

**THE SUPREME COURT**

**JUDICIAL REVIEW JR 58/1997**

Hamilton CJ  
Denham J  
Barrington J  
Keane J  
Murphy J

**BETWEEN:**

**ORLA NÍ EILÍ**

**APPLICANT/APPELLANT**

**AND**

**THE ENVIRONMENTAL PROTECTION AGENCY**

**RESPONDENT**

**RODE IRELAND LIMITED**

**NOTICE PARTY**

**Judgment of Mr Justice Francis D Murphy delivered the 30th day of July 1999 [Nem. Diss.]**

On the 17th December, 1996, the Environmental Protection Agency (the Agency) granted to Roche Ireland Limited (Roche) an Integrated Pollution Control (IPC) licence under Part IV of the Environmental Protection Agency Act, 1992, (the 1992 Act). Ms Orla Ni Eili (the Appellant) applied (pursuant to the liberty given in that behalf) for Judicial Review of the decision to grant the IPC licence. By a judgment and order given and made on the 20th February, 1998, Mr Justice Lavan refused that application. It is from that order that the Appellant appeals to this Court.

## BACKGROUND TO THE PROCEEDINGS

Syntex Ireland Limited commenced the production of certain chemical products at Clarecastle (near Ennis) in the County of Clare in the year 1975. In December 1994 Syntex Ireland Limited was sold by its American parent to Hoffman La Roche of Basel, Switzerland. Apparently, Syntex Ireland Limited changed its name to Roche Ireland Limited. The Agency, which had been incorporated by the Environmental Protection Agency Act, 1992, issued an IPC licence to Roche in 1995 which prescribed air emission limits for three of their main air emission points. Those interim limits were expressed to expire on the 1st December 1997 after which time the Clarecastle plant was required to meet new emission standards known as the BATNEEC Standards, that is to say, the “*best available technology not entailing excessive costs* “. The possession of the licence issued by the Agency under the 1992 Act and the Environmental Protection Agency (Licensing) Regulations 1994 (SI No 85 of 1994) permitted Roche to carry on an activity to which Part IV of the 1992 Act applied, namely, the activity listed at 5.6 of the First Schedule to the 1992 Act ie. “*The manufacture of pesticides, pharmaceutical or veterinary products and their intermediates*”.

On the 31st October, 1995, Roche applied to the Agency for a licence permitting the use of a hazardous waste incinerator. Previously, toxic waste by-products had been exported to the United Kingdom for incineration. It was apprehended that the exportation of toxic waste might be prohibited and, in any event, some change in the process would be required as the then current emissions in the three main air emission vents exceeded the new BATNEEC emission limit values for volatile organic substances and furthermore some changes would be required before the expiration of the then current IPC licence by the 1st December, 1997, in

accordance with the time limit set by the Agency. In those circumstances Roche proposed to install a vapour/liquid incinerator to treat the air emissions from the three main air emission stacks as well as waste - halogenated and non-halogenated solvents. The incinerator was proposed to run at temperatures of 11000 Centigrade for halogenated waste and 8500 Centigrade for non-halogenated waste with a two seconds "*residence time*" in both cases. It was anticipated that the proposed incinerator would reduce the volatile organic substances then being emitted to the atmosphere by 95 per cent, a proposal which was bound to be universally welcomed and its attainment not seriously disputed. What caused concern was the fact that the new process incorporating an incinerator would, unlike the then existing procedures, generate and emit a range of toxic chemicals collectively described as "*dioxins*". Apart from that specific concern, it is clear that the installation of an incinerator and, in particular, an incinerator to burn halogenated waste, was a cause of considerable anxiety to many people living in the vicinity of the Clarecastle plant. As the nature and scheme of the proposed project lay within the scope of the BC (Environmental Impact Assessment) Regulations (SI 349 of 1989), those Regulations and the Local Government (Planning and Development) Regulations (SI 86 of 1994) bringing into effect in Ireland the requirement of Directive 85/337/EEC (generally known as the Environmental Impact Directive) required Roche to supply a wide range of information relating to the environmental aspects of the project in the form of an Environmental Impact Statement.

That statement was prepared by Forbairt and is dated the 30th August, 1995. Very properly, that report deals with a wide range of environmental issues in what appears to be a comprehensive and thorough fashion but, in particular, it deals with the air emissions under the existing process and those anticipated from the proposed vapour/liquid incinerator. The statement recognised the obvious attractions of a process which would eliminate (or virtually

eliminate) the dispersal of volatile organic substances from the plant. The statement considered a variety of processes by which that might be achieved and favoured that proposed by Roche. On the other hand, it recognised that the incineration of the waste product would generate dioxins. I will quote certain passages from the statement dealing with those chemical substances and the extent of the problems to which they were expected to give rise.

