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THE HIGH COURT

2008 93 MCA

IN THE MATTER OF THE WASTE MANAGEMENT ACTS 1996 (AS AMENDED) AND THE PROTECTION OF THE ENVIRONMENT ACT 2003

AND IN THE MATTER OF SECTION 57 OF THE WASTE MANAGEMENT ACT 1996 AS AMENDED BY SECTION 48 OF THE PROTECTION OF THE ENVIRONMENT ACT 2003

AND IN THE MATTER OF SECTION 58 OF THE WASTE MANAGEMENT ACT 1996 AS AMENDED BY SECTION 49 OF THE PROTECTION OF THE ENVIRONMENT ACT 2003

BETWEEN:

JOHN RONAN AND SONS

APPLICANT

AND

CLEAN BUILD LIMITED (IN VOLUNTARY LIQUIDATION), LAURENCE MULLIN, JOHN CHARLES FARRELL, JAMES REDMOND, LIAM O'RUA AND GARY ROE

RESPONDENTS

AND

SOUTH DUBLIN COUNTY COUNCIL

NOTICE PARTY

THE HIGH COURT

2009 88 MCA

IN THE MATTER OF THE WASTE MANAGEMENT ACTS 1996 AND 2003

AND IN THE MATTER OF AN APPLICATION BY SOUTH DUBLIN COUNTY COUNCIL PURSUANT TO SECTION 57 OF THE WASTE MANAGEMENT ACT 1996 AS AMENDED BY SECTION 48 OF THE PROTECTION OF THE ENVIRONMENT ACT 2003

AND IN THE MATTER OF SECTION 58 OF THE WASTE MANAGEMENT ACT 1996 AS AMENDED BY SECTION 49 OF THE PROTECTION OF THE ENVIRONMENT ACT 2003

BETWEEN:

SOUTH DUBLIN COUNTY COUNCIL

APPLICANT

AND

KEN FENNELL (LIQUIDATOR), CLEAN BUILD LIMITED (IN VOLUNTARY LIQUIDATION), LIAM O'RUA, GARY ROE, JOHN RONAN AND SONS, LAURENCE MULLIN, JAMES REDMOND, AND JOHN CHARLES FARRELL

RESPONDENTS

JUDGMENT of Mr. Justice Clarke delivered the 4th August, 2011

1. Introduction

1.1 This case involves what happened at a Site ("the Site") at Bohernabreena Road in County Dublin. The Site was for many years used by the applicants ("Ronan") in the first of the two cases named in the title of this judgment ("the Ronan Proceedings") as a skin and hide factory following on from a planning permission granted in May, 1969. That business continued, with some variations in methodology, until the early years of the last decade. However, in October, 2004 Ronan leased the Site to the first named defendant in the Ronan Proceedings ("Clean Build"). The purpose of the lease was to enable Clean Build to commence business as a facility for the recycling, recovery, collection, segregation and reclamation of certain building products. That business continued until the controversies which are the subject of these proceedings came to a head in 2008. The substance of those controversies arose out of the build up of a large amount of building materials on the Site in circumstances where it is contended that much of that activity was unlawful. Ronan commenced the Ronan Proceedings in 2008 for the purposes of obtaining various orders designed both to prevent a

continuance of what was said to be illegal activity and to procure an appropriate restoration of the Site.

1.2 Not long afterwards the applicant in the second set of proceedings ("South Dublin") ("the South Dublin proceedings") also commenced a set of proceedings raising at least many of the same issues.

1.3 It will be necessary to make specific reference to the personal respondents in both the Ronan Proceedings and the South Dublin Proceedings in due course. Clean Build went into liquidation and the first named respondent in the South Dublin proceedings ("Mr. Fennell") was appointed as its liquidator. In substance, it appears that Clean Build was hopelessly insolvent. Mr. Fennell indicated as much to the court and adopted the position of not taking any further part in the proceedings. It would appear that any order against Clean Build would have been futile for Clean Build had not the resources to comply with any order which the court might have made. In addition, Clean Build was subsequently dissolved and no longer exists. Whilst its name remained in the title of both proceedings its dissolution meant that the cases against it effectively came to an end. In any event, activity on the Site has ceased so that the real question which continues to be in dispute between the parties concerns what is to be done about the historical problem which remains afflicting the Site because of the build up of building materials to which I have referred. Each of the personal respondents (with the exception of Mr. Fennell) was at one time or another a director and/or a shareholder of Clean Build.

1.4 For completeness it should be noted that South Dublin was joined as a notice party in the Ronan proceeding as well. It will be seen that there is, therefore, on any view, a significant overlap between the two sets of proceedings. Indeed, complaint is made both by Ronan and the personal respondents that the South Dublin Proceedings were unnecessary and gave rise to duplication and added cost. This will be returned to later. In the remainder of this judgment the term personal respondents should be read as not including Mr. Fennell.

1.5 Against that very general background a series of specific issues arises to which I now turn.

2. The Issues

2.1 It does not appear to be disputed but that there is a significant problem at the Site which requires remediation. Very detailed expert evidence was filed in both proceedings concerning the works that were said to be necessary to remediate the Site. However, for reasons which I will address in the course of this judgment, much of that dispute had, to a very large extent, disappeared by the time the case ended. The case was conducted on the basis of affidavit evidence with cross examination being permitted. Towards the end of this judgment I make some comments on whether the summary nature of the process by which these proceedings were required to be brought is necessarily the most appropriate form of procedure in all cases involving allegations of unlawful waste activity.

2.2 There remains, however, very serious issues between the parties as to who is responsible for the problems that now require remediation and in particular, what parties can properly be the subject of court orders requiring action to be taken. It was not seriously contested but that Clean Build itself had a liability to remediate the Site. However, for the reasons already pointed out, Clean Build no longer exists and even if restored to the register of companies would not be in a position to meet any such obligation. There is nothing to suggest that Mr. Fennell, as the liquidator, himself did anything wrong after his appointment as such. For practical purposes Clean Build is, therefore, out of the picture.

2.3 Ronan's role was, of course, as landlord only of the Site during most of the relevant period. Ultimately, consequent on the liquidation of Clean Build, the lease came to an end so that Ronan is now the party in occupation of the Site. However, there is no suggestion that any building waste was deposited on the Site subsequent to the liquidation of Clean Build. In that context there are two questions which arise concerning any possible liability of Ronan. First, it is said that part of the problems associated with the Site (and in particular which influence its appropriate remediation) stem from the period when Ronan was operating its business although there are only very limited suggestions that Ronan did anything during those periods which was not in accordance with the appropriate regulatory regime in place at the time. Second, there is the position which now pertains where, even though Ronan was not involved in bringing building waste onto the site, it is now the occupier of the Site where that waste is present. There are legal, and to a certain limited extent factual, issues which arise, therefore, in the context of Ronan's liability.

2.4 So far as the personal respondents in both sets of proceedings are concerned, two legal issues and quite significant factual disputes arise which are material to any potential liability of those parties. The legal issues can be briefly introduced at this stage. First, there is the question of whether the relevant statutory regime (that is the Waste Management Act 1996, as amended by the Protection of the Environment Act 2003) ("the 1996 Act") treats persons in the position of those respondents as having direct responsibility. It will be necessary to refer to the detail of that statutory regime in due course. It is clear that the entity carrying on business at the relevant time was Clean Build. It is also clear that each of the respective personal respondents had some involvement in the business run by Clean Build at the time. There are legal issues as to the extent to which such persons can have, as it were, an independent liability resting on them personally even in circumstances where the business itself was being carried on by a company.

2.5 Second, there is the question of whether so called "fallback orders" can be made in circumstances where primary liability lies on a corporate entity under the relevant legislation but where that corporate entity is unable to meet its obligations.

2.6 In addition to the legal questions as to whether it is open to the court to make orders against the personal respondents, significant factual issues arise under that heading. Depending on the proper legal view as to the position which pertains concerning the circumstances in which an individual who works for a company can be independently personally liable under the 1996 Act, factual issues then may arise as to whether the level of involvement of each personal respondent meets any test appropriately adopted. In addition, as will become clear, the timescale during which the various personal respondents were involved differs significantly so that, in the event that those respondents might be said to have a personal responsibility deriving from either of the two legal bases to which reference has been made, it will be necessary to attempt to disentangle the extent to which liability can properly be attributed to periods during which the personal respondent in question might be said to bear responsibility.

2.7 So far, therefore, as the Ronan Proceedings are concerned, Ronan seeks to make the personal respondents liable for the remediation of the site. So far as the South Dublin Proceedings are concerned, South Dublin seeks to make both Ronan and the personal respondents likewise responsible for the remediation of the site. For obvious reasons both proceedings were tried together. If, and to the extent that, any or all of the personal respondents can properly be made the subject of an order requiring them to carry out works at the site, then such an order could be made in either proceedings. Obviously, to the extent that it might be appropriate, an order requiring Ronan to carry out any works could only be made in the South Dublin Proceedings. Furthermore, there remains some minor issues concerning the precise type of remediation which is required so that, at least in theory and to a limited extent in practise, the remediation works urged by Ronan in the Ronan Proceedings differ from the works urged by South Dublin in the South Dublin Proceedings. However, there does not seem to me to be any real reason to distinguish between the two proceedings save to the limited extent that it is necessary to resolve the question of whether Ronan has any liability (which, as I have pointed

out, arises only in the South Dublin Proceedings) and to the extent that it may be necessary to determine the precise remedial works which are required (which question arises by virtue of the difference between the remediation works urged in the separate proceedings).

2.8 Against the background of those issues, it is next necessary to turn to the statutory framework which applies to waste management insofar as it is relevant to these proceedings and the statutory relief which is sought in the respective proceedings.

