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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Ace Bates Skip Ltd and Samuel's Application [2009] NIQB 13

APPLICATIONS FOR JUDICIAL REVIEW BY

(1) ACE BATES SKIP LTD

(2) MARK SAMUEL

WEATHERUP J

Waste management Licensing.

[1] These two applications for judicial review concern decisions of the Department of the Environment, by its Environment and Heritage Service (EHS), refusing each of the applicants the grant of a Certificate of Registration for Exemption from Waste Management Licensing under the Waste Management Licensing Regulations (Northern Ireland) 2003. Mr Shields appeared for Ace Bates Ltd, Mr Lavery for Mark Samuel and Mr McLaughlin for the Department.

[2] On 19 November 2001 Ace Bates obtained planning permission for the deposit of material on a site opposite 60 Ballyutoag Road Belfast, restricted to soil, clay bricks and blocks only and subject to conditions. Ace Bates was issued with a Certificate of Registration for Exemption from Waste Management Licensing from 7 March 2005 for a period of one year with the details of exempt activity being the 'infilling for agricultural improvement to a level not exceeding two metres on land opposite 60 Ballyutoag Road, Belfast'. The deposits of waste commenced on the site. The Certificates of Exemption were renewed from 7 March 2006 and 7 March 2007. By letter dated 20 September 2007 to Ace Bates the EHS stated that spreading waste on a green field site was not permissible under the Regulations and that, if the Ace Bates site was a green field site, renewal of the Certificate of Exemption

would not be granted. By letter dated 12 February 2008 Ace Bates applied for renewal of the Certificate of Exemption and by letter dated 3 March 2008 EHS refused renewal.

[3] On 25 October 2006 Samuel obtained planning permission for the deposit of materials on a site at the rear of 66 Carr Road Lisburn, subject to conditions. On 13 November 2006 Samuel was issued with an Certificate of Exemption valid for one year in respect of the land to the rear of 66 Carr Road, Lisburn, which land was owned by a third party with whom Samuel had entered a licensing agreement. The details of exempt activity concerned the spreading of specified waste to a particular depth and the development was not to become operational until effective wheel wash facilities had been installed. The deposit of waste commenced on the site. By letter dated 21 September 2007 EHS gave notice to Samuel that spreading of waste was not permitted on a green field site and that a renewal of the Certificate of Exemption would not be granted for such a site. On 12 October 2007 Samuel applied for renewal of the Certificate of Exemption and by letter dated 18 October 2007 EHS refused renewal. On 16 November 2007 Samuel made a new application for a Certificate of Exemption and on 26 November 2007 this was refused by EHS.

[4] Pamela Patterson is the Licensing Manager in Land and Resource Management Division at the EHS. In March 2007 EHS examined the issue of Certificates of Exemption because of concern that many operators were using the exemption as a means of spreading large volumes of waste on land as an alternative to using landfill dumping sites. The planning, environmental control, financial and time requirements for obtaining permission to operate a landfill site are significantly greater than those associated with exemption certificates. The Regulations permit the spreading of waste on land which has been subject to "industrial or other manmade development". EHS had taken the view initially that "manmade development" could encompass agricultural land which had been subject to agricultural use or had otherwise been worked for farming or associated purposes. EHS had therefore granted Certificates of Exemption to permit the spreading of specified waste on agricultural land. As a result of the review conducted by EHS between March and September 2007 EHS decided that the use of land for agricultural purposes was not "manmade development" within the Regulations. Accordingly revised guidance notes were issued on the scope of the exemption which made it clear that it did not apply to "green field sites". Hence EHS issued the letters of 21 September 2007 and applied its new policy to new applications for and to renewals of Certificates of Exemption after that date.