First at paragraph 6.33 under the heading “*Ambient Air Quality (Dioxin)*” the report says:-

*“It is established that the burning of many organic materials may give rise to dioxins if the conditions are suitable and certain chemical precursors are present. Dioxin is a collective name for polychlorinated dibenzo-p-dioxins (PCDDs) and the related group, the polychlorinated dibenzofurans (PCDFs). More than two hundred individual chemicals make up both groups, with varying toxicities. In general, the individual toxicities are related to the known toxicity of one compound, 2, 3, 7, 8, -TCDD and expressed as toxic equivalents. The factors of most concern are the extreme stability of the dioxins, enabling them to persist in the environment, and the toxicity of some of the individual compounds. They bind strongly to soil and are present in low concentrations in most soils.*

*In order to monitor air quality with respect to dioxins, their concentration in soils taken from the vicinity of the plant was measured. Soil samples were taken at the following locations and analysed for dioxin content:*

Sample 1 (14144) O’Donoghues

*Sample 2 (14145) Landfill*

*Sample 3 (14146) Lissane*

*Sample 4 (14147) School*

*The results are shown in Tables 6.15 to 6.18 and it is concluded that they are typical background levels for a rural area.*

*In only two cases was any dioxin found. Where zero concentrations of individual dioxins or related substances (congeners) were found, it was assumed that they may have been present at the detection limit (DL). For that reason, the DL concentration was multiplied by the Toxic Equivalent Factor (TEF) to give the TEQ or Toxic Equivalents (related to the most toxic dioxin -2, 3, 7, 8- TCDD). All of the Toxic Equivalents were added to give the total impact.*

Then, turning to the “*Net Impact of Proposed Incinerator*”, the EIS noted (at paragraph 6.4) that, when operational, the effect of the incinerator would be to reduce emissions by at least ninety per cent of the then current level, but went on to say of dioxins (at page 82):-

*“Up to now, dioxins were not considered as possible emissions from the Syntex site. However; since it is planned to incinerate chlorinated hydrocarbons, it is necessary to address the potential for dioxin formation. It has already been stated in Section 4 that the incinerator will operate to BATNEEC standards by burning the wastes at approximately 11000 for 2 seconds. Controls are installed to shut down the*

*incinerator should the temperature fall below a designated value. An emission limit of 0.1 mg/m<sup>3</sup> will ensure that ground level concentrations are not increased above typical background levels. A dispersion study carried out by Weston-FTA (see Appendix 6) has predicted a ground level dioxin concentration of 0.0003 mg/m<sup>3</sup> (maximum 1 hour average) which should be compared with a typical maximum rural background air level of 0.001 mg/m<sup>3</sup> (maximum 24 hour average) (Jones & Bennet, 1989; Rappe et al, 1988). Therefore, there will be no significant increase in dioxin levels as a result of the incinerator (24 hour average would be lower than the 1 hour average.)”*

The Environmental Impact Statement was forwarded to the Agency on the 27th October, 1995, and on the same date notice of the application to the Agency for a licence and for a review of the existing licence was published in various newspapers including the *Clare Champion*. More than one hundred submissions and objections were received in response to that advertisement.

In a memorandum dated the 26th April, 1996, the Agency’s inspector, Mr Frank Ryan, analysed the application by Roche, the contents of the EIS and the submissions received in relation thereto. It was his recommendation that an IPC licence should be granted in accordance with the draft submitted to the Board of Directors of the Agency.

On the 9th May, 1996, the Agency gave notice in accordance with section 85 (2) of the 1992 Act of its Proposed Determination of a review of the IPC licence indicating - as required by section 85 aforesaid - that in the event of no objection being taken to the proposed determination the Agency would make its decision in accordance with that determination and

grant the licence after the expiration of the appropriate period for objections subject to the thirteen conditions specified therein.

As numerous objections were received from various individuals and organisations (including Roche which objected to various conditions imposed or to be imposed on the revised licence) the Agency directed an oral hearing to be conducted under section 86 of the 1992 Act and appointed Mr Kieran O'Brien to conduct that hearing. The hearing was held at Ennis. It commenced on the 25th September 1996 and the objectors and their advisors were heard over a period of four days. Evidence was taken from twenty-three witnesses including Dr Charles V Howard, a medical doctor, a specialist in toxicology and a lecturer in the pathology section of Liverpool University and Professor Rappe whose *curriculum vitae* qualifies him as an expert on dioxins in relation to which he has advised the World Health Organisation, the European Union and various government bodies.

In his report on the hearing Mr Kieran O'Brien recommended the granting of the licence subject to the revision of certain of the conditions contained in the original Proposed Determination.

At a meeting of the Agency on the 12th December, 1996, the Agency determined to grant a revised licence to Roche under the conditions set out therein.

Leave to seek judicial review of the decision of the Agency was sought and obtained on the 14th February, 1997, on the grounds set out therein. An application to amend the statement of grounds was subsequently sought but refused by the order of Mr Justice Kelly on the 6th May 1997. An appeal from that decision is still pending before this Court.

The grounds on which the Appellant was given leave to seek judicial review were extensive but, as the submissions made on her behalf indicate, were focused on the following propositions:-

- (1) That the decision of the Agency to grant the IPC licence in December, 1996 was unreasonable.
- (2) That the decision to grant the 1996 licence under section 88 (2) of the 1992 Act was *ultra vires*. Any licence granted should have been a new licence under section 83 of the 1992 Act.
- (3) That the granting of a licence prior to the delivery of detailed plans of the proposed incinerator was premature and invalid.
- (4) That the Agency was in breach of its statutory duty to provide reasons for its decision to grant the IPC licence.

In his judgment the learned trial Judge recited the detailed submissions on fact and on law which had been made to him by the Appellant, Roche and the Agency and concluded by rejecting the propositions advanced on behalf of the Appellant. In addition, the learned trial Judge refused to permit cross-examination of any of the deponents by whom affidavits were sworn for the purposes of the proceedings before him or to permit Counsel for the Appellant to open what was described as “*the Dutch Report*” exhibited in an affidavit sworn by Dr



Howard. Those rulings, as well as the substantive judgment and order, are the subject matter of the appeal to this Court.

