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Judgment: approved by the Court for handing down | *Delivered:* **19.10.04**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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IN THE MATTER OF AN APPLICATION BY VIRGIL BATES AND JASON BATES FOR JUDICIAL REVIEW

AND

IN A MATTER OF A DECISION OF THE DEPARTMENT OF THE ENVIRONMENT FOR NORTHERN IRELAND, ENVIRONMENT AND HERITAGE SERVICE DATED 5 MARCH 2004

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DEENY J

Introduction

[1] The applicants are brothers. In May 2001 their father transferred to them, for natural love and affection, a waste recycling facility at 1080, Crumlin Road, Belfast. The father, and his father before him had been in the waste business on this site for over 30 years.

[2] Having taken over the business the brothers took legal advice and on foot of that advice applied to Belfast City Council for a waste disposal license, on 12 November 2001. There had been at least one license in force with regard to this facility in the past but there was no license in force at the time of this application.

[3] On the 5 December 2001 the Waste Disposal Manager of Belfast City Council wrote to the applicants' agents informing them that the application had been refused at the meeting of the council on 3 December 2001. The ground relied on by the Council was:

> "To prevent danger to public health which may result from additional loading of the site. This refers to land slippage which has occurred in Ligoneil Country Park over a period of time and

> which could accelerate with the addition of further waste materials on your land."

[4] The applicants appealed the Council decision on 16 May 2002 which was within the permitted time limit. The appeal was to the Department of the Environment under Article 12 of the Pollution Control and Local Government (Northern Ireland) Order 1978. Within the Department of the Environment the agency responsible for this appeal was the Environment and Heritage Service.

[5] It decided to set up an appeal panel of independent experts to advise the Department on the appeal. The members of the panel were Ms Leslie A. Haesman, BSC,C.Chem, M.R.S.C. M.C.I.W.M; Mr Malcolm Puller, D.I.C, F.I.C.E. F.I.StrucE and Mr John S Turner, BA, F.R.T.P.I., M.R.I.C.S. Chairman. Ms Haesman was an Environmental Chemist with more than 20 years experience in waste management. Mr Puller was a Consulting Engineer specialising in Geo-Technics and Foundation Engineering for the last 16 years, after a broader engineering experience in his earlier career. Mr Turner is a recently retired member of the Planning Appeals Commission. All parties agreed in respecting the independence, qualifications and experience of the panel. They were assisted in legal aspects of the matter by Mr William Orbinson of Counsel, instructed by Ms Jeanne McClune of the Departmental Solicitors Office.

[6] The panel conducted a public hearing of the appeal on Thursday 24 April and Friday 22 August 2003. They prepared a 40 page report which was forwarded to the Department on 14 November 2003. The conclusion centred on paragraph 7.3 of the report and was as follows:

> "The panels' opinions is that, not withstanding the potential for further land slippage within the land ownership of the appellants, or their family, there is not a demonstrable danger to public health from the relatively small additional loading which would result from this Waste Transfer Station. "

They did recommend that the license be subject to lengthy and onerous conditions, particularly with regard to monitoring of the site. These were originally drafted by Belfast City Council and were amended to some degree in the light of representations made by the applicants.

[7] The applicants stress, and this was not disputed, that this was not a land-fill site which they wished to operate. In the past some land-filling had gone on adjacent to the site. However the purpose of the site was to recycle waste. Lorries owned by the applicants would bring full skips, which people had hired, to the Crumlin Road site. Recyclable waste such as bricks and

slates would be sorted and removed for sale. Other waste would be taken to licensed in-fill sites. The additional loading in question therefore consisted of the effect of a number of these skips being on the premises while they were sorted, some skips being left overnight and the movement of lorries. This explains the panels' reference to "relatively small additional loading." The waste in question is and would remain non-hazardous waste.