3. The Statutory Framework and the Reliefs Sought

(a) The Irish Legislation

3.1 The applicants in each set of proceedings seek various reliefs under ss. 57 and 58 of the 1996 Act. The relevant provisions of the 1996 Act, provide as follows:-

> "Section 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 or section 34 or 39(1) to be contravened, 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 or contravention, 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, including costs incurred by the Agency in relation to the carrying out of relevant inspections or surveys and the taking of relevant samples and the analysis of the results of any such activities, as the Court considers appropriate.
>
> (2) An application for an order under this section shall be by motion, and the High Court when considering the matter may make such interim or interlocutory order as it considers appropriate.
>
> Section 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 or section 34 or 39(1) to be contravened, that court may make an order requiring that other person to do one or more of the following, that is to say:
>
> > (i)to discontinue the said holding, recovery or disposal of waste within a specified period, or
> >
> > (ii)to mitigate or remedy any effects of the said holding, recovery or disposal of waste in a specified manner and within a specified period.
>
> […]
>
> (2)(a) An application for an order under this section shall be brought in a summary manner and the court when considering the matter may make such interim or interlocutory order as it considers appropriate.
>
> […]
>
> 3(a) An order shall not be made by a court under this section unless the person named in the order has been given an opportunity of being heard by the court in the proceedings relating to the application for the order.
>
> (b) The court concerned may make such order as to the costs of the parties to or persons heard by the court in proceedings relating to an application for an order under this section as it considers appropriate.
>
> 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.
>
> […]"

3.2 In order to understand the effect of the above provisions, reference must also be made to a number of the definitions as contained in s. 5 of the 1996 Act. Same provide as follows:-

> ""*person in charge*" includes, in relation to any premises, the occupier of the premises or a manager, supervisor or operator of an activity relating to the holding, disposal or recovery of waste which is carried on at the premises;
>
> "*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 health or harm the environment, and in particular—
>
> > (a) create a risk to waters, the atmosphere, land, soil, plants or animals,
> >
> > (b) create a nuisance through noise, odours or litter, or

(c) adversely affect the countryside or places of special interest;

"*holder*" means, in relation to waste, the owner, person in charge, or any other person having, for the time being, possession or control, of the waste;"

3.3 It should be noted that the definition of "holder" under s.5 of the 1996 Act has been amended. Article 19 of the Waste Management (Registration of Brokers and Dealers) Regulations 2008, which came into effect on the 1st July, 2008, provides that the definition of "'holder' means the producer of the waste or the natural or legal person who is in possession of it". This amendment took effect at the time of the issuance of Ronan Proceedings and before the commencement of the South Dublin Proceedings.

(b) The European Legal Context

3.4 Ronan also placed reliance on the provisions of the Council Directive 75/442/EEC as amended by Directive 2006/12/EC (the "Waste Framework Directive"), to which the 1996 Act gives effect, to the extent that the provisions of the 1996 Act must be interpreted purposively and in a manner which gives effect to and is harmonious with the Waste Framework Directive.

3.5 South Dublin also placed reliance on the Waste Framework Directive but focussed its attention on the polluter pays principle contained in Article 15 which provides:-

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

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

(b) the previous holders or the producer of the product from which the waste came."

(c) The Reliefs

3.6 Ronan seeks reliefs against all of the respondents, either jointly or severally, under ss. 57 and 58 of the 1996 Act with one exception. Ronan does not any longer seek any relief under s. 57 against the third respondent, Mr. Farrell, following an order of Cooke J. dated the 30th March, 2009, in which he struck out the s.57 claim as against Mr. Farrell.

3.7 The orders sought are in the following terms:-

(i) Pursuant to s. 57 and/or s. 58 an order requiring the respondents to take and/or pay for any measures (including but not limited to the extraction, transport and disposal of any remaining waste) identified by Minerex Environmental Solutions Limited in its revised remediation proposal as admitted into evidence in the within proceedings and otherwise to mitigate and/or remedy the effects of the deposit of any waste material at the Site and ensure it is left in a condition whereby it is not causing or likely to cause environmental pollution. Such measures to be carried out within such period as specified by MEL in its revised remediation proposal or in default of such agreement such period as the court may specify and/or deem appropriate.

(ii) Pursuant to s. 57 and/or s. 58 an order requiring the respondents to discharge all costs incurred by the applicant and the notice party since the commencement of the proceedings in removing and disposing waste from the Site and to discharge any further costs incurred in the removal and disposal of the aforesaid waste and/or the implementation of the MEL revised remediation proposal.

3.8 South Dublin, in its proceedings, now only seeks reliefs under s. 57(1)(a) and (b) of the 1996 Act against the fifth named respondents in those proceedings (i.e Ronan) on the grounds that none of the other respondents occupy the Site and, save for the holding of waste, all other waste activities have ceased. Nevertheless South Dublin reminds the court of its wide discretion as to the nature and extent of the orders which may be made under s. 57(1)(c).

3.9 The orders sought by South Dublin in its proceedings under s. 57 are in the following terms:-

a) to remove gypsum waste to a waste facility authorised under and in accordance with the Waste Management Act 1996 or the Environmental Protection Agency Act 1992 to undertake the recovery of such waste.

b) to arrange for the removal of waste held at the said facility by authorised waste collection permit holders only and prior to the transfer of the waste to submit to the Environmental Services Department of South Dublin County Council the Reference Numbers of the Waste Collections Permits held by all waste collection permit holders involved in the transfer of waste from the said facility.

c) To submit to the Environmental Services Department of South Dublin County Council receipts/disposal certificates in respect of all waste transferred from the said facility within two days of such transfer.

d) To maintain at the said facility for inspection by the Environmental Services Department of South Dublin County Council a written record of the following information:

i.The name of any waste facility which refuses to accept waste from the respondents;

ii.The reason or reasons given by any waste facility for non-acceptance of waste from the respondents; and

iii.To immediately notify the Environmental Services Department of South Dublin County Council by telephone or fax of all complaints received relating to the waste removal activities being carried out under the terms of any order, such information to include:

a. The time and date of the complaint;

b. The name of the complainant;

c. The details of the nature of the complaint;

d. The action taken to deal with the complaint; and

e. The response made to the complainant.

3.10 The reliefs sought under s. 58 are those set out in the notice of motion, except para. 3(a) and (b) which have been abandoned as unnecessary. The reliefs sought are against each respondent other than the liquidator and Clean Build. The claim against the liquidator is abandoned as he is an insolvency practitioner and has no personal responsibility for the present state of the Site while Clean Build has been dissolved and struck off the register of companies.

3.11 The order sought under s. 58 of the 1996 Act is one requiring the respondents and each of them within a period of four weeks to take the following measures in respect of all waste materials deposited in, on, and under the land at the Site:-

> (a) To carry out the extraction, transport and disposal of the waste materials deposited at the said facility in accordance with the method statement approved by the Environmental Services Department of South Dublin County Council within two weeks of the date of notification of the approval of the method statement.
>
> (b) To mitigate and/or remedy the effects of the deposit of waste materials at the facility in accordance with the remediation plan approved by the Environmental Services Department of South Dublin County Council within three months of the date of notification of the approval of the remediation plan.

4. The Facts

4.1 The Site is located at Bohernabreena Road, Tallaght, Co. Dublin. These lands comprise a 6.5 acre holding on which there is a warehouse/large factory-type unit divided into three bays on the northern part and four shed-type structures to the south. There is a canteen and office building to the east of the warehouse and also a large open yard area. The lands are ringed in part on three sides by a berm or bund which is approximately 12 feet in height. The Site is in a residential area adjacent to the Allerton housing estate and Bohernabreena cottages and is bounded by the River Dodder on two sides.

4.2 Prior to 1938 the Site was owned by a company called Burnhouse Ltd., which was involved in the rendering of animal by-products. Burnhouse Ltd. sold the Site to Robert J. Wilson & Co. Ltd. who, between 1938 and 1968, used it as a collection and storage depot for animal by-products, in particular from small butchers in the Dublin area. The by-products were transported to associated plants for later processing. The Site was then acquired by Ronan, an unlimited company incorporated in Ireland, on the 1st October, 1969, from Thomas Burke, the then owner.

4.3 Ronan obtained a planning permission (ref. no. A.1504) on the 21st May, 1969, for a skin and hide factory on the Site. On foot of this permission building screens, associated septic tanks, soak pits and other works were carried out on the Site. Between 1969 and 1989 the curing process produced a run-off solution which consisted of water, salt and blood. This solution was filtered through screens into a series of three soak pits in which the solids settled, and from which they were pumped periodically, with the remaining liquids allowed to percolate into the surrounding ground. The soak pits were in use up to around 1989 and in 2007 they were infilled with subsoil and builder's rubble. Ronan contend that this method of waste water treatment was in full compliance with the applicable legal requirements of the time. The processing of cattle hides and sheepskins continued from its commencement in early 1970 until it ceased in April, 2003.

4.4 Ronan obtained a further planning permission (ref. no. 87A-1098) on the 30th November, 1987, to connect the Site to the public sewer, which connection was made in January, 1992. It was suggested that this action was as a result of complaints of pollution made in relation to the River Dodder which prompted the local authority to request that Ronan direct all waste water from the Site into the mains sewage system. Ronan was then issued with a licence (ref. no. WPS/183/225) pursuant to the Local Government (Water Pollution) Act 1977, dated 10th February, 1989, to discharge trade effluent into the sewer. This licence provided for the monitoring of the waste waters on a biannual basis, which continued until April, 2003.

4.5 Clean Build was a limited liability company which was incorporated on the 4th May, 2004, under the laws of Ireland.

4.6 By a lease dated the 24th October, 2004, Ronan leased the Site to Clean Build for a period of four years and nine months commencing on the 1st October, 2004. The purpose of the lease was for the warehousing and distribution of predominantly used plaster and gypsum products. Coupled with the lease was a personal guarantee from the then directors of Clean Build, namely Laurence Mullin, John Charles Farrell and James Redmond, (each of whom is a respondent in both of these proceedings) to ensure that certain obligations under the lease were complied with. These include the payment of rent and the clearing of any waste from the Site.

4.7 Clean Build used the Site as a facility for the recycling, recovery, collection, segregation and reclamation of construction, demolition and used gypsum and plaster products.

4.8 Clean Build applied for a waste permit which was granted by South Dublin in February, 2005 for the purposes of collecting and recovering waste gypsum, plaster and plasterboard products on the Site. A second permit application followed in March 2005 for the collection and segregation of certain construction waste materials. A revised waste permit was then issued by the Council on the 7th July, 2005, for the period from 1st July, 2005, until the 30th June, 2008.