## THE ARGUMENTS

### First, the argument as to “unreasonableness”:-

There was little dispute between the parties as to the principles applicable in determining whether a Court should set aside the decision of an administrative body as having been made in excess of the powers entrusted to it by Statute. The extent of the unreasonableness required to justify such an intervention was identified in the judgment of State (Keegan) v. the Stardust Compensation Tribunal [1986] IR 642 at 658 in the following much-quoted terms:-

*“I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted ultra vires, for the necessarily implied constitutional limitation of jurisdiction in all decision making which affects rights or duties requires, inter alia, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision.”*

In O’Keeffe v. An BordPleanala [1993] 1 IR 39 Finlay CJ, expressing views with which the entire Court was in agreement, endorsed the principles established by Henchy J in the Stardust case. In addition, he quoted (also from the Stardust case) a passage from the

judgment of Griffin J which in turn derived from the decision of Lord Brightman in **R v. The Chief Constable of North Wales Police. ex. Evans** [1982] 1 WLR 1155 at 1160 as follows:-

*“Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the Court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power ... Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.”*

Chief Justice Finlay (at pages 71-72 of his judgment) explained - particularly in relation to the Planning Acts - the limited function of the Courts in matters such as these in the following terms:-

*“Under the provisions of the Planning Acts, the Legislature has unequivocally and firmly placed questions of planning, questions of the balance between development and the environment and the proper convenience and amenities of an area within the jurisdiction of the planning authorities and the Board which are expected to have special skill, competence and experience in planning questions. The court is not vested with that jurisdiction, nor is it expected to, nor can it, exercise discretion with regard to planning matters.”*

Chief Justice Finlay then concluded as follows (at pg. 72):-

*“I am satisfied that in order for an applicant for judicial review to satisfy’ a court that the decision-making authority has acted irrationally in the sense which I have outlined above so that the court can intervene and quash its decision, it is necessary that the applicant should establish to the satisfaction of the court that the decision-making authority had before it no relevant material which would support its decision.”*

Counsel for the Appellant sought to overcome these formidable obstacles by relying primarily on this simple proposition: *“The issue”*, said Mr Gaffney, SC, on behalf of the Appellant,

*“before the hearing officer was a question as to the toxicity of dioxins and their potential for damaging the health of human beings. This is a medical issue. The only medical evidence provided to the hearing officer was that of Dr Howard who was vehemently opposed to the grant of the IPC licence whereas the evidence given in support of the licence was that of an expert, albeit a respected expert, in science rather than medicine. It would be perverse or in the words of Henchy J “it would fly in the face of reason” to accept the evidence of a scientist over that of a respected doctor in matters of medicine. Furthermore, the granting or withholding of an IPC licence by the Agency is not an adversarial procedure. It does not depend upon preferring on the balance of probabilities the evidence of one party as against another. The statutory obligation imposed upon the Agency requires it to be satisfied that the statutory conditions have been met irrespective of any view they may take of the evidence presented at the inquiry.”*

To evaluate the submission of the Appellant on this issue it is necessary to identify with some precision the areas of conflict between the Doctor and the Professor. Not surprisingly, these two experts, whilst committed to the views which they expressed, were in agreement on the basic chemistry of the dioxins, the procedures by which they are detected; the means by which they are measured, the notation by which they are recorded and the data generally known and widely accepted by their peers in relation to these toxic substances.

The December IPC licence restricts the emission of dioxins from the Clarecastle plant to  $.1 \text{ mg/m}^3$  per day and imposes conditions to that effect, the breach of which would expose Roche to massive penalties. Professor Rappe thought this was a reasonable and appropriate limit. It was the same limit as that fixed by the European Union (see Council Directive 94/67/EC of the 16th December 1994) and one-half of the level set by the US EPA. It conforms also with views which the Professor had formed as a result of the very many studies which he had himself undertaken in conjunction with other distinguished organisations. However, Dr Howard in the course of the hearing referred expressly to a US EPA draft report which expressed concern in relation to the non-cancer causing low dose effect of PCB's and dioxins. Professor Rappe pointed out that the particular report had been heavily criticised, that it was labelled "*Draft - do not quote or cite*" and had been returned to the US EPA for re-evaluation. Furthermore, Professor Rappe pointed out that the US EPA continued to licence incinerators on the basis of proposed emission for dioxins of  $.2 \text{ mg/m}^3$  - twice that permitted for the Clarecastle plant.

Perhaps the main thrust of Dr Howard's argument was the absence of what he considered to be adequate analysis of the existing or ambient dioxin levels in the locality of the plant. In

the affidavit sworn by him on the 7th June, 1997, in the judicial review proceedings he expressed himself vigorously in the following terms:-

*“It is my opinion that the decision to licence the operation of Roche Ireland Ltd which was made by the Respondent on the 17th December 1996 is irrational and reckless because there has been no assessment of the current health status of the human populace in the vicinity of Roche Ireland Ltd’s operation, no empirical assessment of the risk posed by the licensed operation to human health and the Licence itself contains no conditions to ensure ongoing monitoring of any impact the licensed operation may have on human health.”*

Dr Howard referred critically to the tests and analysis which had been made in relation to the presence of dioxins in the locality of the plant and the inadequacy, as he saw it, of those researches. He pointed out that fetuses and breast-fed infants were especially vulnerable to dioxins because their intake from their mothers was high in proportion to the foetal and infant body weight over a short period of time. Apparently, he had suggested at the oral hearing that the level of dioxin in the local populous should be measured by *“analysing a pooled breast milk sample from nursing mothers in the area”* for dioxin contamination. Apparently, he explained - though this is not recorded in the notes of the inspector - that this is a procedure adopted in other industrialised countries.

