Neutral Citation Number: [2011] IEHC 67

THE HIGH COURT

2009 191 MCA

IN THE MATTER OF THE WASTE MANAGEMENT ACTS 1996-2010 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

BETWEEN

THE ENVIRONMENTAL PROTECTION AGENCY

APPLICANT

AND

NEIPHIN TRADING LTD, DEAN WASTE COMPANY LTD, JENZSOPH LTD, ANTHONY DEAN, KEITH CAIRNS, THADY NEALON and SAMUEL STEARS

RESPONDENTS

AND BY ORDER

IRELAND AND THE ATTORNEY GENERAL

NOTICE PARTIES

JUDGMENT of Mr Justice John Edwards delivered on the 3rd day of March 2011.

Introduction

1.1 The motion presently before the Court arises in proceedings commenced by the applicant against the respondents in the High Court by way of an originating Notice of Motion dated the 7th of August 2009 and in which the applicant seeks certain Orders and Declarations against the respondents including Orders pursuant to section 57 of the Waste Management Act, 1996 as amended by section 48 of the Protection of the Environment Act 2003. On the 23rd of November, 2009 Mr. Justice O'Neill, in acceding to an application on behalf of the fourth to seventh named respondents inclusive, directed that the following point of law be tried as a preliminary issue in these proceedings:

> "Whether, 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)."

1.2 While, *prima facie*, the preliminary issue as framed potentially embraces any civil Order of the injunctive or remedial type made under any provision of the Waste Management Acts 1996 to 2010, the applicant's claim for statutory relief in these proceedings is confined to a claim for relief under s. 57 of the Waste Management Act, 1996 (hereinafter the 1996 Act) as amended. Accordingly, the Court considers that it is unnecessary to address the preliminary issue other than in the context of s. 57 of the 1996 Act (as amended). In the circumstances I will, of my own motion, amend the narrative title to the proceedings so as to reflect this.

1.3 *In Wicklow County Council v Fenton (No 2.)[*2002] 2 I.R. 583 the High Court (O'Sullivan J) held that a "fall-back" order may be made against individual directors and/or shareholders of a corporate entity under the provisions of s. 57 and s. 58, respectively, of the Waste Management Act 1996. O'Sullivan J's judgment in the *Fenton (No 2.)* case was subsequently followed and applied by Clarke J in *Cork County Council v O'Regan* [2005] IEHC 208; by Peart J in *Laois County Council v Scully* [2006] IEHC 2 and again by Clarke J in *Wicklow County Council v O'Reilly & Others* [2006] IEHC 265.

1.4 This Court is now being asked by the fourth to seventh named respondents to hold, in effect, that the case of *Wicklow County Council v Fenton (No 2.)* was wrongly decided (and by implication also the subsequent cases of *O'Regan, Scully & O'Reilly*, respectively, in which *Fenton (No 2.)* was followed and applied), and that *Fenton (No 2.)* ought not to be followed again in this case or in any future cases.

The jurisdiction to depart from the principle of stare decisis

2.1 Counsel on both sides of the issue, in their excellent written submissions, as well as in oral argument, are in agreement that the leading Irish authority concerning when a Court may depart from the principle of stare decisis and decide not to follow a decision of a court of equal jurisdiction is the case of *Irish Trust Bank Limited v Central Bank of Ireland* [1976-77] I.L.R.M.50 where Parke J refused to depart from the earlier decision of Gannon J in *Dunne v O'Neill* [1974] I.R. 180.

2.2 Both sides have cited and seek to rely upon the following passage from the judgment of Parke J:

> "Mr O'Neill SC on behalf of the defendants urged me that I should not follow or apply the principles quoted from the judgment of Gannon J. I fully accept that there are occasions in which the principle of stare decisis may be departed from but I consider that these are extremely rare. A court may depart from a decision of a court of equal jurisdiction if it appears that such a decision was given in a case in which either insufficient authority was cited or incorrect submissions advanced or in which the nature and wording of the judgment itself reveals that the judge disregarded or misunderstood an important element in the case or the arguments submitted to him or the authority cited or in some other way departed from the proper standard to be adopted in judicial determination."

2.3 In addition the applicant relies upon the following further passage from the same judgment, which follows immediately after the passage just quoted:

> "It is clear that none of these elements can be detected in *Dunne v O'Neill* or the judgment therein delivered. Mr O'Neill does not in fact contend any such thing but his argument rests solely on the fact that the decision is contrary to previous authorities and that I am therefore not obliged to follow it. Whatever may be the case in courts of final appellate

jurisdiction a court of first instance should be very slow to act on such a proposition unless the arguments in favour of it were coercive. If a decision of a court of first instance is to be challenged I consider that the appellate court is the proper tribunal to declare the law unless the decision in question manifestly displays some one or more of the infirmities to which I have referred. The principle of stare decisis is one of great importance to our law and few things can be more harmful to the proper administration of justice which requires that as far as possible lay men may be able to receive correct professional advice than the continual existence of inconsistent decisions of courts of equal jurisdiction. The present case affords an interesting example of what ought to be avoided. Mr Mackey SC appeared for the applicants in *Dunne v O'Neill*. Not only are his arguments set out in detail in the judgment but they are adopted and made part of the ratio decidendi in a manner in which counsel is seldom gratified to experience. Mr Mackey appeared for the plaintiffs in the present case and it would be an ironic comment on the state of the law if counsel could find his arguments adopted and applied in one court and yet be told in another court of equal jurisdiction that they were fundamentally wrong and inconsistent with the authorities.

I find nothing to convince me that the judgment of Gannon J shows such disregard or inconsistency with previous authorities to justify me in departing from it. Although the report is scanty in information as to the authorities cited by counsel it is clear from a perusal of the judgment that almost all of the cases cited to me in argument and set out in the taxing master's report were considered by the learned judge. Indeed many of the passages relied upon by Mr O'Neill and cited in the taxing master's report are also cited and relied upon by the learned judge. I therefore take the view that the only grounds upon which I could properly be asked to descend from or fail to follow *Dunne v O'Neill* have not been established to my satisfaction."

2.4 The fourth to seventh named respondents contend that this Court is free to depart from the decision in *Fenton (No 2.)* if it is of the view that it is wrong and based on an incorrect interpretation of the law. They submit that it ought to do so for reasons that will be addressed later in this judgment. The applicant does not contest that the Court would have jurisdiction to depart from the principle of stare decisis in an appropriate case but it contends that this is not such a case. The applicant argues, in reply to the fourth to seventh named respondents, that the judgments in *Fenton (No 2.), Scully, O'Regan* and *O'Reilly* suffer from none of the infirmities mentioned by Parke J. Rather they are valid determinations of issues fully argued before the Court and there is no basis for departing from them.

The Waste Management Act, 1996 Act; s. 57 thereof and related provisions
3.1 The Waste Management Act 1996 is the principal enactment in a scheme of legislation which, as of the date of this judgment, is to be collectively cited as "The Waste Management Acts 1996 to 2010". In this regard the most recent reconstitution of the scheme is as provided for in articles 2 and 3 respectively of the Waste Management (Landfill Levy) Order 2010, S.I. 13/2010, which articles state:

> *"2. In this order, "Waste Management Acts 1996 to 2010" mean the Waste Management Act 1996 (No. 10 of 1996) as amended by the Waste Management (Amendment) Act 2001 (No. 36 of 2001), Part 3 of the Protection of the Environment Act 2003 (No. 27 of 2003), the Waste Management (Electrical and Electronic Equipment) Regulations 2005 (S.I. No. 290 of 2005), the Waste Management (Environmental Levy)(Plastic Bag) Order 2007 (S.I. No. 62 of 2007), the Waste Management (Registration of Brokers and Dealers) Regulations 2008 (S.I. No. 113 of 2008), the Waste Management (Landfill Levy) Order 2008 (S.I. No. 168 of 2008), the Waste Management (Certification of Historic Unlicenced Waste Disposal and Recovery Activity) Regulations 2008 (S.I. No. 524 of 2008) and the Waste Management (Landfill Levy) Order 2009 (S.I. No. 496 of 2009).*
>
> *3. The "Waste Management Acts 1996 to 2010" shall include this Order and shall be construed together as one Act."*

As of the date of the judgment in *Fenton (No 2)* the scheme bore the collective citation "The Waste Management Acts 1996 to 2001" and included just the principal Act as amended by the Waste Management (Amendment) Act 2001

3.2 The long title to the Act of 1996 is expressed in terms that it is:

> *"An act to make provision in relation to the prevention, management and control of waste; to give effect to provisions of certain acts adopted by institutions of the European Communities in respect of those matters; to amend the Environmental Protection Agency Act, 1992, and to repeal certain enactments and to provide for related matters."*

3.3 The structure of the Act is that it is comprised of seven parts. Part I (which contains sections 1 to 21 inclusive) is entitled "Preliminary and General"; Part II (which contains sections 22 to 26 inclusive) concerns "Waste Management Planning"; Part III (which contains sections 27 to 31 inclusive) concerns "Measures to Reduce Production, and Promote Recovery, of Waste; Part IV (which contains sections 32 to 36 inclusive) concerns "Holding, Collection and Movement of Waste"; Part V (which contains sections 37 to 54 inclusive) concerns "Recovery and Disposal of Waste"; Part VI (which contains sections 55 to 59 inclusive) concerns "General Provisions Regarding Environmental Protection"; and Part VII (which contains sections 60 to 71 inclusive) concerns "Miscellaneous". There are then five schedules to the Act dealing with "Categories of Waste", "Hazardous Waste", "Waste Disposal Activities", "Waste Recovery Activities" and "Repeals and Revocations", respectively.

3.4 S.2 of the 1996 Act states:

> *"The purposes for which the provisions of this Act are enacted include the purpose of giving effect to the community acts specified in the Table to this section."*

The Table referred to then lists the following instruments:

> Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils - O.J. No. L 194/23, 25 July 1975 ("otherwise the Waste Oils Directive");
>
> Council Directive 75/442/EEC of 15 July 1975 on waste - O.J. No. L 194/39, 25 July 1975;
>
> Council Directive 76/403/EEC of 6 April 1976 on the disposal of polychlorinated biphenyls and polychlorinated terphenyls - O.J. No. L 108/41, 26 April 1976;
>
> Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances - O.J. No. L 20/43, 26 January 1980;

Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment - O.J. No. L 175/40, 5 July 1985;

Council Directive 86/278/EEC of 12 June 1986 on the protection of the environment, and in particular of the soil, when sewage sludge is used in agriculture - O.J. No. L 181/6, 4 July 1986;

Council Directive 87/101/EEC of 22 December 1986 amending Directive 75/439/EEC on the disposal of waste oils - O.J. No. L 42/43, 12 February 1987;

Council Directive 87/217/EEC of 19 March 1987 on the prevention and reduction of environmental pollution by asbestos - O.J No. L 85/40, 28 March 1987;

Council Directive 89/369/EEC of 8 June, 1989 on the prevention of air pollution from new municipal waste incineration plants - O.J. No. L 163/32, 14 June 1989;

Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste O.J. No. L 78/32, 26 March 1991;

Council Directive 91/157/EEC of 18 March 1991 on batteries and accumulators containing dangerous substances - O.J No. L 78/38, 26 March 1991;

Council Directive 91/27/EEC of 21 May, 1991 concerning urban wastewater treatment - O.J No. L 135/40, 30 May, 1991;

Council Directive 91/689/EEC of 12 December 1991 on hazardous waste - O.J No. L 377/20, 31 December 1993 ("otherwise the Hazardous Waste Directive");

Commission Directive 93/86/EEC of 4 October 1993 adapting to technical progress Council Directive 91/157/EEC on batteries and accumulators containing certain dangerous substances - O.J No. L 264/51, 23 October 1993;

Council Regulation (EEC) No. 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community - O.J No. L 30/1, 6 February 1993;

European Parliament and Council Directive 94/62/EC of 20 December 1996 on packaging and packaging waste - O.J No. L 365/10, 31 December 1994;

It should be noted that the principal instrument among these is Council Directive 75/442/EEC of 15 July 1975 (as amended by Council Directive 91/156/EEC of 18 March, 1991), and it is sometimes referred to as the "Waste Framework Directive".

3.5 The list contained in s.2 of the 1996 Act has been added to over the years by some of the further enactments now collectively constituting the Waste Management Acts 1996 to 2010.

