Neutral Citation Number: [2007] IEHC 469

THE HIGH COURT
JUDICIAL REVIEW

[2007 No. 440 JR]

BETWEEN

MR. BINMAN LIMITED

APPLICANT

AND
LIMERICK COUNTY COUNCIL

RESPONDENT

Judgment of Mr. Justice Gilligan delivered on the 21st day of September, 2007

1. By order of this Court [Peart J.] as dated 14th May, 2007, the applicant was given leave to apply for the following reliefs:

> 1. A declaration that the applicant has the benefit of a tacit consent for the shipment of waste as referred to in Article 8(1) of Council Regulation 259/93 in respect of the trans-frontier shipment from Foynes to Sweden of a total of 20,000 tonnes of Refuse Derived Fuel Waste for recovery for the duration of Notification IE 140096 issued by the applicant pursuant to Council Regulation 259/93;
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> 2. A declaration that the imposition by the respondent in the Trans-Frontier Shipment certificate dated the 27th day of February, 2007 issued by it pursuant to Article 8 of the Waste Management (Trans-Frontier Shipment of Waste) Regulations 1998 (S.I. No. 149) of a limit of 11,000 tonnes on the amount of Refuse Derived Fuel Waste which may be shipped to Sweden for recovery by the applicant for the duration of Notification IE 140096 is unlawful and/or *ultra vires* the respondent;
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> 3. A declaration that Trans-Frontier Shipment Certificate dated the 27th day of February, 2007 issued by the respondent pursuant to Article 8 of Waste Management (Trans-Frontier Shipment Waste) Regulations, 1998 (S.I. No. 149) takes effect without any limitation and/or restriction on the amount of Refuse Derived Fuel waste which may be shipped to Sweden on an ongoing basis by the applicant in respect of all shipments contemplated by Notification IE 140096;
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> 4. A declaration that upon satisfaction compliance with Article 8 of the Waste Management (Trans-Frontier Shipment of Waste) Regulations, 1998 (S.I. No. 149) in the manner already effected, the applicant through its shipping agent Indaver Ireland Ltd is at liberty to export without any further restriction consignments of Refuse Derived Fuel Waste from Foynes, County Limerick to Sweden for the duration of Notification IE 140096 within the terms of such Notification;
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> 5. A declaration that the respondent's intimation by letter dated the 16th day of February, 2007 that it would permit an increase in the quantity of Refuse Derived Fuel Waste for trans-frontier shipment to 31st of December 2007 to 17,500 tonnes subject to confirmation that the applicant would comply with pre-conditions as to the introduction of a comprehensive waste recycling education campaign: the implementation of a bag marking system to facilitate producer identification and the delivery of recycling opti-bags to householder customers is unlawful;
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> 6. *Certiorari* of the decision constituted by the said letter dated the 16th day of February, 2007;
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> 7. *Certiorari* quashing the certificate dated 27 February 2007 issued by the respondent under the Waste Management (Trans-Frontier Shipment of Waste) Regulations, 1988 to the extent that it limits the tonnage of waste covered thereby to 11,000 tonnes;
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> 8. Alternatively *certiorari* quashing the said certificate and mandamus requiring the respondent to issue to the applicant a certificate under the Waste Management (Trans-Frontier Shipment of Waste) Regulations, 1998 in respect of the entirety of the waste the subject matter of Notification IE 140096;
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> 9. Damages;
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> 10. Such interim or interlocutory relief as may be required;
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> 11. Further or other order;
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> 12. Liberty to apply; and
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> 13. The costs of the within proceedings.

