THE HIGH COURT

2002 25 MCA

IN THE MATTER OF SECTION 57 AND SECTION 58 OF THE WASTE MANAGEMENT ACT, 1996 AND

IN THE MATTER OF AN APPLICATION BY THE COUNTY COUNCIL OF THE COUNTY OF WICKLOW

BETWEEN

THE COUNTY COUNCIL OF THE COUNTY OF WICKLOW

APPLICANT

AND

CLIFFORD FENTON, SWALCLIFFE LIMITED (TRADING AS DUBLIN WASTE)

LOUIS MORIARTY AND EILEEN MORIARTY

RESPONDENTS

Judgment of O'Sullivan J. delivered the 31st of July, 2002.

The Parties

The applicant (Wicklow County Council) is the statutory authority charged with waste management and control functions under the Waste Management Act, 1996 (the 1996 Act) for the County of Wicklow. The first respondent (Mr. Fenton) is the owner of land (Coolamadra) in County Wicklow upon which the applicant alleges the second respondent, a Waste Collection Company (Dublin Waste) or its agents unlawfully dumped waste material including hazardous waste material some of which includes hazardous waste material collected from the Mater Misericordiae Public Hospital (The Mater Hospital) and the Blackrock Clinic. The third and fourth respondents (Mr. Moriarty) and (Mrs. Moriarty respectively) are directors of Dublin Waste.

By order of McKechnie J. on the 29th April, 2002 Dublin Waste was granted leave to join the Mater Hospital and the Blackrock Clinic as notice parties. By order of the 14th June, 2002 after a full hearing I made an order setting aside those third party proceedings.

In the course of the hearing before me counsel applied to be joined as a notice party on behalf of Mr. Fenton's wife and I acceded to that request. She has filed an affidavit to which I will refer hereafter.

Relief claimed

Wicklow County Council seeks relief primarily under Section 58 of the 1996 Act against all the respondents but also under Section 57, and an order was obtained by consent on the 11th March, 2002 when Kelly J. ordered Mr. Fenton to cease using Coolamadra as a dump or site for receiving waste materials. This application can therefore effectively be treated as an application for relief under s. 58 but also, if necessary, for an order under s. 57. It is appropriate, therefore, that I set out the relevant provisions of ss. 57 and 58 as follows:

"*57. - (1)Where, on application by any person to the High Court, that Court is satisfied that waste is being held, recovered or disposed of in a manner that causes or is likely to cause environmental pollution, it may by order -*

(a) Require the person holding, recovering or disposing of such waste to carry out specified measures to prevent or limit, or prevent a recurrence of, such pollution, within a specified period,

(b) Require the person holding, recovering or disposing of such waste to do, refrain from or cease doing any specified act, or to refrain from or cease making any specified omission,

(c) Make such other provision, including provision in relation to the payment of costs, as the Court considers appropriate…

(d) Without prejudice to the powers of the High Court to enforce an order

under this section, a person who fails to comply with an order under this section shall be guilty of an offence.

"58. - (1)(a) Where, on application by any person to the appropriate court, that court is satisfied that another person is holding, recovering or disposing of, or has held, recovered or disposed of, waste, in a manner that is causing, or has caused, environmental pollution, that court may make an order requiring that other person to do one or more of the following, that is to say:

to discontinue the said holding, recovery or disposal of waste within a specified period, or

to mitigate or remedy any effects of the said holding, recovery or disposal of waste in a specified manner and within a specified period…

(4) (a) Where a person does not comply with an order under subsection (1), a local authority, as respects its functional area, or the Agency, may take any steps specified in the order to mitigate or remedy any effects of the activity concerned. (b) The amount of any expenditure incurred by a local authority or the Agency in relation to steps taken by it under paragraph (a) shall be a simple contract debt owed by the person in respect of whom the order under subsection (1) was made to the authority or the Agency, as the case may be, and may be recovered by it from the person as a simple contract debt in any court of competent jurisdiction…

(7) Without prejudice to any powers of the court concerned to enforce an order under subsection (1), a person who fails to comply with an order under that subsection shall be guilty of an offence."

Whilst both sections deal with situations where pollution is actually occurring,

s. 57 deals also with cases where it has not happened yet but is likely to occur, whereas s. 58 deals with cases where it has happened in the past.

It will be seen that both ss. 57 and 58 are concerned with environmental pollution. The definition of this phrase is of crucial importance to the interpretation of these sections. I set it out (as contained in s. 5 of the 1996 Act) as follows:

> *""Environmental pollution" means, in relation to waste, the holding, transport, recovery or disposal of waste in a manner which would, to a significant extent, endanger human life or harm the environment, and in particular –*
>
> *(a) create a risk to waters, the atmosphere, land, soil, plants or animals,*
>
> *(b) create a nuisance though noise, odours or litter, or (c) adversely affect the countryside or places of special interest;"*

It will be seen that this definition includes the concept of risk where such is created in relation to waters, the atmosphere, land, soil, plants or animals. I emphasise this because much of the evidence adduced on behalf of the respondents was directed to showing no existing or actual harmful effects occurring in the stream running beside the dump, for example. Such evidence is beside the point, however, once it is accepted (as it was, at least to a significant extent, by the expert witnesses called on behalf of the respondents) that the dumped material caused a risk, for example to the ground water, then such a risk itself constitutes environmental pollution according to this definition. This is not surprising: one of the witnesses for the County Council expostulated during the trial that it was surely not necessary to wait for actual harm to be caused before the Council could provide its case. Indeed not. Environmental pollution is caused if a risk is created to waters, the atmosphere, land, soil, plants or animals.

In the motion initiating these proceedings the orders sought against Mr. Fenton

are that he cease the holding, recovery or disposal of waste at Coolamadra, that he take all measures or steps necessary to prevent or limit the recurrence of environmental pollution being caused or likely to be caused by reason thereof. In addition the order sought against all respondents include that each of them "take such measures or steps as directed by this Honourable Court to be necessary to mitigate or remedy any effects of environmental pollution caused and being caused" by the illegal dumping.

All respondents are also required to put in place an effective on-going monitoring, examination and inspection programme following remediation.

In addition the applicant seeks that each respondent pays the applicant's expenses of managing the land as a consequence of the illegal dumping.

The European Directives

The long title of the 1996 Act states, *inter alia*, that it is an Act to give effect to provisions of certain Acts adopted by the Institutions of the European Communities in respect of the prevention, management and control of waste.

It is appropriate, therefore, that I cite briefly from the relevant European Directives and indeed initially from Article 174 of the Treaty of Rome (as amended).

Article 174 (2), where relevant, provides,

> "2. Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."

The first Council directive on waste was 75/442/EEC of the 15th July, 1975. Whilst much of it (the first 12 articles) were substituted in a later directive it is, nonetheless, appropriate that I cite selectively from the preambles as follows:

"*…Whereas the essential objective of all provisions relating to waste disposal must be the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste;....*

Whereas that proportion of the costs not covered by the proceeds of treating the waste must be defrayed in accordance with the "polluter pays" principle".

As already indicated the first 12 articles of the foregoing directive were replaced by 18 fresh articles and two annexes by Council Directive 91/156/EEC of the 18th March, 1991. It is therefore appropriate that I cite selectively from these 18 articles as follows:

"Article 1

For the purposes of this Directive:

"waste" shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard…

"producer" shall mean anyone whose activities produce waste (original producer) and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste;

(c)"holder" shall mean the producer of the waste or the natural or legal person who is in possession of it".

The words "disposal" and "recovery" are defined by reference to a list set out in parts A and B of Annex II respectively.

(g) "collection" shall mean the gathering, sorting and/or mixing of waste

for the purpose of transport....

Article 8

Member States shall take the necessary measures to ensure that any holder of waste:

- has it handled by a private or public waste collector or by an undertaking which carries out the operations listed in Annex II A or B, or

- recovers or disposes of it himself in accordance with the provisions of this Directive....

Article 15

In accordance with the "polluter pays" principle, the cost of disposing of waste must be borne by:

- the holder who has waste handled by a waste collector or by an undertaking as referred to in Article 9, and/or

- the previous holders or the producer of the product from which the waste came....

Annex IIA

Disposal Operations

N.B.: This Annex is intended to list disposal operations such as they occur in practice. In accordance with Article 4, waste must be disposed of without endangering human health and without the use of processes or methods likely to harm the environment.

D1 Tipping above or underground (e.g. landfill, etc.)"

It will be seen, from the above, that landfill tipping above or under the ground is

the first listed of disposal operations in respect of which the "polluter pays" principle applies and all provisions (in the directive) relating to waste disposal have as their essential objective the protection of human health and the environment against harmful effects caused by the collection (as defined) transport, treatment, storage and tipping of waste.

There are separate instruments of the EC dealing with hazardous waste: these define hazardous wastes by reference, *inter alia*, to a list of wastes which display any of the properties contained in another list. Predictably these properties include infectious substances believed to cause disease in man or other living organisms and toxic substances which may involve serious health risks. The first category of waste displaying such properties listed in the relevant directive is

1. Anatomical substances; hospital and other clinical wastes:

Whilst this application relates primarily to an allegation that the respondents have caused environmental pollution, some of the evidence from both sides was directed to establishing or otherwise the presence of hazardous waste at Coolamadra. It is appropriate therefore that I should have briefly alluded in the foregoing to the essential concepts underlying the relevant instruments.

The "polluter pays" principle.

Section 5 of the 1996 Act includes the following:

""the polluter pays principle" means the principle set out in Council Recommendation 75/436/Euratam, ECSC, EEC, of 3 March, 1975 regarding cost allocation and action by public authorities on environmental matters".

It will be seen, that the transposition into Irish domestic law of this principle which applies universally throughout all European legislation dealing with waste (hazardous or otherwise) - by reason of its presence in the Treaty itself - has been done by way of reference

to the Euratam Recommendation regarding cost allocation and action by public authorities on environmental matters.

