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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Envirogreen Polymers Limited's Application (Leave stage) [2015] NIQB 84

IN THE MATTER OF AN APPLICATION BY ENVIROGREEN POLYMERS LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF DECISIONS OF THE NORTHERN IRELAND ENVIRONMENT AGENCY DATED 15 OCTOBER 2013

TREACY J

Introduction

[1] The Applicant in these proceedings is Envirogreen Polymers Limited. In a letter dated 15 October 2013, the Northern Ireland Environment Agency ("the NIEA") refused the Applicant's application for exemption from waste management licensing under Paras 12 and 17 of Schedule 2 to the Waste Management Licensing Regulations (NI) 2003 ("the 2003 Regulations") for the storage and baling of waste paper and cardboard. The Applicant challenges this decision of the NIEA dated 15 October 2013 refusing the application for exemption from waste management licensing.

[2] Mr Ronan Lavery QC with Mr Paul Smyth appeared for the Applicant and Mr David Forscdick QC with Mr Paul McLaughlin appeared for the Respondent. I am grateful to all counsel for their helpful oral and written submissions.

Order 53 Statement

[3] The Applicant sought, *inter alia*:

> (a) An Order of *certiorari* to quash the decisions of the Northern Ireland Environment agency to refuse the applications for exemption from waste

management licensing under paragraphs 12 and 17 of Schedule 2 to the Waste Management Licensing Regulations (NI) 2003 (the "2003 Regulations") for the storage and baling of waste paper and cardboard (the "Paragraph 12 and 17 Exemptions").

(b) A Declaration that the said decisions are unlawful, *ultra vires* and of no force or effect;

(c) A Declaration that the said decisions are irrational;

(d) A Declaration that the said decisions are *Wednesbury* unreasonable;

(e) A Declaration that the said decisions are procedurally unfair;

(f) An Order that the matter be reconsidered and determined according to law;

(g) Damages;

(h) ...

(i) ...

(j) ..."

[4] The grounds on which relief is sought are as follows:

(a) In reaching the impugned decision the Northern Ireland Environment Agency acted unlawfully, irrationally and unreasonably.

(b) The Respondent, in refusing to grant the Paragraph 12 and 17 Exemptions;

(i) Failed to properly consider the specific and limited grounds for the refusal of an exemption application under the 2003 regulations;

(ii) Took into account irrelevant matters in refusing the application;

(iii) Unlawfully and irrationally refused the application for the Paragraph 12 and 17 Exemptions following the submission of applications that met all of the criteria required under the 2003 Regulations for acceptance of an exemption;

(iv) Incorrectly identified Mr Guy as Director of the Applicant company as being in receipt of an "Article 27 Notice" and unlawfully and irrationally refused the application on this basis;

> (v) Took into account factually incorrect information in refusing the application.
>
> (c) The Applicant had a legitimate expectation that his applications would be properly considered in accordance with law and in particular the 2003 Regulations.
>
> (d) The Northern Ireland Environment Agency reached a decision which in the circumstances is perverse and in the circumstances is one which no reasonable environment agency could have arrived at.
>
> (e) In reaching the impugned decision the Northern Ireland Environment Agency acted ultra vires.
>
> (f) The Respondent took into consideration irrelevant matters in reaching its decision namely information in relation to previous sites and an outstanding Article 27 notice."

Background

[5] Envirogreen Polymers Limited specialise in the collection and recycling of plastic and cardboard waste. These proceedings relate to a site at 30 Low Road, Newry.

[6] The Applicant previously operated from a site at 227 Battleford Road, Armagh ("Battleford Road Site"). The activities carried out at this site were subject to exemption from waste management licensing under Para 12 of Part 1 of Schedule 2 of the 2003 Regulations. In 2012 Envirogreen received a number of warning letters from the NIEA with regard to operations at the Battleford Road site which it alleged were outside of the scope of the exemption. This included a notice under Art 27 of the Waste and Contaminated Land (NI) Order 1997 dated 6 April 2012 to remove waste stored on part of the site. Ultimately the NIEA served a notice dated 17 September 2012 revoking the exemption for the site. The Applicant did not challenge the decision and identified alternative premises.

[7] The alternative premises secured were located at 31 Elm Park Road, Killylea ("Elm Park Site"). These premises, over which Envirogreen took a lease, also benefitted from exemption from waste management licensing granted on 10 October 2012. This exemption, as with the Battleford Road site, was granted under Para 12 of Part 1 of Schedule 2 to the 2003 Regulations for the baling of plastic and cardboard waste.