The Waste Management (Amendment) Act 2001 added:

Council Directive 1999/31/EC of 26 Aril 1999 on the landfill of waste – O.J. No. L 182/1, 16 July 1999;

The Protection of the Environment Act, 2003 added:

Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control - O.J. No. L 257, 10 October 1996;

European Parliament and Council Directive 2000/53/EC of 18 September 2000 on end-of-life vehicles - O.J. No. L 269, 21 October 2000;

European Parliament and Council Directive 2000/76/EC of 4 December 2000 on the incineration of waste - O.J. No. L332, 28.12.2000;

The Waste Management (Electrical and Electronic Equipment) Regulations 2005 added:

European Parliament and Council Directive 2002/95/EC of 27 January 2003 on the restriction of the use of certain hazardous substances in electrical and electronic equipment - O.J. No. L 37/19, 13 February 2003;

European Parliament and Council Directive 2002/96/EC of 27 January 2003 on waste electrical and electronic equipment - O.J. No. L 37/24, 13 February 2003;

European Parliament and Council Directive 2003/108/EC of 8 December 2003 amending Directive 2002/96/EC on waste electrical and electronic equipment - O.J. No. L 345/106, 31 December 2003.

The Waste Management (Registration of Brokers and Dealers) Regulations 2008 added:

Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste - O.J. No L 114/9, 27 April 2006;

Regulation (EC) No. 1013 of the European Parliament and of the Council of 14 June 2006 on shipments of waste - O.J. No L 190/1, 12 July 2006;

Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC - O.J. No L 156/17, 25 June 2003

It should be noted that Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste is a consolidating instrument incorporating, *inter alia*, all amendments and changes to Council Directive75/442/EEC and is now referred to as the

"Codified Waste Framework Directive". A new Waste Framework Directive, namely Directive 2008/98/EC, has in turn recently replaced this Directive. It was published formally on the 24th of November 2008 and the deadline for its transposition was the 12th of December 2010. The new Waste Framework Directive modifies fundamentally current EU waste legislation by replacing the existing Codified Waste Framework Directive, the Hazardous Waste Directive and the Waste Oils Directive and updates EU Law on waste generally.

3.6 Section 57 of the 1996 Act (as amended by section 48 of the Protection of the Environment Act 2003) is an enforcement section and is entitled "Powers of the High Court in relation to the holding, recovery or disposal of waste", and it provides:

> *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.*
>
> *(3) An application for an order under this section may be made whether or not there has been a prosecution for an offence under this Act in relation to the activity concerned and shall not prejudice the initiation of a prosecution for an offence under this Act in relation to the activity concerned.*
>
> *(4) Without prejudice to the powers of the High Court to enforce an order under this section, a person who fails to comply with an order under this section shall be guilty of an offence."*

3.7 As the Court is expressly empowered by s.57 to make an order against a person "holding", "recovering" or "disposing" of relevant "waste", it is necessary to have recourse to the definitions of those terms contained within the Act itself.

3.8 S. 4 of the 1996 defines (*inter alia*) "waste", "disposal" and "recovery". The relevant provisions are:

> *4. —(1) (a) In this Act, "waste" means any substance or object belonging to a category of waste specified in the First Schedule or for the time being included in the European Waste Catalogue which the holder discards or intends or is required to discard, and anything which is discarded or otherwise dealt with as if it were waste shall be presumed to be waste until the contrary is proved.*
>
> > *(b) A reference in this Act to waste shall be construed as including a reference to hazardous waste unless the contrary intention appears.*
>
> *(3) In this Act, "disposal", in relation to waste, includes any of the activities specified in the Third Schedule, and "waste disposal activity" shall be construed accordingly.*
>
> *(4) In this Act, "recovery", in relation to waste, means any activity carried on for the purposes of reclaiming, recycling or re-using, in whole or in part, the waste and any activities related to such reclamation, recycling or re-use, including any of the activities specified in the Fourth Schedule, and "waste recovery activity" shall be construed accordingly.*

3.9 In construing s.57 above regard must also be had to the following definitions, which are contained (*inter alia*) in s.5 of the 1996 Act:

> *"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 though noise, odours or litter, or*
> >
> > *(c) adversely affect the countryside or places of special interest;*
>
> *"European Waste Catalogue" means the list of waste set out in Commission Decision 94/3/EC of 20 December, 1993, (made pursuant to Article 1 (a) of Council Directive 75/442/EEC on waste) and includes such list as amended from time to time;*
>
> *"holder" (as now amended by Regulation 19 of the Waste Management (Registration of Brokers and Dealers) Regulations, 2008 – S.I. No 113/2008) means the producer of the waste or the natural or legal person who is in possession of it;*

3.10 It ought to be noted that at the time of delivery of the judgments in *Fenton (No 2.), Scully*, *O'Regan* and *O'Reilly*, respectively, "holder" was defined somewhat differently. The original definition as set out in s. 5 of the 1996 Act prior to its amendment by S.I. 113/2008 stated:

> *"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;*

In further elucidation of this definition s.5 also stated:

> *"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;*

and:

> *"occupier" includes, in relation to any premises, the owner, a lessee, any person entitled to occupy the premises and any other person having, for the time being, control of the premises;*

3.11 Although the Court is only concerned in the present case with s.57 of the 1996 Act, the judgment of O'Sullivan J in *Wicklow County Council v Fenton (No 2)* was concerned with both s. 57 and s.58 of the 1996 Act. Accordingly, it may be useful if I also set out the terms of s. 58, which is another enforcement provision. It provides:

> *58. —(1) (a) Where, on application by any person to the appropriate court, that court is satisfied that another person is holding, recovering or disposing of, or has held, recovered or disposed of, waste, in a manner that is causing, or has caused, environmental pollution, that court may make an order requiring that other person to do one or more of the following, that is to say:*
>
> *(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.*
>
> *(b) In this subsection, "appropriate court", in relation to an application under paragraph (a) means—*
>
> *(i) in case the estimated cost of complying with the order to which the application relates does not exceed £5,000, the District Court,*
>
> *(ii) in case the estimated cost aforesaid does not exceed £30,000, the Circuit Court, and*
>
> *(iii) in any case, the High Court.*
>
> *(c) (i) If, in relation to an application under this section to the District Court, that court becomes of opinion during the hearing of the application that the estimated cost aforesaid will exceed £5,000, it may, if it so thinks fit, transfer the application to the Circuit Court or the High Court, whichever it considers appropriate having regard to the estimated cost aforesaid.*
>
> *(ii) If, in relation to an application under this section to the Circuit Court,that court becomes of opinion during the hearing of the application that the estimated cost aforesaid will exceed £30,000, it may, if it so thinks fit, transfer the application to the High Court.*
>
> *(iii) This paragraph is without prejudice to the jurisdiction of a court (being either the District Court or the Circuit Court) to determine an application under this section in relation to which it was, at the time of the making of the application, the appropriate court.*
>
> *(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.*
>
> *(b) Where an application is transferred under paragraph (c) of subsection (1), the court to which it was transferred shall be deemed to have made any order made under this subsection by the court from which it is so transferred in the proceedings in relation to the application.*
>
> *(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.*
>
> *(5) (a) An application under subsection (1) to the District Court shall be made to the judge of the District Court for the District Court district in which the activity concerned takes place.*
>
> *(b) An application under subsection (1) to the Circuit Court shall be made to the judge of the Circuit Court for the circuit in which the activity concerned takes place.*
>
> *(6) An application under subsection (1) may be made whether or not there has been a prosecution for an offence under this Act in relation to the activity concerned and shall not prejudice the initiation of a prosecution for an offence under*

this Act in relation to the activity concerned.

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

3.12 It is also appropriate to recite s. 9 of the 1996 Act as certain reliance has been placed upon this section by the fourth to seventh named respondents in the course of their submissions. S. 9 provides:

9. —(1) Where an offence under this Act has been committed by a body corporate and is proved to have been committed with the consent or connivance of or to be attributable to any neglect on the part of a person being a director, manager, secretary or other similar officer of the body corporate, or a person who was purporting to act in any such capacity, that person as well as the body corporate shall be guilty of an offence and shall be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) shall apply in relation to the acts and defaults of a member in connection with his or her functions of management as if he or she were a director of the body corporate.

The decision in *Wicklow County Council v. Fenton & Ors, (No 2.)* [2002] 4 I.R. 44

4.1 A brief outline of the facts of the case is conveniently set out in the head note to the report. The first respondent was the owner of land within the functional area of the applicant, upon which it was alleged that the second respondent, a licensed waste collection company of which the third and fourth respondents were directors, was unlawfully dumping hazardous waste material causing environmental pollution. The applicant sought relief under ss. 57 and 58 of the Act of 1996, preventing the continuation of such dumping and requiring the respondents to remedy the environmental pollution caused thereby.

4.2 There were multiple controversies in this case including issues concerning whether negligence had to be established; the state of knowledge of some of the respondents; the chain of causation of the pollution complained of; whether some of the respondents could be relieved of liability on the basis of a novus actus interveniens; the objectives of the European Directives underpinning the Waste Management Act 1996; the relevance and applicability of the "polluter pays" principle; and whether the veil of incorporation could be lifted so as to allow for fallback orders against the third and fourth named respondents in the event of the second named respondent being unable for financial reasons to comply with orders made against it. Clearly the Court is not concerned with every one of those issues in the present case but, rather, is only concerned with some of them. The review that follows is confined therefore to relevant issues only.

4.3 O'Sullivan J's judgment commences with a description of the parties and the essential facts of the case. He then proceeds to identify the statutory reliefs claimed and recites the relevant statutory provisions, namely ss. 57 & 58 of the 1996 Act. Having done so, he remarks:

"Whilst both sections deal with situations where pollution is actually occurring, s. 57 deals also with cases where it has not happened yet but is likely to occur, whereas s. 58 deals with cases where it has already happened.

It will be seen that both ss. 57 and 58 are concerned with environmental pollution. The definition of this phrase is of crucial importance to the interpretation of these sections."

The learned judge then rehearses the definition of environmental pollution contained in s.5 of the 1996 Act and states:

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

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

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

4.4 O'Sullivan J then proceeds to examine, under a heading entitled *"The European Directives"* the legislative background to the 1996 Act. He states:

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

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

Article 174 (2), where relevant, provides: -

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

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

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

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

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

"Article 1

For the purposes of this Directive: -

(a) 'waste' shall mean any substance or object in the categories set out in Annex2 which the holder discards or intends or is required to discard …

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

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

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

"(g) 'collection' shall mean the gathering, sorting and/or mixing of waste for the purpose of transport …

Article 8

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

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

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

Article 15

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

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

and/or

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

Annex IIA

Disposal Operations

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

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

It will be seen, from the above, that landfill tipping above or under the ground is the first listed of disposal operations in respect of which the "polluter pays" principle applies and all provisions (in the Directive) relating to waste disposal have as their essential objective the protection of human health and the environment against harmful effects caused by the collection (as defined) transport, treatment, storage and tipping of waste.

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

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

4.5 O'Sullivan J then proceeds, under a heading entitled *'The "polluter pays" principle'* to trace the history, and to state what he believes to be the relevance, of the "polluter pays" principle. He states:

> "Section 5 of the Act of 1996 includes the following: -
>
> > "'the polluter pays principle' means the principle set out in Council Recommendation 75/436/EURATOM, E.C.S.C., E.E.C., of 3 March, 1975 regarding cost allocation and action by public authorities on environmental matters."
>
> It will be seen that the transposition into Irish domestic law of this principle, which applies universally throughout all European legislation dealing with waste (hazardous or otherwise), by reason of its presence in the Treaty of Rome itself, has been made by way of reference to the EURATOM Recommendation regarding cost allocation and action by public authorities on environmental matters.
>
> The instrument is in fact a recommendation by the Council to member states. It refers to principles and rules contained in a communication from the Commission to the Council and sets them out. I cite, partially, from these principles and detailed rules, governing their application as follows: -
>
> > "2. To achieve this [namely the allocation of costs connected with the protection of the environment against pollution throughout the Community in accordance with principles which avoid distortion of competition affecting trade] the European Communities at Community level and the Member States in their national legislation on environmental protection must apply the 'polluter pays' principle, under which natural or legal persons governed by public or private law who are responsible for pollution must pay the costs of such measures as are necessary to eliminate that pollution or to reduce it so as to comply with the standards or equivalent measures which enable quality objectives to be met …
> >
> > 3. A polluter is someone who directly or indirectly damages the environment or who creates conditions leading to such damage. If identifying the polluter proves impossible or too difficult, and hence arbitrary, particularly where environmental pollution arises from several simultaneous causes ('cumulative pollution') or from several consecutive causes ('pollution chain'), the cost of combating pollution should be borne at the point in the pollution chain or in the cumulative pollution process, and by the legal or administrative means which offer the best solution from the administrative and economic points of view and which make the most effective contribution towards improving the environment …
> >
> > 4. Under the 'polluter pays' principle, standards and charges, or a possible combination of the two, are the major instruments of action available to public authorities for the avoidance of pollution …"

I have been referred to paragraph 1.32 of *E.C. Environmental Law* (4th Ed.) by Professor Ludwig Krämer where he says: -

> "… the polluter pays principle was originally an economic principle and was understood as expressing the concept that the cost of environmental impairment, damage and clean-up should not be borne via taxes by society, but that the person who caused the pollution should bear the cost."
>
> Whilst it is clear from the foregoing that the main thrust of the relevant objectives concerned with the implementation of the "polluter pays" principle is to ensure that the polluter bears the costs of adhering to appropriate standards and pays relevant charges and is thus largely prospective, the principle applies a *fortiori* to the interpretation of domestic law intended retrospectively to deal with situations where a polluter has caused environmental pollution in breach of the law or, for example, the terms of a relevant licence."