Of course, Professor Rappe necessarily and clearly recognised that dioxins are toxic. Indeed, the voluminous documentation dealing with the subject sets out the relative toxicity of the different chemicals comprising this dangerous group. Again, it appears to be universally accepted that dioxins disperse rapidly in air, more slowly in water and accumulate over

lengthy periods in other media. Professor Rappe and Dr Howard were in full agreement that dioxins would accumulate in milk, in human beings and, above all, in the land - in the latter, for as much as ten years. The dioxins escaping from the plant would necessarily disperse and the pattern in which the surviving chemicals would reach the ground would depend upon atmospheric conditions, which, presumably, could be predicted with some degree of accuracy.

It is true that neither Professor Rappe nor Roche provided the Agency with information as to the presence of dioxins in human beings, less still breast-feeding mothers. There is no suggestion that evidence of that nature was directly available to the Agency. In the final analysis the potential danger of dioxins to human beings necessarily depended upon the quantities which they ingest. Dr Howard emphasised what conventional wisdom had long established, namely, that a safe or unsafe dosage level must be measured by reference to the body weight of the persons exposed. Throughout the hearing and in the affidavit sworn by the experts, these levels were discussed in picograms per kilogram (pg/kg) per day. It is this factor which explains and necessarily confirms the vulnerability of the infant breast-fed by a mother who has accumulated in her system a quantity of dioxins which might be of a small but significant amount. Professor Rappe for his part gave evidence at the hearing of evaluations and re-evaluations of dioxin exposures undertaken by the Nordic Councils in 1955 which decided not to change what they had determined as the safe dosage level namely, 5 pg/kg body weight per day.

Whilst the Agency does not appear to have had any direct evidence of the levels of dioxins in the local population, there was indeed a considerable body of evidence available as to the

ambient dioxin levels generally and the additions thereto which the plant might be expected to generate.

As already pointed out, the EIS prepared in August 1995 recorded background dioxin levels some samples taken at four locations in the area of the plant. The analysis of those samples showed existing concentrations to be at minimal levels. Even those figures were necessarily overstated. Where no dioxins were detected, the assumption was made that they existed (or, more correctly, the most toxic of the dioxins existed) and was present at the lowest level at which it would have been detected if it had been present. In fact in only two cases were dioxins actually found. The Agency had the added advantage that there was in existence a report commissioned by them in April 1996 entitled *“Dioxins in the Irish Environment”* based on a survey carried out in June 1995 by Colman Colcannon. The cows’ milk samples taken in the course of that survey were in fact analysed by Professor Rappe at the University of Umea, Sweden. That report emphasised the toxicity of the dioxins and explained the effects thereof in experiments on animals *“at levels [of] hundreds or even thousands of times lower than for most other chemicals of environmental interest”* [pg.3]. The methodology of the report was explained in relation to the sampling that was taken and the location of those samples. As it happens, two were taken in County Clare, one in the South East and one in the West of the County. Some were taken from neutral areas and other areas designated as *“hot spots”*, that is to say, areas which were regarded as potential dioxin sources such as waste incinerators. What the report established was that, either in absolute terms or by reference to other European countries, the ambient dioxin levels were modest indeed. Furthermore it was recognised, and must be recognised, that dioxins are generated, as Professor Rappe explained in his evidence, by routine domestic and agricultural operations such as the burning of grasses

or hay or indeed the smoking of cigarettes. Zero ambient levels of dioxins may be an ideal. *It* does not appear to be an attainable goal.

The typical maximum rural background air level was given in the EIS report as .001 mg/m<sup>3</sup>. The predicted ground level concentration derived from the incinerator was assessed at .00003 mg/m<sup>3</sup>. What the authors of the statement concluded was that this did not involve any significant increase in dioxin levels as a result of the incinerator. Mr Ryan's report to the Board in 1996 took the same view and the Inspector in his report concluded [at p605 - 2]:-

*"The modelling of dioxin emissions set out in the application clearly shows that the predicted increase in dioxin concentration as a result of stack emissions from the proposed incinerator is in the order of 1% of the background level. In this regard, having considered the contribution of various sources to human dioxin intake, I conclude that the contribution from stack emissions from the proposed incinerator is insignificant. I do not consider that new evidence on the toxicity of dioxins has been presented at the hearing that would justify serious concerns regarding the emissions of dioxins as provided for in the proposed determination."*

In the final analysis it seems to me that such dispute as did exist between the Doctor and the Professor - and more particularly the possibility of any concern arising in the minds of the directors of the Agency - was the nature and extent of the samples which should be undertaken before concluding that the anticipated emission of dioxins as dispersed in the locality taken in conjunction with existing levels of dioxin would not cause a health hazard.

