground 3(e) alleged irrationality on the part of the Council in relying upon the economic appraisal produced by the Tribal group which allegedly did not comply with NIGEAE. The detailed particulars of this contention are contained at 3(e)(i)-(xii). Sub-para (xii) specifically alleged a failure to conduct any analysis of the legal and practical consequences of the framework directive including a failure to consider Art 11 dealing with separate collection. Ground 3(f) alleged irrationality in failing to consider and

apply the Council's own sustainable procurement policy. Ground 3(g) alleged a failure to take into account the views of, *inter alia,* Bryson Recycling and others. Ground 3(h) alleged irrationality in failing to take into account relevant information the particulars whereof are set out at sub-para(h)(i)-(vii). Sub-para (h)(vii) alleged as a particular of irrationality that the Council failed to take into considering or give appropriate weight to the impact of the framework directive upon a "co-mingled" waste strategy including an alleged failure to consider the impact of Art 11(2) of the Waste Directive. Ground 3(i)(i)-(ii) alleged irrationality in giving inappropriate weight to the Tribal Report and inappropriate weight to a report prepared by council officers. Ground 3(j) alleged that the Council failed to consider or give appropriate weight as to whether Bryson staff would transfer to the Council under TUPE and finally Ground 3(k) alleged that the Council demonstrated bias and pre-determination in particular for the reasons set out at sub-para (k)(i)-(v).

[105] The applicant acknowledged that the role of the Court ought properly to be confined to consideration of whether the Council's decision was taken in good faith following a process of proper enquiry. The applicant expressly and correctly accepted that there was no scope for the Court to engage in a minute examination of the merits of the competing options for the provision of recycling services or to require a particular mode of provision to be adopted on judicial review. The applicant however submitted that the decision is amenable to judicial review because a process of proper enquiry had not been followed. Material considerations contained in guidelines were not taken into account and EU Directives and national legislation ignored or misapplied.

[106] I have already held that the impugned decision was not reviewable, that the 2002 Act was not breached and that the judicial review was irredeemably out of time. Accordingly I can deal with the remaining contentions rather more succinctly than might otherwise have been required.

[107] Notwithstanding the applicant's acknowledgement about the role of the Court referred to above, the applicant presented a very detailed critique of the Tribal Report based on its own expert evidence from EUNOMIA. Furthermore, the applicant presented a very elaborate argument around the late amendments concerning the EU Directives and transposing legislation as summarised at paras 3(e)(xii) and 3(h)(vii). I hope I do counsel and the parties no injustice if I deal with the remaining arguments including those based on the EU Directives rather more summarily than their detailed written and oral submissions might otherwise demand. There are a number of reasons for adopting this approach in particular my conclusions that the impugned decision is not reviewable, that the 2002 Act was not breached and that the application is irredeemably out of time.

[108] As to Ground 3(d) relating to the commissioning of the Tribal Report, I accept that the Council's decision to commission Tribal cannot be characterised as irrational. The organisation was already contracted by the Council, in accordance with its financial rules, to provide three other economic appraisals and when these were procured, it was expressly noted that there was the option of the Council commissioning Tribal to prepare a fourth appraisal.

[109] As to Ground 3(e) relating to reliance by the Council on the Tribal Report, this ground asserts that the Council acted irrationally by relying on the Tribal Report which, it was said, did not comply with the relevant guidance summarised at 3(e)(i)-(xii). This challenge is based principally on alleged failures on the part of Tribal to follow the NIGEAE and 'the Green Book'. Irrespective of whether there were any material failures to comply with the relevant guidance (which the respondent strongly disputes) and whether the Council was obliged to comply with such guidance (which is also disputed) I am satisfied that the alleged failure to comply with the relevant guidance does not, in the circumstances of this case, represent a breach of any legal obligation entitling the applicant to relief. The Council has not been shown to have acted irrationality in taking this expert report into account. Indeed, having commissioned the report, presumably at the ratepayers expense, it might have been thought strange if it were to disregard it. The report has not been shown to be so flawed as to represent an irrelevant consideration which could not lawfully have been taken into account by the Council. I accept the respondent's submission that the applicant's evidence does not surpass this high threshold.