4.6 Next, O'Sullivan J reviews the evidence in detail and then proceeds to describe the procedural history of the case. Having done so he then reviews the parties respective legal submissions. It is appropriate for the purposes of this judgment to rehearse his summaries of those respective submissions to the extent that they bear on the issues with which the Court is presently concerned.

4.7 Under the heading *"Applicant's Submissions"* O'Sullivan J notes (*inter alia*):

> "(a) It is submitted that art. 15 of Council Directive 91/156/E.E.C., in referring to the "polluter pays" principle, indicates that the cost of the disposal of waste must be borne by the holder of the waste who has it handled by a waste collector and/or the previous holders or the producer of the product from which the waste has come, rather than by the community at large, except in exceptional circumstances. This principle has been acknowledged in the Act of 1996, which in s. 5 (the definition section) defines "the polluter pays principle" as meaning the principle set out in Council Recommendation 75/436/EURATOM, E.C.S.C., E.E.C. of the 3rd March, 1975, regarding cost allocation and action by public authorities on environmental matters. This principle means that culpable parties or responsible parties should pay for the remediation or mitigation of the entire effects of any environmental pollution rather than the community and that Irish legislation should be interpreted so as to achieve that objective.
>
> (f) In regard to the first respondent, he allowed his land to be used for unauthorised dumping thereby breaking the law. He must take the consequences. Even if he himself was not actually aware that hazardous hospital waste was being dumped on his land, he was negligent and culpable and it was foreseeable that in the absence of any controls hazardous waste could be dumped, as it in fact was.
>
> (g) It may not have been foreseen that the entire contents of the unauthorised dump, comprising 8,000 tonnes, would have been contaminated but such contamination was of the type foreseeable and, accordingly, each of the respondents has caused this pollution and is answerable for it. Each of them is liable for the full cost of all relevant remedial action and appropriate steps under ss. 57 and 58.
>
> (h) This applies equally to the third and fourth respondents. In the case of the third respondent, he supervised the operations at Sheriff Street. In the case of the fourth respondent, the evidence is that she did the books of the second respondent both before and after the incorporation of the company in 1987. Both enjoyed the fruits of the company's earnings. These individuals, rather than either the applicant or the community, should be made to pay."

4.8 Under the heading *"The second, third and fourth respondent's submissions"* O'Sullivan J notes (*inter alia*):

"(c) Section 9(1) of the Act of 1996, which deals with an offence, provides that, where a body corporate is proved to have committed the offence with the consent or connivance of a person who is a director, manager or secretary or other similar officer thereof, such person shall also be guilty of the offence. The Act, in making it clear that the corporate veil can be lifted in the context of a criminal offence, must be taken not to have done so in other contexts such as the present one which is concerned with civil liability. In this regard, the Irish Act is different from the Environmental Protection Act, 1990 in the United Kingdom, which makes specific provisions in relation to civil cases for liability for individuals' responsibility. On the contrary, the court should follow the decision of Hamilton P. in *Dun Laoghaire Corporation v. Parkhill Developments Ltd.* [1989] I.R. 447, where he said, in the context of an s. 27 planning injunction, at p. 452: -

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

There is no evidence of impropriety by the third and fourth respondents in the present case and therefore no order should be made against them personally."

4.9 Having considered the parties respective submissions O'Sullivan J then gave a reasoned decision on each of the issues before him. Once again it is only necessary to rehearse so much of this portion of the judgment as bears on the issues raised in the present challenge. The learned judge commenced by making the following remarks under the general heading "*Conclusions*". He said:

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

Both ss. 57 and 58 of the Act of 1996, use the word "may" when defining the jurisdiction conferred on the court. In my view, this connotes that the jurisdiction is discretionary but, that said, such discretion must be exercised in accordance with principles which include the principle that the objectives of the Act and of the underlying directives must be achieved by the interpretation and application by this court of those sections."

4.10 The passage just quoted is then immediately followed by a further heading, viz "*Causation*", which must, I feel, be treated as a first subheading to the general or main heading to the decision part of his judgment, viz "Conclusions". Within the text underneath the first subheading the learned judge then sets out at some length his decisions on the issues of causation and related questions and the reasoning underpinning same.

4.11 The next part of the "Conclusions" section of the judgment appears under what must be regarded as a second subheading entitled "Director's personal liability". The learned Judge had the following to say on this issue:

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

The planning code was not enacted to transpose European directives into domestic law. The Act of 1996 was. A polluter is defined in the Council Recommendation 75/436/EURATOM, E.C.S.C., E.E.C. of the 3rd March 1975 dealing with the "polluter pays" principle as: -

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

It cannot be said that either the third or fourth respondent did not - at least indirectly - create such conditions. The same instrument provides that: -

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

It cannot be said, in my opinion, that the third and fourth respondents are not responsible within the meaning of the foregoing.

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

The domestic law in relation to limited liability of companies would, in my opinion, frustrate or at least fail fully to implement the objectives of the relevant directives if it precluded the making of an order against directors in

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

4.12 The final part of O'Sullivan J's judgment deals with the form of the Orders to be made in the circumstances of the particular case.

Legal submissions on the preliminary issue:
5.1 The fourth to seventh named respondents are in effect the moving parties on this preliminary issue. Accordingly it would seem appropriate to consider their submissions first, and then to consider the opposing submissions on behalf of the applicant.

Submissions on behalf of the fourth to seventh named respondents
5.2 The fourth to seventh named respondents acknowledge, as is the law, that "the purpose of statutory construction is to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context" – per Kelly J in *Director of Consumer Affairs v Bank of Ireland [*2003] 2 I.R. 217. However, as emphasized by Blaney J in *Howard v Commissioners of Public Works* [1994] 1 I.R. 101, and affirmed by Denham J in the Supreme Court in *B (D) v Minister for Health and Children* [2003] 3 I.R. 12 (at 21):

> "If the words of the statute are precise and unambiguous then no more is necessary than to give them their ordinary sense. When the words of the statute are plain and unambiguous they declare best the intention of the legislature. If the meaning of a statute is not clear then a court may move on to apply other rules of construction; it is not the role of the court to speculate as to the intention of the legislature."

5.3 The fourth to seventh named respondents first point is, therefore, that O'Sullivan J failed to attempt to construe s. 57 of the 1996 Act according to the literal rule of construction in the first instance, and that he was wrong in the circumstances of the case to adopt a purposive approach to its construction and to seek by application of teleological principles to ensure that the objectives of the legislation were achieved. In support of this point they have cited, and in their written submissions they have quoted extensively from, *Keane v An Bord Pleanala* [1997] 1 I.R. 184; Howard v Commissioners of Public Works [1994] 1 I.R. 101; *B (D) v Minister for Health and Children* [2003] 3 I.R. 12; and *Gooden v St Otteran's Hospital* [2005] 3.I.R. 617. They rely on those decisions and on the further jurisprudence and commentaries cited and relied upon with approval within those judgments, including well known passages from *Craies on Statute Law* and *Maxwell on The Interpretation of Statutes* as well as the judgment of Lord Blackburn in *Direct United States Cable Co. v Anglo-American Telegraph Co.* (1877) 2 App. Cas. 394.

5.4 The fourth to seventh named respondents have also referred the Court to s.5 of the Interpretation Act 2005 and say that this Court is obliged to have regard to it in construing s.57 of the 1996 Act. This provision, which was not in force when O'Sullivan J gave judgment in the *Fenton (No 2.)* case, applies to both Acts and statutory instruments. It provides as follows:

> *"In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) –*
>
> *a. that is obscure or ambiguous, or*
>
> *b. that on a literal interpretation would be absurd or would fail to reflect the plain intention of –*
>
> *i. in the case of an Act to which paragraph (a) of the definition of Act in section 2(1) relates, the Oireachtas, or*
>
> *ii. in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,*
>
> *the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."*

They say that s.5 confirms the literal rule as the primary rule of statutory interpretation, and authorises the courts to depart from the literal rule and adopt a purposive approach only in clearly defined circumstances. They submit no such circumstances exist in the present case.

5.5 The fourth to seventh named respondents say that applying the literal rule of statutory interpretation, it is quite clear that relief under section 57 can only be granted against "the person holding, recovering or disposing of…waste". If that person is a company, then an order can only be made against it and not against a director or shareholder of that company. They say that s.57 is neither obscure nor ambiguous, nor would a literal interpretation be absurd or fail to reflect the plain intention of the Oireachtas.

5.6 The fourth to seventh named respondents also contend that when considering what was the intention of the Oireachtas in enacting s.57 of the 1996 Act, this Court must consider, and O'Sullivan J in the *Fenton (No 2.)* case ought to have considered, s.57 in its full statutory context. They say that in doing so particular regard must be had to s. 9 of the 1996 Act. They say that reading s. 57 in the context of the 1996 Act as a whole and, in particular, in the light of s. 9 thereof, it is quite clear that the Oireachtas did not intend that s. 57 could be used to pierce the corporate veil and impose civil liability on directors. It is contended that the existence of s.9 makes it clear that the Oireachtas directed its mind as to the circumstances in which the corporate veil should be pierced to as to impose liability on the directors and officers of a company for its actions and made express provision in that regard in s. 9. In contradistinction to the position under s. 9 with respect to criminal proceedings, s.57 makes no provision for the piercing of the corporate veil in civil proceedings so as to allow orders to be made against directors of corporate respondents that are holding, recovering or disposing of waste. The fourth to seventh named respondents submit that, having regard to the absence of any provision in, or relating to, s. 57 of the 1996 Act providing for the piercing of the corporate veil in civil proceedings under that section similar to that contained in s.9 of the same Act with respect to criminal proceedings, it follows that the Oireachtas did not intend to

permit the corporate veil to be pierced in the context of applications made pursuant to s. 57 in civil proceedings.

5.7 The fourth to seventh named respondents further argue that the separate legal personality of a company and its members is a long established and fundamental principle of company law, and that save in exceptional circumstances the principle of separate legal personality can only be abridged by statute. They acknowledge that exceptional circumstances justifying a deviation from the notion of separate legal personality might exist where there is an attempt to use the statutory privilege for fraudulent or other improper purposes. However, they say, no such circumstances existed in the *Fenton (No 2.)* case. They argue that any construction of s.57 of the 1996 should take into account the fundamental nature of the separate legal personality principle and that, in the absence of an express statutory abridgment of that principle, the Court should lean against an interpretation permitting the corporate veil to be pierced.

5.8 It is further argued on behalf of the fourth to seventh named respondents, adopting the terms of a criticism of the *Fenton (No 2.)* decision articulated by Dr. Yvonne Scannell in her work entitled *"Environmental and Land Use Law"(*Round Hall, 2006), (and echoing further criticisms by Alan Keating, Barrister at Law in the Dublin University Law Journal in a thought provoking article entitled *"The 'Polluter Pays' Principle in Domestic Law",* 2006 D.U.L.J 172), that O'Sullivan J went too far "in expressly endorsing, interpreting and applying the [polluter pays] principle almost as if it were a rule of law rather than a politico-legal principle the status of which is hotly debated". Putting it another way, the fourth to seventh named respondents contend that in the absence of specific provisions in EU and domestic legislation requiring him to do so, O'Sullivan J incorrectly applied the "polluter pays" principle and in effect treated that principle as a directly effective principle of EU law, which it is not.