[8] On the site there is a vehicle repair maintenance shed and also a very large shed constructed in 1996. The panel closely examined the issue of planning permission and were satisfied that there was planning permission for the operation. That was not disputed for the purposes of this judicial review application. The sheds are about 5 metres below the Crumlin Road. The waste facility is on flat ground around these sheds but running from the edge of the area to be licensed there is a down-ward slope of about 25 metres in height. From the base of that slope to the fence around Northern Ireland Housing Executive dwellings is about 100 metres. However over that distance the ground falls by an amount of approximately 5 metres only.

[9] In 1989 a water main in the slope below the applicants' site had fractured. It was common case that this was caused by some movement of the land although there was no external land slippage as such.

[10] The site is adjacent to the Ligoneil Country Park. There has been some evidence of slippage in that park in recent years. That movement had been monitored by Doran Consulting Limited on behalf of Belfast City Council. It appeared from that monitoring that the slope was creeping downhill at about 300 millimetres or 1 foot per year. While that had not happened at the applicants site there are distinct geological similarities between both slopes.

[11] Article 12 of the Order deals with "Appeals to Department from decisions with respect to licences". Where an application for a disposal licence or a modification of the same is rejected the applicant for the licence may appeal to the Department. The refusal of a licence is ineffective while that appeal is pending. It seems clear and is not in dispute that the Department should apply the same test as the district council does under Article 7.

[12] Mr Stewart Beattie appeared for the applicants in this matter. Mr David McAlister appeared for the Department and Mr David Scoffield for Belfast City Council. All three provided helpful skeleton arguments and made oral submissions at the hearing. Mr Beattie's first contention is that, unlike the advisory panel, the Department failed to have any adequate regard for the statutory test under Article 7(3) of the 1978 Order. I set out that paragraph in full.

> "7.(3) Where a District Council receives an application for a disposal licence for a use of land, plant or equipment for which such planning permission is in force or such consent has been granted, the Council shall not reject the application unless the Council is satisfied that its rejection is necessary for the purpose of preventing danger to public health."

[13] Mr Beattie compares that provision with that to be found in other licensing provisions. For example, under Article 7(4) of the Licensing NI Order 1996 it is provided that:

> "A court shall refuse an application for the grant of a licence unless it is satisfied - ….".

There then follows a list of mandatory stipulations with which the applicant must comply, before a licence may be granted. I therefore turn to the Department's consideration to see whether the correct test was properly applied by them.

Departmental consideration

[14] The report of the independent panel went to the Department on 14 November 2003. The statutory test was therein set out at paragraph 5.8 and was addressed by the panel at 5.9. In her affidavit, Pamela Patterson says that she is the Operations Manager in the Waste Management and Contaminated Land Unit of the Environment and Heritage Service of the Department of the Environment. She attended the appeal hearing conducted by the panel to provide administrative assistance to them and to listen to the evidence. The point is made by applicant's Counsel and not disputed that her administrative duties meant that she was absent from time to time from the hearing and would not have heard all of the evidence.

[15] She avers that she prepared a written Consideration of the panel's report and Department's Response which were dated 30 January 2004 and exhibited by her to her affidavit in this manner. The first 4 or so pages of this document are described as the Department's Consideration of the panel's report dated 14 November 2003. However it appears from her affidavit that she was the sole author of this Consideration. In form it is largely a summary of the panel's views but written from a very definite viewpoint. As early as paragraph 5 one finds the following.

> "The panel has concluded that the appeal should be allowed subject to the imposition of certain Waste Disposal Licence Conditions. The Department, having carefully considered the content and

> reasoning put forward in the report, have concluded that we should reject the panel's recommendation to approve this appeal".

Counsel for the applicants draws attention to the fact that this conclusion at an early stage of the Consideration is made without any express or implied reference to the statutory test. It does not set out the language used in the Order In Council. It does not paraphrase the test.

[16] Counsel draws attention to paragraph D in the Department's Response. There are various aspects of this paragraph which he submits are controversial. On this issue he cited this sentence.

> "The appellant should therefore have been requested to provide assurance that the proposed activity would not pose a danger to public health".

While that does not sound objectionable in itself on its own, in its context it does imply that the author is unaware of the burden of proof as set out in the statutory test, and may be reversing it. In any event such "assurance" had been provided to the satisfaction of the Panel.

