

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

APPLICATION BY FRIENDS OF THE EARTH FOR JUDICIAL REVIEW

WEATHERUP J

**The application.**

[1] The applicant is an environmental pressure group and operates in Northern Ireland as Friends of the Earth Northern Ireland. The respondent is the Department for Regional Development (Water Service) which has powers and duties in relation to water and sewerage services in Northern Ireland. The Environmental and Heritage Service (EHS), an agency of the Department of the Environment, is the environmental regulator.

[2] This is an application for Judicial Review of the decision of the Water Service in relation to the grant of consents or the making of agreements under Articles 17, 24 or 32 of the Water and Sewerage Services (Northern Ireland) Order 1973 for connections to the sewerage system, where the related waste water treatment is not compliant with the requirements of the Urban Waste Water Treatment Regulations (Northern Ireland) 1995. There are two broad grounds of challenge, being first the contention that under European and domestic law the Water Service has a legal obligation to refuse new connections in those areas where the sewerage system is not compliant with legal requirements, and secondly the contention that the Water Service, in deciding whether to grant consents or enter agreements for connections to the sewerage system, has failed to take into account a relevant consideration, namely whether the related waste water treatment is compliant with legal requirements. Mr Larkin QC and Mr Scofield appeared for the applicant and Mr McCloskey QC, Professor Wyatt QC and Mr Maguire appeared for the respondent.

[3] The applicant believes that the sewerage system in Northern Ireland falls very significantly below the standards required by European and

domestic law, primarily because of the inadequate standards at many waste water treatment works. The applicant describes the result as being significant and harmful environment pollution and a risk to public health. Because of these concerns the applicant wrote to the Water Service on 18 May 2005 seeking an assurance that the Department, through the Water Service, would not in future grant any consents or agreements for new connections to the sewage system, where such connections and the resulting discharges would either individually or cumulatively exacerbate non-compliance with the relevant European Directive or Northern Ireland Regulations or worsen the environmental harm which the European Directive sought to avoid. The applicant recognised that there were intermediate measures that could be undertaken by developers or property owners which would permit the grant of consents or the making of agreements in affected areas without adverse environmental effect. By a reply dated 13 June 2005 the Water Service accepted that in some areas waste water treatment did not meet the requirements of the Northern Ireland Regulations, but disagreed with the assertion of the applicants that new connections to the sewage system would be incompatible with European or domestic law and refused to give any assurance in relation to consents or agreements for new connections to the sewage system.

#### **New connections to the sewerage system.**

[4] The Water and Sewage Services (Northern Ireland) Order 1973, Article 3, states the duty to provide water and sewage services -

"(1) Subject to this order the (Department) shall -

- (a) Supply and distribute water;
- (b) Provide and maintain sewers for draining domestic sewage, surface water and trade effluent;
- (c) Make provision for effectually dealing with the contents of the sewers."

[5] In relation to applications for consent or agreements in lieu of applications for consent Article 17 of the 1973 Order provides:

"(1) Where the provision of the water or sewage service from the Department is required in respect of any premises, the owner or occupier may apply to the Department -

- (a) for a supply of water from the Department;

- (b) to discharge into a sewer or sewage treatment works vested in the Department domestic sewage and surface water;
- (c) for the connection of his service pipe, drain or private sewer with an existing main, sewer or sewage treatment works vested in the Department; or
- (d) for an existing main or sewer be extended or augmented in the connection of its service pipe, drain or private sewer without extended or augmented main or sewer.

- (3) The Department may refuse the application or grant the application unconditionally or subject to such and conditions (including conditions as to costs and charges) as it thinks fit to impose."

[6] In relation to trade effluents it is provided by Article 22:

"Subject to Article 32, an occupier or prospective occupier of trade premises who proposes to make a new discharge of trade effluent from those premises into the sewers or sewage treatment works of the (Department) shall obtain of the (Department) to the discharge ....."

Article 24(1) provides:

"The (Department) in its decision on an application on Article 22 shall, within three months from the date on which it receives that applications, refuse its consent or grant its consent either unconditionally or subject to such conditions (including conditions as to charge this) as it thinks fit to impose."