This instrument is in fact a recommendation by the Council to Member States. It refers to principles and rules contained in a communication from the Commission to the Council and sets them out. I cite, partially, from these principles and detailed rules, governing their application as follows:

> "2. To achieve this"
>
> [namely the allocation of costs connected with the protection of the environment against pollution throughout the Community in accordance with principles which avoid distortion of competition affecting trade] "the European Communities at Community level and the Member States in their national legislation on environmental protection must apply the "polluter pays" principle, under which natural or legal persons governed by public or private law who are responsible for pollution must pay the costs of such measures as are necessary to eliminate that pollution or to reduce it so as to comply with the standards or equivalent measures which enable quality objectives to be met...
>
> A polluter is someone who directly or indirectly damages the environment or who creates conditions leading to such damage.
>
> If identifying the polluter proves impossible or too difficult, and hence arbitrary, particularly where environmental pollution arises from several simultaneous causes ("cumulative pollution") or from several consecutive causes ("pollution chain"), the cost of combating pollution should be borne at the point in the pollution chain or in the cumulative pollution process, and by the legal or administrative means which offer the best solution from the administrative and economic points of view and which make the most effective contribution

towards improving the environment….

Under the "polluter pays" principle, standards and charges, or a possible combination of the two, are the major instruments of action available to public authorities for the avoidance of pollution..."

I have been referred to paragraph 1.32 of EC Environmental Law (4th Ed.) by Professor Ludwig Kramer where he says

"...the polluter pays principle was originally an economic principle and was understood as expressing the concept that the cost of environmental impairment, damage and clean-up should not be borne via taxes by society, but that the person who caused the pollution should bear the cost."

Whilst it is clear from the foregoing that the main thrust of the relevant objectives concerned with the implementation of the "polluter pays" principle is to ensure that the polluter bears the costs of adhering to appropriate standards and pays relevant charges, and is thus largely prospective in its thrust, the principle applies *a fortiori* to the interpretation of domestic law intended retrospectively to deal with situations where a polluter has caused environmental pollution in breach of the law or, for example, the terms of a relevant licence.

Factual background

There is something of the order of 8,000 tonnes of dumped material on a part of the lands at Coolamadra comprising an area of some 100 metres by 26 metres by some 4 metres deep. There is no licence or permit for such dumping which was unlawful. It had been going on for some time prior to August, 2001 and up to then comprised apparently builders' rubble (inert) but also some domestic waste (putrescible), but not it seems hazardous waste that is known of.

In early August, 2001 Sonia Dean, Assistant Engineer with Wicklow County Council and employed in the Environmental Services Department and holding, *inter alia*, degrees in chemistry and biotechnology, noticed a truck carrying waste on the road which was not covered and gave off a terrible smell. She followed it to Coolamadra and there found a small quantity of domestic waste in an area which had been excavated possibly for sand or gravel. She spoke to Mr. Fenton, warned him of the illegality of what he was doing and the penalties and risks involved, and he told her that he would cease dumping, clean up the site and remove the waste therefrom to an authorised disposal facility. She told him she would carry out a further inspection of his lands in due course.

Despite this promise he was approached by a man in early October who was unknown to him and agreed to the dumping of waste on his land charging £90 per load. He says that about eleven truck loads of waste were deposited on his land. After the waste had been dumped he leveled the site and covered it with clay. He did this by machine and this process caused the intermingling of the waste with the material already on site. He says he was not aware that the waste was hazardous waste until it was pointed out to him by Sonia Dean and from that point on he claims to have co-operated fully with Wicklow County Council.

It emerged in the course of the hearing that the unknown man who approached him at the beginning of October was Martin Munnelly, who also drove the eleven truck loads either himself or with his brother Adrian.

It also appears from the evidence that Martin Munnelly approached Mr. Moriarty in early October and was taken on by him to drive truck loads of rubbish from Dublin Waste's Collection facility at Sheriff Street, Dublin, to, Mr. Moriarty claims, authorised dumps such as Nurneys in Kildare. In fact Martin Munnelly dumped the material which included hazardous hospital waste from the Mater Hospital and the Blackrock Clinic at the Coolamadra dump paying £90 to Mr. Fenton for each load. He was paid £500 per load by Mr.

Moriarty. I will return in more detail to this aspect at a later point in this judgment.

The operation at Sheriff Street was authorised by a licence from the Environmental Protection Agency (E.P.A.) to which there were attached a number of conditions. The evidence shows that a total of eleven notices were served on Dublin Waste by the E.P.A. between 26th June, 2000 and 6th November, 2001, alleging breaches of the conditions attaching to the licence. Several of these required cessation by Dublin Waste of the transfer of waste to unauthorised facilities. These notices were admitted in evidence by me after argument and to establish that they were in fact served and that Mr. Fenton was put on notice of the requirements of the E.P.A., but not to prove the alleged breaches since there was no direct evidence thereof.

The evidence also established that the oral agreements between Dublin Waste and the Mater Hospital and the Blackrock Clinic were to the effect that Dublin Waste would collect what Mr. Moriarty described as *"health care non-risk waste"* , which excluded hazardous hospital waste such as blood-contaminated materials or "sharps" . It further emerged that under the relevant regulations and procedures the hospitals as producers of hazardous hospital waste were obliged to stream it at source separately from other waste. Dublin Waste collected material from the Mater Hospital and Blackrock Clinic by sending their own sealed containers to the hospitals. The waste was loaded into these and compacted on site and the entire sealed and delivered to Dublin Waste by drivers who owned their own trucks but were contracted to carry exclusively for Dublin Waste and who operated to their direction. The containers were owned by Dublin Waste. In this way it would only have been when the waste was off-loaded at the facility at Sheriff Street that Dublin Waste would have had an opportunity to identify hazardous hospital waste which they were not authorised to handle and which under their agreement with the hospitals, according to Mr. Moriarty, the hospitals were obliged to exclude. Mr. Moriarty in evidence said that he relied on the hospitals to comply with this term

of the agreement but admitted that he was not sure how the hospitals would be aware of this.

The system operated at Sheriff Street was that the incoming containers were dumped on the floor of this large purpose built facility so that it could be sorted and separated. This operation was done by an operative from a high vantage point on a machine. The operative would see large metal items such as cylinders which would be taken out and set aside. He did not in practice see hazardous hospital waste which would have been packed in either hard yellow containers (for sharps) or yellow bags (for blood-contaminated objects and so on).

In evidence Mr. Moriarty said that two men had been killed on the floor of this facility and accordingly the inspection and sorting had to be done in the manner described. This system was agreed, he said, with a Mr. Kevin McDonald of the E.P.A. with whom he had a lot of meetings. Under cross-examination he acknowledged, however, that he would have indicated to Mr. McDonald that this method entailing inspection from a high vantage point on a machine would have been satisfactory for segregating the waste. He said that the truck drivers operated under the directions of Dublin Waste and admitted that a visual check would not in fact reveal the presence of hazardous hospital waste. In effect he relied on the hospitals not to include hazardous waste in their waste stream for Dublin Waste and presumed that they would not do this but could not say for definite that they knew that he was relying on them to send him no hazardous waste.

The truck drivers were given swipe cards and the system at Sheriff Street was that the lorries were weighed with and without the loads and the swipe card system was set up to indicate the destination (i.e authorised dump) where the outgoing waste was being taken to. They were paid monthly by reference to this information. Martin Munnelly only worked for Dublin Waste for three weeks before the hazardous waste was discovered at Coolamadra: he had not been working for long enough to get a swipe card apparently and in any event he had

not been given one. The operatives at Sheriff Street did keep a tally on the number of truck loads he delivered on behalf of Dublin Waste - fourteen in all - and he was paid in full at the rate of £500 per load by Mr. Moriarty (being the amount which Dublin Waste would have had to pay if the material had been brought to an authorised landfill) notwithstanding the fact that at the time he was paid Mr. Moriarty was already aware that he had delivered the material to an unauthorised dump and Dublin Waste was already having to explain itself to Wicklow County Council.

If Martin Munnelly had taken the loads to an authorised landfill he would have been paid something in the order of £350 per load because Dublin Waste would have had to pay some £150 (either in advance or otherwise) to the landfill direct. Each load therefore would have cost Dublin Waste £500. The only explanation that Mr. Moriarty could give in evidence as to why he paid all of this money to Mr. Munnelly when the waste had been brought to an unauthorised dump was that he felt that he owed him the money. This was paid at a time, apparently, when Mr. Moriarty was aware that there were going to be problems for Dublin Waste in relation to Coolamadra. I find this evidence of Mr. Moriarty's unconvincing if it is intended to be an entire explanation in relation to this payment. Even if there is nothing more to be said, however, the fact is that it demonstrates that Mr. Moriarty was prepared to pay the same money for unauthorised dumping as he was for authorised dumping in accordance with the explicit terms of his licence. This not only facilitated unauthorised dumping but suggests that his only concern was how much removal of the waste from Sherrif Street was to cost Dublin Waste without any regard to making sure that it ended up in an authorised landfill.

Sonia Dean's promised further inspection of Coolamadra occurred on the 22nd October, 2001 and revealed that a significant amount of unauthorised material had been recently deposited since her visit to Mr. Fenton the previous August. Steps were immediately taken to have this illegal dumping stopped, the site sealed off and protected and the source of the illegal

material identified. Some of the material comprising torn bags found at Coolamadra had *"Dublin Waste Limited"* on them and accordingly these respondents were contacted by Wicklow County Council. They immediately accepted responsibility for the amount which their operatives had dumped comprising somewhere, as they thought, between 200 and 400 tonnes. Dublin Waste issued a press release on 2nd November, 2001 stating that following a thorough inquiry a driver employed by a firm subcontracted to them may have been responsible for a small part of the dumped material at Coolamadra. The driver had been dismissed. The company was unaware of the existence of this site and never sanctioned its use. The company was shocked and announced a donation of £5,000 to the local community to indicate its commitment to the environment.