[110] The applicant expressly acknowledged that there was no scope for the Court to engage in a minute examination of the merits of the competing options for the provision of recycling services or to require a particular mode of provision to be adopted on judicial review. Despite this disavowal the applicant's criticisms of the Tribal report do strongly appear to have the character of an impermissible attempt to unpick the merits of the decision. This is not an appropriate exercise for the Court in the exercise of its supervisory jurisdiction on judicial review especially where the impugned decision represents the exercise of commercial judgment on the part of the Council and the Tribal report provided a detailed expert analysis which the High Court is neither entitled nor equipped to review in the absence of clear irrationality.

[111] The critique of the Tribal report presented by the applicant is *ex post facto* and contentious. It is strongly disputed by the respondent and by Tribal which has furnished a detailed rebuttal. The applicant's suggestion that Tribal has used a wrong assumption originating from the Council's officers is also emphatically disputed. The report provided to Bryson by Eunomia has been severely criticised in the affidavit evidence of the respondent – see third

affidavit of Mr Lindsay at paras 39-44. In these circumstances I accept that the Court cannot proceed on the basis that the criticisms contained in Mr Randall's various affidavits are correct.

Role of Expert Evidence in Judicial Review

[112] Expert evidence is a statement of opinion from a person who is qualified to give such an opinion. In principle such evidence is admissible in judicial review proceedings subject to compliance with any relevant procedural rules governing its admission. The courts are however cautious about admitting expert evidence in claims for judicial review. Because the focus of claims for judicial review is generally on the lawfulness of public bodies' decisions and not on the merits of those decisions, the courts have warned against the inappropriate use of expert evidence as a means of attacking the underlying merits of the decision under challenge – see CF v Secretary of State for the Home Department [2004] EWHC 111 (Fam), [2004] 1 FCR 577, paras 217-219 per Munby J. Nevertheless the courts may be prepared to admit expert evidence in certain situations. Situations where such evidence may be admissible include:

(i) Where expert evidence forms part of the materials that were before a decision-maker whose decision is under challenge, there is usually no difficulty in admitting it: the court will normally wish to see the material that was before the decision-maker;

(ii) Expert evidence may be necessary to explain a complex process in a technical field, where the court needs to understand that process in order to resolve the issues – (see R (Lynch) v General Dental Council [2003] EWHC 2987 (Admin), [2004] 1 All ER 1159, paras 22-25 per Collins);

(iii) In cases involving alleged breaches of Convention rights, such evidence may be necessary to explain the feasibility of suggested less intrusive alternatives to the measure under challenge (eg R (Seahawk Marine Foods Ltd) v Southampton Port Health Authority [2002] EHRLR 15, para 34 per Buxton LJ, stating that 'while in some cases it will be possible for a court to reach a conclusion on an issue of proportionality on the basis of common sense and its own understanding of the process of government and administration, I doubt whether it will often be wise for a court to undertake that task in a case involving technical or professional decision-making without the benefit of evidence as to normal practice and the practicability of the suggested alternatives.'

(iv) Expert evidence may be relevant to the determination of a precedent fact – (eg the adduction of expert evidence in cases where the court is required to determine the age of a young person).

[See para 27.32 *et seq* of *Judicial Review Principles and Procedure* by Auburn, Moffett and Shorland; see also A Lidbetter *Expert Evidence in Judicial Review* [2004] 1 FCR 194; see also the cases referred to at Fordham 6th Ed. at 17.1.6 dealing with expert evidence].

[113] A more recent exposition of the law in this area is contained in the judgment of Coulson J in BY Development Limited v Covent Garden Market Authority [2012] EWHC 2546 (TCC). The Court reaffirmed the position that expert evidence would not generally be admissible or relevant in judicial review or procurement challenges for several reasons: (i) partly because the court was carrying out a limited review of the decision reached by the relevant public body and was not substituting its own view for that previously reached; (ii) partly because the public body was likely either to be made up of experts or would have taken expert evidence itself in reaching the decision; and (iii) partly because such evidence might usurp the court's function.

[114] The respondent submitted that insofar as the evidence relied upon by the applicants could be said to be expert evidence it should be given little or no weight for these reasons. The Council's officers had considerable waste management expertise and engaged professional consultancy expertise to assist it in weighing the options.

