Neutral Citation Number: [2007] IEHC 58

THE HIGH COURT

JUDICIAL REVIEW

[1999 No. 473 JR]

BETWEEN

DÓNAL BRADY

APPLICANT

AND

THE ENVIRONMENTAL PROTECTION AGENCY

RESPONDENT

Judgment of Mr. Justice Charleton delivered the 9th day of March, 2007

Introduction

1. The applicant owns an intensive pig farm near Edgeworthstown, County Longford. He has 2000 sows, together with their progeny. At any particular time somewhat less than 25% of those sows will have piglets suckling on them. Of the pigs born, about 10% die naturally and the rest are reared for fattening. This results in him having around 10,000 pigs, I am told, in a purpose built facility which is called Carrick Boy Farms.

2. These pigs produce an enormous amount of effluent which, on the evidence before me, I am satisfied exceeds that of a similar human population and is many times more toxic in terms of its bacteriological and viral content and the potential that it carries for pollution. In this country, the organic load generated by agricultural livestock, is said to be equivalent to that of a human population of sixty-eight million persons. This applicant produces somewhere in the region of 30,000 m3 of pig slurry per year. If this is not properly dealt with, it can result in pollution to the environment by way of odour and water contamination. Odours are unpleasant but usually amounted to no more than a nuisance. Pig slurry is 80 times more polluting than untreated human sewage and 1,000 times more polluting than treated sewage. Pig slurry contains pathogens which are harmful to human health. The micro-organisms in it have a high demand for oxygen. In consequence, if pig slurry is discharged in quantity into water systems, the resultant micro-biological action consumes the natural oxygen content of the water. The result can be fish kills together with the growth of undesired plant species. The relevant pathogens in pig slurry include viruses that can live for up to 170 days in ground water. The bacterial count in every gram of pig slurry is counted in millions whereas the national standard for drinking water is zero. Pig slurry is also a valuable fertilizer and is particularly good at replenishing the nutrients in grassland.

Issues

3. The applicant holds an integrated pollution control licence; which is reference No. 408 of the 28th October, 1999. This enables him to carry on the business of industrial-scale pig farming subject to strict conditions. He seeks an order quashing the decision of the respondent to grant that licence and asks the court to remit his application to the respondent so that the matter can be determined "in accordance with the requirements of the Environmental Protection Agency Act, 1992".

4. The applicant applied for his licence on the 9th March, 1998. A draft licence was issued on the 29th May, 1999. On receiving this draft licence, the applicant was aggrieved. Many of its features were repeated when the licence was issued. He had submitted details with licence application as to how he proposed to deal with the pig slurry he produces. He had constructed on his land a number of large storage tanks, which have now a capacity equivalent to his entire annual output. He had entered into agreements with a number of neighbouring farmers that they would take this pig slurry to use it as an organic fertilizer. These lands amounted to, in total, just under 6,000 acres.

5. The applicant is required by the terms of his licence to make sure that these farmers use the pig slurry properly, so that it does not cause pollution. The applicant says that whereas he can control his own operation in his own farm, he would find it impossible to ensure that the pig slurry accepted by these farmers was dealt with in an acceptable way. He argues that the respondent has no power to do anything other than regulate his operation; which operation ends at the perimeter of his premises. Any condition to the licence which he holds that he should monitor the activities of any local farmer accepting, or buying, the pig slurry from him as an organic fertilizer is, it is argued, unlawful because the powers of the Environmental Protection Agency do not extend to imposing such a condition. Even more fundamentally, it is argued that pig slurry is not waste but is organic fertilizer; a substance which, it is claimed, the respondent has no power to regulate in terms of its disposal.

6. I now quote some selected portions of the licence with which the applicant asserts he has the most severe problems:-

> "5.5.4. Landspreading shall not take place on land identified in schedule 3(iv) lands where land spreading of organic waste from this facility are excluded.
>
> 5.5.7. The licensee shall ensure that no slurry/manure from the facility to which this licence relates is provided to lands in the land bank which receive waste from lands spreading from any other off-farm source which are not included in the Nutrient Management Plan, other than by agreement with the Agency.
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> 5.5.9. All land spreading activities shall be undertaken in accordance with a Nutrient Management Plan which must be agreed with the Agency and submitted not later than six months from date of grant of this licence and each calendar year thereafter as part of the AER.
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> 5.5.10. The applicant shall provide a copy of the REPS plans for all farms identified in the land bank which are included in the REPS scheme, to the Agency, within six months of the date of grant of the licence.
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> 5.5.11. Landspreading shall be carried out in accordance with schedule 3(v) buffer zones for land spreading of organic waste and schedule 3(iv) code of practice for land spreading of organic waste. All land spreading activities shall be carried out in such a manner as to avoid contamination of surface and ground waters, and so as to minimise odour nuisance from the activity.
>
> 5.5.13. A register of land spread slurry/manure ("slurry/manure register") shall be maintained on site on a daily basis and shall be available for inspection by authorised personnel of the Agency at all times. The register shall include details of … date of slurry … spreading, contractor… spreading slurry… weather and ground conditions … nutrient requirements for individual fields … volumes of slurry … applied.