[17] The conclusion of the Departments response is at paragraphs E and F which I set out in full.

> "E. Even if the Panel's views reflect the level of stability and potential risk for the site and surrounding area, the Department cannot proceed on the basis of probability that there would be a low risk to property and very low risk of personal injury or death. The Department is duty bound to exercise caution where there is any danger to public health no matter if that risk is perceived to be very low.
>
> F. The Department has therefore determined that the appeal should be dismissed and that a Waste Disposal Licence not be granted for a waste recycling facility at 1080 Crumlin Road, Belfast".

[18] Again, Mr Beattie points out, the statutory test is not set out. He suggests that it must clearly be inferred from the language used that the author is not directing herself as to the statutory pre-disposition in favour of granting the licence unless the decision maker is satisfied that it is necessary not to do so.

[19] The Department's response was reviewed by Stephen Aston, Head of Waste Management and Contaminated Land Unit. He was Ms Patterson's superior. He recommended no variation in it. Her affidavit does not expressly say that he reviewed the original panel's report. In any event he does not add any views of his own citing the statutory test or otherwise.

[20] Mrs Patterson averred in her affidavit that the appeal then came for a final decision to Dr Roy Ramsay, Director of Environmental Protection, in the Department. She said that he had available to him the response prepared by herself and reviewed by Mr Aston. Mr McAllister said from the Bar on instructions that Dr Ramsay also had the Consideration and I accept that he had that and all the relevant documents.

[21] On 5 March 2004 he wrote to the applicant's solicitors in the following terms.

> "Your client's appeal against Belfast City Council's decision to refuse the Waste Disposal Licence for the above facility refers.
>
> Having carefully considered all the evidence presented at the public hearing in August 2003 and the Report from the appointed panel (copy enclosed). The Department has determined to dismiss the appeal on the basis of the un-quantified risk to the public.
>
> Yours sincerely."

It does appear as though there is a typographical error and this was meant to be one sentence with a comma after the brackets.

[22] The statutory test is that an application for a licence of this kind shall not be rejected unless the Department, in this case, "is satisfied that its rejection is necessary for the purpose of preventing danger to public health". I do not think it can be argued that the words used by Dr Ramsay are a paraphrase of that test.

[23] Mr McAllister did argue, correctly, in my view, that the failure to set out the statutory test should not inevitably lead to an inference that it was not applied. That is an entirely fair point.

[24] It is a very common practice of public authorities when exercising statutory powers to refer in their forms of correspondence to the power they are exercising and to use the words of the statutory provision. They cannot automatically be condemned for failing to do so. But if they neither set out the statutory test nor paraphrase it they do run the risk of the inference being drawn that they have failed to direct themselves correctly with regard to the

duty upon them. In this case one finds that not only does the final decision letter appear to neglect the statutory test but it is neither set out nor paraphrased in the longer document prepared for the assistance of Dr Ramsay by Mrs Patterson. It appears to me that the inference to be properly drawn from these documents is that the Department mis-directed itself in law by failing to appreciate that there was an onus on it to be satisfied that it was necessary to reject the application for the purpose of preventing danger to public health.

[25] One might express it alternatively as a finding that the Department failed to take account of the test as a relevant consideration. Mr Beattie relies on that also in his criticism of the final decision later in referring to "an unquantified risk to the public." He says that it was quantified by the panel who found the risk to be between non-existent and fairly low. Certainly in the assessment of risk it is normally impossible to reduce it to precise percentages although witnesses are sometimes urged to do so.

[26] It is entirely laudable that the Department would wish to approach this issue with caution, while bearing in mind that this is a waste recycling operation and not a dump. But they must direct themselves as to the proper legal test and consider whether the fears they apprehend are such as to justify the rejection of the application in the way that the Order In Council contemplates. This they did not do.

[27] This finding relates to grounds 1 and 2 of the Order 53 Statement. Ground 3 was one that I indicated at the hearing was not persuasive and which Mr Beattie did not press. The fourth ground related to failure to provide any lawful reasons, as re-phrased by Mr Beattie, for ignoring the recommendation of the appeal panel. I reject that ground as I conclude that the Department did provide reasons. They are to be found in the Department's Consideration and response and the letter of 5 March 2004.

