

Neutral Citation No. [2010] NICA 10

Ref: **GIR7740**

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

Delivered: **15/2/10**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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

QUEEN'S BENCH DIVISION

Between:

PATRICK LAVERTY t/a RGC INTERNATIONAL

Plaintiff/Respondent;

and

**DEPARTMENT OF THE ENVIRONMENT FOR NORTHERN IRELAND
THE ENVIRONMENT AND HERITAGE SERVICE DEPARTMENT**

Defendant/Appellant.

MORGAN LCJ, GIRVAN LJ AND COGHLIN LJ

GIRVAN LJ

Introduction

[1] These proceedings arise out of the transportation of waste by the respondent from the Republic of Ireland to Northern Ireland. The question which arises is one of statutory interpretation, the question being whether Article 72 of the Waste and Contaminated Land (Northern Ireland) Order 1997 ("the 1997 Order") empowers an authorised officer of the appellant Department to remove from the roadside and take to another place a vehicle

carrying waste and to retain the vehicle in order to carry out an examination and investigation of the waste on a container carried by the vehicle. Mr Simpson QC appeared with Mr Hopley QC on behalf of the appellant. Mr O'Hara QC appeared with Mr Shields on behalf of the respondent.

Factual background

[2] The respondent, Patrick Laverty, who trades as RGC International from Ballymena, County Antrim is involved primarily in the transportation of waste to various recycling sites in Northern Ireland. He is a registered carrier of controlled waste for the purposes of the 1997 Order. On 20 September 2004 two of his vehicles, Registration Number HKZ2145 and HKZ2148 were transporting waste from Dublin to Belfast. At around noon the two vehicles were stopped by a police constable near Banbridge, Co Down. The police constable was accompanied by officials of the Environmental Heritage Service, a branch of the appellant Department. The two vehicles were conveyed by EHS officers to a facility in Portadown for the purpose of examining the waste contents of the vehicles. The respondent's drivers did not accompany the vehicles to the facility whose location was not revealed to the drivers or to the respondent.

[3] On 21 September 2004 another of the respondent's vehicles Registration Number HKZ2144 was also transporting waste from Dublin to Belfast. It was likewise stopped by a police constable accompanied by EHS officials and it was also taken by the appellant's officials and conveyed to a facility for examination, the location of which was again not revealed to the respondent or the respondent's drivers. Neither the respondent nor any of his employees was permitted to be present at the examination. No written notification or justification for these actions was provided to the respondent at the time at which the vehicles and contents were taken away from the roadside by the EHS officials.

[4] On 24 September 2004 the respondent's legal advisers contacted the appellant's Waste and Contaminated Land Unit referring to the lack of written notification or explanation. On 22 September 2004 the respondent's legal advisers were informed by the appellant in a phone call from an official that the vehicles were detained in exercise of powers under Article 72 of the Order.

[5] On 22 September 2004 the vehicles Registration Numbers HKZ2145 and 2148 were inspected and samples of the waste taken photographed by officials of the appellant. On 23 September 2004 vehicle HKZ2144 was similarly inspected and samples taken. The appellant's officials were not satisfied with the type, composition and quality of the waste stream in the vehicles inspected.

The course of proceedings

[6] On 24 September 2004 the respondent commenced judicial review proceedings in the Queen's Bench Division challenging the appellant's actions as unlawful and ultra vires the legislation. It was alleged that the Department's actions had been carried out in an arbitrary manner. Leave to apply for judicial review was granted and the court ordered the return of the vehicles to the respondent.

[7] On 9 September 2005 the respondent discontinued his Order 53 proceedings and the proceedings were continued as if begun by writ. The case was transferred to the commercial list. The respondent claimed loss and damage occasioned by negligence, nuisance, conversion, breach of statutory duty and unlawful interference with the respondent's goods that is to say the three vehicles detained on 20 and 21 September 2004 together with their contents. It was alleged that the appellant had breached the statutory powers contained in the Order and in particular Article 72. The appellant denied the allegations that the waste contained in the three vehicles detained was licensed waste and further asserted that the seizure and detention of the vehicles was permitted by virtue of the power contained in and incidental to Article 72.