> 7.1.5. The licensee shall within twelve months of the date of grant of this licence submit to the Agency for agreement the surface water monitoring programme for surface waters which bisect the land spread areas. The results generated by the agreed programme are to be reported annually as part of the AER."

7. A number of affidavits have been exchanged in these proceedings and some relevant scientific papers have been exhibited. The core point in this judicial review application, however, is well summarised in the affidavit of Dr. Vincent Flynn, an agricultural advisor, which was sworn on the 17th November, 2006:-

> "… it appears that the Agency does in fact seek to control holdings outside the licensable installation and occupiers of holdings that are not licensable holdings. I say that the Agency appears in the impugned licence to require the applicant to accept a condition or conditions in his licence that would somewhat result in the applicant having a level of control over the customer farmer's lands to enable them to carry out a scientific evaluation of the nutrient status of their lands and to take responsibility for implementing a fertilising regime on those lands based on such evaluation… [the respondent] appears to be concerned that if a farmer having purchased such animal manure proceeds to spread it and subsequently causes pollution that it is the applicant who is responsible and I say that this is I say and believe and dealt with by other legislation and is a matter over which the producer of the animal manure can have no control and in effect what the Agency are seeking to do is to make the applicant responsible for the acts of third parties."

Consequences

8. Section 84(2) of the Environmental Protection Agency Act, 1992 provides that it is an offence not to comply with any condition attached to a licence, or a revised licence. Section 83(7) provides that it is a good defence to a prosecution under any enactment, apart from Part IV of the Environmental Protection Agency Act, 1992, or to proceedings pursuant to ss. 10 or 11 of the Local Government (Water) Pollution Act, 1977, s. 20 of the Local Government (Water Pollution) (Amendment) Act, 1990 or s. 28A or s. 28B of the Air Pollution Act, 1987 to prove that the Act complained of was authorised by a licence or a revised licence granted under that Act. No other relevant defence is provided under the Environmental Protection Agency Act, 1992 or the Waste Management Act, 1996. Section 9 of the Environmental Protection Agency Act 1992, provides that a person guilty of an offence under this Act is liable on summary conviction to imprisonment for up to twelve months and a fine not exceeding IR£1,000 and is liable on conviction on indictment to a fine not exceeding IR£10,000,000 or to imprisonment for a term not exceeding ten years.

9. The applicant claims that the terms of the licence means that once there is a breach by a third party, he becomes criminally liable. In imposing the penalty, the Court has to have regard to the risk, or extent of damage, to the environment arising from the act or omission constituting the offence. A further contravention after conviction constitutes a separate offence. Curiously, were the applicant to be prosecuted in respect of noise pollution under s. 7 of the Environmental Protection Agency Act, 1992, or for a nuisance in respect of noise under s. 108 of the same Act, then both s. 107(6) and s. 108(2) provide that it is a good defence, but only in relation to such prosecutions, for the accused to show that he took reasonable care. No such defence otherwise exists in general terms under the Act. This is what the applicant faces should the conditions attached to his licence be breached; he argues without his knowledge and in respect of people who were not under his control.

10. At the time when the licence was issued, Statutory Instrument No. 378 of 2006 was not in force. This legislation, the European Communities (Good Agricultural Practice for Protection of Waters) Regulations 2006, makes it a summary offence to contravene any provision of Parts II to V thereof. The penalty provided is summary, amounting to a fine of €3,000 and imprisonment for up to six months. This legislation applies to anyone using certain types of fertilizer and it regulates all the farmers to whom the applicant supplies pig slurry. Parts II to V of the Regulations provide for the proper disposal of soiled water, the maintenance of proper storage facilities, the prevention of spreading certain fertilizers at particular distances from a water body, the limiting in terms of date as to when fertilizers may be applied, specifics as to the amount of particular nutrients that may be placed on soil and, in addition, it provides for a general duty on the occupier of a farm not to pollute water and an obligation to keep records about a wide range of relevant matters, including soil tests and the quantities and types of fertilizers moved on or off the farm. This legislation is silent as to any defence. It is argued that this piece of legislation assumes that pig slurry is a fertilizer, as opposed to a waste material, and indicates how it is to be used. By so closely regulating farmers using pig slurry, and other fertilizers , and by providing for criminal liability in the event of a breach, it is argued that the licence conditions casting this burden on the applicant are demonstrated to be beyond the powers of the respondent.

Waste in European Law

11. The vast majority of environmental legislation that has been passed in this jurisdiction as has been necessitated by our membership of the European Union. The fundamental argument advanced by the applicant has been that both the product and the by-product of this farming operation is not waste as defined by Council Directive 75/442/EEC of 15th July, 1975 on waste as amended by Council Directive 91/156/EEC of 18th March, 1991. He accepts that pigs which die of disease or accident are waste, as are waste waters as a result of washing operations in the pig pens and yards. It is common case, however, that both of these are dealt with correctly: only the pig slurry remains an issue.