[115] Courts need to be astute to the risk in judicial review of challengers introducing expert evidence as a disguised means of attempting to unpick the merits of a decision with which it disagrees. It is not the function of the judicial review court in the exercise of its supervisory jurisdiction to seek to resolve a dispute created by *ex post facto* expert evidence presented by a challenger.

[116] It has not in any event been demonstrated that the high threshold has been crossed in relation to the applicants complaint that it was irrational for the Council to rely on the Tribal report. The respondent submitted with some justification that it is also significant that the Chartered Institute of Public Finance and Accountancy (CIPFA) – the independent expert organisation responsible for the education, training and regulation of accountants undertaking economic appraisals – has not endorsed the Bryson/Eunomia critique of the Tribal report in any significant respect:

> "We conclude the Council has a high degree of compliance with good practice. In our view

> where the Council did not fully comply, there was *no material impact on the appraisal* undertaken and their inclusion and compliance would not have affected the outcome of the appraisal." (paragraph 5 of the CIPFA report)
>
> "By consolidating our findings for each step in the good practice process, we conclude that the Council had a *high degree of compliance with DFP guidance.*
>
> There were aspects of the recommended process in which the Council was not fully compliant, but we consider these to be *minor* and in themselves *would not have resulted in a different conclusion to the Council's preferred option."* (paras38-39 of the CIPFA report)

[117] The Council also placed reliance on the fact that both the Local Government Auditor and the Department of Finance and Personnel have also considered the issues arising in this case on foot of a complaint made to the auditor by the applicant and in the course of the Department's consideration of the Council's loan sanction application. In each case, neither body raised any concerns.

Scarva Road – the applicant's submissions

[118] After the impugned decision came into effect on 1 April 2012, the Council began to collect waste in the split body RCV and deliver it to its civic amenity site at Scarva Road, Banbridge for 'bulking up'. This part of the process is not identified in the Tribal Report. Scarva Road is subject to a Waste Management Licence ('WML') which sets limits on the quantities of waste that can be accepted and constraints on the operation of the site. The WML pertaining at the time of the impugned decision did not permit Scarva Road to deal with the quantities of materials set out in the Tribal Report. An application for an appropriate modification to the WML was submitted by the Council in January 2011 and granted in January 2012.

[119] The applicant submits that no consideration was given in the decision-making process to whether Scarva Road had the appropriate planning consent and WML to operate as a waste transfer station and handle the quantities of waste envisaged. Accordingly, no consideration was given to: the costs associated with obtaining the appropriate WML and planning consents; the risk that the WML and planning consent might not be granted; the requirement to meet the costs of alternative waste transfer facilities; and the operational costs associated with the facility.

[120] The applicant alleges also that the Council is in on-going breach of the WML, in particular in relation to the hours of operation of Scarva Road.

[121] Scarva Road has the benefit of planning permission which constrains the activities on the site. The applicant submits that, in breach of para 2.5.15 of the NIGEAE, the Tribal report failed to consider whether the Council would require further planning permission at the site to increase the scope for waste receipt or whether it needed a needed to acquire new premises and accordingly, that these factors were not taken into consideration by the Council. Additionally, the applicant submits that the use of Scarva Road has intensified to accommodate the anticipated volumes of waste and therefore a 'change of use' planning consent is required.

Scarva Road – the Council's submissions

[122] The Council submits that the Scarva Road points are without merit since the evidence plainly shows that these issues were considered at the time of the Council's relevant decision-making *per* para 129 of Mr Lindsay's third affidavit, as follows:

> "(a) The Council holds a current, valid waste management licence for the Scarva Road recycling centre. Officers considered that the proposed scheme could be provided within the terms of the existing licence with only a small modification in terms of tonnages required, which the site could clearly accommodate. The Council liaised with the NIEA about the proposed use of the site in the context of the new kerbside recycling service and this culminated in an application to NIEA for an amendment to its licence. This amendment was granted by NIEA, in its full knowledge of the facts around the planned use of the site. The Council therefore took all reasonable steps to ensure that this aspect of the proposed scheme was properly taken into consideration in the decision to proceed with its implementation as the preferred model. Any dispute at this stage about the validity of the waste management licence (and, indeed, whatever the outcome of that dispute) does not invalidate the steps taken by the Council at the relevant time to assure itself that there was no licensing issue in relation to the adoption of the

new scheme – nor was any issue raised by the regulator when it was consulted. It plainly cannot be said the view taken by the Council at the time of its decision that there was no significant licensing issue was irrational.