Article 32 provides:

"The (Department) may enter into an agreement with the owner or occupier of any trade premises for the reception, treatment or disposal by the Ministry of any trade effluent produced on those premises."

## **The European Directive on Urban Waste Water Treatment Works.**

[7] Council Directive 91/271/EEC of May 21, 1991 deals with urban waste water treatment and states in Article 1 that it concerns the collection, treatment and discharge of urban waste water and the treatment and discharge of waste water from certain industrial sectors.

Article 3 provides that Member States shall ensure the provision of collecting systems that satisfy specified requirements.

Article 4 provides that Member States shall ensure that urban waste water entering collecting systems shall before discharge be subject to secondary treatment, or an equivalent treatment, by certain dates for certain agglomerations (being a measure of the size of an area by population and economic activity).

Article 5 provides that Member States shall ensure that urban waste water entering collecting systems shall before discharge into sensitive areas be subject to more stringent treatment than that described in Article 4 for all discharges from agglomerations of a stated size.

Article 11 provides that Member States shall ensure that discharges of industrial waste into the system shall be subject to regulation.

The Directive was transposed into domestic legislation by the Urban Waste Water Treatment Regulations (Northern Ireland) 1995. It is not disputed that the 1995 Regulations effectively transposed the Directive.

## **The Urban Waste Water Treatment Regulations (NI) 1995.**

[8] Regulation 4 of the 1995 Regulations supplements the duty to provide sewage services imposed on the Department by Article 3(1)(b) and (c) of the 1973 Order as follows -

4.- Duty to provide and maintain sewers.

(2) ..... the duty imposed by sub-paragraph (1)(b) of Article 3 of the 1973 Order shall include a duty to ensure that collecting systems which satisfy the requirements of Schedule 2 are provided .....

(4) The duty imposed by sub-paragraph (1)(c) of Article 3 of the 1973 Order shall include a duty to ensure that urban waste water entering collecting systems is, before discharge, subject to treatment provided in accordance with regulation 5 .....

5. – Requirements as to provision of treatment.

(1) .....treatment plants which provide secondary treatment [as defined in the Regulations] or an equivalent treatment shall be provided .....

(2) ..... treatment plants which provide more stringent treatment than that described in paragraph (1) shall be provided by 31st December 1998 in respect of all discharges from agglomerations with a population equivalent of more than 10,000 into sensitive areas, or into the relevant catchment areas of sensitive areas where the discharges contribute to the pollution of these areas.

**6. – Discharges of urban [domestic] waste water.**

(1) Discharges from urban waste water treatment plants described in paragraphs (1) or (2) of regulation 5 ..... shall satisfy the relevant requirements of Part 1 of Schedule 3.

**7. – Discharges of industrial waste water to collecting systems or treatment plants.**

(1) It shall be the duty of the Department in exercising its functions under Part V of the 1973 Order (trade effluents) with respect to any discharge of industrial waste water, to secure that the requirements of Schedule 4 are met in respect of that discharge.

(2) Nothing in Article 24(1) of the 1973 Order (conditions of consent) shall be construed as restricting the power of the Department to impose in any consent under that Part such conditions as are necessary to comply with paragraph (1).

(3) Nothing in any agreement entered into between the Department and the occupier of premises used for carrying on any trade or industry shall be treated as a consent, direction or condition for the purposes of Part V of the 1973 Order unless the terms of that agreement are such as will secure that the requirements of Schedule 4 are met in respect of any discharge to which the agreement relates.

(4) The Department shall review, and if necessary modify, the consents, directions or conditions granted under Part V of the 1973 Order at regular intervals.

(5) For the purposes of complying with paragraph (1) the Department may vary any agreement under Article 32 of the

1973 Order (agreements as respects trade premises) which provides for the discharge of industrial waste water to an urban waste water treatment plant without first entering a public sewer, and any such agreement shall not be enforceable if and to the extent that it permits any discharge of industrial waste water in respect of which the requirements of Schedule 4 are not met.

- (6) Nothing in Part V of the 1973 Order shall—
- (a) restrict the power of the Department to vary a consent, direction or condition in pursuance of the duty imposed by this regulation; or
  - (b) render the Department liable to pay compensation as a consequence of any such variation made in pursuance of that duty.