The Waste Management Licensing Regulations (Northern Ireland) 2003

[5] The statutory prohibition on the unauthorised or harmful deposit, treatment or disposal of waste is contained in Article 4 of the Waste and Contaminated Land (Northern Ireland) Order 1997. It is provided that a person shall not deposit, treat, keep or dispose of controlled waste except in accordance with a Waste Management Licence. Regulations may provide for exemption in prescribed cases. The relevant regulations are the Waste Management Licensing Regulations (Northern Ireland) 2003.

Regulation 17 provides for exemptions from Waste Management Licensing in relation to the carrying on of any “exempt activity”.

Regulation 18 provides for registration with the Department in connection with exempt activities. Regulation 18(11) provides that the Department shall renew the particulars registered in respect of an exempt activity at the date of expiry of the previous registration if specified conditions are satisfied.

Regulation 20 provides for refusal, revocation and cessation of registration of an exempt activity. Registration may be refused or revoked in the event that the activity does not comply with any of the requirements or conditions or limitations set out in respect of the exempt activity in the Regulations.

Part I of Schedule 2 defines “exempt activity”. Under paragraph 11(3) the spreading of specified waste is exempted where the activity results in benefit to agriculture or ecological improvement and (*italics added*) -

“(a) *the spreading is carried out for the purpose of reclamation, restoration or improvement of land which has been subject to industrial or other manmade development and the use to which that land could be put would be improved by the spreading;*

(b) the spreading is carried out in accordance with any planning permission, where such a permission is required;

(c) the waste is spread to a depth not exceeding the lesser of 2M or the final cross section shown on any plan required to be submitted in accordance with Regulation 1 and Part II of this Schedule;

(d) the waste spread does not exceed 20,000 cubic metres per hectare.”

Grounds for Judicial Review

[6] The applicants' grounds for judicial review of the decisions to refuse to renew or to grant the Certificates of Exemption may be summarised as follows -

- (i) Wednesbury unreasonableness.
- (ii) Failing to take into account or give sufficient weight to relevant matters, namely the mandatory nature of Regulation 18(11), the previous grant of Exemption Certificates, the absence of material changes of circumstances, compliance with the conditions of 18(11), the absence of any breach of conditions, the conduct of the activities in compliance with the Regulations, rendering the lands unfinished and unusable.
- (iii) Taking into account irrelevant matters, namely the sites being green field sites, that the spreading of waste on a green field site was not permissible and that the sites had not been subject to manmade development.
- (iv) Treating the applicants unfairly in that the relevant time for determination of renewal was at the time of application for renewal and taking account of the irrelevant consideration that the Department had designated the land as agricultural land.
- (v) Breach of the legitimate expectation that the activities could be completed.
- (vi) Breach of the right to property under Article 1 of the First Protocol of the European Convention.

Manmade Development

[7] Paragraph 11(3)(a) of Schedule 2 of the Regulations involves three components. First the spreading is carried out for the purpose of reclamation, restoration or improvement of land. Secondly the land has been subject to industrial or other manmade development. Thirdly the use to which the land could be put would be improved by the spreading. The second component raises the issue as to the nature of land that has been subject to "other manmade development". The EHS now refers to land with an agricultural use for the growing of grass or crops as a "green field site" and as land that has

not been subject to manmade development. Similarly the EHS now refers to land that has had no agricultural use but has comprised marshland as a “green field site” and as land that has not been subject to manmade development.

[8] Is a “green field site”, in the sense that, before any spreading of waste, the land has had an agricultural use for the growing of grass or crops, land that has been subject to manmade development? At some earlier point the land will have been cleared of shrubbery, trees, vegetation and stones, boundaries will have been created by stone walls and hedges and fencing, the enclosure may have been planted and grazed or harvested, the levels may have been altered to the extent arising from tilling by horse or later tractor. In this manner the condition of the land might be said to be “manmade”. Would it be “development”?

[9] In general usage such working of the land would probably not be regarded as ‘development’. The definitions in the Shorter Oxford Dictionary include “The action of developing land etc. so as to realise its potentialities; speculative building; a development site, esp. a new housing estate.”

