Neutral Citation Number: [2009] IEHC 589

THE HIGH COURT

JUDICIAL REVIEW

2008 460 JR

BETWEEN:

GREENSTAR LIMITED

APPLICANT

AND

DUBLIN CITY COUNCIL,

DUN LAOGHAIRE/RATHDOWN COUNTY COUNCIL, FINGAL COUNTY COUNCIL,

AND SOUTH DUBLIN COUNTY COUNCIL

RESPONDENTS

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 21st day of December, 2009

1. This case, which was heard immediately after the conclusion of the hearing in *Nurendale Ltd t/a Panda Waste v. Dublin City Council & Ors.* (Record No.: 2008/420 JR) (Judgment delivered on 21st December 2009), is concerned with the same overall factual and legal situation as in that case. Accordingly I am satisfied that the material conclusions as to fact and law reached in *Nurendale* are equally applicable in this case and apply *mutatis mutandis*. Therefore the within judgment relates only to three matters not contended for in the related case.

2. For the sake of clarity I herewith confirm the following conclusions which apply equally to this case:

i) The respondents are undertakings for the purposes of the Competition Act 2002 ("CA 2002");

ii) Both ss. 4 and 5 CA 2002 are applicable to the actions of the respondents;

iii) The Variation is an agreement between undertakings or concerted practice within the meaning of s. 4 CA 2002;

iv) There is no objective justification which would save the Variation under s. 4(5) CA 2002;

v) The respondents have therefore breached s. 4 CA 2002;

vi) The respondents are dominant in each of their respective areas and collectively dominant in the greater Dublin area in the market for the collection of household waste;

vii) They have abused that position of dominance because the Variation:

a. is an agreement or concerted practice in breach of s. 4 CA 2002, or

b. would substantially influence the structure of the market to the detriment of competition, or

c. would significantly strengthen the position of the respondents on the market.

viii) The Variation is not saved by virtue of any consideration of efficiencies or objective justification under s. 5 CA 2002;

ix) The Variation would not have an appreciable effect on *inter* State trade, thus Arts. 10, 81, 82, 86 of the EC Treaty are not applicable;

x) The Variation is *ultra vires* the powers granted under the Waste Management Act 1996 since it clearly goes beyond what could have been contemplated by the Oireachtas in seeking to re-monopolise the market for household waste collection;

xi) The Variation is vitiated by bias and prejudgment because of the statements of Mr. Twomey, and the partial nature of the reports relied upon to ground it;

xii) The Variation cannot be said to be unreasonable or irrational by the *Keegan* or *O'Keefe* standards;

xiii) The actions of the respondents gave rise to no legitimate expectation on the part of the applicant;

xiv) The Variation does not disproportionately interfere with the applicant's property rights or right to earn a livelihood.

3. The three issues which Greenstar seeks to have determined by this Court in addition to the above are:

i) Whether the failure of the respondents to hold an oral hearing breached fair procedures;

ii) Whether the failure of the respondents to provide the February 2008 RPS report and the legal and economic and competition advice from Phillip Lee and Company, breached fair procedures by in effect not giving all of the reasons for the making of the Variation in question; and,

iii) Whether the fact that the respondents were both operators and regulators of a market gives rise to structural bias.

Background

4. Before addressing these specific issues it is worthwhile setting out some of the background specific to this action. Greenstar, the applicant, is a company which is involved in all aspects of the waste management industry, including the collection, disposal, recovery and recycling of waste, both public and private, and commercial and residential. It was granted a Waste Collection Permit ("WCP") by the first-named respondent on 4th November 2005. In or around October 2006, it began to formulate a strategic plan for its entry into the market for the collection of household waste from single dwelling households in the Dublin region. It commenced to implement this plan in August 2007, when it began advertising its entry into the second-named respondent's functional area (Dun Laoghaire / Rathdown). This followed Nurendale Limited t/a Panda Waste which had entered that market in or about November 2006. Greenstar began offering services in the third-named respondent's functional area in or about January 2008.

