

**APPROVED**

**THE HIGH COURT**

**IN THE MATTER OF ORDER 102 OF THE DISTRICT COURT RULES  
(CONSULTATIVE CASE STATED)**

**IN THE MATTER OF SECTION 34A(9) OF THE WASTE MANAGEMENT  
ACT 1996 (AS AMENDED)**

**[2024] IEHC 121**

**High Court Record No. 2023/508SS**

**District Court Record No. 2021/00111**

**BETWEEN:**

**ALAN PILKINGTON T/A PILKINGTON GRAB HIRE**

**Appellant**

**-AND-**

**OFFALY COUNTY COUNCIL AS THE NATIONAL WASTE COLLECTION  
PERMIT OFFICE (NWCPO)**

**Defendant**

**JUDGMENT of Mr. Justice Conleth Bradley delivered on the 16<sup>th</sup> day of February 2024**

# INTRODUCTION

## *Background*

1. This is a consultative case stated dated 10<sup>th</sup> March 2023 from Judge Colm Roberts, a Judge of the District Court sitting in the Tullamore District, pursuant to the provisions of section 52 of the Courts (Supplemental Provisions) Act, 1961.
2. The background to this consultative case stated concerns a statutory appeal brought pursuant to section 34A(9) of the Waste Management Act, 1996<sup>1</sup>, as amended (“the WMA 1996”) by Alan Pilkington trading as Pilkington Grab Hire (“the Appellant”), which is pending before Judge Roberts in relation to a decision dated 18<sup>th</sup> June 2021 by the Defendant, Offaly County Council, in its capacity as the National Waste Collection Permit Office (“the NWCPO”) to refuse the grant of a reviewed Waste Collection Permit (Ref: NWCPO 15-11786-01) (“the permit”), to the Appellant on the basis that the Appellant was not a fit and proper person in accordance with section 34D WMA 1996.
3. The decision to refuse the application for the permit was made pursuant to the NWCPO’s powers pursuant to section 34 WMA 1996 and Waste Management (Collection Permit) Regulations 2007<sup>2</sup> (“the WMCPR 2007-2016”).<sup>3</sup>

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<sup>1</sup> Set out at paragraph 6 (and also referred to at paragraph 22) of the consultative case stated dated 10<sup>th</sup> March 2023.

<sup>2</sup> With the agreement of the parties I was furnished with the consolidated version (2007-2016) of the Waste Management (Collection Permit) Regulations 2007 (as amended) from the National Waste Collection Permit Office (“NWCPO”).

<sup>3</sup> Paragraph 5 of the consultative case stated dated 10<sup>th</sup> March 2023.

4. As this is a consultative case stated, the facts referred to in this judgment are those as found by Judge Roberts in the Consultative Case Stated dated 10<sup>th</sup> March 2023: see Order 102, r. 12 of the District Rules (as amended); *DPP (Travers) v Brennan* [1988] 4 I.R. 67; *The DPP (at the suit of Garda Liam Varley) v Ciaran Davitt & the Attorney General* [2023] IESC 17.
5. The factual context of the conviction which led to the questions in the consultative case stated is summarised at paragraph 25 of the consultative case stated dated 10<sup>th</sup> March 2023.
6. The Appellant was found guilty of an offence<sup>4</sup> under section 32(6)(a) WMA 1996 and was convicted and fined the sum of €750 plus costs. The evidence before the District Court related to what was described as ‘a load of soil and stones’ which was mistakenly delivered to a farmer by an employee of the Appellant. On the instruction of the local authority this was subsequently removed from the unauthorised location by the Appellant at his own cost and conveyed by it to an authorised waste management facility and accepted at that EPA licensed facility as three lorry loads of soil and stones and for which the appropriate fees and charges were paid to the land fill operator for its appropriate management.
7. This conviction was upheld at a sitting of the Circuit Court in Trim on 30<sup>th</sup> July 2019.
8. There was some confusion concerning what led to the instigation of the review process under section 34A WMA 1996. In summary, the position appears to be as follows:

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<sup>4</sup> In Navan District Court.

initially, on 18<sup>th</sup> January, 2019, Meath County Council (the local authority in the relevant functional area) requested the NWCPO to review the permit (pursuant to Article 23 WMCPR 2007-2016) and this was known as “*the NWCPO initiated review.*”<sup>5</sup> However, as the current permit was due to expire on 26<sup>th</sup> September 2021, a review by (and on behalf of) the Appellant, as the permit holder, was also required to be initiated sixty working days before this date.<sup>6</sup>

9. Mr. Tom Flynn SC (for the NWCPO) submitted that the review was pursuant to section 34A(1)(b) WMA 1996 (*i.e.*, where a local authority may review a waste collection permit (or an amended permit) on an application by the permit holder. Mr. Oisín Collins SC (for the Appellant) submitted that nothing turned on this issue as, in his view, an automatic review of the permit occurs upon a conviction as per section 34A(2)(a) WMA 1996 which provides that a local authority *shall review* a waste collection permit (or a waste collection permit amended under this section) where the permit holder *has been convicted* of an offence prescribed under section 34(5) WMA 1996 and that in his view, this was contemplated by section 34A(1)(a) WMA 1996 which provides that a local authority may review a waste collection permit, or a waste collection permit amended under this section at any time after the permit was granted or amended.