Preliminary Investigations

On 6th November, 2001 there was a meeting with Wicklow County Council at which the County Manager, the Law Agent and three others attended for the Council and Mr. Moriarty, Managing Director of Dublin Waste and a Mr. Con Herr, Operations Manager, attended for Dublin Waste. The whole matter was gone into in detail and the lengthy minutes of that meeting note that the Manager asked whether Dublin Waste were taking responsibility in that they would deal with the clean up costs *etc*. and the removal of the waste. The Managing Director, Mr. Moriarty stated they would. Mr. Herr asked that the Council put its request in writing and inform Dublin Waste exactly what the Council wanted them to do. He, Con Herr, then stated that in principle Mr. Moriarty was accepting responsibility but that the Council wanted Louis Moriarty to put his head into a noose now and that he could not do that. The meeting ended with Con Herr requesting the Council to write a letter stating what it needed to be done with an estimate of costs, monitoring, security and so on. I set out this matter in some detail because it was contended on behalf of Dublin Waste that they offered without qualification from the outset to do everything that Wicklow County Council is now seeking to

achieve by court order.

At this time, November, 2001 Wicklow County Council concentrated on sealing the site, securing it and ascertaining the origin of the waste, the contents of the waste and the likely effects of the waste. The site also became a criminal investigation site secured by An Garda Síochána for that purpose. They were investigating the possibility of criminal offences under the Act of 1996 and associated legislation. It was not until they were finished apparently in June, 2002 that third parties such as Dublin Waste and their agents could have access to the site.

Wicklow County Council employed the services of ECO Safe Systems Limited a company which specialised in managing and advising in connection with hazardous waste issues. They were advised initially that the costs of remediation could be somewhere between €3 million and €20 million depending, inter alia, on whether materials at Coolamadra could be removed to landfill within this country. The site at Coolamadra was wholly unsuitable as a dump site for four main reasons, namely, it was right beside a stream which was a tributary of the River Slaney (some 800 metres away), it was situated on a worked out sand and gravel pit and was therefore on a relatively porous bed, a residential farm house occupied by Mr. Fenton was close by and the configuration of the terrain meant that the materials were likely to flow away from the dump in different directions. It would not be possible to contain the unauthorised material which would therefore have to be wholly removed. The best way of doing this would be to establish a containment area in which the hazardous materials would be located, segregating the materials into various streams and disposing of each appropriately.

Before describing the nature of the hazard found at Coolamadra I should complete this recital of the pre-trial sequence of relevant events. On 10th January, 2002 Wicklow County Council sent to Mr. Fenton a notice requiring him to refrain from unauthorised dumping, to undertake to refund all costs incurred to date by Wicklow County

Council and to submit his proposals for mitigating and remedying the effects of the dumping. Similar notices were sent to the other respondents on 5th February, 2002. These proceedings were authorised by Manager's order of 12th February. On the same date the solicitor acting for Dublin Waste, Mr. Moriarty and Mrs. Moriarty wrote undertaking to refrain from unauthorised dumping and undertaking to:

> "discharge all expenses directly incurred in relation to the waste deposited by them or their agents. (At the meeting) it was agreed that the County Council would furnish our clients an estimated total of such expenses. To date our clients have not received this estimated schedule of costs from Wicklow County Council.
>
> Our clients again reiterate their undertaking to remove all waste deposited by them or their agents ..."

Further the letter specified that in order to mitigate or remedy the effects of the dumping these respondents were prepared within fourteen days of receiving authorisation from Wicklow County Council to send their own contractor to the site to commence work involved in the task referred to above.

It is clear from the foregoing that the offer from Dublin Waste was at no time unqualified. On the contrary, their offer was limited to the consequences of the waste which their subcontractor had dumped in the landfill, whether that was 200 tonnes or 400 tonnes. This qualified offer was maintained by Dublin Waste and Mr. and Mrs. Moriarty at the trial. As will be seen hereafter at no stage was it possible to segregate the material dumped by these respondents' subcontractor from the remainder in such a way as to leave no contaminated material behind. On the contrary from the very beginning, due in large part to the mixing which occurred when the Mr. Fenton leveled the incoming material and then covered it with top soil, the entire landfill became contaminated and it was the advice of the consultants engaged by the applicant that the entire should be removed. At no point did any of the respondents

undertake without qualification to be responsible for this operation of removal.

Moreover the evidence of Donal O'Leary on behalf of the applicant was to the effect that the extent and cost of the operation required at the conclusion of the trial was no greater than was needed when he was first required to consider remedial action. Whilst Dublin Waste made the point at the trial that they had requested details of work and costings from the applicant which either were not furnished or were furnished too late, these requests were always in the context of an undertaking that Dublin Waste would be responsible *only* for the material deposited by its subcontractor. From the evidence this was not only an inadequate solution at any time but was also impossible to achieve at all times.

The Proceedings

The proceedings were initiated and an order restraining dumping was made by consent on the 11th March, 2002. On that date Kelly J. dealt also with a challenge by the respondents seeking to have the proceedings struck out because they were brought by way of notice of motion which was required in the Act of 1996 Act in respect of s. 57 proceedings only. This challenge failed. A subsequent order was made by McKechnie J. on the 29th April, 2002 giving liberty to join the hospitals as third parties but as I have said I set aside this order on the 14th June, 2002 having heard legal argument.

By letter of the 7th June, 2002 Wicklow County Council wrote to the solicitor for the respondents detailing the works and steps required to be carried out at Coolamadra.

Access was finally permitted to consultants on behalf of Dublin Waste on the 3rd July, 2002, the Garda Síochána having released the site, on the 13th May, 2002 and appropriate measurements and surveys were carried out. I will deal with these issues at a later point.

The proceedings were initiated by way of notice of motion and grounding affidavit as already indicated. They came on for final determination, following the interlocutory

orders referred to above, before me in July 2002. An initial objection was taken on behalf of Dublin Waste and Mr. and Mrs. Moriarty on the basis that there was such a conflict between the parties that the entire proceedings should be heard by way of oral evidence. I refused to accede to this objection and direct a plenary hearing in part because this ground of objection was dealt with in principle, at least, in the judgment of Kelly J. delivered the 11th March, 2002 but also because the matter appeared extremely urgent from the point of view of protecting the environment and I was not prepared to accommodate any avoidable delay. I did make an order providing, however, for cross-examination on behalf of these and the first respondent of the affidavits filed on behalf of the applicant and also indicated that I would take a flexible approach to permitting the filing of further affidavits on behalf of these respondents should they so wish at a late stage. Such affidavits were in fact filed and the relevant deponents subjected to cross-examination.

Counsel for these respondents when renewing the objection at the conclusion of the hearing accepted that apart from the foregoing he had not raised interim objections in the course of the hearing. In the course of the hearing I granted adjournments, of brief and medium duration, at the request of the parties including these respondents and on one occasion agreed not to sit on a particular available court hearing day towards the end of the hearing to accommodate the parties. In lieu and with the agreement of all parties, written submissions were furnished and supplemented submissions and counter-submissions were heard by me on a subsequent day.

As may be seen from the summary of evidence set out hereafter there was not in fact a very wide divergence between the parties in relation to essential factual matters or indeed in relation to some key questions of professional opinion. Given the urgency caused by the threat of significant environmental pollution the manner in which the case was conducted was, in my view, not only appropriate but entirely fair to all parties. In saying this I am not in any

way suggesting that in a case of less urgency the proceedings must necessarily be by way of plenary hearing: on the contrary, the judgment of Kelly J. of the 11th March, 2002 leads, in general, to the opposite conclusion.

The Environmental Hazard

Sonia Dean has given evidence that on her follow up inspection at Coolamadra on the 22nd October, 2001 it was immediately obvious that there had been significant recent activity since her inspection in August, the level had been significantly raised since then with part of the bank to the river having been dug away. She found latex gloves, pharmaceutical products and thereafter work on site was carried out with protective clothing, gloves and boots. Trial holes were dug producing an overpowering smell unlike the smell of ordinary decomposing domestic waste. It smelled like stale blood. Apart from gloves, hospital grips and tubing were found, bags were uncovered containing blood-stained swabs, bandages, disposal theatre closing tissue, plastic syringes and pharmaceutical packaging. Laboratory waste was found as was documentation with names and addresses of individuals, notebooks and diaries. Slides containing microscope images of cells labelled with womens' names and account numbers with names and addresses were found. An Garda Siochana were notified and requested to secure the site which they did and it became a crime scene as already indicated. Warning signs were put up and the lands monitored on a 24 hour basis.

Following this a river survey was done which showed that the river was in a healthy state and contained fish. The risk therefore was low for the time being given that the deposit was recent. It can take months or years for leachate to form. The landfill however represented a serious hazard for the future and needed urgent remediation. Heavy rain could produce a collapse of part of the site into the stream. The site was divided into eleven grid sections under the advice of Donal O'Laoire from ECO Safe Systems Limited. Mechanical and hand excavations were done on eight of the grids, the other three being too unstable to

work. Examination revealed yellow plastic hospital ward bags containing soiled dressings used incontinence pads, used sanitary towels and syringes, as well as black plastic bags with *"Dublin Waste"* inscribed on them. There was a gas cylinder. There was also stained dressing material, plastic bags of different colours (green from the Blackrock Clinic) red and clear. Many yellow bags were found containing soiled dressings, plastic forceps, used swabs, sharps, sheaths and packaging. An apparatus for intravenous administration of fluids and drugs for blood sampling was found.

On analysis of 22 samples of hospital waste the presence of blood was found on 20 of them. Because the waste was intermingled it was considered that the entire site must now be treated as contaminated so that not only all waste but all soil would have to be removed therefrom.