[8] On 17 June 2013 the NIEA issued a revocation notice in respect of the exemption at the Elm Park Road site on the basis of alleged non-compliance with the terms of the exemption. The Director Mr Guy had misgivings over the decision to revoke the exemption in respect of the Elm Road site. However, at that time he took the view that the business was better served by seeking to work with the NIEA to identify a suitable site at which the business could operate to the satisfaction of the Agency.

[9] The Applicant engaged consultants, EnvAudit Limited to prepare an application for exemptions under Paras 2 and 17 of Part 1 Schedule 2 to the 2003 Regulations for the storage, sorting and baling of cardboard and plastic waste. They prepared a report on the viability of the now cleared Battleford Road site but that application was refused due to the fact that an exemption had already been revoked previously in respect of that site.

[10] Mr Guy then focussed on locating a further site that would be acceptable to the agency and submitted an application in respect of the site the subject of these proceedings at 30 Low Road, Newry.

Statutory Framework

The Waste and Contaminated Land (NI) Order 1997

[11] Article 4 of the Order provides:

> 4.—(1) Subject to paragraphs (2) and (3) a person shall not—
>
> (a) deposit controlled waste, or knowingly cause or knowingly permit controlled waste to be deposited in or on any land unless a waste management licence authorising the deposit is in force and the deposit is in accordance with the licence;
>
> (b) treat, keep or dispose of controlled waste, or knowingly cause or knowingly permit controlled waste to be treated, kept or disposed of—
>
> (i) in or on any land, or
>
> (ii) by means of any mobile plant,
>
> except under and in accordance with a waste management licence;
>
> (c) treat, keep or dispose of controlled waste in a manner likely to cause pollution of the environment or harm to human health
>
> …

(8) Except in a case falling within paragraph (9), a person guilty of an offence under this Article shall be liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding £20,000 or to both; and

(b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or to a fine or to both.

(9) A person guilty of an offence under this Article in relation to special waste shall be liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or to a fine not exceeding £20,000 or to both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine or to both.

Meaning of "fit and proper person"

3.—(1) The following provisions apply for the purposes of the discharge by the Department of any function under this Part which requires the Department to determine whether a person is or is not a fit and proper person to hold a waste management licence.

(2) Whether a person is or is not a fit and proper person to hold a licence is to be determined by reference to the carrying on by him of the activities which are or are to be authorised by the licence and the fulfilment of the requirements of the licence.

(3) Subject to paragraph (4), a person shall be treated as not being a fit and proper person if it appears to the Department—

(a) that he or another relevant person has been convicted of a prescribed offence;

(b) that the management of the activities which are or are to be authorised by the licence are not or will not be in the hands of a technically competent person; or

(c) that the person who holds or is to hold the licence has not made and either has no intention of

making or is in no position to make financial provision adequate to discharge the obligations arising from the licence.

(4) The Department may, if it considers it proper to do so in any particular case, treat a person as a fit and proper person notwithstanding that paragraph (3)(a) applies in his case.

(5) Regulations may prescribe the qualifications and experience required of a person for the purposes of paragraph (3)(b).

(6) For the purposes of paragraph (3)(a), another relevant person shall be treated, in relation to the licence holder or proposed licence holder, as the case may be, as having been convicted of a prescribed offence if—

(a) any person has been convicted of a prescribed offence committed by him in the course of his employment by the holder or, as the case may be, the proposed holder of the licence or in the course of the carrying on of any business by 2 or more persons in partnership one of such persons was the holder or, as the case may be, the proposed holder of the licence;

(b) a body corporate has been convicted of a prescribed offence committed when the holder or, as the case may be, the proposed holder of the licence was a director, manager, secretary or other similar officer of that body corporate; or

(c) where the holder or, as the case may be, the proposed holder of the licence is a body corporate, a person who is a director, manager, secretary or other similar officer of that body corporate—

(i) has been convicted of a prescribed offence; or

(ii) was a director, manager, secretary or other similar officer of another body corporate at a time when a prescribed offence for which that other body corporate has been convicted was committed.

[12] The following provisions of the 2003 Regulations are relevant:

Regulation 17-Exemptions from Waste Management Licensing

17. (1) Subject to the following provisions of this regulation and of regulations 18, 19 and 20 and to any conditions or limitations in Part I of Schedule 2, Article 4(1) (a) and (b) of the 1997 Order shall not apply in relation to the carrying on of any exempt activity.