Logically, the Doctor must be correct in stressing the dioxin levels in the milk of nursing



mothers. If such levels were significant, clearly the danger to the infants would be a matter of grave concern. On the other hand, no information was readily available as to the number of nursing mothers in the locality, nor how far those potentially involved would be willing to co-operate in any screening process. Furthermore, the very nature of the project would suggest that care would be required to ensure that the diet of the nursing mothers concerned was typical of the members of the group; otherwise, any conclusion based on the finding would be misleading. The essential disagreement between Dr Howard and Professor Rappe, as I see it, concerned the nature and the evaluation of the information which should be obtained in relation to the ambient dioxin levels to determine whether or not this would give rise to any risk at any stage of the food chain. Dr Howard preferred, indeed insisted, that appropriate information could only be obtained in relation to the very final links in the chain, that is to say the feeding of a baby by its mother. Professor Rappe was satisfied to rely on ground samples taken at appropriate localities which would no doubt provide an accurate basis as to the levels of dioxin which would be ingested by the local population over a period of time. Professor Rappe did not dispute the value of any information which might be obtained from an analysis of the milk of nursing mothers. The thrust of his evidence was that the existing air and ground levels of dioxin were so low and the anticipated percentage increase thereto which might be emitted from the plant so small that there was no danger to the health of the local population. In this scientific, statistical and logical analysis I have no reason to doubt that the expertise of Professor Rappe was at least equal to that of Dr Howard and that the Hearing Officer and the Agency were entitled to treat Professor Rappe as a witness of competence and credibility in this regard. I do not see that Professor Rappe is at any disadvantage in this respect. Indeed, his extraordinary experience at the highest level with the World Health Organisation and other international bodies of the highest distinction

would suggest that he is fully competent to express a view which is equally worthy of consideration as that expressed by Dr Howard.

In my view there was nothing unreasonable or irrational in any way in a decision based confidently on the views expressed by Professor Rappe confirming as it did the views incorporated in the EIS and the reports. I am satisfied that the learned trial Judge was correct in rejecting the argument based on unreasonableness.

**Secondly. the argument that a licence, if granted at all, should have been a licence under section 83 of the 1992 Act.**

Mr Justice Lavan declined to permit the Appellant to make this case. It was not one of the express grounds on which leave to apply for judicial review had been granted and the argument that it was implicit was, in my view, rightly rejected by the trial Judge. Furthermore, even if this ground had been available to the Appellant it does not appear that any argument based on it had been addressed to the hearing officer having regard to the intensity, and I have no doubt the sincerity, of the Appellant's belief in the case which she seeks to present I would offer the following observations on this purported argument. The 1992 Act does not create different categories of licence. The distinction in terminology does not involve differences in quality. No comparison could be drawn between the 1992 Act and, say, the Intoxicating Liquor Acts. In relation to the sale of intoxicating liquor there are important distinctions to be drawn between public house licenses and restaurant licenses and between off-licenses and on-licenses. Under the 1992 Act an industrialist either holds or does not hold a licence to permit him to carry on an activity

which is required by that Act to be licensed. Nor is there any question of holding a multiplicity of licenses in relation to a particular plant. The purpose of part IV of the Act and the very description of the “*Integrated Pollution Control Licence*” is to combine the permission in one licence and under one regulatory authority and to control the environmental impact of an industry on a particular locality. The licence originally held by Roche, was described, in short, as a licence’, that is to say, a licence permitting the activity designated in that subparagraph in the First Schedule to the 1992 Act. The Appellant accepted that it was open to Roche (or the Agency) to apply to have that licence reviewed but it argued that no revision of a licence for that activity could result in the revised licence authorising the activity designated at 11 .1 in the First Schedule to that Act, namely, “*The incineration of Hazardous Waste* “.

The words “*revised licence*” add nothing to the scope or the nature of a statutory permission which is described merely as “*a licence*”, no more than it differs from what is described in section 92 of the 1992 Act as a “*new licence* “. Where a distinction does unquestionably exist *IS* in the Environmental Protection Agency (Licensing) Regulations 1994. In those Regulations a “*licence*” is defined separately from a “*revised licence* “. This distinction is to facilitate the different regulations which are applicable in relation to an application for a licence *ab Inuit* and an application to review an existing one. Again, it is true that the 1994 Regulations expressly impose more extensive requirements on the person applying for a licence as distinct from applying for a “*revised licence*”. In practice, it may be assumed that n the case of a review the Agency would have in its possession a substantial body of information which would render it unnecessary for it to seek the same quantity of information that would be required from a new applicant. On the other hand, the Regulations expressly authorise the Agency to seek and obtain, in relation to a review, quite as much information as

they would obtain for a new application. The reality of the matter in the present case is that the most comprehensive information was sought and obtained by the Agency and circulated amongst the parties. The installation of an incinerator was undoubtedly a very significant change but its purpose was primarily to meet the defects in the existing operation. To that extent, it seemed logical to regard it as a review of the existing activity. On the other hand, having regard to the controversial nature of incinerators and the extensive information which the Agency would and did seek, it might have been appropriate for the Agency to exercise the statutory power conferred on it by section 92 (2)(a) of the 1992 Act to direct Roche to apply for “*a new licence*” in substitution for the then existing one. On the other hand, it does not seem to me that the Agency could be said to have acted unlawfully by failing so to do.

Finally, I would say that even if this argument were available to the Appellant and well Founded I do not accept that it would form a proper basis for the exercise of the Court’s discretion to grant an order of *certiorari*. As was pointed out in *McBride v. Galway Corporation [1998] 1 IR 485*, it is inappropriate to grant such an order where the substance of the legislation has been complied with - as was undoubtedly the case here - even if precise requirements of the legislation were not met.