Donal O'Laoire, with relevant primary and post graduate degrees, assisted and directed in connection with the investigation and in advising Wicklow County Council. He worked closely with his partner in ECO Safe Systems Limited, Dr. Ronald Russell. Both of these gave evidence. The stream is well stocked with fresh water fish and is a spawning ground for game fish. There is a farm house immediately adjacent to the dump. His affidavit deposes to similar findings to those of Sonia Dean's. In addition he mentions finding food waste and animal carcasses, construction waste, chemical waste and domestic waste. He says that the hospital waste was spread over the entire site and that uncovered hazardous hospital waste was accessible to birds and vermin. Not all hospital waste is hazardous but blood and any items visibly soiled with blood are so classified as is contaminated waste from patients with transmissible infectious diseases, items contaminated with bodily fluids, human tissue, sharps (needles, scalpels, razors, stitch cutters and the like) radioactive and chemical waste. Non-risk waste includes domestic waste, confidential material including shredded waste documents, medical equipment not contaminated with blood or hazardous bodily fluids and

potentially offensive materials which is assessed as non-infectious. There was no evidence of treatment of the hazardous hospital waste.

On his preliminary inspection on the 25th October, 2001 there were signs of potential erosion of material from part of the site into the adjoining stream during heavy rain run off. There was a risk of a major environmental disaster pollution in the area. He concluded that the waste posed a health and safety risk and also an environmental risk. The health and safety risk related to persons working on or near the site including biohazard from potentially infectious materials, danger from injury from sharps or pharmaceutical waste. The environmental risk was a threat to the river system and the risk of blood, biological and chemical pollution of river and ground water.

Part of the site was unstable and there was a risk of a landslide into the river. It posed an environmental hazard to animals (sheep, deer, dogs, foxes, birds and vermin) nearby as did windblown litter. This serious situation merited a full systematic assessment which was carried out by O'Laoire Russell Associates. All personnel working on the site had to receive training, immunisation and protective equipment. Security was maintained and the site monitored for gas and radiological hazards. A daily permit-to-work system was introduced. The site was divided into eleven search grids, three of which were so unstable as to preclude further physical investigation. Representative samples were removed for analysis and the entire photographed and documented.

Donal O'Laoire gave an account of what was found at each of the eight investigated grid sections. Hospital waste was found in each of them. 21 samples were chosen at random and forensically examined for the presence of blood. It was found in 21 out of 22. The blood on hospital waste was not pre-treated or sterilised and was therefore hazardous. Parallel samples were made available for interested third parties. Testing and analysis confirmed multiple hazards. He estimated the landfill contained approximately 10,000 cubic

metres (8,000 tonnes) of mixed materials. 60% of this was waste. This calculation included for a depth of some 1½ metres above (soil coverage) and beneath the waste material. The precautionary principle meant that the entire contents should be treated as hazardous waste; it would not be sufficient to remove only the waste from the site. The site itself was unstable and of poor construction and there was no management of leachate. Its proximity to the river and fear of partial collapse posed a threat in the event of rain. There was a serious threat to fish in the river.

He sets out a number of remediation options and advises that the most feasible and economic would involve segregation of the waste on site and disposal of the various streams appropriately both within and outside the State. The cost of this option he estimates at between €4 million and €5.5 million. There would also be a cost of establishing a monitoring programme at €80,000 with yearly costs at €20,000.

An affidavit was sworn by Thomas Keenan, an appropriately qualified environmental consultant and also Director of the National Environmental Services Agency on behalf of Dublin Waste. He states that the primary obligation rested on the producer or holder of the health care risk waste to divide it into risk and non-risk waste before it leaves the relevant premises. He states that much of the material found at Coolamadra was health care risk waste rather than health care non risk waste and therefore should not have been permitted by the hospitals to be transferred to the Dublin Waste premises at Sheriff Street.

He says that the risk of having flooding would occur only if the level of the valley floor at Coolamadra would be under approximately a metre of water. He says that the option espoused for remediation by Mr. O'Laoire is impractical given the admitted scarcity of licensed landfill facilities for the State. (I note in passing that all witnesses agreed that a producer of hospital hazardous waste had an obligation to separate it into streams).

Six Months Later

An affidavit sworn by Sonia Dean on the 23rd April, 2002 describes the then current on-site situation. Leachate streams were forming on site and she thought possibly running into the tributary river of the River Slaney. This was in the grid sections 1 to 5. In grid sections 6 to 10 she found 13 leachate streams some of them oily. Some ran to the centre of the site and seeped into the ground. She could not detect any leachate stream entering the river but the closest stream was about two metres from the river. It then seeped into the ground before reaching the river bank. There was evidence of slippage of the material in the direction of the river and heavy rainfall posed a significant threat. It would be impractical to suggest that one could simply extract the 400 tonnes of waste deposited by Dublin Waste as the entire site was contaminated. An affidavit from Donal O'Laoire of the same date states that the environmental status of the site had deteriorated since November and was now threatening the environmental integrity of the river. He suggested a contained intermediate storage facility with the capacity of fifteen hundred metric tonnes of waste.

This affidavit from Donal O'Laoire contains similar evidence to that in Sonia Dean's. He also states that Dublin Waste was successfully prosecuted twice by the Environmental Protection Agency with regard to non maintenance of records as required by its waste licence and also with regard to use by it of unauthorised facilities for the disposal of waste.

I refer to this because these averments were not contradicted in a subsequent affidavit of Mr. Moriarty dated the 7th May, nor in oral evidence at the hearing before me. In that affidavit Mr. Moriarty avers that on the 6th November he informed representatives of the Council that Dublin Waste was prepared to undertake the removal of the 400 tonnes identified as having been disposed of by its subcontractors. He was advised that if that had happened the risk of environmental pollution would have been significantly minimised by such a prompt

response. The Council were to come back to him in regard to this but did not do so. He accepts that with the benefit of hindsight "and in the context of contemporary industry practice" the system at Sheriff Street was imperfect in certain respects. This seems to be a reference to the fact that his sub-contractors were paid notwithstanding that they might not be able to prove that they had delivered the waste to an authorised dump.

He queries the relevance of the EPA notice evidence in a supplemental affidavit of Edward Sheehy, Manager of Wicklow County Council and states "insofar as these notices are relevant to the within proceedings, which is denied, I say that the matters contained therein have been dealt with by the District Court." He goes on to admit however, with the benefit of hindsight and in the context of contemporary industry practice the system of waste management at Sheriff Street was imperfect in certain respects. When subsequently dealing with the specific averments contained in the affidavit of Donal O'Laoire to the effect that he was successfully prosecuted for failing to keep records and for using unauthorised facilities he simply says that these issues were dealt with (generally) in his response to the affidavit of Edward Sheehy. There is no specific denial of the averment that he was successfully prosecuted. Nor was there any in oral evidence.

A second affidavit from Thomas Keenan on behalf of Dublin Waste suggests that whereas it is accepted that there is a need for covering waste when it was discovered, an impermeable liner or capping of poorly permeable clay would have been better than using sandy or gravely soil. He also avers that all options should be considered without delay (as of the 7th May, 2002).

The Hydrogeological and other Evidence

An affidavit was sworn on the 16th July by Shane Bennett hydrogeologist on behalf of Dublin Waste. He carried out a survey of Coolamadra with Dr. Emma Sweeney a Project Geologist with SM Bennett and Company Limited on the 3rd July. The purpose was to

investigate possible effects on the nearby stream and to quantify the volume.

There was no visible evidence of leachate entering the stream (this is in accord with the evidence from the applicant's witnesses) nor any other obvious potentially contaminating site. Water analysis upstream and downstream showed greater concentrations of relevant substances upstream than downstream. With regard to estimate of quantity, their survey showed the volume of soil (minus cap material) to be 3,800 cubic metres over a measured area of 2,600 square metres. This is broadly in line with the estimates furnished by Wicklow County Council when one factors in the latter's additional estimates for cap material and underlying material.

Exhibited to this report is a detailed hydrological and waste quantity survey produced by Dr. Emma Sweeney project geologist with SM Bennett and Company Limited. She describes the method of survey investigation and sampling and gives the results. They are in accord with the averments in the affidavit of Shane Bennett. This evidence was responded to in an affidavit sworn by Robert Bracken hydrogeologist on the 18th July, 2002. He holds relevant degrees and has relevant experience. He carried out an inspection on the 17th July to assess hydrogeological conditions and potential risks to groundwater and the stream. He says that there is nothing in Shane Bennett's affidavit dealing with the hydrogeology of the area, that is ground water quality and flow direction. The hydrogeological context has not been established: this is essential to adequately assess the potential risks.

His own inspection suggested that leachate could enter the nearby stream and an underlying aquifer through permeable deposits present at the site. The sample evidence relied on by Shane Bennett is completely inadequate as there was only one sample upstream and one downstream. Normally quality measurements should be linked to stream flow measured over various states of flow.

An affidavit of Ronald Russell partner in the firm of O'Laoire Russell

Associates with relevant expertise and experience sworn on behalf of Wicklow County Council points out that Shane Bennett does not deal with the amount of leachate streams which have formed or are in the process of forming on the landfill site itself. He visited the site on five different occasions and on all of these leachate streams were visible on the riverward side of the landfill. This was most obvious in February prior to growth of grass and weeds. Most were not reaching the river directly as they percolated into the landfill. He noted bandages and other waste in the river and on the other side of the river on these visits. Birds were scavenging and carrying the waste from the site. In February and June he noted gas bubbling. Samples were taken on the 6th March and were analysed. This analysis showed substances moving within the landfill mass some migrating towards the river, vegetation absorbing and incorporating a range of chemicals but measurable impact on the fast running river was still low at that stage.