4.9 On the 25th January, 2007, Mr. Farrell resigned as a director and as the company secretary of Clean Build at which time his involvement with the Site ceased. While it would appear that, prior to his resignation, Mr. Farrell was actively involved in the management and oversight of the Site and Clean Build's affairs, it is nevertheless his contention that during his tenure Clean Build compiled with the terms and conditions of its waste permit and that the majority, if not the entirety, of the waste, which is the subject of these proceedings, was deposited on the Site following his resignation.

4.10 Mr. Farrell avers that during the period of his involvement with Clean Build no disposal of waste on the Site took place. Instead, the practice was that between July, 2005 and July/August, 2006 any waste materials which were brought onto the Site were segregated into recovered timber; recovered concrete blocks and rubble; and recovered soil and stone and were then transferred to various permitted sites to be processed. Any residual waste was similarly collected by a third party and processed off-site. From August, 2006 until his departure, Mr. Farrell suggests that Clean Build's strategy changed to the extent that all segregation on the Site was ceased and all waste materials were then transferred off-site to a single third party operator for full recovery.

4.11 On his evidence, prior to his departure, Mr. Farrell sold his shareholding in Clean Build to Messrs. Mullin and Redmond in exchange for the repayment of his director's loan and the release from his personal guarantees in respect of Clean Build, to the extent that that was possible.

4.12 During the period August, 2005 to April 2008, there were complaints concerning Clean Build's waste operations which prompted site inspections by South Dublin officials. South Dublin then issued a notice pursuant to s. 55 of the 1996 Act on the 1st May, 2008, which required Clean Build and Messrs. Mullin and Redmond to perform a number of stated actions. These included the immediately cessation of all operations at the Site, the removal of all waste and waste residues to licensed waste disposal and recovery facilities within 30 days using authorised waste collection contractors and the requirement that they submit details of those facilities to South Dublin prior to the transfer of any waste.

4.13 An enforcement notice dated the 11th February, 2008, was withdrawn against Mr. Farrell on the 5th March, 2008, for the reason that he was no longer the owner of the property.

4.14 Following exchanges of correspondence with Clean Build and meetings with Messrs. Mullin and Redmond, on the 13th May, 2008, South Dublin agreed to extend the time limit for compliance with the s. 55 notice by Clean Build. South Dublin also gave consideration to the remediation proposals submitted by Clean Build on the 14th May, 2008. However these were ultimately deemed to be unsatisfactory and a warning letter was issued on the 30th May, 2008, referencing the s. 55 notice and requiring an immediate cessation of the operations then in progress at the waste facility. Further correspondence between South Dublin and Clean Build followed.

4.15 On the 30th June, 2008, Clean Build's waste permit expired and an application was lodged for a permit WPR 048 but that application was declared invalid on the 11th July, 2008. It appears that the application was found to be deficient both in terms of form and content. At this point, Ronan saw fit to commence its proceedings on the 2nd July, 2008.

4.16 On the 7th July, 2008, Clean Build and Mr. Redmond gave a series of four undertakings regarding the Site to this Court. These undertakings were followed by further lengthier undertakings given to the court on the 28th July, 2008, by Clean Build, Mr. Mullin and Mr. Redmond. Separately, on the 5th September, 2008, undertakings were given by Clean Build, Mr. Roe and Mr. O'Rua to South Dublin outside the specific context of proceedings. Each of the relevant undertakings are set out in full below.

4.17 The undertakings given by Clean Build and Mr. Redmond on the 7th July, 2008, to the court in the Ronan Proceedings were in the following terms:-

> (a) "That the First and Fourth-Named Respondents their servants agents or licensees will not dispose of or stockpile within the meaning of the Waste Management Act 1996 any waste on the Applicant's lands situate at Bohernabreena Road, Tallaght, County Dublin either indoors or outdoors;
>
> (b) That the First and Fourth-Named Respondents their servants agents or licensees will immediately commence the remove off-site of the full stock of mixed waste situate in Bay 1 of the main warehouse building on the said lands, such removal to be completed within 2 weeks;
>
> (c) That the First and Fourth-Named Respondents their servants agents or licensees will not import any gypsum plaster or plasterboard products onto the said lands;
>
> (d) That the First and Fourth-Named Respondents their servants agents or licensees will carry out the substantial removal off-site of the existing stockpile of gypsum from Bays 2 and 3 of the main warehouse building within 3 weeks."

4.18 The undertakings given by Clean Build, Mr. Mullin and Mr. Redmond on the 28th July, 2008, were in the following terms:-

> (a) "That the existing stockpile of mixed waste in Bay 1 will be entirely removed off site by the 1st August, 2008.
>
> (b) That the existing stockpile of wood opposite Bay 1 will be entirely removed off site by the 1st August, 2008.
>
> (c) That the existing stockpile of gypsum and gypsum products situate in Bays 2 and 3 will be entirely removed off site by the 8th August, 2008, unless authorisation in writing is received by the First-Named Respondent from South Dublin County Council permitting the same to be processed. (In the event that such authorisation is received, a copy thereof will immediately be furnished to the Applicant and the said gypsum and gypsum products will be processed and removed off site before the 30th August, 2008).
>
> (d) That the bund on the East and South side of the site will be removed off site by the 30th September, 2008. The bund on the banks of the River Dodder will be removed if the First-Named Respondent is required to do so by South Dublin County Council.
>
> (e) That the building rubble that has elevated the ground level of the site to the East and North of the three-bay warehouse will be removed off site by the 1st of June 2009 (or sooner if required by South Dublin County Council) to the intent that the ground level of the site will be reinstated to its original level at the date of the commencement of the Lease between the Applicant and the First-Named Respondent.
>
> (f) That for the residue of the term of the Lease no waste will be disposed or stockpiled on the site or in the buildings situate thereon.
>
> (g) That the rear wall of the three-bay warehouse will be replaced by the 30th September, 2008.
>
> (h) That the roller doors and roof of the said warehouse building will be reinstated and repaired by the 30th September, 2008.
>
> (i) That the Respondents will facilitate reasonable access and inspection of the works as aforesaid by the Applicant and an engineer nominated on its behalf.
>
> (j) That the Respondents will furnish a copy of any notice or correspondence received by them from South Dublin

County Council in relation to the premises.

(k) Subject to compliance with all legal requirements normal operation of the site will resume on the 15th August, 2008."

4.19 The undertakings given by Clean Build, Mr. Roe and Mr. O'Rua on the 5th September, 2008, directly to South Dublin were in the following terms:-

(a) "To cease the acceptance, disposal, recycling and recovering of all waste materials at the facility situate at Bohernabreena Road, Tallaght, Dublin 24 until such time as Clean Build Limited has applied for and obtained from South Dublin County Council a revised Waste Permit in respect of that facility in accordance with the provisions of the Management Acts 1996 to 2003 (sic) and the Regulations made thereunder, in particular, Waste Management (Facility Permit and Registration) Regulations 2007.

(b) To dispose of all waste contained in skips provided to customers of Clean Build Limited and collected by Clean Build Limited or any other waste collection permit holder on behalf of Clean Build Limited only at waste facilities holding a valid waste licence or permit authorized to accept the waste materials contained in such skips until such time as Clean Build Limited has applied for and obtained from South Dublin County Council a revised Waste Permit in respect of the facility situate at Bohernabreena Road, Tallaght, Dublin 24 and provided the deposit of wastes so collected may be deposited, held and/or recovered in accordance wit (sic) the terms and conditions of any revised Waste Permit hereinafter issued in respect of the Bohernabreena facility.

(c) To maintain records and to furnish in writing to South Dublin County Council within three days of being requested to do so, such particulars as to the quantities of waste collected by Clean Build Limited from the 5th September 2008 and the place or places to which such waste was delivered for recovery or disposal as the case may be until such time as Clean Build Limited has applied for and obtained from South Dublin County Council a revised Waste Permit in respect of the facility situate at Bohernabreena Road, Tallaght, Dublin 24."

4.20 On the 11th July, 2008, Mr. Redmond and Mr. Mullin agreed to transfer their shareholdings in Clean Build to Mr. O'Rua and Mr. Roe, to resign as directors and be replaced by the latter two and to waive directors' loans owed by Clean Build in the amount of €900,000 in return for Mr. O'Rua's undertaking to discharge all of their personal guarantees and creditors in full. Minutes from a meeting dated the 9th July, 2008, reflect this agreement although Mr. O'Rua suggested that they were not circulated to him at the time. While Mr. O'Rua contends that he was then unaware of the s. 55 notice, these minutes record that reference was made to a "Section 55 on the premises". It is Mr. O'Rua's case, and by extention Mr. Roe's, that Messrs. Mullin and Redmond misled him when selling Clean Build or, as it has been variously described: "they saw him coming".

4.21 Particulars filed with the Companies Registration Office show that Messrs. Mullin and Redmond resigned as directors and secretary of Clean Build to be replaced by Messrs. Roe and O'Rua with effect from the 10th July, 2011. However, there appears to have been an agreement that a transition period of approximately two months would apply within which time the new owners would gradually take over the operations and affairs of Clean Build and on a phased basis the previous owners would depart.

4.22 It is Mr. Mullin's contention that the matters which are the subject of these proceedings have arisen as a result of deficiencies in the manner in which Messrs. Roe and O'Rua have operated and managed Clean Build's affairs and in turn the Site. In particular it is asserted that both Messrs. Roe and O'Rua allowed stockpiles of waste material to be deposited on the Site between the period September 2008 and December 2008.

4.23 In response Mr. O'Rua submitted, in his affidavit, that no new waste was taken on to the Site post 9th July, 2008, and therefore any waste which is now present was inherited from the former promoters of Clean Build.

4.24 Mr. O'Rua took an active role in the management and operation of Clean Build and the Site. He employed a number of staff, including Mr. Paddy Boyce as manager, to oversee the day to day running of the business. Mr. Roe, while listed as a director, appears to have held a position of little actual authority and mostly was involved with sweeping and general site maintenance. Mr. Roe was 19 years of age at all material times.