[8] When the action came on for trial on 18 October 2005 the parties agreed that if the respondent's argument on the interpretation of Article 72 was correct the appellant would be liable to the respondent for the detention and retention of the vehicles and he would be entitled to damages and costs. If, on the other hand, the appellant's argument on Article 72 was correct the court would have to proceed to determine whether the appellant could justify the necessity of an examination of the contents and the extent of it. The parties formulated a legal question for determination by the trial judge which the parties considered encapsulated a preliminary legal question which, if decided in favour of the respondent, would entitle him to judgment. The question as formulated was expressed in the following way:

"Do the powers of the defendant under Article 72 of the 1997 Order include the power to remove from the scene and to take to an appropriate place a vehicle and to keep it to carry out an examination and investigation?"

[9] The judgment on this preliminary question in the trial was not delivered until 1 June 2009 some 3 ½ years after the hearing. The trial judge noted that the Order did not make express provision for an authorised officer to be involved in stopping vehicles nor did it empower such officer or constable to

remove or direct removal of a vehicle from the roadside to another location. The judge went on to consider whether such powers could be inferred from the language of Article 72 read in conjunction with the other Articles in the Order and the underlying EU Directives 75/442 EEC and 91/156 EEC (“the Waste Directives”). He noted that while the Waste Directives are comprehensive they nowhere relate to the detail of removal of vehicles for examination. He observed that it would have been open to Parliament to make direct provision within the Order for the removal of vehicles for examination or investigation but it had not done so. He expressly adopted a purposive approach to the interpretation of Article 72. However, while he accepted that the words examination and investigation in Article 72(2)(c) were wide in nature he considered that the language of Article 72 could not be stretched to include a power to remove a vehicle from the roadside to a more appropriate location for examination or investigation. He considered that the detention of a person’s property was a fundamental matter which Parliament could only provide for by clear language. This had not been done. He found in favour of the appellant and awarded damages in what he understood to be an agreed amount of £65,000 together with costs.

[10] The trial judge recorded in his judgment that the parties had agreed that if the respondent’s interpretation of Article 72 prevailed the appellant would pay the respondent £65,000 together with costs. The judgment of the court fixed damages in that sum. Mr Simpson QC, however, in his submissions expressed some surprise at the wording of the judgment and contended that it was not his understanding that an agreement in that amount had been reached. Since for reasons which are set out below I consider that the matter should be remitted for full trial on the issues on the question of whether or not there was an agreement as to the amount of damages is an issue which can be explored at trial.

[11] In any proceedings in any court or tribunal the delivery of a judgment expeditiously is not merely desirable. It is the duty of the decision maker to decide the matter with reasonable expedition. This duty has always existed as an aspect of the duty of fairness. There is an overriding public interest in the bringing of litigation to finality (*rei publicae interest ut sit finis litium*). The overriding principles set out in Order 1 rule 1A of the Rules of the Court of Judicature include the objective of dealing with cases fairly including the duty in rule 1A(2)(d) to ensure that the case is dealt with expeditiously. This overriding objective is frustrated by undue delay in the delivery of the decision in the case. It is also a statutory duty on the court. Section 6 of the Human Rights Act 1998 makes it unlawful for a public authority to act in a way which is incompatible with the Convention rights of the parties. Article 6 entitles the litigants to a fair trial within a reasonable time. A fair trial necessarily involves a determination of the party’s rights within a reasonable timeframe otherwise they will not have received their trial within a reasonable time. In Anderson v UK [2010] ECHR 19859/04 the European Court of Human Rights held that

notwithstanding that the parties themselves had contributed to delay that was not sufficient to absolve the domestic court of its own obligation to take an active role in the management of the proceedings. As the Court stated:

“As the Court has frequently stated, the State remains responsible for the efficiency of its system; the manner in which it provides for mechanisms to comply with the reasonable time requirement – whether by automatic time-limits and directions or some other method – is for it to decide. If a State allows proceedings to continue beyond the “reasonable time” prescribed by article 6 of the Convention without doing anything to advance them, it will be responsible for the resultant delay (Bhandari v UK 42341/o4, 2 October 2007, together with references therein.)”

Undue delay by the domestic court in deciding the case after the conclusion of the hearing cannot be attributed to the actions of the parties and thus the responsibility for that delay can only be attributed to the court’s failure to fulfil its obligations under Article 6 to conclude the proceedings within a reasonable time. If undue delay occurs in the delivery of a judgment the parties must have a right of access to the court to require the court to fulfil its duty. It is reasonable for the parties to expect that the court will inform them of a reasonable time table within which a decision will be delivered and if it is not delivered by the indicated date they are entitled to an explanation. Delay in decision making may cause parties particular difficulties and financial consequences which parties should have an opportunity to bring to the attention of the court. The decision in Anderson v UK highlights the need for all courts to be vigilant to the need to manage their case load efficiently, not least at the decision making stage.