Samples from a leachate stream in grid five on a site flowing towards the river tributary contained raised levels of manganese as did vegetation in the path of the leachate stream pointing to pollution of the river. The impact on the stream was relatively low at that time. The level of a number of substances analysed from samples taken on the 21st February, were raised, meaning above the mean level in the average domestic landfills (this was clarified in oral evidence as meaning landfills in the UK). Samples of vegetation from the edge of the stream contained very high levels of a number of substances including chromium, copper, nickel, lead, arsenic and barium. These results demonstrated evidence of leachate run off from the landfill to the river tributary on a very regular basis.

There was clear evidence he said that chemicals issuing from the site were finding their way into the river tributary.

He takes issue with Mr. Bennett insofar as he states that his water samples showed greater contamination upstream than downstream. Ronald Russell's samples taken several months earlier also on a once off survey demonstrated the opposite. Further leachate

samples taken on the 28th June, bear out his initial findings. He noted a new dark colour leachate stream on this occasion and gas bubbling. Analysis showed most parameter values to have increased consistent with maturation of the landfill. Many chemical substances will spread throughout the site, contaminate all materials present and later enter the ground water or river due to gravity and rainfall. They will also get into the vegetation with consequent threat for animals in the vicinity. He criticises the hydrological survey in the affidavit of Shane Bennett because the five bacterialogical parameters measured are not particularly relevant to potential hazard associated with landfill contents (unless the numbers decrease downstream which would indicate a toxic effect on them). The survey must be approached with scepticism.

A second supplemental affidavit of Sonia Dean (18th July, 2002) accepts that there was no direct evidence of leachate actually running off into the stream but criticises the survey because it is notoriously difficult to detect any contaminant in a fast flowing stream. The absence of any reference to the speed of flow of the river or the approximate volume of water means that the results are unreliable. The only accurate measure of the level of contamination of the river (a biological river survey) is not a viable option if pollution is to be prevented rather than measured when it occurs.

She further avers that Wicklow County Council's concern is not only with the watercourse but also asserts that the lands themselves have been subjected to serious environmental pollution because they are now useless as are the adjoining lands which cannot be used in the future for grazing or other agricultural use. Furthermore contamination is being caused to wildlife scavenging in the area and also there is a threat to wild deer and other species such as rabbits, rats and birds. These are prey to larger creatures and infection or disease may be picked up and transmitted into the food chain over a much wider area. Sheep and lambs were found roaming in the area on and around the landfill site. This poses a threat to the human food chain which cannot be overestimated. The Council wrote to Mr. Fenton in March

2002 asking him to tag the sheep and lambs but he has not done it.

She acknowledges that if only construction and demolition or commercial waste had been disposed of on site that would present a much lesser threat of environmental pollution and the mitigation and remediation effects would be significantly less onerous. A final affidavit from Donal O'Laoire does not contest the volumetric estimates of Dublin Waste's experts but insists that the entire site must be urgently remedied by total removal and states that the temporary remediation works outlined by him in April would no longer be appropriate or sufficient because of the significant pollution of the site itself which has occurred.

Oral Evidence

There was cross-examination of these experts at the hearing. Mr. O'Laoire said that the works which he advised were required to remediate the site were no different now than they had been in October. Even then it would have been impossible to separate these wastes; the damage had already been done and the material would have had to have been all removed from the site. Shane Bennett accepted that his affidavit was carefully worded when it said there was no evidence of leachate directly reaching the stream because there may be contaminants entering the stream that were not visible. There is leachate on the site and there is a risk of environmental pollution.

He accepted that only limited conclusions could be taken from his one off upstream and downstream samples in the river and he acknowledged that if pollutants were on the land then he would be concerned about it actually reaching the groundwater although he would not say that it is reaching the groundwater. He accepted that best practice required the doing of what was necessary to prevent percolation into the groundwater. He said that tests should be done to establish the position regarding the groundwater involving investigation down to bedrock and identifying the groundwater levels and direction of flow. Thomas Keenan accepted that he could not say that there was no prospect of the leachate entering the

water system. He advised a full investigative survey as early as April which he believed was communicated to Wicklow County Council. He was at a meeting on the 8th May, the purpose of which was to discuss his detailed proposals for investigating the site and ascertaining the most appropriate remedial action.

I ruled out further evidence in relation to this meeting as the details thereof had not been put to Edward Sheehy, County Manager when he was being cross-examined. The context was that this case had been fast tracked in order to achieve an early resolution and order if possible before the end of July. It had been made clear to all parties that the evidence had to be completed on Tuesday the 23rd July, and submissions by Friday the 26th (preceded by written submissions on Tuesday the 23rd). In these circumstances there was no room for adjournment or latitude given that the details of these discussions had not been put to the County Manager.

Thomas Keenan gave evidence that he would advise further extensive site investigation before remedial works could be planned or programmed. This would involve hydrogeological testing, site soil testing, ascertainment of the ground conditions and the impact of the material on the air, water and soil.

Ronald Russell gave evidence that the scientific evidence that pollution was occurring was contained primarily in the results of samples taken from the vegetation. He would not have expected proof to come from samples taken from the river water. The levels recorded in the vegetation were between forty and hundreds of times above the mean and that comprised a clear indication that environmental pollution has occurred.

The Waste Licence

I now set out some relevant conditions attaching to Dublin Waste's licence which authorises:

"Storage prior to submission to any of the 12 activities listed in the third

schedule to the 1996 Act."

These include deposit on, in, under land and incineration on land or at sea.

This storage is, however, subject to a number of conditions. I set out some of the relevant ones as follows:

"3.1 The licensee shall make written records of the following incidents:

…(f) Any occurrence with the potential for environmental pollution….

3.9 The licensee shall maintain a written record or a record in a format to be agreed with the agency for each load of waste arriving at and departing from the facility. The licensee shall record the following:

A. the date of arrival or dispatch;

B. the name of the carrier….

E. a description of the waste….

I. the quantity of waste leaving the facility, recorded in tonnes;

J. the destination of the load….

5. No hazardous or liquid wastes shall be accepted at the facility….

5.3 Waste acceptance procedures….

5.3.2 Each load of waste arriving at the transfer station shall be visually inspected prior to unloading...any wastes deemed to be in contravention of this licence and/or unsuitable for acceptance at this facility shall be removed for disposal or recovery at an appropriate alternative facility….

5.3.3.1 Within six months of the date of grant of this licence, the licensee shall submit a written procedure for the management of unacceptable wastes received at the facility for the agreement of the agency...

5.3.3.2 All suspect materials identified by the visual inspection of the waste shall be diverted to the Waste Quarantine Area...

5.4 A record of all incoming waste inspections shall be maintained. All wastes shall be checked to ensure that they comply with the requirements of the licence. Any wastes deemed to be in contravention of this licence and/or unsuitable for acceptance at this facility shall be removed for disposal at an appropriate alternative facility. Such waste shall be stored in the Waste Quarantine Area only.

5.5...waste arriving at the facility shall be weighted, documented and directed to the waste transfer building. The waste shall then be deposited on the floor of the waste transfer building for visual inspection. Only following visual inspection and assessment shall the waste be processed.

5.6.1 Waste sent off site for disposal or recovery shall only be conveyed to a waste contractor agreed in writing by the agency. The ultimate disposal facility for all waste shall be agreed in advance with the agency. All waste removed off site for disposal or recovery shall be transported from the facility to the consignee in a manner which shall not adversely affect the environment. In a schedule to this licence under the heading "waste activities" it is specified that activities authorised by the licence shall be restricted to

"storage prior to submission to any activity referred to in a preceding paragraph of this schedule (i.e. the third schedule to the 1996 Act) other than temporary storage pending collection on the premises where the waste concerned is produced

This activity is limited to the temporary storage of commercial and construction and demolition waste at the facility for disposal off site."

The Notice Party

As indicated I gave leave to Mr. Fenton's separated wife to be joined as a notice party. She says that she is joint owner with her husband of 120 acres of an overall 150 acres holding farmed by him at Coolamadra. She claims an interest in the remaining 30 acres which are owned by her husband. To the best of her belief no dumping activity has taken place on the 120 acres jointly owned by herself and her husband. She has lived apart from Mr. Fenton since August 1994 and has not been involved in the management or operation of the farm.

SUBMISSIONS

Applicant's submissions

(a) It is submitted that article 15 of Council Directive 91/156/EEC (The Waste Directive) in referring to the "polluter pays" principle indicates that the cost of the disposal of waste must be borne by the holder of the waste who has it handled by a waste collector and/or the previous holders or the producer of the product from which the waste has come rather than by the community at large except in exceptional circumstances. This principle has been acknowledged in the Act of 1996 which in s. 5 (the definition section) defines "the polluter pays principle" as meaning the principle set out in Council Recommendation 75/436/Euratom, ECSC, EEC of 3 March, 1975 regarding cost allocation and the action by public authorities on environmental matters. This principle means that culpable parties or responsible parties should pay for the remediation or mitigation of the entire effects of any environmental pollution rather than the community and that Irish legislation should be interpreted so as to achieve that objective.

(b) With regard to the issue of causation (both ss. 57 and 58 refer to persons

causing environmental pollution) the Council's primary submission is that once a nexus has been established between the activity of the polluter and the environmental pollution this is itself the causation referred to in these sections and there is no need to establish negligence, fault or actual knowledge on the part of the polluter. Reference is made to the speech of Lord Wilberforce in **Alphacell Ltd. V. Woodward** [1972] AC 824 (a case dealing with what was required to secure a conviction) in a case where brambles, birds and leaves had got into strainers in a system designed to prevent polluting water overflowing into a river, where he said

> "In my opinion, "causing" here must be given a commonsense meaning and I deprecate the introduction of refinements such as causa causans, effective cause or novus actus….
>
> In my opinion, this is a clear case of causing the polluted water to enter the stream. The whole complex operation which might lead to this result was an operation deliberately conducted by the appellants and I fail to see how a defect in one stage of it, even if we must assume that this happened without their negligence, can enable them to say that they did not cause the pollution."

