

Case Name: *Baci Bedfordshire Ltd, R (on the application of) v The Environment Agency & Anor* [2019] EWCA Civ 1962 (19 November 2019)

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Commentary: This case was an appeal by a local action group against the dismissal of its claim for judicial review challenging an environmental permit granted by the Environment Agency for the operation of a waste incineration plant in Bedfordshire.

The local action group's single ground of challenge was that the Environment Agency (the "EA") issued the environmental permit unlawfully on a factually incorrect and scientifically erroneous basis which would result in a breach of the Industrial Emissions Directive (Directive 2010/75/EU). The source of the scientific error was said to be a document submitted in support of the application for the environmental permit. It was agreed by both the applicant (Covanta Energy) and the EA that the supporting document did contain such an error but they maintained that it had not affected the decision to issue the permit and that the permit would be effective in preventing a breach of the Industrial Emissions Directive through the discharge of potentially harmful metals.

As such, Lord Justice Lindblom identified the question at the heart of the appeal as being whether the environmental permit incorporated an error made in the permit application and, if so, what the consequences in law for the permit were.

The appeal was dismissed. The court held that the error was not the result of any fault of the EA and nor was it adopted or relied upon by the EA in the course of making its decision. There was nothing to show that the error had undermined the decision-making process. The clear inference to be drawn from the documents was that the EA adopted a scientifically sound approach and it was not necessary for it to have corrected the error in its decision document. As such, the analysis of Lang J. in the High Court was correct on this matter.

The court also refused to uphold claims that Lang J. had misdirected herself on the law relating to mistake of fact; failed to acknowledge the significance of a dust management plan and had erred in relying on the principle of the 'margin of appreciation' in concluding that the permit was lawful. In relation to the latter claim, the Court referred to the basic principle, namely that the court should afford a decision-maker an enhanced margin of appreciation in cases involving scientific, technical and predictive assessments, and noted that Lang J. did not need to rely on this jurisprudence in order to conclude that the EA had acted lawfully. Invoking this principle to excuse a patent mistake of fact or basic science would, of course, be misguided. However, this was not the approach taken by Lang J. who had correctly identified that the only real error was in the supporting document and that this had not impaired the EA's exercise of expert judgment when deciding to issue the permit.