[10] For the purposes of planning control the Planning (NI) Order 1991 defines ‘development’ as not only the carrying out of building, engineering, mining or other operations but also the making of any material change in the use of land. It is expressly provided in the 1991 Order that the use of any land for the purposes of agriculture shall not be taken to involve development, implying that it would otherwise have been regarded as development. It is further provided in the 1991 Order that the deposit of waste material on land will involve a material change in the use of the land, thus confirming that it was to be regarded as development.

[11] The Regulations refer to land which has been subject to “industrial or other manmade development...” It is a principle of statutory construction that wide words (in this case ‘other manmade development’) associated in the text with more limited words (in this case ‘industrial’) are taken to be restricted by implication to matters of the same limited character – Bennion on Statutory Interpretation (5th ed.) pages 1231 – 1245 on the ejusdem generis rule (of the same kind). The rule requires that there must be a category, class or genus that is narrower than the general words. A single term may form the category, class or genus. In this case the category, class or genus may be the term ‘industrial’. By way of example, Bennion refers to the words “...building or other operations...” in section 290 of the Town and Country Planning Act 1971, where the words ‘other operations’ were read as akin to ‘building’ so as to exclude the storing of scrap materials on land - Parkes v Secretary of State for the Environment [1978] 1 WLR 1308. The application of this principle of construction points to the narrower construction of ‘other manmade

development' as being akin to industrial development and involving building, engineering or mining operations rather than agricultural use.

[12] The statutory context of the Regulations is the control of the deposit of waste and in effect the Regulations provide for exceptions where the deposit of waste may, in the stated circumstances, be permitted for stated purposes and a stated result. The three components of paragraph 11(3)(a) are inter-related in that there has been previous 'development' on the land; the activity of spreading the waste is to address the development for the stated purposes of reclamation, restoration or improvement of the land; the stated result must be that the potential use of the land will be improved by the spreading. If the land has a current agricultural use for grazing or crops it would not be appropriate to describe the spreading of waste as 'reclamation or restoration'. It is difficult to regard such activity as 'improvement' of existing agricultural land, save to the extent that it will facilitate a resurfacing of the affected area with new topsoil for improved agricultural land, a procedure that need not involve the spreading of waste at all.

[13] Marshland with no agricultural use requires different consideration. If it has at one time had agricultural use but has been allowed to revert to marshland it might be said to be capable of reclamation or restoration by the spreading of waste for a topsoil finish. If there had been no previous agricultural use it might be said to be capable of improvement by the spreading of waste for a topsoil finish. The result of the spreading must be that the spreading improves the use to which the land may be put. The contemplated benefits of the spreading relate to agriculture or ecological improvement. From an ecological perspective it cannot be assumed that the reclaiming of marshland for other uses would constitute an 'improvement' in the use of the land. The ecologist may prefer the lines of Gerard Manley Hopkins in *Inversnaid* in 1881 -

'What would the world be, once bereft
Of wet and of wildness? Let them be left,
O let them be left, wildness and wet;
Long live the weeds and the wilderness yet.'

[14] On the other hand if 'other manmade development' has the narrower meaning of building, engineering, mining or other operations on the land then the activity of spreading waste for reclamation, restoration or improvement of the land is readily understood, as is the requirement that the spreading should improve the use to which the land might be put. Thus the general usage and the principle of construction and the statutory context all indicate that 'other manmade development' concerns previous building, engineering, mining or other operations, rather than a green field site.

[15] The Department initially took the view that agricultural land constituted manmade development and qualified for exemption from control of the deposit of waste where the other conditions were satisfied. However after the review in 2007 it was decided that spreading waste on a green field site was not permitted. This approach involves the interpretation of “other manmade development” in paragraph 3(a) of Part I of Schedule 2 of the 2003 Regulations as not extending to green field sites. In light of the above discussion of general usage and the principle of construction and the statutory context this amended approach by the Department is the correct interpretation.