In a second case, ***Empress Car Company (Abertillery) Limited v. National Rivers Authority*** [1997] 2 AC 22 the appellant company's diesel tank drained directly into the river. The tap (which had no lock) was opened by an unknown person and the contents overflowed into the river. The company was convicted of "causing...waste to enter controlled waters". Lord Hoffman said:

"if the defendant did something which produced a situation in which the polluting matter could escape but a necessary condition of the actual escape which happened was also the act of a third party or a natural event, the justices

should consider whether that act or event should be regarded as a normal fact of life or something extraordinary. If it was in the general run of things a matter of ordinary occurrence, it will not negative the causal effect of the defendant's acts, even if it was not foreseeable that it would happen to that particular defendant or take that particular form."

Lord Clyde said:

"I would also wish to avoid the language of foreseeability in relation to the inquiry into causation...Matters of fault or negligence are not of immediate relevance...and….should best be avoided."

It was submitted on behalf of the applicant that in *NRA v. Yorkshire Services Limited* the causing of pollution to enter a river was held by the House of Lords to be essentially a question of fact so that all the water authority had to do was to establish a factual nexus between the acts of the defendant and the pollution of the controlled waters. Accordingly the primary submission of the applicant in this case is that whether or not Mr. Fenton and the Dublin Waste respondents actually knew that hazardous hospital waste was in the matter dumped at Coolamadra or was in the hospital waste delivered to Sheriff Street their activities were connected to the threat of environmental pollution and the actual environmental pollution established so as to constitute each of them as a cause of such pollution.

(c) Alternatively if foreseeability or culpability is to be required then this too has been adequately established in the present case.

Dublin Waste the respondents, were clearly obliged under the terms of their licence to ensure that only non-hazardous material was received at Sheriff Street and in the event that hazardous material was received to identify it and set it aside for appropriate processing. This they patently failed to do because, *inter alia*, if they had complied with the

terms of their licence then hazardous material from the hospitals would not have come into and gone out from their premises at Sheriff Street in the way in which it obviously did. This alone establishes negligence; moreover it is foreseeable that the defective system which they operated at Sheriff Street could result in hazardous waste material being received into and transferred out of their premises.

There was no control over Martin Munelly's destination and once again it was foreseeable that such lack of control and failure to ensure that he delivered to an authorised dump could result in the waste material being delivered to an unauthorised dump.

(d) It was submitted, in addition that the liability of the respondents, Dublin Waste goes to the entire landfill at Coolamadra and not merely to the amount of material for which they accept responsibility. If they had complied with their waste licensing conditions the probability is that the 8,000 tonnes of materials at Coolamadra would not have been contaminated with hazardous hospital and putrescible waste so as to require remediation of the entire. The application of the "polluter pays" principle means that they should pay rather than the innocent party which is the applicant or the community.

(e) It is submitted that it is not necessary for the applicant to establish negligence. If, contrary to this, negligence must be established it is clearly established on the evidence because it is a reasonable inference that there was no compliance by Dublin Waste with the conditions of its licence. This was a breach of their obligations which amounted to negligence the foreseeable consequence of which was the potential and actual pollution at Coolamadra. The type of damage was foreseeable even if the full extent of the damage was not. Negligence is established, however, under Irish domestic law once the type of damage is foreseeable and as has been established in cases such as *Reeves v. Carthy* [1984] IR 348 which followed the *Overseas Tankships (U.K.) Ltd*. v. *Morts Dock & Engineering Co. Ltd. (The Wagon Mound* [1961] AC 388 as applied in particular in *The Wagon Mound* (No. 2), Overse*as TankShip*

(UK) Limited -v- The Millar Steamship Company Pty [1967] 1 AC 617. Reference is made to the judgment of Griffin J. in *Reeves v. Carthy* where he said:

> "since the *Wagon Mound No 1 and Burke v. John Paul & Co. Lt.,* .[1967] IR 277) the law has not required that the precise nature of the injury must be reasonably foreseeable before liability for its consequences follows. In Salmond on "*The Law of Torts*" (16th ed., para. 202 at p. 564), Professor Heuston, with his customary clarity, has concisely and conveniently summarised this branch of the law as follows:-
>
> "Type of damage must be foreseen. It has been made plain that the precise details of the accident, or the exact concatenation of circumstances, need not be foreseen. It is sufficient if the type, kind, degree, category or order of harm could have been foreseen in a general way. The question is, was the accident a variant of the perils originally brought about by the defendants negligence?"

In ***Condon -v- CIE*** Unreported High Court 16th of November 1984 Barrington J. said

> *"I accept that in determining liability for the consequences of a tortious act of negligence, the test to be applied is whether the damage is of such a kind as a reasonable man should have foreseen. I also accept that if damage is of such a kind...it is quite irrelevant that no one foresaw the actual extent of the damage."*

Counsel for the applicant submits that if - contrary to his primary submission - it is necessary for the applicant to establish negligence then these cases lay down the principles which should apply but that, if anything, the Court should be more rigorous in assigning liability to the polluter in light of "the polluter pays" principle which underlies the proper

interpretation of the 1996 Act.

(f) In regard to the first named respondent he allowed his land to be used for unauthorised dumping thereby breaking the law. He must take the consequences. Even if he himself was not actually aware that hazardous hospital waste was being dumped on his land, he was negligent and culpable and it was foreseeable that in the absence of any controls hazardous waste could be dumped as it in fact was.

(g) It may not have been foreseen that the entire contents of the unauthorised dump comprising 8,000 tonnes would have been contaminated but such contamination was of the type foreseeable and accordingly each of the respondents have caused this pollution and is answerable for it. Each of them is liable for the full cost of all relevant remedial action and appropriate steps under ss. 57 and 58.

(h) This applies equally to the third and fourth named respondents. In the case of the third named respondent he supervised the operations at Sheriff Street. In the case of the fourth respondent the evidence is that she did the books of Dublin Waste both before and after the incorporation of the company in 1987. Both enjoyed the fruits of the company's earnings. These individuals, rather than either the applicant or the community, should be made to pay.

The First Respondent's Submissions

(a) It was submitted that the court has a discretion whether or not to make orders because of the use of the word *"may"* in both sections. The cases on the application of *"s. 27"* planning injunctions should apply, *mutatis mutandis*, to the application of these sections.

The applicant's conduct shows that it did not come to court with clean hands and therefore should be refused relief as was the applicant in *O'Connor & Spollan Concrete Group Limited v. Frank Harrington Limited* (Unreported, High Court, Barr J. 26th April, 1983). In the present case the County Manager alleged that Mr. Fenton had not co-operated fully with the applicant but failed to tell the court that Mr. Fenton had given the applicant the

name of a driver of one of the lorries, had given any telephone numbers he had together with vehicle registration numbers (differing front and back in the case of one truck), that he had hired a private investigator (actually without result) and that during the course of the hearing he had by chance seen a lorry driver involved and had communicated this to the applicants law agent. Moreover the applicant had not investigated the possibility of having the Coolamadra material transferred to the Balleally dump site in North County Dublin for deep burial. All of this, it was submitted, showed bad faith on the part of the applicant.

(b) Secondly Mr. Fenton was unaware that hazardous material had been deposited and should be treated only as being culpable for allowing builders waste being dumped on his land rather than anything more hazardous. In this regard the evidence of Sonia Dean is relevant to Mr. Fenton's liability because she said that if only construction and demolition waste had been deposited a much lesser threat with much lesser mitigation and remediation costs would have applied.

(c) Thirdly it is submitted that the orders sought are too vague and uncertain to be appropriate for an order of the court. Indeed the sections by frequent use of the word "specify" and cognates, show that precise orders and not vague orders are the only ones which a court should make.

(d) Fourthly it was submitted that not all remediation options had been fully explored and this should be done before the court makes an order.

(e) It was further submitted that Mr. Fenton could not be said to be a cause of the dumping of hazardous waste when he agreed only to builders material and when Dublin Waste is much more closely associated with such dumping in the present case. The dumping (either by the lorry driver or by Dublin Waste) broke the chain of causation between Mr. Fenton's wrongful act (granting permission for illegal dumping of builders waste) and the consequences of hazardous waste on his land.

The Second, Third and Fourth Respondents' Submissions

(a) It was submitted that the chain of causation between Dublin Waste and the dumping of hazardous material at Coolamadra was broken by the unauthorised actions of their sub-contractor. This act was criminal or reckless in nature and therefore was capable of breaking such a chain.

(b) Secondly primary responsibility for the non streaming of the hospital wastes at source of origin rests with the hospitals and they rather than Dublin Waste should be liable for the consequences as producers of that waste who had failed in their streaming obligations. (c)

Section 9(1) of the Act of 1996 which deals with an offence provides that where a body corporate is proved to have committed the offence with the consent or connivance of a person who is a director, manager or secretary or other similar officer thereof, such person shall also be guilty of the offence. The Act in making it clear that the corporate veil can be lifted in the context of a criminal offence must be taken not to have done so in other contexts such as the present one which is concerned with civil liability. In this regard the Irish Act is different from the Environmental Protection Act 1990 in the United Kingdom which makes specific provisions in relation to civil cases for liability for individuals' responsibility. On the contrary the court should follow the decision of Hamilton P (as he then was) in *Dun Laoghaire Corporation v. Parkhill Developments Ltd.* [1989] IR 447) where he said:

> *"as I have found no evidence of any impropriety by the second respondent in the conduct of the affairs of the first respondent, I am satisfied that he traded with the benefit of limited liability in this case and I would not be justified in attempting to make him personally responsible for the admitted default of the first respondent. Consequently, I will refuse to make the orders sought against the second respondent but as the first respondent is still in existence, though insolvent, I will make the order sought by the applicant against the first*

respondent."