10. Ultimately, therefore, both Mr. Collins SC and Mr. Flynn SC agreed that nothing turned on this in terms of the interpretive exercise involved in this consultative case stated and that all or any of the provisions in section 34A WMA 1996 could be considered by the court.

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<sup>5</sup> Set out further at paragraphs 7 to 10 of the Consultative Case Stated dated 10<sup>th</sup> March 2023.

<sup>6</sup> Set out further at paragraphs 11 to 12 of the Consultative Case Stated dated 10<sup>th</sup> March 2023.

11. The immediate context to Judge Roberts seeking the opinion of this court was the evidence adduced before him from officials of the NWCPO outlining their assessment of the Appellant’s application and their subsequent recommendation that the review be refused and that the permit be revoked “... *based on the fact that it had been determined by the Respondent<sup>7</sup> that the Appellant had been convicted of relevant offences within the meaning of s.34D(1) WMA 1996 and that the Appellant was therefore no longer a “fit and proper person” within the meaning of 34D of the WMA 1996.*”
12. At paragraph 21 of the consultative case stated dated 10<sup>th</sup> March 2023, the decision, the subject of the appeal before the District Court, is described as follows:

*“[t]he Decision was communicated to the Respondent by letter dated the 18<sup>th</sup> June 2021 wherein it was stated that the reasons for refusal were that “[t]he Applicant cannot be deemed to be a Fit and Proper Person in accordance with s.34D of the Waste Management Act, 1996 as amended” because of its conviction in Navan District Court on the 23<sup>rd</sup> November 2018 under s.32(1) of the WMA 1996 and the fact that the conviction was upheld at a sitting of the Circuit Court in Trim on the 30<sup>th</sup> day of July 2019 ...”.*

13. Judge Roberts in the consultative case stated dated 10<sup>th</sup> March 2023 stated that in the course of the appeal, it was submitted on behalf of the NWCPO that the circumstances of the Appellant’s convictions were not a relevant matter in respect of the exercise of

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<sup>7</sup> The NWCPO.

the NWCPO's powers to refuse the application for the renewal of the permit and that the only matter relevant to the exercise of the NWCPO's powers is the fact of the conviction and the fact it was upheld on appeal. Notwithstanding this, the District Court heard evidence during the course of the appeal as to the circumstances which gave rise to the Appellant's convictions and the penalties imposed including the Appellant's subsequent appeal to the Circuit Court in which the conviction was affirmed (as referred to earlier).

14. Accordingly, on 10<sup>th</sup> March 2023, Judge Roberts made a consultative case stated pursuant to the provisions of section 52 of the Courts (Supplemental Provisions) Act, 1961 consequent upon an application by counsel on behalf of the Appellant.

## **THE QUESTIONS OF LAW**

15. Judge Roberts seeks to have the following questions answered by this court:

(1) Is the correct interpretation of section 34D(1)(a) of the WMA 1996 and Articles 4(2)<sup>8</sup>, 17(3) and 28(6) of the WMCPR 2007-2016 that an applicant for a waste collection permit, or a review of a collection permit who has been convicted of the offences prescribed in s. 34D(1) of the WMA 1996 is of necessity in every case not 'a fit and proper person' for the purposes of section 34 and 34A of the Act and Article 4(2) of the WMCPR 2007-2016.

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<sup>8</sup> It was agreed by the parties that the reference to Article 2 in the first question asked in the Consultative Case Stated was a typographical error.

- (2) If the answer to the first question is yes, is the District Court obliged to confirm the decision of the nominated authority to: (a) refuse an application for a waste collection permit under section 34 of the WMA 1996 and the WMCPR 2007-2016 (b) refuse an application for the review of a waste collection permit under section 34A and the WMCPR 2007-2016, and (c) revoke the existing waste collection permit, or may the District Court grant the permit?
- (3) If the answer to the first question is no, what discretion, if any, does the nominated authority have in considering an application for a review of waste collection permit?

### **PARTIES' POSITIONS ON THE QUESTIONS ASKED**

16. Before assessing the competing legal arguments put forward by Mr. Collins SC and Mr. Flynn SC, it is useful to recap, at this juncture, what their suggested answers in fact were to the particular questions asked by Judge Roberts.
17. The first question asked in the consultative case stated is as follows: is the correct interpretation of section 34D(1)(a) of the WMA 1996 and Articles 4(2), 17(3) and 28(6) of the WMCPR 2007-2016 that an applicant for a waste collection permit, or a review of a collection permit who has been convicted of the offences prescribed in s.34D(1) of the WMA 1996 is of necessity in every case not 'a fit and proper person' for the purposes of section 34 and 34A of the Act and Article 4(2) of the WMCPR 2007-2016.
18. Mr. Collins SC says that in answer to the first question, the court should adopt a strict and literal interpretation of section 34D(1)(a) of the WMA 1996 and interpret this section as merely prescribing the category of persons who are fit and proper and that

this does not mean that those – including the Appellant – who do not fit into that automatic qualifying category are automatically disqualified from qualification. He submits that it is permissive rather than exclusive. He says that the correct interpretation of section 34D(1)(a) of the WMA 1996 is that the section does not exclude those who have convictions. Mr. Collins SC makes the point that consequences of what is, he submits, on the scale of offences, a relatively minor offence, has a devastating effect on his client.