4.25 By a telephone call on the 11th July, 2008, from Ms. Emma Downey, who represented herself as Clean Build's environmental consultant, South Dublin was informed that Clean Build was under new ownership. This was followed by email correspondence on the 14th July, 2008, which set out proposals to remove waste wood, general waste and gypsum from the Site via Panda Waste Services. As the terms of Panda Waste Services' waste permit did not allow them to accept gypsum, the Council requested an amended proposal. An undertaking was given to furnish such a proposal by the 18th July, 2008, but it was not furnished by that time or, it would appear, at all.

4.26 At or around the same time, Ronan was informed that there were new owners and was advised that there would be fresh investment both in terms of capital and resources in Clean Build.

4.27 On the 6th August, 2008, South Dublin was informed of the existence of the proceedings which had been taken by Ronan against Clean Build and others. On the 11th August, 2008, South Dublin was furnished with copies of the undertakings given on the 7th and 28th July, 2008. Following a series of investigations, South Dublin decided that the undertakings were not being compiled with and that Clean Build was transferring waste contrary to the conditions of their waste collection permit (reference no. 580/4).

4.28 Despite South Dublin's directions that Clean Build cease operations, evidence was put before the court which suggested that Clean Build had both removed some waste materials from the Site in August, 2008 but also accepted some 30 tonnes of waste at the Site after the 30th June, 2008.

4.29 South Dublin sent a pre-litigation warning letter to Clean Build dated 27th August, 2008, threatening proceedings under ss. 57 and 58 of the 1996 Act. South Dublin also requested copies of the proceedings then in being. A similar request was made to Ronan on the same date but neither was acceded to.

4.30 At a meeting on the 5th September, 2008, South Dublin agreed to defer proceedings in return for written undertakings from Clean Build which included personal undertakings from the Mr. O'Rua and Mr. Roe that waste materials would not be disposed of, recycled or recovered on the Site until such time as Clean Build had applied for and received a new waste permit. Almost immediately thereafter, following an inspection of the Site, South Dublin wrote to Clean Build by letter dated the 8th September, 2008, informing

them of their concern that the earlier undertakings had been breached. Similar letters followed making the same allegations, each of which was denied by Clean Build as unfounded.

4.31 A series of correspondence followed in which Mr. Boyce sought a 30 day temporary permit on Clean Build's behalf. South Dublin's response was to direct Clean Build's attention to the proper manner in which waste permits were to be applied for.

4.32 Subsequently South Dublin received further complaints concerning the Site and undertook site inspections in November 2008. A further meeting was held in December 2008 with Mr. O'Rua at the instigation of Ronan. Proceedings were again deferred on the basis of assurances that applications for planning permission and a waste permit would be submitted to South Dublin within two weeks. No such applications followed.

4.33 A detailed proposal was submitted by Clean Build on the 25th November, 2008, for the removal of waste from the Site but was deemed unacceptable by South Dublin for a number of reasons including that the operators nominated to receive some of the waste either did not hold permits which permitted the type of waste concerned or the relevant amount.

4.34 In the same month, and on foot of site inspections and a dye test, which indicated run-off from the Site into the river, carried out on 14th November, 2008, South Dublin exercised its powers under s. 56 of the 1996 Act to arrange for the removal and disposal of a large stockpile of some 775 tonnes of mixed waste from the open yard in order to prevent environmental pollution which was said to be likely to be caused to the River Dodder which was some 50 metres from the waste in question. This removal was carried out by Veolia Environmental Services Limited on the 29th and 31st December, 2008, at a cost of €126,730.40.

4.35 On the 6th January, 2009, Clean Build convened a creditors' meeting and subsequently went into voluntary liquidation with Mr. Fennell being appointed as the liquidator. At that point the Directors' Estimated Statement of Affairs disclosed that the overall deficiency in the affairs of the company was approximately €1.028 million. As pointed out earlier the liquidator did not take an active role in the proceedings.

4.36 Following a fire at the Site, on the 18th March, 2009, South Dublin, acting under the Local Government (Sanitary Services) Act 1964 (as amended) carried out emergency works including the erection of hazard signage at the two entrances of the Site.

4.37 On the 25th May, 2009, South Dublin issued its own proceedings.

4.38 On the 9th June, 2009, Clean Build was convicted in the District Court of breaches of ss. 14, 34 and 39 of the 1996 Act and was fined €2,300 on foot of seven summonses and a further €2,400 on one summons.

4.39 The Site is presently under the control of Ronan who, along with contractors for the Council, has removed a substantial amount of waste. Ronan has also constructed fencing and engaged in other maintenance work on the Site which has cost a sum in excess of €144,301 to date. There remains a large quantity of gypsum waste on the Site. It is stable and is stored under cover in secure conditions. Also on Site is the bund around the perimeter which is constituted of construction and demolition waste which has been landfilled.

4.40 While much of the factual background just described is not a matter of significant controversy, there are real disputes between the parties as to the precise time during the sequence of events described when a real build up of building waste occurred. That is an issue to which it will be necessary to return. However, before coming to the controversial factual questions which it may be necessary to decide, it seems to me to be appropriate to refer first to the legal issues, for the resolution of those issues will at least provide the legal context in which it will be necessary to approach the factual disputes. I, therefore, turn to the law.

5. The Law – Polluter Pays Principle

5.1 The status of the "polluter pays" principle under Irish law but moreover the question of its relevance are matters of some dispute in particular in light of recent jurisprudence on the matter. It will be necessary to turn to a consideration of the case law in due course. Before turning to that question, it is, however, useful to look briefly at the wider context and the genesis of the "polluter pays" principle.

5.2 Article 191(2) (ex Art. 174(2) TEC) of the Treaty on the Functioning of the European Union ("TFEU") provides that:-

> "Union 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 Union. 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."

5.3 While this provision is neither directly effective nor a legal basis provision, it does provide an indication of the approach that the European Union must follow when legislating in the area of environmental protection. Similarly Council Recommendation of 3rd March, 1975, regarding cost allocation and action by public authorities on environmental matters (75/436/Euratom, ECSC, EEC), which describes the "polluter pays" principle in detail, is not binding by virtue of Art. 288 TFEU or indeed its predecessors which were in similar terms. However, just because, as a recommendation, it is not binding, same does not consequently render it entirely devoid of legal effect.

5.4 In *Salvatore Grimaldi v. Fonds des maladies professionnelles* (Case C-322/88) [1989] ECR 4407 the European Court of Justice ("ECJ") held that since recommendations cannot be regarded as having no legal effect at all, the national courts are bound to take them into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding EU provisions.

5.5 Given that the Waste Framework Directive, which is sought to be implemented by the 1996 Act, cites the "polluter pays" principle, which in turn references the Council Recommendation, the starting point of any consideration of the status of the polluter pays principle must be that, at least at the level of principle, I am obliged to take it into consideration. I now turn to the Irish jurisprudence.

6. A Review of the Irish Jurisprudence

6.1 In *Wicklow County Council v. Fenton (No. 2)* [2002] 4 I.R. 44, O'Sullivan J. concluded that the purpose of the 1996 Act and of the underlying directives is:-

> "[…] 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, a person who causes it can be made the subject of an order [under the 1996 Act]. 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."

6.2 Next, the court addressed the question of causation and found that:-

> "[…] 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 like in the causal chain linking the person to the environmental pollution."

O'Sullivan J. then continued by holding that:-

> "[t]o 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 claim' – 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."

6.3 In addition, O'Sullivan J. then found that three of the respondents in the case, only one of whom was a limited liability company, were guilty of negligence in the traditional sense. He stated that:-

> "[…] the first respondent was negligent in the traditional sense as it was foreseeable that, due to his acts or omission, 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 the second respondent, it too was negligent in failing to have an appropriate system whereby it could identify hazardous hospital waste […] and set it aside as it was required to do under its licence. Moreover, the second respondent, in the person of the third respondent, was negligent in dealing with Martin Munnelly without insisting that he establish before being paid that he was dumping in an authorised dump. […] The second respondent is liable under the traditional law of negligence if this is the appropriate criterion."

6.4 Importantly O'Sullivan J. went on to suggest that:-

> "[…] 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. […] Accordingly, a 'fall-back' order may be made against individual directors and or shareholders where a company cannot comply with a primary order."

6.5 Finally, the form of order granted was primarily against the relevant company, with fallback orders against its directors with leave to apply to court to fix the first respondent with a share of the costs of the remediation. All of the parties were to be jointly and severally liable for the costs involved.

6.6 In the case of *Minister for Environment v. Irish Ispat Ltd.* [2005] 2 I.R. 338, Carroll J. refused to order the liquidator of the relevant respondent company to expend monies in the remediation of pollution, which the company had caused, as to do so would be to compel the unsecured creditors to bear the burden. The court ruled that in the circumstances, the principle of the "polluter pays" as far as the company is concerned cannot be achieved. It should be noted that none of the company's directors or shareholders were involved in the proceedings and as such no issue arose as to the making of orders under the 1996 Act against them.

6.7 In *Cork County Council v. O'Regan* [2009] 3. I.R. 39 I described the test that must be satisfied in order for an order under s. 57 to be made. The test is in two parts. First, the following elements must be proved: the existence of "waste" and such waste is "being held, recovered or disposed off"; second, that the holding or disposal of waste is "likely to cause environmental pollution" or is likely to contravene ss. 34 or 39(1). This later limb may require a determination of the extent and nature of any waste concerned along with a decision as to the correct proposal or report to be followed in order to properly remediate the site. In addition, in the exercise of its discretion as to whether and on what terms to make any order, the court should be proportionate in its approach. Specifically I held that:-

> "[…] there should be some reasonable proportion between the burden placed upon the respondent and the good to be achieved by securing compliance with the environmental code concerned. Thus, the court should attempt to impose the least onerous order upon a respondent which will, nonetheless, secure the objectives of the [1996] Act."

6.8 In reference to *Fenton*, I noted that:-

> "[t]he 'polluter pays' principle requires, O'Sullivan J. held, that even those indirectly responsible for causing environmental pollution should pay for it rather than leave it to an innocent party or the community to do so."

