Neutral Citation Number [2005] IEHC 208
2003 No 37 MCA

THE HIGH COURT
IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 57 OF THE WASTE MANAGEMENT ACT 1996

BETWEEN

CORK COUNTY COUNCIL

APPLICANT

AND
LOUIS O'REGAN AND AGGREGATE SUPPLIES AND TRANSPORT LIMITED

RESPONDENTS

Judgment of Mr. Justice Clarke delivered 17th June, 2005.

The proceedings
1. These proceedings were first commenced by Cork County Council ("The Applicant") by originating notice of motion dated 3rd June, 2003. In that motion the Applicant sought orders which required the cessation of the dumping of waste materials by means of land filling or otherwise at Weir Island, Barryscourt, Carrigtoohil in County Cork. Ancillary orders relating to permitting or accepting such waste were also sought and, of particular relevance to the issues which have now to be decided, at para. 4 an order was sought which if granted would direct the respondents to remove the relevant waste material and to dispose of same in accordance with the provisions of the Waste Management Act 1996 "and in a manner designed to prevent environmental pollution" or as might be directed by the court. Affidavits were exchanged and the matter came before the court (Quirke J.) on 17th November, 2003 on foot of an application for an interlocutory injunction. The order made on that date notes an undertaking on behalf of the respondents "not to hold recover or dispose of waste on Weir Island, Barryscourt, Carrigtoohil in the County of Cork including the candidate special area of conservation in a manner that causes or is likely to cause environmental pollution pending the hearing of these proceedings". The order also notes an undertaking given on behalf of the applicant to consider and process with expedition "any application for a Waste Permit submitted by the respondents or each of them in relation to Weir Island notwithstanding the existence of these proceedings".

2. On 11th February, 2004 the Applicant issued a second substantive originating notice of motion seeking the same relief as had been sought in the first substantive originating motion. That motion was returnable for 23rd February, 2004. The purpose behind the issuing of a second substantive motion seeking the same relief was that there had, in the intervening period since the issuing of the first originating notice of motion, been amendments to the relevant legislation which I will consider in more detail later in this judgment. The purpose of the second motion was, therefore, to seek, to the extent that it might be necessary, to obtain the benefit of the amended legislation.

3. In any event both substantive motions initially came on for hearing before me on 3rd March, 2005. Having substantially opened the relevant law and affidavits counsel for the applicant sought to submit an additional affidavit which was designed to establish the course of criminal proceedings as against the respondents for breaches of ss. 31(1) and 39(1) of the Waste Management Act, 1996 (as amended) arising out of events occurring on 17th December, 2003 at Weir Island. The learned District Judge sitting at Midleton District Court formed the view that the relevant charges were sufficiently serious to warrant prosecution on indictment. On that basis the case came before Cork Circuit Criminal Court on 21st February, 2005, on indictment, where the first named respondent, in his capacity as secretary of the second named respondent, pleaded guilty on behalf of the second named respondent to the relevant charges. As a result His Honour Judge Patrick Moran imposed a fine on the second named respondent of €100,000 in respect of one charge with the second charge taken into consideration.

4. Counsel for the respondents objected to the late admission of that affidavit. Given that the respondents were parties to the criminal proceedings sought to be introduced in evidence I enquired of counsel for the respondents as to the manner in which it was contended the respondents would be prejudiced by the introduction of such evidence given that each of the respondents would have been well aware of the events in the courts concerned. The argument put forward by counsel for the respondents was to the effect that had the respondents been aware of the fact that the Applicant intended to rely upon the convictions further evidence might have been tendered in reply. As a result of the debate concerning that issue of prejudice and as a result of certain comments which I made in the course of that debate, counsel for the respondents was afforded a brief opportunity to take instructions after which I was informed that substantial works had been done at Weir Island since 2003. On that basis it seemed to me that there was arguably a prejudice as against the respondents in that if substantial works had been done since the date by reference to which the criminal convictions were recorded that might arguably be a matter material to the exercise of the courts powers in an application such as this. With some reluctance I was, therefore, persuaded to grant the adjournment concerned.

5. In that context I should, therefore, note that in the intervening period only one short affidavit was filed on behalf of the respondents (to which I will return in due course) and no mention is made in it of any works having been carried out since the relevant date for the pleas of guilty.