[16] The applicants contend that if it is the case that the adaptation of the land for agricultural use would not have constituted manmade development, the deposit of waste on the agricultural land in accordance with the Certificate of Exemption would constitute manmade development. Accordingly the applicants contend that, when the applicants applied for renewal of registration, the land in question had been subject to manmade development by virtue of the spreading of the waste. I am satisfied that the three components of paragraph 11(3)(a), namely the spreading of waste for the purpose of reclamation, restoration or improvement of land, the land having been subject to industrial or other manmade development and that the use to which that land could be put would be improved by the spreading, are components that must be present at the commencement of the exempt activity and must continue throughout the exempt activity. Accordingly the activity of spreading the waste for the specified purposes can not itself constitute the manmade development to which the land in question has been subject. Thus when Samuel applied for the new grant of a Certificate of Exemption the EHS were entitled to refuse on the basis that there had not been any qualifying development.

The prior condition of the lands.

[17] What was the condition of the respective lands at the commencement of the spreading of the waste? The Ace Bates site was at land opposite 60 Ballyutoag Road, Belfast. In the grounding affidavit the applicant mistakenly described a site for a replacement dwelling at 51 Ballyutoag Road, Belfast, which was an adjacent site. At one point the applicant appears to have sought to rely on both the lands opposite number 60 and the adjacent lands at the proposed redevelopment area at number 51 as a combined area where there was an entitlement to spread waste in accordance with the Certificate of Exemption. I set aside the involvement of number 51 and focus on the relevant site on land opposite 60 Ballyutoag Road, Belfast.

[18] The relevant site was described in the Ace Bates ‘Method of Operation’ as being a series of uneven fields covering approximately 1.8 hectares with

the fields consisting of thin layers of soil till which overlay the Antrim basalt. James Wright the Senior Scientific Officer with EHS referred to the Ace Bates Method of Operation and to some photographs taken before the deposit of waste and described the lands as undeveloped open green fields. Mr Bates did not accept this description and described the land as “very rough and uneven and appeared to have been the subject of previous development of some description.” There is no evidence of any previous development of the site although Mr Bates may be referring to the previous building development at 51 Ballyutoag Road, which is not relevant for present purposes. Mr Wright then referred to a report of the Planning Case Officer who described the surrounding lands as flat and marshy ground, flat and low lying, very scant vegetational coverage and no definite delineation on the ground.

[19] The relevant lands are those opposite 60 Ballyutoag Road and do not include the area of the proposed redevelopment at 51 Ballyutoag Road and any previous development at number 51 is not relevant. The Department was entitled to conclude that the relevant site to which the Certificate of Exemption applied comprised a number of fields for agricultural use and that the lands comprised a ‘green field site’.

[20] The Samuel lands at 66 Carr Road, Lisburn were described by Mr Samuel prior to the commencement of the spreading of waste as a 4 acre site that was non arable bog land or marsh land of no agricultural or indeed any other use. The Department was entitled to conclude that the lands comprised a ‘green field site’.

Renewal under Regulation 18(11).

[21] The applicants contend that the EHS has a duty to renew their certificates under Regulation 18(11), which provides -

“The Department shall renew the particulars registered in respect of an exempt activity at the date of expiry of the previous registration relating to such activity (“the expiry date”) if no later than 28 days before the expiry date the establishment or undertaking carrying on such activity-

- (a) serves written notice on the Department of its desire to renew the registration;
 - (b) pays on or before the expiry date the fee specified in accordance with paragraph (12) for such renewal;
 - (c) confirms in such notice that there are no changes in the particulars registered in relation to that activity;
- or

(d) if there are any such changes, specifies in such notice the details of the changes and provides the amended documents and/or plans as may be required under paragraphs (3) and (5) in relation to the activity.”