### **The pragmatic approach of Government.**

[9] There are 274 waste water treatment works on the public register. Of the 274 only 35 were subject to the 1995 Regulations prior to 31 December 2005. Further waste water treatment works became subject to the requirements of the Regulations from 1 January 2006. Some treatment works were not in compliance with the 1995 Regulations prior to that date and further instances of non-compliance arose after 1 January 2006.

[10] In 2001 the EHS recommended the refusal of planning permission in a number of locations across Northern Ireland where the environmental implications of continued development resulting from increased load on the sewage infrastructure meant that planning permission for development should not be granted. In 2002 Planning Service requested the EHS to provide an indication of areas across Northern Ireland where there were environmental concerns about further new development arising out of the problems with the sewage infrastructure. The 56 areas identified became known as "hotspots". Some of the hotspots were subject to the 1995 Regulations. It was decided to put on hold planning applications throughout the 56 hotspots pending examination of the issues by the Northern Ireland Executive. The outcome was a statement by the Minister of the Environment, Dermot Nesbitt, on 2 October 2002 ("the Nesbitt statement").

[11] The Nesbitt statement noted that compliance of sewage treatment works with EU standards fell from 53% in 2000 to 35% in 2001 and compliance with domestic standards fell from 81% in 2000 to 57% in 2001. This compared with 95% compliance in England and Wales for the previous five years. It was further noted that the EHS had expressed concern about the

implications of further development with regard to environmental compliance and pollution risk in the 56 locations across Northern Ireland; that the Department of the Environment and the Department of Regional Development had undertaken a location by location examination of the compliance problems and the work needed to resolve them, together with a comparison of the projects and priorities in the Water Service capital works programme; that the outcome was to adopt a “pragmatic approach” designed to balance the need for physical development with the need to protect the environment. The outcome was stated as follows:

"The approach that we, as Executive Ministers, have adopted reflects an acknowledgement that an absolute constraint on development in those areas with a significant degree of non-compliance with environmental standards until such time as the deficiencies in the sewage infrastructure can be corrected would have a crippling effect on physical development across Northern Ireland. Such an approach, despite the high level of environmental protection that would be afforded, would have carried high risk in respect of constraints in economic growth and social progress."

[12] The joint EHS/Water Service examination of the 56 hotspots identified fourteen areas where the environmental impact was classed as low; remedial works were to be completed in three years at five of the locations and within five years at seven of the locations and no remedial works were planned at the remaining two locations; because of the low environmental impact the EHS would not object to the granting of planning permission at those locations; the Planning Service would complete the processing of the affected applications and would issue decisions.

At the remaining 42 hotspots the environmental impact was considered medium or high; remedial works were to be completed in three years at twenty three locations and within five years at nineteen locations; the EHS would alert the Planning Service to the environmental issues at those locations but would not object to the granting of planning permission; the Planning Service would complete the processing of the affected applications and issue decisions.

[13] Of the impact of ongoing development at the 56 hotspots the Minister stated –

“.....I also acknowledge that it means that developments will continue to connect to the public sewer in areas where the current

inadequacy of the sewage collection and treatment systems is having high or medium environmental impact and will continue to do so for some years, pending completion of the Water Service's capital works programme".

The Minister noted that officials in the EHS would monitor progress carefully in the capital programme works and the continuing environmental impact of development, especially in the high and medium impact locations and concluded -

"My aim is to avoid any serious exacerbation of pollution in those areas. I therefore caution that, in the longer-term, it may not be sustainable to continue to connect developments to non-compliant sewerage systems in which remedial works remain some way off. However, I will keep the situation under continuous review, considering the balance between environmental protection and facilitating development ...".

[14] The pragmatic approach of the Nesbitt statement has remained the policy of the Department of the Environment and the Department for Rural Development.

[15] Slippage has occurred in the capital works programme. Katherine Bryan is the Chief Executive of the Water Service. By her affidavit sworn on behalf of the respondent she gives particulars of the significant levels of funding for capital investment in the water and sewage infrastructure. Of the hotspots, the works in 15 are delayed beyond the period referred to in the Nesbitt statement.