The EU legal context

[12] The Waste Directive 75/442/EEC set as a community objective the protection of human health in the environment by seeking to act against the harmful effects caused by the collection, transport, treatment, storage and tipping of waste and by promoting the harmonisation of laws applicable in member states. That Directive was amended by Directive 91/156/EEC adopted on 18 March 1991. Its recitals recognised the need for carriers of waste to be subject to authorisation and registration and appropriate inspection. Article 4 requires member states to take appropriate measures to ensure that waste is recovered and disposed of without endangering human health or environmental damage. Member states are required to take the necessary measures to prohibit the abandonment, dumping and uncontrolled disposal of waste. Article 12 requires member states to ensure a registration system for undertakings, collecting and transporting waste on a professional basis subject to appropriate periodic inspection. Member states are required to draw up

appropriate waste management plans and to prevent the movement of waste which is not in accordance with the waste management plans. As is normal the Directives do not descend into particulars of what should be contained in domestic law. It is incumbent on the member states to ensure that the domestic law fully accords with the state's obligations on foot of the directives.

The domestic legal provisions

[13] The 1997 Order which replaced with considerable modification the earlier Pollution Control and Local Government (Northern Ireland) Order was passed in order to give effect to the Waste Directives as amended. Part II of the 1997 Order makes provision for licensing and control of waste on land. Part III makes provision for coping with contaminated land. Part IV is entitled "General" which includes the supervision and enforcement provisions in Articles 72 to 74. Article 74 creates offences relating to the obstruction of authorised persons, the failure to comply with requirements imposed under Article 72 and the failure or refusal to provide facilities, assistance, information or inspections. Article 73 empowers an authorised person to deal with any substance or article causing imminent danger of serious pollution of the environment.

[14] Article 38 to 43 make provision for transportation of waste by vehicles and for offences relating thereto. Article 38 makes it an offence for any person who is not a registered carrier of controlled waste to transport controlled waste to or from any place in Northern Ireland. Article 42 provides -

- (1) If it reasonably appears to any authorised officer or to a constable that any controlled waste is being or has been transported in contravention of Article 38(1), he may -
 - (a) stop any person appearing to him to be or have been engaged in transporting that waste and require that person to produce his authority or, as the case may be, his employer's authority for transporting that waste; and
 - (b) search any vehicle that appears to him to be a vehicle which is being or has been used for transporting that waste, carry out tests on anything found in any such vehicle and take away for testing samples of anything so found."

[15] Article 42 is not of direct relevance in the present context since it relates to a situation in which it is considered that there has been a breach of Article 38. It is not alleged in the present case that the respondent was acting contrary to Article 38. Article 42 is called in aid by the respondent who points out that it

makes no provision for the removal of a vehicle for investigation elsewhere. Counsel argued that this is of significance when Article 72 falls to be construed.

[16] Article 72 is of central relevance in the appeal and it is thus necessary to set out the provision in full -

**“Powers of enforcing authorities and persons
authorised by them**

72. - (1) An authorised person may, on production (if so required) of his authority, exercise any of the powers in paragraph (2) for the purpose of -

(a) determining whether any provisions of the pollution control statutory provisions in the case of an enforcing authority are being, or have been, complied with;

(b) discharging one or more of the functions conferred or imposed on an enforcing authority by or under the pollution control statutory provisions; or

(c) determining whether and, if so, how such a function should be discharged.

(2) The powers of an authorised person are -

(a) to enter at any reasonable time (or, in an emergency, at any time and, if need be, by force) any premises which he has reason to believe it is necessary for him to enter;

(b) on entering any premises by virtue of subparagraph (a), to take with him -

(i) any other person duly authorised by the enforcing authority and, if the authorised person has reasonable cause to apprehend any serious obstruction in the execution of his duty, a constable; and

(ii) any equipment or materials required

for any purpose for which the power of entry is being exercised;

(c) to make such examination and investigation as may in any circumstances be necessary;

(d) as regards any premises which he has power to enter, to direct that those premises or any part of them, or anything in them, shall be left undisturbed (whether generally or in particular respects) for so long as is reasonably necessary for the purpose of any examination or investigation under sub-paragraph (c);

(e) to take such measurements and photographs and make such recordings as he considers necessary for the purpose of any examination or investigation under sub-paragraph (c);

(f) to take samples, or cause samples to be taken, of any articles or substances found in or on any premises which he has power to enter, and of the air, water or land in, on, or in the vicinity of, the premises;