The Criminal Charges
6. On the basis, therefore, that there has been a plea of guilty to the relevant charges, that there has been a conviction recorded against the second named respondent on that basis, and that there is no evidence before the court to suggest that matters have changed since the date to which the charges relate, it seems to me that it is not open to the respondents, in these proceedings, to dispute the substance of the charges. It should be noted that the first named respondent owns all of the relevant lands while it would appear that the second named respondent operated the landfill business on the lands. I should, therefore, set out the charges to which the pleas of guilty related. They are as follows:-

> "That you the above named Aggregate Supplies and Transport Limited the accused is charged as follows:-
>
> 1. That you did on 17th day of December, 2003 at Weir Island, Barryscourt, Carrigtoohil in the County of Cork in the Court Area and District Aforesaid dispose of or undertake the recovery of waste at a facility for which there was no licence in force in relation to the carrying on of the activity concerned at that facility contrary to the provisions of s. 39(1) of the Waste Management Acts 1996 to 2003.
>
> 2. That you did on 17th day of December, 2003 at Weir Island, Barryscourt, Carrigtoohil in the County of Cork in the Court Area and District Aforesaid hold, transport, recover or dispose of waste in a manner that causes or is likely to cause environmental pollution contrary to the provisions of s. 32(1) of the Waste Management Acts 1996 to 2003."

The Relief now Claimed

7. Before passing from the history of these proceedings I should also add that between the adjourned date in March and the matter coming on for hearing again before me, the Applicant refined it's position in respect of this application by indicating that, at this stage, the only relief which was being sought was for an order to the effect that:-

> "The respondents forthwith commission and pay Fehilly Timiney to perform a site investigation and report, in accordance with the recommendations of Fehilly Timiney and of Dr. Jervis Good, to include a mitigation plan".

8. Fehilly Timiney were retained by the environment department of the applicant to investigate the cost implications involved with an investigation into possible environmental pollution caused or which may be caused by unauthorised land filling of waste material at Weir Island.

9. An initial report from Fehilly Timiney was proved in evidence. It noted that no previous site investigations had been conducted and, crucially, that the quantity and quality of materials deposited remains unclear.

10. The initial report recommends a comprehensive site investigation and specifies, in some detain, the parameters of the recommended investigation.

11. It should finally be noted that the initial report gives what are necessarily tentative costings for certain possible alternative strategies for the removal or remediation of the waste concerned.

12. The circumstances which give rise to the application now made and to the suggestion that further consideration of making any additional remedial orders should be postponed until the receipt of the report above referred to will again be a matter to which I will return in due course.

The Legislation

13. Section 57 of the Waste Management Act 1996 as amended reads as follows:-

> 57(1) where, on application by any person to the High Court, that court is satisfied that waste is being held, recovered or disposed of in a manner that causes or is likely to cause environmental pollution, or s. 34 or s. 39(1) to be convened, 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 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 inspection or surveys and the taking of relevant samples and the analysis of the results of such activities, that the court considers appropriate.

14. It should be noted that the addition of the reference to ss. 34 or 39(1) and their contravention was brought about as of the 22nd October, 2003 by amendments contained in the Protection of the Environment Act, 2003 (s. 48).

15. Therefore two substantive questions arise in relation to any case in which the court is invited to make an order under s. 57 of the Waste Management Act 1996. They are:-

> 1. Whether the conditions necessary to the making of an order as specified have been established to the satisfaction of the court; and
>
> 2. In the event that the necessary conditions are satisfactorily established what course of action (if any) is appropriate for the court having regard to the various measures and provisions set out at subs. (a) to (c) of s. 57(1).

The Necessary Conditions

16. Much of the legal debate at the hearing before me centered on the proper interpretation of the conditions necessary to be established before the jurisdiction of the court to make any order under the section could be said to arise. The principal argument addressed by counsel for the respondents was to the effect that the section addresses ongoing active environmental damage. This submission is based upon the use of the word "is" in relation to the "holding recovery or disposal of waste". Therefore, it is contended, the court must be satisfied at the time it is contemplating making an order that the necessary conditions are present. There may well be some merit in that argument up to a point. However it does not seem to me to arise on the facts of this case. For the reasons indicated above I am bound to conclude that as of the 17th December, 2003 the second named respondent held transported, recovered or disposed of waste in a manner that causes or is likely to cause environmental pollution. There being no evidence of any material change in circumstances since that date it seems to me that I must necessarily conclude that the same situation exists today.