**Thirdly. the argument that the Agency acted unlawfully in granting the December licence when Roche had not at that time submitted precise details of the incinerator proposed to be used in the altered process.**

The Appellant rightly recognised that the licensing provisions of the 1992 Act apply to “*an activity* and not to “*an incinerator*” or other particular plant or machinery. What is argued, however, is that the statutory “*activity*” is defined in section 3 of the 1992 Act as meaning:-

*“any process, development or operation specified in the First Schedule.”*

The particular process in this case is *“the incineration of hazardous waste “*. Article 10 of the 1994 Licensing Regulations provides that an application for a licence shall:-

*“....(h) describe the plant, methods, processes and operating procedures for the activity...”*

The licensing section of the 1992 Act (section 83) specifically provides that the Agency should not grant a licence or a revised licence unless it is satisfied that (amongst other things):-

*“the best available technology not entailing excessive costs will be used to prevent or eliminate or, where that is not practicable, to limit, abate or reduce an emission from the activity.” {s.83(3)(D)}*

The Appellant then refers to section 5 of the 1992 Act which defines BATNEEC:-

*“as meaning the provision and proper maintenance, use, operation and supervision of facilities which, having regard to all the circumstances, are the most suitable for the purposes.”*

*Facilities”* are themselves defined in section 5 aforesaid as including *“plant and premises “*.

What the Appellant argues is that these statutory requirements cannot be observed because neither the Appellant (nor the other objectors) nor the Agency had the opportunity to evaluate or analyse the actual incinerator to be operated and the exact method and procedure to be used in the process or activity to be licensed.

In my view this argument, though attractive, is misconceived. The information, drawings and explanations furnished in relation to the nature of the proposed incinerator fully explained the technology which is to be used in the course of the activity. It was clearly explained how the then ongoing vapour emissions from the three main stacks would be treated in the incinerator process and the technology was sufficiently explored to be compared with several other options which were investigated and compared with that proposed by Roche. Indeed, it seems that the Agency and the various experts were able to satisfy themselves that the technology proposed by Roche was the best available without seeking to prefer or justify it on any basis of cost. Whilst the Appellant and other objectors (as well as the Agency) might have had some residual concern as to whether the particular plant to be installed would achieve the result anticipated by Roche and their advisors, any such misgivings were properly satisfied by the express conditions imposed by the licence granted. If the incinerator failed to operate at 11000 Centigrade or if the “*residence*” time fell below two seconds (whether due to shortcomings in the incinerator or otherwise), the licence conditions would be breached.

A further condition imposed in relation to the installation of the plant provided even more protection for the environment. Condition 7.3 of the Licence expressly provides that, before the incinerator became operational the commissioning programme had to be agreed with the Agency to demonstrate the achievement of the operational parameters, the waste destruction efficiency and the specified emission limit values fixed by the licence. The condition

expressly provides that the incinerator could not be put into operation until the Agency had indicated in writing that it was satisfied with the full results of the commissioning programme. In my view it would have been sufficient for the Agency to describe parameters which had to be achieved. By imposing condition 7.3 the Agency effectively guaranteed that the incinerator could and would work within the prescribed limits and with the results anticipated and required.

I am satisfied that the learned trial Judge was correct in rejecting this argument.

**Fourthly. the argument that the Agency failed to give reasons - as it was required to do - for its decision to grant the December licence.**

This is not a case in which an obligation is imposed by implication on an administrative tribunal or body to give reasons for its decision. In the present case the Licensing Regulations at Article 28 expressly provide as follows:-

*“A proposed determination under section 85(2) of the Act or a decision under section 83(1) or 88(2) of the Act shall contain the reasons for the proposed determination or the decision.”*

The Appellant is, therefore, clearly correct in saying that the Agency was under an obligation to give reasons and that not once but twice. First, it must give reasons for its decision for its *“Proposed Determination”* and, secondly, reasons for its actual decision to grant a licence. The issue between the parties related to the manner in which these reasons should be expressed and the documentation in which they should be located.

The reasons at the proposed determination stage could differ materially from those at the licensing stage. The reasoning or ‘*judgment*’ of the Agency at the different stages is likely to be provided for the benefit of different parties. At the stage of the proposed determination, I would assume that it is the Applicant who is most likely to be concerned by conditions imposed by the Agency on his intended activity and the reasons by which it justifies any particular intrusion on his industrial enterprise. The application will only proceed to the decision process if objections are made formally to the proposed and pursued determination. It would follow that such objectors would at that stage have a clear interest in knowing the reasons of the Agency for granting a licence opposed by them and, in particular, in those cases - such as the present - where the opposition was based on expert evidence and not merely personal preference or social pressures.

The decided cases do provide some guidance as to the manner in which administrative bodies may explain the reasons for their decisions. In **Golding & Ors v. The Labour Court & Cahill Roberts Ltd** [1994] ELR 153, 159, Mr Justice Keane pointed out that:-

*“the determination by the Labour Court need not, as a matter of law, take any particular form: what is essential is that the manner in which it is expressed leaves no room for doubt as to the reasons which led to the decision, thus ensuring that neither the appellate nor the supervisory jurisdiction of this Court is frustrated by an inadequate indication of reasons.”*

More specifically, in **O’Keeffe v. An Bord Pleanala** [1993] 1 IR 39 (at page 76) Finlay CJ said of reasons provided by An Bord Pleanala in the form of a combination of a brief



statement together with a series of conditions and reasons given for the imposition of such conditions the following:-