5.9 Starting with the contention that it was necessary to interpret s. 57 so as permit "fall back" orders to be made in order not to frustrate the European Directives underpinning the 1996 Act, the fourth to seventh named respondents argue that the first difficulty is that O'Sullivan J did not identify the Directive or any provision thereof that he was seeking to give effect to. The decision of the court was not, in fact, grounded in any of the provisions of such Directives but, rather, Council Recommendation 75/436/EURATOM, ECSC, EEC of the 3rd March 1995.

5.10 The fourth to seventh named respondents concede that it is well established that community law takes precedence over domestic law but they submit that community law for this purpose does not include non-binding recommendations. The status of a recommendation as a matter of European Union law is prescribed by Article 249 of the Treaty of Rome (as amended). It provides that "recommendations and opinions shall have no binding force". This contrasts with a Regulation which Article 249 provides "shall be binding in its entirety and directly applicable in all Member States" and a Directive which Article 249 provides "shall be binding, as to the result to be achieved, upon each Member State to which it is addressed but shall leave to the national authorities the choice of form and methods". Accordingly, say the fourth to seventh named respondents, O'Sullivan J's approach in treating the "polluter pays" principle articulated in Council Recommendation 75/436/EURATOM, ECSC, EEC of the 3rd March, 1995 as having binding force, and effectively regarding it as a directly effective principle of EU law, was erroneous. In support of this the Court was referred to *Grimaldi v Fonds des Maladies Professionneles* [1989] ECR 4407. This decision confirms, if confirmation were needed, that recommendations are not intended to produce binding effects, even as regards the persons to whom they are addressed, However, that said, the decision also clarifies that it is not the case that recommendations have no legal effect. National courts are bound to take recommendations into consideration where appropriate, 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 community provisions.

5.11 The fourth to seventh named respondents also acknowledge the existence of a general principle of effectiveness such that national law must not make it virtually impossible or excessively difficult to obtain a remedy for a breach of a right conferred by European law. This principle was expressly recognized and applied in *Maher v The Minister for Agriculture and Rural Development* [2001] 2 IR 139. In addition, they also acknowledge the further principle, clearly articulated in *Marleasing SA v Commercial Internacionale de Alimentactio* C-106/89 [1990] ECR 1-4135, that a national court must interpret domestic law so far as possible to give effect to the purpose of European Directives. Again, this principle was expressly recognized and applied in *Byrne v Conroy* [1998] 1 IR 1. However, they submit that O'Sullivan J failed to identify any legal right conferred by European law or any provision of a European Directive to which effect was given by piercing the corporate veil and making "fall back" orders under section 57. It is argued that a reference to general principles such as the "polluter pays principle" is not enough to justify a departure from the principles of domestic statutory interpretation and the reading in of language into a clear statutory provision.

Submissions on behalf of the applicant

5.12 The applicant submits that although issues may arise in respect of the factual exercise of the jurisdiction to make "fall back" orders, the existence of the jurisdiction cannot be in any doubt. It has been recognised in several decisions of this Honourable Court concerning sections 57 and 58 of the Waste Management Act 1996, as amended; it is consistent with the "polluter pays" principle; and, in any event, it would seem to be available as a matter of company law.

5.13 The applicant points out that although preliminary legal issues such as this must ordinarily be tried on the basis that the facts alleged by the party seeking the relief will be proved, the respondents here rather assert the point as one of pure law: They assert there is no jurisdiction whatever the facts. This, it is submitted, is a high threshold to meet in any case and it is not met here.

5.14 The applicant contends that *Wicklow County Council v Fenton (No 2.)* [2002] 2 I.R. 583 represents good law. It says that *Fenton (No 2.),* together with *Cork County Council v O'Regan* [2005] IEHC 208; *Laois County Council v Scully* [2006] IEHC 2 and *Wicklow County Council v O'Reilly & Others* [2006] IEHC 265 constitute valid precedents which this Court should follow. It is argued that although the High Court is not rigidly bound by its earlier decisions, it is settled law that it should be slow to depart from same. The applicant says that the judgments in *Fenton (No 2.), Scully, O'Regan* and *O'Reilly* suffer from none of the infirmities mentioned by Parke J. in *Irish Trust Bank Limited v Central Bank of Ireland* [1976-77] I.L.R.M.50. Rather they are valid determinations of issues fully argued before the Court. There is no basis for this Honourable Court to reverse itself, particularly on an issue presented to the Court in the way of a preliminary issue such as this.

5.15 The applicant submits that a comparison with the approach adopted by the Courts in cases under the planning code is valuable notwithstanding the general reluctance of the Courts to lift the veil of incorporation in such cases except where there has been something like fraud, misrepresentation, serious negligence in corporate governance, a siphoning off of money out of the company so as to leave it unable to fulfil its obligations, or where, in the case of small companies, the most effective way of ensuring that the company complies with its obligations is to make an order against the directors as well as against the company itself.

5.16 In this context, s. 57 of the 1996 Act may usefully be compared with s. 27 of the Local Government (Planning and Development) Act 1976, which provides: -

> *27. —(1) Where—*

(a) development of land, being development for which a permission is required under Part IV of the Principal Act, is being carried out without such a permission, or

(b) an unauthorised use is being made of land,

the High Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order prohibit the continuance of the development or unauthorised use.

(2) Where any development authorised by a permission granted under Part IV of the Principal Act has been commenced but has not been, or is not being, carried out in conformity with the permission because of non-compliance with the requirements of a condition attached to the permission or for any other reason, the High Court may, on the application of a planning authority or any other person, whether or not that person has an interest in the land, by order require any person specified in the order to do or not to do, or to cease to do as the case may be, anything which the Court considers necessary to ensure that the development is carried out in conformity with the permission and specifies in the order.

(3) An application to the High Court for an order under this section shall be by motion and the Court when considering the matter may make such interim or interlocutory order (if any) as it considers appropriate. The order by which an application under this section is determined may contain such terms and conditions (if any) as to the payment of costs as the Court considers appropriate.

This provision has since been replaced by section 160 of the Planning and Development Act 2000. However, it was in force at the time the Waste Management Act 1996 was enacted and the cases considered below were all decided in the context of section 27.

5.17 The applicant argues that the courts have consistently accepted that they have a jurisdiction to make Orders against the Directors of companies, even where it is the company that is the holder of the permission. In *Dublin Corporation v Elton Homes Ltd* [1984] ILRM 297, Barrington J refused to make an order against directors of a company that had gone into liquidation but strongly asserted that such a jurisdiction existed. He said:

"The question arises of whether the court can or ought to make an order against Mr Keogh and Mr English personally as the former directors of the company. Let me say at once that I think it may be quite proper, in certain circumstances, to join the directors of a company as respondents when an application is made by a planning authority against a company pursuant to the provisions of s. 27. Mr Gallagher, who appeared for the planning authority, referred me to a motion *Dublin County Council v Crampton Builders Ltd & Ors.* which came before the President on 10 March 1980 in which directors of a building firm had been joined as respondents to the motion. The President did not in that case make an order against the directors but he apparently said that, in his view, s. 27 was sufficiently widely drafted to empower the joining of company directors as respondents, but that whether an order would or would not be made against them would depend on the facts of each individual case. There may be many cases, particularly in the case of small companies, where the most effective way of ensuring that the company complies with its obligations is to make an order against the directors as well as against the company itself. But in such a case the order against the directors would be a way of ensuring that the company carried out its obligations. A body corporate can only act through its agents and the most effective way of ensuring that it does in fact carry out its obligations might be to make an order against the persons in control of it.

What is sought against the second and third-named respondents in the present case is very different. They are no longer in control of the company and it is not suggested that, through them, the company can be forced to carry out its obligations. What is suggested is that because they were directors of the company at the time when the company obtained planning permission that they should be ordered to complete the development at their own expense. I am not saying that there might not be cases where the court would be justified in making such an order. If the case were one of fraud, or if the directors had siphoned off large sums of money out of the company, so as to leave it unable to fulfil its obligations, the court might be justified in lifting the veil of incorporation and fixing the directors with personal responsibility. But that is not this case. The second and third-named respondents appear to be fairly small men who, having failed in this particular enterprise, are now back working for others. The worst that can be imputed against them is mismanagement."

5.18 The applicant points out that Murphy J cited Barrington J's judgment with approval in *Dublin County Council v O'Riordan* [1985] IR 159, although again not making an order against a director on the facts of that case. Hamilton P also cited Barrington J's judgment with approval in *Dun Laoghaire County Council v Parkhill Developments Ltd*. [1989] IR 447.

5.19 The Court was further referred to *Sligo County Council v Cartron Bay Construction Ltd.* (unreported, High Court, O'Caoimh J, 25th May 2001) in which O' Caoimh J granted an Order for the sequestration and attachment of directors of an insolvent company in circumstances where the company had not complied with an Order previously made by Barrington J pursuant to section 27 of the Local Government (Planning and Development) Act 1976, as amended. O' Caoimh J reasoned as follows:

"Insofar as the affairs of the company are inextricably linked to the actions of the second and third Respondents, if the company has been in wilful default it has been through the medium of the actions of the second and third Respondents. Insofar as a company can have a will it must be by those in control of the company. In the instant case the control was in the hands of the second and third Respondents. At the same time it must be recognised that the failure of a corporate entity will not necessarily give rise to a conclusion of wilful default on its part or on the part of its directors."

O' Caoimh J made an Order for the sequestration of the two directors pending the completion of the works required by the earlier Order of the Court. He indicated that he would be prepared to discharge the Order if the directors provided £120,000 to the Applicant, together with court interest for 10 years since 1983.

5.20 The applicant submits that s. 57 of the 1996 Act is clearly an equivalent provision to s. 27 of the Local Government (Planning & Development) Act, 1976. It was enacted by the Oireachtas to perform a similar function and with knowledge of how s. 27 of the 1976 Act had been interpreted by the courts. There is nothing in the wording of s. 57 to suggest that it is any more limited in its range of application than was s. 27 of the 1976 Act. Accordingly, even absent precedent, it is submitted that there can be no doubt but that this Court has the jurisdiction under s. 57 to grant Orders against the directors of companies, even where – as in these proceedings – the relevant licence is held by the company.

5.21 The applicant further argues that such a construction of s. 57, quite apart from being in accordance with precedent and consistent with a jurisdiction recognised under the Planning code, is entirely consistent with the "polluter pays principle" as set out in Council Recommendation 75/436/Euratom, ECSC, EEC of 3 March, 1975 regarding cost allocation and action by public authorities on environmental matters, which is given statutory force by s. 5 of the Waste Management Act, 1996. Paragraph 2 of the Recommendation requires that the European Communities at Community level and the Member States in their national legislation on environmental protection must apply the 'polluter pays' principle, under which natural or legal persons governed by public or private law who are responsible for pollution must pay the costs of such measures as are necessary to eliminate that pollution or to reduce it so as to comply with the standards or equivalent measures which enable quality objectives to be met. This principle is referenced at Recital 5 to Council Directive 1999/31/EC (the Landfill Directive), which is transposed in Ireland by the Waste Management Acts 1996-2010, and specifically by s.2 of the Waste Management (Amendment) Act, 2001.

Recital 5 states:

> "(5) Whereas under the polluter pays principle it is necessary, *inter alia*, to take into account any damage to the environment produced by a landfill;"

Moreover, Article 1 of the Landfill Directive identifies its overall objectives as:

> "With a view to meeting the requirements of Directive 75/442/EEC, and in particular Articles 3 and 4 thereof, the aim of this Directive is, by way of stringent operational and technical requirements on the waste and landfills, to provide for measures, procedures and guidance to prevent or reduce as far as possible negative effects on the environment, in particular the pollution of surface water, groundwater, soil and air, and on the global environment, including the greenhouse effect, as well as any resulting risk to human health, from landfilling of waste, during the whole life-cycle of the landfill."

The respondents' position in the within proceedings is that their operations at the first named respondent's facility are subject to no environmental controls whatsoever. According to the applicant this represents a direct assault on the objective of the Landfill Directive, and it brings the polluter pays principle sharply into focus.

5.22 The applicant has referred the Court to Directive 2006/12/EC of the European Parliament and of the Council, viz the codified Waste Framework Directive. Again, the recitals refer to the polluter pays principle, Recital 14 providing:

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

Article 4 of the codified Waste Framework Directive then provides:

> "1. Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular:
>
> (a) without risk to water, air or soil, or to plants or animals;
>
> (b) without causing a nuisance through noise or odours;
>
> (c) without adversely affecting the countryside or places of special interest.
>
> 2. Member States shall take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste."