5. The respondents are the four local authorities in the Dublin region. All are active in the household waste collection market, and regulate that market *inter alia* through a regime of WCPs. Under the Waste Management Acts 1996 – 2007 ("WMAs") a number of local authorities may jointly adopt a co-ordinated approach to waste management. To that end, the respondent authorities joined in making the Waste Management Plan for the Dublin Region 2005-2011 ("the WMP"). The first-named respondent, Dublin City Council, is the authority nominated to act as regulator and lead authority on the behalf of the other local authorities within that region (pursuant to s. 34(1)(a)(a) of the Waste Management Act 1996 ("WMA 1996")). As well as making provision for the adoption of joint plans, this legislation controls waste collection by way of a permit system, which in detail is now regulated by the Waste Management (Collection Permit) Regulations 2001 – 2007 (S.I. 402/2001; S.I. 540/2001; and S.I. 820/2007). These regulations are augmented by bye-laws in individual regions. In its capacity as regulator, Dublin City Council, by enforcing the conditions of the permits, controls how domestic waste is collected, transported, recovered, recycled and disposed of. This system applies to operators, other than the local authorities; such authorities however are also involved in the collection of household waste, and charge a fee for such collection. The statutory provisions and the background to the waste management legislation are set out *in extenso* in the *Nurendale* judgment at paras. 28 – 31 and need not be outlined again.

6. The previous Waste Management Plan for the region was made in 1998/1999. In or about 2004 the Respondents began considering a replacement for the Plan. To that end they engaged in a process of consultation and obtained advice from a "*consortium of international experts"*. They received over 70 written submissions and 90 public feedback forms, and consulted with a number of prescribed bodies, as well as the Department for the Environment, Heritage and Local Government.

7. On 11th November 2005, following the conclusion of this process, the respondents, by Order of each City or County Manager, published the existing 2005-2010 plan. The Plan contained a general nine point Policy Statement (s. 17.6) and also specified more detailed objectives (ss. 18 and 19), including, *inter alia*, s. 18(15) that states:

> *"The Waste Management Plan follows the principle of the EU waste hierarchy… The Dublin Local Authorities will if necessary and as appropriate for environmental reasons direct that certain waste streams must be delivered to a certain tier in the waste hierarchy (example re-use, recycling, biological treatment and energy recovery). This will be achieved by means of the waste collection permit system or other appropriate regulatory or enforcement measures."*

The respondents note that no aspect of the WMP was challenged by the applicant herein or others at the time it was made in 2005.

8. In or about February 2007 the respondents commenced a formal process of review of WCPs in the Dublin region. On or about 22nd February 2007 Dublin City Council invited submissions on the proposed review. However, having embarked upon this process, the respondents determined that the only way to prevent "*uncontrolled fracturing*" of the household waste collection market was to vary the WMP. They therefore suspended the review of the WCPs and on 8th June 2007 a notice was published advertising their intention to commence the process of varying the WMP (s. 22(5) WMA 1996) and inviting submissions thereon. The public advertisement was informative; it said:

> *"The variation may include an objective in the Plan that the collection of household waste from single dwelling households (other than those in purpose built apartment blocks) will be carried out by the local authorities or that the local authorities will make arrangements by way of a public tendering process for the collection of such household waste (which may be on a geographical or area basis)."*

9. The purpose of any such variation was to tackle what the local authorities saw as the problem of entry into the household waste collection market of private operators. Following responses to its notice of intention to vary, the respondents prepared a proposed variation which was published, in accordance with s. 23 WMA 1996, together with reports from RPS Consulting Engineers ("RPS") and Dr. Francis O'Toole, on 19th September 2007, and provided a period for making submissions thereon. In addition to this notice, the respondents initiated a public consultation on *www.dublinwaste.ie*; where they provided the RPS Report, Dr. O'Toole's Economics and Competition Policy Report, and the submissions received from interested parties, together with a further consultation paper in relation to the variation. The consultation paper on the proposed Variation, as well as the economist's report, asserted that the waste collection

market was a "*natural (local) monopoly*" and that as such, only a single supplier should operate within each local authority area; such a supplier being either the local authority itself or its assignee. The consultation paper also identified a number of environmental concerns with multiple private operators. RPS also prepared a response report, but this was not published until after the final decision to make the Variation.

10. The applicant herein made a submission on the proposed Variation on or about 19th November 2007, in which it requested, *inter alia*, an oral hearing into the proposal. Notwithstanding this request, and without further communication, each of the respondent authorities made orders approving the Variation on 3rd March 2008. The Variation itself was published on 10th March 2008, together with the RPS response report of February 2008. The Variation, which was in identical terms to the proposal, inserted the following specific objectives into the WMP:-