Licence conditions

[28] Mr Beattie's fifth ground was added by way of amendment at the hearing of this judicial review action as were his sixth and seventh grounds. I gave him leave to do so, with the consent of the other parties. His fifth ground was that the EHS, as it is put in the Order 53 Statement, "failed to have any regard to the suggested Conditions accepted by the applicants to secure the ongoing monitoring of the site and its long term safety." These Conditions make up appendix 3 to the report of the panel. There are some 22 pages. It is recorded therein that the text was provided originally by Belfast City Council in April 2003 and amended by the panel. They were the subject of debate at the public hearing. They were accepted by the applicants. They cover many things. They prohibit operations at the site commencing until a working plan has been submitted to the waste disposal authority. They limit the waste that may be used to "solid inert and non-putrescible waste

delivered by the skip hire company owned by the holder of the Waste Disposal Licence." They put a maximum ceiling of the quantity of waste that may be present at the site on any one day at 102 tonnes. They restrict the hours of operation. They require the presence of technically competent and suitably experienced members of staff. They require risk assessments to be carried out.

[29] At 1.13 the issue of site stability which is at the core of the Department's decisions is expressly addressed. The licensee is required to establish permanent survey monitoring monuments across the flat service of the upper site, on the slopes at 3 levels and on the land below the slopes all in accordance with the waste authorities reasonable requirements.

> "These monuments shall be surveyed quarterly for position and level to a tolerance of plus or minus 5 mm in relation to a grid of 3 bench-mark reference monuments also positioned around the site."

It should be noted that 5 mm here is not a mis-print for metres. The instrumentation has to be fine enough to detect tolerances of below 1/5 of 1 inch. "The monitoring shall be carried out by a competent, independent professional company." The surveys must be carried out in conjunction with the council's agents and forwarded quarterly in a digital form acceptable to them. If the monitoring shows significant ground movement, the definition of which does not appear, an action plan shall be submitted to the waste authority for approval. There are a further 17 pages of Conditions that follow.

[30] The applicants point out that there is only indirect reference to these Conditions, at paragraph 5 of the Department's Consideration, and also, I note, at paragraph 4. In the discussion of the "The Stability of the Site and Surrounding Land" and the "Risk to Public Safety" there is no reference to the conditions at all. Nor is there any in the summary of key points nor in the Department's Response. Clearly there was none by Mr Aston and nor is there any reference in the letter of 5 March 2004. It is right to say that ex post facto justification by decision makers has been the subject of criticism by the courts. See *R v Westminster City Council ex parte Ermakov* [1996] 2 All E.R. 302 and In *Re: Windsor Securities* (Unrep. 2004) Girvan J. In this case even that does not appear as none of the 3 officials involved have sworn that they did take the conditions into account.

[31] I have had the benefit of being taken through the Consideration and Response prepared by Mrs Patterson in some detail by Counsel for both the applicants and the respondent. In the light of that careful exposition and the documents themselves it seems to me that the only proper inference is that

the conditions were not taken into account by the Department when arriving at its decision.

[32] Counsel for the Department was at pains to emphasise that despite the language of Mrs Patterson's document the final decision was made by Dr Ramsey. I accept that but I am mindful of the decision of Mr Justice Kerr, as he then was, in *In Re: Belfast Chamber of Trade and Commerce* [1999]. In that case he quashed the decision of the Department to grant planning permission to a large out of town development because the summary prepared by the then Deputy Secretary of the Department misrepresented the views of the planning service to the Minister. It was true that if the Minister had diligently read below the summary to earlier documents he could have found this out for himself. But the court ruled, in a decision which was not disputed by the Department, that the decision to grant planning permission had not been validly made.