17. Insofar as it was also contended on behalf of the respondent that the court needs to be satisfied that the state of affairs necessary to meet the condition for making an order exists as of the date of the hearing (rather than as of the date on which the proceedings were commenced) I should comment that that too does not, for the same reason, arise.

18. However it seems to me that counsel for the applicant is correct when he submits that to place an interpretation on s. 57 which, as a condition to the exercise of the courts discretion, required that the circumstances which would justify making an order continue in existence up to the date of the hearing would make a nonsense of the section and in particular the express statutory entitlement under s. (2) of the court to make such interim or interlocutory order as it considers appropriate. Such a construction would be absurd in the sense used by Denham J. in *D.P.P. (Ivers) v. Murphy* [1999] 1 I.R. 98. If the contention of counsel for the respondent were to be correct then a respondent who complied with an interim or interlocutory order restraining an apparent breach of the waste management legislation (or who, as here, gave and complied with an undertaking to the same effect) would be immune from having a permanent order made because the condition necessary would have ceased subsequent to the commencement of the proceedings but prior to same coming on for full hearing. Therefore even if I did not feel bound by the circumstances referred to above (i.e, the plea of guilty by and conviction of the second named respondent in respect of the relevant criminal charge and the absence of a change in

circumstances since) I am of the clear view that in order to establish the conditions necessary for the making of an order under s. 57 it is necessary for an applicant to establish that those conditions were present at any time from the commencement of the proceedings to the date of hearing.

19. I should add, however, that the conditions prevalent at the date of hearing can, in an appropriate case, be material to the form of order which the court should appropriately make or, indeed, in certain cases, whether any order may be necessary.

The Facts of the Case

20. Independent of the criminal conviction it seems to me that the conditions necessary for the exercise by the court of its discretion to make an order under s. 57 exist. The first element of the test is that there must be "waste". While it was originally contended in the affidavit of the first named respondent sworn on 17th July, 2003 that "there is no waste material being stored on Weir Island" as "all such waste as has arrived … with C & D material has been removed", it is now accepted that the materials concerned do constitute waste within the meaning of the legislation.

21. On the evidence a very considerable volume indeed of such waste has been deposited on Weir Island. For reasons which I will address later in this judgment it is not possible to state with any certainty the volume thereof but it would appear to amount to a minimum of 100,000 tonnes and may on one view be not too far short of 200,000 tonnes. It does seem that at least a very significant proportion of the waste deposited is of the so-called "C & D" type being construction and demolition waste associated with a number of significant infrastructural projects. It may be that some of the materials which would not constitute what one might call pure C & D waste (i.e. earth, concrete, gravel and stone) have been removed at some stage although even the extent of this is far from clear and there is a sufficient body of evidence before the court from which I conclude that there is at least to some significant extent interspersed with the pure C & D material quantities of wood steel and plastic. So much is again admitted, at least to an extent, in the affidavit of the first named respondent of 17th June, 2003.

22. There is, in any event, ample evidence to justify a conclusion that the materials concerned are waste as defined. The definition of waste for the purposes of the Act is by reference to the European Waste Catalogue (s. 5 of the Waste Management Act 1996). Commission Decision 2000/532/EC updated the European Waste Catalogue with effect from 1st January, 2002. A specific section of the catalogue is headed Construction and Demolition Waste (s. 17) and includes concrete, bricks, tiles and ceramics, wood, glass and plastic and many other materials. Despite, therefore, the position initially adopted by the respondents there is more than ample evidence that what has been deposited at Weir Island is waste.

23. Section 57 goes on to require that such waste "is being held recovered or disposed off". There is little doubt that the waste concerned is being held.

24. Furthermore, "disposal" is defined in s. 4 as including any of the activities specified in the third schedule. The third schedule, as amended, includes, *inter alia*, "deposition in or under land (including landfill)" European Communities (amendment of Waste Management Act, 1996) Regulation, 1998. While there may be some doubt as to whether waste is still being disposed of there can be no doubt on the evidence that waste was being disposed of during the currency of these proceedings.

25. The final leg of the test is that the holding or disposal of waste is "likely to cause environmental pollution" or is likely to contravene s. 34 or s. 39(1).