[22] The renewal must be in respect of an “exempt activity” and if that is not the case there is no obligation to renew under Regulation 18(11) even if the other conditions are satisfied. It is equally the case that the original exemption from waste management licensing under Regulation 17 only applies to an exempt activity. That the Department had mistakenly interpreted the activity as an exempt activity on original registration cannot be taken to require the Department to continue the mistake on renewal of the registration. At the date of the proposed renewal the proposed activity was not an “exempt activity”. That outcome does not invalidate the conduct of the applicants on foot of the original registration as they were in possession of the necessary statutory certificate which remained valid until set aside and that had not occurred nor has it been suggested that it should.

Refusal under Regulation 20.

[23] The applicants contend that the Department relied improperly on Regulation 20 to refuse to register their activity. Regulation 20(1) provides –

“The Department may refuse to register an exempt activity in the event that the activity or, as the case may be, the content of the notification under regulation 18 does not comply with any requirements of regulations 17(4), 18(2) and 18(3) or any conditions or limitations set out in respect of the exempt activity in regulation 19(1) and 19(2) and in Parts I and II of Schedule 2.”

It was said on behalf of the applicants that Regulation 20 cannot apply to renewals. The terms of Regulation 20(1) include provision that the activity complies with the limitations and conditions in Part I of Schedule 2, which includes and the types of activity that are exempt, with paragraph 11(3)(a) containing the manmade development condition or limitation. It is clear that Regulation 20 must apply to original registration and to renewals and the Department may refuse registration and renewal of registration if the conditions for registration are not satisfied.

Legitimate Expectation.

[24] The applicants contend for a legitimate expectation of the renewal of the existing or the new grant of a Certificate of Exemption. A legitimate expectation may arise from a promise or practice of a public authority that a power would be exercised in accordance with the promise or practice. From the initial limits of procedural legitimate expectation there has now emerged the wider substantive legitimate expectation. More recently Laws LJ has distinguished between a paradigm case of procedural legitimate expectation and a secondary case of procedural legitimate expectation (R (Bhatt Murphy) v The Independent Assessor [2008] EWCA Civ 755).

[25] However, of whatever species, any expectation must be 'legitimate' and must be subject to the terms of any primary or secondary legislation which governs the decision making. The applicants rely on the Regulations as establishing their legitimate expectation but that depends upon the interpretation of the Regulation. No legitimate expectation can arise in circumstances where the exercise of the power would be inconsistent with a statutory scheme. Nor can a legitimate expectation arise from the actions of a public authority in interpreting a statutory scheme in a particular manner which that public authority then establishes is not a proper interpretation of the statutory scheme. Accordingly in the circumstances of the present case, where I hold that the Department's present interpretation of "other manmade development" in the Regulations is the correct interpretation, the applicants can have no legitimate expectation that the Department will apply any other interpretation. Nor can the applicants have any legitimate expectation that the Department's previously mistaken interpretation must be continued to be applied to an extension or the new grant of a Certificate of Exemption.

The right to property

[26] The applicants claim a breach of the right to property under Article 1 of the First Protocol of the European Convention. Article 1 of the First Protocol provides -

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one should be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[27] There are three rules in Article 1 of Protocol 1. The first rule, in the first sentence, is the general principle of peaceful possession of property. The second rule, in the second sentence, permits deprivation of property on certain conditions. The third rule, in the second paragraph, permits the State to control property for certain purposes. Deprivation under the second rule and control under the third rule are instances of interference with the first rule of peaceful possession.

[28] The present cases have engaged the first and third rules in that they concern the peaceful enjoyment and control of the use of possessions. Such control must be subject to the conditions provided for by law and be in accordance with the general interest. Conditions provided for by law introduce the requirement for legal certainty. This involves compliance with domestic legal provisions; the provisions must be accessible; the operation of the provisions must be foreseeable, in that they are formulated with reasonable precision; there must be procedural safeguards against the arbitrary use of powers. The concept of foreseeability was considered by the ECtHR in Sunday Times v UK [1979] 2EHRR 245 in relation to the common law of contempt, which was held to satisfy the requirement that a measure be prescribed by law. At paragraph 49 it was stated that the measure must be -

“... formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.”