[33] The panel report could have been sent simpliciter to Dr Ramsay. In the alternative a simple summary could have been prepared for him. In choosing to prepare a Consideration and Response the Department exposed itself to the danger that the final decision maker would be misdirected as to law or fail to take into account a relevant condition, as I find was the case here. These Conditions could not be described as "tangential or peripheral" to use the language of the Court of Appeal in *In Re: Gilligan* [2003] NIJB 184-198. On the contrary, they were clearly of considerable importance and needed to be carefully taken into account in making a decision on the grant of a licence.

Further grounds

[34] The seventh ground of the amended Order 53 statement drew attention to the apparent failure of the Department "to have regard to the fact that the site could be put to alternative lawful uses that would have equivalent effect in terms of loading on the site". It seems to me that this is likely to be a relevant consideration which ought to be taken into account by any decision maker in arriving at a conclusion on this licence application. However, I accept the submission of counsel for the respondent that it was not a matter put before the Department when they were considering it and that it would not be fair in the circumstances to criticise it for failing to take it into account.

[35] The sixth ground criticised the respondent the EHS for failing "to have regard to the evidence presented by the applicant regarding the short term stability of the site and in particular monitoring since December 2002 that demonstrated no movement of the lands." Counsel for the applicants drew attention to a number of matters which supported this contention, which had been put somewhat differently in a skeleton argument. He points

out that at paragraph 17 of the Department consideration the first bullet reads:

> "The Panel recorded signs of movement in the slope in April 2003."

That seems to be the wrong slope. He points out that the summary and response give the impression that the Panel was dissatisfied with the monitoring which had been carried out on behalf of the applicants whereas, when one reads the report one sees that they were merely pointing out that because of its recent origin it could not given long term assurance. Long term in that sense meant at least some years.

[36] He pointed out that the author of the Department's response was simply wrong to say there was "no documented evidence" to justify the Panel's view, that there would be warning signs of movement and that the risk of personal injury or death would be very low. Such evidence existed both from the monitoring by the experts retained by the applicants and also from the more long term monitoring carried out by Doran Consulting on behalf of the City Council with regard to the nearby slope in Ligoneil Country Park.

[37] I think there is some force in these submissions but in the light of my earlier findings I do not find it necessary to reach a conclusive view and I do not do so.

[38] I would make this observation. It seems that none of the three officials in the Department were themselves possessed of Geo-technical expertise. They were or were close to being lay persons so far as issues of land stability were concerned. In those circumstances it would be important for them to carefully consider the views of the Panel who did possess such expertise and which had directly heard the evidence of other experts in that field. Counsel for the respondent rightly points out that the Department was not obliged to accept the view of the Panel but it must carefully consider it and provide relevant reasons if it wishes to disregard it.

Remedies

[39] Mr McAlister accepted that if one or more of the grounds put forward by the applicants found favour with the court a declaration should properly be made. He argued that I should not make an order of Certiorari quashing the decision of the Department even if I felt that some of the grounds were made out. Mr Scoffield said that no one was arguing that the applicant cannot come to court and seek to quash the decision. These submissions involve two elements. Firstly that the Department would no longer have the power to grant a licence under the 1978 Order. Secondly, even if it had the

power I should not exercise my discretion to grant Certiorari but should leave the applicant to apply afresh for a licence under the new statutory regime which came into force in 2003. I now consider these submissions.

[40] The relevant provisions of the Pollution Control and Local Government (NI) Order 1978 have already been set out above. I draw attention in particular, at this stage, to Article 12(2) of that Order. It provides that while an appeal is pending under paragraph (1) of Article 12 the decision in question ie. to refuse a licence shall, subject to paragraph (c) be ineffective. Paragraph (3) has not been invoked in this case. Therefore until the appeal is dismissed the decision to refuse the licences is ineffective. Dismissal in that context must mean a lawful dismissal of the appeal upon a real determination and not a purported determination. *Anisminic, Limited v The Foreign Compensation Commission and Another* [1969] 1 All ER 208. HL.