And, Article 15 of the same Directive 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."

5.23 The applicant submits that the evidence at the full hearing will establish that the respondents have gained a financial advantage by disposing of waste subject to no proper environmental controls, thereby causing Article 15 of the Waste Framework Directive to be infringed. The only way in which that situation can be retrieved is to ensure that the respondents' financial advantage be recouped to pay for environmental damage caused by the respondents.

5.24 The applicant has referred the Court to the case of Commune de Mesquier Case C-188/07 in which the European Court of Justice has relied on the polluter pays principle in assessing the obligations of holders of waste under the Waste Framework Directive. Interpreting the original Waste Directive 75/442, the Court of Justice relied on the "polluter pays" principle in support of the taking of a broad approach to determining or identifying the person(s) who constituted the "previous holders" or "the producer of the product from which the waste came" for the purposes of Article 15, and in doing so potentially fixing the persons so identified with liability for the remediation costs arising from the pollution caused by the waste. The applicant has quoted at length from the judgment of the Court of Justice in support of position in the present case, and that quotation bears repeating.

5.25 The Court of Justice said in *Commune de Mesquier:*

> "76 In the main proceedings, the question which arises is whether the person who sold the goods to the final consignee and for that purpose chartered the ship which sank may also be regarded as a 'holder', a 'previous' one, of the waste thus spilled. The referring court is also uncertain whether the producer of the product from which the waste came may also be responsible for bearing the cost of disposing of the waste thus produced.
>
> 77 On this point, Article 15 of Directive 75/442 provides that certain categories of persons, in this case the 'previous holders' or the 'producer of the product from which the waste came', may, in accordance with the 'polluter pays' principle, be responsible for bearing the cost of disposing of waste. That financial obligation is thus imposed on them because of

their contribution to the creation of the waste and, in certain cases, to the consequent risk of pollution.

78 In the case of hydrocarbons accidentally spilled at sea following the sinking of an oil tanker, the national court may therefore consider that the seller of the hydrocarbons and charterer of the ship carrying them has 'produced' waste, if that court, in the light of the elements which it alone is in a position to assess, reaches the conclusion that that seller-charterer contributed to the risk that the pollution caused by the shipwreck would occur, in particular if he failed to take measures to prevent such an incident, such as measures concerning the choice of ship. In such circumstances, it will be possible to regard the seller-charterer as a previous holder of the waste for the purposes of applying the first part of the second indent of Article 15 of Directive 75/442.

79 As noted in paragraph 69 above, in circumstances such as those of the main proceedings, the second indent of Article 15 of Directive 75/442 provides, by using the conjunction 'or', that the cost of disposing of the waste is to be borne either by the 'previous holders' or by the 'producer of the product from which' the waste in question came.

80 In this regard, in accordance with Article 249 EC, while the Member States as the addressees of Directive 75/442 have the choice of form and methods, they are bound as to the result to be achieved in terms of financial liability for the cost of disposing of waste. They are therefore obliged to ensure that their national law allows that cost to be allocated either to the previous holders or to the producer of the product from which the waste came.

81 As the Advocate General observes in point 135 of her Opinion, Article 15 of Directive 75/442 does not preclude the Member States from laying down, pursuant to their relevant international commitments such as the Liability Convention and the Fund Convention, that the ship-owner and the charterer can be liable for the damage caused by the discharge of hydrocarbons at sea only up to maximum amounts depending on the tonnage of the vessel and/or in particular circumstances linked to their negligent conduct. That provision also does not preclude a compensation fund such as the Fund with resources limited to a maximum amount for each accident from assuming liability, pursuant to those international commitments, in place of the 'holders' within the meaning of Article 1(c) of Directive 75/442, for the cost of disposal of the waste resulting from hydrocarbons accidentally spilled at sea.

82 However, if it happens that the cost of disposal of the waste produced by an accidental spillage of hydrocarbons at sea is not borne by that Fund, or cannot be borne because the ceiling for compensation for that accident has been reached, and that, in accordance with the limitations and/or exemptions of liability laid down, the national law of a Member State, including the law derived from international agreements, prevents that cost from being borne by the ship-owner and/or the charterer, even though they are to be regarded as 'holders' within the meaning of Article 1(c) of Directive 75/442, such a national law will then, in order to ensure that Article 15 of that directive is correctly transposed, have to make provision for that cost to be borne by the producer of the product from which the waste thus spread came. In accordance with the 'polluter pays' principle, however, such a producer cannot be liable to bear that cost unless he has contributed by his conduct to the risk that the pollution caused by the shipwreck will occur.

83 The obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 249 EC and by the directive itself. That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of the Member States including, for matters within their jurisdiction, the courts (see Case C 106/89 Marleasing [1990] ECR I 4135, paragraph 8, and Inter-Environnement Wallonie, paragraph 40).

84 It follows that, in applying national law, whether the provisions in question were adopted before or after the directive or derive from international agreements entered into by the Member State, the national court called on to interpret that law is required to do so, as far as possible, in the light of the wording and the purpose of the directive, in order to achieve the result pursued by the directive and thereby comply with the third paragraph of Article 249 EC (see, to that effect, Marleasing, paragraph 8). …

89 In the light of the above considerations, the answer to the third question must be that, for the purposes of applying Article 15 of Directive 75/442 to the accidental spillage of hydrocarbons at sea causing pollution of the coastline of a Member State:

> – the national court may regard the seller of those hydrocarbons and charterer of the ship carrying them as a producer of that waste within the meaning of Article 1(b) of Directive 75/442, and thereby as a 'previous holder' for the purposes of applying the first part of the second indent of Article 15 of that directive, if that court, in the light of the elements which it alone is in a position to assess, reaches the conclusion that that seller-charterer contributed to the risk that the pollution caused by the shipwreck would occur, in particular if he failed to take measures to prevent such an incident, such as measures concerning the choice of ship;
>
> – if it happens that the cost of disposing of the waste produced by an accidental spillage of hydrocarbons at sea is not borne by the Fund, or cannot be borne because the ceiling for compensation for that accident has been reached, and that, in accordance with the limitations and/or exemptions of liability laid down, the national law of a Member State, including the law derived from international agreements, prevents that cost from being borne by the ship-owner and/or the charterer, even though they are to be regarded as 'holders' within the meaning of Article 1(c) of Directive 75/442, such a national law will then, in order to ensure that Article 15 of that directive is correctly transposed, have to make provision for that cost to be borne by the producer of the product from which the waste thus spread came. In accordance with the 'polluter pays' principle, however, such a producer cannot be liable to bear that cost unless he has contributed by his conduct to the risk that the pollution caused by the shipwreck will occur."

5.26 The Court understands the applicant to be arguing that, for reasons not dissimilar to those articulated by the Court of Justice in *Commune de Mesquier,* O'Sullivan J was obliged to construe s.57 of the Act of 1996 Act in the way that he did, and that I am obliged to do likewise. It is urged that not to do so would imply a failure on the part of the State to have properly transposed and implemented the Waste Framework Directives, and related European environmental legislation.

5.27 The applicant makes the further point that the polluter pays principle has been transposed into Irish law in the legislation establishing the E.P.A., in as much as it is obliged by s.52 (2)(d) of the Environmental Protection Agency Act 1992

> *"[i]n carrying out its functions ……to have regard to the need to give effect, insofar as it is feasible, to the "polluter pays" principle, as set out in Council Recommendation 75/436/EURATOM, ECSC, EEC of 3 March, 1975, regarding cost allocation and action by public authorities on environmental matters."*

5.28 Finally, the applicant argues that notwithstanding the rule in *Salomon v. Salomon* concerning the separate legal personality of companies it is also a recognised principle of company law that the Courts will not permit the statutory privilege to be used for the purposes of evading contractual or other legal obligations. In this regard, the Court was referred to Chapter 11 of Keane on Company Law (4th Edition) where the former Chief Justice comments:

> 11.26 "As we have noted, while there have been a number of cases in which the courts have modified the rule in Salomon's case, it is not easy to extract any general principle underlying the cases. One qualification is clearly established beyond doubt, however: the courts will not permit the statutory privilege of corporation to be used for a fraudulent purpose." ……. "There has also been, however, a further refinement of this qualification: in a number of cases, it has been held that the Courts will not allow the Acts to be used for the purpose of evading contractual or other legal obligations."

The cases cited by the former Chief Justice in support of, or to illustrate, the refinement referred to included *Cummins v Stewart* [1911] 1 I.R. 236; and *Jones v Lipman* [1962] 1 All E.R. 442. He also referred (*inter alia*) to *Mastertrade (Exports) Ltd & Ors v Phelan* [2001] IEHC 171; *Roundabout Ltd v Beirne* [1959] I.R. 423 and *Adams v Cape Industries plc* (1990) BCLC 479 where the courts refused relief based on the facts of those cases. He remarked in conclusion:

> "11.36 The cases mentioned in the previous paragraph are readily enough reconcilable with a general legal principle that the Courts will not permit a statutory privilege to be used for fraudulent purposes, using the word 'fraudulent' in its more generous equitable sense as including attempts to evade contractual or other legal obligations or the use of such statutory privileges for improper purposes."

It is urged upon the Court that the law therefore permits a court, in an appropriate case, to lift the corporate veil to ensure that the statutory privilege of corporation is not fraudulently or improperly used by a polluter as a means of avoiding his liabilities under the "polluter pays" principle.

Legal analysis and conclusions:

Interpretation of national law in light of EU law

6.1 Prior to Ireland's accession to the European Communities (hereinafter EC) the Courts generally followed a two-stage approach to statutory interpretation. First of all they examined whether a literal reading of the provision in question gave rise to an ambiguity or absurdity. If not, then the Court would usually go no further even if the literal construction were contrary to that envisaged by the legislature in enacting the legislation. If, however, a literal construction did give rise to an ambiguity or absurdity the court then the court could move on to consider the intention of the legislature in enacting the legislation, adopting a purposive approach. The authorities cited by the fourth to seventh named respondents confirm and reflect that this two stage approach was, at least prior to the enactment of s.5 of the Interpretation Act, 2005, the default approach to statutory interpretation.

6.2 Ireland's accession to the EC complicated matters for Courts concerned with issues of statutory interpretation. In particular, Article 10 of the EC Treaty provided:

> "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
>
> They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

Although this provision has recently been repealed by the Treaty of Lisbon it has been replaced in substance by Article 4(3) of the Treaty on European Union (hereinafter TEU) as most recently amended in accordance with the Treaty of Lisbon. (It was provisionally re-numbered Article 3a(3) in the Treaty of Lisbon itself, but Article 5 of the Lisbon Treaty mandated a final renumbering in the amended TEU). The present Article 4(3) states:

> "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.
>
> The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.
>
> The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

6.3 Ex article 10 EC, and now article 4(3) TEU, has long been regarded as underpinning, and also as requiring, the application of the doctrine of consistent interpretation of EC, now EU, law by Member States including their national courts. This doctrine is aimed at securing the efficacy and uniformity of EU law. The best known and most commonly cited articulation and formulation of the doctrine is contained in the judgment of the European Court of Justice (hereinafter the ECJ) in C-106/89 *Marleasing SA v La Comercial Internacional de Alimentación SA* [1990] ECR I -4135 at [8]:

> "[I]n applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter."

6.4 It is important to note that the ECJ has couched the requirement in terms of discretion. Consistent interpretation cannot be used to bring about a *contra legem* interpretation of national law. Accordingly, the duty on a national court is to interpret national law in light of community law "as far as possible". This is a point of considerable importance in the circumstances of the present case and I will be returning to it later in this judgment.

6.5 Following Ireland's accession to the EC, Irish Courts found themselves concerned, with ever increasing frequency, with having to construe national legislation in accordance with long established domestic canons of construction on the one hand, but also with due regard to the doctrine of consistent interpretation on the other hand. Sometimes it was relatively easy to reconcile the two. At other

times it was profoundly difficult.