17 (4) Paragraph (1) only applies in relation to an exempt activity by an establishment or undertaking if-

(a) the type and quantity of waste submitted to the activity, and the method of disposal or recovery of waste is consistent with the need to attain the objectives mentioned in paragraph 4(1)(a) of Part I of Schedule 3;

(b) any information required under regulation 18(3) and 18(5) and the fee (if any) required under regulation 18(12) have been sent to the Department in the manner specified therein.

Regulation 18-Registration in connection with exempt activities

18. (2) Subject to paragraph (3), the register maintained under Article 34(1) of the 1997 Order shall contain the following particulars in relation to each such establishment or undertaking which carries on an exempt activity –

(a) the name and address of the establishment or undertaking, its telephone number and, if applicable, fax number and e-mail address;

(b) the activity which constitutes the exempt activity;

(c) the place or places where the activity is carried on; and

(d) a copy of any information received by the Department under paragraphs (3) and (5).

(3) Subject to paragraphs (4) and (5), the Department shall enter the particulars referred to in paragraph (2) in the register in relation to an establishment or undertaking if it receives notice of them in writing and –

(a) that notice is provided to it by or on behalf of that establishment or undertaking;

(b) that notice is accompanied by a plan of each place at which any such exempt activity is carried on showing –

(i) the boundaries of that place;

(ii) the locations within that place at which the exempt activity is to be carried on;

(iii) the location and specifications of any impermeable pavements, drainage systems or hardstandings as are required by a relevant paragraph of Part I of Schedule 2.

(c) that notice contains the correct 6 figure Ordnance Survey Irish grid reference showing the location of each place referred to in sub-paragraph (b);

(d) that notice is accompanied by a payment of any fee in respect of each place where any such exempt activity is being carried on; and

(e) the registration has not been refused under regulation 20.

Regulation 19-Registration obligations

19. (1) Subject to paragraph (2), in the case of an exempt activity set out in the first column of Part II of Schedule 2, the relevant obligations set out in the second column of that Schedule ("the registration obligations") shall apply to the registration of that activity.

(2) The Department may notify an establishment or undertaking in writing that some or all of the information required by regulation 18 does not need to be included with any notification under that regulation.

Regulation 20-Refusal revocation and cessation of registration

20. (1) 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.

(2) Where the Department has refused to register an activity under paragraph (1), it shall serve a notice on the establishment or undertaking stating that the registration has been refused and giving the reasons for its decision. Considering the above the relevant provisions are outlined below.

[13] The Para 12 and 17 exemptions contained in Part 1 of Schedule 2 of the 2003 Regulations are set out as follows:

12. Carrying on at any place, in respect of a kind of waste listed in Table 5, any of the activities specified in that Table in relation to that kind of waste where –

(a) the activity is carried on with a view to the recovery or reuse of the waste (whether or not by the person carrying on the activity listed in that Table); and

(b) the total quantity of any particular kind of waste dealt with at that place does not in any period of seven days exceed the limit specified in relation to that kind of waste in that Table.

Table 5

Kind of waste	***Activities***	***Limit (tonnes per week)***
Waste paper or cardboard	Baling, sorting or shredding	3,000
Waste textiles	Baling, sorting or shredding	100
Waste plastic	Baling, sorting, shredding, densifying or washing	100
Waste glass	Sorting, crushing or washing	1,000
Waste steel cans, aluminium cans or aluminium foil	Sorting, crushing, pulverising, shredding, compacting or baling	100
Waste food or drink cartons	Sorting, crushing, pulverising, shredding,	100

	compacting or baling

...

17. (1) The storage in a secure place on any premises of waste of a kind described in Table 7 if –

(a) the total quantity of that kind of waste stored on those premises at any time does not exceed the quantity specified in that Table;

(b) the waste is to be reused, or used for the purposes of –

(i) an activity described in paragraph 12; or

(ii) any other recovery operation;

(c) each kind of waste listed in the Table stored on the premises is kept separately; and

(d) no waste is stored on the premises for longer than twelve months.