12. Council Directive 75/442 was passed to further the objective of ensuring that waste disposal must be effected so as to protect human health and the environment. One of the recitals to Directive 91/156, records that the purpose of the Council in this legalisation was to restrict the production of waste by promoting clean technologies and products which can be recycled and reused, taking into consideration existing or potential market opportunities for recovered waste. Essentially, the applicant claims that pig slurry is not waste: by reason of having in place a complete system for its use on the land it is argued that it should be classified as organic fertilizer instead. This would have the result, it is argued, that the conditions on the licence providing for the proper disposal of waste, and so described, are both unnecessary and beyond the powers of the respondent.

13. Waste is defined in Council Directive 91/156 by the introduction of new sections into Council Directive 75/442. Article 1 defines waste as "any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard". A producer of waste is defined as "anyone whose activities produce waste… and/or anyone who carries out pre-processing, mixing or other operations resulting in a change in the nature or composition of this waste". The concept of disposal is defined in accordance with Annex IIA; and recovery in accordance with Annex IIB. Under Article 1, the Commission is entitled to draw up a list of waste belonging to the categories listed in Annex I. In effect, this expands on the existing categories. Among the categories of waste listed in Annex I are production or consumption residues; products for which the holder has no further use as exemplified in agricultural, household, office, commercial or shop discards; and any materials, substances, or products that are not already categorised. Annex IIA makes it clear that its purpose is to list disposal operations but, insofar as these are followed, they must be carried out "without endangering human health and without the use of processes or methods likely to harm the environment". The disposal operations listed include the bio-degradation of liquid or sludge discards. Among the operations listed in Annex IIB, which may lead to the recovery of waste, are spreading on land which results "in benefit to agriculture or ecological improvement, including composting or

other biological transformation processes, except in the case of waste excluded under Article 2(1)(b)(iii)". This is a specific reference to items excluded from the scope of the Directive. These include gaseous effluents emitted into the atmosphere and, where they are already covered by other legislation, radioactive waste, quarry extractions and "faecal matter and other natural non-dangerous substances used in farming".

14. A comprehensive definition of waste, within the meaning of European legislation has, not surprisingly, proved impossible to achieve; though it is apparent that one must look both to the nature of the substance and what is proposed to be done with it, or is actually done with it: waste and discard are inter-linked concepts. The concept of waste is not to be understood as excluding substances and objects which are capable of economic realisation; joined cases C/206/88 and C/207/88 Criminal Proceedings against *G Vessoso and G Zanetti* [1990] ECR – I 1461. The term discard, as employed in the definition of waste, has a special meaning which encompasses both the disposal of waste and its consignment to a recovery operation. In joined cases C-304/94, C-330/94, C-342/94 and C-224/95, criminal proceedings against *Euro Tombesi and Others*. [1997] ECR I – 3561, the European Court emphasized that the definition of waste hinges around the intention of the owner to discard the substance in question, or his obligation in that regard. At paras. 52 and 53 the court set out the following helpful observation:-

> "52. It follows that the system of supervision and control established by Directive 75/442, as amended, it intended to cover all objects and substances discarded by their owners, even if they have a commercial value and are collected on a commercial basis for recycling, reclamation or re-use.
>
> 53. As the Advocate General points out in paras. 60 and 61 of his Opinion, deactivation process intended merely to render waste harmless, landfill tipping in hollows or embankments and a waste incineration constitute disposal or recovery operations falling within the scope of the Community legislation. The fact that a substance is included in the category of re-usable residues without any details being given as to its characteristics or use is irrelevant in that regard. The same applies to the grinding of waste."

15. The issue in case C-129/96 *Inter-Environnement Wallonie ASBL v. Région Wallone* [1997] ECR I – 7411, was as to whether an integral part of an industrial production process was excluded from the definition of waste. The Court indicated that it was not. These are the observations of the Court at paras. 29 to 34:-

> "29 First, Directive 75/442, as amended, applies, as is apparent in particular from Articles 9 to 11, not only to disposal and recovery of waste by specialist undertakings, but also to disposal and recovery of waste by the undertaking which produced them, at the place of production.
>
> 30 Second, while Article 4 of Directive 75/442, as amended, provides that waste is to be recovered or disposed of without endangering human health or using processes or methods which could harm the environment, there is nothing in that directive to indicate that it does not apply to disposal or recovery operations forming part of an industrial process where they do not appear to constitute a danger to human health or the environment.
>
> 31 Finally, it should be borne in mind that the Court has already held that the definition of waste in Article 1 of Directive 75/442, as amended, is not to be understood as excluding substances and objects which were capable of economic reutilization (Case C-359/88 Zanetti and Others [1990] ECR I-1509, paragraphs 12 and 13; C-422/92 Commission v Germany [1995] ECR I-1097, paragraphs 22 and 23, and Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 Tombesi and Others [1997] ECR I-3561, paragraphs 47 and 48).
>
> 32 It follows from all those considerations that substances forming part of an industrial process may constitute waste within the meaning of Article 1(a) of Directive 75/442, as amended.
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> 33 That conclusion does not undermine the distinction which must be drawn, as the Belgian, German, Netherlands and United Kingdom Governments have correctly submitted, between waste recovery within the meaning of Directive 75/442, as amended, and normal industrial treatment of products which are not waste, no matter how difficult that distinction may be.
>
> 34 The answer to the second question must therefore be that a substance is not excluded from the definition of waste in Article 1(a) of Council Directive 75/442, as amended, by the mere fact that it directly or indirectly forms an integral part of an industrial production process."