[29] The actions of the Department in controlling the applicants use of property is governed by domestic law, the provisions are accessible to the applicants and there are procedures that safeguard against the arbitrary use of the powers. Foreseeability requires sufficient precision. Few laws have been formulated that are not capable of giving rise to argument about their interpretation. Courts may differ in the interpretation of laws and the interpretation of today will not always be the interpretation of tomorrow. The Department had one interpretation of paragraph 11(3)(a) that later gave way to a different interpretation. I am satisfied that in the circumstances of the

present cases the Department initially misinterpreted paragraph 11(3)(a). However the applicants were able to foresee, to a degree that was reasonable in the circumstances, the consequences that a given action might entail. That applied to the initial interpretation by the Department and to the later interpretation by the Department. On the basis of the initial interpretation the applicants' actions were regulated by the Department for a year at a time. The applicants' present objections relate to the effects of the later decisions. I am satisfied that the later decisions that are the subject of these applications for judicial review have been made on foot of measures that are prescribed by law for the purposes of Article 1 of Protocol 1.

[30] In addition the control of the use of land must satisfy the requirements of proportionality. The principle of proportionality has been restated by the House of Lords in Huang v Secretary of State for the Home Department [2007] UKHL 11. The overarching approach is "...the need to balance the interests of society with those of individuals and groups. This is indeed an aspect which should never be overlooked or discounted." It has been stated to be inherent in the whole of the European Convention that a fair balance be struck between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights. The components of proportionality were stated in Huang at paragraph 19 to be -

- "Whether (1) the legislative objective is sufficiently important to justify limiting a fundamental right;
- (2) the measures designed to meet the legislative objective are rationally connected to it; and
- (3) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

[31] I would rearrange the summary of the approach to proportionality set out in Christian Institute's Application [2008] NI 86 at paragraph [83] as requiring consideration of -

- (1) The objective being sufficiently important to justify limiting the fundamental right.
- (2) The measures designed to meet the objective being rationally connected to it, that is, the measures must not be arbitrary, unfair or based on irrational considerations.
- (3) The need for proportionate means being used so as to impair the right or freedom no more than necessary to accomplish the objective, that is, that the measures are the least intrusive, in light of both the objective and the infringed right. The Court should consider whether the measures fall within a range of reasonable alternatives, rather than seeking to ascertain whether a lesser degree of interference is a possibility.

- (4) The need for proportionate effect in relation to the detrimental effects and the advantageous effects of the measures and the importance of the objective.
- (5) The latitude that must be accorded to legislative and executive choices in relation to policy, judgment and discretion. However it is for the Court to decide if the interference with the right is justified.
- (6) The overarching need to balance the interests of society with those of individuals and groups.

[32] There must be an objective of sufficient importance, a legitimate aim. Article 1 of Protocol 1 refers to the general interest, which includes the requirement that the control of the use of property furthers a legitimate aim. The social policy of controlling the spreading of waste on land is undoubtedly such a legitimate aim in the general interest.

[33] The measures must be rationally connected to the objective. In R v Oakes [1986] 1 SCR 103, in the Supreme Court of Canada, Dickson CJ referred to this component of the proportionality test as requiring that "... the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational consideration. In short, they must be rationally connected to the objective." It will be noted that fairness is an aspect of this component.

[34] In addition there must be proportionate means used and there must be proportionate effect. In relation to proportionate effect, Dickson CJ stated in R v Oakes that "Regard must be had to the nature of the right violated, the extent of the violation and the degree to which the measures impact upon the integral principles of a free and democratic society."