Table 7

Kind of waste	*Max total quantity*
Waste paper or cardboard	15,000 tonnes
Waste textiles	1,000 tonnes
Waste plastics	500 tonnes
Waste glass	5,000 tonnes
Waste steel cans, aluminium cans or aluminium foil	500 tonnes
Waste food or drink cartons	500 tonnes
Waste articles which are to be used for construction work which are capable of being so used in their existing state	100 tonnes
Solvents	5 cubic metres
Refrigerants and halons	18 tonnes
Tyres	250 tyres
Waste mammalian protein	100 tonnes

Waste mammalian tallow	100 tonnes

[14] The environmental objectives at Para 4(1)(a) of Part 1 of Schedule 3 to the 2003 Regulations are as follows:

> **4**. (1) For the purposes of this Schedule, the following objectives are relevant objectives in relation to the disposal or recovery of waste –
>
> (a) ensuring that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment and in particular without –
>
> (i) risk to water, air, soil, plants or animals; or
>
> (ii) causing nuisance through noise or odours; or
>
> (iii) adversely affecting the countryside or places of special interest.

Waste Directive

[15] **Article 25**

> **Conditions for exemptions**
>
> 1. Where a Member State wishes to allow exemptions, as provided for in Article 24, it shall lay down, in respect of each type of activity, general rules specifying the types and quantities of waste that may be covered by an exemption, and the method of treatment to be used.
>
> Those rules shall be designed to ensure that waste is treated in accordance with Article 13. In the case of disposal operations referred to in point (a) of Article 24 those rules should consider best available techniques.
>
> 2. In addition to the general rules provided for in paragraph 1, Member States shall lay down specific conditions for exemptions relating to hazardous waste, including types of activity, as well as any other necessary requirement for carrying out different forms of recovery and, where relevant, the limit values for the content of hazardous substances in the waste as well as the emission limit values.

3. Member States shall inform the Commission of the general rules laid down pursuant to paragraphs 1 and 2.

Article 13

Protection of human health and the environment

Member States shall take the necessary measures to ensure that waste management is carried out without endangering human health, without harming the environment and, in particular:

(a) without risk to water, air, soil, plants or animals;

(b) without causing a nuisance through noise or odours; and

(c) without adversely affecting the countryside or places of special interest.

<u>Applicant's Submissions</u>

[16] The Applicant submitted that the grounds for refusal of a Schedule 2 exemption are limited to the following:

(i) any information required under regulation 18(3) (location and plans) and the fee required under regulation 18(12) has not been sent to the Department in the manner specified therein (regulation 17(4)(b));

(ii) the type and quantity of waste submitted to the activity, and the method of disposal/recovery of waste is not consistent with the need to attain the objectives mentioned in paragraph 4(1)(a) of Part I of Schedule 3 to the 2003 Regulations (environmental risks and impact) (Regulation 17(4)(a));

(iii) information required relating to the location of the site and proposed activity required to be placed on the register of exemptions as specified under Regulation 18(2) has not been provided; and

(iv) the application does not comply with the requirements of the specific exemption(s) applied for, namely in relation to types and volumes of waste, methods of storage and processing, etc. as set out in Schedule 2 to the 2003 Regulations paragraphs 12 and 17.

[17] The grounds for refusal of the application in the letter of 15 October 2013 refers to an "outstanding Art 27 Notice" (Art 27 of the Waste and Contaminated Land (NI) Order 1997 at a non-specified site. No such notice was in force in respect

of the application site at 30 Low Road, Newry and the existence of any such notice is not a ground for refusal of an exemption under the 2003 Regulations.

[18] The Applicant had a legitimate expectation that the application for exemption would be considered in accordance with the above regulations. The Respondent failed to consider the specific and limited grounds for refusal of a Schedule 2 exemption.

[19] The Respondent refused the application following submission of an application that met all the criteria required under the 2003 Regulations for acceptance of an exemption.

[20] Regulation 17(4)(1)(a) states that an exemption only applies to an establishment or undertaking if: the type and quantity of waste submitted to the activity, and the method of disposal or recovery of waste is consistent with the need to attain the objectives in Para 4(1)(a) of Part I of Schedule 3 to the 2003 Regulations. The wording "to the activity" indicates the activity that forms the subject of the current application and the only way of applying these provisions correctly is through the determination of the application at hand.

[21] In considering the outstanding Art 27 notice and refusing the application on this basis the Applicant has been subjected to a *de facto* fit and proper person test where no fit and proper person test exists. For example, there is a fit and proper person test under Art 3 of The Waste and Contaminated Land (NI) Order 1997. If legislators had intended those applying for exemption to be subjected to such a test then provision could quite easily have been made for same.