(The context was a s. 27 planning injunction). There is no evidence of impropriety by the third and fourth respondents in the present case and therefore no order should be made against them personally.

(d) The court should make specific orders only, if at all and should follow the lead of O'Hanlon J. in *Meath County Council -v- Thornton* (Unreported, High Court, O'Hanlon J. 14th January, 1994) where despite evidence of contamination of the groundwater the court did not order removal of the relevant waste from the site but only on site remediation as appropriate.

Conclusions

The purpose of the Act of 1996 and of the underlying directives is, *inter alia*, to control and prevent environmental pollution due to the production, handling, recovery and disposal of waste including hazardous waste. Where environmental pollution occurs or is likely to occur then a person who causes this can be made the subject of an order. In interpreting the Act of 1996 I must apply the teleological principle with the result that the Act must be interpreted in a way which achieves these objectives rather than otherwise. If a principle of purely domestic law such as the protection afforded by limited liability in the case of corporations were to operate in a given case so as to run counter to and frustrate the attainment of those objectives then in the absence of any other appropriate remedy in my opinion such a principle must yield to the superior imperatives of those objectives.

Both ss .57 and 58 use the word *"may"* when defining the jurisdiction conferred on the court. In my view this connotes that the jurisdiction is discretionary but, that said, such discretion must be exercised in accordance with principles which include the principle that the objectives of the Act and of the underlying directives must be achieved by the

interpretation and application by this court of those sections.

Causation

Having regard to these objectives in my opinion a court can be satisfied under ss. 57 and 58 that a particular person *causes* or is likely to *cause* environmental pollution if it is established that an activity or omission of such a person brings about or contributes to the bringing about of such pollution notwithstanding the absence of proof of intention, foreseeability or recklessness and further notwithstanding that the act of a third party or some natural event might have intervened as a contributing factor to or subsequent link in the causal chain linking the person to the environmental pollution. To use the language of Lord Clyde in ***Empress Car Company (Abertillery) Limited v. National Rivers Authority*** 2 AC 22,[1999]

> *"in deciding whether some particular factor has played so important a part that any activity by the defendant should be seen as entirely superseded as a causative element it is not a consideration of the foreseeability, or reasonable foreseeability, of the extraneous factor which seems to me to be appropriate, but rather its unnatural, extraordinary or unusual character. Matters of fault or negligence are not of immediate relevance in the present context and the concepts particularly related to those matters should best be avoided."*

To determine that a further element (such as recklessness, foreseeability or deliberate intention) is required before statutory causation is proved would be, in my view to ignore the "polluter pays" principle in its application to the interpretation of ss. 57 and 58 because it would mean that despite the presence of the relevant nexus between the perpetration and the pollution (whether as sole cause, or as part of "cumulative pollution" or of a "pollution chain" - to hark back to the concepts in the Directive) the polluter would not have to pay unless further matters were established, thus resulting in payment by the community or an innocent

party. The "polluter pays" principle requires that the party causing pollution should pay for it in full rather than an innocent party such as the applicant in this case or the community at large. The community at large would *"pay"* for pollution in this sense in my opinion if it is left unremediated or partially remediated.

As already noted *Empress Car Company* was a criminal case. In this jurisdiction there have been a handful of cases which dealt with the question whether intention or recklessness was necessary before a conviction can be obtained in cases involving water pollution and these have resulted in a divergence of judicial opinion.

On the one hand Lynch J. favoured what is known as strict or absolute liability when interpreting s. 171(1) of the Fisheries (Consolidation) Act, 1959 in *Maguire v. Shannon Regional Fisheries Board* [1994] 3 I. R. 580 and his reasoning and interpretation were followed by Murphy J. in the High Court in Shannon Regional Fisheries Board v. Cavan Co.Co. (Unreported: 21 December 1994) and by the majority (O'Flaherty, Blayney J.J) in the Supreme Court in that case, although in their view the point was not relevant on the facts (which established *mens rea*).

In a comprehensive dissenting judgment, Keane J. (as he then was) concluded that Maguire v. Shannon Regional Fisheries Board was wrongly decided because in his view an accused person may avoid liability under the section by proving that he took reasonable care. Keane J. had, after a full review of case law, reached the conclusion that the law should recognize that there is an intermediate range of offences, of which an offence under s. 171 (1) was one, in which, while full proof of *mens rea* is not required and the proof of the prohibited act *prima facie* imports the commission of the offence, nonetheless the accused may avoid liability by proving that he took reasonable care.

I allude to these cases because in an appropriate case which this is not it may be open to a defendant, notwithstanding proof of a causative connection in the sense identified

above, to persuade a court in the exercise of its discretionary jurisdiction that no order should be made against it on the basis that such defendant had taken all reasonable steps to avoid the pollution concerned or for other good reason. It is not appropriate that I make a ruling in this regard in the present case as the facts would not permit any such defence.

If I am incorrect in the foregoing and if the correct interpretation of ss. 57 and 58 requires the establishment of negligence in the traditional sense then I would hold that on the facts of the present case both Mr. Fenton and Dublin Waste were negligent in this sense. Mr. Fenton knowingly breached the law (having promised Sonia Dean that he would cease dumping at Coolamadra); accepted builders rubble from an unknown lorry driver who paid him £90 a load and failed to ensure that only builders rubble and nothing else was dumped on his land where he himself also dumped material during the relevant three week period in October 2001 during which he covered up third party dumping with a layer of covering material. He either saw or should have seen that the waste was not exclusively builder's rubble and in fact in evidence he admitted that he saw black bags which he presumed contained domestic waste some of these were torn and some domestic waste was coming out. He was concerned and said he did not want black bags after the first three or four loads but did not subsequently check: he remained concerned but did nothing about it. He also admitted that he got no paperwork whatsoever from Martin Munnelly and kept no record of the payments. In my opinion Mr. Fenton was negligent in the traditional sense as it was foreseeable that due to his acts or omissions hazardous material could be dumped on his site, and the applicant's case against him in that regard is established if this is the appropriate criterion.

With regard to Dublin Waste they too were negligent in failing to have an appropriate system whereby they could identify hazardous hospital waste at Sheriff Street and set it aside as they were required to do under their licence. Moreover Dublin Waste in the person of Mr. Moriarty was negligent in dealing with Martin Munnelly without insisting that

he establish before being paid that he was dumping in an authorised dump. This company was also negligent in failing to have a system which ensured that all materials leaving Sheriff Street would be brought only to authorised dumps and not to unauthorised dumps. It was clearly foreseeable that the acts and omissions of Dublin Waste could bring about a situation whereby the type of damage which actually happened namely the transfer of hazardous waste from Sheriff Street to an unauthorised dump with potential environmental consequences, could happen. The exact concatenation of circumstances may not have been foreseen but the *type* of disaster was foreseeable. Dublin Waste are liable under the traditional law of negligence if this is the appropriate criterion.

Even if the traditional law of negligence applies I do not accept that the reckless or illegal activities of the truck drivers broke the chain of causation between Dublin Waste and the environmental pollution. Nor did the introduction of hazardous waste to Mr. Fenton's dump by Martin Munnelly break the chain of causation between Mr. Fenton's acts and omissions and the environmental disaster which actually occurred.

The negligence of each of the respondents in this regard was to fail to ensure that the person with whom they were dealing and for whose acts they were accepting responsibility acted in accordance with their obligations. There is no question of *novus actus interveniens* in my view.

Mr. Fenton says additionally that the applicant did not come with clean hands in respect of the matters already detailed above. I do not agree. The County Manager in evidence said he thought Mr. Fenton did not co-operate. He specified that Mr. Fenton did not give him useful information. I think this is correct. Mr. Fenton failed to get relevant names and telephone numbers and failed to identify all drivers and trucks which brought unauthorised material on to his lands. The point is that it was in Mr. Fenton's interest to provide this material because it might provide further respondents who could share the cost and liability of

remediating the landfill. Mr. Fenton's claimed co-operation was not particularly effective. The private investigator apparently came up with nothing useful and if Mr. Fenton was unable to provide specific names and truck identities this was because he did not equip himself with this appropriate information in the first place. In my opinion Mr. Sheehy's comment about Mr. Fenton's failure to co-operate was fully justified.

It was also submitted that the applicant had not fully explored all possible remediation solutions and that this dis-entitled it to orders in the present case. In particular it had not ascertained whether the Coolamadra landfill could be taken in at the Balleally dump in North County Dublin.

I do not think the onus is on the applicant to go into this level of detail particularly when the evidence is that Mr. Sheehy is quite doubtful whether hazardous hospital waste would be accepted at Balleally.

It was also submitted on behalf of Mr. Fenton that Dublin Waste should bear the primary responsibility, if not the hospitals themselves, for the hospital hazardous waste given the evidence that had such not been transferred to Coolamadra the hazard and remediation costs would have been much less. Again, I do not agree. Mr. Fenton allowed unauthorised dumping at Coolamadra. He failed to ensure or see to it that hazardous waste was not included notwithstanding his stipulations to the unknown individual who was doing the dumping. He must accept in principle liability for the consequences of his actions and failures in this regard which were foreseeable. The fact that others too may have to take a share of the responsibility does not mean that he can be relieved of same. To apply ss. 57 and 58 in this way would be to suspend the application of the *" polluter pays "* principle because it could in certain circumstances mean that either the applicant would have to pay or the community in the sense that the remediation would be left undone.

On behalf of Dublin Waste it was submitted that the illegal or reckless acts of

the truck drivers broke the chain of causation between them and the environmental pollution. For the reasons given in the context of Mr. Fenton's submission I reject this argument.

It was further submitted that the hospital had primary and exclusive responsibility for the consequences of the presence of hazardous hospital waste coming into Sheriff Street and leaving it. Once again I do not agree. Not only would this be a failure to apply the "polluter pays" principle (as instanced above) but in the case of the Sheriff Street operation by Dublin Waste it would involve turning a blind eye to the clear failures of that company to adhere to the conditions of its licence in circumstances where if those conditions had been complied with the probability is that the environmental pollution would not have occurred.