> *"New Section 18.4A:*
>
> *1. (i) …*
>
> *(ii) …*
>
> *(iii) Specific Objectives*
>
> *Specific objectives with respect to the collection of household waste from single dwelling households are:*
>
> > • *Each Dublin Local Authority shall either collect specific streams of source separated household waste from single dwelling households within its functional area or arrange for the collection of such household waste by means of competitive tendering process(es).*
> >
> > • *Such collection of this source-separated household waste shall be by a single operator in designated areas, which may comprise all or part(s) of a functional area or a number of functional areas within the Dublin Region. The single operator shall either be a Dublin Local Authority or the successful tenderer under a competitive tendering process."*

11. On 10th March 2008, the date of publication of the Variation, Mr. Twomey appeared on RTÉ Radio's Morning Ireland for a debate with the Chief Executive of Greenstar. The applicant cites a passage from the transcript of this interview where, it contends, Mr. Twomey admitted that under the Variation prices could increase. Mr. Twomey is one of the Dublin City Council's Assistant Managers. He has delegated responsibility for Environmental and Engineering Services, is the official in charge of Waste Management Services and has the delegated power under s. 22 of the WMA1996 to make, vary or replace the WMP, and was also the Chairman of the Dublin Regional Waste Steering Group which was appointed to provide guidance on the preparation of the WMP and which recommended the final draft to the four Dublin City and County Managers. He was a key figure in the *Nurendale* case, but his relevance for the purposes of this judgment is limited.

12. On 21st April 2008 Greenstar sought and were granted leave to apply for judicial review. This is the matter now before the Court.

Fair Procedures – Oral Hearing:

13. The first issue to be dealt with is whether the respondents have breached fair procedures in the variation process by not having an oral hearing prior to making the decision to vary on the 3rd March 2008. The applicant contends that where a body vested with administrative functions exercises discretionary powers, it is required to act in accordance with the principles of natural and constitutional justice (*East Donegal Co-op v. Attorney General* [1970] I.R. 317). In particular they claim that fair procedures have been breached in this case because of the above-mentioned failure.

14. Although there is no such requirement in the legislation, the applicant contends that the courts have in the past imposed obligations beyond the scope of relevant statutory regimes in order to satisfy the requirements of fair procedures (*e.g. Prendiville v. Medical Council* [2007] IEHC 427 (Medical Practitioners Act 1978); *Davy v. Financial Service Ombudsman* [2008] IEHC 256 (Central Bank Act 1942); *North Wall Holding Company Ltd. v. Dublin Docklands Development Authority* [2008] IEHC 305 (Dublin Docklands Development Authority Act 1997)).

15. The applicant submits that where the civil or property rights of a person are to be affected by a proposed decision, then that person must be entitled to a fair and impartial hearing in relation to the subject matter. Further, even if there is no absolute obligation to hold such a hearing, in the particular circumstances of this case, where there is a significant conflict of evidence, and where the property rights of the applicant, including its right to earn a livelihood, have been and will be affected by the Variation, then such a hearing is required in order to vindicate those rights.

16. In support of this proposition, the applicant states, by virtue of s. 3 of the European Convention on Human Rights Act 2003 ("ECHRA 2003"), that the respondents are obliged to perform their functions in a manner compatible with the European Convention on Human Rights ("ECHR"), in particular Article 6 thereof, which states:

> *"In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."*

It is claimed that the respondents could not be independent or impartial within the meaning of Art. 6. The applicant notes the case of *R (On the Application of Kathro) v. Rhonnda Cynon Taff County Borough Council* [2001] EWCA 517 where the High Court in England held that the fact that the defendant was deciding on a planning application for a development which it was promoting, was "*plainly sufficient to establish a lack of independence and impartiality for the purposes of Article 6*"; although the Court ultimately found that the remedy of judicial review was sufficient to overcome the lack of independence. Further, the court noted that, the limited scope of judicial review, in particular with regards to review for errors of fact, might present difficulties (see generally: Simons, "*Planning and Development Law (2nd Ed.)*" (2007), pp. 873 – 887).

17. In relation to whether judicial review would be such a sufficient remedy in this case, the applicant draws attention to

the decision of the European Court of Human Rights ("ECtHR") in *Connors v. United Kingdom* [2005] 40 EHRR 9, where the Court found that because judicial review would not permit Mr. Connors, a member of the travelling community who had been evicted, an opportunity for an examination of the facts in dispute, then access to judicial review would not vindicate his convention rights (in that case Article 8). In particular the Court noted at para. 92:

> *"While therefore the existence of judicial review may provide a valuable safeguard against abuse or oppressive conduct by local authorities in some areas, the Court does not consider that it can be regarded as assisting the applicant, or other gypsies, in circumstances where the local authority terminates licences in accordance with the applicable law."*

18. The case of *Tsfayo v. United Kingdom* [2006] 48 EHRR 457, was also relied upon, where the Court found that judicial review was inadequate to remedy the lack of independence at the decision-making stage; as with *Connors* this because the High Court had no jurisdiction to rehear evidence and substitute its own views on the facts.