2. The grounds upon which the relief is sought are:

> 1. Pursuant to EC Council Regulation 259/93 "on the supervision and control of shipments of waste within, into and out of the European Community" and by Transfrontier Shipment Notification IE 140096 dated the 31st of August 2006, the applicant, through its shipping agent Indaver Ireland Ltd, notified the Swedish Environmental Protection Agency as the Competent Authority of Destination within the meaning of Article 6 of EC Council Regulation 259/93 of the intention of the applicant to ship Refuse Derived Waste for recovery from Foynes, Limerick to Sweden in a maximum total of 20,000 tonnes by shipments commencing on the 27th of October 2006 and ceasing on the 26th of October 2007. The said notification was a general notification within the meaning of Article 28 of EC Council Regulation 259/93.
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> 2. Pursuant to EC Council Regulation 259/93 the applicant furnished a copy of Notification IE 140096 to the respondent as the Competent Authority of Dispatch within the meaning of the said Regulation.
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> 3. Notification IE 140096 was on the 30th October 2006 and stamped by the Swedish Environmental Protection Agency as both received and acknowledged (within the meaning of Article 7(1) of Council Regulation 259/93) and by letter dated the 11th of November 2006 the Swedish Environmental Protection Agency consented to the notified shipments;
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> 4. The respondent raised no objection within the meaning of Article 7 of Council Regulation 259/93 to Notification IE 140096 or the shipments proposed therein within the 30 day time limit prescribed by Article 7(2) of Council Regulation

259/93.

5. Relating to shipment of waste for recovery, Notification IE 140096 fell within Chapter B of Council Regulations 259/93. Pursuant thereto and absent reasoned objection within Article 7 of Council Regulation 259/93 by the Competent Authorities within the prescribed time-limits, the aforesaid shipment of Refuse Derived Waste for recovery has the benefit of tacit consent for shipment pursuant to Article 8(1) of EC Council Regulation 259/93 subject to the requirement of the existence of an appropriate financial guarantee or security in accordance with Article 27 of EC Council Regulation No. 259/93;

6. Pursuant to Article 27 of Council Regulation 259/93 as implemented in Irish Law by Article 8 of the Waste Management (Trans-Frontier Shipment Waste) Regulations, 1998, the applicant applied to the respondent for a Trans-frontier Shipment Certificate of Financial Guarantee or Security in respect of the proposed shipment of Refuse Derived Fuel waste as notified by Notification Form IE 140096;

7. By Trans-frontier shipment certificate dated the 27th of February 2007 the respondent certified there was in existence in respect of Notification IE 140096 a financial guarantee satisfying the requirements of Article 27 of Council Regulation 259/93. However, the aforesaid Trans-frontier Shipment certificate was subject to a limitation and condition which provided that the quantity of Refuse Derived Fuel Waste for export shall not exceed 11,000 tonnes for the period specified in the notification IE 140096;

8. The respondent has given reasons for the imposition of the said condition by reference to alleged failures on the part of the applicant to achieve certain targets as to waste management in the operation of its waste business generally;

9. The respondent, in issuing the aforesaid Trans-frontier shipment Certificate dated the 27th of February 2007 with a condition and/or limitation on the quantity of Refuse Derived Fuel waste which may be exported by the applicant for the period specified in notification IE 140096 acted unlawfully and *ultra vires*.

10. The respondent as Competent Authority for Dispatch,

a. in issuing the aforesaid certificate has failed to lawfully apply the appropriate procedures under EC Council Regulation No. 259/93 and has acted in excess of the procedural and/or substantive rules of EU law;

b. in issuing the aforesaid certificate has failed to lawfully apply the appropriate procedures under the EC Council Regulation No. 259/93 and has acted in excess of jurisdiction afforded it by the Waste Management (Trans-Frontier Shipment Waste) Regulations, 1998;

c. is obliged as a public body or public authority and as a matter of European Union and/or Irish Law, to apply the rules derived from EC Council Regulation 259/93 on the supervision and control of shipments of waste within, into and out of the European Community and must comply with any substantive or procedural rules provided therefor and has acted without or in excess of jurisdiction in so far as it has acted contrary to the European Union law;

d. is obliged to have regard to the substantive and procedural rules set out in said Council Regulation and the implementation thereof through the European Union;

e. is not entitled to impose conditions on Trans-Frontier shipment certificates unrelated to the purpose of issuance of such certificates or for purposes ulterior or extraneous to the purposes of Article 27 of Council Regulation 259/93;

f. is not entitled to impose tonnage limits on Trans-Frontier shipment Certificates;

g. is not entitled to avail of the Trans-Frontier shipment Certification procedure for the purpose of advancing the purposes of its Waste Management Plan; and

h. is not entitled to use the Trans-Frontier Shipment Certification procedure as a substitute for the objection procedure pursuant to Article 7 of Council Regulation 259/93 – as it has done in this case.