(g) in the case of any article or substance found in or on any premises which he has power to enter, being an article or substance which appears to him to have caused or to be likely to cause pollution of the environment or harm to human health, to cause it to be dismantled or subjected to any process or test (but not so as to damage or destroy it, unless that is necessary);

(h) in the case of any such article or substance as is mentioned in sub-paragraph (g), to take possession of it and detain it for so long as is necessary for all or any of the following purposes, namely -

(i) to examine it, or cause it to be examined, and to do, or cause to be done, to it anything which he has power to do under that sub-paragraph;

(ii) to ensure that it is not tampered with before examination of it is completed;

(iii) to ensure that it is available for use as evidence in any proceedings for an offence under the pollution control statutory provisions in the case of the enforcing authority under whose authorisation he acts or in any other proceedings relating to a variation notice, enforcement notice or prohibition notice under those statutory provisions;

(i) to require any person whom he has reasonable cause to believe to be able to give any information relevant to any examination or investigation under sub-paragraph (c) to answer (in the absence of persons other than a person nominated by that person to be present and any persons whom the authorised person may allow to be present) such questions as the authorised person thinks fit to ask and to sign a declaration of the truth of his answers;

(j) to require the production of, or where the information is recorded in computerised form, the furnishing of extracts from, any records -

(i) which are required to be kept under the pollution control statutory provisions for the enforcing authority under whose authorisation he acts, or

(ii) which it is necessary for him to see for the purposes of an examination or investigation under sub-paragraph (c),

and to inspect and take copies of, or of any entry in, the records;

(k) to require any person to afford him such facilities and assistance with respect to any matters or things within that person's control or in relation to which that person has responsibilities as are necessary to enable the

authorised person to exercise any of the powers conferred on him by this Article;

(l) any other power for a purpose mentioned in paragraph (1) which is conferred by regulations.

(3) The powers which under paragraphs (1) and (2) are conferred in relation to any premises for the purpose of enabling an enforcing authority to determine whether any provision of the pollution control statutory provisions in the case of that authority is being, or has been, complied with shall include power, in order to obtain the information on which that determination may be made -

(a) to carry out experimental borings or other works on those premises; and

(b) to install, keep or maintain monitoring and other apparatus there.

(4) Except in an emergency, in any case where it is proposed to enter any premises used for residential purposes, or to take heavy equipment on to any premises which are to be entered, any entry by virtue of this Article shall only be effected -

(a) after the expiration of at least 7 days' notice of the proposed entry given to a person who appears to the authorised person in question to be in occupation of the premises in question, and

(b) either -

(i) with the consent of a person who is in occupation of those premises; or

(ii) under the authority of a warrant by virtue of Schedule 4.

(5) Except in an emergency, where an authorised person proposes to enter any premises and -

(a) entry has been refused and he apprehends on reasonable grounds that the use of force may be necessary to effect entry, or

(b) he apprehends on reasonable grounds that entry is likely to be refused and that the use of force may be necessary to effect entry,

any entry on to those premises by virtue of this Article shall only be effected under the authority of a warrant by virtue of Schedule 4.

(6) Regulations may make provision as to the procedure to be followed in connection with the taking of, and the dealing with, samples under paragraph (2)(f).

(7) Where an authorised person proposes to exercise the power conferred by paragraph (2)(g) in the case of an article or substance found on any premises, he shall, if so requested by a person who at the time is present on and has responsibilities in relation to those premises, cause anything which is to be done by virtue of that power to be done in the presence of that person.

(8) Before exercising the power conferred by paragraph (2)(g) in the case of any article or substance, an authorised person shall consult -

(a) such persons having duties on the premises where the article or substance is to be dismantled or subjected to the process or test, and

(b) such other persons,

as appear to him appropriate for the purpose of ascertaining what dangers, if any, there may be in doing anything which he proposes to do or cause to be done under the power.

(9) No answer given by a person in pursuance of a requirement imposed under paragraph (2)(i) shall be admissible in evidence in Northern Ireland against that person in any proceedings.

(10) Nothing in this Article shall be taken to compel the production by any person of a document of which he would on grounds of legal professional privilege

be entitled to withhold production on an order for discovery in an action in the High Court.

(11) Schedule 4 shall have effect with respect to the powers of entry and related powers which are conferred by this Article.