19. The applicant further calls in aid a passage from the decision of Clarke J. in *Ashford Castle Ltd v. SIPTU* [2007] 4 I.R. 70 which looked at a broad range of tasks entrusted to administrative bodies. At one end were decisions which turned, primarily, on questions of fact; whereas at the other end, were expert bodies with specialist knowledge which might be utilised as part of an exercise of discretion within the statutory powers. The relevant passage reads:

> *"However a great deal of the expertise of the body will be concerned with exercising a planning judgment independent of questions of disputed fact. In such cases the underlying facts are normally not in dispute. Questions of expert opinion (such as the likely effect of a proposed development) may well be in dispute and may be resolved, in a manner similar to the way in which similar issues would be resolved in the courts, by hearing and, if necessary, testing competing expert evidence. However above and beyond the resolution of any such issue of expert fact, the authority concerned will also have to bring to bear its own expertise on what is the proper planning and development of an area." (ibid.* at para. 37*)*

The applicant argues that the current proceedings fall at the end of scale where the decision-maker was not in a position to fall back on their own expertise, but rather was reliant on expert evidence. In circumstances where that expert evidence was clearly in dispute and challenged, *inter alia*, by Greenstar, the expert opinion should have been dealt with, as stated by Clarke J.:

> *"in a manner similar to the way in which similar issues would be resolved in the courts, by hearing and, if necessary, testing competing expert evidence."*

20. In reply the respondents contend that the authorities relied upon by the applicant, in particular *Prendiville v. Medical Council* [2007] IEHC 427 and *North Wall Holding Company Ltd. v. Dublin Docklands Development Authority* [2008] IEHC 305, are not supportive of a general right to an oral hearing. Rather, the authorities demonstrate that, depending on the specific circumstances of the case, the principle of *audi alteram partem* can be complied with where there is no oral hearing. In this regard, Hogan and Morgan, *"Administrative Law in Ireland (3rd Ed.)"* (1998), suggest that since the entitlement varies depending on the circumstances of each case, it may be misleading to speak of a "right" to an oral hearing. As an example, the respondents note that in *VZ v. The Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 135 the Supreme Court rejected the contention that, in the context of applications for refugee status, there was a right to an oral hearing. McGuinness J. stated:

> *"I would accept the submission on behalf of the Respondents that there is no authority to establish that an oral hearing on appeal is necessary in all cases. The Applicant is not in the position of an accused person facing prosecution. He may certainly wish to expand on either his own evidence or independent evidence concerning the conditions prevailing in his country of origin but it is open to him to provide this information in writing." (ibid*. at p. 161*)*

21. Citing *Mooney v. An Post* [1998] 4 I.R. 288 and *Galvin v. Chief Appeal Officer* [1997] 3 I.R. 240, the respondents suggest that with regards to an entitlement to an oral hearing there is no hard and fast rule. In particular, if an oral hearing is not necessarily required in a dispute between parties, it is difficult to see how such an oral hearing is required as a matter of right where there is no formal dispute between the parties.

22. In the circumstances of this case, where there were two rounds of consultation, where each interested party had an opportunity to comment on the September 2007 RPS Report and the O'Toole Report, and where the applicant did in fact make submissions, the requirements of natural justice have been adequately met.

23. Considering the ECtHR jurisprudence relied upon, the respondents firstly note that no declaration of incompatibility is sought, pursuant to the European Convention on Human Rights Act 2003, nor has the applicant sought to invoke the remedies available under ss. 3 and 5 thereof.

24. Notwithstanding this however, it is denied that the Variation breaches Art. 6 ECHR. In this regard the respondents contend that the Variation does not determine the applicant's civil rights or obligations within the meaning of that Article. The adoption of the variation has not had the effect of precluding the applicant from continuing to provide a household waste collection service. If the circumstances of this case related to the revocation of the applicant's WCP, then that might more properly be a determination as to the applicant's civil rights and obligation within Art. 6, although in the case of a WCP review an appeal to the District Court is provided for.