19. Mr. Flynn SC, by reference to the Legal Submissions on behalf of the NWCPO, submits that the answer to *Question 1* ought to be as follows: “... *yes, the correct interpretation of section 34D(1)(a) WMA 1996 and Articles 4(2), 17(3) and 28(6) of the WMCPR 2007-2016 that an applicant for a waste collection permit or a review of a collection permit who has been convicted of any of the offences prescribed in section 34D(1) of the WMA 1996 is not “a fit and proper person” for the purposes of sections 34 and 34A of the Act and Article 4(2) of the WMCP Regulations.*”

20. The second question in the consultative case stated poses the following question: if the answer to the first question is yes, is the District Court obliged to confirm the decision of the nominated authority to (a) refuse an application for a waste collection permit under section 34 WMA 1996 and the WMCPR 2007-2016, (b) refuse an application for the review of a waste collection permit under section 34A WMA 1996 and the WMCPR 2007-2016, and (c) revoke the existing waste collection permit or may the District Court grant the permit?



21. Mr. Collins SC submits that the court should answer paragraphs (a), (b) and (c) of the second question as “no” and questions whether such powers in fact exist pursuant to section 34(9) WMA 1996, and in relation to the final paragraph in question 2, namely may the District Court grant the permit, he submits that the District Court must be empowered under section 34(9) WMA 1996 and give directions in relation to a grant, and accordingly the answer to this is “yes.”

22. Mr. Flynn SC, by reference to the Legal Submissions on behalf of the NWCPO, submits that the answer to *Question 2* ought to be as follows: “[y]es, absent some error by the Respondent as to the relevant facts giving rise to the determination that an applicant was not a fit and proper person, the District Court is obliged to confirm the decision of the nominated authority to (a) refuse an application for a waste collection permit under the section 34 of the WMA 1996 and the WMCPR 2007-2016 (b) refuse an application for the review of a waste collection permit under section 34A WMA 1996 and the WMCPR 2007-2016, and (c) revoke the existing waste collection permit.”

23. The third question posed by Judge Roberts asks that if the answer to the first question is ‘no’, what discretion, if any, does the nominated authority have in considering an application for a review of waste collection permit?

24. Mr. Collins SC submits that this question does not arise because you are not in every case *not* a fit and proper person and suggests, in any case, that the nominated authority must have complete discretion in accordance with section 34(9) WMA 1996 and must be able to grant or direct a grant of the Waste Collection Permit subject to such conditions as the court considers appropriate.

25. For very different reasons, of course, Mr. Flynn SC, by reference to the Legal Submissions on behalf of the NWCPO in relation to the first and second questions, submits that Question 3 does not arise.

## **DISCUSSION & DECISION**

26. Contextually, Mr. Collins SC points to what he submits is the unfairness (and potentially devastating consequences on a person's business) of the downstream consequences which arise on a review of an existing waste permit when (where) a person is found guilty of a scheduled offence under the WMA 1996, and in particular when that person is found guilty of an offence which is deemed to be at the lower end of the spectrum of gravity, which Mr. Collins SC submits is the position of the Appellant in this case.

27. In *A, B & C (A Minor Suing by His Next Friend A) v The Minister for Foreign Affairs and Trade* [2023] IESC 10<sup>9</sup>, the Supreme Court (Murray J.) referred to the court's earlier decision in *Heather Hill Management Company CLG & Anor v. An Bord Pleanála* [2022] IESC 43, [2022] 2 ILRM 313, in putting beyond doubt that *language, context and purpose* are potentially in play in every exercise of statutory interpretation, with none ever operating to the complete exclusion of the other and observed as follows at paragraph 73 of the court's judgment:

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<sup>9</sup> 9<sup>th</sup> May, 2023.

*“[t]he starting point in the construction of a statute is the language used in the provision under consideration, but the words used in that section must still be construed having regard to the relationship of the provision in question to the statute as a whole, the location of the statute in the legal context in which it was enacted, and the connection between those words, the whole Act, that context, and the discernible objective of the statute. The court must thus ascertain the meaning of the section by reference to its language, place, function and context, the plain and ordinary meaning of the language being the predominant factor in identifying the effect of the provision but the others always being potentially relevant to elucidating, expanding, contracting or contextualising the apparent meaning of those words.”*

28. That is the guidance this court must follow in addressing the questions asked by Judge Roberts.

29. In considering, therefore, the language, context and purpose of the WMA 1996 and the WMCPR 2007-2016, the following factors can be considered in addressing the three questions posed by Judge Roberts.