#### **The Water Service approach to new connections to the system.**

[16] In relation to connections to water service sewers under Article 17 of the 1973 Order, Ms Bryan states that such applications would normally be received after planning approval has been given by the planning service for the proposed development and -

"The senior officer deciding on the application will be aware of the current status of the receiving WWTW and of any plans to upgrade it. However, consideration is not generally given to the adequacy of the WWTW when reaching



the decision under Article 17". (Underlining added)

The essence of the respondent's approach appears in paragraph 44 of Ms Bryan's affidavit as follows -

"It is acknowledged that further development could lead to deterioration in water quality at some locations until the planned improvements WWTW are completed. However, if connections to the sewerage system were to cease until such time as the system is fully compliant with the Urban Waste Water Treatment Directive and other environmental Directive standards, there is no doubt that it would have an impact on development, potential new investment, jobs, and social progress in the areas affected. There would be significant impacts for the construction industry as new homes could not be sold if they did not have facilities to deal with the waste water. This would have an impact on jobs in the construction industry and also on the housing market, and would have consequences for the Regional Development Strategy. A ban on new trade effluent connections to sewers could potentially have impacts on jobs. Factories or businesses might be unable to locate in particular areas, they might move outside Northern Ireland, and expansion of existing businesses could be curtailed".

**The applicants grounds for Judicial Review.**

[17] The grounds for judicial review are as follows -

(a) The Water Service, in granting consents for making agreements to new connections to the sewerage system (whether under Articles 17, 24 or 32 of the 1973 Order) where such connections (and the resulting discharges) would either individually or cumulatively exacerbate non-compliance with the directive and/or the Regulations and/or worsen the environmental harm which the said directive seeks to avoid, is acting unlawfully and ultra vires and particularly is acting

(i) in breach of the directly effective provisions of the Urban Waste Water Treatment Directive 1991 and in particular Articles 4 and 11 thereof;

(ii) in breach of the Urban Waste Water Treatment Regulations (Northern Ireland) 1995 and in particular Regulations 4-9 therefore;

(iii) in excess of its jurisdiction by virtue of Section 24 of the Northern Ireland Act which provides that a Northern Ireland department has no power to do any act so far as that act is incompatible with community law.

(b) The Water Service, in exercising its functions under Articles 17, 24 and/or 32 of the 1973 Order has abdicated and/or fettered its discretion and/or has failed to take relevant considerations into account (or given the manifestly insufficient weight) and in particular has

(i) granted consents or made agreements for new connections to the sewerage system without making any or adequate enquiries in respect of the effects of connection in terms of the environmental harm which the directive seeks to avoid or the extent of exacerbation of non-compliance with the direction and Regulations;

(ii) fail to give any or adequate consideration to the possibility of imposing conditions on the grant of a consent or the making of an agreement for connections to the sewerage system;

(iii) fail to give any or adequate consideration to the possibility of requiring ameliorative temporary or alternative measures in respect of the treatment of sewerage where its consent or agreement to connection is sought.

(c) The Water Service has failed to give any or adequate reasons for its decisions and actions.

(d) The Water Service's decisions and actions are unreasonable and/or irrational in the Wednesbury sense.

**The relevance of non compliant waste water systems to the grant of consents or agreements.**

[18] The broad "Wednesbury principle" requires not only that a decision must not be unreasonable, as that term is understood in judicial review, but further that the decision-maker must take into account relevant

considerations and leave out of account irrelevant considerations. In the first place relevant considerations may be obligatory for the decision maker to take into account. The statute will expressly or impliedly require the considerations to be taken into account and the decision-maker must therefore take those considerations into account. Secondly, considerations may be discretionary in that the decision-maker may determine whether they are or are not to be taken into account. The Court will intervene if the exercise of that discretion has been *Wednesbury* unreasonable. Thirdly, considerations may be irrelevant, in which case the decision-maker must not take them into account. See the discussion by Cooke J in Creednz -v- Governor General (1981) 1 NZLR 172 adopted by Lord Scarman in Findlay -v- Secretary of State (1984) 3 All ER 801 at 826(f) to 827(d) and recently applied by Laws LJ in London Borough of Newham -v- Khatun (2004) EWCA Civ 55 paragraphs 34 and 35 and by the Court of Appeal in Northern Ireland in John Joseph Duffy's Application [2006] NICA 28.

