

Polluter Pays – High Court confirms personal liability of Directors and Shareholders for clean-up costs

In a recent decision of the High Court in *John Ronan and Sons v Clean Build Limited (in liquidation) and Others*, Judge Clarke held five former directors and shareholders of a liquidated company personally liable for the costs of remediating a site in Tallaght on which significant quantities of construction waste had been allowed to accumulate.

This decision follows a decision of the High Court in *Neiphin Trading* earlier this year in which the Court found that it has no power to impose ‘fall back orders’ on directors and shareholders personally for the costs of remediation where the company responsible for the pollution was unable to pay.

It had generally been accepted since the decision of Mr Justice O’Sullivan in *Wicklow County Council v Fenton (No.2)* that the High Court had an inherent power to impose a ‘fall back order’ in order to give effect to the polluter pays principle, a principle of EU law which can be found in article 191(2) of the Treaty on the Functioning of the European Union and in the Waste Framework Directive. The Court in *Fenton* found that the Waste Management Act 1996, as amended, should be interpreted in a purposive manner so as to give full effect to the objectives of the Waste Framework Directive, which it transposed. It was on that basis that the Court held that it had the power to make fall back orders against directors of a company which had been responsible for the unlawful disposal of waste in County Wicklow, but which did not have the financial ability to pay the full costs of remediation of the site.

In the *Ronan* case, the site was owned and operated by John Ronan & Sons for a number of years. It was then leased to Clean Build for a period from 2004 to 2008. Clean Build carried on the business of recycling, recovery, collection, segregation and reclamation of building materials, including gypsum and used plaster. Large quantities of waste materials were allowed to accumulate on site in breach of the waste permit issued by South Dublin County Council. The directors of Clean Build changed a number of times over the relevant period.

John Ronan & Sons issued proceedings under sections 57 and 58 of the Waste Management Acts seeking orders to require Clean Build to remove waste materials and remediate the site. Clean Build gave certain undertakings to the Court in this regard which ultimately were not complied with. The company then went in to voluntary liquidation, and subsequently South Dublin County Council issued separate (but similar) proceedings against John Ronan & Sons, the liquidator, Clean Build and each of its directors and former directors. The Judgment delivered on 4 August 2011 deals with both sets of proceedings. The proceedings against the liquidator were struck out on an earlier occasion.

While the Judgment in the *Ronan* case does not resolve the conflict between the *Neiphin Trading* decision and the earlier *Fenton* case, it provides a useful analysis of the scope and application of the polluter pays



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principle in Ireland, and confirms that directors and shareholders of companies may be held personally and independently liable for environmental pollution. Before considering the outcome of the *Ronan* case, it is necessary to first consider how the polluter pays principle had been applied by the Court up to that date.

The decision of Mr Justice O'Sullivan in the *Fenton* case, constituted a landmark judgment in which the 'corporate veil' in domestic company law was lifted by the Court in order to give effect to the polluter pays principle, a principle of EU law which is found in the Waste Framework Directive which was in turn transposed by the Waste Management Acts. The Court interpreted sections 57 and 58 of the Waste Management Acts in a purposive way, to give full effect to the Directive and to the Polluter Pays Principle. The Court held that it was necessary to lift the 'corporate veil' and impose personal liability on directors of a limited liability company for any shortfall in the remediation costs which the company might not be able to meet by way of 'fall back orders'. The Court found that it was appropriate to do so, even where the directors were not directly involved in the relevant activities, to ensure that an innocent party, the community or State would not be required to step in to pay the remediation costs.

Mr Justice O'Sullivan's rationale appeared to have been accepted and approved in a number of subsequent judgments. For example, in the significant decision of Ms Justice Carroll in *Minister for Environment v Irish Ispat Limited*, the Court determined that the polluter pays principle did not require the Court to impose liability for remediation costs on the liquidator of an insolvent company, as that would unfairly transfer liability to the creditors of the company who were not responsible for the disposal of the waste. In that case, the Court allowed the liquidator to disclaim the operating licence and avoid the associated remediation costs, which were ultimately required to be borne by the State. In addition, Mr Justice Clarke in *Cork County Council v O'Regan* accepted the polluter pays principle as set out by Judge O'Sullivan, but found that the Court should ensure that any order for remediation should be proportionate and that the Court should attempt to impose the least onerous order which still secures the objectives of the Waste Management Acts. This approach was approved later by Mr Justice Peart in *Laois County Council v Scully*.