***The approach to be adopted in addressing the questions asked***

30. First, the primary complaint of the Appellant in this case arises from the *downstream consequences* of the outcome of a review of an existing waste permit *when a person is found guilty of a scheduled offence*. As this is a consultative case stated, I note that

Judge Roberts included the following description of what occurred in paragraphs 23, 24 and 25 of the consultative case stated on 10<sup>th</sup> March 2023, as follows:

*“23. [i]n the course of the Appeal, the Respondent submitted that the circumstances of the Appellant’s convictions are not a relevant matter in respect of the exercise of the Respondent’s powers to refuse the application for the renewal of the permit and that the only matter to [sic.] the exercise of the Respondent’s powers is the fact of the conviction and that the fact it was upheld on appeal.*

*24. Notwithstanding this, the Court heard evidence during the course of the Appeal as to the circumstances which gave rise to the Appellant’s subsequent appeal to the Circuit Court in which the conviction was affirmed.*

*25. In summary, such evidence was that the Appellant had been found guilty of an offence under section 32(6)(a) of the WMA 1996 and was convicted and fined the sum of €750 plus costs. Evidence before the court related to a load of soil and stones which was mistakenly delivered to a farmer by an employee of the Appellant, and which on the instruction of the local authority was subsequently removed from the unauthorised location by the Appellant at his own cost and conveyed by the Appellant to an authorised waste management facility and accepted at that EPA licensed facility as 3 lorry loads of soil and stones and for which the appropriate fees and charges were paid to the landfill operator for its appropriate management ...”.*

31. It is, of course, a matter for a local authority to decide as to whether or not it would proceed with a prosecution under the WMA 1996. This is not a matter that can be gainsaid when considering the questions posed in this consultative case stated. It is, however, open for a party, in any putative prosecution to outline to the District Court (or on appeal to the Circuit Court) the possible downstream consequences as to the meaning of '*fit and proper*' for any future review of a permit on behalf of a person, *if* a conviction is recorded and to seek, for example, that a conviction not be recorded or look for the application of the Probation Act. A person faced with a prosecution can vindicate their rights through the criminal process in the District Court, on appeal to the Circuit Court and also have, in an appropriate case, the possibility of a judicial review. Further, the offences to which section 34D WMA 1996 refers are particular scheduled offences, deliberately chosen by the Oireachtas, narrow in range and aimed at the collectors of waste.
32. From an interpretive perspective, the refusal and revocation decision dated 18<sup>th</sup> June 2021 of the Programme Manager of the NWCPO is important because it sets out the Respondent's understanding of how the various relevant provisions of the WMA 1996 and the WMCPR 2007-2016 are interlinked. The approach in that correspondence, is in my view, consistent with the statutory and regulatory provisions which are referred to and relied upon.
33. The 18<sup>th</sup> June 2021 letter states, for example, that it is in relation to the WMA 1996 and the WMCPR 2007-2016 and Review of Waste Collection Permit: NWCPO-16-11786-01 and Review Application ref: NWCPO-16-11786-02.

34. The first paragraph of the letter stated that the NWCPO wished to advise “... *that having received an application for a review of a Waste Collection Permit for Alan Pilkington T/A Pilkington Grab hire of Shangri-La, Killucan Road, Kinnegad, Co. Westmeath, ref: NWCPO-16-11786-01, it has been decided to REFUSE the grant of a reviewed waste collection permit*”. Next, the letter has a sub-heading “[*r*]eason for Refusal”, and the letter states that “[*t*]he Applicant cannot be deemed to be a Fit and Proper Person in accordance with Section 34D WMA 1996.”
35. The letter then sets out a number of paragraphs the first two of which (are numbered and) record the fact of the conviction in Navan District Court that the Appellant “[*o*]n 23-Nov-2018, a complaint was heard and determined did, on the 10<sup>th</sup> of May, 2018 at Ardnamullen, Clonard in the County of Meath (in the court area and district aforesaid) did cause or facilitate the abandonment, dumping and unauthorised management of waste in a manner that caused or was likely to cause environmental pollution, contrary to Section 32(1) of the Waste Management Acts 1996 to 2011 thereby committing an offence under Section 32(6)(a) of the Waste Management Acts, 1996 to 2011: It was adjudged that the said defendant be convicted of said offence and pay a fine of EUR750.00 and Costs of EUR1,370.00 making a total sum of EUR2,120.00 within 6 months.”
36. The letter then sets out relevant extracts of the provisions of section 34D(1)(a)(i)(I), section 34(4), section 34(5)(a), section 34(A)(5)(d)(i) WMA 1996 before stating, “[*a*]s this review is now refused, Waste Collection Permit Reference NWCPO-16-11786-01 has been REVOKED. The permit holder may appeal the decision of Offaly County Council as the National Waste Collection Permit Office (NWCPO), in accordance with

*Section 34(A)(9) of the Waste Management Act, 1996, as [sic.] amended, to the Judge of Tullamore District Court, being the District Court in which the principal offices of Offaly County Council is situated, within 28 days of this notice. Please be advised that if such an appeal is lodged, the decision of the NWCPO is suspended until the final outcome of the appeal is decided by the relevant court.”*

37. The incorporation by the Oireachtas of the criminal law code into the permit review provisions of the WMA 1996 is illustrative of the seriousness that Parliament accords to the regulation of the waste industry. Those participating in the industry are on notice of the serious nature of the provisions which apply, when it comes to the review of existing permits.

