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*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

*Delivered:* **14/06/2016**

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

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**Envirogreen Polymers Limited's Application (Judicial Review) [2016] NIQB 68**

**AN APPLICATION BY ENVIROGREEN POLYMERS LIMITED  
FOR JUDICIAL REVIEW**

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**Before: Morgan LCJ, Weatherup LJ and Weir LJ**

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**WEATHERUP LJ (delivering the judgment of the court)**

[1] This is an appeal by the Northern Ireland Environment Agency ("NIEA") from the decision of Treacy J dated 21 September 2015 quashing a decision of NIEA on 15 October 2013 to refuse Envirogreen Polymers Limited ("Envirogreen") an exemption from waste management licensing. Mr Forsdick QC and Mr McLaughlin appeared for NIEA, and Mr Ronan Lavery QC and Mr Smith appeared for Envirogreen.

[2] NIEA's refusal to exempt Envirogreen from the waste management licencing scheme was based on the conclusion that Envirogreen had demonstrated a clear pattern of disregard for environmental regulations in the operation of previous sites. Treacy J quashed NIEA's refusal of the exemption on the ground that the statutory scheme for exemption from waste management licensing did not permit NIEA to take into account Envirogreen's history of operations at previous sites.

[3] Conor Guy is the owner and director of Envirogreen, a company that specialises in the collection and recycling of plastic and cardboard waste. Mr Guy founded the business as Envirogreen Recycling Limited ("Recycling") in 2009.

Recycling is described by Mr Guy as Envirogreen's sister company and is now in voluntary liquidation.

[4] In the grounding affidavit for this application Mr Guy set out some background to Envirogreen's operations over the previous three years. Recycling operated from an industrial site at 227 Battleford Road, Armagh. An exemption from the requirement to hold a waste management licence was issued on 20 October 2011 for the storage and baling of plastic and cardboard waste. In 2012 Recycling received warning letters from NIEA with regard to operations at the Battleford Road site which were alleged to be outside the scope of the exemption and a notice under Article 27 of the Waste and Contaminated Land (NI) Order 1997 dated 6 April 2012 required the removal of waste stored on part of the site. NIEA served a notice revoking the exemption on 17 September 2012. Mr Guy disputed the basis of the revocation. However the revocation resulted in the closure of the Battleford Road site and the transfer of operations to an alternative site.

[5] The alternative was at 31 Elm Park Road, Killylea where Envirogreen took a lease and was granted an exemption on 10 October 2012 for the storage and baling of plastic and cardboard waste. On 17 June 2013 NIEA issued a revocation notice on the basis of non-compliance with the terms of the exemption and an Article 27 notice for removal of waste from the site. Again Mr Guy disputed the basis on which NIEA undertook those actions.

[6] Envirogreen engaged consultants, cleared the Battleford Road site and applied for an exemption on 30 June 2013 which was refused by NIEA on 9 August 2013 on the basis that an exemption had previously been revoked and an outstanding enforcement notice applied to the site (this being the Article 27 notice dated 6 April 2012 which Mr Guy considered had been honoured).

[7] Envirogreen then turned to the site with which this appeal is concerned at 30 Low Road Newry and on 22 August 2013 applied for exemption, which was refused on 15 October 2013 referring to an outstanding Article 27 notice (in respect of the other site).

[8] Stephanie Miller is a Principal Scientific Officer with the Land and Resource Management Unit of NIEA and signed the decision letter of 15 October 2013 refusing Envirogreen's exemption. Further to the application for an exemption she received from the Environmental Crime Unit of NIEA a request dated 20 September 2013 not to progress the exemption application because of concerns arising from current enforcement action and a number of incidents relating to Mr Guy. On a site visit officials considered that the site was not suitable for exemption as it had not been sufficiently adapted to enable the storage of waste in a secure place. She stated that ultimately it was decided that in light of the involvement of Mr Guy and Envirogreen and the history of non-compliance with the conditions of waste management exemptions the Department could not be satisfied that if the exemption were granted

the environmental objectives set out in the Regulations would be met and accordingly the application was refused.