However, I ultimately found that:

> "[t]he relevant facts are that the first named respondent is the owner of the lands. He is also the owner of the second named respondent and has accepted his personal control of the activities of the second named respondent on the site (including the acceptance of waste). He has also accepted that waste was held at and disposed of on the site without licence. Section 57 orders can relate to 'the person holding, recovering or disposing' of waste. A holder is defined in s. 5 as including a person in charge while a person in charge is defined as including a 'manager, supervisor, or operator' of an activity giving rise to the holding of waste. In those circumstances it seems that a s.

> 57 order can apply to a manger or supervisor independent of the owner whether corporate or individual. On the facts referred to above I am satisfied that the first named respondent is the manager or supervisor of the holding (sic) of the waste and was the manager or supervisor of the disposal of the waste at times during the currency of the these proceedings. In those circumstances I am satisfied that he is properly the subject of an order under s. 57. Even if I am wrong in that view I would consider that it would be appropriate to make a 'fall back' order as against the first named respondent similar to that made by O'Sullivan J. in *Wicklow County Council v. Fenton (No. 2).*"

6.9 Thus, I found that where primary liability under the 1996 Act could be found to attach to a respondent, who also happened to be a director or shareholder of another respondent, then there was no need to make a "fall-back" order unless such liability were found to have been incorrectly attributed in view of the provisions of the 1996 Act.

6.10 In the case of *Laois County Council v. Scully* [2006] 2 I.R. 292, Peart J. when faced with the question of which remediation proposal to approve ruled that:-

> "I would share the view that if there are two solutions put forward, one of which is more economic than the other, then the solution which places the lesser burden on the 'payer' should be regarded as the appropriate one. But that cannot so (sic) unless the Court is satisfied that the less onerous solution is equally effective and satisfactory in order to fully achieve the objectives of the legislation."

This would appear to be an implicit approval of the proportionality requirement set out in *O'Regan.*

6.11 In this case the first four respondents did not appear to contest liability under the 1996 Act and Peart J. had little difficulty in granting *Fenton* type "fall-back" orders against them. However, he did demur from similarly granting an order against the fifth respondent by noting that:-

> "I will hear submissions as to whether any order is required against the fifth named respondent, who I understand is the owner of the lands in question, but who may have played no part in the activities which have given rise to this application."

6.12 From this it may be inferred that the first four respondents were found liable for their involvement in the creation of environmental pollution and not for their indirect involvement in the affairs of a company which itself was responsible, yet unable to comply with any order to remediate.

6.13 In *Wicklow County Council v. O'Reilly & Ors* [2006] IEHC 265, citing *Fenton*, I ruled that a party should be joined to the proceedings on the grounds that there was authority for making "fall-back" orders against the directors of a corporate defendant. I also found that a company secretary, in his capacity as secretary, had no role of control or management over a company and as such could not be subjected to liability under the 1996 Act. It should, however, be noted that what I was dealing with at that stage in *O'Reilly* was an application concerning whether certain parties should be joined to the proceedings. The only question was, therefore, whether the proceedings were bound to fail as against the parties sought to be joined, for if the proceeding were so bound to fail then it would have been inappropriate to join the relevant parties. It was intimated on behalf of the proposed added respondents that it was intended to argue that *Fenton* was wrongly decided. Having noted that fact, I expressed the view that it would be inappropriate, on a procedural motion which simply sought to join a party to proceedings, to reach a concluded view as to whether *Fenton* was correctly decided. Thus all that was, in truth, decided at that stage in *O'Reilly* was that it was arguable (on the basis of *Fenton*) that fall back orders could be made and that the appropriate place to determine whether *Fenton* was, in fact, correctly decided was at the trial.

6.14 In a later ruling in the same set of proceedings, namely *Wicklow County Council v. O'Reilly & Ors* [2007] IEHC 71, I directed that a preliminary issue be tried as and between Mr. Steers, the director referred to in the earlier judgment who was joined to the proceedings, and the applicant as to:-

> "[w]hether, on a true construction of the law, a 'fallback' order may be made against individual directors and/or shareholders of a corporate entity under the provisions of the Waste Management Act, 1996 (as amended)".

6.15 It appears that rather than deal with the preliminary issues so directed to be tried, the applicant County Council decided to drop the question of fall back orders for the purposes of those proceedings so that the question has not and will not be determined in those proceedings.

6.16 As it happens, such a preliminary issue was tried in the case of *Environmental Protection Agency v. Neiphin Trading Ltd & Ors* [2011] IEHC 67. The question before Edwards J. was:-

> "[w]hether, on a true construction of the law, a 'fall-back' order may be made against individual directors and/or shareholders of a corporate entity under the provisions of the Waste Management Act 1996 (as amended)."

This issue was considered by the court solely in the context of s. 57 of the 1996 Act.

6.17 Edwards J. held, in relevant part, the following:-

> "[…] although the Waste Framework Directive in all its versions, including the current version, requires that the costs of waste management shall be borne by the original waste producer or by the current or previous waste holders in accordance with the polluter pays principle the Directive does specify how this is to be enforced (sic). In particular it does not specifically require the putting in place of an enforcement system that allows for the making of fallback orders. Try as it might, the Court has been unable to identify any particular article, or articles, of the Waste Framework Directive mandating the establishment of an enforcement system predicated upon the 'polluter pays principle' and structured to ensure that liability, and in particular civil liability, is determined with reference to that principle."
>
> […]
>
> "O'Sullivan J put it in terms that 'full application of the 'polluter pays' principle' requires that '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', and I agree with him that that is what full application of the 'polluter pays' principle requires."

[…]

"Where I differ with O'Sullivan J is in his belief that, in the circumstances, s.57 and s.58 respectively are capable of being construed so as to confer a blanket jurisdiction on the High Court to make 'fall-back' orders against individual directors and/or shareholders where a company cannot (as opposed to will not) comply with a primary Order."

[…]

"[I]f the intention of the Oireachtas had been to apply the polluter pays principle as defined in s.5 to ss. 57 and 58, respectively, one might have expected to see references to that principle in the wording of those provisions, as was the methodology employed with respect to s. 22(6)(d) and s. 26(2)(d) respectively. There are no such references."

[…]

"If the polluter pays principle only required the lifting of the veil in similar circumstances s.57 and s.58 could be harmoniously interpreted on the basis that the necessary jurisdiction already exists and is of long standing. However, it demands more than that. It demands that the polluter should pay in all circumstances which may require the veil to be lifted in any case where a company cannot comply, even in cases where the shareholders /directors are not fraudulently or improperly attempting to hide behind the company. The jurisprudence of the Irish Courts has long set its face against such an incursion. Absent the existence of a fraudulent or improper purpose the Courts will not lift the corporate veil unless authorized to do so by statute."

[…]

"To the extent that a jurisdiction to lift the veil already exists, it derives from the Court's inherent jurisdiction to protect its own process, or a statutory privilege, from being abused. It does not derive from any statute, and certainly not from s.57 and/or s.58 of the 1996 Act, nor has it anything to do with the polluter pays principle."

[…]

"Yet another reason for holding the view that I do is that it is difficult to reconcile the existence of s. 9 of the 1996 Act with the view that ss. 57 and 58 respectively confer the necessary additional jurisdiction on the High Court to entitle it to make in civil cases the kind of fall back orders championed by O'Sullivan J. The Oireachtas, having seen fit to grant to expressly sanction the lifting of the corporate veil so as to allow for 'a director, manager, secretary or other similar officer of a body corporate, or any person acting in that capacity' to be made criminally liable 'as well as the body corporate', it begs the question why there is no corresponding provision to allow for such persons to be also made civilly liable. The absence of any such provision is strongly suggestive of an intention on the part of the Oireachtas not to allow the veil to be lifted in civil proceedings."

[…]

"It seems to me therefore that the Waste Framework Directive has not been properly or adequately transposed in so far as enforcement is concerned, in so far as the existing enforcement procedures contained in s. 57 of the 1996 Act do not in fact allow for the making of fall back orders against individual shareholders/directors of a corporate entity. In the circumstances I must answer the preliminary question in the negative."

6.18 Insofar as the polluter pays principle forms part of the landscape of environmental law in this jurisdiction, the tenor of Edwards J.'s decision is that its scope does not extend to the provision of a jurisdiction on the courts to make "fall back" orders against individuals who have no connection with environmental pollution other than their position as either director or shareholder of a company found liable under the 1996 Act. In short, the "polluter pays" principle cannot, in the view of Edwards J., be used to infer provisions into the law which simply are not there. This finding, however, does not suggest that the polluter pays principle should not be given any consideration *at all* by the court nor does it address circumstances where a director or shareholder is found to be independently liable under the 1996 Act. Accordingly the principles set out in *O'Regan* in my view represent the present state of the law on the question of "independent" as opposed to "fall back" liability for those actively involved in a company.

6.19 As an aside, a useful analogy is the concept of vicarious liability in a situation where there is a relationship of employer/employee between two parties. In such circumstances an employer can be held liable for the tortuous acts of his employee. However, the mere fact of the employer's vicarious liability does not absolve the employee of all responsibly. The employee remains a tortfeasor and thus remains liable as such.

6.20 In order to approach the potential liability of the personal respondents it seems to me to be logical, therefore, to consider whether those respondents are independently liable under the provisions of the 1996 Act. If the respondents are so liable, then the question of whether they might be amenable to a fall back order would not arise and it would not be necessary to come to a view as to whether the reasoning of O'Sullivan J. in *Fenton* or that of Edwards J. in *Neiphin Trading* is to be preferred. I, therefore, turn to the question of the potential liability of the personal respondents under the *O'Regan* test.