(b) The Council holds full planning consent for the Scarva Road recycling centre. Again, officers considered that the proposed scheme could be provided within the terms of the existing permission. It not only reviewed the consent internally in advance of the decision challenged in these proceedings but also relied upon the NIEA to advise if there was deemed to be any restriction that would prevent the amendment of the waste management licence. Again, the Council behaved in a reasonable and rational manner to ensure that this aspect of the proposed scheme was properly taken into consideration in the decision to adopt the new service model. Again, any dispute at this stage (and, indeed, whatever the outcome of that dispute) does not invalidate the steps taken by the Council at the relevant time to assure itself that there was no planning issue in relation to the adoption of the new scheme. Again, it plainly cannot be said the view taken by the Council at that time was irrational.

(c) The Waste Management Licence for the Scarva Road Recycling Centre was amended by the NIEA to reflect the on-site waste management activities associated with the new in-house kerbside recycling collection service. The NIEA was fully advised of the nature of the activities on site that would be associated with the new scheme.

(d) Even if, in the worst case scenario for the Council, amendments to the Scarva Road recycling centre approvals are subsequently determined to be required to accommodate the bulking up of kerbside collected recyclable materials (or indeed, which is extremely unlikely, if the bulking up had to be transferred to another site, temporarily or permanently),

> any additional cost involved would be much less than the cost differential between the chosen model and other options in any event.
>
> In view of the above, there was nothing irrational in the Tribal economic appraisal declining to consider additional costs for amendments to the Scarva Road's site licence or planning status. These are not costs which the Council has incurred in starting up the new system or envisages incurring in the future."

[123] The Council submits that it is clear from that evidence that it considered the issues of the WML and planning permission at the time and was satisfied that these were adequate (with minor modification in the case of the WML) to accommodate the new system. The Northern Ireland Environment Agency ('NIEA') was consulted about the new system and raised no concerns, later granting a modification of the WML in respect of the new scheme. It is common case that NIEA considers whether there is adequate planning permission for activities covered by a WML so the grant of the modification by NIEA without any concern being raised about the adequacy of Scarva Road planning permission for the new scheme was another basis for concluding that no planning issue arose. Mr Lindsay, as an officer with considerable waste licensing and enforcement experience, was particularly well placed to consider these issues.

[124] Scarva Road is the largest of such Council recycling centres across Northern Ireland (and more than three times larger than Bryson's own waste management site located in the district). It has been acknowledged across the sector as a model of best practice in terms of design and operation, including by two Northern Ireland Environment Ministers. It has adequate capacity to deal with the operation of the new scheme. Moreover, the site was inspected by NIEA officials in May 2012, after the new system had come into operation, and no adverse comments or feedback was provided, let along any suggestion of any breach of the Council's license or need for enforcement action.

[125] The present situation is that both the NIEA and Planning Service wrote to the Council in summer 2012 (allegedly prompted by complaints by Bryson and the threat of legal proceedings against them if they did nothing) to raise issues about the operation of the new scheme at Scarva Road. Council officials responded to and met with both the NIEA and Planning Service and no further enforcement action is anticipated. The NIEA has since inspected again and made no significant adverse comments or observations.

[126] In light of the above I accept the Council's submission that it was not irrational for the Council to take the view that there were no significant issues

with either its WML or planning permission in relation to the introduction of the new system.

The revised Waste Framework Directive and the Waste Regulations (Northern Ireland) 2011

[127] As previously pointed out the applicant presented a very elaborate argument around the EU Directives and transposing legislation as set out at Grounds 3(3)(xii) and 3(h)(vii) set out at para3 above.

[128] Para3(e)(xii) of the Order 53 Statement asserts that the Tribal Report failed to conduct any analysis of the legal and practical consequences of the rWFD, including a failure to consider Article 11. The applicant also asserts at paragraph 3(h)(vii) of the Order 53 Statement that the Council failed to take into consideration or give appropriate weight to the impact of the rWFD on a 'co-mingled' waste strategy, including inter alia a failure to consider the impact of Article 11(2), which the applicant asserts was relevant information.