#### ***The incorporation of section 34 WMA 1996 & the WMCPR 2007-2016***

38. Second, as mentioned earlier, the parties accept that the review process *includes* that which is contemplated by section 34A(1)(b) WMA 1996, *i.e.*, where a local authority may review a waste collection permit (or an amended permit) by the permit holder and section 34A(3), *i.e.*, a request for information/further information.

39. Importantly, section 34A(4) WMA 1996 provides that where a local authority has reviewed and considered matters pursuant to sections 34A(1)(a), 34A(1)(b) and section 34A(3) WMA 1996, it must then *determine* whether it is *satisfied* regarding the same matters in relation to which the authority is required to be satisfied for the purposes of a grant of an application under section 34 WMA 1996 and *shall make a decision* in relation to the review.

40. Section 34A(4) WMA 1996, therefore, sets out the *criteria* which the local authority have to consider and, as just mentioned, this incorporates section 34 WMA 1996.

41. In this regard, sections 34(4)(a) and 34(4)(b) WMA 1996 provide that a “... *local authority shall not grant a waste permit unless it is satisfied that – (a) the applicant is a fit and proper person within the meaning of section 34D to hold a waste collection permit, and (b) the activity concerned would not, if carried on in accordance with such conditions as may be attached to the permit, cause environmental pollution, and that the grant of the permit is consistent with the objectives of the relevant waste management plan or the hazardous waste management plan, as the case may be, and the implementation of that plan.*” Both of these matters are, therefore, required to be considered.

42. The NWCPO is not at large when determining whether or not *it is satisfied* that the applicant is a fit and proper person within the meaning of section 34D WMA 1996 and the process and framework of its review is further set out in the WMCPR 2007-2016.

43. This is consistent with the application of the regulatory framework.

44. The provisions of the WMCPR 2007-2016 – including *inter alia* Article 4(2) which provides for the interpretation of various terms used in the Regulations, Article 17(3) which provides that “... *a nominated authority shall not grant a waste collection permit unless it is satisfied that –(a) the activity concerned, carried on in accordance with such conditions as are attached to the waste collection permit, will not cause environmental*



*pollution, (b) any emissions from the activity concerned will not result in the contravention of any relevant standard, including any standard for an environmental medium, or any relevant emission limit value, prescribed under any enactment, and (c) the applicant is a fit and proper person*”, Article 28(6) which provides that “... a nominated authority shall not grant a reviewed waste collection permit to which Article 23(1A) does not apply unless it is satisfied that –(a) the activity concerned, carried on in accordance with such conditions as are attached to the reviewed waste collection permit, will not cause environmental pollution, (b) any emissions from the activity concerned will not result in the contravention of any relevant standard, including any standard for an environmental medium, or any relevant emission limit value, prescribed under any enactment, and (c) the applicant is a fit and proper person” – are reflective of, and consistent with, the provisions of section 34A(4) and section 34(4)(a) and 34(4)(b) WMA 1996. Later, in this judgment when addressing the “disregard provisions”, the history of the amendments to Articles 17(3) and 28(6) of the Regulations, which are the particular regulatory provisions referred to by Judge Roberts in the questions he has referred, are important in illustrating their complete alignment with the statutory definition of ‘fit and proper person’.

45. The definition of ‘fit and proper person’ in the WMCPR 2007-2016 means a fit and proper person in accordance with section 34D of the WMA 1996.

46. The regulatory framework in essence sets out ‘the mechanics’ in the process involved in the application, assessment and granting of a permit. The entire process prescribed in the regulatory process has to be gone through because an appeal could relate, for

example, to a mistake or error in the identity of the person involved or other similar matters.

47. Article 21 lists out from (a) to (q) the prescribed offences for the purposes of section 34(5) WMA 1996, which is a discretionary power to refuse an application or revoke a permit and this can be contrasted with the limited and narrow range of offences prescribed in section 34D(1)(a)(i)(I) or (II) or 34D(1)(a)(ii) WMA 1996.

48. Article 23 of the WMCPR 2007-2016 which, as referred to earlier in the judgment, was initially engaged sets out the procedures to be followed in the circumstances of a notice from the NWCPO requiring a review of a waste collection permit. This was overtaken in this case by Article 24 of the WMCPR 2007-2016 which sets out the procedures to be followed when an application is made on the initiative of the permit holder for the review of waste collection permit with Article 25 of the WMCPR 2007-2016 prescribing the procedures to be applied, in this instance by the NWCPO, in the determination of an application for the review of a waste collection permit. Article 26 of the WMCPR 2007-2016 provides for a decision on an application for the review of a waste collection permit on the basis of particulars received from the applicant and prescribed nature of the process. This confirms that the NWCPO are not at large in their decision-making and this is further evidenced by Article 27 of the WMCPR 2007-2016, which deals with a decision on an application for the review of a waste collection permit on the basis of particulars received from the applicant, relevant local authorities and other persons.