16. Joined cases C-418/97 and C-419/97 *Arco Chemie Nederland Ltd. v. Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer and Vereniging Dorpsbelang Hees and Others v Directeur van de dienst Milieu en Water van de provincie Gelderland* [2000] ECR I – 4475 concerned the use of a substance produced as a by-product of a chemical process. This substance was useful in the cement industry and was therefore transported from the chemical factory producing it for use in cement making in other locations. At para. 88 the court held:-

> "…the fact that a substance used as fuel is the residue of the manufacturing process of another substance, that no use for that substance other than disposal can be envisaged, that the composition of the substance is not suitable for the use made of it or that special environmental precautions must be taken when it is used may be regarded as evidence that the holder has discarded that substance or intends or is required to discard it within the meaning of Article 1(A) of the Directive. However, whether it is in fact waste within the meaning of the Directive must be determined in the light of all the circumstances, regard being had to the aim of the Directive and the need to ensure that its effectiveness is not undermined."

17. In case C-9/00 *Palin Granit Oy and Vehmassalon kansanterveystyon kuntayhtyman hallitus* [2002] ECR I -3533, the issue before the court was as to whether material taken from a mine, which was stored close by, which in itself was an integral part of the Earth, that had been dug up and which was reused to fill the galleries excavated, could be regarded as waste. Again, the interpretation put on this term by the court hinged upon the concept of the intention of the owner to discard the substance; was that their intention and how was it to be done?

18. In looking to all the circumstances, the answer should be found in the fact of what the owners did to the substance in question. The court emphasized that the Community policy on the environment required that dealings with waste should be hinged around the precautions that must be taken to ensure that it does not cause environmental damage, as opposed to reacting to this on its occurrence; para. 23. It should be recalled that the facts of this case involved the extraction from the ground, and the storing nearby, and the replacement in the ground of what was precisely the same material that was taken out in the first instance. The

valuable rock would have been subject to an extraction process whereas the non-valuable rock was simply replaced as part of the good practice of mining. At para. 32 the court made a practical reference to the ordinary meaning of waste which was said to be that which "… falls away when one processes a material or an object and is not the end-product which the manufacturing process directly seeks to produce".

19. The court then emphasized the certainty of the use of that by-product in determining that it could not be captured within the definition of waste at paras. 36 and 37 of the judgment.

> "36 having regard to the obligation recalled at para. 23 of this judgment to interpret the concept of waste widely in order to limit its inherent risks and pollution, the reasoning applicable to by-products should be confined to situations in which the reuse of the goods, materials or raw materials is not a mere possibility but a certainty, without any further processing prior to reuse and as an integral part of the production process.
>
> 37. It therefore appears that, in addition to the criteria of whether a substance constitutes a production residue, a second relevant criterion for determining whether or not that substance is a waste for the purposes of Directive 75/442 is the degree of likelihood that the substance will be reused, without any further processing prior to its reuse. If, in addition to the mere possibility of reusing substance, there is also a financial advantage to the holder in so doing, the likelihood of reuse is high. In such circumstances, the substance in question must no longer be regarded as a burden which its holder seeks to "discard", but as a genuine product".

20. In case C-121/03 *Commission v. Spain* [2005] I – 07569, an action was brought before the court seeking to condemn Spain for its failure to implement community legislation, including the relevant Directives. The case also concerned the by-products of large scale pig farming, of which the most important is pig slurry. At para. 60 the court held that the Spanish Government had correctly argued that livestock effluent may fall outside classification as waste, and be treated in the same way as case C-9/00, *Palin Granit*, if it is lawfully used as a soil fertilizer on identified land and is stored only for that purpose; paras. 60-68. In other words, a substance may be a genuine product that has a valuable use and this makes it unlikely that it will be discarded, bringing it outside the definition of waste. I note that the pig slurry in that case was spread, as the court noted, "in accordance with good agricultural practice laid down by the Autonomous Community of Catalonia". This had the result that the persons running these large pig farms where not seeking to discard the product, thus having the result that it was not classified as waste within the meaning of Directive 75/442; para. 65. A complaint was also made by the Commission that prior to spreading the pig slurry, Spain had failed to carry out a proper hydrogeological study on the soil to ensure that there was no water pollution in accordance with the Nitrates Directive, namely Directive 91/676. This complaint was also dismissed in a passage which has been relied on by both sides in this case. At paras. 99 to 103 the court held as follows:-