11. The respondent has acted manifestly and deliberately in breach of and *ultra vires* EC Council Regulation 259/93 and the Waste Management (Trans-Frontier Shipment Waste) Regulations 1988 and the respondent is liable to compensate the applicant for such losses as it has and will incur as a consequence of the respondent's breach thereof;

12. Despite numerous demands on behalf of the applicant the respondent has failed to rectify the errors aforesaid.

3. The applicant is a refuse collector pursuant to a waste collection permit as issued by the respondent in the Mid West region and *inter alia* recovers waste which it converts into refuse derived fuel (RDF) and which it exports in bales from its recycling facility at Kilmallock, Co. Limerick via Foynes Port to a waste processing facility in Sweden where it is used as fossil fuel replacement in a cement kiln. If this waste is not extracted as RDF and transported to Sweden it would be disposed of in Ireland, by way of landfill.

4. Pursuant to the particular Trans-Frontier Movement of Waste Notification Form bearing Record No. IE 140096 and as dated 30th day of October, 2006 the applicants were seeking from the respondent the requisite certificate for the transport to Sweden of 20,000 tonnes of RDF. The subsequent certificate as issued by the respondent on 27th February, 2007 provided only for the export of 11,000 tonnes for the period as specified in the Trans-Frontier Shipment Notification IE140096 thereby leaving the applicant without the requisite certification to export the remaining 9,000 tonnes of RDF in respect of which it had sought the appropriate certificate.

5. Two central issues arise in this application; the first issue is that due to an administrative error, the respondent never received the appropriate acknowledgment and accordingly did not object to the transfer of the 20,000 tonnes of RDF to Sweden within the prescribed 30-day time period. The respondent only became aware of the situation on the 19th day of February, 2007 and subsequently, on the 27th day of February, 2007, issued the appropriate certificate for the export of only 11,000 tonnes of RDF and not the 20,000 tonnes as sought by the applicant.

6. It is accepted by both parties that the export of RDF by the applicant has to comply with Council Regulations 259/93 on the supervision and control of shipment of waste within, into and out of the EU and the Waste Management (Trans-Frontier Shipment of Waste) Regulations 1998 (1998 Regulation) which gave effect in Irish law to elements of Council Regulation 259/93. Article 5 of the 1998 Regulations imposed a general obligation to comply with Council Regulations 259/93. This legislation regulated shipments of waste into and out of Ireland until 12th July, 2007.

7. Article 6 of the Council Regulation 259/93 required advance notification of intended trans-frontier shipments of waste to (the competent authority of destination) – copied to the notification to "the competent authority of dispatch". The active consent of the latter to the shipment was not required but either authority could object to the shipment for reasons specified in the Council Regulation generally including what can be called substantive waste management reason. In the present case the Swedish EPA was the "competent authority of destination" and Limerick County Council being the respondent herein, was "the competent authority of dispatch".

8. As a separate matter to the consent/objection regime the legislation requires the provision of financial guarantees with respect to a shipment. Article 27 of Council Regulation 259/93 provides that:

> "All shipments of waste covered within the scope of this regulation shall be subject to the provision of a financial guarantee or equivalent insurance covering costs for shipment … and for disposal or recovery."

9. Article 8 of the 1998 Regulations provides that:

> "A shipment of waste shall not enter or leave the State unless there is in force in relation to the shipment a certificate issued under this article."
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> "An application for a certificate in relation to a shipment of waste shall be made to the competent authority of dispatch …"
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> "A competent authority which receives an application … shall issue the certificate requested if it is satisfied that there is in force in respect of the shipment or will be in force at the time the shipment enters or leaves the State as the case may be, a financial guarantee or other equivalent security satisfying the requirement of Article 27 of the Council Regulation and such certificate shall certify that the competent authority is so satisfied."