49. Of further importance in this application are the provisions of Article 28 of the WMCPR 2007-2016, which provides for the determination and notice of grant or refusal of a reviewed waste collection permit (or of the amendment of conditions attached to a waste collection permit). Article 23(5) provides for a time period of five years for the life of the permit and, as set out earlier in this judgment, Article 28(6) provides that “... *a nominated authority shall not grant a reviewed waste collection permit to which Article 23(1A) does not apply unless it is satisfied that –(a) the activity concerned, carried on in accordance with such conditions as are attached to the reviewed waste collection permit, will not cause environmental pollution, (b) any emissions from the activity concerned will not result in the contravention of any relevant standard, including any standard for an environmental medium, or any relevant emission limit value, prescribed under any enactment, and (c) the applicant is a fit and proper person.*” These regulatory provisions are *ad idem* with the provisions of section 34A(4) and section 34(4)(a) and 34(4)(b) WMA 1996. The statutory and regulatory provisions are consistent, one with each other, and form the basis of a comprehensive code and framework for the granting and reviewing of waste collection permits.

50. The statutory definition of fit and proper person in section 34D WMA 1996 is as follows:

*“(1) [f]or the purposes of sections 34, 34A and 34B a person is a fit and proper person if—*

*(a) neither that person nor any person employed by him or her to direct or control the carrying on of the activity to which the waste collection permit relates or, as the case may be, may relate, has been convicted—*

*(i) summarily of an offence under—*

*(I) subsection(6) of section32 consisting of a contravention of subsection (1) of that section, or*

*(II) section 55(8),*

*or*

*(ii) on indictment of an offence under this Act, the Environmental Protection Agency Acts 1992 to 2011, the Local Government (Water Pollution) Acts 1977 to 2007, or the Air Pollution Acts 1987 and 2011,*

*(b) in the reasonable opinion of the nominated authority, that person or, as appropriate, any person employed by him or her to direct or control the carrying on of the activity to which the waste collection permit relates or, as the case may be, may relate has the requisite technical knowledge or qualifications to carry on that activity in accordance with the waste collection permit and the other requirements of the Act,*

*(c) in the reasonable opinion of the nominated authority, that person is likely to be in a position to meet any financial commitments or liabilities that will be entered into or incurred by him or her in carrying on the activity to which the waste collection permit relates in accordance with the terms thereof or in consequence of ceasing to carry on that activity,*

*(d) that person has not had a waste collection permit revoked under section 34A, other than where the permit was surrendered, and*

*(e) that person has not had an order made against him or her under section 57 or 58.*

*(2) The Minister may make regulations providing for requirements in relation to the requisite technical knowledge or qualifications to carry on the activity to which the waste collection permit relates in accordance with the permit and any other requirements of this Act.”*

51. Some important observations arise from a consideration of section 34D WMA Act 1996.

52. Section 34D(1)(a),(d) and (e), for example, provide for *factual matters*. There is no discretion to be exercised in relation to each of these matters.

53. Therefore, having regard to the questions posed by Judge Roberts, the interpretation of sections 34D(1)(a)(i)(I), 34D(1)(a)(i)(II) and section 34D(1)(a)(ii) WMA 1996, for example, are *factual matters* as to whether or not the particular person (including an employee involved in directing/controlling the carrying on of the activity the subject of the Waste Collection Permit) have or have not, *as a matter of fact*, been convicted.

54. In contrast, sections 34D(1)(b) and (c) refer to the “reasonable opinion of the nominated authority” and this reference and also the reference to the NWCPO being “satisfied” does incorporate a discretion, the exercise of which is governed by principles which were addressed recently by the Supreme Court (Hogan J.) in *Waltham Abbey & Ors v An Bord Pleanála* [2022] IESC 30 at paragraph 28 (and previously in *Kiely v Kerry County Council & Ors* [2015] IESC 97 per McKechnie J. at paragraphs 68 to 71) referring to the observations of O’Higgins C.J. in *State (Lynch) v Cooney* [1982] I.R.

337 at page 380 and when applied to this case, the NWCPO's assessment must be *bona fide* held, factually sustainable, not unreasonable and *intra vires*.

55. Again, from the perspective of interpretation, it is clear that in 2015 when the Oireachtas decided to define what 'fit and proper person' means in primary legislation by inserting Section 34D ("fit and proper person") into the Waste Management Act 1996 via section 39 of the Environment (Miscellaneous Provisions) Act 2015, the definition of 'fit and proper person' became much narrower, covering a more limited range of persons and of those convicted when compared to the definition of 'fit and proper person' which applied – up to that point in time – in Article 4(2) of the Waste Management (Collection Permit) Regulations 2007 (S.I. No. 820 of 2007). This is consistent with, and parallels the removal in the ministerial regulations of the 'disregard' provisions, which I now address.

#### *A disregard provision?*

56. The third factor to be considered formed the basis of significant disagreement between the parties and is, I believe, a fundamental issue in addressing the questions posed by Judge Roberts. This relates to whether, when considering the definition of fit and proper person in section 34D WMA 1996, a 'disregard provision' (or discretion) can be *read in* to section 34D. Mr. Collins SC (for the Appellant) argues that without such a *read in*, the section presents a *fait accompli* with devastating financial consequences for the Appellant. Mr. Flynn SC argues that you cannot *read in* to section 34D a 'disregard provision' or discretion.