6.6 What this situation gave rise to was a de facto shift in approach, particularly in cases involving the interpretation of national laws that were intended to transpose binding measures issuing from the European institutions, such as directives, from the traditional approach whereby the intention of the legislature was not examined in detail unless a literal reading of the provision in question gave rise to an ambiguity or absurdity. In such cases the Irish Courts began to adopt a purposive or teleological approach to interpreting national implementing legislation notwithstanding any clear literal meaning and/or the absence of any ambiguity or absurdity. In proceeding on this basis many Courts looked in the first instance to the presumed intention of the domestic legislator, namely the effective transposition of the particular piece of European legislation at issue. They would then pay due regard to the European legislation which it was intended to implement, and indeed to the policy objectives underpinning that legislation where these were discernable from the legislation itself, from the Treaties, or from another instrument such as a Recommendation. They would then seek, in so far as possible, to achieve a harmonious interpretation of the domestic legislation. Our Courts were able to do this because although the literal rule of construction was the default rule, and was long established, it was not enshrined in any statute. In the circumstances the Courts had the necessary degree of flexibility to deviate from the literal rule in an appropriate case in order to accommodate the needs of the new legal order within which they were required to work.

6.7 This teleological approach to construction, "i.e. one which looks to the effect of the legislation rather than the actual words used by the legislature" (so characterised by Keane J in *Murphy v Bord Telecom Éireann* [1989] I.L.R.M. 53 at 60), is now well established in Irish jurisprudence. See *Lawlor v Minister for Agriculture* [1988] I.L.R.M 400; *Murphy v Bord Telecom Éireann* [1989] I.L.R.M. 53; *O'Brien v Ireland* [1991] 2 I.R. 387; *Young v Pharmaceutical Society of Ireland* [1995] 2 I.R. 91; *HMIL Ltd v Minister for Agriculture & Food* [1996] ICLY 398; *Nathan v Bailey Gibson Ltd* [1998] 2 I.R. 162; *Telecom Éireann v O'Grady* [1998] 3 I.R. 432; *Bosphorous Hava v Minister for Transport, Energy and Communications* [1999] 2 ILRM 551; *Maher v An Bord Pleanála* [1999] 2 I.L.R.M. 198; *Coast Line Container Ltd v Services Industrial Professional Technical Union* [2000] E.L.R. 1; *Wicklow County Council v Fenton (No 2.)* [2002] 2.I.R. 583; *Cork County Council v O'Regan* [2005] IEHC 208; *Kenny v Ireland ROC Ltd* [2005] IEHC 24; and other more recent cases.

6.8 The common law rules governing the interpretation of domestic statutes were placed on a statutory footing for the first time by s.5 of the Interpretation Act 2005, albeit with a significant modification. One effect of the enactment of s.5 of the Interpretation Act, 2005 was to give partial statutory effect to what was by then a well-established practice in any event in cases involving the implementation into domestic law of binding European measures, and to extend that practice more generally. I have previously alluded to this in my judgment in *Monahan v. Legal Aid Board* [2008] IEHC 300 where I said:

> "S. 5 implicitly recognises the literal rule as the primary rule of statutory interpretation, and authorises the courts to depart from the literal rule and adopt a purposive approach only in clearly defined circumstances. The language of the Bill is close to that set out in the recommendations of the Law Reform Commission Report on Statutory Drafting and Interpretation: Plain Language and the Law, LRC 61-2000, at 21, which was largely derived from the judgment of Keane J. in *Mulcahy v Minister for the Marine* (unreported, High Court, 4th November, 1994) where he stated as follows:-
>
> > 'While the court is not, in the absence of a constitutional challenge, entitled to do violence to the plain language of an enactment in order to avoid an unjust or anomalous consequence, that does not preclude the Court from departing from the literal construction of an enactment and adopting in its place a teleological or purposive approach, if that would more faithfully reflect the true legislative intention gathered from the Act as a whole.'
>
> As such, s.5 largely reflects the approach adopted by the courts prior to its enactment in any event. The main departure from the common law position occasioned by s.5 is the creation of an exception to the general rule where a literal interpretation would defeat the intention of the Oireachtas. This exception to the literal rule of interpretation now applies, together with the traditional common law ambiguity and absurdity exceptions. It is important to note that there is an important limitation built into the language of s.5; the purposive rule provided for in s.5 may only be applied where the intention of the Oireachtas "can be ascertained from the Act as a whole." Thus, the wording of the s.5 limits the possibility of reliance on external materials to ascertain the legislative intent behind a particular provision. Interpretation in light of the intention of the enacting body is permissible only "where that intention can be ascertained from the Act as a whole".

6.9 I should add that my reference to a limitation on the possibility of reliance on external materials to ascertain the legislative intent behind a particular provision, points up an important distinction between the purposive approach used under s. 5 and the purposive approach used in the interpretation of Irish law in light of EU law. In the former case the objective is to give effect to the intention of the Irish legislature. In the latter it is the purpose of the instrument of EU law that is paramount. This distinction, which I agree exists, is identified and discussed by Sean O'Reilly in *The Private Enforcement of European Community Law in the Irish Superior Courts*, [2009] D.U.L.J.324. It has the potential to give rise to problems in cases where there is some reason to doubt as to whether the intention of the domestic legislature coincides with that of the framers of a binding EU instrument or law.

6.10 However, in the majority of cases encountered to date, the Irish Courts have been concerned, as in the present case, with national legislation specifically enacted for the purpose of transposing EU law into domestic law, and in those circumstances the national and EU legislatures are to be presumed as having a shared or common intention to implement the relevant EU law. In those circumstances it is entirely legitimate and appropriate for a national Court to employ a teleological approach to interpreting national implementing legislation, and to construe it in the light of the EU legislation intended to be implemented.

6.11 Returning, as promised, to the subject of limits on the doctrine of consistent interpretation, Fennelly J, giving judgment in the Supreme Court in *Albatross Meats Ltd v Minister for Agriculture & Food, Ireland and the Attorney General* [2007] 1 I.R. 221, and with whom Hardiman J and Kearns J, respectively, concurred, indicated that Court's agreement with the most recent re-statement by the European Court of Justice of the general principle articulated in *Marleasing*. This was in the conjoined cases of *Pfeiffer, Roith & others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (C-397/01 to C-403/01) [2004] ECR I-8835. Fennelly J then went on to identify or re-iterate certain limits to the application of the *Marleasing / Pfeiffer* principle. He said (at p.241 et seq of the report):

> "[55]. The first respondent relies, in particular, on the decision of the European Court of Justice in *Pfeiffer v. Deutsches Rotes Kreuz* (Joined cases C-397-403/01) [2004] E.C.R. I-8835. That was a reference for preliminary ruling concerning the interpretation of the working time directive between employees and their employer in Germany. In that case, the court restated in a notably extensive form its well established jurisprudence regarding the obligation of the courts of the member states to interpret national legal provisions and procedures so far as possible in the light of provisions which they were designed to implement. In the following passage from the court's judgment, I omit citations and underline the key points regarding the obligation of the national court: -

"113. Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a Directive, *the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the Directive concerned in order to achieve the result sought by the Directive...*

114. The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it *permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it…*

115. Although the *principle* that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the Directive in question, *it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the Directive…*

116. In that context, *if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the Directive*.

117. In such circumstances, *the national court*, when hearing cases which, like the present proceedings, fall within the scope of Directive 93/104 and derive from facts postdating expiry of the period for implementing the Directive, *must, when applying the provisions of national law specifically intended to implement the directive, interpret those provisions so far as possible in such a way that they are applied in conformity with the objectives of the directive…* "(emphasis added).

In considering how those principles could apply to the facts of the case then before him, Fennelly J subsequently commented:

"[59] It is …. perfectly clear that the court is under an obligation to interpret national law, *so far as possible*, in the light of the Community law provisions it is designed to implement. The important qualification is: *so far as possible*. The European Court of Justice does not interpret national law. It is a fundamental principle that the Community law respects national procedural autonomy. The national court is subject to the obligation of "conforming interpretation," as the court described it in its judgment in *Criminal proceedings against Pupino* (Case C-105/03) [2005] E.C.R. I-5285. There are, however, limits to that obligation. Most recently, the European Court of Justice in its judgment in *Adeneler v. Ellinkos Organismos Galaktos* (Case C-212/04) [2006] I.R.L.R. 716 repeated at para. 110 that "the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem.*"

The national court is not obliged so to interpret its national law in a way which would be incompatible with the relevant national legislation."

6.12 More recently, the importance of a *non contra legem* interpretation was again reiterated by Kearns J in his judgment in the Supreme Court appeal in *Harding v Cork Co Council* [2008] I.L.R.M. 251 where he said (at 279):

"Accepting that the Act falls to be interpreted in the light of the terms and objectives of the Directive in question it is also an established principle that such an interpretative approach does not mean that the Act be interpreted *contra legem."*

The Legal Status of the Polluter Pays Principle

6.13 Although it is common case that s. 57 is an enforcement provision in a domestic scheme of legislation that was enacted primarily to transpose a series of European Directives, and certain other binding measures, into Irish law, there is a dispute as to the status of the "polluter pays" principle in EU law and the extent to which those very Directives which the 1996 Act was enacted to transpose actually require the application of the "polluter pays" principle. Though the principle is specifically referred to in the operative part some of the relevant instruments, particularly the Waste Framework Directive, and the Codified Waste Framework Directive, in certain other instruments the only reference to it is in the preliminary Recitals, while in others again there is no reference to it at all. O'Sullivan J in *Fenton (No 2)* considered that "this principle …applies universally throughout all European Legislation dealing with waste (hazardous or otherwise), by reason of its presence in the Treaty of Rome itself." It is necessary for the purposes of this judgment to examine the validity of that assertion.

6.14 As is made clear in Dr. Ludwig Krämer's work entitled *"Focus on European Environmental Law"* (Sweet & Maxwell, 1992) (at p.253 et seq) the polluter pays principle was first suggested by the European Commission in its proposal for the First Programme of Action on the Environment (Commission Proposal, 1st Action Programme O.J. 1973 No C52/1, Pt II, No 1A 4.), which proposal was in fact adopted in 1973. Then in 1975 the Council made a Recommendation to the member states on the allocation of costs and intervention by public authorities in the case of environmental measures (i.e. Council Recommendation 75/436/EURATOM, ECSC, EEC of the 3rd March, 1975), in which it stated that the polluter pays principle had been "adopted" at Community Level by means of the First Environment Programme and recommended that the member states arrange their allocation of costs in accordance with the Commission communication annexed to the Recommendation.

6.15 The Commission's communication states (*inter alia*):

"1. In the framework of the declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting within the Council of 22 November 1973 on the programme of action of the European Communities on the environment, the "polluter pays" principle was adopted. The programme of action provides that the Commission submit to the Council a proposal concerning the application of this principle, including possible exceptions thereto.

Charging to polluters the costs of action taken to combat the pollution which they cause encourages them to reduce that pollution and to endeavour to find less polluting products or technologies thereby enabling a more rational use to be made of the resources of the environment. Moreover, it satisfies the criteria of effectiveness and equitable practice.

In order to avoid distortions of competition affecting trade and the location of investments which would be incompatible with the proper functioning of the common market, the costs connected with the protection of the environment against pollution should be allocated according to the same principles throughout the Community.

2. To achieve this, the European Communities at Community level and the Member States in their national legislation on environmental protection must apply the "polluter pays" principle, under which natural or legal persons governed by public or private law who are responsible for pollution must pay the costs of such measures as are necessary to eliminate that pollution or to reduce it so as to comply with the standards or equivalent measures which enable quality objectives to be met or, where there are no such objectives, so as to comply with the standards or equivalent measures laid down by the public authorities.

Consequently, environmental protection should not in principle depend on policies which rely on grants of aid and place the burden of combating pollution on the Community.

3. A polluter is someone who directly or indirectly damages the environment or who creates conditions leading to such damage."

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

(a) Standards include:

(i) "environmental quality standards" ….;

(ii) "product standards" …;

(iii) standards for fixed installations ...;

(b) The purpose of charges shall be to encourage the polluter to take the necessary measures to reduce the pollution he is causing as cheaply as possible (incentive function) and/or to make him pay his share of the costs of collective measures, for example purification costs (redistribution function). The charges should be applied, according to the extent of pollution emitted, on the basis of an appropriate administrative procedure.

Charges should be fixed so that primarily they fulfil their incentive function.

In so far as the main function of charges is redistribution, they should at least be fixed within the context of the abovementioned measures so that, for a given region and/or qualitative objective, the aggregate amount of the charges is equal to the total cost to the Community of eliminating nuisances."

(c) In order to avoid distortions of competition affecting trade and the location of investment in the Community, it will undoubtedly be necessary to harmonize more and more closely at Community level the various instruments where they are applied in similar cases.

Until this is achieved, the question of the allocation of anti-pollution costs will never be entirely resolved at Community level. This Commission communication therefore constitutes merely a first step in the application of the "polluter pays" principle. The first step must be followed up as quickly as possible by the harmonization within the Community of the instruments for implementing the said principle when they are applied to similar cases, as stated in the third subparagraph of paragraph 8 of this document.