25. Further, the remedy of judicial review, as invoked in this case, is a sufficient safeguard to satisfy the requirements of Art. 6, and in fact the ECtHR case law is replete with examples where the Court has found that judicial review, as provided for in an English context, was sufficient. For example, in *Bryan v. UK* [1995] ECHR 19187/91 the issue considered was whether an appeal on a point of law only to the High Court against a planning inspector's determination, satisfied Art. 6(1). It was accepted that an appeal on a point of law could be brought on grounds identical to those which could ground an application for judicial review. The ECtHR ultimately held that such form of review was sufficient to comply with Art. 6.

The House of Lords, considering whether a procedure, whereby the Secretary of State had the power to determine certain matters of planning and compulsory purchase subject to judicial review, held that the statutory process, together with the availability of judicial review were sufficient to comply with the requirements for "*an independent and impartial tribunal*" (*R (Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, where the House applied *Bryan*). See also *Runa Begum v. Tower Hamlets* [2000] UKHL 3.

26. The respondents seek to distinguish the case of *Tsfayo v. UK* on the ground that the fundamental question of fact at issue in those proceedings, namely whether or not there was sufficient factual justification to warrant an extension of time, was not one which could be substantively reassessed in judicial review proceedings. In contrast, in the case at hand, there is no dispute as to facts, but instead the applicant herein challenges issues of law and procedure. *Tsfayo* is therefore clearly distinguishable.

27. Having considered the submissions of the parties in this regard I would start by saying that I concur with the respondents in that there is no general right to an oral hearing for all determinations which may affect an applicant. Most of the case law relied upon in this respect is clearly distinguishable from the present case. In the cases referred to, the central issues under consideration were matters which related to specific entitlements, *e.g*. licences or planning permission, or related to *inter partes* disputes. In this case neither is the situation; the parties were merely making submissions on a proposal to vary the WMP. Further, they were afforded the opportunity to make written submissions. Moreover, it is to be doubted if the Variation process was one which could be said to directly relate to the applicant's "civil rights and obligations". In any event, I am satisfied that judicial review is a sufficient remedy to satisfy the requirements of Art. 6.

28. The ECtHR in *Tsfayo* stated at paras. 42 – 43:

> *"42. The Court recalls that even where an adjudicatory body determining disputes over 'civil rights and obligations' does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are 'subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 § 1 (Albert and Le Compte v. Belgium,, judgment of 10 February 1983, Series A no. 58, § 29).*
>
> *43. In Bryan v. the United Kingdom, judgment of 22 November 1995, Series A no. 335-A, §§ 44-47, the Court held that in order to determine whether the Article 6-complaint second-tier tribunal had 'full jurisdiction', or provide 'sufficiency of review' to remedy a lack of independence at first instances, it was necessary to have regard to such factors as the subject-matter of the decision appealed against, the manner in which that decision was arrived at and the content of the dispute, including the desired and actual grounds of appeal."*

The ECtHR went on to consider *Bryan v. UK*, noting that although the inspector's powers included some fact-finding, he was in essence called upon to exercise discretion on a wide range of policy matters, and it was these policy judgments, rather than the findings of primary fact, which *Bryan* challenged in the High Court.

29. Ultimately, in my view the Courts take a pragmatic approach to the consideration of whether an oral hearing is required. It is not necessary in all cases. I would respectfully agree with Costello J., in *Galvin v. Chief Appeals Officer* [1997] 3 I.R. 240 at 251, where he observed:

> *"There are no hard and fast rules … as to when the dictates of fairness require the holding of an oral hearing. The case (like others) must be decided on the circumstances pertaining, the nature of the inquiry being undertaken by the decision-maker, the rules under which the decision-maker is acting, and the subject matter with which he is dealing and account should also be taken as to whether an oral hearing was requested."*

30. In this case I am satisfied that the procedure under consideration is not such as to require an oral hearing to uphold natural justice and fair procedures. The Variation, or any variation, may affect personal rights, but it could not be said that determinations were being made on an individual basis, such that the affected parties might be entitled to have an oral hearing. I feel that the statutory requirements obliging the decision-maker to consider the submitted materials are more than sufficient in this particular area, which is largely a matter of policy. Further, it is clear that the decisions of the respondents are reviewable by way of judicial review, and indeed in such proceedings this Court has held that the Variation was vitiated for being biased, prejudged, and contrary to competition law. I am therefore satisfied that the procedure for varying a WMP is in compliance with Art. 6 ECHR, and/or any other constitutional requirements of fair procedures relating to a right to an oral hearing.

Fair Procedures – Duty to Give Reasons:

31. The respondents, in conducting the process involved in varying the WMP, considered, *inter alia*, legal, economic and competition issues. In this regard a report, in the form of a letter, was prepared by their solicitors, Phillip Lee and Company, setting out those issues, and this report formed part of the respondents' decision-making process. The respondents, however, refused to produce this report in these proceedings, claiming privilege. In those circumstances, it is alleged, the respondents failed to provide all reasons for their decision.