10. All shipments of RDF by the applicant to Sweden are subject to a notification to the respondent and the Swedish EPA under Council Regulation 259/93 and the 1998 Regulations.

11. Article 6 of Council Regulation 259/93 required the notifier to notify the competent authority of destination with a copy of the notification *inter alia* to the competent authority of dispatch.

12. Article 7(1) provides that on receipt of the notification the competent authority of destination shall within the three days send an acknowledgment to the notifier and copies to the other competent authorities and to the consignee.

13. Article 7(2) provides *inter alia* that the competent authority of dispatch has thirty days following dispatch of the acknowledgement to object in writing to the shipment to the notifier. Article 7(2) states:

> "The competent authorities of destination dispatch and transit shall have thirty days following dispatch of the acknowledgment to object to the shipment. Such objection shall be based on para. 4. Any objection must be provided in writing to the notifier and to other competent authorities concerned within the thirty day period."

14. Article 8(1) provides that:

> "The shipment may be effected after the thirty day period has passed if no objection has been lodged. Tacit consent however, expires within one year from that date."

15. The characteristics accordingly of the objection procedure are:

> 1. Objection may be made by any of the competent authorities concerned.
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> 2. The objection must be made within thirty days of dispatch by the competent authorities of destination of the acknowledgment of the notification.
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> 3. The objection must be made in writing.
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> 4. The objection must be made to
>
> a. The notifier
>
> b. The other competent authorities.

16. The reasons for objection must be based on the content of Article 7(4)(a) of Council Regulations 259/93 which state as follows:

> "The competent authorities of destination and dispatch may raise reasoned objections to the planned shipment:
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> 1. In accordance with directive 75/442/EEC (The Waste Framework Directive) and in particular Article 7 thereof; or
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> 2. If it is not in accordance with national laws and regulations relating to environmental protection public order, public safety or health protection; or
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> 3. If the notifier or the consignee has previously been guilty of illegal trafficking in this case the competent authority of dispatch may refuse all shipments involving the person in question in accordance with national legislation; or

> 4. If the shipment conflicts with obligations resulting from international conventions concluded by the Member State or the Member States concerned; or
>
> 5. If the ratio of the recoverable and non recoverable waste the estimated value of the materials to be finally recovered or the cost of the recovery and the cost of the disposal of the non recoverable fraction do not justify the recovery under economic and environmental considerations."

17. In the particular circumstances in this case the notification issued by the Swedish EPA indicated that the intended tonnage was 20,000 tonnes of RDF. A letter was sent from the Swedish EPA to the applicant's agent with an acknowledgment of receipt of the declaration on 30th October, 2006, whereupon, the Swedish EPA sent the applicant the acknowledgement as obliged under Article 7 TFS Regulation. The Swedish EPA were obliged to send an acknowledgment to the respondent, Limerick County Council and this they did, but in doing so, and I am so satisfied to find as a fact, they sent the acknowledgement on the 30th day of October, 2006 to a fax number which had previously been used by Limerick County Council, but on moving office the number was discontinued, the result being that the respondent herein, Limerick County Council did not receive the acknowledgement until 19th February, 2007. The respondent argues that the thirty day period should run from the 19th February, 2007 and not from the 30th October, 2006.

18. In effect what occurred was an administrative error which led to the confirmation of a contract of dispatch being faxed to an incorrect fax number which previously had been used by Limerick County Council but which was no longer in use on the relevant day.

19. It is of some importance that the acknowledgment was in fact faxed by the Swedish EPA to the respondent Limerick County Council at a fax number of their Environment Section which at all material times was still showing the relevant fax number to be a fax number for the respondents Environmental Section and which at all material times still appeared on the respondents official E-Tenders website.