[9] Ms Millar extended the history to two earlier sites operated by Recycling. One was at 3 Washing Bay Road, Coalisland and on 26 March 2010 NIEA had received an application for exemption which was granted on 22 April 2010. On 27 October 2011 NIEA found waste products that were not authorised stored in an area outside the boundaries of the permitted exemption. On 11 November 2011 unauthorised waste was stored on site. All operations on site ceased on 1 December 2011.

[10] The other site was at 97 Mullalelish Road, Richhill. Recycling applied for exemption on 27 November 2009 which was granted on 5 March 2010. On 9 June 2010, at a site visit, waste was found to be stored externally in an untidy condition which could have presented a fire hazard. At a further site visit on 5 July 2010 the breaches persisted. On 8 July 2010 notice was given that revocation would take effect from 16 July 2010. The site was cleared by 27 July 2011.

[11] In relation to consideration of the application for exemption for 30 Low Road, Newry Ms Miller outlines concerns about the condition of the site at Elm Park Road, the revocation of that exemption, the Article 27 notice not having been complied with, significant quantities of waste remaining on site, criminal proceedings having been undertaken, the history of non-compliance with exemptions granted to companies associated with Mr Guy, the use of different companies as vehicles for Mr Guy's activities, the substantial amount of time and resources expended by NIEA in monitoring and regulating the activities and a clear pattern of disregard of environmental regulations. This led to the following conclusion -

“We formed the view that the environmental objectives set out in Schedule 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 its future activities would cause harm to the environment, cause nuisance through noise or odours or adversely affect the countryside. For all of these reasons it was decided that the application should be refused.”

[12] Mr Guy took issue with the NIEA version of events. The grant of the exemption at Low Road would have enabled all the materials to be removed from Elm Park Road. The site at Elm Park Road was cleared at no cost to the public. There had been compliance with the exemptions but NIEA had failed to co-operate in a constructive manner. Recycling had been wound up for commercial reasons with no outstanding environmental liabilities and NIEA had been unwilling to accept evidence of Envirogreen's compliance with the Regulations. As stated, Treacy J found that the statutory scheme for exemption from waste management licensing did not permit NIEA to take into account Envirogreen's history of operations at previous sites.

## **The Waste Directive**

[13] At the European level Directive 2008/98/EC of 19 November 2008 is the Consolidating Directive on Waste.

Article 23 deals with the issue of permits and provides that Member States shall require any establishment or undertaking intending to carry out waste treatment to obtain a permit from the competent authority.

Article 24 provides for exemptions from permit requirements for establishments or undertakings in respect of the disposal of their own non hazardous waste at the place of production or recovery of waste.

Article 25 provides the conditions for exemptions. Member States shall lay down in respect of each type of activity, general rules specifying the types and quantities of waste that may be covered by the exemption and the method of treatment to be used. The rules are required to be designed to ensure that waste is treated in accordance with Article 13, that is, the obligation to ensure that waste management is carried out without endangering human health or harming the environment.

## **The Waste and Contaminated Land (Northern Ireland) Order 1997**

[14] The domestic primary legislation is the Waste and Contaminated Land (NI) Order 1997 which provides for the prohibition of the unauthorised or harmful deposit, treatment or disposal of waste.

Article 4(1)(a) and (b) prohibit the deposit, treatment, keeping or disposal of controlled waste without a waste management licence.

Article 6 provides for the grant of waste management licences.

Of significance in the present application is the inclusion of a “fit and proper person” provision in relation to waste management licences. Article 8(4) provides that the Department shall not refuse an application for a licence which has been duly made if it is satisfied that the applicant is a “fit and proper person” unless it is satisfied that such refusal is necessary for the purpose of preventing pollution of the environment, harm to human health or serious detriment to the amenities of the locality.

Article 3 provides for the approach to “fit and proper person” as follows -

“(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 a 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.”