[19] Whether it is to be regarded as implicit that a particular consideration should be taken into account by the decision-maker is a matter of interpretation of the legislation. Cooke J in Creednz stated that "There may be matters so obviously material to a decision on a particular project that anything short of direct consideration of them ..... would not be in accordance with the intention of the Act." It is for the Court to determine the nature of the obligatory considerations that the decision-maker should take into account.

[20] In the present case the Department exercises a statutory discretion under Article 17 of the 1973 Order to grant or refuse consent to discharge into or connection to the Department's sewer or sewage treatment works. Further, the Department has power under Articles 24 and 32 of the 1973 Order as to consents or agreements relating to trade effluent. The statute does not expressly identify any factors to be taken into account by the Department in the exercise of its discretion. It is necessary to consider the present scheme of the 1973 Order. The general duties of the Department under Article 3 of the 1973 Order as to the provision and maintenance of sewers for draining domestic sewage, surface water and trade effluent and making provision for effectually dealing with the contents of the sewers, are duties qualified by the 1995 Regulations. In particular, the duty to make provision for effectually dealing with the contents of the sewers (Article 3(1)(c)) requires the Department to ensure that domestic water entering collecting systems is, before discharge, subject to the specified treatment, namely secondary treatment or in certain circumstances more stringent treatment (Article 5). Discharges of treated domestic water and industrial waste water must satisfy certain requirements. Collection, treatment and discharge requirements have been imposed from certain dates on certain areas identified by population equivalents.

[21] It is apparent that the contents of the original domestic duties under the 1973 Order have been supplemented by the 1995 Regulations in transposing the 1991 European Directive, the objective of which is to protect the environment from the adverse effects of waste water discharges. It is necessarily implicit in the statutory scheme in place since the introduction of the 1995 Regulations that compliance with the specified standards is at least a consideration for the decision-maker to take into account in determining whether to issue consents or enter agreements under Articles 17, 24 or 32 of the 1973 Order. Taking into account the nature and content and purpose of the statutory scheme it is not possible to reach any conclusion other than that non compliance of a waste water system with the legal requirements must be a factor to be taken into account in deciding whether to permit further connections to the system.

[22] The Department states in relation to Article 17 consents that the officer concerned will be “aware” of the status of the receiving waste water treatment works and of any plans to upgrade it, but that “generally” consideration is not given to the adequacy of the waste water treatment works when reaching the decision under Article 17. In relation to trade effluent under Articles 24 and 32 it is stated that the adequacy of the receiving waste water treatment works and plans to upgrade are factors that are “known” when decisions are taken on applications. I conclude that, in the case of trade effluent, consideration is not given to the adequacy of the waste water treatment works when reaching decisions under Article 24 or 32.

[23] The Department’s stated approach is borne out by the “Procedures, guidance and policies for consideration of Article 17 and 23 applications” as set out in the Water Service Manual. The non-compliance of a particular waste water treatment works with the statutory standards is not stated to be a consideration in the determination of applications. The respondent accepts that consents have been granted in respect of applications involving connection with waste water treatment works that do not meet the requirements of the 1995 Regulations. The Department has devised a new protocol for consideration of applications under Articles 17 and 24 of the 1973 Order with effect from 1 June 2006. The factors listed for the decision-maker to take into account in individual cases do not include the compliance of the relevant waste water treatment works with the statutory requirements, although the protocol does state that the list of factors is not necessarily exhaustive and other factors may be considered.

[24] In response to requests by the applicant for statistics on the grant of consents Mr Woods avers that in the year prior to June 2005 there had been no refusals of Article 17 applications, there were 325 applications relating to development sites, and 413 single property applications. In the two years prior to June 2005, 138 Article 17 approvals had been granted in respect of

areas where the waste water treatment works discharges did not comply with the Regulations.

[25] In the circumstances outlined above I am satisfied that the Water Service is not taking into account the compliance with legal requirements of the relevant waste water system in deciding on new connections to the system.