[129] The applicant submits that, by virtue of Article 25 of the 1997 Order, the Council is required to make arrangements for the management of waste and therefore its activities are constrained by the rWFD. Article 1 of the rWFD makes it clear that the Directive is a relevant material consideration which must be adhered to when considering how domestic recycling should be delivered. Accordingly, in the submission of the applicant, the Council should have considered and applied the requirements of the rWFD and the 2011 Regulations when making the impugned decision. The Council submits that the rWFD does not have direct effect on an authority such as the Council and in any event that Article 11 and regulation 18 of the 2011 Regulations, which transposes it, have no effect until 1 January 2015.

[130] The Council did consider whether it would be possible to reuse any of the waste collected from households. In focusing solely on the quantity of waste collected for recycling (which is a 'recovery operation' as defined by Annex II of the rWFD) rather than the quantities of waste actually recycled, the Council it was submitted failed to prioritise recycling as it is required to do under the rWFD, the 2011 Regulations, and the Northern Ireland Waste Management Strategy.

[131] The Council submits that the applicant's reliance upon the rWFD is misplaced because the conditions for direct effect are not met. In particular, it submits that (i) the key obligation upon which Bryson relies has not yet reached its date for implementation; (ii) in any event, the obligations in the Directive are not unconditional nor sufficiently precise to be directly effective

and therefore cannot be relied upon in these proceedings; and (iii) the rWFD is not prescriptive about requiring kerbside sort which, in the submission of the Council, is assumed by the applicant. In any event, the Council submits that, even if the rWFD applied fully to it at the time of the decision, the decision would still have been lawful in the circumstances of the case.

[132] Additionally, the Council submits that while there are a number of obligations which applied from the transposition date of 12th December 2010, these provisions (in common with many others in the Directive) do not have direct effect and cannot be relied upon directly against a public authority in national courts. A 'Framework' Directive is only ever intended to make very general provision, to be supplemented in due course by daughter Directives.

[133] The Council submits that Article 10 is clearly directed towards member states at national level (see Article 10(1)). It is inherently lacking in specificity given that it refers only to 'the necessary measures' to ensure that waste undergoes 'recovery operations'. 'Necessary measures' are not defined and the phrase plainly requires the exercise of judgment as to what is necessary. Similarly 'recovery operations' are not defined but include a wide variety of operations, given the broad definition of 'recovery' in Article 3(15). 'Recovery' is also to be contrasted with 'recycling' in the waste hierarchy set out in Article 4(1). In short, the Council submits that Article 10(1) is aspirational and in the nature of an over-arching target duty and plainly can have no direct effect.

[134] Similarly, in the Council's submission, Article 10(2) cannot have any direct effect, partly because its application is entirely dependent on the direct effect and application of Article 10(1). The obligation in Article 10(2) arises only "where necessary to comply with paragraph 1". The obligation is therefore conditional; and the condition is, for the reasons given above, extremely imprecise. In addition, Article 10(2) only applies where it is also "necessary… to facilitate or improve recovery". Again, this is an open-textured question of judgment.

[135] Even if those difficulties are surmounted, the obligation to collect waste separately is itself both unclear and qualified. It is unclear because 'waste' is given a broad meaning in Article 3(1), namely 'any substance or object which the holder discards or intends or is required to discard'. Given this broad definition, it is unclear what Article 10(2) requires and there is nothing to suggest that the co-mingling of dry recyclable materials is contrary to it. Even if that additional difficulty is surmounted, the obligation is also qualified, since it arises only 'if technically, environmentally and economically practicable'. Again, the notion of practicality, in each of these fields, is open-textured and requires a judgment to be made.

[136] The Council makes similar points in relation to Article 11(1), which requires member states to 'take measures to promote high quality recycling' – both the 'measures' and 'quality' standards being completely unspecified – but, again, only conditional on this being technically, environmentally and economically practicable "and appropriate" to meet further unspecified standards.