### **The Waste Management Licensing Regulations (Northern Ireland) 2003**

[15] The domestic regulations are the Waste Management Licensing Regulations (NI) 2003 which at Regulation 17 provide for exemptions from waste management licensing. The exempt activities are set out in Part I of Schedule 2 of the Regulations. Relevant to the present applications are paragraph 12 which includes the baling, sorting or shredding of waste paper or cardboard and paragraph 17 which concerns the storage in a secure place of waste paper or cardboard.

Regulation 17(1) provides -

- (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.

The key provision is contained in Regulation 17(4) (*with italics added*) -

- (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.

[16] The above reference to the objectives mentioned in paragraph 4(1)(a) of Part 1 of Schedule 3 reflects Article 13 of the Directive in stating -

“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:*

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

(ii) without causing nuisance through noise or odours;

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

[17] Regulation 18 provides for registration in connection with exempt activities.

Paragraph (1) creates an offence for an establishment or undertaking to carry on an exempt activity without being registered with the Department.

Paragraph (2) provides for a register that contains the following particulars in relation to each 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).

Paragraph (3) provides that the Department shall enter the particulars in the register in relation to an establishment or undertaking if it receives notice of them in writing provided on behalf of that establishment or undertaking and accompanied by a plan of each place at which any such exempt activity is carried on and at (iii)(e) that registration has not been refused under regulation 20.

[18] Regulation 20 provides for the refusal, revocation and cessation of registration:

(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.

(5) Subject to paragraphs (6) and (7), the Department may revoke the registration of an exempt activity where it is satisfied that -

(a) the establishment or undertaking to which the relevant entry relates no longer exists or has ceased to carry out that activity; or

(b) 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); or

(c) there has been a breach of any of the registration obligations applicable to that activity.

### **The Grounds of Appeal**

[19] The appellant's grounds of appeal are stated as follows:

(1) The learned judge erred in his conclusion that upon considering an application for the registration of an exemption from waste managing licensing requirements, pursuant to Regulations 17 to 20 of the Waste

Management Licensing Regulations (NI) 2003, the Department was precluded from taking account of the identity of the proposed operator. In particular the learned judge erred in his conclusions that:

- (a) Upon an application for the registration of the exemption the Department would not have available to it information about how the activities were likely to be carried out by the proposed operator or that refusal based upon such an assessment would involve the Department in making a finding of non-compliance prior to commencement of activities.
- (b) Consideration of the identity of the proposed operator would amount to the imposition of a form of fit and proper person test.
- (c) Individual persons were not “establishments or undertakings” within the meaning of Regulation 18 of the Waste Management Licensing Regulations (NI) 2003 with the result that individual persons carrying on exempt activities were not required to register an exemption.
- (d) The availability of enforcement powers to revoke an exemption or to issue a notice under Article 27 of the Waste and Contaminated Land (NI) Order 1997 together with a criminal sanction for non-compliance with an exemption under Article 4 of the 1997 Order precluded consideration of the identity of the proposed operator.

(2) The learned judge erred in the above conclusion insofar as the result is inconsistent with the requirement in Regulation 17(4) of the Waste Management Licensing Regulations (NI) 2003 that an exemption from Waste Management Licensing Requirements may only be registered in relation to an establishment or undertaking if the type and quantity of waste submitted to the activity and the method of disposal or recovery is consistent with the need to attain the environmental objectives set out in paragraph 4(1)(a) Part 1 Schedule 3 of the 2003 Regulations.

(3) By concluding that the Department had no power to take account of the identity of the proposed operator when deciding to refuse an application for registration of a waste management licensing exemption in circumstances where the Department was satisfied that the environmental objectives set out in paragraph 4(1)(a) Part 1 Schedule 3 of the 2003 Regulations were unlikely to be achieved the learned judge failed to interpret the 2003 Regulations in a manner which gave effect in national law to the requirements of Articles 13, 24 and 25 of Directive 2006/12/EC on Waste (the Consolidated Waste Framework Directive) contrary to the principle of supremacy of EU law and the obligation of consistent interpretation of domestic law established in C/106/89 Marleasing SA v La Comercial Internacional de Alimentacion SA.