[35] In the present case the Department has reached a new decision on the concept of man made development, has accordingly refused further Certificates of Exemption and has thus stopped the spreading of any further waste on the sites. As outlined above I am satisfied that the decisions to refuse further spreading of waste on the lands reflect the correct interpretation of the Regulations. The applicants contend for a different interpretation of the Regulations, which I have rejected. To the extent that the Regulations, as now interpreted by the Department, permit the control of the applicants use of the respective lands, I am satisfied that the Regulations are compatible with Article 1 Protocol 1 as being in accordance with law, in the general interest, not arbitrary, unfair or based on irrational considerations and represent proportionate means and have proportionate effect.

[36] To the extent that the decisions made by the Department, in furtherance of the new interpretation of the Regulations, amount to interference with the applicants' control of the use of the respective properties

in which the applicants have interests, I am also satisfied that the Department's actions are justified under Article 1 Protocol 1 as being in accordance with law, in the general interest, not arbitrary, unfair or based on irrational considerations and represent proportionate means and have proportionate effect.

[37] However there are also consequential aspects to the Department's decisions which concern the activities to be carried out by the applicants that are necessary to finish the sites and the circumstances in which the applicants will be permitted by the Department to conduct such finishing activities. Restrictions on the activities of the applicants in the finishing of the sites would represent further control by the Department of the use of the respective sites and would have to be justified.

[38] Different considerations apply to the two sites. While there is to be no further waste introduced to the Ace Bates lands the planning permission contemplates, and no doubt the Department would desire, the finishing of the site to certain contours with sub-soil and topsoil. Further, the Samuel lands have received a volume of waste that now exceeds the permitted amount for the area already spread and will require the removal of waste before the finishing of the site. In addition, Samuel installed a haul road with a hardcore base and it is proposed that the hardcore road be removed and replaced with inert material before the finishing of the site. Again the finishing of the site will involve a topsoil cover of the waste. The legal mechanism for the completion of works on the sites, at least in the case of the Samuel lands, in the absence of Certificates of Exemption, may involve the obtaining of Pollution Prevention and Control Permits or other licences. The Department acknowledges that such further licences may be more complex and expensive.

[39] The present issue concerns the activity required to finish the sites in their present state and not with any basis on which the applicants might seek to secure permission to undertake the spreading of any new waste on the sites. The conditions on which the applicants will now complete the finishing of the sites have not yet been determined. The finishing now required on the sites may involve expenditure over and above that which would otherwise have been incurred in the completion of the works, whether as the cost of removal of excess waste or otherwise finishing the area of the site already covered or as the additional cost of an alternative licence. Such costs as are additional to those that would otherwise have been involved in the finishing of the sites would arise, in effect, as a consequence of the previous misinterpretation of the Regulations by the Department.

[40] Accordingly, the Department is contemplating further control of the applicant's use of the respective sites in relation to the finishing of the areas already spread with waste. Such further control is for the same legitimate aim. Such further control must be rationally connected to that aim, which

component includes the fairness of the particular measures that are to be imposed in the circumstances. In addition such further control must employ proportionate means and have proportionate effect, in that it must not impose an unfair burden on the applicants. In the circumstances that have arisen it would be unfair to impose on the applicants the burden of any additional costs in relation to the finishing of the sites in their present state.

[41] I am satisfied that the imposition of any further controls on the applicants' use of the respective sites in connection with the finishing of the areas already spread with waste, where that would involve additional costs to the applicants, would amount to an unfair burden in the circumstances. Such unfair burden would amount to a lack of rational connection, taking account of the requirement for the application of fair measures in all the circumstances. Further, such unfair burden would have disproportionate effect on the applicants, imposing as it would an added financial penalty on the applicants in the circumstances. On either basis a requirement that the further control of the use of the sites would involve the imposition of such added costs on the applicants would not be proportionate for the purposes of Article 1 Protocol 1. The burden of additional costs would not represent a fair balance between the legitimate aim and the means adopted, between the public interest and the private interest?

[42] On the applicants' challenges to the decisions of the Department refusing Certificates of Exemption in respect of the lands formerly granted such certificates, I have not been satisfied on any of the applicant's grounds for judicial review.