[26] The respondent rejects the applicant's complaints about the approach to consents and in any event contends that the Court should not accede to any challenge that does not relate to a particular decision to grant or refuse a consent or agreement. The applicant's challenge is to the refusal of the Department to give a general assurance that consents will not be granted or agreements reached for new connections to non compliant systems. The applicant challenges what is stated to be in effect the policy of the respondent to grant consents or agreements regardless of the compatibility of the treatment works with the requirements of the Regulations. In addition, consents or agreements may be subject to such terms and conditions as the Department thinks fit to impose, and the applicant complains that the respondent has not imposed conditions on the grant of consents or the making of agreements, nor considered alternative measures for the treatment of sewage.

[27] The applicant refers to the position of the Planning Appeals Commission which has expressed concern about the environmental impact of additional development in locations where the related waste water treatment works are not compliant with the Regulations. In a decision by Commissioner Kingham dated 1 March 2005 in relation to a proposed housing development at Cloughy it was noted that the sewage treatment arrangements were "in breach of the European Directive." While the EHS expressed environmental concern about the new development, there was no objection raised, this approach being in line with the pragmatic approach of the Nesbitt statement. A new treatment works was programmed for completion in October 2007 but the Commissioner questioned how realistic the timescale would be where no site had been identified. It was considered that the environmental concerns raised by the objectors and the EHS consultation response outweighed the pragmatic approach. The Commissioner recommended planning permission subject to a package of sewage treatment works serving the development until the waste water treatment works had been upgraded, and that certain dwellings were not to be occupied until the package of sewage treatment works plant had been decommissioned and connection made to the public sewer.

[28] Further, on 7 March 2005 Commissioner Campbell dealt with a proposal for a dwelling in Bangor. The EHS evidence had indicated that the sewage system was not compliant with the requirements. The role of EHS in

considering planning applications was stated to be to provide advice to the Department on the effect of the proposal, but EHS had suggested that because of the Nesbitt statement their advice, notwithstanding its contents, should effectively be registered as not contrary and neutral in respect of the proposal. This had been accepted by the Planning Service which had not carried out a balancing exercise of adverse environmental effect against housing need. Commissioner Campbell described this as the unjustified setting aside of a material consideration by the Department. Consideration was given to treatment by the installation of a septic tank, which was not considered acceptable in an urban area. There was no alternative but connection to the public sewer which would not be compatible until 2009. The proposal was rejected. The decision illustrates how the Nesbitt statement has distorted the approach of the EHS and the approach of the Planning Service.

[29] Dr Ramsey of the EHS has rejected certain alternative measures suggested by the applicant, namely provision of treatment by developers prior to connection to the public sewer, provision of individual treatment plans with discharge to a waterway, or requiring non-occupation pending compatible treatment works. The concerns leading to rejection of the measures are about the regulation of treatment by developers or individual treatment plans. No doubt possible conditions or alternatives would have to be considered on a case by case basis and there may be no suitable alternatives in some or all cases. However the respondent is not considering any such conditions or alternatives as it becomes unnecessary to do so when the condition of the relevant waste water system is not taken into account.

[30] Accordingly the Department through the Water Service has failed to take into account a relevant consideration under Articles 17, 24 or 32 of the 1973 Order in deciding on consents or agreements to new connections to waste water systems, namely whether the system is compliant with the requirements of the 1995 Regulations.

**Refusal of consents and agreements as a matter of legal obligation under the Directive and/or the Regulations.**

[31] The applicant contends that connection to a non-compliant waste water system is not merely a relevant consideration in relation to decisions on consents and agreements for such connections, but that the refusal of such consents and agreements is a legal obligation. In effect the applicant contends that any such new connections are unlawful. The positive obligation to refuse all such connections is said to arise in the first place by the direct effect of the 1991 Directive, secondly under the 1995 Regulations and thirdly by the operation of Section 24 of the Northern Ireland Act 1998.