26. Section 5 defines environmental pollution in the following terms:-

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

27. In *Wicklow County Council v. Fenton (No 2)* [2002] 4 I.R. 44 O'Sullivan J. noting that s. 57 speaks of the waste being likely to cause environmental pollution and on the facts of the case before him, and noting the evidence adduced on behalf of the respondents in that case directed to establishing the absence of any existing harmful effects, stated the following:-

> "such evidence is beside the point, however, once it is accepted (as it was, at least to a significant extent, by the expert witnesses called on behalf of the respondents) that the dumped material caused a risk, for example to the ground water, such a risk itself constitutes environmental pollution according to this definition. This is not surprising: one of the witnesses for the applicant expostulated during the trial that it was surely not necessary to wait for actual harm to be caused before the applicant could make its case. Indeed it is not. Environmental pollution is caused if a risk is created to waters, the atmosphere, land, soil, plants or animals".

The Site

28. What is called Weir Island is, in fact, joined to the mainland by a road. A significant portion of the land is designated on the up to date map (which is exhibit TC13 in these proceedings) as "quarry filled". A portion of the lands is used as a private residence by the first named respondent. The extent of the fill would appear to cover approximately 50,000 square meters. It is also of considerable note that the fill extends in many places beyond the original high water mark. The maritime area surrounding the first named respondent's lands (but not in general the land itself) is designated as:-

> (a) A candidate Special Area of Conservation ("cSAC") pursuant to Council Directive No 92/43/EEC ("the Habitats Directive");
>
> (b) A special Protection Area pursuant to Council Directive 79/409/EEC ("the Wild Birds Directive"); and
>
> (c) A proposed Natural Heritage Area pursuant to the Wildlife Acts 1976 and 2000.

29. I am satisfied, therefore, that the maritime area is a "place of special interest" for the purposes of clause (c) of the definition of environmental pollution as set out in s.5 of the Waste Management Act, 1996. As no formal consequence of the presence or

otherwise of the area in question in any of the above designated areas is relied on (other than as evidence that the area is a "place of special interest") the question of the non-notification of the respondents of the intention to include the area in such designation does not arise.

30. The cSAC under the Habitats Directive and the Special Protection Area under the Wild Birds Directive were defined by reference to the High Water Mark as per the relevant ordinance survey maps. The lands so designated, therefore, include all areas up to the original High Water Mark. However, as is clear from Exhibit "TC13", significant inroads have now been made into that maritime area by spillage over from the landfill. It should be noted that, by virtue of s. 227(2) of the Local Government Act, 2001, this additional area of land forms part of the functional area of the applicant.

The effect of landfill on the site

31. While it may well be that the great majority of the waste now present on the site is C & D waste the evidence suggests that it was deposited under unsupervised and unlicensed conditions and without any appropriate checking of loads or appropriate waste acceptance procedures or records. Indeed the respondents own expert, Ms. Dalton, acknowledges at para.48 of her affidavit that such checking and recording procedures are necessary. The landfill at Weir Island occurred mainly on the site of a quarry it is also clear from the evidence that a great deal of the waste is up to 45 feet (or perhaps even 25 metres) below sea level. The first named respondent accepted the former in his affidavit of 17th July, 2003. Toddy Cuthbert, an Environmental Officer with the applicant, suggested the latter in his affidavit. The landfill at Weir Island occurred mainly on the site of the quarry. It is clear that the respondents have removed part of the foreshore so that there is now a tidal flow into the quarry. Mr. Cuthbert has also deposed to the fact that the tide will now carry any waste that is deposited in the quarry out into the channel. In addition, the foreshore immediately around Weir Island, as indicated above, is part of a cSAC. There is ample evidence, not least that of Dr. Jervis Good, which attests to the significant adverse effect of the presence of the waste and the manner in which it has been deposited, on the cSAC and its effect on the loss of what is described as the eastern roosting site. Dr. Good also deposes to damage to tidal mud flats on both east and west sides of Weir Island. It is noteworthy that these tidal mud flats would appear to have been one of the main reasons for the designation of the area as a cSAC.

32. In view of the fact that there is more than ample evidence to justify a finding of at least a risk to the environment in the manner defined it is unnecessary to go exhaustively through each of the additional items of evidence produced on behalf of the applicant. I am also satisfied that that risk remains present to today's date. Therefore even if there had not been a conviction which establishes the existence of such a risk as of December 2003, I am independently satisfied on the evidence that such a risk continues today not least because of the unknown nature of the very large volume of materials which have been deposited.