[22] Reference is made to this point in the recently published Mills Report into illegal dumping at a site in the townland of Mobuoy near Derry. The document entitled '*A review of waste disposal at the Mobuoy site and the lessons learnt for the future regulation of the waste industry in Northern Ireland*' is authored by Christopher Mills former Welsh Environment Agency Director. In a discussion about the current law in relation to exemptions in Northern Ireland Mr Mills makes the following remarks at Paras 3.27-3.28 of the report:

> "3.27 The wording of exemptions is very broad, vague and open to misinterpretation and excessively light touch compared to the conditions applied in a licence/permit. There is no Fit and Proper Person Test so the system can be abused by those with relevant convictions, Operators have no financial provision and some continually go into voluntary liquidation, leaving waste deposits and then move on to new sites. Some also totally ignore any form of technical competence/management of their site.

> 3.28 Action can and is taken to revoke exemptions, however, there is nothing to stop an operator submitting an application for an exemption once the revocation comes into effect and the whole cycle begins again."

[23] The Respondent has attempted to depict the Applicant in this light when this is not the case. At the time of the application and refusal the Applicant had no relevant convictions. Furthermore, neither the Applicant Company nor any previous company have gone into voluntary liquidation leaving any environmental liabilities. Both Art 27 Notices against the Applicant have resulted in waste being cleared at his own expense.

[24] In any event even if the Applicant were not a fit and proper person the legislation is clear insofar as no such test applies to the grant of exemptions. In refusing the application the Respondent has acted *ultra vires* and has taken into consideration irrelevant factors.

[25] The Respondent incorrectly identified Mr Guy, Director of the Applicant company, as being personally in receipt of an "Art 27 Notice" and unlawfully and irrationally refused the application on this basis.

Respondent's Submissions

[26] The Respondent submits that this challenge raises a single point of statutory construction – namely whether the Department is precluded as a matter of law from having regard to the identity of the proposed operator and their history of compliance with previous exemptions and other environmental protection legislation elsewhere when deciding, in the exercise of its discretion, whether to grant or refuse an exemption under reg 17(1) or reg 20(1) of the Waste Management Licencing Regulations (NI) 2003.

[27] The Respondent submits that there is no preclusion because:

(a) There is no such preclusion in the words used;

(b) Regulation 17, 18 and 20 are inconsistent with any such preclusion being implied;

(c) Regulation 18 demonstrates that the exemption is personal to the applicant and therefore necessarily envisages that the 'activity' *by that operator* is what falls to be considered;

(d) The claimed preclusion would defeat rather than serve the statutory purpose and would be inconsistent with the requirements of the Waste Directive (articles 13, 23 – 25);

(e) The claimed preclusion is inconsistent with reg 20(5) and with the discretion in reg 17(1). It would result in the absurd situation where an exemption could lawfully be revoked under reg 20(5) for breach but would then have to be immediately re-granted on an application by the

same operator under reg 17(1) irrespective as to whether a repeat breach would be likely to occur; and

(f) This is not an attempt by the Department to introduce a 'fit and proper person' test by the back door – the ability of the Department to take into account the operator's past conduct is intrinsic to the scheme.

[28] The Respondent submits that the exemption provisions are designed to permit a light touch regulatory environment for low risk activities requiring minimal regulatory control. The logic for those exemptions only applies if it can be assumed at the outset that the purposes of Article 13 of the Directive and schedule 3 Para 4(1)(a) of the 2003 Regulations will be met. Absent such confidence, the application of exemptions will undermine rather than further the attainment of the legislative objectives.

[29] Regulation 18(1) states that:

> "18.—(1) It shall be an offence for an establishment or undertaking to carry on, after 19th June 2004, an exempt activity without being registered with the Department."

[30] Based on this, the Respondent argues that the effect of this is that any exemption granted is specific to the 'establishment or undertaking'. Therefore, in granting an exemption, the Department is granting an exemption to the particular operator. It is argued that, in doing so, the Department's overarching obligation is to ensure that the objectives in art 13 of the directive and schedule 3 Para 4(1)(a) of the 2003 Regulations are met.

[31] The Respondent argues that the focus of the inquiry at the application stage must be the activity proposed *carried out by the applicant* because that is what the exemption will authorise. On this basis the Respondent argues that the Department may (or indeed must) refuse an exemption in the event that it concludes that the activity is not one where the type and quantity of waste submitted and the method of disposal or recovery to be carried out on it by the applicant will be consistent with the need to attain the Para 4(1) schedule 3 objectives. In addressing this issue, it is submitted, it is material to consider whether the applicant has shown that it does not operate elsewhere in accordance with the above requirements.