20. The issue of administrative error arose in Case C-125/04 *Pedersen AS v. Miljøstyrelsen* ECR [2006] I – 1465. The competent authority refused to authorise a shipment on the ground that *Pedersen* had failed to supply it with the information necessary for it to consider the request and took the view that for that reason the thirty day period for the competent authority to give its consent or to raise objections could not begin to run. *Pedersen* sought a declaration of tacit consent in the Danish Courts which referred questions to the ECJ for a preliminary ruling.

21. As to substantive grounds for objection the court stated that:

> "The cases in which Member State may object to a shipment of waste between Member States are, for shipments of waste for recovery, those exhaustively listed it up in Article 7(4) of that regulation as provided by Article 7(2) thereof …"

22. The court in *Pedersen* took the view that:

> "Having regard to considerations of legal certainty, Article 7(2) of Regulation No. 259/93, should be interpreted strictly. Since the period of thirty days laid down in the Article constitutes a guarantee of sound administration, the competent authorities may raise objections only if they comply with that time limit."

23. Further the court stated:

> "If it is necessary to maintain the rights of those authorities to request additional information when they consider that the notification is incomplete, rights conferred on them by Article 6(4) of Regulation No. 259/93 …. Since Regulation No. 259/93 does not lay down any specific procedures for the introduction by the competent authorities of requests for additional information and documents pursuant to Article 6(4) of that Regulation such request may be formulated by the competent authorities, in the present case the authority of dispatch, within the thirty day period in the form of an objection provided for in Article 7(2) of the Regulation. Such a solution allows strict interpretation of Article 7(2) to be reconciled with maintaining the rights of the competent authorities to request additional information."

24. The court accordingly went on to hold that:

> "The period in Article 7(2) begins to run when the competent authorities of the State of destination have sent the acknowledgment of receipt of the notification irrespective of the fact that the competent authorities of the State of dispatch do not consider that they have received all of the information set out in Article 6(5) of the that Regulation. The effect of the expiry of that time limit is that the competent authorities can no longer raise objections to the shipment or request additional information from the notifier."

25. The principle identified in *Pedersen* is that the procedure involved provides to applicants a "guarantee of sound administration". Thus any administrative failure cannot be called by the administrators to an applicant's detriment. Further the guarantee of sound administration is to the effect that on the expiry of the thirty days the applicant can arrange its affairs on the basis that there is no objection to the shipment on waste management grounds.

26. In this case there was no objection within thirty days of the date when the acknowledgment was sent.

27. I take the view that the Swedish Environmental Protection Agency complied fully with the relevant regulations and expressly consented to the shipment of 20,000 tonnes of RDF by the applicant to Sweden. Having regard to the findings of the European Court in *Pedersen* and on the principle of the guarantee of sound administration, the applicant has to be given the benefit of the situation that has arisen and as no objection was raised by the respondent within the thirty day period the applicant derived tacit consent to the shipment of 20,000 tonnes of RDF and any subsequent purported objection by the respondent herein is in my view of no effect.

28. Accordingly, I come to the conclusion that the applicant is entitled to a declaration that the applicant has the benefit of a tacit consent for shipment of waste referred to in Article 8(1) of Council Regulation 259/93 in respect of the Trans- Frontier Shipment from Foynes to Sweden of a total of 20,000 tonnes of RDF waste for recovery for the duration of notification 11 - 140096 issued by the applicant pursuant to Council Regulation 259/93.

29. For the sake of completeness, I will deal with the second central issue which is that, in the background to the applicants application, the respondent being the relevant authority for waste management in the area in question, had in place a waste management plan. In applying the provisions of the Waste Management Act, 1996 to individual operators such as the applicant herein, the respondent authority makes the case that it is obliged to be proportionate in its dealing with licensed operators and it has an

obligation to see that its overall strategy as set out in its waste management plan giving effect to EU policies is effectively implemented and that a balance has to be struck between encouragement on the one hand and enforcement of the regulations if breached on the other. In attempting to strike a balance in its dealing with the applicant the respondent says that it has attempted to encourage the applicant to direct its operations more and more towards recycling and in its view, the respondent has failed to implement the provisions of the licence granted to it by the respondent for the collection and recycling of waste and has placed obstacles in the way of full implementation of the respondents waste management policies by *inter alia* failing to implement a proper education programme to the public and by failing to make available to the public the necessary receptacles to encourage the greater segregation of waste into recyclables and disposables.