[41] I now turn to The Waste and Contaminated Land (NI) Order 1997. Article 83(2) of this Order provides that the statutory provisions set out in Schedule 6 are "hereby repealed to the extent specified in column 3 of that Schedule." On turning to Schedule 6 one finds that the extent of the repeal includes both Article 7 and Article 12 of the 1978 Order. However, this Order in Council, although made on 26 November 1997 was only to come into operation on days to be appointed under Article 1(2). That in turn provided that the Order would come into operation in such day or days as the head of the Department shall appoint.

[42] Counsel agreed that the relevant commencement order was The Waste and Contaminated Land (1997 Order) (Commencement No. 7) Order (Northern Ireland) 2003 (No. 489). The provisions of this short Commencement Order must be read with care. Article 3 provided that the provisions specified in the Schedule shall come into operation for the purpose of their application to an activity falling within Article 2, on the day immediately following the appropriate date in relation to the appeal in question. The provisions in the Schedule include Article 6 of the 1997 Order relating to the grant of waste management licences.

[43] One therefore turns to Article 2 which I set out in full.

> "Appointed Day
>
> 2. The day appointed for the coming into operation of the provisions of the 1997 Order specified in the Schedule shall be 27 November 2003 save for the purposes of its application to an activity in respect of which on that date an appeal in pursuance of sub-paragraphs (a), (b), (c) or (d) of Article 12(1) of the 1978 Order (appeals to the

> Department of the Environment from decisions with respect to licences) is pending or where the period for making such an appeal has not expired."

[44] This Order was made on 27 November 2003. It is clear that on that date this applicant's appeal to the Department from a decision with respect to licences, pursuant to Article 12 of the 1978 Order was indeed pending. Therefore the new provision would only apply to this appeal on the day immediately following the "appropriate date", within the meaning of Article 1 of the Commencement Order ie. the date on which the appeal is determined in a case where the appeal is dismissed. That decision was made on 5 March 2004 although only communicated on the following day. However, if the court grants an order of Certiorari that quashes the determination of the appeal in question, the appeal is then a pending appeal within Article 2 and the Department is empowered, and indeed obliged to consider the appeal fresh.

[45] However, Mr Scoffield in his argument said that even if I found that there was such a power I should not let the applicant "evade the stricter licensing regime which is now in force". I am not persuaded by this submission. Firstly, it cannot be said that the applicant is "evading" anything. They commenced the appeal under the early statutory provisions. They went to considerable expense in retaining counsel, solicitors and four experts to give evidence before a panel appointed by the Department. They submit that they should not be put to the considerable additional expense of now applying completely afresh if, in the events, their appeal has not been properly determined.

[46] Furthermore, it is pointed out by the applicants that Article 6 of the 1997 Order again provides that "a licence shall be granted" to a person in occupation of lands for waste disposal etc. They argue, further, that at the hearing before the Panel last year they demonstrated that they would comply with current English guidelines to a waste management unit and that therefore, in reality, they were not seeking any relaxation whatsoever. Mr Scoffield drew attention to Article 3 of the 1997 Order which brought in a requirement that a person holding a waste management licence should be a fit and proper person. His suggestion that this did not apply to the applicants was countered by their counsel pointing out that they had no convictions of any kind.

[47] I consider the decisive argument here is that if I do not grant Certiorari this business could be closed down pending any fresh application and decision by the Department. The applicants have no other site from which they conduct it. They are clearly carrying on "an activity" within the meaning of the Commencement Order, on a site where such activity has been carried on for some 30 years. Subject to one point I am therefore persuaded

that it is right to issue Certiorari in this case, given the findings earlier recorded.

[48] The reservation which I have is the need for the Department to reconsider the decision in the light of the order of the court in a measured and proper way. It is entirely a matter for the Department but it is conceivable that, given the elapse of time, they would wish to obtain up-do-date monitoring information. It seems to me that it would be proper to do so provided they made it available to the applicants and the City Council for their comments. However, all this may take some time. I therefore propose to allow counsel for the respondent and notice party to address me on whether any or all of the conditions proposed by the Panel should be performed by the applicants, in the event of an order of Certiorari, pending the fresh decision by the Department. I will also hear from counsel for the applicants as to whether he is in a position to offer any undertakings with regard to the same.