[32] The Respondent submits that in order to succeed in its challenge the Applicant has to show that it is legally immaterial to the decision on an application for an exemption. It is submitted that this cannot be correct of five separate grounds:

(i) The Respondent submits that the purpose of the process is a licencing function which is designed to ensure a high standard of environmental protection in the real world. Because of this aim, it is submitted that very clear preclusionary words to make an otherwise obviously highly material factor legally irrelevant. The Respondent argues that on the approach suggested by the Applicant the Department would have to grant an exemption even if, for

example, it knew that in the real world, the particular Applicant had no intention or ability to carry out the activity in the way described and that breaches (and environmental harm) would follow the grant.

(ii) Regulation 17(4) sets out the requirements for exemption. It specifically refers to the activity 'by an establishment or undertaking'. The Respondent submits that this expressly brings the specific applicant into consideration. The burden under regulation 17(4) is for the Department to be positively satisfied ('only applies… if') that the activity by that establishment will be consistent with the need to obtain the core environmental objectives. Unless that is satisfied, an exemption cannot be granted. The Respondent argues that in the instant case the Department was not positively satisfied that the activity by the establishment will be consistent with the need to obtain environmental objectives so it had no power to grant the exemption. The Respondent further submits Regulation 18 (the details that must be registered) makes clear the personal nature of the exemption and submits that the reason it is tied to the individual undertaking or establishment is because it is that operator whose ability to satisfy the core environmental requirements has been considered.

(iii) The scheme for exemptions has to be understood in its wider statutory context. It is a scheme which lessens the load of regulation when (but only when) there is no need for the full rigour of a Waste Management Licence. It is intrinsic to the scheme that the exemption can only apply if there is confidence that it can and will be complied with. The light touch regulation pre-supposes that there is no difficulty with the operator achieving the basic environmental standards.

(iv) The claimed preclusion is inconsistent with ref 20(5) and with the discretion in reg 17(1). It would result in the absurd situation where an exemption could lawfully be revoked under reg 20(5) for breach but would then have to be immediately re-granted on an application by the same operator under reg 17(1) irrespective as to whether a repeat breach would be likely to occur. This revolving door would make a legislative mockery of the basic objective of the legislation. It would make a nonsense of the statutory scheme if a person could repeatedly seek exemptions which would have to be granted, everyone knowing that given the history that the exemption would be likely to be breached and revoked under reg 20(5) but then had to be re-granted on a re-application. Such an interpretation would also breach the requirements of the Directive because it would be exempting activities which would not achieve the required standards.

(v) Regulation 20(5) makes the application untenable. Any exemption granted may be revoked under regulation 20(5) if the Department is satisfied that:

> "The activity is no longer being carried out in compliance with the conditions or limitations of the relevant paragraph of Part I of Schedule 2 or with the relevant provisions of regulation 17(2) or (4)."

The Respondent makes three submissions in this regard. First, the regulation presupposes that the activity is – at the outset – carried out in compliance with the exemption. Second, its role is to remove any exemption which is no longer appropriate on the facts. Third, it necessarily envisages that no new repeat exemption has to then be immediately granted under regulation 17 because one would then be in a recurring cycle of almost automatic grants followed by inevitable refusals followed by almost automatic grants.

Conclusion

[33] The Court is asked in effect to decide between two competing interpretations of article 17(4) of the 2003 regulations which for ease of reference I set out again:

> "17 (4) Paragraph (1) only applies in relation to an exempt activity by an establishment or undertaking if-
>
> (a) the type and quantity of waste submitted to the activity, and the method of disposal or recovery of waste is consistent with the need to attain the objectives mentioned in paragraph 4(1)(a) of Part I of Schedule 3;
>
> (b) any information required under regulation 18(3) and 18(5) and the fee (if any) required under regulation 18(12) have been sent to the Department in the manner specified therein."

[34] The Applicant argues that the circumstances in which an exemption can be refused are limited to the following:

> "(i) any information required under regulation 18(3) (location and plans) and the fee required under regulation 18(12) has not been sent to the Department in the manner specified therein (regulation 17(4)(b));
>
> (ii) the type and quantity of waste submitted to the activity, and the method of disposal recovery of waste is not consistent with the need to attain the objectives mentioned in paragraph 4(1)(a) of Part I of Schedule 3 to the 2003 Regulations (environmental risks and impact) (Regulation 17(4)(a));

> (iii) information required relating to the location of the site and proposed activity required to be placed on the register of exemptions as specified under Regulation 18(2) has not been provided; and
>
> (iv) the application does not comply with the requirements of the specific exemption(s) applied for, namely in relation to types and volumes of waste, methods of storage and processing, etc. as set out in Schedule 2 to the 2003 Regulations paragraphs 12 and 17."