[20] The appellant formulates the issue on the appeal as follows:

The question at the heart of all three of the grounds of appeal is whether the combination of Regulations 17, 18 and 20 of the 2003 Regulations preclude the NIEA from taking account of the identity of a proposed operator when determining an application for an exemption from waste management licensing.

### **Relevant Considerations**

[21] Relevant considerations may be specified in the legislation as matters which the decision maker must take into account. Irrelevant considerations may be specified in the legislation as matters that the decision maker must not take into account. Then there are those considerations which have not been included or excluded by the legislation but which the decision-maker may elect whether or not to take into account. It is for the Court to determine whether a consideration that has been taken into account is a relevant consideration. Whether the consideration may be taken into account will be subject to the terms of the legislation, the interpretation of the statutory purpose and any implied restrictions on the considerations to be taken into account. This approach has developed from Lord Cooke in Creednz v Governor General [1981] 1 NZLR 172 and Lord Scarman in Re Findlay [1985] AC 318.

### **The interpretation of the Regulations**

[22] Regulation 17(4) applies in relation to an exempt activity by an “establishment or undertaking”. NIEA describes its core submission as being that as its function is to register an exemption in relation to an “establishment or undertaking” it cannot be precluded from taking into account its identity when exercising that function. On the other hand, for Envirogreen the focus of the regulations is on the activity and not the operator.

[23] There are two matters to be considered under 17(4)(a), the first being “the type and quantity of waste submitted to the activity” and the second being “the method of disposal or recovery of waste”. It is the latter that is relevant to the present application. The issue becomes whether, in considering if the method of disposal or recovery of waste is consistent with the need to obtain the objectives relating to human health and the environment, the NIEA may take into account the known performance of the operator. Envirogreen contends that, while the identity of the operator is a relevant particular in the registration process, in assessing an application for exemption, NIEA is only permitted to give consideration to the activity, as outlined by the operator, and not the history of the operator.

[24] The appellant refers to the introduction to 17(4)(a) which refers to “an establishment or undertaking” to indicate that it is the operator rather than the activity that gains exemption and therefore the identity of the operator must be a factor. However this introduction does not alter the succeeding condition that it is the method of disposal or recovery of the waste that must be consistent with the need to attain the objectives. Insofar as the operator may be seen to lack the capacity to achieve the method of disposal or recovery of waste outlined in the application, it is to be expected that NIEA would take that into account in the assessment of the application. However Envirogreen would say that that is a matter touching the ‘method’ and hence the activity rather than the operator.

[25] In Regulation 18 the appellant invokes the references to an “establishment or undertaking” in paragraph 1 on the commission of an offence, in paragraph 2 on the provision of particulars that extended beyond type and quality and method and in paragraph 3 on the Department entering those particulars on the register, all said to indicate a focus on the operator as well as the activity. Clearly the administration of the exemption scheme requires the identity of the operator of the activity to be established. However the issue concerns the history of operations rather than the operator’s identity as such.

[26] In Regulation 20 the discretion to refuse to register an exempt activity is said by NIEA to indicate a judgment as to compliance with the requirements of Regulation 17(4), a matter that includes the attainment of the objectives of protecting human health and the environment. Again the question becomes whether the Regulation 17(4)(a) reference to ‘method’ is limited to the activity, to the exclusion of the history of the operator, in so far as that history relates to an assessment of the operator’s method.

### **Grounds of appeal (1) and (2)**

[27] Grounds (1) and (2) can be taken together as interrelated. Ground 1 is that NIEA is precluded from taking into account the identity of the operator. Clearly the identity of the operator is required for the purposes of the application. What this ground seeks to exclude is the identity of the operator from any assessment of the activity. Ground 2 is that the inclusion of the identity of the operator in the assessment of the activity is not consistent with the requirement to assess the type and quantity of waste and the method of recovery or disposal as being compatible with environmental protection.