5. Depending on the instruments used and without prejudice to any compensation due under national law or international law, and/or regulations to be drawn up within the Community, polluters will be obliged to bear:

(a) expenditure on pollution control measures (investment in anti-pollution installations and equipment, introduction of new processes, cost of running anti-pollution installations, etc.), even when these go beyond the standards laid down by the public authorities;

(b) the charges.

The costs to be borne by the polluter (under the "polluter pays" principle) should include all the expenditure necessary to achieve an environmental quality objective, including the administrative costs directly linked to the implementation of anti-pollution measures.

The cost to the public authorities of constructing, buying and operating pollution monitoring and supervision installations may, however, be borne by those authorities."

"8. In carrying out its tasks within the framework of the Community environment policy, the Commission will comply particularly with the abovementioned definitions and methods of application of the abovementioned "polluter pays" principle.

The Commission asks the Council to take note of these definitions and conditions of application and to recommend that the Member States conform to them in their legislation and administrative measures involving the allocation of costs in the environmental field.

The Commission will submit all the necessary proposals in this field to the Council in due course, particularly as regards the harmonization of instruments for administering the "polluter pays" principle, and its specific application to the problems of transfrontier pollution.

Each Member State should apply the "polluter pays" principle to all forms of pollution within its own country and without making any distinction as to whether the pollution affects that country or another."

6.16 It is necessary to remark at this point about the status of this Recommendation. Ex Art 249 EC (now amended and renumbered

as Art 288 TEU) states clearly that Recommendations and Opinions are to have no binding force. They constitute "soft law" as opposed to more formal measures such as Regulations, Decisions and Directives. However, while such measures are precluded from having binding legal effect, it is not the case that national courts may ignore them. Soft law devices, and in particular Recommendations, are an important tool in the development of EU policy and represent a strong indicator as to that policy, leading a national court to anticipate, and expect, that subsequent formal measures taken or to be taken in the particular area will seek to give effect to that policy. Accordingly, O'Sullivan J was entitled to take account of the existence of Council Recommendation 75/436/EURATOM, ECSC, EEC of the 3rd March, 1975 as being a strong indicator of EU policy, and to regard it as a flag indicating the likelihood that subsequent formal community measures/instruments in the area of environmental protection would seek to give legal effect to that policy. While this Recommendation was non-binding it represented a very clear statement of European community policy on environmental protection, the early formalization of which was reasonably to be expected.

6.17 Further it is well established that where a Directive which is either expressly or by implication based on a principle articulated in a Recommendation falls for consideration by a national court, the Recommendation can be used to inform the national court as to the meaning of the principle. Moreover, as is clear from the *Grimaldi* case, cited by the fourth to seventh named respondents, the national court may refer a question as to the interpretation of a Recommendation to the ECJ.

6.18 The first steps towards the legal formalization and implementation of the policy articulated in Council Recommendation 75/436/EURATOM, ECSC, EEC of the 3rd March, 1975 came later that year when the polluter pays principle was introduced as a "hard law" principle in the area of waste management in three Directives, namely:

> Council Directive 75/439/EEC of 16 June 1975 on the disposal of waste oils - O.J. No. L 194/23, 25 July 1975;
>
> Council Directive 75/442/EEC of 15 July 1975 on waste - O.J. No. L 194/39, 25 July 1975;
>
> Council Directive 76/403/EEC of 6 April 1976 on the disposal of polychlorinated biphenyls and polychlorinated terphenyls - O.J. No. L 108/41, 26 April 1976;

These are the first three instruments listed in the Table to s.2 of the 1996 Act.

6.19 Council Directive 75/439/EEC provides (*inter alia*) that where certain undertakings are required to collect and/or dispose of waste oils indemnities may be granted to those undertakings as a reciprocal concession for the obligations imposed on them by the Member States. The sole reference to the polluter pays principle in the Directive is that contained Article 14 which provides:

> "The indemnities may be financed, among other methods, by a charge imposed on products which after use are transformed into waste oils, or on waste oils.
>
> The financing of indemnities must be in accordance with the "polluter pays" principle."

6.20 Council Directive 75/442/EEC contained just two references to the "polluter pays" principle, one in the preamble and the other in Article 11. The preamble recites:

> "whereas that proportion of the costs not covered by the proceeds of treating the waste must be defrayed in accordance with the 'polluter pays' principle;"

while, within the operative part, Article 11 provides:

> "In accordance with the "polluter pays" principle, the cost of disposing of waste, less any proceeds derived from treating the waste, shall be borne by:
>
> - the holder who has waste handled by a waste collector or by an undertaking referred to in Article 8;
>
> - and/or the previous holders or the producer of the product from which the waste came."

6.21 Council Directive 76/403/EEC sets down rules governing the disposal of two particular forms of hazardous waste, namely polychlorinated biphenyls (PCBs) and polychlorinated terphenyls (PCTs), there is just one reference therein to the polluter pays principle, namely in Article 8 which provides:

> "In accordance with the "polluter pays" principle, the cost of disposing of PCB, less any proceeds derived from treating the PCB, shall be borne by:
>
> - the holder who has the PCB handled by an installation, establishment or undertaking referred to in Article 6,

- and/or the previous holders or the producer of the PCB or of the equipment containing PCB."

6.22 Although over the succeeding decade and a half, five more Directives among those listed in the Table to s.2 of the 1996 Act were promulgated, namely Council Directive 80/68/EEC; Council Directive 85/337/EEC; Council Directive 86/278/EEC; Council Directive 87/101/EEC and Council Directive 87/217/EEC, respectively, none of those instruments contains any reference whatever to the "polluter pays" principle.

6.23 However, in 1987 the "polluter pays" principle was inserted into the EC Treaty by the Single European Act. Ex Article 130r(2) of the E.E.C Treaty, as inserted by the Single European Act (signed on the 17th of February 1986 and which entered into force following ratification by the member states on the 1st of July 1987), initially read:

> "Action by the Community relating to the environment shall be based on the principles that preventative action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. Environmental protection requirements shall be a component of the Community's other policies."

6.24 In 1992, post the Maastrict Treaty, this provision was amended by Article G (38) TEU and re-designated as Article 130(r) of the EC Treaty. It then read:

> "Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations

in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventative action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. Environmental protection requirements must be integrated into the definition and implementation of other Community policies

In this context, harmonization measures answering these requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a Community inspection procedure"

6.25 The Treaty of Amsterdam yielded yet further amendments (though little of major substance), and also re-numbered the provision as Article 174(2) EC. The provision at that stage read:

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

In this context, harmonization measures answering these requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a Community inspection procedure"

6.26 Finally, the Treaty of Lisbon has recently effected some further minor amendments, and the provision has again been renumbered so that it is now Article 191(2) TEU. As of the date of this judgment it reads:

"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 preventative action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay."

In this context, harmonization measures answering these requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union"

6.27 As Alan Keating, Barrister at Law, points out in his article *"The 'Polluter Pays' Principle in Domestic Law",* 2006 D.U.L.J 172, and previously referred to, Article 191(2) cannot be viewed in isolation. The first subparagraph of Article 191 requires that "[u]nion policy on the environment shall contribute to the pursuit of " a list of objectives thereafter specified, namely preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilization of resources and promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. Moreover, the third subparagraph of Article 191 contains a list of matters that must be taken into account when taking action envisaged by Article 191.

6.28 In addition, and this is a very important point, the principles contained in Article 191(2) are addressed, legally, to the EU institutions and not to the Member States. Accordingly, it is not envisaged or intended that Article 191 could or should be directly effective. Rather, implementation of Union policy on the environment, including the polluter pays principle, requires action by the Union's institutions. The modalities for such action are set out in Article 192 TEU (ex Article 175 EC as amended) Accordingly, while there can be no doubt as to the incorporation of the "polluter pays" as a hard law principle of EU law in instances where it has been expressly implemented by means of binding secondary legislation or a binding instrument (i.e. by means of a Directive, Decision or Regulation), it is doubtful as to whether it has any meaningful legal effect where it is not covered by binding secondary legislation or a binding instrument. Dr Ludwig Kramer in *"Focus on European Environmental Law"*, previously referred to, expressed the view (admittedly quite some time ago and with respect to ex Article 130r(2) EEC), that its legal effect is "slight" (at p. 51). Moreover, at p.246 he opined:

"Article 130r(2) of the EEC Treaty lays down principles for "action by the Community" and not principles for the environmental policies of the Member States. Whether and how far Member States avail themselves of the polluter pays principle in their own policies is not determined by Article 130r(2) but by other relevant provisions of the environmental laws of the Community or individual States."

This Court agrees with Dr Kramer's view of the Treaty provisions endorsing the polluter pays principle, i.e., that they merely set forth principles for action by the European Community, or Union as it is now, but they do not themselves have any significant direct or even indirect legal effect. Moreover, this view is easily reconcilable with the provisions of Article 4(3) TEU (ex Article 10 EC). While this provision requires national courts to interpret national legislation in line with "the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union" there are no obligations on member states "arising out of the Treaties" requiring the implementation of the polluter pays principle save to the extent that "institutions of the Union" have acted to implement that principle, i.e. by means of EU Directives, Regulations or Decisions.

6.29 In the context of instruments tabulated in Table 2 to s.2 of the 1996 Act, and additions to that list by virtue of later legislation, the "polluter pays" principle is next referred to in Council Directive 91/156/EEC amending Council Directive 75/442/EEC. The original Directive contained a Preamble containing various Recitals followed by an operative part consisting 15 Articles, numbered 1 to 15 respectively. The amending Directive substituted 18 replacement Articles for the original Articles 1 to 12 inclusive. It then renumbered the original Articles 13, 14 and 15 as Articles 19, 20 and 21. It also added a number of annexes to the instrument. It will be recalled that Council Directive 75/442/EEC as amended by Council Directive 91/156/EEC became known as the Waste Framework Directive. This instrument contains just two references to the polluter pay principle. The first appears in the un-amended recital, as previously quoted, and the second appears in Article 15, which provides:

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

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

and/or

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

6.30 Although in many respects the rules contained in the Waste Framework Directive concerning various aspects of waste management are considerably more detailed than those contained in the original Directive, the one operative provision which relates to the application of the polluter pays principle was, in effect, re-enacted without significant amendment.

6.31 It will be recalled that in his judgment in *Fenton (No 2)* O'Sullivan J quoted selectively from the eighteen articles comprising the Waste Framework Directive by way of support, *inter alia*, for his view that the "polluter pays" principle was a binding principle of EU law to which he was obliged to have regard in interpreting s.57 and s.58 respectively of the Waste Management Act 1996. Those provisions specifically cited by him were two recitals from the unamended preamble to Directive 75/442/EEC, including the recital specifically referring to the "polluter pays" principle, and Articles 1, 8 and 15 respectively from the operative part. He also referred to Annex IIA dealing with "Disposal Operations". Though he might perhaps have done so, he did not for some reason refer to Article 4 of Waste Framework Directive. For completeness this provides:

> "Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular:
>
> - without risk to water, air, soil and plants and animals,
>
> - without causing a nuisance through noise or odours,
>
> - without adversely affecting the countryside or places of special interest. Member States shall also take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste."

6.32 It has been suggested by Keating (*op cit*), and it is part of the fourth to seventh named respondents case, that the combined effect of Articles 1, 8, & 15 (or even Articles 1, 4, 8 &15) and Annex IIA of the Waste Framework Directive did not go so far as to impose an obligation on each member state "to (a) ensure that adequate systems of civil liability were in place to buttress the obligations on the holder of waste" (so as to ensure that in every eventuality "the polluter pays"), "and (b) to ensure that civil and criminal liability is determined with reference to the polluter pays principle". If this is in fact the case then O'Sullivan J has, in seeking to interpret sections 57 and 58 of the 1996 Act teleologically, proceeded upon an erronous view as to the requirements of one of the principal Directives intended to be transposed by the 1996 Act. The Court must give careful consideration to this proposition.

6.33 Before doing so, however, it should be stated that even if the Court upholds O'Sullivan J's interpretation that will not necessarily be dispositive of the matter. A further issue would then arise as to whether on a purposive and teleological interpretation of s.57 of the 1996 Act as amended it is capable of bearing the construction contended for by the applicant, or whether as is suggested by the fourth to seventh named respondents such an interpretation would be *contra legem*. If that were to be the Court's conclusion it would mean that the relevant Directives were not properly transposed in the enforcement provisions of the Waste Management Acts 1996 to 2010.