[35] The Respondent argues that the focus of the inquiry which the department must carry out at the application stage, and upon which it must decide whether or not an exemption should be granted must be the activity proposed *carried out by the applicant* because that is what the exemption will authorise. This broader reading would thus entitle the Department to consider not just the proposed activity but also the person carrying out the activity, including their past history of compliance.

The Legislative Scheme

[36] For the majority of activities which involve dealing with waste, the relevant operator will be required to obtain a Waste Management Licence which entails compliance with a rigorous regulatory scheme. In granting a Waste Management Licence the Department must be convinced that the operator is a 'fit and proper person' to hold such a licence. Certain low-risk activities that involve dealing with waste have been exempted from the license requirement.

[37] Para 5.4 of the consultation paper on the 2003 regulations states:

> "In making exclusions and exemptions under Article 4(3), Article 4(4) requires the Department to consider instances where waste management licensing should not apply in relation to three categories of case:
>
> a) deposits of waste which are small enough or of such a temporary nature;
> b) any means of treatment or disposal which are innocuous enough not to warrant licensing; and
> c) cases for which adequate controls are provided by other legislation."

[38] That document goes on to note that Member States' power to exempt activities from the general requirements for facilities to obtain licensing is limited by the requirements of the Waste Management Directive. It goes on at Para 5.6:

> "… the Directive stipulates that exemption may only be conferred when:

> a) a member state's competent authority has adopted general rules for each type of activity. These must lay down:
>   i. the types and quantities of waste; and
>   ii. the conditions under which the activity may be exempted; and
>
> b) the types or quantities of waste and methods of disposal or recovery are such that the conditions of Article 4 are complied with."

[39] At Para 5.7 it continues

> "The WML Regulations contain provisions to ensure that these requirements are met. Where activities subject to the Directive are exempted in schedule 2, the specification of each individual exemption limits the quantity and type of waste that may be involved, either explicitly or arising implicitly from the nature of the exemption. Conditions to ensure that the disposal or recovery activity is carried out without harm to health or the environment are reinforced by the continued application of Article 4(1) (c) of the 1997 Order to all the activities exempted in Schedule 2 (i.e. that carrying out exempted activities in such a way that they cause harm to health or the environment is an offence)."

[40] It is clear from this explanatory text that the focus of the inquiry is on the activity (the type and amount of waste, the manner in which it is dealt with). At the point of a first application in relation to a site, the activity can only be judged on the application itself. While the 'method' of carrying out the activity could be broad enough to permit consideration of how the activity is carried out by a specific operator, the fact is that on a new application there cannot be any evidence of carrying out the activity in a non-compliant manner. Article 17(4) cannot be read in such a way as to impute behaviour that is feared but has not yet taken place by the applicant to disentitle it to the exemption that it would otherwise be entitled.

[41] The Department's preferred interpretation of the section would allow it to make an operator guilty of non-compliance at a point in time when that operator had not even begun to carry out the activity yet. This cannot be correct.

[42] There was a deliberate legislative decision *not* to impose the rigours of the 'fit and proper person' test in relation to these low risk activities. In place of the licensing, the identified low risk activities are subject to a simple registration scheme.

[43] The Respondent seeks to argue that the wording of *inter alia* regulation 18(1) – that it is an offence for 'an establishment or undertaking' to carry on an exempt activity unless it is registered to do so – necessarily implies that the focus of the inquiry is on the activity proposed to be carried out *by the applicant*, which in turn necessitates a consideration of the applicant itself and its history.

[44] However, in the consultation document which accompanied the draft Waste Management Licensing Regulations (NI) 2003 it says at Para 5.31:

> Scope and Application of the Registration Requirement
>
> 5.3.1 Only "establishments or undertakings" must register; where any exempt activity is undertaken other than by an establishment or undertaking, the person carrying on that activity need not register in order to benefit from the exemption. … For the purpose of the interpretation of these Regulations "establishments or undertakings" who must be registered may be taken to include any organisation, whether a company, partnership, authority, society, trust, club, charity or other organisation, but not private individuals.