[28] This becomes an inquiry as to the scope of ‘method’ and whether it extends to a consideration of the operator’s record of activity. There are indicators in the legislation, as relied on by Envirogreen, that the assessment of ‘method’ is limited to the proposed activity rather than past performance. However it is proposed to consider first of all the four particular matters relied on by NIEA in the first ground of appeal where it is contended that Treacy J was in error.

### Ground (1)(a)

[29] Ground 1(a) states the finding that upon an application for the registration of the exemption the Department would not have available to it information about how the activities were likely to be carried out by the proposed operator and that refusal based upon such an assessment would involve the Department in making a finding of non-compliance prior to commencement of activities.

[30] Envirogreen support Treacy J's final conclusion that under Regulation 17 (4)(a) a waste management licence is not required for an exempt activity if the operator's method 'is' consistent with the need to attain the objectives, which it is said requires consideration of the state of affairs at the time of the application. To consider possible future behaviour of the operator is said to take into account a consideration other than the state of affairs at the time of the application and thus an irrelevant consideration.

[31] However this is not an appropriate characterisation of the NIEA approach. Rather, NIEA seek to focus on the operator's 'method' of disposal or recovery of waste. That method is required to be consistent with the need to attain the objective of environmental protection. NIEA must assess that method upon the application for registration and may refuse to register. The assessment is to be made at the time of the application and it is an assessment of the method. The issue is whether that assessment of method may take account of what is reasonably believed to be a record of failure to conduct the activity so as to attain the objective of environmental protection.

[32] How the activity was likely to be carried out and the likely environmental impact would be relevant aspects of the 'method' and a matter for NIEA to take into account. For NIEA to assess an application and consider the method wanting, in that it was likely to be harmful to the environment, would result in NIEA not being satisfied that the method was consistent with the objectives. Regulation 17(4) imposes the condition that the method "... is consistent with the need to attain the objectives..." Leaving aside that Regulation 17(4)(a) contains plural subject and singular verb, the clear intention is that the judgment would be made in advance of registration that the type and quantity of waste and the method of recovery and disposal of waste are compatible with protection of human health and the environment. Thus we accept NIEA's contention on this ground.

### Ground (1)(b)

[33] Ground 1(b) states the finding that consideration of the identity of the proposed operator would amount to the imposition of a form of fit and proper person test.

[34] NIEA contend that they are not seeking to introduce a fit and proper person condition into the exemption scheme where it is clear that that is part of the statutory

arrangements for waste management licences but has not been included in the statutory arrangements for exemptions. The fit and proper person test for waste management licences contains the three conditions stated in Article 3(3) of the 1997 Order and are not matters that NIEA seek to import into the exemption scheme. Rather, what it sought to be imported is the history of the activity conducted by the operator as relevant to the assessment of the method of disposal or recovery of waste in considering whether the activity is consistent with the need to attain the objectives. Thus we accept NIEA's contention on this ground.

Ground (1)(c)

[35] Ground 1(c) states the finding that individual persons were not 'establishments or undertakings' within the meaning of Regulation 18 of the Waste Management Licensing Regulations (NI) 2003 with the result that individual persons carrying on exempt activities were not required to register an exemption.

[36] In referring to 'establishments or undertakings' and 'private individuals' Treacy J was addressing the argument by NIEA that, as Regulation 18(1) made it an offence for an establishment or undertaking to carry on an exempt activity without registration, the focus was on the activity carried out *by the operator*. Treacy J's conclusion was that the language relied on by NIEA did not invite scrutiny of the operator but was intended to distinguish those subject to registration (establishments and undertakings) and those who were not (individual persons). The conclusion could have been stated by referring to 'private individuals' rather than 'individual persons' and may not have been intended to suggest that individual persons are excluded from registration. To the extent that Treacy J's conclusion may be interpreted as indicating that individual persons are excluded from registration we accept NIEA's contention on this ground.