[137] Article 11(2) imposes duties at national level to take 'the necessary measures designed to achieve' certain environmental targets by 2020. By virtue of Article 11(3), the Commission will establish detailed rules for this purpose (which might include transition periods). The Council submits that it is utterly clear that Article 11(2) is incapable of having direct effect and imposing enforceable obligations on any public authority in Northern Ireland at this time.

[138] I accept the Council's submission that Articles 10 and 11 do not have sufficient precision or un-conditionality to be relied upon directly in the present proceedings. No claim of breach of the transposing legislation has been made nor has it been suggested that the Directive has been inadequately transposed. Moreover, the relevant regulation in relation to the collection of waste (regulation 18) does not come into force until 1 January 2015 and the other regulation on which the applicant appears to rely (although not pleaded), regulation 17, did not come into operation until 8 October 2011 and had no effect at the time of the impugned decision.

Co-mingled collection

[139] Once in force, the obligation in Article 11(1) to institute separate collection is subject to Article 10(2) which means that the obligation will arise only where necessary to comply with Article 10(1) and to facilitate or improve recovery and only if separate collection is technically, environmentally and economically practicable. The construction of article 10(2), to which Article 11(1) is subject, also makes clear that the obligation only arises if it is technically, environmentally and economical practicable. There is no presumption in favour of separate collection unless it is technically, environmentally or economically impracticable.

[140] The applicant contends that co-mingling is not permitted after 2015 but I agree that this is, as a matter of law, incorrect. The submission is also contrary to the EU Commission's guidance on the matter. I accept the Councils submission that in this case where the evidence available to the council pointed clearly in one direction and the adoption of a box scheme would have given rise to worse results environmentally at an increased cost, it is plain that it would be open to the Council, on the same facts, even in 2015, to reach the same conclusion as it did in the impugned decision. Even if the Council was obliged to introduce kerbside sort in 2015, the savings and

benefits to be delivered by the new scheme in the meantime would still clearly justify the decision to introduce it.

[141] The applicant contends that the Council did not have sufficient regard to the precise amount of collected recyclables which would be submitted to reprocessors. However, as the respondent has pointed out the new system has in fact already delivered a major improvement in collection rates and it was always clear to the Council that a much greater amount of recyclables would be provided to reprocessors for recycling. The respondent is surely right that it would be commercially nonsensical for the Council's MRF provider (or indeed the MRF industry generally) to pay significant amounts for collected co-mingled recyclables if there was a significant degree of contamination and wastage. The Council is confident that the co-mingled system would (and does) provide high quality materials because its 'contamination' rate for collected materials is low and accordingly, the MRF contract was entered into on the basis of a 0.5-1.5% rate of diversion to landfill.

[142] I accept that there is no obligation in the rWFD (even assuming the relevant provisions were directly effective) requiring an authority to address a decision of this nature taking into account only a particular type of figures. The Commission Decision relied upon by the applicant relates only to the assessment of national targets under Article 11(2) of the Directive – but even then "where… the output of a sorting plant is sent to recycling… processes without significant losses [which is the present case] that waste may be considered the weight of the waste which is prepared for reuse, recycled or has undergone other material recovery".

Alleged failure to consider the Sustainable Procurement Policy

[143] Para 3(f) of the Order 53 Statement states that the Council acted irrationally in failing to consider and apply its own Sustainable Procurement Policy ('SPP').

[144] The applicant alleges that there is no documentary record showing that the Council had regard to paragraph 4.6 of the SPP when taking the decision to purchase the split-bodied RCV.

[145] I accept the council's submission that the applicant has not provided sufficient evidence to establish that this policy was left out of account as required by Re SOS (NI) Limited's Application [2003] NIJB 252 (CA). In any event, the assertion is contradicted by the evidence of Mr Lindsay.

[146] The council's decision-making process was focussed on sustainability and it selected following due enquiry what in its judgement represented the most sustainable option for which two additional vehicles were required. The

Council's evidence also shows that the vehicles are fuel-efficient and surpass extremely high emissions standards.

The views of interested parties

[147] Ground 3(g) of the Order 53 Statement erroneously asserts that the Council in reaching the impugned decision, failed to seek the views of/or consider the views of/or give appropriate weight to the views of the applicant, other recycling and processing companies and others contrary to their legitimate expectations that they would be consulted on proposals to restructure the management of recycling services and that their views would be given appropriate weight in the decision-making process. There was no such legitimate expectation and in any event the views of the applicant and others were made known and considered by the Council.