(12) In this Article and Schedule 4 -

"authorised person" means a person who is authorised in writing by an enforcing authority for the purposes of this Article;

"emergency" means a case in which it appears to the authorised person in question -

(a) that there is an immediate risk of serious pollution of the environment or serious harm to human health, or

(b) that circumstances exist which are likely to endanger life or health,

and that immediate entry to any premises is necessary to verify the existence of that risk or those circumstances or to ascertain the cause of that risk or those circumstances or to effect a remedy;

"enforcing authority" means -

(a) the Department;

(b) a district council in its capacity as an enforcing authority for the purposes of Part III;

(c) a district council for the purposes of Part II of the Pollution Control and Local Government (Northern Ireland) Order 1978;

"pollution control statutory provisions" -

(a) in relation to the Department, means -

(i) this Order; and

(ii) regulations made under section 2(2) of the European Communities Act 1972,

to the extent that the regulations relate to pollution;

(b) in relation to a district council, means -

(i) Part III;

(ii) Part II of the Pollution Control and Local Government (Northern Ireland) Order 1978; and

(iii) regulations made under section 2(2) of the European Communities Act 1972, to the extent that the regulations relate to pollution;

"premises" includes any land, vehicle, vessel or mobile plant.

(13) Nothing in section 98 of the Local Government Act (Northern Ireland) 1972 shall apply to functions conferred on a district council under this Order, other than functions under Article 28."

[17] Article 73 is also of potential relevance. It provides that where, in the case of any article or substance found by the authorised officer on any premises (which includes the vehicle) which the officer has power to enter, an authorised person has reasonable cause to believe, that in the circumstances in which he finds it the article or substance is a cause of imminent danger of serious pollution or serious harm to human health he may "seize it and cause it to be rendered harmless (whether by destruction or otherwise)." Article 73 thus contains a clear and express power of seizure. The respondent points to the absence of such an express power in Article 72.

[18] Article 74 makes it an offence for a person without reasonable excuse to fail to comply with any requirement imposed under Article 72, to fail or refuse to provide facilities or assistance or any information or to permit any inspection reasonably required or to prevent any person from appearing before an authorised person or answering any questions to which the authorised person may require answers.

Amending legislation

[19] The Waste (Amendment) (Northern Ireland) Order 2007, which is not yet in force, contains a number of provisions and new powers which Mr O'Hara relied on to demonstrate that the legislation has recognised the limited nature of the powers conferred on the Department under the 1997

Order. Article 15 of the 2007 Order when in force will introduce a new Article 42 which expressly authorises a constable or authorised officer to seize any vehicle when it is believed that controlled waste has been transported in contravention of Article 38. Article 42A will provide that where a vehicle is seized under Article 42 the Department may remove the seized property to such place as the department considers appropriate. Regulations will have to be made under Article 42A(2) providing for how the department may deal with any seized property. It is to be noted however that these new powers are exercisable in a case where a breach of Article 38 is believed to have occurred and thus would not have direct relevance in the present context. Mr O'Hara, however, relies on the new provisions to show how the law can be properly formulated to confer an express and limited power of seizure set about by appropriate protections.

Discussion

[20] The trial judge was by agreement asked to determine as a first question the issue formulated by the parties which it was believed if answered in the negative would inevitably result in judgment in favour of the respondent. In view of the way the parties approached the matter the trial judge did not hear evidence and was asked to proceed on a limited set of agreed facts which in fact do not establish all the material relevant to a final conclusion in the case. This appeal is a further example (of which there are sadly many) of a preliminary issue which is not in fact determinative of the case. The short cut of a preliminary point can, as here, result in delaying the final outcome of proceedings as has happened here. Since the legal question raised by the parties raises important issues with implications for other cases it was always distinctly likely that there would be an appeal with the prospect of the matter having to return to the trial judge for further evidence. This accentuated the need for an early determination of the questions.

[21] The appellant based its power to take the impugned actions on Article 72 and on no other basis. Article 72(1) makes clear the purposes for which the powers in Article 72(2)(a) to (l) may be exercised. Since a statutory power needs to be exercised for a proper purpose it is incumbent on the Department to prove that it is exercising its powers for one or more of the purposes set out in Article 72(1) (a) to (c).

[22] The powers of an authorised person as set out in Article 72 relate to the taking of steps relating to the entry of premises (which includes vehicles) and the carrying out of powers of examination and investigation. The exercise of the powers are expressly and by necessary implication subject to a test of necessity. Although sometimes the test is expressed as a subjective test (for example in (a) the authorised officer must have reason to believe that it is necessary to enter premises) and sometimes as a purely objective test (for example in (c) the test is "as may in any circumstances be necessary") the overall test appears to be a mixed test of subjective belief in the necessity to

exercise the powers based on objective grounds. The question for the trial court will be whether the appellant can prove that the authorised officers subjectively believe that it was necessary to exercise the powers claimed and that that belief had an objective basis in fact.