57. In contrast to section 34D WMA 1996, sections 84(4) and (5) of the Environmental Protection Agency Act, 1992 (as amended) (“the EPA Act 1992”) has an express provision which allows the Agency a discretion *to disregard* previous criminal convictions, whereas the Oireachtas has not inserted a similar “disregard” provision in sections 34D(1)(a)(i)(I), 34D(1)(a)(i)(II) and section 34D(1)(a)(ii) WMA 1996, nor can such provisions, I believe, be ‘read in’ as a matter of statutory construction.

58. Section 84(4) of the EPA Act 1992 provides as follows:

*“(4) [f]or the purpose of this Part, a person shall be regarded as a fit and proper person if—*

*(a) neither that person nor any other relevant person has been convicted of an offence under this Act, the Act of 1996, the Local Government (Water Pollution) Acts 1977 and 1990 or the Air Pollution Act 1987 prescribed for the purposes of this subsection,*

*(b) in the opinion of the Agency, that person or, as appropriate, any person or persons employed by him to direct or control the carrying on of the activity to which the licence or revised licence relates or will relate has or have the requisite technical knowledge or qualifications to carry on that activity in accordance with the licence or revised licence and the other requirements of this Act, and*

*(c) in the opinion of the Agency, that person is likely to be in a position to meet any financial commitments or liabilities that the Agency reasonably considers have been, or will be entered into or incurred by him in carrying on the activity to which the licence or revised licence*

*relates or will relate, as the case may be, in accordance with the terms thereof or in consequence of ceasing to carry on that activity.”*

59. Section 84(5) of the EPA Act 1992 provides:

*“(4) [t]he Agency may, if it considers it proper to do so in any particular case, regard a person as a fit and proper person for the purposes of this Part **notwithstanding** that that person or any other relevant person is not a person to whom [section 84(4)(a) applies.”<sup>10</sup>*

60. Similarly, in the context of Waste Licences, section 40(7) of the WMA 1996 provides as follows:

*“[f]or the purpose of this Part, a person shall be regarded as a fit and proper person if—*

*(a) neither that person nor any other relevant person has been convicted of an offence under this Act, the Act of 1992, the Local Government (Water Pollution) Acts 1977 and 1990 or the Act of 1987 prescribed for the purposes of this subsection,*

*(b) in the opinion of the Agency, that person or, as appropriate, any person or persons employed by him or her to direct or control the carrying on of the activity to which the waste licence will relate has or have the requisite technical knowledge or qualifications to carry on*

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<sup>10</sup> Emphasis added.



*that activity in accordance with the licence and the other requirements of this Act,*

*(c) in the opinion of the Agency, that person is likely to be in a position to meet any financial commitments or liabilities that the Agency reasonably considers will be entered into or incurred by him or her in carrying on the activity to which the waste licence will relate in accordance with the terms thereof or in consequence of ceasing to carry on that activity.”*

61. Section 40(8) of the WMA 1996 provides for a ‘disregard’ provision, stating that “[t]he Agency may, if it considers it proper to do so in any particular case, regard a person as a fit and proper person for the purposes of this Part notwithstanding that that person or any other relevant person is not a person to whom [section 40(7)(a)] applies.” (Emphasis added).

62. While the Agency, in the above examples, can disregard the fact of a criminal conviction, it is not, in my view, open to the NWCPO, or the District Court on appeal, to infer or read in a similar provision or a discretion in to 34D(1)(a)(i)(I), 34D(1)(a)(i)(II) and section 34D(1)(a)(ii) WMA 1996.

63. Initially, the Regulations in S.I. No. 820 of 2007 defined “fit and proper person” as applying to a person if — (a) neither that person nor any other relevant person has been convicted of an offence under the Act, the Environmental Protection Agency Acts 1992 and 2003, the Local Government (Water Pollution) Acts 1977 and 1990 or the Air Pollution Act 1987, (b) in the reasonable opinion of the nominated authority, that

person or, as appropriate, any person or persons employed by him or her to direct or control the carrying on of the activity to which the waste collection permit relates or, as the case may be, will relate has or have the requisite technical knowledge or qualifications to carry on that activity in accordance with the waste collection permit and the other requirements of the Act, (c) in the reasonable opinion of the nominated authority, that person is likely to be in a position to meet any financial commitments or liabilities that will be entered into or incurred by him or her in carrying on the activity to which the waste collection permit relates in accordance with the terms thereof or in consequence of ceasing to carry on that activity.