> "99. The Commission submits that slurry is a substance which has a deleterious effect on the taste and/or odour of groundwater and which therefore comes within list II in Directive 80/68. Authorisation procedures involving prior investigations and hydrogeological studies should, as a result, have been implemented in the areas affected by pollution where pigrearing farms were going to be built, in compliance with Articles 3(b), 5(1) and 7 of Directive 80/68, which did not happen. The existence of uncontrolled discharges and seepages of slurry is proved by the enforcement actions undertaken by the Spanish authorities against the managers of the farms in question.
>
> 100. However, it must be observed, first, that the use of slurry as fertilizer is an operation which usually complies with good agricultural practice, and is not disposal or tipping for the purposes of disposal of these substances' within the meaning of Article 5 of that directive.
>
> 101. Secondly, even if the spreading of the slurry has a deleterious effect on the taste and/or odour of the groundwater and could cause water pollution, the system of protection of waters from pollution by livestock effluent is not based, at Community level, on Directive 80/68 but on Directive 91/676. The latter's specific purpose is to counter water pollution resulting from the spreading or discharge of livestock effluent and from the excessive use of fertilizers. The scheme of protection for which it provides involves precise management measures which the Member States must impose on farmers and which take into account the more or less vulnerable nature of the environment receiving the effluent.
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> 102. If Article 5 of Directive 80/68 were interpreted as meaning that the Member States must subject to prior investigation, involving, in particular, a hydrogeological survey, any use of slurry or, more generally, of livestock effluent as agricultural fertilizer, it would result in extensive investigation requirements, whatever the area concerned. Those requirements would be manifestly more rigorous than those which the Community legislature, by Directive 91/676, intended to impose on the Member States in agricultural matters. The scheme of protection established by Directive 80/68 would be substituted in part for that specifically instituted by Directive 91/676.
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> 103. Such a construction of Directive 80/68 cannot therefore be upheld."

Conclusion on Waste

21. It follows from the foregoing that the nature of waste depends both on the type of substance in question and the use to which it is proposed to be put, or is actually put. I would hold that by its inherent dangerousness, and because it is more than animal faeces dropped while grazing or feeding, pig slurry cannot be regarded as having being excluded from Article 2(1) of Council Directive 75/442, as amended by Directive 91/156; I would further hold that by reason of the fact that special environmental precautions must be taken when pig slurry is used as fertilizer, that this constitutes evidence that this substance requires to be discarded (joined cases C-418/97 and C-419/97 *Arco Chemie Nederland*); I would further hold that for such a substance not to be classifiable as waste, its reuse must be both certain and lawful (case C-9/00, *Palin Granit*); lastly, I would hold that such disposal must take place under regulations prescribed for good agricultural practice (case C-121/03, *Commission v Spain).*

22. That, however, does not end the matter. A claim is made that the conditions imposed on the applicant by the respondent with regard to third parties are beyond the statutory powers of the respondent.

Environmental Protection

23. Article 174 (2.2) of the Treaty prescribes that community policy:-

> " … 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."

24. I agree with the observations of Professor Dr. Ludwig Kramer in his *EC Environmental Law* (5th Ed., London, 2003), that the community legal framework devises binding laws for the purpose of enforcing the Treaty and that it is not, of itself, capable of being transformed from a guiding principle for political or legislative decisions into a binding legal rule. For this, precise measures are needed; see paras. 5.1-16 to 5.1-18 of Dr. Kramer's work, and *Vincent Browne v. Attorney General*. [2003] 3 I.R. 205.

25. The national definition of waste, as contained in s. 4 of the Waste Management Act, 1996 does not materially alter the description of this concept in European law, given above. This provides:-

> "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 first 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."

26. The Act is expressed, in s. 3, as not applying to emissions into the atmosphere; to sewage and sewage effluent or the treatment thereof; to the dumping of waste at sea; or to radioactive substances. Further, s. 51 provides that a waste licence under s. 39 of that Act is not required for the recovery of faecal matter of animal or poultry origin in the form of manure or slurry.

27. The exclusion of slurry from the Waste Management Act, 1996 suggests that referring to the definition of Article 2 of Council Directive 75/442, as amended, it is not covered, as is required, "by other legislation" for the purpose of exclusion from the scope of the Directive. Such an exclusion must be given a narrow definition so as not to undermine the purpose of effect of a Directive; see *Commissioners of Customs and Excise v. Mirror Group Plc* [2001] ECR I - 07175, para. 30 for tax and *Palin Granit Oy and Vehmassalon kansanterveystyon kuntayhtyman halutus* [2002] ECR I - 3533 for environmental protection. I would also consider that a reference to legislation in a Directive, unless it is expressed to be in terms of national legislation, must be a reference to European legislation.

28. The applicant is required to hold a licence because the activity of intensive pig rearing is required to be licensed by reason of the Environmental Protection Agency Act, 1992, as amended.