32. The applicant refers to the decision of Finlay P. in *State(Sweeney) v. Minister for the Environment* [1979] ILRM 75, where he noted the purpose behind the requirement to give reasons, albeit in a planning context, namely:

> *"[t]o give … [an] applicant such information as may be necessary and appropriate for him, firstly, to consider whether he has got a reasonable chance of succeeding in appealing against the decision … and secondly to enable him to arm himself for the hearing of such an appeal."*

33. In *International Fishing Vessels v. Minister for the Marine* [1989] I.R. 149, Blayney J. stated at p. 155 of the report:

> *"It is common case that the Minister's decision is reviewable by the Courts. Accordingly, the applicant has the right to have it reviewed. But in refusing to give his reasons for his decision the Minister places a serious obstacle in the way of the exercise of that right. He deprives the applicant of the material it needs in order to be able to form a view as to whether grounds exist on which the Minister's decision might be quashed. As a result, the applicant is at a great disadvantage, firstly, in reaching a decision as to whether to challenge the Minister's decision or not, and secondly, if he does decide to challenge it, in actually doing so, since the absence of reasons would make it very difficult to succeed. A procedure which places an applicant at such a disadvantage could not in my opinion be termed a fair procedure, particularly where the decision which the applicant wishes to challenge is of such crucial importance to the applicant in its business."*

34. Thus, the applicant contends, as administrative bodies exercising statutory powers, there can be no justification for refusing to publish documentation which formed part of the material considered by them in reaching their decision. The selective disclosure of considered material, in circumstances where the retained documents could materially affect the decision, cannot be deemed to accord with principles of natural or constitutional justice.

35. In reply, the respondents argue that the relevant legal principles on the obligation to give reasons are well established. They note that the relevant authorities were set out in *P. v. Minister for Justice* [2002] 1 I.R. 164 by Hardiman J., where, having stated that the reasons must be "*proper, intelligible and adequate*", he added that:

> *"It seems clear that the question of the degree to which a decision must be supported by reasons stated in detail will vary with the nature of the decision itself. In a case such as International Fishing Vessels Ltd v. Minister for Marine [1989] I.R. 149 or Dunnes Stores Ireland Company v. Maloney [1999] 3 I.R. 542, there was a multiplicity of possible reasons, some capable of being unknown even in their general nature to the person affected. This situation may require more ample statement of reasons than in a simpler case where the issues are more defined." (ibid.* at pp. 172 – 173*)*

36. The respondents seek to distinguish the present case from *International Fishing Vessels*. In this case the consultation process provided extensive information to the applicant as to the reasons behind the proposed Variation; so therefore it could not contend that it was unaware of the rationale upon which the respondents sought to invoke the Variation. Insofar as the respondents failed to comply with fair procedures by virtue of not providing the letter/report from Philip Lee Solicitors dated 18th February 2007 in advance of these proceedings this is disputed and, in any event, the allegation is unsupported by case law. It cannot be contended that an interested party is entitled to every document that passes between advisors engaged by the decision makers and third parties in to order to scrutinise every detail or policy or strategy of an administrative decision.

37. I have no doubt that in a case such as this, which involves a decision by a public body on a matter affecting, either directly or indirectly, the whole of greater Dublin, that the respondents had a duty to give detailed reasons for their decision. It is only by providing comprehensive reasons that a person affected may properly assess whether the supposed justification holds up to scrutiny and whether an appeal or review might successfully be brought against it and on what grounds. In this case when the proposal to vary was published it was done so in conjunction with reports from RPS and Dr. Toole, setting out the respondents' purported justification and their rational behind the proposal. Having considered the submissions made in relation thereto, the respondents, when the Variation was published in its final form, provided a report in response to such submissions. In my opinion the reports as published were sufficient to ensure that there were reasons for the Variation put before the public, and in this regard the respondents cannot be found to have breached fair procedures. Indeed, these reports are now relied upon in the within action and have been the subject of Court and expert review. In those circumstances, I also cannot see that the additional publication of the report of RPS of February 2008 and the letter/advice of Phillip Lee was a requirement of fair procedures. The respondents published more than enough material for any person to assess the Councils' reasons for the Variation and to mount a challenge thereto; as has successfully been done here. There has thus been no breach of fair procedures in this regard.