This distinction is reflected in the legislation.

[45] Therefore, the language relied on by the Respondent is not intended to invite scrutiny of the operator, but to differentiate between the operators who are subject to the registration requirement (establishments and undertakings) and those who are not (individual persons).

[46] Further, at 5.26 of the same document it is stated:

> "5.26 Regulation 17(4)(a) makes explicit the need for such exempt activities to be consistent with the objectives of the Directive, but in practice this is unlikely to invalidate exemptions that would otherwise be permitted; inconsistent activities are likely to be already caught by other provisions. It is likely that carrying out an activity using methods of disposal or recovery inconsistent with the objectives would fall foul of Article 4(1)(c) of the 1997 Order… In other cases, where excessive quantities or dangerous or harmful types of waste were subject to the activity, they would exceed the limits as to types and quantities of wastes specified in individual exemptions in Schedule 2."

[47] It is clear from this explanatory paragraph that it is the activities themselves, and the technical specifications of those activities, that attract or disapply the

exemption provisions. This is further clear from regulation 18 which outlines the information which is required to register an exemption – basic contact details, a description of the activity to take place, the location of the site and the location within the site that the activity will take place, and the location of particular features of the land such as drainage systems. This focus on practical, technical detail is the clear focus of the regulations.

[48] The Respondent argues *'it is intrinsic to the scheme that the exemption can only apply if there is confidence that it can and will be complied with. The light touch regulation presupposes that there is no difficulty with the operator achieving the basic environmental standards'.* I cannot agree with this characterization of the scheme as focussed on the operator. It is clear from the language of the regulations, as discussed above, that the focus is on the technical specifications of the activity. A clear statutory decision has been made that certain activities, because they are low risk, can benefit from a lower level of regulation – regardless of the qualifications of the operator. This may seem dangerously laissez-faire on its own, but when looked at in the context of the scheme as a whole it is clear that this light touch regulation is buttressed with enforcement provisions should the operator fail to comply. In the first instance, if there is non-compliance with the requirements of the exemption the exemption can be revoked. Then there are the enforcement provisions at article 4 of the 1997 Order. Finally, there is the Article 27 procedure whereby the department can serve a notice requiring 'any person who is keeping controlled waste on any land' to deliver the waste to a specific person with a view to it being treated/disposed of.

[49] The Respondent argues that interpretation proposed by the Applicant, and accepted by the court will create an absurd situation where a person could repeatedly seek exemptions, breach the exemption, have the exemption revoked and then automatically be entitled to a re-grant of the exemption upon application. I disagree. The purpose of the exemption requirement is to ensure low risk waste management operators remain compliant. If an operator with a registered exemption becomes non-compliant, their exemption will be revoked until such time as they have brought their operation back into compliance with the requirements of the exemption at which point they can re-apply for the exemption. If they can show that the activity is now compliant, they would be entitled to the exemption once again. While their exemption is revoked they will not be entitled to carry out the activity and if they do so they open themselves up to the Department's enforcement powers. This appears to be a sensible and robust light-touch regulatory scheme for low risk activities.

[50] Additionally, Reg 17(4)(a) requires that:

> 17 (4) Paragraph (1) only applies in relation to an exempt activity by an establishment or undertaking if-
>
> (a) the type and quantity of waste submitted to the activity, and the method of disposal or recovery of waste ***is*** consistent with the need to attain the

objectives mentioned in paragraph 4(1)(a) of Part
I of Schedule 3;

[51] This clearly denotes that the department is required to consider the state of affairs at the time that the application is made. Ms Millar in her affidavit explains:

> "… we formed the view that the environmental objectives set out in Sch. 3, paragraph 4 of the 2003 Regulations were unlikely to be achieved in the event that the exemptions were granted. In particular, it was considered likely that his future activities could cause harm to the environment, cause nuisance through noise or odours or adversely affect the countryside"

[52] Clearly the Department in their determination took into account considerations other than the state of affairs at the time of the application and in particular unlawfully took into account their own speculations about future behaviour.

[53] The correct characterization of article 17(4) is that the test that needs to be satisfied is a low burden, a *prima facie* test determined 'on the papers' only for a first registration – this is consistent with the express legislative intention that low-risk activities should benefit from a light-touch regulatory regime. If non-compliance is subsequently detected the Department may revoke the exemption and refuse to re-grant it until such a time as the activity on the site is compliant again.

[54] Accordingly, I allow the judicial review and quash the impugned decision.