64. A number of amendments were made in 2008 which incorporated the “disregard” provisions. For example, the Waste Management (Collection Permit) (Amendment) Regulations 2008 (S.I. No.87 of 2008) amended in a number of respects the Waste Management (Collection Permit) Regulations 2009 (S.I. 820 of 2007) *inter alia* by the insertion after paragraph (c) of sub-article 17(3) of the following: “[a] local authority may, if it considers it proper to do so in any particular case, regard a person as a fit and proper person for the purposes of this Part notwithstanding that that person or any other relevant person has been convicted of an offence under the Act, the Environmental Protection Agency Acts 1992 and 2003, the Local Government (Water Pollution) Acts 1977 and 1990 or the Air Pollution Act 1987.” Similarly, the insertion after paragraph (c) of sub-article 28(6) of the following: “[a] local authority may, if it considers it proper to do so in any particular case, regard a person as a fit and proper person for the purposes of this Part notwithstanding that that person or any other relevant person has been convicted of an offence under the Act, the Environmental Protection Agency Acts 1992 and 2003, the Local Government (Water Pollution) Acts

1977 and 1990 or the Air Pollution Act 1987.” These are the predecessor provisions of the relevant Articles of the WMCPR 2007-2016 referred to in the questions in the consultative case stated by Judge Roberts.

65. However, and importantly, the Waste Management (Collection Permit) (Amendment) Regulations 2016 (S.I. No.24 of 2016) amended the Waste Management (Collection Permit) Regulations and removed the “*disregard*” provisions by providing at Article 2(m) the deletion of the following text after article 17(3)(c): “[a] local authority may, if it considers it proper to do so in any particular case, regard a person as a fit and proper person for the purposes of this Part notwithstanding that that person or any other relevant person has been convicted of an offence under the Act, the Environmental Protection Agency Acts 1992 and 2003, the Local Government (Water Pollution) Acts 1977 and 1990 or the Air Pollution Act 1987”, and a similar deletion of the similar text referred to in Article 28(6)(c) was effected by Article 2 (r).

66. Therefore, the statutory and regulatory provisions which are referred to in Question 1 of the consultative case stated are clear and unambiguous and there is, in my view, no basis for asserting that a disregard provision can be read in and, as stated earlier, they are in complete alignment with the statutory provisions.

67. While it is accepted that these statutory and regulatory provisions are serious matters for the stakeholders involved, there is no implied or inferred *reading in* of a ‘disregard provision’. Therefore, neither a nominated authority, nor the District Court on appeal, can *read in* such a disregard provision, because neither the Oireachtas nor the

minisiterial regulations have provided a basis for doing so with the latter expressly deleting the previous ‘disregard provisions.’

68. The statutory definition is therefore clear and is not ambiguous. Having regard to the *language, context and purpose of the provisions* in the WMA 1996 regulating the review of a waste collection permit, a person who is convicted of a scheduled offence prescribed in section 34D WMA 1996 cannot be a fit and proper person under *that scheme*.

69. The Oireachtas has sought to define narrowly the nature of the selected or bespoke offences which excludes persons from being so defined in section 34D(1)(a)(i),(I),(II) or (ii) WMA 1996 thereby recognising the importance of the regulation of this industry. Those stakeholders involved in the industry should be aware of these provisions and the possible serious downstream consequences if they are convicted of any one of these bespoke statutory provisions.

## **ANSWERS TO QUESTIONS ASKED**

70. Accordingly, having regard to the aforementioned, the answers to the questions posed by Judge Roberts are as follows:

**QUESTION 1:** *Is the correct interpretation of section 34D(1)(a) of the WMA 1996 and Articles 4(2), 17(3) and 28(6) of the WMCPR 2007-2016 that an applicant for a waste collection permit, or a review of a collection permit who has been convicted of the offences*

*prescribed in s.34D(1) of the WMA 1996 is of necessity in every case not 'a fit and proper person' for the purposes of section 34 and 34A of the Act and Article 4(2) of the WMCPR 2007-2016?*

**ANSWER TO QUESTION 1:** Yes. The correct interpretation of section 34D(1)(a) WMA 1996 and Article 4(2), 17(3) and 28(6) of the WMCPR 2007-2016 is that an applicant for a waste collection permit (or a review of a collection permit) who has been convicted of any of the offences prescribed in section 34D(1) WMA 1996 is not “a fit and proper person” for the purposes of sections 34 and 34A of the Act and Article 4(2) of the WMCPR 2007-2016.

**QUESTION 2:** *If the answer to the first question is yes, is the District Court obliged to confirm the decision of the nominated authority to: (a) refuse an application for a waste collection permit under section 34 of the WMA 1996 and the WMCP Regulations (b) refuse an application for the review of a waste collection permit under section 34A and the WMCP regulations, and (c) evoked the existing waste collection permit, or may the District Court grant the permit?*

**ANSWER TO QUESTION 2:** Yes, absent some error by the Respondent as to the relevant facts giving rise to the determination that an applicant was not a fit and proper person, the District Court is obliged to confirm the decision of the nominated authority to (a) refuse an application for a waste collection permit under the section 34 of the WMA 1996 and the WMCP Regulations (b) refuse an application for the review of a waste collection permit under section 34A and the WMCP Regulations, and (c) revoke the existing waste collection permit.

**QUESTION 3:** *If the answer to the first question is no, what discretion, if any, does the nominated authority have in considering an application for a review of waste collection permit?*

**ANSWER TO QUESTION 3:** Having regard to the answers to questions 1 and 2, it is not necessary to answer question 3.

71. I will put the matter in for mention before me at 10.30am on Wednesday 28<sup>th</sup> February 2024 so the parties can address any ancillary and consequential matters which arise, including the costs of the application.