33. In coming to that view I have had regard to both the submissions and evidence of the respondents. As is pointed out above much of the first named respondents evidence is coloured by an inaccurate view as to the meaning of waste for the purposes of the 1996 Act. The original expert evidence tendered on behalf of the respondents was that of Marcia D'Alton, a Consultant Engineer with expertise in waste management. It is clear from her affidavit that her principal brief was the preparation of an application on behalf of the respondents for a waste permit. As will be recalled the applicant had undertaken to the court on 17th November 2003 that such an application by the respondent would be considered notwithstanding these proceedings. In the events that have happened the relevant application was refused and that refusal has not been challenged. While it is true to state that Ms. D'Alton disagreed with certain of the evidence of the deponents whose affidavits are filed on behalf of the applicant (for example she describes some of the effects of the overspill of the boundaries of the landfill site as identified by Mr. Cuthbert as "overstated") I do not see her evidence as denying some adverse effects from the deposit of waste at Weir Island. She denies the extent of those adverse effects and also suggests that other causes have the potential to cause greater harm. In all the circumstances it does not seem to me that, even at its height, Ms. D'Alton's affidavit suggests a lack of a risk of environmental pollution.

34. The brief additional affidavit filed on behalf of the respondents between the two hearings was that of Anja Murray. Ms. Murray is an expert in Hedgerow and Woodland Ecology. While noting the interesting, but hardly relevant, fact that there was a Hawthorn tree and established grassland on the site Ms. Murray's only substantial evidence is to the effect that the pollution which she found between Weir Island and Fota Island was most likely resultant from sources other than Weir Island. Again this does not seem to alter the overall conclusion that there is a risk of environmental pollution from the holding of waste on Weir Island.

35. In all those circumstances I am more than satisfied that the applicants have established the necessary conditions to enable the court to exercise its discretion to make an order under s. 57. That leads to the second question.

The Nature of the Relief

36. In *Wicklow County Council* O'Sullivan J. observed:-

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

37. In the analogous area of planning law the Supreme Court held in *Morris v. Garvey* [1982] ILRM 177 at 180 as follows:-

> "When s. 27(2) is invoked, the court becomes the guardian and supervisor of the carrying out of the permitted development according to its limitations, and in carrying out that function, it must balance the duty and benefit of the developer under the permission as granted against the environmental and ecological rights and amenities of the public present and future, particularly those closely or immediately affected by the contravention of the permission. It would require exceptional circumstances (such as genuine mistake, acquiescence over a long period, the triviality or mere technicality of the infraction, gross or disproportionate hardship, or such like extenuating or excusing factors) before the court should refrain from making whatever order (including an order of attachment for contempt in default of compliance) as is necessary to ensure that the development is carried out in conformity with the permission".

38. In *Dublin City Council v. Eircom* [2002] 3 I.R. 327 it was held that once unauthorised development contrary to the planning code is established the respondent bears the onus of showing that any discretion should be exercised in his favour.

Discretion

39. Certain matters are urged on behalf of the respondents as a basis for suggesting that I should exercise my undoubted discretion against making an order.

> (a) it is pointed out that much of the waste material used as land fill at Weir Island would appear to have emanated from

a small number of major public infrastructural projects. The explanation given by the applicant is that the source of most of the waste would appear to be projects under the control of Cork City Council (which is, of course, a separate local authority from the applicant) and that, in any event, all such projects were under the control of contractors who had the responsibility for the proper disposal of all waste. The respondents complain that much of the evidence for that explanation is hearsay. However given that the onus is on the respondents to establish the basis for the exercise of a discretion against the making of an order the better view is that the respondents have failed to establish a sufficient nexus between the applicant and the waste so as to, potentially, influence the exercise of the courts discretion against the making of an order.

Having regard to the comments of the ECJ in Commission v. Ireland (Case C – 494/01) I am far from convinced that, even if the waste concerned was shown to be waste from the applicant knowingly and wrongfully deposited, this would be sufficient to warrant making no order. It might, in an appropriate case, be justification for directing that the burden of remediation should be shared. This is not such a case. That being said I feel that it is important, in all the circumstances of the case, that the court should deprecate the fact that it would appear that a significant volume of materials emanating from public projects have, apparently, been used as landfill at Weir Island in circumstances where no proper licence existed. It is not possible, on the evidence, to conclude that any public authorities were culpable in permitting this activity to occur. For the reasons indicated above it does not appear to me that even in the event that it were possible to reach such a conclusion same would absolve the owner and operator of an illegal landfill site from compliance with the law and consequently with being the subject of an order under s. 57 for the purposes of remedying any harm done. However, the fact that, by whatever means, a large volume of waste material from public projects would appear, in fact, to have been unlawfully deposited does raise questions which, in my view, should be addressed as to the adequacy of the extent to which there has been proper monitoring to ensure compliance by all concerned with their obligations.