Structural Bias:

38. The applicant claims that by virtue of the fact that the respondents are both operators on the market and regulators thereof, there is structural bias built into the system. Decisions taken by the respondents in relation to this market could be said at least to give rise to a perception of objective bias; in those circumstances it is claimed that special care must be taken so as to avoid any suspicion that they have been influenced by external factors, and particularly in this case by their position as competitors in the market.

39. The case law relating to bias and prejudgment generally need not be set out in full here and in any event is contained in the *Nurendale* judgment at para. 158 et seq. Suffice to say that the general test for objective bias is that whether a reasonable person, knowing all relevant facts, would have a reasonable apprehension that the decision was vitiated by bias; such vitiation arising from external factors (see *Spin Communications Ltd. v. Independent Radio and Television Commission* [2001] 4 I.R. 411).

40. Attention is drawn to the decision of the English Court of Appeal in *Steeples v. Derbyshire Borough Council* [1985] 1 WLR 256 (which will be considered in more detail below: see para. 46 *infra*), and in particular to where the Court considered how the Council, in circumstances where it was necessarily seeking permission from itself (or at least a sub-committee thereof), might have avoided the perception of bias.

41. Thus, the applicant argues, that the respondents have a dual role in the relevant market, meaning that at all times there are external factors to the decision-making process which could give rise to a reasonable apprehension of bias. Further, the Poolbeg incinerator contract could constitute an additional external factor which could give rise to such apprehension. In those circumstances, where the making of the Variation is an executive function, the respondents, in order to avoid any apprehension of bias, should have taken the steps identified in *Steeples*.

42. In reply it is submitted that the Variation should not be vitiated by the fact that the respondents, at the outset of the process, considered a particular outcome desirable; otherwise the Variation would not have been proposed in the first

place. In arriving at such a view, the respondents did so on the basis of legitimate concerns about the entry of private waste collectors into the market for the collection of household waste. In this regard reference is made to the *dicta* of Lord Hoffman in *R (Alconbury Ltd) v. Environment Secretary* [2003] 2 AC 295 at para. 123:

> *"It is the business of the Secretary of State, aided by his civil servants, to develop national planning policies and co-ordinate local policies. These policies are not airy abstractions. They are intended to be applied in actual cases. It would be absurd for the Secretary of State, in arriving at a decision in a particular case, to ignore his policies and start with a completely open mind."*

See also *Persimmon Homes Teeside Ltd*. [2008] EWCA Civ 746, where the Court of Appeal, in following this approach, emphasised the necessity *"to be cognisant of the realities of local government"* (para. 70).

43. It is therefore contended that the relevant case law on bias applies in an attenuated form to administrative actions, particularly where the statutory framework makes it impossible for the administrators to have no view as to the desirability of what they propose.

44. I would start any conclusion on this matter by stating that I am not dealing with the question of whether or not the Variation was vitiated by objective or subjective bias because of any actions of the respondents. The only contention at issue here is that because of the statutory framework there is inevitable structural bias in the decision to vary a WMP, in circumstances where the respondents are both operators and regulators on the relevant market.

45. It is obvious that a local authority which has been charged with the formulation of local policies must, when implementing those policies, have come to some view as to their propriety. However, this does not necessarily mean that they can be automatically considered biased or prejudged. Decisions taken on policy issues are distinct and different from decisions of courts, tribunals or quasi-tribunals. I would, in this regard, agree with the comments of De Smith, in *"Judicial Review (6th Ed.)"* (2007), where the author states at p. 530:

> *"The normal standards of impartiality applied in an adjudicative setting cannot meaningfully be applied to a body entitled to initiate a proposal and then to decide whether to proceed with it in the face of objections. … It would be inappropriate for the courts to insist on … maintaining the lofty detachment required by a judicial officer determining a lis inter partes."*

Nonetheless, this does not mean that, when coming to a conclusion on a matter where there is a statutory requirement to consult those affected that, in the face of trenchant, legitimate opposition, the decision-maker may bulldoze through a decision without regard to such, and regardless of what relevant evidence it has before it.