29. The Environmental Protection Agency Act, 1992 set up the respondent. Under s. 52 its functions and objectives are set out as follows:-

> "52.—(1) The functions of the Agency shall, subject to the provisions of this Act, include—
>
> a) the licensing, regulation and control of activities for the purposes of environmental protection,
>
> b) the monitoring of the quality of the environment, including the establishment and maintenance of data bases of information related to the environment and making arrangements for the dissemination of such information and for public access thereto,
>
> c) the provision of support and advisory services for the purposes of environmental protection to local authorities and other public authorities in relation to the performance of any function of those authorities,
>
> d) the promotion and co-ordination of environmental research, the provision of assistance and advice in relation to such research and the carrying out, causing to be carried out, or arranging for, such research,
>
> e) liaison with the European Environment Agency provided for under Council Regulation 1210/90/EEC,
>
> f) such other functions in relation to environmental protection as may be assigned or transferred to it by the Minister under section 53 or 54 including functions arising from any obligations under any treaty governing the European Communities or an act adopted by the institutions of those Communities or other international convention or agreement to which the State is, or becomes, a party.
>
> (2) In carrying out its functions, the Agency shall—
>
> a) keep itself informed of the policies and objectives of public authorities whose functions have, or may have, a bearing on matters with which the Agency is concerned,
>
> b) have regard to the need for a high standard of environmental protection and the need to promote sustainable and environmentally sound development, processes or operations,
>
> c) have regard to the need for precaution in relation to the potentially harmful effect of emissions, where there are, in the opinion of the Agency, reasonable grounds for believing that such emissions could cause significant environmental pollution,
>
> d) 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,
>
> e) ensure, in so far as is practicable, that a proper balance is achieved between the need to protect the environment (and the cost of such protection) and the need for infra-structural, economic and social progress and development.

30. Section 83 of the Act allows the Agency to grant a licence and to attach conditions thereto. In considering any application for a licence, the Agency is limited by its functions and bound by its objectives. Of particular relevance here, the respondent must have regard to "such other matters related to the prevention, limitation, elimination, abatement or reduction of environmental pollution"' as it considers necessary. Under s. 83(3) the Agency should not grant a licence unless it is satisfied that any emissions from an activity that comes within its scope will not contravene the relevant quality standard for water and, further, that the activity will not cause significant environmental pollution. Where such risks appear to be possible, the Agency is entitled to attach conditions which are related to the protection of the environment from those risks. Any activity which is scheduled under the Act must have a licence from the respondent. The licence is granted under Part IV of the Act and the First Schedule thereto provides that the activities to which

that part of the Act applies include, under para. 6.2, "the rearing of pigs in installations… where the capacity exceeds 1,000 units on gley soils or 3,000 units on other soils." For this purpose, a pig is counted as one unit and a sow as ten. On any reading, the applicant comes under scope of the Act. Under s. 84, conditions may be attached to the licence which, among other matters, can specify limits to the effects of an emission. An emission is defined in s. 3 as including "the disposal of waste".

31. Under Article 10 of the Treaty of Rome and Article 29 of Bunreacht na hÉireann I am obliged to define the concept of waste in the same way as defined by Council Directive 75/442 EEC as amended by Council Directive 91/156/EEC, as described above. In the event of any ambiguity, the interpretation of national legislation must provide for our European obligations. Section 84 of the Environmental Protection Agency Act, 1992 allows the Agency to provide for conditions to be attached to a licence relating to the location of an emission; the periods during which it may be made; the limits to the effect on emission; the rate of concentration of a pollutant in an environmental medium; any matters relating to the construction of outlets; the means to be used for controlling an emission; the limits in relation to the amount or composition of a substance produced or utilised; the maintenance of measuring apparatus; the taking and analysis of samples; the furnishing of information to the Agency; the measures to be taken if there is a breakdown of any equipment; the type of fuel to be used; the nature of the treatment to be applied to waste; and the measures to be taken when the activity ceases.

32. Under s. 87 the Minister may make regulations in relation to applications for licences: these are, in fact, the Environmental Protection Agency (Licensing) (Amendment) Regulations, 1996.

Limits and Consequences
33. Despite the wide powers apparently given to the respondent through the Environmental Protection Agency Act, 1992, as amended, an administrative body is not entitled to impose arbitrary conditions on a licensee. In *Hanrahan Farms Ltd v. The Environmental Protection Agency, Ireland and The Attorney General*, (Unreported, High Court, Smyth J., 21 July, 2005) an issue arose as to whether particular conditions in a licence granted by the respondent were within the powers conferred on it under the Act. Smyth J. commented:-

> "While the nature of the power in s. 83(1) is general in character, the respondent did not contend that its power was unrestricted, it was properly accepted that a condition must be for a legitimate environmental purpose under the relevant legislation and that it must fairly and reasonably be related to the licensed activity. That stance accords (in a planning context) with the judgment of Lord Denning in *Pyx Granite*, infra at p. 572:-
>
> > "… the law says that conditions attached to a planning decision, to be valid must fairly and reasonably relate to the permitted development. The planning authority are not at liberty to use their powers for an ulterior object, however, desirable that object may seem to them to be in the public interest".

34. I would hold that for a licence condition to be valid it must be within the powers of the issuing authority; that such condition must be imposed for the purpose for which the power to grant conditions was specified (here it is for environmental protection purposes); and it must be reasonably related to the activity that is to be permitted in the avoidance of the harm for which licensing of an activity is required by legislation.