(b) Next it is said that the relevant local authorities in the Cork region have failed to provide adequate waste disposal facilities. I am not sure that there is sufficient evidence before the court which could lead to such a conclusion. In any event it does not seem to me to be a material factor to the exercise of the courts discretion in this case. If there is a legal right to the availability of a certain level of waste disposal facilities and if that legal right is breached then the remedy is for an appropriate person or body with *locus standi* to bring proceedings designed to compel the provisions of such facilities. The absence of such facilities would not justify the court in effectively condoning the taking of the law into its own hands by parties such as the respondents.

(c) It is suggested that an order under s. 57 should not be made because the applicant should have used what are described as the simpler remedies provided for in ss. 55 and 56.

40. There is nothing in the Act which suggests that s. 57 should only be used as a last resort when no other remedy is effective. That is not to say that the court should not have regard to the principle of proportionality in considering what order, if any, to make.

41. As indicated above in addition to the general principles already established in the case law referred to it does seem to me that the response of the court should be proportional to the ends involved. Therefore there should be some reasonable proportion between the burden placed upon the respondent and the good to be achieved by securing compliance with the environmental code concerned. Thus the court should attempt to impose the least onerous order upon a respondent would will, nonetheless, secure the objectives of the Act. That brings into focus the difficulty in defining with any precision the works needed to deal with the problem that exists at Weir Island today.

42. For the reasons set out above there is very considerable doubt as to precisely what materials have been dumped as landfill waste. While I am satisfied, both on the basis of the conviction of the second named respondent, and independently on the evidence generally, that there remains a risk of environmental pollution, the extent of that risk and most particularly the minimum works which would need to be carried out to remove that risk cannot at this stage be ascertained with any precision. It is in that context that the applicant seeks, at this stage, only an order directing that the respondents procure by commissioning and paying Fehilly Timiney, a site investigation and report in accordance with the recommendations in that regard set out in the affidavits of Mr. Cuthbert and Dr. Goode.

43. Three principle issues are raised by the respondents in this regard. It is said:-

1. The relief is not claimed in the originating notice of motion,

2. That there is doubtful jurisdiction to make such an order; and

3. That it is not open to the court to proceed in stages, in the manner sought by the applicant, by making an initial order and leaving over further consideration as to whether to make additional orders to a later stage.

44. The Act, on its terms, gives a very wide discretion to the court. In outlining the approach which the court should take to the interpretation of the legislation O'Sullivan J. in *Wicklow County Council* noted at p. 70 that:-

"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 that objective rather than otherwise".

45. While that principle was stated in relation to an argument as to whether the principals of a corporate entity might also be made liable (an issue which also arises in this case and to which I will return) it is of more universal application. Given the wide discretion expressly conferred by s. 57 which enables the court to "make such other provision … as the court considers appropriate" and to the principles for the interpretation of the legislation as a whole to which I have just adverted it seems to me that the court has a jurisdiction to make an order requiring a respondent to procure the commissioning of, by paying for, a report in circumstances where the following matters can be established:-

(a) the conditions necessary for the invocation of the courts discretion under s. 57 have arisen;

(b) the extent and nature of the waste concerned and, in particular, the extent of the minimum works that would necessarily have to be carried out so as to remove any risk of environmental pollution or otherwise bring the case outside

the scope of s. 57 (by removing any contravention of ss. 34 or 39(1)), is unclear; and

(c) where requiring such a report would be a proportionate response in all the circumstances of the case having regard, *inter alia*, to the extent of the waste involved, the extent to which there is uncertainty as to its constituents and the risk of environmental pollution arising therefrom, and the extent to which there may be a wide range of practical measures which might, dependent on the findings of the report, be contemplated as being necessary to remove the risk of environmental protection.