Directors' Personal Liability

With regard to the liability of the third and fourth respondent's submission is made that no order should be made against them personally because it was Dublin Waste the second respondent which carried out or obtained the carrying out of all relevant operations. Reliance is placed on *Dun Laoghaire Corporation v. Parkhill Developments Ltd.* [1989] I.R. 447, *Dublin County Council. v. Elton Homes* [1984] ILRM 297, *Dublin County Council. v. O'Riordan* [1985] I.R.159 and *Ellis v. Nolan* Unreported, High Court (McWilliam J. 6th May, 1983). These were cases under the planning laws and established that directors of companies engaged in planning and development activities would not become personally liable, in the absence of fraud or siphoning off money from the company so as to leave it unable to fulfil its obligations, for the non-compliance by the company with the requirements of its planning permission even when the company was insolvent. The directors traded with the benefit of limited liability and the view of the courts was that it was up to the Planning Authority when granting planning permission to such a company to ensure by the imposition of appropriate conditions that there was sufficient security or other guarantees in place to ensure the

satisfactory completion of the development.

The planning code was not enacted to transpose European directives into domestic law. The Act of 1996 was. A polluter is defined in the Council Recommendation 75/436/ Eurotam ECSC, EEC of 3 March, 1975 dealing with the *"*polluter pays*"* principle as:

> *"... someone who directly or indirectly damages the environment or who creates conditions leading to such damage."*

It cannot be said that either Mr. or Mrs. Moriarty did not - at least indirectly - create such conditions. The same instrument provides that

> "2*...Member States in their national legislation on environmental protection must apply the "polluter pays" principle, under which natural or legal persons governed by public or private law who are responsible for pollution must pay the costs of such measures as are necessary to eliminate that pollution or to reduce it..."*

It cannot be said, in my opinion that Mr. and Mrs. Moriarty are not responsible within the meaning of the foregoing.

It was submitted by counsel on behalf of the applicant, furthermore, that the evidence established such responsibility. In the case of Mr. Moriarty he accepted that his role at Sheriff Street was to supervise the operation. He said this wife *"*did the books*"* *w*hen they were married in 1975 and continued on after 1987 when the company was formed.

The domestic law in relation to limited liability of companies would, in my opinion, frustrate or at least fail fully to implement the objectives of the relevant directives if it precluded the making of an order against directors in circumstances where the company in question having first been directed by the Court to comply with such orders was not in a position for financial or other reasons so to do. In my view in order to ensure the full

application of the *"*polluter pays*"* principle whereby those responsible even indirectly for causing environmental pollution should pay for it rather than leave it to an innocent party or the community to do so, the Court must be in a position to make orders directly against directors in such circumstances, and the domestic company law of limited liability should be suspended and the veil, of incorporation lifted in order to ensure the full application of this principle and other objectives of the European Waste Directives. To hold otherwise would, in my opinion, mean that innocent parties (local authorities or the public) would have to *"pay"* (if only by accepting pollution of their environment without remedy), whereas those individuals who are at least indirectly responsible for it would be beyond the reach of Irish domestic law. That is not, in my opinion a transposition into the Irish law of the European Directives. Accordingly a *"*fall-back*"* order may be made against individual directors and/or shareholders where a company cannot comply with a primary order.

In my opinion it is clearly established on the evidence and I hold as a fact that there is environmental pollution occurring as a consequence of the deposit of waste including hazardous hospital waste at Coolamadra and it is necessary that the court make specific orders providing for the remediation of this landfill site and the continuing monitoring thereof.

With regard to the claim that the expenses incurred by the applicant in managing the environmental hazard it seems clear that the application of the *"*polluter pays*"* principle entitles the applicant to an order on this behalf. For this reason in my view the word *costs* in ss. 57(1)(c) should if necessary be interpreted as including expenses.

The order

All respondents have submitted that any order made should be specific. I agree, for three reasons: firstly, the sections say so, secondly, general principles require that a party should know clearly when he or she is in contempt of court, and thirdly, failure to comply with an order is an offence under the sections and, once again, the respondents are entitled to known

when they are in breach of the criminal law.

I have given careful consideration to the submission on behalf of the respondents that a preliminary order should be made directing further investigation with a view in light of the results thereof to making a final order later. It is submitted that there has been insufficient investigation to demonstrate conclusively that the wholesale removal of the entire contents of the landfill (whether 8000 tonnes or some lesser amount) is necessary and in fairness to the respondents if an equally satisfactory solution can be achieved on-site for less expenditure then the court should facilitate this by providing initially only for further investigation.

I have some sympathy with this submission and have considered it carefully given that the landfill was not available to the respondents' experts until after mid-May of this year because until then it was sealed off as the subject of a Garda investigation. The resulting time pressure has, it is submitted, meant that neither the respondents' nor indeed, they say, the applicants' experts have been able to fully investigate and prepare for the optimum solution.

On the other hand what was being investigated were possible offences under environmental law, that is, offences which are in part a consequence of the breaches of that law by the respondents and for which they therefore must take responsibility. Again the evidence establishes that there is an existing risk and indeed a continuing existing environmental pollution with, not least, a threat of landfill slippage in the direction of the stream itself. There was undoubtedly little time for the respondents to investigate and to prepare their case but this is a circumstance for which in my opinion they must take the lion's share of responsibility.

Furthermore the evidence is that this material is deposited on a worked out or partially worked out sand and gravel deposit which formed part of an esker. The site is wholly unsuitable as a landfill not only because it is, accordingly, located on permeable material but also because it is very close to a tributary (itself inhabited by fish) of the River Slaney which is

some 800 meters away. Furthermore it is near an inhabited farm and on terrain so configured that leachate will run away from it in different directions. There is, therefore, strong evidence that significant pollution will occur and has occurred to the water table and the stream, not to mention the land, fauna, livestock and nearby farm.

I must also bear in mind that the precautionary principle must apply when the Court is making orders for the protection of the environment or remediation of pollution. This is clear from the definition of the phrase "environmental pollution" (with which ss. 57 and 58 are concerned) which incorporates the concept of *risk*. Once there is a *risk*, then that *ris*k itself constitutes pollution and it should be eliminated. All witnesses accepted some degree of risk to the environment arising from the presence of waste at Coolamadra. In my view as a result of this risk the environment has clearly been endangered to a significant extent (to use the language of the definition of "environmental pollution" in s. 5 of the Act of 1996) and it is the duty of the Court to make orders necessary for the mitigation and remedying of this risk.

A further consideration is that planning permission would be required for the retention of the unauthorised landfill and there is no certainty of outcome in what is potentially a lengthy application and appeal process. It is true, certainly, that an Environmental Protection Agency licence, may be required to authorise off-site transport of some of the material but the risks attendant on the outcome and processing of any application for such a licence are in my opinion significantly less than those involved in a planning application for retention.

Accordingly the order will be a final order directing the comprehensive remediation of the landfill by way of the staged process both on and off site submitted by the applicant.

In light of the requirements for specificity and clarity referred to above the order should require one of the respondents to carry out this work and that respondent will be Dublin Waste. There should be a "fall back" order directing Mr. Moriarty and Mrs. Moriarty to carry

out and/or complete those works in the event that Dublin Waste is unable or fails to do so.

With regard to Mr. Fenton he can clearly be directed to facilitate the carrying out of these works by making his land available to all relevant parties. It was submitted, without evidence, that he was not in a position financially to do or pay for any of those works himself. I am not prepared simply to exonerate him from all liability on the basis of an unsworn assurance to the Court that he is unable to comply with an order. On the contrary it seems to me that in principle he is equally liable for the environmental pollution which has occurred (and is occurring) and should be made to bear half of the expenses and costs involved in its remediation. There is an analogy between the landowner and the illegal dumper on the one hand and on the other the receiver and the thief. The thief cannot operate without the receiver nor can the illegal dumper operate without the illegal dump.

Whilst, therefore, the primary order will be made directing Dublin Waste to carry out the detailed step-by-step works identified in the memorandum submitted by the applicant and within appropriate time frames there will also be an order providing for an application to the Court by Dublin Waste and/or Mr. and Mrs. Moriarty for a contribution towards the costs of complying with that order from Mr. Fenton. This order is made in exercise of my inherent jurisdiction and also pursuant to the jurisdiction conferred by s. 57 (1) (c) of the Act of 1996.

With regard to the claim of the applicant to be reimbursed its costs and expenses involved in the management of the unauthorised landfill including providing security there will be an order making Mr. Fenton and Dublin Waste jointly and severally liable to the applicant for these costs and expenses and directing them to pay same within one month of receipt of an itemised and vouched bill from the applicant. In the event that Dublin Waste fails to comply with this order then I direct that Mr. and Mrs. Moriarty be jointly and severally liable to pay such vouched costs and expenses within one month of being notified by the applicant of

Dublin Waste's failure in this regard such notification to be not earlier than the one month period provided for compliance with the order by Dublin Waste.

There will be liberty to all parties including the notice party to apply.

I should make it clear that the provisions in the order of the Court facilitating an application by Dublin Waste and/or Mr. and Mrs. Moriarty as against Mr. Fenton and (*vice versa*) (whereby there should be a 50/50 split of the costs burden as between Mr. Fenton and the other respondents) is entirely subsidiary to the overriding and primary purpose of the order to the effect that all necessary remediation works be done and done on time and the costs and expenses already incurred by the applicant be discharged by the respondents. If it is true indeed that Mr. Fenton is not in a position to pay half of these costs and expenses they must nonetheless be paid by Dublin Waste and/or Mr. and Mrs. Moriarty and the same is true if the position were to be reversed as between these two sets of respondents.

I will hear counsel in relation to the detailed make up of the order.