*“Firstly, I am satisfied that there is no substance in the contention made on behalf of the plaintiff that the Board should be prohibited from relying on a combination of the reason given for the decision and the reasons given for the conditions, together with the terms of the conditions. There is nothing in the statute which would justify such a rigid approach and it would be contrary to common sense and to fairness. What must be looked at is what an intelligent person who had taken part in the appeal or had been appraised of the broad issues which had arisen in it would understand from this document, these conditions and these reasons. Approached in that way, I am satisfied that the entire of this document sufficiently identifies the reasons by which the Board reached a decision to grant this particular planning permission subject to these particular conditions.”*

I have no difficulty in accepting that the principles enunciated by Chief Justice Finlay in the *O’Keeffe* case would be properly and readily applied to a decision by the Agency in relation to a proposed determination. The Applicant for the licence would readily understand that the Agency was satisfied that the statutory conditions would be met if, but only if, the conditions specified by it were met. Moreover, the Applicant would have ample information and evidence with which to seek judicial review if he wished to contend that any of the conditions imposed were *ultra vires* the Agency.

Where a decision to grant a licence is made, the position is different. In that event, by definition, objections will have been made to, and submissions received by the Agency in relation to such objections. If a licence is indeed granted, it might be inferred that those objections had been overruled or the submissions rejected. That would not be an adequate compliance with the Regulation. Those who have gone to the trouble and expense of formulating and presenting serious objections on a matter of intense public interest must be entitled to obtain an explanation as to why their submissions were rejected. I did comment -perhaps not very helpfully - as to the nature and extent of the reasons which administrative tribunals must give for their decisions in *O'Donoghue v. An Bord Pleanála* [1991] ILRM 750 (at 757) in the following terms:-

*“It has never been suggested that an administrative body is bound to provide a discursive judgment as a result of its deliberations but on the other hand the need for providing the grounds of the decision as outlined by the Chief Justice [in *The State (Creedon) v. Criminal Injuries Compensation Tribunal* [1989] ILRM 104] could not be satisfied by recourse to an uninformative if technically correct formula. For example, it could hardly be regarded as acceptable for the bord (sic) to reverse the decision of a planning authority stating only that ‘they considered the application to accord with the proper planning and development of the area of the authority’. It seems to me that in the nature of the problems as defined by the Chief Justice it would be necessary for the administrative tribunal to indicate in its decision that it had addressed its mind to the substantive issue which had led the planning authority to believe that the permission would have an adverse affect on the planning and development of the area.”*

Those comments accord with the subsequent decision of the House of Lords in **Bolton Metropolitan District Council v. The Secretary of State for the Environment** [1995] IPL 1043 and the more recent decision of the Court of Appeal in England in **MJT Securities Ltd v. Secretary of State for the Environment [1998] TPL 138.** In the latter case, Evans U summarised the statutory obligation at page 144 in the following terms:-

*“The Inspector’s statutory obligation was to give reasons for his decision, and the courts can do no more than say that the reasons must be ‘proper, intelligible and adequate’, as has been held. What degree of particularity is required must depend on the circumstances of each case...”*

In the present case I have no doubt that the Agency was required to identify the serious objections put forward by the various organisations (including that to which the Appellant belonged) and to show that there was an answer to those objections which the Agency could, and did, rationally prefer.

Where, as in the present case, there are numerous (over one hundred) objections presented by a wide range of interested parties (not all of whom had the benefit of legal advice), there must have been difficulties in listing and reviewing all of the objections, the arguments and the evidence in support thereof and the conclusions or possible conclusions thereon. In my view, the Hearing Officer, Mr Kieran O’Brien, in his reports appears to have performed this task with extraordinary clarity and cohesion and fully deserved the compliment paid to him by the Agency at their meeting of the 12th December, 1996. Mr O’Brien dealt with the wide range

of arguments and objections. Indeed, he performed a task for which the objectors felt he had not been fairly or adequately equipped and staffed. With extraordinary clarity he showed -particularly in the most contentious area dealing with the generation of dioxins - that there were two view points. On the one hand there was the intense concern, supported by the expert evidence of Dr Howard in particular, as to the dangers which could be caused by excessive ingestion of dioxins and the other case, namely, that put forward by Professor Rappe, that the ambient levels of dioxin were modest and that the amount which could be generated by the plant within the parameters permitted by the licence insignificant. In my view, as I have already said, Mr O'Brien had a fully rational basis for preferring the views of Professor Rappe to those of Dr Howard and the Board, in turn, was entitled and justified in accepting and adopting the findings of the hearing officer appointed by them.

The minutes of the meeting of the Board of the Agency held on the 12th December, 1996, recorded the presence of the Director General and three other members of the Board. In addition, the Hearing Officer, Mr O'Brien, (who is described in the minutes as Chairman or 'Chairman: oral hearing'), was also present. The minutes list the full documentation which the Chairman had compiled from the date of his appointment to his final recommendations. It appears that the Chairman (Mr O'Brien) made a presentation in relation to those documents. Again, the minutes record that there was a detailed discussion on the Chairman's report and the attachments. The operative record of the decision of the Board then appears in the following terms: -

*"The Directors accepted the Chairman's recommendations subject to an extension of the compliance date for lower emissions limit values, to September 1998."*

Having dealt with one other matter, the minutes then go on to record as follows:-

*“The Directors decided to grant a licence, as modified, to Roche Ireland Ltd. Clarecastle, Co. Clare, subject to the conditions as set out in the licence document.”*