7. Question of liability of Respondents under the *O'Regan* test

7.1 The evidence was that, at least at the time when they held the position of director, each of the personal respondents (with the exception of Mr. Roe) had an active role in the management and control of the site. Each of them attended the Site on a regular basis. It would appear that there was little in the way of formalised directors meetings so that practical day to day decisions were taken on site with the benefit of the attendance of directors on a regular basis. Each of the directors appeared to attend the Site weekly or thereabouts at a minimum. It will be necessary to come to the consequences of the change in the definition of "holder" in due course. However, certainly prior to that change in definition, for the purposes of the 1996 Act it is clear that a person in a position similar to that of being a manager, supervisor or operator of a relevant activity is a holder for the purposes of the 1996 Act. The fact that the business may be conducted by a corporate entity does not prevent individuals (whether they be directors, shareholders or otherwise) from being managers, supervisors or operators.

7.2 There might well be a question as to whether someone who genuinely carried on the role of a "pure non-executive director" could come within such a definition. However, that question does not arise on the facts of this case. During their tenure I am satisfied on

the evidence that each of the personal respondents (with the exception of Mr. Roe) had a significant personal supervisory role over the operations being carried out. They were regularly on site. While they were not full-time, they were fully aware, from direct observation, as to what was going on and made the relevant policy decisions and directions as to how activities were to be carried on. I have come to the view that it would not be correct to characterise Mr. Roe's role in the same way. At the time when he was made a director Mr. Roe was 19 years of age. The evidence suggests that his only practical involvement in the operation was at an extremely junior level. On balance, I do not believe that the evidence supports the view that he could be regarded, in any meaningful way, as a holder, recoverer or disposer of waste.

7.3 Subject to the question of whether the change in the definition of holder alters things (an issue to which I will return) I have, therefore, come to the view that, for the periods during which they were involved with Clean Build, each of the other personal respondents (excluding Mr. Roe) were directly and personally involved in the waste operation which was ongoing and must bear responsibility, to an appropriate extent having regard to the activities which occurred during their watch, for the current consequences of those actions. It will be necessary to turn shortly to the remediation proposals. However, before doing so it seems to me that it is necessary to address, briefly, the appropriate approach of the court in making remediation orders, most particularly where there are a number of respondents whose responsibility arise out of different, although connected, circumstances. This raises the question, at least at the level of principle, as to who should remediate and in what way. I now turn to that question.

8. Who Should Remediate and in What Way

8.1 As pointed out earlier both my own judgment in *O'Regan* and the judgment of Peart J. in *Scully* suggest that a solution which places the least burden on any respondents found liable but which nonetheless is appropriate, should be the one imposed. It seems to me that that approach also has implications for the division of responsibility as and between different respondents where the respondents are not all responsible for the entirety of the problem. The purpose of orders under both s. 57 and s. 58 of the 1996 Act seem twofold. Some of the provisions are designed to stop wrongful activity occurring. However, there is no longer any continuing activity on the Site in this case. There is, of course, the fact that waste continues to be held at the site. However, subject to that the harm has largely been done. Both ss. 57 and 58 require, as part of the test for the making of an order under the respective sections, that the relevant activity has caused or is likely to cause environmental pollution or that there had been a breach of either s. 34 or s. 39(1). That seems to me to be the focus of the two sections. It follows that the focus of any orders made must be to create a situation where there is no longer a risk of environmental pollution or to deal with a situation where it is necessary, appropriate and proportionate to require a reversal of action taken in breach of the two sections that I have mentioned. However, the minimum or cheapest remediation measures consistent with those overall requirements seems to be what is mandated by the sections. I will, as I have pointed out, shortly turn to what that solution is on the facts of this case. However, it also seems to me that that focus gives significant guidance as to how the burden should be shared amongst a number of respondents who might be said to bear responsibility for the situation that requires remediation.

8.2 In passing it is worthy of some note that the precise need for two different sections similar to ss. 57 and 58 is not immediately apparent. The conditions for making orders under s. 57 are met where there is a holding, recovering or disposing of waste in a manner that is causing environmental pollution or is in breach of ss. 34 or 39(1). It is true that s. 58 also deals with a situation where there had been but no longer is such a holding, recovery or disposal. However, it is hard to envisage that there could be a case that came within s. 58 but did not also come within s. 57. It is, of course, the case that there may be circumstances where s. 58 arises but s. 57 does not. Section 58 is, therefore, wider in its ambit covering, as it does, both present and past actions. It is also clear that the courts jurisdiction under s. 58, in a case such as that with which I am concerned, is clearer in that there is an express entitlement to require mitigation or remedy of any effects of previous actions.

8.3 Given that the whole purpose of the sections (at least insofar as the measures sought to be invoked in these proceedings are concerned) is to put in place proposals to remedy or mitigate the consequences of previous actions so as to remove the risk of environmental pollution or, perhaps, to ensure that persons are not allowed the fruits of having breached s. 34 or s. 39(1), then it seems to me that the distribution of liability between a number of respondents must focus on the extent to which each respondent can properly be said to have contributed to the situation which now requires remediation. In order to address that question specifically, it seems to me to be more appropriate to turn first to the remediation which is actually needed.

9. The Remediation Proposals

9.1 Ronan and South Dublin have put forward different proposals as to the appropriate remediation solution that should be adopted in respect of the Site. While the purpose of both proposals is to restore the Site to a condition where there is no longer a risk of environmental pollution, the estimated costs respectively involved in achieving that goal are a particular point of difference between the two applicants. In addition, the South Dublin proposal is the more invasive and involves the removal of large quantities of materials from the site, whereas the Ronan proposal involves an *in situ* remedy.

9.2 The Ronan proposal was formulated by Minerex Environmental Solutions Limited ("MEL") and was submitted to the court in a revised form on the 11th March, 2011. It comprises three steps. The first step, which incorporates a contingency plan, addresses the issue of groundwater remediation in what is described in the plan as Zone A. It involves the instillation of wells and pumps which would pump out the groundwater into the foul sewer through the existing connection over the course of one to two years. This contamination primarily resulted during the 20 year period, between 1970 and 1990, in which the soak pits were in use.

9.3 The second step addresses the waste materials on site, namely wood, plastic and metal. As this waste is chemically stable, it is appropriate, it is said, to screen it, divide it among the various categories and then crush it. Finally, the respective materials would be brought offsite for appropriate processing or disposal.

9.4 The final step would deal with the gypsum waste which would be simply removed from the Site. This waste is housed in a warehouse and as such an unstable wall of the building would have to be repaired before any works were carried out.

9.5 According to MEL there is nothing on Site which poses an immediate environmental risk to any of the receptors, namely man or the river and so the above steps could be carried out in an orderly manner over a 36 month period. The only element which is said to be of interest in relation to human protection and safety is the construction of a gas trench on the eastern side of the Site so as to ensure that the methane gas present does not migrate across the road towards the residential areas nearby. Although this situation is unlikely it was proposed that this precautionary action be taken within six months. The estimated costs for the three steps are respectively €128,000, €118,000 and €120,000. This is to be compared with the estimated cost of South Dublin's proposal, which was in the region of €2.5 million.

9.6 The environmental expert on behalf of South Dublin, Mr. Marron, accepted that, although the MEL Remediation Proposal was not in his view strictly in accordance with the Environmental Protection Agency's code of practice (which requires that all waste is removed from an illegal landfill), it was adequate to eliminate the risk to humans and to eliminate the risk of environmental pollution and that it

would remediate the Site. Mr. Marron did raise two reservations to this endorsement of the MEL Proposal. The first was that the Site should be capped as a precaution against the admittedly low risk of air pollution from the Site. The second was that the timeline proposed was too long in his view and that the relevant steps should, therefore, be taken within six months. This period, it was contended, would be in accordance with the EPA Code of Practice which requires that remedial work should be carried out in the shortest practical time.

9.7 The original proposal put forward by South Dublin was formulated by White Young Green, environmental consultants, and has been approved by the Environmental Protection Agency. It involved the proposed removal of approximately 10,850m3 of waste from zone A for disposal to a licensed non-hazardous landfill and the excavation and screening on site of approximately 85,350m3 of waste in zone B involving the removal of non-inert waste to licensed facilities for recycling and/or disposal and the reuse of inert clay and soils along the boundaries at an estimated cost of €2.5 million.

9.8 The South Dublin Proposal divided the Site into two zones. Zone A comprised an area in the northern section of the Site, where the soak pits had been and consequently where the majority of the groundwater contamination had occurred. Zone B comprised the remainder of the Site. The precise demarcation of the two zones was unclear and would, it was said, require further testing for a clear determination to be made.

9.9 As will be seen there was a great deal of difference both in scale and scope between the remediation proposals originally put forward by Ronan and South Dublin respectively. It is also fair to say that there appeared to have been an appropriate and significant level of engagement between the respective experts such that the revised proposal put forward by MEL clearly resulted from some input on the part of South Dublin's expert. It is also fair to say that it should be recorded that the position adopted by counsel for South Dublin was, in my view, appropriate. Having regard to the fact that the experts employed by South Dublin remained of the view that their remediation proposal conformed with the EPA's guidelines and that the MEL proposal, even in its revised form, did not (an issue strongly contested by MEL) counsel felt it appropriate to maintain the formal position that South Dublin continued to seek an order requiring that its remediation proposal be put in place. However, counsel did accept that the state of the expert evidence and the views of the experts had reached a stage by the close of the proceedings that he could not argue (save for the two points of detail to which reference has already been made) that the revised MEL proposal would do other than achieve a situation where there was no longer any risk of environmental pollution.

9.10 In those circumstances it seems to me that the MEL proposal is, in general terms, the appropriate form of remediation to direct in this case. On the combined view of both experts it seems clear that if that proposal is carried out there will no longer be any risk of environmental pollution at the site. In addition, it does not seem to me that any measures beyond those required to comply with the MEL report in its revised form would be necessary in order to impose an appropriate and proportionate requirement arising out of any breach of the 1996 Act. I should also note in passing that I have, since the evidence concluded, been told by the parties that the risk to the integrity of the building which houses much of the gypsum waste has been remedied so that the possible short term environmental risk which would have stemmed from a collapse of the building is no longer a serious problem.