35. Throughout the affidavits in this case, and the exhibits related thereto, a common thread runs through the response of the Environmental Protection Agency. The respondents say that the pig slurry produced by the applicant is a dangerous substance which requires special environmental precautions and that it is therefore required to be regulated since it is not certain that it will always be used in a manner which protects the environment. Even though specific Directives are not referred to in the technical report on the licence application and the objections thereto, I am satisfied that they are in the background of the decision making process by the respondent. Section 83 of the Environmental Protection Agency Act, 1992 as amended, does not require a legalistic technical approach. Rather, the focus of that section, combined with s. 52 of the Act, is to impose an obligation on the agency to ascertain from the most reliable sources what the effects of particular activities and the disposal of particular substances may have on the environment. Once this is done, it is the positive duty of the respondent not to licence the activity unless it is possible to attach such conditions to the licence which will ensure that the environment is protected. In considering how to avoid significant environmental pollution, the Agency is entitled to have regard to the opinion of its own experts, to respected scientific works and, even though they have not been implemented in Irish law, to such directives of the European Council and Parliament as set attainable environmental standards. The respondent did not have to go that far here. The overall responsibility of the respondent is to protect the environment by discovering what harms it, how that harm can be avoided and how the setting of conditions may achieve that end. In some instances, the setting of conditions may require the use of the best available technology which does not entail excessive cost; but that is not what is at issue now.

36. National Competence
Much of the argument in this case has been as to whether the Waste Management Act, 1996 and the Environmental Protection Agency Act, 1992, as amended, are in conformity with European law. Essentially, it is argued that national legislation must precisely mirror the requirements which Ireland has taken upon itself under Article 10 of the Treaty of Rome as allowed by Article 29 of Bunreacht na hÉireann. There is no doubt that Ireland is obliged to implement European legislation within the time limits set out in Directives and Regulations. Where there is a choice as to the measures to be taken, these must be sufficient to implement the legislative purpose in national law. That obligation, however, does not mean that national competence in particular spheres of legislation is at an end.

37. A matter may be covered by the Treaty, for instance in the sphere of environmental protection, and pursuant to the fundamental powers of the European Union as set out in the Treaty, member states may be obliged by European legislation to legislate in the national sphere in specific areas. This they must do correctly. Ireland is entitled, notwithstanding this, as are other member states, to exceed the protections necessitated by European law through taking an independent decision to go further and to require a more stringent standard than the obligation required through membership of the European Union. For instance, Ireland may regulate environmental protection more stringently than is required by European law. It can often be the case that by legislating in respect of a service, an activity, or an economic commodity that is common throughout member states that national law may infringe some piece of European legislation designed to ensure uniform standards or the free movement of goods and services under the Treaty. It can also be the case that provided national legislation is non-discriminatory as to its purpose and effect that a higher measure of, for instance, environmental protection may anticipate the passing into legislation of some proposal of the European Parliament, Commission or Council. In other words, the Waste Management Act, 1996 and the Environmental Protection Agency Act, 1992 can go further in terms of the protections in favour of the environment that they impose than what is required by European legislation; provided that in doing so no other provision of European law is infringed.

38. Criminal Liability

It is argued that the conditions attached to the applicant's licence are too onerous in the sense that they require, in effect, the applicant to police his neighbours. The evidence and submissions of the applicant are to the effect that the pig slurry, which is a by-product of the industrial farming in which he engages, is a valuable commodity and a figure was mentioned that the purchase of it brings in an annual income of around €30,000. The Agency says that none of the farmers who are taking this pig slurry, for the purpose of spreading it to enhance the productivity of their land, have an obligation to take it. The reality must be that, unless these farmers took it, the applicant would be overwhelmed with this product despite the fact that he is required under his licence to have storage tanks taking a year's capacity.

39. The most troubling aspect of this case has been the potential for the applicant, through no apparent fault of his own, to find himself facing a fine to an amount which will probably exceed all of his resources in monetary terms and a stretch of ten years in jail should any of the conditions attached to the licence be breached. A breach of the licence or its conditions is a crime and carries that potential consequence. I am satisfied, however, that what the applicant is faced with is not absolute or strict liability for the commission of a criminal offence. In other words, the applicant does not necessarily become liable for a breach of the criminal law simply because a farmer to whom he has sold slurry spreads it improperly. Nor is it the case, in my view, that only a defence of reasonable care is open to him, thus making the offence detailed above one of strict liability as defined by the Canadian Supreme Court in *R. v. City of Sault Saint Marie* (1978) 85 DLR. I would regard the prospect which the applicant might face in respect of a criminal charge as being completely different to that detailed by the Supreme Court in *Shannon Regional Fisheries Board v. Cavan County Council* [1996] 3 I.R. 267. The application of the dissenting judgment of Keane J. in that case, however, might have enhanced many subsequent analyses of the legal interpretation of criminal statutes. The offence of breach of a licence condition is one of true criminal liability where a mental element of intention or recklessness is necessarily to be inferred into the definition of the offence. This means that the applicant is liable either if he intends that a farmer to whom this slurry is provided is to spread it in breach of the licence conditions or if he advertently takes a serious and culpable risk, that a third party to whom he supplies pig slurry will breach the conditions of the licence. Fundamentally, he is obliged to take care and the conditions in the licence set out the necessary measures in that regard.