The foregoing is the decision of the Agency to grant the licence and, clearly, the reasons for doing so are because the Board accepted the recommendations of the hearing officer appointed by them. Perhaps it might have been more appropriate for the Agency to say (and for the secretary to record) that the Board accepted not merely the recommendations but also the findings and the conclusions of their Hearing Officer. On the other hand it seems that the acceptance of the recommendations necessarily implied the acceptance of the conclusions on which they were based. In my view, the Agency in its decision indicated that it was granting the licence sought by Roche because it was satisfied to accept, adopt and apply the conclusions reached by the Hearing Officer and his proposed rejections and arguments raised by the objectors. The reasons for the rejection of the objections are to be found therefore in the report of the Hearing Officer and these are as ample as any party could require. They were incorporated by reference in the decision and in my view it was not essential in the circumstances of the present case to repeat those reasons in the minutes of the Board meeting. I am sure that the licensing regulations anticipated that the record of the decision of the Agency would itself explain shortly and simply why the objections raised were rejected.

Certainly it is desirable that the reasons for the decisions of the Agency should be readily available without the necessity of excessive research or inquiry. In the present case, the number of objections and the important issues which they raised were such that their consideration and ultimate rejection could not be recorded otherwise than by reference to a voluminous schedule which would merely duplicate the report of the inspector. In the circumstances I am satisfied that the manner in which the reasons were given was, in the circumstances of the present case, sufficient compliance with the Regulations. In less complex cases it would not be appropriate to adopt a similar course.

Subsequent to the meeting and decision of the Board, the Agency granted the licence in a document dated the 17th December, 1996, which was issued under the seal of the Agency purporting to be the actual grant of the revised licence. That did not contain - nor was it required by Article 28 of the 1994 Regulations to contain - reasons for the decision to grant such a licence. It is the decision to grant the licence and not the licence itself which is required to contain the reasons.

Accordingly, I am satisfied that the learned trial Judge was correct in rejecting the argument based on the inadequacy of reasons.

As to the grounds of appeal arising from the particular rulings made by the learned trial Judge in the course of the hearing it is, I believe, sufficient to say that the learned Judge was entitled in the exercise of his discretion to refuse to permit cross-examination on the affidavits filed in the proceedings (*see McElhinney v. Williams [1994] 2 ILRM 115*) and, more particularly, the learned Judge was clearly correct, in my view, in refusing to permit the introduction of the "Dutch Report" or any other evidence which had not been referred to in the proceedings

before the Hearing Officer. To permit such evidence would involve reopening the substance of the conclusions reached by the Hearing Officer and endorsed by the Board. Such a procedure could not be adopted in judicial review proceedings. Counsel, recognising this difficulty, put the argument in favour of referring to “the Dutch Report” on a different basis.

It was the duty of the Agency, he contended, to make itself aware of all relevant material before granting a licence to incinerate hazardous waste. The report was highly material, he submitted, and clearly it was not considered by the Hearing Officer or by the Agency. It was on that ground he claimed that the decision should be set aside. Whilst undoubtedly the Agency has the statutory obligation to perform its duties to the highest professional standards it would be quite unrealistic to suggest that the Agency was bound to familiarise itself with every publication on the issues arising on the applications before them. There must be some limit to the researches which a regulatory body can properly undertake without delaying unreasonably or indefinitely its decision on applications properly made to it. Indeed, the fact that the Dutch Report was delivered by the Health Council of the Netherlands to the Minister for Health Welfare and Sports of that country on the 6th August, 1996 - it is not clear on what date it was circulated - explains why no reference was made to it in the course of the hearing in September, 1996, and the fact that the report contains a list of the literature considered by the Council exceeding one hundred and fifty books or papers or reports illustrates the unreality of the contention that a decision should be invalidated because the Agency could be shown to have been unaware of the contents of any particular academic contribution.

In these circumstances, the appeal must in my view be dismissed but before doing so there are two peripheral matters to which I wish to draw attention. First, I would recall the observation made by the Chief Justice to the effect that the Appellant and other objectors performed an important public service by expressing their concern and raising specific

objections to the granting of the licence by the Agency. Their participation in the hearing before Mr O'Brien no doubt helped to ensure that any possible danger to the environment or public health was frilly and properly explored. Public hearings of that nature are designed for that very purpose. It is for that reason that such proceedings must be conducted with a minimum of formality consistent with an orderly hearing. Hopefully too, the expense and cost incurred by objectors in connection with such proceedings would not be excessive. However, applications to the Superior Courts to quash decisions of administrative tribunals have a different purpose and a different format. In the nature of such proceedings they are expensive, frequently unsuccessful and, as has already been pointed out, do not address the substantive issues which concern objectors. They are concerned with the process adopted by the administrative tribunal and not, in general, the decision which it reaches. Furthermore, even when considering the process it is appropriate to bear in mind the comments of Mr Justice O'Flaherty in Faulkner v. The Minister for Industry and Commerce [1997] ELR 107 when he said:-

“We do no service to the public in general if we subject every decision of every administrative tribunal to minute analysis.”

Finally, it may be helpful to remind the Appellant and others similarly placed that the grant of a licence under the 1992 Act does not confer on the licensee the permission to cause injury to health or damage to the environment or any immunity from any other illegal process. It merely permits an activity to be carried on which would be otherwise illegal. If the conduct of the licensee in any case were to cause injury or damage or otherwise constitute a public nuisance, the persons affected would continue to have available to them a well-stocked arsenal of legal and equitable remedies although one would hope that the conduct of the



licensee and the supervision of the Agency would render it unnecessary to have recourse to any such remedies.

I would dismiss the appeal.