46. A pragmatic approach was taken by the English Court of Appeal in *Steeples v. Derbyshire Borough Council* [1985] 1 WLR 256. In that case the council owned an area of parkland which they proposed to develop with a third party (KLF). An agreement had been entered into between the council and that third party which provided, *inter alia*, that the council would take all reasonable steps to obtain such outline planning permission and consents as were necessary to enable the proposed development to proceed, subject to penalties in liquidated damages should they fail to use their best endeavours to do so. The Court considered, *inter alia*, whether the decision to grant planning permission was in breach of the rules of natural justice because the terms of the council's agreement with the third party might lead a reasonable person to suspect that they would be biased in favour of granting the permission. Having concluded that the relevant test when considering bias was whether a reasonable man, with particular knowledge of the circumstances, would think that there was a real likelihood that the contract, and its requirements, had had a material and significant effect on the planning committee's decision to grant permission, the Court continued:

> *"I would like to add one or two footnotes under the heading of natural justice. First, as I have said, it was the plaintiff's submission that because of the procedure under regulations 4 and 5 the county council were permitted to grant themselves planning permission and therefore, in a sense, to be judges in their own cause, and that because of this it was necessary for them to be more scrupulous than might otherwise have been necessary to be seen to be fair. Mr Mann puts precisely the opposite contention. The effect of those regulations, he says, is that inevitably the planning committee will approach its decision with a predisposition to make it and that it is allowed to do so. I reject that argument. When the county council decide to seek planning permission they can do so without regard to any statutory obligations under the Town and Country Planning Acts; but when they come to grant it, by their planning committee, they must have regard to the considerations and provisions of section 29(1) of the Act of 1971. The fact that the county council have already decided to seek permission is not, in my view, 'any other material consideration' within the meaning of that expression in section 29(1). I reject, therefore, Mr Mann's test, to which I have already referred, and particularly the words in that test which I emphasised, and I agree with Mr McLaren that in operating the procedures under regulations 4 and 5 the planning authority must be particularly scrupulous to ensure that their decision is seen to be fair, particularly when it is at all controversial. …*
>
> *[Next], the county council ask what else they could have done. One answer comes to mind immediately. They could have avoided committing themselves to KLF in any way until after the planning decision had been properly made or, if they were to make a contract with them, they could have ensured that the contract was subject to planning permission, that they had no obligation of any sort in connection with the obtaining of planning permission, and that they would be under no liability of any sort should planning permission not be obtained.*
>
> *Against the background of a contract already made, however, at least two further alternative courses come to mind as being far from inappropriate. They could have let KLF make the application, possibly - I am not sure because the matter has not been canvassed - to the Amber Valley District Council, or they could have decided to hold a public meeting at which they, with members of the planning committee present, explained their proposals and the reasons for them and at which objectors were given an opportunity to air their views." (ibid.* at pp. 588-289) (emphasis added)

47. I would note that in *Steeples* there was a decision-making body which also received applications from the general public. Here on the other hand there is no such organisation, and it was the respondents acting qua regulator which were the decision-makers, and who accepted submissions in relation to the Variation. Ultimately I conclude that the dual role of the respondents, coupled with the statutory procedures for a Variation, are not such that they create objective bias. However, I would note that the situation of the respondents as both regulator and operator must inevitably increase the likelihood of objective bias, and in those circumstances, precautions, such as those suggested in *Steeples*, are to be encouraged where such a situation exists.

48. As I have already found in the *Nurendale* judgment, in this case the decision was both prejudged and vitiated by bias; however this arose in the specific circumstances of the case and in light of the evidence presented in Court. However that is a different contention from whether the procedure and position of the respondents gave rise, almost automatically, to objective bias; in that regard the Court finds that they do not, given the nature of the decision in question, and the statutory functions of the local authorities in relation thereto. Those features alone could not give rise to objective bias on the part of the authorities. Nor does the fact that a local authority has decided to commence upon a course of action evidence prejudgment in absence of further evidence.

Conclusion

49. Having considered the above, and in light of the judgment of this Court in *Nurendale*, the Court therefore comes to the following conclusions relating to the three additional matters canvassed by Greenstar:

i) By failing to provide an oral hearing during the consultation process, the respondents have not breached fair procedures or any constitutional or conventional rights of the applicant.

ii) The respondents were not in breach of fair procedures by failing to provide the RPS report of February 2008 of the letter/report from Phillip Lee Solicitors; it was clear what grounds the respondents were seeking to rely upon in varying the WMP.

iii) The fact that the respondents are both operators and regulators in the market for household waste, coupled with the statutory requirements with regards to consultation in the variation process, do not lead, by virtue of those facts alone, to a finding of objective bias in the decision-making process.

50. Finally, I would reiterate that the above conclusions are in addition to, and without prejudice to, the findings made by this Court in the *Nurendale* judgment, and the conclusions made thereto, as set out at para. 2 of this judgment *supra,* which apply *mutatis mutandis* to the applicant herein.