[32] The applicant contends that the interpretation of the Directive and consequently of the 1995 Regulations and the 1973 Order should be strongly influenced by the objective of the Directive. The objective is stated to be “to protect the environment from the adverse effects of waste water discharges”. Further, the applicant relies on Article 10 of the Treaty which requires Member States to take all appropriate measures “to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the community ... facilitate the achievement of the community’s tasks ... [and] abstain from any measure which could jeopardise the attainment of the objectives of this Treaty”. Article 249 of the Treaty provides that a Directive shall be binding upon each Member State “as to the result to be achieved”, but shall leave to the national authorities the choice of form and methods.

[33] In this regard the applicant relies on Marleasing SA v La Comercial Internacional [1991] ECR I-04135 and Webb -v- EMO Air Cargo (UK) Ltd [1994] 4 All ER 115. A Member States obligation arising from a Directive is to achieve the result envisaged by the Directive, and the duty under the Treaty is to take all appropriate measures to ensure the fulfilment of that obligation. This obligation is binding on the Court and the Directive should be interpreted, as far as possible, in the light of the wording and the purpose of the Directive in order to achieve the result pursued.

[34] Adopting this interpretative approach the applicant contends for a positive obligation on the respondent to prevent waste water entering the system where the requirements for treatment and discharge have not been achieved.

[35] In addition the applicant contends that the Directive and the Regulations provide a textual basis for the obligation on the respondent to restrict access in non-compliant areas. The contention is that the obligations are not limited to collection, treatment and discharge of waste water but that, by the terms of Articles 4 and 5 of the Directive, Member States shall “ensure” that urban waste water “entering” collecting systems shall be subject to the required treatment. This reference to “entering”, according to the applicant, clearly contemplates action by the State at the point of entry, that is, by the connection from the private use to the public system. This, according to the applicant, gives rise to an obligation to prevent new connections to a non-compliant system.

[36] On the other hand the respondent contends that the Directive and the Regulations establish obligations in respect of the collection, treatment and discharge of waste water but do not include any obligation to restrict access to systems that are not compliant with the requirements. Accordingly, while it is acknowledged by the respondent that there are non-compliant areas, the respondent contends that the Directive and the Regulations do not include

obligations as to enforcement by means of the refusal of connections in such non-compliant areas. The respondent portrays the interpretative approach of Marleasing SA v La Comercial Internacional as concerning the interpretation of obligations under the Directive in accordance with the stated objective, but not as involving the stated objective being used as a vehicle to create additional obligations not contained in the Directive.

[37] The respondent further contends that had the approach of the Directive been to prevent further connection in non-compliant areas, then the Directive could have specified that compliance was a condition precedent to residential and industrial connection. By way of example the respondent refers to the Environmental Impact Assessment Directive (85/337/EEC). An environmental impact assessment is a condition precedent to the grant of development consent in the case of projects likely to have significant effects on the environment.

[38] In relation to Articles 10 and 249 of the Treaty the respondent contends that the Articles are concerned with the transposition and enforcement of a Directive and not the creation of additional obligations that are not to be found in the Directive. The respondent notes that the applicant does not contest the effective transposition of the Directive into the 1995 Regulations. Further the respondent contends that the text of the Directive that deals with collection, treatment and discharge of waste water “entering” the system is not thereby creating obligations, express or implied, that involve restrictions on entry, but rather is creating obligations requiring the control of collection, treatment and discharge.

[39] I do not accept the applicant’s argument on the issue of a positive legal obligation arising under the Directive or the Regulations to refuse new connections to a system that is not compliant with the legal requirements. The obligations arising under the Directive and the Regulations concern collection, treatment and discharge of waste water according to specified requirements. The additional obligation of effective transposition of the Directive into the Regulations has, it is agreed by the parties, been achieved. The obligation to provide the required collection, treatment and discharge standards has, it is agreed by the parties, not been achieved in all cases. The Directive and the Regulations are silent on the issue of connection to those systems where the required standards have not been achieved. I do not regard the objective of the Directive in protecting the environment from the adverse effects of waste water discharges as warranting the introduction of an obligation to restrict entry to the system. I do not interpret the measures required in respect of urban waste water “entering” collecting systems as requiring restrictions on entry. The obligations are to provide the required collecting systems and treatment and discharge standards. The result to be achieved is a compliant system and the wording and purpose of the Directive do not expressly or impliedly require restrictions on new connections in non



compliant areas. It is not for the Court to introduce an obligation to prevent new connections in non compliant areas where that does not arise expressly or impliedly under the Directive or the Regulations.