Taking into consideration relevant information

[148] Ground 3(h) of the Order 53 Statement asserts that in reaching its decision, the Council acted irrationally in that it failed to take into account and/or failed to give appropriate weight to and/or failed to give proper and genuine consideration to relevant information provided by experienced and suitably qualified organisations. I reject this submission. It has not been established that the Council failed to have due regard to all material factors in reaching the impugned decision.

[149] As far as the complaint about the WRAP report is concerned I am satisfied that the Council did take into account the WRAP Report. The weight to be given to it was a matter for the Council. The WRAP Report recognised that the appropriate model for a particular area was a matter for the council concerned. It was given little weight because it was prepared in a different context, namely RPA. Furthermore, the WRAP Report did not consider the model the Council decided to adopt and the preferred option incorporated collection of food waste into the collection of dry recyclables. The Council already had a successful food waste collection arrangements. The Council disagreed with a number of assumptions in the WRAP Report which it considered to be inconsistent with the findings of a previous WRAP Report. The Council was entitled to prefer the specific recommendation in the more detailed and specific Tribal Report.

TUPE Regulations

[150] Para 3(j) of the Order 53 Statement states that the Council failed to consider or give appropriate weight to whether or not the applicant's staff engaged in recycling operation on behalf of the Council would transfer to the Council under TUPE.

[151] The applicant submits that a material consideration in reaching the impugned decision was the human resource implications of proposed changes to the working practices of the refuse collection staff employed directly by the Council. The applicant submits that it is clear that the phasing out of "task and finish" contracts was about to have an impact upon staffing in the Council's refuse collection department, however, the Council appears to have failed to identify the impact of the provisions of the TUPE legislation on the applicant's employees engaged in recycled waste collection for Banbridge District Council.

[152] I reject this submission. It is obvious that the TUPE implications were considered. They were expressly raised by the applicant and considered by the Council at its meeting of 18 April 2011 but they did not significantly alter the relative benefits of the various options. In the event, however, no TUPE costs have arisen in relation to the Council's move to the new scheme (as none of the applicant's employees were taken on by the Council). Accordingly, the Council submits, this is a point without merit.

Bias and pre-determination

[153] Para 3(k) of the Order 53 Statement asserts that the Council demonstrated bias and pre-determination in reaching the impugned decision in the respects therein set out.

[154] I reject the applicants threadbare claim of bias and predetermination. Indeed the decision to undertake a detailed appraisal of various options is inconsistent with this allegation. The decision to purchase the split bodied RCV taken in March 2010 was perfectly reasonable for the reasons referred to earlier.

[155] Nor is there anything in the point about Mr Lindsay's indication that the weightings used in the appraisal might be altered. Tribal had asked Mr Lindsay to comment on the proposed weightings and specifically asked 'are these ratings appropriate based on the Council's plans and objectives'. It is for the Council to indicate the appropriate ratings. Mr Scoffield observed the Council was the client and was entitled to explain its priorities – much as a contracting authority in the procurement sphere is entitled to set its own quality/cost ratio, the criteria to be used in a tender exercise and the weightings to be attributed to each criteria.

[156] The response that "the factor rating for efficient use of existing resources could perhaps be higher" is wholly unexceptional. Mr Lindsay explains why this is: "... it would be a priority for Council to maximise the utilisation of its own internal staffing and resources and avoid redundancy where possible." This was a perfectly valid, rational and lawful position for the Council to adopt.

[157] An allegation of bias should not be made lightly and the Court was reminded of the endorsement in R v IRC, ex parte Coombs [1991] 2 AC 283 of the longstanding principle that "in the absence of any proof to the contrary, credit ought to be given to public officers, who have acted prima facie within the limits of their authority, for having done so with honesty and discretion". I have been given no reason to doubt that the desire of Council officers was the identification of the best option for the environment, the Council and its ratepayers. As was submitted the subsequent success of the scheme points unmistakably to the fact that the best option has been selected.

[158] Accordingly, for the reasons given, I reject all the grounds of challenge and dismiss the judicial review.