46. I am satisfied that each of those conditions is met on the facts of this case.

47. For the reasons indicated above I am satisfied that the conditions necessary for the exercise of the jurisdiction of the court have been established.

48. I am also satisfied on the evidence that a great deal of uncertainty exists as to the minimum works necessary to render this site such as would lead to there being no longer a risk of environmental pollution. The initial Fehilly Timiney Report of November 2004 notes the very wide range of possible remedial action that might be required ranging up to full removal and remediation of the waste concerned with a possible and estimated price or cost of €43,700,000. It may well, of course, be the case that something far short of that would be sufficient to render the site in a condition where there would no longer be any actual, or risk of, environmental pollution and where there would be no continuing contravention of s. 39(1) (it is accepted that s. 34 does not arise on the current facts). It is therefore necessary to obtain the suggested detailed report in order for the court to determine what form of order will be required to ensure the proper remediation of the site in a proportionate manner but which achieves the objectives of the legislation.

49. In that context I should deal with the suggestion by counsel for the respondents to the effect that removal or remedial works might themselves cause environmental pollution by disturbance. This is, of course, a possibility. However that very fact seems to me to be a further justification for securing a detailed report which will, doubtless, address that issue amongst others in making recommendations as to the course to be followed.

50. Finally having regard to the extreme variations in the possible cost to the respondent of having to comply with an order in respect of remediation work, (dependent on the extent of the works ordered) to the fact that the necessity for the report is in no small part due in turn to the fact that the respondents do not appear to have kept any proper records as to the constituents of the waste being deposited on the site, and to the proportionality between the possible costs of remediation on the one hand and the estimated cost of the report (€210,600) on the other hand I am satisfied that directing the commissioning and payment for such a report would be a proportionate response in all the circumstances of the case.

51. I am also satisfied that, on the facts of this case, a report of the type contemplated is a necessary preliminary to the court being able to fashion a proportionate order designed to achieve the objectives of the Act of 1996 while not imposing an excessive burden on the respondents. In that sense it seems to me that the order sought is encompassed in the proceedings as being a necessary step towards making specific orders designed to ensure that the waste concerned is no longer (whether by removal, remediation or part one and part the other) such and give rise to a risk of environmental pollution. Given the principles of interpretation set out by O'Sullivan J. in *Wicklow Co. Council* it seems to me that it is appropriate that the court should, in case such as this and on the basis of the substantive relief ultimately sought herein, consider whether the interests of justice and the procurement of the objectives of the Act are best met by the making of an initial order of the type now sought by the applicant. For the reasons set out above I am satisfied that such an order meets those interests and I therefore propose making the order sought. The only remaining issue is as to the possible personal liability of the first named respondent.

52. Before moving to that issue I should note that, in my view, it will remain open to the respondents to seek to persuade the court that any of the recommendations of the Fehilly Timiney Report should not be the subject of a court order. By commissioning the report under compulsion the respondents are not bound by it.

The Liability of the First Named Respondent

53. In *Wicklow County Council* O' Sullivan J. held (at p. 68) that domestic law in relation to the limited liability of companies would frustrate the underlying European Directives if it precluded the making of an order against the directors of the corporate respondent in that case in circumstances where that company was not in a financial position to comply with the order of the court. The "polluter pays" principle requires, O'Sullivan J. held, that even those indirectly responsible for causing environmental pollution should pay for it rather than leave it to an innocent party or the community to do so.

54. The relevant facts are that the first named respondent is the owner of the lands. He is also the owner of the second named respondent and has accepted his personal control of the activities of the second named respondent on the site (including the acceptance of waste). He has also accepted that waste was held at and disposed of on the site without licence.

55. Section 57 orders can relate to "the person holding, recovering or disposing" of waste. A holder is defined in s. 5 as including a person in charge while a person in charge is defined as including a "manager, supervisor, or operator" of an activity giving rise to the holding of waste.

56. In those circumstances it seems that a s. 57 order can apply to a manger or supervisor independent of the owner whether corporate or individual. On the facts referred to above I am satisfied that the first named respondent is the manager or supervisor of the holding of the waste and was the manager or supervisor of the disposal of the waste at times during the currency of the these proceedings. In those circumstances I am satisfied that he is properly the subject of an order under s. 57. Even if I am wrong in that view I would consider that it would be appropriate to make a "fall back" order as against the first named respondent similar to that made by O'Sullivan J. in *Wicklow County Council*.