6.34 The Court has felt somewhat reluctant to embark upon a critique of the core reasoning underpinning O'Sullivan J's judgment in *Fenton (No 2)* because it could be argued that that judgment no longer represents a binding precedent in that the legislative context within which the decision was handed down, both at EU level and at domestic level, has been altered. This is technically true, in as much as the Treaty provisions have been somewhat amended; new Directives have been enacted which in some instances have amended or replaced previous Directives and in other instances have enacted novel legislation, and in the domestic context there has a considerable expanion of the waste management legislative scheme, both in primary and secondary domestic legislation. However, I have come to the view that the alterations to the legislative landscape are more perceived than real and that such changes as have occurred are relatively minor in so far as the status of the polluter pays principle is concerned. In those circumstances *Fenton (No 2)* is not displaced as an ostensibly binding precedent and the Court has no option in the circumstances of this case but to subject the reasoning therein to critical analysis.

6.35 Nevertheless in considering afresh the status of the polluter pays principle in terms of the Directives and other binding measures intended to be implemented by the Waste Management Acts 1996 – 2010 the proper approach is for the Court to consider that issue in the context of the entirety of those measures and in their most up to date form where relevant measures have been amended or substituted. Although the Court has considered in detail each and every one of the measures previously identified in this judgment, and has cited and quoted selectively from some of them within this judgment, it is not necessary to specifically review each one in the course of delivering this judgment. As previously stated the general picture is that the most extensive references to the polluter pays principle are to be found in the Waste Framework Directives, while the other measures either contain fewer (albeit consistent) references to that principle or no reference at all. (Moreover, as regards those that do not specifically refer to the principle there is nothing in any of them that is in any way inconsistent with it.) In the circumstances the Court feels justified in characterising the Waste Framework Directives as the principal EU measures at issue.

6.36 Consistent with the approach indicated in the last paragraph the Court will have particular regard to the new Waste Framework Directive 2008/98/EC, as it is the most up to date version.

6.37 By virtue of the third paragraph of Article 288 TEU (ex Article 249(3) EC as amended), and as further explained in a wealth of EU case law and an impressive body of literature and commentary, a Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. As Sacha Prechal puts it in his work entitled " Directives in EC Law" (Oxford Law Library, 2004)(at p.41):

> "The 'hard core' of a Directive is its substantive rules spelling out the matters to which the Directive relates, thus defining its scope, and often indicating its purpose, thus setting the framework for implementation. The substantive rules also contain provisions which describe, often in a very precise manner, the legal and/or factual situation which the Member States are required to bring about, and which often indicate the ways in which the desired situation must be realised. Obviously the substantive rules are as varied as is the area of intervention by the Community".

6.38 The content of most Directives is therefore largely normative in nature but Prechal notes that in the 1990's, partly as a reaction to the detailed character of many Directives, a new term became fashionable: the Framework Directive. He says (op cit at p.15):

> "This is an unknown instrument in the typology of the EC Treaty and it is, in fact, not clear what it exactly referes to. One of the characteristics of a framework directive seems to be that it lays down only basic and general principles. From this perspective, it is believed that the Member States have more latitude in relation to the implementation of these directives. However, much depends on how this framework is further completed. Quite a few directives known as 'framework directives' are implemented further through so-called 'daughter directives' or 'individual directives' which may

be rather detailed."

6.39 Although they have been getting more detailed with each new version the Waste Framework Directives are comparatively short compared to many other Directives in the environmental field e.g., the Environmental Liability Directive 2004/35/EC. Their relatively compact nature makes ascertaining their purpose and the "result" to be achieved somewhat easier than in other cases. In this courts view O'Sullivan J in *Fenton (No 2)* correctly identifies the provisions in the Waste Framework Directive then current (Council Directive 75/442/EEC as amended by Council Directive 91/156/EEC) relating to waste disposal as having "as their essential objective the protection of human health and the environment against harmful effects caused by the collection (as defined) transport, treatment, storage and tipping of waste." Moreover, since the Waste Framework Directive he was considering specifically refers to the "polluter pays" principle, with article 15 thereof requiring that in accordance with the 'polluter pays' principle, the cost of disposing of waste must be borne by either the holder who has waste handled by a waste collector or by an undertaking as referred to in Article 9, and/or the previous holders or the producer of the product from which the waste came, he was entitled to examine what is meant by the "polluter pays" principle, and the *provenance* of that expression. In this Court's view he rightly identified it with reference to Council Recommendation 75/436/EURATOM, ECSC, EEC of 3 March, 1975 and as the Court has stated earlier, and as confirmed in the *Grimaldi* case, it is perfectly legitimate for a national Court to have regard to a Recommendation issued in a particular field for assistance in construing or interpreting a Directive subsequently promulgated in the same field, notwithstanding the non-binding nature of a Recommendation.

6.40 Was O'Sullivan J correct in concluding, in all the circumstances, that the "polluter pays" principle "applies universally throughout all European legislation dealing with waste (hazardous or otherwise)?" The principle is characterised in recital 26 to the most recent Waste Framework Directive as being "a guiding principle at European and international levels", and that is certainly true. Where this Court would perhaps differ with O'Sullivan J to a degree, and for the reasons set out earlier in this judgment, is in his view that "it applies universally throughout all European legislation by reason of its presence in the Treaty of Rome itself." As pointed out already I am of the view that the relevant Treaty provisions merely constitute guiding principles for action by the Union's institutions, and they do not themselves create binding legal rules which Member States must adhere to. However, this difference does not undermine the validity of the central point on which were are of one mind, namely, that at the very least by virtue of its incorporation in relevant Directives, and to the extent that it is so incorporated, the "polluter pays" is a binding principle of EU law that requires to be applied in the field of waste management generally and, in particular, with respect to the costs of disposing of waste.

6.41 However, 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. 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.

6.42 The answer to this may be that it is of the essence of a directive that it is left to individual member states themselves to implement the obligations placed upon them by a directive. As is the law under Art 288 TEU, the Waste Framework Directive leaves it to national authorities to choose the form and method of its implementation. This is accordance with the principle of national autonomy. Any system of regulation requires an effective system of enforcement. It could be said that it was left to individual member states to put in place for themselves a system of enforcement, that it is implicit in the Waste Framework Directive that any such system would require to be an effective system where liability is determined with reference to the "polluter pays" principle, and that in Ireland effect was given to this requirement by the enactment of s.57 and s.58 respectively of the 1996 Act.

6.43 O'Sullivan J seems to have, in effect, approached the matter in that way. He was of the firm view that the "result" which the directive demands is nothing less than that the "polluter pays" principle should be fully applied. 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. This interpretation is also consistent with recent decisions of the ECJ such as *Commune de Mesquier* Case C-188/07 and the conjoined cases of *Raffinerie Mediterranee (ERG) SpA, Polimeri Europea SpA and Syndial SpA v Ministero dello Sviluppo economico and Others, and ENI SpA v Ministero Ambiante e Tutela del Territorio e del Mare and others*, Case. 378/08, 379/08 and 380/08, although these latter cases should be approached with a little caution because they concern the operation of the "polluter pays" principle in a different albeit somewhat related legislative context, namely the Environmental Liability Directive.

How must s. 57 (and s. 58 respectively) of the Waste Management Act 1996 be construed in the light of the Waste Framework Directive and related EU legislation?

6.44 Although I am largely in agreement with O'Sullivan J concerning what the Waste Framework Directive requires in terms of an effective enforcement system, I find myself in disagreement with in his view that s.57 and s.58 represent an adequate transposition or implementation of those requirements. Moreover, I do not lightly disagree with him, and having regard to the need for judicial comity, the desirability of consistency, and mindful of the need for caution urged in *Irish Trust Bank Limited v Central Bank of Ireland*, I would have been disposed to follow the precedent of O'Sullivan J's decision in *Fenton (No 2)* notwithstanding my disagreement, were it not for my belief that O'Sullivan J in the application of a purposive and teleological approach to the interpretation of s.57 & s.58, respectively, of the 1996 Act, focussed unduly on the intention of the European legislators and insufficiently upon the intention of the Oireachtas.

6.45 There is no question but that the proper approach to the interpretation of these provisions of our domestic legislation is a purposive and teleological one, applying domestic rules of statutory interpretation with due regard to the doctrine of consistent interpretation but none the less subject to the limits of the consistent interpretation obligation. However, while O'Sullivan J was certainly entitled to take into account the fact that the Act was enacted, *inter alia*, for the purpose of giving effect to the Waste Framework Directive, and he was entitled to have regard to the objectives of that Directive, he was nonetheless still obliged to consider what was the ostensible intention of the Oireachtas in enacting s.57 and s.58 in the terms in which it did, and to endeavour to ascertain the legislator's intention from a consideration of the Act as a whole. Moreover, this Court in revisiting the issue must now pay due regard to the statutory provisions enacted since the date of O'Sullivan J's judgment in s.5 of the Interpretation Act, 2005, and to which I have previously alluded.

6.46 This Court has had to address the question as to whether Sullivan J in seeking an interpretation of s. 57 and s. 58, respectively, that was in harmony with what the Waste Framework Directive implicitly requires in terms of an effective enforcement mechanism, overstretched the limits of consistent interpretation so as to end up with an interpretation that is in fact *contra legem*. Regrettably

this Court feels coerced to the conclusion that he did do so.

6.47 I am completely satisfied O'Sullivan J was correct to the extent of concluding 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. To hold otherwise would, in my opinion, mean that innocent parties (local authorities or the public) would have to "pay" (if only by accepting pollution of their environment without remedy), whereas those individuals who are at least indirectly responsible for it would be beyond the reach of Irish domestic law."

Certainly that is what is required, but does the statute permit it? 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.

6.48 I have arrived at a view contrary to that of O'Sullivan J for the following reasons. The first of these is that it is clear from a consideration of the 1996 Act as a whole that the extent to which the "polluter pays" principle has in fact been incorporated by the Oireachtas is fairly limited. There are only very limited references to it within the Act. Contrary to what was suggested by O'Sullivan J in his judgment, s. 5 of the Act does not actually "incorporate" the polluter pays principle at all. It merely defines it in terms that:

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

s Keating (op cit) has pointed out there is a presumption that s.5 is not redundant and that it is to be applied in the context of any substantive references to "the polluter pays principle" contained within the Act. The only substantive references to the principle within the Act are to be found in s.22 (6)(d) and s.26 (2)(d) respectively. The former provides that a waste management plan shall contain, *inter alia*, *"such objectives as seem to the local authority or local authorities concerned to be reasonable and necessary -"* (a), (b), (c), and (d) *"to ensure in the context of waste disposal that regard is had to the need to give effect to the polluter pays principle".* The latter contains a similar provision in the context of a hazardous waste management plan. Apart from these two provisions, and the definition of "the polluter pays principle" contained in s.5, and some further incidental references in subsequent secondary legislation, the Waste Management Acts 1996 - 2010 are otherwise silent with respect to the polluter pays principle.

6.49 Secondly, if 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.

6.50 Thirdly, although the principle of separate corporate personality is not set in stone I agree with the submission made by the fourth to seventh named respondents herein that the Court cannot disregard the fundamental nature of the separate legal personality principle and that, in the absence of an express statutory abridgment of that principle, the Court should lean against an interpretation permitting the corporate veil to be pierced. This is in the interests of legal certainty, a very important principle underpinning our law.

6.51 Fourthly, although a jurisdiction does already exist to lift the veil of incorporation in the case of a company being used for a fraudulent or other improper purpose that jurisdiction, which is of long standing, is intended to ensure (a) that a statutory privilege is not abused, and (b) that the Court's own process is not abused. Every Court is entitled as a matter of inherent jurisdiction to seek to protect its own process and may in an appropriate case lift the corporate veil to ensure that its order are not frustrated by a cynical and strategic reliance on the principle of separate corporate personality by the directors (or shareholders) of a company. Whenever, under the planning code, a Court has seen fit to lift the corporate veil in the case s.27 Orders formerly, and now s.160 Orders, it has invariably done so to that end. 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.

6.52 To the extent that the applicants have argued that the availability of an existing jurisdiction to lift the corporate veil actually supports their case, it seems to me that they are missing the point. The preliminary question as formulated asks "*whether, 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**)"* (emphasis added). The important issue is not the fact that such a jurisdiction already exists to be exercised in very limited and exceptional circumstances, but the basis of that jurisdiction. 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.

6.53 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.

6.54 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.