Ground (1)(d)

[37] Ground 1(d) states the finding that the availability of enforcement powers to revoke an exemption or to issue a notice under Article 27 of the 1997 Order, together with a criminal sanction for non-compliance with an exemption under Article 4 of the 1997 Order, precluded consideration of the identity of the proposed operator.

[38] NIEA contend that Envirogreen's interpretation of the legislation does not address the mischief which has emerged. That mischief involves the revolving door of an operator of an exempt activity being in breach of the exemption, having the exemption revoked, making a further application to NIEA for exemption and being entitled under Regulation 17 to the immediate re-grant of the exemption.

[39] Treacy J was satisfied that any such mischief would be addressed by the operation of the exemption scheme. The exemption would be revoked until such time as the operation became compliant, at which point the exemption would be re-

granted. Any attempt at the further conduct of the exempt activity before the re-grant would be subject to the Department's enforcement powers.

[40] However that approach would not address the mischief as it has manifested itself in the present case, namely where the operator moves to a different site or continues under a different corporate name. Whether that mischief can be addressed by the interpretation of the legislation in the manner contended for by NIEA is at the heart of this appeal. To that extent we also accept the NIEA contention on this ground.

### *A purposive interpretation.*

[41] Whether a particular consideration may be taken into account will be determined by reference to the terms of the legislation, the interpretation of the statutory purpose and any implied restrictions on the considerations to be taken into account. Here we meet the interaction of, on the one hand, the public law assessment of relevant considerations and on the other hand statutory interpretation based on a purposive construction, a development of the 'mischief rule'. *Bennion on Statutory Interpretation* (6<sup>th</sup> ed.) at section 303 states the presumption that an enactment be given a purposive construction. Parliament is presumed to intend that in construing an Act, the court, by advancing the remedy which is indicated by the words of the Act for the mischief being dealt with, and the implications arising from those words, should aim to further every aspect of the legislative purpose.

[42] NIEA describe the statutory scheme involving exemption from waste management licensing as one that involves exempt activities that lessen the load of regulation. It is described as light touch regulation which is said to presuppose no difficulty with the operator achieving the environmental standards. It is the achievement of standards that protect human health and the environment in the recovery and disposal of waste that represents the purpose of the scheme of licensing and exemption and where possible the regulations should be interpreted to achieve that purpose. However this application has rather more to do with the manner in which the legislation seeks to achieve that purpose.

[43] The legislative purpose of the relevant provisions is to provide for the registration of exempt activity in the recovery and disposal of waste in a manner that meets the objectives of protecting human health and the environment. Whether consideration of the 'method' of disposal or recovery of waste may include consideration of the operator's past performance may be determined by reference to the requirement that the method should meet the objective of environmental protection. Such an approach can be accommodated within the legislative requirement that the 'method' should meet the objective. To disregard a known history of a method incompatible with the objective may be to fail the objective of environmental protection. That is not to say that a prior history of inadequate method will result in automatic refusal of exemption but rather that it will be a factor in the registration process and will involve the operator in satisfying NIEA that the method

will meet the objective and address, in the current application, the manner in which it has failed to do so in the past. To leave such a case to an enforcement process is to facilitate a possible period of exempt activity with inadequate method.

[44] Accordingly we are satisfied that in order to ensure that the method of disposal or recovery of waste is consistent with the need to attain the objective of preventing harm to the environment, NIEA may take into account the history of the operator's activity.

[45] The history of the operator's activity may only be taken into account to the extent that it speaks to the 'method' of disposal or recovery of waste. The present case involves the same past and present classes of exempt activity involving cardboard and plastic. A history involving a different class of exempt activity may be of limited value in this regard. Similarly a history involving a different corporate establishment or undertaking may be of limited value in this regard.