9.11 What remains for decision, therefore, are the two concerns expressed by Mr. Marron in relation to the revised MEL proposal. While the matter does not seem to me to have an overwhelming level or urgency, having regard to the fact that the situation now seems to be relatively stable, nonetheless it does seem to me that the period of remediation proposed by MEL does not sufficiently reflect the fact that there has been a significant breach of the law which does need to be addressed within a reasonably short timeframe. In all the circumstances it seems to me that the MEL proposal should be revised so as to ensure that all of the works required to be carried out are completed by the end of 2012.

9.12 I am not satisfied on the evidence that the form of capping which Mr. Marron required is necessary or proportionate having regard to the very low risk that seems to pertain in respect of air pollution on all the evidence.

9.13 In the circumstances, and at the level of principle, it seems to me, therefore, that the appropriate form of remediation that requires to be directed is that set out in the revised MEL report of the 11th March, 2011, subject to the proviso that all necessary action is complete by the end of 2012. Having already concluded that the personal respondents are, at the level of principle, and with the exception of Mr. Roe, potentially liable on the basis of their own independent actions, it is next necessary to turn to the relative responsibility of those individuals and also the question of the responsibility of Ronan.

10. Whose Responsibility

10.1 I will turn first to the question of the responsibility of Ronan. It is true that some of the problems which the Site currently has can, as a matter of probability, be traced to the Ronan period prior to the Clean Build lease. As pointed out there were soak pits in use which were ultimately filled in and in respect of which there appears to be some residual pollution. On the other hand I am not satisfied on the evidence that there is any basis for suggesting that there was any material breach by Ronan of the appropriate regulatory regime that was in place when the Site was in occupation and use by Ronan. While there was evidence of a small number of incidents that gave rise to concern, all of the evidence supports the view that any concerns were dealt with in a timely and appropriate fashion. In addition, it does not seem to me that any of the problems which the Site now has and which can, as a matter of probability, be traced back to the Ronan period, could be said to arise from any breach by Ronan of then applicable regulations and standards. To regard Ronan as being responsible for any historical problems on the Site which stem from their period of occupation in the absence of any breach by Ronan, in any material and contributory way, of the standards and regulations then in force, would be to construe the 1996 Act as imposing a retrospective obligation on parties to remediate sites even though the site in question was, in the light of the legislation then in force, properly managed and operated. In the absence of clear wording imposing such an obligation it does not seem to me that it would be appropriate to interpret the 1996 Act in that way.

10.2 I understand that similar legislation in some countries does permit of the possibility of orders being made which require the current owner of a site to carry out what might be called remediation works even though the problems which now require remediation predated modern legislation and resulted from activities which were lawful in their day. However, it is clear that any such legislation would require safeguards to ensure that same did not operate in an unfair way. The architecture of such legislation would be very different from the provisions of the 1996 Act which are clearly designed to prevent ongoing wrongful waste activity and to remediate wrongful activity which occurred after the Act came into force (or, possibly, although the issue does not arise specifically on the facts of this case) prior to the Act coming into force but nonetheless wrongful in the light of the relevant then current statutory regime. In those circumstances I am not satisfied that Ronan can have any responsibility for the pre-lease activities which they carried on in an appropriate and lawful way.

10.3 As and between the personal respondents it is necessary to divide the problem into three phases. The first is up to the time when Mr. Farrell resigned as a director on 25th of January, 2007. The second is between that date and the time when ownership and control of Clean Build passed from Mr. Mullin and Mr. Redmond to Mr. O'Rua and Mr. Roe on the 11th of July, 2008, although it was

agreed that Messrs. Mullin and Redmond would continue to play some role for a transitional period of two months. The third is from that time onwards to the cessation of any activity.

10.4 Other than the accounts of the personal respondents given in evidence, and some of the objective evidence there is, in truth, little enough to go on from which a very clear view as to precisely when the problem occurred can be obtained. Unfortunately the experts who were employed to consider the appropriate remediation works were unable to place the time at which the materials that require remediation were deposited with any level of precision that would be of assistance in allocating the blame for the problem between the three periods to which I have referred. There simply were no scientific tests or observations available which could have been of assistance in that regard. The only objective evidence is a series of photographs (including a small number of aerial photographs) which can be fixed in time and which show the development of the problem.

10.5 In addition, there is some limited evidence from witnesses called on behalf of Ronan who visited the Site from time to time and also from some witnesses called by South Dublin who visited the Site particularly in the third phase. I have had regard to all of that evidence. On the basis of that evidence I make the following findings of fact:-

> A. Up to the time when Mr. Farrell ceased to be involved the Site was, broadly speaking, conducted in an orderly fashion with only a very small accumulation of waste material beyond that which might be expected to be properly on the Site for the purposes of the activities permitted. There is some evidence of the beginnings of a build up, most particularly by the construction of a bund around some of the edge of the site, which can be placed around the time when Mr. Farrell departed the scene. It is also clear that some form of material was placed over a considerable portion of the Site at or around the same time. That material was described by some witnesses as hardcore designed to facilitate ease of transport by trucks and the storage of skips and the like. Some of the expert evidence in relation to remediation casts doubt on whether all of it was hardcore in the sense in which that term is normally used but rather may have been building waste used for the purposes of providing a surface similar to hardcore. In all the circumstances it seems to me that I must conclude that it would be just to apportion 10% of the problem requiring remediation to the period when Mr. Farrell remained involved.
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> B. At the other end of the scale it is necessary to look at what happened after Mr. O'Rua and Mr. Roe took over. For the reasons already identified I have excluded Mr. Roe from any personal responsibility. On Mr. O'Rua's evidence nothing improper happened after he took over in that he was simply involved in attempting to clean up the Site in an appropriate way and did not take in any additional waste. I am satisfied on the evidence of South Dublin officials that there was at least some additional waste taken onto the Site after Mr. O'Rua took over. However, I am not satisfied that it played any very significant role in the overall build up of waste on the Site which now requires remediation. In addition, some regard has to be had to the fact that, on any view, Mr. O'Rua, during his period, procured that materials were removed from the Site which, in all probability, now makes the task of remediation somewhat easier. In all the circumstances it does not seem to me that it would be fair or just to regard the period after Mr. O'Rua became involved as contributing more than 5% to the current problem which requires remediation.
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> C. It follows that I am also satisfied that the intervening period represented the time when, by an overwhelming margin, the great preponderance of the problem occurred. I am satisfied on all the evidence that the period from when Mr. Farrell departed until Mr. O'Rua took over was a time when this Site got out of hand. Vast amounts of building waste were deposited far beyond the capacity of those involved in the Site to handle. Significant changes in ground level occurred by the build up of materials. By far the preponderance of the problems that now need to be addressed occurred during that period. In the circumstances I am satisfied that it is appropriate to attribute 85% of the problems now requiring remediation to the period when only Mr. Mullin and Mr. Redmond were in charge.

In passing I should note that when I refer to the problems requiring remediation in this section I am referring both to problems required to be dealt with so as to remove a risk of pollution and problems required to be dealt with because it is proportionate to so require because of breaches of the 1991 Act.

10.6 In summary, therefore, it seems to me that Mr. Farrell, Mr. Mullin and Mr. Redmond are jointly and severally responsible for 10% of the problem, Mr. Mullin and Mr. Redmond are jointly and severally responsible for 85% of the problem and Mr. O'Rua is responsible for 5% of the problem. However, as those findings are based on the views which I expressed in *O'Regan* as to individual responsibility, I must now return to question of the change in the definition of the term "holder".

10.7 The new definition of that term, as previously referred to, came into effect on the 1st July, 2008. The Ronan Proceedings were commenced by an originating notice of motion, for which an order for short service was granted by O'Neill J. on the 2nd July, 2008, with a return date of the 7th July, 2008.

10.8 It is also relevant to note the provisions of s. 27(2) of the Interpretation Act 2005, which provides as follows:-

> "Where an enactment is repealed, any legal proceedings (civil or criminal) in respect of a right, privilege, obligation or liability acquired, accrued or incurred under, or an offence against or contravention of, the enactment may be instituted, continued or enforced, and any penalty, forfeiture or punishment in respect of such offence or contravention may be imposed and carried out as if the enactment had not been repealed."

10.9 It seems to follow that any obligation to remediate, deriving from the position of a personal respondent as a holder of waste, which arose prior to the 1st July, 2008, cannot be, in any way, affected by the amendment of the definition of that term by virtue of Article 19 of the Waste Management (Registration of Broker and Dealers) Regulations 2008. The liability in respect of an obligation to mitigate which lies on a holder as previously defined had accrued and s. 27(2) provides that civil proceedings can be instituted (as well as continued or enforced) in those circumstances. Nothing in the change of the definition of holder could have an effect on any of the liabilities which I have identified which are referable to a period prior to the 1st July, 2008.

10.10 There is no evidence to suggest that things got materially worse between the commencement of the Ronan Proceedings and the handover of Clean Build to Mr. O'Rua and Mr. Roe some ten days later. Therefore, it does not seem to me that the change in the definition of holder could have any effect on these proceedings with the possible exception of the potential personal liability of Mr. O'Rua which I have, for the reasons already identified, put at 5%.

10.11 In Mr. O'Rua's case the real question is as to whether he has, as a matter of law, and as a result of the change of the definition of "holder" to which I have referred, any personal liability at all. Mr. O'Rua's entire involvement post-dated the change in definition and must, therefore, be considered by reference to the new definition of holder to which reference has already been made.

It will be recalled that in setting out the test to be applied in *O'Regan* (as appears in the passage from that judgment referred to earlier), I placed specific reliance on the then definition of a holder. The extent to which that test remains valid, subsequent to the amendment of the definition of holder, must now be addressed. The real question is whether Mr. O'Rua can be said to have held, recovered or disposed of waste with "held" being interpreted, as per the new definition, as including someone who can be said to have produced or be in possession of the waste concerned. Production is not relevant in the circumstances of this case. It may well be that the test of being "in possession" of waste requires a greater degree of connection with the waste concerned than the previous definition which was at the root of my finding in *O'Regan*. It is indeed possible that someone might be said to be a "manager", "supervisor" or (perhaps less likely) "operator" of an activity in respect of waste without being actually in possession of the relevant waste. However, I am satisfied that Mr. O'Rua had, during the period when he was in control, a particularly hands on role such that it can fairly be said that any waste on the site was in his possession. Possession is not always and necessarily the same thing as ownership, although the two may be closely connected in many cases as a matter of practicality. On balance I have, therefore, come to the view that, despite the change in the definition of holder, Mr. O'Rua remains personally liable for the (admittedly small) share of responsibility to be attributed to the period when he was in control of Clean Build.