Doubts about the appropriateness of Mr Justice O'Sullivan's decision in *Fenton* emerged in *Wicklow County Council v O'Reilly and Others*, which involved an application to join a party to proceedings in which fall back orders were sought against directors and former directors of a company. Having regard to the judgment in *Fenton*, Mr Justice Clarke allowed the party to be joined to proceedings on the basis that a 'fall-back order' could potentially be made against that party. It had been argued, by way of challenge to the application to join the party to the proceedings, that the *Fenton* case was wrongly decided, but Mr Justice Clarke found that it was inappropriate to determine the question of whether *Fenton* was wrongly decided in a procedural application of that nature.

The issue of whether *Fenton* was wrongly decided finally came before the High Court in the recent *Neiphin Trading* case. In that case, Mr Justice Edwards dealt with a preliminary question of whether 'fall back orders' could be made against individual directors and or shareholders of a corporate entity under the provisions of section 57 of the Waste Management Acts. He concluded that, despite his best efforts, he could not identify any particular article or articles of the Waste Framework Directive mandating the establishment of an environmental enforcement system predicated on the polluter pays principle and structured so that civil liability might be determined by reference to that principle. In particular, he found that there was express provision within the Waste Management Acts to impose personal liability and to lift the corporate veil in the context of *criminal* enforcement proceedings, but that there was no equivalent provision granting the

power to lift the corporate veil so as to impose *civil liability* on a party by virtue of the polluter pays principle. He held that, if the Oireachtas had intended to impose a similar civil liability regime, it would have done so expressly within the legislation. He concluded that, in the absence of evidence of a fraudulent or improper purpose, the Courts will not lift the corporate veil unless it is expressly authorised to do so by Statute, and therefore insofar as the Waste Framework Directive appears to require such a measure to be taken, it would appear that the Directive has not been adequately and properly transposed by the Waste Management Acts. He found that section 57 (and by inference, section 58) of the Waste Management Acts do not authorise the making of fall back orders against individual directors or shareholders who were not directly responsible for the environmental pollution caused by the activities of a company other than indirectly in the context of their role as director/shareholder.

The *Neiphin Trading* case appeared to strike a body blow to the role of the Courts and of litigants in ensuring an active and effective regime of civil environmental enforcement. Mr Justice Clarke's judgment in the *Ronan* case is therefore welcome, insofar as it confirms that the polluter pays principle is relevant and must be considered and applied where appropriate. The *Ronan* case can be distinguished from the *Fenton* case on the basis that, on the evidence before the Court, each of the personal defendants in the *Ronan* case had been found to have had some direct personal involvement in the running of the Clean Build business and the environmental pollution at issue in the case. They were each therefore potentially personally liable for the environmental pollution, independent of their position and role as directors of the company.

The Court confirmed that, where two or more potential remediation options are proposed, the Court is required to choose the most economic option which places the lowest burden on the payer whilst also ensuring that it is effective and satisfactory in order to fully achieve the objectives of the Waste Management Acts.

The Court also found that John Ronan & Sons had a liability as owner and current occupier of the site, but that it should be indemnified by the former directors of Clean Build for the clean-up costs. A certain amount of remediation had already been carried out by John Ronan & Sons and by South Dublin County Council prior to the conclusion of the proceedings, and the question as to who should bear those costs, and also who should bear the costs of the legal proceedings, still needs to be determined by the Court.

Conclusions

The Court avoided the need to decide whether it preferred the reasoning of Mr Justice O'Sullivan in the *Fenton* case, or Mr Justice Edwards in the *Neiphin* case and so the conflict over whether the High Court has the inherent power to make a fall back order against a director or shareholder remains unresolved. The Court did however confirm that a director or shareholder may be held personally liable where it is found to be *independently liable* under the Waste Management Acts for the environmental pollution in question, and that the polluter pays principle is a relevant consideration in the context of civil environmental enforcement. The case is also significant because it would appear to be the first occasion time that a person other than a local authority or the EPA has taken direct civil enforcement action under sections 57 and 58 of the Waste Management Acts.

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