### **Ground of appeal (3) - Interpretation of domestic law in accordance with the purpose of the Directive**

[46] However there is an additional ground of appeal and an issue that was not considered by Treacy J, namely the interpretation of the Regulations having regard to the requirements of the Waste Directive and the European imperative in applying national law. The Court is required to interpret the provisions as far as possible in the light of the wording and the purpose of the Directive in order to achieve the result pursued by the Directive.

[47] Recital 30 of the Directive states the objective as the establishment of a framework to prevent, reduce and insofar as is possible eliminate from the outset the sources of pollution or nuisance by adopting measures whereby recognised risks are eliminated. This objective is stated to be based on the implementation of the precautionary principle and the principle of preventative action and the necessity to set general environmental objectives for the management of waste.

Article 10 provides, in relation to the recovery of waste, that Member States shall take the necessary measures to ensure that waste undergoes recovery operations in accordance with Articles 4 and 13.

Article 4 establishes a waste hierarchy to apply as a priority order in waste prevention and management legislation and policy as (a) prevention, (b) preparing for reuse, (c) recycling, (d) other recovery e.g. energy recovery and (e) disposal.

Article 13 imposes on Member States the duty to take the necessary measures to ensure that waste management is carried out without endangering human health or harming the environment.

[48] As set out above, Article 23 provides for a permit system, Article 24 provides for exemptions from the permit requirements and Article 25 provides for the conditions for exemptions involving Member States laying down general rules that include the method of treatment to be used. Article 25 also provides that the rules laid down by the Member State are designed to ensure that waste is treated in accordance with Article 13, that is the obligation to ensure that waste management is carried out without endangering human health or harming the environment.

[49] On a reference for a preliminary ruling in Marleasing SA v La Comercial Internacional de Alimentacion SA (C-106/89) the European Court of Justice decided that the Member States obligation arising from a Directive to achieve the result envisaged by the Directive and their duty under Article 5 of the Treaty to take all appropriate measures whether general or particular to ensure the fulfilment of that obligation is binding on all the authorities of Member States including for matters within their jurisdiction of the courts. It follows that in applying national law, whether the provisions in question were adopted before or after the Directive, the national court called upon to interpret it is required to do so, as far as possible, in light of the wording and the purpose of the Directive in order to achieve the result pursued by it and comply with the third paragraph of Article 189 of the Treaty.

[50] NIEA contend that the consequence of Envirogreen's interpretation is that there is a legal obligation on NIEA to grant an exemption notwithstanding that NIEA is satisfied on lawful grounds that the environmental objectives of the Directive would not be achieved.

[51] Envirogreen justifies its approach on the basis that enforcement action could be taken against a non-compliant operator. First of all the exemption may be revoked, secondly there are enforcement provisions in Article 4 of the 1997 Order and thirdly Article 27 notices may require delivery of waste to a specific person thus contends the respondent. The non-compliant operator may be prevented from continuing the operation until it becomes compliant.

[52] The present case demonstrates the shortcomings of this approach. The operator moved from site to site and sought exemption on a new site while, on the NIEA view of events, remaining uncompliant on the previous site. To permit the operation of the exemption scheme in this manner is not to advance the purpose of the Directive of protecting human health and the environment.

[53] The Court has a duty to interpret the domestic scheme to further the purpose of the Directive. This should reflect the precautionary principle. It should also reflect the principle of preventative action. To do so in a case such as the present requires the history of the operator to be a factor in assessing whether for the purposes of Regulation 17(4)(a) the method of disposal or recovery of waste is consistent with the need to attain the objectives of ensuring that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment.

[54] We have been satisfied that a purposive interpretation of the 2003 Regulations admits of the conclusion that the history of exempt activity by the operator is a matter to be taken into account in assessing whether the method of disposal or recovery of the waste is consistent with the need to attain the objective of environmental protection. Further we find this conclusion reinforced by the European imperative to interpret the domestic provisions in order to achieve the result pursued by the Directive.

[55] Accordingly we allow the appeal and dismiss the application for Judicial Review.