[23] In determining the extent of the powers set out in Article 72(2) Section 17(3) of the Interpretation Act (Northern Ireland) 1954 to which Mr Simpson QC referred make clear that that where an enactment empowers a person or authority to do an act “all such powers shall be deemed to be also given as are reasonably necessary to enable the person or authority to do that act or thing or are incidental to the doing thereof.”

[24] This statutory formulation reflects the rule in Attorney General v. Great Eastern Railway Company [1880] 5 Appeal Cases 473. As stated by Lord Blackburn the rule is that:

“those things which are incidental to and may reasonably and properly be done under the main purpose (of the enactment) though they may not be literally within it, would not be prohibited.”

Lord Selbourne expressed the principle thus:

Whatever may fairly be regarded as incidental to or consequential upon those things which the legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction to be ultra vires.”

[25] The determination of the extent of the statutory powers under Article 72 read in the light of Section 17(3) of the Interpretation Act (Northern Ireland) 1954 must also be considered in the light of the Convention rights of individuals. Article 1 of Protocol 1 of the Convention provides:

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

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

[26] In determining how far the state may go in exercising its powers under Article 72 regard must be had to the extent of the need for the interference with the individual's right to peaceful enjoyment of his possessions. Any interference must be necessary in the general interest and be subject to conditions provided by law. The exercise of powers must be proportionate so that even if a power exists its exercise must be shown to be proportionate in the circumstances.

[27] The power to carry out necessary examination or investigation under Article 72(2)(c) carries with it the implication that the Department may do what is reasonably necessary to enable an effective examination to be carried out. Similarly, under Article 72(2)(g) the Department will have an implied power to do what is reasonably necessary to carry out a process or test considered necessary. Where waste is contained in a vehicle lawfully stopped at the roadside under Article 180 of the Road Traffic (Northern Ireland) Order 1981 and an authorised officer subjectively concludes on objective grounds that an examination of it is necessary in order to achieve one of the purposes under Article 72(1), it will be a question of fact whether it is necessary to require the removal of the vehicle to another place suitable for the carrying out of the examination. Since the Order seeks the protection of the public health and the environment, in many situations examination at the roadside may be entirely inappropriate and unlawful under Article 4. The combination of a need to examine and an inability to examine at the roadside points to the necessary conclusion that there may be situations in which the waste material will have to be removed to a suitable place for examination in order to make the power of examination effective. Where this can only properly be done by retaining the waste material in a vehicle it will follow that there will be circumstances in which removal to an appropriate examination site of the lorry with the waste intact on the vehicle is required. Article 72(2)(k) obliges anyone asked to afford the Department facilities and assistance to enable the statutory powers of examination to be carried out. The authorised officer, accordingly, can require the driver of a vehicle containing waste to take it to a suitable place for examination if that is unavoidably necessary to permit the examination to be safely and properly carried out. If it is shown to be necessary, he could require the driver of the vehicle to permit the lorry to be driven by an authorised officer to such a place for examination. If a person is required to provide such assistance but declines to do so then it may be necessary for the authorised officer to require the lorry to be vacated so that it may be taken by an authorised officer or his agent to a suitable place for examination. The question whether the authorised officer is acting on the grounds of necessity and is acting in a proportionate way in the circumstances can only be determined by an analysis of the facts with the Department bearing the onus of making good the lawfulness of its actions.

[28] As noted the powers vested in the Department are subject to a test of necessity and they must be exercised proportionately. Those powers are

conferred in the public interest to secure the advancement of environmental protection. This is a legitimate national and community law objective. Any interference with the vehicle owner's property rights in respect of the vehicle must be as minimal as the circumstances permit and if the powers of the Department are abused the vehicle owner has a remedy in tort for wrongful interference with his goods. For these reasons Article 72 if properly and proportionately applied does not infringe the Convention rights of a vehicle owner whose vehicle is removed from the roadside to another place for an examination of the contents. It will be a question of fact in each case whether the powers have been proportionately and legitimately exercised.

[29] In the result the trial judge erred in his conclusion that as a matter of law an authorised officer never has the power under Article 72 to remove or direct the removal of a vehicle to another location to be detained for any length of time. The matter must accordingly be remitted for full trial on the evidence.