10.12 Having come to the conclusion that each of the personal respondents (with the exception of Mr. Roe) are independently liable under ss. 57 and 58, it seems to me that the question of making fallback orders does not arise. It might, theoretically, be the case that the issue of a fallback order could arise in the case of Mr. Roe whom I have absolved from any direct personal liability. However, for much the same reasons as led me to conclude that Mr. Roe was not directly responsible, it seems to me that it would be unfair and inappropriate to make a fallback order against Mr. Roe even if a jurisdiction to make such an order existed. Given that it is not decisive, therefore, as to the issues which arise in these proceedings, I feel I should not express a view as to whether I favour the position adopted by O'Sullivan J. in *Fenton* or Edwards J. in *Neiphin Trading*.

10.13 In the light of those findings it will be necessary to turn, in due course, to the form of orders which should be made. However, before so doing it is necessary that I consider the question of the undertakings already given and the extent to which those undertakings might be said to affect the appropriate course of action which I should adopt. I turn to that question.

11. The Undertakings

11.1 One other consideration that must be taken into account is, as I have said, the status of the undertakings which were given during the life of the two sets of proceedings. Although little reliance was placed on them during the hearing of the action by the respective applicants, I was not given to understand that any of the undertakings had been discharged or reliance on them abandoned.

11.2 It will be recalled that the first set of undertakings were given by Clean Build and Mr. Redmond on the 7th July. These undertakings were to the court in the Ronan Proceedings. The full terms of those undertakings are set out at para. 4.17 of this judgment. Items (a) and (c) relate to the cessation of activity and are not, really, in my view any longer relevant. Items (b) and (d) provide for the removal of certain waste from the site. More extensive undertakings were given in the same proceedings on the 28th July, by the same parties together with Mr. Mullin. Those undertakings are set out in para. 4.18 above. Again items (a) to (c) require the removal of stockpiles within specified periods of time. Items (d) and (e) require removal subject to the views of South Dublin while (f) precludes disposal or stockpiling of waste. Items (g) and (h) concern the building and the remaining items are largely procedural.

11.3 Taken as a whole, it seems to me that those undertakings involve an acceptance of the part of Mr. Redmond and Mr. Mullin that they are responsible for removing all waste on the site. Given that I have already determined that Mr. Redmond and Mr. Mullin are responsible for the vast majority to the problem which now requires to be remediated, it does not seem to me that those undertakings are, in substance, of any continuing material effect. Mr. Redmond and Mr. Mullin will be responsible for most of the remediation. While the remediation that has now been determined on is not in exactly the same terms as that contemplated by the relevant undertakings, nonetheless, in so far as it remains necessary to comply with the remediation proposal, Mr. Redmond and Mr. Mullin will, in substance, have to bear by far the largest part of the responsibility for putting those measures into effect.

11.4 The undertakings given by Clean Build, Mr. Roe and Mr. O'Rua on the 5th September, were given outside the context of court proceedings. Those undertakings are set out at para. 4.19 above. Items (a) and (c) concern cessation of activities and maintenance of records and seem to be of little continuing relevance. Item (b) involved an undertaking to dispose of certain waste in a manner described. Again it does not seem to me that that undertaking should lead to any different view being taken of the degree of responsibility which Mr. O'Rua now bears for the overall situation.

11.5 In substance it seems to me that by requiring the parties to meet their obligations in relation to remediation in the way in which I have set out in the preceding section of this judgment, the parties will in substance and having regard to the more refined view which it is now possible to take of the necessary remediation measures, meet at least those obligations which they undertook to meet in the various undertakings to which I have referred which remain relevant. In those circumstances it does not seem to me that the undertakings should alter the overall approach.

12. The Position of Ronan and the Orders to be Made

12.1 For the reasons already set out I am not satisfied that it is appropriate to attribute any of the blame for the situation which now pertains on the Site to Ronan. However, Ronan is now both the owner and the occupier of the Site since the Clean Build lease came to an end. Ronan must, therefore, be taken to be the holder of any waste on the site. In that sense, and in that sense only, it seems to me that Ronan has a responsibility to ensure that the remediation measures which I have identified as being required are carried out. That leads to the question of the appropriate form of order that should be made.

12.2 What s. 58(1) permits the court to make is an order requiring a person to, amongst other things, remedy any effects of unlawful activity in a specified manner. In those circumstances it seems to me that the appropriate form of order should be one which directs Ronan, Mr. Mullin, Mr. Farrell, Mr. Redmond and Mr. O'Rua to procure that the work specified in the revised MEL report subject to the timescale referred to earlier in this judgment are to be carried out. As and between those parties while Ronan, as the land owner, has a responsibility for ensuring that the works are done, Ronan is entitled to an indemnity from the other parties. That indemnity should be a joint and several indemnity from Mr. Mullin, Mr. Farrell and Mr. Redmond in respect of 10%, a joint and several indemnity from Mr. Mullin and Mr. Redmond for 85% and an indemnity from Mr. O'Rua for 5%.

12.3 In the light of the findings set out in this judgment, I propose inviting counsel to make further submissions as to what the position is in relation to monies already expended both by Ronan and by South Dublin. As pointed out at para. 4.34 above, South Dublin expended €126,730.00. The monies expended by South Dublin are the subject of a separate set of proceedings (*South Dublin County Council v. O'Rua, Roe and John Ronan & Sons* 2010 no. 4806 S) in which it is sought to recover those monies. As pointed out at para. 4.40 above, Ronan expended the sum of €144,301.00. Ronan seeks to recover those monies in the Ronan Proceedings.

13. The Question of Duplicative Proceedings
13.1 It was submitted by a number of the parties that the proceedings taken by South Dublin were unnecessarily duplicative given the existence of the Ronan proceedings. Against that contention South Dublin submit that it was necessary for them to bring the second set of proceedings so as to add a number of parties as respondents including Ronan in particular, but also Mr. Fennell, Mr. O'Rua and Mr. Roe; although the latter two were subsequently joined in the Ronan Proceedings and the inclusion of the liquidator may have in truth added little of substance to the case especially in light of *Ispat.* This question may be more properly a matter for consideration in the context of the hearing for costs which will follow delivery of this judgment.

13.2 However, some of the complications which have arisen in this case (and not only by virtue of the potential duplication to which I have referred) do, it seems to me, require some comment. Both ss. 57 and 58 provide that proceedings under those sections are to be brought in a summary manner. Rules of Court accordingly provide that the proceedings are brought by originating notice of motion. In substance, therefore, evidence in applications under ss. 57 and 58 is primarily given on affidavit.

13.3 In many cases that it is an appropriate procedure to follow. A legal or unlawful waste activity is identified. A local authority, the EPA, or some other interested party can bring proceedings quickly before the court to obtain appropriate orders. However, there are some cases where it seems to me that the summary nature of the process gets in the way of an effective hearing. Some litigation under ss. 57 and 58 can become complicated. For example, one complicating factor in *O'Reilly* was the contention on the part of some of the respondents in that case that the applicant County Council itself was responsible for some of the unlawful waste. A procedural problem emerged as to whether anything in the nature of a counterclaim could be allowed in summary proceedings brought by originating notice of motion.

13.4 This case demonstrates its own difficulties. A vast amount of affidavit evidence and exhibits was put before the court. Not all of it remained relevant by the time the case came to trial because events had moved on. In addition to the complication which stemmed from the desire on the part of South Dublin to be heard on the question of the appropriate type of remediation and as to whether Ronan itself should be made liable, the running of this case seemed to me to be adversely affected by the summary nature of the proceedings. All in all it seems to me that it would be preferable if the court were given a discretion to change the process (in appropriate cases only) to a plenary process if it appeared that the complexity of the case (or indeed any other factors) warranted such a move. In this case there was, as I have said, a large amount of affidavit evidence coupled with the cross examination of many of the deponents. However, given that "the game had moved on" in many respects from the time when the original applications were made to the trial, it seems to me that a more effective process, in this case, would have been a full plenary hearing with the advantage of the procedures commonly adopted in the commercial court, that is witness statements and written submissions. A plenary hearing would also have the advantage of making it much easier to deal with procedural complexities such as arose both in *O'Reilly* and in these cases deriving from suggestions on the part of parties that someone else (not a respondent) ought to be made liable.

13.5 I think it likely that, in the majority of cases, the existing summary process is best suited to achieving a speedy and efficient result. However, there are cases (and this seems to me to be one of them) where a more efficient process could have been devised if the court were given a discretion to convert the proceedings into plenary proceedings (whether pleadings will be necessary might depend on the facts of the case) which would allow all necessary parties to be joined in an appropriate way in one set of proceedings, and would allow witness statements which focused on the issues which required to be decided at the trial to be filed, thus removing any earlier affidavit evidence, which was no longer relevant, from the picture. However, the current state of procedural law does not allow such a measure. I propose sending this portion of the judgment to the Superior Court Rules Committee to enable it to consider what measures, if any, should be taken. However, the costs issue to which I have referred (arising out of the duplication of the two proceedings) remains for decision subject to the argument of counsel on all sides and must, of course, reflect the fact that these proceedings had to be conducted in accordance with procedural law as it currently is.

14. Conclusion
14.1 In summary, therefore, I propose making an order which will require Ronan, Mr. Mullin, Mr. Redmond, Mr. Farrell and Mr. O'Rua to carry out the works specified in the revised MEL report subject to a timescale of completion by the end of 2012.

14.2 I propose directing that as and between those individuals indemnities in the manner set out in para.10.6 should follow.

14.3 I propose leaving over until further argument the question of what is to happen in respect of the monies already expended by Ronan and the issues which arise in the separate proceedings brought by South Dublin in which they seek to recover monies already expended by them.

14.4 In addition, I will also hear counsel further on the precise orders which should be made in each of the respective proceedings.