40. In *C.C. v. Ireland and Others* [2005] IESC 48 Denham J. emphasised that offences, beyond mere regulatory offences, excluding a mental element are rarely, if ever, in our constitutional scheme, to be implied where a serious penalty for conviction is provided by statute. A regulatory measure with a small penalty is different. She stated, speaking of an offence carrying a severe penalty for under-age sexual intercourse:-

> " … the intention of the legislature is best construed from the words of the Act. If the words are clear and unambiguous then they should be given their ordinary and natural meaning. In this case the words of the statute are clear and unambiguous and the meaning of the statute appears clearly from the words. The words themselves do not create an offence of strict liability. On the words of the statute there is no exclusion of the requirement of *mens rea*. As it is only if the words are not clear that one may proceed to a construction by implication, the second step does not arise if one applies the general rules of interpretation of statutes to this section."

41. It is difficult to see offences of absolute or strict liability being compatible with the constitutional scheme where they go beyond the regulation of society through the imposition of small penalties based upon absolute or strict liability. In this regard, the judgment of Denham J. in that case is a most valuable guide to the general part of criminal law. It is the approach I would follow here as regards any decision on the potential liability of the applicant for a breach of licence conditions. I would question that such decisions as *R. v. Prince* (1875) 13 Cox CC 138 could ever be of general application and I note the decision of the House of Lords doubting that case in *B (A Minor) v. D.P.P.* [2000] 2 AC 428.

42. In my view, it is to the advantage of the applicant that the respondent has set the conditions for the disposal of the pig slurry product from his farms in such clear terms. By showing good faith, in implementing the licence conditions, and ensuring that what the licence requires is carried out in accordance with the tests and safeguards therein specified, criminal liability becomes more difficult for him to fall foul of, both in terms of the external and mental elements. What the applicant is required to do is to pursue the conditions according to the letter and, in the event that a breach is disclosed by reason of the investigations that he is therein required to carry out, to refuse the supply of further pig slurry to any third parties showing an improper attitude. I would regard the conditions as being of benefit to the applicant since they show him precisely what he must do. Those farmers who are unable, or unwilling, to comply will simply be deprived of the pig slurry; as to continue to supply them where the response is non-compliant to the conditions, is to give rise to the risk of criminal liability. In other words, an advertent breach of the licence conditions.

43. In my view, it matters little that a farmer showing an improper attitude to environmental protection, and therefore deliberately breaching the conditions of the licence that must be imposed by contract on him by the applicant in the supply of pig slurry, would also be liable for various offences under the European Communities (Good Agricultural Practice for the Protection of Water) Regulations S.I., 378 of 2006. Multiple criminal liability in respect of the one activity is a common feature of many diverse criminal statutes. The penalisation of different parties under different enactments is also common. In the event that there were an intentional or reckless breach of the licence conditions by the applicant through, for instance, continuing to supply pig slurry to farmer customers of his who wanted it and who were in, to his knowledge, or culpable suspicion, flagrant breach, the liability of the customers might be established under S.I. 378 of 2006, whereas the liability of the applicant might be established under s. 84(2) of the Environmental Protection Agency Act, 1992: but that is always subject to the criminal burden and standard of proof.

Conclusion

44. I would conclude that it is impossible to hold that the pig slurry being produced by the applicant in industrial quantities is not waste within the meaning of Article 1 of Council Directive 75/442/EEC as amended by Council Directive 91/156/EEC. I rule that the sale or gift to other farmers of this material constitutes the disposal of waste within the meaning of s. 3 of the Environmental Protection Agency Act, 1992 as amended and that it is an emission. The applicant thus requires a licence from the respondent.

45. I would hold that the conditions attached to the licence of the applicant are necessary for the statutory purpose for which the respondent was set up and that they are both within the powers of the respondent and reasonably related to the activity licensed. In fairness to the argument presented on behalf of the applicant, I would find it impossible to give a different meaning to waste than that defined herein on the basis of the relevant Directives by the European Court. This product, pig slurry, could only be not classified as waste, were it to be:-

> 1. A non dangerous substance that is used in farming (I would hold that it is in fact dangerous to the environment and to human health);
>
> 2. that special environmental precautions do not need to be taken when it is used (I would hold that special environmental precautions are essential if it is properly to be discarded);

3. that it is certain to be used correctly as an organic fertilizer as opposed to becoming a pollutant (I would hold that the certainty of its use in this respect is far from established and is, indeed, uncertain); and

4. that the material is spread in accordance with good agricultural practice pursuant to regulations laid down by a competent authority (I would hold that the respondent is the competent authority and that the regulation of this activity is essential).

46. In the result I would hold the licence to which the applicant is subject to be a lawful use of the powers of the respondent, and the conditions therein to be also lawful.