30. In these circumstances the respondents claim that they are entitled in accordance with the provisions of the various Directives and Regulations dealing with the trans-frontier shipment of waste to take such measures as are available to them to see that their waste management plan is implemented correctly and in order to do so to reduce the amount of RDF being made available for trans-frontier shipment.

31. At all material times to the application and granting of the certificate pursuant to notification IE140096, the respondents were anxious to secure an agreement from the applicant as regards compliance with their waste management scheme and, for example, wanted the applicant to carry out a comprehensive waste recycling educational campaign, implement immediately a bag marking system that would facilitate the identification of producers of all waste presented in bags for collection by Mr. Binman, the applicant herein, deliver the required recycling capacity to householders and payment for the waste collection service and that for example each customer would have to be presented with at least fifty two Opti bags within seven days of making the payment.

32. In essence in forwarding the certificate as dated 27th February, 2007 for the export of 11,000 tonnes of RDF to Sweden, the respondents indicated that they would be willing to increase the quantity of RDF for export during the relevant year provided the applicant agreed to a number of conditions, all of which have to do with the implementation of the respondent's waste management plan.

33. The applicant in turn says that it has complied with the necessary requirements for the issuing of the relevant certificate for the transport of 20,000 tonnes of RDF and that the respondents are not entitled to force upon them conditions albeit in compliance with the respondent's waste management plan.

34. It is clear accordingly that the respondent's refusal to grant the relevant certificate for the export of 20,000 tonnes of RDF arises out of a concern by the respondent as to the applicant's compliance with the respondents waste management plan.

35. It does appear important in the circumstances that arise, to make the distinction between waste management on the one hand and waste movement on the other. The former relates to the situation where waste is disposed of within the confines of each individual Member State be it landfill, incineration, storage, conversion or recycling. The latter relates to the movement of waste across borders, be it sub national such as federal entities or national, such as from one Member State to another. The law relating to both the management of waste and movement of waste differs. The distinction is made in the originating Regulation, Regulation 259/93/EEC with Chapter A dealing with waste for disposal and Chapter B dealing with shipments of waste for recovery.

36. Waste is not converted into energy in this jurisdiction. Other jurisdictions, particularly the Nordic Member States, do so. Accordingly, the conversion of waste into energy will take place in Sweden and the local laws governing waste management will apply to that process. The situation where waste is removed from this jurisdiction to Sweden will be governed by Chapter B of the 1993 TFS Regulation.

37. Article 4(3)(a)(i) of Council Regulation 259/93/EEC deals with shipments of waste for disposal and provides that:

> "In order to implement the principles and proximity, priority for recovery and self sufficiency at community and national levels in accordance with directive 75/442/EEC Member States may take measures in accordance with the treaty to prohibit generally or partially or to object systematically to shipments of waste."

38. The respondent argues that due to the principles of self-sufficiency and proximity in waste management, they are entitled to impose regulations on the transfer of waste from their immediate jurisdiction. The European Court of Justice's decision in Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV v Minister van Volkshuisvesting, Ruimtelijke Ordening en Mileiubeheer* [1998] ECR I-4075 *(Dusseldorp)* states however that self-sufficiency and proximity do not apply to waste for recovery *simpliciter*.

39. The Court observed:

> "that the difference in treatment between waste for disposal and waste for recovery reflects the different roles played by each type of waste in the development of the Community's environmental policy. By definition, only waste for recovery can contribute towards implementation of the principle of priority for recovery laid down in Article 4(3) of the Regulation. It was in order to encourage such recovery in the Community as a while; in particular by electing the best technologies that the Community legislature stipulated that waste of that type should be able to move freely between Member States for processing, provided that transport poses no threat to the environment. It therefore introduced for intra-Community shipment of that waste ea more flexible procedure, which does not reflect the principles of self-sufficiency and proximity."