**Refusal of consents and agreements as a matter of legal obligation under the Northern Ireland Act 1998.**

[40] The applicant contends that there has been a breach of Section 24(1)(b) of the Northern Ireland Act 1998 which provides that -

“A Minister or Northern Ireland Department has no power to make, confirm or approve any subordinate legislation or to do any act so far as the legislation or act -

(b) is incompatible with community law”.

This claim gives rise to a “devolution issue” for the purposes of Schedule 10 to the Northern Ireland Act 1998. Paragraph 1 of Schedule 10 provides that a "devolution issue" means-

(b) a question whether a purported or proposed exercise of a function by a Minister or Northern Ireland department is, or would be, invalid by reason of section 24;

[41] A notice of devolution issue was issued pursuant to Order 120, Rule 2 of the Rules of the Supreme Court (Northern Ireland) 1980. In the event there was no intervener and the respondent argued the devolution issue.

[42] Is the grant of consent or an agreement to a connection to a waste water system that does not comply with the statutory requirements an act which is incompatible with community law? “Community law” is defined in Section 98 of the 1998 Act as meaning -

“(a) all rights, powers, liabilities, obligations and restrictions created or arising by or under the Community Treaties; and

(b) all remedies and procedures provided for by or under those Treaties”.

[43] A similar but not identical definition of community law appears in Section 2(1) of the European Communities Act 1972 which contains the additional words “as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom”. The

commentary on Section 2(1) of the 1972 Act in Halsburys Statutes (Vol 18 4<sup>th</sup> Ed, page 14) states that -

“Sub-section (1) above gives the force of law in the United Kingdom to those provisions of the treaties which are directly applicable in member states and also to such provisions of the secondary legislation as are without further enactment to be given legal effect in the United Kingdom.... (Legislative) acts of the Communities are of the three kinds listed below and sub-section (1) would appear to be concerned mainly with the first kind -

(1) regulations which are of general application, binding in their entirety and directly applicable in all Member States;

(2) directives which are binding, as to the result to be achieved, upon each Member State to which they are addressed, but leave to the national authorities the choice of form and method;

(3) decisions which are binding in their entirety upon those to whom they are addressed”.

[44] Accordingly Section 2(1) of the 1972 Act addresses matters that in accordance with the Treaties are without further enactment to be given legal effect, while Section 98 of the 1998 Act appears to be wider as it applies to matters created or arising by or under the Treaties even where they require further enactment to be given legal effect. While Regulations are covered by both definitions, Directives such as the Urban Waste Water Treatment Directive which require transposition into domestic law, may not to be included in the definition in section 2(1) of the 1972 Act but appear to be included in the definition in section 98 of the 1998 Act.

[45] This issue is concerned with rights, powers, liabilities, obligations, restrictions, remedies and procedures under the Treaties. Assuming that such matters arising under this Directive are matters arising under the Treaties for the purposes of the definition of community law in the 1998 Act, the issue is whether the acts of the respondent are incompatible with those matters. This brings the argument back to the extent of the obligations arising under the Directive. I have found above that the obligation contended for by the applicant to restrict access to the waste water system in non-compliant areas is not an obligation arising expressly or impliedly under the Directive or the Regulations. Accordingly the refusal of the respondent to restrict access in non-compliant areas is not thereby incompatible with community law for the purposes of section 24(1)(b) of the 1998 Act.

[46] Overall I accept the ground relied on by the applicant based on disregard of a relevant consideration, namely compliance with the requirements on collection, treatment and discharge in the area concerned, in determining whether to grant consents or agreements to new connections. Accordingly I propose to make a declaration that the Department through the Water Service has failed to take into account a relevant consideration in determining applications for consents or agreements in lieu of consents for new connections to waste water systems under Articles 17, 24 and 32 of the Water and Sewerage Services (NI) Order 1973, that relevant consideration being whether the system is compliant with the requirements of the Urban Waste Water Treatment Regulations (NI) 1995.