40. Waste for recovery *simpliciter* is governed by the Waste Framework Directive (Directive 75/442/EEC as amended into Directive 2006/12/EC).

41. In accordance with the Treaty means that any measures that a competent authority seeks to impose on the restriction of the shipments of waste for recovery must be done in accordance with the European Treaty and the fundamental doctrines of the Union - namely the free movement of goods. The TFS Regulation has been seen by the European Court of Justice in *Dusseldorp* as being governed by this principle and forbade any "barrier to exports which is not justified either by an imperative measure relating to protection of the environment or by one of the derogations provided for in Article 36 of the European Treaty."

42. Article 36 in turn provides:

> "The provisions of Articles 30 to 34 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on the grounds of public morality, public policy or security; the protection of health and life of humans, animals or plants, the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary

discrimination or a disguised restriction on trade between Member States."

43. The respondent drew up its Waste Management Plan in accordance with section 22(2) of the Waste Management Act. Section 22(6) of the Act states that:

> "(6) A waste management plan shall, in respect of non-hazardous waste, contain such objectives as seem to the local authority or local authorities concerned to be reasonable and necessary
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> (a) to prevent or minimise the production or harmful nature of waste, (b) to encourage and support the recovery of waste,
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> (c) to ensure that such waste as cannot be prevented or recovered is disposed of without causing environmental pollution, and
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> (d) to ensure in the context of waste disposal that regard is had to the need to give effect to the polluter pays principle,
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> and shall specify such measures or arrangements as are to be taken or entered into by the local authority or local authorities, with a view to securing the objectives of the plan."

44. Various principles are then laid out in section 22(7) which pertain to the procedures that the local authority must follow when dictating the waste management plan as well as those goals that the local authority hopes to achieve in its Waste Management Plan. This section deals only with that waste which is for recovery within its own functional area.

45. Section 4(4) of the Act states that:

> "In this Act, "recovery", in relation to waste, means any activity carried on for the purposes of reclaiming, recycling or re-using, in whole or in part, the waste and any activities related to such reclamation, recycling or re-use, including any of the activities specified in the *Fourth Schedule*, and "waste recovery activity" shall be construed accordingly"

46. Accordingly it can be construed that the waste which is governed by the Waste Management Plan of a local authority is that waste which is deemed, among other things, capable of recovery within the local functional area; and that consequently it would appear that the Act would have *prima facie* no application to that waste which was capable of recovery without the local functional area - or that waste which is destined for export to Sweden for processing into RDF.

47. The Waste Management Act 1996 cannot have any effect or make any reference to that waste which is destined for export. This is due to the findings of the European Court of Justice in Case C-203/96 *Chemisehe Afvalstoffen Dusseldorp BV v Minister van Volkshuisvesting, Ruimtelijke Ordening en Mileiubeheer* [1998] ECR 1-4075 (*Dusseldorp*) where the Court held at paragraph 49 of its judgement:

> "It must therefore be concluded that the object and effect of application of the principles of self-sufficiency and proximity to waste for recovery... used to restrict exports of that waste is not justified... by an imperative requirement relating to protection of the environment or the desire to protect the health and life of humans in accordance with Article 36 of the Treaty. A Member State cannot therefore rely on Article [176] of the Treaty in order to apply the principles of self-sufficiency and proximity to such waste."

48. This in turn has been cited on a number of occasions by the European Court, such as by Advocate General Jacobs in Case C-116/01 SITA *EcoService BV v Minister for Volkhuisvesting, Ruimtelijke Ordening en Milieubeheer* [2003] ECR 1-2969 and in Ireland in *Hogan v Waterford County Manager* (unreported, High Court, 30th April, 2003, Herbert J.).

49. This principle was also considered in *Glancré Teoranta v An Bord Pleanála and Mayo County Council* (unreported, High Court, 2nd May, 2006, MacMenamin J.) That case was an application for a judicial review of An Bord Pleanala's decision not to grant planning permission for a manufacturing and waste recovery facility. In that case, while discussing the Waste Management Directive (which, when implemented in this jurisdiction, lead to the Waste Management Act 1996), the applicant party there claimed that it would be incorrect to interpret the *Dusseldorp* decision as deciding that the principles of self-sufficiency and proximity would apply solely to waste for recovery intended for cross-border shipment as set out at par. 54 of the judgment of MacMenamin J.

50. MacMenamin J. went on to state at par. 85 of the judgment:

> "The critical point in relation to the proximity principle as referenced in this Regulation is that, insofar as it has been held that the principle may only be used by Member States to prevent or restrict shipping of waste for disposal across national boundaries and may be not be used to restrict shipping of waste for recovery..."

51. Furthermore, it appears that the respondent is attempting to use one statutory provision to circumvent another and by virtue of this, circumvent the fundamental principle of the European Union - the free movement of goods. In *McDowell v Roscommon County Council* unreported, High Court, 21" December 2004, Finnegan J. states that it is a clear principle of administrative law that a power may not be exercised for a purpose other than that for which it was concerned. In the same vein, the respondent cannot make an objection to the transfer of waste outside of the local authority to Sweden on the basis of its Waste Management Plan as governed by the Waste Management Act 1996. That Act discusses the principles of proximity and self-sufficiency which have been settled in European law as not applying to recovery of waste and the only grounds for objection which the local authority can raise are those which accrue to it under the TFS Regulation itself - namely the Objection Procedure under Article 7(2).

52. In essence the respondent is asserting that there is an over-reaching imperative in the Waste Directive which allows it to ignore the TFS Council Regulations. The applicant submits that this is a bad proposition in law because it ignores the fact that the Council's regulations are expressly introduced to give effect to the Waste Frame Directive and the statutory framework must be interpreted harmoniously and not in a way which results in conflict. The issue between the parties is not whether the Waste Framework directive applies as there can be no issue in that regard, but on the way in which it should be done on the practical application of Council Regulation 259/93/EEC and in this regard the applicant relies on *Pedersen*. The issue that accordingly has to be answered is as to whether or not the respondent is entitled to impose a tonnage limit so as to secure compliance with its Waste Management Plan. In my view the respondent is not so entitled.

53. Article 8 of the 1998 Regulations is clear that the objective in the legislation is to require the provision of appropriate financial

guarantees with respect to the shipment and that a competent authority which receives an application shall issue the certificate requested if it is satisfied that there is in force in respect of the shipment or will be in force as the shipment enters or leave the State as the case maybe a financial guarantee or other equivalent security satisfying the requirements of Article 27 of the Council Regulation and such certificate shall certify that the competent authority is so satisfied.

54. It does appear that the specific wording of Article 8 of the 1998 Regulation is mandatory that the certificate shall be issued if the criterion is satisfied as regards the financial guarantee. There was before me argument as regards to whether or not a financial guarantee or other equivalent security satisfying the requirements of Article 27 of the Council Regulation was in place and I am satisfied such a financial guarantee was in place at all material times.

55. The imposition of any other criteria would effectively undermine the mandatory nature of the obligation imposed by Article 8 of the 1998 Regulations and in my view is *ultra vires* and unlawful. Substantive waste management concerns are irrelevant to the only question as posed by Article 8 in relation to the financial guarantee.

56. I take the view that the appropriate order on this aspect is a declaration that the imposition by the respondent in the trans-frontier shipment certificate dated 27th day of February, 2007 issued by it pursuant to Article 8 of the Waste Management (Trans-Frontier Shipment of Waste) Regulations 1998 S.I. No. 149 of a limit of 11,000 tonnes as the amount of refuse derived waste which may be shipped to Sweden for recovery by the applicants for the duration of notification IE140096 is unlawful and *ultra vires* the respondent.